2021 NSARB-2021-001

Nova Scotia Aquaculture Review Board

BETWEEN:

Kelly Cove Salmon Ltd.

APPLICANT

and-

Minister of Nova Scotia Department of Fisheries and Aquaculture

PARTY

and

Gregory Heming

INTERVENOR

BRIEF ON BEHALF OF
THE DEPARTMENT OF FISHERIES AND AQUACULTURE

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I Overview

1. The Aquaculture Review Board ("the Board") presided over a four day hearing from November 15 to November 18, 2021 ("the Hearing"). Over those four days, the Board received *viva voce* evidence regarding Kelly Cove Salmon Ltd.'s ("the Applicant") application for a lease and license boundary amendment at the Rattling Beach Aquaculture Site #1039 ("the Application"). The Board must now decide whether to approve, or reject, the Application.

2. The Application is contested by Gregory Hemming ("the Intervenor"), who was represented during the Hearing as a formal Intervenor. Additionally, the Board has admitted to the official record of these proceedings two letters from the Kwilmu'kw Maw-klusuaqn Negotiation Office ("the KMKNO"), which challenge the Application.

3. For the most part, the Department of Fisheries and Aquaculture ("the Department") takes no position on whether the boundary amendment Application should be approved or rejected based on the regulatory factors. However, the Department opposes the allegations made by the KMKNO by way of unsworn, pre-hearing correspondence to the Board, that the Application should be rejected on the basis that the Province failed to consult with affected Mi'kmaq communities.

4. These submissions will respond to the KMKNO's allegation that the duty to consult was triggered by the Department's assessment of the boundary amendment Application. In particular these submissions will outline the test for determining whether the duty to consult is triggered, and how that test applies to the evidence before the Board in this case. The primary focus of these submission is on the third part of the duty to consult test: whether the Crown conduct adversely affects an Aboriginal or Treaty right. In particular, these submissions address whether the evidence establishes the potential of a novel adverse impact on an Aboriginal or Treaty right.

5. Before delving into the duty to consult test and evidence, the Department will first reiterate its opposition to the Intervenor being permitted to make submissions on the duty to consult issue.

II Argument

a) Test for Triggering the Duty to Consult

6. The Supreme Court of Canada first established the legal test for deciding whether the duty to consult is triggered in the 2004 case of *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 ("*Haida Nation*"). *Haida Nation* states that the duty to consult arises when "the Crown has knowledge, real or constructive, of the potential existence of [an] Aboriginal right or title and contemplates conduct that might adversely affect it." In the later case of *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43 ("*Carrier Sekani Tribal Council*"), the Supreme Court affirmed and re-stated the test from *Haida Nation* as a three-part analysis. The Supreme Court of Canada requires that each of the three parts in this test must be proven to determine that the First Nations group claiming a right to consultation was in fact owed a duty to consult by the implicated government organization.

Haida Nation at para. 35.
Carrier Sekani Tribal Council at paras. 31 and 39.

7. The three elements of the test set out in *Carrier Sekani Tribal Council* are as follows and each of the test elements must be proven to give rise to the Crown's constitutional duty to consult:

> (1) the Crown must have had knowledge, actual or constructive, of a potential Aboriginal claim or right;
>
> (2) there must have been contemplated Crown conduct; and
>
> (3) there must have been potential for the contemplated Crown conduct to adversely affect an Aboriginal claim or right.

Carrier Sekani Tribal Council at para. 31.

8. The Department states that, based on the requirements of this well-established legal test, the Provincial Crown's duty to engage in consultation with First Nations groups was not triggered by this boundary amendment Application.

9. This conclusion is supported by an application of the facts in evidence, the arguments on record before the Board, and the legal test from *Haida Nation* and *Carrier Sekani Tribal Council*. The Department's submissions explain this assertion with reference to the totality of the relevant evidence, as well as the substantial body of caselaw which has applied and interpreted the test from *Haida Nation* and *Carrier Sekani Tribal Council.* These decisions are authoritative and binding upon all Canadian courts and adjudicative bodies responsible for determining issues related to the duty to consult.

b) Revisiting the Issue of Standing in Duty to Consult Cases

10. The Department maintains its position that the Intervenor has no standing to make submissions on the duty to consult as it has not been delegated the authority to conduct consultations. The Mi'kmaw of Nova Scotia have not delegated administrative authority to the Intervenor to engage in consultations with the Crown on their behalf.

11. The Department respectfully submits that the Board should limit its analysis on the duty to consult to submissions from those who would be party to Crown-Indigenous consultations on the Rattling Beach boundary amendment application, were they to be ordered. That is, the Board should only refer to the KMKNO's letters from August 26th and November 1st, 2021, as well as the submissions on behalf of the Department.

12. The Supreme Court of Canada has stated that s. 35 rights are owed to Aboriginal groups as a collective, and only authorized organizations can represent it for the purpose of asserting its s. 35 rights:

> [30] **The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s.**

> **35 rights, which are collective in nature**: Beckman, at para. 35; Woodward, at p. 5-55. But **an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights**: see, e.g., *Komoyue Heritage Society v. British Columbia (Attorney General)*, 2006 BCSC 1517, 55 Admin. L.R. (4th) 236.
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> [31] **In this appeal, it does not appear from the pleadings that the FNFN authorized George Behn or any other person to represent it for the purpose of contesting the legality of the Authorizations.** I note, though, that it is alleged in the pleadings of other parties before this Court that the FNFN had implicitly authorized the Behns to represent it. As a matter of fact, the FNFN was a party in the proceedings in the courts below, because Moulton was arguing that it had combined or conspired with others to block access to Moulton's logging sites. The FNFN is also an intervener in this Court. **But, given the absence of an allegation of an authorization from the FNFN, in the circumstances of this case, the Behns cannot assert a breach of the duty to consult on their own, as that duty is owed to the Aboriginal community, the FNFN**. Even if it were assumed that such a claim by individuals is possible, the allegations in the pleadings provide no basis for one in the context of this appeal. [Emphasis added]

Behn v. Moulton Contracting Ltd., 2013 SCC 26, at paras. 30-31 ("*Behn v. Moulton Contracting Ltd.*".

13. These statements, from the highest court in the country, are binding on this Board. An individual, like the Intervenor, may only argue that an Aboriginal group's s. 35 right to consultation is triggered if it is authorized by the Aboriginal group to do so. There is no such authorization in evidence before the Board. As a result, the Intervenor should not be permitted to make submissions on this issue.

14. There is no evidence before the Board that the Intervenor is authorized to make submissions on behalf of an Indigenous or First Nations group impacted by the Application. The Intervenor is not a representative, nor even a member of an Indigenous or First Nations group impacted by the Application. Applying the law set out by the Supreme Court of Canada, the Intervenor has no standing to make submission on the duty to consult.

15. Alternatively, the Department states that if the Board permits the Intervenor to submit arguments on the duty to consult, these arguments cannot be determinative upon the

Board's decision on this issue. This is in line with the Supreme Court of Canada's past approach to claimants who raise the duty to consult as an issue, but are not themselves Aboriginal and Treaty rights holders, nor are they the designated legal representatives of such Indigenous and First Nations communities.

16. In the past, the Supreme Court of Canada has prohibited claimants from asserting, on their own, a breach of the Crown's constitutional duty to consult if they are not the legal representative of the Aboriginal group impacted by their claim. The justification provided for this approach is that the Court cannot rely on, or consider, the submissions of an autonomous individual with respect to a constitutional right like the duty to consult. The potential right to consultation from the Crown is a collective, rather than individual, entitlement provided under s. 35 of the Constitution. Courts must therefore determine the existence and scope of the duty to consult having exclusive regard to the submissions of the implicated Aboriginal group or collective, or their designated legal representative. In the words of the Supreme Court of Canada in *Behn v. Moulton Contracting Ltd.*, independents "cannot assert a breach of the duty to consult on their own, as that duty is owed to the Aboriginal community."

Behn v. Moulton Contracting Ltd. at paras. 30-31.
Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53, at para. 35.
2403177 Ontario Inc. v. Bending Lake Iron Group Limited, 2016 ONCA 225 at para. 38-39.
Komoyue Heritage Society v. British Columbia (AG), 2006 BCSC 1517 at para. 35.

17. The issue of Courts and adjudicative decision makers taking the time to ensure that they only consider legal arguments on the duty to consult from s. 35 rights holders or their legal representatives goes to the heart of respecting and fulfilling the Aboriginal and Treaty rights entrenched in the Constitution. Governments carrying out the duty to consult cannot bypass actual Aboriginal groups, or their chosen representatives, to negotiate with independent claimants.

18. Likewise, Courts and adjudicators should not allow such independent parties to influence their decision making with respect to whether the duty to consult has been triggered or fulfilled. Courts and adjudicators, like the Crown, must remain focused on the

submissions of actual s. 35 collective rights holders when determining whether those rights have been triggered.

19. The Supreme Court of Canada's interpretation of s. 35 of the Constitution in *Haida Nation* further supports this position. In that case, the Court describes s. 35 as representing a promise of rights recognition by governments for Indigenous and First Nations societies, to validate such societies' presence and sovereignty from before the arrival of the Crown in Canada. This is the origin of the duty to consult. It is an equal-footed process that recognizes and validates the interests of Aboriginal groups alongside those of the Crown, thereby promoting reconciliation between these two distinct societies.

Haida Nation at paras. 17-20.

20. It follows that where the Crown may be required to carry out such honourable consultations with Aboriginal groups, it must meet with and address the representatives chosen by such groups themselves. And, when Courts or adjudicators consider whether the duty to consult was triggered by specific government conduct, they should rely exclusively on submissions from the concerned, and constitutionally entitled, First Nations groups. The submissions of any other party on the duty to consult should not be determinative of the Board's decision in this matter.

21. The Department points the Board to the following additional decisions on this important matter of constitutional standing. Each of these verdicts points out that independent parties who are not the designated legal representatives of a First Nations group may not claim Crown consultations under section 35 of the Constitution, either for themselves alone or on behalf of a First Nations community: *Behn v. Moulton Contracting Ltd.* at paras. 30-31; *Beckman v. Little Salmon/Carmacks First Nation*, at para. 35; *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, at paras. 38-39; *Athabasca Regional Government* v. *Canada (Attorney General)*, 2010 FC 948 at para. 163; *Komoyue Heritage Society v. British Columbia (AG),* 2006 BCSC 1517 at para. 35; and *Kane* v. *Lac Pelletier*, 2009 SKQB 348 at para. 55.

c) Applying the Test from Haida Nation and Carrier Sekani Tribal Council

22. The KMKNO's letters of August 26 and November 1, 2021, challenge the constitutionality of the Department's review process with respect to the Applicant's boundary amendment application for Rattling Beach. In these letters, the KMKNO relies upon *Haida Nation* in support of its position that the duty to consult applied to the Department's assessment of the Application currently before the Board.

WRT-006, KMKNO Written Statement, November 4, 2021.

23. *Haida Nation* stands for the principle that all governments have a duty to consult with Aboriginal groups when making decisions which may adversely impact established or credible claims of Aboriginal and Treaty rights. Furthermore, as explained above, *Haida Nation* states that performance of consultation by governments is a key component of furthering the goal of reconciliation and fulfilling the constitutional rights of all Aboriginal peoples in Canada.

Haida Nation at para. 20.

24. However, it is well established that the duty to consult is not always engaged by government decision making which stands to impact First Nations peoples. The duty to consult is not automatically triggered by the local presence of a First Nation group in the vicinity of a government project or government-regulated operation. Nor is there a constitutional requirement for the Crown to consult with Aboriginal and Treaty rights holders following the general issuance of a claim that consultation is required.

Haida Nation at para. 35.
Carrier Sekani Tribal Council at para. 31
Behn v. Moulton Contracting Ltd. at para. 29.
Chippewas of the Thames at para. 29.
Pictou Landing First Nation at para. 100.
Mi'kmaq of PEI v PEI (Her Majesty the Queen), 2019 PECA 26 at para. 27.

25. In fact, the principles and legal test introduced by the Supreme Court of Canada in *Haida Nation* and *Carrier Sekani Tribal Council* limits the circumstances in which any duty to consult arises to situations where it has been proven that there is (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

Haida Nation at para. 35.
Carrier Sekani Tribal Council at para. 31.

26. The KMKNO allege that the Department failed to conduct adequate consultations with Aboriginal rights holders in the Annapolis Basin region prior to completing its review of the boundary amendment Application. It is asserted that the Mi'kmaq of Nova Scotia have traditional, and Constitutionally protected interests at Rattling Beach and in the Annapolis Basin in general, which may be engaged by the Application, and, therefore, should have been the subject of Crown consultations prior to this point. Ultimately, it is asserted that the Application stands to adversely impact the Mi'kmaq of Nova Scotia's s. 35 Constitutional rights and therefore cannot move forward until the Department carries out consultation with the KMKNO.

WRT-006, KMKNO Written Statement, November 4, 2021.

27. As explained below, the Department concedes that parts (1) and (2) of the *Haida Nation/Carrier Sekani Tribal Council* test have been met. However, the Department maintains that part (3) of the test has not been proven. There is no potential for the Applicant's boundary amendment Application at Rattling Beach to adversely affect any Aboriginal claim or right. The Department arrives at this conclusion through the application of the Supreme Court of Canada's reasoning in the *Carrier Sekani Tribal Council* case.

i. Step 1: Crown Knowledge of a potential Aboriginal claim or right

28. Meeting the first part of the test from *Haida Nation* and *Carrier Sekani Tribal Council* requires proof that the Department possessed real or constructive knowledge of the KMKNO's claimed constitutional rights at Rattling Beach and in the general Annapolis

Basin region. This part of the test is described by the Supreme Court of Canada as being a "low threshold", with the intention that government entities cannot avoid their constitutional duty to consult through the excuse of a lack of awareness.

Carrier Sekani Tribal Council at para. 40.

29. *Carrier Sekani Tribal Council* defines the terms "actual" and "constructive" knowledge in the following way:

> **41** […] **Actual knowledge** arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.), para. 34. **Constructive knowledge** arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not." [Emphasis added]

30. The Department concedes that there are established Aboriginal rights as articulated by the Nova Scotia Court of Appeal in *R v Denny*, [1990] CanLII 2412 (NSCA), and treaty rights as articulated by the Supreme Court of Canada in *R v Marshall*, [1999] 3 SCR 456 and *R v Marshall*, [1999] 3 SCR 533.

ii. Step 2: Contemplated Crown conduct

31. The second part of the *Haida Nation* and *Carrier Sekani Tribal Council* test is that there be evidence before the Court or adjudicator proving that the alleged adverse impact upon an Aboriginal or Treaty right was caused by some form of conduct contemplated by a government entity. This brings all forms of government decision making, not just the law-making process, into compliance with the constitutional duty to consult.

Carrier Sekani Tribal Council at para. 43.

32. The Department also concedes that this part of the test is met in these proceedings. The Department engaged in a highly thorough, complex, and contemplative review in its processing of the boundary amendment Application.

iii. Step 3: Potential adverse affect on an Aboriginal claim or right

33. The Department's core submissions respecting the duty to consult turn on the third and final part of the *Haida Nation* and *Carrier Sekani Tribal Council* test. This portion of the test requires that the contemplated government conduct at issue must not only have a general impact on the claimed Aboriginal or Treaty right, it requires that the impact of the government conduct must be adverse, or harmful, to the claimed Aboriginal right. Further, the adverse effect of the government conduct must be novel, or new, in the context of the claim.

34. The boundary amendment Application for Rattling Beach will have no novel adverse impact on the KMKNO, nor any Aboriginal and Treaty rights holders in the vicinity of Rattling Beach. Once again, this is established by applying the Supreme Court of Canada's binding instructions for determining what amounts to an "adverse affect on an Aboriginal claim or right". In the absence of any evidence or information from the KMKNO as to how the implicated boundary amendment adversely impacts Aboriginal and Treaty rights in a novel way, the Board can only rely upon the relevant evidence and information submitted during the Hearing in these proceedings.

35. Below, the Department first explains how the manner in which the KMKNO has presented their claim in this case lacks clarity and evidence. Second, the Department explains the Supreme Court of Canada's instructions for determining what amounts to a "novel adverse impact" on an Aboriginal claim or right. Secondly, the Department highlights the evidence which has been presented to the Board and which supports the Department's submission that the Application does not adversely impact the Aboriginal and Treaty rights of the KMKNO and its members in any novel way.

1 The KMKNO's Claims to the Board Lacks Clarity and Evidence

36. Although the Department concedes that it has knowledge of established Aboriginal and Treaty rights, the manner that the KMKNO has chosen to present detail of their claims, in unsworn correspondence, to the Board is deeply problematic. A failure to precisely describe and substantiate the rights engaged may negatively impact the Board's ability to determine whether the right has been impacted under the third part of the test of whether the duty to consult is triggered. Clarity, precision, and evidence is needed for the Board to undertake the necessary analysis of whether a right has been adversely affected. As a result, it is necessary to point out the lack of specificity in the KMKNO's description of its claims involving Rattling Beach and the surrounding area.

37. The Supreme Court of Canada has historically required more detail from Aboriginal rights claimants at this first stage of the duty to consult analysis than the KMKNO has provided to the Board. The Supreme Court of Canada has always required practical clarity from Aboriginal claimants' submissions, as well as evidence that the claimants' allegations are based on existing rights which really do stand to be affected.

38. To this effect, in *Carrier Sekani Tribal Council,* the Supreme Court of Canada describes the first part of the test for determining whether a duty to consult has been triggered. After defining the terms "actual" and "constructive" knowledge, the Court discusses the characteristics of Aboriginal claims that government entities may become aware and, therefore, which lead to the Crown's duty to consult being engaged. The Court states:

> "What is required is **a credible claim**. Tenuous claims, for which a strong *prima facie* case is absent, may attract a mere duty of notice
>
> **The claim or right must be one which actually exists and stands to be affected** by the proposed government action. This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed [...]" [Emphasis added]
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> *Carrier Sekani Tribal Council* at paras. 40-41.

39. The Supreme Court of Canada also discussed the assessment of the requirement that government have knowledge of an Aboriginal rights claim to trigger the duty to consult in *Haida Nation*:

> "As I stated (dissenting) in Marshall, supra, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right **unless one has some idea of the core of that right and its modern scope**". However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. **To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements**." [Emphasis added]

Haida Nation at para. 36.

40. Both of these passages demonstrate how a conclusion that the Crown's duty to consult was triggered and should have been performed must be based upon the judicial or adjudicative decision maker determining that the Crown possessed knowledge of a clear, specific, and factual description of the allegedly impacted Aboriginal or Treaty right.

41. The KMKNO's letters to the Board do not clearly describe the protected Aboriginal rights it claims will be adversely impacted by approval of the Applicant's aquaculture license boundary amendment. For example, the KMKNO has not, with any clarity, explained where the impacted Aboriginal fishing takes place, what species are fished, who is carrying out this fishing, or any other operational details about the constitutionally protected Aboriginal fisheries which it says exist at or near Rattling Beach.

42. Furthermore, the KMKNO is vague in its description of the archeological and cultural rights which it claims may be adversely impacted by approval of the Applicant's license boundary amendment request. The KMKNO states that the Mi'kmaq of Nova Scotia possess an "intense and multifaceted relationship" with Rattling Beach, as demonstrated by the Mi'kmaq's use of this location for traditional cultural practices such as porpoise harvesting and summertime camping. However, the KMKNO similarly have not provided

a clear and practical description of these traditional cultural practices which take place at Rattling Beach. The KMKNO's correspondence to the Board does not disclose where these traditional practices are carried out, their frequency, the magnitude of people who are engaged in them, nor any other clear information about these traditional practices. No expert evidence on these practices was presented, as would usually be required.

WRT-006, KMKNO Written Statement, November 4, 2021.

43. The uncertainty created by the KMKNO's vague assertions of existing Aboriginal claims on Rattling Beach and the surrounding area is amplified by evidence provided to the Board during the Hearing in this matter. During direct examination on November 15, 2021, Jeffery Nickerson ("Mr. Nickerson"), Business Development Manager for the Applicant, informed the Board that the rough and rocky shoreline of Rattling Beach is highly unsuitable and inhospitable for camping during any season of the year. Mr. Nickerson stated that he is unaware of any camping that has taken place at Rattling beach during his twenty years involvement with aquaculture operations at that location. Furthermore, upon his cross examination, Mr. Nickerson stated that during Kelly Cove Ltd.'s fifteen-year presence at Rattling Beach, the company had never documented any interactions, either "positive" or "negative", with a harbour porpoise.

44. Mr. Nickerson's testimony does not absolutely negate the KMKNO's claims. However, the evidence he provided highlights the uncertainty and lack of factual clarity which exists around the KMKNO's submission that the Department's failed to consult with impacted Aboriginal rights holders. Binding precedent in this complex area of law requires that Indigenous and First Nations claimants be responsible for outlining their claims with "clarity" and with "credibility" (which the Department interprets as having an evidentiary foundation) such that both Courts and administrative adjudicators, as well as governments, may acquire adequate knowledge of the implicated Aboriginal rights which may give rise to the duty to consult.

Carrier Sekani Tribal Council at paras. 40-41.
Haida Nation at para. 36.

45. The Department accepts that it has knowledge of the KMKNO's constitutional claims to Rattling Beach and the surrounding Digby Gut and Annapolis Basin region *in general* with respect to Aboriginal and Treaty rights as established in the caselaw. However, the Department points the Board to the requirements set out in caselaw about what information must be provided by First Nations claimants to support that they were owed consultation by the Crown respecting any kind of government conduct. The Department asserts that the KMKNO has not outlined its claims to the Board in these proceedings with either clarity, as required by the decision in *Haida Nation,* nor evidence, as required by the decision in *Carrier Sekani Tribal Council*. Both clarity and evidence are necessary aspects of any First Nations claim for performance of the Crown's duty to consult.

2 The legal meaning of "novel adverse impact"

46. In *Carrier Sekani Tribal Council,* the Supreme Court of Canada addressed head on the debate of whether First Nations claimants may challenge and defeat major public works or ongoing industrial projects by alleging that the duty to consult was not fulfilled for discrete, procedural decisions falling under the broad administrative umbrella of those projects. The Court referred to such projects, which are opposed by First Nations claimants, as potential "underlying or continuing breaches" to Aboriginal and Treaty rights. The Court found that underlying or continuing breaches do not amount to the specific adverse impacts that must be proven anew on every occasion in which it is claimed that the Crown's duty to consult has been triggered.

Carrier Sekani Tribal Council at para. 48.

47. In *Carrier Sekani Tribal Council*, the underlying breach identified by the Supreme Court of Canada was the contested presence of Rio Tinto Alcan Inc.'s hydro electricity plant in the British Columbia Nechako River Valley. The Indigenous claimant in that case had never been consulted on the licensing of the power plant, which was issued during the 1950s. The claimant exercised constitutionally protected fishing rights in the Nechako River. When, in 2007, the government of British Columbia renewed its Electricity

Purchase Agreement ("EPA") with Rio Tinto Alcan Inc., the claimant, Carrier Sekani Tribal Council, applied to that province's Utilities Commission to have the government's EPA with Rio Tinto Alcan Inc. completely invalidated.

Carrier Sekani Tribal Council at paras. 3-6.

48. The basis for this application was that the provincial Crown had failed to engage in proper consultations with the Carrier Sekani Tribal Council prior to entering the agreement. Nevertheless, the British Columbia Utilities Commission, and later the Supreme Court of Canada, found that the province's decision to renew its EPA with Rio Tinto Alcan did not introduce a novel adverse impact upon the constitutional rights of the Carrier Sekani Tribal Council. Indeed, both the administrative decision maker and this country's highest court concluded that the Crown's duty to consult with the implicated First Nations claimant had not been triggered.

49. In describing the third element of the test for triggering the duty to consult, the Supreme Court stated the claimant must show a "causal relationship" between the proposed Crown conduct and the potential adverse impacts:

> [45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a **causal relationship** between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. **Past wrongs, including previous breaches of the duty to consult, do not suffice.**
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> [46] Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). **Mere speculative impacts, however, will not suffice**. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must an "**appreciable adverse effect on the First Nations' ability to exercise their aboriginal right**". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice. [Emphasis added]

50. The key passage in *Carrier Sekani Tribal Council* establishing the "novel adverse impact" requirement is at paragraphs 48-49 of that decision. Here, the Court stated that:

> 48 An underlying or continuing breach, while remediable in other ways, **is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult**. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.
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> 49 The question is **whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question**. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult **if the present decision has the potential of causing a novel adverse impact on a present claim or existing right.** This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — **a contemplated Crown action must put current claims and rights in jeopardy**. [Emphasis added]
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> *Carrier Sekani Tribal Council* at paras. 48-49.

51. These paragraphs convey additional evidentiary requirements within the words "adverse impact". As expected, government conduct must introduce a negative or harmful change to an existing Aboriginal or Treaty right for the duty to consult to be triggered. However, that change must also be "novel", or new in the specific context of the current government conduct that triggered the change. In summary, there must be evidence of a causal connection that shows the Crown conduct could cause the novel adverse impact.

52. For example, consider another landmark decision of the Supreme Court of Canada respecting the duty to consult, *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 ("*Chippewas of the Thames*"). This case involved the National Energy Board's approval of Enbridge Pipelines Inc. using an existing oil pipeline to transfer a new and increasingly toxic kind of oil, in an increased volume,

across the claimant First Nation's treaty-protected lands. The Chippewas of the Thames First Nation objected to this project's approval on the basis that the planned crude oil transportation posed a novel adverse risk to the soil and waterbeds on its territory, potentially violating its constitutionally-protected rights to the exclusive use and enjoyment of its land.

Chippewas of the Thames at paras. 1-6.

53. In the *Chippewas of the Thames* case, the National Energy Board conceded that the Crown's duty to consult had been triggered due to the obvious novel adverse characteristics of the new crude oil transfer it had decided to permit.

Chippewas of the Thames at para. 31.

54. Similarly, in the more recent case of *Nova Scotia (Aboriginal Affairs) v Pictou Landing First Nation*, 2019 NSCA 75 ("*Pictou Landing First Nation*"), the Nova Scotia Court of Appeal also found that the Crown's Duty to Consult was triggered due to the presence of a new and harmful impact to the Pictou Landing First Nation's constitutionally protected rights.

Pictou Landing First Nation at para. 131.

55. This case arose in the context of the Nova Scotia government's response to the controversial and long-standing pollution of Boat Harbour at Abercrombie Point, in Pictou Landing. Northern Pulp Nova Scotia Corp. had operated a pulp mill in this location for more than fifty years, discharging chemical effluent into the surrounding waters and air. From 1967 to 2019, the fluid effluent emissions had been collected and processed at the Boat Harbour Effluent Treatment Facility, which was owned by the Provincial government and leased for operation to Northern Pulp Nova Scotia Corp. This facility neighbored the Pictou Landing First Nation, whose members relied on Boat Harbour for their water supply.

Pictou Landing First Nation at paras. 1-5.

56. In 2019, the provincial government agreed to close the Effluent Treatment Facility at Boat Harbour. It did so by enacting the 2019 *Boat Harbour Act,* S.N.S. 2015, c. 4, which decreed that all use of the facility must cease after January 30, 2020. It later became public that the Province had begun new plans with Northern Pulp Nova Scotia Corp. to fund the construction of another Effluent Treatment Facility that would allow the company's pulp mill to continue operating. The Pictou Landing First Nation consequently applied to the Courts for a ruling that the Crown's duty to consult had been triggered by the Province's decision to participate in funding the new pulp mill at Boat Harbour. By way of response, the Province argued that the contemplated new Effluent Treatment Facility would not amount to a "novel" adverse impact due to the years of chemical effluent treatment which had already occurred at this location.

57. In the end, both the Nova Scotia Supreme Court and Nova Scotia Court of Appeal agreed: the new Effluent Treatment Facility project plan introduced a novel adverse impact upon the constitutionally protected interests of the Pictou Landing First Nation. The Court of Appeal deemed that the *Boat Harbour Act*'s absolute moratorium upon chemical effluent treatment at Boat Harbour had established a new legal baseline, where any treatment above the statutory prohibition would amount to a "novel" amount of chemical treatment in that location. The Court of Appeal then found that the Province's plans to provide funding for a new Effluent Treatment Facility, where chemicals would inevitably be treated and emitted into the nearby air and water, would deviate from the statutory prohibition of chemical effluent treatment in the *Boat Harbour Act.* Hence, it ruled that the Crown's duty to consult had been triggered in these circumstances.

Pictou Landing First Nation at paras. 162-164.

58. *Carrier Sekani Tribal Council, Chippewas of the Thames,* and *Pictou Landing First Nation* each demonstrate that the Crown's duty to consult will only be triggered when there is evidence that the contemplated government conduct causes a truly novel adverse impact upon Aboriginal and Treaty rights holders. These cases also reinforce the other side of the duty to consult test, which is that contemplated government conduct will not

engage the duty to consult if it merely maintains the status quo operation of an ongoing or historical project that the First Nations claimant seeks contemporary consultation for.

Carrier Sekani Tribal Council at paras. 52-53.
Chippewas of the Thames at paras. 41-42.
Pictou Landing First Nation at para. 118.

59. *Carrier Sekani Tribal Council* first established that the duty to consult is not triggered by currently contemplated government conduct that is related to an ongoing or historical activity impeding First Nations claimants' ability to exercise their s. 35 constitutional rights. *Carrier Sekani Tribal Council* directly identifies and addresses this limitation upon when and how the duty to consult may be triggered. The Court explains that:

> 52 The respondent's submissions are based on a broader view of the duty to consult. It argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. **The effect of this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. The current government action or decision, however inconsequential, becomes the hook that secures and reels in the constitutional duty to consult on the entire resource.**
>
> 53 I cannot accept this view of the duty to consult. *Haida Nation* negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. **It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the current decision under consideration.**" [Emphasis added]

Carrier Sekani Tribal Council at paras. 52-53.

3 There is No Novel Adverse Impact Raised by the Application in These Proceedings

60. The Board must determine whether the Application gives rise to the Crown's duty to consult with implicated Aboriginal and Treaty rights holders. The Department submits

that there is no evidence presented to the Board that the Applicant's boundary amendment will cause a novel adverse impact upon the implicated First Nations claimants' constitutionally protected rights. The totality of the evidence before the Board discloses no indication of any changes in the Applicant's operations and impact upon the surrounding area, were its boundary amendment request to be approved.

61. Each of the three parties who participated in these proceedings called witnesses before the Board whose evidence supports the conclusion that the Applicant's boundary amendment application will introduce no novel adverse affects upon access, activity, or archeological heritage at Rattling Beach or the surrounding area. The Department specifically points to the evidence of Jefferey Nickerson and Jennifer Wiper, for the Applicant; Nathaniel Feindel, for the Department; and Jonathan Carr, for the Intervenor, in support of this position.

a. Evidence Submitted by the Applicant

62. On November 15, 2021, the Board heard extensive evidence from Mr. Nickerson about the operational impact of his company's requested boundary amendment application. Subsequently, the Board heard from Jennifer Wiper ("Ms. Wiper"), Manager of compliance and certification at Kelly Cove Salmon Ltd. Ms. Wiper spoke in detail about the Applicant's Standard Operating Procedure for managing "interactions" with other users of the public waters surrounding the aquacultural operation at Rattling Beach. The other users Ms. Wiper testified about included both human and wildlife users of the waters in the Digby Gut surrounding Rattling Beach.

63. The Applicant's witnesses indicated that there will be no change to the industrial, commercial, or biological output of the aquaculture operation at Rattling Beach were its boundary amendment to be approved. Mr. Nickerson and Ms. Wipers' evidence refutes the possibility that the Applicant's lease boundary expansion would introduce novel

adverse impacts upon Rattling Beach and/or the surrounding area. Hence, their evidence supports the Department's conclusion that this application did not trigger the Crown's duty to consult with impacted Aboriginal and Treaty rights holders.

64. Had the KMKNO participated in the Hearing process as an Intervenor, as it was invited in good faith to do, the Board may have had the opportunity to receive more direct evidence about the potential adverse impacts of the Applicant's formal boundary extension on its members' Aboriginal and Treaty rights. Indeed, the Department invited the KMKNO to become an Intervenor and provide such information. However, the KMKNO declined this invitation to participate in these proceedings. Now the Board must consider whether the application under review poses a novel risk of adversely impacting the interests of Aboriginal and Treaty rights holders in Nova Scotia. The Board is bound to do so based on solely the evidence and information on record in these proceedings.

i. The application does not change or expand the Applicant's operations

65. Mr. Nickerson informed the Board that, while the sought-after boundary amendment approval increases the size of the Applicant's aquaculture lease and license at Rattling Beach on paper, it will result in no changes to infrastructure or stock at its finfish farm in that location. He explained that the Applicant has occupied the geographic footprint of its boundary amendment Application for nearly two decades, since 2004. Hence, if the Board approves the Application, there will be no changes to any of the following industrial characteristics of the Rattling Beach aquaculture site: (1) the type or magnitude of equipment used, (2) the species of salmon harvested, (3) the methods used for harvesting fish, (4) the Applicant's annual fish yield, nor (5) the overall structure of the Applicant's fish farm.

66. This evidence proves that the Applicant is not seeking its boundary amendment to expand its operation. No expansion in these circumstances also means no change to the effects of the Applicant's operation upon its surroundings, including the health and availability of

the wild fish populations that nearby fisheries rely upon for sustenance and livelihood. This includes whatever fish populations are harvested by First Nations fishers in the Annapolis Basin. Contrary to the KMKNO's assertions, there is no evidence of a novel adverse impact upon its members' Treaty protected fishing activities in this area.

ii. The application does not introduce any new restraints on access to Rattling Beach and the surrounding waters

67. Mr. Nickerson also addressed how the Applicant's aquaculture operation impacts access to Rattling Beach and public use of the surrounding area. Mr. Nickerson informed the Board that, while the aquaculture infrastructure at Rattling Beach goes all the way to the outer boundary of its requested lease line, the operation does not impede any access to the area. The Board was informed by Mr. Nickerson, as well as by Nathaniel Feindel on the next day, that there are numerous, thriving fisheries, including constitutionally protected Aboriginal fisheries, in the Digby Gut area with which the Applicant successfully shares its waters. Moreover, Mr. Nickerson submitted that no one is blocked from accessing, and if desired, camping upon, the actual shores of Rattling Beach.

68. In his sworn evidence to the Board, Mr. Nickerson established that this open access will be maintained by the Applicant on a go forward basis. To this effect, Mr. Nickerson stated that the Applicant is, and has been recognized, as a cooperative, rather than adverse, member of the fishing and public marine community in this location since its establishment nearly two decades ago. And, because the sought-after boundary amendment introduces no changes to the magnitude of the Applicant's operation at Rattling Beach, Mr. Nickerson stated, there is no reason to assume that any of its neighbors will be adversely impacted by its approval in the future.

iii. The application does not introduce new risks for wildlife, particularly harbour porpoises

69. Ms. Jennifer Wiper, the Applicant's second witness, provided additional information about the Applicant's interactions with outside users of the waters surrounding Rattling Beach. Ms. Wiper was called to specifically address whether and how the Applicant interacts with wildlife in the area, and in particular, at-risk wildlife species.

70. The effect of Ms. Wiper's testimony is clear. The Board heard that the Applicant has crafted, and implemented, a complex Wildlife Interaction Plan for mitigating its encounters with species at risk and ensuring, as best as possible, that such species are not adversely impacted by its aquaculture operation. In particular, Ms. Wiper informed the Board that the Applicant has never had a "negative" interaction with a harbour porpoise at Rattling Beach. However, were a harbour porpoise to even be sighted from the aquaculture farm in this location, the Applicant's Standard Operating Procedure for Wildlife Interactions dictates that it would notify the local coastguard and take measures so as not to harm that animal.

71. Ms. Wiper's testimony demonstrates that the Applicant's operation has put in place risk mitigation strategies to avoid adversely impacting the wildlife species that the KMKNO has expressed concern for in its correspondence to the Board. The Department submits that there will always be some underlying risk of adverse environmental impacts upon such species in the Annapolis Basin. However, there is no evidence to suggest that the Applicant's boundary amendment Application introduces a novel adverse impact upon such species' survival in this region. Consequently, the KMKNO's concerns of this nature are unfounded and do not suffice to trigger Crown-Indigenous consultations on the Applicant's boundary amendment Application.

iv. The application does not introduce any changes to the potential for retrieving archeological heritage from Rattling Beach and the surrounding area

72. The Applicant's witnesses testified about the potential for archeological excavation at Rattling Beach. The Department once again underlines that the Applicant's evidence on this subject is the only concrete information which the Board has heard or received about

the potential archeological significance of this location. There is, simply put, no evidence on record which supports the KMKNO in its assertion that there is archeological heritage at Rattling Beach which stands to be impacted by the Applicant, nor that the Applicant's sought after boundary amendment introduces novel adverse impacts upon any such archeological remains.

73. On the contrary, the Board heard from Mr. Nickerson that the Applicant completed a comprehensive public scoping as part of its boundary amendment Application preparation. As part of this scoping process, the Applicant consulted with the Nova Scotia Museum, the province's dedicated institution for recovering and preserving significant natural, paleontological and archaeological sites. The Nova Scotia Museum informed the Applicant that Rattling Beach is not known to be a site of significant archeological importance. Mr. Nickerson stated that the sea floor at and surrounding Rattling Beach has been dredged by scallop fishers for multiple decades, resulting in the likely destruction of any significant archeological heritage years before Kelly Cove Salmon Ltd.'s arrival in this location.

74. This evidence refutes the KMKNO's characterization of Rattling Beach as a likely source for retrieving untouched artefacts and archeological remains relating to the Mi'kmaq of Nova Scotia's historical and traditional presence there. Moreover, it supports the conclusion that formalizing the Applicant's license boundary amendment would not increase the risk of harm or degradation to potential archeological remains at or around this location. As such, the Department submits, there is no novel adverse impact posed by the Applicant's requested boundary amendment. And, there is no resulting duty to consult triggered on the part of the Crown by this application.

b. Evidence submitted by the Department

75. On the second day of the Hearing, November 16, 2021, the Department called Nathaniel Feindel ("Mr. Feindel"), Manager of Aquaculture Development and Marine Plant

Harvesting in the Department of Fisheries and Aquaculture. Mr. Feindel was a leader on the provincial government's regulatory review team assigned to assess the Application for a boundary amendment.

76. Mr. Feindel exhaustively explained the procedures that the Department's review team employed during its processing of the Application. He informed the Board that the Department's entire review process is structured to ensure that finfish farms are not approved unless they meet numerous statutory requirements and regulations for environmentally sound aquaculture operations. Mr. Feindel explained that the objective of this review process is to prevent aquaculture operators, as much as possible, from adversely and irreparably changing the natural environments that they are licensed to operate within.

77. Mr. Feindel explained that the Department engages in a lengthy Network Consultation process during its review. This process involves seeking specialized input from a wide range of provincial, and federal government agencies, whose mandates overlap with the Department's licensing of aquaculture operators in Nova Scotia. One of the Network Partners consulted is the federal Department of Fisheries and Oceans ("the DFO").

78. The DFO is mandated to execute and uphold the *Fisheries Act,* the *Species at Risk Act,* the *Oceans Act* and all applicable regulations under those statutes. The DFO was consulted during the Network Consultation stage of this Application to assess whether the Applicant's boundary amendment would harmfully impact the wild animal populations present in the surrounding area or introduce new adverse effects upon the natural habitats of those populations. As stated in the DFO's Letter of Advice to the Department on October 11, 2019, its role in the application review process was to: "assess the deposit of deleterious substances; serious harm to fish or fish habitat; and the killing, harming, or harassing of aquatic species listed under SARA and the destruction of their critical habitat."

2021-001-13-C, AQ#1039 Report on Consultation, Tab A, at p. 24.

79. Mr. Feindel walked the Board through the DFO's assessment of the Applicant's boundary amendment Application, including its October 2019 Letter of Advice, a 62-page Science Report from the Canadian Science Advisory Secretariat ("the CSAS Science Report"), and a follow-up, Addendum Letter of Advice dated December 1, 2020. Each of these documents concludes that while there is always natural risk to some of the wildlife populations which reside at or around Rattling Beach and the surrounding Annapolis Basin, the Applicant's requested license boundary amendment posed no significant increase to those risk levels. The DFO's advice included assessments of all SARA-listed species, shellfish and finfish populations harvested by nearby fisheries, wild Atlantic Salmon populations in the area, and harbour porpoise. That is, the DFO's scientific review considered the potential risks and impacts of the Application upon all the marine species that the KMKNO has issued concern for in its correspondence to the Board.

2021-001-13-C, AQ#1039 Report on Consultation, Tab A, at p. 24-30, 33-94, 118-120.

80. Mr. Feindel confirmed for the Board that the Department relied upon the contents of these advisory documents from the DFO to base its own specific conclusions on the risk involved with approving the Applicant's boundary amendment. The Department interpreted the DFO's advice as meaning that this application does not introduce any new, or novel, adverse impacts upon the wild Atlantic salmon population of the Annapolis Basin, nor would it adversely affect the supply of wild fish harvested by nearby fisheries, including the constitutionally protected Aboriginal fisheries which operate near Rattling Beach. This assessment is both sound and uncontroversial, not only because it is based on the thorough scientific analysis performed by the DFO, but also because the Application does not involve any actual operational expansion of the Rattling Beach aquaculture site.

81. It is worth highlighting in these submissions that the Department followed up with the DFO after receiving the federal agency's first Letter of Advice and attached CSAS Scientific Report. The Department followed up with several clarifying questions to be

sure in its official interpretation of DFO's report on the risks to wild species and species habitats which may be introduced by the formal expansion of the Applicant's aquaculture license. The Department particularly wanted to establish certainty with respect to the DFO's use of the phrase "serious residual risk" in its first Letter of Advice and CSAS Scientific Report.

2021-001-13-C, AQ#1039 Report on Consultation, Tab A, at p. 104-113.

82. Mr. Feindel explained before the Board how the phrase "serious residual risk" had been used by the DFO: The DFO reported that there remained some "serious residual risks" to wildlife species in the Annapolis Basin, tied to the presence of aquaculture operations, after its accounting of the Department's and the Applicant's risk mitigation systems. Mr. Feindel testified that, considering the serious implications of this statement upon its review of the Applicant's operation at Rattling Beach, the Department wanted to be sure of the DFO's exact meaning with respect to these "serious residual risks". It followed up, prompting the DFO to provide its second Addendum Letter of Advice in December 2020.

2021-001-13-C, AQ#1039 Report on Consultation, Tab A, at p. 118-120.

83. The Board has now had the opportunity to both review the DFO's Addendum Letter of Advice to the Department and to hear Mr. Feindel' s explanation of this document. The DFO's follow up letter stated with explicit clarity that its reference to residual risks in the waters surrounding Rattling Beach did not mean that, despite the Applicant's investment and implementation of complex risk mitigation procedures, its Rattling Beach aquaculture operation poses novel risks to marine wildlife species in the Annapolis Basin. To this effect, the DFO's Addendum Letter of Advice stated, "[i]f DFO had concluded that additional risk treatment was needed," with respect to Rattling Beach, "it would have been stated in the [original] letter of advice."

2021-001-13-C, AQ#1039 Report on Consultation, Tab A, at p. 119.

84. Mr. Feindel explained to the Board how the Department interpreted these comments. He explained that the DFO, like the Department of Fisheries and Aquaculture, acknowledges there will always be some degree of risk flowing from the aquaculture industry's

operation in locations adjacent to marine wildlife species. However, the aquaculture operation in question in these proceedings does not introduce any additional, novel adversities to such wild populations, according to the DFO.

85. Mr. Feindel's evidence demonstrates that the third branch of the Supreme Court of Canada's duty to consult test from *Haida Nation* and *Carrier Sekani Tribal Council* is not satisfied in the context of the Applicant's boundary amendment Application. No novel risks to nearby wildlife species means that the Application under consideration in these proceedings introduces no novel adverse impacts to protected Aboriginal fisheries and the availability of traditional wildlife harvesting at or around Rattling Beach. Formally amending the Applicant's aquaculture lease and license boundary for Rattling Beach will not change the status quo for wildlife species in the vicinity, nor those who rely upon such species for sustenance, livelihood, and tradition. This includes any individuals who are entitled to these pursuits under s. 35 of the Constitution.

c. Evidence Submitted by the Intervenor

86. Finally, the Department refers to the evidence of Jonathan Carr ("Dr. Carr"), on behalf the Intervenor in these proceedings. Dr. Carr testified that there is substantial uncertainty around the true impact of salmon aquaculture on the health and flourishing of wild Atlantic salmon. Consequently, Dr. Carr advocated for the implementation of wild salmon monitoring in Nova Scotia's rivers prior to the approval of the Applicant's boundary amendment Application.

87. Dr. Carr's testimony about the general risks of salmon farms to wild salmon populations in Nova Scotia cannot be legitimately relied upon to establish that the application in these proceedings will introduce novel adverse impacts upon the Aboriginal and Treaty rights which are entrenched in the Constitution. As described, the Department's review and processing of the Applicant's boundary amendment utilized scientific information from its own qualitative and quantitative studies, as well as similarly thorough reports from its

wide array of Network partners. Each of these reports concluded that the specific application in question does not introduce novel risk to the environment and the species at Rattling Beach and in the general Annapolis Basin area.

88. Over the course of Dr. Carr's testimony before the Board, his conclusions and credibility as an assessor of the Applicant's boundary amendment request were both challenged and undermined. Dr. Carr's expert report on this subject, which states that it is reasonable to conclude that the Applicant's formal boundary expansion will have negative impacts on the local wild salmon population, was shown to have been primarily based on studies and research from outside of Canada. More importantly, it was demonstrated that the research Dr. Carr submitted as relevant to the Board's decision in these proceedings originates in and concerns sectors of the international aquaculture industry which are different in nature and in regulatory structure from that which exists in Nova Scotia. Dr. Carr's main evidence was therefore undermined as not relevant or instructive for the Board in these proceedings.

89. On the surface, and as framed by the Intervenor, Dr. Carr's evidence had the potential to support the KMKNO's assertions about the environmentally risky and constitutionally perilous character of the Department's decision to approve the Applicant's requested boundary expansion. Indeed, Dr. Carr was the one source of evidence suggesting a factual basis for the possibility that the Applicant's requested boundary amendment will have a possible continued harmful effect upon its surroundings. However, it was shown during the Hearing that there is no explicit evidence, either originating from Dr. Carr's own research or from that of other experts in his field, supporting the claim that approval of the Application will increase the risk of harm and population decline amongst the wild Atlantic salmon population.

III Conclusion

90. The decision before the Board on whether the duty to consult is triggered, requires an application of the above evidence to a longstanding and affirmed body of caselaw from the Supreme Court of Canada and the Nova Scotia Court of Appeal. The Courts have repeatedly established that the Crown's duty to consult with Aboriginal and Treaty rights holders under the Constitution is only triggered in specific circumstances: when "the Crown has knowledge, real or constructive, of the potential existence of [an] Aboriginal right or title and contemplates conduct that might adversely affect it." This legal test for when the duty to consult may be triggered is further expressed as a three-part analysis, each branch of which must be proven before it is settled that the implicated government entity owed a constitutional duty to consult with First Nations claimants.

Haida Nation at para. 35.
Carrier Sekani Tribal Council at para. 31.

91. The Department concedes that the first two parts of this test have been met. However, the evidence provided during these proceedings does not establish that the Crown's duty to consult was triggered. To find the duty to consult was triggered, the Board would have to find that the requested boundary amendment introduced some novel adverse impact upon constitutionally protected Aboriginal and Treaty rights or claims. The Department has outlined that there is no information, or evidence, on record from these proceedings which would satisfy this strict legal requirement.

92. Indeed, despite having been expressly invited to do so by the Department of Fisheries and Aquaculture, the First Nations claimant which has participated in this process has refrained from providing the Board with factual information, or any evidence, in support of its claim to consultation on this application. The information which has been presented by the KMKNO in its letters to the Board is unsworn and vague. This in and of itself is contrary to the caselaw, which requires that First Nations litigants define their claims under the Constitution with clarity and evidence.

93. During the Board Hearing process, it was stated that the application for boundary amendment which is currently under review is an "expansion on paper" which will have

no altering impact upon the surrounding environment. Neither the Applicant's human or wildlife neighbors will feel the effects of the boundary amendment; there will be no novel adverse impact upon Rattling Beach and the Annapolis Basin. By extension, there is no novel adverse impact upon Aboriginal and Treaty rights tied to the natural resources at this location – from the wild marine species relied upon by nearby Aboriginal fisheries, to the potential cultural heritage which may be accessed and recoverable in the area.

94. The Board's task in this application is not to decide upon the legitimacy of salmon aquaculture in this Province. The Board must decide whether to approve or reject the boundary amendment Application based on the s. 3 factors set out in the Regulations. Apart from the factors in the Regulations, the Board must also decide whether the boundary amendment Application triggered the Crown's duty to consult. The Department submits, on the basis of the written and oral evidence presented, that the duty to consult is not triggered in the unique context of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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per

Caitlin Menczel
Articled Clerk

AUTHORITIES