

FIRST NATIONS LEADERSHIP COUNCIL



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August 10, 2010

Honourable Gail Shea
Department of Fisheries and Oceans Canada
House of Commons
Ottawa, Ontario K1A 0A6

Dear Minister Shea,

We are writing to express our concerns about the Federal BC Aquaculture Regulation and Strategic Action Plan Initiative and the recent release of the BC Aquaculture regulations (the "Regulations") published in the Canada Gazette on July 10, 2010. In particular, we are concerned with the Government's failure in their legal duty to consult with First Nations in the development of these Regulations.

The process in which the Regulations were developed does not meet Canada's legal and constitutional obligation to consult with First Nations. Fulfillment of the Crown's duty to consult requires that First Nations in BC not be engaged solely as stakeholders; instead, First Nations must be engaged on a bi-lateral level with government. The regional dialogue sessions that took place with respect to these regulations were attended by some First Nations. These participants saw those sessions as the first step in a dialogue – they did not accept that that feedback fulfilled the Crown's constitutional and legal obligations. First Nations strongly indicated that they fully expect to continue to be meaningfully engaged and consulted on the development of the regulations.

In *Morton v. British Columbia (Agriculture and Lands)*, the BC Supreme Court ruled that BC government does not have the constitutional authority to regulate the aquaculture industry. In particular, the court held that "fish which are reared in finfish farms on the coast of British Columbia fall under the jurisdiction of Parliament under s. 91(12) of the Constitution Act 1867" and that "the impugned provincial legislation... was *ultra vires* the provincial crown and thus invalid." The BC Court of Appeal initially gave the federal government twelve months to enact legislation for the regulation of finfish farming.

First Nations have Title, Rights and Treaty Rights to our lands, waters and resources, and these rights include the right to manage and access our lands, waters, and resources according to our inherent laws and jurisdictions including for food, social, ceremonial and economic purposes. These substantive rights must be recognized and respected by the Federal Crown. The Crown has an obligation to consult directly with First Nations on a government-to-government basis on issues that may impact on Aboriginal Title and Rights and Treaty rights. Courts have also affirmed that the duty to consult and accommodate arises at the earliest point the Crown contemplates action that might infringe on First Nation rights. The Crown's legal duty to consult with First Nations and accommodate

Aboriginal Title and Rights is firmly established in many Supreme Court of Canada rulings, including the *Sparrow*, *Haida*, *Taku*, *Mikisew Cree* and other cases.

Canada and BC are currently negotiating a Memorandum of Understanding that will set out their respective roles and responsibilities for regulation of the aquaculture industry as the transition from the provincial regulatory regime to a federal regime continues to unfold. First Nations must also be consulted about any proposed new arrangements between Canada and BC before the Memorandum of Understanding is concluded.

We also understand that the Department of Fisheries and Oceans plans to roll over existing aquaculture licenses without any consultation with First Nations. These licenses were issued pursuant to a regulatory regime which the courts have determined is unconstitutional. A jurisdictional rollover without consultation and accommodation of the infringements caused by these licences would be unconstitutional.

Again, we urge you to meaningfully engage and accommodate with First Nations in BC on development of the Regulations before they are adopted, through bilateral, government to government processes. We also strongly encourage you to engage with First Nations on the development of the Memorandum of Understanding and any operational guidelines, area-based management plans and aquaculture management plans subsequently developed pursuant to the Regulations. All of this work must be adequately resourced by DFO to ensure that there is capacity support for First Nations to participate effectively.

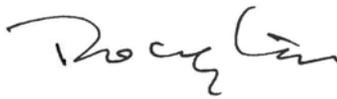
We request an early meeting with you to discuss these concerns in more detail.

Yours truly,
FIRST NATIONS LEADERSHIP COUNCIL

On behalf of the FIRST NATIONS SUMMIT:



Grand Chief Edward John



Chief Douglas White III Kwulasultun



Dan Smith

On behalf of the UNION OF BC INDIAN CHIEFS



Grand Chief Stewart Phillip



Chief Willie Charlie



Chief Bob Chamberlin

On behalf of the BC ASSEMBLY OF FIRST NATIONS:

A handwritten signature in black ink, appearing to read 'Jody Wilson-Raybould', with a large, sweeping flourish at the end.

Regional Chief Jody Wilson-Raybould

cc: National Chief Shawn A-in-chut Atleo, Assembly of First Nations
Hon. John Duncan, Minister of Indian Affairs, Canada
Hon. George Abbott, Minister, Aboriginal Relations and Reconciliation
Honourable Barry Penner, Minister of Environment
The BC First Nations Fisheries Council