FORM 301 Rule 301

Court File No: T-70-15

FEDERAL COURT

BETWEEN:

THE AHOUSAHT, EHATTESAHT, HESQUIAHT, MOWACHAHT/MUCHALAHT, and TLA-O-QUI-AHT INDIAN BANDS and NATIONS

AND:

MINISTER OF FISHERIES AND OCEANS

NOTICE OF APPLICATION

TO THE RESPONDENT: MINISTER OF FISHERIES AND OCEANS

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at 701 West Georgia Street, Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa *(telephone 613-992-4238)* or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

January 15, 2015

Issued by: Minichiello
(Registry Officer)

VISHVA MINICHIELLO
REGISTRY OFFICER
AGENT DU GREFFE

00997954-3

Address of
local office:_____
Federal Court
Pacific Centre - P.O. Box 10065
701 West Georgia Street
Vancouver, B.C.V7Y 1B6

TO: Minister of Fisheries and Oceans Canada
c/o The Department of Justice
Attorney General of Canada
900-840 Howe Street
Vancouver, BC V6Z 2S9

APPLICATION

This is an application for judicial review in respect of a decision of the Minister of Fisheries (the "**Minister**") dated December 16, 2014 and communicated to the Applicants on Wednesday, December 17, 2014 authorizing a commercial roe herring fishery on the West Coast of Vancouver Island ("**WCVI**") for 2015 (the "**Decision**").

The Applicants make application for:

1. A declaration pursuant to section 18(1)(a) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and section 35(1) of the *Constitution Act, 1982*, that the Decision is:

    a. a breach of Canada's duty to consult and negotiate with the Applicants in respect of the manner in which the Applicants' aboriginal rights to fish and sell can be accommodated and exercised without jeopardizing Canada's legislative objectives and societal interests in regulating the fishery;

    b. a breach of Canada's duty to accommodate the Applicants' established aboriginal rights to fish and sell fish;

    c. a breach of the trust-like or fiduciary duty owed by Canada to the Applicants as aboriginal rights holders; and

    d. unconstitutional as contrary to the honour of the Crown;

2. An order pursuant to section 18.1(3)(b) of the *Federal Courts Act* quashing or setting aside the Decision;

3. An interim or interlocutory injunction pursuant to Rule 373(1) of the *Federal Courts Rules* enjoining the Minister, a Regional Director-General or a Fishery Officer from opening a commercial roe herring fishery on the WCVI or, in the alternative, in Pacific Fisheries Management Areas 24 and 25 pursuant to the *Fishery (General) Regulations* SOR/93-53, ss. 6(1) and (2) and the *Pacific Fishery Regulations,* SOR/93-54 until either:

    a. final disposition of BC Supreme Court Action S033335 (Vancouver Registry); or

b. agreement of the Applicants;

4. An order of prohibition or an injunction pursuant to sections 18(1)(a) and 18.1(3)(b) of the *Federal Courts Act*, prohibiting or enjoining the Minister, a Regional Director-General or a Fishery Officer the Minster from opening a commercial roe herring fishery on the WCVI or, in the alternative, in Pacific Fisheries Management Areas 24, 25 and 26 pending hearing of this Application for Judicial Review;

5. Costs; and

6. Such further and other relief as this Honourable Court considers just.

The grounds for the application are:

A. OVERVIEW

1. The Applicants are five Nuu-chah-nulth First Nations located on the WCVI who have established aboriginal rights to fish any species of fish in their territories (including herring) and to sell that fish into the commercial marketplace ("Aboriginal Rights") established in the British Columbia Superior Courts.

2. The Aboriginal Rights declared by the BC courts have not yet been implemented. The courts directed that the parties consult and negotiate how the Rights can be accommodated and exercised, with liberty for either party to return to the B.C. Supreme Court after May 2012 if no agreement was reached. The negotiations have not been successful and the Applicants' Aboriginal Rights, including with respect to herring, have not been addressed or accommodated by Canada.

3. Despite the absence of accommodation of the Applicants' Aboriginal Rights, on December 17th, the Minister authorized a re-opening of the WCVI to a general commercial roe herring fishery for 2015 after a 10-year closure.

4. This is the second consecutive year in which the Minister has authorized the WCVI to a commercial herring roe fishery. In 2014, the Minister authorized an opening in Pacific Fisheries Management Areas 23 and 25 on the WCVI after a nine-year conservation

closure without first accommodating the Applicants' Aboriginal Rights and without addressing their conservation concerns. However, by order dated February 28, 2014, this Court granted an interlocutory injunction to enjoin the Minister from opening the fishery (the "**FCC Injunction**"). An appeal of that injunction was dismissed on grounds of mootness.

5. The Applicants oppose the re-opening of the commercial roe herring fishery on the WCVI. They maintain that the significant conservation concerns about the WCVI herring stocks remain and that a commercial opening on those stocks will put them at risk. Further, they assert that their established Aboriginal Rights, which have constitutional priority, must be accommodated before the WCVI can be re-opened to commercial fishing. Their Rights, and the opportunity to accommodate their Rights, will be irreparably harmed by the Decision to re-open the WCVI commercial roe herring fishery.

6. There has been no material change in circumstances since the FCC Injunction and the Applicants remain opposed to a re-opening. Specifically, the conservation concerns identified by the Applicants in 2014 (which were shared DFO staff) have not been addressed. Further, while DFO has made a last-minute offer to of 22 additional roe herring gillnet licences for 2015 (to be shared among the five Applicants), Canada has not engaged in substantive negotiations with the Applicants in respect of their Aboriginal Rights to fish herring commercially and the Applicants submit that the licences are clearly not accommodation of their Aboriginal Rights.

7. In light of the Applicants' Aboriginal Rights, Canada's duty to negotiate accommodation of those rights, and the conservation concerns of the Applicants, it would be a breach of Canada's duty to the Applicants, the order of the BCSC declaring the Aboriginal Rights and the duty to negotiate ("BCSC Order"), the *Constitution Act, 1982*, s. 35(1) and the honour of the Crown to re-open the WCVI to a commercial herring roe fishery.

B. THE APPLICANTS

8. The Applicants are five of the 14 First Nations comprising the Nuu-chah-nulth cultural and linguistic group located on the WCVI.

9. The traditional territories of the five Applicants are contiguously located as follows:

   (a) the **Ehattesaht**, located in and around Esperanza, Zeballos and Espinosa Inlets and Port Eliza;

   (b) the **Mowachaht/Muchalaht** located in and around Nootka Sound;

   (c) the **Hesquiaht** located in and around the Hesquiaht Peninsula and Hesquiaht Harbour;

   (d) the **Ahousaht** located in northern and central Clayoquot Sound; and

   (e) the **Tla-o-qui-aht** located in and around southern Clayoquot Sound and the Esowitsa Peninsula.

C. THE APPLICANTS' ESTABLISHED ABORIGINAL RIGHTS

10. In a judgment issued November 3, 2009 (the "**BCSC Judgment**"), the British Columbia Supreme Court declared that the five Applicants hold Aboriginal Rights, protected by the *Constitution Act, 1982*, s. 35(1) to harvest any species of fish from their traditional fishing territories to an extent of nine miles offshore and to sell that fish into the commercial marketplace. The BCSC also declared that Canada's regulatory regime applicable to the West Coast fishery infringes the Applicants' Aboriginal Rights, except with respect to clams.

11. The BCSC found Canada was not in a position to justify its infringement of the Applicants' Aboriginal Rights because it had not taken into account the existence of those rights as required by *R. v. Sparrow*, [1990] 1 S.C.R. 1075 and *R. v. Gladstone*, [1996] 2 S.C.R. 723. However, the BCSC declined to make a declaration that Canada's infringement of the Aboriginal Rights is unjustified and instead directed that the parties consult and negotiate the manner in which the Aboriginal Rights can be accommodated and exercised without jeopardizing Canada's legislative objectives and societal interests in regulating the fishery. The BCSC declared that Canada has a duty to engage in this consultation and negotiation and granted either party liberty to return to the BCSC to try the justification issue after a period of two years.

12. The BCSC Judgment was affirmed by the B.C. Court of Appeal (with the exception that one species of clam, the geoduck, was excluded from the otherwise all-species right, and the consultation and negotiation period was extended May 11, 2012). On July 3, 2012, the BCCA reaffirmed its decision following a reconsideration ordered by the Supreme Court of Canada. A further application for leave to appeal to the SCC brought by Canada was dismissed on January 30, 2014.

13. Both the existence and the *prima facie* infringement of the Applicants' Aboriginal Rights to fish commercially in their territories, including for herring, are declared and recognized, with all potential appeals, including to the SCC, exhausted.

14. The Applicants' Aboriginal Rights have constitutional priority, subject to conservation and food fishing for First Nations. As a matter of law, the Applicants' Aboriginal Rights must be accommodated by Canada pursuant to the orders of the Court and the *Constitution Act, 1982*, s. 35(1).

D. THE CONSULTATION AND ACCOMMODATION PROCESS

15. Since the time of the BCSC Judgment, the Applicants have been seeking to engage Canada, and the Department of Fisheries and Oceans ("**DFO**") in particular, in a meaningful consultation and negotiation process mandated by the courts. Meetings have taken place, but without substantive negotiation or accommodation of the Applicants' Aboriginal Rights. The Applicants, working together under the name "**T'aaq-wiihak**", have presented a broad range of fishing proposals, but none of those has been accepted or implemented by Canada. Canada has otherwise failed to offer or propose commercial opportunities that accommodate or are commensurate with the Applicants' Aboriginal Rights.

16. Herring fishing opportunities were not a focus of the consultation and negotiation process between 2009 and 2013 because of the long-time conservation closure of the WCVI to commercial roe herring fishing. The Applicants supported this closure and, since the BCSC judgment until the Minister's decision in relation to the 2014 herring season, had no expectation that it would re-open in the near future. However, during that period, the Applicants indicated to Canada that they would present a proposal for years going

forward; and, have continually expressed their interest in a rights-based herring fishery to Canada. Canada is well aware of that interest.

17. Since the 2014 decision by the Minister to re-open the WCVI to commercial roe herring fishing, which was enjoined by the FCC Injunction, the Applicants and DFO have exchanged limited correspondence regarding herring and representatives of the Applicants received DFO stock assessment information for 2015.

18. On or about September 19, 2014, the Applicants submitted to DFO a document providing an initial outline of the main elements of an Aboriginal Rights-based herring fishery (the "**T'aaq-wiihak Herring Outline**"). The T'aaq-wiihak Herring Outline contained two parts: Part I identifies the Applicants' ongoing conservations and stock management concerns with respect to the WCVI herring stocks; and Part II outlines an Aboriginal Rights-based herring fishery model proposed for implementation once conservation and stock management concerns are addressed. The conservation and stock management issues were present in 2014, and, were shared then by DFO staff.

19. The Applicants and other Nuu-chah-nulth Nations advised DFO that, in light of the unresolved conservation and stock rebuilding issues, they are opposed to opening the commercial roe herring fishery on the WCVI in 2015.

20. Canada has provided no offers or proposals for a Rights-based herring fishery for the Applicants. Two of the Applicants, Ahousaht and Tla-o-qui-aht, respectively hold eight and four gillnet herring licenses that may only be fished in the general commercial herring fishery and in accordance with the rules applicable to that fishery. Two other Applicants, Ehattesaht and Hesquiaht, are minority partners in a commercial fishing enterprise called Hayu. The majority of Hayu is made up of three other First Nations who do not have established Aboriginal Rights to fish commercially. Hayu holds 7 herring gillnet licences and 1 herring seine licence that may only be fished in the general commercial fishery and in accordance with the rules applicable to that fishery. All of these licences were held at the time of the FCC Injunction.

21. On December 18, 2014, without discussion and despite (and without responding to) the T'aaq-wiihak Herring Outline, DFO made a "final" offer of an additional 22 general commercial herring gillnet licences to be shared by the five Applicant Nations.

22. All of these licences are commercial gillnet roe fishery licences. The Applicants (who have a combined population of approximately 5000 members) do not consider these licences to provide or accommodate a reasonable opportunity for members to engage in a community fishery exercising their constitutionally-protected Aboriginal Rights-based or to otherwise address their prioritized Aboriginal Rights and preferred means of fishing.

23. Canada has engaged in no discussions or negotiations in respect of the T'aaq-wiihak Herring Outline.

E. CONTINUATION OF THE BCSC PROCEEDINGS

24. Following the expiration of the period for negotiation set by the courts, and in light of the lack of progress in the negotiations, the Applicants set the continuation of the BCSC proceeding down for trial on the question of justification. That trial is scheduled to begin on March 2, 2015.

F. THE WCVI HERRING FISHERY

25. DFO manages Pacific herring in British Columbia according to five major stocks or stock areas: the WCVI, the Strait of Georgia, the Central Coast, Prince Rupert, and, Haida Gwaii.

26. The commercial herring fishery has been closed on the WCVI since 2006 because of conservation concerns and, most recently (2014) due to the FCC Injunction. The evidence and decision and the BCSC Judgment recognized that the abundance of herring on the WCVI was low.

1. Pacific Herring Rebuilding Initiative

27. In September, 2013, DFO put forward an Interim Pacific Herring Rebuilding Initiative (the "Interim Initiative"). The Interim Initiative acknowledges low stocks in the WCVI (as well as in Haida Gwaii and the Central Coast- together the three areas are referred to as the "**Closed Areas**"), noting that there is "uncertainty as to the cause of the low stock

sizes" and "considerable uncertainty about future stock trajectories because neither the historical causes, nor the anticipated future changes are well understood for either natural mortality or growth". DFO further acknowledged in the Interim Initiative that: "The sustained low productivity in these [C]losed [A]reas [including the WCVI] and uncertainty as to the cause and persistence of this low productivity indicate that caution should be exercised when developing reopening strategies for commercial fishing in these areas once stocks apparently begin to recover."

28. The Interim Initiative also recognizes that consultation and further development of scientific knowledge, objectives, and management tools including reference points, will be required to develop an appropriate rebuilding plan.

29. According to the Interim Initiative, DFO's Precautionary Approach Framework policy, which was implemented in 2009, requires the department to develop a rebuilding plan when a stock reaches low levels and to minimize risk of serious or irreversible harm during times of uncertainty. The Interim Initiative recognizes that a review of the current management approach is required, and provides that DFO will develop such a long-term plan or initiative to rebuild Pacific herring stocks, including WCVI herring.

30. To the present, no progress has been made on developing the rebuilding plan, identifying reference points, reviewing the current management approach, or otherwise addressing the issues identified in the Interim Initiative.

31. The Minister's Decision to re-open the WCVI roe fishery in light of the uncertainty around the stocks, and, in the absence of a rebuilding strategy raises conservation concerns for the Nations and puts the implementation of their established Aboriginal Rights at risk.

2. 2014 Memorandum to the Minister

32. In a Memorandum for the Minister dated December 9, 2013 (the "**2014 Memo**"), DFO staff, including the Pacific Region Resource Manager for Pelagics (Lisa Mijacika) up to Associate Deputy Minister Bevan, recommended against re-opening the WCVI and the two other Closed Areas to a commercial roe herring fishery for 2014.

33. The 2014 Memo contained statements regarding the uncertain state of herring stocks in the Closed Areas. It also:

(a) acknowledged that recent stock assessments forecast stocks in the Closed Areas would be above the "cut-off level" that could trigger a commercial fishery, but that "the forecast is for levels to remain near the 'cut off'";

(b) discussed the Department's intention to review the management framework for Pacific Herring to align it with DFO's Sustainable Fisheries Framework, and,

(c) stated that commercial fishing industry supported a commercial opening for the Closed Areas (their interest being "strategic" to rebuild markets with a supply of higher quality roe), whereas First Nations supported maintaining the closure because they did not view the stocks to be rebuilt and noted that the current management regime led to the extended closures..

34. The 2014 Memo also makes passing reference to a potential need to negotiate with the Applicants:

> Furthermore, because of the recent decision from the Supreme Court that confirms that rights of five Nuu-chah-nulth Nations (Ahousaht, Ehattesaht/Chinehkint, Hesquiaht, Mowachaht/Muchalaht, and Tla-o-qui-aht) to a commercial harvest, the Department may need to negotiate an agreement to accommodate this latest ruling. (emphasis added)

35. The 2014 Memo recommends that the Minister "[m]aintain a closure for the three areas for the 2014 fishing season" stating that "the Department would like to see more evidence of a durable and sustained recovery before re-opening" and the continuation of the closure would allow time to:

> 1) advance progress on evaluation of the harvest management system; (2) develop appropriate strategies for rebuilding stocks for implementation in 2015 including developing a one year solution for a Herring Stock Assessment project (in the absence of a Section 10 Use of Fish agreement; and (3) reduce risks associated with First Nations interests that could involve conflict on the fishing grounds and/or legal action.

G. MINISTER'S REJECTION OF DFO RECOMMENDATION

36. The Minister rejected the recommendation of her Department as set out in the 2014 Memo and. indicated her decision to open the Closed Areas at a 10% harvest rate and to proceed with the science, licencing and management reform work with industry. The Minister made no acknowledgment of the passing reference to the potential need to negotiate with the Nations.

37. Subsequent to the Minister's decision to reject the advice of her department and open the Closed Areas to a commercial roe herring fishery, the Pacific Regional Director General approved an Integrated Fisheries Management Plan for the 2014 commercial roe herring fishery (the "**2014 Herring IFMP**") that included openings in Areas 23 and 25 on the WCVI.

38. As far as the Applicants are aware, none of the conservation recommendations contained in either the Interim Initiative or the 2014 Memo has been implemented.

H. THE 2014 JUDICIAL REVIEW AND INTERLOCUTORY INJUNCTION

1. The 2014 Application for Judicial Review

39. On February 12, 2014, the Nations filed a Notice of Application in respect of the decision of the Minister to approve the 2014 Herring IFMP. Among other things, the Nations asserted that the Minister's decision to approve the IFMP allowing a WCVI commercial roe herring fishery was made without adequate consultation with the Applicants (having regard to the Respondents' established Aboriginal Rights), in breach of Canada's court-declared and constitutional duty to consult and negotiate with the Nations in respect of their Aboriginal Rights, and contrary to conservation concerns.

2. The FCC Injunction

40. Contemporaneous with filing the application for judicial review, the Nations brought a motion for an interlocutory injunction to enjoin the Minister from re-opening the WCVI roe herring fishery, which was imminent. There were two main bases to the Nations' injunction motion:

(a) re-opening the WCVI herring fishery before Canada fulfills its court-declared duty to accommodate the Nations' Aboriginal Rights deprives the Nations of a unique opportunity to have their constitutionally-protected rights accommodated before the area is re-opened to a general commercial fishery; and

(b) Re-opening the fishery prematurely threatens the rebuilding of WCVI herring stocks and damages the fragile stocks, frustrating or further delaying (and thereby harming) the implementation of the Nations' Aboriginal Rights respecting herring.

41. The injunction motion was heard by the Federal Court on February 21, 2014 at a special sitting of the Federal Court in Vancouver. The BC Seafood Alliance, which is an industry group representing a wide range of commercial fishing interests, intervened in the motion and provided evidence to the court regarding the interests of industry.

42. The Motions Judge (Mandamin J.) granted the injunction. He agreed with the Applicants that they would suffer irreparable harm if they lost the unique opportunity to have their Aboriginal Rights accommodated before competing commercial interests were re-introduced into the WCVI herring fishery. He also agreed that irreparable harm to the Applicants' Aboriginal Rights arises from the Minister's decision on the basis of conservation, specifically citing: the Minister's rejection of the conservation-based recommendations of her Department, the failure to consider the conservation concerns of the Applicants, and the deviation from a science-based approach by fixing the harvest rate arbitrarily at 10%.

43. On the question of the balance of convenience, the Motions Judge concluded that the public interest both in the reconciliation of established Aboriginal Rights and in giving due recognition to Court declarations regarding negotiation and accommodation of Aboriginal Rights were significant factors.

44. He also noted that the balance of convenience favours "the opportunity for a First Nations people to practice their recognized Aboriginal right to fish and sell fish and reclaim their heritage" over the strategic interests of the commercial fishing sector, which interests could be mitigated to a degree by relocating the commercial fishery to areas where stocks were healthier.

3. The FCC Injunction Appeal

45. The Minister appealed the FCC Injunction. The appeal was heard on September 24, 2014. At the hearing, the Federal Court Appeal gave oral judgment (which were followed by written reasons) dismissing the appeal on grounds of mootness (the 2014 herring fishery having long passed). The Court specifically stated that:

> …the research and negotiations as to the 2015 IFMP will continue and if the Minister once again approves an IFMP over the objections of the First Nations, there will be another opportunity to litigate these issues.

I. FAILURE TO ADDRESS CONSERVATION AND ABORIGNAL RIGHTS IN 2014

46. Despite the DFO advice in the 2014 Memo, the FCC Injunction, the ongoing legal duty to negotiate accommodation of the Applicants' Aboriginal Rights, the tabling of the T'aaq-wiihak Herring Outline, the requirement to review and update DFO's management approach identified in the Interim Initiative, and the Applicants' ongoing conservation concerns, DFO failed to substantively engage with the Applicants in respect of or otherwise address any of these matters throughout 2014 and to the present.

47. Specifically:

(a) as far as the Applicants are aware, no progress was made on the "evaluation of the harvest management system" or on "developing a one year solution for a Herring Stock Assessment project", both as recommended in the 2014 Memo; and

(b) DFO engaged in no substantive discussion or negotiations in respect of the T'aaq-wiihak Herring Outline, including the conservation concerns detailed in the Outline and the Aboriginal Rights-based fishing model set out in the Outline. To date, the Applicants have received no response to the T'aaq-wiihak Herring Outline.

J. THE 2015 DECISION TO RE-OPEN THE WCVI HERRING FISHERY

48. Despite DFO's failure or refusal to address these issues, the Minister decided again to re-open the WCVI to a commercial roe herring fishery in 2015 and communicated that decision, through DFO staff, to the Applicants on December 16, 2014.

49. The Minister's decision calls for a 10% harvest rate for all three previously Closed Areas (including the WCVI) and a 20% harvest rate for the two areas where stocks have remained strong (Strait of Georgia and Prince Rupert).

50. At the invitation of DFO to identify the amount of each stock that it wishes to harvest, the Herring Integrated Advisory Board opted to maximize the allowable harvest in each area. This will result in a coast-wide estimated commercial harvest of 37,200 short tons, which is by far the largest commercial harvest in over a decade and represents a substantial overall increase from what was proposed last year (19,700 short tons), even before the FCC Injunction and the actual annual harvests over the past decade (2013 - 15,905 tons, 2012 - 13,000 tons, 2011 - 15,846 tons, 2010 - 10,037 tons, 2009 - 11,750 tons, 2008 - 12,500 tons, 2007 - 11,592 tons, 2006 - 25,064 tons, 2005 - 30,497 tons, and 2004 – 29,455 tons).

51. The commercial roe herring fleet may not even have the capacity to harvest the full proposed commercial harvest this season.

K. LACK OF NEGOTIATION AND ACCOMMODATION

52. The decision to re-open the commercial herring fishery on the WCVI for 2015 was made without negotiation of Aboriginal Rights-based fishing model. It was also made without substantively discussing or addressing the Applicants' conservation concerns.

53. Over the course of 2014, there was limited correspondence between the Applicants and DFO regarding herring. Representatives of the Nuu-chah-nulth Tribal Council fisheries department attended two meetings of industry and First Nations groups at which DFO gave stock assessment information for the 2014 and 2015 seasons, and, herring was put on the agenda of two meetings between the Applicants and DFO, no substantive discussion or negotiation addressing the Applicants' Aboriginal Rights, including accommodation of their Rights or conservation concerns occurred. There has been no negotiation of, or response to the T'aaq-wiihak Herring Outline. The Applicants advised DFO that they are opposed to opening a commercial roe herring fishery in 2015, in light of the outstanding and unresolved conservation, management and stock rebuilding issues.

54. The only (very minor) exception to DFO's failure to engage with the T'aaq-wiihak Herring Outline or the concerns and points raised by the Applicants is that DFO accepted a sampling deficiency that was pointed out by the Nuu-chah-nulth Tribal Council's fisheries department and re-calculated one aspect of its stock assessment based on that deficiency. Apart from this one minor point, DFO ignored all of the Applicants' conservation concerns and management issues raised in the T'aaq-wiihak Herring Outline.

L. PREJUDICE TO APPLICANTS' ABORIGINAL RIGHTS

1. Failure to Implement the Aboriginal Rights

55. Canada has failed to accommodate the Applicants' Aboriginal Rights for herring and has not negotiated an Aboriginal Rights-based herring fishing opportunity based on the proposed T'aaq-wiihak Herring Outline or otherwise since the BCSC Judgment.

56. Canada's policy is to not displace involuntarily any existing interests in any commercial fishery to accommodate aboriginal fishing opportunities. Canada has maintained that policy with respect to fishing opportunities for the Applicants following the declaration of the Aboriginal Rights.

57. The ten-year closure of the WCVI to commercial herring fishing means that commercial fishing interests are accustomed to fishing in areas other than the WCVI not having access to the WCVI as part of their commercial roe herring operations.

58. Since the Applicants' Aboriginal Rights were established and affirmed during this closed period, there is currently a unique opportunity to accommodate those Aboriginal Rights, with little or no disruption to other interests in the fishery. However, if the WCVI stocks are re-opened to commercial harvest before the Applicants' Aboriginal Rights are addressed, the accommodation and implementation of those Rights will be more complex and potentially disruptive to other interests, making it more difficult to implement the BCSC Judgment.

2. Ongoing Conservation Concerns

59. DFO's decision to open commercial roe herring fisheries in the WCVI area is based on DFO's determination, applying its stock assessment method that the WCVI Stock is sufficient to permit a commercial fishery. This new approach, combined with the continuing poor state of the WCVI herring stocks over the past decade of closure, the failure to review and update DFO's management and stock assessment approach, and the lack of a comprehensive rebuilding strategy for WCVI herring raises significant conservation concerns for the Applicants.

3. WCVI Opening is Unnecessary and Harmful to the Nations' Rights

60. For much of the last decade, the commercial roe herring fishery has taken place only in the Strait of Georgia and Prince Rupert stock areas. DFO's stock forecasts for these two areas are strong. Even if the WCVI remains closed in 2015, the coast-wide proposed 2015 allowable harvest would still be considerably higher than the proposed harvest from 2014 and the actual harvests in the last several years. Thus, even if the WCVI remains closed for 2015, the commercial herring fishery will be much stronger than in previous years, such that the opening of the WCVI is not necessary.

61. Re-opening this WCVI herring stocks (unnecessarily) to a general commercial fishery in the face of the ongoing conservation concerns and without first addressing the Applicants' now-established Aboriginal Rights will prejudice the accommodation of those rights. The long period of closure has given the commercial users of the herring fishery the opportunity to adjust to a commercial fishery that does not include the WCVI. There is presently a unique opportunity, previously recognized by this Court in the FCC Injunction, to accommodate the Applicants' Aboriginal Rights while minimizing disruption to other interests in the fishery. However, if the WCVI stocks are re-opened to commercial harvest, the accommodation and implementation of the Applicants' Rights will be more complex and disruptive to other interests, making it considerably more difficult to accommodate and reconcile the Applicants' Aboriginal Rights. This will cause irreparable harm to the Applicants.

4. Contrary to Crown's Duties

62. The Minister's decision to open the WCVI to a commercial herring fishery in 2015:

(a) was made without adequate consultation and negotiation with the Applicants regarding the Applicants' established Aboriginal Rights;

(b) was made with no negotiation with the Applicants in respect of their Aboriginal Rights;

(c) is a breach of the court-ordered duty of Canada to consult and negotiate the manner in which the Applicants' Aboriginal Rights can be accommodated;

(d) was made without accommodating the Applicants' conservation concerns or their Aboriginal Rights;

(e) is contrary to the constitutional priority of the Applicants' Aboriginal Rights;

(f) is contrary to the Crown's trust-like or fiduciary relationship with the Applicants as holders of established Aboriginal Rights;

(g) is contrary to the honour of the Crown; and

(h) prejudices the Applicants and harms their Aboriginal Rights

This application will be supported by the following material:

1. Affidavit of *Tyee Hawiih* Maquinna (Mike Maquinna) to be sworn.
2. Affidavit of Dr. Donald Hall to be sworn.
3. Such other affidavits that the Applicants may serve.

The Applicants request, pursuant to Rule 317, that the Minister transmit a certified copy of the following material that is not in the possession of the Applicants but is in the possession of the Minister to the Applicants and to the Registry:

- All material that was considered by the Minister in making the Decision.

January 15, 2015

Issued by: _____

F. Matthew Kirchner
Lisa C. Glowacki
Ratcliff & Company LLP
500 – 221 West Esplanade
North Vancouver, BC V7M 3J3
Telephone: 604-988-5201
Fax: 604-988-1452

SOR/2004-283, ss. 35 and 38