

1-1-2005

Bringing Meaning to First Nations Consultation in British Columbia Salmon Aquaculture Industry

Mark Rappaport

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/djls>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 License](#).

Recommended Citation

Mark Rappaport, "Bringing Meaning to First Nations Consultation in British Columbia Salmon Aquaculture Industry" (2005) 14 Dal J Leg Stud 146.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Journal of Legal Studies by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

BRINGING MEANING TO FIRST NATIONS CONSULTATION IN THE BRITISH COLUMBIA SALMON AQUACULTURE INDUSTRY

MARK RAPPAPORT[†]

ABSTRACT

One aspect of the legal relationship between the Crown and Aboriginal peoples is the duty to consult. This duty is part of the overall fiduciary duty that the Crown owes towards Aboriginal people. The recent Supreme Court of Canada decision of Haida v. British Columbia brings the duty to consult into focus specifically in the context of salmon aquaculture in British Columbia. Difficulties arise with regards to the precise content of the duty to consult: is it merely procedural in nature, or do First Nations have a substantive right to consultation? The extent of consultation and accommodation will be determined proportionally to the strength of the claim and the seriousness of the potential infringement. The Haida case confirms the requirement of the Crown to act honourably and to effect reconciliation between the Crown and Aboriginal peoples, as has been established in previous Canadian Aboriginal jurisprudence. Consultation is practically difficult because of the fact that salmon aquaculture regulation is divided amongst several government agencies. This paper explores the question of how much input Aboriginal peoples should have and what the nature of accommodation might look like if an Aboriginal band were to protest salmon aquaculture in its territory.

[†] Mark Rappaport (B.Sc., University of Victoria) received his LL.B. from Dalhousie Law School in 2005..

The salmon aquaculture industry in British Columbia has been wrought with controversy from its infancy.¹ At the heart of this controversy are questions surrounding the industry's sustainability, including its effects on the environment and wild pacific salmon.² Traditionally, governments have had difficulty addressing these issues because the aquaculture industry is serviced under various Constitutional heads of power, resulting in a regulatory regime that is haphazardly divided between the Federal and Provincial governments.³ In order to address this lack of vertical integration, the Provincial and Federal governments signed a Memorandum of Understanding in 1988, which identified a number of coordination duties.⁴ Conspicuously absent from the Memorandum of Understanding, however, was mention of a role for First Nations to play in regulating the industry.⁵

In this paper I will discuss the Crown's legal obligations and the fiduciary duty owed to First Nations people, including the Crown's traditional approach toward consultation. I will examine how the recent decision of *Haida v. British Columbia (Ministry of Forests)*⁶ could be used as a tool by decision-makers to help facilitate reconciliation of Crown and Aboriginal interests in the context of salmon farming in British Columbia.

I. DEFINING THE LEGAL RELATIONSHIP

Prior to 1982, the rights of Aboriginal peoples in Canada could be abolished by an Act of Parliament. In an attempt to protect Aboriginal inter-

¹ Originally the industry was poorly regulated and there was little scientific understanding of potential environmental impacts. This led to significant public concern and several moratoriums on issuing licences and several government reviews of the industry. See British Columbia Report of the Environmental Assessment Office, *Salmon Aquaculture Review Summary*, vol. 1 (Victoria: Queens Printer, 1997) at 1-3.

² *Ibid.*

³ *Ibid.*

⁴ David VanderZwaag, Gloria Chao and Mark Covan, "Canadian Aquaculture and the Principles of Sustainable Development: Gauging the Law and Policy Tides and Charting a Course" (2002) 28 Queen's L.J. 279.

⁵ British Columbia, Ministry of Agriculture, Food and Fisheries, "Salmon Aquaculture Review Final Report", online: Ministry of Agriculture, Food, and Fisheries <http://www.agf.gov.bc.ca/fisheries/studies_rpts_detail.htm>.

⁶ 245 D.L.R. (4th) 33, 2004 SCC 73 [*Haida*].

ests from the arbitrary will of the Crown, the Supreme Court of Canada defined the legal relationship between the two parties as fiduciary in nature, in *Guerin v. The Queen*.⁷ While some have criticized this fiduciary relationship as overly patriarchal, the *Guerin* decision established a legal principle for assessing the legitimacy of Crown actions with respect to Aboriginal peoples. After *Guerin*, the Crown was legally required to act in the best interests of Aboriginal peoples. The Crown's fiduciary obligation has since been further defined: it is now clear that not all Crown-Indian relationships give rise to a legal fiduciary duty. Rather, "the fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests."⁸

In 1982, Aboriginal rights were elevated to Constitutional status through s. 35(1) of the *Constitution Act, 1982*.⁹ While entrenching Aboriginal rights in the Constitution has indeed helped to protect them from the political whims of the majority, it has also placed the heavy burden of interpreting those rights on the judiciary. The first framework for interpreting section 35 rights was established by the Supreme Court of Canada in *R. v. Sparrow*.¹⁰ Dickson, C.J. and La Forest, J. concluded that the terms "recognition and affirmation" in s. 35 incorporated the Crown's fiduciary obligation.¹¹ Further, the Court created a four-part test to assess the legitimacy of Crown actions, whether those actions interfered with the interests of an Aboriginal right and, if so, whether they could be justified.

The Aboriginal claimant first has the onus of proving the Aboriginal right and infringement; the onus then shifts to the Crown to prove that the right has been extinguished or, alternatively, that the interference is justifiable.¹² In *Sparrow* the Musqueam Band was successful in proving that they had an Aboriginal right to fish for salmon and that the Government had interfered with it.¹³ In interpreting the nature of s. 35(1) rights, the court clearly stated that they should "be construed in a purposive way [and that] a generous, liberal interpretation of the words in the con-

⁷ [1984] 2 S.C.R. 335.

⁸ *Roberts v. R.*, [2002] 4 S.C.R. 245, 220 D.L.R. (4th) 1 at para. 81.

⁹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁰ [1990] 1 S.C.R. 1075 at para. 62, [1990] 4 W.W.R. 410 [*Sparrow*].

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

stitutional provision” should be given. In other words, section 35 rights should not be interpreted as being frozen in time.¹⁴ Moreover, Dickson C.J. in Sparrow notes that,

[s]ection 35(1) at the least provides a solid constitutional base upon which subsequent negotiations can take place ... it calls for just settlement of Aboriginal peoples ... Moreover, the crown is under a moral if not a legal duty to negotiate in good faith.¹⁵

In *R. v. Van der Peet*, the Supreme Court of Canada elaborated on the nature of section 35(1), noting that its fundamental purpose is “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.”¹⁶

One of the most significant aspects of Aboriginal rights litigation has been the determination of the nature and scope of the Crown’s duty to consult Aboriginal peoples regarding potential infringements. The content of the duty to consult for established title claims was addressed in *Delgamuukw v. British Columbia*. There, Dickson C.J., for the majority, held that:

[t]he nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to the land held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose land are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.¹⁷

¹⁴ *Ibid.* at para. 56.

¹⁵ *Ibid.* at para. 53.

¹⁶ *R. v. Van der Peet* [1996] 2 S.C.R. 507 at para. 31, [1996] 9 W.W.R. 1 [*Van der Peet*].

¹⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 168, 153 D.L.R. (4th) 193.

While these decisions shed a great deal of light on the legal relationship between the Crown and Aboriginal peoples, they leave many significant questions unanswered. Specifically, what is the extent of the Crown's obligation to consult with First Nations in the context of the salmon aquaculture industry? Is the requirement procedural or do First Nations have a substantive right to consultation? Does the obligation to consult exist at all if the potentially affected Aboriginal right has not yet been proven in law? How will the obligation to consult be affected if it is unclear whether salmon farming could infringe upon a claimed right? For the remainder of this paper I will address these questions in an attempt to define the legal rights of Aboriginal peoples in the salmon aquaculture decision-making process.

II. *HAIDA* AND THE DUTY TO CONSULT

The Supreme Court of Canada's recent unanimous decision in *Haida* further defines the nature of the duty to consult and accommodate as being "grounded in the honour of the Crown."¹⁸ Chief Justice McLachlin noted that while section 35 of the Constitution Act, 1982, "represents a promise of rights recognition ... a corollary of s. 35 [is that] the Crown act honourably in defining the rights it guarantees."¹⁹ The reason for this is twofold. First, "it is always assumed that the Crown intends to fulfill its promises."²⁰ Second, the Crown must act honourably if it is to achieve the purpose of s.35, that is, "the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown."²¹

Chief Justice McLachlin further states that, "the honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty."²² Where it has not, the honour of the Crown implies "a duty to consult and, if appropriate, accommodate,"²³ if an Aboriginal right or title may be infringed.

¹⁸ *Supra* note 6 at para. 16.

¹⁹ *Supra* note 6 at para. 20.

²⁰ *Supra* note 6 (quoting from *R. v. Badger* [1996] 1 S.C.R. 771, 4 W.W.R. 447 at para. 41).

²¹ *Supra* note 6 at para. 17 (quoting from *Van der Peet* at para. 31).

²² *Supra* note 6 at para. 18.

²³ *Supra* note 6 at para. 20.

The Court then addressed the Crown's argument that a legally enforceable duty to consult does not exist until a right has been proven. Chief Justice McLachlin stated at paragraph 33:

[t]o limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title ... It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.²⁴

As to when, precisely, the duty to consult arises, the Court cites *Halfway River First Nation v. British Columbia (Minister of Forests)* and states, "the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."²⁵

Chief Justice McLachlin then addresses the issues of the scope and content of the duty to consult and accommodate. Essentially, she notes that the scope of the duty to consult is proportional to the strength of the claim and the seriousness of the potential infringement.²⁶ At one end of the spectrum, where the asserted right is tenuous and the potential infringement is minimal, the Crown's duty to consult may be satisfied by merely "giving notice, disclosing information, and discussing any issues raised in response to the notice."²⁷ In these situations the duty to consult appears to be primarily procedural in nature. At the other end of the spectrum, where an Aboriginal claimant has a "strong *prima facie*" case and the potential for infringement is significant, then the interests of the claimant may have to be accommodated rather than merely consulted.

Accommodation in the context of a strong *prima facie* claim and a significant potential for infringement means "the opportunity to make submissions for consideration, formal participation in the decision-mak-

²⁴ *Supra* note 6 at para. 33.

²⁵ *Supra* note 6 (quoting from *Halfway River* [1997] 4 C.N.L.R. 45, [1998] 4 W.W.R. 283 (B.C.S.C.), at para. 35).

²⁶ *Supra* note 6 at para. 39.

²⁷ *Supra* note 6 at para. 43.

ing process, and provision of written reasons [by the Government] to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.”²⁸ While at this end of the spectrum the right to consultation is significantly more substantive in nature, the Court is clear that “this process does not give Aboriginal groups a veto over what can be done with land pending final proof of claim.”²⁹ According to McLachlin C.J.,

[t]he controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims.³⁰

I will now examine how this balancing of societal and Aboriginal interests might play out in the salmon aquaculture context.

III. THE DUTY TO CONSULT AND SALMON AQUACULTURE POLICY

The manner in which the Crown’s duty to consult and accommodate Aboriginal peoples may affect salmon aquaculture policy is guided by the Supreme Court’s decision in *Haida*. For the remainder of this paper I will address the issues of how and when decision makers should consult Aboriginal people, the level of input Aboriginal peoples should have in the decision making process, and how a Minister’s decision to grant salmon aquaculture licenses and tenures could be affected by a band who protests salmon aquaculture. Further, I will argue that the duty to consult and accommodate could compel the Crown to adopt best management practices regarding salmon farming, including subsidizing closed system aquaculture facilities, in limited situations.

²⁸ *Supra* note 6 at para. 44.

²⁹ *Supra* note 6 at para. 42.

³⁰ *Supra* note 6 at para. 45.

1. When and how should aboriginal peoples be consulted regarding proposed salmon aquaculture projects?

While the Crown argued in *Haida* and *Taku River*³¹ that a legal obligation to consult did not exist until the Aboriginal claimant had proven an Aboriginal right, they amended their Provincial Policy for Consultation to reflect the British Columbia Court of Appeal's decision in both of those cases. Those decisions held that there was in fact a duty to consult prior to the proven existence of an Aboriginal claim.³² Accordingly, the British Columbia Provincial Crown's Policy for Consultation with First Nations now acknowledges that, "the depth of consultation and degree to which workable accommodations should be attempted will be proportional to the soundness of that interest."³³ The Crown's policy also acknowledges that, "consultation should be carried out as early as possible in the decision-making process."³⁴ Both of these principles uphold the honour of the Crown and are consistent with the Supreme Court's decision in *Haida*.

Because the regulation of salmon aquaculture is divided amongst so many different government agencies, one is left to question how the consultation process is administered to achieve a consistent result. Currently, there are two major provincial agencies, one provincial Crown Corporation and one federal agency that are responsible for regulating the industry. The B.C. Ministry of Water, Land and Air Protection regulates the use of water permits, Land and Water B.C. Inc. issues land use tenures, the B.C. Ministry of Agriculture, Fisheries and Foods issues aquaculture licenses, and the Federal Department of Fisheries and Oceans issues permits under the *Navigable Waters Protection Act*³⁵ and

³¹ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2002), 211 D.L.R. (4th) 89 (B.C.C.A.) rev'd (2004) 245 D.L.R. (4th) 193 [*Taku River*].

³² Land and Water British Columbia Inc., "Aboriginal Interests Consideration Procedures" (Sept. 8, 2003), online: Land and Water British Columbia <www.lwbc.bc.ca/04community/fn/docs/aicp.pdf>. Refers to the BCCA decisions in *Haida* and *Taku* and states that the Provincial Policy for Consultation with First Nations, October, 2002 takes into account those decisions.

³³ Government of British Columbia, "B.C. Provincial Policy for Consultation with First Nations" (October 2002), online: British Columbia Treaty Negotiations Office <http://www.gov.bc.ca/tno/down/consultation_policy_fn.pdf> at 25.

³⁴ *Ibid.* at 19.

³⁵ R.S.C. 1985, c. N-22.

the *Fisheries Act*.³⁶ Environment Canada may also become involved if issuance of a Federal permit triggers an environmental assessment.³⁷

While it may not be necessary for all agencies to consult in the most efficient manner, one would assume that consistency is an important element of honourable consultation. Traditionally, each agency responsible for granting a permit or issuing a license consulted with potentially affected First Nations groups separately. Recently, however, there has been a move toward an integrated consultation process. The Provincial and Federal governments are currently working on a harmonized consultation policy for aquaculture that will be available some time in 2005.³⁸ It is anticipated that this move toward integration will enhance the consistency of the consultation process and the honour of the Crown's conduct.

2. What level of input should aboriginal peoples have in the decision making process?

Although the answer to this question depends on the context of the situation, a few broad generalizations can be made. First, as the obligation to consult is proportional to the strength of the asserted claim and the potential for infringement, one must first establish an Aboriginal right or title that could be affected. In the context of a salmon aquaculture facility, one right that could be potentially infringed is the right to fish for wild salmon.

It is likely that many coastal First Nations groups will be able to establish an Aboriginal right to fish wild salmon for food and ceremonial purposes. This is supported by several factors. First, as Philip Drucker notes in his book *Cultures of the North Pacific Coast*, "exploitation of the fisheries, particularly salmon – the most abundant fish – was the crux of North Pacific Coast economy."³⁹ In addition, salmon were spiritually central to North Pacific Coast peoples. Drucker also notes, "of all the priest-conducted rites of group interest, the most important was

³⁶ R.S.C. 1985, c. F-14, cited in VanderZwaag, *supra* note 4.

³⁷ VanderZwaag, *supra* note 4 at para. 47.

³⁸ Interview of Sean Herbert, Aquaculture Manager for BC Ministry of Water, Land and Air Protection, (Nov. 22, 2004).

³⁹ Philip Drucker, *Cultures of the North Pacific Coast* (San Francisco: Chandler Publishing Company, 1965) at 11.

associated with the arrival of the first salmon each year.”⁴⁰ Accordingly, it is likely that many first nations groups on the Pacific Coast would be able to establish an Aboriginal right to fish for salmon because the practice has been central and integral to the lives of many North Pacific Coast peoples since before contact with Europeans.⁴¹

Moreover, Aboriginal claimants are not required to produce indisputable evidence from pre-contact times to establish an Aboriginal right or title. Rather, the evidentiary burden requires the claimant to prove claims “on the basis of cogent evidence establishing their validity on the balance of probabilities.”⁴² For example, in *Heiltsuk Nation v. British Columbia (Minister of Sustainable Resource Management)*, Justice Gerow accepted the oral history of the Heiltsuk at face value and determined that they had “a strong *prima facie* case of Aboriginal rights to fish in the area.”⁴³

Two additional factors support the likelihood that several Pacific Coast bands would be able to establish a right to fish for salmon. First is the *Sparrow* decision itself, in which the Musqueam band successfully established an Aboriginal right to fish salmon for food and ceremonial purposes.⁴⁴ Second is the Department of Fisheries and Oceans Aboriginal Fisheries Strategy, which reflects the *Sparrow* decision in a broader context by allocating priority to Aboriginal food fisheries over the commercial sector.

Therefore, assuming that it will be likely that many bands will be able to establish a strong *prima facie* claim to fish for wild salmon, the operating question becomes: What is the likelihood that a decision to grant a salmon aquaculture license will infringe the Aboriginal right to harvest wild salmon? As noted above, the onus is on the Aboriginal claimant to prove the likelihood of an infringement. In order to answer this question it is imperative to establish a detrimental link between farmed salmon and wild salmon. This is difficult because, although there is a great deal

⁴⁰ *Ibid.* at 94.

⁴¹ ‘Central and integral since pre-contact times’ is the test to establish section 35(1) Aboriginal rights as set out by the Supreme Court of Canada in *Van der Peet*, *supra* note 16 at para. 44.

⁴² *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, 199 D.L.R. (4th) 385 at para. 51.

⁴³ *Heiltsuk Nation v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (S.C.) at para. 64 [*Heiltsuk*].

⁴⁴ *Supra* note 10.

of public opposition to salmon farming, there is also a great deal of scientific uncertainty regarding the effects of the industry on wild salmon. However, McLachlin C.J. states in *Haida* this is not as problematic as it may seem. She maintains that “difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.”⁴⁵

Over the past decade there has been significant development in determining the risk that fish farming may present to wild salmon. In 1995 the B.C. Provincial Environmental Assessment Office began a comprehensive assessment of salmon aquaculture practices. The study evaluated five major concerns regarding salmon aquaculture in B.C. including: the impact of escaped farm salmon on wild stocks, disease in wild and farmed fish, environmental impacts of waste discharged from farms, impacts of farms on coastal mammals and other species, and the siting of salmon farms. The conclusions of the Salmon Aquaculture Review (SAR) were as follows:

[s]almon farming in B.C., as presently practiced and at current production levels, presents a low overall risk to the environment. However, this general finding is tempered by certain reservations. First, continuing concern about localized impacts on benthic (seabed) organisms, shellfish populations and marine mammals suggests the need for additional measures to protect them. Second, significant gaps in the scientific knowledge on which [these] conclusions are based point to the need for monitoring and research in areas such as the potential impacts of escaped farmed salmon with wild populations, identification and control of disease and disease pathogens, potential for disease transfer ... Science rarely has the ability to reach definitive conclusions on the risk or potential severity of the consequences of human interactions with complex ecosystems ... Direction is provided by the precautionary principle which advocates the consideration and anticipation of the potential negative impacts of an activity before it is approved.⁴⁶

Thus, at the time of the SAR’s conclusion (in 1997) it would have been difficult for an Aboriginal claimant to prove that salmon farming would infringe a claimed right to fish for wild salmon. However, by acknowledging a lack of scientific understanding and advocating a precaution-

⁴⁵ *Supra* note 6 at para. 37.

⁴⁶ *Supra* note 1 at 4.

ary approach toward the industry, the SAR implies that some risk to wild salmon exists. Still, the duty to consult would likely fall closer to the procedural end of the spectrum as the risk of infringing the right to harvest wild salmon appeared low.

Since the SAR, however, there has been new research to indicate that salmon aquaculture may, in fact, present a greater risk to wild fish than previously believed. Two recent observations support this conclusion. First, in 1997, PhD student John Volpe discovered that escaped Atlantic salmon have spawned in several rivers on Vancouver Island and, in some cases, those fish have established self-sustaining populations. In laboratory experiments Volpe also determined that Atlantic salmon out-compete their native niche equivalent, the steelhead salmon. His experiments suggest that Atlantic salmon pose a greater risk to wild salmon than was previously believed.⁴⁷

One year later, Alexandra Morton, a biologist who lives in the Broughton Archipelago, became alarmed at the negative effects of the 20 fish farms in the area. In particular, she was concerned by the abnormally large number of sea lice that she discovered on juvenile pink salmon, and that she believed was attributable to a disease outbreak in the local farms. She presented her evidence to the Department of Fisheries and Oceans, but they denied that anything was wrong. Two years later when the age class of pink salmon returned to the Broughton Archipelago the stock had collapsed from 3.5 million to 147,000, a reduction of 96% from previous years.⁴⁸ As a result, the DFO has begun researching the sea lice problem in the area but has not yet attributed the outbreak to the area's fish farms.⁴⁹ While Morton's research is circumstantial, a number of reputable scientists agree with her conclusions.

In 2000 both Morton and Volpe undertook a study to determine the number of Atlantic salmon that had escaped in Management Area 12 and the degree of risk that farmed Atlantics posed to the natural environment. Morton and Volpe contacted commercial fishermen via VHF and

⁴⁷ John P. Volpe. *Invasion Ecology of Atlantic Salmon (*Salmo salar*) in British Columbia*. Ph.D. Thesis. University of Victoria, B.C. 2001.

⁴⁸ Earth Crash Earth Spirit, online: <<http://eces.org/articles/000003.php>> and Prince Rupert. com, North Coast's Regional Information Site, online: <http://www.princerupert.com/economy/Morton_responds_Hagen.htm>.

⁴⁹ Department of Fisheries and Oceans Canada, "Pacific Region Pink Salmon Action Plan: Introduction to and Weekly Results of the Marine Research Project in 2004," online: <http://www-sci.pac.dfo-mpo.gc.ca/mehsd/sea_lice/2004/2004_intro_e.htm>.

by visiting boats during commercial salmon openings from August 2, 2000 to September 22, 2000. During that period a total of 10,826 Atlantic salmon were discovered in 17 days of open fishing.⁵⁰

These three new discoveries demonstrate that the risk posed by salmon farming to wild salmon is greater than previously believed. Therefore, since the potential for infringing an Aboriginal right to fish for salmon has increased with new evidence, so too should the Crown's corresponding duty to consult. If we assume that more evidence will accumulate, the level of consultation required by the Crown to issue salmon farm permits would likely reach the level of accommodation. The Provincial Policy for Consultation with First Nations acknowledges the responsibility to accommodate where a sound case for Aboriginal rights has been established and there appears to be a likelihood that the decision may result in an infringement of those interests.⁵¹ However, the Crown's policy does not detail what 'accommodation' means in practice. For this we can turn to *Haida* for guidance: accommodation may include formal participation in the decision making process but does not constitute a right to veto. Accordingly, in the hypothetical situation where an Aboriginal claimant has a strong *prima facie* claim to fish for wild salmon and the likelihood of infringing that right by issuing a salmon farming permit is significant then the Aboriginal group would likely be granted some say over how the project proceeds.

3. How will the decision to grant a salmon farm license be affected by a band that protests salmon aquaculture in its territory?

Evaluating the B.C. Supreme Court's decision in *Heiltsuk* in conjunction with *Haida* will shed some light on this question. In *Heiltsuk*, the Heiltsuk Nation brought an application for judicial review asking the Court to quash the Minister's decision to grant licenses to Omega Salmon Group Ltd. (Omega) to operate a commercial fish hatchery in their territory. The Heiltsuk claimed unproven Aboriginal rights and title to

⁵⁰ Alexandra Morton and J.P. Volpe, "A description of Atlantic Salmon *Salmo salar* in the Pacific salmon fishery in British Columbia, Canada, in 2000" Alaska Fishery Research Bulletin 9: 102-110, 2002.

⁵¹ *Supra* note 33 at 32 and 33.

the land where the hatchery was located, and opposed any type of Atlantic salmon aquaculture in their territory.⁵² The Heiltsuk claimed that they had not been adequately consulted with, and that the decision to grant the licenses would infringe upon their Aboriginal right to fish for salmon and other types of fish.

In assessing the nature of the Heiltsuk's claim, Justice Gerow accepted the oral history of the Heiltsuk at face value and determined that they had "a strong *prima facie* case of Aboriginal rights to fish in the area."⁵³ The Court then turned to whether the Heiltsuk had shown an infringement of their claimed right. Here, the band failed to produce enough evidence showing that the proposed activity would infringe their claimed right to fish. First, Justice Gerow pointed out that the proposed facility was land based and, as such, the likelihood of interaction between the hatchery raised fish and wild fish would be remote.⁵⁴ Supporting this conclusion was the fact that the discharge pipe from the hatchery to the ocean would have a triple screening system.⁵⁵ The Heiltsuk also failed to present evidence that effluent from the hatchery would impact the marine environment in an adverse way.⁵⁶ Given that the Minister of Fisheries and Oceans had confirmed that the activity would not result in "a harmful alteration, disruption, or destruction (HADD) of fish habitat,"⁵⁷ and that the hatchery was regulated under the *Land-Based Fin Fish Waste Control Regulation*,⁵⁸ Justice Gerow concluded that the Heiltsuk had not established a potential infringement.

In determining whether sufficient consultation had taken place, Justice Gerow highlighted the fact that Heiltsuk had a reciprocal duty to consult with the Crown.⁵⁹ Still, while the Crown later acknowledged their obligation to consult, they did not initially consult with the Heiltsuk regarding the licenses.⁶⁰ Omega, however, was willing to consult and had made many attempts to do so.⁶¹ For Justice Gerow, the consulta-

⁵² *Supra* note 43 at para. 108.

⁵³ *Supra* note 43 at para. 64.

⁵⁴ *Supra* note 43 at para. 95.

⁵⁵ *Supra* note 43 at para. 94.

⁵⁶ *Supra* note 43 at para. 93.

⁵⁷ *Supra* note 43 at para. 91.

⁵⁸ *Supra* note 43 at para. 91.

⁵⁹ *Supra* note 43 at para. 104-105.

⁶⁰ *Supra* note 43 at paras. 98 and 102.

⁶¹ *Supra* note 43 at para. 100.

tion was not effective because the Heiltsuk were “opposed to any type of Atlantic salmon aquaculture in the territory over which they [were] asserting a claim ... [and] have been unwilling to enter into consultation regarding any type of accommodation concerning the hatchery.”⁶² Justice Gerow was skeptical that that the right to consultation contained a right to veto use of the land and, since *Haida*, it is clear that the right to consultation of an unproven right indeed does not carry with it a right to veto.⁶³

In the end, however, Justice Gerow adjourned the Heiltsuk’s request to quash the Minister’s decision until adequate consultation had taken place. He also dismissed the application to grant an interim or interlocutory injunction on the grounds that Omega had invested significant resources into the project and the Heiltsuk did not bring their petition to the Court in a timely manner.⁶⁴

The *Heiltsuk* decision is useful because it provides some guidance for the hypothetical situation outlined above. Would the Court’s decision have been different if the Heiltsuk were located somewhere in the Broughton Archipelago and the licenses being contested were for an ocean-based Atlantic salmon farm? Assuming the band could establish a strong *prima facie* claim to fish for wild salmon, and assuming more evidence accumulates to suggest that farmed salmon are detrimental to wild salmon, it seems likely that the Crown’s obligation to consult would reach the level of accommodation. Since accommodation does not include a veto right, the right to consultation would include significant involvement in the decision-making process and the final outcome. As Chief Justice McLachlin states in *Haida*,

[w]here a strong *prima facie* case exists for the claim, and the consequences of the government’s proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.”⁶⁵

⁶² *Supra* note 43 at para. 108.

⁶³ *Supra* note 6 at para. 48.

⁶⁴ *Supra* note 43 at para. 126.

⁶⁵ *Supra* note 6 at para. 47.

The government's obligation, therefore, would be "to minimize the effects of the infringement,"⁶⁶ which may mean that injunctions would be more easily attainable, if the potentialities of the hypothetical are realized.

By engaging in this question, we must ask what options the Crown has to minimize the effects of a potential infringement. Over the past several years the provincial government has experimented with several closed system salmon aquaculture facilities that prevent Atlantic salmon escapes and collect farm effluent.⁶⁷ Both of these mechanisms would satisfy the government's obligation to minimize any potential infringement. The traditional problem with closed systems is that they are prohibitively expensive. However, statistics have recently been released from a pilot project conducted by Marine Harvest Canada in Cusheon Cove on Saltspring Island – the largest closed system salmon farming operation in the world. The study determined that in their first attempt to produce closed system Atlantic salmon, operational costs were \$0.85/Kg greater than the traditional open pen systems placed alongside the new technology as a control. Moreover, the study found several areas where costs could be reduced in future trials. For example, it is believed that costs can be reduced by \$0.07/Kg by providing a more ready source of oxygen to aerate the pens.⁶⁸ While \$0.78/Kg represents approximately 25% increase in cost compared to salmon produced through open net cage farming, it is comparably less than the premium that consumers pay for organic produce.⁶⁹

In the hypothetical situation above, it seems reasonable that the government could meet their obligation to minimize the effects of the infringement by subsidizing these "best management practices" in areas where Aboriginal bands protest traditional salmon farms. While Chief Justice McLachlin was clear in *Haida* that "pending settlement, the Crown is bound by its honour to balance societal and Aboriginal

⁶⁶ *Supra* note 6 at para. 47.

⁶⁷ Government of British Columbia, "Fisheries and Aquaculture: New Technology", online: Ministry of Agriculture, Food, and Fisheries <www.agf.gov.bc.ca/fisheries/technology/new_tech.htm>.

⁶⁸ Michel Dubreuil, "Economic Performance of Atlantic Salmon in the SEA System II Relative to Conventional Net Cages", online: B.C. Ministry of Agriculture, Food, and Fisheries <www.agf.gov.bc.ca/fisheries/reports/MH_Economic_Performance_of_the_SEA_System.pdf>.

⁶⁹ See e.g. Anna Ross, "Organic Food Prices 2002," online: <www.domainomania.com/wfa/downloads/Prices%20Report.pdf>.

interests in making decisions that may affect Aboriginal claims,”⁷⁰ she was also explicit when she stated that “the controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.”⁷¹

IV. CONCLUSION

Fostering an environment where salmon aquaculture can proceed in a manner that supports societal interests and minimizes potential infringements of Aboriginal interests would be consistent with the Supreme Court of Canada’s decision in *Haida*. Such an environment would maintain the honour of the Crown while simultaneously working towards reconciliation between the Crown and Aboriginal peoples. While subsidizing salmon farm operations may meet public opposition, the reality is that many sectors of the Canadian economy are already heavily subsidized. For example, the forest industry is subsidized in the range of \$3 billion to \$8 billion annually, the fossil fuel industry is subsidized approximately \$5.9 billion annually, agriculture was subsidized \$5.6 billion in 2000 and the fishing industry was subsidized \$553 million in 1997 and \$694 million in 1996.⁷² Furthermore, subsidies to the salmon aquaculture industry could be recaptured through eco-labeling of salmon produced in closed systems and charging a premium for those products.⁷³ Given current opposition to traditional salmon farming in B.C., it seems likely that the public would support a new market that minimizes its impact on the environment. Moreover, a Provincial Aquaculture Policy that promotes closed system salmon farms in limited situations would protect Aboriginal rights, bring meaning to the consultation process and help achieve the broader goals of s. 35 of the Constitution Act, 1982, through reconciliation of Crown and Aboriginal interests.

⁷⁰ *Supra* note 6 at para. 45.

⁷¹ *Supra* note 6 at para. 45.

⁷² David R. Boyd, *Unnatural Law: rethinking Canadian environmental law and policy* (Vancouver: UBC Press, 2003) at 320.

⁷³ M.F. Teisl, B. Roe, and R.L. Hicks, “Can Eco-Labels Tune a Market? Evidence from Dolphin-Safe Labeling” *Journal of Environmental Economics and Management* (2002), vol. 43, no. 3 at 339-341.