

Docket: T-127-21
T-128-21
T-129-21
T-132-21

FEDERAL COURT

BETWEEN:

**MOWI CANADA WEST INC., CERMAQ CANADA LTD., GRIEG
SEAFOOD B.C. LTD., AND 622335 BRITISH COLUMBIA LTD.**

Applicants

and

**THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST
GUARD**

Respondent

NOTICE OF MOTION

TAKE NOTICE THAT Homalco First Nation (“**Homalco**”) and Tla’amin Nation (“**Tla’amin**”, and collectively with Homalco, the “**Sister Nations**”) will make a motion to the Court on Wednesday, March 17th at 9 a.m. PDT or as soon thereafter as the motion can be heard, at the Federal Court of Canada, 701 West Georgia Street, Vancouver, British Columbia.

THE MOTION IS FOR AN ORDER:

1. that each of the Sister Nations be added as a respondent, with full rights to participate as a party, to these consolidated applications for judicial review (the “**Application**”);
2. in the alternative to the relief in paragraph 1, that each of the Sister Nations be granted intervener status in the Application with the right to file affidavit evidence in the Application and any interlocutory motions;
3. that the style of cause be amended accordingly;
4. costs of this motion; and

5. such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THIS MOTION ARE:

6. The Sister Nations seek an order that each Sister Nation be added as a respondent in the Application, pursuant to Rules 104(1)(b) and 303(1) of the *Federal Courts Rules*, SOR/98-106. In the alternative, the Sister Nations seek an order that each Sister Nation be granted leave to intervene in the Application, pursuant to Rule 109(1) of the *Federal Courts Rules*.

The Sister Nations

7. Each of the Sister Nations is a band under the *Indian Act*, RSC 1985, c I-5 and each Sister Nation is one of the “aboriginal peoples of Canada” within the meaning of section 35 of the *Constitution Act, 1982*, Being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

8. Homalco has unceded and unsurrendered Aboriginal title, rights and interests within and throughout its territory, which are recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. Homalco’s Aboriginal rights include fishing, hunting, gathering and stewardship rights. Homalco is also a party to a Comprehensive Fisheries Agreement with Fisheries and Oceans Canada (“**DFO**”). Under the Comprehensive Fisheries Agreement, DFO issues Homalco an Aboriginal communal fishing licence (“**ACFL**”) to fish for food, social and ceremonial (“**FSC**”) purposes.

9. The Tla’amin Final Agreement (the “**Final Agreement**”), a treaty between Tla’amin, the Government of Canada and the Government of British Columbia, recognizes and protects Tla’amin’s Aboriginal rights under section 35(1) of the *Constitution Act, 1982*. Under the Final Agreement, Tla’amin members have the right to: (i) harvest fish and aquatic plants for domestic purposes; and (ii) trade and barter fish and aquatic plants harvested amongst themselves or with other Aboriginal peoples of Canada (the “**Tla’amin Fishing Right**”). The Final Agreement provides for annual allocations of fish further to the Tla’amin Fishing Right.

Impacts of Fish Farms on the Exercise of the Sister Nations' Rights

10. The fish farms have had serious, adverse impacts on populations of wild Pacific salmon and other marine resources that members of the Sister Nations rely on to exercise their Aboriginal and treaty rights. Salmon was once abundant in the Sister Nations' territories and now the populations of wild Pacific salmon the Sister Nations rely on to exercise their Aboriginal title and rights are nearing extinction. The Sister Nations cannot meaningfully exercise their Aboriginal right to fish due to declines in populations of all species of wild Pacific salmon and other marine resources.

11. The Sister Nations are concerned that any additional stressors will drive imperiled populations of wild Pacific salmon to extinction, sterilizing their constitutionally protected rights and thus extinguishing their rights and an important part of their culture. Homalco is already unable to fish the allocations provided under its ACFL and in many years is not able to harvest any fish of some species. Tla'amin has not been able to meaningfully exercise its Tla'amin Fishing Right and has never been able to harvest up to its annual allocations under the Final Agreement.

History behind the Accommodation

12. In 2009, after a then record-low 1.4 to 1.6 million sockeye returned to the Fraser River, Canada initiated the Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River (the "**Cohen Commission**").

13. In 2012, Mr. Justice Bruce Cohen made 75 recommendations, including Recommendation 19 of the Cohen Commission:

On September 30, 2020, the Minister of Fisheries and Oceans should prohibit net-pen salmon farming in the Discovery Islands (fish health sub-zone 3-2) unless he or she is satisfied that such farms pose at most a minimal risk of serious harm to the health of migrating Fraser River sockeye salmon.

14. Justice Cohen was clear that "if, by that date [September 30, 2020], DFO cannot confidently say the risk of serious harm is minimal, it should prohibit all net-

pen salmon farms from operating in the Discovery Islands” (underlining added).

15. On September 28, 2020, the Minister of Fisheries, Oceans and the Canadian Coast Guard (the “**Minister**”) announced that DFO would consult with seven First Nations, including the Sister Nations, about aquaculture licences for fish farms in the Discovery Islands (the “**Fish Farms**”). The Minister stated that the results of the consultation would be used to inform her decision on licence renewals for the Fish Farms.

16. Between October 1 and December 4, 2020, the Sister Nations participated in consultations with DFO, the Minister and other First Nations whose territories include the Discovery Islands. The Sister Nations reviewed DFO’s documents and attended multiple meetings, including two meetings with the Minister.

17. On December 4, 2020, the Sister Nations and Klahoose First Nation provided DFO with submissions regarding the impact of the Fish Farms on their constitutionally protected Aboriginal and treaty rights. The Sister Nations identified decommissioning the Fish Farms as a necessary accommodation to preserve their constitutionally protected rights.

18. On December 17, 2020, the Minister:

- a) met with the Sister Nations, promising them that the Fish Farms in the Discovery Islands would be phased out over an 18-month period after harvesting their current stocks; and
- b) publicly announced her decision to phase out open-net salmon farming in the Discovery Islands by June 20, 2022, including:
 - (i) issuing 18-month finfish aquaculture licenses pursuant to section 7 of the *Fisheries Act* for the Fish Farms;
 - (ii) prohibiting the issuance of new or replacement aquaculture licences to the Fish Farms; and

- (iii) prohibiting the issuance of licences to restock the Fish Farms under section 56 of the *Fishery (General) Regulations* (collectively, the “**Decision**”).

The Sister Nations ought to be added as Respondents

19. Rule 303(1)(a) of the *Federal Courts Rules* requires an applicant for judicial review to name as respondents every person directly affected by the application.

Under Rule 104(1)(b) of the *Federal Courts Rules*, parties may be added as respondents where: (1) they should have been respondents in the first place because they are directly affected by the relief sought; or (2) their presence before the Court is necessary.

20. The Sister Nations will be directly affected by the relief sought in the Application, are necessary to effectually and completely determine the issues before the Court, and had the Decision been different, could have filed an application for judicial review.

21. The Sister Nations requested the Applicants’ consent to their addition as a respondents to the Application. The Applicants refused. The Minister supports the Sister Nations’ addition as respondents.

The Sister Nations are Directly Affected by the Relief Sought

22. The Sister Nations have a direct interest in having the Crown’s promised accommodation upheld. Any suspension, quashing, judicial declarations about, or other interference with that promised accommodation will directly affect the Crown’s implementation of the promised accommodation, directly affect the Sister Nations’ constitutionally protected rights and directly affect Reconciliation between the Sister Nations and the Crown.

23. The Sister Nations also have a direct interest in the health of the populations of wild Pacific salmon that use and migrate through the Discovery Islands. Quashing, suspending or otherwise interfering with the Decision in any way, including prolonging the operation of the Fish Farms or allowing them to be stocked with Atlantic salmon, will harm the populations of wild Pacific salmon the Sister

Nations rely on and their efforts to restore and rehabilitate those stocks. Such harm will directly and prejudicially affect the Sister Nations' ability to exercise their rights.

24. Furthermore, the Sister Nations, through their constitutionally protected rights, have a direct interest in the sites occupied by the Fish Farms and the effects the Fish Farms have on the fish and fish habitat in proximity to them. The Decision to decommission the Fish Farms provides the opportunity to restore traditional use sites and to rehabilitate the productivity of traditional clam beds and fishing grounds. The Decision, by removing the Fish Farms, will also allow the Sister Nations to return to harvesting in areas which the Fish Farm tenures currently prohibit them from accessing. Any quashing, suspending or otherwise interfering with the Decision will directly and prejudicially affect the Sister Nations.

25. Finally, if the Decision is quashed and the Minister must reconsider it, then the Sister Nations' ability to obtain and realize the promised accommodation will be placed in jeopardy. The Decision provides the Sister Nations with an accommodation to protect their current and future exercise of constitutionally protected rights. It governs the issuance of aquaculture licences and Transfer Licences in their territories. Any reconsideration of the Decision will place their ability to obtain the same, or similar, accommodation in jeopardy, thus directly affecting the protections promised to protect the Sister Nations' constitutional rights from the adverse impacts to harvesting sites and the continued exposure of wild Pacific salmon and other marine resources to the pathogens and parasites released from the Fish Farms.

The Sister Nations are Necessary to Effectually and Completely Determine the Issues

26. The Sister Nations are necessary to ensure that all matters in dispute in the Application are effectually and completely determined (i) to ensure that the adverse interests the Minister considered in coming to the Decision are before the Court and (ii) to protect their interests, which are at stake in the proceedings.

27. The Decision flowed from a process in which the Minister had to balance the adverse interests of multiple parties. Given the Minister wears many hats and represents the broader public interest when balancing adverse interests, her presence alone cannot create the full record and necessary debate to effectually and completely determine the issues before the Court. The Minister is unable to represent the interests of any one of the diverse user groups whose interests she considered when coming to the Decision, including those with constitutionally protected Aboriginal and treaty rights, such as the Sister Nations.

28. In addition, parties whose interests are at stake in a proceeding are necessary parties. The need to hear from the Sister Nations regarding how suspending, altering or quashing the Decision would adversely impact their constitutionally protected rights is particularly acute with respect to any injunctive relief in which this Honourable Court would need to weigh and determine the balance of convenience.

The Sister Nations could have Filed for Judicial Review had the Decision been Different

29. Had the Decision been different, the Sister Nations could have applied for judicial review. The Supreme Court of Canada has confirmed the importance of judicial review for addressing inadequate consultation. Through its participation in the consultations, the Sister Nations made clear that they were preparing for a judicial review if the Decision were different.

30. Accordingly, the Sister Nations ought to be added as respondents to the Application.

In the alternative, the Sister Nations ought to be granted leave to intervene

31. In the alternative, the Sister Nations ought to be granted leave to intervene in the Application and any motions for injunctive relief. The interests of justice will be better served by the Sister Nations' participation, and the Sister Nations' participation will assist the Court in determining the factual and legal issues.

32. The Sister Nations wish to participate fully, including the right to submit affidavits, conduct cross-examinations of the Applicants' affidavits, and the right to make written and oral submissions. All of the Applicants have indicated that they would not oppose a motion to add the Sister Nations as interveners.

33. Homalco's address is: 1218 Bute Crescent, Campbell River, BC, V9H 1G5.

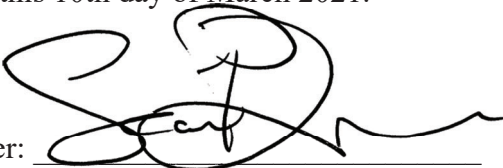
34. Tla'amin's address is: 4779 Klahanie Road, Powell River, BC, V8A 0C4.

35. The Sister Nations rely upon Rules 104(1)(b), 109(1) and 303(1) of the *Federal Courts Rules*.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE RELIED UPON:

- a) the Affidavit of Chief Darren Blaney, affirmed March 2, 2021;
- b) the Affidavit of Hegus John Hackett, affirmed March 2, 2021;
- c) the Affidavit of Won Drastil, affirmed March 9, 2021; and
- d) such further and other materials as counsel may advise and this Honourable Court may permit.

DATED at Vancouver, British Columbia, this 10th day of March 2021.

Per: 

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Attention: Mark Underhill