



Court File No. T- 554-23

**FEDERAL COURT**

WE WAI KAI NATION and WEI WAI KUM FIRST NATION

APPLICANTS

- and -

THE MINISTER OF FISHERIES, OCEANS, AND THE CANADIAN COAST  
GUARD, GRIEG SEAFOOD B.C. LTD., MOWI CANADA WEST INC. and  
CERMAQ CANADA LTD.

RESPONDENTS

APPLICATION UNDER THE *FEDERAL COURTS ACT*,  
R.S.C. 1985, c. F-7, s. 18.1

**NOTICE OF APPLICATION**

TO THE RESPONDENT:

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 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 applicants' 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.

March 20, 2023

ORIGINAL SIGNED BY

EVA KAN  
REGISTRY OFFICER  
AGENT DU GREFFE

Issued by:

\_\_\_\_\_  
(Registry Officer)

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TO: Minister of Fisheries, Oceans and Canadian Coast Guard  
The Honourable Joyce Murray, P.C., M.P.  
c/o Office of the Deputy Attorney General of Canada  
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AND TO: Attorney General of Canada  
The Honourable David Lametti  
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AND TO: Grieg Seafood B.C. Ltd.  
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Attention: Keith B. Bergner and Toby Kruger

AND TO: Mowi Canada West Inc.  
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Attention: Roy W. Millen, Rochelle L. Collette and Brady Gordon

AND TO: Cermaq Canada Ltd.  
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Attention: Kevin O'Callaghan, Dani Bryant and Madison Grist

## APPLICATION

This is an application for judicial review in respect of the decision of the Minister of Fisheries and Oceans (the “Minister”) on February 17, 2023 to refuse to re-issue aquaculture licenses for 7 open-net Atlantic salmon farms situated in the following locations in the Discovery Islands area in British Columbia:

- Hardwicke Island;
- Sonora Point;
- Lees’ Bay;
- Venture Point;
- Chancellor Channel;
- Brent Island; and
- Barnes Bay.

(the “2023 Decision”)

The applicant makes application for:

- a. A declaration pursuant to s. 18(1)(a) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 that the 2023 Decision was inconsistent with the honour of the Crown and constitutes a breach of Canada’s duty to consult and accommodate the Applicants in respect of their Aboriginal Rights and Title, contrary to s. 35 of the *Constitution Act, 1982*;
- b. A declaration pursuant s. 18(1)(a) of the *Federal Courts Act* that the 2023 Decision was unreasonable;
- c. A declaration pursuant s. 18(1)(a) of the *Federal Courts Act* that the 2023 Decision was procedurally unfair;

- d. An order pursuant to s. 18.1(3)(b) of the *Federal Courts Act* quashing or setting aside the 2023 Decision;
- e. Costs; and
- f. Such further and other relief as to this Honourable Court seems just.

The grounds for the application are:

### **Overview and Parties**

1. The applicants, Wei Wai Kum First Nation (Campbell River Indian Band), and We Wai Kai First Nation (Cape Mudge Indian Band), are historically known collectively as the Ligwìldax<sup>w</sup> Nation (hereinafter, the “Laich-kwil-tach” or “the Nation”). The Laich-kwil-tach Nation also includes the Kwiakah First Nation, whose core territories do not encompass the sites at issue in this application. Although the Kwiakah have indicated they support this application, they are not a party.
2. The unceded and exclusive traditional territory of the Laich-kwil-tach, over which it holds Aboriginal title, includes the region in British Columbia known today as Johnstone Strait, the Discovery Islands and the area known as Shaw Point at the entrance to Topaze Harbour. Laich-kwil-tach history originally centres around Topaze Harbour. By the year 1792, the Nation was in control from the region around Port Neville to Seymour Narrows and Fredericks Arm, including West Thurlow Island, East Thurlow Island, and all but the southeast section of Sonora Island. Before 1846, the Nation expanded its territory further south in manner consistent with their Indigenous laws, to include the remaining Discovery Islands and beyond, into the Gulf of Georgia.
3. The respondent Minister is responsible for regulating aquaculture operations through the *Fisheries Act*, R.S.C. 1985, c. F-14 (“*Fisheries Act*” or the “*Act*”), and its accompanying regulations. The Department of Fisheries and Oceans (“DFO”) is

responsible for issuing all aquaculture licences for marine finfish, shellfish, and freshwater operations in British Columbia.

4. The respondents Grieg Seafood BC Ltd. (“Grieg”), Mowi Canada West Inc. (“Mowi”), and Cermaq Canada Ltd. (“Cermaq”) (collectively, the “Operators”) operate various aquaculture sites on Laich-kwil-tach territories, including the seven sites at issue in this application.

5. The Attorney General of Canada is being served with this application pursuant to Rule 304(1)(b)(iii) of the Federal Courts Rules.

6. The applicants bring this application in response to the Minister’s decision, announced February 17, 2023, to refuse to re-issue aquaculture licences (the “Licenses”) for fifteen finfish farms, including seven farms located on the core title lands of the Laich-kwil-tach, over which they hold and assert Aboriginal rights and title.

7. The Minister’s decision was made in the face of a detailed proposal by the applicants to permit the staged reintroduction of fish farming in the waters within their core title lands. Under this proposal, a limited number of farms would be operated as experimental pilot sites for sustainable aquaculture in partnership with industry, under the joint control and supervision of applicants as title-holders alongside the DFO.

8. By effectively ignoring the applicants’ proposal, the Minister unjustifiably excluded the Laich-kwil-tach from the management of their own territories – territories they have occupied since time immemorial, and over which they hold constitutionally-protected rights under s. 35 of the *Constitution Act, 1982*. As titleholders to their traditional territories, the Laich-kwil-tach have the right to determine whether, where, and how finfish farming is to take place on their territories, or, at the very least to be partners in the decision-making process. The Minister’s decision displays a flagrant and unlawful disregard for these rights. It should be quashed accordingly.

### **Finfish Farming in Laich-kwil-tach Territories**

9. Finfish farming began in the region formerly known as the Discovery Islands in the early 1980s. Prior to 2020, there was a peak of 19 finfish farming sites in the region. In the beginning, Pacific salmon species were farmed until companies gradually turned to raising Atlantic species for various reasons. By 2022, 18 of the 19 sites were Atlantic salmon farms, with one tenure still raising Chinook.

10. This region is large, spanning over an area of 1500km<sup>2</sup>. Seven First Nations claim core or shared territories in the area, but the Laich-kwil-tach dispute some of these claims. This includes the Wei Wai Kum, We Wai Kai, Kwiakah, Klahoose, K'ómoks, Homalco, and Tla'amin. Four finfish aquaculture companies have historically operated in the area: Mowi, Cermaq, Grieg, and Yellow Island Aquaculture Ltd.

11. Finfish farming in the Discovery Islands area is jointly regulated under Canadian law by the Province of British Columbia and the Federal government. The operation of a finfish farm requires both an aquaculture license, issued by the Minister under s. 7 of the *Fisheries Act*, and a licence of occupation under British Columbia's *Land Act*, R.S.B.C. 1996, c. 245.

12. The Operators currently hold licences of occupation for all seven of the farms at issue in this application. This application concerns the federal Minister's decision to refuse to re-issue aquaculture licences in respect of those farms.

### **The First Attempted Closure of Finfish Farms in Laich-kwil-tach Territories**

13. In 2019, the Prime Minister mandated the Minister of Fisheries and Oceans to work with the Province of BC and Indigenous communities to create a responsible plan to transition away from net-pen aquaculture in BC by 2025.

14. In September 2020, with a decision to renew various aquaculture licenses for finfish farms in Laich-kwil-tach territories approaching, the Nation and DFO began exchanging views on the pending decision, its impact on the Nation's Aboriginal rights and title, and expectations around the consultation process.

15. Throughout the engagement process, the Nation expressed its expectation that the consultation process would be based on a mutual understanding of the Nation's strength of claim and be appropriately responsive to the Nation's rights as titleholder in Laich-kwil-tach territories. To this end, by letter dated September 24, 2020, the Nation requested that the consultation process be:

- a. bilateral, as between the Laich-kwil-tach Nation and DFO;
- b. a forum for exploring collaborative decision-making, including a collaborative approach to the pending decision; and
- c. attended by senior officials from DFO with the authority to explore a collaborative approach to the decision.

16. In a series of letters exchanged between September and December 2020, the Laich-kwil-tach explained the basis for their claim to title over the affected areas, while asserting its rights, as title-holder, to make decisions related to the use of its lands and waters. Among other things, the Nation provided DFO with a strength of claim report authored by Dr. Dee Cullon, setting out the basis of their claim to title over the affected areas.

17. In the course of this correspondence, DFO acknowledged the Nation's claim to title, and admitted that the licences subject to its decision fell with Laich-kwil-tach territory. Nevertheless, it took position that given the short timeline for consultation, there was limited or no scope to address the decision collaboratively, and that determination of the Laich-kwil-tach's title was ultimately outside of its purview.

18. By letter dated December 3, 2020, the Nation expressed its dissatisfaction with DFO's process, and asserted that it had not met even the most minimal of consultation requirements, let alone the deep consultation required by the Nation's strong *prima facie* claim to title. The Nation reiterated its request for a process of collaborative governance and the joint development of options or potential solutions, and requested immediate further meetings.

19. On December 15, 2020, DFO sent a final response by letter. While acknowledging the Nation's title claim, DFO refused any further engagement, stating simply that it was "not the forum" to "determine [the Nation's] title claim."

20. On December 17, 2020, the then-Minister of Fisheries, Oceans, and the Canadian Coast Guard, Bernadette Jordan, announced the federal government would be phasing out 19 salmon farms in the area referred to as the Discovery Islands, including all existing finfish farms on Laich-kwil-tach territories (the "2020 Decision")

21. According to the Minister, the 2020 Decision was based in part on "social acceptability" rather than science, citing the region as a key migration route for wild salmon. In addition, the Minister claimed that all seven Nations in the area unanimously wanted farms removed. She did not address the applicants' concerns that the government had failed to consult them adequately, or include them in the decision-making process.

22. In January 2021, four salmon farming companies filed for a judicial review of the 2020 Decision with the support of the Nation. On April 22, 2022, the Federal Court set aside Minister Jordan's decision to remove the 19 farms, on the grounds it was unreasonable and procedurally unfair, in reasons indexed as *Mowi Canada West Inc. v. Canada (Fisheries, Oceans and Coast Guard)*, 2022 FC 588. Among other things, the Court found that the Minister had failed to "meaningfully grapple with key issues" or demonstrate "a full appreciation of the facts" before her.



### **Transitioning Finfish Farming in Laich-kwil-tach Territories**

23. While the judicial review was underway, a new Fisheries Minister, Joyce Murray, took office in October 2021. In June 2022, the Minister announced a two-year renewal for all fish farms in British Columbia, except for the 19 licences in the area affected by the decision under review. According to the Minister, the region is a “subset” of her mandate to transition open net-pen salmon farms by 2025. The Minister also indicated that the decision to renew those licences would be made in January 2023 after consultation between impacted First Nations and DFO.

24. In a discussion framework for the open-net transition plan posted online and updated on July 29, 2022 (the “Discussion Framework”), DFO listed “reconciliation and Indigenous partnerships” as one of the primary objectives of the plan. Among other things, this objective is described as involving:

- a. enhanced First Nations’ engagement in the management of aquaculture, including through collaborative planning and decision-making;
- b. increased involvement of First Nations in aquaculture activities on their territories, including First Nations agreements required for licensing, Area-Based Aquaculture Management, and First Nations partnerships for monitoring, guardianship programs, and research and development;
- c. Meaningful engagement with First Nations, respect for existing agreements, and support for the principles of reconciliation; and
- d. rewarding strong partnerships between industry and Indigenous peoples, supporting Indigenous Knowledge and Science, and the broader implementation of Area-Based Aquaculture Management.

25. In the face of the upcoming renewal decision, and in light of these identified priorities, the Nation entered discussions with the Operators active on their traditional

territories in 2022. Together, the Nation and the Operators developed a plan for the staged reintroduction of limited number of finfish farming sites in Laich-kwil-tach territories in a manner consistent with western science, Traditional Ecological Knowledge (“TEK”), economic diversification, and wild salmon conservation.

26. As part of the plan, the following seven finfish farming sites were identified and agreed on for licence re-issuance in the core territories of the Laich-kwil-tach Nation:

- Hardwicke Island;
- Sonora Point;
- Lees’ Bay;
- Venture Point;
- Chancellor Channel;
- Brent Island; and
- Barnes Bay.

(the “Co-Management Sites”)

27. The Co-Management Sites were identified based on a range of different factors and have been conditionally approved by the Nation. Working with the Operators, the Laich-kwil-tach intend to use these sites to collaboratively investigate alternative aquaculture production technologies for the purpose of minimizing the impacts of aquaculture on wild salmon, while continuing to monitor salmon farms to support evidence-based decision making.

28. As part of this process, any of the Co-Management Sites utilized for live fish farming are intended to operate as pilot sites to:

- a. test new approaches to finfish farming;
- b. support research based on western science and TEK;
- c. provide a basis for a feasibility studies;
- d. support species diversification; and
- e. implement improved monitoring and compliance programs led by the Nation but in coordination with the federal and provincial governments.

### **The Co-Management Proposal**

29. On November 30 2022, the applicants submitted a detailed proposal (the “Proposal”) to the Minister, setting out their plan for the staged reintroduction of finfish farming in Laich-kwil-tach territories, and requesting a government-to-government meeting to discuss the Proposal in December 2022.

30. The Proposal specifically requested that the Minister:

- a. re-issue aquaculture licences for the seven Co-Management Sites for one production cycle;
- b. immediately include the applicants in the ongoing transition process of open net-pen aquaculture; and
- c. redistribute the value of lost revenue caused by the decision of the former Minister back into wild salmon conservation, support for growing Guardian Watchmen programs, and new technology for finfish aquaculture operations to minimize or eliminate interaction between wild and farmed salmon.

31. In addition, the Proposal contained summaries from each of the three Operators concerning the seven Co-Management Sites. Those summaries contained the

Operators' plans to progressively minimize or eliminate interactions between farmed and wild salmon in their operations, as well as their commitment to Indigenous self-determination and the protection of wild Pacific salmon.

32. As the Proposal makes clear, in seeking the re-issuance of aquaculture licenses, the Nation does not necessarily intend to permit the operation of active fish farms on the Co-Management Sites. Rather, it intends to determine for itself if, when, and how the seven chosen farms are operated in the future. The Nation has not yet defined its position on salmon farming in its waters. Instead, it seeks to make its own decisions regarding the sector in keeping with its Aboriginal rights and title, and well as the principles of self-determination and reconciliation.

33. The priority of the Nation is the protection, stewardship, and restoration of wild Pacific salmon stocks in its territories. While working with the Operators, this priority is intended to guide the transition of, and operations planning for, the re-installment of salmon aquaculture in Laich-kwil-tach territories. Until aquaculture permits are granted, however, the Laich-kwil-tach cannot exercise their jurisdiction over this process.

34. A Laich-kwil-tach-led transition process will allow the Nation to conduct Indigenous oversight and monitoring of operations in its territories; build Guardian Watchmen programs; collaborate with DFO, scientists, and the Operators to create a holistic approach to managing the marine space that benefits its capacity building, self-determination, and the protection of wild salmon in line with the priorities identified in the Discussion Framework.

35. On February 9, 2023, over two months after submitting the Proposal, the applicants sent a letter to the Minister indicating that they had not yet received a response. On February 10, 2023, the applicants received an acknowledgement that their letter had been received, but no substantive response to their Proposal.

36. On February 17, 2023, the Minister announced her decision to refuse to re-issue 15 aquaculture permits in the Discovery Islands area, including all seven of the Co-Management Sites (the “2023 Decision”). Her decision did not address the Proposal, or any of the applicants’ requests.

37. On the same day, the applicants were informed by phone that they would receive official correspondence from the Minister’s office regarding the reasons for the Minister’s negative decision the following week. They have yet to receive any such reasons.

### **Legal Basis**

38. The 2023 Decision was unlawful, unreasonable, and procedurally unfair. It should be quashed or set aside accordingly.

39. As title-holders to their traditional territories, the applicants have a special constitutional relationship with the Crown. This relationship is recognized and affirmed in s. 35 of the *Constitution Act, 1982*. Among other things, s. 35 requires the Crown to consult with Indigenous peoples and accommodate their rights where the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal or Treaty right and contemplates conduct that might adversely affect it.

40. The process of consultation and accommodation is guided by the honour of the Crown and must further the objective of reconciliation with Indigenous peoples. It requires the Crown to make every reasonable effort to inform, consult, and accommodate where appropriate. Regulatory processes must provide for mechanisms which allow for participation which corresponds to the Crown conduct contemplated and the rights affected.

41. In addition, the Minister has a statutory duty under s. 2.4 of the *Fisheries Act* to consider any adverse effects on the rights of the Indigenous peoples of Canada when making a decision under the *Act*.

42. All seven of the Co-Management Sites are in Laich-kwil-tach Nation's core territory. At all material times, the respondent Minister had direct knowledge of the applicants' strong *prima facie* claim to Aboriginal title over the affected areas.

43. As title-holders, the applicants had, among other rights:

- a. the right to decide how their lands and waters would be used;
- b. the right to the economic benefits of their lands, waters and resources;  
and
- c. the right to pro-actively use and manage their lands, water and resources in coordination with the Crown.

44. In addition, under the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP"), incorporated into Canadian law under the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c. 14, the applicants had:

- a. The right to freely pursue their economic, social and cultural development (art. 3);
- b. The right to determine and develop priorities and strategies for exercising their right to development (art. 23);
- c. The right to own, use, develop and control their traditional territories (art. 26); and
- d. The right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources (art. 32).

45. The Minister's refusal to re-issue aquaculture permits for the Co-Management Sites directly impacted the exercise of these rights by, *inter alia*:

- a. Causing the loss of an estimated \$12.3 million in annual direct economic benefits from the lands, waters and resources in form of full-time jobs, benefit-sharing agreements, and contracts with indigenous-owned companies who provide further indigenous employment;
- b. Interfering with agreements made with the Operators recognizing Laich-kwil-tach jurisdiction, and establishing structures to oversee and monitor finfish farming operations in Laich-kwil-tach Territories in accordance with that jurisdiction;
- c. Depriving the applicants of the means to build increased science capacity, marine oversight, Guardian Programs, and wild salmon conservation efforts, and to integrate TEK into monitoring and decision-making; and
- d. Directly interfering with the applicants' attempts to assert management and governance rights over their traditional territories.

46. The Minister, accordingly, owed a duty to consult and accommodate the applicants' rights and strong *prima facie* claim to Aboriginal title over the affected areas. In issuing the 2023 Decision, the Minister breached this duty by, *inter alia*:

- a. Failing to adequately engage with the applicants concerning the Decision and its impacts on their rights over their traditional territories;
- b. Failing to prioritize consultation with the applicants above consultation with other First Nations with no, or weak, claims to rights and title in the affected area;

- c. Failing to prioritize constitutionally-recognized Aboriginal rights and title over the political views of non-aboriginal constituents and lobby groups; and
  - d. Failing to consider or accommodate the applicants' right to manage and benefit from their lands adequately, or at all.
47. In addition, the 2023 Decision was unreasonable insofar as the Minister:
- a. Failed to provide adequate, or any, consideration to the Proposal;
  - b. Failed to consider the adverse effects of the 2023 Decision on the applicants' rights and title, contrary to s. 35 of the *Constitution Act, 1982*, and her statutory obligations under the *Fisheries Act*;
  - c. Failed to grapple with the key facts and issues raised in the Proposal and other submissions;
  - d. Failed to afford adequate priority to the applicants' views as title-holders to the affected areas; and
  - e. Failed to adequately justify her decision to reject the Proposal, or demonstrate a full appreciation of the facts before her.
48. Finally, the Minister owed a duty of procedural fairness to the applicants, which she breached by:
- a. Failing to adequately consult the applicants with respect to 2023 Decision; and
  - b. Failing to provide reasons for rejecting the Proposal.
49. The appropriate remedy in the circumstances is to quash or set aside the 2023 Decision.



**Materials in Support of the Application**

This application will be supported by the following material:

1. one or more affidavits, to be sworn;
2. the record before the Minister in respect of the re-issuance of aquaculture permits for the seven Co-Management Sites; and
3. such further material as counsel may advise and this Honourable Court may allow.

Pursuant to Rule 317 of the *Federal Court Rules*, the applicants request that the Minister produce all records in her possession, relevant to the issues raised in this judicial review application that are not in the possession of the applicants, and to send a certified copy of this material to the applicant and to the Registry. This request includes, but is not limited to:

- a. The record of all consultation and engagement, including all correspondence, submissions, notes, records of communication, or any other records, between the DFO, the Minister, her delegate, her staff and any other person, entity, stakeholder, First Nation or other third party regarding the 2023 Decision;
- b. All documents created, considered, submitted or relied on by the Minister, her delegate, her staff, of the DFO in the course of preparing for or in the making of the 2023 Decision;
- c. All internal documents created by or on behalf of the DFO, the Minister, her delegate or her staff relating to the making of the 2023 Decision including all correspondence, notes, and records of communication, or any other record;

- d. All correspondence and records of communication in the possession of the DFO, the Minister, her delegate or her staff that are between parties outside of DFO regarding the making of the 2023 Decision including all correspondence from third parties advocating with respect to the content of the 2023 Decision; and
- e. All documents and records in any form relating to the 2023 Decision

March 20, 2023



Signature of solicitors for the Applicants  
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I HEREBY CERTIFY that the above document is a true  
copy of the original issued out of/ filed in the Court on the  
20 day of MAR A.D. 20 23  
Dated this 20 day of MAR 20 23



**EVA KAN**  
**REGISTRY OFFICER**  
**AGENT DU GREFFE**