December 17, 2013

Dr. Irasema Coronado
Executive Director
Secretariat for the Commission for Environmental Cooperation
393, rue St-Jacques Ouest, bureau 200
Montréal (Québec)
H2Y 1N9

Dear Dr. Coronado:

I am writing in response to the Secretariat's Request for Information dated November 4, 2013, pursuant to Article 21 of the *North American Agreement on Environmental Cooperation* (NAAEC), in relation to Canada's October 4, 2013 Party Response to the *British Columbia (BC) Salmon Farms* submission (SEM-12-001).

In my letter to you dated October 4, 2013, I referenced an application for judicial review, filed in the Federal Court of Canada by Alexandra Morton on May 7, 2013, concerning the matter of an aquaculture license issued by the Minister of Fisheries and Oceans pursuant to the *Pacific Aquaculture Regulations*. While I am not in a position to provide further details concerning the facts of this case as this could compromise the federal government's ongoing involvement in the judicial proceeding, I would note the following:

- the submission and the application for judicial review address Canada's enforcement of environmental law with respect to the same species;
- the submission and the application for judicial review both raise concerns regarding salmon aquaculture operations in the same geographic location (BC);
- the submission and the application for judicial review both deal with the terms of licensing conditions that allow fish farms to operate in the region; and,
- the submission and the application for judicial review both deal with the interaction between farmed and fish habitats.

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I would also like to draw your attention to the *Pacific Aquaculture Regulations* themselves, which are considered by the noted judicial review. In particular, I would suggest you note section 4 of the regulations (*inter alia*) which identifies certain conditions the Minister of Fisheries and Oceans may specify in an aquaculture licence, such as

(a) the species and quantities that are permitted to be cultivated and their place of origin;
(b) the age, sex, stage of development or the size of fish that are permitted to be cultivated;
(c) the waters in which aquaculture and prescribed activities are permitted to be engaged in;
(d) the fish feed that is permitted to be used in aquaculture, as well as the storage of fish feed in the aquaculture facility;
(e) the harvesting of fish in the aquaculture facility;
(f) the measures that must be taken to control and monitor the presence of pathogens and pests in the aquaculture facility;
(g) the measures that must be taken to control and monitor the presence of pathogens and pests in wild fish in the waters that may be affected by the operations of the aquaculture facility;
(h) the measures that must be taken to minimize the escape of fish from the aquaculture and to catch the fish that escape;
(i) the catching of nuisance fish;
(j) the measures that must be taken to minimize the impact of the aquaculture facility's operations on fish and fish habitat;
(k) the measures that must be taken to monitor the environmental impact of the aquaculture facility's operations;
(l) the equipment that is permitted to be used in the operation of the aquaculture facility and the manner in which it is permitted to be used; and,
(m) the notice that must be given to the Minister before
    i. a substance is used to treat fish for pathogens or pests,
    ii. fish are transferred to the aquaculture facility, or
    iii. fish are harvested;

Many, if not all, of these elements of the regulations are directly or indirectly referenced in SEM-12-001 (BC Salmon Farms), and the authority to specify certain licence conditions is also raised in the *Morton* application for judicial review.

In the *Morton* application for judicial review, the litigants are currently proceeding with cross examinations on affidavits, which will continue to be considered by the Federal Court through early 2014. Consequently, the *Morton* case remains pending.

I also offer the following clarifications on the status of the case filed by Chief Bob Chamberlin of behalf of the *Kwikwasu'tinuxw Haxwa'mis First Nation* (KAFN).

The original representative action was commenced by Chief Chamberlin on behalf of the KAFN in February 2009, and Canada was added as a defendant to the case in September 2009. Before the matter could proceed to a trial on its merits, the Plaintiffs first sought to be certified as a class. Although the matter was initially certified as a class action by the BC Supreme Court, the federal government appealed the certification arguing that the fundamental problem with the class proceeding was class identification. The BC Court of Appeal overturned the class certification. 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 Federal Crown officials are and will continue to be pursuing the case. A summary of the components of the action is attached for your reference in Annex I.

As for the Secretariat's discussion of sections 9 and 10 of the *BC Class Proceedings Act*, it is my understanding that the BC Court of Appeal did not apply these provisions to the KAFN case. As such, the Court of Appeal's decision did not need to be brought back to the BC Supreme Court's certification judge for further consideration.

You will recall that in our letter to the Secretariat of February 12, 2013 (see Annex II), we explained the significant similarities between this case and SEM-12-001 (BC Salmon Farms).

Explanation of Article 45(3) definition of pending judicial or administrative proceedings

You have asked us to explain how the two cases meet the Article 45(3) definition of pending judicial proceedings. In response we offer the following explanations:

- "*judicial or administrative proceeding*". Both cases are filed with judicial institutions: the KAFN representative action remains on file with the BC Supreme Court and the Morton case was filed with the Federal Court;

- "*initiated by the Party*". On this question, I would clarify that the wording used in the NAAEC is "pursued by the Party", not "initiated by the Party" as stated in your request for information. Canada has been actively pursuing its defense of its laws and regulations as noted above and in the Annex, and will continue to pursue these cases;
- "*in a timely manner*". The Government of Canada has made timely and relevant filings in both cases and will continue to do so, as filings are called for or as appropriate; and,
- "*in accordance with the Party's laws*". The *KAFN* statement of claim was filed pursuant to the laws of British Columbia with regard to section 35 of the *Constitution Act, 1982* and the Morton case was filed in accordance with section 18.1 of *the Federal Courts Act.*

Finally, your request for information asks for any additional information that would assist in determining how proceeding with the Submission "would in practice conflict with Canada's NAAEC Article 6 commitments, since the proceedings referenced by Canada have in fact already been accessed." In response, I would submit that access to private remedies should not be limited to an individual's ability to simply file a claim, but rather should include the expectation that a case may be pursued to its fullest extent.

Continuing with the Submission would duplicate or interfere with pending cases

I have noted that the Secretariat has requested "an explanation of how, in practice, preparation of a factual record would result in the duplication [of] and/or interference with these domestic legal actions."

Article 14(3) of the *NAAEC* is unambiguous when describing what action the Secretariat shall take when informed by a Party of a pending judicial or administrative proceeding – it indicates that "...the Secretariat shall proceed no further." It is not immediately clear why further guidance for the Secretariat is necessary or whether it would be helpful to the process. Nevertheless, as this seems to be a general request not exclusively associated with the *BC Salmon Farms* submission, I will raise this matter with my Alternative Representative colleagues and discuss if there are things we or Council can do to provide the Secretariat greater guidance in fulfilling its mandate under the treaty. It may be, for example, that if Council were to provide a general explanation of why that provision exists, that would be helpful to the Secretariat when it is communicating with submitters or the public at large.

On a somewhat related matter, your request for information notes that Guideline 9.6 uses the term "explains" concerning a pending judicial or administrative proceeding. This is

an area where it may indeed be appropriate to re-examine the Guideline. Guidelines should provide greater clarity, not create ambiguity. The language used in the NAAEC in relation to this Guideline is "The Party shall **advise** ..." (emphasis added). As you are aware, the Guidelines cannot abrogate or derogate from the exact and clear provision of the treaty requirement. It may indeed be the case that the wording of this Guideline is doing so in this instance. This is a matter that I will raise with my Alternate Representative colleagues as well.

Article 14(3) – "the Secretariat shall proceed no further"

In summary, Canada is again advising the Secretariat of the pending judicial proceedings of the KAFN and of Alexandra Morton, as per NAAEC Article 14(3).

We again request that NAAEC Article 14(3) be applied, and that the Secretariat proceed no further with this submission.

Sincerely,

Dan McDougall
Assistant Deputy Minister
International Affairs Branch

Attachment:

- *Annex I* – Timelines associated with the KAFN case
- *Annex II* - February 2, 2013 Letter from Canada to the CEC Secretariat on the pursuit of available private remedies in relation to the *BC Salmon Farms* submission

Annex I

Timelines associated with the KAFN case

The following timeline provides further information on the court proceedings related to this case.

- On February 4, 2009, Chief Chamberlin filed his original representative action on behalf of the Kwikwasu'tinuxw Haxwa'mis First Nation (KAFN) against the province of BC.

- On September 17, 2009, Justice Slade of the Supreme Court of BC ordered that the Government of Canada be added as a defendant in the court action.

- On May 5, 2009, Chief Chamberlin filed a notification regarding his request to seek class certification on behalf of Aboriginal peoples.

- April 13, 2010, the Supreme Court of BC began hearing arguments in Chief Chamberlin's class certification application

- On December 21, 2010, the court action was certified as a class action.

- On May 3, 2012 the class certification was struck down by the BC Court of Appeal.

- On November 15, 2012, the Supreme Court of Canada dismissed an application by Chief Chamberlin and the KAFN for leave to appeal the BC Court of Appeal decision regarding the request for class certification

Accordingly, Canada considers the KAFN case to be a pending judicial proceeding.

Annex II

February 12, 2013 Letter from Canada to the CEC Secretariat on the pursuit of available private remedies in relation to the *BC Salmon Farms* submission

Environment Canada Environnement Canada

February 12, 2013

Dr. Irasema Coronado
Executive Director
Secretariat for the Commission for Environmental Cooperation
393, rue St-Jacques Ouest, bureau 200
Montréal (Québec)
H2Y 1N9

Dear Dr. Coronado:

I understand that the Secretariat is completing a review under Article 14 of the *North American Agreement for Environmental Cooperation* of a submission filed by the Center for Biological Diversity, the Pacific Coast Wild Salmon Society, the Kwikwasu'tinuxw Haxwa'mis First Nation, and the Pacific Coast Federation of Fishermen's Associations concerning Canada's effective enforcement of the federal *Fisheries Act* with respect to salmon aquaculture in British Columbia (SEM-12-001). The purpose of this letter is to support your efforts in this regard and bring to your attention important gaps in the information provided by the Submitters and recent developments that have occurred in a related legal action, information which we believe warrants terminating the process.

Pursuant to Article 14(2) of the Agreement, "in deciding whether to request a response, the Secretariat shall be guided by whether private remedies available under the Party's law have been pursued." Article 7.5 of the *Guidelines for Submission on Enforcement Matters* further clarifies that in considering whether private remedies available under the Party's law have been pursued by the Submitter, "the Secretariat will be guided by whether continuing with the submission process could duplicate or interfere with private remedies being pursued or that have been pursued, in particular those that involve the Party, and in such cases the Secretariat should consider terminating the process in whole or in part."

The Submitters provide information in the submission and in Exhibit E of the submission regarding previous attempts to address alleged government inaction with respect to the impact of salmon aquaculture on the environment. Of particular note, the Submitters reference a private remedy being pursued by the Kwikwasu'tinuxw Haxwa'mis First Nation "against the British Columbia government over the negative impact of commercial salmon feedlots on wild salmon" (*Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)*). 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 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.

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In light of the significant similarities between the submission and the court case, and the language of Article 14(2) of the Agreement and Article 7.5 of the Guidelines, Canada would like to bring the Secretariat's attention to the following information relating to developments in the legal action which were not covered in the Submission:

- On September 17, 2009, Justice Slade of the Supreme Court of British Columbia ordered that the Government of Canada be added as a defendant in the court action (please see Attachment 1). Therefore, this action which is being pursued by one of the Submitters involves Canada; and,

- As mentioned in the Submission, on December 21, 2010, the court action was certified as a class action. What is not noted is that the certification was struck down by the British Columbia Court of Appeal on May 3, 2012 (please see Attachment 2). On November 15, 2012, the Supreme Court of Canada dismissed an application by Chief Chamberlin and the Kwikwasu'tinuxw Haxwa'mis First Nation for leave to appeal the Court of Appeal decision (please see Attachment 3). Importantly, these court decisions relate only to the certification of the action as a class action and not to the action itself, which continues as a representative action with Chief Chamberlin suing on his own behalf and for other members of the First Nation.

In conclusion, it is Canada's opinion that the on-going court action initiated by Chief Robert Chamberlin and the Kwikwasu'tinuxw Haxwa'mis First Nation in which Canada is a defendant is aimed at the kind of private remedies contemplated in Article 14(2) of the Agreement and Article 7.5 of the Guidelines. In Canada's view, continuing with the BC Salmon Farms submission process could duplicate and interfere with these private remedies. As such, the Secretariat should terminate this submission process.

Please be assured that Canada is committed to the Submission on Enforcement Matters process to promote transparency and information sharing. I trust you will find this information useful as you continue the review of the BC Salmon Farms submission and as you administer the public submission process.

Sincerely,

Mollie Johnson
Director General, Americas Directorate
International Affairs Branch

Attachments (3)

SUPREME COURT
OF
BRITISH COLUMBIA
SEAL
23-Sep-09
Vancouver
REGISTRY

S-090848
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CHIEF ROBERT CHAMBERLIN,
Chief of the Kwicksutaineuk/Ah-Kwa-Mish First Nation,
On his own behalf and on behalf of the members of the
KWICKSUTAINEUK/AH-KWA-MISH FIRST NATION

PLAINTIFF

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE
OF BRITISH COLUMBIA, and the MINISTER OF
AGRICULTURE AND LANDS

DEFENDANTS

ORDER

BEFORE THE HONOURABLE	)	THURSDAY THE 17th DAY
	)	
	)	
MR. JUSTICE SLADE	)	OF SEPTEMBER, 2009

THE APPLICATION of the Defendant, Her Majesty the Queen in right of the Province of British Columbia, coming on for hearing at Vancouver, British Columbia, on the 17th day of September 2009 AND ON HEARING Paul E. Yearwood and Sara Knowles, counsel for the Defendant, Her Majesty the Queen in right of the Province of British Columbia; J.J. Camp and Reidar Morgerman, counsel for the Plaintiff; and Harry Wruck, Q.C., counsel for the Attorney General of Canada;

THIS COURT ORDERS that:

1. The Attorney General of Canada be added as a Defendant in this action and that the style of proceedings be amended accordingly; and
2. The Plaintiff is at liberty to make consequential amendments to the Writ of Summons and Amended Statement of Claim.

BY THE COURT

Digitally signed by
White, Patricia

District Registrar

APPROVED AS TO FORM

Paul E Yearwood
Solicitor for the Her Majesty the Queen
in right of British Columbia

J.J. Camp
Solicitor for the Plaintiffs

Harry Wruck, Q.C.
Solicitor for the Attorney General
of Canada

Vancouver
06-Jul-10
REGISTRY

Further Further Amended Statement of Claim pursuant to the Consent Order dated May 3, 2010 (entered May 18, 2010)
Further Amended Statement of Claim filed December 9, 2009
Amended Statement of Claim filed May 14, 2009
Original Statement of Claim filed February 4, 2009

No. S090848
Vancouver Registry

In the Supreme Court of British Columbia

BETWEEN:

CHIEF ROBERT CHAMBERLIN,
Chief of the Kwicksutaineuk/Ah-Kwa-Mish First Nation,
on his own behalf and on behalf of all members of the
KWICKSUTAINEUK/AH-KWA-MISH FIRST NATION

PLAINTIFF

AND

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE
OF BRITISH COLUMBIA as represented by the MINISTER
OF AGRICULTURE AND LANDS and ATTORNEY GENERAL OF CANADA

DEFENDANTS

BROUGHT UNDER THE *CLASS PROCEEDINGS ACT*, R.S.B.C. 1996, c. 50

FURTHER FURTHER AMENDED STATEMENT OF CLAIM

Introduction

1. This is a proposed class action on behalf of all aboriginal collectives who have or assert constitutionally protected aboriginal and/or treaty rights to fish wild salmon for sustenance, food, social, and ceremonial purposes ("Fishing Rights") within the Broughton Archipelago ("Class"). The boundaries of the Broughton Archipelago are set out on the map attached as Schedule "A" to this Statement of Claim.

2. The Broughton Archipelago is a network of fjords and islands located along the mainland coast and adjacent to the North Eastern side of Vancouver Island. The Broughton Archipelago is a unique ecosystem that supports significant stocks of wild salmon that migrate in

Vancouver
06-Jul-10
REGISTRY

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In the Supreme Court of British Columbia

BETWEEN:

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PLAINTIFF

AND

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE
OF BRITISH COLUMBIA as represented by the MINISTER
OF AGRICULTURE AND LANDS and ATTORNEY GENERAL OF CANADA

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1. This is a proposed class action on behalf of all aboriginal collectives who have or assert constitutionally protected aboriginal and/or treaty rights to fish wild salmon for sustenance, food, social, and ceremonial purposes ("Fishing Rights") within the Broughton Archipelago ("Class"). The boundaries of the Broughton Archipelago are set out on the map attached as Schedule "A" to this Statement of Claim.

2. The Broughton Archipelago is a network of fjords and islands located along the mainland coast and adjacent to the North Eastern side of Vancouver Island. The Broughton Archipelago is a unique ecosystem that supports significant stocks of wild salmon that migrate in

cycles from their spawning grounds in the Broughton Archipelago to the Pacific Ocean and then return to spawn their original spawning grounds ("Wild Salmon").

3. 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.

The Representative Plaintiff

4. The Plaintiff, Chief Robert Chamberlin is Chief of the Kwicksutaineuk/Ah-Kwa-Mish First Nation ("KAFN") and brings this claim on his own behalf and on behalf of all members of the KAFN. The KAFN is an Aboriginal group within the meaning of s.35 of the *Constitution Act,* 1982 and a band within the meaning of the *Indian Act*, 1985, c. I-5.

5. The members of the KAFN are descendants of the Kwakwala speaking people who, at the time of European contact, were organized as two tribes known as the Kwicksutaineuk and the Ah-Kwa-Mish. These tribes were amalgamated on or about 1940 and are now collectively referred to as the KAFN.

6. Before and at the time of European contact, the Kwicksutaineuk and the Ah-Kwa-Mish tribes used fishing sites in the Broughton Archipelago, including offshore, inshore and foreshore sites, rivers and streams, including land, land covered by water, and the water itself. From these sites, members of the tribes harvested the Wild Salmon for sustenance food, social and ceremonial purposes in the Broughton Archipelago. In order to support and continue these uses, the tribes successfully sustained and managed their fishing sites and the Wild Salmon stocks that they harvested from them in accordance with their laws and customs. The fishing and management of the Wild Salmon were, and continue to be, integral to the KAFN's distinctive culture as a First Nation. The KAFN have Fishing Rights in the Broughton Archipelago.

7. The KAFN's preferred means of exercising their Fishing Rights are:

(a) to fish Wild Salmon during the period of March to November each year;

(b) to fish Wild Salmon from the rivers within the Broughton Archipelago by means of traps, dip net, spear and gaff hooks; and

(c) to fish Wild Salmon from tidal and salt waters within the Broughton Archipelago by means of trolling with a line and lure, gill net, seine net, dip net and gaff hook.

8. The primary residential village of the KAFN, which has been set aside for the KAFN's exclusive use as a reserve within the meaning of the *Indian Act*, is on Gilford Island in the Broughton Archipelago. In addition, nine reserves within the meaning of the *Indian Act* have been set-aside in the Broughton Archipelago for the exclusive use of the KAFN, six of which were expressly reserved for fishing purposes of the KAFN. Those features are set out on the map attached as Schedule "A".

9. By its words and conduct, the Province has admitted that the Class, including the KAFN, has Fishing Rights in the Broughton Archipelago.

The Impact of Salmon Aquaculture in the Broughton Archipelago

10. The Province authorizes and regulates salmon aquaculture in the Broughton Archipelago under the *Land Act*, R.S.B.C. 1996, c. 245 (*"Land Act"*) and the *Fisheries Act*, R.S.B.C. 1996, c. 149 (*"Fisheries Act"*). Pursuant to the *Fisheries Act*, the Province has enacted the *Aquaculture Regulation*, B.C. Reg. 78/2002. Pursuant to the *Environmental Management Act*, S.B.C. 2003 the Province has enacted the *Finfish Aquaculture Waste Control Regulation*, B.C. Reg. 256/2002. In its entirety, the provincial legislative scheme permits, sets the terms for, monitors and otherwise regulates almost every aspect of salmon aquaculture. The Minister is the statutory decision maker with respect to the issuance of aquaculture licences of occupation under section 11(2) the *Land Act* and aquaculture licences under sections 13(5) and 14(2) of the *Fisheries Act*.

11. As at the date of the filing of this Statement of Claim, the Minister has authorized 29 salmon aquaculture sites to operate in the Broughton Archipelago ("Salmon Farms") as set out on the map attached as Schedule "A".

12. The manner in which the Province has authorized and regulated the Salmon Farms and the farming of non-indigenous salmon species has had and continues to have significant, cumulative, and deleterious impacts on the Wild Salmon stocks in the Broughton Archipelago, in particular, by:

(a) failing to prevent or adequately manage the concentration of parasites, including sea lice, at the Salmon Farms and the transmission of these parasites from the Salmon Farms to the Wild Salmon;

(b) failing to prevent or adequately manage the concentration of infectious diseases at the Salmon Farms and the transmission of these infectious diseases from the Salmon Farms to the Wild Salmon;

(c) allowing the farming of non-indigenous Atlantic salmon species at the Salmon Farms and failing to prevent or adequately manage escapes of Atlantic salmon from the Salmon Farms that compete with the Wild Salmon for habitat and food;

(d) permitting the Salmon Farms to be located in areas that encounter significant runs of Wild Salmon, particularly as vulnerable juvenile Wild Salmon;

(e) permitting Salmon Farms to operate without requiring fallowing in a manner that effectively protects juvenile Wild Salmon during critical periods when juvenile Wild Salmon stocks are known to be passing in close proximity to Salmon Farms;

(f) permitting Salmon Farms that allow the transmission of parasites and disease to Wild Salmon by the use of permeable cages causing free flow of contaminated water and waste between the Salmon Farms and the marine environment;

(g) allowing the number of farm sites and density and total biomass of the farmed fish to increase dramatically;

(h) allowing the pollution of Wild Salmon habitat; and

(i) making other decisions about, among other things, the location of the farms, size of the farms, concentration of the fish permitted in the farms, the application of pest and disease treatments and the timing of fish harvesting operations, which have significant negative impacts on the Wild Salmon.

13. The Province is, or ought to have been, aware that the manner in which it has authorized and regulated the Salmon Farms in the Broughton Archipelago has had and continues to have significant, cumulative, and deleterious impacts on the Wild Salmon and consequent harm to plaintiff and the Class.

14. Further, the Province's authorization and regulation of the Salmon Farms constitutes the management of a fishery which is a matter of exclusive federal jurisdiction and *ultra vires* the Province.

The Province has Infringed and Interfered with the Fishing Rights

15. The operation of the *Land Act* and the *Fisheries Act* and the Minister's authorization and regulation of the Salmon Farms has infringed and interfered with the Class' Fishing Rights by limiting, reducing, or destroying:

(a) their ability to harvest sufficient quantities of the Wild Salmon to satisfy their sustenance, food, social, and ceremonial needs;

(b) their ability to harvest their preferred stocks or runs of the Wild Salmon;

(c) their ability to harvest the Wild Salmon at their preferred times;

(d) their ability to harvest the Wild Salmon using their preferred means;

(e) their ability to harvest the Wild Salmon in their preferred places;

(f) their ability to manage and preserve the habitat required by Wild Salmon; and

(g) their ability to manage, preserve, and control the Wild Salmon stocks in accordance with customary law.

16. In addition, with respect to those members of the Class who have Fishing Rights pursuant to the Douglas Treaty, the Province's authorization and regulation of the Salmon Farms interferes with their treaty rights "to carry on [their] fisheries as formerly".

17. The Province's infringement of the Fishing Rights of the Class is a violation of s.35 of the *Constitution Act* and, with respect to the members of the Class with Treaty Rights, is beyond its legislative jurisdiction.

18. Further, sections 11(2) of the *Land Act* and sections 13(5) and 14(2) of the *Fisheries Act* are of no force and effect because these provisions confer on the Minister the discretion to authorize salmon aquaculture and this discretion is not structured to accommodate the Fishing Rights of the Class.

Remedies

19. As a direct result of the unconstitutional infringement of the Fishing Rights, the Class has suffered loss and damages including, but not limited to:

(a) general damages for the loss of their ability to exercise a constitutionally protected right which provides for a source of food, sustenance and is of cultural, social and economic significance;

(b) the costs of purchasing or otherwise procuring, and transporting food to replace the Wild Salmon that are not available;

(c) costs arising out of the lost ability to exercise the Fishing Rights at their preferred times, using their preferred means, in their preferred places; and

(d) the loss of the cultural, ecological, and spiritual integrity of the Wild Salmon habitat and fishing sites, including their ability to maintain cultural practices related to the Wild Salmon harvesting, including traditional management of the Wild Salmon.

20. The Province and the Minister continue to authorize and regulate the Fish Farms in the manner set forth above and this continuing authorization and regulation causes unconstitutional, ongoing and irreparable harm to the Fishing Rights and gives rise to injunctive relief.

Wherefore the plaintiff claims:

(a) an order certifying this case as a class proceeding and appointing the Plaintiff as the representative plaintiff under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50;

(b) a declaration that the KAFN and the other Members of the Class have Fishing Rights within the Broughton Archipelago;

(c) a declaration that the manner in which the Province has authorized and regulated the Salmon Farms has contributed to a significant decline in the Wild Salmon stocks;

(d) a declaration that sections 11(2) of the *Land Act* and sections 13(5) and 14(2) of the *Fisheries Act* are of no force and effect because these provisions confer on the Minister the discretion to authorize salmon aquaculture and this discretion is not structured to accommodate the Fishing Rights of the Class;

(e) a declaration that the manner in which the Province has authorized and regulated the Salmon Farms has infringed the KAFN and other Class Members' Fishing Rights in violation of s.35 of the *Constitution Act, 1982*, and that the permits

authorizing and regulating the Salmon Farms are void and of no force and effect and/or are constitutionally inapplicable;

(f) an injunction prohibiting the Minister from issuing, renewing, or replacing any salmon aquaculture permits in the Broughton Archipelago;

(g) a mandatory injunction requiring the Province to remediate the impact of Salmon Farms on Wild Salmon by restoring Wild Salmon stocks and habitat to the position that they would have been in but for the Province's infringement of the Fishing Rights;

(h) damages and/or compensation;

(i) an order that the relief granted be implemented under the continuing supervision and jurisdiction of the Court; and

(j) such further other equitable and related relief as to this Court may seem meet and just.

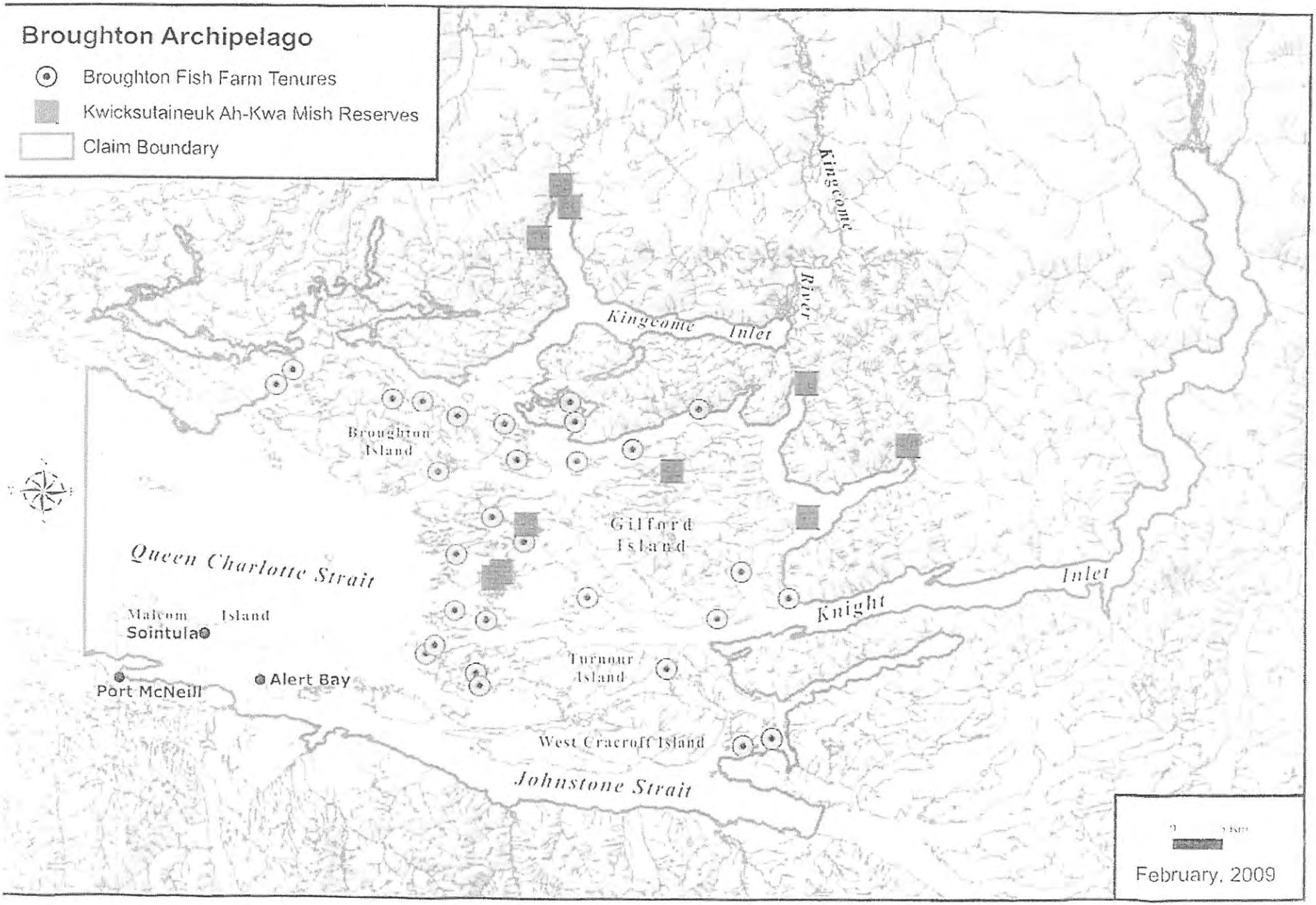
PLACE OF TRIAL: Vancouver, British Columbia

DATED at Vancouver, British Columbia this 5th day of July, 2010.

J.J. Camp, Q.C.
Camp Fiorante Matthews
Solicitors for the Plaintiff

This Further Further Amended Statement of Claim is filed by J.J. Camp, Q.C., Camp Fiorante Matthews, 400 – 856 Homer Street, Vancouver, British Columbia, V6B 2W5. Tel: 604-689-7555.

SCHEDULE "A"


Broughton Archipelago
Broughton Fish Farm Tenures
Kwicksutaineuk Ah-Kwa Mish Reserves
Claim Boundary
Kingcome River
Kingcome Inlet
Broughton Island
Gilford Island
Queen Charlotte Strait
Malcom Island
Sointula
Port McNeill
Alert Bay
Knight Inlet
Turnour Island
West Cracroft Island
Johnstone Strait
February, 2009

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2012 CarswellBC 3565

Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Minister of Agriculture and Lands)

Chief Robert Chamberlin, Chief of the Kwicksutaineuk/Ah-Kwa-Mish First Nation, on his own behalf and on behalf of all members of the Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Agriculture and Lands and Attorney General of Canada

Supreme Court of Canada

McLachlin C.J.C., Rothstein J., Moldaver J.

Judgment: November 15, 2012
Docket: 34909

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Proceedings: Leave to appeal refused, 2012 CarswellBC 1217, 214 A.C.W.S. (3d) 350, (sub nom. Chamberlin v. British Columbia (Minister of Agriculture and Lands)) 319 B.C.A.C. 273, [2012] B.C.W.L.D. 3700, [2012] B.C.W.L.D. 3722, [2012] 3 C.N.L.R. 148, (sub nom. Chamberlin v. British Columbia (Minister of Agriculture and Lands)) 542 W.A.C. 273, [2012] 8 W.W.R. 47, 2012 BCCA 193, 66 C.E.L.R. (3d) 169, 31 B.C.L.R. (5th) 215, 20 C.P.C. (7th) 38 (B.C. C.A.); Reversed, 2010 CarswellBC 3315, [2011] B.C.W.L.D. 942, [2011] B.C.W.L.D. 953, (sub nom. Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture & Lands)) [2011] 1 C.N.L.R. 92, [2011] 4 W.W.R. 679, 2010 BCSC 1699, 55 C.E.L.R. (3d) 165, 15 B.C.L.R. (5th) 322 (B.C. S.C. [In Chambers])

Counsel: Counsel — not provided

Subject: Civil Practice and Procedure; Constitutional; Property; Public

Aboriginal law

Civil practice and procedure

Per curiam:

1 The application for leave to appeal from the judgment of the Court of Appeal for British Columbia (Vancouver), Numbers CA038705 and CA038707, 2012 BCCA 193, dated May 3, 2012, is dismissed with costs.

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