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Responding to Finfish Aquaculture in Your Territory

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RESPONDING TO FINFISH AQUACULTURE IN YOUR TERRITORY

A 'How to' Guide for First Nations

Prepared by Lani E. Gibson for the

Environmental Law Centre
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"Each First Nation makes the difficult choice to participate in this industry for itself. We do not condemn our neighbours for choosing to participate in fish farming, but neither can we ignore our neighbour's right to live free from the effects of salmon farming. It's a tough balance, and we don't know yet if it can be done."

Arnie Narcisse, Chairman of the BC Aboriginal Fisheries Commission

Image on cover: *Salmon Cycle* by artist Jim Gilbert, used with the permission of Raven Publishing.

Table of Contents

Note: If viewing this document on-line simply click on the topic you wish to go to.

This handbook was prepared by Lani Gibson, a law student, and reviewed by lawyers Cheryl Sharvit of the Environmental-Aboriginal Guardianship through Law and Education (EAGLE) and Angela McCue of the Sierra Legal Defence Fund. It is a publication of the Environmental Law Centre (ELC) at the University of Victoria and was developed for the Musgamagw Tsawataineuk Tribal Council for distribution to BC First Nations.

The ELC provides non-profit research and advocacy on public interest environmental issues by drawing upon the expertise and involvement of students, professors, legal practitioners, and environmental activists. The ELC takes on new projects throughout the year. Please contact us through our website if you feel we might be able to help with an environmental issue:

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Purpose of this Guide

As the finfish aquaculture industry in the province continues to expand an increasing number of First Nations are faced with the difficult task of responding to proposals for the siting of salmon farms in or near their traditional territories. This guide is intended as a resource for aboriginal communities in British Columbia who are preparing for or involved in a finfish aquaculture consultation process. It provides an overview of the industry in the province, key provincial and federal authorities, and the process by which aquaculture licences and tenures are obtained. Its primary focus is on how aboriginal interests may be affected by fish farming and how First Nations may best ensure that their concerns are accommodated through a process of meaningful consultation with government and industry.

This guide is not legal advice and is not intended to replace the services of a lawyer. While there is great value in leaders, staff and community members becoming more familiar with the legal issues surrounding aquaculture and consultation in British Columbia, vitally important interests are at stake and it is important that you seek legal advice if an aquaculture tenure is applied for in your traditional territory.

What is Aquaculture?

Aquaculture can be defined as the cultivation of aquatic organisms, such as fish, shellfish, crustacea, or aquatic plants, in natural or controlled marine or freshwater environments. The practice of aquaculture dates back to the times of the ancient Chinese, Egyptians and Romans, but in recent decades it has become a rapidly growing industry around the world. When the right species are cultivated using the right technology, aquaculture can be a socially and environmentally sustainable endeavour. However, the large scale production of carnivorous species such as salmon,

especially when undertaken in open net cages in the marine environment, can have significant adverse effects on the environment and is highly controversial.

Expansion of Finfish Aquaculture in BC

The two main forms of aquaculture practiced in British Columbia are finfish aquaculture and shellfish aquaculture. Shellfish aquaculture is currently perceived as being more environmentally sustainable and has attracted less concern than finfish aquaculture. This guide is intended to provide information pertaining to the development of the finfish aquaculture industry in British Columbia.

Commercial finfish aquaculture in British Columbia can be traced back the mid 1950s when the province licensed the first rainbow trout farms. The first salmon farm began operation in 1971. There are now a variety of finfish species currently under culture in British Columbia. In marine waters, Atlantic, Chinook and Coho salmon are the principle species, with Atlantic accounting for over 70% of production.[1]

The salmon aquaculture industry has developed from ten operating farms in 1984 to a peak of 135 farms in 1989. A temporary moratorium on the expansion of salmon farming was imposed by the province in 1995 in order to assess its environmental impacts. In 2002, the government announced its decision to lift the moratorium and invited applications for new finfish aquaculture. While proponents of aquaculture argued in favour of lifting the moratorium that the industry could be regulated in an environmentally sound manner, there are many conflicting scientific opinions and the decision was controversial. Currently there are 121 licensed marine salmon farms in BC, primarily located in and around the northeast and west coasts of Vancouver Island. This number does not

[1] The information in this section is adapted from the Ministry of Agriculture, Food and Fish website: www.gov.bc.ca/agf (last accessed July 2003). There is currently a fair amount of experimentation with species other than Atlantic salmon and the figure of 70% may be expected to fluctuate.

include the many new farms that the industry and provincial government hope to see on our coast over the next few years. The number of companies operating in BC has declined from 50 in 1989 to 12 in 2002. Farmed salmon is BC's largest legal agricultural export.

Environmental, Economic and Social Issues

First Nations, like other BC residents, are divided over the economic and environmental impacts of an expanding aquaculture industry in the province. It is important that each nation faced with making a decision about aquaculture in its territory takes the time to consider all available information. The following pages highlight some of the common concerns that First Nations have but for an in-depth consideration of specific issues you may wish to get further information from the list of contacts and resources provided in the Appendix.

Environmental Concerns

First Nations rely heavily on a healthy environment for the resources needed to sustain them culturally and economically. For this reason, most coastal aboriginal communities are greatly concerned with the potential environmental impacts of salmon farming, especially upon wild salmon populations, shellfish farms operated by First Nations themselves, and other culturally and economically important marine resources. The following are some of the predominant environmental concerns associated with fish farming.

Escapes of Salmon. In BC, the vast majority of farmed salmon are Atlantic salmon. Atlantic salmon are considered alien species in Pacific waters since they do not naturally occur in the Pacific Ocean. Currently, almost all farmed salmon are raised in open net cages in the ocean. These nets can tear, allowing farmed salmon to escape into the wild. Over a million farmed salmon have been reported by the industry to have

escaped into Pacific waters since 1988; because many escapes over the years have gone unreported, experts believe the real figure is much higher. [2]

Research shows that Atlantic salmon have been found in a number of BC rivers and streams.[3] Moreover, only a small portion of our rivers have been surveyed so far - meaning non-native Atlantic salmon could be inhabiting many more. Atlantic salmon compete with wild salmon for habitat, particularly steelhead, and have been known to eat wild salmon fry and eggs. Atlantic salmon have been found spawning, and juveniles have been found surviving in the wild.

Science also suggests that there are risks even when farmed indigenous species escape into the wild. Escaped farmed Chinook can interbreed with wild Chinook. Since farmed salmon are cultivated from a limited gene pool, this interbreeding leads to "genetic dilution", or a narrowing of the genetic makeup in wild fish, which could lessen their ability to survive in the wild

Transfer of Disease and Parasites. Open netcage systems can allow for the transfer of disease and parasites from farms to wild salmon. The transfer of sea lice to wild populations has been an issue of particular concern for First Nations. The Pacific Fisheries Resource Conservation Council recently issued an Advisory on Wild Salmon and Aquaculture in which they noted the significant gaps in knowledge regarding the potential effects of aquaculture on wild populations and, specifically, the risks relating to sea lice. See this report at: http://www.fish.bc.ca/reports/pfrcc_wild_salmon_and_aquaculture_2.pdf.

Disruption of Other Species. At some farms, Acoustic Harassment Devices (AHDs) have been used to scare predators such as seals and sea lions away from salmon

[2] See "Why You Should Think Twice About Eating Farmed Salmon" on the Coastal Alliance for Aquaculture Reform website at www.farmedanddangerous.org.
[3] See "Super un-Natural: Atlantic Salmon in BC Waters" by John Volpe, PhD at: www.farmedanddangerous.org/pdfs/Super_Un_natural.pdf.

farms. These underwater noisemakers are extremely loud and can lead to loss of hearing in marine mammals. Research shows that they also change the behaviours in some marine mammals such as killer whales and harbour seals, driving them out of an area.

Salmon farmers have been granted licenses to kill predators such as sea lions and seals to stop them from eating their fish. According to the Coastal Alliance for Aquaculture Reform ("CARR") website,[4] in the spring of 2001 a mass grave containing at least 15 sea lions killed by a farm operator was discovered in Clayoquot Sound. Since then, more pits of dead sea lions have been found in the same area. BC salmon farmers reported having killed at least 5000 seals and sea lions in the last decade. The real figure could be much higher as some kills may be unreported.

To fatten up their livestock, some salmon farmers use bright lights even at night to confuse the salmon into thinking it is always feeding time. Science suggests that this attracts other fish to the farm area and may disrupt their feeding and migration patterns.

Pollution of the Marine Environment. In BC fish farms use net guards that deter predators. According to the CARR website, some farmers coat the nets in a highly toxic solution to prevent naturally occurring marine organisms from growing on them. This toxic solution contaminates our waters. CARR also notes that the current number of fish farms collectively discharge waste into the ocean in an amount equivalent in terms of pollution to the raw sewage from a city with 500,000 inhabitants. This untreated waste contaminates the marine environment.

[4] www.farmedanddangerous.org

Economic Concerns

The mass worldwide production of salmon in fish farms has caused a drop in wild salmon prices. This hurts commercial fishermen and the communities in which they live and also affects First Nations with an interest in commercial fishing, which makes one question the true economic value of this industry. Further, a recent economic study by the Canadian Centre for Policy Alternatives suggests that industrial salmon aquaculture will deliver no or few new jobs in BC, even if the industry doubles in size. To access this study, entitled *Fishy Business: The Economics of Salmon Farming in BC*, go to www.policyalternatives.ca.

Social Concerns

Since the 1980s, aquaculture, which is the aquatic version of industrial agriculture, has been the fastest-growing supplier of fish worldwide. Some observers see aquaculture as an opportunity to take the pressure off wild fish stocks, while addressing the growing imbalance between fish production and food requirements for an expanding world population. While aquaculture can be beneficial in some cases, this may not be the case when carnivorous species are farmed.

Salmon are carnivores and it takes from two to five kilograms of wild fish to grow one kilogram of salmon. Thus, apart from the ecological and health concerns associated with salmon farming, farmed salmon actually represent a 'net loss' of protein in the global food supply. Highly nutritious fish like herring, mackerel, sardines and anchovy are used to produce the feed for farmed salmon, which is essentially luxury fare for the North American, European and Japanese markets. This reduces the amount of these other species of fish available for consumption in less developed countries where they are often essential sources of protein.

The vast majority of global aquaculture production, about 85%, uses non-carnivorous fish species - like tilapia and

catfish - produced in land-based ponds for domestic markets. Most ponds are ecologically integrated into the agricultural, industrial, and community fabric, meaning, for example, that wastes become fertilizers rather than pollutants. In contrast, evidence suggests that industrialized open net cage salmon farming is less socially and environmentally sustainable.

Responsible Authorities

Four provincial agencies and one federal agency share the responsibility for the regulation and management of the aquaculture industry:

Provincial

- Ministry of Agriculture, Food and Fisheries (MAFF)
- Ministry of Water, Land and Air Protection (WLAP)
- Ministry of Sustainable Resource Management (SRM)
- Land and Water BC (LWBC)

Federal

- Fisheries and Oceans Canada (DFO)

MINISTRY OF AGRICULTURE, FOOD AND FISHERIES

MAFF is the lead agency for aquaculture development in British Columbia. MAFF administers the *BC Fisheries Act* and *Aquaculture Regulation* and regulates most aspects of fish farm operations (escape prevention, net maintenance, etc.). Its Aquaculture Licensing and Compliance Branch is responsible for receiving, adjudicating and issuing aquaculture licences and for ensuring compliance with their terms and conditions.

LAND AND WATER BRITISH COLUMBIA INC.

Fish farm operators require a Crown land tenure under the *Land Act* in order for a marine aquaculture operation to be located on aquatic or upland Crown land. LWBC is responsible for leasing Crown land and oversees compliance with the terms and conditions of the *Land Act*. This includes the duty (which may not necessarily be adequately discharged) to ensure that applications are publicly advertised and that consultations take place with both the public and local First Nations as part of the assessment process.

MINISTRY OF WATER, LAND AND AIR PROTECTION

WLAP is responsible for ensuring the management, conservation and protection of the provincially regulated aspects of the marine environment and fish and wildlife species. In relation to salmon farming, this includes assessing impacts to fish and wildlife as a result of waste discharges (such as fish faeces) and regulating the disposal of sewage and other wastes. Legislation administered by WLAP includes the *Waste Management Act,* the *Aquaculture Waste Control Regulation*, the *Wildlife Act,* the *Pesticide Control Act* and the *Water Act*.

MINISTRY OF SUSTAINABLE RESOURCE MANAGEMENT

SRM is responsible, along with federal and local authorities, for the management of the shoreline and the seabed in the inshore and nearshore waters of province. SRM is currently involved in the development of Coastal Plans that address economic development and diversification, environmental threats, and land and resource conflicts. Decisions made by other ministries in relation to aquaculture licensing and tenure granting are co-ordinated with existing SRM policy and coastal plans. SRM is also the lead ministry for the inventory and mapping of all coastal resources.

FISHERIES AND OCEANS CANADA

The federal government has a constitutional authority over sea coast and inland fisheries and has the primary responsibility to ensure the preservation and conservation of wild fish stocks. DFO is responsible for the federal review of aquaculture applications and for ensuring compliance with three federal acts: the *Fisheries Act*, the *Navigable Waters Protection Act* and the *Canadian Environmental Assessment*

Act. DFO reviews aquaculture applications with regard to matters such as the protection of wild fisheries, protection of the marine environment and maintaining safe marine navigation.

License and Tenure Application Process

This section provides an overview of the application process.

Applications

Aquaculture operations on Crown land require both an Aquaculture Licence from MAFF and a Crown land tenure from LWBC. The application process has been merged for administrative ease and applicants apply for both a license and a tenure by preparing a Commercial Finfish Aquaculture Management Plan and submitting it to LWBC.

Referrals and Public Consultation

LWBC then refers the plan to other government departments and agencies for review and comment. These agencies may include DFO, WLAP, LWBC, the BC Ministry of Aboriginal Affairs, local governments, and other agencies and organizations as appropriate. In addition, a process of public consultation may take place.

Where the application has a potential to impact a First Nation's rights or interests they are to be consulted. For the past few years, consultation has typically been initiated by a "referral letter" from BCAL. Under an agreement between BCAL and MAFF, BCAL held the primary responsibility for First Nations consultation. However, the various government authorities involved in consultation are in the midst of revising their approaches to consultation and a new set of consultation policies may be expected in the near future. What is important to remember is that even if attempts to consult with

one authority have been unsuccessful, there remains the possibility of influencing the decision-making process of another authority by asserting one's interests and concerns. In addition, many applicants (i.e., companies) now also attempt to consult with First Nations on their own prior to any government consultation.

Strategies for responding to a government referral letter and any contact from a potential applicant are discussed below.

Assessment of an Application

Provincial policy requires that a number of factors be considered in deciding whether or not to grant an aquaculture license or tenure. These include the paramount consideration of whether it is in the public interest to issue a license, and other factors such as the suitability of the location of the fish farm, the past performance of the applicant, the comments from referrals, the nature and extent of local community support for the proposed operation, economic and employment benefits, etc.. For a complete list of factors see the Provincial Licensing Policy at:
http://www.agf.gov.bc.ca/fisheries/siting%5Freloc/MAFF_licensing_policy_update.pdf

The Decision

Applicants are provided with an opportunity to respond to any relevant material or information provided through the referral and public consultation process, and then a decision is made in accordance with the Provincial Licensing Policy by a Ministry official to whom the statutory decision-making power has been delegated. The decision-maker may: (1) issue a salmon aquaculture license on terms and conditions deemed reasonable in the circumstances; (2) deny the application; or (3) decline to make a decision and refer the plan back to the applicant for further information.

If the decision to grant a license or tenure is made without adequate consultation with First Nations whose aboriginal

interests are at stake, there may be grounds to challenge the decision in court. It is important to ensure that First Nation responses to referrals are as thorough as possible in order for the First Nation's position to be fully on the record in the event of a court action. Whether or not consultation is adequate will depend upon the facts of each case. This point is discussed further in the following section.

Aquaculture and the Duty to Consult

In *Delgamuukw v. British Columbia*[1], the Supreme Court of Canada affirmed that **the crown has a duty to consult with First Nations in relation to all potential infringements of aboriginal rights or title**. Recent decisions from the BC Court of Appeal (*Taku River Tlingit First Nation v. British Columbia* and *Haida Nation v. British Columbia*[2]) held that **this duty arises even before the aboriginal rights in question have been proven in court or agreed to in a treaty. Further, consultation must take place at the earliest possible stages in planning - before substantial decisions are made - in order to ensure that aboriginal interests are adequately represented.** (Important note: The *Taku* and *Haida* decisions have been appealed to the Supreme Court of Canada and therefore some aspects of the law discussed in this section may change in the near future).

This section provides an overview of:

- the source of the duty to consult;
- the relationship between aboriginal rights and title and the duty to consult; and
- the content of the duty to consult.

The Source of the Duty to Consult: The Fiduciary Obligation

The crown's duty to consult arises from its fiduciary obligation towards aboriginal peoples. **This fiduciary obligation requires that the crown (both federal and provincial) act with the utmost good faith and interests of aboriginal peoples whenever its actions may impact an existing aboriginal right**. When granting aquaculture licences and tenures in an area in which there is a claim to an aboriginal right or title, and the proposed activity may affect the right or title claimed, the crown is legally required to consult with First Nations (see *Haida* and *Taku*). [Note: The degree of

consultation required and the strength of the crown's obligation to seek an accommodation will depend upon the potential soundness of the claim for aboriginal rights or title. In *Haida*, the claimants were found to have a very strong claim and the scope of consultation and accommodation required was broad. However, this does not mean that there is no duty of consultation in cases where the claim is less sound than in the *Haida* case. For more on the content of consultation see "*Clues to the Content of Consultation*" below.]

Aboriginal Rights and Title

Aboriginal rights arise from the pre-colonial occupation of Canada by aboriginal peoples and the existence of their organized societies and distinctive cultures. In 1982, all existing aboriginal and treaty rights were recognized and affirmed in section 35 of the *Constitution Act*, 1982. Since then, a number of court decisions have interpreted the nature of these rights.

In *Delgamuukw*, the Supreme Court of Canada explained that constitutionally recognized aboriginal rights fall along a spectrum with respect to their degree of connection with the land. At one end are those aboriginal rights which are practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the right but where the right is not connected to a particular piece of land. In the middle are rights which are site-specific. In these cases an aboriginal group may not be able to demonstrate title to the land but may nevertheless have **an aboriginal right to engage in a particular activity in a specific area**. At the other end of the spectrum is aboriginal title which is a right to the land itself. **Aboriginal title is the right to use an area of land for a variety of activities, including modern forms of economic development**.

The Spectrum of Aboriginal Rights

↓	↓	↓
Aboriginal rights which are not specific to a particular area.	**Site-specific aboriginal rights**	**Aboriginal title**

Proving Aboriginal Rights

In *R. v. Van der Peet*[3] the Supreme Court of Canada set out the legal test to be used in order to prove that an aboriginal right exists:

- the right claimed must relate to a specific practice, tradition or custom that is integral to the distinctive culture of the aboriginal group claiming the right;
- the right claimed must be a defining feature of the culture in question;
- the right claimed cannot be a practice general to all societies, nor a practice merely incidental to the culture in question;
- aboriginal rights are not general and universal – they are particular to the group claiming them and are determined on a case by case basis;
- the right claimed must have existed prior to that society's contact with European society. The fact that the practice, custom or tradition continued after the arrival of Europeans, but adapted in response to their arrival, will not adversely affect the claim. Nor is it necessary to have an unbroken chain between current practices, customs and traditions and those existing prior to contact. A practice existing prior to contact can be resumed after an interruption. Conclusive evidence from pre-contact times is not necessary. The evidence simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact.

Features of Aboriginal Title

In *Delgamuukw*, the court explained that aboriginal title is "*sui generis*" (i.e., unique). In other words, aboriginal title has a number of characteristics that make it distinct from other forms of title to land. For example:

- Aboriginal title is "inalienable", meaning it cannot be sold or transferred to anyone other than to the Crown.
- Aboriginal title is a collective right to land held by all members of an aboriginal nation.
- Aboriginal title is the right to the exclusive use and occupation of the land for various purposes. This right is not restricted to the right to use the land only for traditional practices or activities. However, the use must be compatible with the nature of the occupation of that land and the relationship that the particular group had with the land which together gave rise to aboriginal title in the first place. For example, a group successfully claiming Aboriginal title to land that was occupied as a hunting ground may not use the land in such a way as to destroy its value for hunting.

Proving Aboriginal Title

In order to prove aboriginal title a First Nation must establish:

- That the land was occupied by that nation prior to 1846. Occupation can be established in many ways, including construction, cultivation and resource exploitation. Since this evidence may be scarce, a group claiming aboriginal title may prove pre-1846 occupation through evidence of present occupation, supplemented by evidence of continuous occupation in the past. The claiming group need not establish an unbroken chain of continuous occupation, but rather a substantial maintenance of their connection with the land.

- That occupation was exclusive in 1846 (although it may be possible to prove that two or more nations shared title to the exclusion of others).

Infringement of Aboriginal Rights

In Canadian law, aboriginal rights and title are not absolute. This means that the crown can impact or 'infringe' these rights, but only in specific circumstances and only so long as it is able to justify its actions. The process of consultation helps the crown to identify how the interests of affected First Nations can be minimally affected, accommodated and/or compensated in the event that an infringement takes place.

In *R. v. Sparrow*[4], the Supreme Court of Canada set out a framework for determining whether an action of government (such as the granting of an aquaculture license) interferes with an aboriginal right and, if so, whether the interference is justifiable.

The Sparrow Test

1. Is there an existing aboriginal right?

2. Does the proposed government activity interfere with an existing aboriginal right? (For example, is it unreasonable? Does it imposes undue hardship or prevent the holder of the right from their preferred means of exercising it?)

3. If the right is interfered with, is the interference justified because:

    a. there is a valid legislative objective;
    b. the particular regulation gives priority to First Nations;
    c. there is as little infringement as possible;
    d. in the case of expropriation there is fair compensation; and

e. there has been appropriate consultation?

Remember, in order to be justified it is also necessary that the crown's actions are consistent with its fiduciary obligation towards aboriginal peoples. In other words, the government must "uphold the honour of the crown" by ensuring that it acts with the utmost good faith and the interests of aboriginal peoples in mind at all times (see more on this in the following section).

Clues to the Content of Consultation

In *Delgamuukw* the court explained how aboriginal rights and title, the crown's fiduciary duty, the justification of an infringement, and the crown's duty to consult are all related.

The Chief Justice gave some examples of circumstances in which the Crown may lawfully infringe aboriginal title (i.e., **"valid legislative objectives"** in the Sparrow Test). These include: the development of agriculture, forestry, mining and hydroelectric power; the general economic development of the interior of British Columbia; protection of the environment or endangered species; and the building of infrastructure and the settlement of foreign populations to support those aims.

Although the possibilities for a lawful infringement are far reaching it does not mean that aboriginal title is not a powerful right. As noted in the previous section, even if an infringement of aboriginal title occurs for one of the reasons listed above, it will only be lawful or 'justified' as long as the crown ensures that the infringement is consistent with its fiduciary obligation towards aboriginal peoples. This fiduciary duty requires that the crown act with the utmost good faith and with the best interests of aboriginal peoples in mind at all times. **The process of consultation provides the crown with the opportunity to gather the information necessary to discharge its fiduciary obligation. That which is required by the crown in order to meet this fiduciary**

obligation will vary depending upon the facts in each situation (the nature of the aboriginal claim, the nature of the proposed government action, etc.). **In some cases it will require that the crown give aboriginal interests priority over all other interests, in other cases it will require that the crown ensure that the infringement is minimal or that fair compensation is available. The process of consultation allows the parties to exchange information relating to how the priority of the aboriginal interest may best be reflected, how the aboriginal right may be minimally infringed – if it should be infringed at all – and what kind of compensation will be fair if an infringement is justified.**

The court also described the three key features of aboriginal title and how they relate to the crown's fiduciary duty. These features have a bearing on the content of consultation:

1. The aboriginal right to the exclusive occupation and use of an area of land requires that government demonstrate that the process of resource allocation and the actual resource allocation reflect the prior interest of the holders of aboriginal title. Examples include accommodating aboriginal participation in resource development, granting resource exploitation authorizations that reflect the aboriginal prior occupation, reducing the economic barriers to aboriginal uses of their lands, and so forth. **Discussions relating to accommodating the priority of aboriginal title ought to be part of the consultation process.** This may involve assessing all of the various interests at stake in the resources. Difficulty in determining the value of the aboriginal interest in the land should not interfere with this process.

2. The fact that aboriginal title includes the right to choose the uses of land suggests that the fiduciary relationship may be satisfied by involving aboriginal titleholders in decisions respecting their lands. **The crown always has a duty of consultation, and the nature and scope of**

that duty will vary with the circumstances. Even 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 lands 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. (Unfortunately, to date there have been too few cases before the courts for anyone to know the precisely in which circumstances full consent will be required.)

3. Since aboriginal title has an important economic aspect, fair compensation will ordinarily be required to fulfil the crown's fiduciary duty when aboriginal title is infringed. **Negotiations regarding compensation will therefore ordinarily be part of the consultation process.** The amount of compensation will vary according to the nature of the aboriginal title in question, the severity of the infringement, and the extent to which aboriginal interests are accommodated.

The Provincial Consultation Policy (2002)

In 2002, after the BC Court of Appeal decisions regarding consultation in *Taku* and *Haida*, the provincial government drafted a new policy to provide guidance to government officials undertaking consultation with First Nations. Each provincial ministry is also responsible for drafting its own specific consultation policies. Unfortunately, at the time of the writing of this guide the MAFF and LWBC consultation policies were in the process of being drafted and not yet available.

A copy of the 2002 Provincial Consultation Policy is available on the home page of the Ministry for Sustainable Resource Management Website (www.gov.bc.ca/srm) and should be obtained in order to supplement this guide. If followed, this policy has the potential to provide the framework for very

meaningful consultations between government and First Nations. Therefore, it is useful for First Nations to be familiar with the policy so that they can put pressure on the province to follow it. In particular, it is worth noting the various checklists (beginning at page 27 of the policy) that decision makers are to use when assessing a claim to aboriginal rights or title. At the same time, First Nations are not obliged to follow a consultation policy that has been unilaterally developed. The courts have found (see, for example, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*)[5] that neither party ought to impose a consultation format on the other. **Negotiations relating to how the process of consultation ought to take place should be the first step in the consultation process. The process should be tailored to meet the needs of all parties.**

Industry's Duty to Consult

In the recent *Haida* decision, the BC Court of Appeal expanded the scope of the law of consultation by holding for the first time that the duty to consult may apply to third parties operating on crown land under a crown licence. This means that third parties are expected to work with First Nations and government to ensure that adequate accommodation and compensation of aboriginal interests occurs. This duty will be the most stringently applied in situations where the third party has actual or implied knowledge of the aboriginal claim and the fact that there has not been adequate consultation by government. (Recall that this decision is under appeal to the Supreme Court of Canada and this aspect of the law may change in the near future).

The Reciprocal Obligation of First Nations

In *Halfway River First Nation v. British Columbia*[6], the BC Court of Appeal noted that there is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have an opportunity to consider the information provided to them by the crown (e.g., a referral letter regarding an

aquaculture license). First Nations also have a duty to consult in good faith and cannot frustrate the consultation process by refusing to participate or by imposing unreasonable conditions.

Summary – the Content of Consultation

Consultation is required whenever there is a sound claim to an aboriginal right or title and government action may affect that right or title. The scope of consultation and accommodation must be proportionate to the potential soundness of the claim. Consultation should begin at the earliest possible stages of planning in order to ensure that the priority of aboriginal interests is incorporated into decision-making at all times. The purpose of consultation is for the crown to discharge its fiduciary duty. Consultations provide the crown with the opportunity to:

- demonstrate that its actions reflect the priority of the aboriginal interest at stake (which may mean that the proposed activity does not go ahead),
- ensure that aboriginal interests are minimally affected,
- negotiate suitable accommodation measures, and
- identify an appropriate measure of compensation.

If the government does not participate in consultations in good faith with the goal of substantially addressing a First Nation's concerns then it is not meeting its fiduciary duty. This may lead to a court action in which a government decision to allow an activity to take place is reversed and/or the government is found liable for any impairment of an aboriginal interest resulting from its actions.

Third parties operating on crown land under a crown license also have a duty to consult with First Nations in an attempt to find suitable accommodation and compensation (unless this aspect of the *Haida* decision is reversed by the Supreme Court of Canada). Finally, First Nations have a reciprocal duty to identify their interests and the evidence supporting their

claims, express their concerns and participate in a consultation process.

Consultation Strategies for First Nations

In the context of aquaculture, consultation is usually initiated either by some form of direct contact from the license applicant (such as a letter or phone call to arrange a meeting to discuss the possibility of working together) or by a referral letter from LWBC. Regardless of whether government or industry first contacts a First Nation, it will be necessary for that nation to develop a consultation strategy in order to assert and protect its interests.

1. Identify how members of your nation wish to respond.

Perhaps the most important step in developing a strategy is identifying how members of your nation wish to respond to the possibility of finfish aquaculture in their territory. While some nations have a zero-tolerance policy towards salmon farming, others embrace the potential for economic development and employment. It is necessary to gather all available information and engage as many members of the community as possible in making a decision. In order to work with government and industry it is necessary to have a position. Do you support salmon farming? Under what conditions? Perhaps you oppose it entirely. Your community may also need more information before it can make a decision. In this case, government and industry have an obligation to respond to all reasonable requests for information. You may even wish to have representatives from government, industry, and/or a scientific or environmental organization come to your territory to speak to community members about aquaculture.

2. Seek legal advice.

As mentioned above, this guide is not legal advice and cannot replace the services of a lawyer. The law is constantly changing and it is important to get the advice necessary to protect your vital aboriginal interests. Many lawyers in BC specialize in aboriginal law and some will already be familiar with aquaculture consultation. A lawyer will assist you in identifying your rights and in shaping a consultation strategy that best protects your interests.

3. Identify your interests and concerns.

In order to negotiate successfully with industry or government you need to identify your aboriginal interests. Is the proposed fish farm to be located in an area to which you have a claim of aboriginal title? Are there specific aboriginal rights that you wish to exercise in this area that may be interfered with? How will your interests be affected by the proposed fish farm? What evidence do you have to support each of these claims? Would you be willing to accept accommodation and compensation measures in exchange for the location of a fish farm in your territory? If so, what would be acceptable to you? Remember that the Supreme Court of Canada held that aboriginal title has "an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put."[7] This means that if you have evidence to support a claim to aboriginal title over a certain area your entitlement to compensation will flow from your right to choose to which ends those lands may be put today, and not solely from the loss of traditional uses.

4. Seek outside resources and make alliances.

Several First Nations have already had the experience of fish farms moving into their territory. You may wish to contact some of them to hear their stories and advice. The BC Aboriginal Fisheries Commission has a mandate to protect and

enhance aboriginal fishing rights and is an excellent source of information and support. Finally, a number of environmental organizations are concerned with the expansion of fish farming in BC and you may wish to establish an alliance with them, especially if you oppose fish farming or are trying to learn about ways that practices may be improved so that it is more sustainable. If you oppose fish farming or certain practices associated with fish farming because you are concerned with its environmental impacts the government will require that you support your opposition with scientific evidence. These organizations can help you to assemble that evidence. See the list of contacts and resources in the Appendix.

5. Assert your rights.

Whether you are responding in writing to a referral letter from a government agency or are preparing for a meeting with a fish farm company, it is necessary to have a clear idea of your rights. It will be beneficial to you if the representatives of your nation involved in the consultation process each have a clear understanding of:

- the nature of aboriginal rights and title,
- the nature of the fiduciary duty of the crown,
- the steps the crown must take to justify an infringement of aboriginal rights or title, in particular, consultation, accommodation and compensation, and
- the duty of industry to ensure that First Nations are adequately consulted and that their interests are adequately accommodated or compensated.

If you are responding in writing to a referral letter you should include the following information:

- the nature of the aboriginal rights you are claiming and whether you are claiming them in relation to a specific territory,
- the area to which you are claiming aboriginal title,

- the evidence you have to support your claims (note the checklists starting at page 27 in the 2002 Provincial Consultation Policy),
- how the proposed fish farm will affect your rights (recall that in the case of aboriginal title you are entitled to reap a share of the economic benefits as compensation for your loss of exclusive use of the lands and the power to choose how the land should be developed),
- what specific social, environmental, economic or other concerns you have and evidence to support your claims,
- how you wish for your interests and concerns to be accommodated and/or compensated, and
- how you envision the next step in the consultations or negotiations and the consultation process overall.

Most aquaculture license referral letters request a response within 30 – 45 days. More than likely, you will require more time than this in order to gather all of the necessary information and respond to the referral. In this case, it is best to respond within the set number of days with a letter that:

- acknowledges your receipt of the referral letter,
- states the existing information you have, the nature of any further information you may require, and
- states how much time you need to gather the information and respond to the referral.

When dealing with government and industry it is necessary to be as specific as possible about the nature of your interests and your concerns. A common complaint by government officials is that some First Nations will state that they do not want fish farms in their area without providing any details or supporting evidence of their claim or the concerns they have. A lawyer can help you to articulate your claim to rights and/or title and environmental organizations can provide you with the kind of up-to-date scientific evidence you need to support

your claims regarding environmental concerns. A thorough response will increase the likelihood of getting government and industry to take your claim seriously and will also improve the chances of a successful court action in the event that consultations are not adequate.

Finally, for an excellent step-by-step guide to drafting a consultation response letter see the "response" section of the Kla-soms Kwuth Toogen Toolbox For Responding To Crown Land Referrals website at:
http://www.nativemaps.org/referrals/templates/response.html

Appendix - Contacts and Resources

Government Agencies

Ministry of Agriculture, Food and Fisheries	www.gov.bc.ca/agf
Ministry of Water, Land and Air Protection	www.gov.bc.ca/wlap
Ministry of Sustainable Resource Management	www.gov.bc.ca/srm
Land and Water BC	www.lwbc.bc.ca
Fisheries and Oceans Canada	www.dfo-mpo.gc.ca

Aboriginal Organizations

BC Aboriginal Fisheries Commission	www.bcafc.org
Kla-soms Kwuth Toogen Crown Land Referrals Toolbox	www.nativemaps.org/referrals/index.html

Non-Governmental Organizations

For an extensive list of websites with consumer information, media sources, scholarly publications and more go to the "links" page of Professor John Volpe's Atlantic Salmon Research website at the University of Alberta:

www.biology.ualberta.ca/faculty/john_volpe/salmon/atlantics/background/links

Environmental Law Centre	www.elc.uvic.ca
Coastal Alliance for Aquaculture Reform	www.farmedanddangerous.org
David Suzuki Foundation	www.davidsuzuki.org
Canadian Centre for Policy Alternatives	www.policyalternatives.ca
Pacific Fisheries Resource Conservation Council	www.fish.bc.ca

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[1] [1997] 3 SCR 1010.
[2] *Haida Nation* v. *British Columbia (Minister of Forests)* 2002 BCCA 147 ("*Haida 1*"); *Haida Nation v. B.C. and Weyerhaeuser* 2002 BCCA 462 ("*Haida 2*"); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* 2002 BCCA 59
[3] [1996] 2 SCR 507.
[4] [1990] 1 SCR 1075.
[5] [2001] F.C.J. No. 1877
[6] [1999] BCJ No. 1880 (QL) at paras 160 – 161.
[7] *Delgamuukw* at para 169.