Docket No: 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

WRITTEN REPRESENTATIONS

I. OVERVIEW

1. Homalco First Nation ("**Homalco**") and Tla'amin Nation ("**Tla'amin**", and collectively with Homalco, the "**Sister Nations**") request this Honourable Court add each of the Sister Nations as a respondent to these consolidated applications for judicial review (the "**Application**"), pursuant to Rules 104(1)(b) and 303(1) of the *Federal Courts Rules*.[1] In the alternative, the Sister Nations request the Court grant each of them intervener status in the Application, pursuant to Rule 109(1) of the *Federal Courts Rules*.

2. The Sister Nations are directly affected by the relief the Applicants seek: quashing or setting aside an accommodation the Crown promised to protect the Sister Nations' constitutionally protected Aboriginal and treaty rights, specifically, the removal of 19 fish farms of millions of Atlantic salmon (the "**Fish Farms**") from the Sister Nations' territories. The promised accommodation is necessary (i) to avoid harming populations of wild Pacific Salmon, which are so close to extinction that all sources of harm should be reduced to the "maximum extent possible"[2] and (ii) to

[1] SOR/98/106.
[2] *Recovery Potential Assessment for Fraser River Sockeye Salmon (Oncorhynchus nerka) – Nine Designatable Units – Part 1: Probability of Achieving Recovery Targets,* Canadian Science Advisory

avoid irreparably harming and further infringing the Sister Nations' constitutionally protected rights. [3] The Crown promised the accommodation in furtherance of the Crown's constitutional duty to protect and preserve Aboriginal and treaty rights,[4] reconcile Aboriginal rights with asserted Crown sovereignty,[5] and to prevent the resources those rights depend on from "[careening] into obliteration".[6]

3. The accommodation is the result of the Crown's balancing of "competing societal interests with Aboriginal and treaty rights."[7] Accordingly, the questions before the Court cannot be completely and effectually determined without the parties for whom the Crown made the accommodation. Neither the Applicants nor the Minister can represent the Sister Nations' position. To proceed without the Sister Nations would be to proceed without two of the parties whose interests and rights are directly at stake.

4. In the alternative, the Sister Nations should be granted leave to intervene in the Application. The interests of justice, and Reconciliation, will be better served by the Sister Nations' participation in the Application. They represent a unique and necessary perspective, and their participation will assist the Court in determining the factual and legal issues in the Application.

II. BACKGROUND

A. The Sister Nations

5. Each of the Sister Nations is a band under the *Indian Act*[8] and each Sister Nation is one of the "aboriginal peoples of Canada" within the meaning of section 35

Secretariat. See affidavit of Chief Darren Blaney affirmed on March 2, 2021 ("**Chief Blaney Affidavit**"), para 89, Exhibit "L", Motion Record ("**MR**") pages 30 and 305 and Affidavit of Hegus John Hackett affirmed on March 2, 2021 ("**Hegus Hackett Affidavit**"), para 73, Exhibit "M, MR pages 491 and 814.

[3] See *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, para 47 [*Haida*], Book of Authorities ("**BOA**") tab 10.

[4] *Fort McKay First Nation v Prosper Petroleum Ltd,* 2020 ABCA 163, para 77 [*Fort McKay First Nation*], BOA tab 8; see also *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council,* 2010 SCC 43, paras 33-34, BOA tab 19.

[5] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, para 66 [*Manitoba Metis*], BOA tab 12.

[6] *Fort McKay First Nation, supra* note 4, para 83, BOA tab 8.

[7] *Haida, supra* note 3, para 50, BOA tab 10.

[8] RSC 1985, c I-5; Chief Blaney Affidavit, *supra* note 2, para 41, MR page 20; Hegus Hackett Affidavit, *supra* note 2, para 25, MR page 478.

of the *Constitution Act, 1982*.[9] Each of the Sister Nations is a Northern Coast Salish Nation.[10] Members of the Sister Nations have a deep physical, cultural and spiritual connection to their territory,[11] which includes the Discovery Islands.[12] For each Sister Nation, its territory is inextricably connected to its identity.[13]

6. The connection of each Sister Nation to its territory is inseparable from the hunting and fishing practices in which each Sister Nation engages on those territories, and in which each has engaged since time immemorial to sustain their populations and way of life. Harvesting salmon, in particular, has not only been an important food source for the Sister Nations, but plays a central role in the Sister Nations' traditional ceremonies,[14] including transmitting cultural knowledge to younger generations; harvesting salmon keeps the culture, stories and traditions of the Sister Nations alive. [15]

7. Homalco has unceded and un-surrendered Aboriginal title, rights and interests within and throughout its territory,[16] which are recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. Since time immemorial, Homalco has occupied, hunted, fished, gathered, travelled, and acted as stewards of the land and waters of its territory.[17] Homalco's Aboriginal rights include fishing, hunting, gathering and stewardship rights that Homalco continues to exercise today.[18]

8. Homalco is also party to a Comprehensive Fisheries Agreement with Fisheries and Oceans Canada ("**DFO**").[19] Under the Comprehensive Fisheries Agreement, DFO issues Homalco an Aboriginal communal fishing licence ("**ACFL**") to fish for food, social and ceremonial ("**FSC**") purposes.[20]

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[9] Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; Chief Blaney Affidavit, para 41, MR page 20; Hegus Hackett Affidavit, para 25, MR page 478.
[10] Chief Blaney Affidavit, para 42, MR page 20; Hegus Hackett Affidavit, para 25, MR page 478.
[11] Chief Blaney Affidavit, para 45, MR page 20; Hegus Hackett Affidavit, para 28, MR page 478.
[12] Chief Blaney Affidavit, para 44, Exhibit "G", page 19, MR pages 20 and 120; Hegus Hackett Affidavit, para 26, Exhibit "G", page 9, MR pages 478 and 553.
[13] Chief Blaney Affidavit, para 45, MR page 20; Hegus Hackett Affidavit, para 28, MR page 478.
[14] Chief Blaney Affidavit, para 68, MR page 26; Hegus Hackett Affidavit, para 59, MR page 488.
[15] Chief Blaney Affidavit, paras 66-67, MR pages 25-26; Hegus Hackett Affidavit, para 58, MR pages 488.
[16] Chief Blaney Affidavit, para 49, MR page 21.
[17] *Ibid*, para 50, MR page 22.
[18] *Ibid*, para 53, MR page 22.
[19] Chief Blaney Affidavit, *supra* note 2, Exhibit "J", MR page 311.
[20] *Ibid*, Exhibit "J", MR page 311.

9. The Tla'amin Final Agreement (the "**Final Agreement**"),[21] 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**").[22] The Final Agreement provides for annual allocations of fish further to the Tla'amin Fishing Right.[23]

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

10. Salmon was once abundant in the Sister Nations' territories: families would share salmon and there was enough to feed the community. [24] Now the populations of wild Pacific salmon the Sister Nations rely on to exercise their Aboriginal rights are nearing extinction.[25] 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.[26]

11. 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 rights.[27] Among other things, the Fish Farms have:

a) exposed juvenile Pacific salmon to pathogens and sea lice as those salmon migrate, causing population-level impacts;

b) depleted stocks of fish populations so they no longer support fishing;

c) rendered clam beds unusable due to discharged waste; and

d) prohibited members of the Sister Nations from accessing certain areas to exercise their rights.[28]

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[21] Hegus Hackett Affidavit, *supra* note 2, para 37, Exhibit "I", MR pages 480 and 744.
[22] *Ibid*, para 49, Exhibit "I", page 101, MR pages 484 and 749.
[23] *Ibid*, para 51, Exhibit "I", pages 123-129, MR pages 484-486 and 771-777.
[24] Chief Blaney Affidavit, paras 78-79, MR page 28; Hegus Hackett Affidavit, para 69, MR page 490.
[25] Chief Blaney Affidavit, para 87, MR page 29; Hegus Hackett Affidavit, para 71, MR page 490.
[26] Chief Blaney Affidavit, para 98, MR page 32; Hegus Hackett Affidavit, paras 52 and 79, MR pages 486 and 492-493.
[27] Chief Blaney Affidavit, para 98, MR page 32; Hegus Hackett Affidavit, para 80, MR page 493.
[28] Chief Blaney Affidavit, *supra* note 2, paras 111-123, Exhibit "G", pages 158-162, MR pages 39-45 and 259-263; Hegus Hackett Affidavit, *supra* note 2, para 83, Exhibit "G", pages 158-162, MR pages 493 and 702-706.

12. 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.[29] 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. [30] 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.[31]

C. History behind the Accommodation

13. In 2009, after a then record-low 1.4 to 1.6 million sockeye returned to the Fraser River,[32] Canada initiated the Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River (the "**Cohen Commission**").[33] On behalf of Homalco, Chief Blaney participated in, and presented to, the Cohen Commission.[34]

14. 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.[35]

15. 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"[36] (underlining added).

16. On September 28, 2020, the Minister of Fisheries, Oceans and the Canadian Coast Guard (the "**Minister**") announced that DFO would consult with seven First

[29] Chief Blaney Affidavit, para 93, MR page 31; Hegus Hackett Affidavit, para 77, MR page 492.
[30] Chief Blaney Affidavit, paras 82 and 84, MR pages 28-29.
[31] Hegus Hackett Affidavit, paras 68 and 79, MR pages 489-490 and 492-493.
[32] Chief Blaney Affidavit, para 21, MR page 14; Hegus Hackett Affidavit, para 8, MR page 472.
[33] Chief Blaney Affidavit, para 21, MR page 14; Hegus Hackett Affidavit, para 8, MR page 472.
[34] Chief Blaney Affidavit, para 21, MR page 14.
[35] Chief Blaney Affidavit, para 22, Exhibit "A", page 25, MR pages 14 and 64; Hegus Hackett Affidavit, para 8, Exhibit "A", page 25, MR pages 473 and 510.
[36] Chief Blaney Affidavit, *supra* note 2, para 23, Exhibit "A", page 25, MR pages 15 and 64; Hegus Hackett Affidavit, *supra* note 2, para 8, Exhibit "A", page 25, MR pages 473 and 510.

Nations, including the Sister Nations, about the Fish Farms,[37] and that consultation would inform her decision on licence renewals for the Fish Farms.[38]

17. Between October 2 and December 4, 2020, the Sister Nations participated in consultations with DFO, the Minister and other First Nations whose territories include the Discovery Islands.[39] The Sister Nations reviewed DFO's documents and attended multiple meetings, [40] including two meetings with the Minister.[41]

18. 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 rights (the "**Submissions**").[42] The Sister Nations identified decommissioning the Fish Farms as a necessary accommodation to preserve their constitutionally protected rights.[43]

19. 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; [44] and

b) publicly announced her decision to phase out open-net salmon farming in the Discovery Islands by June 20, 2022,[45] including:

   (i) issuing 18-month finfish aquaculture licenses pursuant to section 7 of the *Fisheries Act*[46] for the Fish Farms;

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[37] Chief Blaney Affidavit, para 30, Exhibit "E", MR pages 16 and 84; Hegus Hackett Affidavit, para 18, Exhibit "F", MR pages 475 and 532.
[38] Chief Blaney Affidavit, para 128, Exhibit "E", MR pages 46 and 84; Hegus Hackett Affidavit, para 18, Exhibit "F", MR pages 475 and 532.
[39] Chief Blaney Affidavit, para 131, MR page 47; Hegus Hackett Affidavit, paras 19 and 91, MR pages 475 and 495.
[40] Chief Blaney Affidavit, paras 133-134, MR pages 47-50; Hegus Hackett Affidavit, paras 92 and 94, MR pages 495-496.
[41] Chief Blaney Affidavit, paras 31, 134(v) and (ix), MR pages 16 and 48-50; Hegus Hackett Affidavit, 92(iii) and (v) and 94, MR pages 495 to 496.
[42] Chief Blaney Affidavit, para 33, Exhibit "G", MR pages 18 and 42; Hegus Hackett Affidavit, paras 20 and 93, Exhibit "G", MR pages 476, 496 and 538.
[43] Chief Blaney Affidavit, para 34, Exhibit "G", pages 174-186, MR pages 18 and 275-287; Hegus Hackett Affidavit, para 21, Exhibit "G", pages 174-186, MR pages 476 and 718-730.
[44] Chief Blaney Affidavit, para 35 and 134(ix), MR pages 18 and 50; Hegus Hackett Affidavit, para 94, MR page 496.
[45] Chief Blaney Affidavit, para 36, Exhibit "H", MR pages 18-19 and 300; Hegus Hackett Affidavit, para 22, Exhibit "H", MR pages 476-477 and 738.
[46] RSC 1985, c F-14.

(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*[47] (collectively, the "**Decision**").

20. The Applicants filed their respective applications for judicial review of the Decision on January 18, 2021. The Court consolidated the applications on February 2, 2021.

21. The Sister Nations requested the Applicants' consent to their addition as respondents.[48] The Applicants opposed their addition as respondents, but agreed the Sister Nations should be added as interveners. [49] The Minister supports each of the Sister Nations being added as a respondent.[50]

III. ISSUES

22. This motion raises the following issues:

a) Should the Sister Nations be added as respondents because:

(i) the Application will affect their rights, impose legal obligations upon them or prejudicially affect them in a direct way; or

(ii) they are necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined?

b) In the alternative, should the Sister Nations be granted leave to intervene in the Application because their participation will assist in the determination of the factual and legal issues raised in the Application?

IV. LAW AND SUBMISSIONS

A. The Sister Nations ought to be added as Respondents

23. Rule 303(1)(a) of the *Federal Courts Rules* requires an applicant for judicial review to name as a respondent every person "directly affected by the order sought in the application."

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[47] SOR/93-53.
[48] Affidavit of Won Drastil affirmed on March 9, 2021 ("**Drastil Affidavit**"), paras 2-3, Exhibits "A" and "B", MR pages 879-880 and 883-889.
[49] *Ibid,* paras 6-9, Exhibits "E", "F", "G" and "H", MR pages 880 and 907-913.
[50] *Ibid*, para 10, Exhibit "I", MR pages 880 and 925.

24. Under Rule 104(1)(b), parties may be added as respondents where:

a) they should have been respondents in the first place because they are directly affected by the relief sought; or

b) their presence before the Court is necessary.

25. Satisfaction of either of these requirements is sufficient, if had the tribunal's decision been different, the party seeking joinder could have brought an application for judicial review.[51]

26. In *Forest Ethics,* Mr. Justice Stratas described the test for "directly affected" as follows:

> [21] Translating this to Rule 303(1)(a), the question is whether the relief sought in the application for judicial review will affect a party's legal rights, impose legal obligations upon it, or prejudicially affect it in some direct way. If so, the party should be added as a respondent. If that party was not added as a respondent when the notice of application was issued, then, upon motion under Rule 104(1)(b), it should be added as a respondent[52] (underling added).

27. In *Shubenacadie Indian Band v. Canada (Attorney General)*[53] the Federal Court of Appeal endorsed the following passage from *Amon v. Raphael Tuck & Sons* as the test for when a party is a "necessary" party:

> The only reason which makes it *necessary* to make a person a *party* to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party (italics in original).[54]

28. As discussed in more detail below, each of the Sister Nations would be directly affected by the relief sought, their participation is necessary to effectually and completely determine the issues before the Court, and had the Decision been different, they could have applied for judicial review.

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[51] *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2013 FCA 236, paras 11 and 18 [*Forest Ethics*], BOA tab 7.
[52] *Forest Ethics, supra* note 51, para 21, BOA tab 7.
[53] 2002 FCA 509, BOA tab 24.
[54] *Ibid,* para 8.

The Sister Nations are Directly Affected by the Relief Sought

29. While the relief each Applicant seeks is slightly different, the Applicants, in effect, seek to alter, suspend or quash the Decision. Altering, suspending or quashing the Decision would directly affect the Sister Nations' rights by:

a) nullifying an accommodation made by the Crown to protect and preserve their constitutionally protected rights;

b) exposing the imperilled populations of wild Pacific salmon and other marine resources the Sister Nations rely on for exercising their constitutionally protected rights to disease agents and parasites that cause population-level impacts;

c) prolonging intrusions in their territories that damage and prevent them from using traditional harvesting sites; and

d) putting their ability to obtain the same or similar accommodation to protect their Aboriginal and treaty rights in jeopardy.

30. Each of the above direct effects on the Sister Nations is sufficient to have each of them added as a respondent.

The Applicants seek to Nullify an Accommodation to Protect the Sister Nations Aboriginal and Treaty Rights

31. The Applicants seek to quash, suspend or otherwise interfere with an accommodation promised by the Crown in furtherance of the Crown's obligation to protect the Sister Nations' Aboriginal and treaty rights.[55] Setting aside the Decision will directly and prejudicially affect Reconciliation between the Sister Nations and the Crown.

32. Because the wild Pacific salmon and marine resources they rely on are threatened, endangered or nearly extinct:[56]

a) Homalco is not able to meaningfully exercise its Aboriginal right or rely on the amounts identified in its Comprehensive Fisheries Agreement with DFO;[57] and

[55] *Fort McKay First Nation, supra* note 4, para 77, BOA tab 8.
[56] Chief Blaney Affidavit, *supra* note 2, paras 78-92, Exhibits "K", "L", "M", and "N", MR pages 28-31 and 352-414; Hegus Hackett Affidavit, *supra* note 2, paras 66 -78, Exhibits "L", "M", "N", and "O", MR pages 489-492 and 808-870.

b) Tla'amin is unable to meaningfully exercise its treaty rights and has never been able to harvest the allocations provided through its Final Agreement.[58]

33. The Sister Nations' Submissions to the Minister identified numerous ways the Fish Farms adversely impact the wild salmon and marine resources they rely on[59] and explained that, to prevent extinguishing their constitutionally protected rights, the Fish Farms needed to harvest their remaining stocks and be decommissioned. [60] The Submissions said the Sister Nations:

> ….require that all 21 of the Fish Farms in the Discovery Islands area [be] immediately removed. Licences should only be renewed to allow for the current stocks of farmed fish to be removed and for those fish farms to be decommissioned.[61]

34. The Certified Tribunal Record ("**CTR**") provided by the Minister to the Sister Nations represents that statement as follows:

> Accommodation Measures
>
> • The Nations insist upon all 21 farms in the DI to be immediately removed, with licences issues only to permit the farming of current stocks before decommissioning.[62]

35. The Minister's Decision reads as follows:

> My decision is for a temporary (18 month) renewal of aquaculture licenses for facilities operating in the Discovery Islands. All farms in this area must no longer have fish in pens by June 30th, 2022.
>
> • During the period between license renewal and June 30th, 2022, no hatchery smolts will be introduced.
>
> • The intent of allowing time to grow out and harvest fish already in pens to avoid culling in order to meet timelines.[63]

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[57] Chief Blaney Affidavit, paras 75, 81-86, MR pages 27-29. See also Exhibit "J", MR page 311.
[58] Hegus Hackett Affidavit, paras 54, 68 and 79, MR pages 487, 489-490 and 492-493.
[59] Chief Blaney Affidavit, para 33, Exhibit "G", pages 88-174, MR pages 18 and 189-275; Hegus Hackett Affidavit, para 20, Exhibit "G", pages 88-174, MR pages 476 and 632-718.
[60] Chief Blaney Affidavit, para 34, Exhibit "G", pages 174-186, MR pages 18 and 275-287; Hegus Hackett Affidavit, para 21, Exhibit "G", pages 174-186, MR pages 476 and 718-730.
[61] Chief Blaney Affidavit, *supra* note 2, para 34, Exhibit "G", page 174, MR pages 18 and 275; Hegus Hackett Affidavit, *supra* note 2, para 21, Exhibit "G", page 174, MR pages 476 and 718.
[62] Drastil Affidavit, *supra* note 48, para 11, Exhibit "J", page 54, MR pages 881 and 931.
[63] *Ibid,* para 11, Exhibit "J", page 8, MR pages 881 and 927.

36. Accommodating the Aboriginal and treaty rights of First Nations, including the Sister Nations, was integral to the process leading up to the Decision. In particular, DFO announced that "[c]onsultations with the seven First Nations in the Discovery Islands area provided important guidance to the Minister and heavily informed the decision"[64] (underlining added). The Decision is also consistent with the two meetings the Sister Nations had with the Minister on November 25, 2020 and December 17, 2020,[65]and the Minister's commitment to increase First Nation monitoring of the Fish Farms and to rehabilitate the salmon habitat and restore of salmon populations around the Discovery Islands.[66]

37. In short, the Minister made the Decision "in furtherance of the Crown's obligation to protect"[67] the Sister Nations' constitutionally protected aboriginal and treaty.

38. In *Haida,* the Supreme Court of Canada described the purpose of accommodation of an Aboriginal right as avoiding irreparable harm or minimizing the effects of infringement:

> 47 … Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where 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 (underlining added). [68]

39. A promise of accommodation engages and flows from the honour of the Crown: "[i]n its most basic iteration, the law assumes that the Crown always intends to fulfill its solemn promises, including constitutional obligations".[69] Madam Justice Greckol of the Alberta Court of Appeal, in concurring reasons in *Fort McKay First Nation,* explained the importance of promises made in furtherance of the Crown's

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[64] Chief Blaney Affidavit, para 36, Exhibit "H", MR pages 18-19 and 300; Hegus Hackett Affidavit, para 22, Exhibit "H", MR pages 476-477 and 738.
[65] Chief Blaney Affidavit, para 135, MR pages 50-51; Hegus Hackett Affidavit, paras 92(iii) and 94, MR pages 495-496.
[66] Chief Blaney Affidavit, paras 134(ix) and 136, Exhibit "S", MR pages 50-51 and 464; Hegus Hackett Affidavit, paras 94 and 96, Exhibit "Q", MR pages 496-497 and 874.
[67] *Fort McKay First Nation, supra* note 4, para 77, BOA tab 8.
[68] *Haida, supra* note 3, para 47, BOA tab 10.
[69] *Manitoba Metis, supra* note 5, para 79 [citations omitted], BOA tab 12.

obligation to protect constitutionally protected rights[70] and elaborated on the role those promises play in Reconciliation:

> The honour of the Crown has as its ultimate purpose the reconciliation of Aboriginal interests with Crown sovereignty. It is engaged prior to treaty infringement (*Mikisew 2018* at para 67) and seeks to protect Aboriginal rights from being turned into an empty shell. Whether or not the treaty rights of FMFN have been infringed remains to be seen. Regardless, the Crown must deal honourably with First Nations in negotiations designed to stave off infringement. The honour of the Crown may not mandate that the parties agree to any one particular settlement, but it does require that the Crown keep promises made during negotiations designed to protect treaty rights. It certainly demands more than allowing the Crown to placate FMFN while its treaty rights careen into obliteration. That is not honourable. And it is not reconciliation[71] (underlining added).

40. By seeking to quash, suspend or otherwise interfere with the Decision, the Applicants are attempting to nullify and set aside the Crown's promised accommodation to the Sister Nations. Specifically, they are seeking to set aside measures the Crown has promised (i) to avoid irreparable harm to the Sister Nations' legal and constitutionally protected rights and minimize further infringement of them, (ii) to implement Tla'amin's treaty rights[72] and (iii) to advance Reconciliation between the Sister Nations and the Crown.

41. 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. On this basis alone, each of the Sister Nations is sufficiently directly affected to be joined as a respondent.

The Remedies the Applicants Seek will directly Harm the Populations of Wild Pacific Salmon the Sister Nations depend on to Exercise their Aboriginal and Treaty Rights

42. Quashing, suspending or otherwise interfering with the Decision will directly affect the Sister Nations' constitutionally protected rights by causing harm to extremely depleted and endangered populations of wild Pacific salmon that the Sister

[70] *Fort McKay First Nation, supra* note 4, para 77, BOA tab 8.
[71] *Ibid*, para 83.
[72] *Manitoba Metis, supra* note 5, para 79, BOA tab 12; *Fort McKay First Nation, supra* note 4, paras 77-83, BOA tab 8.

Nations rely on to exercise their constitutionally protected rights. Those populations are on the path to extinction:

a) a record low 293,000 sockeye returned to the Fraser River in 2020;[73]

b) some populations have confirmed losses of 89-99%;[74] and

c) at least nine populations require all sources of harm be reduced to the "maximum extent possible" to provide the "best opportunity for survival".[75]

43. In 2012, Mr. Justice Cohen concluded that:

> ….the potential harm posed to Fraser River sockeye salmon from salmon farms is serious or irreversible. Disease transfer occurs between wild and farmed fish, and I am satisfied that salmon farms along the sockeye migration route have the potential to introduce exotic diseases and to exacerbate endemic diseases that could have a negative impact on Fraser River sockeye.[76]

44. The Sister Nations' Submissions review and document a body of credible scientific evidence that demonstrates the Fish Farms expose the wild Pacific salmon the Sister Nations rely on to exercise their constitutionally protected rights to harmful pathogens and parasites, including:

a) 99% of juvenile sockeye sampled in the Discovery Islands were infested with an average of 9 sea lice and DFO's research confirms that infestation with an average of 10 sea lice causes profound physiological impact to sockeye;[77]

b) infection with the disease agent Piscine orthoreovirus ("**PRV**") in wild Pacific salmon was highest in the Discovery Islands;[78] and

c) multiple other pathogen-induced diseases have been documented in the Discovery Islands and the cumulative impacts of those diseases is currently unknown, but is likely serious.[79]

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[73] Chief Blaney Affidavit, *supra* note 2, para 88, Exhibit "K", MR pages 30 and 352; Hegus Hackett Affidavit, *supra* note 2, para 72, Exhibit "L", MR pages 490-491 and 808.
[74] Chief Blaney Affidavit, para 92, Exhibit "N", MR pages 31 and 410; Hegus Hackett Affidavit, para 76, Exhibit "O", MR pages 492 and 869.
[75] Chief Blaney Affidavit, para 89, Exhibit "L", MR pages 30 and 358; Hegus Hackett Affidavit, para 73, Exhibit "M", MR pages 491 and 814.
[76] Cohen Commission Vol. 3 page 22. See Chief Blaney Affidavit, *supra* note 2, Exhibit "A", MR page 61; Hegus Hackett Affidavit, *supra* note 2, Exhibit "A", MR page 507.
[77] Chief Blaney Affidavit, Exhibit "G", pages 164-165, MR pages 265-266; Hegus Hackett Affidavit, Exhibit "G", pages 164-165, MR pages 708-709.
[78] Chief Blaney Affidavit, Exhibit "G", page 166, MR page 267; Hegus Hackett Affidavit, Exhibit "G", page 166, MR page 710.

45. Those exposures to parasites and pathogens cause population-level impacts to the wild Pacific salmon the Sister Nations rely on to exercise their rights and thus cause adverse impact to the Sister Nations' ability to exercise their right to fish.[80]

46. The Sister Nations have a direct interest in the health of the populations of wild Pacific salmon that use and migrate through the Discovery Islands. They have each taken significant efforts to preserve and restore those stocks, including operating hatcheries and voluntarily limiting and managing their harvesting.[81]

47. The courts have previously recognized the direct impacts fish farms stocked with Atlantic salmon can have on First Nations' rights. In both *Blaney et al. v. Minister of Agriculture et al.,*[82] and '*Namgis First Nation v. Canada (Fisheries, Oceans and Coast Guard),*[83] the courts found that stocking fish farms posed a serious risk of irreparable harm to First Nations' rights.[84]

48. 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. This direct effect on the Sister Nations' constitutionally protected rights is sufficient for each of them to be added as a respondent.

The Applicants seek to Nullify a Decision to Remove Intrusions that Currently Prevent the Sister Nations from Exercising their Rights

49. By decommissioning the Fish Farms, the Minister is doing more than just preventing the exposure of wild Pacific salmon to pathogens, pollutants and

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[79] Chief Blaney Affidavit, Exhibit "G", pages 167-168, MR pages 268-269; Hegus Hackett Affidavit, Exhibit "G", pages 167-168, MR pages 711-712.
[80] Chief Blaney Affidavit, paras 100-104, 105-106 and 107, Exhibit "G", pages 88-149, 156-157, 163-173, MR pages 32-38, 189-250, 257-258 and 264-274; Hegus Hackett Affidavit, paras 80-82, Exhibit "G", pages 88-149, 156-157, 163-173, MR pages 493, 632-693, 700-701 and 707-717.
[81] Chief Blaney Affidavit, para 71, Exhibit "I" and paras 65 and 86, MR pages 25, 27, 29 and 304; Hegus Hackett Affidavit, paras 62-65, MR page 489.
[82] 2004 BCSC 1764 [*Blaney 2004*], BOA tab 1.
[83] 2018 FC 334 ['*Namgis 2018*], BOA tab 13.
[84] *Blaney 2004*, *supra* note 82, paras 60-61, BOA tab 1; '*Namgis 2018*, *supra* note 83, para 93, BOA tab 13.

parasites. The Minister is removing intrusions in the Sister Nations' territories which prevent them from exercising their rights to fish for FSC purposes.

50. As described in the Submissions, the Fish Farms currently damage and prevent the use of traditional harvesting sites the Sister Nations have used to exercise their right to fish for millennia. The Fish Farms, among other things, have:

a) damaged clam beds through waste discharge;

b) intruded onto fishing grounds for salmon, halibut, lingcod, and red snapper;

c) damaged shellfish through exposure to toxins;

d) closed traditional fishing grounds near treaty settlement offer lands;

e) resulted in prohibitions to fish in traditional use areas; and

f) had other adverse impacts on the Sister Nations' right to fish for FSC purposes.[85]

51. 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.

52. 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. Any quashing, suspending or otherwise interfering with the Decision will directly and prejudicially affect the Sister Nations' ability to use those sites and exercise their rights. This direct effect on the Sister Nations' Aboriginal and treaty rights is sufficient for each of them to be added as respondents.

[85] Chief Blaney Affidavit, *supra* note 2, paras 111-124, Exhibit "G", pages 158-162, MR pages 39-45 and 259-263; Hegus Hackett Affidavit, *supra* note 2, para 83, Exhibit "G", pages 158-162, MR pages 493 and 702-706.

The Relief Sought will Directly and Prejudicially affect the Sister Nations' ability to Receive the Accommodation

53. If the Decision is quashed and the Minister must reconsider it, then the First Nations' ability to obtain and realize the promised accommodation will be placed in jeopardy.

54. The Minister has consistently taken the position that the Crown does not consult First Nations directly on transfer licences issued under s. 56 of the *Fishery (General) Regulations* ("**Transfer Licences**") to stock fish farms. The Minister says DFO consults on aquaculture licences, and fish health policies, and that such upstream consultation is sufficient to discharge the duty to consult First Nations on Transfer Licences because such policies and aquaculture licences govern the issuance of Transfer Licences.[86]

55. In *'Namgis First Nation v. Canada (Fisheries, Oceans and the Coast Guard)*,[87] the Federal Court of Appeal confirmed that the Crown can rely on such upstream consultation when issuing a Transfer Licence if the decision to issue the Transfer Licence is consistent with that past consultation.[88]

56. If the Minister acts consistently with the Decision and does not grant future Transfer Licences in the Discovery Islands, then the Honour of the Crown will be upheld. But, if the Decision is quashed, suspended or interfered with, and the Minister, without further adequate consultation, issues Transfer Licences inconsistent with the Decision, then the Minister will breach the Crown's duty to consult.[89]

57. If the Decision is suspended, quashed or interfered with, then, to avoid breaching the duty to consult, the Minister must consult with the Sister Nations on any reconsideration of the Decision and before issuing any Transfer Licences in the Discovery Islands. Such a reconsideration of the Decision, and associated consultation, would place the ability of the Sister Nations to obtain the same or similar accommodation in jeopardy.

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[86] *Morton v Canada (Fisheries and Oceans),* 2019 FC 143, paras 325 and 338 [*Morton*], BOA tab 13.
[87] 2020 FCA 122 [*'Namgis 2020*], BOA tab 16 .
[88] *Ibid*, paras 34-38.
[89] *Ibid*, paras 34-38.

58. In *'Namgis First Nation v. Minister of Fisheries, Oceans and the Canadian Coast Guard et al.*,[90] the Court ruled on a joinder motion in similar circumstances. 'Namgis First Nation ("'**Namgis**") applied for judicial review of the Minister's regulation of PRV with respect to the issuance of Transfer Licences. Mowi Canada West Ltd. ("**Mowi**") and Cermaq Canada Ltd. ("**Cermaq**") sought to be added as party respondents. 'Namgis opposed their addition.

59. Case Management Judge Ring held that Mowi and Cermaq should be added as parties. It was not necessary for Mowi and Cermaq *to have legal rights* to future Transfer Licences. It was sufficient that their ability to apply for, and obtain, such discretionary Transfer Licences was prejudicially affected in a direct way: if 'Namgis were successful in the underlying application, "and the reconsidered PRV Policy is declared unlawful, the validity of Mowi's and Cermaq's current Transfer Licences, and their ability to obtain future Transfer Licences, may be placed in jeopardy"[91] (underlining added).

60. The reasoning applied with respect to the reconsideration of a policy governing Mowi and Cermaq's ability to apply for Transfer Licences granted at the Minister's discretion must apply with greater force to the Decision, which is a promise from the Crown to provide an accommodation to protect *the current and future exercise* of Aboriginal rights recognized and affirmed by section 35 of the *Constitution Act, 1982.*

61. The Decision governs the issuance of aquaculture licences and Transfer Licences in the Sister Nations' 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 (i) the adverse impacts to harvesting sites and (ii) the continued exposure of wild Pacific salmon and other marine resources to the pathogens and parasites released from the Fish Farms. [92] As in *'Namgis First Nation*

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[90] *'Namgis First Nation v Minister of Fisheries, Oceans and the Canadian Coast Guard, Mowi Canada West Ltd. and Cermaq Canada Ltd.,* (July 16 2020), Vancouver T-1798-19 (FC) ['*Namgis First Nation v Minister of Fisheries et al.*], BOA tab 16.

[91] '*Namgis First Nation v Minister of Fisheries et al.*, *supra* note 90, para 50. See also paras 49-52, BOA tab 16.

[92] See paras 42-48 above.

v. Minister of Fisheries et al.,[93] this direct and prejudicial effect is sufficient for each of the Sister Nations to be added as a respondent.

62. In *'Namgis,* the Court granted Mowi and Cermaq party status because a judicial review of a policy decision governing the issuance of discretionary Transfer Licences could jeopardize their ability to obtain future Transfer Licences. The Sister Nations respectfully submit it would be incongruous for the Court not to grant them party status in a judicial review of a Decision which could jeopardize their ability to obtain accommodation for their constitutionally protected Aboriginal and treaty rights.

63. In summary, the Sister Nations submit that they are each directly affected by the relief sought in the Application and each ought to be added as a respondent to the Application.

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

64. While the above bases are, individually and together, more than sufficient to justify the orders sought in this motion, the Sister Nations submit that they are also necessary to effectually and completely determine the issues raised in the Application.

65. Rule 104(1)(b) of the *Federal Courts Rules* allows the Court to "order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party" (underlining added).

66. 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 allow the Sister Nations to protect their interests, which are at stake in the proceedings.

[93] *'Namgis First Nation v Minister of Fisheries et al., supra* note 90, BOA tab 16.

The Adverse Interests the Minister considered must be before the Court

67. In *Douglas v. Canada (Attorney General)*,[94] Madam Prothonotary Tabib applied the rule articulated in *Tetzlaff v. Canada (Minister of the Environment)*,[95] that "parties to proceedings before a federal board, commission or tribunal are, *prima facie*, proper and necessary parties to judicial review applications attacking these proceedings or the results thereof".[96] Madam Prothonotary Tabib explained that the origin of this principle stemmed from a previous iteration of the rule, which required "any interested person who is adverse in interest to the applicant" to be named in judicial review proceedings and further explained how the adversarial nature of the process that produced the decision remains relevant to determining standing.[97]

68. In *Cowessess First Nation No. 73 v. Pelletier*,[98] Mr. Justice Roy followed *Douglas,* noting that it was the submissions of the party seeking joinder which led to the decision of the tribunal that was now subject of an application for judicial review.[99] Justice Roy held that such a party's "presence is now necessary (*Tetzlaff , supra*) to ensure that there will be a debate, or in the words of Rule 104, 'to ensure that all matters in dispute in the proceeding may be effectually and completely determined.'"[100]

69. The principles from *Tetzlaff, Douglas* and *Cowessess First Nation* apply with equal force for the current motion. As confirmed in *Haida*, when making an accommodation, "the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests"[101] (underlining added). The Decision flowed from a process in which the Minister had to balance the adverse interests of multiple parties. And, as in *Cowessess First Nation,* the consultation with Sister Nations, their Submissions and meetings with the Minister, led to the Decision. [102]

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[94] 2013 FC 451 [*Douglas*], BOA tab 6.
[95] [1991] FCJ No 1277 [*Tetzlaff*], BOA tab 26.
[96] *Douglas*, *supra* note 94, para 16, BOA tab 6.
[97] *Douglas*, *supra* note 94, para 19, BOA tab 26.
[98] 2016 FC 1127 [*Cowessess First Nation*], BOA tab 5.
[99] *Ibid*, para 6.
[100] *Ibid*, para 8.
[101] *Haida*, *supra* note 3, para 50, BOA tab 10.
[102] Chief Blaney Affidavit, *supra* note 2, para 36, Exhibit "H", MR pages 18-19 and 300; Hegus Hackett Affidavit, *supra* note 2, para 22, Exhibit "H", MR pages 476-477 and 739.

70. Given the Minister wears many hats and represents the broader public interest[103] 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 CTR demonstrates the Minister's limited ability to speak to the Sister Nations' need for the accommodation, or the impacts any interference with it could cause them: the Sister Nations' participation in 10 meetings and the submission of over 700 pages of materials is reduced to a 2-page summary. [104] The Minister's inability to advocate for the Sister Nations' interests will be particularly acute and prejudicial when the Court must determine the balance of convenience on a motion for injunctive relief.

The Sister Nations are Necessary because their Interests are at Stake

71. The Federal Court has repeatedly confirmed that a party whose interests are at stake is a necessary party respondent.[105] Other courts have ruled similarly. In *Sanford v. Ontario (Minister of Environment)*,[106] the Ontario Superior Court of Justice found that the Huron-Wendat Nation was a necessary respondent to an application for judicial review, in part, because of their "wish to protect the result of the consultation process."[107] The Court noted that the other respondents, which included the Minister of the Environment, "may see it as less necessary to do."[108] The Court further found that the Huron-Wendat Nation had "an interest in ensuring that the consultation process that was engaged be affirmed."[109]

72. In *Ontario Federation of Anglers and Hunters v. Ontario*,[110] the Ontario Superior Court of Justice, when ruling on the standing of First Nations, said unequivocally, "[s]uch adjudications should never be made in the absence of persons whose rights are at stake."[111] Ontario had taken the position that the Williams Treaties First Nations had surrendered all of their pre-existing rights, but then

[103] *Wewaykum Indian Band v Canada*, 2002 SCC 79, para 96 [*Wewaykum*], BOA tab 28.
[104] Drastil Affidavit, *supra* note 48, para 11, Exhibit "J", pages 52-55, MR pages 881 and 929-932.
[105] *Tetzlaff*, *supra* note 95, para 21, BOA tab 26.
[106] 2006 CarswellOnt 5243 [*Sanford*], BOA tab 23.
[107] *Ibid*, para 4.
[108] *Ibid*, para 4.
[109] *Ibid*, para 4.
[110] 2015 ONSC 7969 [*Ontario Federation*], BOA tab 18.
[111] *Ibid*, para 18.

changed its position[112] and issued an Interim Enforcement Policy ("**IEP**") for the treaty lands until the litigation was resolved.[113] The IEP protected those rights by permitting "the First Nations to hunt and fish for food, social and ceremonial purposes in their traditional territories, subject to some limited exceptions",[114] but allegedly at the expense of the anglers and hunters who filed for judicial review.

73. The applicable rule in *Ontario Federation* provided "for the mandatory joinder of every person 'whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding'."[115] Applying that rule, the Ontario Super Court of Justice held, *inter alia*:

> [14] In this judicial review proceeding, the OFAH seeks a declaration that the IEP is void, invalid, and of no force and effect. The IEP grants rights to the First Nations and to nobody else. If those rights are to be taken away, the First Nations must be before the court.
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> …
>
> [18] These are issues fundamental to the First Nations as a people. It would be highly inappropriate, perhaps even impossible, to make such findings, or even entertain such arguments, in the absence of the people against whom they are directed. This entire proceeding is directed towards obtaining rulings that are contrary to the rights asserted by the First Nations. Those challenged rights include hunting, fishing and harvesting rights, but also include even more fundamental rights under the *Charter*. Such adjudications should never be made in the absence of the persons whose rights are at stake. Even without a request by the First Nations to be added as parties, I would expect a court to be reluctant (to say the least) to make such pronouncements in their absence. In my opinion, the First Nations are clearly necessary and proper parties to this proceeding[116] (underlining added).

74. A full panel of the Ontario Superior Court of Justice upheld the motion judge's decision.[117]

75. The applicants in *Ontario Federation* sought the same result as the Applicants in the current Application: to set aside accommodations provided by the Crown to protect Aboriginal and treaty rights. In this Application, just as in *Ontario*

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[112] *Ibid,* para 6.
[113] *Ibid,* para 7.
[114] *Ibid,* para 7.
[115] *Ontario Federation*, *supra* note 110, para 9, BOA tab 18.
[116] *Ibid,* paras 14 and 18.
[117] *Ontario Federation of Anglers and Hunters v Minister of Natural Resources and Forestry*, 2017 ONSC 441, BOA tab 17.

Federation, the First Nations whose rights would be affected by the relief sought are necessary to effectually and completely determine the issues before the Court.

76. The need for the Sister Nations to be party respondents is especially acute on a motion for injunctive relief. The Supreme Court of Canada has repeatedly confirmed that the Minister must prioritize the protection of the conservation of fish and the Aboriginal fishery over commercial fisheries. [118] Before determining if it should suspend the Decision pending determination of the underlying application, the Court must weigh the balance of convenience considering those priorities. It would be contrary to Reconciliation, and the just determination of the motion on its merits, if the Sister Nations were unable to adduce evidence on the potential impacts injunctive relief could have on their constitutionally protected rights – rights the Supreme Court of Canada has repeatedly confirmed the Minister must prioritize over the interests of the Applicants.

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

77. Finally, 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:

> [24] Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review.[119]

78. The Sister Nations' Submissions make clear that before the end of the consultation process they had contemplated judicial review and were preparing for a judicial review if the Decision were different:

> These well-established principles of the duty consult and accommodate mean that any decision to renew the aquaculture licences for the Fish Farms, and any operational decisions DFO approves during the term of

[118] *R v Gladstone*, [1996] 2 SCR 723, para 54, BOA tab 21; *R v Sparrow*, [1990] 1 SCR 1075, pages 1115-1116, BOA tab 22.
[119] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40, para 24 [*Clyde River*], BOA tab 4.

> those aquaculture licences, will be vulnerable to being quashed on judicial review.[120]

79. In *Blaney v. British Columbia (The Minister of Agriculture Food and Fisheries)*,[121] the British Columbia Supreme Court confirmed that Homalco is affected by, and has standing to apply for judicial review of, aquaculture licensing decisions.[122] The Federal Court's decision in *Morton*[123] confirms that First Nations have standing to seek judicial review of DFO's policy decisions with respect to fish farming. And, in *Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General)*[124], the Federal Court confirmed that the renewal of aquaculture licences triggers the duty to consult and these decisions are subject to judicial review.[125]

The Federal Court's decision in Gitxaala Nation is distinguishable

80. Mowi has cited *Gitxaala Nation v. Prince Rupert Port Authority*,[126] in its opposition to the Sister Nations' motion for joinder. In *Gitxaala Nation,* the Prince Rupert Port Authority and Transport Canada (the "**Port Authorities**") approved Wolverine Terminal ULC's ("**Wolverine**") fuel service project (the "**Project**") having concluded that the Project did not cause any significant adverse environmental effects. Gitxaala Nation ("**Gitxaala**") filed an application for judicial review on the grounds that consultation with Gitxaala had been inadequate and the finding of no significant environmental adverse effects was unreasonable. Lax Kw'alaams and Metlakatla First Nations (the "**Moving Nations**") moved to be joined as respondents.[127]

81. In *Gitxaala Nation*, Case Management Judge Ring held that:

a) a First Nation's reciprocal duty to consult with the Crown is not a "legal obligation" sufficient for a First Nation to establish it is directly affected under Rule 104(1)(b);[128]

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[120] Chief Blaney Affidavit, *supra* note 2, Exhibit "G", page 192. See also pages 134-156 and pages 187-192, MR pages 293, 235-257 and 288-293; Hegus Hackett Affidavit, *supra* note 2, Exhibit "G", page 192. See also pages 134-156 and pages 187-192, MR pages 736, 678-701 and 731-736.
[121] 2005 BCSC 283, BOA tab 2.
[122] *Ibid.*
[123] *Supra* note 86, BOA tab 13.
[124] 2012 FC 517, BOA tab 11.
[125] *Ibid*. See para 110 in particular.
[126] 2020 CanLII 382 (FC) [*Gitxaala Nation*], BOA tab 9.
[127] *Ibid,* paras. 1-5.
[128] *Ibid*, paras 27-29.

b) speculation that the Moving Nations may be unable to obtain economic benefits from a reconsidered project were merely consequential and indirect effects, not direct effects;[129] and

c) the Moving Nations' participation was not necessary to determine the adequacy of the Crown's consultation with a different First Nation.[130]

82. *Gitxaala Nation* is distinguishable: the Port Authorities did not find a significant adverse environmental effect; the Crown did not provide Gitxaala or the Moving Nations with an accommodation. Here, the Crown made an accommodation to protect Aboriginal and treaty rights and the Applicants attack that accommodation directly.

83. The Moving Nations said the reciprocal duty to consult in good faith would impose legal obligations on them; they did not argue they would be directly affected by quashing, suspending or interfering with an accommodation made in furtherance of the Crown's obligation to protect their Aboriginal and treaty rights.

84. The reasonableness of Crown consultation is not an issue in the Application. The Sister Nations' motion for joinder does not argue future consultations would impose legal obligations on them. Instead, the Sister Nations submit they are directly and prejudicially affected by the Applicants seeking to quash, suspend or interfere with an accommodation made to prevent irreparable harm, further infringement or extinguishment of Aboriginal and treaty rights.

85. *Gitxaala Nation* is further distinguishable: the Moving Nations relied on speculative, indirect and consequential economic impacts; the Sister Nations rely on direct, adverse and prejudicial impacts to their ability to exercise constitutionally protected rights, the risk of which has been confirmed by the Cohen Commission,[131] *Blaney 2004* and '*Namgis 2018*.[132]

86. Despite being distinguishable, far from undermining the Sister Nations' motion, *Gitxaala Nation* confirms the importance of ensuring that the Sister Nations are each added as a respondent.

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[129] *Ibid,* paras 35-38.
[130] *Ibid,* paras 45-46.
[131] Chief Blaney Affidavit, para 22, Exhibit "A", page 25, MR pages 14 and 64; Hegus Hackett Affidavit, para 8, Exhibit "A", page 25, MR pages 473 and 510.
[132] Blaney 2004, supra note 82, paras 60-61, BOA tab 1; Namgis 2018, supra note 83, para 93, BOA tab 13.

87. In *Gitxaala Nation,* Wolverine, the party whose interest was put in jeopardy by the remedy sought, was a respondent. As the relief the Applicants seek puts their interests at stake, the Sister Nations submit they should be added as respondents, consistent with *Ontario Federation* and *Sanford.*

88. In *Gitxaala Nation,* the Crown, the industry proponent and the First Nation who said the judicial review directly affected its constitutionally protected rights were all parties to the proceedings thus ensuring adverse interests were adequately represented, consistent with *Cowessess First Nation, Douglas,* and *Tetzlaff.*

B. The Sister Nations should be granted leave to intervene

89. In the alternative, the Sister Nations submit they should each be granted leave to intervene in the Application, pursuant to Rule 109(1) of the *Federal Court Rules*. None of the Applicants object to the addition of the Sister Nations as interveners.

90. The Federal Court of Appeal considered the test for granting an application for intervention in *Sport Maska Inc. v. Bauer Hockey Corp.*[133] The Federal Court of Appeal held as follows:

> [42] The criteria for allowing or not allowing an intervention must remain flexible because every intervention application is different, i.e. different facts, different legal issues and different contexts. In other words, flexibility is the operative word in dealing with motions to intervene. In the end, we must decide if, in a given case, the interests of justice require that we grant or refuse intervention. Nothing is gained by adding factors to respond to every novel situation which motions to intervene bring forward. In my view, the *Rothmans, Benson & Hedges* factors are well tailored for the task at hand. More particularly, the fifth factor, i.e. "[a]re the interests of justice better served by the intervention of the proposed third party?" is such that it allows the Court to address the particular facts and circumstances of the case in respect of which intervention is sought. In my view, the *Pictou Landing* factors are simply an example of the flexibility which the *Rothmans, Benson & Hedges* factors give to a judge in determining whether or not, in a given case, a proposed intervention should be allowed (underlining added).[134]

[133] 2016 FCA 44 [*Sport Maska*], BOA tab 25.
[134] *Ibid*, para 42.

91. Below, the Sister Nations address each of the "*Rothmans, Benson & Hedges*" [135] factors.

92. *Is the proposed intervener directly affected by the outcome?* Yes. As described above, should the relief be granted, the Sister Nations' constitutionally protected legal rights will be directly and prejudicially affected.[136]

93. *Does there exist a justiciable issue and a veritable public interest?* Yes. The relief sought implicates an accommodation that the Crown promised to the Sister Nations. The Supreme Court of Canada has confirmed that "the duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest".[137] In *Ontario Federation*, the Ontario Superior Court of Justice described proceeding to review an accommodation of constitutionally protected rights as "highly inappropriate, perhaps even impossible"[138] in the absence of the impacted First Nations. It would be contrary to the public interest, to the point of absurdity, to exclude any one of the First Nations for whom the accommodation was made and who wish to participate.

94. *Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?* Yes. The Sister Nations' involvement is the only reasonable or efficient manner of ensuring that all issues regarding the Decision are resolved, including how their constitutionally protected rights were considered in the Decision and may be affected by any proposed remedies before the Court.

95. *Is the position of the proposed intervener adequately defended by one of the parties to the case?* No. the Minister cannot adequately respond to the Application on her own. The Minister wears many hats and represents the broader public interest.[139] She cannot advocate on behalf of the Sister Nations and cannot explain the impacts that will follow to their legal and constitutional rights if the relief sought is granted.

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[135] *Rothmans, Benson & Hedges Inc v Canada (Attorney General)*, [1990] 1 FC 74 (TD), para 12, aff'd [1990] 1 FC 90 (CA), BOA tab 20.
[136] See paras. 29-63 above.
[137] *Clyde River*, *supra* note 119, para 40, BOA tab 4.
[138] *Ontario Federation*, *supra* note 110, para 18, BOA tab 18.
[139] *Wewaykum, supra* note 103, para 96, BOA tab 28.

96. *Are the interests of justice better served by the intervention of the proposed third party?* Yes. The interests of justice and Reconciliation will only be served if the Sister Nations, as the First Nations for which the accommodation was made, are before the Court.

97. *Can the Court hear and decide the cause on its merits without the proposed intervener?* No. The Court cannot determine the proposed merits of the underlying application or the injunction motion without the Sister Nations, who would be affected by the relief sought and for whom the Crown made the accommodation.

98. The Sister Nations submit that the interests of justice and the public interest require that the Sister Nations be added as interveners if they are not added as respondents. The Sister Nations' participation as interveners would go directly to the Court's determination of the reasonableness and lawfulness of the Decision. For the reasons detailed above, the Minister is not able to adequately respond to the Application on her own.

99. In *Viiv Healthcare ULC v. Teva Canada Limited*,[140] the Federal Court of Appeal held that "a key consideration is whether the proposed intervener will advance different and valuable insights and perspectives that will actually further the Court's determination of the matter."[141] No other party will be able to represent the interests of the Sister Nations, the First Nations for which the Crown made the accommodation.

100. The Sister Nations should be permitted to participate fully in the Application, and any motions for injunctive relief, including the right to submit affidavits, conduct cross-examinations on the Applicants' affidavits, and the right to make written and oral submissions. In *Canada (Minister of Citizenship and Immigration) v. Ishaq*,[142] the Federal Court of Appeal held that interveners can play an important role in the fact-finding process before first-instance decision-makers.[143] To assist that fact-finding process, the Sister Nations must necessarily have the opportunity to adduce evidence. Without the Sister Nations' evidence, determining

[140] 2015 FCA 33, BOA tab 27.
[141] *Ibid*, para 4.
[142] 2015 FCA 151, BOA tab 3.
[143] *Ibid*, para 16.

the merits of the Application will be prejudiced and weighing the balance of convenience will be impossible.

101. The Applicants' position that they would not oppose any application for intervener status is an acknowledgement that the Sister Nations have different and valuable perspectives that will further the Court's determination of the Application and the motion for injunctive relief. For those different and valuable perspectives to further the Court's determination of the Application, the Sister Nations must necessarily have the ability to file evidence.

102. Pursuant to the Order of this Court issued on March 3, 2021, the Sister Nations include in their Motion Record, the following affidavits the Sister Nations seek to file in response to the motions for injunctive relief:

a) the affidavit of Chief Blaney of Homalco First Nation affirmed on March 2, 2021, which the Sister Nations also rely on in this joinder motion;

b) the affidavit of Hegus Hackett of Tla'amin Nation affirmed on March 2, 2021, which the Sister Nations also rely on in this joinder motion;

c) the affidavit of Dr. Gideon Mordecai affirmed on March 10, 2021, describing the risk of pathogen transfer from the Fish Farms to the populations of wild Pacific salmon the Sister Nations rely on;

d) the affidavit of Stanley Proboszcz affirmed on March 9, 2021, describing background on:

    (i) the species of wild Pacific salmon;

    (ii) the location and operation of fish farms in British Columbia;

    (iii) the regulation of the fish farming industry in British Columbia and other jurisdictions; and

    (iv) fish health management practices, including culling and the risk of sea lice transfer from the Fish Farms to the populations of wild Pacific salmon;

e) the affidavit of Won Drastil affirmed on March 9, 2021, which exhibits excerpts from Mowi's most recent annual report, DFO's Framework for Aquaculture Risk Management, and an email from Ginny Van Pelt of the BC Introduction and Transfer Committee dated March 10, 2021 to legal counsel for the Sister Nations; and

f) the affidavit of Robert Chamberlin affirmed on March 9, 2021, which exhibits resolutions, letters and news releases supporting the removal of open net-pen fish farms generally, and the removal of open net-pen fish farms from the Discovery Islands specifically.

V. CONCLUSION

103. The Sister Nations request an order naming each of them as a respondent in the Application with the full rights of parties, including the right to adduce evidence, cross-examine affiants and make written and oral submissions. The Decision is an accommodation made by the Crown to protect the Sister Nations' Aboriginal and treaty rights from further infringement and extinguishment. The Sister Nations will be directly affected if the Decision is quashed, suspended or interfered with.

104. The Sister Nations are necessary parties: neither the Applicants nor the Minister will be able to explain the impact of the Decision on the Sister Nations' constitutionally protected Aboriginal rights and the effects that will occur should the Decision be overturned.

105. In the alternative, the Sister Nations ought to be granted leave to intervene in the Application and adduce the evidence listed above in paragraph 102. The Sister Nations have a different and valuable perspective to offer and their participation will assist the Court in its determination of the Application and any motions for injunctive relief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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

Per: _____

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LIST OF AUTHORITIES

LEGISLATION

Constitution Act, 1982, s. 35

Federal Courts Rules, SOR/98-106, Rule 104(1)(b), 109(1), 303(1)(a)

Fisheries Act, RSC, 1985, c F-14, s. 7

Fishery (General) Regulations, SOR/93-53, s. 56

CASES

Blaney et al. v. Minister of Agriculture et al., 2004 BCSC 1764

Blaney v. British Columbia (The Minister of Agriculture Food and Fisheries), 2005 BCSC 283

Canada (Minister of Citizenship and Immigration) v. Ishaq, 2015 FCA 151

Canada (Minister of Fisheries and Oceans) v. Shubenacadie Indian Band, 2002 FCA 509

Clyde River (Hamlet) v. Petroleum Geo-Services Inc, 2017 SCC 40

Cowessess First Nation No. 73 v. Pelletier, 2016 FC 1127

Douglas v. Canada (Attorney General), 2013 FC 451

Forest Ethics Advocacy Assn. v. National Energy Board, 2013 FCA 236

Fort McKay First Nation v. Prosper Petroleum Ltd, 2020 ABCA 163

Gitxaala Nation v. Prince Rupert Port Authority, 2020 CanLII 382 (FC)

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73

Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General), 2012 FC 517

Manitoba Metis Federation Inc v. Canada (Attorney General), 2013 SCC 14

Morton v. Canada (Fisheries and Oceans), 2019 FC 143

'*Namgis First Nation v. Canada (Fisheries, Oceans and Coast Guard),* 2018 FC 334

'*Namgis First Nation v. Canada (Fisheries, Oceans and the Coast Guard)*, 2020 FCA 122

'*Namgis First Nation v. Minister of Fisheries, Oceans and the Canadian Coast Guard, Mowi Canada West Ltd. and Cermaq Canada Ltd., (July 16 2020), Vancouver* T-1798-19 (FC)

Ontario Federation of Anglers and Hunters v. Minister of Natural Resources and Forestry,

2017 ONSC 441

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Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General), [1990] 1 FC 74 (TD)

R v. Gladstone, [1996] 2 SCR 723

R v. Sparrow, [1990] 1 SCR 1075

Sanford v. Ontario (Minister of Environment), 2006 CarswellOnt 5243

Sport Maska Inc. v. Bauer Hockey Corp, 2016 FCA 44

Tetzlaff v. Canada (Minister of the Environment), [1991] F.C.J. No. 1277

Viiv Healthcare ULC v. Teva Canada Limited, 2015 FCA 33

Wewaykum Indian Band v. Canada, 2002 SCC 79

STATUTES, REGULATIONS, RULES AND OTHER SECONDARY SOURCES

Constitution Act, 1982, s. 35(1)

Section 35 (1)	
PART II - RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA **Recognition of existing aboriginal and treaty rights** 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	**PARTIE II - DROITS DES PEUPLES AUTOCHTONES DU CANADA** **Confirmation des droits existants des peuples autochtones** 35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

Federal Courts Rules, SOR/98-106, Rules 104, 109 & 303 (Rule 104(1)(b), 109(1), 303(1)(a))

Rule 104	
Order for joinder or relief against joinder **Ordonnance de la Cour** 104 (1) At any time, the Court may (a) order that a person who is not a proper or necessary party shall cease to be a party; or (b) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually	**Ordonnance de la Cour** 104 (1) La Cour peut, à tout moment, ordonner : a) qu'une personne constituée erronément comme partie ou une partie dont la présence n'est pas nécessaire au règlement des questions en litige soit mise hors de cause; b) que soit constituée comme partie à l'instance toute personne qui aurait dû l'être ou dont la

and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order. **Directions** (2) An order made under subsection (1) shall contain directions as to amendment of the originating document and any other pleadings.	présence devant la Cour est nécessaire pour assurer une instruction complète et le règlement des questions en litige dans l'instance; toutefois, nul ne peut être constitué codemandeur sans son consentement, lequel est notifié par écrit ou de telle autre manière que la Cour ordonne. **Directives de la Cour** (2) L'ordonnance rendue en vertu du paragraphe (1) contient des directives quant aux modifications à apporter à l'acte introductif d'instance et aux autres actes de procédure.
Rule 109	
Leave to intervene 109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding. **Contents of notice of motion** (2) Notice of a motion under subsection (1) shall (a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and (b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding. **Directions** (3) In granting a motion under subsection (1), the Court shall give directions regarding (a) the service of documents; and (b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	**Autorisation d'intervenir** 109 (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance. **Avis de requête** (2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir : a) précise les nom et adresse de la personne qui desire intervenir et ceux de son avocat, le cas échéant; b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance. **Directives de la Cour** (3) La Cour assortit l'autorisation d'intervenir de directives concernant : a) la signification de documents; b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.
Rule 303	
Respondents 303 (1) Subject to subsection (2), an applicant shall name as a respondent every person (a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or (b) required to be named as a party under an Act of Parliament pursuant to which the	**Défendeurs** 303 (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur : a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande; b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou

application is brought. **Application for judicial review** (2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent. **Substitution for Attorney General** (3) On a motion by the Attorney General of Canada, where the Court is satisfied that the Attorney General is unable or unwilling to act as a respondent after having been named under subsection (2), the Court may substitute another person or body, including the tribunal in respect of which the application is made, as a respondent in the place of the Attorney General of Canada.	de ses textes d'application qui prévoient ou autorisent la presentation de la demande. **Défendeurs — demande de contrôle judiciaire** (2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre. **Remplaçant du procureur général** (3) La Cour peut, sur requête du procureur général du Canada, si elle est convaincue que celui-ci est incapable d'agir à titre de défendeur ou n'est pas disposé à le faire après avoir été ainsi désigné conformément au paragraphe (2), désigner en remplacement une autre personne ou entité, y compris l'office fédéral visé par la demande.

Fisheries Act, RSC, 1985, c F-14, s. 7

Section 7	
Fishery leases and licences 7 (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on. **Default of payment of fine** (1.1) The Minister may refuse to issue a lease or licence for fisheries or fishing to a person, if, among other things, they are in default of payment of a fine in relation to a contravention of the Act and the proceeds of the fine belong to Her Majesty in Right of Canada or of a province or to any other person or entity. **Restriction** (2) Except as otherwise provided in this Act or regulations made under it, leases or licences for any term of more than nine years shall be issued only under the authority of the Governor in Council. R.S., 1985, c. F-14, s. 7; 2019, c. 14, s. 10.	**Baux, permis et licences de pêche** 7 (1) En l'absence d'exclusivité du droit de pêche conferee par la loi, le ministre peut, à discrétion, délivrer des baux et permis de pêche ainsi que des licences d'exploitation de pêches — ou en permettre la délivrance —, indépendamment du lieu de l'exploitation ou de l'activité de pêche. **Défaut de paiement d'une amende** (1.1) Le ministre peut refuser de délivrer un bail, un permis ou une licence notamment à toute personne en défaut de paiement d'une amende infligée à l'égard d'une infraction à la présente loi et dont le produit est attribué à Sa Majesté du chef du Canada ou d'une province ou à toute autre personne ou entité. **Réserve** (2) Sous réserve des autres dispositions de la présente loi et des règlements, la délivrance de baux, de permis et de licences pour un terme supérieur à neuf ans est subordonnée à l'autorisation du gouverneur en conseil. L.R. (1985), ch. F-14, art. 7; 2019, ch. 14, art. 10.

Fishery (General) Regulations, SOR/93-53, s. 56

Section 56	
Licence to Release or Transfer Fish	**Permis pour libérer ou transférer des poissons**

56 The Minister may issue a licence if (a) the release or transfer of the fish would be in keeping with the proper management and control of fisheries; (b) the fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish; and (c) the release or transfer of the fish will not have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks.	56 Le ministre peut délivrer un permis dans le cas où : a) la libération ou le transfert des poissons est en accord avec la gestion et la surveillance judicieuses des pêches; b) les poissons sont exempts de maladies et d'agents pathogènes qui pourraient nuire à la protection et à la conservation des espèces; c) la libération ou le transfert ne risque pas d'avoir un effet néfaste sur la taille du stock de poisson ou sur les caractéristiques génétiques du poisson ou des stocks de poisson.