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Shellfish Aquaculture and the New
Relationship:
Nov 17/06 Workshop Background Paper

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Shellfish Aquaculture and the New Relationship

Workshop Background Paper

University of Victoria, November 17 2006

1. Introduction

Shellfish aquaculture has the potential of playing a key role in reinvigorating and sustaining B.C.'s coastal economy.¹ For this to occur, however, a variety of impediments to growing the shellfish aquaculture industry -- political, legal and economic -- need to be addressed. This Background Paper considers the possibilities for addressing these barriers in light of the recent *New Relationship* partnership between BC First Nations and the Government of British Columbia. It is hoped that this paper can serve as a convenient starting point for dialogue and discussion at our forthcoming Workshop.

1.1 Background

First Nations in British Columbia have traditionally used the ocean's resources for food and barter, as well as for social, ceremonial, and commercial purposes. Shellfish are fundamental to the health and well-being of many Aboriginal communities as their use in customs, practices, and traditions (including songs, dances, rituals, names and knowledge sites) creates and renews cultural property for personhood and grouphood.² Shellfish harvesting represents not only a commercial opportunity, it is a priority Aboriginal right and therefore, integral to Aboriginal society. Harm to the shellfish resource can result in a loss of cultural property and hinder the ability of First Nations to maintain their customary laws. To this end, shellfish harvesting represents a significant factor in claiming Aboriginal rights and title to the seabed and foreshore.³

With over 26,000 km of coastline in B.C., there is still significant economic potential for the shellfish aquaculture industry.⁴ Currently, there are 460 licensed shellfish tenures occupying only 2114 hectares situated primarily within the Strait of Georgia and around Vancouver Island.⁵ In 2003 the B.C. shellfish industry yielded \$30.9 million, with local economies

¹ Richard Harry, "A New Era of Self-Sufficiency and Prosperity: The Future of Aboriginal Aquaculture in Canada" Bulletin, Aquaculture Association of Canada 104-1 (2004), <http://www.aquacultureassociation.ca/bulletin/104-1.pdf>.

² Viviane Barry and Paul Williams, "Cultural Revitalization through Bivalve Aquaculture: The Suquamish Indian Tribe" Bulletin, Aquaculture Association of Canada 104-1 (2004), <http://www.aquacultureassociation.ca/bulletin/104-1.pdf>.

³ Chris Tollefson, "Charting a Course: Shellfish Aquaculture and Indigenous Rights in New Zealand and British Columbia" BC Studies, no. 150, Summer 2006, pg. 39.

⁴ Centre for Shellfish Centre, http://csr.mala.bc.ca/ind_ind_bac.asp?document=3.

⁵ Ibid.

retaining the bulk of this revenue.⁶ Despite this advantageous position, B.C.'s shellfish sector is directed by a legal and policy regime that has constrained its growth.

1.2 Legislative and Policy Regime

BC shellfish growers confront a variety of regulatory and licensing requirements that often pose significant operational challenges. Key challenges in this regard include a lack of inter-agency regulatory coordination, relatively low levels of provincial government support for First Nations' shellfish aquaculture initiatives, and a lack of recognition for the role of traditional shellfish harvesting in Aboriginal communities.

Federal agencies and legislation regulate the environmental impact of shellfish aquaculture facilities, as well as the safety of harvested shellfish. The *Canadian Environmental Assessment Act* can trigger a "screening" assessment of small projects and a comprehensive study of large projects, particularly if the project will interfere with navigation and thus deemed a "work" under the terms of the *Navigable Waters Protection Act*. The Department of Fisheries and Oceans, Environment Canada, and the Canadian Food Inspection Agency also jointly administer the Canadian Shellfish Sanitation Program, which establishes the practices and protocols necessary to assure the safety of harvested shellfish.⁷

Leasing of Crown land and industry licensing requirements are governed by provincial regulation. The Integrated Land Management Bureau of the Ministry of Agriculture and Lands is responsible for administering provincial Crown land, including the foreshore and land covered by water. A grower wishing to use Crown land for commercial aquaculture purposes must obtain a lease or license. Leases and licenses are site-specific, and regulate the type of activity, period of tenure, nature of improvements, and other factors. Leases and licenses of occupation are issued for 20 year terms based on an annual rental. Thirty year replacement tenures are available for leases midway through the initial lease period.

Applicants for shellfish tenures must meet a variety of federal and provincial requirements, such as developing a Shellfish Management Plan (SMP) and a Marine Environmental Assessment.⁸ The SMP is a type of business plan, showing how the tenure will be developed (including timing of capital improvements), types of shellfish to be raised, and anticipated production levels.⁹

The final layer of regulatory complexity comes from regional districts that have in some cases enacted zoning regulations restricting the use of property for shellfish aquaculture.

This regulatory framework is characterized by conflicting policy objectives (some pro- and some anti-shellfish aquaculture), resulting in a lengthy process to obtain tenures. The involvement of multiple government actors at the federal, provincial and local government levels also results in a lack of integration for coastal zone planning.

⁶ Ibid.

⁷ Brian Kingzett and Ruth Salmon, "First Nations Shellfish Aquaculture Regional Business Strategy" (Nanaimo, Kingzett Professional Services Ltd: 2002) pg. 9-4, http://www.blurevolution.ca/projects/regional_nc.htm.

⁸ Ibid., pg. 9-11.

⁹ Ibid., pg.9-11-12.

1.3 First Nations Involvement in the Provincially-Regulated Industry

According to many First Nations, key deficiencies of the current shellfish regulatory regime are its failure to recognize the importance of shellfish harvesting as an Aboriginal right and its failure to proactively promote First Nation participation in the industry. Current provincial policy entitles First Nation entities such as band corporations or band/tribal councils to apply for shellfish tenures through essentially the same process as other applicants.¹⁰ Approval of these applications includes grants of licences of occupation (typically twenty years) or occasionally shore leases (thirty years).¹¹

Through a provincial Memorandum of Understanding (MOU) policy, Aboriginal communities also have the exclusive right to apply for tenures in specified areas for a ten year period, or until the First Nation asserts Aboriginal rights or title or a final treaty regarding the area is concluded. In turn, First Nations are obligated to participate in a timely manner in Crown resource development referrals that may occur elsewhere upon their traditional territory.

As the primary provincial initiative to increase Aboriginal involvement in the shellfish aquaculture industry, the MOU process presents a number of inadequacies including: (1) inaccessibility to many Coastal First Nations because of existing environmental damage to much of the coastal zone in their traditional territories; (2) participation that affirms provincial authority over the foreshore, seabed and ocean without acknowledgement of Aboriginal rights and First Nations' decision-making powers; (3) mandatory requirements to participate in Crown consultation that may not be reciprocal nor equitable; and (4) a consultation process that does not appear to recognize First Nations as distinct right-holders. While the MOU process has resulted in the opportunity for more tenures held by First Nations' communities, a more pointed criticism of the MOU process may be that it is insufficient accommodation of Aboriginal rights, as required by law, particularly as an interim measure for First Nations pursuing comprehensive claims through the BC treaty process.

In short, to date the BC Government has neither developed a comprehensive approach to Aboriginal interests in the coastal zone nor implemented, in a consistent or transparent fashion, its duties of recognition, consultation and accommodation.

1.4 Market and Capacity Challenges

The B.C. shellfish industry also faces a variety of challenges in the marketplace. An overarching issue is price: increasing production in countries such as China, Chile, Europe, and New Zealand has deflated the world price for shellfish products forcing Canadian producers to become more competitive.¹² The capacity of the Canadian shellfish sector to respond to this challenge is hampered by the structure of the industry as a whole. Largely dominated by small and medium-sized firms, the sector has tended to suffer from a lack of cohesion and leadership, and be plagued by undercapitalization and low levels of investment particularly in research and development.

¹⁰ Supra note 1, pg.33.

¹¹ Ibid., pg. 33.

¹² Ibid., pg. 7.

Aboriginal communities also face market challenges due to their lack of existing infrastructure (both in human resources and built capacity), and the additional costs stemming from many First Nations' remote locations.¹³ Funding to support human resources and business skills capacity development within Aboriginal communities has been modest, consisting primarily of grants of \$2.0 million to Malaspina University-College programs aimed at training First Nations for careers in shellfish aquaculture. Individual communities such as the Halalt First Nation, Nu'chal'nulth First Nation, Hul'qumi'num Treaty Group and Huu-ay-aht First Nation have also received financial support to develop shellfish aquaculture projects.

Nonetheless, there are some notable success stories. For example, the Comox First Nation owns and operates Pentlatch Seafoods Inc., which has harvested manilla clams and Pacific oysters since its incorporation in 2004. The Comox Band is presently implementing a multiphase strategic developmental action plan with the aim of creating a self-sustaining shellfish aquaculture operation.¹⁴

However, because of the market and policy barriers, as well as capacity issues in First Nations communities, Aboriginal involvement in the industry remains minimal. B.C. bands manage only 490 hectares of the 3,000 hectares presently used for shellfish farming.¹⁵ Absent an integrated Aboriginal-provincial strategy, it is unlikely that the potential for increased First Nations involvement in the industry will be realized.

1.5 Summary of Barriers

In summary, the primary legal and political barriers to industry expansion and First Nations participation in the industry are as follows:

1. The overlapping jurisdiction of federal, provincial and local government involvement creates a regulatory burden for the shellfish industry;
2. There is no provincial strategy to address Aboriginal rights in the coastal zone that is based on the legal principles of recognition, consultation accommodation; and
3. There is little provincial commitment to enhance the capacity of Aboriginal communities to use the opportunity for new tenures.

2.0 International Experience: New Zealand

The experience of New Zealand is illustrative of the opportunities and pitfalls associated with a coastal economic development strategy focusing on shellfish aquaculture. New Zealand and B.C. are similar in terms of population, extent of coastal areas, and legal and political histories. The regulation of shellfish in New Zealand, however, has been markedly different from that of B.C. The value of the industry in New Zealand has increased from CDN\$17 million in 1988 to CDN\$124 million in 2000.¹⁶ However, partly due to its rapid growth, the NZ industry has encountered difficulties in recent years. Particularly instructive

¹³ Tim DeJager, "Training for Enterprise and Ownership in British Columbia's First Nation Shellfish Aquaculture Initiatives" Bulletin, Aquaculture Association of Canada 104-1 (2004), <http://www.aquacultureassociation.ca/bulletin/104-1.pdf>.

¹⁴ Comox Valley Economic Development Society, <http://www.investcomoxvalley.com/investcomox/successPentlatch.htm>.

¹⁵ Supra note 2, pg. 11.

¹⁶ Supra note 4, pg. 15.

aspects of the NZ experience for our purposes are how the New Zealand Government has tackled the challenge of regulatory reform and reconciliation of Maori interests in the foreshore.

Regulatory reform became a priority due to the cumbersome and inefficient nature of the aquaculture permitting process during the industry's take-off period through most of the 1990s. New Zealand has now adopted a "one-window" permitting model that grounds individual licenses in a larger coastal marine planning framework.¹⁷ Under this new model, Regional Councils play the lead role exercising primary authority over coastal zone planning and permitting. Tenure security is enhanced through the granting of standardized twenty-year leases for all sites, with a right of renewal if the holder has been a suitable corporate citizen.¹⁸ Regulatory reviews for "undue adverse effects" are performed on aquaculture management areas as opposed to a farm-by-farm basis.

Implementation of these regulatory reforms has also required the NZ government to address unresolved questions concerning Maori interests in the foreshore and marine farming created intense debate in New Zealand. To this end, government introduced a law reform package that sought to clarify the nature of legal rights in marine areas, in the process reaching "a fundamental and final reconciliation of competing Crown-Maori interests".¹⁹ The *Maori Commercial Aquaculture Claims Settlement Act, 2004* allocates to the Maori 20 percent of existing tenures since 1992 and 20 percent of all new tenures.²⁰ The *Foreshore and Seabed Act* endows both the Maori Land Court and the High Court with the capacity to grant a "customary rights order" to allow a cultural group to engage in a customary activity, practice, or use on the public foreshore or seabed.²¹ The High Court may further exercise its authority to recognize territorial customary rights by establishing reserves to protect such rights. As a result of these legislative changes, Maori have secured a central role in the shellfish aquaculture industry and are guaranteed significant and continuing economic benefits from development of the resource. However, many Maori remain bitter both about the manner in which the reform package was developed and its impact on their customary and territorial rights.²²

3. The New Relationship²³

In March 2005, the First Nations Leadership Council (comprised of the First Nations Summit, Union of B.C. Indian Chiefs, and the B.C.-Assembly of First Nations) and the Province of British Columbia signed a political accord titled the *New Relationship*. The purpose of the *New Relationship* is to develop a new Government-to-Government relationship based on respect, recognition and accommodation of Aboriginal rights, titles and interests. The *New Relationship* has been lauded by its proponents as a momentous historic reform of Aboriginal-Crown relations, but activities to date under its framework have been limited.

¹⁷ Supra note 4, pg. 11.

¹⁸ Supra note 4, pg. 21.

¹⁹ Supra note 4, pgs. 13 and 19.

²⁰ Supra note 4, pg. 23.

²¹ Supra note 4, pg. 23.

²² Supra note 4, pg. 11.

²³ See <http://www.fns.bc.ca/info/newrelationship.htm>.

3.1 New Relationship Goals and Activities

Key features of the New Relationship that are particularly relevant to this discussion include:

- Restoring, revitalizing and strengthening First Nations and their communities through means such as the restoration of habitats to achieve access to traditional foods (Goal 1);
- Exercising First Nations' self-determination through Aboriginal title, including realizing the economic component of Aboriginal title, and exercising jurisdiction over the use of the land and resources by First Nations' governmental structures (Goal 2);
- Developing mechanisms that ensure that lands and resources are managed in accordance with First Nations laws, knowledge and values, and that resource development is carried out in a sustainable manner (Goal 3);
- Recognition by all Parties that First Nations economic self-sufficiency will require strong economic partnerships and shared decision-making;
- Commitments to:
 - Develop new institutions or structures to negotiate Government-to-Government Agreements for shared decision-making regarding land use planning, management, tenuring and resource revenue, and benefit sharing that recognize the need to preserve each First Nations' decision-making authority (Action Item 1);
 - Identify institutional, legislative and policy changes to implement the *New Relationship* (Action Item 2);
 - Develop additional protocols or accords to further the implementation of the *New Relationship* (Action Item 3);
 - Establish effective procedures for consultation and accommodation (Action Item 6); and
 - Establish funding and distribution structures/institutions to support First Nations' capacity development and effective participation in consultative/accommodation processes (Action Item 5).

There have been two tangible achievements in the first year and half of implementation of the *New Relationship*: (1) establishment of the \$100 million *New Relationship Trust* (see *New Relationship Trust Act*, Bill 11, 2006);²⁴ and (2) review and reform of forestry resource management, that included (i) development of the *forestry opportunities agreement* ("FOA"), replacing the former *forestry range agreement* ("FRA"),²⁵ (ii) establishment of a province-wide

²⁴ See <http://www.newrelationshiptrust.ca/home>.

²⁵ See http://www.for.gov.bc.ca/haa/FN_Agreements.htm.

First Nations Forestry Council, and (iii) signing of the Mountain Pine Beetle Funding Transfer Agreement.²⁶

3.2 First Nations' Responses and Opportunities for Action

Reaction to and assessment of the *New Relationship* has, to date, been mixed. Some First Nations have voiced frustration at delays in implementing the terms of the agreement, particularly outside the forestry sector. Many First Nations have noted significant bureaucratic resistance at the policy, administrative and legislative levels to implementation of the *New Relationship*.

The impact of the *New Relationship* has been relatively modest in terms of concrete regulatory and law reform. Notably, the agreement has not yet been translated into a province-wide consultation and accommodation policy for all ministries, departments and agencies. Moreover, it remains unclear how and to what extent the *New Relationship* will become a driver for reform in resource sectors beyond forestry.

While these issues have been a source of frustration, several key First Nations' leaders are supportive of the *New Relationship*, emphasizing that the agreement is open-ended and needs to be implemented carefully over time based on a fully informed and engaged process.²⁷ Viewed in this light, the *New Relationship* can serve as a catalyst for change in any resource sector if First Nations identify a sector or industry, such as shellfish aquaculture, as a priority.

Strengths of the *New Relationship* that can be used to promote the shellfish aquaculture sector include:

- A First Nations-driven initiative that further recognizes Aboriginal title to the foreshore, regardless of whether an individual First Nation opts to exercise their shellfish seeding and harvesting rights;
- Legislative and policy reform that may address: (1) shared decision-making on a Government-to-Government basis, (2) benefit-sharing (resource revenue), and (3) recognition of First Nation decision-making authority; and
- Further protocols and accords.

4. The New Relationship and Shellfish Aquaculture: Workshop November 17, 2006

In light of the opportunities for shellfish aquaculture provided by the *New Relationship* and the industry challenges noted above, there is interest in discussing what a *New Relationship* approach would be to growing and managing the shellfish aquaculture sector. Key to this discussion is what strategic opportunities exist to make this happen, and what law and policy

²⁶ Ministry of Forest and Range, "First Nations Receive Funding for Pine Beetle Response", October 18, 2006 at <http://www.for.gov.bc.ca/pscripts/pab/newsrel/mofnews.asp?refnum=2006FOR0137%2D001&searchtext=&crumb=B.C.+Home&crumburl=%2Fhome>.

²⁷ Interview with Merle C. Alexander, General Counsel to the New Relationship Trust Corporation, First Nations Forestry Council and First Nations Summit.

reforms are needed to implement such an approach. The following questions will serve as a framework for the discussion on the afternoon of November 17.

- Does the current regulatory and policy regime governing shellfish aquaculture take the *New Relationship* into consideration?
- Is there a need for specific consultation and accommodation policies, procedures and laws for the shellfish aquaculture sector's relationship with First Nations?
- What lessons can be learned from other jurisdictions and other resource sectors in terms of implementing the *New Relationship*? For example, would a template interim agreement such as the *Forestry Opportunities Agreement*, coupled with a province-wide council (i.e., First Nations Forestry Council), be an appropriate approach for shellfish aquaculture?
- What opportunities for growing the industry does the *New Relationship* partnership model offer?
- Can First Nations use the *New Relationship Trust Fund* for capacity building to further shellfish aquaculture?
- Where do the interests of workshop participants converge; where do they diverge?
- How can shellfish aquaculture development be best promoted in a manner that recognizes and respects Aboriginal rights and title?
- Are First Nations looking to province-wide or regional approaches?
- What is the federal government's role?
- How can Aboriginal interests be reconciled and advanced to improve the socio-economic well-being of First Nations' communities?