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MEMORANDUM

To: Brenda McCorquodale & Alex Gagne, First Nations Fisheries Council

From: Kate M. Blomfield, Lisa C. Glowacki, Gregory J. McDade Q.C.

Date: January 25, 2010

File: 09/1974

Re: Legal Opinion for FNFC re Consultation and the Federal Aquaculture Initiative

EXECUTIVE SUMMARY

INTRODUCTION

In February, 2009, the BC Supreme Court issued a decision (*Morton et. al. v. Marine Harvest et al*)¹ finding that it should be the federal government, not the provincial government, that regulates aquaculture. In response to the *Morton* decision, the federal government is now taking on the role of regulator and manager of aquaculture in British Columbia. Pursuant to that mandate, Canada has launched the Federal BC Aquaculture Regulation and Strategic Action Plan Initiative (the “Federal Initiative”), which encompasses the development of a regulatory framework and policies for aquaculture in the province, and is linked to national and regional strategic planning regarding aquaculture.

The Federal Initiative is a complex endeavour and the shift in governance is very significant for First Nations. Aquaculture is a large and expanding industry mainly located in coastal waters, impacting First Nations’ territory, practices and rights. Although aquaculture currently operates mainly on the south and central coast of British Columbia, including Vancouver Island and the Gulf Islands, the federal plans for expansion of the industry indicate that the impacts will increase and spread. The Federal Initiative therefore is likely to impact the rights and interests of virtually all coastal First Nations in BC, and due to the potential effects of aquaculture on wild fish stocks, could impact to the rights and interests of non-coastal First Nations who rely on fish such as wild salmon. The Federal Initiative also addresses and contemplates expansion of shellfish aquaculture which, while raising some different issues, will similarly impact First Nations rights and title interests.

You have asked for a legal opinion on the duty owed by the federal Crown to consult with First Nations in relation to the Federal Initiative, which raises the following broad issues:

¹ *Alexandra B. Morton et al. v. Minister of Agriculture and Lands et al.*, 2009 BCSC 136

1. What is the nature and scope Crown's duty to consult with First Nations regarding the Federal Initiative, and specifically with respect to the development of aquaculture regulations, policies and strategic plans?
2. What substantive issues are raised by the Federal Initiative regarding which the Crown must consult with First Nations?

You have asked that, as much as possible, we frame our analysis of the specific issues (addressed in Part III of this document) in accordance with the four priorities/themes identified by the FNFC membership: siting, science and environment, monitoring and compliance, and management.²

Our legal opinion is therefore set out as follows:

- I. Overview of the Federal Initiative
- II. Consultation and accommodation regarding the Federal Initiative
- III. Specific issues arising in the Federal Initiative
 - A. Overview of DFO's vision and policy position
 - B. Siting and Licensing
 - C. Science and Environment
 - D. Monitoring and Compliance
 - E. Management
 - F. Opportunities for First Nation Participation, Innovation and Investment
- IV. Framework for Consultation

This Executive Summary provides our short answer which summarizes our key conclusions and then reviews our proposed Framework for Consultation.

The central objectives of this legal opinion are to:

- Summarize the key procedural and substantive issues raised by the Federal Initiative that may impact First Nations and the legal bases for the Crown's corresponding duties of consultation and accommodation;
- Provide legal precedents relating to consultation and accommodation on which First Nations and the FNFC can rely; and
- Outline next steps for the FNFC and First Nations regarding consultation and accommodation in respect of the Federal Initiative.

² FNFC Request for Legal Opinion (Dec. 18, 2009)- Key Issues

SHORT ANSWER

The Federal Initiative will have a significant impact on the asserted and proven aboriginal rights of First Nations in British Columbia and Canada has a duty to deeply consult with First Nations in respect of these impacts and to demonstrably integrate the feedback of First Nations into the regulations, policies and strategic plans that will govern aquaculture. As is set out in more detail below, the duty to consult requires the crown to meaningfully address the concerns of First Nations.

Our key conclusions in respect of the Federal Initiative are:

1. Given the scope of changes that the Federal Initiative plans to implement, the potential and established impacts of aquaculture on First Nations' rights, and the number of First Nations whose rights will be affected and who therefore are entitled to participate in consultations, it is not possible, in our opinion, for Canada to meet its duty to consult in respect of the Federal Initiative within the timelines currently proposed, i.e. to March 2010.
2. The process of consultation must be revisited and redeveloped in conjunction with First Nations, including with respect to:
 - (a) consulting comprehensively with respect to the regulations, policies, and strategic plans that make up the Federal Initiative;
 - (b) how to appropriately engage First Nations as rights-holders; and
 - (c) a workable timeline for consultation.
3. First Nations' interests and First Nation participation must be demonstrably integrated into the Federal Initiative, particularly with respect to ongoing decision-making at the site-specific, regional planning, strategic planning levels, including with respect to:
 - (a) granting and monitoring of individual licences;
 - (b) area, regional and coast-wide planning; and
 - (c) opportunities for and benefits to First Nations.

This integration of First Nations' interests and participation should be direct and explicit on the face of regulations, policies and strategic planning documents and guidelines developed by Canada.

FRAMEWORK FOR CONSULTATION

As is evident, the Federal Initiative is an extremely complex endeavour that is likely to significantly affect the rights and interests of First Nations throughout the province.

Below we briefly summarize the central aspects of our opinion regarding the Crown's duty to consult with First Nations in respect of the Federal Initiative. We then identify key next steps and some of the many issues for further consideration and analysis.

A. PROCESS: CONSULTATION ON FEDERAL INITIATIVE

Canada has a legal duty to consult with First Nations whose asserted or proven rights may be impacted by the Federal Initiative. Our opinion is that there is a duty to engage in deep consultations regarding all aspects of the Federal Initiative (regulations, policies and strategic plans) and that the consultations must begin with more significant exchanges of information and discussions regarding the appropriate process of consultation.

Canada must be responsive to the concerns and interests of First Nations (both with respect to the process of consultation and with respect to substantive issues) and must demonstrably integrate the concerns and suggestions of First Nations into the Federal Initiative. Our opinion is that demonstrably integrating the input of First Nations will mean that the regulations, policies and strategic plans will, on their face, explicitly include reference to First Nations rights, interests and participation and that First Nations will be included in the decision-making structures and processes at all levels including the site-specific, area or regional management, and industry-wide and province-wide planning.

Our primary concerns regarding the current process of consultation proposed by Canada are:

1. The timeline is inadequate for Canada to discharge its duty of consultation. Canada has not been ordered to enact regulations by a certain time, has indicated that it can implement interim measures, and thus must, in our view, significantly extend the timeframe of consultation. In most cases, simply responding to the strategic questions in the Discussion Document will not be sufficient consultation.
2. Canada's approach to consulting with the significant number of First Nations who may be impacted by the Federal Initiative needs to be reviewed. Further thought must be directed to how to best structure consultation with so many rights-holders. Discussions between First Nations and with Canada should take place in this regard.
3. Canada's guiding vision and principles for the Federal Initiative do not address or incorporate First Nations' rights and interests. Aside from holding separate meetings with First Nations, Canada appears to be treating First Nations as one of many stakeholder groups, not as rights-holders.
4. Consultation on the Federal Initiative in stages seems inappropriate and in our opinion is harmful to the interests of First Nations. Canada's proposed regulation, policies and strategic plans regarding the Federal Initiative work in conjunction and are interdependent. Meaningful consultation cannot take place on these pieces in isolation of each other and must be integrated.

We recommend that First Nations bring these issues of concern to Canada's attention.

We note that along with Canada's legal duty to consult, many of Canada's assertions and agreements, as well as the business interests of aquaculture, also support meaningful consultation with First Nations in which the consent of First Nations to Canada's plans is the desired outcome.

B. SUBSTANCE: ISSUES ARISING IN FEDERAL INITIATIVE REQUIRING CONSULTATION

A large number of issues are raised by the Federal Initiative which require consultation with First Nations. At its most basic level, a standard fin-fish aquaculture facility require tenure to a large amounts of ocean space and a licence allows a facility to use the space to the exclusion of others- including for fishing, introduce hundreds of thousands of non-native fish, and deposit significant amounts of feed, drugs, and other substances into the water on a daily basis. Shell-fish aquaculture operations have similar implications (although with less depositing of chemicals, etc). Aquaculture facilities impact aboriginal title, the ability of First Nations to exercise control over territory, and aboriginal rights (particularly fishing rights). The form and content of the federal regulation, policies and strategic plans that govern aquaculture are of significant importance to First Nations in BC, particularly coastal First Nations.

We organized our analysis of specific issues that arise in keeping with the issues identified as priority concerns by the FNFC membership: we highlight some of these key issues again below.

1. DFO's vision for aquaculture

DFO appears to intend to take a stream-lined approach to aquaculture regulation and licensing. First Nations need more information regarding Canada's plans and need to ensure that there is adequate opportunity for First Nations' input and participation regardless of stream-lining.

Canada is taking a growth-oriented approach to the aquaculture industry as a whole. First Nations must ensure that this growth does not come at the expense of their rights and interests (including with respect to preserving and restoring healthy and productive ecosystems), and that First Nations benefit from and are partners in growth where they wish to be and in ways that are in keeping with their goals, rights, and perspectives.

2. Siting and Licensing

First Nations must be consulted with respect to the siting and licensing of individual aquaculture operations, as well as with respect to regional and coast-wide planning (including expansion into new areas). Siting decisions may be based on policies and strategic plans, but will also be carried out on a site-by-site basis, requiring ongoing First Nations' involvement at all levels.

A significant issue is Canada's duty to consult and accommodate with respect to all = the aquaculture operations that currently operate pursuant to a provincial licence and will soon require federal approval. First Nations should press Canada for their plans in this regard.

3. Science and Environment

First Nations should have the opportunity to retain the assistance of scientists and contribute to the science that Canada relies upon. Areas of scientific uncertainty, such as the specific impacts of aquaculture on wild fish stocks, have been recognized by the courts to require consultation.

Canada must be pressed to clarify its plans in respect of environmental review of aquaculture operations – both current and prospective. It is not evident at this stage, for example, whether the review process under the *Canadian Environmental Assessment Act* will apply.

An issue not addressed by this opinion that deserves further consideration and analysis is the contribution that aboriginal traditional knowledge can make to management and decision-making for aquaculture.

4. Monitoring and Compliance

Monitoring and compliance of aquaculture operations to ensure against unforeseen infringements is important to First Nations. Monitoring and compliance must include information-exchange and ongoing consultations which allow First Nations to assess and avoid or reduce the impacts of aquaculture on their rights and interests.

Strategic planning and policies must be established which ensure opportunities for First Nations to participate in monitoring and compliance. This may be carried out in a number of ways including as on the ground personnel, and representation on standard-setting and decision-making bodies.

5. Management

Management of aquaculture takes place at all levels, from the site-specific to province-wide and involvement of First Nations in management must be secured through consultations. Of particular emphasis should be the interest of First Nations in area-based management that records and assesses cumulative effects of aquaculture. The management of the aquaculture industry as a whole, especially with regard to its interaction with broader interests and industries including FSC and commercial fishing is also of direct concern to First Nations.

6. Opportunities for First Nation Participation, Innovation and Investment

DFO asserts that the Federal Initiative will present opportunities for First Nations, but these opportunities require elaboration. The opportunities must also be balanced against the impacts of aquaculture. First Nations should press for more information and for firm commitments regarding opportunities, including with respect to: resource and revenue sharing, employment and training, expansion of aquaculture into new species, the development of new technologies, opportunities for First Nations' businesses, and direct benefits to First Nations communities such as by license allocation and revenue-sharing.

C. KEY NEXT STEPS

This opinion outlines many steps that can be taken by individual First Nations and/or groups representing First Nations in respect of consultation for the Federal Initiative. Essential steps, that in our view should be taken immediately, are:

1. Advising Canada (DFO) of the aboriginal rights and interests that First Nations assert will be impacted by the Federal Initiative (likely including aboriginal rights, fishing rights, and aboriginal title);
2. Advising Canada of the concerns of First Nations with respect to some of the broad and specific ways that it appears that the Federal Initiative will impact and infringe these asserted and proven aboriginal rights;
3. Advising Canada of the desire of First Nations to be consulted with respect to all aspects of the Federal Initiative, including the development of regulations, policies, and strategic plans;
4. Advising Canada of any concerns that First Nations have with regard to the currently proposed consultation process, including: the timeline of the process, the engagement of First Nations as rights-holders, the fracturing of the consultation process into separate pieces, and expanding consultations beyond the strategic questions in the Discussion Document. As part of this it is important to remind Canada that the first step in consultation is to discuss with First Nations the process of consultation;
5. Advising Canada that their participation in the current consultation process must not be taken as support for the current process which was developed without their input. First Nations must emphasize to DFO that their participation is without prejudice to their right to challenge Canada's consultation process as inadequate;
6. Identifying for Canada broad and specific areas where more information is needed from Canada in respect of the Federal Initiative in order that First Nations can engage meaningfully in consultation;
7. Raising with Canada the issue of funding for First Nations that will be necessary in order to ensure meaningful participation; and
8. Carrying out preliminary discussions within and between First Nations regarding needs and goals in respect of the process and general substantive outcomes of consultation on the Federal Initiative.