



OCT - 4 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:

Canada has reviewed the Secretariat's determination issued on September 12, 2013, pursuant to Article 15(1) of the *North American Agreement on Environmental Cooperation* (NAAEC) concerning the BC Salmon Farms submission (SEM-12-001). Canada appreciates the Secretariat's efforts to review the merits of this submission and develop its determination. The purpose of this letter is to provide the Secretariat with information regarding pending legal proceedings, in accordance with NAAEC Article 14(3) and Guideline 9.2 of the *Guidelines for Submissions on Enforcement Matters under Article 14 and 15 of the NAAEC* (the "Guidelines"), which we believe warrant terminating the submission process.

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, the Kwicksutainneuk/Ah-Kwa-Mish First Nation (*Kwicksutainneuk/Ak-Kwa-Mish First Nation v. British Columbia*), an action in which the Government of Canada was enjoined as a defendant. Canada's records indicate that the representative action of Chief Chamberlin on behalf of the Kwicksutainneuk/Ah-Kwa-Mish First Nation has not been discontinued.

In addition, on May 7, 2013, Ms. Alexandra Morton (represented by Ecojustice) filed an action in Federal Court against the federal Minister of Fisheries and Oceans (DFO). The Notice of Application (attached) 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*) and requests judicial review of the Minister's decision.

.../2



The Government of Canada is concerned that proceeding with the *BC Salmon Farms* submission process would result in the duplication and/or interference with these domestic legal actions. Moreover, it would conflict with Canada's commitment, under Article 6 of the Agreement, to ensure that persons with a legally recognized interest are given appropriate access to legal proceedings and that requests for investigations receive due consideration under Canadian law. Therefore, it is Canada's position that these pending legal proceedings warrant the termination of the *BC Salmon Farms* submission process, in accordance to NAAEC Article 14(3)(a); and that the Secretariat should promptly notify the submitters and the Council, in accordance with Guideline 9.6 of the *Guidelines*.

Please be assured that Canada is committed to the Submission on Enforcement Matters process to promote transparency and information sharing.

Sincerely,



Dan McDougall
Assistant Deputy Minister
International Affairs Branch

Attachments (2):

- Attachment 1: *Morton v. Minister of Fisheries and Oceans and Marine Harvest Canada Inc.*
- Attachment 2: February 12, 2013 Letter from Environment Canada to the CEC Secretariat regarding pending legal proceedings (with annexes)

Attachment 1

Morton action



FEDERAL COURT

ALEXANDRA MORTON

Applicant

and

MINISTER OF FISHERIES AND OCEANS
and MARINE HARVEST CANADA INC.

Respondents

NOTICE OF APPLICATION

APPLICATION UNDER SECTION 18.1 OF THE *FEDERAL COURTS ACT*, RSC 1985, C F-7

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at *Vancouver, British Columbia*.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules, 1998* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules, 1998*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

**ORIGINAL SIGNED BY
CHRISTIAN PRESBER
REGISTRY OFFICER**

Date: May 7, 2013

Issued by: _____

Address of
Local office: Federal Court
Pacific Centre
PO Box 10065
701 West Georgia Street
Vancouver, B.C. V7Y 1B6

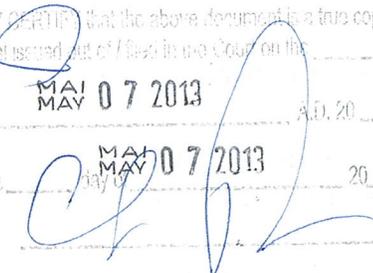
TO:

Minister of Fisheries and Oceans
1570-200 Kent Street
Ottawa, ON K1A 9E6
Phone: (613) 996-3085
Fax: (613) 996-6988

c/o Department of Justice Canada
Vancouver Regional Office
900 – 840 Howe Street,
Vancouver, BC V6Z 2S9

Marine Harvest Canada Inc.
Suite 100 938 Gibsons Way
Gibsons, BC V0N 1V7
Phone: (250) 850-3276
Fax: (250) 850-3275

**Courts Administration Service
P.O. Box 10065, 3rd Floor
701 West Georgia Street
Vancouver, B.C. V7Y 1B6**

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the
day of MAY 07 2013 A.D. 20
Dated this MAY 07 2013 day of _____ 20


**CHRISTIAN PRESBER
REGISTRY OFFICER
AGENT DU GREFFE**

APPLICATION

This is an application for judicial review of in respect of a License granted under the *Pacific Aquaculture Regulations* (the “Aquaculture License”) by the Minister of Fisheries and Oceans or his delegate (the “Minister” or “DFO”) to Marine Harvest Canada Inc (“Marine Harvest Canada”). The Aquaculture License contains a License condition that is contrary to law.

Specifically this Application alleges that the Minister lacks the authority or jurisdiction under the *Pacific Aquaculture Regulations*, SOR-2010-270 (the “PARs”) to include the impugned License condition in this or any Aquaculture License. The Application further alleges that the impugned License condition is contrary to section 56 of the *Fishery (General) Regulations* SOR-93-53 and is unlawful.

On April 12, 2013, DFO confirmed to the Applicant that DFO had purportedly authorized Marine Harvest Canada to transfer fish infected with a disease agent, under Marine Harvest’s Aquaculture License. The Applicant first obtained a copy of the Aquaculture License from DFO on May 3, 2013.

The Applicant makes application for:

1. An order or orders declaring that:
 - a. The Minister 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 PARs.
 - b. Section 4 of the PARs and section 22 of the *Fishery (General) Regulations* do not authorize any License conditions that grant permission to transfer fish having diseases or disease agents.
 - c. The License condition at clause 3.1 of the Aquaculture License (the “License Condition”) is without authority, exceeds the jurisdiction of the Minister and is *ultra vires*.
 - d. Any License condition in an aquaculture License that purports to authorize the transfer of fish having diseases or disease agents that may be harmful to the protection and conservation of fish is *ultra vires*.
2. An order or orders further declaring that:
 - a. The License Condition is contrary to law.

- b. The License Condition unlawfully allows the transfer of fish having diseases or disease agents that may be harmful to the protection and conservation of fish, contrary to section 56 of the *Fishery (General) Regulations*.
 - c. In issuing an Aquaculture License containing the License Condition, the Minister unlawfully and incorrectly applied, or failed or refused to apply, section 56 of the *Fishery (General) Regulations*.
 - d. The License Condition constitutes an unlawful exception to the legal prohibition, in section 56 of the *Fishery (General) Regulations*, against the transfer of fish having disease or disease agents that may be harmful to the protection and conservation of fish.
 - e. The Minister's ongoing policy and practice of excluding salmon aquaculture operations in British Columbia from section 56 of the *Fishery (General) Regulations* is unlawful.
3. An order in the nature of *certiorari* severing the impugned License Condition.
 4. An order that the Applicant shall not be required to pay costs to the Respondents of the Application, pursuant to Rule 400 of the *Federal Courts Rules*, in the event that the Application is dismissed.
 5. Costs.
 6. Such further and other relief as this honourable Court deems just.

The grounds for the application are:

The Parties

1. The Minister administers and implements the *Fishery (General) Regulations* and the PARs, which are both enacted under the *Fisheries Act*, RSC 1985, c F-14.
2. On February 28, 2013, the Minister issued the Aquaculture License containing the impugned License Condition to Marine Harvest Canada.
3. Marine Harvest Canada is the holder of the Aquaculture License under the PARs. That Aquaculture License includes the impugned License Condition regarding transfer of fish having disease or disease agents that at issue in this litigation. Marine Harvest Canada operates both the hatchery from which fish infected with Piscine Reovirus were transferred and the aquaculture facility to which these fish were transferred.

4. The Applicant, Alexandra Morton, is a public interest litigant with no personal, proprietary or pecuniary interest in the outcome of this Application. Ms. Morton has a demonstrated record of genuine interest in protecting the marine environment from the impacts of salmon aquaculture in British Columbia. In relation to salmon aquaculture, Ms. Morton has worked to ensure that governments act within their legal powers, to promote compliance with environmental laws, to contribute to scientific studies and to provide information to the Canadian public. She has participated in public interest litigation, private prosecutions and, provincial reviews of salmon aquaculture. Further, she has testified before federal parliamentary and provincial legislative committees, and was a participant and witness in a federal commission of inquiry, all in relation to salmon aquaculture.
5. Ms. Morton believes that this Application is necessary to address the Minister's failure or refusal to correctly apply section 56 of the *Fishery (General) Regulations* to salmon aquaculture operations in British Columbia.
6. The Minister's compliance with the legal preconditions for transferring fish into the ocean is in the public interest.

Transferring fish infected with harmful diseases or harmful disease agents into the ocean is prohibited by the Fishery (General) Regulations

7. Transfer of fish to a fish rearing facility is governed by Part VIII of the *Fishery (General) Regulations*.
8. Under Part VIII, fish may only be lawfully transferred pursuant to a License and in accordance with the requirements set out in section 56; including the requirement in paragraph 56(b) that the fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish.
9. Section 56 does not permit the Minister to authorize any transfer of fish having diseases or disease agents that may cause harm to the protection and conservation of fish.

DFO has an ongoing policy of excluding certain salmon aquaculture operations from the fish transfer provisions under Part VIII of the Fishery (General) Regulations

10. As a matter of policy or practice, DFO has developed nine "salmonid transfer zones" covering British Columbia and its coast.
11. Salmonid transfer zones are not prescribed by law.

12. Where a person seeks to transfer salmon from one of DFO's salmonid transfer zones to another zone, DFO requires that person to obtain an Introductions and Transfer License pursuant to Part VIII of the *Fishery (General) Regulations*.
13. DFO requires a person applying for an Introductions and Transfer License under Part VII to apply using a form called "Form B". Form B incorporates information addressing the legal requirements set out in paragraph 56(b) of the *Fishery (General) Regulations*.
14. However, where an aquaculture Licensee seeks to transfer salmon within a salmonid transfer zone, DFO appears to exempt the aquaculture Licensee from obtaining an Introductions and Transfer License pursuant to Part VIII. Rather than requiring an application using Form B, DFO purports to allow aquaculture Licensees to transfer salmon within a salmonid transfer zone pursuant to aquaculture Licenses under the PARs.
15. In effecting this policy or practice of exempting aquaculture Licensees from Part VIII of the *Fishery (General) Regulations*, DFO has adopted a template form for all aquaculture Licenses issued under the PARs (the "Template").
16. Part 3 of the Template includes language identical to the impugned License Condition. The impugned License Condition, and thus also the Template condition, purport to allow a licensee to transfer live salmonids known to have disease agents or diseases that may be harmful to the protection and conservation of fish. The impugned License Condition further purports to allow a licensee to transfer live salmonids known to have had diseases provided that the facility's veterinarian has deemed the transfer to be "low risk."
17. The License Condition states:
 - 3.1 The License holder may transfer to this facility live Atlantic or Pacific salmonids from a facility possessing a valid aquaculture License issued pursuant to section 3 of the *Pacific Aquaculture Regulations* between the Fish Health zones described in Appendix VI, provided transfers occur within the same salmonid transfer zone as outlined in Appendix II and provided:
 - (a) the species of live salmonid fish are the same as those listed on the face of this License;
 - (b) the license holder has obtained written and signed confirmation, executed by the source facility's veterinarian or fish health staff, that, in their professional judgement:
 - (i) mortalities, excluding eggs, in any stock reared at the source facility have not exceeded 1% per day due to any infectious diseases, for any four consecutive day period during the rearing period;
 - (ii) the stock to be moved from the source facility shows no signs of clinical disease requiring treatment; and

(iii) no stock at the source facility is known to have had any diseases listed in Appendix IV; or

(iv) where conditions 3.1 (b)(i) and/or 3(b)(iii) cannot be met transfer may still occur if the facility veterinarian has conducted a risk assessment of facility fish health records, review of diagnostic reports, evaluation of stock compartmentalization, and related biosecurity measures and deemed the transfer to be low risk.

Marine Harvest Canada's Aquaculture License contains the impugned License Condition

18. On February 28, 2013, the Minister or the Minister's delegate granted the Aquaculture License to Marine Harvest Canada.
19. There is no legal requirement to post, release or otherwise make publically available an aquaculture license issued under the PARs. The Aquaculture License was not disclosed to the public or to the Applicant at the time it was issued.
20. On or about March 12, 2013, Ms. Morton learned that Marine Harvest Canada was actively conducting a transfer of Atlantic salmon smolts within DFO's "Salmonid Transfer Zone 7" from its Dalrymple Hatchery to its Shelter Bay aquaculture site.
21. These transferred Atlantic salmon smolts were infected with a disease agent, known as Piscine Reovirus ("PRV") that may be harmful to the protection and conservation of fish.
22. PRV may harm fish, and in particular PRV may be harmful to wild salmon.
23. PRV is waterborne and contagious and can be transmitted from farmed salmon to wild fish.
24. PRV is associated with, and thought, to cause Heart and Skeletal Muscle Inflammation ("HSMI") in salmon.
25. The physical effects of HSMI on salmon reduce salmon's ability to survive and to complete their life-cycle and particularly their ability to swim upstream.
26. In early March 2013, approximately one week prior to Marine Harvest Canada's transfer of infected Atlantic salmon, Ms. Morton wrote to representatives of DFO, Marine Harvest Canada and the Province of British Columbia informing them that 60 percent of the Atlantic salmon smolts at the Dalrymple Hatchery had reportedly tested positive for PRV.
27. Between March 26 and April 4, 2013, Ms. Morton corresponded with Stacey Martin, a DFO official in aquaculture management, attempting to identify the source of the authority for Marine Harvest Canada's transfer of the fish to the Shelter Bay facility. On

April 4, 2013 Ms. Morton specifically sought DFO's reasons for why it perceived the transfer to be lawful.

28. On April 12, 2013, Ms. Martin responded to Ms. Morton's April 4, 2013 email. She advised Ms. Morton that this transfer of fish had been authorized, purportedly, under the Aquaculture License granted to Marine Harvest Canada rather than being authorized under the *Fishery (General) Regulations*.
29. On May 2 and 3, 2013, Ms. Morton requested a copy of the Aquaculture License from DFO. On May 3, 2013, a DFO official provided Ms. Morton with a copy of the Aquaculture License.
30. The Aquaculture License provided to Ms. Morton on May 3, 2013 contains the License Condition.

The License Term is ultra vires the Pacific Aquaculture Regulations

31. Section 43 of the *Fisheries Act* allows the Governor in Council to make regulations for carrying out the purposes and provisions of that legislation. Pursuant to section 43, the Governor in Council enacted the PARs, which came into force on December 18, 2010.
32. Aquaculture off the coast of British Columbia is largely regulated under the *Fisheries Act* scheme through the PARs.
33. Cabinet enacted the PARs in response to the decision of the British Columbia Supreme Court in *Morton v. British Columbia (Agriculture and Lands)*, 2009 BCSC 136.
34. Section 3 of the PARs allows the Minister to issue an aquaculture License authorizing a person to engage in aquaculture.
35. Sections 4 of the PARs and s. 22 of the *Fishery (General) Regulations* enumerate the matters that the Minister may specify in License conditions. With the exception of matters addressed under section 22 of the *Fishery (General) Regulations*, section 4 is exhaustive of all matters on which the Minister may lawfully specify License conditions.
36. Section 4 of the PARs allows the Minister to specify conditions in an aquaculture License for the proper management and control of fisheries and the conservation and protection of fish.
37. Section 4 of the PARs does not authorize the Minister to specify any conditions in an aquaculture License that purport to authorize the transfer of fish having diseases or disease agents that may be harmful to the protection and conservation of fish.

38. There is no authority or jurisdiction to authorize transfer of fish having diseases or disease agents that may be harmful to the protection and conservation of fish.
39. As with section 4 of the PARs, section 22 of the *Fishery (General) Regulations* authorizes License conditions respecting the matters specifically enumerated within subsection 22(1). None of the enumerated matters address or permit the transfer of fish having diseases or disease agents that may be harmful to the protection and conservation of fish.
40. Section 22 of the *Fishery (General) Regulations* expressly prohibits License conditions that are inconsistent with any provision of, *inter alia*, the *Fishery (General) Regulations* or the PARs.
41. Section 22 of the *Fishery Act (General) Regulations* does not authorize or permit the Minister to specify any conditions authorizing transfer of fish having diseases or disease agents that may be harmful to the protection and conservation of fish in an aquaculture License.
42. It is unlawful for a License issued under the PARs to specify any conditions related to or authorizing the transfer of Atlantic salmon infected with or carrying a disease or disease agent that may be harmful to the protection and conservation of fish.
43. When including the License Condition in the Aquaculture License granted to Marine Harvest Canada, the Minister acted without authority, exceeded his jurisdiction and acted *ultra vires* the PARs.
44. The Minister's ongoing policy or practice of including conditions allowing the transfer of fish with diseases or disease agents that may be harmful to the protection and conservation of fish into Licenses under the PARs is without authority, lacks jurisdiction and is *ultra vires*.

The License Condition is contrary to section 56 of the Fishery (General) Regulations

45. The impugned License Condition purports to permit Licensees to transfer Atlantic salmon that are known to be infected with harmful disease agents into coastal waters off British Columbia.
46. The License Condition grants Licensees a purported discretion to determine whether to transfer Atlantic salmon that they know contain harmful disease agents into coastal waters off British Columbia.

47. Pursuant to section 56 of the *Fishery (General) Regulations*, the Minister may not issue a License to transfer salmon to a salmon rearing facility where those fish are infected with a disease or disease agent that may cause harm to fish.
48. The License Condition unlawfully allows a Licensee to transfer Atlantic salmon into the marine environment regardless that those Atlantic salmon are known to be infected with a disease agent that may be harmful to the protection and conservation of fish. In this respect, the License Term constitutes an unlawful exception to the legal prohibition in section 56 of the *Fishery (General) Regulations* against the transfer of fish infected with potentially harmful disease or disease agents.
49. In issuing an Aquaculture License containing the impugned License Condition, the Minister unlawfully and incorrectly applied, or failed or refused to apply, section 56 of the *Fishery (General) Regulations*.
50. The License Condition is contrary to law.
51. In creating and implementing a process that permits the transfer of Atlantic salmon infected with potentially harmful diseases or disease agents into aquaculture operations in British Columbia, the Minister is acting unlawfully.
52. The Minister's ongoing policy or practice of excluding salmon aquaculture operations in British Columbia from section 56 of the *Fishery (General) Regulations* is contrary to law.

Additional Grounds

53. The Minister failed to act in a manner consistent with the precautionary principle.
54. In addition, the Applicant relies generally on sections 18, 18.1 and 18.2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and the Federal Courts Rules, and such further additional grounds as counsel may identify and this Court may consider.

This Application will be supported by the following material:

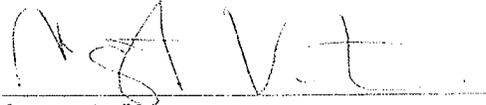
1. An affidavit of Alexandra Morton, to be served.
2. The Record of Materials considered by the Minister of Fisheries and Oceans.
3. Such further and additional materials as counsel may advise and the Court may allow.

Rule 317 request:

The Applicant requests that the Minister send a certified copy of the following material not in the Applicant's possession, but in the possession of the Minister, to the Applicant and the Registry:

- I. The record of materials considered or relied on by the Minister or his delegate in issuing the Aquaculture License, including but not limited to:
 - a. materials containing advice or information about section 56 of the *Fishery (General) Regulations*, and
 - b. materials setting out DFO's policy or practice of allowing transfer of salmon *within a salmonid transfer zone pursuant to an aquaculture License under the PARs*.

Date: May 7, 2013



Margot A. Venton
Solicitor for the Applicant
214-131 Water Street
Vancouver BC V6B 4M3
Tel: (604) 685-5618 ext. 235
Fax: (604) 685-7813
mventon@ecojustice.ca

Attachment 2

February 12 letter

Annex 1

Annex 2

Annex 3



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.



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)



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
KWICKSUTAINÉUK/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:

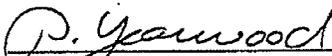
1. The Attorney General of Canada be added as a Defendant in this action and that the style of proceedings be amended accordingly; and
2. The Plaintiff is at liberty to make consequential amendments to the Writ of Summons and Amended Statement of Claim.

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
KWICKSUTAINNEUK/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

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:

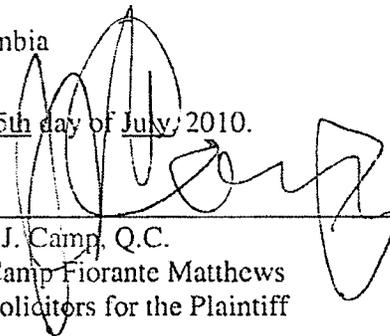
- (a) an order certifying this case as a class proceeding and appointing the Plaintiff as the representative plaintiff under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50;
- (b) a declaration that the KAFN and the other Members of the Class have Fishing Rights within the Broughton Archipelago;
- (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.

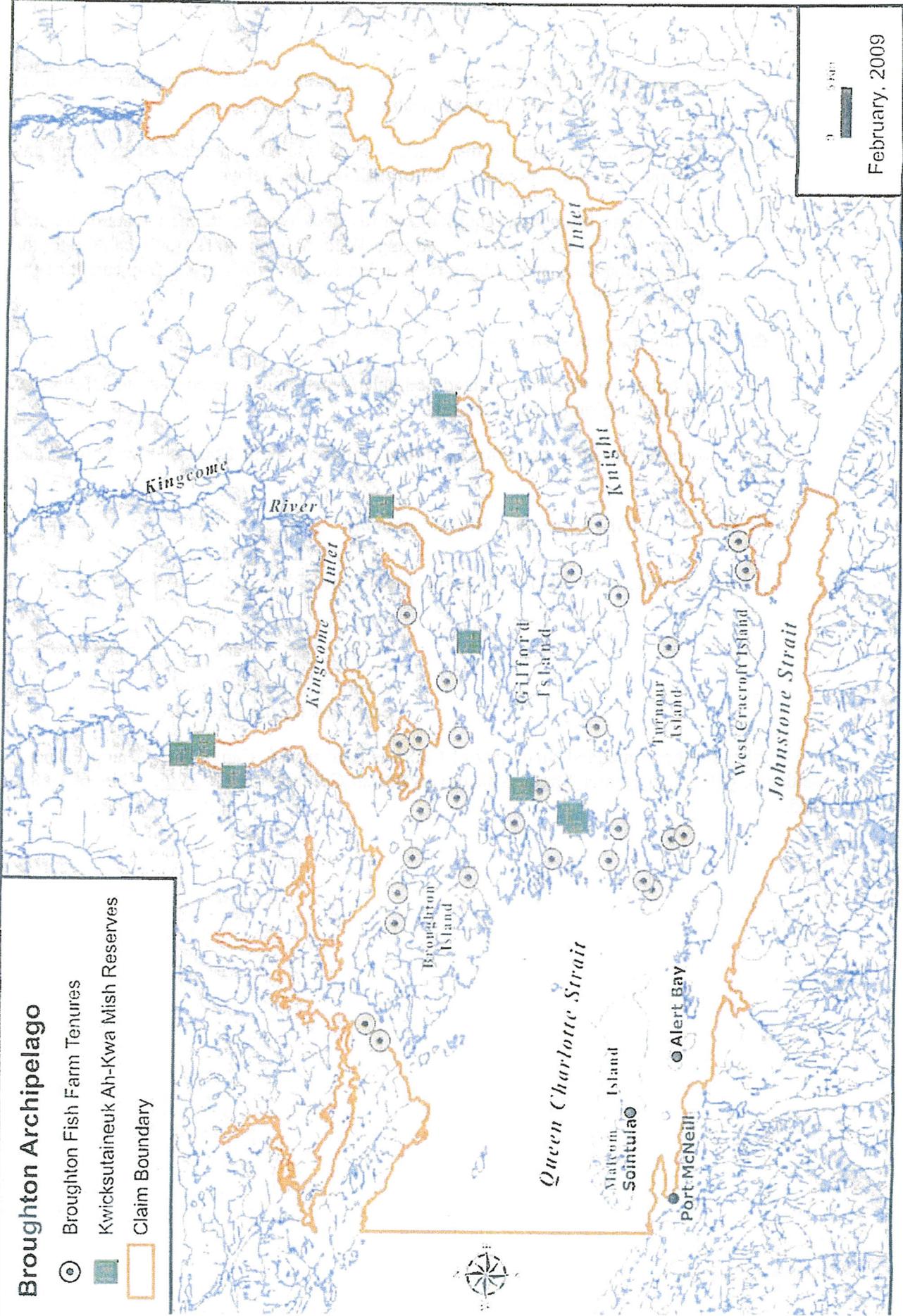


J.J. Camp, Q.C.
Camp Fiorante Matthews
Solicitors for the Plaintiff

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.

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SCHEDULE "A"



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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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