

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
KWICKSUTAINIUK/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

DEFENDANTS

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

STATEMENT OF CLAIM

Introduction

1. This is a proposed class action on behalf of all members of the First Nations 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.

The Province has Infringed and Interfered with the Fishing Rights

14. 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.

15. 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".

16. 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.

17. 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

18. 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 livelihood, 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.

19. 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 4th day of February, 2009.

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

This Statement of Claim is filed by J.J. Camp, Q.C., Camp Fiorante Matthews, 400 – 555 West Georgia Street, Vancouver, British Columbia, V6B 1Z6. Tel: 604-689-7555.