



# Environmental Law Centre

Murray and Anne Fraser Building  
University of Victoria  
P.O. Box 2400 STN CSC  
Victoria, BC, Canada  
V8W 3H7

[www.elc.uvic.ca](http://www.elc.uvic.ca)

First Nations and Shellfish Aquaculture:  
Consultation, Accommodation and Participation

Researcher: Kathryn Deo

Date Published: Fall, 2002

Copyright © 2002 - 2005 The Environmental Law Centre Society.

Permission is hereby granted to reproduce and distribute these materials in whole or in part for educational and public interest purposes, provided such copies are disseminated at or below cost, provided that each copy bears this notice, and provided that the Environmental Law Centre is credited as the original published source.

**DISCLAIMER:** This material is provided for general information as a public and educational resource. We attempt to ensure the accuracy of the material provided, however much of the information is produced by students, not lawyers, and we do not guarantee that it is correct, complete or up to date. The Environmental Law Centre does not warrant the quality, accuracy or completeness of any information in this document. Such information is provided "as is" without warranty or condition of any kind. The information provided in this document is not intended to be legal advice. Many factors unknown to us may affect the applicability of any statement or comment that we make in this material to your particular circumstances. This information is not intended to provide legal advice and should not be relied upon. Please seek the advice of a competent lawyer in your province, territory or jurisdiction; or contact the ELC for more complete information.

**First Nations and Shellfish Aquaculture:  
Consultation, Accommodation and Participation**

**Kathryn Deo  
Fall 2002  
University of Victoria  
Faculty of Law  
Environmental Law Centre**

## TABLE OF CONTENTS

<b>I. INTRODUCTION</b>	<b>3</b>
<b>II. PARTICIPATION</b>	<b>4</b>
A. ABORIGINAL RIGHTS/ TITLE CLAIM PROCESS	<b>4</b>
1. Advantages	<b>5</b>
2. Disadvantages	<b>5</b>
B. TENURE ACQUISITION PROCESS	<b>6</b>
1. Advantages	<b>7</b>
2. Disadvantages	<b>8</b>
• Zoning Conflict	<b>10</b>
a) Obligation to Consult	<b>10</b>
b) Tenure vs. Zoning Bylaws	<b>11</b>
<b>III. CONSULTATION</b>	<b>14</b>
A. CONSULTATION OBLIGATIONS OF LWBC	<b>14</b>
1. Specific Consideration of Aboriginal Interests	<b>15</b>
2. Aboriginal Interest Assessment Procedures	<b>17</b>
B. PROVINCIAL CONSULTATION POLICY, 2002	<b>17</b>
C. CONSULTATION OBLIGATIONS OF MUNICIPALITIES AND REGIONAL DISTRICTS	<b>19</b>
D. CONSULTATION OBLIGATIONS OF TENURE APPLICANTS	<b>20</b>
<b>IV. CONCLUSION</b>	<b>21</b>

## I. INTRODUCTION

Shellfish aquaculture is “the commercial seeding, growing and harvesting of marine molluscs, and shellfish, or other invertebrates in a natural or manufactured environment”.<sup>1</sup>

Shellfish aquaculture is considered to be an environmentally responsible industry, one that “makes decisions based on sound science” and ensures that its “business practices are conducted in an environmentally, socially and economically sustainable manner.”<sup>2</sup> As a result, the industry is becoming increasingly popular in British Columbia.

Shellfish aquaculture is of particular interest to many First Nations, as shellfish is a traditional food source for many coastal First Nations. Indeed, as of February 2002, 50 BC First Nations were involved in shellfish aquaculture. This represents 55% of the total number of aquaculture projects in which BC First Nations are involved.<sup>3</sup>

In British Columbia, shellfish tenures to Crown land are granted through Land and Water British Columbia, Inc. (LWBC).<sup>4</sup> However, considerable parts of First Nations’ traditional territories lie within provincial Crown land, so the granting of shellfish tenures may adversely impact Aboriginal interests. Shellfish tenures are also of

---

<sup>1</sup> Online: LWBC website <[http://www.lwbc.bc.ca/applying\\_for\\_land/shellfish.htm](http://www.lwbc.bc.ca/applying_for_land/shellfish.htm)>.

<sup>2</sup> “Land and Water British Columbia Inc. Aquaculture Policy: Volume 3, Chapter 3, section 3.2.0400, at p. 2, online: LWBC website <<http://www.lwbc.bc.ca/>>.

<sup>3</sup> J. Spence, “Review on Coastal First Nations from British Columbia involved in Aquaculture Projects” (2002), online: Institute for Pacific Ocean Science and Technology (iPost) <[http://ipost.org/Documents/FIRST%20NATIONS%20AQUACULTURE%20PROJECTS%20BY%20BANDS%20OF%20BC\(bis\).pdf](http://ipost.org/Documents/FIRST%20NATIONS%20AQUACULTURE%20PROJECTS%20BY%20BANDS%20OF%20BC(bis).pdf)>, at p. 2. (Website is currently under construction.)

<sup>4</sup> Online: LWBC website <[http://www.lwbc.bc.ca/about\\_bcal](http://www.lwbc.bc.ca/about_bcal)>.

particular concern to many BC First Nations, as they grant the holder access (often exclusive access) to the land, water and foreshore in the tenure area.<sup>5</sup>

This paper will address two important issues. First, it will explore ways through which interested First Nations can become involved in the shellfish aquaculture industry. Second, it will examine ways to ensure that First Nations are consulted fully before shellfish tenures in their traditional territories are granted to non-Aboriginals. Although these issues are closely interrelated, they will be examined separately.

## **II. PARTICIPATION**

At present, there are two possible routes through which BC First Nations can become involved in the shellfish aquaculture industry. First, they can pursue a claim in court for Aboriginal Rights and/or Title to the area in question. Second, they can apply to LWBC to get a shellfish tenure.<sup>6</sup> Each process, as well as its advantages and disadvantages, will be explained in detail.

### **A. ABORIGINAL RIGHTS/TITLE CLAIM PROCESS**

As stated earlier, many BC First Nations have harvested shellfish as a traditional food source. If the First Nation can show that the harvesting of shellfish is a “practice, custom, or tradition” that is integral to its distinctive culture,<sup>7</sup> the First Nation likely has a strong basis for an Aboriginal Rights claim to allow it to continue with its traditional practice. Further, although it is clear that Aboriginal Rights may exist without Aboriginal

---

<sup>5</sup> See note 2, at pp. 8-10.

<sup>6</sup> The treaty process is another option for BC First Nations. However, it seems unlikely that any treaties will be negotiated in the near future, so I have chosen to omit this option from the paper.

<sup>7</sup> *R. v. Van der Peet* [1996] 2 S.C.R. 507, at para. 46, online: QL (SCJ).

Title,<sup>8</sup> evidence that the First Nation has harvested shellfish from the area may help to strengthen an Aboriginal Rights claim.

### 1. Advantages

There are several advantages to pursuing an Aboriginal Rights/Title claim. First, many First Nations are fundamentally opposed to the idea of having to seek permission from the provincial government to use its traditional lands. Second, if the claim is successful the First Nation will have much broader rights than those that come with a shellfish tenure. Finally, a successful claim will virtually guarantee that the First Nation will be consulted fully before shellfish tenures within its territory are granted to anyone other than the First Nation.<sup>9</sup> More generally, the duty to consult would require that the First Nation be consulted fully before *any* actions are taken that would adversely affect its interests in the area. (For example, if the First Nation is able to prove its Aboriginal Right to harvest shellfish, it would have to be consulted before any action is taken that could directly or indirectly affect its ability to harvest shellfish.)

### 2. Disadvantages

There are two main disadvantages to pursuing an Aboriginal Rights/Title claim. First, the court process is extremely lengthy and expensive. Most cases take years to resolve, and many cases are appealed to the Supreme Court of Canada. Many First Nations simply do not have the financial resources to pursue a claim in court. Second, the First Nation will be required to present considerable evidence in support of its claim. It is much more difficult to prove such a claim than it is to acquire a shellfish tenure.

---

<sup>8</sup> *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 26, online: QL (SCJ).

<sup>9</sup> The duty to consult will be examined in detail in part III of the paper.

## B. TENURE ACQUISITION PROCESS

In British Columbia, shellfish tenures are granted by LWBC. LWBC is a Crown corporation (although it is also referred to as a provincial agency), and is responsible to the Minister of Sustainable Resource Management.<sup>10</sup> LWBC's authority to grant tenures comes from s. 17(1) of the *Land Act*,<sup>11</sup> which provides that

The minister may, if the minister considers it advisable in the public interest, designate a portion of Crown land for a particular use of for the conservation of a natural or heritage resource.

LWBC's policy specifically provides that a First Nation may apply for a shellfish tenure through a band corporation, trustee, Indian Band or Tribal Council. If a Band or Tribal Council is applying for the tenure, it must present a Band Council Resolution "a) authorizing the council to enter into the tenure agreement, and b) giving the signatories of the tenure document the ability to sign on behalf of the Band."<sup>12</sup> There is nothing in the policy that specifically prevents an Aboriginal person from applying for tenure as an individual – she or he need only be a Canadian citizen or permanent resident, and at least 19 years old.<sup>13</sup>

There are two main types of shellfish tenures. The most common type of tenure for shellfish aquaculture is a license of occupation. It is granted where a short-term tenure is required, and is most commonly granted for a period of 20 years.<sup>14</sup> Where a longer-term tenure is required, it may be possible to acquire a lease, most commonly for a period of 30 years. Leases are not generally granted for aquaculture purposes, but are

---

<sup>10</sup> See note 4.

<sup>11</sup> R.S.B.C 1996, c. 245.

<sup>12</sup> See note 2, at p. 7.

<sup>13</sup> *Ibid.* at p. 6.

<sup>14</sup> *Ibid.* at pp. 8-9

more likely to be granted for shellfish aquaculture than for finfish aquaculture.<sup>15</sup> If granted a lease, to holder will enjoy the “right to exclusive use and enjoyment of the area, and has the right to exclude or charge the public for use of the land and/or improvements.”<sup>16</sup>

## 1. Advantages

There are many advantages to participating in the tenure acquisition process. If successful, a First Nation will be able to increase its use of a traditional food source, and will be able to participate in a burgeoning industry.

The tenure process may allow a First Nation to strengthen an Aboriginal Rights/Title claim. For example, the Comox Band recently signed a Memorandum of Understanding (MOU) with LWBC.<sup>17</sup> Under the MOU, land at seven locations will be set aside for 10 years, during which the Comox Band will have the exclusive right to apply for tenures to these areas.<sup>18</sup> The agreement is renewable, and was signed with the understanding that it can exist “until the Band asserts its aboriginal rights or title” to any of the seven locations.<sup>19</sup> During the 10 year period, the Band must be allowed to review all other shellfish applications to the area to determine whether there are any potential infringements of its Aboriginal Rights or Title.<sup>20</sup>

The tenure acquisition process may also provide a means for First Nations to regain rights over traditional territories that have been set aside as parks. For example, 11 hectares of foreshore was removed from Hesquiat Peninsula Park to allow the

---

<sup>15</sup> *Ibid.* at pp. 9-10.

<sup>16</sup> *Ibid.* at p. 9.

<sup>17</sup> B. Scott, “Shellfish agreement means jobs for band” *The Comox Valley Record* (15 November 2002) A3. See also C. Wiens, “Comox Band signs shellfish agreement” *The Comox Valley Record* (15 November 2002) 1.

<sup>18</sup> *Ibid.*

<sup>19</sup> C. Wiens, see note 17, at p. 2.

Hesquiaht First Nation to develop a shellfish aquaculture industry.<sup>21</sup> The Comox Band is also in negotiations with BC Parks as part of its MOU.<sup>22</sup>

## 2. Disadvantages

There are several disadvantages to participating in the tenure acquisition process. As stated earlier, many First Nations understandably have philosophical objections to participating in the tenure acquisition process.

Further, a First Nation will hold far fewer rights under a tenure than it will if it makes a successful Rights/Title claim. A First Nation will most likely be granted a license of occupation rather than a lease, and as a result will not be allowed to “curtail public access over the license area”.<sup>23</sup> For example, under the MOU between the Comox Band and LWBC, the Band would not be allowed to “restrict public access” to the beachfront in any way.<sup>24</sup> A First Nation would not be able to get full title to the land under the tenure acquisition process, as it does not allow for the sale of land.<sup>25</sup>

Although the tenure application process is far less expensive than the cost of pursuing an Aboriginal Rights/Title claim in court, there are costs associated with the process. These costs may impose a hardship on First Nations with limited resources, and may even prevent some First Nations from participating in the process.<sup>26</sup>

---

<sup>20</sup> *Ibid.*

<sup>21</sup> Ministry of Attorney General, News Release 2002AG0006-000041, “Miscellaneous Statutes Amendment Act (no. 2), 2002 Introduced” (15 May 2002).

<sup>22</sup> B. Scott, see note 17.

<sup>23</sup> See note 2, at p. 9.

<sup>24</sup> C. Wiens, “Band looks at shellfish harvesting in harbour” *The Comox Valley Echo* (18 October 2002), at p. 3.

<sup>25</sup> See note 2, at p. 10.

<sup>26</sup> See LWBC Aquaculture Policy, note 2, at Appendix 1 for a fee schedule. See also the Schedule of Fees set out in the *Aquaculture Regulation*, B.C. Reg. 78/2002, and the *Land Act Shellfish Aquaculture Fee Regulation*, B.C. Reg. 232/99.

The tenure process may impose obligations on First Nations that may infringe their Aboriginal Rights. Chief Hardy of the Comox Band has stated that his Band “has an interest in protecting and managing the resource in their traditional areas”, and wants to “try and look after it so it will be there forever.”<sup>27</sup> Although Aboriginal Rights have recently been held to include conservation practices,<sup>28</sup> tenure holders are required to comply with the standards set by LWBC. For example, LWBC requires that aquaculture tenure holders comply with the standard of “diligent use”, which makes it mandatory to comply with provincial waste management standards.<sup>29</sup> The Comox Band would not be allowed to follow traditional resource management practices if they conflict with these provincial standards.

The tenure process may also impose obligations on First Nations that would not arise if they held Aboriginal Rights. For example, as part of its MOU with LWBC, the Comox Band is expected to appear before council, and “host a number of open houses and public meetings”.<sup>30</sup> In other words, the Band is expected to advise and consult with the public; this is essentially a reverse consultation obligation.

Finally, there is a potential conflict between zoning bylaws enacted by municipalities and regional districts and tenures granted by LWBC. This issue will be explored in detail.

---

<sup>27</sup> C. Wiens, see note 17.

<sup>28</sup> *R. v. Charles Max Haines et al.* (3 October 2002), Prince Rupert 22340/22576-C (B.C. Prov. Ct.).

<sup>29</sup> See note 2, at p. 4.

<sup>30</sup> See note 24.

## Zoning Conflict

As explained above, LWBC has the authority to grant shellfish tenures to provincial Crown land. Municipalities and regional districts have the authority to enact zoning bylaws under s. 903 of the *Local Government Act*.<sup>31</sup> Specifically, municipalities and regional districts are allowed to regulate the use of land within their jurisdiction.<sup>32</sup> The possibility exists that these bylaws may extend to areas under tenure. This potential conflict gives rise to two unresolved issues, each of which will be explored in detail:

- a) Whether the municipality or regional district is obligated to consult First Nations and consider their interests when enacting zoning bylaws that may conflict with a shellfish tenure granted to the First Nation by LWBC.
  - b) Whether zoning bylaws can “trump” a tenure granted by a provincial agency to a First Nation, and if not, whether zoning bylaws can “trump” a tenure issued to a First Nation in order to accommodate a s. 35 Aboriginal Right or a treaty right.
- a) Obligation to Consult

Municipalities and regional districts have been deemed to have a dual nature.

When the corporation is the agent of the province in executing general provincial laws within its territory, it can be said to be acting in its governmental aspect. On the other hand, when it is performing the duties of regulating the conduct and supplying the wants of its population in its geographical area by local law, it is acting in its municipal aspect. In the latter aspect, it is, in a sense, a private corporation; in the former aspect it is a branch of the state.<sup>33</sup>

A zoning bylaw is enacted within a particular geographic area to meet the wants of the local population. In enacting a zoning bylaw, then, a municipality or regional district is clearly acting as a private corporation.

---

<sup>31</sup> R.S.B.C. 1996, c. 323.

<sup>32</sup> *Ibid.* s. 903(1)(c)(i).

<sup>33</sup> I. Rogers, *The Law of Canadian Municipal Corporations*, 2<sup>nd</sup> ed. (1971) at pp. 6-7, cited in *City of Medicine Hat v. Attorney-General of Canada* (1985) 18 D.L.R. (4<sup>th</sup>) 428 (Alta. Prov. Ct.) at p. 7, online: QL.

At the end of the day, however, this distinction may not be very important. In a recent decision, the British Columbia Court of Appeal ruled that a private company had a duty to consult the Haida Nation.<sup>34</sup> If a truly private company can be obligated to consult a First Nation, clearly the duty must also apply to municipalities and regional districts, whether there are acting as a private corporation or as an agent of the province.

b) Tenure vs. Zoning Bylaw

As stated above, the question of whether a zoning bylaw can “trump” a shellfish tenure has not yet been resolved. However, there are three possible arguments that suggest that a bylaw cannot trump a provincially-granted tenure.

First, the doctrine of interjurisdictional immunity has never been used to immunize a provincial company or undertaking from a federal law.<sup>35</sup> It is even more unlikely that the doctrine would be applied to bind a provincial corporation by a municipal law.<sup>36</sup> Bylaws are subordinate instruments, and cannot “exceed the scope or contradict the intent of corresponding provincial legislation.”<sup>37</sup>

Second, as stated earlier, in enacting a zoning bylaw a municipality or regional district is acting as a private corporation, not as an agent of the provincial Crown. Decisions made by private corporations must clearly be subordinate to the provincial legislature. Further, s. 4(1)(e) of the *Local Government Act* provides that “the independence of local government is balanced by the responsibility of the Provincial government to consider the interests of the citizens of British Columbia generally.”<sup>38</sup> By

---

<sup>34</sup> *Haida Nation v. British Columbia (Minister of Forests)* [2002] B.C.J. No. 378.

<sup>35</sup> P. W. Hogg, *Constitutional Law of Canada*, 1999 Student ed. (Toronto: Carswell, 1999) at p. 378.

<sup>36</sup> Confirmed in email correspondence from Professor John Borrows (21 November 2002).

<sup>37</sup> J. Benidickson, *Environmental Law*, (Irwin Law, 1997), Chapter 2, Part D, online: QL (BENI).

<sup>38</sup> See note 31.

extension, the right of municipalities and regional districts to enact zoning bylaws must be limited by the provincial government's responsibility to protect First Nations interests.

Third, municipalities and regional districts are prohibited from enacting bylaws that adversely affect farm practices. The *Farm Practices (Right to Farm) Act*<sup>39</sup> ("*Right to Farm Act*") was enacted to protect farmers from "nuisance bylaws", and to ensure that "if a farmer farms properly on the land in the [agricultural land reserve] or where aquaculture is licensed, the farmer is deemed not to contravene local government nuisance or miscellaneous bylaws."<sup>40</sup> Section 903(5) of the *Local Government Act*<sup>41</sup> provides that a local government cannot use its bylaw-making powers to prohibit or restrict the use of land for farm business. "Farm business" includes shellfish aquaculture.<sup>42</sup> Read together, these acts mean that municipalities and regional districts cannot enact zoning bylaws that restrict or prohibit shellfish aquaculture.

Indeed, a councillor in Comox has expressed concern that Comox may lose its zoning authority "if the province preserves aquaculture operations by regulating them through a process similar to the way it regulates the agricultural land reserve".<sup>43</sup> The current process is indeed similar to the process regulating the agricultural land reserve (ALR). Further, concern has been raised that the provincial government intends to make

---

<sup>39</sup> R.S.B.C. 1996, c. 131.

<sup>40</sup> "Farm Practices Protection (Right to Farm) Act – Legislative Summary", online: Ministry of Agriculture, Food & Fisheries website <<http://www.agf.gov.bc.ca/ministry/legsum/FPPR.stm>>.

<sup>41</sup> See note 31.

<sup>42</sup> The definitions of "farm business" and "farm operation" set out in s. 1 of the *Right to Farm Act* (see note 39) together provide that a farm business includes aquaculture, as defined in the *Fisheries Act*. Section 1 of the *Fisheries Act*, R.S.B.C. 1996, c. 149, defines aquaculture as including "the growing and cultivation of shellfish on, in or under the foreshore or in water."

<sup>43</sup> See note 24.

coastal waters a part of the ALR.<sup>44</sup> If this were to happen, then shellfish aquaculture would receive even more protection under s. 47 of the *Agricultural Land Reserve Act*.<sup>45</sup>

For these reasons it seems unlikely that zoning bylaws could trump shellfish tenures granted by LWBC. It is even more unlikely that a municipal bylaw could take precedence over a tenure granted to accommodate an Aboriginal Right or treaty right.

Aboriginal and treaty rights are recognized and affirmed in s. 35(1) of the *Constitution Act, 1982*.<sup>46</sup> Any infringement of these rights must be justified.<sup>47</sup> Chief Justice Lamer states that both the provincial and federal governments may infringe s. 35(1) rights.<sup>48</sup> He does not mention municipal governments, so it seems very unlikely that any infringement of s. 35(1) rights by municipalities or regional districts could be justified.

Assuming, however, that a municipal government could infringe a s. 35(1) right, it would have to meet the test for justification as set out in *Delgamuukw*. First, the government would have to show that the infringement is required to meet a “compelling and substantial” legislative objective – either “the recognition of the prior occupation of North America by aboriginal peoples or ... the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown.”<sup>49</sup> Second, the

---

<sup>44</sup> C. Genovali, “Welcome to the New Era of farmed fish in British Columbia” [*Victoria News Weekend Edition*] (18 October 2002) p. 7.

<sup>45</sup> R.S.B.C. 1996, c. 10.

<sup>46</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>47</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (*Delgamuukw*), at para. 160.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.* at para. 161.

infringement must be consistent with the fiduciary relationship between the Crown and aboriginal peoples.<sup>50</sup>

Clearly a municipality or regional district cannot meet this test. First, the purpose of enacting zoning bylaws has nothing to do with the recognition or reconciliation of prior occupation by Aboriginal peoples. Second, even if a municipal government could assume the role of the Crown,<sup>51</sup> enacting bylaws that infringe s. 35(1) rights is clearly a breach of the fiduciary duty. It seems very unlikely that a court would uphold a municipal bylaw that adversely impacts tenures granted to a First Nation.

### III. CONSULTATION

The purpose of this part of the paper is to set out ways in which First Nations can be more fully involved in decisions that may affect their interests. Specifically, the focus will be on how First Nations can use the duty to consult<sup>52</sup> to become more involved in decisions concerning shellfish tenures. Unfortunately this section will largely consist of examples of how the duty is not being fulfilled. Essentially, the best way for First Nations to increase their involvement in these decisions is to ensure that the government is meeting its existing obligations through structures that are already in place.

#### A. CONSULTATION OBLIGATIONS OF LWBC

LWBC considers Aboriginal interests at several points during the tenure acquisition process. First, there are several specific points at which Aboriginal interests

---

<sup>50</sup> *Ibid.* at para. 162.

<sup>51</sup> As argued above, a municipality is acting as a private corporation when enacting bylaws.

<sup>52</sup> A detailed description of the duty and its origins is beyond the scope of this paper.

must be considered. Second, LWBC considers Aboriginal interests generally through its Aboriginal Interest Assessment Procedures.

### 1. Specific Consideration of Aboriginal Interests

Several parts of LWBC's Aquaculture Policy<sup>53</sup> provide for consideration of First Nations interests throughout the tenure allocation process.

When a First Nation signs an Economic Measure MOU with the government, it can identify areas of interest. Where such a MOU is in place, LWBC will not consider tenure applications that conflict with sited identified in the MOU.<sup>54</sup> However, where a First Nation is involved in "significant negotiations" to create an Economic Measure MOU, LWBC will still accept (but will not assess) tenure applications.<sup>55</sup> This is problematic – if the negotiations are considered "significant" then there is a clear possibility that the First Nation will have a recognized interest in the area. By still accepting tenure applications, LWBC is ignoring this potential interest.

Where a First Nation does not have an Economic Measure or sites selection MOU, LWBC will accept shellfish tenure applications, but the applications will be subject to the Aboriginal Interest Assessment Procedures (to be discussed below).<sup>56</sup>

When setting siting criteria for aquaculture tenures, LWBC will consider factors such as "First Nations potential aboriginal interests and rights".<sup>57</sup> However, the Director has the discretion to modify these criteria "where appropriate".<sup>58</sup> The possibility exists for First Nations' interests to simply be ignored in determining the siting criteria.

---

<sup>53</sup> See note 2.

<sup>54</sup> *Ibid.* at p. 14.

<sup>55</sup> *Ibid.* at p. 19.

<sup>56</sup> *Ibid.* at pp. 14-5.

<sup>57</sup> *Ibid.* at p. 16.

<sup>58</sup> *Ibid.*

When LWBC reviews tenure applications, referrals may be made to address First Nations' interests. However, it is specifically noted that "provincial consultations with First Nations are not meant to replace or satisfy federal aboriginal consultation requirements."<sup>59</sup> This may also be problematic – the fact that the federal government has an obligation does not lessen or negate the provincial government's duty to consult.

When assessing a tenure application, LWBC must do a site inspection where it determines that "there is a need to see, understand and address" concerns identified by First Nations. Where the First Nation has expressed concerns a joint inspection will be conducted. Further, a site inspection will be done where LWBC feels it will allow it an opportunity to "develop and improve working relationships" with First Nations.<sup>60</sup> This is problematic in that LWBC has the discretion to determine whether a site inspection is necessary.

Where LWBC initiates a competitive tenure application process, the Aquaculture Manager, in developing specific criteria, should "strive" to consider factors such as partnerships with First Nations, and "any additional community criteria that may have been established as part of a negotiated Economic Measures MOU with First Nations".<sup>61</sup> Again, LWBC is not required to consider First Nations' interests; rather the Aquaculture Manager has the discretion to determine what criteria to consider.

As stated earlier, aquaculture leases are granted rarely. LWBC's policy states that a lease will only be offered "where it meets the requirements of good land use decision-making and does not compromise...First Nations interests".<sup>62</sup> It is essential that First

---

<sup>59</sup> *Ibid.* at p. 22.

<sup>60</sup> *Ibid.* at pp. 26-7.

<sup>61</sup> *Ibid.* at p. 29.

<sup>62</sup> *Ibid.* at p. 10.

Nations interests be considered fully before leases are granted, as the leaseholder will have the right to the exclusive use of the land.<sup>63</sup>

Finally, where First Nations interests need to be addressed, provincial and federal agencies may apply to establish aquaculture reserves, to prevent the disposition of aquaculture sites.<sup>64</sup> However, this provision is very brief and vague, with no explanation of the criteria needed to establish a reserve or what the terms of such a reserve would be.

## 2. Aboriginal Interest Assessment Procedures

LWBC's Aquaculture policy states that in order to meet the province's fiduciary obligations, it follows its Aboriginal Interest Assessment Procedures as well as provincial consultation guidelines.<sup>65</sup>

The Aboriginal Interest Assessment Procedures were issued in 1999, and were intend to comply with the provincial Consultation Guidelines, 1998.<sup>66</sup> Where there is any inconsistency with the provincial guidelines, the provincial guidelines are to apply.<sup>67</sup> The BC government recently released a new Consultation Policy. As the Aboriginal Interest Assessment Procedures are now out of date and therefore inconsistent with the provincial guidelines, the analysis will move on to the Provincial Consultation Policy, 2002.

## B. PROVINCIAL CONSULTATION POLICY, 2002

The Provincial Consultation Policy concerns Aboriginal Rights and Title that have been asserted but not proven in court. These "asserted rights" are considered to be "potentially existing aboriginal rights and/or title", and are referred to as "aboriginal

---

<sup>63</sup> *Ibid.* at p. 11.

<sup>64</sup> *Ibid.* at p. 10.

<sup>65</sup> *Ibid.* at p. 26.

<sup>66</sup> Online: LWBC website <[http://lwbc.bc.ca/pdf\\_docs/aiap.pdf](http://lwbc.bc.ca/pdf_docs/aiap.pdf)>, at p. 1.

interests.”<sup>68</sup> The policy applies to all ministries, agencies and Crown corporations;<sup>69</sup> therefore it applies to LWBC.

Although the province claims to be aware of the recent court decisions in *Haida Nation v. British Columbia*<sup>70</sup> and *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*<sup>71 72</sup>, the policy arguably falls far below the legal standard of the duty to consult.

First, the policy provides that consultation may not be necessary at all if so indicated by a “Pre-Consultation Assessment”.<sup>73</sup> The list of situations in which consultation may not be required is extensive and contrary to the law. For example, consultation may not be required where “potentially interested First Nations have indicated through previous consultation that they have no particular interests with respect to the area, or their interests have been canvassed or identified in other contexts”.<sup>74</sup> This goes completely against the decision in *Delgamuukw*, in which Chief Justice stated “[t]here is always a duty of consultation.”<sup>75</sup>

The policy then states that consultation “should be made diligently and meaningfully, *and with the intention of fully considering aboriginal interests*”<sup>76</sup> (emphasis added). This is clearly insufficient; the fiduciary duty requires the province to do more than simply intend to consider Aboriginal interests.

---

<sup>67</sup> *Ibid.* at p. 2.

<sup>68</sup> Provincial Policy for Consultation with First Nations (2002), online: BC government website <<http://srmwww.gov.bc.ca/cpp/docs/Consultation PolicyFN.pdf>>, at p. 4.

<sup>69</sup> *Ibid.* at p. 17.

<sup>70</sup> See note 34.

<sup>71</sup> [2002] B.C.J. No. 155.

<sup>72</sup> See note 68, at p. 9.

<sup>73</sup> *Ibid.* at pp. 13, 23.

<sup>74</sup> *Ibid.* at p. 23.

<sup>75</sup> See note 47, at para. 168

<sup>76</sup> See note 68, at p. 18.

The policy provides that where a “sound” claim is made, “consultation efforts must attempt to address and/or accommodate a First Nation’s concerns”.<sup>77</sup> This is simply wrong. The court in *Haida Nation* makes it clear that the duty to consult exists even where there is less than a good prima facie case.<sup>78</sup> Further, it is beyond the authority of the province to determine the soundness of a claim; only a court can make such determinations.

Finally the policy states that

[T]hrough consultation, the Province must consider aboriginal interests prior to making land or resource decisions concerning Crown land activities that are likely to affect those interests and *attempt to address and/or accommodate* concerns that are raised, provided that those concerns relate *directly* to aboriginal interests that are sound and to impacts of Crown decisions on those interests<sup>79</sup> (emphasis added)

This statement is problematic for a number of reasons. First, the duty obligates the province to do more than attempt to address the concerns of First Nations. Second, it must do more than address the concerns; it must make every attempt to accommodate the interests. Finally, the duty to consult applies to government actions that affect Aboriginal interests directly and indirectly.

### C. CONSULTATION OBLIGATIONS OF MUNICIPALITIES AND REGIONAL DISTRICTS

As stated earlier, in enacting zoning bylaws, municipalities and regional districts are acting in the role of a private corporation. The decision in *Haida Nation* makes it clear that private corporations as well as the Crown have a duty to consult First Nations about potential infringements of their Aboriginal Rights and Title. This duty includes the

---

<sup>77</sup> *Ibid.*

<sup>78</sup> See note 34, at para. 51.

obligation to accommodate these interests, and extends to cultural and economic interests.<sup>80</sup> Shellfish aquaculture is an Aboriginal Right, and has both economic and cultural significance. If a municipality intends to enact bylaws that may affect a First Nation's ability to practice shellfish aquaculture, it will therefore be bound by an onerous obligation of consultation.

#### D. CONSULTATION OBLIGATIONS OF TENURE APPLICANTS

The decision in *Haida Nation* makes it clear that third parties may also be obligated by the duty to consult.<sup>81</sup> As a result, there is a possibility that persons holding shellfish tenures may be deemed to owe a duty of consultation and accommodation to potentially affected First Nations. This would be most likely where the tenure-holder is a corporation (as provided for in LWBC's Aquaculture Policy<sup>82</sup>).

The duty to consult attaches to both the Crown and to third parties for the purpose of "creating incentives on the parties to reach negotiated settlements."<sup>83</sup> However, the Crown must stay involved in the process even where the third party assumes consultations.<sup>84</sup>

In *Haida Nation*, the court granted the remedy of a declaratory order.<sup>85</sup> However, the court left open the possibility that the validity of Weyerhaeuser's license could have been successfully challenged if fuller arguments had been made.<sup>86</sup> By extension, then, a

---

<sup>79</sup> See note 68, at pp. 18-19.

<sup>80</sup> See note 34, at para. 48.

<sup>81</sup> *Ibid.*

<sup>82</sup> See note 2, at p. 6.

<sup>83</sup> S. Lawrence & P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar Rev. 252, at p. 258.

<sup>84</sup> *Ibid.* at pp. 260-61.

<sup>85</sup> See note 34, at para. 60.

<sup>86</sup> *Ibid.* at para. 59

First Nation could challenge the validity of a shellfish tenure granted to a third party if the First Nation could show that it was not adequately consulted or accommodated in the process.

#### **IV. CONCLUSION**

First Nations have several options available to them if they wish to participate in the shellfish aquaculture industry. As explained above, there are disadvantages to each option. More work needs to be done to find ways to increase First Nations participation in the industry, and to remove obstacles preventing First Nations from becoming involved. Specifically, the costs involved both in pursuing an Aboriginal Rights/Title claim and in applying for a tenure may be prohibitive to many First Nations.

Further, the provincial government is failing to meet its duty to consult and accommodate First Nations in decisions made about shellfish tenures. More work needs to be done to determine how First Nations can ensure that they are fully consulted in these matters. More generally, work needs to be done to determine other ways in which First Nations can participate in the tenure acquisition process.