IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2009 BCSC 1494

Date: 20091103
Docket: S033335
Registry: Vancouver

Between:

The Ahousaht, Ehattesaht, Hesquiaht, Hupacasath, Huu-ay-aht, Mowachaht/Muchalaht, Nuchatlaht, Tla-o-qui-aht, and Tseshaht Indian Bands and Nations et al.

Plaintiffs

And

The Attorney General of Canada and Her Majesty the Queen in Right of the Province of British Columbia

Defendants

Before: The Honourable Madam Justice Garson

Corrected Judgment: Pages 1 and 2 of the judgment were corrected on December 15, 2009

Reasons for Judgment

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Date and Place of Trial:	Ahousaht, B.C. May 1 – 2, 2006 Vancouver, B.C. April 24 – 28, May 8 – 12; 15 – 18, 2006 February 4 – 8; 11 – 15; 25 – 29, March 3 – 6; 10 – 14; 25 – 28; 31, April 1 – 4; 7 – 11; 21 – 24; 28; 29, May 5 – 9; 15, 16; 26 – 30, June 2 – 5; 16 – 19; 23 – 27, September 2 – 5; 8 – 12; 15 – 19; 29; 30, 2008 March 9-11; 16-20; 23-25, 2009
Date and Place of Judgment:	Vancouver, B.C. November 3, 2009

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I. INTRODUCTION

[1] The plaintiffs in this case are the Ehattesaht, the Mowachaht/Muchalaht, the Hesquiaht, the Ahousaht, and the Tla-o-qui-aht, five aboriginal bands whose territories are located on the west coast of Vancouver Island (an area which I will call here the "WCVI"). This case turns primarily on the claim of these plaintiffs to an aboriginal right to fish on a commercial basis. They assert that at the time of contact with Europeans, their ancestral communities fished and traded fish and these activities were intrinsic aspects of their culture. They contend that those fishing and trading activities found their modern-day aboriginal rights to fish commercially, and that Canada's fisheries regime unjustifiably infringes those rights. They claim that they are largely excluded from the WCVI commercial fishery. The plaintiffs do not seek rights to fish free from government regulation, but say such regulation must recognize their aboriginal rights, which at the moment it fails to do.

[2] Canada denies that the plaintiffs possess an aboriginal right to trade or to sell fish. In the alternative, Canada denies that its legislation infringes any aboriginal rights that the plaintiffs do possess. Further, in the alternative, Canada says that if there is any such infringement it is justified by its need to conserve and to manage the fishery in a sustainable way.

[3] The plaintiffs additionally claim aboriginal title to the submerged lands extending 100 nautical miles into the Pacific Ocean from the foreshore of their dry land territories. They do not seek title to dry land in this action. Appendix A to these Reasons, replicated from the plaintiffs' pleadings, is a map of the WCVI depicting the territories over which the plaintiffs claim these aboriginal rights and title. That map depicts the claims of all 11 original plaintiffs in this action. Six of those plaintiffs discontinued their actions or will be proceeding in a subsequent phase of this action. I will refer to the five bands with whose claims I deal here, and their members, collectively, as "the Nuu-chah-nulth" or "the Nuu-chah-nulth people".

[4] During the course of the trial, the plaintiffs (by which I mean the five plaintiffs referred to above) withdrew the several claims they made directly against the

Province of British Columbia. By the end of evidence, the Province's only remaining interest was with respect to the title claim. At the commencement of closing arguments, however, the Province elected to make no submissions in respect to that claim or at all. All the claims are defended by Canada. Any references I make to "the parties" in these Reasons are references to the five plaintiffs and Canada only.

[5] I summarize the parties' positions below. I then identify the broad issues this Court must resolve and outline the nature of the evidence in the case. I then set out a brief overview of the legal framework applicable to the issues. The balance of this judgment is divided into four main sections: aboriginal rights; aboriginal title; infringement; and justification.

II. OVERVIEW OF THE PARTIES' POSITIONS

[6] The plaintiffs seek declarations of both aboriginal rights and title in these proceedings.

[7] The plaintiffs claim that before and at the time of contact with Europeans, their predecessors (collectively, the "Nuu-chah-nulth Nations") existed as organized and self-governing social and political entities. They claim that the Nuu-chah-nulth Nations are culturally related groups that share common distinctive features including language, customs, practices, traditions, laws, economies, spiritual beliefs and culture. After British Columbia's entry into Confederation in 1871, each of the Nuu-chah-nulth Nations was constituted as a band under the predecessor of the *Indian Act*, R.S.C. 1985, c. I-5, and, today, each band is the legal representative of its predecessor Nation and the lawful holder of the collective aboriginal rights and title of that Nation.

[8] The plaintiffs alternatively plead that before contact and before the assertion of British sovereignty, the Nuu-chah-nulth Nations existed together in a single aboriginal nation, the Nuu-chah-nulth Nation. The evidence tendered at trial does not support the pleading that the plaintiffs' ancestors were part of one single Nuu-chah-nulth Nation. The plaintiffs did not press this argument in final submissions. I

conclude that this claim is contrary to the evidence, and I do not consider it further in these Reasons.

[9] The plaintiffs claim that from a time prior to European contact and continuing to the present, they owned, used and occupied territories within an area on the WCVI and extending 100 nautical miles into the Pacific Ocean. This area is set out on the map attached as Appendix A to these Reasons, as are the approximate boundaries of the specific territories claimed by each individual plaintiff. The plaintiffs' claimed territories are set out with great particularity in Exhibit 26, the Base Map Book.

[10] The plaintiffs claim that prior to and at contact, the Nuu-chah-nulth were a fishing people whose way of life was characterized by trade, including trade in fish. They submit that these pre-contact practices translate into modern aboriginal rights, which they plead as follows:

a. To harvest all species of fisheries resources from within their territories, or portions thereof, and, in the alternative, one or more of those species;

b. To harvest those fisheries resources for any purposes including for food purposes, social purposes, ceremonial purposes, trade purposes, purposes of exchange for money or other goods, commercial purposes, purposes of sustaining the plaintiff communities, or one or more of those purposes; and

c. To sell, trade or exchange those fisheries resources:

    i. on a commercial scale; or

    ii. in the alternative, to sustain their communities; or

    iii. in the further alternative, for money or other goods.

[11] The plaintiffs additionally claim aboriginal title to the fishing territories within their respective territories. The fishing territories comprise, for each plaintiff, a "test case" river, the foreshore areas and bodies of water below the low water mark and extending 100 nautical miles into the Pacific Ocean. The plaintiffs do not seek declarations of title to the upland areas of their territories. Further, they ask the Court to define the content of their aboriginal title only to the extent necessary to establish rights to harvest and sell fisheries resources incident to that title.

[12] The plaintiffs submit that the aboriginal rights and title they claim have not been extinguished, and are recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[13] The plaintiffs further claim that their aboriginal rights to fish, including those which are a component of title, have been infringed by the restrictions and prohibitions placed on their fishing activities by operation of both Canada's statutory fisheries regime and the Department of Fisheries and Ocean's (the "DFO") policy regime. More specifically, they contend that the *Fisheries Act*, R.S.C. 1985, c. F-14, and regulations promulgated thereunder infringe their fishing rights on their face, as they impose a general prohibition against fishing and selling fish without a licence, and then place authority to issue licences within the absolute discretion of the Minister of Fisheries and Oceans (the "Minister"). By subjecting the exercise of their constitutional rights to the unfettered discretion of the Minister, the legislative scheme, they say, infringes those rights. With respect to the policy regime, the plaintiffs submit that the cumulative effect of DFO policy has been to severely limit the fishing opportunities available to the Nuu-chah-nulth, in particular, commercial opportunities. The plaintiffs say that they have been forced out of the fishery and are unable to exercise their aboriginal rights, with devastating consequences for their communities. The plaintiffs submit that Canada is unable to justify these infringements of their aboriginal rights.

[14] In the alternative to their aboriginal rights and title claims, the plaintiffs assert the existence of a fiduciary duty on the part of Canada to ensure that the Nuu-chah-

nulth have access to fisheries resources for commercial purposes in order that they may earn their livelihoods and sustain their communities through the sale of those resources.

[15] Canada responds that the plaintiffs have failed to establish that they are the successor collectives to the aboriginal groups that historically possessed aboriginal rights and title. For this reason alone, their claims must fail.

[16] Canada further submits that none of the plaintiffs have established that they possess aboriginal rights to harvest, for any of the reasons they assert, all species of fisheries resources in their respective territories. They have also failed to establish aboriginal rights to sell any species of fisheries resources harvested in their respective territories, whether on a commercial scale, for the purposes of sustaining their communities, or in exchange for money or other goods. Canada contends that these rights cannot be proven because no such practices existed at the time of contact; alternatively, any such practices were not integral to the distinctive cultures of the plaintiffs; or, in the further alternative, there is no continuity between the pre-contact fishing practices of the aboriginal peoples of the WCVI and the modern activities alleged to be the modern iteration of those practices.

[17] With respect to aboriginal title, Canada submits that the plaintiffs' claims are not supported at law or on the evidence. As a matter of law, it says, aboriginal title does not subsist over submerged lands. Further, on the facts, the plaintiffs did not occupy their fishing territories to the extent necessary to establish aboriginal title. Canada additionally submits that the fishing rights that the plaintiffs claim as an incident to title do not exist as a component of any aboriginal title which may be found to exist with respect to the submerged lands in question.

[18] In the event this Court finds aboriginal rights or title, Canada submits that there has been no meaningful diminution, and, accordingly, no *prima facie* infringement, of those rights or title. Alternatively, any infringement is justified given that Canada's fisheries legislation and policies are intended to fulfil a variety of objectives, including: conservation of the fisheries; promotion of economic and

regional fairness; promotion of fairness amongst First Nation users of the fisheries; and, promotion of the sustainable development of the fisheries.

[19] With respect to the plaintiffs' fiduciary duty claim, Canada admits the existence of a fiduciary relationship but denies the existence of a fiduciary duty to ensure that the plaintiffs have access to fisheries resources for commercial purposes in order to earn a livelihood and sustain their communities through the sale of those resources. Alternatively, if such a duty exists, Canada says that it has not breached that duty.

III. ISSUES

[20] This case raises four main issues.

[21] The first issue is whether the plaintiffs have an aboriginal right to fish and to sell fish. This part of the plaintiffs' claim requires the plaintiffs to prove that at 1774, the date of first contact with Europeans, they fished and traded fish (in the absence of a conventional monetary system). The evidence before the Court on this issue consists primarily of journals, logs, and diaries of European explorers and traders, as well as other anthropological and ethnographic evidence. One of the issues confronting the Court is the extent to which the Court can infer from descriptions of post-contact activity that those same activities occurred before contact. If I conclude that the plaintiffs have proven the existence of pre-contact trade, I must then characterize the aboriginal right and consider the scope or quantification of that right.

[22] A second issue is whether the plaintiffs have established aboriginal title to their fishing territories and that they hold fishing rights as an economic component of that title.

[23] If I conclude that the plaintiffs have proven aboriginal fishing rights, the next issue is to determine whether Canada's fisheries regime *prima facie* infringes those rights.

[24] Finally, if the plaintiffs prove *prima facie* infringement, then the burden shifts to Canada to prove that the infringement is justified. One example of a justificatory factor is the need for conservation. I must consider the justificatory factors advanced by Canada to determine whether the infringement can be justified.

IV. LEGAL FRAMEWORK

[25] I set out a fairly brief overview of the legal principles that govern an aboriginal rights claim in order to provide context for the review of the evidence and the analysis to follow. I will expand upon the legal concepts as necessary in subsequent sections of these Reasons.

A. Aboriginal Rights – Overview of Legal Principles

[26] Any analysis of aboriginal rights must begin with s. 35(1) of the *Constitution Act, 1982*:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[27] Section 35(1) provides a constitutional framework for the protection of the distinctive cultures of aboriginal peoples so that their prior occupation of North America can be recognized and reconciled with the sovereignty of the Crown: *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 30; *R. v. Sappier*; *R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 22. In *Van der Peet*, Lamer C.J. described the basis for the doctrine of aboriginal rights in these terms, at para. 30:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1) because of one simple fact: when Europeans arrived in North America, aboriginal peoples <u>were already here</u>, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.
>
> [Emphasis in original]

[28] In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the first case to consider s. 35(1), the Supreme Court developed the basic analytical framework for considering an aboriginal rights claim:

a. Is there an existing aboriginal right?

b. Has the aboriginal right been extinguished?

c. Has there been a *prima facie* infringement of the right?

d. Can that infringement be justified?

[29] Beginning with *Van der Peet*, the Court has steadily developed the jurisprudence relating to aboriginal rights as first set out in *Sparrow*.

1. Is there an existing aboriginal right?

[30] Aboriginal rights fall along a spectrum, the cornerstone of which is their degree of connection to the land. In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, Lamer C.J. explained, at para. 138:

> ... At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the "occupation and use of the land" where the activity is taking place is not "sufficient to support a claim of title to the land" (at para. 26 [of *Adams*] (emphasis in original)). Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. I put the point this way in Adams, at para. 30:
>
> > Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land.
> >
> > [Emphasis in original]
>
> At the other end of the spectrum, there is aboriginal title itself. As *Adams* makes clear, aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself.

[31] As noted in this passage, an aboriginal right, excluding title, is an activity that is an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. This was the definition enunciated by the Supreme Court in *Van der Peet*. In that decision, the Court set out a multi-tiered analysis for considering the existence of an aboriginal right:

a. characterizing the claimed aboriginal right;

b. establishing the existence of the ancestral practice, custom or tradition advanced as supporting the claimed right;

c. determining whether the ancestral practices, customs or traditions were integral to the distinctive culture of the claimant's pre-contact society; and

d. determining whether reasonable continuity exists between the pre-contact practice and the contemporary claim.

[32] In assessing a claim for the existence of an aboriginal right, the Court must be sensitive to, and take into account, the perspective of the aboriginal claimants: *Van der Peet*, at para. 49. However, since aboriginal rights exist within the legal system of Canada, that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.

[33] I will elaborate upon each of these four aspects of the analysis.

a. Characterizing the right

[34] The first step is to characterize the right claimed. A key component in analyzing an aboriginal rights claim, characterization is guided by three factors (*Van der Peet*, at para. 53):

a. the nature of the action which the applicant claims was done pursuant to an aboriginal right;

b. the nature of the governmental regulation, statute or action being impugned; and

c. the pre-contact practice, custom or tradition being relied upon to established the right.

[35] Characterization of the claim is important because whether or not the evidence will support the claim will depend in large measure on what that evidence is being called to support: *Van der Peet*, at para. 51.

b. Establishing the existence of the ancestral practice, custom or tradition advanced as supporting the claimed right

[36] This stage of the analysis requires the Court to determine whether, as a question of fact, the evidence establishes the ancestral practice, custom or tradition supporting the claimed right. The relevant time frame is the period prior to contact with Europeans: *Van der Peet*, at para. 60; *Sappier*, at para. 34. As Lamer C.J. explained in *Van der Peet*, at para. 60, "[b]ecause it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the Courts must look in identifying aboriginal rights".

c. Integral to the distinctive culture of the claimant's pre-contact society

[37] The Court must also determine whether the activity claimed to be an aboriginal right is part of a practice, custom or tradition that was an integral part of the distinctive culture of the aboriginal community asserting the right prior to contact with Europeans. The rationale for this approach was described in *Van der Peet*, at para. 56:

> This aspect of the integral to a distinctive culture test arises from the fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation

> of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights.
>
> [Emphasis added]

[38] To be integral, a practice, custom or tradition must be a central and significant part of the society's distinctive culture. It cannot be merely incidental to the society's identity. The Supreme Court has moved away from the notion that to be integral, the practice must lie at the core of the society's identity. In *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, it was held that it was those practices that go to the core of the pre-contact aboriginal society that will be protected as aboriginal rights. At para. 12, McLachlin C.J. wrote that a practice, custom or tradition would be integral to a distinctive aboriginal culture in the sense that:

> … it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet*, *supra*, at paras. 54-59 [emphasis in original])

[39] However, in *Sappier*, the Supreme Court's most recent consideration of aboriginal rights, the Court rejected this articulation of the standard. As Bastarache J. wrote, at paras. 40-41:

> … Although intended as a helpful description of the *Van der Peet* test, the reference in *Mitchell* to a "core identity" may have unintentionally resulted in a heightened threshold for establishing an aboriginal right. For this reason, I think it necessary to discard the notion that the pre-contact practice upon which the right is based must go to the core of the society's identity, i.e. its single most important defining character. This has never been the test for establishing an aboriginal right. This Court has clearly held that a claimant need only show that the practice was integral to the aboriginal society's pre-contact distinctive culture.
>
> The notion that the pre-contact practice must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it, has also served in some cases to create artificial barriers to the recognition and affirmation of aboriginal rights.

[40] Bastarache J. went on to explain what was meant by "distinctive culture". After acknowledging the challenge courts have encountered in applying this concept, he wrote, at para. 45:

> The aboriginal rights doctrine, which has been constitutionalized by s. 35, arises from the simple fact of prior occupation of the lands now forming Canada. The "integral to a distinctive culture" test must necessarily be understood in this context. As L'Heureux-Dubé J. explained in dissent in *Van der Peet*, "[t]he 'distinctive aboriginal culture' must be taken to refer to the reality that, despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands: …" The focus of the Court should therefore be on the nature of this prior occupation. What is meant by "culture" is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word "distinctive" as a qualifier is meant to incorporate an element of aboriginal specificity. However, "distinctive" does not mean "distinct", and the notion of aboriginality must not be reduced to "racialized stereotypes of Aboriginal peoples" …

[41] Consistent with this reasoning, Bastarache J. held that practices undertaken for survival purposes may be considered integral to the distinctive culture of an aboriginal people.

[42] Courts have also considered the relationship of a practice to a particular geographic site when considering its integrality to the aboriginal society: *Mitchell*, at paras. 55-56.

d. Continuity

[43] In order for an activity to be recognized as an aboriginal right, the present practice, custom or tradition must have reasonable continuity with the practices, customs and traditions that existed prior to contact. The concept of continuity ensures that the modern manifestation of the pre-contact practice can evolve, though within limits. As Lamer C.J. wrote, at para. 64 of *Van der Peet*:

> The concept of continuity is, in other words, the means by which a "frozen rights" approach to s. 35(1) will be avoided. Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of

> aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.

[44] Although the nature of the practice which founds the aboriginal right claim must be considered in the context of the pre-contact distinctive culture of the particular aboriginal community, the nature of the right must be determined in light of present day circumstances: *Sappier* at para. 48. Thus, the practice and its associated uses must be allowed to evolve; otherwise, rights would be frozen in their pre-contact form. As McLachlin C.J. explained in *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220 at para. 25, "Logical evolution means the same sort of activity, carried on in the modern economy by modern means." In the factual context of *Sappier*, for instance, the Court held that the right to harvest wood for the construction of temporary shelters must be allowed to evolve into a right to harvest wood by modern means to be used in the construction of modern dwellings.

[45] Continuity also requires that claimants establish a connection with the ancestral group upon whose practices they rely to assert an aboriginal right: *Marshall and Bernard*, at para. 67.

2. Has the aboriginal right been extinguished?

[46] The onus of proving that an aboriginal right has been extinguished lies upon the Crown. There must be strict proof of the fact of extinguishment and evidence of a clear and plain intention on the part of the Crown to extinguish the right: *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41. The mere fact that a right has been regulated by the government and its exercise subject to terms and conditions is not sufficient to extinguish the right: *Sparrow*, at p. 1097.

[47] In this case, Canada does not assert that the aboriginal rights claimed have been extinguished. There is also no evidence of extinguishment. Accordingly, I make the finding that, to the extent the plaintiffs prove aboriginal rights, those rights have not been extinguished.

3. Has there been a *prima facie* infringement of the right?

[48] Once it has been determined that an aboriginal right has not been extinguished, it then falls to the claimant to prove that the government has infringed that right. As set out in *Sparrow*, the test for infringement asks whether the impugned government action has the effect of interfering with an existing aboriginal right. If it does, it constitutes a *prima facie* infringement of s. 35(1). Questions that guide the analysis as to whether an impugned government action has the effect of interfering with an existing aboriginal right include:

a. Is the limitation unreasonable?

b. Does the limitation impose undue hardship?

c. Does the regulation deny to the holders of the right their preferred means of exercising that right?

4. Can the infringement be justified?

[49] Once a *prima facie* infringement has been established, the onus shifts to the Crown to demonstrate that the infringement is justifiable. *Sparrow* lays out a two-stage analysis with respect to justification:

a. The infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial.

b. The infringement must also be consistent with the special fiduciary relationship that exists between the Crown and aboriginal peoples.

B. Analytical Approach in this Case

[50] Much of the aboriginal rights jurisprudence summarized above has developed in the context of regulatory prosecutions in which the existence of an aboriginal right is raised as a defence to a charge. The analyses set out in the authorities are not

always easily applied in a civil proceeding for declaratory relief, such as the case at bar. One particular area of challenge is with respect to characterizing aboriginal rights.

[51] Where the existence of an aboriginal right is raised as a defence to a regulatory prosecution, as it was in *Van der Peet*, it is logical that the *actus reus* of the offence and the governmental statute or regulation that has been engaged will largely shape the characterization of the aboriginal right being claimed. After all, the purpose of the analysis is to determine whether the activities in which the claimants were engaged come within the constitutionally protected ambit of s. 35(1). The logic of that approach is less apparent, however, in a civil proceeding. In this latter context, it is necessarily the pleadings that will govern the nature of the plaintiffs' claim: *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2008 BCSC 447, [2008] B.C.J. No. 652.

[52] In *Marshall and Bernard*, McLachlin C.J. discussed in general terms how courts should approach a claim for an aboriginal right, at para. 48:

> The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right. The question is whether the aboriginal practice at the time of assertion of European sovereignty (not, unlike treaties, when a document was signed) translates into a modern legal right, and if so, what right? This exercise involves both aboriginal and European perspectives. ...

[53] *Marshall and Bernard* was a treaty rights and aboriginal title case, thus the reference to the assertion of sovereignty as the relevant moment in the passage above. Nevertheless, the approach of examining the ancestral practice and translating it into a modern legal right is well suited to civil cases, particularly that at bar, given that the plaintiffs plead their aboriginal fishing rights along a spectrum. It is also consistent with the Supreme Court's approach in *R. v. Gladstone*, [1996] 2 S.C.R. 723, and *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, where the Court turned first to consider whether the evidence established a lesser fishing right

and proposed to consider a broader commercial right only if that lesser right were established.

[54] The Supreme Court in *Van der Peet* set out an analytical framework for considering whether a claimant has proved the existence of an aboriginal right. I propose to modify the analysis slightly to reflect the nature of the present action, and will approach it in the following way. First, I will review the evidence and make findings of fact with respect to the existence and nature of ancestral Nuu-chah-nulth fishing and trading practices. Next I will determine whether any such practices were integral to the distinctive culture of pre-contact Nuu-chah-nulth society. Included here will be discussion of the geographical ambit of those practices and whether they were specific to particular marine species. I will also here address whether the plaintiffs are the proper claimant groups. I will then consider whether reasonable continuity exists between the plaintiffs' pre-contact and contemporary practices. Finally, I will translate the ancestral practices into modern rights or, in other words, characterize the aboriginal rights.

V. REVIEW OF THE EVIDENCE

A. Nature of the Evidence/Fact Finding Method

[55] The task facing courts in aboriginal rights and title cases is one usually reserved for historians, anthropologists, archaeologists, and ethnographers. Courts have sufficient difficulty determining what happened a few months or years ago, never mind a few centuries ago. The main fact that the plaintiffs seek to prove is that they traded fish prior to contact with European culture, and that that activity is analogous to the modern activity of commercial fishing. The majority of the evidence at trial concerning the aboriginal rights claim was led to prove this fact.

[56] Before analyzing that evidence, I propose to review the legal principles that govern proof of facts in aboriginal rights and title cases, and explain the evidentiary principles that govern the fact finding process. I will also discuss the sources and types of evidence tendered, and how I propose to use it.

[57] First, to repeat what is trite, courts have recognized the inherent challenges in proving aboriginal claims which require proof of facts from long ago: *Delgamuukw*, at paras. 80 and 82; and *Mitchell*, at paras. 27 and 29.

[58] In *Van der Peet*, at para. 62, Lamer C.J. acknowledged "the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community." He recognized that the burden of proof must not be applied in such a way as to conflict with the spirit and intention of s. 35(1) of the *Constitution Act*, *1982*. At para. 68, he wrote:

> [A] court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in.

[59] The Supreme Court of Canada has also held that owing to the difficulties in proving aboriginal rights, courts must be prepared to draw inferences from what evidence is available:

> Flexibility is important when engaging in the *Van der Peet* analysis because the object is to provide cultural security and continuity for the particular aboriginal society. This object gives context to the analysis. For this reason, courts must be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available.
>
> *Sappier*, at para. 33

[60] This flexible approach to the evidence does not, however, negate the operation of general evidentiary principles. In *Mitchell*, McLachlin C.J. stated, at para. 38:

> … it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law …

[61] McLachlin C.J. commented upon the evidentiary concerns in proving aboriginal rights beginning at para. 27:

27 Aboriginal right claims give rise to unique and inherent evidentiary difficulties. Claimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records. Recognizing these difficulties, this Court has cautioned that the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). Thus in *Van der Peet*, *supra*, the majority of this Court stated that "a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in" (para. 68).

28 This guideline applies both to the admissibility of evidence and weighing of aboriginal oral history (*Van der Peet*, *supra*; *Delgamuukw*, *supra*, at para. 82).

(a) Admissibility of Evidence in Aboriginal Right Claims

29 Courts render decisions on the basis of evidence. This fundamental principle applies to aboriginal claims as much as to any other claim. *Van der Peet* and *Delgamuukw* affirm the continued applicability of the rules of evidence, while cautioning that these rules must be applied flexibly, in a manner commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in s. 35(1). This flexible application of the rules of evidence permits, for example, the admissibility of evidence of post-contact activities to prove continuity with pre-contact practices, customs and traditions (*Van der Peet*, *supra*, at para. 62) and the meaningful consideration of various forms of oral history (*Delgamuukw*, supra).

30 The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum" (*R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 487). Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.

…

37 … Thus, it is imperative that the laws of evidence operate to ensure that the aboriginal perspective is "given due weight by the courts."

…

39 There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation

> should not be confused with a vague sense of after-the-fact largesse" (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14). …

[62] From the foregoing authorities, I draw the following evidentiary principles that have special application in cases involving claims to aboriginal rights and title:

- As in all civil cases, the burden of proof rests on the plaintiff. The material facts must be proven on a balance of probabilities, with due regard to the rules of evidence.

- While evidence must be sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test, it may be necessary to draw inferences where appropriate, such as inferring from post-contact activity that the same activity took place before contact.

- Traditional rules of evidence regarding the admissibility, reliability and weight of evidence continue to apply. However, the Court must also recognize the evidentiary challenges inherent in proving events and circumstances that took place hundreds of years ago, and apply those rules flexibly in a manner that is consistent with the spirit and intent of s. 35(1) of the *Constitution Act, 1982*.

- Finally, the Court must be sensitive to not only the European perspective but also the aboriginal perspective when examining evidence about aboriginal peoples as recorded by Europeans.

[63] I now turn to the different types of evidence relied upon by the parties to prove the historical and pre-historical facts in support or defence of the plaintiffs' claims to aboriginal rights and title.

B. Documentary and Expert Evidence

1. Explorer Records

[64] The plaintiffs and Canada tendered into evidence a collection of documents that have come to be known in these proceedings as the "Explorer Records". Pursuant to an earlier mid-trial ruling (2008 BCSC 768), these documents are in evidence for the *prima facie* truth of their contents. I concluded in that ruling that an individual Explorer Record could be admitted into evidence if it was referred to by an expert in a manner sufficient to permit the Court to make a determination as to the threshold reliability, not weight, of the record. It was not necessary, I held, for the expert to adopt the entirety of a document as truthful; rather, it was sufficient that the expert's testimony about the circumstances of the making of the record was such that the Court could make a determination as to its threshold reliability. If the document met that threshold, the whole of the document could be admitted into evidence.

[65] In accordance with that ruling, the parties tendered the collection of Explorer Records into evidence, each of those documents having been referred to and identified by one or more of the experts.

[66] The Explorer Records span the period from 1774 to approximately 1900. They include records created by the earliest explorers and maritime fur traders to arrive on the WCVI. The records document their observations about the aboriginal groups with whom they interacted. Among the documents, for example, are the logs of Captain James Cook and his officers recording their observations upon their arrival at Nootka Sound in 1778. The Explorer Records represent the only written evidence regarding the earliest interactions between Europeans (and some Americans) and aboriginal groups on the WCVI.

2. Common Book of Historical Documents

[67] The parties also tendered a further collection of historical documents, primarily government records, which span the period from approximately 1842 to

1950. By agreement of the parties, these documents were entered for the *prima facie* truth of the facts contained therein.

[68] There are various other documents in evidence which are unnecessary for me to detail at this time.

3. Expert evidence

[69] In dealing with the plaintiffs' aboriginal rights claims, both parties tendered expert evidence in the areas of anthropology, ethnography and ethnohistory. Stated at its simplest, anthropology is the scientific study of humanity in the widest possible sense. Included within that discipline are the sub-disciplines of ethnography and ethnohistory. Ethnography is the study of a culture based on data collected from members of that culture, while ethnohistory is the study of a culture largely through the examination of historical documents.

[70] The plaintiffs relied on the expert testimony of the following witnesses:

a. Dr. Barbara Lane, qualified as a cultural anthropologist with particular expertise in ethnology, ethnography and ethnohistory with respect to aboriginal people;

b. Mr. Richard Inglis, qualified as an anthropologist, ethnographer and ethnohistorian with expertise in Northwest Coast aboriginal people, particularly the Nuu-chah-nulth;

c. Dr. Alan McMillan, qualified as an anthropologist, archaeologist, ethnographer and ethnohistorian with particular expertise in those disciplines concerning the Nuu-chah-nulth peoples; and

d. Dr. Daniel Boxberger, qualified as an anthropologist with special expertise in the aboriginal peoples of the Pacific Northwest Coast.

[71] With the exception of Dr. Boxberger, all of the plaintiffs' experts have specific experience in the study of the Nuu-chah-nulth aboriginal cultures.

[72] The defendant's expert was Dr. Joan Lovisek, who was qualified as an anthropologist and ethnohistorian with expertise in the use of ethnographic, archaeological and historical resources concerning First Nations people of Canada.

4. Primary and secondary evidence

[73] The experts relied on a combination of what I will call primary evidence and secondary evidence. Characterized loosely, primary evidence is original evidence in the sense of being a first-hand description of an observation of an event. Primary evidence may also be a study of original artefacts, such as an archaeological study of fish bone deposits to determine their age and species. Secondary evidence is what I would call commentary.

[74] For convenience, I will characterize the Explorer Records as primary evidence, though I acknowledge that they are not necessarily so in the truly historical sense. As Dr. Lovisek explained, there are four distinct processes involved in the preparation of the Explorer Records, although not every explorer record went through the same four stages to publication. The first stage is the log book or field book, which is a record of daily activities and is usually written close to the time of the activities described. The second stage is a journal, which is a retrospective account written after a voyage, or part of a voyage, has been completed. The journal is next re-worked into a draft manuscript, which is the third stage of production. The manuscript journal is then re-worked into an edited and published text. Dr. Lovisek noted in her second report that fourth stage sources, that is, published books, cannot be considered primary documents in a historical sense.

[75] The distinction between these various stages becomes relevant when I consider the reliability and weight of the various Explorer Records. For example, with respect to the journals of John Jewitt, a sailor held captive at Nootka Sound from 1803 to 1805, both his logs recorded contemporaneously and his published "journal" are in evidence.

[76] Regardless of the stage of publication of the various Explorer Records, I will refer to them in these Reasons as primary documents. As I explained in my earlier ruling concerning the admissibility of the Explorer Records, those records are not stand-alone evidence. In order to assess their reliability and the weight they should be accorded, it is necessary that I consider the expert evidence as to the provenance of each. I heard, for instance, much testimony from the experts as to which of the different edited versions of Captain Cook's journals is the most authoritative. (I explain this controversy in more detail below.)

[77] With respect to secondary evidence, all of the experts relied on the scholarly work of other archaeologists, anthropologists, ethnographers, ethnohistorians, and historians, at least in part, to support their opinions. The experts who testified often disagreed on the interpretation of a particular piece of primary evidence, and each sought support for his or her interpretation from the work of other scholars or authors who had studied the subject matter. In addition, many scholarly opinions were put to the experts in cross-examination.

[78] In accordance with *R. v. Marquard*, [1993] 4 S.C.R. 223, the opinions of scholars who did not testify only became evidence if they were adopted by the experts as authoritative and thereby read into the body of evidence, or were relied upon by the experts in their own opinions. In other words, these scholarly works were not admitted as stand-alone evidence. Where I refer in these Reasons to scholars who did not testify but whose work was relied upon, I will endeavour to indicate the particular expert(s) whose opinion incorporated the work of the non-witness scholar.

[79] I have rather loosely characterized evidence as primary and secondary, and recognize that historians would be much more precise in their characterization. Nevertheless, I still find it convenient to draw this distinction largely as a way of differentiating my treatment of the documents from an evidentiary point of view.

[80] A third type of evidence that I would put into its own category is ethnographic evidence. The ethnographic study entitled *The Northern and Central Nootkan Tribes*

(Washington: United States Printing Office, 1951) by Philip Drucker is an example of this type of evidence. Drucker collected the material for his seminal work between 1935 and 1936. His ethnographic period was from 1870 until about 1900, which he referred to as his ethnographic horizon unless he noted otherwise. He chose this ethnographic horizon because it was within the living memory of the individuals he interviewed in 1935 and 1936. All of the experts relied to some extent on Drucker's work, though not entirely without criticism, and there is widespread respect by the academics for the generally authoritative nature of his work.

[81] Unlike many aboriginal rights and title trials, I heard virtually no oral history evidence.

[82] In *R. v. Marshall*, [1999] 3 S.C.R. 456, Binnie J. acknowledged some academic criticism by professional historians of the judicial treatment of historical evidence. He commented, at paras. 36-37:

> The courts have attracted a certain amount of criticism from professional historians for what these historians see as an occasional tendency on the part of judges to assemble a "cut and paste" version of history: G. M. Dickinson and R. D. Gidney, "History and Advocacy: Some Reflections on the Historian's Role in Litigation", *Canadian Historical Review*, LXVIII (1987), 576; D. J. Bourgeois, "The Role of the Historian in the Litigation Process", *Canadian Historical Review*, LXVII (1986), 195; R. Fisher, "Judging History: Reflections on the Reasons for Judgment in *Delgamuukw v. B.C.*", B.C. Studies, XCV (1992), 43; A. J. Ray, "Creating the Image of the Savage in Defence of the Crown: The Ethnohistorian in Court", *Native Studies Review*, VI (1990), 13.
>
> While the tone of some of this criticism strikes the non-professional historian as intemperate, the basic objection, as I understand it, is that the judicial selection of facts and quotations is not always up to the standard demanded of the professional historian, which is said to be more nuanced. Experts, it is argued, are trained to read the various historical records together with the benefit of a protracted study of the period, and an appreciation of the frailties of the various sources. The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can.

[83] In the present case, plaintiffs' counsel, in particular, expressed some reservations about the Court examining the historical documents independently of the experts and drawing conclusions from that examination, possibly unsupported by expert evidence. I agree that experts provide helpful, and at times essential, interpretative evidence with respect to historical documents. Their evidence is often helpful in order to understand, for instance, the historical context in which a statement was made, a custom of the time, a geographic reference and a host of other facts that may be relevant. At the end of the day, however, it is the Court which must make the necessary findings of fact and, at times, it may be appropriate and necessary for the Court to independently examine a historical document and make those findings of fact. I would, nevertheless, add that the Court should be cautious in approaching the historical evidence without the support of an expert opinion.

[84] An example of how such caution is necessary is the journal of John Meares respecting a voyage made in 1788 and 1789. He wrote at p. 228 of his journal that Maquilla (Maquinna, Chief of the Nootka Sound tribes) was sovereign of the whole territory stretching from the southern tip of the Queen Charlotte Islands and southward to the islands of Wickaninnish (Clayoquot Sound). Mr. Inglis testified that Meares was not correct in his statement that Maquinna was sovereign of this whole territory. Mr. Inglis considered that Meares must have observed trading relationships and confused those relationships with a sovereign-type relationship. He cautioned that one should not take too literal an interpretation of individual historical records but, rather, look for similar references in other observations.

C. Evidence of Trade and Features of Trade

[85] The purpose of the following portions of this part of these Reasons, under the heading "Aboriginal Rights", is to review the evidence relevant to the plaintiffs' claim of the existence of indigenous trade at the time of contact with Europeans. To place the evidence in its historical context, I begin with a short historical chronology of the main events surrounding contact between the Nuu-chah-nulth and Europeans. I then

turn to a review of the records of the explorers and maritime traders. I review the numerous references I consider pertinent in a chronological order. Throughout my review of the Explorer Records, I comment on expert testimony regarding interpretation of those records. I then follow with a more generalized review of Nuu-chah-nulth culture. For instance, I canvass topics such as kinship, marriage, and warfare. The relevance of this evidence is to either support or refute the existence of trade. Canada, for example, argues that warfare was a prominent feature of contact era Nuu-chah-nulth society. Such warfare, it contends, is antithetical to friendly trade. The plaintiffs disagree and point to evidence in support of their submission that warfare caused only temporary interruptions in trade. Accordingly, I have found it important to consider more general evidence of the culture of the Nuu-chah-nulth in order to determine whether the assertion of the existence of trade is consistent with, and integral to, Nuu-chah-nulth culture.

[86] In my view, it is not possible to precisely define trade. I prefer instead to enumerate features of trade. As will be recalled, the plaintiffs have pleaded alternative descriptions of trade which they say evolved, over the centuries, into the right to modern-day commercial fishing. Canada says that any trade between indigenous groups was infrequent, opportunistic, of small quantities, and within an idiom of kinship. As I discuss below, I disagree with Canada's definition of trade as it excludes any trade between kin. Ultimately, I am persuaded by the evidence to accept the plaintiffs' argument that kin in Nuu-chah-nulth society incorporates a very loose network of different groups, possibly connected by arranged marriage or some distant relationship. I find Canada's definition to be overly restrictive.

[87] During the period under review, the Nuu-chah-nulth had no conventional monetary system, thus it is necessary to identify features of transactions that constitute trade. Some of the defining features of trade include the following: exchanges of fish or shellfish for an economic purpose; exchanges of a significant quantity of goods; exchanges as a regular feature of Nuu-chah-nulth society; and exchanges outside the local group or tribe. I discuss these features throughout the evidence.

[88] At the conclusion of this part of my Reasons, I do conclude the plaintiffs have proven that the Nuu-chah-nulth fished and traded fish at the time of contact. I characterize their trading activity as one that included the features just described. That conclusion then leads to my analysis of the characterization of the modern-day activity that has evolved from that pre-contact trade in fish.

D. Historical Chronology – Pre-contact to Present

[89] The following chronology identifies events on the WCVI relevant to this litigation from the time before contact between Nuu-chah-nulth people and Europeans to the present day. These descriptions are intended to provide the reader with a brief historical narrative in order to place the evidence that is discussed below in its historical and chronological context. The facts described in these brief descriptions of events are not controversial in this litigation.

Pre-contact period

- Approximately 4,000 years before present – The roots of Nuu-chah-nulth culture were established on the WCVI. ("Before present years" is a time scale used in archaeology and other scientific disciplines to specify when events in the past occurred. Standard practice is to use January 1, 1950, as the origin of the age scale.)

- January 1700 – A tsunami struck the WCVI in the Barkley Sound region. The resulting depopulation of the local groups in that region helped to bring about the amalgamation of the Huu-ay-aht, a process that had commenced well before contact. The amalgamation of local groups in the Clayoquot Sound region to form the Tla-o-qui-aht also commenced in the pre-contact period.

Early contact period – 1774-1778

- 1774 – The first known interaction between Nuu-chah-nulth people and Europeans occurred in 1774, when a Spanish expedition on *The Santiago* commanded by **Juan Pérez** anchored in the afternoon of August 7, 1774, and

overnight approximately six miles offshore in the vicinity of Estevan Point, south of Nootka Sound. *The Santiago* departed the following day without landing or moving closer to the shore. (There are some theories that Francis Drake possibly contacted the Nuu-chah-nulth in about 1579. Only fleeting reference to this possibility was made in the evidence and it is not relevant to the issues before me.)

- 1775 – A second Spanish expedition aboard the same ship but led by **Bruno de Hezeta** approached the WCVI. They came within approximately 18 miles of the shore in the vicinity of Nootka Sound. They did not anchor and continued sailing southward. Nuu-chah-nulth followed *The Santiago* in canoes and made brief contact with the Spaniards.

- 1778 – A British expedition led by **James Cook** aboard *The Resolution* and *The Discovery* landed at Nootka Sound. The expedition anchored at Resolution Cove on the south shore of Bligh Island, several miles from the Nuu-chah-nulth village of Yuquot (Friendly Cove). Cook remained at Nootka Sound for approximately one month. Members of the expedition also made a one-day tour of the region and visited two villages.

- 1779-1784 – No vessels visited the WCVI.

Maritime fur trade period – 1785-1818

- 1785, 1786 – *The Sea Otter*, a British trading vessel under the command of **James Hanna**, was the first non-indigenous trading vessel to visit Nootka Sound. Hanna returned in 1786 on another trading vessel. No journals from Hanna's expeditions have been located.

- 1786 – A second British trading expedition, this one led by **James Strange**, visited Nootka Sound. The expedition arrived off the WCVI on June 26, 1786, and stayed at Nootka from July 6 until July 28. They subsequently travelled up the coast as far as Alaska. **Alexander Walker**, an officer on the Strange

expedition, wrote an account of his visit, which is the first extant journal relating to the WCVI after those of the Cook expedition. Strange also kept a journal, which provides some information respecting the Nuu-chah-nulth.

- 1787 – A trading expedition led by **Charles Barkley** was the first known to have visited the area later to be named Barkley Sound. No journal from the Barkley expedition has been located.

- 1787-1788 – A British trading expedition under the command of **James Colnett** visited the Nootka and Kyuquot Sound regions in 1787 and again in 1788. *The Princess Royal* and *The Prince of Wales* arrived off the WCVI on July 5, 1787, and anchored in Nootka Sound for one month and in Nasparti Inlet for two days. They wintered in Hawaii, and *The Princess Royal* returned to Nootka Sound on April 19, 1788, for a further month. **Charles Duncan** captained *The Princess Royal.*

- 1788 – From May to September 1788, a trading expedition under the command of British trader, **John Meares**, visited the WCVI. Meares visited both Nootka and Clayoquot Sounds.

- 1788 – An American trading expedition led by **John Kendrick** (*The Columbia*) and **Robert Gray** (*The Lady Washington*) arrived at Nootka Sound in September 1788, and wintered at Yuquot. The expedition included officers **Robert Haswell** and **Joseph Ingraham**. Haswell's log is the only record from the first expedition other than a letter that Ingraham wrote to Martínez, describing the Nuu-chah-nulth. Ingraham kept a journal, but it has not been located to date.

- 1791 – *The Columbia* expedition returned to Nootka Sound. Records of the second voyage include Haswell's second log, John Hoskins' narrative and John Boit's log. During this second expedition, Kendrick negotiated five separate transactions for territories with different Nuu-chah-nulth chiefs, including those of the Ehattesaht, Mowachaht and Tla-o-qui-aht. These

"deeds" included submerged lands in the subject area, including rivers, creeks, and harbours as well as "all the produce of both sea and land appertaining thereto."

- 1789 – **Estevan José Martínez** led the first of several successive Spanish expeditions which established and maintained a garrison at Yuquot in the years 1789 to 1795. Martínez had been an officer on the Pérez expedition in 1774. He arrived at Nootka Sound in May 1789 and remained there until the end of September 1789, during which time he kept a journal which included observations about the Nuu-chah-nulth. Martínez was involved in conflict with both the Nuu-chah-nulth and British traders. He, or a marine under his command, shot and killed Callicum, the second chief at Nootka. He also arrested and seized the ships of British trader James Colnett, who had returned to the area for a third visit in 1789, precipitating the Nootka Sound Controversy. The Controversy was eventually resolved with the Nootka Sound Conventions.

- 1790-1792 – A Spanish expedition under the command of **Francisco de Eliza** wintered at Nootka Sound in 1790/91 and 1791/92. Eliza served as the Commander of the Spanish garrison at Yuquot in 1790, taking over from Martínez. **Ramon Saavedra** was an officer on the expedition, and was Commandant of the garrison in 1791 during Eliza's absence.

- 1791 – A Spanish scientific expedition under the command of **Alejandro Malaspina** visited Nootka Sound for two weeks in August 1791.

- 1792 – **Juan Francisco de la Bodega y Quadra** commanded a Spanish expedition to the WCVI, primarily Nootka Sound, to implement the Nootka Sound Convention. **José Mariano Moziño**, a Spanish naturalist with the expedition, stayed at the Spanish garrison at Yuquot from April to September 1792. He wrote a descriptive account of the Nuu-chah-nulth.

- 1792 – **Alcala Galiano** and **Cayetano Valdes** commanded *The Sutil* and *Mexicana* to the WCVI, including Nootka Sound.

- 1792-1794 – A British expedition to the northwest coast commanded by **George Vancouver** visited the WCVI on three occasions: 1792; 1793; and 1794. Vancouver negotiated with Quadra in an attempt to resolve the Nootka Sound Controversy.

- 1793-1794 – An American trading expedition on *The Jefferson*, led by **Bernard Magee**, wintered in Barkley Sound from 1793 to 1794. The expedition also visited Nootka and Clayoquot Sounds.

- 1795 – Captain **Charles Bishop** of *The Ruby* arrived at Yuquot in September 1795, and proceeded south to Clayoquot Sound where he traded with Wickaninnish and others.

- 1795-1820 – There were few non-aboriginal visitors to the WCVI during this period. The Spanish and British had departed in accordance with the Nootka Convention, and the fur trade had largely moved elsewhere. Two vessels of note visited during this time. *The Boston*, an American trading vessel, arrived in Nootka Sound in 1803 and was attacked by Nuu-chah-nulth led by Maquinna. The only survivors of the attack were **John Jewitt**, a blacksmith, and John Thompson, a sailmaker. They remained captives of Maquinna for two years. Jewitt kept a journal of his time in captivity, and subsequently published a narrative of his experiences. *Le Bordelais*, on a commercial voyage from Bordeaux under the command of **Camille de Roquefeuil**, arrived off the WCVI on September 1, 1817. Roquefeuil visited Nootka and Barkley Sounds, anchoring from September 27 to October 14 in Port Desire in Bamfield Inlet, and returned briefly to Nootka Sound in September 1818.

1820-1850

- 1820-1850 – There were few non-aboriginal visitors to the WCVI during this approximately 30-year period. There is a complete gap in the historical record from approximately 1838 to the 1850s.

- 1825 – **John Scouler** was a doctor aboard the Hudson's Bay Company vessel, *William & Ann*, which visited Nootka Sound from July 30 to August 3, 1825. Scouler kept a journal, and recorded some of the crew's interaction with the Nuu-chah-nulth.

- 1837 – **Edward Belcher** was Captain of *The HMS Sulphur*, which visited Nootka Sound in 1837. Belcher recorded various marine resource activities that he witnessed Nuu-chah-nulth engaging in. Captain **George Richards**, who later conducted a hydrographic survey of the WCVI, was also on the vessel.

- 1846 – The Oregon Boundary Treaty established the present-day boundary between what is now Canada and the United States, including the boundary line to the south of Vancouver Island.

Colonial Period – 1850-1871

Colony of Vancouver Island

- 1843 – The Hudson's Bay Company established Fort Victoria in the location of the present day city of Victoria in anticipation of settling the Oregon boundary dispute.

- 1849 – The Crown made a grant of "Vancouver's Island" to the Hudson's Bay Company. **James Douglas** was the senior Hudson's Bay official at Fort Victoria before becoming Governor of the Colony of Vancouver Island.

- 1850-1854 – Fourteen land cession treaties were concluded with the aboriginal tribes of Vancouver Island by James Douglas during this period.

These included a series of treaties with aboriginal peoples in the vicinity of Victoria to secure cession of most of their lands in exchange for payments. None of these treaties were concluded with Nuu-chah-nulth people.

Colony of British Columbia

- 1858 – In response to the frenzied mining and discovery of gold, the British Government created the mainland colony of British Columbia.

Traders

- Circa 1850 – Non-aboriginal traders began operating on the WCVI. **William Eddy Banfield**, **Peter Francis** and **Thomas Laughton** conducted trading operations out of Clayoquot Sound and Barkley Sound. Banfield later became the government agent in the area.

- 1859 – Banfield purported to purchase land, including water privileges, for his residence in Barkley Sound from Cleeshin, the Huu-ay-aht (Ohiat) chief. He purchased a second parcel in 1860.

- Banfield wrote a series of short reports for the *Victoria Gazette* about the Huu-ay-aht and the Tla-o-qui-aht.

Establishment of non-aboriginal commercial fishery – 1850s

- A growing interest in the commercial trade of dogfish for oil developed in the period leading up to the 1850s. By the early years of the decade, Banfield, Francis and Laughton were purchasing fish and dogfish oil from the Nuu-chah-nulth and sending it to Victoria.

1860 – 1865

- 1860-1861 – **Charles Barrett-Lennard** was a trader and explorer who made a trading voyage to the WCVI in the summer of 1860, and cruised around the

Island from September to December 1860. He returned for a second visit in 1861 and published an account of his cruise and other travels.

- 1860-1862 – Captain **George Richards** of the British Navy led a hydrographic survey of the WCVI, and produced a series of maps that were published by the British admiralty. Richards and others on board the *H.M.S. Hecate* kept journals, noting Nuu-chah-nulth villages. Some of the villages were also marked on their maps.

- 1860-1864 – **Edward Stamp** established a sawmill at the head of the Alberni Inlet in 1860. He purported to negotiate a treaty with the Tseshaht chiefs for the land for his sawmill. **Gilbert Malcolm Sproat** was an employee of Stamp's sawmill in Alberni where he lived from 1860 to 1864. He went to Alberni as the head of the construction crew to build the mill and became the manager in 1863, the same year that he was appointed Justice of the Peace for Vancouver Island. The sawmill closed in 1864. Sproat's book on the Nuu-chah-nulth, *Scenes and Studies of Savage Life*, was published in 1868 after he had returned to England.

- 1863 – **Robert Brown** served on a botanical expedition on the WCVI, and kept a journal from May to July 1863.

- 1864-1865 – Robert Brown led the Vancouver Island Exploring Expedition in 1864, which travelled and mapped the WCVI. **John Buttle** was also a member of the expedition in 1864, and he led it in 1865. **Thomas Laughton** was a member of the expedition under Buttle.

Early confederation period – 1871-1920

- 1871 – British Columbia entered into Confederation, at which time both fisheries and Indians came under the jurisdiction of the federal government.

- 1874 – **George Blenkinsop** was dispatched by the Department of Indian Affairs to investigate and prepare a report on Indian tribes in the Barkley

Sound region in anticipation of the establishment of reserves in the area. He prepared a report for Indian Superintendent Israel W. Powell, and also prepared a map depicting the boundaries of the tribes in the area and marking some settlement sites.

- 1874, 1879 – **Superintendent Powell** was the Indian Superintendent for British Columbia from 1872 to 1889. He visited the Nuu-chah-nulth tribes on the WCVI in September 1874, aboard the British gunboat *HMS Boxer*. He undertook another tour in 1879.

- 1882-1889 – **Peter O'Reilly** was appointed Indian Reserve Commissioner for British Columbia. He made three trips to the WCVI to establish reserves for the plaintiffs: Barkley Sound in 1882; to the Hesquiaht in 1886; and, the tribes from Ucluelet to Che:k'tles7et'h' in 1889.

- 1886 – The City of Vancouver was incorporated.

- 1888 – Comprehensive fisheries regulations were adopted for British Columbia, and the federal government introduced the concept of food fishing for aboriginal peoples. The regulations had a specific provision allowing them to fish for food but not barter.

- Early 1900s – As the fishing industry developed, Nuu-chah-nulth were recruited as fishermen at the canneries and salteries, and also as shore workers at the canneries and whaling stations.

- 1912-1916 – A joint provincial and federal Royal Commission on Indian Affairs for the Province of British Columbia, known as the McKenna-McBride Commission, was established. The Commission travelled to the WCVI in 1914 and met with the Nuu-chah-nulth in their communities.

VI. ABORIGINAL RIGHTS

A. Date of Contact

[90] Aboriginal rights have their origin in pre-contact societies. For this reason, the relevant time period for determining whether a practice, custom or tradition that is alleged to ground an aboriginal right was integral to the aboriginal society is the period prior to contact between the aboriginal society and Europeans. This ensures that the practice, custom or tradition is an indigenous one and not one that arose solely as a response to European influences. As Lamer C.J. explained in *Van der Peet*, at para. 60, "[b]ecause it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights."

[91] He continued at para. 62, with further clarification:

> That this is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.

[92] Satanove J. commented upon the lack of guidance in the authorities as to what precisely is meant by "contact" in *Lax Kw'alaams Indian Band*, at paras. 113-114:

> [113] Little guidance appears in the case law as to what is meant by "contact". The decisions of *R. v. Van der Peet* and *R. v. Gladstone*, confirmed by *R. v. Sappier*, refer to "the arrival of Europeans in North America" as the relevant time of contact. In *Delgamuukw v. British Columbia*, the Supreme Court of Canada states that the activities that were protected were only those carried out at the time of contact or "European influence". In

> *R. v. Adams*, the court finds that the date of contact with respect to the accused's Mohawk ancestors was the arrival of Samuel de Champlain in 1603 because that was when the French "established effective control" over what would become New France. In *Mitchell v. M.N.R.* the court uses 1609 (not 1603) as the date of first contact relevant to the Mohawks, because the case involved a different group of Mohawks than the one in *R. v. Adams*.
>
> [114] In my opinion, given the Supreme Court of Canada's admonition in *R. v. Van der Peet* that courts must focus on the particular aboriginal group claiming the aboriginal right, and that aboriginal rights are not generally universal but that their scope and content must be determined on a case by case basis, then the date of contact should be the date on which occurred the first direct arrival of Europeans in the area of the particular group of aboriginals, in this case, the Coast Tsimshian.

See also the discussion in *Tsilhqot'in Nation v. British Columbia,* 2007 BCSC 1700, [2007] B.C.J. No. 2465, at paras. 1180-1212.

[93] In the present case, the parties appear agreed that the date of contact is 1774. This is the date on which Juan Pérez onboard *The Santiago* anchored approximately six miles offshore and Nuu-chah-nulth people, likely Hesquiaht, paddled out to meet him and traded fish with his crew. The next encounter with Europeans occurred in 1775, this time approximately 18 miles offshore from Nootka Sound. It was again *The Santiago*, then under the command of Hezeta. Neither Pérez nor Hezeta made landfall.

[94] The first contact that involved any significant interaction between the Nuu-chah-nulth and Europeans was the Cook expedition in 1778. It was not until 1785 that the maritime fur trade era began in earnest, and other Nuu-chah-nulth groups besides the Hesquiaht and the Mowachaht/Muchalaht at Nootka Sound had any significant contact with Europeans. As the plaintiffs note, more generalized contact between the fur traders and the Nuu-chah-nulth people occurred over the next several years. Approximately 50 trading vessels came to various points of the Nuu-chah-nulth territories including Barkley, Clayoquot and Kyquot Sounds between 1774 and 1818.

[95] I find 1774 to be the date of contact. However, in the circumstances of this case, I also find that that date does not precisely demarcate between pre-contact

Nuu-chah-nulth activity on the one hand and activity influenced by European contact on the other. In my view, the more pertinent question is whether the observations of the maritime explorers and traders between Pérez's arrival in 1774, Cook's arrival in 1778 and the end of the maritime fur trade period in 1818 reflect pre-contact Nuu-chah-nulth society. The plaintiffs say I should infer from those observations that trade in fish was a distinctive and integral aspect of pre-contact Nuu-chah-nulth culture, whereas Canada says that such trade, to the extent it existed, was the product of European influence. As I explore more fully below, there are significant issues concerning the influence of European contact on the culture of the Nuu-chah-nulth people in the three decades that followed Pérez's arrival at Nootka Sound.

[96] In their submissions, neither party detailed the evidence of contact for each separate plaintiff. Indeed, it would have been difficult to do so. Moreover, because there was considerable interaction between the various Nuu-chah-nulth groups up and down the coast, European influence, such as the importation of iron, may have been experienced by some plaintiffs prior to direct European contact. Dr. Lovisek referred to this indirect contact with Europeans as "proto-contact." As the evidence does not permit me to conclude otherwise, I make clear that my finding of 1774 as the date of contact applies to each of the plaintiffs.

B. Pre-contact Practices and Way of Life

[97] The plaintiffs claim the right to harvest all species of fisheries resources within their fishing territories and to sell those products on a commercial scale. They alternatively claim the right to sell such fisheries resources in an amount sufficient to sustain their community or, in the further alternative, to exchange them for money or other goods.

[98] This claim to an aboriginal right requires the Court to examine the pre-contact way of life of the Nuu-chah-nulth in order to determine whether, as a question of fact, the evidence establishes trade in fish, and whether any such trade was integral to the distinctive culture of the pre-contact Nuu-chah-nulth.

[99] I begin my examination of the pre-contact practices and way of life of the Nuu-chah-nulth with a review of the evidence of explorer contact with the Nuu-chah-nulth and, in particular, evidence from their records relating to Nuu-chah-nulth trade in fish.

1. Review of Explorer Records

a. Juan Pérez and The Santiago

[100] The first recorded contact between any aboriginal group on the west coast of British Columbia and Europeans was the Nuu-chah-nulth's encounter on August 7, 1774, with the Spanish vessel, *The Santiago*, under the command of Juan Pérez. The encounter was brief. *The Santiago* approached the WCVI and set anchor on the evening of August 7, 1774, some six miles off what is now called Estevan Point, southeast of Nootka Sound. While *The Santiago* was anchored offshore, Nuu-chah-nulth canoes, likely from the Hesquiaht tribe, approached the vessel but did not communicate with those aboard. The following day, 15 canoes came to *The Santiago* and trade was conducted between members of the aboriginal group and the crew of *The Santiago*.

[101] Pérez described the event in his diary as follows:

> We continued sailing under full sail in search of the coast, steering to the N; the wind out of the SE, fresh; the sea smooth; the sky overcast. At 3 in the afternoon canoes began coming out from the land; three of them were nearby and up to five of them collected together, but without wanting to come near regardless of how much they were called.
>
> …
>
> The Indians then came within speaking distance, and they started their trading by an exchange of furs for shells which our men brought from Monterey. They [the sailors] got in return various sea otter skins and many sardines. The Indians differed in appearance from those at Santa Margarita [Queen Charlotte Islands], the pelts [they wore] not being placed against the body. There is copper in their land, for various strings of beads were seen (similar to glass beads) that were made of animal teeth, and at their ends they had some eyeholes of beaten copper, which had certainly been grains extracted from the earth and later pounded, implying that they had some mines of this metal. These Indians are very docile, for they gave up their furs even before they were paid for them. They are very robust and white as the

> best Spaniard. The two women whom I saw had the same appearance as the other. Some Indians wore rings made of bone in their ears. It did not appear that they had experienced or seen civilized people before. As many as 15 canoes collected around.

[102] After Pérez prepared his diary, it was read and "certified" by Martínez, another officer on *The Santiago*. That certification reads:

> I certify that this diary is a literal copy of the original kept and written by the hand of ensign, frigate grade, said Juan Pérez who has daily shown me his work. Everything expressed in it is certain and true, and therefore as it happened. So that this is clear, I signed it in the capacity of second captain and pilot, and as an eyewitness, in Monterey, 29 August 1774.

(Martínez made a subsequent journey to Nootka Sound which will be described below.)

[103] The Pérez records also contain the accounts of two Catholic priests who accompanied the Pérez expedition, Fray Tomás de la Pena and Fray Juan Crespi. The language of those two accounts is so similar that I conclude that the two priests either collaborated in their writing of their journals or one copied the other. Contrary to Pérez's diary, no mention is made by the priests of the trade in sardines, although both do mention trade. de la Pena states in his account:

> We gave them [the natives] to understand that they might draw near without fear, and presently they came to us and began to trade with our people what they brought in their canoes, which consisted only of skins of otters and other animals, hats of rushes, painted and with the crown pointed, and cloth woven of a kind of hemp, having fringes of the same, with which they clothe themselves, most of them wearing a cape of this material. Our people bought several of these articles, in exchange for old clothes, shells which they had brought from Monterey and some knives; for these and the shells they manifested greater liking. …

[104] Pérez's contact with the Nuu-chah-nulth was terminated quickly because a high wind came up threatening to blow the ship onto the shore. Pérez made the decision to cut the anchor cable and sail away.

[105] Later the following decade, an American trading expedition led by John Kendrick (*The Columbia*) and Robert Gray (*The Lady Washington*) wintered in

Nootka Sound from 1788 to 1789. Joseph Ingraham, an officer aboard *The Columbia*, wrote what has come to be called the "Ingraham Letter" for Martínez, who was in command of another expedition. In his letter, Ingraham recounted stories told to him by the natives of Nootka Sound about the encounter with Pérez. The encounter is noted to have occurred approximately 40 months prior to the arrival of Captain Cook. This is roughly correct, thus lending some degree of reliability to Pérez's account. Ingraham wrote:

> About 40 months before Captain Cook's arrival a ship came into the sound and anchor'd within some rocks on the East side [of] the entrance where she Remain'd 4 Days and Departed. They said she was a larger ship than they had ever seen since; that she was copper'd and had a Copper Head, this I suppose to have been Gilt or painted yellow; that she had a great many guns and men; that the Officers wore Blue lac'd [laced] coats; and that most of the men wore Handkerchiefs about their heads. They [the ship's crew] made them presents of Large pearl shells some of which they still have in their possession. Besides this they gave them Knives with crooked Blades [and] a black handle. They [the natives] sold them Fish and their Garments but no furs. When they first saw this ship they said they were exceedingly Terrified and but few of them even ventur'd along side. All the different accounts of this ship agreed in every particular, but one informe'd me he saw from the shore a Small vessel in the offing at a great distance from the Land which had but two masts. From every circumstance I was led to believe at the time this must have been a Spanish ship which immediately acount'd to me for the two silver spoons Captain Cook found among the Natives.

[106] The plaintiffs submit that what is significant about this first encounter between the Nuu-chah-nulth and Europeans is that, according to both Pérez and the Nuu-chah-nulth as recorded by Ingraham, fish were sold to the Spanish. The plaintiffs say that these accounts corroborate each other and document a commercial exchange in fish.

[107] I turn next to the opinions of the expert witnesses who testified with respect to the Pérez encounter with the Nuu-chah-nulth.

[108] Dr. McMillan, in concluding that the Nuu-chah-nulth traded fish to the Spanish, relied primarily on Pérez's account. He admitted under cross-examination that he did not rely on the accounts of the two priests or of Mourelle, another officer onboard. It was also put to Dr. McMillan that he had disregarded the language in

Mourelle's account that they "handed over [the shells and sardines] before receiving the agreed upon price." This, it was suggested to him, was a form of gift giving and not trade. Dr. McMillan noted first that the wording of the journals of de la Pena and Crespi were almost the same and that he consequently questioned whether they could stand as independent documents. He also expressed his view that the encounter was trade, reciprocal gift giving or barter.

[109] Dr. Lovisek acknowledged in cross-examination that Pérez's entire diary (including the passage relating to Nootka Sound) would have been submitted to the Viceroy Bucareli in Mexico City at the conclusion of his voyage and that "Martínez's certification was an indication that he had seen the diary daily as Pérez had shown it to him." The "certification" by a second observer presumably lends further legitimacy to the observations.

[110] Dr. Lovisek seemed to discount the accounts of these transactions between Pérez and the Nuu-chah-nulth as trade and relied, in part, on another academic, Christian Archer, to support her opinions in this regard. She was, however, mistaken. During cross-examination, it was pointed out to her that Dr. Archer had in fact characterized the transactions in question as trade.

[111] My conclusion in respect to the Pérez encounter is that the Nuu-chah-nulth did engage in an exchange of fish for goods offered to them by the crew of *The Santiago*. In my view, Dr. McMillan's and Dr. Archer's interpretation of the records is supportive of this finding. Dr. Archer's opinion was relied upon by Dr. Lovisek in her testimony and report. I place less weight on the accounts of the two priests for the reasons already noted.

b. Bruno de Hezeta

[112] On August 13, 1775, Bruno de Hezeta, commanding *The Santiago* (Pérez's former vessel) approached the WCVI about 18 miles offshore in the vicinity of Nootka Sound. He did not anchor but continued sailing southward. His diary records that Nuu-chah-nulth canoes "came off in each of which were two Indians,

who made signs to us to go onshore to their land." During this brief encounter, the Nuu-chah-nulth exchanged goods with the Spaniards, including sea otter pelts and a canoe.

c. Captain James Cook

[113] A British expedition led by Captain James Cook in two ships, *The Resolution* and *The Discovery*, with a crew totalling some 188 men, arrived off the WCVI on March 29, 1778. They anchored in Resolution Cove on Bligh Island, (so named after the cartographer William Bligh, who became infamous because of the mutiny on *The Bounty*, then under his command) in Nootka Sound. The ships remained there until April 26, 1778, in order that they could be provisioned and repaired. After leaving Nootka Sound, Cook travelled to Hawaii. He was killed in Hawaii in 1779 on the same voyage, and thus his journal of his third voyage (1776-1779, which included his voyage to Nootka Sound) was published posthumously.

[114] Two edited versions of the Cook journals were entered into evidence. One version was edited by John Douglas: Cook, James. *A Voyage to the Pacific Ocean: … performed under the direction of Captains Cook, Clerke, and Gore, in His Majesty's ships the Resolution and Discovery: in the years 1776, 1777, 1778, 1779, and 1780*. Vol. I and II written by James Cook; vol. III by James King. London: Printed by W. and A. Strahan for G. Nicol and T. Cadell. 1784. Another version was edited by J.C. Beaglehole, an academic, and published in 1967: Beaglehole, J.C., *The Journals of Captain James Cook On His Voyages of Discovery; The Voyage of the Resolution and Discovery, 1776-1780, Parts I and II*, Cambridge: University Press, 1967.

[115] A controversy between Dr. Lovisek, who relied on the Douglas version, and the plaintiffs' experts, who relied on the Beaglehole version, arose because of a statement in the latter in which Cook wrote "(f)ish seemed to be in greater plenty, though we got none but by truck from the Natives, who after the first Week supplied us pretty plentifully with a small fish like Sardines, if they were not of them, and a small fish like Bream, now and then a Cod." This statement was not contained in the

Douglas version. The plaintiffs argue that this is an important piece of evidence because it tends to support the contention that the natives traded fish with the early explorers.

[116] Douglas relied on a manuscript kept by William Anderson, a surgeon onboard *The Resolution*. Unfortunately, the Anderson journals are no longer extant. Douglas, who was not on Cook's voyage, re-wrote Cook's words, recast some of Cook's observations, and supplemented Cook's descriptions with observations from the journals of other crew members, sometimes with, and other times without, attribution. Mr. Inglis noted that the publications of Cook's journals were often bestsellers and that the 1784 edition of the *Third Voyage* edited by Douglas sold out in three days.

[117] Dr. Lovisek stated in her August 8, 2008 report that "John Douglas had Captain Cook's permission to edit his journals." The statement may be accurate for the earlier voyages but is inaccurate in respect to the voyage that included the Nootka Sound entries because, as I have noted already, Cook was killed on that voyage and his journals were edited posthumously. Cook did not have the opportunity either to revise his shipboard journal or to have any input into Douglas' changes as the third voyage journal was being prepared for publication.

[118] Mr. Inglis testified that modern scholars rely on the Beaglehole version published in 1967 and subsequently re-printed in 1973 and 1999. He noted that Douglas took literary licence and added his own content, whereas the Beaglehole edition comprised "Cook's unvarnished words". Mr. Inglis speculated that Douglas was possibly catering to his intended audience. Another difference he pointed out between the two publications is the inclusion in the Beaglehole version of the journals of other ship officers, which are set out separately. Douglas, on the other hand, wrote the journal in the first person so it is not possible for the reader to know whether the words are those of Cook or of other officers whose journals were incorporated, for the most part, without attribution.

[119] I conclude from the evidence of Mr. Inglis and other of the plaintiffs' experts, as well as the testimony of Dr. Lovisek under cross-examination, that the weight of scholarly opinion on this topic is that the Beaglehole version is more authoritative and reliable than the Douglas version. I find on the evidence before me that the Beaglehole version should be relied upon in preference to the Douglas version.

[120] Reliance on the Douglas version led Dr. Lovisek to write in her report, "Cook makes no mention of a barter or exchange in this transaction" (p. 90). She is correct about the Douglas version, but not the Beaglehole version. Cook, as noted, wrote in the Beaglehole version that they traded in fish with the natives. In addition, in the separate officers' journals published by Beaglehole, Samwell, King, and Ellis all say that the Nootka Sound natives traded fish to the crew of the Cook expedition. Some of the observations record very sizeable amounts of fish.

[121] Cook's encounter with the Nootka Sound natives was more substantial than that of his predecessors, Pérez and Hezeta. As noted by Dr. Lane in her report, Cook was an experienced explorer (p. 45):

> By the time [Cook's] expedition arrived in Nootka Sound, Cook was a widely experienced explorer. He had led expeditions of explorations which visited Tahiti, New Zealand, Australia, Tonga, Tasmania, Easter Island, Hawaii and many other locations remote from Britain. Prior to meeting the Nuu-chah-nulth, Cook had many previous encounters in which he had observed and described indigenous peoples who had little or no previous contact with Europeans.

[122] Cook made a number of observations in his journal under the headings of "Country and produce", "Inhabitants and their Persons and Habits", "Manufacture", "Ornaments", "Canoes", "Food & Habitations", "Food and Cookery", "Large Images", "Fishing implements", "Tools" and "Government and Religion". He appears to have learned some of the Nuu-chah-nulth language, as he included a brief dictionary which included the word "ma'cook" meaning to exchange or barter and "pa'cheetle" or "pa'chatle" meaning to give or to give me.

[123] Among the entries in Cook's journal, as edited by Beaglehole, are the following:

We no sooner drew near the inlet than we found the coast to be inhabited and the people came off to the Ships in Canoes without shewing the least mark of fear or distrust. We had at one time thirty two Canoes filled with people about us, and a groupe of ten or a dozen remained along side the Resolution most part of the night. They seemed to be a mild inoffensive people, shewed great readiness to part with any thing they had and took whatever was offered them in exchange, but were more desireous of iron than any thing else, the use of which they very well knew and had several tools and instruments that were made of it.

… A great many Canoes filled with the Natives were about the Ships all day, and a trade commenced betwixt us and them, which was carried on with the Strictest honesty on boath sides. Their articles were the Skins of various animals, such as Bears, Wolfs, Foxes, Dear, Rackoons, Polecats, Martins and in particular the Sea Beaver, the same as is found on the coast of Kamtchatka. Cloathing made of these skins and a nother sort made, either of the bark of a tree or some plant like hemp; Weapons, such as Bows and Arrows, Spears & c Fish hooks and Instruments of various kinds, pieces of carved work and even human sculs and hands, and a variety of little articles too tedious to mention. For these things they took in exchange, Knives, chisels, pieces of iron & Tin, Nails, Buttons, or any kind of metal. Beads they were not fond of and cloth of all kinds they rejected.

…

A considerable number of the Natives visited us daily and we every now and then saw new faces. On their first coming they generally went through a singular ceremony; they would paddle with all thier strength quite round both Ships, A Chief or other principal person standing up with a Spear, or some other Weapon in his hand and speaking, or rather holloaing all the time, sometimes this person would have his face cover[ed] with a mask, either that of the human face or some animal, and some times in stead of a weapon would hold in his hand a rattle. After making the Circuit of the ships they would come along side and begin to trade without further ceremony. Very often indeed they would first give us a song in which all joined with a very agreable harmony.

…

SATURDAY 4th. In these Visits they gave us no other trouble than to guard against their thievish tricks, but on the 4th in the Morning, we were interrupted in our work by all those about the Ships suddenly assembling at the place where we were cuting wood and filling water and arming themselves with whatever they could meet with; those who had not proper weapons, got sticks and Stones. Not knowing their intention, this occasioned us to arm also and stand upon the defensive and I ordered all the workmen that were ashore, to the Rock where the observatories were and left the Indians in possession of the ground they had chosen, which was within a stones throw of the Ships stern. The Indians seeing that they had given us some alarm, gave us to understand by signs, it was not us they were arming against but a party of their Country-men that were coming to fight with them. We at the same time observed that they had people looking out on each point of the Cove and canoes passing to and fro between them and the Main body.

At length a party in about a dozen large Canoes, appeared of the South point of the Cove, where they laid drawn up in a body. Some people in Canoes pass'd to and from between the two parties and there was some speaking on both sides. At length the difference, whatever it was, was compromised, but the Strangers were not allowed to come along side the Ships nor to have any trade or intercourse with us: our first friends, or those who lived in the Sound seemed determined to ingross us intirely to themselves. This we saw on several other occasions, nor were all those who lived in the Sound united in the same cause; the Weakest were frequently obliged to give way to the Strong, and were sometimes plundered of every thing they had, without attempting to make the least resistance. In the afternoon we resumed our work and the next day rigged the Foremast; the head of which being rather too small for the Cap, the Carpenter went to work to bring, or fix a piece on one side to fill up the Cap. In cuting into the mast head for this purpose, and examining a little farther into it, both cheeks were found so rotton that there was no possibility of repairing them without geting the mast out and fixing on new ones. It was evedent that one of the Cheeks had been defective at the first, and the defective part had been cut out and a piece put [in], what had not only weakened the mast head, but had in a great measure been the occasion of roting all the other part. Thus when we were almost ready to put to Sea, we had all our work to do over again, and what was worse a job of work to perform that required some time to finish, but as there was no remedy we immidiately set about it. It was lucky these defects were descovered in a place where wood, the principal thing wanting was to be had; for among the drift wood in the Cove where we lay, were some well seasoned trees and very proper for our purpose, one of which was pitched upon and the Carpenters went to work to make out of it two new Cheeks.

…

The bad weather which now came on did not however hinder the Natives from Visiting us daily and proving very usefull, as they frequently brought us a tolerable supply of fish, when we could catch none our selves with hook and line and there was no place near us to draw a net. The fish they brought us were either Sardins or a small fish very like them and a small kind of Bream, with now and then a small Cod.

…

SATURDAY 18th. On the 18th a party of Strangers in Six or eight Canoes came into the Cove where they remained looking at us for some time, then retired without coming along side either ship. We supposed our old friends would not suffer them, who were more numerous at this time about us than the strangers. It was evident that they engrossed us intirely to themselves, or if at any time they allowed Strangers to trade with us it was always managed the trade for them in such a manner that the price of their articles was always kept up while the Value of ours was lessening daily. We also found that many of the principals of those about us carried on a trade with their neighbours with the articles they got from us; as they would frequintly be gone from us four or five days at a time and then return with a fresh cargo of skins curiosities &c and such was the passion for these things among our people that they always came to a good Market whether they were of any value or no. But such of them as visited us daily we reaped the most benifit

> from, these, after disposing of all their little trifles, employed a part of their time in fishing and we always got at least a part of the fruits of their labour. We also got from these people a quantity of very good Animal oil which they had reserved in bladers; in this traffick some would attempt to cheat us by mixing Water with the oil, once or twice they had the address to impose upon us whole bladers of water wi[t]hout a drop of Oil in them. It was always better to put up with these tricks than to quarrel with them, as our articles of trafick consisted for the most part in trifles, and yet we were put to our shifts to find these trifles, for beads and such things of which I had yet some left, were in little esteem. Nothing would go down with them but metal and brass was now become their favourate. So that before we left the place, hardly a bit of brass was left in the Ship, except what was in the necessary instruments. Whole Suits of cloaths were striped of every button, Bureaus &c of their furniture and Copper kettle[s], Tin canesters, Candle sticks, &c all went to wreck; so that these people got a greater middly and variety of things from us than any other people we had visited.
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> …
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> After they had finished their Songs which we heard with admiration, they came along side the Ships, and then we found that several of our old friends were among them, who took upon them the intire management of the trade between us and them very much to the advantage of the others. Having a few Goats and two or three sheep left I went in a boat accompaned by Captain Clerke in a nother, to the Village at the west point of the Sound to get some grass for them, having seen some at that place. The Inhabitants of this village received us in the same friendly manner they had d[o]ne before, and the Moment we landed I sent some to cut grass not thinking that the Natives could or would have the least objection, but it proved otherways for the Moment our people began to cut they stoped them and told them they must Makook for it, that is first buy it. As soon as I heard of this I went to the place and found about a dozen men who all laid cla[i]m to some part of the grass which I purchased of them and as I thought liberty to cut where ever I pleased, but here again I was misstaken, for the liberal manner I had paid the first pretended pr[o]prietors brought more upon me and there was not a blade of grass that had not a seperated owner, so that I very soon emptied my pockets with purchasing, and when they found I had nothing more to give they let us cut where ever we pleased.
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> …
>
> Here I must observe that I have no where met with Indians who had such high notions of every thing the Country produced being their exclusive property as these; the very wood and water we took on board they at first wanted us to pay for, and we had certainly done it, had I been upon the spot when the demands were made; but as I never happened to be there the workmen took but little notice of their importunities and at last they ceased applying. But made a Merit on necessity and frequently afterwards told us they had given us Wood and Water out of friendship.

[124] David Samwell was the surgeon onboard *The Discovery*. He noted in his journal on March 29, 1778, that as soon as they arrived they were:

> ... surrounded by thirty or 40 Canoes full of Indians who expressed much astonishment at seeing the Ship … We made Signs of Friendship to them and invited them alongside the Ship where they soon ventured and behaved in a peaceable manner, offering us their Cloaths and other things they had in their Canoes, and trading immediately commenced between us; we soon found that they were not unacquainted with Iron by the value they put upon our Nails, for which they gave us Bear Skins and two or 3 pieces of a thick kind of Cloth ...

[125] On April 5, Samwell noted:

> One party paddled out of the Cove, the People belonging to the other came to trade along side the Ship as usual. They begin now to bring us some flat fish to sell as well as Mussels and Cockles, for which we give them little pieces of Tin and other trifles.

[126] On April 25, he wrote, after detailing the fish and animals that made up the diet of the natives:

> … In their Bays they catch Flat fish, Herring and Spratts & other small kinds of fish, & we saw great plenty of Mussels and Cockles among them. The fish of these they smoke place[d] in rows upon sticks, many of which they brought to sell to us as well as fresh ones, & they also sold us great quantities of dried Herrings. (p. 1098, Samwell).

[127] Samwell observed in his journal (at p. 1103) that they found iron, copper and brass among the natives, who also had silver spoons they judged to be Spanish. He theorized that they "got the Spoons & the Iron by way of Traffic from other Tribes to the Southward, as the Coast is probably inhabited all the Way from this Sound to California."

[128] Dr. Lane noted Cook's comment that the natives were eager to trade. She also referred to Samwell's note that it was as common to buy fish from the natives as it was in London:

> … they bring us some Sprats to sell as well as flat fish & it is as common to buy a halfpennyworth of Sprats here as it is in London, they measure them out to us & give us good pennyworths and are very fine fish. This is the first place that we have found our Money current at since we left Plymouth; silver they don't set much Value upon preferring a halfpenny to a Shilling.

[129] Dr. Lane concluded that Cook saw evidence of inter-tribal trade with neighbours. In saying this, she relied on Cook's observation that some of the natives would be gone for four or five days at a time and then return with a fresh cargo, from which she inferred they had traded European goods with their neighbours.

[130] Dr. Lane also noted that Cook and his officers portrayed the Nuu-chah-nulth as engaged in trade with neighbouring native groups:

> It was noted that the native people were in possession of several commodities that could only have been obtained by trade with outsiders, including iron, silver spoons, and blankets made from "wool", likely mountain goat wool originating on what is now the British Columbia mainland.

[131] Dr. McMillan stated that:

> Cook was aware that the people of Yuquot were monopolizing the trade, requiring their neighbours to go through them to obtain items of European manufacture. He also realized that they were exchanging the items they had received with more distant groups, returning with fresh stocks of skins and other goods to trade with Cook's crew.

[132] Mr. Inglis also opined that inter-tribal trade was noted by the Cook expedition.

[133] As already noted, Dr. Lovisek relied on the Douglas version of the Cook journals, and consequently was not of the view that they supported the contention that there was indigenous trade in fish; that is, exchange of fish between the Nuu-chah-nulth or with other aboriginal groups, as opposed to trade with the Europeans.

[134] Canada says that Cook's journals, as well as those of his crew, contain speculative references about trade between aboriginal groups involving goods that the aboriginals obtained from the ships. Canada also submits that the journals do not contain direct observations of trade in fish or other marine products between aboriginal groups.

d. James Strange

[135] James Strange spent a month between June 25 and July 26, 1786, trading with aboriginals in Nootka Sound. For most of this time, the vessels were anchored off Yuquot. Alexander Walker, an officer on the expedition, prepared an account of his visit. Walker's journal is the first extant journal relating to the WCVI after those of the Cook expedition.

[136] In the first recorded encounter between the Nuu-chah-nulth people and the Strange expedition, the Nuu-chah-nulth "sold", as described by Strange, various products, including fish, to the expedition. At p. 43 of his journal, Walker wrote:

> These Canoes were loaden with various kinds of fine fish, particularly some very excellent Salmon and Trout. They very readily sold the latter, or any other kind of fish, but their demands for Salmon were so exorbitant that we refused to take any. Having disposed of as many fish as they could, this set of Canoes departed.

e. James Colnett

[137] A British fur trading expedition under the command of James Colnett visited Nootka Sound and the Kyuquot regions in 1787 and again in 1788. Colnett recorded that he bought fish from the Nuu-chah-nulth in his first encounter with them on his approach to Nootka Sound. He also recorded a subsequent purchase of fish and shellfish.

f. John Meares

[138] John Meares, a British fur trader, was on the WCVI from May to September 1788. He visited both Nootka and Kyuquot Sounds. He purchased fish from the Nuu-chah-nulth at both locations. His journal contains this entry, at p. 130:

> Our supplies of fish were constant and regular, and the natives never failed to bring to daily sale as much of this article as they could spare from the demands of home consumption.

g. Don Estevan Josef Martínez – 1789

[139] Don Estevan Josef Martínez, who had been aboard Pérez's vessel when it visited Nootka Sound in 1774, returned to Nootka Sound in 1789, leading the first of several successive Spanish expeditions which established and maintained a garrison at Yuquot from 1789 to 1795. Martínez arrived at Nootka Sound on May 5, 1789, and remained until the end of September 1789, during which time he kept a journal which included observations about the Nuu-chah-nulth.

[140] As already mentioned, Martínez received a letter from Joseph Ingraham dated July 7, 1789. Martínez had requested Ingraham, who was a member of the crew of the American vessel *The Columbia*, to prepare an account describing Nootka Sound and its inhabitants. Martínez then dispatched the account to the Viceroy in Mexico on July 15, 1789.

[141] An account of the circumstances surrounding the Ingraham Letter and Nootka Sound in 1789 was written by Mark D. Kaplanoff, a research scholar at Trinity College, Cambridge, and was referred to by Mr. Inglis in his testimony. Kaplanoff's introduction to the Ingraham account is helpful in providing the context in which the Ingraham Letter and Martínez's journal were written:

> For a brief time at the end of the 18th century, Nootka Sound on the west coast of Vancouver Island became the principal port of call for the flourishing maritime fur trade and the bone of contention in a threatened European war. The first Europeans to arrive were the Spaniards on the *Santiago*, who anchored off Friendly Cove in August 1774, bartered a few goods with the native Indians, and sailed off the following day. Next came the English expedition under Captain James Cook on the *Discovery*, which arrived on March 29, 1778, remained almost a month, and left the sound an erroneous name (*Nootka* is not an Indian word) and a sudden prominence in world trade.
>
> ...
>
> Among those early visitors, the American ship *Columbia* has an important place. Not only did she blaze the trail for the Americans who soon came to dominate the maritime fur trade, but she also provided an important basis for subsequent American claims to the Oregon country as the first vessel to cross the bar of the Columbia river.
>
> ...

> The circumstances under which Ingraham [an officer on the Columbia] composed his account cast some light on the complicated international rivalries which centered on Nootka.

[142] That account, the Ingraham Letter, described, among other things, the methods of fishing and whaling used by the inhabitants of Nootka Sound, as well as the large variety of marine products caught. With respect to the latter, Ingraham listed "whales, porpoises, salmon, a species of the salmon about the same size with its nose turning down like a hawksbill ... small bream, halibut, cod, flounders, elephant fish, sculpins, frost fish, dog fish, a fish shaped much like a bream generally from eight inches to a foot long, [other fish he could not identify] ... eels, cuttle fish, coal fish, scate, herrings, and sardines." He additionally identified various types of shellfish: "oysters, mussels, limpets, sea ears, cockles, snails, scallops, crabs, and sea eggs."

[143] Martínez's own journals describe the construction of the Spanish garrison at Nootka Sound, as well as his lengthy stay in Nootka Sound. They contain numerous references to the Spaniards exchanging fish with the Nuu-chah-nulth by barter. For example, Martínez wrote on May 6, 1789, "At about six o'clock in the morning there approached the side of the frigate many canoes with Indians, who brought fish and fresh vegetables, which they bartered for pieces of iron, knives, and glass beads". On May 28, 1789, he noted that although the Indians had moved to a different village, they "now and then come to visit us and to sell us some fish by barter." The journals also contained reference to the Ingraham Letter, noting that "the pilot of the American frigate, Don Joseph Ingraham, had given me before his departure an account written in English of the customs of the Nootka Indians, the herbs and plants, trees, birds, quadrapeds, sea fish, and the characteristics of these, the ebb and flow of the tide of this port, and a short vocabulary of the Indian language translated into English." On August 25, 1789, Martínez observed that Maquinna was moving to his winter habitation at a place called "Tahsis". He wrote, "His people were carrying the boards with which they make their houses when they move from one place to another …". He noted again on September 27, 1789, that the Indians

had moved to Tahsis where "they intend to pass the winter there as they are accustomed to do every year."

[144] On September 30, 1789, Martínez wrote a summary of his observations, which included "… the nature and duration of the trade which they [the Nootkans] have carried on with the English, and that which they carry on among themselves." In a detailed part of his summary, Martínez wrote as follows, at p. 199:

> He [Cook] inclines to the belief that these metals were obtained from the forts on Hudson Bay. On the other hand, I do not believe this to have been the case, for the natives of different villages carry on communications and trade with each other. It is more probable that the natives from the south, already civilized, should have introduced both metals, carrying them from village to village. As proof of this, I cite the instance of a silver spoon which a few days ago the natives of this port stole from me. The men who had set out in the schooner found it a long distance away to the south, among the natives of the port of Clayocuat, from whom they bought it in exchange for a piece of iron. As further proof that the Indians trade and traffic among themselves and carry news from one place to another there is the fact that, although I have not left this port, the natives along the strait of Juan de Fuca know very well that I am anchored here. The same thing happened in the north, as the English have ascertained the arrival of the Aranzazu and of our men, when the latter went to Juan de Fuca under my orders.
>
> ... All these natives trade among themselves from one village to another. The coast Indians trade with those of the interior villages (bartering fish to them). Along the coast they carry on a trade in fox skins, and some give more pelts for an amount of copper or iron than do others.
>
> [Emphasis added]

[145] Martínez also wrote about the confusion surrounding the origins of the name of Nootka Sound:

> The name of Nootka, which was given to this port by the English, is due to the failure of the English and of the natives to make themselves understood by each other. It came about in this way: Captain Cook's men were asking the Indians by means of signs what was the name of this port. One of the English made a circle on the ground with his hand, and then rubbed it out. Upon this the Indian answered "Nootak", which means to take away. Cook called it in his diary King George's or Nootka Inlet, and vessels since have known it by the latter name of Nootka. For this reason the Indians have also adopted the name, although at first they did not fail to wonder at the application of the name. However, the real native name for it is Yucuat, which means "therefore".

[146] At the conclusion of his account (p. 212), Martínez wrote a list that included the names of the chiefs "of this port", as well as the names of the "villages which the natives of this entrance visit and traffic with to the north." There he listed a number of villages as follows: Shumahat [Cuma'ath]; Nutchalat [Nuchatlaht]; Ahatsut [probably Ehattesaht]; Chinequinut; Otlachehat; Chiachsult; Caiyuquat; Clay-is-hut; and Xusqui-muquat. (I have indicated in square brackets the current tribe name where I could ascertain it from the evidence.) Martínez then listed the names of the "villages which the natives of this entrance visit and trade with to the south": Hashcoat; Manoyst; Matchelat; Aotsusut; Kitsmahat; Clay-yoquat; Uttli-it-let; Clay-isut; and Tosuch. Finally, he included quite a lengthy vocabulary which had been given to him by Ingraham.

[147] The plaintiffs place considerable weight on the Martínez account to support their assertion that the Nuu-chah-nulth traded fish amongst themselves. Canada, on the other hand, submits that taken as a whole, there is little in the account to support the view that there was a pre-contact integral practice of trading fish amongst the aboriginal peoples on the WCVI.

[148] Dr. Lovisek did not mention in her report the reference in the Martínez journal to the natives trading amongst themselves. She was aware of the reference as it had been specifically drawn to her attention by counsel for Canada. In her testimony, Dr. Lovisek explained her view that Martínez was unreliable, and that she relied on other scholars – Gormley, Archer, Moore and Wagner – for this view. However, it was demonstrated on cross-examination that none of those scholars supported her opinion that the Martínez journal was unreliable, and that some, in fact, relied on the journal in their own work. Dr. Moore, for example, noted that Martínez was prone to self-praise but that he (Dr. Moore) nevertheless relied quite considerably on the Martínez journal.

[149] Dr. Lovisek also suggested that Martínez had simply copied the Ingraham Letter. In cross-examination this, too, was shown to be incorrect. Further, Mr. Inglis testified that he found no evidence that Martínez had copied the Ingraham Letter.

[150] I conclude that Dr. Lovisek confused opinions about Martínez's incompetence as a commander and his somewhat reckless capture of a British ship which, in turn, sparked the Nootka Sound Controversy, with the question of the reliability of his journal. I agree with the plaintiffs that there appears to be no basis for Dr. Lovisek's opinion that the Martínez journal should be found to be unreliable.

h. José Mariano Moziño

[151] Between April 29 and September 21, 1792, Spanish naturalist José Mariano Moziño, a member of the Quadra expedition, stayed at the Spanish fort at Yuquot. During his more than four months at Yuquot, he gathered a wide range of information on the region's natural and human history. Moziño was a scientifically trained botanist and naturalist, and he learned enough of the Nuu-chah-nulth language to act as a translator. He was specifically tasked with recording observations of the Nuu-chah-nulth at Nootka Sound, and he wrote a lengthy account. Dr. Lane testified that Moziño's account was exceptional amongst the early contact period records in the sense that it was "an ethnographic description of the sort that a modern ethnologist might prepare". Dr. McMillan largely adopted this view, and Mr. Inglis was of a similar opinion, noting Moziño's keen observational skills.

[152] Moziño stated at p. 9 of his lengthy report:

> Our residence of more than four months on that island enabled me to learn about the various customs of the natives, their religion, and their system of government. I believe I am the first person who has been able to gather such information, and this was because I learned their language sufficiently to converse with them.

[153] Moziño's report covered such topics as the Nuu-chah-nulth's preferred clothing, weapons, house furnishings, funerals, marriages, birth rituals, and methods of fishing. At p. 65, Moziño wrote as follows:

> Textiles, skins, whale oil, and canoes were apparently the articles they exchanged in their commerce, <u>which indisputably must have been desultory since it was carried out among nations more or less supplied with the same products</u>. In the year [17]78 the aspect of things changed entirely. For that

> part of America it was the beginning of a memorable epoch. Captain [James] Cook gave them some copper, and his crew bought a number of sea otters in exchange for pieces of this metal, knives, fishhooks, glass beads, and other trifles.
>
> [Emphasis added]

[154] Much time in cross-examination of experts at the trial and in submissions was spent in consideration of this particular paragraph. Canada contends that Moziño's conclusion about "desultory" trade, given his understanding of the Nuu-chah-nulth language and his expertise and opportunity for observation, must be given due regard. The plaintiffs, however, say that Moziño's comment was speculative or, alternatively, an inference; either way, it was not an observation.

[155] So that Moziño's statement may be understood in its context, I reproduce the entirety of the passage that is in issue:

> The kinship ties with the Nuchimanes [Nimkish] and the princes' custom of marrying women of this tribe have resulted in the longstanding commercial relations between these villages. Through the agency of the Nuchimanes, the Nootkans extended their trade up to Bucareli Inlet and probably up to Queen Charlotte Island, in addition to the trade which they certainly have had, and now have, with the continent, across the strait of Juan de Fuca. They told me of having seen, after a trip of several days, a certain class of women who had, under their natural mouth, an additional one that held a small stick of wood, and these, for certain, are not found except in the northern countries which I have just cited.
>
> The wool they intertwine with the cedar fibers is of a quadruped that is not found anywhere on the island, and if by chance it is the buffalo, as I have suspected, it is surely the one that abounds in the north of our most remote possessions of New Mexico. When Captain Cook saw the Nootkans for the first time, he found that they already had a knowledge of iron and copper, and it appears indisputable that they acquired these metals by trading on the continent with other nations which came to make exchanges [at a place] which, according to Captain [George] Vancouver, is no more than four hundred miles to the east of a port in which he was anchored inside the strait. I do not have its name at present.
>
> To the south they appear not to have gone farther than the Island of Tutusi [Cape Flattery] and Port of Nuñez Gaona [Neah Bay], to this point the same language is spoken with very little difference from that at 51º. Textiles, skins, whale oil and canoes were apparently the articles they exchanged in their commerce, which indisputably must have been desultory since it was carried out among nations more or less supplied with the same products. In the year [17]78 the aspect of things changed entirely. For that part of America it was the beginning of a memorable epoch. Captain [James] Cook gave them

> some copper, and his crew bought a number of sea otters in exchange for pieces of this metal, knives, fishhooks, glass beads, and other trifles. The natives believed that they had succeeded in unloading their merchandise at a very advantageous price. In effect they had, considering the circumstances of that time, because they tripled their small capital by means of the copper which, leaving the hands of the Nootkans, began to disperse itself throughout almost all the Archipelago.

[156] Dr. Lovisek quoted the first paragraph of this passage in her report. Because she excluded any trade between kin within her definition of commercial trade, she consequently discounted this passage as evidence of commercial trade. Dr. Lane did not mention this passage in her report, and on cross-examination, she dismissed it as inaccurate. Dr. McMillan did not comment on Moziño's observation in his report. Mr. Inglis said that he thought it was unclear whether Moziño directly observed any trading. He did testify that Moziño would have had ample opportunity to obtain this information directly from the Nuu-chah-nulth informants.

[157] The plaintiffs contend that although Moziño did not mention marine products as an item of trade, he also did not reach the positive conclusion that there was no aboriginal trade in marine products. They further state in their written submissions that "[Moziño's] speculation is not based on information he received from informants but rather on his own supposition that because this trade was 'carried out among nations more or less supplied with the same products' it must have been desultory." The plaintiffs say that the speculative nature of the Moziño statement is apparent on its face. Moziño states "textiles, skins, whale oil and canoes were <u>apparently</u> the articles they exchanged …" and that this trade "indisputably <u>must have been</u> desultory."

[158] The passage from Moziño's journal cited above began with observations of kinship ties with the Nimkish, who populated the eastern side of Vancouver Island. Moziño described the trade trails across the Island about which several expert witnesses gave evidence. He concluded that there were "longstanding commercial relations between the Nimkish and the Nuu-chah-nulth of Nootka Sound." He then discussed the extent of trade as far north as the Queen Charlotte Islands. He noted that Captain Cook observed that the Nuu-chah-nulth at Nootka Sound already had

knowledge of iron and copper, from which he and Cook inferred a wide-spread trade. Moziño observed that to the south the same language was spoken and that the trade to the south must have been desultory since it was carried out among nations more or less supplied with the same products.

[159] In my view, the passage as a whole concerns a discussion of indigenous trade: first, to the Nimkish, that is, across the island; second, to the north as far as the Queen Charlotte Islands; and third, to the south. The portion of the passage that includes the description of trade as being "desultory" is only with reference to the southbound trade, which Moziño speculated was desultory because the Nuu-chah-nulth tribes to the south were supplied with the same products.

[160] Dr. McMillan considered Moziño to have been mistaken in assuming that resources were the same throughout the different groups' territories. Dr. Lovisek also noted the extreme variation in salmon runs among different local group territories that resulted in hunger and starvation, although she said that this was a motivation for amalgamation, not trade or barter. (I consider this later in my discussion of the history of the individual tribes.) Likewise, Dr. Lane considered Moziño's comment to be erroneous because it wrongly assumed that there was no variation in the timing and availability of resources. Dr. Lane also noted that Moziño did not consider other reasons that people desire goods (including that they are different and come from afar) and that Moziño's account is not consistent with descriptions in other documents.

[161] I conclude from Moziño's text and the expert evidence interpreting it that there was trade between the Nuu-chah-nulth at Nootka Sound but that the southbound trade to other Nuu-chah-nulth tribes was, in Moziño's opinion, limited.

i. John Jewitt

[162] On March 22, 1803, Chief Maquinna attacked the American fur trading vessel, *The Boston*, and captured the vessel's armourer, John Jewitt, and its sailmaker, John Thompson. The rest of the crew were all killed. Jewitt and

Thompson were held in captivity until July 1805. Jewitt kept a journal during his captivity and it represents a first-hand account of aboriginal daily activities during the post-contact period in Nootka Sound. In 1807, subsequent to his release, Jewitt published his journal. Later in 1815, a narrative account of his experiences, ghost written by Richard Alsop, was also published. Jewitt participated in the preparation of this narrative.

[163] In the introduction to the 1807 journal, Jewitt described arriving in Nootka Sound on March 12, 1803. *The Boston* was anchored five miles above the village of Yuquot. Many visits took place between the Nuu-chah-nulth and the captain and crew of *The Boston*. A dispute arose over an apparently faulty musket that the captain had traded to Chief Maquinna. On March 22, Chief Maquinna suggested to the captain that the crew would be well advised to catch fresh salmon for their onward journey. Maquinna and his men then ambushed the crew and killed everyone except for Jewitt and Thompson. Jewitt was told that he would be a slave to Maquinna and that his life would be spared, largely because he was an armourer (blacksmith) and therefore useful for metal working. Maquinna also expressed the view that Thompson, the sailmaker, would be useful for making sails for the canoes, and his life, too, was spared. Thompson died of an illness shortly after being rescued and returning to the United States.

[164] Jewitt learned the Nuu-chah-nulth language. He made frequent, but not daily, entries in his journal; at times there are gaps of several days or longer.

[165] Jewitt wrote in his journal that a few days after the capture of *The Boston*, a great number of canoes from no less than 20 tribes to the north and south arrived at Nootka Sound. At p. 46 of the narrative, Jewitt noted the tribes coming to receive from Maquinna the bounty from *The Boston*. He wrote:

> In this manner tribes of savages from various parts of the coast, continued coming for several days, bringing with them, blubber, oil, herring-spawn, dried fish and clams, for which they received, in return, presents of cloth, &c. after which they in general immediately returned home. I observed that very few, if any of them, except the chiefs, had arms, which I afterwards learned is the

> custom with these people, whenever they come upon a friendly visit or to trade, in order to shew, on their approach, that their intentions are pacific.

[166] In a lengthy section of the narrative beginning at p. 59, Jewitt described the "manners and customs of the people of Nootka Sound". In this section, there are some references to inter-tribal trade. At p. 95 he wrote:

> The trade of most of the other tribes with Nootka, was principally train oil, seal or whale's blubber, fish fresh or dried, herring or salmon spawn, clams, and muscles, and the *yama*, a species of fruit which is pressed and dried, cloth, sea otter skins, and slaves.

[167] And at p. 96:

> Many of the articles thus brought, particularly the provisions, were considered as presents, or tributary offerings, but this must be viewed as little more than a nominal acknowledgment of superiority, as they rarely failed to get the full amount of the value of their presents. I have known eighteen of the great tubs, in which they keep their provisions, filled with spawn brought in this way.

[168] Jewitt recorded 116 visits to Maquinna from other tribes. According to Mr. Inglis, Jewitt recorded the names of 16 tribes that visited and traded with Chief Maquinna in Nootka Sound over the two-year period he was captive. Twelve of those names can be equated with contemporary Nuu-chah-nulth communities, two are not recognized, and two are non-Nuu-chah-nulth communities – one from the north and one from the south.

[169] Dr. Lane summarized the journal entries relating to visits from other tribes in a table, as follows:

Tribe	Current Tribe Name	Number of Visits to Maquinna
Ai-tiz-arts, (Aitizzarts, Ai-tiz-zarts)	Ehattesaht	35
Sarvanh, Savahina (Savin-ars)	Tsawunath	18
Wickeninishes, Wickeningish (Wickinninish)	Tla-o-qui-aht	13
Esquates, Esquatts (Eshquates)	Hesquiaht	11
Visits by tribes not named in journal		10
Cla-u-quate, Clauquates (Kla-oo-quates)	Tla-o-qui-aht	5

Check-ach-lizaits, Cheack-clitz-arts, Chech-cliz-arts, Check-cliz-arts	Chicklesaht	4
Clar-zarts, Claz-arts Clarazarts, Clar-zils (Kla-iz-arts)	Makah (Q^{w}idičča?atx)	4
Caruquate (Cayuquets)	Kyuquot	4
New-chee-mass, Newcheemass (Newchemass)	Nimpkish	3
Newchadlates, New-chat-laits (New-chad-lits)	Nuchatlaht	3
Ahowsarts, Ah-ow-zerts (Ah-owz-arts)	Ahousaht	2
Shoemadeth, Chewmadart (Schoo-mad-its)	Cuma'ath	2
Chee-chu-ate	tribal name not recognized	1
Clar-ah	tribal name not recognized	1
Michlate (Mich-la-its)	Muchalaht	1
Moowachart (Mo-watch-its)	Mowachaht	1
Total visits to Maquinna		118

[170] She also summarized the trade items brought by those tribes to Maquinna:

Trade Item	Number of Times Traded
Ifraw (dentalia)	16
Herring spawn	12
Train oil	10
Seals	9
Skins (not specified)	9
Salmon spawn	7
Whale blubber	6
Dried Salmon	4
Geese (not specified)	4
Slaves	4
Spawn (not specified)	3
Herring	2
Fresh herring	2
Fresh Salmon	2
Dried clams	2
Canoes	2
Dried herring	1
Salmon	1
Dried cockles	1
Sea otter skins	1
Fruit	1
Cloth	1

[171] Dr. Lane regarded these as mostly commercial exchanges.

[172] Canada raises the following points concerning the reliability of Jewitt's journals and narrative as evidence of pre-contact indigenous trade in fish:

1. Jewitt was captured some 29 years following contact. Within this time frame, the WCVI, and Nootka Sound in particular, had become the center of an intense maritime fur trade. From 1774 to 1811, over 50 trading and exploration expeditions are known to have visited the area. This contact resulted in significant changes to the economies of the groups on the WCVI and particularly of those close to the centers of trade. As a result, Canada argues, what Jewitt observed was not an unchanged aboriginal culture but, rather, one that had been changed significantly by European contact.

2. As Jewitt was only 20 years old at the time of his captivity, and trained as a blacksmith, Canada questions the accuracy of his observations.

3. Jewitt wrote his contemporaneous journal in a terse style that provides very little context as to the nature of the events he witnessed.

4. Canada questions the accuracy of the later published narrative, particularly given that it was ghost written. Canada notes that it is only in this narrative that Jewitt describes trade.

5. Jewitt appears to acknowledge the marine resources brought to Maquinna as tribute offerings from groups connected politically to Maquinna. Further, given the distinct forms of exchange that existed among aboriginal groups, Canada argues that only groups without political connections to Maquinna could be considered to have been engaged in trade. It says that out of a total of 784 entries in Jewitt's journal, only 29 of the transactions could be considered independent of Maquinna. Even within that number, there is some doubt about the independence of certain groups.

6. Jewitt only observed exchange patterns in Nootka Sound, and it is not possible to determine whether those patterns would have been present elsewhere in the claimed areas.

7. Much of the bounty traded by Maquinna and recorded as such by Jewitt was the result of the pillaging of *The Boston* and cannot be considered typical of indigenous trade.

[173] The plaintiffs note that it is not only Jewitt's narrative that includes references to trade, but also his journal which includes, for instance, the following notation:

> Other tribes of Indians come every day to trade with our Chief, bringing with them whale's blubber, train oil, dried clams, herrings &c. and receiving in return cloth &c.

[174] I discuss the expert evidence about Jewitt and my conclusions about the reliability of his journal later in these Reasons after considering the whole of the evidence on trade.

j. Alexander Walker and the Strange Expedition

[175] A British fur-trade expedition commanded by James Strange spent the period June 25-July 26, 1786, anchored off Yuquot trading with aboriginals in Nootka Sound. Alexander Walker, the commander, prepared an account of the visit. He and others from the expedition travelled up the outside of Nootka Island and encountered a group of Nootkans returning from a trade expedition. Walker described their encounter, at p. 53:

> We here [past Skuna Bay] met with a Canoe, which belonged to our friends at Nootka. We soon recognized each other. The appearance of a Canoe at this distance from the Sound was a proof of a commercial intercourse existing of considerable extent, and that the relations of friendship prevailed beyond the usual range of Savage Life. The partnership of tribes is the most limited and jealous state of Society in existence. We told them whither we were going, and they advised us not to proceed farther; as they had just come from the same pursuit, and had been able to procure nothing, but a few pieces of Fur.

[176] Walker provided several other descriptions of Nootka trading relations with other tribes:

> Moquilla [chief at Nootka Sound] told us, that they navigate a great way both to the North and South, and that on such Voyages they have been absent several months.

[177] And at p. 59:

> The inhabitants of the Sound, having disposed of all the Furs, in their immediate Possession, were obliged to apply to the Neighbouring tribes for a supply, to enable them to continue the trade, and on this errand Kurrighum made two or three trips to the Southward, and as often returned loaded with rich Furs. At the same time, either his, or Mokquillas agents sweeped the Coast a great way to the Northward, and brought us likewise the produce of that quarter ...

k. Robert Haswell and The Columbia

[178] Robert Haswell was an officer with *The Columbia* expedition that wintered in Nootka Sound in 1788-1789. In 1789, he prepared a log in which he compiled a list of the "Names of the Towns which they [the Nootka] trade with to the Southward of Nootka Sound" and a second list of "Names of Towns which they visit and trade with the Northward of Nootka Sound". Eighteen tribes are listed in their correct geographical order. Nine towns were "to the Northward of Nootka Sound": "Shuma athat, Noocho tlat, Ahatesut, Che neckenet, Otluckchaal, Kyuquot, Chee ah clee sutt, Cly ish hut, Qushkeemoowhoat". Nine towns were "to the Southward of Nootka Sound": "Hash coal, Matchetlat, Manoish, Otsoosutt, Kitsmahat, Clyoqot, Ut looetlet, Clyees uh, Tootooch."

[179] These two lists bear a striking similarity to those prepared by Martínez and Jewitt, lending strength to the argument that trade was an integral component of the Nuu-chah-nulth culture. The translation of the Nuu-chah-nulth language to English results in a variety of different spellings of the same tribe but the names are, nevertheless, sufficiently similar phonetically to enable me to infer that the lists compiled by Haswell, Jewitt, and Martínez refer to many of the same tribes.

l. Espinosa y Tello

[180] In imitation of Cook, a Spanish scientific expedition under the command of Alejandro Malaspina visited Nootka Sound between August 12-28, 1791. Espinosa y Tello, one of the expedition's officers, kept a journal in which he recorded observations about the Nootka peoples' trading relationship with the Nimpkish.

m. Caamano

[181] As noted by Mr. Inglis, Caamano, a Spanish officer who wintered at Nootka in 1790-1791, provided details of the products of intertribal trade at Nootka:

> Their trade consists of otter pelts, bear skins, and deer hides, a kind of coarse cloth which they make from pine bark, with which they make blankets about six feet long and about three and one half feet wide, in which they wrap themselves, sleeping mats of the same material, large tanned chamois skins, fish, canoes, paddles and children.

3. Post-contact ethnographic evidence: Sproat and Drucker

[182] The ethnographic evidence introduced in this case included the studies of Philip Drucker, Gilbert Sproat, and Edward Sapir. These individuals observed and interviewed the Nuu-chah-nulth about their way of life and early memories of their way of life. Drucker's *The Northern and Central Nootkan Tribes* is considered to be the most comprehensive ethnographic description of the Nuu-chah-nulth.

[183] Drucker's time horizon generally refers to Nuu-chah-nulth life from the 1870s to the early 1900s. He wrote in his introduction, at p. 15:

> As a consequence, I made an effort while in the field to place my information so far as possible, and to make it first-hand evidence by informants, not hearsay. Where informants had specific data on earlier practices, I noted it as such. The bulk of the material in the present report, except, of course, that of formal traditions and war tales, refers to the days of childhood to early adulthood of the informants, who ranged in age from the fifties to the seventies in 1936 and 1937. That means that most of the data refer to Nootkan life from the 1870's [sic] to the early 1900's [sic]. A few phases of custom – techniques and usages specifically described by their elders, and personal anecdotes told as moral lessons, or as amusing incidents – go back a little earlier, but not much. I wish to emphasize, therefore, that this ethnography is intended to be a description of the Nootkan tribes during the

> last three, or at most four decades of the nineteenth century, except where specified as earlier.

[184] Drucker noted that exceptions to his time horizon were formal traditions and war tales. As noted by the plaintiffs, this would include stories of wars, as well as the transmission of hereditary rights and privileges, such that Drucker's ethnography provides useful information dating further back than 1870.

[185] Dr. McMillan explained that ethnographic accounts of traditional culture are sometimes descriptions of traditions that can be assumed to have originated long before the ethnographic account was given. He expressed the view, for instance, that Jewitt's descriptions of harvesting techniques for salmon and herring were traditional practices unchanged by European culture. He described these practices as having considerable "time depth", meaning that they had existed in time earlier than the recorded observations.

[186] Sproat was one of the first non-Nuu-chah-nulth settlers on the WCVI. He arrived in Alberni in 1860 to establish the Anderson sawmill operation. From the end of the fur trade in the first decades of the 1800s until Sproat's arrival, there had been very little contact between Europeans and the Nuu-chah-nulth. Sproat spent over five years in Alberni. During his stay, he was appointed Justice of the Peace and *de facto* government agent for the Colony of British Columbia. He returned to England in 1865 but came back to British Columbia in 1876 and was appointed to the three-person joint Indian Reserve Commission. He then became the sole commissioner until he resigned in 1880.

[187] Sproat wrote a comprehensive ethnography entitled *Scenes and Studies of Savage Life*, notes for which he kept on a contemporaneous basis. He published his ethnography in 1868 after his return to England. Sproat wrote about his observations of the 1860s but, as Mr. Inglis testified, Sproat recognized that the cultural practices of the Nuu-chah-nulth were longstanding. He wrote about the remoteness of the "Aht" district. He noted that there had been little Euro/American influence in Barkley Sound prior to the 1860s, that there had only been 14 maritime

expeditions entering Barkley Sound between 1787 and 1817, and that there had been virtually no contact from 1817 until the 1850s. Both Mr. Inglis and Dr. McMillan considered Sproat's observations to have more time depth than the period of his observations.

[188] Sproat wrote about the motivations for trade in fish products. He cited tribal specialization, variation in fishing activity and desire to obtain materials from outside the Nuu-chah-nulth territories, at p. 19:

> There seems to be among all the tribes in the island a sort of recognized tribal monopoly in certain articles produced, or that have been long manufactured in their own district. For instance, a tribe that does not grow potatoes, or make a particular kind of mat, will go a long way, year after year, to barter for those articles, which, if they liked, they themselves could easily produce or manufacture.

[189] He further wrote, at p. 79:

> An active trade existed formerly among the tribes of this nation, as also between them and the tribes at the south of the island and on the American shore. The root called gammass, for instance, and swamp rushes for making mats, neither of which could be plentifully produced on the west coast, were sent from the south of the island in exchange for cedar-bark baskets, dried halibuts and herrings. The coasting [sic] intertribal trade is not free, but is arbitrarily controlled by the stronger tribes, who will not allow weaker tribes to go past them in search of customers; just as if the people of Hull should intercept all the vessels laden with cargo from the north of England for London, and make the people of London pay for them an increased price, fixed by the interceptors.
>
> [Emphasis added]

[190] Sproat also commented on the Nuu-chah-nulth's trading acumen, at p. 78:

> Commodities are obtained among the Ahts from one another by bartering slaves, canoes, and articles of food, clothing or ornament; and from the colonists by exchanging oil, fish, skins, and furs. All the natives are acute, and rather too sharp at bargaining. The Ahts are fond of a long conversation in selling, but seldom reduce their price. … News about prices, and indeed about anything in which the natives take an interest, travels quickly to distant places from one tribe to another.

[191] At p. 228, he wrote:

> Many disputes arise between tribes on the finding of dead whales near the undefined boundaries of the tribal territories. If the quarrel is serious, all intercourse ceases; trade is forbidden, and war is threatened. By-and-by, when the loss of trade is felt, negotiation is tried.

[192] The plaintiffs rely on Dr. McMillan's opinion that Sproat's observations have considerable time depth. As noted, prior to Sproat's arrival in the Alberni Valley, there had been very little contact between the southern Nuu-chah-nulth groups and Europeans. Moreover, there had been a long period of virtually no contact between Europeans and any Nuu-chah-nulth group since the end of the maritime fur trade in the early 19th century. The plaintiffs say, in reliance on Dr. McMillan's opinion, that it is difficult to imagine what Sproat could have meant by an active trade "formerly existing" if he did not mean prior to European times.

[193] In their written submission, the plaintiffs argue:

> … Sproat's account of trade in fish by the Nuu-chah-nulth among themselves and with neighbouring groups is good evidence of Nuu-chah-nulth's pre-contact trading activities. His descriptions are of indigenous trade for indigenous products and his observations are either expressly descriptions of earlier times or are of a society that has been largely uninterrupted by European contact. The contact period accounts of trade in fish "provide the link to pre-contact times."

[194] Canada notes that Drucker does not speak at all about trade as a means by which deficiencies in locally available resources were addressed. In fact, Drucker is virtually silent on the topic of trade. The plaintiffs respond that even if the absence of references to trade in Drucker's work could be taken as evidence that the practice did not occur, it could only be evidence that it did not occur during Drucker's time frame of 1870 to 1930. They submit that during most of that period, the Nuu-chah-nulth had already moved heavily into the commercial fishery.

[195] Canada also says that Sproat's reference to trade existing formerly among the tribes cannot be considered evidence of a pre-contact practice in trade of

fisheries resources because Sproat was clearly writing almost 100 years after contact.

[196] Drucker does not discuss "trade in fish" *per se* in his ethnography of the Nuu-chah-nulth. Dr. McMillan considered the absence of discussion of trade in Drucker to be "puzzling given that other informants writing at the same time such as Gilbert Sproat do refer to trade." Drucker's informants were speaking about their recollections of the period 1870 to 1900, whereas Sproat was recording his actual observations from 1860 to 1865. I would therefore place greater weight on Sproat's observations on this topic than Drucker. I find Sproat's observations to be accurate observations of trade. I find, as well, that his observations did have considerable time depth.

4. Other evidence about the way of life of the Nuu-chah-nulth at contact

[197] In addition to the direct evidence of the explorers and the ethnographic evidence reviewed in the previous section, there is other evidence of the Nuu-chah-nulth way of life that is important in determining whether indigenous trade in fish existed and whether it was integral to their culture at contact. I review other aspects of the Nuu-chah-nulth way of life in the following sections under the headings: Dependence on fish; Political organization; Kinship; Feasting, potlatches and tribute; Warfare and raiding; Trade routes; and Gifts as a form of trade.

[198] It is Canada's contention that an examination of these other aspects of the Nuu-chah-nulth way of life provides evidence of a society that did not trade in fish. It submits that the way of life of the Nuu-chah-nulth at contact was characterized by a kinship economy; that is, the primary means by which groups obtained access to fisheries resources was through kinship ties, not trade. Surplus fish was distributed through feasting and potlatching, and warfare and raiding were used to obtain control of fishery resources. Canada submits that trade in marine resources was not an integral feature of Nuu-chah-nulth culture.

[199] Dr. Lovisek captures Canada's position on the absence of indigenous commercial trade between the Nuu-chah-nulth in the following passage in her report, at p. 86:

> Precontact population density, a rough coastal environment, a strict system of territory and titleholder rights including tribute and feasting and the prevalence of intertribal warfare would have limited the freedom of movement between local groups and limited the development of commercial exchange. In 1803 to 1805 (the time of Jewitt's enslavement) it still was not possible to travel freely between territories. The development of federations and the introduction by Euro-Americans of the sail to the canoe, would, for example, have allowed more freedom of movement, but any motivation for the bartering of marine resources was likely offset by the cultural practices of tribute, alliance through marriage, gift, feast and raiding.

[200] The plaintiffs point to evidence such as trade trails crossing Vancouver Island, extended notions of kinship, differences in the availability of resources for different groups, inter-marriage for the purpose of facilitating trade, and various other aspects of Nuu-chah-nulth culture as proof of the existence of a trade in fish.

[201] Accordingly, I will now focus my examination of the evidence on various features of Nuu-chah-nulth society or culture in order to determine whether the plaintiffs' assertion of trade between indigenous groups is supported by this cultural evidence.

a. Dependence on fish

[202] What is not in dispute in this lawsuit is that prior to and following contact with Europeans, the Nuu-chah-nulth were a fishing people and that fishing was an overwhelming feature of their pre-contact way of life.

[203] Captain Cook, for instance, described the "amazing abundance of fish stored in the Nuu-chah-nulth long houses" he visited. Alexander Walker of the Strange expedition noted in 1786 the vast number of fish that were caught every day. John Meares described the fishing harvest as involving prodigious quantities. In one journal entry, John Jewitt noted that the natives came home with "90 large baskets full of halibut." In the later historical period, Governor James Douglas noted in 1855

the infinite number of halibut caught by the Nuu-chah-nulth. In 1858, William Banfield commented that the immense quantities of fish were equal to anything he had seen in England. In 1868, Gilbert Sproat wrote, "this fish [salmon] is, to man, here what the corn crop is in England, or what the potato crop was in Ireland." He also wrote, at p. 53:

> The principal food of the natives, as before alluded to, is fish – salmon, whale, halibut, seal, herring, anchovy and shellfish of various kinds. Their commonest article of food at all times is dried salmon, whale blubber, preparations of salmon roe, and the heads of smaller fish are esteemed delicacies.

[204] Indian Superintendant Powell wrote in 1875 that the Nuu-chah-nulth were "toilers of the sea and happily so."

[205] Canada agrees with the plaintiffs' characterization of the Nuu-chah-nulth as relying heavily on fishing but qualifies this on the basis that their harvest was for food, social and ceremonial ("FSC") purposes in rivers and near shore areas.

b. Political organization

[206] An understanding of Nuu-chah-nulth political organization is necessary to address the question of kinship and whether trade was between independent groups or, as Canada argues in respect to Jewitt's observations, whether what was observed was primarily tribute between groups politically connected to Maquinna.

[207] Some time prior to contact, the Nuu-chah-nulth lived in local groups. Mr. Inglis described the socio-political organization of the Nuu-chah-nulth in these terms, at p. 59 (March 2007 report):

> Sociopolitical Units
>
> Drucker defined three sociopolitical units: local group, tribe, and confederacy. The fundamental social unit Drucker identified as the "local group." It was "the basic unit of which more elaborate ones were compounded." Drucker described the local group as:
>
> > .... a family of chiefs who owned territorial rights, houses and various other privileges. Such a group bore a name, usually that of their "place" (a site at their fishing ground where they "belonged"), or

> sometimes that of a chief; and had a tradition, firmly believed, that they have descent from a common ancestor.

The name of the local group is generally taken from the name of the place of origin of the highest-ranking family, usually a village at a salmon river. The suffix "aht," meaning "person, or people of" is added to this name. An example of a local group name is Ahousaht, meaning "the people of *Ahous.*"

Membership in the local group is based on kinship. Each local group is made up of a number of sub-groups, variously termed family groups, lineages, or houses. The head of the highest ranked family group is the Chief of the local group.

The second sociopolitical unit identified by Drucker is the tribe, which consisted of "united local groups." Drucker wrote:

> "Among most Northern Nootkans these local groups were not autonomous. Each was formally united with several others by possession of a common winter village, fixed ranking for their assembled chiefs, and often a name. To such a union the term "tribe" is applied...."

Each local group had a house or houses at the tribal village. The houses in the village were ranked, with the highest ranked house located in the centre and the lowest ranked houses at either end.

The third sociopolitical unit is the confederacy which Drucker defined as "formally linked tribes:"

> "The confederacy was cemented by ties of the same nature as those uniting a number of local groups into a tribe: a common village site – in this case a summer one - to which all, or most, of the people repaired for sea fishing and hunting; seriation of their chiefs, expressed in the order of seating on ceremonial occasions; and a name. These largest groups corresponded fairly well to major geographical divisions [for example, Kyuquot Sound]."

The name of the confederacy was generally taken from one of the component local groups. Most local groups had a house at the confederacy village. Again, house locations were ranked, with the highest ranked located in the centre of the village and the lowest ranked at either end.

In the Contact period records, towns, villages, or tribes are the most commonly referenced sociopolitical unit. These towns or villages generally were large and populous. In anthropological terms, the sociopolitical structure represented by these large and populous villages is either a tribe or a confederacy. Other settlements were noted but these were generally small and likely associated with resource activities.

In the Colonial and post-Confederation period records, the tribe is the referenced sociopolitical unit. In anthropological terms, the sociopolitical structure represented by tribe is either a tribe or a confederacy, as described by Drucker.

[208] The other experts did not disagree with Mr. Inglis' description. I accept this evidence. What is important is that exchanges or tribute between members of a local group or tribe ruled by one chief could not be considered trade. However, as will be discussed below, the existence of distinct polities was quite changeable. Nuu-chah-nulth society was marked by the formation of various confederacies, alliances based on marriage, and forced acquisitions from time to time. One of the challenges in assessing the evidence is to tease out from that evidence, such as the observations of Jewitt, whether there was a regular trade between distinct entities or loosely connected entities, as opposed to within a single group. Cook and others noted that other tribes were treated as strangers in the sense that they had to seek Maquinna's permission to trade with him. Below, I will address this issue of the inter-connectedness of different tribes.

c. Kinship

[209] Canada's position is that kinship was a central principle upon which the societies and economies of the pre-contact Nuu-chah-nulth local groups were based. Canada says that the establishment of kinship ties was a primary means by which groups obtained greater access to marine resource harvesting locations. Kinship, it submits, was the defining feature of exchange relationships; exchanges were not conducted between individuals who did not share some kinship connection.

[210] Kinship relationships and their connection to trade are relevant because Canada relies on Dr. Lovisek's definition of commercial trade. She defines commercial trade as "*the exchange of large quantities of a non-mammal marine resource to unrelated persons or persons outside a kinship network.*" Counsel for Canada advised me that Dr. Lovisek authored this definition of commercial trade.

[211] The plaintiffs do not accept this definition. In particular, they say that the concept of kinship in the context of the Nuu-chah-nulth relationships between different tribes is much broader than a modern understanding of the term "kinship". They also argue that kinship relations amongst the Nuu-chah-nulth coexisted with commercial relations and were often established for the purpose of facilitating trade.

Later I will discuss what I consider to be problems with Dr. Lovisek's definition of commercial trade.

[212] All of the experts testified as to the importance of kinship.

[213] Ethnographer Drucker stated:

> It was a fundamental tenet of all Nootkan social behaviour that one had dealing only with one's kin. The actual practice was for the remotest relationships to be reckoned valid enough to entitle one to marry into, live with, or give potlatches to almost any group he chose. For an outsider the concept of relationship was extended not only to all the local group of a family to which he claimed kinship, but to the whole tribe or even confederacy.

[214] Dr. Boxberger, Mr. Inglis and Dr. Lane agreed with Drucker's statement and agreed that his description of the importance of kinship had time depth. Dr. McMillan adopted a more nuanced approach. He stated that "in this traditional society, virtually all amicable relations were conducted in an idiom of kinship and descent".

[215] Mr. Inglis explained the importance of marriage between chiefly families as a means to increase access to resources and territories in his report, at p. 29:

> Marriage between chiefly families was fundamental in formalizing alliances, both political and economic, between families and tribes. Drucker wrote:
>
> > ... marriage, in the Nootkan view, was a formal alliance between two family groups rather than between two individuals. That is to say, a union was recognized as legitimate only when formally approved by the recognized family heads through a series of gift exchanges.
>
> Intermarriage established broader kin ties that allowed increased access to territories and resources. Drucker highlighted the importance of intermarriage between Nuu-chah-nulth tribes in twelve pages which he devoted to explaining the details of one high ranking marriage.
>
> *Contact Period*
>
> In 1788, Meares noted the importance of women in intertribal relations of the Nootka:
>
> > From him [Callicum] we learned that there were several very populous villages to the Northward, entrusted to the government of the principal female relations of Maquilla and Callicum; such as grandmothers, mothers, aunts, sisters.... The whole forming a

> political band of union, not very unlike to [sic] the general system of government in Europe, at an early period of its civilization, and which is well known under the appellation of the feudal system.

Meares is referring to intermarriage which was also noted in many other journals from the Contact period.

In 1789, Haswell wrote of Nuu-chah-nulth marriage and intermarriage among chiefly families:

> A plurality of wives is alowed [sic] among them and every person has as maney wives as he can purchace the parents of Chiefs generaly purchace their sons Wives from distant tribes at a very exorbutant prise of Iron Copper Canoes etca.

Chief *Maquinna* from Nootka Sound had at least three wives, one being the daughter of the Ehattesaht Chief, *Hannape*. *Callicum*, another Nootka Sound Chief, was married to the sister of the Tla-o-qui-aht Chief, *Wicananish*. In 1793, members of the Vancouver expedition noted part of the ceremonies relating to the marriage of *Maquinna's* daughter to *Wicananish's* son.

Intermarriages were also noted with non-Nuu-chah-nulth tribes. For example, *Tatoosh*, the Chief of the island now bearing his name located off Cape Flattery, Washington, was married to women from chiefly families in Tla-o-qui-aht and Ahousaht. And Chiefs of Mowachaht and Ehattesaht in Nootka Sound intermarried with the chiefly families of the Nuchimanes [Namgis] from the eastern side of Vancouver Island.

Intermarriage between chiefly families was recorded by a number of the early traders as a basis for trade networks. For example, in 1792 Mozino stated:

> The kinship ties with the Nuchimanes and the princes' custom of marrying women of this tribe have resulted in the longstanding commercial relations between these villages.

Colnett, while anchored in Clayoquot Sound in 1792, noted an intermarriage between chiefly families from Nootka and Tla-o-qui-aht:

> In the Evening an Elderly woman, the Chief's [Wicananish] sister, came....her husband a Second Rank Chief at Nootka ... lost his life, being murdered by Don Estevan Martinez.

This Chief was *Callicum*, often referred to as the second ranked Chief at Nootka, who was shot by the Spaniards in 1789.

[216] Ingraham also wrote in his letter to Martínez about the chiefs' custom of purchasing wives from distant tribes. He observed Chief Hanappe, one of the chiefs at Yuquot, set off to purchase a wife for his seventeen-year old son, Ka-a-shook-o-nook. Ingraham wrote, "They fitted out two war canoes with a great quantity of fish, copper, iron, etc." Those products were used by Chief Hanappe to purchase a wife for his son, although Ingraham was told that the girl was only six and would remain with her own family for some time.

[217] Dr. Lovisek testified that the pre-contact economies of the Nuu-chah-nulth were kinship based and that it was necessary to establish kinship relationships primarily through marriage and other forms of alliance in order to obtain access to marine resources. She stated, at p. 58 of her report:

> Kinship relationships and culturally appropriate transfers of marine resources in the form of gifts, dowry, tribute and feasts influenced and/or contributed to the exchange between peoples either related or soon to be related. Exchanges between kin were not commercial.

[218] She footnoted this last statement. The footnote reads, "Commercial is defined as the exchange of large quantities of a non-mammal marine resource to unrelated persons or persons outside a kinship network." I have already mentioned that I was told by counsel that Dr. Lovisek authored this definition. Her definition of "commercial trade" exposes a definitional problem that is central to the issues I must decide. In my view, because kinship has such a broad meaning in the Nuu-chah-nulth culture, it is not necessarily appropriate to exclude trade between neighbouring tribes from the definition of trade or commercial trade on the basis that these tribes are kin.

[219] For instance, Espinosa, who visited Nootka Sound in 1791, obtained information from Maquinna's brothers-in-law about their kinship relationship with the Nuchimas, with whom they exchanged the copper they had obtained from Europeans as a result of the sea otter fur trade. They explained to Espinosa that this exchange took place because of high ranking marriage ties between the two groups:

> As they sell most pelts to the Europeans in exchange for a great deal of copper, we asked them what they do with this metal. They said that they have been friends of the *Nuchimas* people for a long time, which, as we said, are quite numerous and are also fisherman. They live on the shores of two great lakes to the north, not too far from Tahsis. They border to the east with the cut-lip peoples or the islands that border those of Queen Charlotte. Having married the daughter of those people's chief, Natzapi was considered by them as chief … That's why he would regularly supply those peoples with useful products from the commerce with the Europeans, trading them for otter pelts which the *Nuchimas* obtain in large numbers from the lakes mentioned.

> The main objects traded on the part of the Nootkans are copper, and "*aulunes*" or Monterey abalone shells, and sometimes iron and cloth.

[220] In 1792, Moziño made a similar observation:

> The kinship ties with the Nuchimanes and the princes' custom of marrying women of this tribe have resulted in the longstanding commercial relations between these villages.

[221] There are references in the historical records describing the responsibility of chiefs to share provisions with their kinsmen. For example, Jewitt wrote, at p. 171 of his narrative account:

> The king is, however, obliged to support his dignity by making frequent entertainments, and whenever he receives a large supply of provision, he must invite all the men of his tribe to his house, to eat it up, otherwise, as Maquina told me, he would not be consider as conducting like a Tyee, and would be no more thought of than a common man.

[222] Dr. McMillan differentiated between trade and tribute. He described tribute as a payment in recognition of a chief's rights over the group territory. Consequently, Dr. McMillan opined that some of the instances of goods being brought in by other groups, as observed by Jewitt, may have been tribute if they were part of the Yuquot-Tahsis Confederacy and thus tributary to Chief Maquinna. The argument of Canada is that since tribute did not involve reciprocal exchange, any such transactions could not be described as trade. Canada appears to argue that if there was any connection between groups, for example, Maquinna's group and the Ehattesaht group, the exchange of goods would be tribute.

[223] I disagree with this proposition because there is other evidence, as already mentioned, that suggests that chiefs arranged marriages with other groups so as to facilitate trade with those groups.

[224] The experts seem to agree that trade occurred within a broadly defined meaning of kin. The controversy really concerns Dr. Lovisek's frame of reference, an issue to which I will return below.

d. Feasting, potlatches and tribute

[225] Canada argues that feasting and potlatching were the primary means by which surplus marine resources were distributed. Potlatching, according to Canada, was the means by which a chief would distribute excess fish. A chief who failed to feed his tribe or provide feasts would lose influence. Canada says that the plaintiffs' argument essentially ignores this integral cultural practice. It submits that given the importance of feasts and potlatches, as well as the sharing of food with kin, it is reasonable to assume that there was little requirement for pre-contact local groups to engage in trade of marine resources.

[226] The plaintiffs' position is that the sharing of food through feasts or potlatches does not rule out trade as another method of distributing goods. Dr. Lovisek admitted that feasting and potlatches did not rule out the possibility of other forms of distribution, such as trade, coexisting.

[227] The experts appear to agree that excess or surplus food was also distributed through tribute to chiefs. Drucker described how this process worked, in a passage adopted by Mr. Inglis:

> The conditions under which a group member was permitted to exploit a Chief's territory expressed public acknowledgment of the legitimacy of ownership. They were as follows: No one might fish on any important fishing ground until the owner formally opened the season either by ordering some men to go out to procure the first catch or the first two catches for him, or by calling on all to accompany him on the first expedition of the season. After this, men could go when they pleased. Sometime during the season, or afterward when the product had been dried, the chief sent men to collect "tribute" (o'umas) for him .... Informants say, "The fishermen gave all they could spare. They didn't mind giving, for they knew the chief would give a feast with his tribute." The foodstuff collected in this fashion was always used to give a great feast, at which the giver announced it had been obtained as tribute, and explained his hereditary right to demand tribute from that place. He invariably concluded by requesting the people to remember that the place belonged to him, "to take care of it for him," though they might use it when they wished after the formal seasonal opening. The right to exact this tax demonstrates very neatly the relationship between chiefly status and property ownership. Each chief collected his tribute from whatever fishing grounds he owned, river, inlet, or fishing banks ...

[228] The plaintiffs do not dispute the existence of the practice of tribute payments but, as with potlatching and feasting, argue that it is a practice that coexisted with trade. This evidence confirms the communal nature of Nuu-chah-nulth society. It was the chief who owned the territory, although not for himself in a personal way. I agree with the plaintiffs that evidence of the existence of tribute, potlatch, and feasting does not rule out the co-existence of trade.

e. Warfare and raiding

[229] Canada argues that the evidence is clear that in the immediate pre- and post-contact period, warfare was commonly waged by local groups of the Nuu-chah-nulth for the specific purpose of obtaining access to marine resources. It submits that this, combined with other cultural practices in place to deal with surplus marine resources, makes it unlikely that the Nuu-chah-nulth would have engaged in widespread trade on any scale.

[230] The experts all agree that warfare or raiding was a feature of pre-contact and post-contact Nuu-chah-nulth life. The plaintiffs argue that notwithstanding its prevalence, warfare did not prevent the Nuu-chah-nulth groups from carrying on friendly relations. They say this in their written submissions:

> 247. While warfare (or raiding) was a feature of pre-contact Nuu-chah-nulth life (as it was for Europeans in the same era), the evidence does not establish that this prevented the carrying on of friendly relations amongst the Nuu-chah-nulth and between Nuu-chah-nulth and other groups. For example:
>
> a) Meares, on whom Canada relies for its warfare proposition, also documents Wickaninnish and others visiting Maquinna on friendly terms in 1788;
>
> b) Meares also documents friendly relations between Wickaninnish and his Ahousaht neighbours, Hanna and Detouche. Specifically, Meares describes a treaty between those groups that permitted the Ahousaht chiefs to trade with Meares while Meares was in Wickaninnish's territory;
>
> c) Cook and one of his officers described similar relations where the group in whose territory Cook's ship sat facilitated trade between Cook's crew and outside native peoples;

d) Walker describes interactions between the Nootkans and "strangers." Although Walker says that strangers were not always warmly received, this does not imply open physical hostilities;

e) Moziño, again a source relied upon by Canada for its warfare proposition, talks about "longstanding commercial relations" between the Nootkans and the Nimpkish, demonstrating that warfare was not a barrier to trade;

f) Jewitt, on whom Canada relies for the existence of one war, between Maquinna and a group called the A-y-chart, also records over one hundred friendly interactions between Maquinna's people and neighbouring groups who came to visit, feast and trade.

[231] As mentioned above, Sproat observed, in respect to tribal quarrels over whale carcasses, that if the quarrel was serious, war was threatened, trade ceased, "by-and-by, when the loss of trade is felt, negotiation is tried."

[232] The Ahousaht-Otsosaht war, as recounted to Drucker and referred to by Dr. Lovisek, is said to have taken place in the early 1800s. Drucker wrote as follows:

> In the spring a large party of them proceeded, in small canoes, with their womenfolk to ōpnit where they found a large camp of Otsosat. The Clayoquot said they were on the way to Hesquiat to purchase dried fish - their stores had run short. They spent the night feasting and visiting with the Otsosat. Early in the morning, the leader of the Clayoquot party climbed on the roof of one of the houses and shouted, "Clayoquot women, get up now to cook our breakfast!" This was the signal that had been arranged, and the warriors fell on their unsuspecting hosts.
>
> [Emphasis added]

[233] This account would seem to indicate that trade in fish was a commonplace activity insofar as the cover story for the Clayoquot was that they were on a trading mission.

[234] Below I recount specific evidence of warfare in my discussion of the connections between the modern-day plaintiffs and the contact era groups from whom they say they derive their aboriginal rights. Some of the forced acquisitions of territory were for the purpose of acquiring fishing territories. The existence of

warfare underscores the fact that not all Nuu-chah-nulth groups were equally endowed with marine resources. This, in turn, points to an important feature of trade motivation. There is evidence of scarcity of resources among some groups from time to time which would necessitate trade. The plaintiffs say warfare and trade co-exist. I conclude that there is evidence of trade and warfare co-existing.

f. Trade routes

[235] In addition to the various observations in the Explorer Records that the plaintiffs say support their contention of indigenous trade in fish, the plaintiffs rely as well on the existence of trade routes from the west coast to the east coast of Vancouver Island. They say that the existence of these trade routes supports the notion of the Nuu-chah-nulth as trading people. Dr. McMillan described two major trading trails leading eastward across the Island; one beginning at Tahsis in Kyquot Sound and the other beginning at Tahsis in Nootka Sound. The explanation for the similar names, given by Dr. McMillan, is that the term “tahsis” in Nuu-chah-nulth means “doorway”.

[236] Dr. Lovisek, Mr. Inglis, Dr. Lane and Dr. McMillan all testified about the trade trails across Vancouver Island, based largely on the anthropological study by Dr. Yvonne Marshall, *The Mowachaht/Muchalaht Archaeology Final Report*, Culture Department Library, Ministry of Small Business, Tourism and Culture, Victoria, 1992. The experts agree that the trade trails were already established at the time of contact with Europeans. Many of these trade trails continued into the colonial and post-confederation periods.

[237] These trade trails are important evidence of trade between distant groups. While the existence of the trails does not prove that it was fish that was being traded, they are, nevertheless, evidence that trade was a well entrenched custom of the Nuu-chah-nulth. A conclusion that trade in fish occurred requires additional evidence over and above the existence of the trade trails themselves.

g. Gifts as a form of trade

[238] Dr. Lovisek testified that gift giving could not be characterized as trade. Mr. Inglis testified that "although the trade was often represented as gifts, it is clear that these were viewed by the chiefs as commercial transactions with return of equivalent value in goods expected." Dr. McMillan testified to the same effect.

[239] Mr. Inglis' report refers to an 1860 account by Barrett-Lennard that gift giving was another form of trade:

> We went through the ceremony of receiving presents from our various Indian acquaintance; a fine black bear skin being sent us from Macoola ... we studiously kept aloof from him [a sub-chief of the Mowichats], hoping he would abstain from making us any presents, as we should not then be called upon to make any return; for receiving presents from Indians is merely another name for barter, an equivalent in return being in every case expected. There was no help for it, however, as he, in turn, came off in his canoe, and deposited his gift, a land otter, on our decks. Some few hours afterwards we sent him what we deemed a suitable recompense; being, however, it would appear, of a different opinion himself, he again came alongside, and, after bitterly reproaching us with our niggardly spirit to our great amusement walked off with the present he had lately made us, and which was still lying on the deck, keeping at the same time, what we had given him in return.

[240] Meares, in 1788, described Nuu-chah-nulth trading protocol as including reciprocal gifts.

[241] I conclude that gift giving was a polite form of trade and is not distinguishable from trade.

C. Findings of Fact Concerning Fishing and Indigenous Trade at Contact

[242] The plaintiffs contend that the evidence demonstrates that their ancestors traded in fish and that that trade in fish was integral to their culture. Canada contends that, at most, the evidence supports a finding of occasional, opportunistic trade in fish. It argues that any exchange of fish or marine products was largely within a context of kinship, gifts, or tribute to a chief, and therefore cannot be

construed as trade. It further argues that any trade was the product of European influence.

[243] I have not defined trade. Instead, I have outlined the features that I consider necessary to prove the existence of an indigenous pre-contact trade in fish. To repeat, those features are: exchanges of fish or shellfish for an economic purpose; exchanges of a significant quantity of such goods; exchanges as a regular feature of Nuu-chah-nulth society; and, exchanges outside the local group or tribe.

[244] I have also concluded that the terminology used by the explorers and traders to describe exchanges of goods, tribute, trade, and reciprocal gifts is inconsistent. These concepts overlap; they are not mutually exclusive. For instance, Dr. Lovisek was asked about maritime fur trader Alexander Walker's 1785 observation that strange groups of Nuu-chah-nulth people that came from the south to trade, paid tribute to either Maquinna or Callicum. She defined tribute as follows:

> What is interesting about this observation which, in conjunction with other historical observations, is that one of the features of exchanging marine resources amongst the Nuu-chah-nulth is the concept of tribute. And tribute means that one gives resources or gives something and receives resources in return as an acknowledgment to the person giving them marine resources that they have – they are the title holder. They are the authority, and it is a respect situation.

[245] The plaintiffs say that although Dr. Lovisek agreed that gift-exchange transactions netted the same result as trade, she did not accept that these transactions could be characterized as trade. The plaintiffs submit that this stems from Dr. Lovisek's failure to examine the pre-contact Nuu-chah-nulth practices from an aboriginal perspective, which is critical to the aboriginal rights analysis.

[246] Mr. Inglis said that "although the trade was often represented as gifts, it is clear that these were viewed by the Chiefs as commercial transactions with return of equivalent value in goods expected. If the return was not of expected value, the trade ceased" (p. 42). Dr. McMillan also commented on the overlapping nature of gifting and barter or trade. He said, at p. 4:

> Categories of exchange are not necessarily mutually exclusive. Gifts with expectation of reciprocity were functionally and conceptually little different than barter. Nuu-chah-nulth chiefs used such gifts as a trade tactic during the late 18th century traffic in furs. Howay, for example, describes the aboriginal practice of "trading under the guise of reciprocal gifts". This led the European fur traders to attempt to evade such gifts.

[247] The point is that the Nuu-chah-nulth culture of gift giving was essentially a polite form of trading. Dr. Lovisek did acknowledge that mercantile dealings would shift from trade to reciprocal presents. She also acknowledged that common barter or reciprocal presents netted essentially the same result – each side received something from the other.

[248] Jewitt chronicled trade with various tribes to the north and south of Nootka Sound, including each of the four other plaintiffs: the Ehattesaht; the Hesquiaht; the Ahousaht; and the Tla-o-qui-aht. Canada contends that this was mostly tribute or kinship trading and that any trading observed by Jewitt was a result of European influence and the availability of European goods. I conclude that the four other plaintiffs were independent from Maquinna at the time of contact, although the Ehattesaht may have been loosely connected to Maquinna. (See the discussion below of the history of each plaintiff.)

[249] On several of the 92 occasions of goods being brought in that he recorded, Jewitt identified products given in return, being goods pillaged from *The Boston*. On many occasions, however, he did not identify items given in return. Dr. Lane, Dr. McMillan and Mr. Inglis were of the opinion that even in cases where Jewitt did not note any return items, it is likely that these interactions were trade transactions. In my view, this is a reasonable inference and is supported by Jewitt's narrative in which he stated, at p. 95:

> The trade of most of the other tribes with Nootka, was principally train oil, seal or whales' blubber, fish fresh or dried, herring or salmon spawn, clams, and mussels and the *yama* a species of fruit which is pressed and dried, cloth, sea otter skins and slaves. From the Aitizzarts, and the Cayuquets, particularly the former, the best I-whaw [dentalia] and in the greatest quantities was obtained.

[250] Although Jewitt's list of items brought to trade includes many identified in the journal as being brought to Maquinna without mention of items given in return, Jewitt called these transactions "trade" in both his narrative and his journal. It is reasonable to infer that the goods identified in the journal were brought as trade items.

[251] Dr. Lovisek did not accept that what Jewitt documented were trade transactions but she agreed that the transactions were balanced reciprocal exchanges. She also agreed with the following passage from a thesis by Robert Morgan: *The Economic Basis and the Institutional Framework of Traditional Nootka Polities*:

> Further evidence for balanced reciprocal exchange between independent groups comes from Jewitt's observations regarding Moachat [Mowachaht] Chief Moqwina's [Maquinna's] intercourse with visiting parties from different political groups. Moqwina [Maquinna] regularly received resources and reciprocated with other goods: ... The relative value of the goods exchanged cannot be assessed from Jewitt's account, but immediacy of return and value equivalence are generally associated. Jewitt's journal includes a number of incidents of interpolity exchange where returns are not mentioned, however it is reasonable to interpret that these transfers were reciprocated in other interactions.

[252] Dr. McMillan stated in his reply report, at p. 4:

> Categories of exchange are not necessarily mutually exclusive. Gifts with expectation of reciprocity were functionally and conceptually little different than barter ... Marriage ties also should not eliminate transactions from being considered as trade. In fact, marriages were often arranged to facilitate trade relations. Dr. Lovisek (p. 58) discounts any transactions "between peoples either related or soon to be related" claiming that these should not be considered as commercial exchange. That opinion places an unreasonable restriction on the concept of "trade". Moziño, for example, in 1792 commented on the importance of marriage in maintaining trade relations with the Kwakwaka'wakw across the island stating:
>
> > The kinship ties with the Nuchimanes and the prince's custom of marrying woman of this tribe have resulted in the long standing commercial relations between these villages. (Moziño 1970:63)

[253] In his narrative at p. 96, Jewitt used the terms "trade" and "tribute" somewhat interchangeably in discussing exchanges with Maquinna. For instance, he wrote:

> Many of the articles thus brought, particularly the provisions, were considered as presents, or tributary offerings, but this must be viewed as little more than a nominal acknowledgement of superiority, as they rarely failed to get the full amount of the value of their presents. I have known eighteen of the great tubs, in which they keep their provisions, filled with spawn brought in this way.

[254] Following this passage, Jewitt returned to the language of trade in which he stated, in the same document at p. 97, "whenever they came to visit or trade, it was the general custom, to stop a few miles distant under the lee of some bluff or rock, and rig themselves out in their best manner by painting and dressing their heads ... this was their usual mode of traffick ..."

[255] In my view, where the essence of a transaction is an exchange of goods for something of economic value, the transaction has the characteristics of trade. I would not disregard as evidence of trade Jewitt's observations or those of the other explorers and traders where reference is made to tribute or gifts. Rather, I conclude that the terms are used loosely by different observers. Moreover, I conclude that there was considerable overlap in the Nuu-chah-nulth culture of exchange between gifts, tribute, and trade. Considering the evidence through an aboriginal perspective, I would not categorize these transactions in such neatly defined terms.

[256] Another important feature of trade is the question of with whom the trade occurred. Here, I refer again to Dr. Lovisek's exclusion of kin from her definition of trade.

[257] As discussed, kinship was an essential component of Nuu-chah-nulth trade but the concept of kin, as described by all the experts and perhaps best described by Drucker, includes remote relationships. There are evidentiary references, summarized by Mr. Inglis, to marriages arranged by chiefs with distant tribes so as to enhance trading relationships. The existence of trade routes pre-dating contact, such as the Tahsis Trails across Vancouver Island, is compelling evidence of the existence of trade with remotely connected groups.

[258] In *Van der Peet*, at p. 568, Lamer C.J., after noting the trial judge's findings that any trade in fish by the Sto:lo was minimal and opportunistic, indicated that he would add to those findings a reference to the expert testimony that trade occurred through the "idiom of maintaining family relationships." He quoted from the testimony of one of the experts:

> The medium or the idiom of much trade was the idiom of kinship, of providing hospitality, giving gifts, reciprocating in gifts ...

[259] Lamer C.J. also noted that another witness had testified that the exchange of goods was related to the maintenance of family and kinship relations.

[260] It will be apparent from my review of the evidence that I have not reached the same conclusion as did the trial judge in *Van der Peet.* Although in *Van der Peet* kinship trade was found to be commercial trade, I consider this a finding of fact, not law, and distinguishable from the factual findings I make on the evidence in this case.

[261] In summary on the kinship question, I conclude that the Nuu-chah-nulth traded with kin but that the definition of kin is so loose that it cannot be employed in a manner that excludes all trade occurring within "an idiom of kinship".

[262] Another factor that may be important to the question of the existence of trade is whether there was any motivation for trade. All the expert witnesses agreed that there was considerable variation in the quantity and type of marine resources available in the various Nuu-chah-nulth territories. This variation in resources made some kinds of exchange a necessity.

[263] Another important issue with respect to proof of trade is consideration of whether the observations made by the explorers and traders were of a society influenced and rapidly changed by contact with Europeans.

[264] Canada and Dr. Lovisek discount the importance of Jewitt's evidence on the basis that any observations he made were of a society already influenced, and impliedly changed, by European culture; that is, that what the European explorers

and traders were observing was essentially a trade of their own making which grew out of a desire of the Nuu-chah-nulth to acquire European goods, particularly metals.

[265] Jewitt's observations were written 29 years following contact.

[266] What is remarkably consistent about the Explorer Records is the evidence of immediate and persistent efforts by all the Nuu-chah-nulth people, the Europeans encountered, to begin trading. Even when Pérez, the first European to contact the Nuu-chah-nulth, arrived several miles offshore, the very first act of the Nuu-chah-nulth people was to offer to trade fish with him.

[267] The older maritime explorers made similar observations that almost all their encounters with the Nuu-chah-nulth were marked by requests to trade fish and other indigenous items for metal, fabric, guns or other European goods. I do not detect in the records any note of hesitancy on the part of the Nuu-chah-nulth to trade with the Europeans. Mr. Inglis commented that "this trade was obviously not a new thing to the [Nuu-chah-nulth]." He opined that "they aren't learning trading from the Europeans in fact Europeans are fitting into their trading system."

[268] Canada points to an article co-authored by Mr. Inglis in 1985 in which he described marked changes in Nuu-chah-nulth culture in the decades between Cook and Jewitt: "Cook to Jewitt: Three Decades of Change in Nootka Sound". Paper presented at the Fifth North America Fur Trade Conference, Montreal, 1985. Re-published in *Huupukwanum Tupaat: Nuu-chah-nulth Voices, Histories, Objects and Journeys*, edited by Alan L. Hoover. Victoria, B.C.: Royal B.C. Museum, 2000 (reprint of 1987 article). There he expressed the view that significant change to the Nuu-chah-nulth culture took place as a result of contact; that is, after Cook and before Jewitt. In the article, he posited that the seasonal round (*i.e.* the Nuu-chah-nulth move from villages on the outside coast to their inland villages on rivers) was an historic post-contact period adaptation to population decline. He expressed the view that the people of Nootka Sound:

> ... in choosing to abandon their traditional economic activities in favour of becoming port managers, had to find alternate means of acquiring sufficient

> foodstuffs to sustain them over the winter months. The solution appears to have involved two separate strategies: one, an exchange system of foodstuffs for trade items with neighbouring groups and two, the development of a food procurement schedule that did not conflict with managing the trade. Both strategies were developed early. Food was one of the major items noted by Europeans as being brought into Yuquot for exchange by neighbouring groups. The second strategy involved the development of a limited seasonal round in which Yoquot people moved in September from their "outside" village to the head of Tahsis Inlet to trap salmon.

[269] Canada says that the opinions expressed in the *Cook to Jewitt* article conflict with the opinion Mr. Inglis gave at trial.

[270] Mr. Inglis testified that since writing the article 26 years ago, he has modified his views, based largely on the widely respected archaeological research of Dr. Marshall. Dr. Marshall dates the Yuquot-Tahsis amalgamation, that is, the change in settlement pattern from small local groups to large confederacy, to 300 to 400 years before her work (thus, 1600 to 1700). Dr. Lovisek agreed with Dr. Marshall's conclusion that the seasonal round predated European contact and therefore agreed that the profound changes suggested in the *Cook to Jewitt* article did not happen as a result of contact. In particular, she agreed that the excerpt from the *Cook to Jewitt* article just mentioned was not accurate.

[271] Mr. Inglis accepts Dr. Marshall's conclusions and thus no longer holds the views he earlier expressed in the *Cook to Jewitt* article that the seasonal round developed in response to European contact. The significance of this is that the development of the seasonal round went hand in hand with the development of larger confederacies which, in turn, was accompanied by economic relations, including trade, between the various larger groups. Dr. Marshall stated at p. 154 of her thesis, in part based on the archaeological evidence of the trade trails, that "Long distance trading was a well-established practice in pre-European Nuu-chah-nulth society." Dr. Lovisek agreed with much of the work of Dr. Marshall, specifically the dating of the development of the seasonal round. Her disagreement with Dr. Marshall's conclusion about long distance trading (which is accepted by Mr. Inglis) is based on her contention that archaeologists wrongly conclude that archaeological evidence of exotic materials in a foreign locale is necessarily

evidence of trade. Rather, she said, it could be evidence of gifting, potlatching, or some other form of exchange. I disagree with Dr. Lovisek's conclusion in this regard because Dr. Marshall's opinion is based on her study of the historical and ethnographic literature, as well as her own archaeological research. Thus, Dr. Marshall's conclusions drawn from analysis of archaeological artefacts are informed by their historical context.

[272] Canada also takes issue with Mr. Inglis' qualifications, not as to the admissibility of his opinion, but with respect to its weight. Canada cites his lack of formal academic qualifications and his limited published work. Canada also says he was an evasive witness.

[273] Mr. Inglis has a master's degree in anthropology. He worked as a curator at the Royal British Columbia Museum, and subsequently held the position of head of anthropology. He has a particular interest and experience in researching the Nuu-chah-nulth peoples and their history. I found Mr. Inglis to be a knowledgeable expert witness. Contrary to Canada's assertions that he was not well-qualified to give the opinions he gave, I conclude that he has spent much of his career researching historical and anthropological sources relating to the Nuu-chah-nulth. He demonstrated a remarkable familiarity with the historical material and was able to explain the context in which the European explorers' observations were made. I agree with Canada that at times his selection of material was not even-handed but unfortunately I drew the same conclusion with respect to Dr. Lovisek, Dr. McMillan, and Dr. Lane. At times, all of them selected secondary references that supported their opinions while ignoring others that did not. Mr. Inglis was a nervous witness, but I do not conclude, as Canada asserts, that he was deliberately evasive.

[274] All of the expert witnesses were impressive. All researched an astonishing volume of material to reach their conclusions. I have accepted parts of all their opinions, and found other parts less persuasive. In rejecting Dr. Lovisek's definition of commercial trade, I have certainly not rejected all her conclusions. I do note, however, that she has relatively little previous research experience directly related to

the Nuu-chah-nulth, whereas Mr. Inglis, and Dr. McMillan, in particular, have spent much of their professional careers researching Nuu-chah-nulth history and culture. Thus, they have acquired an intimate and nuanced understanding of the Nuu-chah-nulth culture and history.

[275] As noted already, Mr. Inglis testified that the Nuu-chah-nulth did not need European influence to learn to trade. He also opined that the Nuu-chah-nulth were not evenly supplied with the same products and that geographical differences resulted in different access to resources. Trade was therefore a necessity. Even with the seasonal round to summer villages on the coast and to winter inland villages, he said that the various Nuu-chah-nulth groups did not have even access to a full range of resources. In support of his opinion he referred to, in part: Haswell's lists of communities, both to the south and north, that traded with Maquinna; Meares' observations that different groups traded with Wikaninnish; and, the work of Dr. Marshall. Haswell's lists identify 18 trading groups. They were not all related by kin.

[276] Mr. Inglis relied on Cook's and Meares' observations that the Nootkans seemed to be leaving Nootka Sound and returning with new products as evidence of trade. He also relied upon the network of trails to the Nimkish tribes on the east side of Vancouver Island which, he said, were a pre-contact trade network. He does not hold the view that Jewitt's observations were of a newly acquired culture and trading pattern brought about by European influence.

[277] Cook observed that Maquinna appeared to act as a gatekeeper between the other tribes and the Cook expedition. It does not seem probable to me that this was a new cultural practice; rather, it appears that all the different tribes accepted Maquinna's "ownership" of the Europeans in his territory and sought Maquinna's permission to partake in the trade.

[278] Cook and others, as well as Dr. Marshall, noted that metal, particularly iron, appeared to have travelled from tribe to tribe with considerable speed.

[279] Sproat's evidence is further corroboration of the existence of an ancestral practice of trading in fish. I am of the view that it is appropriate to infer from Sproat's evidence that many of the practices he observed were of long-standing significance, probably as far back as first contact with Europeans.

[280] I have not distinguished between the individual plaintiffs in this section because the evidence of trade inherently links them in the same activity: trade. It is also noteworthy that the vast majority of European contact with the Nuu-chah-nulth took place at Nootka Sound and, to a lesser extent, Clayoquot Sound. The other Nuu-chah-nulth tribes would have had indirect exposure to Europeans (or proto-contact as Dr. Lovisek described it), thus their culture would have been somewhat less influenced by contact with Europeans. I have inferred that all the Nuu-chah-nulth engaged in the same or similar trading activity.

[281] In summary, I have concluded from the evidence the following:

1. the Nuu-chah-nulth had longstanding trade networks both in a north/south direction along the coast and overland via the Tahsis and other trade routes;

2. trade relations existed with "strangers" who came to pay tribute to powerful chiefs but in doing so received reciprocal gifts in return;

3. marriages were arranged to facilitate trade with extended kin, kin having a broad definition;

4. dentalia [shells] were found in exotic places (that is, far from the place of origin) by archaeologists, indicating their use as a trade item;

5. iron was noted by the earliest of the explorers to be traded up and down the coast, indicating a strong pre-contact trade network;

6. the Nuu-chah-nulth were not equally endowed with the same resources and thus the exchange of foodstuffs was necessary;

7. the systems of payment of tribute, gift giving, reciprocal exchange and trade overlapped with each other and existed within a polite form of respect for powerful chiefs;

8. the Nuu-chah-nulth did not trade for the purposes of accumulating wealth (I heard no such evidence);

9. the Nuu-chah-nulth had the ability to dry, preserve, and trade vast quantities of fish and marine products. (For a more detailed discussion, see the section above titled "Dependence on Fish"); and

10. the frequency and amount of trade, including trade in fish and marine products, suggest that such trade was a practice integral to Nuu-chah-nulth society.

[282] I conclude that at contact, the Nuu-chah-nulth engaged in trade of fisheries resources. I conclude that that trade included the regular exchange of fisheries resources in significant quantities to other tribes or groups, including groups with kinship connections. I do not exclude from this definition reciprocal gift giving or barter.

[283] Having concluded that at contact there did exist an aboriginal practice of fishing and trading in fish, I return to the *Van der Peet* analysis to consider the existence of an aboriginal right.

D. Integrality of the Ancestral Practices to the Distinctive Cultures of the Claimants' Pre-contact Societies

[284] The next question prescribed by *Van der Peet* concerns the integrality of trade to the plaintiffs' culture. To be integral, a practice must be a central and significant aspect of the aboriginal society's distinctive culture, and cannot be merely incidental to an integral practice: *Van der Peet*, at para. 56. "Culture" in this context entails an inquiry into the pre-contact way of life of a particular aboriginal community, while "distinctive" incorporates an element of aboriginal specificity: *Sappier*, at para. 45.

[285] Much of the earlier discussion incorporated evidence relevant to the question of whether fishing and trade in fish were integral to Nuu-chah-nulth culture. I am satisfied that the evidence just reviewed demonstrates that fishing and trade in fish were integral to the Nuu-chah-nulth culture.

[286] I turn now to review the evidence as to whether the plaintiffs are the proper claimant groups and whether they have proven that specific territories are associated with their fishing claims. I will also consider whether their claims must be specific to particular species.

1. Proper claimant group

[287] Aboriginal rights and title are collective rights: *Sparrow*, at para. 68; *Delgamuukw*, at para. 115. Such rights must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the present community: *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, at para. 24. Consequently, the plaintiffs must, to succeed in this claim, establish that they are the successor collectives to the aboriginal groups that possessed aboriginal rights at the date of contact. I am not in this section considering the plaintiffs' title claim. The question to be resolved is whether these modern plaintiffs can prove that they are rights holders; that is, are they connected to the groups from whom they say they derive their aboriginal rights to fish and to trade in fish. Earlier in these Reasons, I noted the requirement for claimants to establish that they are the rights holders as part of the continuity analysis: *Marshall and Bernard*, at para. 67. On the facts of this case, however, I find it more convenient to consider this issue as part of the "integral to the distinctive culture" analysis instead.

[288] As has been noted elsewhere, most of the authorities that address aboriginal rights do so in the context of regulatory prosecutions. Another challenge in applying such cases to a civil proceeding is that they provide little guidance with respect to how to trace or identify the modern collective that is the appropriate rights or title holder. In prosecutions, an accused person claims an aboriginal right belonging to

his or her aboriginal community as a defence, and it is generally not necessary for the Court to identify the whole of the appropriate collective with any precision.

[289] The Supreme Court discussed identification of the proper rights holder in *Powley*, a decision that concerned a claim to Métis rights under s. 35(1). The Court approached the issue by first identifying the historic rights-bearing community and then identifying the contemporary rights-bearing community. The headnote provides a convenient synopsis of the Court's approach:

> The aboriginal right claimed in this case is the right to hunt for food in the environs of Sault Ste. Marie. To support a site-specific aboriginal rights claim, an identifiable Métis community with some degree of continuity and stability must be established through evidence of shared customs, traditions, and collective identity, as well as demographic evidence. The trial judge's findings of a historic Métis community and of a contemporary Métis community in and around Sault Ste. Marie are supported by the record and must be upheld.

[290] While *Powley* concerned a claim to Métis rights, the decision does, in my view, provide some helpful guidance in terms of the factors to consider in approaching the issue.

[291] In *Marshall and Bernard*, McLachlin C.J. addressed successorship, relating the identification of the proper group to the requirement for continuity. At para. 67 she wrote:

> The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right.

[292] That proof of connection will be primarily based on a geographical identification but it is not necessary to prove the geographic connection in the same way that proof of aboriginal title would require.

[293] I will apply the *Marshall and Bernard* test to the facts of this case.

[294] At a time prior to contact, the WCVI was densely occupied by a large number of local groups, each of which occupied a territory that was owned by the chief of that local group.

[295] Dr. Lovisek wrote, at p. 106:

> … The archaeological record supports a large population which is reflected by numerous sites in which almost every inhabited location in Nootka Sound was occupied. This, according to archaeologist Yvonne Marshall gives "the overwhelming impression of a full, densely occupied landscape."

[296] Dr. Lane wrote at p. 18:

> The Nuu-chah-nulth local group is viewed as an extended group of kin, centred on a family of chiefs who own a variety of economic and ceremonial privileges. Each of the Nuu-chah-nulth local groups bore a distinctive name and had a tradition that explained their descent from a common First Ancestor. The name of each group reflects its history, through the group's ties to a particular location, often a fishing river or stream; to a First Ancestor or other family hero; or to a momentous event in the group's history.

[297] Starting at a time prior to contact, the local groups began to amalgamate into larger political entities for a variety of reasons. One was de-population brought about by warfare and later European-introduced disease. Another was access to pre-contact trade routes. Some amalgamations were voluntary, while others were forced by military conquest. The original polities did not disappear, according to Dr. McMillan; rather, the chiefs of the formerly independent local groups continued to hold ranked titles within the larger grouping governed by a head chief. The amalgamated tribe was associated with specific territories. According to Drucker, a family of chiefs bore a name denoting their common ancestor and place of origin.

[298] There was no evidence that any non-Nuu-chah-nulth aboriginal group with a different language or culture occupied any part of the WCVI during the time frame at issue here, that is, the period just before and following contact to the present. Indeed, Canada admits that there is little doubt that members of the plaintiff First Nations are descendants of individual aboriginal peoples who inhabited the WCVI at contact and at sovereignty. Canada does contend, however, that the plaintiffs must

show that they are the successors to the aboriginal collectivities extant at contact and the assertion of sovereignty.

[299] The evidence is clear that the plaintiffs share a common Nuu-chah-nulth language, culture and history. They do not now have, nor have they ever had, a single overarching governing Nuu-chah-nulth authority. Each plaintiff self-identifies as an autonomous nation and each claims it is the proper aboriginal group for the purpose of holding aboriginal rights and title.

[300] Canada contends that continuity between the pre-contact and pre-sovereignty groups and the plaintiffs in this case has not been established. It says that the plaintiffs cannot obtain constitutional protection of their modern activities if those activities were integral to the distinctive culture of some other groups to which they are not related or which no longer exist. Canada submits that the plaintiffs have not demonstrated how the 18th and 19th century aboriginal groups of the WCVI were connected to the modern plaintiffs. Canada describes the plaintiffs' argument in this way:

> In other words, 'if not the plaintiffs, then whom?'. While this argument has a degree of attraction, it does not meet the standard of proof required to establish successorship.

[301] Canada points out that the experts agree there was considerable turmoil and instability in the historical groups which ultimately resulted in significant population decline amongst the aboriginal peoples of the WCVI, and that the local groups extant in the late 19th century were considered to be a fraction of those which existed at the time of contact.

[302] In Canada's submission:

> Simply stated, any rights or title in existence at the time of contact or the assertion of sovereignty would have attached to more than one hundred autonomous socio-political groupings. However, subsequent epidemics, migrations and conquests have made it extremely difficult to establish the legitimate transmission of the rights of those contact-era or sovereignty-era groupings to the much smaller number of modern Plaintiff First Nations in this case. Accordingly, it is not possible to determine whether most of these

> Plaintiffs are the appropriate Aboriginal collectivities entitled to a declaration of Aboriginal rights and title in the present case. To the extent that genealogical and oral history evidence might have addressed the issue of successorship, the Plaintiffs declined to tender this evidence.

[303] In order to address the issue of whether the plaintiffs are the proper claimant groups, I will examine the history of each plaintiff. To place that history in some context it may be helpful to first note the evidence of population decline. It is this significant population decline that seems to be at least part of the cause of the shift from local groups to amalgamated entities.

a. Population decline

[304] Based on Spanish naval surveys conducted in 1791, Dr. Lane and Mr. Inglis concluded that a minimum of 21,000 Nuu-chah-nulth people occupied Nootka Sound, Clayoquot Sound and Lower Barkley Sound at the time of contact, as follows:

4,000	Nootka Sound (Mowachaht/Muchalaht, Ehattesaht, Nuchatlaht)
8,500	Clayoquot Sound (Ahousaht and Tla-o-qui-aht)
8,500	Lower Barkley Sound (Huu-ay-aht, Tseshaht, Toquaht, and Uchecklesaht)

[305] These population estimates exclude the Che:k'tles7et'h', Ka:'yu:k't'h, Hesquiaht, Hupacasath, Ucluelet, Ditidaht and Pacheedaht.

[306] In his authoritative work, *The Coming of the Spirit of Pestilence: Introduced Infectious Diseases and Population Decline among Northwest Coast Indians*, *1774-1874*, (Vancouver: UBC Press, 1999), Robert Boyd estimated the Nuu-chah-nulth population in 1774 at 12,375. Mr. Inglis testified that Mr. Boyd's work was authoritative but he nevertheless questioned the sources for Mr. Boyd's estimate. It is unnecessary in this action to resolve the question of these different population estimates other than to note that the area that is the subject of these claims was observed by the explorers to be fully populated at or around the date of contact, and that there was a dramatic population decline in the following 100 years.

[307] Dr. Lovisek noted in her July 20 report (at p. 11) that the conditions and identities of the Nuu-chah-nulth differed substantially from contact to 1846 because of raiding, amalgamation, and massive de-population. Many of the local groups identified at contact no longer existed as discreet independent social or political entities by the mid-19th century. The groups which survived were amalgamated into their present modern named groups.

[308] The plaintiff band populations based on 2006 data are as follows:

Bands	**Total "Registered Aboriginals"**	**On-Reserve**	**Off-Reserve**
Ahousaht	1869	603	1266
Ehattesaht	331	87	244
Hesquiaht	660	153	507
Mowachaht/Muchalaht	543	201	342
Tla-o-qui-aht	944	309	635
TOTAL	4341	1353	2994

[309] I now turn to chronicle the history of each plaintiff in order to make the necessary findings of fact to underpin my later determinations as to whether the plaintiffs are the proper rights holders.

b. History of each plaintiff

i. Ehattesaht

[310] The Ehattesaht claim fishing rights in the territories and title to the lands and waters in the regions surrounding the north shore of Esperanza Inlet, including part of Hecate Channel, Zeballos Inlet, Espinosa Inlet, Queen's Cove and the outside coast east and north to Mushroom Point, as depicted in Appendix A to these Reasons. The Ehattesaht claim also the foreshore and submerged waters to the Park River.

[311] With respect to the Ehattesaht, Canada takes the position that the plaintiffs have failed to prove that the local groups who occupied what is now the Ehattesaht

claim area are the ancestors of the modern-day Ehattesaht. It submits that there is insufficient evidence for the Court to infer that the modern-day Ehattesaht descended from the groups occupying the area at the time of contact, and says that the plaintiffs' submissions do not properly analyze this issue. Canada does acknowledge that some Ehattesaht ancestors inhabited the claim area at contact.

[312] Dr. Lovisek traced the known history of the Ehattesaht. She said that pre-contact, the Ehattesaht consisted of six local groups which shared a winter village at Hohk. At some time this group was joined by a coastal group called the Ha'wehtakamlath. After the inclusion of the Ha'wehtakamlath, the Ehattesaht then had rights to coastal fishing grounds. Dr. Lovisek said that Drucker identified a Queen's Cove group which remained apart but friendly with the Ehattesaht for a long time. This last group joined the Ehattesaht at a time estimated to be between 1865 and 1885.

[313] Interestingly, Dr. Lovisek explained that between 1803 and 1805, Jewitt described the Ehattesaht as having 300 warriors and that they were tributary to Maquinna at Yuquot in Nootka Sound. She also described some inter-marriage between the Ehattesaht and the Mowachaht in the 1840s.

[314] Mr. Inglis said that the Ehattesaht take their name from Ehatis, a local group village located on the west side of the head of Zeballos Inlet. Mr. Inglis relied on a map prepared by Drucker setting out the boundaries of the Ehattesaht territory and locating the village sites. Drucker's boundaries include the territories claimed by the Ehattesaht in this lawsuit. Mr. Inglis noted that Haswell's list of tribes the Nootka visited and traded with in 1789 included the Ahatesut, a different rendition of the Ehattesaht name. Haswell also listed the village of Che neckenet as a village the Nootka visited and traded with to the north of Nootka Sound. The Che neckenet people, according to Mr. Inglis, are likely from the area of Chenerkintau, which is the property of an Ehattesaht chief.

[315] Kendrick, of *The Columbia* expedition, negotiated the purchase of land from the Ehattesaht chief in the area of Chenerkintau on the north side of Esperanza Inlet

within the boundaries of the present day Ehattesaht territorial claim. The Ehattesaht appear in the 1791 Espinoza and Cevalos charts as part of the Malaspina expedition of Nootka Sound in 1791. Four settlements are noted by Espinoza and Cevalos within the present Ehattesaht claimed areas.

[316] As already noted, Jewitt recorded visits with the Ehattesaht on 35 occasions. Mr. Inglis said that they were the most frequent visitors to Maquinna, according to Jewitt.

[317] Mr. Inglis noted that in 1855 during the colonial period, Francis and Banfield estimated the population of the Ehattesaht at 320. In 1860, Sproat documented 36 males in the Ehattesaht tribe. In 1862, a British hydrographic survey documented the Ehattesaht living at the Esperanza and Nuchatlaht Inlet region, again within the present Ehattesaht territorial claimed area. Then in 1865, Laughton listed the Ehattesaht as one of the Nootka Sound tribes.

[318] In September 1865, members of the Vancouver Island expedition explored the Zeballos River and noted a village at the head of the Zeballos Inlet in the area of Ehatis. Superintendent Powell visited the Ehattesahts in 1874, and Peter O'Reilly, Indian Reserve Commissioner, established their reserves in 1889. Superintendent Powell wrote, "the Indians resident in this inlet are remnants of the Nuchatlitz [Nuchatlaht] and E-hat-is-aht [Ehattesaht] and they number 256; their chiefs are named Tle-nen-o-ou-ick and Moquinna. Like the majority of Indians on this coast, these took little, or no, interest in the allotment of their reserves, but after various conversations with them … they accompanied me and assisted in selecting 13 small fishing stations" (Inglis, p. 175). O'Reilly established four Indian reserves for the Ehattesaht. Each of these reserves, according to Mr. Inglis, equated with a local group site or a confederacy site.

[319] Mr. Inglis concluded, at p. 176:

> Based on documentary records from the Contact, Colonial, and post-Confederation periods, the Ehattesaht, or groups joined together with the Ehattesaht, lived on the lands and controlled the lands and waters

> surrounding the north shore of Esperanza Inlet, including Queen's Cove, Little Espinosa Inlet, and Zeballos Inlet, and the outside coast to Rugged Point, throughout the period of study. There is no evidence in the historic documentary record of other aboriginal groups occupying Ehattesaht territory during this period.

[320] Canada says that the issue of which local groups occupied which part of the claim area at contact is anything but clear.

[321] Dr. McMillan acknowledged that the northern Nuu-chah-nulth groups, that is, the Ka:'yu:k't'h/Che:k'tles7e'h, Nuchatlaht, Ehattesaht and Mowachaht, did not have the access to abundant fisheries that the southern groups did and that this, as well as warfare, may well have played a part in the process of amalgamation.

[322] The evidence is not clear as to the groups which came together to form what is now the Ehattesaht. It is possible that there were more groups living in this area than the ones identified by Drucker. For instance, Captain Richards noted the presence of a third group in addition to the Ehattesaht and Nuchatlaht called the Aoquas. Mr. Inglis acknowledged that the identity of the Aoquas group is unclear. It is not known what happened to this group.

[323] Although the antecedents of the Ehattesaht are not entirely clear, particularly given evidence of co-mingling with their co-plaintiff, the Nuchatlaht, I am nevertheless satisfied that the evidence demonstrates a sufficient connection between the present day Ehattesaht and the people who occupied their territories at contact such that they are the proper rights holder.

ii. Mowachaht/Muchalaht

[324] The Mowachaht/Muchalaht claim territorial fishing rights and title to the lands and waters in the southern Nootka Sound region, including the southern part of the outside coast of Nootka Island from north of Bajo Point, the offshore waters including the entrance to Nootka Sound, Tahsis Inlet, Tlupana Inlet, Bligh Island and the surrounding waters, Muchalaht Inlet, and the shore and offshore waters of Hesquiaht Peninsula just north of Escalante Point. As described in the statement of claim, the

Mowachaht/Muchalaht claim the foreshore and submerged waters of the Tahsis and Gold Rivers.

[325] The Mowachaht are an amalgamation of the Mowachaht and Muchalaht tribes. Both Dr. Lovisek and Mr. Inglis agree that pre-contact, various smaller local groups from the southern Nootka Sound region joined to form the Yuquot-Tahsis Confederacy, and that by the colonial period these people were known as the Mowachahts or the Nootkas.

[326] The Muchalaht tribe was a consolidation of independent local groups who joined together for mutual protection. Their territory included the areas surrounding Muchalaht Inlet and Gold River. From the late 1800s, the Muchalaht were closely connected with the Mowachaht through inter-marriage and residency. They officially joined together in 1951.

[327] Based on the extensive archaeological evidence of Dr. Marshall, whose work was referred to by all of the experts, Dr. Lovisek and Mr. Inglis date the formation of the Yuquot-Tahsis Confederacy to between 1600 and 1700 A.D. Also well documented is the seasonal round of the Yuquot-Tahsis Confederacy. Dr. Lovisek agreed that the seasonal round developed hand-in-glove with the emergence of the Confederacy. Dr. Lovisek stated that the Muchalaht joined the Yuquot-Tahsis Confederacy in the mid-1800s. In 1975, the Nootka Indian Band changed its name to the Mowachaht Indian Band and in 1994 it became the Mowachaht/Muchalaht Indian Band.

[328] Based largely on Dr. Marshall's archaeological work, Dr. Lane, Dr. Lovisek and Mr. Inglis agree that at contact, Nootka Sound was densely occupied with numerous villages on any piece of available, inhabitable land. Dr. Lovisek quoted Dr. Marshall as saying that the overwhelming impression "[is] of a full, densely occupied landscape." Unlike some of the other plaintiff groups, Dr. Marshall also concluded that there was remarkable stability in the settlement pattern in Nootka Sound. In the contact period, many maritime explorers noted a seasonal round

pattern of residence between the outside village at Yuquot and Tahsis at the head of the Tahsis Inlet.

[329] The Mowachaht/Muchalaht claim two rivers: a portion of the Tahsis River from Tahsis Inlet to approximately seven kilometres upstream and the Gold River which flows from Muchalaht Lake to the head of Muchalaht Inlet.

[330] Tahsis River was the fall fishing village of the Yuquot-Tahsis Confederacy. Maquinna maintained a large village at Tahsis that was described by Captain Vancouver. Jewitt also discussed Tahsis based on his residence there for two seasons while captive at Nootka Sound. There are also several observations of the Muchalaht use and occupation of the Gold (Muchalaht) River.

[331] Canada submits that the Mowachaht/Muchalaht have the strongest case of all the plaintiffs for inferring that they descend from the aboriginal inhabitants of the claim area at contact. It says that while the identity and specific locations of all the groups at contact is unknown, there is no evidence that this plaintiff acquired new territory by force in the era post-contact and post-sovereignty. It further says there is no evidence of significant geographic displacements around the time of contact for this plaintiff as there is for other plaintiffs.

[332] Canada contends that notwithstanding its position just stated, the plaintiffs have not attempted to decipher the evidence in order to demonstrate how the Mowachaht/Muchalaht reflect the composition of those ancestral aboriginal groups. They fault the plaintiffs for effecting a superficial analysis of the evidence concerning continuity of identity. However, Canada states at para. 1073 of its submissions that "[t]he modern Mowachaht trace their roots at contact to the local groups comprising the Yuquot-Tahsis Confederacy and the Tlupana Inlet groups." I assume Canada contends that the plaintiffs must lead evidence as to which of these specific groups identified at contact are ancestral to the Mowahchaht/Muchalaht. I do not understand the *Marshall and Bernard* test to require specific and conclusive evidence of ancestry. Rather, the test is focussed on the modern groups' ability to demonstrate "a connection" to the pre-contact group.

[333] With respect to the Muchalaht, Canada submits that at or prior to contact, Muchalaht local groups were isolated and rarely visited the coast. It says that ethnographically, they occupied the Muchalaht Arm, parts of Nootka Sound south of Muchalaht Arm and inland north to the confluence of the Gold and Leiner Rivers and south in the inlet confluence with Muchalaht River.

[334] Mr. Inglis said in his report that there is no evidence in the documentary record of other aboriginal groups occupying Muchalaht or Mowachaht territory during the contact period.

[335] Dr. Lovisek commented in her report (at p. 174) that Nootka Sound was characterized by a relatively stable settlement, and that there is ethnographic and archaeological evidence of occupation during the contact period and well into the 20th century. She said very few new settlements were established during the contact period. As to the Muchalaht, she said that they are a modern group comprised of at least seven pre-contact local groups. The distinct local groups amalgamated sometime in the post-contact period for protection from raids.

[336] I have no difficulty in concluding that the present day Mowachaht/Muchalaht are connected to the groups that at contact occupied what is now their claimed territory in Nootka Sound.

iii. Hesquiaht

[337] The Hesquiaht claim title to the fishing territories, lands, and waters in the Hesquiaht Peninsula and Hesquiaht Harbour region from just north of Escalante Point down to approximately half way between Hesquiaht Point and Shark Point. The Hesquiaht claim the Purden Creek River and an unnamed creek in Hesquiaht I.R. No. 1.

[338] The main modern Hesquiaht community is presently located at Hot Springs Cove at Refuge Cove I.R. No. 6. Hot Springs Cove falls within Ahousaht territory and is not claimed by the Hesquiaht. The Hesquiaht moved to Hot Springs Cove around 1959 because it provided a safer moorage for fishing boats, as compared to

the open ocean waters of Hesquiaht Harbour, their previous location. In ancient times, canoes could be kept safely in Hesquiaht Harbour because they could be rolled up out of the water. In 1964 a tidal wave destroyed the majority of houses at Hot Springs Cove, and the Hesquiaht people living there moved to various alternative locations on Vancouver Island.

[339] Canada submits that the plaintiffs have failed to prove that the Hesquiaht are rights holders. It concedes that some Hesquiaht ancestors inhabited the claim area at contact, but says that the evidence is unclear as to what happened to each of the local groups that inhabited the area at the time of contact. It also contends that there appears to have been some co-mingling between the Hesquiaht and their neighbours.

[340] Dr. Lovisek wrote in her report, at p. 179:

> The modern Hesquiaht consist of all or part of between five and perhaps 12 named groups, nine of which had their own territory. Five of these groups were local groups and seven groups were either family groups associated with the five local groups or some may have been local groups. Of the 12 named groups having territorial rights in Hesquiat Harbour, five local groups have been identified by Drucker. The main community of the Hesquiaht is at Refuge Cove I.R. #6, also known as Hotsprings Cove. The local groups of Hesquiat Harbour occupied territory which included all of the shoreline, adjacent waters and land from Split Cape on the outer coast to the north, Hesquiat Harbour and Hesquiat Lake, to a point on the outer coast midway between Refuge Cove [Hot spring Cove] and south to Hesquiat Point. The five local groups occupied territories that included long stretches of shoreline, numerous offshore reefs, semi protected and fully protected harbour shorelines, numerous small lakes and streams as well as Hesquiat Lake. The local groups functioned as independent socio-political units until approximately the mid 19th century when they amalgamated into the modern group known as the Hesquiaht.
>
> …
>
> Of the five precontact local groups at least two were outer coast local groups, the Homisath and the Haimai'isath. One local group was a transitional local group known as the Kiqinath which occupied both areas, and two local groups were inner coast local groups known as the Ma'apiáth and the Ya.qhsisath.

[341] According to Dr. Marshall, as noted by Dr. Lovisek, 11 of the sites located by her "had little to no archaeological evidence for prehistoric occupation indicating they

were established during the historic period (that is, after contact) … As noted, all of Hesquiaht Harbour local groups amalgamated at Heckwi, which was formerly the village for the Haimai'isath during the historic period." (According to Mr. Inglis, Heckwi is the same place as is now referred to as Hesquiaht I.R. No. 1.)

[342] According to Dr. Lovisek, amalgamation of the groups at Heckwi (Hesquiaht) resulted in a change in the exploitation pattern to that of a seasonal round. Dr. Lovisek says that archaeological evidence indicates that this settlement around Hesquiaht Harbour was abandoned. Reserves were set aside for the Hesquiaht in the 1880s and included various locations used pre-contact: Hesquiaht I.R. No. 1, Homais I.R. No. 2, Iusuk I.R. No. 5, Maahpe I.R. No. 4, and Tehmit I.R. No. 3.

[343] The plaintiffs note that the Hesquiaht are infrequently mentioned in the contact period records because of the difficulty of accessing their territory. However, they were probably the first aboriginal people contacted by Europeans. It is thought that the canoes which came out and traded with Juan Pérez of *The Santiago* in 1774 were Hesquiaht. *The Santiago*'s location was offshore Hesquiaht territory.

[344] I conclude that there is a proven connection between the present day Hesquiaht and the local groups that occupied those territories at contact, and that this connection is sufficient for the Hesquiaht to prove that they are rights holders.

iv. Ahousaht

[345] The Ahousaht claim fishing rights and title to the foreshore and submerged waters in northwestern Clayoquot Sound, including Sydney Inlet, Shelter Inlet, Millar Channel, Herbet Inlet, Bedwell Sound, Warn Bay and part of Fortune Channel, as well as Flores Island and Vargas Island and the surrounding islands and waters. They also claim title to the foreshore and submerged waters of the Megin River.

[346] The history of the Ahousaht and the territories they inhabited is generally not controversial as between the plaintiffs and Canada. Where controversy does arise is with respect to the fact that after contact, the Ahousaht acquired parts of their territory by force.

[347] The historical record is reasonably clear that the Ahousaht are an amalgamation of several groups. The original Ahousaht were located in the area of Blenden, Bartlett and Vargas Islands and their adjoining waters. They expanded their size and territories through war with the Otsosaht, their neighbours to the northwest, and by amalgamation with the Kelsomaht to the east, and the Manhousaht on the northwest, beyond the Otsosaht territory.

[348] In the early 1800s, the Ahousaht acquired the territory of the Otsosaht through a protracted war that annihilated the Otsosaht to take control of their territory. The rationale for the war was that the Otsosaht, despite an inter-marriage with the daughter of the chief, refused to share fishing rivers with the Ahousaht who had inadequate rivers. The war began with muskets obtained from *The Boston*. Hence, Stanley Sam, an Ahousaht witness, dates the commencement of the war to 1811. He testified a little girl was born at the outset of the war and became a lady when the war ended, which means she was 13 years old and thus there were 13 years of war. Dr. Lovisek opined that the war lasted 15 years, between 1812 and 1826. By the end of the war, the Ahousaht had gained the Otsosaht rivers and territory.

[349] Canada says that the notion of acquiring rights by killing the holder of the rights is incompatible with the common law, and that the Ahousaht are therefore unable to show that they are the proper rights holder in the areas expanded by raiding in the post-contact and post-sovereignty eras. The plaintiffs respond to this contention as follows, at para. 202 of their reply:

> Canada submits that the Court should not recognize occupation that was obtained through warfare as that would be "unconscionable or incompatible with Crown sovereignty". This is a surprising submission given that Britain's very assertion of sovereignty over parts of Canada, namely New France, was itself effected through warfare. On Canada's logic, Canada would be compelled to return Quebec to France given the "unconscionable" battle that took place at the Plains of Abraham.
>
> Moreover, the hostile territorial acquisitions had all been effected by 1846, which is the date of sovereignty that has been accepted by this Court.

[350] Mr. Inglis described forced amalgamations as follows, at p. 20 (October 26, 2007):

> In situations where the amalgamation was by force, there was a transfer of ownership, and the rights and privileges of the one local group were taken over by another local group. In the case of warfare where the objective was territorial gain, the people who held the ownership rights (family of Chiefs) of a local group had to be killed off before those rights can be divided among the Chiefs of the conquering local group. The Nuu-chah-nulth term for this form of acquisition is *his'o^k't,* meaning 'obtained by striking.'

[351] Dr. Lovisek and Dr. McMillan testified that in the case of forced amalgamations (war), the conquered group's territory was directly absorbed into that of the victor. Dr. Lovisek relied on the text, R. Bouchard and D. Kennedy, *Clayoquot Sound Indian Land Use* (November 1990) as one of her sources for the Ahousaht history she cites. Bouchard and Kennedy, in turn, relied on ethnographic evidence compiled by Drucker and others. With respect to the Ahousaht-Otsosaht war, they noted at p. 237 of their text that the chiefs distributed the spoils of war by killing the chiefs who owned the territory that they wished to acquire. In other words, as Dr. McMillan testified, the conquerors absorbed the territory of the defeated groups.

[352] There does not appear to be any jurisprudence that addresses whether this method of territorial acquisition is sufficient to extend territorial rights and/or title to the conqueror. I conclude on the evidence presented in this case that the traditional practices of this plaintiff included forced acquisition of desired territories and the annihilation of the owner of those territories. I further conclude that in circumstances of such forced territorial acquisition, there was also a transfer of the rights and privileges of the vanquished owner to the conquering group.

[353] The Ahousaht claimed territory now includes what was Otsosaht territory, but also the Manhousaht and Kelsomaht territories. The Manhousaht formally amalgamated in April 1945. The Kelsomaht formally amalgamated in 1951. The Ahousaht were joined by the Kelsomaht in 1875. Dr. Lovisek noted that the amalgamation took place in 1880, after a large number of Kelsomaht drowned in a sealing accident. The Kelsomaht and Manhousaht still hold traditional roles within

the Ahousaht today. The amalgamated Ahousaht territorial boundaries do not appear to be in dispute.

[354] I am satisfied that the modern-day Ahousaht are connected to the pre-contact groups including Ahousaht, Kelsomaht, Otsosaht, and Manhousaht. Those four groups have in the various ways described amalgamated to form the modern-day Ahousaht. Thus, the Ahousaht have demonstrated a connection to those four pre-contact groups and their distinctive culture.

v. Tla-o-qui-aht

[355] The Tla-o-qui-aht claim title and fishing rights to the submerged lands and waters in the south eastern Clayoquot Sound area, including those surrounding Kennedy Lake, Tofino Inlet, part of Fortune Channel, Lemmens Inlet, Browning Passage, Grice Bay and Esowista Peninsula, and south to part of Long Beach. The Tla-o-qui-aht also claim title to the Kennedy River.

[356] The plaintiffs say that the Tla-o-qui-aht have owned, used and occupied their claimed territory since the time before contact. Canada counters that the Tla-o-qui-aht have failed to prove that they are the descendents of the people who occupied the outside coastal areas of their claimed area at contact. Rather, it says, the available evidence suggests that pre-contact, the only dominant people in the outside coastal claim area were the Hisauistath. The Hisauistath, however, were annihilated in an attack by an alliance of the inland local groups. Canada says that the date of this attack and subsequent occupation of the Hisauistath territory is uncertain but likely occurred after contact.

[357] The event that is the subject of this controversy is the Clayoquot-Esowista war. At p. 196 of her report, Dr. Lovisek described the Clayoquot-Esowista war as follows:

> Although the date is unclear the Clayoquot local group allied with the Shew'aht, Kwoktlasaht and Aqowitisaht to annihilate the Hisauistath and take over their territory. The allied groups under the leadership of the Clayoquot local group took Hisauistath territory (including the sockeye rivers), Long

> Beach, and islands for sea lions. The oral tradition refers to this event as the Clayoquot-Esowista war (c. 1812-1836).
>
> Over an estimated interval of about a year the Clayoquot alliance killed or merged with as many as ten formerly independent precontact groups. The conquering Clayoquot chief, Ya'aihlstohsmahhlneh took the name of Wickaninnish. In his new capacity Wickaninnish redistributed all the Hisauistath property and privileges which included salmon streams, Esowista and various islands used by sea lions at the east end of Long Beach. The newly formed amalgamated group took the name, Clayoquot and included peoples who occupied and used the Kennedy Lake and Kennedy River area, Tofino Inlet, Esowista Peninsula and islands off Meares Island. Their main village was established at Opitsat on Meares Island (Opitsat I.R. #1).

[358] Dr. Lovisek testified that the modern Clayoquot are a late historical period amalgamation of an unknown number of independent local groups from the Kennedy Lake and Clayoquot Sound region. The first recorded observation on this point comes from Meares in 1788. At that time, Meares observed Chief Wikaninnish to be in control of what is now the Tla-o-qui-aht claim area. He described Wikaninnish's house in the villages, at p. 219:

> Abreast of the ship, on one of the islands, we perceived a village almost thrice as large as that of Nootka …
>
> On entering [Wickaninnish's] house, we were absolutely astonished at the vast area it enclosed. It contained a large square, boarded up close on all sides to the height of twenty feet, with planks of an uncommon breadth and length…
>
> … [we] descended down the chin into the house, where we found new matter for astonishment in the number of men, women and children, who composed the family of the chief; which consisted of at least eight hundred persons. These were divided into groupes, according to their respective offices, which had their distinct places assigned them.

[359] Dr. Lovisek did acknowledge that the amalgamation process of what became Clayoquot, then Tla-o-qui-aht, territory "may have started in the late pre-contact period but continued into the contact period with new intensity likely related to the maritime fur trade."

[360] Prior to the amalgamation, the inland local group, which has been referred to as the Kennedy Lake tribes, rarely visited the coast but, rather, occupied sites at Kennedy and Clayoquot Lakes (inland locations), according to Drucker as cited in

Lovisek. There they fished for salmon but had no access to herring grounds or halibut banks. After amalgamation, the Kennedy Lake tribes acquired access to new resources such as whales, sea otters and other sea resources.

[361] With respect to Canada's denial that the Tla-o-qui-aht have proven that they occupied the outside coast area of their claim area at the time of contact, the plaintiffs point to the evidence of Meares observing a massive village at Opitsat in 1788. The plaintiffs contend that it is highly unlikely that the Clayoquot amalgamation process could have begun in 1788. I agree with the plaintiffs that it is improbable that Wikaninnish could have been so firmly established in such large villages on the outside coast if that amalgamation process had not started some years prior to Meares' observations in June 1788.

[362] Mr. Inglis summarized the evidence regarding the territory of the Tla-o-qui-aht as follows:

> The Tla-o-qui-aht are recorded as being in the region of south eastern Clayoquot Sound in the contact period. They were the people occupying this region in the Colonial period records, and in the records of the Department of Indian Affairs. Indian Reserves established in this region by the Federal Government in the late 19th century were identified for the Tla-o-qui-aht. The reserves are distributed throughout Tla-o-qui-aht territory.
>
> The population of the Tla-o-qui-aht at contact was estimated by observers at the time to be between 3,000 and 4,000 people. By 1881, the population was reduced to less than 350.
>
> At contact, five villages were recorded for the Clayoquot. In the colonial period, the Clayoquot had at least 12 settlements. Most were established as Indian reserves for the Tla-o-qui-aht by the Federal Government in the late 19th century.

[363] Mr. Inglis concludes that based on the documentary records from the contact, colonial, and post-confederation periods, the Tla-o-qui-aht lived on the lands and controlled the lands and waters in the south eastern Clayoquot Sound region throughout the period of study for his report. There was no evidence of another aboriginal group occupying the Tla-o-qui-aht territory during this period.

[364] I accept the conclusions of Mr. Inglis on this point. There is no conflicting evidence; that is, I do not perceive Dr. Lovisek to disagree with Mr. Inglis as to the occupation of the Tla-o-qui-aht territory from the time of contact to the modern era. The only real controversy in respect to the Tla-o-qui-aht appears to be in respect to the date on which the inside Kennedy Lake groups expanded their territory, by annihilating the Hisauistath and taking over their territory. I have already concluded that based on Meares' observations, this must have occurred prior to contact, as Wikaninnish was so firmly in control of this large territory when first observed by Meares.

[365] I conclude from the foregoing that the modern-day Tla-o-qui-aht are connected to the groups that occupied their claim territories at or about the time of contact.

2. Species specificity

[366] As part of the integrality analysis, I now turn to species specificity.

[367] The plaintiffs seek a declaration that they have an aboriginal right to harvest all species of fisheries resources in their claimed territories for a variety of purposes. In the alternative, they claim a right to harvest one or more species, although they do not specify which. The plaintiffs define fisheries resources as including all species of fish, shellfish and aquatic plants. They say that their modern-day aboriginal right is properly characterized as a right to harvest and sell all species of fish available to them within their territory.

[368] The plaintiffs submit that it is well settled that aboriginal rights, and fishing rights in particular, are not species specific. They rely on *Lax Kw'alaams Indian Band*, where Satanove J. wrote, at para. 498:

> I agree that an aboriginal right, once proven, is not limited in terms of species of the specific resource which formed the subject of the ancestral activity on which the aboriginal right is based.

[369] Similarly, in *Tsilhqot'in Nation*, at para. 1246, Vickers J. accepted that aboriginal rights to trade skins and pelts were not species specific:

> This Aboriginal right is properly characterized as a right to trade skins and pelts as a means to secure a moderate livelihood. In my view, the case law does not support Canada's argument that this right must be restricted to specific species of animals. I find that such an approach would unduly frustrate the modern expression of this Aboriginal right.

[370] The plaintiffs also rely on *Powley* and *Sappier*, two Supreme Court of Canada cases in which the Court held that the focus of aboriginal rights is on activities, not on particular resources. In *Powley*, the Crown at trial had argued for a single species approach in an aboriginal hunting rights prosecution. The trial judge said "to take this approach one must suspend common sense" and held that the right to hunt is not one that is game specific: *R. v. Powley,* [1999] 1 C.N.L.R. 153 (Ont. Ct. Prov. Div.). The Supreme Court of Canada in *Powley,* at para. 20, agreed with the trial judge's characterization of the right:

> We agree with the trial judge that the periodic scarcity of moose does not in itself undermine the respondents' claim. The relevant right is not to hunt moose but to hunt for food in the designated territory.
>
> [Emphasis in original]

[371] *Sappier* concerned an aboriginal right to harvest timber. The New Brunswick Court of Appeal wrote at *R. v. Sappier*, 2004 NBCA 56, [2004] N.B.J. No. 295, aff'd at SCC, at para. 33:

> By way of introduction, and as a summary of what is to follow, the jurisprudence tells us that it is not permissible to characterize an aboriginal right in terms of the species of fish being harvested (e.g. perch or salmon). Nor is it permissible to characterize the nature of the aboriginal right in terms of the means used in furtherance of the harvesting activity (e.g. the use of drift nets). What is of immediate importance is whether the aboriginal right to fish is for purposes of personal consumption or trade.

[372] The Supreme Court of Canada held, at para. 21:

> … the respondents led most of their evidence about the importance of wood in Maliseet and Mi'kmaq cultures and the many uses to which it was put. This is unusual because the jurisprudence of this court establishes the central

> importance of the actual practice in founding a claim for an aboriginal right. Aboriginal rights are founded upon practices, customs, or traditions which were integral to the distinctive pre-contact culture of an aboriginal people. They are not generally founded upon the importance of a particular resource. In fact an aboriginal right cannot be characterized as a right to a particular resource because to do so would be to treat it as akin to a common law property right.

[373] Canada argues that the question of species specificity is part of the characterization of the aboriginal right. It says that there is no evidence that at the time of contact there was a market for all species of fisheries resources or that such a market exists today. Accordingly, Canada argues that a right to fish should not be characterized as a right to fish for "anything anywhere anytime" as the plaintiffs claim.

[374] In support of this proposition, Canada cites *Gladstone*, where the Heiltsuk were successful in establishing an aboriginal right to fish herring spawn-on-kelp for commercial purposes. Canada also notes that in *Lax Kw'alaams Indian Band*, Satanove J. found that the plaintiff had established a right to sell eulachon on a commercial basis but no other species. She held, at para. 499:

> However, the plaintiffs' simplistic position that the ancient trade in eulachon grease has transmogrified to a modern day right to commercial fishing of salmon, halibut and all other marine and riverine species of fish, ignores the fundamental fact that the Coast Tsimshian fished for sustenance, not for trade. …

[375] Canada's position, of course, is that there is no evidence of trade or exchange other than in a limited, opportunistic and kinship context. However, Canada says that if there is evidence of trade, it would be illogical to conclude that the Nuu-chah-nulth would have traded amongst themselves for fisheries resources which they each already had; consequently, those exchanges would have occurred, if at all, in respect of a limited number of species. Canada argues that to extend the aboriginal right to fisheries resources to all species of fish in the plaintiffs' claim areas would be to create a modern right unrelated to the way of life of the contact era Nuu-chah-nulth or to the way of life of the modern claimants. Canada

additionally notes that the modern-day fishery is regulated on a species specific basis.

[376] In its written submissions, Canada sets out the species referred to in the evidence in respect to the individual plaintiffs. In respect of the Ehattesaht, Canada notes that Jewitt's journal refers to the species being harvested by the Aitizzards. All the experts appear to be agreed that Aitizzards is a previous rendering of the name Ehattesaht. Jewitt's journal shows that the Aitizzards brought Maquinna dentalia (identified as ifraw in the journal), whale blubber, train oil, slaves, sea otter skins, unidentified skins, dried salmon, salmon spawn, herring spawn and seals. Canada notes other more recent historical documents from the 1880s through to the Royal Commission in 1914 which indicate the Ehattesaht harvested salmon, herring and halibut.

[377] With respect to the Hesquiaht, Canada notes the archaeological record indicates that pre-contact, rockfish and greenling were consumed by the residents of Hesquiaht Harbour in abundance; herring, salmon and toad fish were also consumed and, very rarely, halibut. Dr. McMillan agreed that the archaeological evidence at Hesquiaht suggests a pattern of reliance on fish caught close to shore and in protected waters. Dr. Lovisek detailed archaeological evidence of perch, dogfish, flat fish, clams, mussels, and sea snails caught by the Hesquiaht.

[378] Turning to the Mowachaht/Muchalaht, Captain Cook noted that the people of Nootka Sound relied on herring, sardines, breem and small cod, mussels and sea mammals. Dr. Lovisek noted herring, sardines and salmon harvested by the Mowachaht/Muchalaht.

[379] The Tla-o-qui-aht, being an inland group, did not have access to the plethora of open sea resources available in other locations. According to Canada, Drucker noted that the Tla-o-qui-aht relied on salmon and little else.

[380] Meares commented on the variety of fish caught. In 1788 he wrote, at p. 244:

> Vast quantities of fish are to be found, both on the coast and in the sounds or harbours. – Among these are the halibut, herring, sardine, silver-bream, salmon, trout, cod, elephant-fish, shark, dog-fish, cuttle-fish, great variety of rock-fish, &c. All of which we have seen in the possession of the natives, or have been caught by ourselves.
>
> (Exhibit 152)

[381] As well, Martínez, who spent six months in Nootka Sound in 1789, described the variety of fish, at p. 197:

> Their meals, when of largest variety, consist of cooked fish, mussels, clams, sardines, dried herrings, whale – which they use in place of bread – sea-wolf and sea-otter, all kinds of shell-fish and some sea herbs; to eat these, they mix them with whale-oil.

[382] The plaintiffs say that to the present day, the Nuu-chah-nulth have opportunistically exploited the resources available to them. They have adapted to changing conditions and fishing restrictions, and continue to fish the species they have the means and opportunity to harvest.

[383] Elsewhere in these Reasons, I discuss the proper characterization of the right claimed. I explain that the characterization of the right should be sufficiently broad to encompass the activity that is integral to the way of life at contact as it has evolved to the present day. The activity in question here is fishing, and to require the plaintiffs to prove that right in respect to each species is inconsistent with the evidence regarding their way of life. The Nuu-chah-nulth people followed a seasonal round which corresponded to the seasonal availability of various species of fish. Species gained and lost importance depending upon their abundance. That was the pattern during both pre- and post-contact periods, and it has continued to modern times. In my view, it would be an artificial limitation of the characterization of the plaintiffs' fishing right to limit it to certain species. I use "fishing right" and "harvesting right" interchangeably.

[384] I turn now to site specificity.

3. Site specificity

[385] The plaintiffs claim aboriginal rights in respect of territories which they have defined as being bounded by the foreshore of each individual plaintiff's territory and extending westward from the foreshore 100 nautical miles. The approximate boundaries are set out on the map at Appendix A to these Reasons, and are more particularly described for each plaintiff at Exhibit 26 – the Base Map Book.

[386] Canada says that the Supreme Court of Canada has avoided delineating precise boundaries where site specific aboriginal rights can be exercised since the vast majority of aboriginal rights cases before the Court have arisen in the context of regulatory prosecutions. In those cases, the aboriginal right is raised as a defence by the accused and thus the Court need only determine whether the offence occurred within an area in which the accused may have exercised aboriginal rights. As a result, descriptions of boundaries have understandably tended to be vague. Canada submits that in a declaratory action where there are multiple claimants asserting independent rights within a specifically defined claim area, such as the present case, the Court is required to draw boundaries with some precision around any site-specific aboriginal right that may be proven.

[387] In response, the plaintiffs acknowledge that aboriginal fishing rights are site-specific but they say that there is simply no authority that supports the strict geographical definition of aboriginal rights contended for by Canada. To the contrary, they say, courts have described the geographic scope of aboriginal rights in very general terms.

[388] Typically, courts have characterized the geographical boundaries of the exercise of aboriginal rights in a flexible manner:

> *Mitchell* – the right to bring goods across the St. Lawrence River for the purposes of trade;
>
> *R. v. Adams*, [1996] 3 S.C.R. 101 – the right to fish for food in Lake St. Francis;

R. v. Côté, [1996] 3 S.C.R. 139 – the right to fish for food within the territory of the "zone d'exploitation contrôlée";

Powley – the right to hunt for food in the environs of Sault Ste. Marie; and

Sappier – the right to harvest wood for domestic uses on Crown lands traditionally used for this purpose by the claimants' respective First Nation.

[389] I will begin my analysis by reviewing the law regarding site specificity.

[390] In *Côté*, Lamer C.J. explained how the territorial description of an aboriginal right existed independently of a claim to title, at paras. 38-39, largely by referring to the companion case of *Adams*:

> 38 For the reasons I have given in the related appeal in *Adams*, *supra*, I find that aboriginal rights may indeed exist independently of aboriginal title. As I explained in *Adams*, at para. 26, aboriginal title is simply one manifestation of the doctrine of aboriginal rights:
>
> > . . . while claims to aboriginal title fall within the conceptual framework of aboriginal rights, aboriginal rights do not exist solely where a claim to aboriginal title has been made out. Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition. The *Van der Peet* test protects activities which were integral to the distinctive culture of the aboriginal group claiming the right; it does not require that that group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to aboriginal title to the land.
>
> We wish to reiterate the fact that there is no *a priori* reason why the defining practices, customs and traditions of such societies and communities should be limited to those practices, customs and traditions which represent incidents of a continuous and historical occupation of a specific tract of land.
>
> 39 However, as I stressed in *Adams*, at para. 30, a protected aboriginal right falling short of aboriginal title may nonetheless have an important link to the land. An aboriginal practice, custom or tradition entitled to protection as an aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact. As such, an aboriginal right will often be defined in site-specific

> terms, with the result that it can only be exercised upon a specific tract of land.

[391] The Supreme Court discussed the issue again in *Mitchell*, noting that while the harvesting of fish may be intrinsically connected to a geographically defined area, trading of the fish may not be so tied:

> 55 The importance of trade - in and of itself - to Mohawk culture is not determinative of the issue. It is necessary on the facts of this case to demonstrate the integrality of this practice to the Mohawk in the specific geographical region in which it is alleged to have been exercised (i.e., north of the St. Lawrence River), rather than in the abstract. This Court has frequently considered the geographical reach of a claimed right in assessing its centrality to the aboriginal culture claiming it. For example, in recognizing a constitutionally protected Mohawk fishing right in *Adams*, *supra*, the majority of this Court framed the *Van der Peet* test as follows (at para. 34):
>
> > The appellant argues that the Mohawks have an aboriginal right to fish in Lake St. Francis. In order to succeed in this argument the appellant must demonstrate that, pursuant to the test laid out by this Court in *Van der Peet*, fishing in Lake St. Francis was "an element of a practice, custom or tradition integral to the distinctive culture" of the Mohawks.
>
> The majority, in assessing the integrality of this practice to the Mohawks in Adams, consistently tied the claimed right to the specific area at issue - the region of Lake St. Francis (see paras. 37 and 45). *Côté*, *supra*, similarly emphasized that it is the exercise of the claimed right in a specific geographical area that must be integral (paras. 41-78). In that case, the Court stated that "[a]n aboriginal practice, custom or tradition entitled to protection as an aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact" (para. 39).
>
> 56 Thus, geographical considerations are clearly relevant to the determination of whether an activity is integral in at least some cases, most notably where the activity is intrinsically linked to specific tracts of land. However, as Lamer C.J. observed in *Delgamuukw*, "aboriginal rights ... fall along a spectrum with respect to their degree of connection with the land" (para. 138). In this regard, I note that the relevance of geography is much clearer in hunting and fishing cases such as *Adams* and *Côté*, which involve activities inherently tied to the land, than it is in relation to more free-ranging rights, such as a general right to trade, which fall on the opposite end of the spectrum. General trading rights lack an inherent connection to a specific tract of land. Thus, geography was not a relevant factor in the aboriginal rights trilogy of *Van der Peet*, *supra*, *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *Gladstone*, *supra*, all cases involving claimed rights of exchange or trade. The claimants in these cases were only required to demonstrate the integrality of the claimed trading practice in general, rather than in relation to a specific region. Moreover, in *Gladstone*, where the

> Heiltsuk successfully established an aboriginal right to engage in the commercial trade of herring spawn on kelp, the Court did not confine the scope of this trade to its historical reach. Such a restriction would unduly cement the right in its pre-contact form and frustrate its modern exercise, contrary to the principles set out in *Van der Peet*. Consequently, trading rights will seldom attract geographical restrictions.
>
> [Emphasis added]

[392] The Supreme Court observed, in *Sappier,* at para. 50, that it had imposed a site-specific requirement on the aboriginal hunting and fishing rights it recognized in *Adams*, *Côté*, *Mitchell* and *Powley*. Bastarache J. held that the activity in question in *Sappier* – harvesting wood – imported a necessary geographical element and that its integrality to the relevant aboriginal cultures should be assessed on this basis. The claimed aboriginal right was ultimately characterized as a right to harvest wood for domestic uses on Crown lands traditionally used for this purpose by members of the relevant First Nations.

[393] I conclude from these authorities that the task of defining the geographic specificity of a claimed aboriginal right is part of the characterization analysis. More importantly, it is an aspect of the "integral to the distinctive culture" analysis. The court looks to the evidence of the actual pattern of activity prior to contact; characterization of the right flows from there. Here, the rights that the plaintiffs claim, put at their broadest, are the rights to harvest and to sell or to trade fish. They do not confine this latter right of selling or trading fish to a particular geographic location. With respect to the harvest right, the plaintiffs claim a right to harvest all species of fisheries resources from within their fishing territories, or portions thereof. Based on the authorities, the plaintiffs must establish that their fishing practices were exercised within the fishing territories they claim.

[394] I conclude that the plaintiffs must prove a pre-contact connection to the territories in which they claim the right to harvest fish. For instance, it is obvious that they are not claiming, and indeed could not claim, an aboriginal right to harvest fish in the Fraser River, a site far from their ancestral homes. This approach is consistent with the flexible manner in which evidence in aboriginal rights cases should be analyzed. The plaintiffs should not be required to prove their claims to a

degree of precision that is inconsistent with the reality of the historical record: *Van der Peet*, at para. 68; *Sappier*, at para. 33.

[395] With respect to the geographical specificity of the claim to fishing rights within the plaintiffs' territories, Canada submits that the vast majority of species caught by the plaintiffs at contact were caught in rivers or from near shore marine environments, such as protected inlets and sounds. Consequently, it says, the plaintiffs have failed to establish that at contact their ancestors harvested fish offshore as an integral aspect of their culture. This is an important distinction because halibut and cod are primarily harvested from offshore fishing banks. Salmon may also be harvested by trolling some distance from shore. Citing *Lax Kw'alaams Indian Band* and *Tsilhqot'in Nation*, Canada further submits that the plaintiffs' alternative claim to an aboriginal right in a portion of the claimed territory is not pleaded with sufficient particularity to succeed.

[396] The plaintiffs' pleading "or, portion thereof" has relevance only to the seaward longitudinal boundary of their claims because, as I find below, each plaintiff has sufficiently proven the latitudinal boundaries of its fishing territory. (I use the term "longitudinal boundary" to indicate the seaward boundary running roughly parallel to the shoreline, and "latitudinal boundary" to indicate the boundary between the individual plaintiff territories running very roughly west to east.)

[397] The foreshore boundaries of each plaintiff's territory, as shown in Exhibit 26, is proven with a sufficient degree of specificity for a rights claim (as opposed to a title claim), as I will discuss later in these Reasons. As to the seaward longitudinal boundary, the evidence (also detailed below) is compelling that each tribe fished within the rivers and sounds, that is, within the jaws of land, of its traditional territories. The Nuu-chah-nulth exercised considerable proprietary rights over the rivers and sounds of their territories. There is also evidence proving that they fished and travelled offshore; that evidence, however, is sparse as to precisely how far offshore each tribe or group travelled. In my view, the plaintiff's pleading is sufficient to enable the Court to assess the evidence and determine a seaward boundary.

[398] Canada contends that there is little or no evidence that the Nuu-chah-nulth people fished offshore. It notes that there is very little faunal archaeological analysis of fish bones in the claim area. Canada submits that to the extent researchers have analyzed faunal deposits, the analysis proves an overwhelming reliance on species caught close to shore. These studies disclose little evidence of remains of halibut and cod, which are offshore species. Canada also relies on Dr. McMillan's evidence that halibut and cod would not have been accessible in the winter months.

[399] The plaintiffs rely on the evidence of the explorers, traders, and ethnographers to argue that there is evidence proving considerable offshore fishing activity. Some examples follow.

[400] Alexander Walker of the Strange expedition in 1786 observed canoes laden with fish, including salmon and trout, which he concluded had been caught off Yuquot, not in the rivers. The plaintiffs say this is evidence that the salmon had been taken by offshore trolling. Walker also observed the broad range of gear used by the Nuu-chah-nulth to fish, including fish hooks made of bone, stone and shell. The plaintiffs say these would have been unnecessary if fishing was confined to shallow areas and rivers.

[401] In 1788, Taylor of *The Colnett* observed the canoes coming in from the sea with salmon. He also observed natives successfully fishing with hooks and lines consistent with offshore fishing.

[402] John Meares commented on the Nootkans' use of hooks and lines, and observed that "angling" was a "common practice" of fishing.

[403] In 1788, Robert Haswell, while in Barkley Sound, observed two native men who "paddled farther out to sea where they hoved too, to fish".

[404] Jewitt recorded "natives fishing" almost daily. He also noted that the natives went "about nine miles from Nootka" to catch halibut.

[405] Sproat observed that the Nuu-chah-nulth went about 12 miles offshore to access the best halibut grounds. He wrote, at p.225:

> ...Hundreds of canoes, with two or three men in each, start at midnight for the fishing-ground, so as to arrive there in the morning. After half a day's work, if the sea is moderate, the canoes are quite laden and the fishermen return.

[406] The first contact with Europeans (Pérez in 1774) took place six miles offshore. In their second European encounter with Bruno de Hezeta the following year, the Nuu-chah-nulth paddled 18 miles from shore to meet the vessel. John Meares and Estevan Jose Martínez documented Wikaninnish travelling by canoe from Opitsat (near Tofino) to Yuquot, a distance of a little over 80 kilometres.

[407] In January 1794, Captain Magee of *The Jefferson* encountered the Ahousaht chief in Barkley Sound where he had come to buy dried fish. That was more than 50 kilometres from Ahousaht territory and would have required travelling in outside waters off Long Beach, in this case during the month of January.

[408] Observations in the historical and ethnographic record document Nuu-chah-nulth travelling very long distances and showing remarkable skill using a canoe. In my view, not only does the evidence show that the Nuu-chah-nulth used their ocean territories expansively, it also shows that they had capacity to do so.

[409] As a fishing people, the plaintiffs say that their way of life was, of necessity, not confined to localized areas. They regularly used their definite bounded and owned territories to follow the fish throughout those territories, including to distances miles offshore where the territories extended. They submit that the evidence supports their contentions in this regard. I agree with these submissions, but that does not resolve the question of how far offshore this Court should define the plaintiffs' boundaries. The submissions of the parties on this point were not helpful. The plaintiffs claim 100 nautical miles of which there is no evidence. In oral argument, they made reference to lesser distances referenced in the evidence. Canada says that in the absence of a pleading specifying a distance, it need not

address the issue. In my view, the pleading "or portion thereof" is sufficient for the Court to assess the extent of the territory claimed by the plaintiffs.

[410] Hezeta encountered the Nuu-chah-nulth 18 miles offshore. Sproat's observations of offshore fishing extended to 12 miles. The experts testified that Sproat's observations about fishing methods appeared to have considerable time depth. Jewitt noted the natives fished about nine miles offshore. Drucker noted that the Nuu-chah-nulth territories extended for miles offshore (p. 247), and that "not only rivers, but inlets, bays, and the outside seas were divided by natural landmarks into tracts which belonged to various chiefs." Walker observed in 1786 that a group of canoes had been following his ship when he left Espiranza Inlet but left when the ship apparently crossed a boundary line into another group's territory. Meares recorded a similar observation, that is, that the chiefs of the territories of which he was sailing abreast accompanied him until he passed into other chiefs' territories. In addition, many of the plaintiff band members testified about what they understood to be long traditions of fishing offshore at halibut banks, which were approximately twelve miles offshore.

[411] I am satisfied that despite the relative absence of archaeological records (and there has not been extensive archaeological research in most parts of the plaintiffs' territories) of faunal deposits of cod and halibut, there is evidence that the Nuu-chah-nulth's traditional territories and fishing in those territories extended beyond the rivers and sounds to the offshore waters. The evidence, however, is sparse as to how far offshore the Nuu-chah-nulth regularly fished. Doing the best I can with the evidence available, I would accept that the plaintiffs' fishing territories include the rivers, inlets, and sounds within each plaintiff's territory as shown in Exhibit 26. Some of the plaintiffs' elders who testified described contemporary offshore fishing at halibut fishing banks. These are probably the same fishing banks referred to by Jewitt and Sproat. Jewitt's evidence that the fishing territories regularly used were about nine miles offshore does not appear to be contradicted and is the best evidence as to the distance offshore the Nuu-chah-nulth travelled. His evidence is supported by the other explorer evidence I mentioned. On the basis of all of this

evidence, I am persuaded the Nuu-chah-nulth fishing territories extended at least nine miles offshore.

[412] I now turn to the evidence of the boundaries between the various Nuu-chah-nulth territories, or what I have called the latitudinal boundaries. There is considerable evidence that the Nuu-chah-nulth people had strict customs of ownership of territories and resources within their territories, as well as strict notions of boundaries. The plaintiffs plead that they exercised their ancestral fishing practices within the boundaries of their own territories. While Canada argues that it is necessary to draw precise boundaries around those territories, the plaintiffs say that for the purposes of proving aboriginal rights, as opposed to aboriginal title, it is not necessary to strictly construe the boundaries of each plaintiff. I agree with the plaintiffs. The determination of territorial boundaries is somewhat flexible and primarily requires the plaintiff to prove a connection with the territory sufficient to prove that fishing in that territory is integral to its culture.

[413] I have already reviewed the evidence linking each plaintiff group to the modern-day plaintiffs. Drucker prepared territorial maps of each of the northern and central Nuu-chah-nulth groups he studied. The maps depict the territorial boundaries of each group, as well as the local group sites within those territories. Mr. Inglis testified that based on his research, he is in agreement with Drucker's boundaries. In addition to Drucker, the sources used by Mr. Inglis include the explorer and fur trade maps and journals, the maps prepared by the British hydrographic study of the coast conducted between 1860 to 1862, and the reserve creation documents from the 1880s. It is my view that the documentation of territorial boundaries of the various groups has considerable time depth.

[414] Insofar as we are dealing with the exercise of fishing rights, those foreshore boundaries are pleaded with sufficient particularity to link the territories to the various plaintiff groups. The harvesting of fish in the environs of those territories is sufficiently described in the plaintiffs' pleadings. It is unnecessary to review the evidence of the plaintiffs' territories with the same specificity that would be required

for title adjudication. Accordingly, I find that the plaintiffs have proven the necessary site specificity as pleaded and as shown on the maps in Exhibit 26, with the exception of the offshore boundary which I would draw at nine miles from shore, that is, from a line drawn from headland to headland within each plaintiff's territory.

E. Continuity with Modern Activity

[415] In order for an activity to be recognized as an aboriginal right, the present practice, custom or tradition must have reasonable continuity with the practices, customs and traditions that existed prior to contact. As Lamer C.J. explained at para. 63 of *Van der Peet*:

> ... It is precisely those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of aboriginal rights under s. 35(1). Where an aboriginal community can demonstrate that a particular practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).

[416] Lamer C.J. went on to explain that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices and those which existed prior to contact; an interruption will not preclude the establishment of an aboriginal right. Courts are to exercise flexibility, he wrote, in assessing the establishment of continuity.

[417] Importantly, pre-contact practices are allowed to evolve and may find modern form. Bastarache J. discussed this notion at paras. 48-49 of *Sappier*:

> 48 Although the nature of the *practice* which founds the aboriginal right claim must be considered in the context of the pre-contact distinctive culture of the particular aboriginal community, the nature of the *right* must be determined in light of present-day circumstances. As McLachlin C.J. explained in *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43, at para. 25, "[l]ogical evolution means the same sort of activity, carried on in the modern economy by modern means." It is the practice, along with its associated uses, which must be allowed to evolve. The right to harvest wood for the construction of temporary shelters must be allowed to evolve into a right to

> harvest wood by modern means to be used in the construction of a modern dwelling. Any other conclusion would freeze the right in its pre-contact form.
>
> 49 Before this Court, the Crown submitted that "[l]arge permanent dwellings, constructed from multi-dimensional wood, obtained by modern methods of forest extraction and milling of lumber, cannot resonate as a Maliseet aboriginal right, or as a proper application of the logical evolution principle", because they are not grounded in traditional Maliseet culture (appellant's factum in *Sappier* and *Polchies* appeal at para. 76; appellant's factum in *Gray* appeal at para. 80). I find this submission to be contrary to the established jurisprudence of this Court, which has consistently held that ancestral rights may find modern form: *Mitchell*, at para. 13. In *Sparrow*, Dickson C.J. explained that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time" (p. 1093). Citing Professor Slattery, he stated that "the word 'existing' suggests that those rights are 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'" (p. 1093, citing B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 782). In *Mitchell*, McLachlin C.J. drew a distinction between the particular aboriginal right, which is established at the moment of contact, and its expression, which evolves over time (para. 13). L'Heureux-Dubé J. in dissent in *Van der Peet* emphasized that "aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live" (para. 172). If aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless. Surely the Crown cannot be suggesting that the respondents, all of whom live on a reserve, would be limited to building wigwams. If such were the case, the doctrine of aboriginal rights would truly be limited to recognizing and affirming a narrow subset of "anthropological curiosities", and our notion of aboriginality would be reduced to a small number of outdated stereotypes. The cultures of the aboriginal peoples who occupied the lands now forming Canada prior to the arrival of the Europeans, and who did so while living in organized societies with their own distinctive ways of life, cannot be reduced to wigwams, baskets and canoes.

[418] I have already reviewed the evidence of fishing and trade in fish from contact to 1850. What follows is a review of the evidence with respect to fishing activities from 1850 up to the modern period.

[419] The plaintiffs submit that the evidence demonstrates that prior to contact, fishing (all species for all purposes) and trading were practices integral to their culture. Over the more than two centuries since contact with Europeans, fishing has continued to be fundamental to their culture, though the form of fishing has evolved, and the role of trade in their pre-contact society has largely been subsumed by participation in the commercial fishery. They say that since before contact to the

present day, they have and remain a fishing people whose communities rely on fishing to sustain them. In light of this, the plaintiffs say, the appropriate right that has modern relevance is a right to fish all species for all purposes, including for commercial sale.

[420] Canada responds that aboriginal participation in the commercial fishery did not begin until such time as European settlement and the establishment of industries on the WCVI created a commercial market for fisheries products. It says that these activities are very different from the pre-contact practice of harvesting certain species of fish, and distributing surpluses of fisheries resources through sharing with kin, feasting and potlatching. Canada submits that the plaintiffs' participation in the modern commercial fishery is not rooted in its activities from the pre-contact period and, as such, they have not established continuity.

1. 1850 – 1871 Colonial Period

[421] The plaintiffs say that they traded fish and dogfish oil throughout the colonial period. Canada acknowledges that the Nuu-chah-nulth people harvested fisheries resources for FSC purposes but says that there is no connection between the plaintiffs' entry into commercial fishing activities, which first began in the 1850s, and their pre-contact fishing practices.

[422] From 1850 to 1900, the Nuu-chah-nulth were major producers and traders of dogfish oil which they traded with European traders. Dr. Lovisek (relying on Sproat) opined that the Nuu-chah-nulth of Barkley Sound bartered slaves, canoes, articles of food, clothing or ornament from colonists in exchange for oil, fish skins and furs. Sproat described a trade during this period between the Nuu-chah-nulth and the tribes at the southern end of Vancouver Island and on the American side of the border. He stated that the Nuu-chah-nulth traded cedar bark baskets and dried halibut and herring in exchange for camas, which is a lily-type of bulbous plant. Sproat also commented, at p. 38, about the nomadic nature of the Huu-ay-aht tribe:

> … Following the salmon as they swim up the rivers and inlets, the natives place their summer encampments at some distance from the seaboard,

> towards which they return for the winter season about the end of October, with a stock of dried salmon – their principal food at all times. By this arrangement, being near the seashore, they can get shellfish, if their stock of salmon runs short, and can also catch the first fish that approach the shore in the early spring. Every tribe, however, does not thus regularly follow the salmon; some of the tribes devote a season to whale fishing, or to the capture of the dogfish, and supply themselves with salmon by barter with other tribes.

[423] Sproat noted the Nuu-chah-nulth trade of halibut off Barkley Sound, at p. 225:

> Thousands of halibut, some of them weighing more than 200 pounds, are caught by the natives and are exchanged for the potatoes, gammaas [camas], rush mats and other articles.

[424] Mr. Inglis cited an 1862 article from a Victoria newspaper, *The British Colonist*, in which it was noted the Barkley Sound Indians had been offering codfish for sale. Mr. Inglis also reported Sproat's reference (p. 37) that the Nuu-chah-nulth depended mainly on fish for their means of subsistence and that any change in the habits of the fish or a serious diminution in the fish would "reduce the Aht people to great straits." As cited earlier in these Reasons, Sproat indicated "this fish is to man here what the corn crop is in England or what the potato crop was in Ireland."

[425] I conclude that the Nuu-chah-nulth fished and sold or traded fish including salmon, halibut, dogfish and dogfish oil during the colonial period.

2. 1871 – 1920 Early Confederation Period

[426] To place this period in its historical context, British Columbia entered into Confederation in 1871. Fisheries and Indians came under the jurisdiction of the federal government at that time.

[427] Canada argues that there is no continuity or link between the plaintiffs' fishing practices at contact and "modern" commercial fishing during the 1871-1920 period. It says that the participation of the Nuu-chah-nulth in the fishing industry was in the form of wage work rather than independent commercial fishing. By 1870, it says, commercial sealing had become the preferred occupation of the Nuu-chah-nulth. By 1890 and into the early 1900s with the introduction of canneries and other fish

processing plants, the Nuu-chah-nulth became wage labourers fishing directly for the canneries, most often with boats supplied by the canneries, and/or working inside the canneries processing fish.

[428] Dr. Boxberger testified that, “By 1919, the BC fishing industry employed 9000 people, the majority of whom were Indians, and more than one-third of all salmon fishermen were Indians.”

[429] Evidence as to the activities of the Nuu-chah-nulth associated with the fishing industry during this period was gathered by the parties primarily from government reports, including: an 1874 report from George Blenkinsop to the Department of Indian Affairs; reports from Indian Superintendent Powell from 1872 to 1889; the report of a 1916 Royal Commission on Indian Affairs which travelled to the WCVI to meet with the Nuu-chah-nulth in their communities; and excerpts from the Department of Indian Affairs Annual Reports written by John A. MacDonald, then Superintendent of Indian Affairs; Harry Guillord, Indian Agent; Thomas White, 1887 Superintendent General of Indian Affairs; and A.W. Vowell, Indian Superintendent in 1895.

[430] What is evident from a review of these documents is that the various officials concluded that the Nuu-chah-nulth lived by fishing, otter and seal hunting, and manufacturing oil from dogfish. There was resistance by these government officials to the notion that the Nuu-chah-nulth should be persuaded to turn their attentions to agriculture for subsistence. It was noted that income from fishing was good at times and from sealing at other times, and that the Nuu-chah-nulth went to the American side for the hop picking and other work, there being little work and low wages at the canneries.

[431] Superintendent Powell noted the value of the fisheries to the Nuu-chah-nulth in his 1874 annual report, in which he stated:

> They are … the richest of any Indians I have met in the Province … There seems to be scarcely a limit to their productive resources, and I am told that it

> is not at all uncommon for any Indian to realize from $500 to $1,000 per annum from their sealing grounds and fisheries alone.

[432] The plaintiffs note that during this period it became illegal under Canada's statutory regime for Indians to exchange fish for money or other goods. Section 35(2) of the *Fishery (General) Regulations*, S.O.R./93-53, made it an offence to, "buy, sell, trade, barter or offer to buy, sell, trade or barter any fish" without a commercial licence.

[433] In my view, the principal occupation of the majority of the Nuu-chah-nulth people during this period remained associated with the fishery. The fact that many found sealing more remunerative does not detract from the continuing overwhelming importance of the fishing industry to them.

[434] It is clear that during this period, fishing and trading in fish in its various forms remained important and integral activities to the Nuu-chah-nulth but gradually evolved into modern commercial fishing either for wages or for sale. Their employment also broadened to include sealing, working in canneries, hop picking and other wage work. I consider fishing for canneries to constitute commercial fishing. I am satisfied that there is sufficient continuity of commercial fishing and activities during this period for purposes of establishing the plaintiffs' aboriginal rights.

[435] In any event, Canada cannot argue that the plaintiffs were not exercising their aboriginal practices of fishing and trading in fish when fisheries regulations made it illegal for them to do so except with a licence.

3. 1920 – 1960 mid-20th century – modern period

[436] As reviewed later in these Reasons, it is clear from the evidence of Michelle James, Canada's fishery expert and Allen Wood, the plaintiffs' fishery expert, as well as that of members of the plaintiff First Nations who testified, that fishing and commercial fishing were integral activities to Nuu-chah-nulth society in the modern period. Participation in the fishing industry in the modern period was very high, and

the evidence is compelling that the Nuu-chah-nulth remained a fishing people during this period.

F. Characterization of the Right

[437] To repeat, in *Van der Peet*, the Supreme Court set out a multi-tiered analysis to considering the existence of an aboriginal right:

a. characterizing the claimed aboriginal right;

b. establishing the existence of the ancestral practice, custom or tradition advanced as supporting the claimed right;

c. determining whether the ancestral practices, customs or traditions were integral to the distinctive culture of the claimant's pre-contact society; and

d. determining whether reasonable continuity exists between the pre-contact practice and the contemporary claim.

[438] Before turning to the characterization of the right, I will summarize my conclusions in respect to the other parts of the *Van der Peet* test, having now considered the evidence and submissions on these points.

[439] The second and third parts of the *Van der Peet* analysis direct the Court to consider the existence of the ancestral practices supporting the claimed rights to both harvest fish and sell that fish, and whether those rights were integral to the distinctive cultures of pre-contact Nuu-chah-nulth society. At contact, the Nuu-chah-nulth were overwhelmingly a fishing people. They depended almost entirely on their harvest of the resources of the ocean and rivers to sustain themselves. The Nuu-chah-nulth traded these resources with other aboriginal groups both within a loosely defined kinship network and outside that network. After contact with Europeans, that well-established trading custom was expanded to adapt to the influx of European explorers and fur traders. Having concluded that the various Nuu-chah-nulth tribes shared a language and culture, I have, where appropriate, made the necessary

inferences from the evidence that all the Nuu-chah-nulth peoples engaged in trade with each other even though the evidence of indigenous trade cannot on the basis of the direct observations made at contact be attributed to each of the plaintiffs. In my view, there is sufficient evidence of indigenous trade up and down the WCVI for me to conclude that each of the plaintiffs was engaged in that indigenous trade.

[440] I am also satisfied that fishing and trading in fisheries resources were practices that were integral to the distinctive cultures of pre-contact Nuu-chah-nulth society. I have concluded that each of the plaintiffs has demonstrated sufficient connection to the pre-contact society from whose aboriginal practices they claim to have derived their aboriginal rights. Similarly, each of the plaintiffs has demonstrated sufficient geographic connection between their claimed fishing territories and those of their ancestors from whom they claim to derive their aboriginal rights. Fishing was the predominant feature of the Nuu-chah-nulth society and I have concluded that indigenous trade in fish was also an integral feature of Nuu-chah-nulth society. As distinct from the conclusion reached by Satanove J. in *Lax Kw'alaams Indian Band* that any indigenous trade in fish by the plaintiff band was infrequent or opportunistic, I conclude these plaintiffs have proven trade in fish to be a prominent feature of their society.

[441] The fourth part of the *Van der Peet* analysis requires the Court to consider whether reasonable continuity exists between the pre-contact practice and the contemporary claim. I have considered the evidence of continuity of fishing as it evolved into commercial fishing. The plaintiffs have proven that Nuu-chah-nulth people have continued until recent decades to fish. That fishing activity has at times been done as wage work, and at times on a commercial basis. The evolution of the modern fishery is discussed in more detail in the infringement section of this judgment. Suffice it to say that there is ample evidence from which to conclude that the plaintiffs have proven reasonable continuity between the pre-contact practice of fishing and trading that fish, and their contemporary claim.

[442] I indicated earlier in my discussion of the plaintiffs' aboriginal rights claim that I would address the appropriate characterization of any rights after I reviewed the evidence and made my findings of fact. Having now done so, I return to the question of characterization.

[443] Courts have long grappled with how to characterize aboriginal fishing rights. In *Sparrow*, the first of the modern aboriginal fishing rights cases, the Supreme Court considered fishing rights in the limited context of the right to fish for FSC purposes, and expressly declined to consider the commercial aspect to the right (pp. 1100-1101). The Supreme Court subsequently confronted the issue in the *Van der Peet* trilogy (*Van der Peet, N.T.C. Smokehouse* and *Gladstone*). In each of the three cases, whether the particular aboriginal group had an aboriginal right to fish for food was never in question; rather, it was the extent to which an aboriginal right to sell or to exchange fish existed.

[444] The issue before the Court in the trilogy and raised again in this case is how to properly characterize the right to sell fish in terms of quantity where there is no internal limitation on the right. In contrast to fishing for FSC purposes, a right which is internally limited by consumption needs, a commercial fishing right is only limited by the abundance of fish and the catching power of the fisher. The application of government limitations on aboriginal fishers is discussed later in these Reasons. Nevertheless, Supreme Court of Canada jurisprudence suggests that I must, at least to some extent, incorporate some contours or limitations reflective of the aboriginal practice at contact with Europeans within the characterization analysis.

[445] *Van der Peet* was the core decision in the trilogy with respect to characterization of the aboriginal right claimed. Briefly with respect to its facts, Mrs. Van der Peet, a member of the Sto:lo First Nation, was charged with selling 10 salmon caught under the authority of an Indian food fish licence for $50, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*, S.O.R./84-248. This provision prohibited the sale or barter of fish caught under such a licence.

Mrs. Van der Peet asserted an aboriginal right to sell the fish as a defence to the charge.

[446] Lamer C.J., writing for the majority, began his analysis with a general discussion of how aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* should be defined. He formulated the "integral to the distinctive culture" test for aboriginal rights, and set out the analysis for determining whether a particular activity satisfied the test: (1) characterization of the claim; (2) determination of whether the activity claimed is part of a practice, custom or tradition which was, prior to contact with Europeans, an integral part of the distinctive aboriginal society of the people in question; and (3) an assessment of continuity. Of relevance for present purposes is the question of characterizing the aboriginal right in question.

[447] Lamer C.J. indicated that the correct characterization was important because whether or not the evidence supported the claim would depend in significant measure on what the evidence was being called to support. By way of illustration, he expressed his disagreement with the characterization of Mrs. Van der Peet's claim by both the majority and dissenting judges of the British Columbia Court of Appeal (*R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75 (B.C.C.A.)).

[448] The majority judges had held that Mrs. Van der Peet's claim was that the practice of selling fish "on a commercial basis" constituted an aboriginal right. They rejected her claim, in part, on the basis that the evidence did not support the existence of such a right. Lamer C.J. found this characterization of the appellant's claim to be in error, as Mrs. Van der Peet's claim was that the practice of selling fish was an aboriginal right, not that selling fish "on a commercial basis" was. He also considered the approach of Lambert J.A. in dissent to have been in error. Lambert J.A. had endorsed a "social" method of approaching aboriginal rights, which related "the custom to the significance of the custom in the lives of the aboriginal people in question": para. 137 of the Court of Appeal judgment. Applying this approach to the facts before him, Lambert J.A. wrote, at paras. 149-151:

> It seems to me also that the "social" description of aboriginal rights best accords with good sense in relation to the modern exercise of the rights. The dietary resources available to the Sto:lo Indians now are much more varied and ample than they were in 1846 and earlier when the people were much afflicted by sickness. I am sure that those Indian peoples would wish to take the opportunity to vary their diet in accordance with the standards of the Canada Food Guide. Surely, if they have an aboriginal right to fish for food it would be wiser in today's times for the Indians to fish for the amount of salmon per capita that would have provided them with their food resources, livelihood and occupation in 1846 and earlier, but, instead of eating all that fish, to sell so much of it as they wish in order to have the financial resources to buy other sources of nourishment for the protection of their health.
>
> For those reasons I conclude that the best description of the aboriginal customs, traditions and practices of the Sto:lo people in relation to the sockeye salmon run on the Fraser River is that their aboriginal customs, traditions and practices have given rise to an aboriginal right, to be exercised in accordance with their rights of self-regulation including recognition of the need for conservation, to catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood, and, in any event, not less than the quantity of salmon needed to provide every one of the collective holders of the aboriginal right with the same amount of salmon per person per year as would have been consumed or otherwise utilized by each of the collective holders of the right, on average, from a comparable year's salmon run, in, say, 1800.
>
> In my opinion that represents the most correct contemporary expression of the aboriginal fishing rights of the Sto:lo people derived from their ancestral customs, traditions and practices.
>
> [Emphasis added]

[449] As noted, Lamer C.J. found this approach to have been in error, as he explained at para. 52 of his reasons:

> It was however, equally incorrect to adopt, as Lambert J.A. did, a "social" test for the identification of the practice, tradition or custom constituting the aboriginal right. The social test casts the aboriginal right in terms that are too broad and in a manner which distracts the court from what should be its main focus – the nature of the aboriginal community's practices, customs or traditions themselves. The nature of an applicant's claim must be delineated in terms of the particular practice, custom or tradition under which it is claimed; the significance of the practice, custom or tradition to the aboriginal community is a factor to be considered in determining whether the practice, custom or tradition is integral to the distinctive culture, but the significance of a practice, custom or tradition cannot, itself, constitute an aboriginal right.
>
> [Emphasis added]

[450] In his view, the correct characterization of an applicant's claim required consideration of such factors as: (1) the nature of the action which the applicant is claiming was done pursuant to an aboriginal right; (2) the nature of the governmental regulation, statute or action being impugned; and (3) the practice, custom or tradition being relied upon to establish the right. In applying these factors to the case before them, therefore, the Court would consider the actions which led to Mrs. Van der Peet being charged, the fishery regulation under which she was charged, and the practices, customs and traditions she invoked in support of her claim in order to appropriately characterize it.

[451] Although subsequent courts have tended to uniformly apply these three factors, virtually elevating them to a test, it should be observed that Lamer C.J. introduced those factors with the words, "[t]o characterize the applicant's claim correctly, a court should consider such factors as …". This suggests that they are just that, factors that a court may consider, and that they are neither mandatory nor exhaustive. This flexibility is important given that *Van der Peet*, as well as the subsequent decisions that have applied the characterization analysis set down therein, were regulatory prosecutions, a context quite different from that at bar.

[452] Lamer C.J. determined the correct characterization of Mrs. Van der Peet's claim to be an aboriginal right to exchange fish for money or other goods. He based this characterization on both the specific acts which had led her to being charged, as well as on the regulation under which she had been charged. The sale of 10 salmon for $50, in the absence of evidence that she had sold salmon on other occasions or on a regular basis, could not be said to constitute a sale on a commercial or market basis. Further, the regulations under which she had been charged prohibited all sale or trade of fish caught pursuant to an Indian food fish licence. Thus, Lamer C.J. reasoned, to argue that the regulations implicated her aboriginal right required no more than that she demonstrate an aboriginal right to the exchange of fish for money (sale) or other goods (trade); it was not necessary that she demonstrate a right to sell fish commercially.

[453] The evidence in *Van der Peet* established that the Sto:lo fished for food and ceremonial purposes but that there was no regularized market system in the exchange of fish. Any trade that did occur was incidental to fishing for food purposes. This led Lamer C.J. to write that while the evidence clearly demonstrated that fishing for food and ceremonial purposes was a significant and defining feature of the Sto:lo culture, it was not sufficient to demonstrate that the exchange of salmon was an integral part of Sto:lo culture. Further, the absence of a regularized trading system or market indicated that any exchange of salmon did not take place on a basis sufficiently widespread to suggest that the exchange was a defining feature of Sto:lo society.

[454] Lamer C.J. ultimately concluded that Mrs. Van der Peet had failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo society prior to contact. Thus, the aboriginal rights of the Sto:lo did not include the right to exchange fish for money or other goods.

[455] McLachlin J. wrote dissenting reasons that took a different approach to identifying what constitutes an aboriginal right. In her view, that question was to be answered by looking at what the law had historically accepted as fundamental aboriginal rights. She would have held that this encompassed the right to be sustained from the land or waters upon which an aboriginal people traditionally relied for sustenance; further, trade to the extent necessary to maintain traditional levels of sustenance was a permitted exercise of this right.

[456] Applying this approach to aboriginal fishing rights, McLachlin J. posed the question to be decided in *Van der Peet* as whether aboriginal people enjoy a constitutional right to fish for commercial purposes. (She had earlier explained in para. 236 that she saw little point in labelling Mrs. Van der Peet's sale of fish as something other than commerce: "When one person sells something to another, that is commerce. Commerce may be large or small, but commerce it remains.") Her general approach to determining whether an aboriginal people possessed an aboriginal right to trade fish was set out, at paras. 278-279:

> The aboriginal right to fish may be defined as the right to continue to obtain from the river or the sea in question that which the particular aboriginal people have traditionally obtained from the portion of the river or sea. If the aboriginal people show that they traditionally sustained themselves from the river or sea, then they have a *prima facie* right to continue to do so, absent a treaty exchanging that right for other consideration. At its base, the right is not the right to trade, but the right to continue to use the resource in the traditional way to provide for the traditional needs, albeit in their modern form. However, if the people demonstrate that trade is the only way of using the resource to provide the modern equivalent of what they traditionally took, it follows that the people should be permitted to trade in the resource to the extent necessary to provide the replacement goods and amenities. In this context, trade is but the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised.
>
> The right to trade the products of the land and adjacent waters for other goods is not unlimited. The right stands as a continuation of the aboriginal people's historical reliance on the resource. There is therefore no justification for extending it beyond what is required to provide the people with reasonable substitutes for what it traditionally obtained from the resource. In most cases, one would expect the aboriginal right to trade to be confined to what is necessary to provide basic housing, transportation, clothing and amenities – the modern equivalent of what the aboriginal people in question formerly took from the land or the fishery, over and above what was required for food and ceremonial purposes. Beyond this, aboriginal fishers have no priority over non-aboriginal commercial or sport fishers. On this principle, where the aboriginal people can demonstrate that they historically have drawn a moderate livelihood from the fishery, the aboriginal right to a "moderate livelihood" from the fishery may be established (as Lambert J.A. concluded in the British Columbia Court of Appeal). However, there is no automatic entitlement to a moderate or any other livelihood from a particular resource. The inquiry into what aboriginal rights a particular people possess is an inquiry of fact, as we have seen. The right is established only to the extent that the aboriginal group in question can establish historical reliance on the resource. For example, evidence that a people used a water resource only for occasional food and sport fishing would not support a right to fish for purposes of sale, much less to fish to the extent needed to provide a moderate livelihood. There is, on this view, no generic right of commercial fishing, large-scale or small. There is only the right of a particular aboriginal people to take from the resource the modern equivalent of what by aboriginal law and custom it historically took. This conclusion echos the suggestion in *Jack v. The Queen*, [1980] 1 S.C.R. 294, approved by Dickson C.J. and La Forest J. in *Sparrow,* of a "limited" aboriginal priority to commercial fishing.

[457] In *Gladstone*, the appellants, members of the Heiltsuk First Nation, were charged under the *Fisheries Act* with offering to sell herring spawn-on-kelp caught under the authority of an Indian food fish licence. The volume of herring spawn-on-

kelp at issue was 4,200 pounds. The appellants raised as a defence that the regulations violated their aboriginal rights.

[458] Lamer C.J. held that the actions of the appellants appeared to be best characterized as the commercial exploitation of herring spawn-on-kelp. However, as the regulations under which they were charged prohibited all sale or trade in herring spawn-on-kelp without the appropriate licence, the regulations were best characterized as aimed at the exchange of herring spawn-on-kelp for money or other goods, regardless of whether the extent or scale of that sale could reasonably be characterized as commercial in nature. Lamer C.J.'s means of resolving this difficulty in characterization was to address both possible characterizations of the appellants' claim.

[459] The trial judge had concluded that the Heiltsuk had regularly harvested herring spawn-on-kelp as a food source, and that the band had engaged in inter-tribal trading and barter of the herring spawn-on-kelp. Lamer C.J. found that the facts as found by the trial judge supported the appellants' claim that exchange of herring spawn-on-kelp for money or for other goods was a central, significant and defining feature of the culture of the Heiltsuk prior to contact. As the evidence pointed to trade in the resource in tonnes, he found that the extent and scope of the trading activities of the Heiltsuk supported their further claim that they had an aboriginal right to sell herring spawn-on-kelp to an extent best described as commercial. Lamer C.J. concluded that the appellants had demonstrated an aboriginal right to trade herring spawn-on-kelp on a commercial basis.

[460] In her concurring reasons, McLachlin J. applied the approach she had set out in *Van der Peet*. She would have found that the evidence clearly established that the Heiltsuk derived their sustenance from trade derived from the herring spawn-on-kelp resource. They relied on trade to supply them with the necessaries of life, principally, other food products. At paras. 164-165 she wrote:

> The next question is whether the Heiltsuk's use of the resource of herring spawn on kelp was confined to sustenance or whether the trade in question allowed the band to accumulate wealth beyond that required for a basic

> standard of living. The evidence indicates that large quantities of herring spawn on kelp were traded – amounts that would yield great wealth today because of large demand for herring spawn on kelp by foreign markets. However, the right to derive from a resource what was traditionally derived from that resource is not necessarily a right to harvest the same quantity of fish from that resource as was traditionally harvested. The right is rather to take from the fishery enough to secure "the modern equivalent of what the aboriginal people in question formerly took from the land or the fishery".
>
> Despite the large quantities of herring spawn on kelp traded, the evidence does not indicate that the trade of herring spawn on kelp provided for the Heiltsuk anything more than basic sustenance. There is no evidence in this case that the Heiltsuk accumulated wealth which would exceed a sustenance lifestyle from the herring spawn on kelp fishery. It follows that the aboriginal right to trade in herring spawn on kelp from the Bella Bella region is limited to such trade as secures the modern equivalent of sustenance: the basics of food, clothing and housing, supplemented by a few amenities.

[461] In *N.T.C. Smokehouse*, the appellant, a corporation operating a food processing plant, was charged under the *Fisheries Act* with various offences related to selling and purchasing fish caught under the authority of an Indian food fish licence. The charges arose from the appellant's purchase of 119,435 pounds of salmon caught by members of the Sheshaht and Opetchesaht bands, and its sale of 105,302 pounds of that salmon.

[462] Lamer C.J. again applied the principles he had articulated in *Van der Peet*. He noted that in contrast to Mrs. Van der Peet's sale of 10 salmon, the immediate case involved the sale of in excess of 119,000 pounds of salmon by 80 people, which appeared much closer to an act of commerce, defined in the *Concise Oxford Dictionary* (7th ed. 1982) as an "exchange of merchandise or services, especially on a large scale" (para. 18). This suggested that the appellant's claim was that the Sheshaht and Opetchesaht had the aboriginal right to fish commercially. Again, however, the regulations under which the appellant had been charged prohibited all sale or trade of salmon caught under the authority of an Indian food fish licence. This suggested that, despite the scale and extent of the sale and trade by the Sheshaht and Opetchesaht, their claim was best characterized in the manner suggested in *Van der Peet*, a claim to the right to exchange fish for money or other goods. As in *Gladstone*, Lamer C.J. characterized the claim at the outset as the

right to exchange fish for money or other goods, and proposed to turn to the claim to fish commercially only if the lesser claim was established.

[463] Ultimately, Lamer C.J. found that the findings of fact made by the trial judge did not support the appellant's claim that prior to contact the exchange of fish for money or other goods was an integral part of the distinctive cultures of the Sheshaht and Opetchesaht. Sales of fish that were "few and far between" could not be said to have the defining status and significance necessary to find an aboriginal right to exchange fish for money or other goods. Moreover, exchanges of fish at potlatches and at ceremonial occasions, because incidental to those events, did not have the independent significance necessary to constitute an aboriginal right.

[464] Although the concept of deriving a moderate livelihood from a resource as it was developed by McLachlin J. in the *Van der Peet* trilogy did not find favour in the Court, aspects of her reasoning were nevertheless subsequently cited in *R. v. Marshall*, [1999] 3 S.C.R. 456, where Binnie J. referred to her dissenting reasons in *Gladstone* in the context of his discussion of a treaty right to trade for "necessaries". At para. 59, he wrote:

> The concept of "necessaries" is today equivalent to the concept of what Lambert J.A. in *R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75, at p. 126, described as a "moderate livelihood". Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth (*Gladstone*, *supra*, at para. 165). It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today.

[465] His reference to para. 165 of *Gladstone* was to the reasons of McLachlin J. Binnie J. referred further to her reasons when he continued, at para. 60:

> The distinction between a commercial right and a right to trade for necessaries or sustenance was discussed in *Gladstone*, *supra*, where Lamer C.J., speaking for the majority, held that the Heiltsuk of British Columbia have "an aboriginal right to sell herring spawn on kelp to an extent best described as commercial" (para. 28). This finding was based on the evidence that "tons" of the herring spawn on kelp was traded and that such trade was a central and defining feature of Heiltsuk society. McLachlin J., however, took

> a different view of the evidence, which she concluded supported a finding that the Heiltsuk derived only sustenance from the trade of the herring spawn on kelp. "Sustenance" provided a manageable limitation on what would otherwise be a free-standing commercial right. She wrote at para. 165:
>
> > Despite the large quantities of herring spawn on kelp traditionally traded, the evidence does not indicate that the trade of herring spawn on kelp provided for the Heiltsuk anything more than basic sustenance. There is no evidence in this case that the Heiltsuk accumulated wealth which would exceed a sustenance lifestyle from the herring spawn on kelp fishery.
> >
> > [Emphasis in original by Binnie J.]
>
> In this case, equally, it is not suggested that Mi'kmaq trade historically generated "wealth which would exceed a sustenance lifestyle". Nor would anything more have been contemplated by the parties in 1760.

[466] *Marshall* was a treaty rights case, and minutes recording pre-treaty negotiations had referred to the concept of "necessaries" in the context of the treaty provision that was at issue in the case. This extrinsic evidence led Binnie J. to conclude that what had been contemplated in a rather ambiguous provision was a right to trade for necessaries, as opposed to trade generally for economic gain. Securing necessaries, he wrote, did not extend to the open-ended accumulation of wealth. The appellant in *Marshall* had landed 463 pounds of eel, which he sold for $787. Binnie J. agreed with the characterization of the appellant's activity as small-scale commercial activity to help subsidize himself and his common law spouse. The activity fell within what was reasonably required for necessaries. Binnie J. later wrote that catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards could be established by regulation and enforced without violating the treaty right.

[467] Binnie J.'s comments regarding necessaries at para. 59 of *Marshall* were, in turn, cited by Vickers J. in *Tsilhqot'in Nation*, where he concluded that the plaintiff had an aboriginal right to trade in furs, pelts and other animal products as a means of securing a moderate livelihood. Paragraph 1263 encapsulates his factual findings in this regard:

> Tsilhqot'in people moved about their territory harvesting what the land had to offer, according to their needs and the seasons. Fish, game, root plants, and berries provided the staples for their diets. Salmon were a critical

> component. When salmon failed, the Tsilhqot'in way of life included a trade of furs, root plants, and berries for salmon. I am satisfied that trade was not just opportunistic or incidental and was not limited to times of need. It was a way of life, accelerated in times of need. Trade was always undertaken for the necessaries of life; it was not trade to accumulate wealth. In my view, the trading practice of the Tsilhqot'in people, at the time of first contact and continuing well into the twentieth century, was more than sufficient to meet the tests of cultural integrality set out by the Supreme Court of Canada.

[468] After citing para. 59 of *Marshall*, Vickers J. held that the right claimed was properly characterized as an aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood. He further held that the evidence demonstrated that the Tsilhqot'in ancestors engaged in that right and that it was integral to their distinctive culture.

[469] *Sappier* is the Supreme Court's most recent decision that bears upon the characterization of aboriginal rights. In it, the Court revisited the definitional elements of aboriginal rights.

[470] *Sappier* was a joinder of appeals arising from two separate prosecutions in New Brunswick. The aboriginal respondents were charged under New Brunswick's *Crown Lands and Forests Act*, S.N.B. 1980, c. C-38.1 with unlawful possession or cutting of timber from Crown lands. The logs had been cut or taken from lands traditionally harvested by their respective First Nations, the Maliseet and Mi'kmaq. The timber taken by one respondent was to be used for the construction of a house and the residue for community firewood; that cut by the other was to be used to fashion his furniture. Their defence to the charges was that they possessed an aboriginal and treaty right to harvest timber for personal use.

[471] Bastarache J. authored the reasons of the majority. With respect to characterizing the respondents' claim, he wrote as follows at para. 24:

> In the present case, the relevant practice for the purposes of the *Van der Peet* test is harvesting wood. It is this practice upon which the respondents opted to found their claims. However, the respondents do not claim a right to harvest wood for any and all purposes – such a right would not provide sufficient specificity to apply the reasoning I have just described. The respondents instead claim the right to harvest timber for personal uses; I find

> this characterization to be too general as well. As previously explained, it is critical that the Court identify a practice that helps to define the way of life or distinctiveness of the particular aboriginal community. The claimed right should then be delineated in accordance with that practice: *Van der Peet*, at para. 52. The way of life of the Maliseet and of the Mi'kmaq during the pre-contact period is that of a migratory people who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation. Thus, the practice should be characterized as the harvesting of wood for certain uses that are directly associated with that particular way of life. The record shows that wood was used to fulfill the communities' domestic needs for such things as shelter, transportation, tools and fuel. I would therefore characterize the respondents' claim as a right to harvest wood for domestic uses as a member of the aboriginal community.

[472] Bastarache J. indicated that the word "domestic" qualified the uses to which the harvested timber could be put, and that the right so qualified had no commercial dimension. The harvested wood, therefore, could not be sold, traded or bartered to produce assets or raise money, even if the object of such trade or barter was to finance the purchase or construction of a dwelling or any of its components.

[473] Bastarache J. also briefly discussed the notion of this right being a communal one, and in so doing, commented that "the right to harvest (which is distinct from the right to make personal use of the harvested product even though they are related) is not one to be exercised by any member of the aboriginal community independently of the aboriginal society it is meant to preserve." In the context of fishing rights, this would suggest that the right to harvest fish is separate from, though related to, the right to exchange or sell the fish that is harvested.

[474] Later in his reasons, Bastarache J. addressed the question of whether a practice undertaken for survival purposes could be considered integral to an aboriginal community's distinctive culture. In concluding that the authorities did not support the proposition that it could not be so considered, he wrote, at para. 37:

> More recently, this Court has recognized a right to fish for food in *Adams* and in *R. v. Côté*, [1996] 3 S.C.R. 139. In *Adams*, the Court specifically noted that fish were only important as a source of subsistence. In *Côté*, Lamer C.J. emphasized that "[f]ishing was significant to the Algonquins, as it represented the predominant source of subsistence during the season leading up to winter" (para. 68). Moreover, this Court has previously suggested that the scope of s. 35 should extend to protect the means by which an aboriginal

> society traditionally sustained itself, and that the *Van der Peet* test emphasizes practices that are vital to the life of the aboriginal society in question: see *R. v. Pamajewon*, [1996] 2 S.C.R. 821, at para. 28; and *Mitchell*, at para. 12, respectively. I wish to clarify, however, that there is no such thing as an aboriginal right to sustenance. Rather, these cases stand for the proposition that the traditional means of sustenance, meaning the pre-contact practices relied upon for survival, can in some cases be considered integral to the distinctive culture of the particular aboriginal people.
>
> [Emphasis added]

[475] As discussed elsewhere, Bastarache J. also rejected the notion that the pre-contact practice had to go to the core of the society's identity or be a defining feature. It is only necessary that the practice was "integral" to the society's pre-contact distinctive culture.

[476] Bastarache J. found the right to harvest wood to be site specific, such that its exercise was necessarily limited to Crown lands traditionally harvested by the members' respective First Nations. At the conclusion of his analysis, he found that the respondents possessed an aboriginal right to harvest wood for domestic uses on Crown lands traditionally used for this purpose by their respective First Nations.

[477] Binnie J. wrote brief separate reasons expressing his concurrence, except with respect to the issue of personal use. He expressed his view that barter or sale within the reserve or local aboriginal community would reflect a more efficient use of human resources than requiring all members to exercise the right for themselves. Thus, for instance, a Mi'kmaq or Maliseet should be able to sell firewood to or barter it with an aboriginal neighbour. Binnie J. agreed with the majority that trade, barter or sale outside the aboriginal community would represent a commercial activity outside the scope of the aboriginal right established on the evidence.

[478] *Lax Kw'alaams Indian Band* is a recent decision of this Court. There, the aboriginal plaintiffs had similarly sought to characterize their aboriginal right to fish commercially as including the right to sustain their community from the fish resources in the claimed territories. The defendant raised a number of objections similar to those raised by Canada in the present case, including: the plaintiffs were seeking a guaranteed economic position under the guise of aboriginal fishing rights;

the term "sustain the community" was ambiguous and unclear; the Supreme Court held in *Sappier* that there was no aboriginal right to sustenance; and, there was no evidence of the plaintiff aboriginal groups sustaining themselves from the sale of fish. The defendant also raised objections based on the failure of the plaintiff to include that particular characterization of the right in their pleadings.

[479] Satanove J. indicated her agreement with most of the defendant's submissions. Most important, she wrote, was the Supreme Court's admonition in both *Van der Peet* and *Sappier* that it was not the significance or purpose of the pre-contact practice that supported the aboriginal right, but whether the practice was integral to the distinctive culture of the group. Although she acknowledged that the Court in *Sappier* had indicated that a traditional means of subsistence could in some cases be considered integral to the distinctive culture of the aboriginal group in question, she did not consider it appropriate to characterize the claim to sell fish on a commercial scale as including a right to sustain the community at what was a late stage in the proceedings. In the result she held that on the evidence the plaintiffs had failed to prove an aboriginal right to trade in fish.

[480] Turning to the present case, I will repeat that part of the pleadings in which the plaintiffs set out the aboriginal rights they claim:

> (a) … [rights] to harvest for any purpose all species of Fisheries Resources in the Territories, or portions thereof, or in the Nuu-chah-nulth Territory, or portions thereof. For greater certainty, the aboriginal rights referred to herein are:
>
> > (i) to harvest all species of Fisheries Resources from within the Territories, or portions thereof, or in the Nuu-chah-nulth Territory, or portions thereof, and, in the alternative, one or more of those species of Fisheries Resources; and
> >
> > (ii) to harvest those Fisheries Resources for any purpose including for food purposes, social purposes, ceremonial purposes, trade purposes, purposes of exchange for money or other goods, commercial purposes, purposes of sustaining the plaintiff communities, or one or more of those purposes;
>
> (b) … [rights] to sell on a commercial scale or, in the alternative, to sell for the purpose of sustaining that Band's or Nation's community or, in the further alternative, to exchange for money or other goods all species of Fisheries Resources, or one or more of those species, that they harvest from the

> Territories, or portions thereof, or the Nuu-chah-nulth Territory, or portions thereof pursuant to their aboriginal rights referred to in paragraph (a).

[481] The plaintiffs claim both harvest and sale rights along a spectrum, and they contend that it is open to me to accept whatever characterization I consider appropriate based upon my findings of fact.

[482] I state at the outset that I do not consider the harvest and sale of fish "to sustain the community" to be a viable characterization. It incorporates the notion of a minimum guarantee of a certain level of fishing return, which would be contrary to the evidence and be a purpose-driven characterization. It would also be contrary to the authorities, and is therefore a characterization that I decline to entertain. That leaves exchange for money or other goods and sale on a commercial scale.

[483] Exchange for money or other goods was the characterization applied by the Supreme Court in *Van der Peet*. That characterization was based on the impugned activity that led to the charge against Mrs. Van der Peet, the sale of 10 salmon caught under the authority of an Indian food fish licence for $50. Lamer C.J. held that the scale of the transaction could not be said to constitute sale on a commercial or market basis. Later in his reasons he also noted that "the appellant in this case has only claimed a right to exchange fish for money or other goods, not a right to sell fish in the commercial marketplace". In *Gladstone*, he similarly contrasted an aboriginal right to exchange herring spawn-on-kelp for money or other goods with "the further aboriginal right of the Heiltsuk Band to sell herring spawn-on-kelp to the commercial market". Accordingly, I interpret "exchange for money or other goods" to refer to small-scale sale outside the commercial market.

[484] Some limited guidance can be gleaned from the authorities as to the scale of transaction that constitutes a commercial sale, as this was the right considered in *Gladstone* and raised in *N.T.C. Smokehouse*. Charges arose in the former case from the attempted sale of 4,200 pounds of herring spawn; in the latter case, from the sale of 119,000 pounds of salmon. In both cases, Lamer C.J. held that given the

scale of the transactions, the rights claimed were best described as aboriginal rights to fish commercially. At para. 18 of *N.T.C. Smokehouse* he wrote:

> In the case at bar, however, the claim made by the appellant appears closer to a claim of a right to fish commercially than was the case in *Van der Peet*. The sale of in excess of 119,000 pounds of salmon by 80 people, an amount constituting approximately 1,500 pounds of salmon per person, would appear to be much closer to an act of commerce – "exchange of merchandise or services, esp. on a large scale" (emphasis added), *Concise Oxford Dictionary* (7th ed. 1982) – than was engaged in by Mrs. Van der Peet, thereby suggesting that the claim being made by the appellant is, in fact, that the Sheshaht and Opetchesaht have the aboriginal right to fish commercially.

[485] I have concluded on the evidence that the plaintiffs' pre-contact ancestral communities fished and engaged in indigenous trade of fish. The evidence with respect to the quantity of fish that was traded is that it was substantial. Those quantities, nevertheless, were limited by the methods of fishing employed by the ancestral communities.

[486] In my view, the plaintiffs' ancestral practices translate into a broader modern entitlement to fish and to sell fish than captured by "exchange for money or other goods". The small-scale sale of fish outside the commercial market is not an adequate modern analogue for the ancestral practices. At the same time, however, those ancestral practices do not equate to an unrestricted right to the commercial sale of fish. To the extent that "commercial" as it is used in the authorities suggests sale on a large industrial scale, I would decline to choose that characterization, given my finding that trade was not for the purpose of accumulating wealth.

[487] In my view, the most appropriate characterization of the modern right is simply the right to fish and to sell fish. I consider the characterization I have chosen to fall within the claim as pleaded and to accord with the evidence. In the circumstances of this case, there is an arbitrariness in endeavouring to impose limits on the scale of sale at this stage of the analysis by quantifying a certain level of sale. Beyond stating that the right does not extend to a modern industrial fishery or to unrestricted rights of commercial sale, I decline to do so. Limitations on the scope of the right are most appropriately addressed at the infringement and justification

stages of the analysis, as part of the reconciliation process. In this regard, I note the comments of Newbury J.A. at paras. 18-19 of *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 80 B.C.L.R. (3d) 212:

> 18 The foregoing reasons for following the usual rule against exercising jurisdiction in the absence of a "live controversy" apply in my view with even greater force where the definition of aboriginal rights is in issue. It is only in the last 20 years or so that a framework for the analysis of aboriginal claims has been established, case by case, by the Supreme Court of Canada. As Mr. Wruck argued, that analysis is a purposive one and is directed towards the "reconciliation" of aboriginal rights with Crown sovereignty over Canadian territory. In my view, such rights cannot be properly defined separately from the limitation of those rights. The latter are needed to refine and ultimately define the former*: R. v. Van der Peet* [1996] 2 S.C.R. 507, at paras. 30-1. As Cory J. stated in *R. v. Nikal* [1996] 1 S.C.R. 1013 in connection with treaty rights:
>
> > It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a Charter or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. Section 1 of the *Canadian Charter of Rights and Freedoms* is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. On this issue the reasons of Blair J.A. in *R. v. Agawa* (1988), 65 O.R. (2d) 505 (C.A.), at p. 524, are persuasive and convincing. He recognized the need for a balanced approach to limitations on treaty rights, stating:
> >
> > > ". . . Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in s. 1 of the *Canadian Charter of Rights and Freedoms* which provides that limitation of Charter rights must be justified as reasonable in a free and democratic society."
> >
> > [at 1057-8; emphasis added.]
>
> 19 Applying these comments to the case at bar, it is clear that any aboriginal "right to fish" that might be the subject of a declaration would not be absolute. Like other rights, such a right may be subject to infringement or restriction by government where such infringement is justified. The point is that the definition of the circumstances in which infringement is justified is an important part of the process of defining the right itself.
>
> [Emphasis in original]

[488] As Newbury J.A. states, the definition of the circumstances in which infringement is justified is an important part of the process of defining the right itself. That is most definitely the case here.

[489] Accordingly, I conclude that the plaintiffs have established aboriginal rights to fish for any species of fish within the environs of their territories and to sell that fish. (In these Reasons, when I refer to the plaintiffs' right to fish and sell fish, the term "to sell fish" refers to the right to sell only that fish caught pursuant to their now proven aboriginal right.) The approximate boundaries of the plaintiffs' respective territories are delineated in the map at Appendix A to these Reasons and in Exhibit 26, except that the seaward boundaries of the territories extend only nine miles. Broadly speaking, the right is not an unlimited right to fish on an industrial scale, but it does encompass a right to sell fish in the commercial marketplace. I will consider the important and appropriate limitations on that right in the following sections of these Reasons.

[490] The plaintiffs also plead an aboriginal right to fish in their fishing territories for FSC purposes. Canada acknowledges that right but denies that it has been infringed. Accordingly, it is not necessary for me to address fishing for FSC purposes in this part of my Reasons.

VII. ABORIGINAL TITLE

A. Introduction

[491] The plaintiffs' claim to aboriginal title is a novel one that has not previously been considered by a Canadian court. In essence, they claim submerged lands bordered by the foreshore throughout the territory of each plaintiff and extending 100 nautical miles into the ocean; they do not claim the upland areas of their territories in this action. The plaintiffs restrict their title claim to one economic component of that title – the fishery – and acknowledge that component to be subject to the infringement and justification analyses.

[492] Canada counters that the plaintiffs' claim to aboriginal title to submerged lands is not legally tenable and should be dismissed.

B. Description of Plaintiffs' Claim

[493] The plaintiffs claim that from a time before contact to the present, they have owned, used and occupied territories within an area on the WCVI extending from Cape Cook on Brooks Peninsula southeast along the height of land on Vancouver Island to Tsusiat Point and 100 nautical miles seaward from the baseline as defined in the *Oceans Act*, S.C. 1996, c. 31. They claim that each Nuu-chah-nulth Nation has owned, used and occupied a specific territory within this area, as shown on Schedule A to these Reasons.

[494] The plaintiffs further claim that at or before sovereignty, each Nuu-chah-nulth Nation owned and occupied, to the exclusion of all others, the rivers, foreshore areas and bodies of water below the low water mark and extending 100 nautical miles seaward within that Nation's territory. Since sovereignty, they claim, each Nuu-chah-nulth Nation has held aboriginal title to its fishing territory or, in the alternative, to portions thereof. The plaintiffs additionally claim that each Nuu-chah-nulth band or, in the alternative, Nuu-chah-nulth Nation, has, as a component of that aboriginal title, the right to harvest all species of fish, shellfish and aquatic plants from its fishing territory for any purpose, including consumption and trade.

[495] The plaintiffs do not seek declarations of title to the whole of that territory in these proceedings. Rather, each Nuu-chah-nulth Nation's title claim is limited to the fishing territories within its territory, which, as noted, comprise the rivers, foreshore areas (not the upland), and bodies of water below the low water mark and extending 100 nautical miles seaward. With respect to rivers, each Nuu-chah-nulth Nation claims a specific "test case" river or rivers within its territory. Further, the plaintiffs seek only that the Court define the content of their aboriginal title to the extent necessary to establish rights incident to that aboriginal title to harvest fisheries resources within their fishing territories for any purpose, including commercial purposes.

[496] The plaintiffs advance identical claims to aboriginal title in the alternative with respect to the Nuu-chah-nulth Nation.

[497] The plaintiffs seek, *inter alia*, the following declaration:

> That each of the Nuu-chah-nulth Bands or, in the alternative, each of the Nuu-chah-nulth Nations, hold aboriginal title to the Fishing Territories, or portions thereof, and the right or rights, as a component of that aboriginal title, to harvest for any purpose, including any or all of those purposes referred to in paragraph (a) and sell all species of Fisheries Resources or, in the alternative, one or more of those species of Fisheries Resources, harvested from territories to which they have aboriginal title.

C. Duplication of Claim to Aboriginal Rights

[498] A similar parallel claim of aboriginal rights and title was advanced in *Adams*. The appellant had been fishing for perch in the marshes of a portion of Lake St. Francis, and was charged with fishing without a licence. He argued in defence that he had been fishing pursuant to an aboriginal right existing either because of the Mohawks' aboriginal title to the fishing area, which included Lake St. Francis, or because of a free-standing aboriginal right to fish in the area. After concluding that the appellant had proven an aboriginal right to fish on this latter basis, Lamer C.J. wrote at para. 34:

> Given that this is so, it will be unnecessary to address the appellant's arguments that the Mohawks have aboriginal title to the lands in the fishing area that gives rise to an incidental right to fish there. The appellant himself rests his claim primarily on the existence of the free-standing aboriginal right to fish in Lake St. Francis; since I accept this argument it is unnecessary to consider any subsidiary arguments the appellant makes.

[499] In my view, this reasoning is applicable to this case, though on a slightly different basis. The primary reason for the plaintiffs to advance their title claim in the restricted manner they have is to support the incidental right to fish. Insofar as I have found that the plaintiffs have proven an aboriginal right to fish within their territories, it could be said, as in *Adams*, that it is unnecessary for me to consider this secondary argument. Counsel for the plaintiffs acknowledged as much in his oral submissions on this issue. He submitted that in the event I found that the

plaintiffs had a full-scale aboriginal right to fish commercially, it would not be necessary for me to address the title claim. He further submitted, however, that if I found an aboriginal fishing right that was lower down the spectrum, it would be necessary for me to address the title claim, since fishing rights parasitic on aboriginal title might be broader and thus lead to different infringement and justification analyses. This broader argument was not addressed in *Adams*.

[500] As I have characterized the plaintiffs' aboriginal rights as the rights to fish and to sell fish, it could be argued that it is necessary for me to deal with the submission that the plaintiffs have a different and broader fishing right parasitic on their aboriginal title. This is so because "parasitic rights" that manifest themselves as an economic component to title do not depend for their existence on proof that those rights are the modern-day equivalent of an ancestral practice. As Lamer C.J. explained at para. 111 of *Delgamuukw*:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title.

[501] Ultimately, it is not necessary for me to decide this issue since, in my view, the infringement and justification analyses as applied to title would not yield a different result than when applied to the plaintiffs' aboriginal rights in the circumstances of this case. As I discuss in detail below, I find that Canada's fishery regime does *prima facie* infringe the plaintiffs' aboriginal fishing rights. If these rights are infringed by the fisheries regime, it would only stand to reason that any broader, unconstrained commercial fishing right or activities parasitic on aboriginal title would similarly be infringed.

[502] With respect to the justification analysis, factors upon which Canada could rely in seeking to justify the infringement of a narrowly circumscribed fishing right – conservation needs and adherence to international treaties to name only two – would apply equally in justifying an infringement of broader fishing rights.

Even assuming that a claim to submerged lands is legally tenable, of which I have some doubt, it is not necessary that I decide the plaintiffs' aboriginal title claim, and I decline to do so.

VIII. INFRINGEMENT

A. Introduction

[503] Infringement is the third step in the *Sparrow* framework for analyzing an aboriginal rights claim. Where a court has determined that claimants have proven an aboriginal right that has not been extinguished, it goes on to consider whether the effect of government action is to unreasonably interfere with the exercise of that right.

[504] In the present case, there is considerable overlap between the evidence relevant to the questions of both infringement and justification. I have found it convenient to recount much of the evidence in this section, that is, infringement, with references to this evidence, where applicable, when I discuss justification. It is not always easy to discern the line between issues that are relevant to infringement and those to justification. At the risk of over-simplifying the difference, I consider infringement to be largely focussed on the plaintiffs, their participation in the fishery and the effects on them of Canada's fishery regime. The justification analysis, on the other hand, is focussed more on the steps taken by Canada, both legislative and operational, that it says justify its infringement. Below I have found that I could not fully determine Canada's justification defence on the evidence before me. Consequently there is also justification evidence not commented upon in these Reasons.

B. Summary of Plaintiffs' Position on Infringement

[505] The plaintiffs assert that Canada's fishing regime infringes their aboriginal rights both at the legislative and the policy/operational levels. With respect to the former, they submit that the legislative scheme, comprising the *Fisheries Act* and its regulations, imposes a complete prohibition against the activity that forms the basis

of their aboriginal rights, and imparts to the Minister absolute discretion to issue licences with respect to that activity. Citing the Supreme Court of Canada's decisions in *Adams* and *Marshall*, they say that the fact that the *Fisheries Act* prohibits the exercise of their aboriginal rights subject to the Minister's discretion constitutes an infringement.

[506] The plaintiffs additionally claim that their rights have been infringed by the policy and operational measures implemented by the DFO since the 1960s. They say that, as a whole, these measures have entrenched a large scale, capital-intensive industrial fishery on the Pacific coast with the effect that the Nuu-chah-nulth have fallen out of the fishery and cannot get back in. The plaintiffs submit, for instance, that the DFO's management measures fail to make provision for community-based fisheries that can facilitate widespread participation of Nuu-chah-nulth members with a lower capital investment than what is required in the DFO's current management regime. Instead, they say, DFO policies and operational restrictions impose undue hardship on the plaintiffs and deny them their preferred means of exercising their rights, if they can be exercised at all.

[507] The plaintiffs do not challenge the DFO's overall management of the fishery *per se*, nor do they suggest that they have unlimited rights to the fishery. Their complaint is that in implementing its management scheme, Canada has failed to reserve them sufficient fishing opportunities to accommodate their aboriginal rights, and has failed to permit them to fish using their preferred means.

[508] The plaintiffs have particularized the statutory, regulatory, policy and operational infringements in their response to Canada's demand for further and better particulars dated October 14, 2008. The pertinent parts of that response to Canada's demand for particulars are reproduced as Appendix B to these Reasons.

C. Summary of Canada's Position on Infringement

[509] Canada denies that its fisheries legislation, regulations, or policies infringe the plaintiffs' aboriginal rights, and submits that none of the plaintiffs' allegations of

infringement are established on the evidence. Canada says that the legislation, regulations and policies under challenge are reasonable constituent parts of a larger regulatory scheme premised on conservation, the cumulative effect of which is to facilitate the plaintiffs' asserted rights. In fact, Canada says, the evidence ably demonstrates that the plaintiffs' fishing opportunities have increased as a result of the DFO policies. In the result, the plaintiffs have failed to discharge the burden of proof to establish any infringements.

[510] Canada contends that its regulatory scheme as a whole accommodates the plaintiffs' collective aboriginal rights and that its many special programs protect and enhance aboriginal participation in economic fisheries. Canada describes its policies as follows (at para. 2057 of its written submission):

> DFO's Aboriginal programs are designed to strengthen the relationship between the Federal Government and Aboriginal groups and communities by supporting integration in the commercial fishery and the development of scientific, technical and administrative capacity of Aboriginal groups. In summary, DFO policies:
>
> 1) provide Aboriginal groups with access to fisheries resources to address asserted rights and socio-economic aspirations:
>
> a) through the Licence Retirement Program, ATP [Allocation Transfer Program], ARROM [Aboriginal Aquatic Resource and Oceans Management] Access, and PICFI [Pacific Integrated Commercial Fisheries Initiative] programs which all facilitate the voluntary retirement of commercial licences and issuance of communal licences for commercial fisheries to Aboriginal groups
>
> b) through the Somass Economic Fishery, ESSR [Excess Salmon to Spawning Requirements] fishery;
>
> c) through the operation of the FSC fishery which has priority after conservation over commercial and recreational fishing; and
>
> d) by permitting, in some circumstances, fishing for FSC and commercial purposes at the same time (sometimes referred to as 'dual fishing' or 'combination fishing')
>
> 2) provide for the negotiation of annual, and in some cases multi-year, agreements under AFS [Aboriginal Fishing Strategy] and other programs which, amongst other things, can set out fishing arrangement, co-management arrangements, fisheries projects, and funding arrangements.
>
> 3) provide for increased Aboriginal participation in fisheries co-management by:

> e) annual multi-year AAROM [Aboriginal Aquatic Resource and Oceans Management] funding which brings the NTC together to build fisheries capacity to participate in the decision-making process; and
>
> f) the West Coast of Vancouver Island Aquatic Management Board, which brings together all sectors of the west coast of Vancouver Island fisheries in a co-management model. The sectors which participate are Aboriginal groups, commercial fishers, recreational fishers, municipalities, environmental groups and DFO.

D. Legal Principles

[511] Aboriginal rights recognized and affirmed by s. 35(1) are not absolute and may be infringed, both by provincial and federal governments. However, s. 35(1) requires that those infringements satisfy the test of justification. The analytical framework for considering both infringement and justification was set out in *Sparrow*, and refined in *Gladstone*.

[512] The test for infringement asks whether the impugned legislation has the *effect* of interfering with an existing aboriginal right. If it does, it constitutes a *prima facie* infringement of s. 35(1). The onus of demonstrating a *prima facie* infringement rests with the claimant.

[513] Questions that guide the analysis as to whether impugned legislation has the effect of interfering with an existing aboriginal right include:

a. Is the limitation unreasonable?

b. Does the limitation impose undue hardship?

c. Does the regulation deny to the holders of the right their preferred means of exercising that right?

[514] The fact that this test appears to set a substantially higher threshold than "*prima facie*" suggests, was subsequently commented upon in *Gladstone*. At para. 43, Lamer C.J., for the majority, clarified what was necessary to establish a *prima facie* infringement. He also made clear that while the questions assist in the

analysis, they are not required to be answered in the affirmative in order to prove an infringement:

> The *Sparrow* test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a *prima facie* interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis. On the other hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.

[515] In *Sparrow*, Dickson C.J. commented as follows at p. 1112 with respect to the facts of the appeal before him:

> ... In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length restriction resulted in a hardship to the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.

[516] In applying the *Sparrow* test for infringement, the Court must take into account any factual variations in the particular case at hand. One such variation that existed between *Sparrow* and *Gladstone* was the scope of the alleged infringement. Whereas in *Sparrow* only a single net length restriction was challenged, the government's entire regulatory regime with respect to the herring spawn-on-kelp fishery was impugned in *Gladstone*. Where the scope of the challenge is broad, the

questions that form the *Sparrow* test must be applied to all aspects of the regulatory scheme at issue.

[517] Thus in *Gladstone*, for instance, in analyzing the government's scheme for regulating the herring spawn-on-kelp fishery, the Court divided the scheme into four constituent parts: (1) the government determines the amount of herring stock that will be harvested in a given year; (2) the government allots the herring stock to the different herring fisheries (i.e., roe-herring, herring spawn-on-kelp, and other herring fisheries); (3) the government allots the herring spawn-on-kelp fishery to various user groups; and (4) the government allots the commercial herring spawn-on-kelp licences.

[518] Although the components of the regulatory scheme must each be analyzed in accordance with the *Sparrow* test, it is the cumulative effect of the scheme on the exercise of the aboriginal right that is significant for the purposes of the infringement analysis. As Lamer C.J. explained in *Gladstone*, at para. 52:

> Because each of these constituent parts has a different objective, and each involves a different pattern of government action, at the stage of justification it will be necessary to consider them separately; however, at the infringement stage the government scheme can be considered as a whole. The reason for this is that at the infringement stage it is the cumulative effect on the appellants' rights from the operation of the regulatory scheme that the court is concerned with. The cumulative effect of the regulatory scheme on the appellants' rights is, simply, that the total amount of herring spawn on kelp that can be harvested by the Heiltsuk Band for commercial purposes is limited. Thus, in order to demonstrate that there has been a *prima facie* infringement of their rights, the appellants must simply demonstrate that limiting the amount of herring spawn on kelp that they can harvest for commercial purposes constitutes, on the basis of the test laid out in *Sparrow*, a *prima facie* interference with their aboriginal rights.

[519] Although Lamer C.J. reviewed the regulatory scheme as it pertained to the herring spawn-on-kelp fishery in considerable detail, his analysis of infringement was fairly brief. At para. 53, he wrote:

> In light of the questions posed by the Court in *Sparrow*, it seems clear that the appellants have discharged their burden of demonstrating a *prima facie* interference with their aboriginal rights. Prior to the arrival of Europeans in North America, the Heiltsuk could harvest herring spawn on kelp to the extent

> they themselves desired, subject only to such limitations as were imposed by any difficulties in transportation, preservation and resource availability, as well as those limitations that they thought advisable to impose for the purposes of conservation; subsequent to the enactment of the regulatory scheme described above the Heiltsuk can harvest herring spawn on kelp for commercial purposes only to the limited extent allowed by the government. To use the language of Cory J. in *R. v. Nikal*, *supra*, at para. 104, the government's regulatory scheme "clearly impinge[s]" upon the rights of the appellant and, as such, must be held to constitute a *prima facie* infringement of those rights.

[520] In *R. v. Nikal*, [1996] 1 S.C.R. 1013, Cory J., on behalf of a majority of the Court, rejected the proposition that once an aboriginal right has been established, anything which affects or interferes with the exercise of that right constitutes a *prima facie* infringement. Thus, he held, the mere requirement of a licence in order to fish, as distinct from the conditions of that licence, will seldom constitute a *prima facie* infringement of the s. 35 aboriginal right to fish. As Cory J. explained, any system of control of the fishery must commence with a licensing scheme, and it is through the issuing of licences to the various types of users that the government will be able to manage the resource. Nevertheless, Cory J. continued, the government will be required to justify the conditions of a licence that on their face infringe the s. 35 right. As he explained, at paras. 103-104:

> Although licensing by itself will not as a rule constitute a *prima facie* infringement of the aboriginal right to fish, the government will be required to justify those conditions of a licence which on their face infringe the s. 35 right to fish. The 1986 licence at issue in this case contains several conditions. Some of these printed on the licence itself are mandatory. Others are completed by the issuing fishery officer and are discretionary. Of the mandatory conditions printed on the face of the licence, some are clearly *prima facie* infringements of the aboriginal right of the appellant as properly found by the courts below. The infringing conditions are:
>
> (i) the restriction of fishing to fishing for food only;
>
> (ii) notes 4 and 5 of the licence, which provide:
>
> 4. Fishing Time Subject to Change by Public Notice.
>
> 5. Indian Food Fishing before July 1st and after September 30th must be licenced by the Provincial Fish & Wildlife Conservation Officer.
>
> (iii) the restriction to fishing for the fisher and his family only;
>
> (iv) the restriction to fishing for salmon only.

> These conditions are *prima facie* infringements of the appellant's aboriginal rights, which were specifically and correctly found to include:
>
> (i) the right to determine who within the band will be the recipients of the fish for ultimate consumption;
>
> (ii) the right to select the purpose for which the fish will be used, i.e. food, ceremonial, or religious purposes;
>
> (iii) the right to fish for steelhead;
>
> (iv) the right to choose the period of time to fish in the river.
>
> Since those conditions of the licence set out above clearly impinge upon these aspects of the appellant's s. 35 rights, they must constitute *prima facie* infringements.

[521] Cory J. then went on to consider justification, concluding that the government had failed to justify those conditions found to infringe the appellant's aboriginal rights.

E. Background to Regulation of the Fishery

[522] I begin my discussion of the infringements alleged with an historical review of the main developments in the regulation of Canada's fishery. Before doing so, however, I wish to make a few introductory comments.

[523] Canada's regulation of its fishery comprises a vast and complex web of regulations, programs, and policies. Over the years, Canada has orchestrated innumerable studies, task forces, commissions, round tables, and treaties, all in an effort to fairly regulate fishing and conserve the fishery for future generations. To state the obvious, fish cannot be seen, and thus the assessment of the health or abundance of stocks is a difficult scientific task. I cannot in these Reasons do more than summarize the primary components of the regulatory regime and the main features of the regulatory history, focusing on those aspects that I consider to have greatest relevance to this case. (My use of "regulatory regime" is intended as a collective term to incorporate the entire statutory, regulatory, and policy based regime of Canada's fisheries regulation.) In certain of the authorities, such as *Sparrow* and *Nikal*, the Court's infringement analysis was fairly limited in that it was only necessary to consider a single regulation or the conditions that attached to a

particular licence. That is not the situation here, as the plaintiffs have put in issue the entirety of the regulatory regime as it impacts their aboriginal rights.

F. Historical Overview of Fishery Regulation

[524] The broad outlines of the history of the west coast fishery were provided in a report by one of Canada's fishery experts, Dr. Peter Pearse. He was not cross-examined on his report, and the historical overview he provides is not in dispute in this litigation. I have borrowed liberally from Dr. Pearse's report in the following historical overview.

[525] Prior to the rise of the modern fishing industry on the Pacific coast in the 19th century, the generally accepted view was that ocean fisheries were inexhaustible. However, as catches grew with expanding fleets and improved fishing technology, the effect of fishing pressure on the most accessible and valuable stocks became apparent. By the late 19th century, the most vulnerable stocks – which on Canada's Pacific coast included some species of whale, and salmon – showed convincing evidence of overharvesting. By the 1890s, fisheries officials were calling for a limit on the number of salmon fishing boats on the Fraser River. The sturgeon and pilchard fisheries expanded and then collapsed. Soon, the limited capacity of fish stocks to yield sustainable harvests and the threat of overfishing and depletion were widely acknowledged by scientists and governments in Canada and other fishing nations.

[526] Recognizing that some control of fishing was necessary to ensure sustainable catches, many governments launched concerted regulatory efforts in the first half of the 20th century. The Government of Canada progressively introduced closed fishing seasons, closed areas, and a myriad of restrictions on boats and fishing gear in an effort to constrain catches to levels within the sustainable productive capacity of the stocks. However, as the expansion of fishing fleets and fishing pressures continued, the Government's struggle to limit catches to sustainable levels met with mixed success. By the end of World War II, it had become apparent that the world's most valuable stocks were fully exploited or approaching full exploitation, and many

were being depleted. In the words of Dr. Pearse, "Fisheries were condemned to a kind of dismal Maltheusian equilibrium, evidenced around the world in over-expanded fleets of over-equipped vessels, over-exploited stocks, and low incomes of vessel owners and fishers." Overfishing and dissipation of economic returns became a worldwide phenomenon in the latter half of the 20th century.

[527] The open fishery created an incentive for all individual fishers to catch as many fish as possible before the fish were caught by others. Three related economic consequences of open access have weighed heavily on Pacific fisheries. One was distortion of the fishing technology used to find, catch and transport fish. Vessel owners were compelled, in their race with competitors, to invest in increasing the size and speed of their vessels to reduce running time and enable them to work further offshore and in rough seas. If the catch was already being fully harvested, such competitive investment simply added to the costs of fishing and lowered the net returns.

[528] Another effect was price instability. An increase in the price of fish, or a technological development that lowered the cost of fishing, would set off and accommodate further expansion of the fishing fleet even if there could be no increase in the catch. Reduced prices for fish forced of the market and financial failures.

[529] Finally, over-expansion of fishing fleets complicated the task of managing the fishery. For example, Pacific halibut can be caught almost year round but because the fleet over-expanded, the fishing season had to be shortened to protect the stocks from overfishing. As the fleet continued to grow, the season was reduced yearly until, by 1990, halibut fishers were allowed to fish just 10 days per year. Landing the whole year's catch in such a short time meant that most of it had to be frozen, significantly lowering its market value and increasing processing costs.

[530] The over-expansion of fishing fleets was particularly conspicuous in Canada's Pacific fisheries because, ironically, the major fisheries in the region are capable of yielding unusually high returns. Salmon, halibut and roe-herring, in particular, are

highly valued and potentially highly profitable. However, the perverse process of profits attracting redundant fishing capacity until the profits are dissipated in higher costs led the fishing fleets in these fisheries to over-expand to many times the fishing capacity needed to harvest the available catch, before earnings were sufficiently reduced to attract no more entrants.

[531] The DFO endeavoured to reduce fishing pressures through restrictions on fishing times, areas and gear, as well as on vessel capacity. To alleviate the industry's poor economic performance and low incomes, the federal government also introduced a wide variety of subsidies and programs of assistance to fishers, ranging from support for vessel construction to easier access to unemployment insurance. Whatever the desirable social effects of these measures, by supporting fishers' income, these measures aggravated the problem of overcrowded fisheries.

[532] A major innovation in fishing controls was introduced in the late 1960s. By that time, the fishing fleet in the Pacific fisheries had expanded to such an extent that the established practices of shortening seasons and restricting fishing gear were increasingly recognized as inadequate. To prevent further decreases in fishing income, the DFO licensed existing vessels and declared that no additional licences would be issued. This limitation of licensing was referred to as the "Davis Plan" after the then Minister of Fisheries. Initially, the licences authorized commercial fishing of all species of fish. However, since each species is able to support its own harvest with differing levels of capacity, each needed its own limited licensing scheme. One after another, a limited number of special licences were introduced for each of the major species or group of species, usually by "grandfathering" the established fishers in the fishery, who ranged from a few dozen in the case of sablefish and geoduck, to thousands for salmon and roe-herring. Because the rights to fish were now limited, these rights (or licences) began to take on a market value.

[533] That fishing rights were now valuable assets was welcomed by established fishers who were grandfathered into the new regime. For those who wanted to enter

the fishery, it posed a new barrier because they would now have to buy a licence from someone else at market value.

[534] Examples of current value of licences for various species are:

- a salmon troll licence for the WCVI costs approximately $145,000;
- a halibut licence with 10,000 pounds of quota costs approximately $343,000;
- a crab licence costs approximately $480,000; and
- geoduck licences are valued at $2,500,000 but since the geoduck fishery is so lucrative, licence holders do not sell them.

[535] Thus, the government introduced, if only incidentally through the regulatory process, fishing rights that had some of the essential characteristics of property. Licences were now valuable rights of access to fisheries. The licensees' rights were exclusive. They were also transferable; while technically not so, the Minister adopted a policy of accommodating private transfers by responding to a licensee's request to relinquish his licence and have a new one issued to someone he designated. Licensees had some security because, although licences usually had terms of only one year, the policy was to issue new licences to those who held them the previous year. Licensees were able to enjoy the economic benefit of exercising the licence.

[536] Licence limitation proved to be less effective than hoped. Every owner of a licensed vessel still had a strong incentive to increase its fishing power to obtain a larger share of the catch. Although the number of vessels could no longer be increased, owners replaced their vessels with larger, more powerful ones and fitted them with more advanced equipment. In an effort to forestall this continuing wasteful expansion of fishing power, the DFO added still more restrictions, this time on the size and capacity of vessels, and on fishing gear.

[537] A variety of other measures were progressively taken to reduce the excessive capacity of the fleets, and to facilitate management of the fishery. This was particularly so in the salmon fishery, the largest fishery on the Pacific coast. The federal government launched a series of "buy-back" programs through which it spent several hundred million dollars to purchase and cancel licences (and sometimes vessels with licences) in order to reduce the fleet.

[538] Area licensing was introduced in the salmon and roe-herring fisheries in order to avoid the convergence of the whole coastal fleet in areas opened for fishing. Licence holders were required to select generally one or two areas of the coast to which their licences were designated. They were also permitted to purchase licences from other licence holders for other areas. This had the beneficial effect of reducing the fleet by eliminating the sellers' vessels.

[539] To further manage the fishery, the DFO separately licensed vessels by the type of gear they used, known as "gear licensing". This meant that roe-herring fishers' licences specified that the holders were authorized to use either gillnet or seine gear but not both. Salmon licensees were authorized to use only one of gillnet, seine or troll gear. This prevented fishers from switching or combining gear.

[540] Despite the foregoing, fishing capacity continued to expand as a result of the flexibility of fishing technology, the ingenuity of fishers and ship architects, and the practical impossibility of restricting all dimensions of fishing power.

[541] In 1991, individual quotas were introduced (in a restricted form) for the first time in a major Canadian fishery, the Pacific halibut fishery. The resulting improvement in the fishery was dramatic. The enormous overcapacity of the fleet was soon eliminated by the fishers themselves. With the security of a defined share of the catch, and the ability to adjust it through purchase and sale of quota, fishers restructured their operations to achieve economies of scale and to harvest their quota as efficiently as possible. Alternatively, they sold their quota or part of it to others. Within 10 years, the number of vessels was reduced by half without governmental help and with a corresponding reduction in the cost of fishing.

[542] Freed from the race for fish during brief fishing seasons, fishers could now fish for most of the year at times when markets were most favourable. They could also take time to clean and prepare their fish for the best prices. Halibut fishers, for instance, were soon receiving substantially higher prices for their product. This increased revenue from the catch, together with the lower cost resulting from the rationalized fleet and produced a much more profitable fishery for vessel owners and crews. As a consequence, the market value of the rights to fish halibut – now including quota entitlements as well as licences – rose substantially. Today, halibut fishers and others who operate under individual quotas take responsibility (and pay) for detailed monitoring of catches, biological sampling, surveys, administration of quota transfers and other management functions.

[543] During the 1990s and early 2000s, some form of individual quota was introduced in all the major Pacific fisheries except the salmon fishery.

G. Statutory and Regulatory Authority to Govern the Fishery

[544] With this narrative background in mind, I now set out the statutory and regulatory basis for Canada's management of the Pacific coast fishery. As will be seen, the Minister is granted wide discretion as to the manner in which she regulates the fishery pursuant to these statutory instruments. It is primarily through conditions of license and policy that the DFO effects its governance of the fishery. The plaintiffs contend that it is the totality of this regulatory regime that infringes their aboriginal rights.

[545] Canada exercises exclusive legislative jurisdiction over "Sea Coast and Inland Fisheries" pursuant to s. 91(12) of the *Constitution Act, 1867*. The primary legislation under which Parliament has exercised this jurisdiction is the *Fisheries Act*. Broadly speaking, the Minister is granted statutory powers under the *Fisheries Act*, and these powers are further defined in regulations enacted by the Governor-in-Council. The regulations of most relevance to the present case are the *Fishery (General) Regulations*, S.O.R./93-53; the *Pacific Fishery Regulations, 1993*, S.O.R./93-54; the *Pacific Fishery Management Area Regulations, 2007*,

S.O.R./2007-77; and the *Aboriginal Communal Fishing Licences Regulations*, S.O.R./93-332.

[546] The *Fisheries Act* and regulations impose general prohibitions against fishing and selling fish unless authorized by the appropriate licence. As a result, it is illegal to fish or to sell fish without a licence issued by the DFO. This applies to all aboriginal food fishing and all commercial fishing.

[547] Section 26 of the *Pacific Fishery Regulations*, *1993*, creates a general prohibition against persons fishing without a licence:

> 26. (1) Subject to subsection (2), no person shall fish except under the authority of a licence issued under these Regulations, the Fishery (General) Regulations or the Aboriginal Communal Fishing Licences Regulations.
>
> (2) Subsection (1) does not apply to a person who is registered and who is engaged in commercial fishing for a species of fish from a registered vessel that is authorized by a commercial fishing licence to be used in fishing for that species.

[548] The *Fishery (General) Regulations* impose a general prohibition against selling fish without a licence that specifically authorizes sale, trade or barter in s. 35:

> 35. (2) Subject to subsection (3), no person shall buy, sell, trade, barter or offer to buy, sell, trade or barter any fish unless it was caught and retained under the authority of a licence issued for the purpose of commercial fishing, a licence issued under Part VII, a licence issued under the *Aboriginal Communal Fishing Licences Regulations* in which the Minister has authorized the sale of fish or an Excess Salmon to Spawning Requirement Licence issued under the *Pacific Fishery Regulations*, *1993*.

[549] Licences may be either personal (sometimes referred to as party-based) or vessel-based. In the case of party-based licences, the licence holder is entitled to fish the licence from any vessel, although the individual is almost always required to designate a specific vessel. The party may be a person, corporation or a Band. In the case of vessel-based licences, the specific vessel that is associated with the licence must be used for the fishery.

[550] Under the *Fisheries Act,* the Minister has absolute discretion to issue licences. Section 7(1) of the *Act* provides:

> 7. (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.

[551] While the authority to issue licences lies within the absolute discretion of the Minister, Parliament has conferred upon the Governor-in-Council broad authority to enact regulations concerning various aspects of fisheries. Section 43 of the *Fisheries Act* reads, in part:

> 43. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations
>
> (a) for the proper management and control of the sea-coast and inland fisheries;
>
> (b) respecting the conservation and protection of fish;
>
> (c) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;
>
> (d) respecting the operation of fishing vessels;
>
> (e) respecting the use of fishing gear and equipment;
>
> …
>
> (f) respecting the issue, suspension and cancellation of licences and leases;
>
> (g) respecting the terms and conditions under which a licence and lease may be issued;
>
> …

[552] Thus, the Minister's discretion under s. 7 is governed by regulations made by the Governor-in-Council under s. 43. Section 22(1) of the *Fishery (General) Regulations*, for instance, gives the Minister authority to impose any licence conditions that are not inconsistent with the regulation, and sets out a wide range of factors that may be specified as conditions:

> 22. (1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may specify in a licence any condition that is not inconsistent with these Regulations or any of the Regulations listed in subsection 3(4) and in particular, but not restricting the generality of the foregoing, may specify conditions respecting any of the following matters:

> (a) the species of fish and quantities thereof that are permitted to be taken or transported;
>
> …
>
> (c) the waters in which fishing is permitted to be carried out;
>
> …
>
> (f) the period during which fishing or transporting fish is permitted to be carried out;
>
> (g) the vessel that is permitted to be used and the persons who are permitted to operate it;
>
> (h) the type, size and quantity of fishing gear and equipment that is permitted to be used and the manner in which it is permitted to be used;
>
> (i) the specific location at which fishing gear is permitted to be set;
>
> ...
>
> (2) The Minister may, for the purposes of the conservation and protection of fish, amend the conditions of a licence.

[553] As a result of this legislative scheme and the broad discretion conferred on the Minister, most of the policies and management schemes that are at issue in this case have not been imposed through legislative instruments such as statutes or regulations. Rather, they have been imposed through discretionary decisions of the Minister relating to the issuance of licences and the conditions imposed on those licences. Such conditions set out the details of how (i.e. gear), where (i.e. areas) and how much (i.e. quotas) fishing can be conducted under the licence to which they attach. Thus, for example, there are no statutes or regulations that:

- established limited entry in the salmon fishery in 1969;
- expanded limited entry licensing to other species;
- determined the initial allocation of the limited number of licences at the outset of limited entry licensing;
- defined the characteristics of licences, such as transferability; or
- established quota regimes in various fisheries.

[554] The DFO's regulatory scheme also imposes area, time, species, and gear restrictions in respect of all Pacific commercial species. Management areas play a significant role in how Canada regulates the fishery on a day-to-day basis. Pursuant to regulation, the Pacific coast is divided into 48 management areas, each with numerous sub-areas. The *Fisheries Act* establishes a general prohibition against fishing during a close time, and the *Pacific Fishery Regulations, 1993*, fixes the close time for the majority of Pacific fisheries at January 1 to December 31. The DFO, however, has authority to vary the close times for any of the species or gear types in respect of any of the management areas or sub-areas.

1. The *Aboriginal Communal Fishing Licences Regulations*

[555] The *Aboriginal Communal Fishing Licences Regulations* were introduced in 1993, shortly after the *Sparrow* decision. They provide that the Minister may issue a communal licence to an aboriginal organization to carry on fishing and related activities. Section 4 provides that in issuing a communal licence, the Minister may designate the persons who may fish under the authority of the licence and the vessels that may be used to fish. The Minister has considerable discretion under s. 5(1) to impose conditions on licences issued under these Regulations, including conditions regarding "the species and quantities of fish that are permitted to be taken" (s-s. (a)) and "the disposition of fish caught under the authority of the licence" (s-s. (l)).

[556] Virtually all of the licences issued under the *Aboriginal Communal Fishing Licences Regulations* are FSC Licences, commercial licences issued under the Allocation Transfer Program (F Licences) or clam licences issued to aboriginal communities (Z2ACL Licences). This is the case with respect to the Nuu-chah-nulth. However, the Nuu-chah-nulth have also been issued licences with respect to the Somass "pilot sale" salmon fishery conducted by the Tseshaht and the Hupacasath. (The Tseshaht and Hupacasath are not plaintiffs in this part of the trial.)

[557] FSC licences permit First Nations to harvest up to a specified quantity of fish for FSC purposes only. Sale, trade or barter of FSC fish is not permitted.

[558] F Licences are issued to aboriginal organizations under the Allocation Transfer Program. Commercial fishing conducted under an F Licence is subject to the same licence conditions as ordinary commercial licences for that fishery. Privileges under those licences must be exercised by a single vessel designated by the aboriginal organization. In the case of quota fisheries, such as halibut, any quota that is allocated under the Allocation Transfer Program can only be fished by a vessel that also has a limited entry licence, which means that quotas cannot be broken up for use by a small boat fleet as part of a community fishery.

[559] The commercial clam fishery is the only fishery in which a separate Aboriginal Community Licence has been created specifically for issuance to aboriginal communities at the outset of a limited licensing regime. On an annual basis, aboriginal communities are allocated a quantity of clam licences. The aboriginal community, in turn, allocates the Z2ACL Licences to individuals who conduct the harvest and sell their catch.

H. Regulation of Specific Fisheries

[560] Different species of fish are subject to different regulatory regimes. The plaintiffs challenge them all. As discussed below, I have concluded that Canada has not *prima facie* infringed the plaintiffs' aboriginal right to harvest and sell clams. I have concluded that Canada has infringed the plaintiffs' aboriginal right to harvest and sell all other species of fish. I also conclude that the plaintiffs' aboriginal right to fish for FSC purposes is recognized by Canada and that Canada's regulation of the fishery does not infringe that aboriginal right. However, it is necessary to outline in general terms the manner in which each of the main fisheries is regulated in order to provide a factual context for the infringement and justification analyses that follow.

1. Regulation of the salmon fishery

[561] For the past number of years, Canada has managed the salmon fishery through a management plan called the Integrated Fisheries Management Plan ("IFMP"). The IFMP pulls together all sectors – that is, First Nations, recreational

and commercial fishers, environmental stakeholders, and managers – in order that the entire management of the salmon fishery is coordinated. IFMP meetings occur in the spring. The management plan is finalized subject to mid-season changes and at the end of the season, further consultation occurs.

[562] The introduction to the 2008/2009 southern British Columbia salmon IFMP explains the scope of the management plan as follows:

> INTRODUCTION
>
> This 2008/2009 Southern B.C. Salmon Integrated Fisheries Management Plan (IFMP) covers the period June 1, 2008 to May 31, 2009 for First Nations, recreational and commercial fisheries for Pacific salmon in the southern areas of B.C. It is designed to describe the approach to fisheries in tidal and non-tidal waters from Cape Caution south to the B.C./Washington border, including the Fraser River watershed. Pacific salmon species covered in the plan include sockeye, coho, pink, chum and chinook salmon.
>
> This plan describes the management of Pacific salmon fisheries in southern B.C. and the factors that influence decision-making.
>
> This plan incorporates the results of consultations and input from the Integrated Harvest Planning Committee (IHPC), south coast First Nations, and south coast recreational and commercial advisors.
>
> Fisheries and Oceans Canada will continue to consult with First Nations, recreational, and commercial fish harvesters to further co-ordinate fishing activities in 2008. Further consultations will occur as updated forecast information becomes available or when observed in-season returns are not covered by the decision guidelines.

[563] Paul Ryall, who has responsibility for the south coast salmon team and overall responsibility for the south coast salmon IFMP, described the difficulty in managing the salmon fishery owing to factors that include:

a. environmental threats and uncertainty;

b. over-harvesting in some cases;

c. the migratory nature of salmon;

d. the multiplicity of stocks, by which he refers to unique identifiable populations of salmon (i.e. originating from different rivers), some of which are weak and others strong;

e. variability in salmon run timing, meaning that different stocks of salmon run at different times of the year;

f. biological and environmental changes which impact the productivity of stock and hence the accuracy of pre-season predictors;

g. legal changes, such as the *Sparrow* decision;

h. social changes, by which he refers to the increased focus on conservation and the recognition that natural resources are not inexhaustible; and

i. technological changes, a reference to the fact that fishing gear changes, driven by desire for increased productivity, have led to all fishing vessels now having GPS navigational systems, trollers with freezers and/or larger holds, drum seiners which can set up 18-20 sets per day, the introduction of brine in seine vessels leading to improved efficiency and quality of harvested catch, and faster, more mobile boats, all of which create more pressure on the resource.

[564] Wilf Luedke, the Acting Area Director, South Coast, of the DFO, referred in his evidence to the 1999 New Pacific Salmon Treaty Agreement, which changed the allowable catches from a constant number to one that varies based on the abundance of stocks. This resulted in a significant reduction in the allowable catch off the WCVI. Furthermore, the inclusion of the offshore recreational fishery in the allowable troll fishery catch also impacted the commercial fishery. Larger boats, new GPS technology and improved depth sounders gave recreational fishers the ability to fish in offshore waters where previously only commercial trollers frequented. As a result, the WCVI troll fishery was further reduced.

[565] Since 1996, salmon licences have been vessel-based, gear type, and area designated. Thus, for example, a salmon fisher must choose one of seine, gillnet or troll gear, and must designate a particular licence area. Below, I refer to the

testimony of the plaintiffs' fisheries manager, Dr. Don Hall, explaining how this licence limitation adversely impacts smaller fishers like the plaintiffs.

2. Regulation of the groundfish fishery – halibut, sablefish, rockfish, lingcod and dogfish

[566] Groundfish is a broad term used to describe fish that dwell at or near the bottom of the ocean. Some species of groundfish are halibut, rockfish, lingcod and sablefish. There are seven groundfish fisheries for management purposes: groundfish troll; halibut by hook and line; sablefish by trap and by hook and line; inside rockfish by hook and line; outside rockfish by hook and line; lingcod by hook and line; and dogfish by hook and line.

[567] Within the hook and line gear fishery, the halibut fishery is the most valuable. Halibut has the largest landed value for a single species of groundfish. The landed value for the halibut total allowable catch (TAC) was approximately $45 million for 2006. There are 435 licences issued annually but only about 50% of them are actually fished. Halibut can only be retained when taken by hook and line or trap gear. The halibut season is eight months long, spanning March 10 to November 15. Most commercially licensed halibut harvesters average two trips per season to harvest their quota; each trip lasts approximately 10 days. Halibut are tagged by a department-certified observer at the point of initial off-loading with a unique serial number that will identify each fish. These numbers are recorded by the observer and the validation record completed for each landing. The objectives of tagging are enforcement and to assist in marketing. All halibut landed in Canada, including Canadian-caught halibut landed in the United States, are tagged.

[568] Since 1991, Canada has implemented an individual vessel quota system in the halibut fishery whereby each licensed vessel is given a percentage of the area catch limit to harvest at any time over an extended season. Most Canadian halibut goes to the fresh fish market instead of being sold frozen, as was the case before the implementation of individual quotas.

[569] In the fishing year April 1, 2006 to March 31, 2007, a new Integrated Fisheries Management Plan (IFMP) for all groundfish fisheries replaced the previous five separate IFMPs. This step followed several years of extensive consultation with all stakeholder groups, including aboriginal groups, and, specifically, the plaintiffs. The new IFMP was designed to address by-catch issues, regarding which there were significant concerns with the mortality of discarded fish. For example, in 2004 it was estimated that 55,862 pounds of rockfish, discarded after having been caught, would not have survived. There were also significant concerns that at-sea releases of by-catch were resulting in mortality in excess of two or three times the total allowable catch for some species such as yellow eye and quillback rockfish. The DFO concluded that by-catch was a major problem for the management and sustainability of the commercial groundfish fisheries and that reform was necessary. In June 2003, with the enactment of the *Species at Risk Act*, R.S.C. 2002, c. 29, many species of rockfish were identified as being at risk.

[570] In response to these concerns, the DFO identified five guiding principles for the commercial groundfish sector:

a. all rockfish catch must be accounted for;

b. rockfish catches will be managed according to established rockfish management areas;

c. fishers will be individually accountable for their catches;

d. new monitoring standards will be established and implemented to meet the above three objectives; and

e. species and stocks of concern will be closely examined and action, such as a reduction in total allowable catch and other catch limits, will be considered and implemented to be consistent with the precautionary approach to management.

[571] The reforms focused on 100% at-sea monitoring and 100% dockside monitoring, individual vessel accountability for all catch, both retained and released, individual vessel quotas and reallocation of these quotas between vessel and fisheries to cover by-catch of non-directed species.

[572] Dr. Groot, Canada's scientific and technical expert witness, noted that halibut stocks are generally in good shape. The Pacific halibut fishery is regulated by the International Pacific Halibut Commission, of which both Canada and the United States are members. The management goal of the Commission is to develop a maximum sustained yield of halibut for the benefit of both countries. Each year the Commission checks the progress of the commercial fishery and reviews new research in order to prepare regulations for the following season. The authority to allocate among user groups is considered the responsibility of the individual governments who are members of the Commission. The Commission deals only with conservation issues and domestic government regulations cannot conflict with or be more liberal than those set by the Commission. The requirement for Canada to comply with its international obligations under this treaty is one of the many factors that Canada says justifies the manner in which it regulates the groundfish fishery, particularly halibut.

[573] In the 2008 report referred to in the evidence of one of Canada's fisheries witnesses, Diane Trager, *A Preliminary Review of the Groundfish Integration Pilot Program*, Fraser and Associates, August 2008, prepared for the DFO by an outside consultant, the authors concluded that the monitoring costs arising from the groundfish IFMP pilot program had increased and that those costs were more significant for harvesters of small volumes and of lower valued products. The authors also concluded that there was no clear evidence that average fishing costs had declined or that average fishing revenues had increased to help offset the higher monitoring costs.

[574] The costs of monitoring, which are entirely born by the fisher, are significant. For electronic monitoring, the vessel owner must either install monitoring equipment,

estimated to cost about $8,000, or else rent it at an estimated cost of $65 per day. Alternatively, an on-board observer costs $343 per day.

[575] At p. 29 of the report, the authors note that "the key social and distributional concerns raised with respect to integration include potential adverse impacts on the small boat fleet and small producers in the various fisheries; potential adverse impacts on present and future First Nations' access to these fisheries; and, potential restrictions on limitations on access to ground fish resources by recreational fishers."

[576] The plaintiffs say that the halibut fishery provides a good example of the exclusion experienced by the Nuu-chah-nulth as a result of the implementation of limited entry regulation. When the halibut fishery became limited entry in 1979, the qualifying criteria required a vessel owner to have landed 3,000 pounds of halibut in one of either the 1977 or 1978 fishing seasons. Fishers who may have fished halibut less intensively in the qualifying years were shut out. The result, after appeals were considered, was that 435 vessels qualified for a halibut licence from 1979 forward. None of those licences were allocated to Nuu-chah-nulth fishers. Similarly, when the rockfish fishery went to limited entry, none of the more than 70 Nuu-chah-nulth fishers who fished rockfish before limited entry qualified for a licence. Nuu-chah-nulth witnesses testified about the effect on Nuu-chah-nulth fishers of limited entry. Dr. Lucas testified that this exclusion "devastated the Nuu-chah-nulth tribes." Similarly, plaintiff members Benson Nookemis, John Frank and Chuck McCarthy were all fishermen who did not qualify for halibut licences despite having fished for halibut in the years prior to 1979.

[577] The plaintiffs also submit that the fixed share and variable share quotas have operated to exclude them from the fishery. While the plaintiffs are not opposed to all quotas and do not take issue with them *per se*, they do take issue with the fact that the whole commercial TAC has been allocated to others without accommodating their rights. Dr. Hall described "the root of the problem" as being "who gets the initial award" of the quota. When quotas were introduced to limited entry fisheries, the only parties that were considered for the issuance of quotas were those who already

had existing licences. The DFO did not have special programs to allocate quota to First Nations when quotas were put in place.

3. Regulation of the herring fishery

[578] Management of the roe-herring fisheries is also through IFMPs. There are four separate IFMPs for herring: spawn-on-kelp; roe-herring; food and bait; and special uses. Dr. Groot stated in his report that there are five major Pacific herring stocks in British Columbia: the WCVI; the Strait of Georgia; the central coast; Prince Rupert; and, the Queen Charlottes. In addition, there are many small resident stocks that remain near their breeding grounds. It is to these smaller resident stocks that the Nuu-chah-nulth refer when they propose pocket herring fisheries. The abundance of herring on the WCVI has been declining steadily in recent years.

[579] Dr. Groot said in his report that estimating abundance of small herring runs in areas outside the major assessment regions is difficult. The precautionary principle is therefore used for these minor stocks and the exploitation level is set at a maximum of 10%. The exploitation level is set at 20% for herring in the major assessment regions.

[580] In cross-examination, DFO witness Greg Thomas was asked about the Nuu-chah-nulth Tribal Council's proposal to create pocket herring fisheries:

> Q: Hypothetically you could send one or two or three boats to a particular location, limit the amount of harvest and not create a conservation concern?
>
> A: On face value you could do that but it's never that simple. The problem is that – because you are going to take so much herring you would have to have a very complex management system that would be costly to operate whereby you were monitoring abundances in all of these small pocket areas and there's the added problem too in estimating how much fish is in these minor locations and then providing some sort of in-season target on what you want to take out of there. And it's for that reason, because of the logistics of it and the problems with estimating abundances in minor areas, that we focussed the fishery on the larger aggregations.

[581] Mr. Thomas testified that if management costs were not a concern, it would be possible to conduct a pocket herring fishery without creating conservation problems. Those management costs would be related to stock assessment and the administration associated with managing such a fishery.

[582] A further complication for the administration of pocket herring fisheries is that herring do not always return to spawn in the same inlet. Herring are highly migratory, which is, in part, why their abundance is so uncertain and highly variable. However, stock assessment techniques for herring have proven relatively accurate, though those assessments must be performed annually.

[583] Owing to conservation concerns, there has been no commercial roe herring fishery on the WCVI for three years and no commercial herring spawn-on-kelp fishery for the past two or three years.

4. Regulation of intertidal clams and geoducks

[584] Licence limitation was introduced to the intertidal clam fishery in 1998. At that time, 50% of licences were designated aboriginal communal licences to recognize historical First Nation representation in the fishery. Aboriginal communal licences provide the same access to the fishery as regular commercial clam licences, but are held communally. The band chief and council designate the licence holders annually.

[585] When the DFO began licence limitation in the clam fishery, the goal was 50% participation by First Nations on the south coast. As the Nuu-chah-nulth bands had 237 of the total 333 clam licences in Management Area F, this accounted for 70% of the licence eligibilities. When Aboriginal communal licences and regular commercial clam licences are combined, Nuu-chah-nulth members have approximately 80% of the total clam licence eligibilities in Area F. The DFO records indicate that the Nuu-chah-nulth Tribal Council bands are eligible for 237 clam licences but that in the years 1998 to 2007, only a proportion of those licences have been used, ranging from a low of 144 in 2006 to a high of 192 in 2002.

[586] I discuss regulation of the clam fishery in more detail later in these Reasons, and explain why I have concluded that the plaintiffs' aboriginal right to harvest clams is not infringed.

[587] The geoduck fishery, another shellfish fishery, is regulated differently from clams. The geoduck fishery is subject to limited entry and harvest quotas. This fishery is limited to 55 commercial licences, and thus quotas are set at 1/55 of the annual coast-wide quota. The location and schedule of openings and closings varies from year to year, but the potential to harvest is available every day of a calendar year. The geoduck fishery ranks first in landed value of invertebrate fisheries in the province. John Frank, a member of the Ahousaht First Nation, testified how the geoduck fishery is "a stone's throw" from the Ahousaht village but that the licence regulations prevent any Ahousaht from participating in that fishery. I do find the plaintiffs' aboriginal rights are infringed in respect to the geoduck fishery.

I. Aboriginal Participation in the WCVI Fishery

[588] Canada's first defence to the plaintiffs' claim that their aboriginal rights are infringed is that the plaintiffs' current rate of participation in the commercial fishery, on a proportionate basis, is equal to or greater than their historical rates of participation. Canada submits that this proportional analysis demonstrates that Nuu-chah-nulth participation in the fishery has remained steady at about 32% over the period from 1951 to date. The plaintiffs, however, assert that the proportional analysis is misleading, and instead prefer to rely on actual numbers of Nuu-chah-nulth fishers to prove that their aboriginal rights have been infringed. The parties take very different views of the evidence of Nuu-chah-nulth participation in the WCVI fishery.

[589] In this section, I will consider both the statistical and anecdotal evidence as to aboriginal participation in the commercial fishery since approximately 1950. (I described the participation of the plaintiffs in the WCVI fishery prior to 1950 earlier in these Reasons in the discussion of continuity.) I begin with the evidence of some of the individual members of the plaintiff First Nations. Some of these witnesses are,

or were, fishers; others recounted their observations of their communities' declining participation in the fishery; yet others discussed the impact of specific regulations on their ability to fish. After recounting the individual plaintiffs' evidence, I will refer to the evidence of the plaintiffs' fisheries officer, Dr. Hall. I will then relate the statistical and opinion evidence of aboriginal participation given by the experts for both the plaintiffs and Canada.

1. Shawn Dion Atleo

[590] Shawn Atleo is the representative plaintiff for the Ahousaht First Nation. At the time of his testimony, he was 39 years of age. He is a Hereditary Chief of the Ahousaht and, at the time he testified, the Regional Chief for British Columbia in the Assembly of First Nations. Prior to being elected to this position, he served as the central region co-chair for the Nuu-chah-nulth Tribal Council.

[591] Recounting his first trolling experience, Mr. Atleo testified, "I think I was six or seven when we went offshore, right off of Ahousaht here. That was my first real trolling experience, was late grandpa Mark taking me out and being able to pull out some fish and even earn a few dollars, I think I earned $40.00 that day...". In speaking of his grandfather Mark Atleo, he stated, "He was a fisherman, as everyone was here, he took me out fishing when I was a boy ...".

[592] When asked to describe the fishing activity that he observed in Ahousaht, Mr. Atleo testified, "…over my growing-up years here I don't ever remember a time where there wasn't fishing going on". He continued to describe fishing as a child on the wharf and out with relatives. As he grew older, he progressed to trollers and small mosquito fleet fisheries. He reminisced about the "…entire float being full of people, of fishermen". He said:

> … so growing up it's difficult to think of anyone who didn't in one way or another participate in the fishery going out for halibut, cod, our people also went offshore for tuna, all of the species that you find in our territories and further outside of our territories our people participated in.
>
> …

> There were a good number of boats, I couldn't tell you how many there were at the time. Like any kid growing up here, you know, if you weren't out fishing, you were in school that day. You waited for the fish boats to come home at the end of the day. So lots of people in our community were having as their principal activity commercial fishing.

[593] Mr. Atleo went on to discuss his teenage years:

> Through my teens it was working on the commercial salmon fishery on the seine boats ... it's very much a time where, as a young person, you know, those are instruction grounds ... My grandmother would tell me about how they would go and they would fish all summer for food, and they would fish in the winder, in the early fall for their winter supply of food, and all summer they would fish commercially, and she's 83 or 84 years old, and she did that all her life, when she was a child as well ... So I've got, you know, memories of fishing my whole life, and it was commercially from the time – as I said, from when I was 13 to 17. I don't remember any of my peers who did fish who didn't work with their families and go out fishing, so obviously that's changed tremendously to today ...

[594] Mr. Atleo described the range of fish species he had observed Ahousaht people harvesting to be coho salmon, sockeye salmon, chum salmon, dog salmon, herring, halibut, cod, red snapper, trout, shellfish, and sea urchin, before concluding, "…really just about everything that is edible would be harvested and either used at home or sold".

2. Stanley Michael Sam

[595] Stanley Michael Sam is a member of the Ahousaht First Nation. He was 78 years of age at the time of his testimony. He was born in Ahousaht and has lived there for the duration of his life, with the exception of a five-year period when he lived in Port Alberni. Mr. Sam holds the traditional role in the Ahousaht Indian Band as speaker for two Chiefs, Hyupinulth (Bill Keitlah) and A-In-Chut (Shawn Atleo).

[596] Mr. Sam caught his first coho salmon when he was seven years old, and began helping his father fish at 11. When he purchased his first boat at the age of 13, "everyone was fishing, even the mothers, kids, ten years old, nine years old, they were out there ... catching fish". He stated there used to be about 40 to 50 dugout

canoes down the beach in Ahousaht. People could fish whenever they wanted, without a licence. He declared:

> … everybody worked for their dollars, year round, and I got doing the commercial fishing when I was – I didn't use a licence with my boat for I don't know how long, but my father told me, he said that "if you ever pay for a licence, it's going to be forever, and to pay for it, you pay for it every year. Not only that, you break our culture", he said, "break our law" …

[597] Eventually Mr. Sam did purchase a licence. He retired from fishing around 1996 or 1997 for health reasons.

[598] With respect to modern-day fishing in Ahousaht, Mr. Sam stated:

> But what we see today, what changes there is today, you see all the boats on the shore there, you see 12 boats, all destroyed, because the sea is all closed, you don't see people in their boat anymore. You see there, you take a picture of it, and it shows around the whole world how we suffer today.

3. Francis Frank

[599] Francis Frank is a member of the Tla-o-qui-aht First Nation. He was 46 years of age at the time of his testimony. Mr. Frank was formerly the elected chief of the Tla-o-qui-aht First Nation.

[600] Asked about his recollections of his community's fishing activities when he was growing up, Mr. Frank described seeing 15 to 20 fishing trollers docked at Opitsaht in the 1970s when he was in high school. Many village residents owned vessels; many of those who did not worked as crew. As well, people fished from speed boats in a mosquito fleet. He said members of his community on Opitsaht were either fishers or loggers.

[601] Mr. Frank recalls that the decline in the fleet occurred between the late 1970s and the late 1980s. In his professional capacity as a social worker, he observed an increasing number of people on government assistance during that time period. He testified that the Tla-o-qui-aht First Nation did have two troller licences but that the band did not have sufficient capital or capacity to actually go out and fish the

licences. Mr. Frank testified that there is now only one fisherman left in Opitsaht; he is referred to as "the die-hard".

4. Barney Williams Sr., known as Too-Tah

[602] Barney Williams Sr. was born into the Che:k:'tles7et'h' First Nation and later adopted into the Tla-o-qui-aht First Nation. He was 90 years of age at the time of his testimony.

[603] As a young boy, Mr. Williams Sr. fished from a canoe, trolling for salmon, lingcod and halibut. Speaking of the 1930s, he said that everybody in Opitsaht fished from canoes or whatever they could use: "That was our living, our way of life." The Che:k:'tles7et'h' fished for salmon from by trolling June to September. In the fall, they fished for salmon in the rivers and inlets, as well as at the mouths of rivers using cone-shaped traps made of cedar. In February and March, they fished for spawn herring, raking the fish into the canoe or using dipnets. The herring spawn was collected from cedar or hemlock branches and also from kelp. Fish were bartered and exchanged and also sold to BC Packers and other buyers. Among the species they fished were spring salmon, coho salmon, sockeye salmon and halibut.

[604] Mr. Williams Sr. started commercial fishing when he was 20 years old. He continued commercial fishing until his retirement due to illness approximately 20 years before his testimony. He obtained a benefit from one of the DFO's aboriginal programs, through which he was able to build a 54' seine boat for about $72,000. Mr. Williams Sr. has also trapped and logged to earn a living.

[605] Mr. Williams Sr. testified as follows:

> Yes my daughter more or less grew up on the boat. She's 46 years old now. She was running the drum and everything. She, she -- all my kids grew up on a boat, during the summertime. All have a chance to go fishing and that was beautiful for them to have. It's not everybody that has a chance to go fishing. That's why I think we want to keep our right fishing. That's one of the reasons, because that's our life and livelihood. That's our livelihood.

5. Robert Jack Dennis

[606] Robert Jack Dennis is a member of the Huu-ay-aht First Nation and is currently its elected chief. He was born in 1947.

[607] Mr. Dennis started to fish when he was 11 or 12 years of age, learning in a dugout canoe. His father fished his entire life until five years before his death at age 70. He testified that all of the members of his community were taught how to be fisherman: "Everyone of us had a putter and we were known as the mosquito fleet. And that was just the progression into getting into the fishing industry." Mr. Dennis testified that there was no one in the Huu-ay-aht First Nation who did not fish. He said that his family had two or three houses in different places within the Huu-ay-aht territory related to fishing locations. He testified that "we were a fishing community, that was all we had. And so, it was an annual thing to head out there and do our thing". He said that at the peak of the fishing season, there would be about 70 houses occupied on Diana Island in Huu-ay-aht territory.

[608] Mr. Dennis fished until he was 25, and then chose to go into logging because he felt fishing was not a good career. He turned down an offer from his father of the salmon troll boat, as "it seemed too risky" financially. He subsequently ended up back in the fishing industry, working at fish plants in Bamfield and Ucluelet.

[609] Mr. Dennis was asked to describe the level of involvement of the Huu-ay-aht people in the fishery today. He responded:

> Not anywhere near, not even close to what it used to be. There used to be a time in our tribe that everybody lived at home, everybody could make, you know, a reasonable income from fishing. A huge change. You know, there was a time when all the fish buyers were located either at Chapis or in Bamfield. And then when the industry itself started to what we call centralize, they moved their fish buying operations to Vancouver, Victoria. So, it became harder for us little guys to participate in the industry. So that was, that was the biggest change that I saw. You know, there was no more, there wasn't the ability to just go out fishing for the day and bring your fish into the buyer and sell it.
>
> And then a huge change in the licensing system too, where we would be able to sell our fish under my Dad's licence. After, after I forget what it was called, the Davis Plan, you couldn't do that anymore

[610] Mr. Dennis testified that five Huu-ay-aht have licensed boats and that the band has two boats and licences. The communal fishing licences presently employ up to 10 people for a maximum of two to three weeks of the year. Mr. Dennis testified that they leased out a licence to a commercial fishing company, and that with the money they raised they performed salmon enhancement work. They also lease their communal licence to band members. Mr. Dennis fishes for his own use every year. He has an 18' boat with a 115 horsepower motor.

6. Julia Lucas

[611] Julia Lucas was born a member of the Ahousaht First Nation. She became a member of the Hesquiaht First Nation after her marriage to Simon Lucas in 1959. She was 64 years old at the time she testified.

[612] Ms. Lucas recalls that in her youth, fishermen would go out on a daily basis from mid-April to mid-October. Boats began to pack ice in 1959, and then the fish camps disappeared. Her husband would then deliver his fish to Tofino or, if he was fishing in the Kyuquot area, to Kyuquot or Winter Harbour. Ms. Lucas testified that there has been a huge change in the abundance of fish compared to the 1950s and 1960s, and that there are presently only two boats in the Hesquiaht band.

[613] Ms. Lucas deposed in her affidavit that she recalls about 67 Ahousaht owner-operated fishing vessels that fished commercially during the period from the 1950s to the 1990s. In addition, she recalls about 16 people who fished in small canoes or small motor boats. She recalls 21 commercial fishing vessels operating from Hesquiaht between the 1950s and 1980s. In the 1990s, the number of commercial fishing vessels operating from Hesquiaht territory fell to nine and in the 2000s that number had further reduced to four.

7. Lillian Howard

[614] Lillian Howard is a member of the Mowachaht/Muchalaht First Nation. She was 57 at the time she testified. She recalls commercial fishing when she was about five years old. She recalls going out to fishing grounds about two hours offshore.

The reserve is now at Tsa Xana which is on the Gold River. She said that the members of the band are still very active fishing in and at the mouth of the Gold River, though not to the extent of the 1950s. Ms. Howard recalls that in the past, there were 16 commercial fishing vessels operating out of the Mowachaht/Muchalaht reserve. Now there are none.

8. Ray Williams

[615] Ray Williams is a member of the Mowachaht/Muchalaht band. He was 66 at the time he testified. He and his family are the only members of the band who continue to live at Yuquot, in Nootka Sound. He recalls approximately 21 commercial fishing vessels operating from Mowachaht/Muchalaht reserves in the 1950s and 1960s. Only one now continues to operate.

[616] Mr. Williams testified that his family does still fish. He vividly described winter fishing in Nootka Sound:

> Q: Can you describe for us what it is like to -- the weather in Yuquot in the winter? How often can you get out onto the open ocean with the winter storms? If you could just fill that in for us.
>
> A: It -- you have to see it. Because it's so enormous, the waves and the wind. And the rain is coming this way. It's not going down. It's going this way. Because it's so stormy. And it's impossible -- almost impossible. There are days when it just calms right down like this, but the ocean is big. Like, big swells, big waves but not breaking. Just a big swell, but humungous swells though. But we don't risk going out unless we're sure that it's going to be calm, calm, calm. Because there's no other boats around. Just me and my son in one boat. So we have to risk our lives and risk our fishing chip when we go out and go out in December, January, for p'uu-i, for halibut. And the halibut then is what we call the homesteaders. The homesteaders that – halibut that stay there -- live there, stay there. They don't go out into the deep like the other ones do. And we know where they are. And we have to pick our days. And risk our lives and risk our boat. It's our only means of travel is our boat. We have to be careful of what we -- if we hit something, then it's another loss of our repairing the boat. So we have to be careful because we're the only ones living there. And there's no one close by that can rescue us quickly if something should happen. That's how risky it is, our way of life. But we chose that life to live. That's what we love. We're in it, and nobody is going to change me for the way I live because I love it the way I am.

Q: Right. So when would you say the ocean is as rough as you've described it? What months of the year would you describe as being as you've just stated?

A: It would be November, December, January and February.

Q: Right.

A: We did a fishing trip three weeks ago, and there was one of the very few chances we had to go. And again risking -- risking our travel and our trip to the fishing grounds. But that's – that's what we like to do and that's what we love to eat: halibut and yellow eye. And being without it is a long time in between, so when we do catch one, even which -- like two, three months ago we caught -- had it last. So us going out, after not having it for two, three months, it is a real treat for us to have it because that's the way we live. It's what we eat.

Q: Right. Okay. And presently, Mr. Williams, it's yourself and your family are the only Mowachaht/Muchalaht members living on the coast; is that correct?

A: That is correct.

Q: And the rest of the members live up in Tsarksis or in --

A: Tsa Xana.

Q: Tsa Xana. Or outside of Tsa Xana in Nanaimo or in Victoria?

A: Yes.

[617] What Mr. Williams was describing was food, as opposed to commercial, fishing. He said that eight years ago, between 400-450 speedboats, 90% of them Americans, were recreational fishing in Yuquot, whereas many non-aboriginal fishers have left commercial fishing.

9. Edward Jack

[618] Edward Jack is a member of the Mowachaht/Muchalaht First Nation. He was 58 years old at the time he testified. Mr. Jack could recall about 30 different fishers who owned and operated their own vessels at varying times between the 1950s and 1990s. He testified that in the mid-1980s, no Mowachaht/Muchalaht people had commercial fishing licences. Because he could not afford a commercial fishing licence, he sold his fish through someone who did have a licence. Several other Mowachaht/Muchalaht fishers did so as well.

10. Simon Lucas

[619] Simon Lucas is a member of the Hesquiaht First Nation and its representative plaintiff in this action. He was 70 years of age at the time he testified.

[620] Dr. Lucas went to residential school for eight years and returned home only in the summers. By the time he was 13, he was fishing with his father during those summer months. His father taught him to fish and where the fishing banks were. He left school at the age of 15. He spent two years logging and then returned to fishing with his father. By the time he was about 20, he was a commercial fisherman selling to the Canadian Fish Company and to a travelling fish buyer who came to Hesquiaht Harbour. Dr. Lucas borrowed $57,000 from the Indian Fishermen's Assistance Program for a new boat, his boat having burned. That price included a licence. He fished that boat for about 20 years until the buy-back in 1998.

[621] Dr. Lucas has held many leadership positions in the Nuu-chah-nulth Tribal Council, as well as in various fisheries organizations and task forces. He is knowledgeable about fishery regulations and the AFS. He observed that there was no aboriginal involvement in the cod fishery despite the fact that the resource was in their territory and they used to catch the species. He also complained about the implementation of quotas for halibut because, as he said, one had to have caught 5,000 pounds to qualify for the quota and none of the aboriginal fishers qualified even though they had been catching halibut for years. As a result, they lost the right to fish halibut.

[622] Dr. Lucas testified that in the early 1970s, the Nuu-chah-nulth people as a whole had approximately 175 fishing boats and about 100 putter fishermen boats. By the 1990s, the availability of boats had declined drastically to the extent that it was difficult to acquire fish for food.

[623] Dr. Lucas deposed in his affidavit that between 1950 and 1990, there were about 64 Ahousaht commercial fishers operating at some point in time in that First Nation. Between 1950 and the 1980s, 22 Hesquiaht commercial fishers were

operating. He recalls that in the 1990s there were 11 Hesquiaht commercial fishers, and there were only four by the 2000s.

11. Benson Nookemis

[624] Benson Nookemis is a member of the Huu-ay-aht First Nation. He was 73 at the time he testified.

[625] Mr. Nookemis recalls that when he was a young man, about 90% of the Huu-ay-aht people were commercial fishermen. He himself fished for about 57 years starting in 1940 and into the 1990s. He said that in the 1950s and 1960s, there were 36-40 boats in the Huu-ay-aht community. Mr. Nookemis testified that under the Mifflin Plan, which restricted gear use, "all our people that used to seine at the time lost their seine privileges because they didn't have any sales in the previous years to when they closed it and they lost their licences at that time". He testified that he lost his right to fish for halibut because he had not fished 3,000 pounds in the previous years. He also lost profits when changes occurred with the licences for bottom fish and groundfish. Historically he had trolled for salmon in the summer and then switched over to gillnet in the fall, but the new fisheries regulations required fishers to select one or other of the gear.

12. Frank (Alex) Short

[626] Mr. Short is a member of the Ka:'yu:k'th/Che:k:'tles7et'h' Band. He was about 77 years of age at the time of his testimony.

[627] Mr. Short recalls about 50 Ka:'yu:k'th/ Che:k:'tles7et'h' band members fishing at various times between the 1930s and the present date. At the moment, there is only one remaining Ka:'yu:k'th/Che:k:'tles7et'h' fisherman. Mr. Short testified that in the late 1970s the individual quota system "squeezed [him] out of selling our halibut." He said that he did not get a halibut licence because "our boats were too small to handle the equipment, the long line that needed a bigger boat". He testified that no one else from Ka:'yu:k'th qualified for a halibut licence. From age 30 to about 60,

Mr. Short worked in the forestry industry. The employment was seasonal, and he fished in the spring.

13. Christine Jules

[628] Christine Jules is a member of the Ka:'yu:k'th/Che:k:'tles7et'h' First Nation. At the time she testified she was 67 years of age. She grew up as a Mowachaht and became Ka:'yu:k'th/ Che:k:'tles7et'h' upon marriage.

[629] Of the 42 commercial fishers Ms. Jules can recall operating between the 1950s and the 2000s, only one, Victor Hanson, is still fishing. As a child she fished with her father who was a commercial fisherman. She testified that in the Mowachaht First Nation, fishing was the "only way our people would make money". She then fished with her husband until his death in a boating accident. Her eldest son took over the fishing. She remarried Victor Hanson, the only commercial fisherman left in their community. She testified that Mr. Hanson does not make much, if any, money from his fishing. He has an AI licence and a halibut licence. He fishes his AI licence and leases his halibut licence.

[630] When Ms. Jules moved to Kyquot in the late 1950s, there were 30 or more fishing boats at the time. By the time of her first husband's death in the late 1980s, there were only about 12 fishing boats left in the community. She testified that there are 10 recreational fishing lodges operating in their territory from June until the end of August each year. She estimates there are about 300 recreational fishermen a week in the Kyquot territory.

14. Troy John

[631] Troy John is a member of the Ehattesaht First Nation. He was 22 years of age at the time he testified. He grew up fishing with his father and his grandfather. Mr. John has a clam licence which earns him about $7,000 a year after expenses. He also earns about $1,000 a year working for an oyster farm, and approximately $10,000 working as a fish guide for a recreational fishing company. He would prefer, however, to be a fisherman.

15. John Frank

[632] John Frank is a member of the Ahousaht First Nation. He was 58 years old at the time he testified.

[633] Mr. Frank has been a fisherman all his life. He recalls growing up in the Ahousaht village in the late 1950s and early 1960s when there would have been 30-40 canoes on the beach and the harbour was full of trollers. He recalls there being over 100 fishing boats in the Ahousaht harbour, in addition to the many members of the Ahousaht First Nation who lived in Port Alberni, Nanaimo or Victoria and who continued to fish from those locations. Mr. Frank's extended family alone had 18 boats. He testified about the abundance of fish when he was a child. He also testified about the significant amounts of money that fishermen were able to earn in the mid-1970s. He said that the herring fishery provided very good income. In his best year, he earned about $290,000. Mr. Frank lost the opportunity to fish halibut when limited entry was introduced. By focussing on herring, he had not caught sufficient halibut to qualify for a licence. He said that the limited entry fishery for halibut prejudiced the generalist who historically fished for all species because the generalist did not qualify for licences as he had not landed enough halibut in the previous years.

[634] Mr. Frank testified about the geoduck fishery and how there is geoduck in abundance in front of the Ahousaht community. He said it is a $9 million business but the Ahousaht are restricted from participating in that industry by the regulatory regime. Mr. Frank described the geoduck fishery as occurring a stone's throw away from their village. He said, "and I wonder why it's happening and we've got the biggest crab bed ever and we have a crab fishery that rakes in $4 million a year and a geoduck bed that is $9 million a year. You've got $13 million sitting right in our front yard that we can't even get access to. Zero." He testified that the last geoduck licence he heard of for sale was priced at $1,200,000. He said that the Ahousaht would take part in that fishing opportunity if they had the ability to do so.

[635] Mr. Frank is a successful fisherman. He contrasted himself with his brother and many others who were not able to navigate the complexities and limitations of the DFO regulatory regime and, consequently, could not survive in the commercial fishery. He complained about the fact that the Ahousaht First Nation had worked with the DFO to stock a coho stream in Ahousaht territory, yet only recreational fishers were permitted to catch the coho that were successfully enhanced. He also expressed dissatisfaction with the DFO's refusal to licence the mosquito fleet to fish commercially on a modest basis.

[636] Mr. Frank deposed in his affidavit that in 2007, six members of the Ahousaht fished with AI licences in their own vessels. In 2000, eight members of the Ahousaht were fishing with AI licences. In the 1990s, 32 members of the band were fishing with AI licences. Between 1960 and 1980, 71 members of the Ahousaht were fishing. In the 1960s, 35 members of the Ahousaht fished from canoes and sold their fish without DFO licences, and another 33 fished without licences from small motor boats. None of those people now fish.

16. Charles (Chuck) McCarthy

[637] Charles McCarthy is a member of the Ucluelet First Nation. He was 52 years old at the time he testified.

[638] Mr. McCarthy became a commercial fisherman when he was 18, inheriting his father's boat. He is still working as a commercial fisherman. He has two vessels. He, like Mr. Frank, is a successful fisherman. This year he will be fishing with his 48' fibreglass vessel, *The Patriot*. A boat of this size is necessary in order to make his fishing enterprise viable. *The Patriot* has a $9,000 video camera on board to monitor all the fish he catches, a requirement of the DFO. He pays $65 per hour to have someone review the video footage or, alternatively, hires an onboard observer which costs $700 a day. If he is halibut fishing and pulls up other fish, he must buy quota for the by-catch and cannot go out to fish again until he has done so.

[639] I conclude from the evidence of Mr. McCarthy and Mr. Frank that fishing commercially on a successful basis is a complicated, costly enterprise. The fisher must be familiar with the DFO's complex regulatory regime and have capital. Most Nuu-chah-nulth fishers cannot hope to enter the industry on that basis.
Mr. McCarthy testified that there are no Ucluelet fishers operating at the present time, though there are people interested in doing so. There are, however, barriers to these people becoming involved in commercial fishing. Mr. McCarthy testified that the biggest barrier is the cost of the licence and the boat. He believes that it would be quite lucrative to fish from a boat of less than 20' if fishers did not have to acquire a licence and a quota. He was asked about the current barriers to commercial fishing:

> Q: In your time as chief, were you in some way working towards more access for the Ucluelet First Nation?
>
> A: We've always wanted more access for individuals to just actually be able to access salmon and – salmon, any species, and be able to make some sort of moderate living, whether it's prawns in some of our territory, to split licences to make available an option whether or not they want to fish.
>
> Not everybody might want to fish. But there's a certain amount of people that, I mean, if given an access to the resource will actually re-enter the fishing industry.
>
> But the biggest barrier for anybody is the cost of quotas and monitoring and other fees.

[640] Mr. McCarthy deposed in his affidavit that there were 30 commercial fishing boats operating from the Ucluelet First Nation in the 1960s to 1980s. In the 1990s that number was reduced to seven. In the 2000s the number was reduced to two inactive licensed fishing vessels owned by a member of the Ucluelet First Nation.

17. Barney Williams Jr.

[641] Barney Williams Jr. is a member of the Tla-o-qui-aht First Nation. He was 70 years of age at the time he testified. He testified that every family on Opitsaht had a boat when he was growing up, either a little putter, a troller or a combination boat.

18. Dr. Don Hall

[642] The plaintiffs also rely on the evidence of Dr. Don Hall to prove infringement. Dr. Hall has been employed by the Nuu-chah-nulth Tribal Council as a fisheries biologist since 1992 and as the Fisheries Program Manager since 1996.

[643] The Nuu-chah-nulth Tribal Council is composed of fourteen Nuu-chah-nulth nations, including the plaintiffs. The Council maintains a fisheries department to offer services to its member First Nations, including technical and policy advice on matters related to the management of aquatic resources. That department co-ordinates certain aspects of the relationship between the DFO and the Nuu-chah-nulth Tribal Council members, including the distribution of funding.

[644] In 2006, the Nuu-chah-nulth First Nations established an aquatic management organization with the Nuu-chah-nulth name of *Uu-a-thluk*. The central forum and decision-making body for the *Uu-a-thluk* is a Council of *Ha'wiih* (hereditary chiefs and their representatives), consisting of representatives of each of the Nuu-chah-nulth First Nations. The Council of *Ha'wiih* is supported by *Uu-a-thluk* staff and a joint technical working group. That working group, in turn, is comprised of members from the DFO, the Nuu-chah-nulth First Nations and the Nuu-chah-nulth Tribal Council.

[645] The Nuu-chah-nulth Tribal Council annually receives funding from the DFO to support the activities and programs of its fisheries department, as well as the *Uu-a-thluk* and the Council of *Ha'wiih*. In 2007, that amount was approximately $994,000.00. This funding is passed through to the individual First Nations who make up the Nuu-chah-nulth Tribal Council.

[646] Dr. Hall testified that there are now only three full-time Nuu-chah-nulth fishers, compared to about 70 or 80 sixteen years ago when he began his employment with the Nuu-chah-nulth Tribal Council:

> Q: So you start working there. What's the state of affairs with -- how many people in the Nuu-chah-nulth nations are fishing based -- you

know, what knowledge did you acquire about the level of participation in commercial fisheries?

A: When I started working with the Nuu-chah-nulth Tribal Council in '92, there were -- my recollection, you know, 70 or 80 Nuu-chah-nulth fishermen. And this would be skippers of boats, not deckhands or that. But 70 or 80 people that were involved with commercial fishing. To at least earn part of their livelihood. Some of that would be full-time part of their livelihood. Others it would be a good portion of it. If I could use that term. In other words, active commercial fishermen, there were 70 or 80 that were running boats and skippers boats.

Q: And how -- what number would you -- in your experience exist today similar question. I mean, people running their own boats, how can you compare the 70 or 80 to today?

A: In that I've worked there almost 16 years. It will be 16 years this July. So in that period of time my observation has been a decline of Nuu-chah-nulth participation. Now to the point where I can, you know, name or count off about 18 or 20 or so Nuu-chah-nulth fishermen that I can, you know, say that are at least, you know, part time involved in fishermen. Of that group -- of that group, I can only think of three that are in my observation, you know, full-time fishermen that are, you know, to describe it generally, making a go, making a living at commercial fishing. And that would be Chuck McCarthy from Ucluelet, Vic Amos from Hesquiaht and Vic's nephew Terry Amos from -- also from Hesquiaht. So those -- those three are the guys that are -- the men that are, you know, active. Active Nuu-chah-nulth commercial fishermen. And the other set, you know, of 16 or 17 or -- would be, you know, guys that are still trying, you know, may fish salmon. May fish herring. You know, one guy Calvin Clark fishes crab. So there, that is that other set of people that -- I don't think they're making a living at commercial fishing any more, but they are still trying and still participating.

Q: And so has it been part of your role at the NTC to address this declining number of fishermen?

A: Oh, absolutely. It is a stated objective of Uu-a-thluk and the Council of Haw'iih to increase the economic access for Nuu-chah-nulth. And that is in the existing commercial fisheries, in new economic fisheries in the -- you know, maintaining the types of pilot sales fisheries that we talked about before.

So, sure, we tried every which way we can to maintain, hold on to what Nuu-chah-nulth have, and certainly try to, you know, grow that in every opportunity and way that we can think of. That I can think of and that my staff can think of.

Q: You say opportunity you can think of. Are you limiting yourself to the license and quota structure currently in place through DFO?

A: No. We are -- sorry. Uu-a-thluk staff and myself are always looking for, you know, any opportunity. It does not just -- it is not -- there are

> not those opportunities that are just within the existing commercial license and quota structure.

[647] I assume Dr. Hall overlooked Mr. Frank, a successful Ahousaht fisher.

[648] Dr. Hall gave evidence about numerous proposals that his organization has made to enhance commercial fishing opportunities for the Nuu-chah-nulth First Nations. He described, for instance, the Somass Terminal Fishery which operates on the Somass River and benefits the Tseshaht and Hupacasath First Nations. The fishery is called a terminal fishery because the fish are caught as they swim upstream to their spawning grounds, in other words, at the terminus of their life cycle. The Somass Terminal Fishery is an aboriginal-only fishery and enables numerous members of the participating First Nations to fish from small boats and to sell their fish to somewhat enhance their income. The Nuu-chah-nulth Tribal Council has requested the extension of this program to other rivers and First Nations. Below I reproduce a letter dated July 18, 2006, from Francis Frank, president of the Nuu-chah-nulth Tribal Council, to Prime Minister Harper that was prepared with the assistance of Dr. Hall. The letter discusses the benefits of a terminal fishery, such as that on the Somass:

> Two Nuu-chah-nulth First Nations in the Port Alberni area, Tseshaht and Hupacasath, have been involved in exploring methods for aboriginal commercial fisheries since 1992. These First Nations have designed small scale fisheries that create seasonal employment for local residents of the Port Alberni area. An economic evaluation of the fishery determined that most of the money generated from the aboriginal commercial fishery stays in the Port Alberni area, supporting all local businesses. Past and present Port Alberni mayors and local business leaders support the contribution of the aboriginal commercial fishery, the general commercial fishery, and the recreational fishery to our local economy.
>
> The aboriginal commercial fishery is a different fishery than the general commercial fishery. Where the general commercial fishery uses large boats with long nets and power driven gear, the Tseshaht and Hupacasath have deliberately created a fishery with small boats, short nets, and no power gear allowed to pull the nets. With these restrictive rules the Tseshaht and Hupacasath create opportunities for over a hundred community members to participate in the fishery. The same quantity of fish harvested by over 100 Tseshaht and Hupacasath community members over a two month long fishing season (subject to area and weekly openings and closures) could easily be harvested by one seine boat (with a crew of 5 persons) or a few

> commercial gillnet boats (crew of 2 or 3 persons) in a few days of fishing. Tseshaht and Hupacasath have chosen to create a fishery with different rules to provide a reasonable benefit to a large number of their community members. Likewise, the recreational fishery has designed rules that maximize the opportunity and expectation for a maximum number of sport fishing participants. The commercial fishery has designed rules that work for their choice of vessels and gear. They are all different fisheries, with different objectives designed to meet the needs of their constituents.
>
> Aboriginal, commercial, and recreational fishing interests continue to work together so that they will all benefit from the harvestable surplus of salmon returning to the rivers in Alberni Inlet. It is hard work, but it is paying off with peace on the water and benefits to all harvesters. No one wants to go back to the 1980's, with racial tensions that lead to dangerous confrontations and eroded community spirit, not to mention greatly escalated the enforcement costs to DFO.

[649] The DFO has not agreed to extend this type of fishery to other rivers.

[650] The Somass Terminal Fishery has not been without controversy, and similar pilot sales programs on the Fraser River have been challenged in the Courts on constitutional grounds. Recently, in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, the Supreme Court of Canada upheld the constitutionality of those pilot sales programs, concluding that they did not infringe the equality rights of non-aboriginal fishers under s. 15 of the *Charter*.

[651] Another suggestion that Dr. Hall has made to the DFO is to permit aboriginal fishers to fish from a mosquito fleet, being a fleet of small motorized boats. The proposal is that a licence would be divided, for example, by five, so that five fishers could operate from smaller vessels. It is Dr. Hall's view that permitting fishing through a divided licence in a mosquito fleet would generate economic spinoff to aboriginal communities. He has had no success in persuading the DFO to agree to such a proposal.

[652] The Ahousaht First Nation made a proposal to the DFO in March 1997 for their mosquito fleet to become *bona fide* commercial fishers. The Ahousaht proposed that they procure through the Aboriginal Fisheries Strategy program five salmon gillnet licences and then convert them on a tonnage basis into 30 separate licences. The Ahousaht said in its proposal that "with the allowability to split

tonnage, each of these fishers will become legitimate commercial fishers, hiring one extra crew person per vessel to hand pull gillnets. As a result, 60 members of Ahousaht will be integrated into the mainstream economy, allowing them to receive market prices for their catch, pay market wages to their crew and save money over the long term for the future purchase of additional licences and vessels."

[653] Wilf Luedke, a DFO witness, testified that this Ahousaht proposal was favourably viewed by the local DFO staff but that to implement it would have required ministerial decisions which, for one reason or another, were never forthcoming.

[654] Along similar lines, on behalf of another Nuu-chah-nulth Tribal Council non-plaintiff First Nation, Dr. Hall has recommended the splitting of crab licences. This proposal, too, was not favourably received by the DFO on the basis that conservation requirements could not be met, as five separate vessels fishing on a partitioned licence would actually fish more than one vessel on one licence.

[655] Dr. Hall also gave evidence about the advantages of permitting aboriginal fishing in pocket herring fisheries. As noted above, pocket herring fisheries are stocks that are separate and discreet from the major herring stocks harvested in the commercial roe-herring seine and gillnet fisheries. The stocks are not sufficiently large to sustain the regular fishery, but Dr. Hall is of the view that they could be fished by aboriginal fishers to create economic opportunities. The DFO has not agreed to grant a pocket herring fishery to the Nuu-chah-nulth.

[656] Dr. Hall testified that the individual transferrable quota system is simply too expensive for Nuu-chah-nulth fishers. Nuu-chah-nulth fishers did not qualify for quota because they had not caught sufficient tonnage in prior years. Dr. Hall testified that there are now no Nuu-chah-nulth participants in the halibut fishery. He testified that to make a living on the WCVI, a fisher needs to diversify, but that diversification is not encouraged by the present regulatory regime. For example, some years, sockeye salmon will migrate down into the Georgia Strait, and in other years, down the WCVI. Dr. Hall pointed out that the Nuu-chah-nulth at one point

had a diversity of access through the "A" licences under which different species could be accessed. As the regulatory regime changed, however, various species were, to quote Dr. Hall, "stripped off that A licence over time." Each species that was stripped off the "A" licence went into its own licensing regime.

[657] Dr. Hall testified that a diversified fishery remains a goal of the Nuu-chah-nulth Tribal Council and the Nuu-chah-nulth communities. He pointed out that there are limited economic opportunities on the WCVI. As he put it, "there is fish, there are trees and there are tourists." He said that those are the only major economic sectors on the WCVI.

[658] Dr. Hall also testified about the prohibitive cost of licences. He testified about proposals for communal licences in which more than one boat could operate under the same licence as a way of spreading the economic opportunity to the community. The DFO has not agreed to that proposal. Dr. Hall described the Makah Fishery in Washington State as a model of what could be done to enhance aboriginal fishing opportunities. The Makah are a Nuu-chah-nulth speaking aboriginal community at the end of the Olympic Peninsula in Washington State. They have similar geography and similarly limited economic opportunities. Dr. Hall testified about his recent visit to Makah communities:

> I saw a harbour full of Makah fishing vessels like 50 or 60 vessels, and some slips that were boat slips where boats go, some slips that were empty implying to me that boats were out fishing, so they were actively fishing as well. There were boats that were offloading … because part of our observation down there wasn't just the fishing fleet but it was also the political structure, the judicial structure that Makah have done there.

[659] Dr. Hall was of the view that the kind of vibrant aboriginal fishing community that exists in the Makah territory could be replicated in the Nuu-chah-nulth territories in British Columbia.

[660] It was pointed out to Dr. Hall in cross-examination that the Nuu-chah-nulth do have 25 communal commercial licences, some of which are leased to non-Nuu-chah-nulth fishers. He responded that some of them are not being fished because

of the current poor state of the salmon fishery and some are not fished because there are no fishers with suitable vessels who can afford to fish.

[661] At a DFO Pacific Region community dialogue in 2007, Dr. Hall is reported to have been asked and answered the following questions:

> Q: What do you see happening in the years you have been involved?
>
> A: Since 1992, I have seen a downward turn in Nuu chah nulth participation. If we go back further in 60s and 70s we had a very strong troll fleet on west coast. When I started there were still about 80 to 90 active fishermen. Right now you count on both hands the number of Nuu chah nulth fishermen.
>
> What opportunities are out here? I say nowadays the opportunities are fishing, trees, and tourists. Fishing will remain part of west coast economy. It is hard not to be pessimistic. Lots of resources are being extracted – just not many west coast people participating in economy. Nuu chah nulth is trying to turn tide around, in particular to benefit from sea resources.
>
> Q: What do you see happening as far as trends with resources themselves and other factors affecting resources?
>
> A: Scary things are going on with high value species people are dependent on – sockeye in particular. Climate change is affecting the southern limit for sockeye. If climate change continues, those species will have hard time maintaining themselves. Fishery is very dependent on Fraser sockeye but the Fraser experienced warming of waters … Biologically you would figure that there are other species that will fill in over time maybe not within our time scale though. Oceans are still productive, still in good condition. Other species will be accessible – we just don't know what they are.
>
> Q: What else are you saying re: resource shift in west coast area?
>
> A: There are lots of strange things going on. There is a huge shift with sardines which have shown up in last couple of years – trying to get that to become viable. Other changes that elders in Barclay Sound mention are with sea mammals like sea lions, and of course the sea otters. Changes are happening so quickly it is hard for fish harvesters and people to adapt.
>
> Q: Would you say, re: licensing, that part of the issue is trying to find ways to be more adaptable and catch variety of species?
>
> A: Yes, but how do you get there? Nuu chah nulth have learned to adapt and survive. Everyone used to fish salmon, halibut, etc, worked in process plants, logged. Today there is less opportunity to have that kind of diverse work background. Today you need a licence or to be part of forest company. How do you get back to being able to earn a living from resources?

Q: Are people fighting for access here?

A: There is a short term crisis on west coast re: access. There is an abundance of resources out here that are not accessible to residents on the west coast.

Q: What is your vision for the future?

A: Nuu chah nulth is looking at access and how it can be distributed to benefit communities. We say to government in terms of Nuu chah nulth access – policies need to be changed. We see part of the answer is to be able to distribute benefits amongst more people to give a modest level or moderate livelihood. For example, in the Somass fishery, their communities use their own restrictions in fishery to distribute amongst family members. As a result they have 150 people participating in fishery, even thought you could take the same quantity of fish with a seine boat. How do you distribute benefits amongst community members?

J. Michelle James – Canada's Fisheries Expert

[662] Canada relies on statistical evidence compiled by Michelle James, its fisheries expert, in support of its argument that aboriginal participation in the commercial fishery has remained relatively constant since 1950. Canada contends that it cannot be said to infringe the plaintiffs' aboriginal rights if the proportion of aboriginal participants in the commercial fishery has remained relatively constant since that time.

[663] Ms. James testified to the following rates of participation in the commercial fishery:

> **1951** – The total number of commercial fishers in British Columbia was 13,213. 17.2% of all species licences and 17% of all salmon licences were held by aboriginal fishers.
>
> **1973** – The total number of commercial fishers in British Columbia was 11,717. 14.3% of salmon licences were held by aboriginal fishers.
>
> **1985** – The total number of commercial fishers in British Columbia was 18,168. 17.9% of all species licences and 20.5% of salmon licences were held by aboriginal fishers.

> **2003** – The total number of commercial fishers in British Columbia was 8,142. 21.5% of species licences and 32.2% of salmon licences were held by aboriginal fishers.

[664] Ms. James concluded that the commercial fishery has declined since the 1980s, whether measured by number of licences, employment, number of vessels, or value of catch. She also said that despite the decline in the commercial fishery, the percentage of aboriginal participation has been slowly increasing. She attributes this partly to individual aboriginal fishers' skill in fishing and their ability to adjust to the changing industry, and partly to government programs aimed at maintaining and increasing aboriginal participation in commercial fisheries.

[665] Measuring aboriginal participation in a different way, Ms. James testified that aboriginal peoples in British Columbia (not just the plaintiffs) hold 21% of all vessel-based licences in the province but that their share of the landed value is only 14%.

K. Allen Wood – the Plaintiffs' Fisheries Expert

[666] Mr. Wood did not materially disagree with Ms. James' calculations of the number of aboriginal-held licences.

[667] Mr. Wood testified that he also measured Nuu-chah-nulth involvement in the fishery by calculating the number of fishing licences issued to Nuu-chah-nulth, the number of fishing jobs, either captain or crew, and the number of fishing weeks of work. He calculated the Nuu-chah-nulth salmon fishing licences for all 11 original plaintiff bands as follows:

> 1967 – 193
>
> 1977 – 102
>
> 1980 – 103
>
> 1995 – 89
>
> 2001 – 23

(This calculation excludes F Licences, Allocation Transfer Program or pilot sales.)

[668] Mr. Wood explained that the decrease in the number of salmon fishing licences from 1995 to 2001 was related to the introduction of area and gear licences, licence stacking, the voluntary buyback of 50% of the salmon licences, and stringent conservation measures. Thus, for instance, of the 89 Nuu-chah-nulth salmon licences in 1995, 52 were sold to the buy-back program and 14 others were sold to non-Nuu-chah-nulth fishers for a total Nuu-chah-nulth decrease of 74%.

[669] Mr. Wood calculated the number of Nuu-chah-nulth salmon fishing jobs as follows:

1967 – 232

1977 – 169

1980 – 186

1995 – 185

2001 – 42

[670] He also calculated work weeks per year of salmon fishing for the Nuu-chah-nulth on a periodic comparative basis:

1967 – 4,084

1977 – 2,356

1980 – 3,121

1995 – 1,710

2001 – 373

[671] Mr. Wood explained that this dramatic decline was partly the result of the increased catching power of the larger industrial boats requiring much less manpower than the smaller boats used previously.

[672] Mr. Wood also looked at non-salmon licences, though there is less statistical data available for the earlier years in those fisheries. As well, he noted, most of the Nuu-chah-nulth licences for non-salmon fisheries are for low value fisheries such as clams. Mr. Wood calculated that in 1995, the Nuu-chah-nulth held 245 non-salmon licences (of this number 177 were clam licences) representing 202 jobs, or 1,554 work weeks (1,119 attributable to clams). The number was relatively stable for 2001, at 238 licences (182 clam licences), 206 jobs, and 1640 work weeks (1,150 for clams). Mr. Wood concluded that, "The bottom line is that much of the BC catch is taken in the WCVI area, but Nuu-chah-nulth hold few licences for fisheries in their area, except for clams. For various reasons, Nuu-chah-nulth's participation in local groundfish, shellfish and herring fisheries is now low."

[673] Mr. Wood also opined that the cost of fishing competitively has become prohibitive for most Nuu-chah-nulth fishers. Having noted that Nuu-chah-nulth people living on reserve have no collateral, and thus no ability to mortgage a home in order to raise capital, he stated (at p. 31):

> In the 1920s, a person could go trolling for the cost of some hand lines, lures, a small boat and a $1 licence - a total cost of less than $50. To fish in outer waters required a bigger boat and a bit more gear but the overall price was about $650 (fisheries department annual reports). Through time the size of boats and the number of lines fished increased, as did the cost to go fishing. Average troll vessel value in 1964 was $5,500 and in 1965 was $8,700 (Sinclair, 1978), $8,960 in 1967 and $9,939 in 1968 (Campbell, 1973). Then in 1969, with limited entry vessel based licensing, both the cost of the licence and the average cost and size of vessels went up sharply. By 1972 an average licensed troller was valued at $19,123, and in 1976 at $46,800. Now, with area and gear licensing and licence stacking the cost to get licences has increased again. Salmon troll licences now sell for $170,000 to $200,000 depending on the licence area. Troll vessels now sell for $100,000 plus and fishing gear and related equipment are expensive. To get into salmon trolling now would cost at least $300,000 to $400,000. To fish in more than one area requires an additional licence for each area. To be able to fish anywhere on the coast, as in the past, would be $600,000 or more. (Average annual gross income of trollers from 1992 to 1995 was $57,600. (Gislason, 1997)). The questions for would-be NCN fishermen are, where can I get $300,000 to $400,000 and can I earn enough fishing to pay it back on schedule and make a living? For those people living on reserve, these requirements often prevent them from going fishing. Also, if a current fisherman doesn't keep up with changes in fishing power it will affect his catch and the resale value of his vessel.

[674] In conclusion, Mr. Wood opined that the conservation measures taken by the government, the industrialization of the fishery, the collapse of the salmon fishery, and the various licensing regimes have combined to largely exclude the Nuu-chah-nulth from the WCVI fishery. He said that no attempt was made by the DFO to protect the Nuu-chah-nulth artisanal fishery. Rather, the regulatory regime rewarded those fishers who moved into the industrial fishery. Mr. Wood said that the only fishery in which the Nuu-chah-nulth have a significant share is clams, but the total landed value of all clam licences was only $493,000 in 2005. With respect to the balance of the fishery, he concluded that the Nuu-chah-nulth are "now essentially excluded from accessing species that accounted for about 70% of the 2003 BC landed value of $360 million. Many of these fisheries take place in part in the WCVI area." Mr. Wood concluded that the "main force driving change has been competition for fish and profits. Although competitive pressures are inherent in common property fisheries, government programs and industry responses aggravated those pressures, sped up change, and increased competition and pressure on [Nuu-chah-nulth] fishermen."

[675] As to the government programs intended to have ameliorative effects with respect to the impact of these changes on aboriginal participation in the fishery, Mr. Wood concluded that such programs generally only assisted those still in the fishery to stay in the industry, rather than helping those displaced by the changes. Few of the programs helped the plaintiffs to get into commercial fishing. In his view, government policy and programs failed to protect the interests of First Nations fishers.

[676] Gordon Gislason, an economic expert with particular expertise in the valuation of ocean-based industries on the WCVI, testified as a witness for Canada. He gave evidence about the impact of the loss of fishing jobs on aboriginal communities. Among the points he made were the following: any one licence and associated job loss is much more significant to First Nations people and communities than to their non-aboriginal counterparts; aboriginal people in their home communities are particularly disadvantaged in trying to cope with their

reduced employment base; fishing jobs and income comprise a much greater share of the community economic base in aboriginal communities; many First Nations communities are isolated and/or lack road access thereby further diminishing job opportunities; aboriginal people are less likely to move from their home communities to take a job even if one is available; many aboriginal peoples do not have assets to use as collateral to secure financing to purchase a second salmon licence; employment earnings are spread or shared among the community and its members more so than in non-aboriginal communities; the impacts of a job loss are more far-reaching; many reserves are remote and barren with little opportunity to live off the land; and fishing is the only life many First Nations people have ever known.

L. Conclusion on Nuu-chah-nulth Participation in the Commercial Fishery

[677] The rate of aboriginal participation in the commercial fishery is relevant to the infringement analysis since decline in participation, if attributable at least in significant part to the impugned government action, is evidence of infringement.

[678] The plaintiffs contend that Mr. Wood's evidence, combined with the personal observations and recollections of numerous plaintiff witnesses, paints an accurate picture of the decline of Nuu-chah-nulth participation in the WCVI fishery. Canada, on the other hand, relies primarily on the evidence of Ms. James and admissions made by Mr. Wood to argue that Nuu-chah-nulth participation in the commercial fishery is proportionate to the Nuu-chah-nulth population when compared to the population of British Columbia.

[679] In my view, the statistical evidence is not helpful to my analysis because it creates a distorted picture of actual Nuu-chah-nulth participation in the commercial fishery. The statistical evidence is largely focussed on licences and quota without regard to who is fishing the licence or if it is being fished. Further, the statistics do not differentiate between these plaintiffs and others, or between clam licences and other species licences.

[680] The uncontroverted evidence of Dr. Hall and the individual members of the Nuu-chah-nulth communities was that there are now only a handful of active full-time Nuu-chah-nulth commercial fishers. The evidence of witnesses such as Dr. Lucas, John Frank, and Charles McCarthy – that the individual quota system "squeezed" the Nuu-chah-nulth out of the halibut fishery – was not challenged. I accept the evidence of the plaintiffs as proof of the fact that Nuu-chah-nulth participation in the commercial fishery has been reduced to three or four active fishermen. I also accept the evidence of the plaintiffs, and it was not challenged, that as recently as the 1980s, there was a flourishing Nuu-chah-nulth commercial fishery in which participants fished from vessels of varying sizes.

[681] The proportional analysis upon which Canada relies treats all licences equally. The plaintiffs contend, and I agree, that most of their licences are in the lower value fisheries. Moreover, the plaintiffs do not utilize some of their licences because they do not have sufficient capital to fish those licences.

[682] Canada's emphasis on a proportionality analysis derives from comments of Lamer C.J. in *Gladstone*, at para. 64

> That no blanket requirement is imposed under the priority doctrine should not suggest, however, that no guidance is possible in this area, or that the government's actions will not be subject to scrutiny. Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are those enumerated in *Sparrow* relating to consultation and compensation, as well as questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example), whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food versus commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users. These questions, like those in *Sparrow*, do not represent an exhaustive list of the factors that may be taken into account in determining whether the government can be said to have given priority to aboriginal rights holders; they give some indication, however, of what such an inquiry should look like.

[683] I pause here to note that although proportionality is one of the questions that Lamer C.J. posed as relevant to the justification analysis, he did not suggest that on its own it was an absolute test of justification.

[684] While a proportionality analysis may be relevant to justification, it is not a full answer, either factually or legally, to the question of infringement in this case because the absolute number of Nuu-chah-nulth fishers now actively fishing on a commercial basis is miniscule, both in absolute terms and in comparison to the historical way of life of the Nuu-chah-nulth people.

[685] Proportionality must also be examined in the context of the importance of the fishery to the economic and cultural survival of the plaintiffs. Mr. Gislason's evidence is important because it is another indicator of the importance of the fishery to Nuu-chah-nulth survival. Similarly, Dr. Hall noted the dependence of the Nuu-chah-nulth on the fishery because of the limited alternative economic opportunities available to them. Going back earlier to the 19th century, Superintendent Powell, Sproat and others observed that the Nuu-chah-nulth were almost entirely dependent on the harvest of the sea for their economic well-being.

[686] I find that the evidence of the actual participants in the industry, that is, the Nuu-chah-nulth community members, paints a more accurate picture of Nuu-chah-nulth participation than the statistical evidence of the experts based on licences and quota. I also find that the loss of a fishing job in the Nuu-chah-nulth communities imposes greater hardship on the plaintiffs than it does on non-aboriginal communities because of the isolation of Nuu-chah-nulth communities and the lack of other significant economic opportunities. Evidence of other economic opportunities such as guiding recreational fishers, working in fishing lodges, working in aquaculture (which is relevant to this conclusion and is therefore admissible), and tourism does not refute the evidence of historical economic dependence on the fishery and the relative absence of other significant economic opportunities.

M. Cumulative Effects of Canada's Fisheries Policy

1. Introduction

[687] The plaintiffs contend that DFO policies have devastated their commercial fishing opportunities. Canada counters that the cumulative effect of its "suite" of fisheries policies and programs has, in fact, accrued to the benefit of the plaintiffs, and that the decline in the aboriginal fishery is the result of other factors.

[688] In this section, I will summarize the evidence regarding the fishing policies and programs upon which Canada relies to prove that the regulatory regime as a whole has had an ameliorative effect on the plaintiffs.

[689] Canada's fishing policies govern the management of the fishery. As already noted, it is these policies, and not the *Fisheries Act* and regulations, which largely allocate the fishery among the various user groups. A consideration of the cumulative effect of Canada's fisheries policies is relevant to the infringement analysis, in particular, whether the impugned regulatory regime imposes undue hardship on the plaintiffs or denies them their preferred means of exercising their aboriginal rights. As will be seen from the discussion of these policies, Canada adheres to an integrated management model that treats all participants in the commercial fishery equally. While Canada endeavours to support aboriginal participation, it does not recognize any aboriginal right to participate in the commercial fishery.

2. Canada's current fishing policy

[690] Following the Supreme Court of Canada's judgment in *Sparrow*, the DFO restated its fishing policy with respect to aboriginal peoples as follows in its "Policy for the Management of Aboriginal Fishing" (August 6, 1993):

> Taking into account the current state of the law on Aboriginal fishing rights, DFO has adopted the following policies related to Aboriginal fishing:
>
> - Aboriginal fishing should occur within the areas that were used historically by the aboriginal group or First Nation.

- Aboriginal fishing opportunities will be provided to the First Nation having historical use and occupancy of the area in question. The First Nation will administer the fishing opportunities for the benefit of its members collectively rather than individually.
- Aboriginal fishing for food, social and ceremonial purposes will have first priority, after conservation, over other user groups. Aboriginal fishing for such purposes will only be restricted to achieve a valid conservation objective, to provide for sufficient food fish for other Aboriginal people, to achieve a valid health and safety objective, or to achieve other substantial and compelling objectives.

[691] Cameron West, a DFO manager, testified that this policy has been used to regulate the west coast fishery since August 1993.

[692] Building on the post-*Sparrow* policy, Canada's current policy respecting the aboriginal fishery is set out in a policy document entitled "One Fishery For All Of Us", July 2007 (as testified to by David Radford). This document was used to introduce the Pacific Integrated Commercial Fisheries Initiative, and it sets out Canada's policy in these terms:

> Achieving a fair, sustainable, integrated commercial fishery on Canada's west coast, in which all commercial participants fish under common and transparent rules, is an important priority of Canada's new government …
>
> Addressing First Nations' interests in increasing their participation in commercial fisheries, implementing enhanced monitoring and reporting measures, and strengthening collaboration among fishing groups to maximize benefits of sustainable fisheries are all important pillars to achieving these changes …
>
> The new funding of $175 million over a five-year period will provide for:
>
> - First Nations' participation in integrated commercial fisheries across B.C. through voluntary commercial licence retirement (including vessels, quota and gear) and capacity building to support development of First Nation fisheries enterprises based on best practices.
>
> ...
>
> Fisheries and Oceans Canada is working with commercial fishers and First Nations to achieve a future in which the fishery is more economically viable, and provides sustainable livelihoods for all participants.

[693] Section 2.4 of the current Integrated Fisheries Management Plans with respect to salmon sets out the legal and policy framework with respect to First Nations and fisheries as follows:

> 2.4 First Nations and Canada's Fisheries Framework
>
> The Government of Canada's legal and policy frameworks identify a special obligation to provide First Nations the opportunity to harvest fish for food, social and ceremonial purposes. The Aboriginal Fisheries Strategy (AFS) was implemented in 1992 to address several objectives related to First Nations and their access to the resource. These included:
>
> - improving relations with First Nations,
> - providing a framework for the management of the First Nations fishery in a manner that was consistent with the 1990 Supreme Court of Canada Sparrow decision,
> - greater involvement of First Nations in the management of fisheries, and
> - increased participation in commercial fisheries (Allocation Transfer Program or ATP).
>
> The AFS continues to be the principal mechanism that supports the development of relationships with First Nations including the consultation, planning and implementation of fisheries, and the development of capacity to undertake fisheries management, stock assessment, enhancement and habitat protection programs.
>
> The Aboriginal Aquatic Resources and Oceans Management (AAROM) program has been implemented to fund aggregations of First Nation groups to build the capacity required to coordinate fishery planning and program initiatives. AAROM is focused on developing affiliations between First Nations to work together at a broad watershed or ecosystem level – a level at which there is a certain number of common interests and where decisions and solutions can be based on integrated knowledge of several Aboriginal communities. In the conduct of their activities, AAROM bodies are working to be accountable to the communities they serve, while working to advance collaborative relationships between member communities, DFO and other interests in aquatic resource and oceans management.
>
> As part of the reform of Pacific fisheries, DFO is looking for opportunities to increase First Nations participation in new economic fisheries. Treaty provisions are likely to provide for economic provisions and new planning approaches and fishing techniques will be required to ensure an economically viable fishery. In recent years some "demonstration fisheries" have been initiated where some of these facets of fisheries of the future have been explored. Similar projects are anticipated again in 2007. In the lower Fraser River, the Department is also working with First Nations and others with an interest in the salmon fishery to have better collaboration of fishery planning.

[694] Section 4.1.5, of the same document further amplifies Canada's most recent policy with respect to economic opportunities for First Nations as follows:

> DFO has undertaken a series of discussions with First Nations regarding fishing for economic purposes to experiment with mechanisms to integrate management of fisheries following the negotiations of treaties. These fisheries are undertaken with two principles:
>
> - These fisheries are of the same priority as the commercial fishery.
> - The share of fish harvested by First Nation economic opportunity fisheries must be fully mitigated over time by the retirement of commercial salmon licences from the commercial fishery.

[695] With respect to the phrase "mitigation over time by the retirement of commercial salmon licences from the commercial fishery", Paul Ryall had this to say in his affidavit:

> With respect to the mitigation through retirement, it is my understanding that one of the main objectives of this approach is to avoid negative impacts on established fishers. It is believed that this will have positive impacts on First Nations by removing significant opposition and a significant obstacle to improved First Nation access to economic opportunities. If First Nation participation in the commercial fisheries were increased without mitigation, or some other management measure such as defined shares, this would make fisheries more difficult to manage and achieve conservation and allocation objectives.

[696] Mr. Ryall did not testify at trial. His affidavit evidence was unchallenged.

[697] The plaintiffs say, with respect to Canada's policies, that the fisheries policies do not provide structure to the Minister's discretion. As Canada acknowledges, fisheries policies serve as a guide for decision-making but do not bind the Minister's statutory discretion. In summary, Canada's fishery policy ranks allocation of the fishery in order of priority: (1) conservation; (2) FSC; and (3) commercial/ recreational. Canada adheres to a policy of integrated management for each species. Canada has numerous policies designed to enhance and support the aboriginal commercial fishery, but since Canada does not recognize an aboriginal right to fish commercially, any efforts to enhance the aboriginal fishery are only offered in a way that does not detrimentally impact the non-aboriginal commercial fishery.

3. Special aboriginal programs

[698] Notwithstanding that Canada does not recognize an aboriginal right to fish commercially, Canada submits that it has implemented a number of specific programs to support aboriginal participation in the commercial fishery. It says that these programs have been effective and that, as a consequence, the fishery regime does not infringe the plaintiffs' aboriginal fishing rights.

[699] Mr. West testified with respect to various of these programs. I briefly summarize them below based on his evidence. Ultimately, I conclude that these special policies and programs have failed to significantly support Nuu-chah-nulth participation in the WCVI fishery.

a. Indian Fishermen's Emergency Assistance Program (IFEAP) (1980-1982)

[700] The mandate of this program was to assist aboriginal fishers with debt and financing payments. The program ran for two years. At the time of its termination, $2 million in grants had been expended, $200,000 in direct loans provided, and $700,000 in loan guarantees extended. Approximately 30% of all assistance was provided to Nuu-chah-nulth Tribal Council bands through the Nuu-chah-nulth Board.

[701] The plaintiffs say that IFEAP provided some financial assistance to individual Indian fishermen but the programs ended in 1982. This program, they say, is therefore of no relevance to more recent issues concerning access to fishing opportunities for the plaintiffs. Moreover, the plaintiffs say that the IFEAP favoured established and successful fishermen. I agree that this program is of historic significance only.

b. Aboriginal Cooperative Fisheries and Habitat Management Program (1994-)

[702] Announced on June 24, 1991, funds under this program were provided to improve fish management and fish habitat, and to help ensure a more stable and profitable industry. A multi-year cooperative program provided initial funding of

$11 million to enable tribal councils, bands, and native communities to participate in a wide range of fisheries and habitat management activities. This program is not relevant to actual Nuu-chah-nulth participation in the commercial fishery, but is undoubtedly is beneficial to the industry as a whole.

c. Aboriginal Fisheries Strategy (AFS) (1992-)

[703] Launched in 1992, in part as a response to the Supreme Court's decision in *Sparrow*, AFS is one of the key DFO programs with respect to aboriginal fisheries. The Supreme Court of Canada provided a helpful explanation of the AFS in *Kapp*, at paras. 5-7:

> [5] The aboriginal right has not been recognized by the courts as extending to fishing for the purpose of sale or commercial fishing: *R. v. Van der Peet*, [1996] 2 S.C.R. 507. The participation of Aboriginals in the commercial fishery was thus left to individual initiative or to negotiation between aboriginal peoples and the government. The federal government determined that aboriginal people should be given a stake in the commercial fishery. The bands tended to be disadvantaged economically, compared to non-Aboriginals. Catching fish for their own tables and ceremonies left many needs unmet.
>
> [6] The government's decision to enhance aboriginal involvement in the commercial fishery followed the recommendations of the 1982 Pearse Final Report, which endorsed the negotiation of aboriginal fishery agreements (Turning the Tide: A New Policy For Canada's Pacific Fisheries). The Pearse Report recognized the problematic connection between aboriginal communities' economic disadvantage and the longstanding prohibition against selling fish - a prohibition that disrupted what was once an important economic opportunity for Aboriginals. Policing the prohibition was also problematic; the 1994 Gardner Pinfold Report addressed the serious conservation issue stemming from a fish sales prohibition "honoured more in the breach than the observance" (An Evaluation of the Pilot Sale Arrangement of Aboriginal Fisheries Strategy (AFS), p. 3). The decision to enhance aboriginal participation in the commercial fishery may also be seen as a response to the directive of this Court in Sparrow, at p. 1119, that the government consult with aboriginal groups in the implementation of fishery regulation in order to honour its fiduciary duty to aboriginal communities. Subsequent decisions have affirmed the duty to consult and accommodate aboriginal communities with respect to resource development and conservation; it is a constitutional duty, the fulfilment of which is consistent with the honour of the Crown: see e.g. Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010.
>
> [7] The federal government's policies aimed at giving aboriginal people a share of the commercial fishery took different forms, united under the

> umbrella of the "Aboriginal Fisheries Strategy". Introduced in 1992, the Aboriginal Fisheries Strategy has three stated objectives: ensuring the rights recognized by the Sparrow decision are respected; providing aboriginal communities with a larger role in fisheries management and increased economic benefits; and minimizing the disruption of non-aboriginal fisheries (1994 Gardner Pinfold Report). In response to consultations with stakeholders carried out since its inception, the Aboriginal Fisheries Strategy has been reviewed and adjusted periodically in order to achieve these goals. A significant part of the Aboriginal Fisheries Strategy was the introduction of three pilot sales programs, one of which resulted in the issuance of the communal fishing licence at issue in this case. The licence was granted pursuant to the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332 ("*ACFLR*"). The *ACFLR* grants communal licences to "aboriginal organization[s]", defined as including "an Indian band, an Indian band council, a tribal council and an organization that represents a territorially based aboriginal community". The communal licence cannot be granted to individuals, but an aboriginal organization can designate its use to individuals.

[704] A June 1992 backgrounder summarized the aim of AFS as increasing economic opportunity in Canadian fisheries for aboriginal people while achieving predictability, stability, and enhanced profitability for all participants.

[705] Under the program, individual food permits are no longer issued and, instead, AFS fisheries are licensed through communal licences under the *Aboriginal Communal Fishing Licence Regulations*. The benefits of these permits accrue to the entire First Nations community, although some bands may designate certain individuals to fish. Some communal licences may include the benefits of sale if negotiated as part of the agreement. The DFO endeavours to negotiate mutually agreeable arrangements with aboriginal groups. Today, approximately 162 of 186 (87%) eligible First Nations in British Columbia are covered under some form of AFS agreement.

[706] This program has no doubt been of some benefit to some aboriginals. In my view, however, it has not been adequate to support meaningful participation by the plaintiffs in the commercial fishery.

d. AFS agreements with the Nuu-chah-nulth Tribal Council

[707] A seven-year framework fisheries agreement was reached on August 20, 1992, between the DFO and the Nuu-chah-nulth Tribal Council representing 14

bands. The agreement included a DFO contribution of up to $1.5 million for Nuu-chah-nulth Tribal Council fisheries programs. The Initial Interim Fisheries Agreement expired in 2000 and since then, the DFO and the Nuu-chah-nulth Tribal Council have entered into nine additional agreements. This program enables the Nuu-chah-nulth Tribal Council to operate.

e. Contribution Agreements and Project Funding Agreements (1991-)

[708] The DFO has entered into a series of annual funding agreements both with the Nuu-chah-nulth Tribal Council and individual Nuu-chah-nulth Tribal Council bands for specific projects. The DFO and the Nuu-chah-nulth Tribal Council have from time to time entered into Amending Contribution Agreements to adjust funding levels or add funding for additional projects. In 2004, AFS Contribution Agreements were revised as Project Funding Agreements. These agreements generally provided funding for a 12-month period and since 1991, the agreements have provided approximately $20 million to the Nuu-chah-nulth Tribal Council and individual Nuu-chah-nulth Tribal Council bands.

f. Fisheries Related Community Meetings and Consultations

[709] The DFO provides funding specifically for the involvement of representatives of the Nuu-chah-nulth Tribal Council and bands represented by the Nuu-chah-nulth Tribal Council on various committees and advisory boards related to fishery management. The Nuu-chah-nulth Tribal Council also receives funding through their Aboriginal Aquatic Resource and Oceans Management agreement to participate in the DFO advisory processes.

g. Aboriginal Fisheries Guardians (1992-)

[710] The Fisheries Guardian Program enables aboriginal groups to participate in fisheries management, enforcement, habitat monitoring and protection, and assessment activities. The fishery guardian training program was designed under the Aboriginal Fisheries Training Committee. Guardian training was introduced as a

pilot project, and funding is provided annually to Nuu-chah-nulth fisheries guardians and technicians.

h. Voluntary Licence Retirement Program (1992-)

[711] The Voluntary Licence Retirement Program was announced in December 1992 as a one-time $7 million program to voluntarily retire commercial salmon licence eligibilities and transfer them to aboriginal groups without creating increased harvesting pressure on fish stocks

[712] In the second round of this program, the Licence Retirement Selection Committee, composed of representatives from commercial fishing interests and aboriginal groups, received 240 applications, and made 33 recommendations for licence retirement to the DFO. Under the second round of the program, $2.52 million was allocated to retire commercial licences. A total of 75 commercial licences were retired after the completion of the third round. Twenty-six of the retired commercial licences were reissued to aboriginal groups as equivalent communal F licences. Two were issued to Nuu-chah-nulth Tribal Council nations. Other retired licences were used to provide licence capacity to support economic opportunity pilot projects. A 1993 DFO commissioned review confirmed the licence retirement program “worked well”.

[713] I find that this program has also had a limited effect on the plaintiffs’ participation in the commercial fishery.

i. Allocation Transfer Program (ATP) (1994-)

[714] ATP was introduced in 1994 as a successor to the Licence Retirement Program. It facilitated the voluntary retirement of commercial licences and the issuance of licences to eligible aboriginal groups. The initial program had a duration of six years, and a total of $42 million was approved for funding.

[715] ATP licences are issued as communal licences to aboriginal organizations rather than individual licences. As of March 31, 2008, 35 of the 38 aboriginal

organizations that were eligible received an ATP licence. No licence fee is payable for licences issued under the *Aboriginal Communal Fishing Licences Regulations*, including ATP. For profitable fisheries, First Nations have been required to make contributions to fisheries co-management. Between 1994 and March 2008, there have been 354 transactions to retire licences and quota plus an additional 14 transactions to acquire commercial fishing vessels; 259 licences were allocated to aboriginal organizations throughout coastal British Columbia. The DFO has provided for the issuance of a number of licences to the Nuu-chah-nulth Tribal Council and member First Nations. These licences are set out in a series of Communal Commercial Fisheries Access Sub-Agreements beginning in 1997. After 1999, ATP licences were specifically designated to particular bands rather than generally to the Nuu-chah-nulth Tribal Council.

[716] The plaintiffs agree that the ATP and its forerunner, the Licence Retirement Program, provide some commercial fishing opportunities to First Nations by retiring ordinary commercial licences and reissuing licences to First Nations as communal "F" licences. However, the plaintiffs say the program is wholly inadequate to meet their needs or to begin to accommodate their aboriginal rights for the following reasons. First, the plaintiffs say the program is underfunded. Second, the plaintiffs say that contrary to Canada's submission, the ATP does not provide community access to commercial fisheries. They submit that if the ATP provides a commercial fishing licence to an aboriginal community, the licence can only be fished on one vessel. Thus, while the monetary benefits of the licence may flow to the community (depending on the terms of use of the licence agreed to by the community and the fisher) the actual fishing opportunity is limited to one boat. A single licence cannot be split amongst two or more smaller (mosquito) vessels. The plaintiffs also submit that licences issued under the ATP must be fished in accordance with the ordinary commercial fishery. Fishing must take place at the times and locations that are designated by the DFO and which are open to all in that fishery, Nuu-chah-nulth or otherwise. The plaintiffs say this is not respectful of the priority nature of aboriginal rights and is not responsive to the plaintiffs preferred means of fishing or their wish for a community-based fishery. The plaintiffs say the program depends on "willing

sellers" to provide licences to the program through the market place. Sellers, especially in profitable fisheries like the geoduck fishery, may not exist and the cost of acquiring licences severely limits the program. The plaintiffs also contend that the number of licences available through the ATP is inadequate. The result, they say, is that First Nations, even within the Nuu-chah-nulth Tribal Council itself, must compete for the few licences that are available.

[717] Canada claims that the Nuu-chah-nulth Tribal Council has received 240 communal fishing licences. The plaintiffs say this is "simply wrong unless Canada is counting each annual renewal of an "F" licence as a separate licence." The plaintiffs note that ATP licences have costs associated with their use and that the program is not based on aboriginal rights. I agree with the plaintiffs' submissions.

j. Excess Salmon to Spawning Requirements (ESSR)

[718] The DFO endeavours to manage salmon stocks in such a way as to achieve maximum spawning and to make the best use of the harvestable portion of the stock, including priority for FSC fisheries. Excess salmon that cannot be harvested in regular fisheries migrate to their terminal spawning areas or to hatcheries, which results in increased salmon production. These surpluses can be harvested under the ESSR policy, using selective fishing techniques to safely harvest without impacting other stocks. The DFO allows preferential access to ESSR opportunities to native groups on the west coast for FSC purposes. The DFO's second priority is to provide surplus salmon to local aboriginal groups for harvesting and commercial sale; when an aboriginal group declines, the opportunity is offered to the local community.

[719] The plaintiffs say that ESSR fisheries have been conducted at four hatchery locations on the WCVI since the early 1900s but that there have been no ESSR fisheries for any of them at these four sites (with the sole exception of the Mowachaht/Muchalaht) for certain years up to 2001. They submit that ESSR fisheries are, by definition, the lowest priority commercial fisheries and thus do not accord with the priority nature of aboriginal rights. The plaintiffs say that fish caught

up river in the ESSR are less valuable than those caught in the fisheries at the mouth of the river or in the ocean.

[720] The only bands out of the six plaintiffs that have even had a chance to decline an ESSR opportunity are the Mowachaht/Muchalaht and the Huu-ay-aht.

[721] The plaintiffs note that Canada characterizes the participation of the Huu-ay-aht and Mowachaht/Muchalaht in ESSR fisheries as occasional. They rely on the evidence of Paul Preston, a DFO manager, in this regard. What Mr. Preston actually confirmed, according to the plaintiffs, was that Huu-ay-aht had the possibility of one small ESSR fishery in one year but otherwise there was no evidence of any other ESSR opportunity in their territory and the Mowachaht/Muchalaht did not pursue a recent ESSR opportunity for reasons including the low value of the fish. I agree with the plaintiffs' submissions.

k. Pilot Sales Agreements

[722] The DFO established Pilot Sales Agreements with three Aboriginal organizations to test the sale of fish by aboriginal groups along the Somass, Fraser and Skeena Rivers. These were intended as interim measures to provide First Nations with commercial access to fish pending settlement of treaties. These pilot sales agreements were terminated in 2003 following the Provincial Court's decision in *Kapp* which declared them to be unconstitutional. They were recommenced in 2004 upon the British Columbia Supreme Court overturning the earlier decision. As noted earlier, the Supreme Court of Canada upheld the constitutionality of the program.

[723] The plaintiffs say this program has provided some modest benefits to the non-plaintiff Tseshaht and Hupacasath First Nations by allocating them a defined share of the returning Somass River salmon fishery and permitting them to sell their catch. Despite efforts of individual bands and the Nuu-chah-nulth Tribal Council, Canada has refused to extend this program to any of the six plaintiffs or to any species other

than salmon. I conclude that this type of program would undoubtedly benefit the plaintiffs but was not offered to them.

l. Selective Fisheries First Nations Gear Purchase Program

[724] Funding under this program was provided to over 50 First Nations to purchase selective gear for FSC fishing. The selective fishing funds were provided to aboriginal organizations through the AFS.

m. AFS Review (2002)

[725] A comprehensive review of the AFS was conducted in the spring of 2002. The DFO participated in a series of meetings with aboriginal interest groups. These meetings included input on the formulation of the proposed Aboriginal Aquatic Resource and Oceans Management program, its relationship with the AFS, and strategic opportunities within the DFO and other agencies. Many aboriginal participants proposed concrete solutions and presented examples wherein innovative aboriginal-led strategies were yielding positive results, such as the pooling of the AFS with other resources to achieve greater benefits for their communities, or working with other First Nations in common fisheries management structures. There appeared to be mutual agreement on potential guiding principles for addressing the limitations of the AFS. The DFO proposed several initiatives to address concerns raised during these discussions; for example, simpler, broader, and longer term agreements, and a new Aboriginal Aquatic Resource and Oceans Management initiative to provide eligible aboriginal groups with the capacity to better participate in areas of DFO responsibility.

n. Aboriginal Aquatic Resource and Oceans Management (AAROM) Program (2003)

[726] AAROM was introduced by the DFO in 2003 following discussions with aboriginal groups in response to an increased desire on the part of those groups for greater participation in the decision-making processes for aquatic resources and oceans management. Implementation was planned for the 2004-2005 fiscal year

and the budget was $8 million. The main objectives of the initiative were to: assist aboriginal groups in acquiring administrative capacity and scientific expertise to facilitate their participation in aquatic resource and oceans management; encourage the establishment of collaborative management structures; enhance existing collaborative management structures; facilitate sound decision making in advisory and other processes; and strengthen relationships through improved information sharing. AAROM also supports access to economic opportunities, such as in aquaculture and commercial fishing. This program while having considerable merit also has not increased participation by the plaintiffs in the commercial fishery.

o. Salmonoid Enhancement Program (SEP)

[727] SEP was announced in 1975 and implemented in 1977. SEP was intended to double production of salmon in British Columbia, restoring salmon runs to historic levels. Pre-SEP hatchery facilities were absorbed into the newly formed SEP. In addition to hatcheries, other technologies and programs were implemented through SEP; for example, the Lake Enrichment Program, the Community Economic Development Program, Public Involvement Program and Resource Restoration Program. The Community Economic Development Program operates mid-sized hatcheries by native and non-native communities while the Public Involvement Program supports public education and elementary school programs. Resource Restoration focuses on restoring and providing access to spawning and rearing habitat for salmon. The programs collectively produce a significant amount of harvest, as well as playing an important role in the conservation and protection of salmon resources and their habitats.

p. Pacific Integrated Commercial Fisheries Initiative (PICFI) (2007)

[728] PICFI is an initiative aimed at supporting the long term economic viability of the province's commercial fisheries and the sustainability of fisheries resources, while at the same time addressing aboriginal interest in access to commercial fisheries. PICFI provides additional funding to First Nations to acquire commercial

licences, quotas, vessels and gear for transfer to First Nations through voluntary relinquishment by regular licence holders.

[729] Canada has provided $175 million over a five-year period to implement this initiative. Of that amount, $115 million is specifically allocated for the acquisition of licences, vessels, quotas and gear. The Nuu-chah-nulth Tribal Council has been integrally involved in the consultation and formation of the PICFI program. The Tribal Council is part of the PICFI working group, and is one of the first six aboriginal organizations to apply to participate in the initiative.

[730] The plaintiffs contend that PICFI is a recently announced program and has provided little or no fishing opportunities to date. They note that any benefits of this program are at the present time speculative, and that speculation is no basis upon which to justify an infringement of constitutional rights.

[731] I find that while this program may hold out hope for more success in the future, at the present time it is new and untested.

q. New Emerging Fisheries Policy

[732] This program is designed to develop new commercial markets for species of fish that have not traditionally been exploited commercially. The plaintiffs say that this policy, introduced in 2001, with the intent of providing First Nations with considerable opportunities in fisheries new to commercial fishery, has not yet produced a single viable commercial fishery and that Canada has grossly overstated its anticipated impact. Canada claims that the percentage of the aboriginal share of commercial fisheries will grow as new and emerging species enter the commercial market. However, the plaintiffs say, any assertion that new and emerging fisheries will have a significant impact is completely at odds with the actual experience to date. Of the 24 fisheries classified as new emerging fisheries, none has become a viable regular commercial fishery. Mr. Harbo, who has responsibility for this program, deposed in his affidavit that these few new species are high risk, expensive and rarely lucrative.

N. Conclusion in Respect to Special Aboriginal Programs

[733] In conclusion, I find that these programs, while well-intentioned, have not significantly supported Nuu-chah-nulth participation in the commercial fishery. These programs are designed to incrementally increase aboriginal participation without causing negative impacts to established fishers. The fact remains that Canada adheres to an integrated management model for each fishery with no recognition of the plaintiffs' aboriginal rights.

O. Analysis of Infringement

[734] I now turn to consider whether there has been a *prima facie* infringement of the plaintiffs' aboriginal rights to fish and to sell fish. I do not propose to address the various fisheries separately, that is, salmon, halibut, groundfish, herring and sardines, and other invertebrates, because the facts that I find applicable to the infringement analysis apply equally to the different fisheries. The one exception is clams, and I will therefore discuss that particular fishery separately. I will consider infringement with respect to the FSC fishery separately, as well.

[735] I begin by briefly restating the parties' positions in respect to infringement.

1. Plaintiffs' position on infringement

[736] The plaintiffs submit that the legislative scheme, comprising the *Fisheries Act* and its regulations, constitutes an infringement of their aboriginal rights. Specifically, they say that the scheme imposes a complete prohibition against the activity that forms the basis of their aboriginal rights, and imparts to the Minister an unstructured and broad discretion to issues licences in respect of that activity. The plaintiffs rely on *Adams* and *Marshall* to argue that Nuu-chah-nulth commercial fishing rights are not addressed in the fisheries regulatory scheme and that for that reason alone, an infringement has been made out. The plaintiffs do continue their infringement analysis to also argue that in addition to the legislative infringement, their rights have been infringed by the policy and operational measures implemented by the DFO since the 1960s which, as a whole, have entrenched a large scale, capital-intensive

industrial fishery on the Pacific coast with the effect that the Nuu-chah-nulth have fallen out of the fishery and cannot get back in. This they refer to as the policy and operational infringement.

2. Canada's position on infringement

[737] Canada says that the key issue in the analysis of legislative infringement is whether there is a means of ensuring that the exercise of ministerial discretion is not unstructured. Canada says that in this inquiry, the Court is not confined to an examination of the applicable legislation and regulations but, rather, must also consider policies adopted as part of the administrative regime to determine whether such structure exists. As noted already, Canada says its "suite" of policies have enhanced aboriginal participation in the fishery.

3. Analysis

[738] As set out in my review of the applicable legal principles, the test for *prima facie* infringement inquires into whether the impugned legislation has the effect of interfering with an existing aboriginal right. Following *Sparrow*, I am to consider the following questions: (1) whether the limitation is unreasonable; (2) whether the limitation imposes undue hardship; and (3) whether the regulation denies to the holders of the right their preferred means of exercising it. I consider the *prima facie* infringement test to require proof of a detrimental effect on the plaintiffs' exercise of their aboriginal rights.

[739] The plaintiffs contend that Canada, in its regulation of the fisheries, has failed to reserve to them sufficient fishing opportunities to accommodate their aboriginal rights. Canada, for its part, asserts that its aboriginal fishing strategy and the multitude of programs to assist First Nations to participate in the fishery ameliorate the effect of the regulatory regime on the exercise of the plaintiffs' aboriginal rights. At the infringement stage, I am concerned only with whether the impugned regulatory regime has the effect of meaningfully interfering with the plaintiffs'

aboriginal rights. This is a more plaintiff-focussed factual inquiry, whereas the justification analysis is more focussed on the defendant.

[740] I have endeavoured to separate out from the parties' infringement arguments those factors which, in my view, are more appropriately considered in the justification analysis. (Some of the evidence reviewed above is relevant to both the infringement and justification analysis; for example, the special aboriginal fisheries programs. Canada argues that those programs have supported aboriginal participation in the fishery, an enquiry that is relevant to the infringement analysis. I have concluded that they have not significantly supported Nuu-chah-nulth participation. However, Canada also relies on those programs, in part, in its submissions regarding justification.)

[741] I now turn to a review of the two main cases upon which the plaintiffs rely in their submissions regarding legislative infringement.

a. *R. v. Adams* and *R. v. Marshall*

[742] In *Adams*, the accused was charged with fishing unlawfully in Lake St. Francis contrary to s. 4(1) of the *Quebec Fishery Regulations*. A licence was unavailable to the accused under those regulations. While a special licence issued under a ministerial permit authorizing aboriginal persons to fish for food may have been available under s. 5(9), the accused did not apply for such permission. He challenged his conviction on the basis that he was exercising an aboriginal right to fish.

[743] Lamer C.J. found that the accused had an aboriginal right to fish for food in Lake St. Francis; the question was whether s. 4(1) of the *Quebec Fishery Regulations* constituted an infringement of that right. Lamer C.J. indicated at para. 50 that "In order to answer this question the nature of the impact on the appellant's rights from the operation of the provision must be determined, taking into account the broader regulatory scheme of which the provision is a part" (emphasis added). He then went on to describe the regulatory scheme as follows, at para. 51:

> The basic structure of the government's regulatory scheme, in terms of its application to the appellant, is as follows: under s. 4(1) of the Regulations fishing is prohibited absent a licence of the type described in Schedule III. Under Schedule III licences are available for sport and commercial fishing only; the Schedule does not allow for the issuance of licences for aboriginal food fishing. Under s. 5(9) of the Regulations the Minister may, at his discretion, issue a special permit to an Indian or Inuk authorizing them to fish for their own subsistence. In essence, under the regulatory scheme as it currently exists, the appellant's exercise of his aboriginal right to fish for food is exercisable only at the discretion of the Minister.

[744] The *Quebec Fishery Regulations* were silent as to how the Minister's discretion was to be exercised.

[745] Applying the infringement test from *Sparrow*, Lamer C.J. held that by subjecting the exercise of the appellant's aboriginal rights to a pure act of ministerial discretion without explicit guidance, the regulatory scheme infringed his aboriginal rights. The scheme both imposed undue hardship on the appellant and interfered with his preferred means of exercising his rights. Lamer C.J. contrasted the situation with one where a statute confers a broad unstructured administrative discretion which may be exercised in a manner that encroaches upon a *Charter* right. In that circumstance, he wrote, the proper judicial course is to find that the discretion must be exercised in a manner which accommodates the guarantees of the *Charter*. At para. 54, he continued:

> I am of the view that the same approach should not be adopted in identifying infringements under s. 35(1) of the *Constitution Act, 1982*. In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.

[746] Lamer C.J. went on to indicate that the infringement was all the more pronounced when it was considered that permits allowing fishing for food with a

seine net were not being issued for Lake St. Francis. In the absence of the factual possibility of the issuance of a licence that would allow him to exercise his aboriginal right to fish for food, Lamer C.J. wrote, the appellant had clearly demonstrated that his aboriginal rights had been infringed.

[747] The other decision upon which the plaintiffs rely is *Marshall*. *Marshall* involved a claim to a treaty fishing right in defence to a charge under the *Maritime Provinces Fisheries Regulations*, S.O.R./93-55 and the *Fishery (General) Regulations*. At paras. 62-63, Binnie J. set out the circumstances in question:

> The appellant is charged with three offences: the selling of eels without a licence, fishing without a licence and fishing during the close season with illegal nets. These acts took place at Pomquet Harbour, Antigonish County. For Marshall to have satisfied the regulations, he was required to secure a licence under either the Fishery (General) Regulations, SOR/93-53, the Maritime Provinces Fishery Regulations, SOR/93-55, or the Aboriginal Communal Fishing Licences Regulations, SOR/93-332.
>
> All of these regulations place the issuance of licences within the absolute discretion of the Minister. Section 7(1) of the Fisheries Act, R.S.C. 1985, c. F-14, so provides:
>
> > 7.(1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on. [emphasis in original]
>
> The Maritime Provinces Fishery Regulations provides that the Minister "may issue" a commercial fishing licence (s. 5). The Aboriginal Communal Fishing Licences Regulations state as well that the Minister "may issue" a communal licence to an aboriginal organization to carry on food fishing and related activities (s. 4). The licences described in the Fishery (General) Regulations are all discretionary as well, although none of those licences would have assisted the appellant in this situation.

[748] Binnie J. mentioned s. 7 of the *Fisheries Act* and the *Aboriginal Communal Fishing Licences Regulations*, both of which are components of the regulatory regime being challenged in the case at bar. He observed that there was nothing in the regulations which provided direction to the Minister with respect to exercising this discretionary authority in a manner which respected the appellant's treaty rights. After quoting from *Sparrow* and *Adams*, he continued at para. 64:

> ... To paraphrase *Adams*, at para. 51, under the applicable regulatory regime, the appellant's exercise of his treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Mi'kmaq treaty rights were not accommodated in the Regulations because, presumably, the Crown's position was, and continues to be, that no such treaty rights existed. In the circumstances, the purported regulatory prohibitions against fishing without a licence (*Maritime Provinces Fishery Regulations*, s. 4(1)(a)) and of selling eels without a licence (*Fishery (General) Regulations*, s. 35(2)) do *prima facie* infringe the appellant's treaty rights under the Treaties of 1760-61 and are inoperative against the appellant unless justified under the *Badger* test.

[749] Mirroring the language in *Marshall*, the plaintiffs in the present case say that Canada's position has and continues to be that no Nuu-chah-nulth commercial fishing rights exist. As a consequence, those rights are not addressed in the legislative scheme and, on this basis alone, an infringement has been made out.

[750] Canada responds that the key issue when analysing legislative infringement is whether there is a means of ensuring that the exercise of ministerial discretion is not unstructured. The Court is not restricted in this inquiry to the legislative scheme, but must also consider the relevant administrative scheme. Canada submits that the discretionary regime at issue in this case is not unstructured, and that the evidence presented is far more comprehensive than that led in *Adams* and *Marshall* where there was little, if any, evidence before the Court explaining how Canada regulated fishing by aboriginal groups. The policies adopted by the DFO, it asserts, overcome the infringement alleged by the plaintiffs.

[751] Canada says that the use of policies as sufficient guidance and structure of ministerial discretion was endorsed by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511. In that decision, the Court examined the scope and content of the government's duty to consult. The passage upon which Canada relies is para. 51, where McLachlin C.J., on behalf of the Court, wrote:

> It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, the

> government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.
>
> [Emphasis added]

[752] The *Fisheries Act*, on its face, imposes a complete prohibition against the activity that forms the basis of the plaintiffs' aboriginal rights. Pursuant to s. 7 of the Act, the Minister's discretion to issue licences in respect of that activity is absolute. Section 22 of the *Fishery (General) Regulations* confers on the Minister a broad discretion to impose licence conditions. While DFO policies certainly provide considerable guidance with respect to the exercise of the Minister's discretion, they do not, as Canada itself acknowledges, bind or confine the Minister in his or her exercise of that discretion. However, Canada implicitly argues that its policies are so firmly entrenched in the operations of the DFO that the absence of such recognition in the legislation is of no particular importance.

[753] I have some difficulty reconciling the infringement analysis in *Sparrow* and *Gladstone* with the legislative infringement analysis in *Adams* and *Marshall*. In my view, however, the plaintiffs' argument (that the failure of the legislative scheme to guide the exercise of the Minister's discretion so as to ensure that their aboriginal rights are respected is sufficient to prove infringement) is overly simplistic. What is absent from their approach is any consideration of whether the legislative scheme, in fact, causes any meaningful diminution in their ability to exercise their aboriginal rights. The *Sparrow* infringement analysis, in my view, mandates an inquiry into whether the impugned legislation causes that meaningful diminution. Accordingly, although the exercise of ministerial discretion may be unstructured, I consider it necessary that that unstructured discretion result in a meaningful diminution of the exercise of the aboriginal right in question before an infringement can be made out.

[754] Moreover, the plaintiffs' pleadings do not challenge the fisheries legislation *per se*. Rather, they plead Canada's fishery regime "ha[s] significantly restricted the Nuu-chah-nulth's ability from 1970 to present to exercise their customs, practices and traditions associated with harvesting, processing and selling of Fishery Resources and Fish Products" (emphasis added). In their response to Canada's demand for particulars they again plead that the policies "have restricted [their] ability to exercise their customs ...". Thus the plaintiffs' pleadings put in issue the detrimental effect of the fisheries legislation on the exercise of their aboriginal rights.

[755] To illustrate, I turn to the example of clams.

[756] The plaintiffs claim that the regulatory regime infringes their rights to harvest and sell clams. The plaintiffs hold about 70% of all commercial clam licences. As will be discussed later in these Reasons, I have found that the members of the plaintiff communities who choose to clam for commercial purposes are able, subject to conservation measures, to harvest clams consistent with their aboriginal rights. Thus, despite the absence of recognition of the plaintiffs' aboriginal rights in the licensing regime for clams, the plaintiffs have not proven that they have experienced any meaningful diminution in their ability to harvest clams.

[757] I conclude that the appropriate infringement analysis in this case involves the following enquiries:

1. Does the legislative scheme impart to the Minister an unstructured discretion that risks infringing the plaintiffs' aboriginal rights?

2. Are there policies which operate under the legislative scheme that recognize the claimed aboriginal rights, and are they entrenched in a way that they could be said to guide the Minister's discretion?

3. Does the regulatory regime operate in such a way that it meaningfully diminishes the exercise of plaintiffs' aboriginal rights? This last question incorporates the three *Sparrow* questions: is the limitation

> unreasonable; does it impose undue hardship; and, does it deny the holders their preferred means to exercise their rights.

[758] Starting with the first question, I do conclude, as the plaintiffs submit, that the *Fisheries Act* and regulations impart to the Minister an unstructured discretion that risks infringing the plaintiffs' aboriginal rights. With respect to the second inquiry, DFO policies do not presently recognize aboriginal fishing rights outside the context of an FSC fishery. It obviously follows that the Minister's discretion to issue licences accommodating aboriginal fishing rights, other than for FSC purposes, is unstructured and unconstrained by legislation. I will return to the FSC fishery later. For now, I turn to the third inquiry, whether the regulatory regime meaningfully diminishes the exercise of the plaintiffs' aboriginal rights to fish and to sell fish.

[759] The plaintiffs contend that the policy and operational measures implemented by the DFO since the 1960s have entrenched a large-scale and capital-intensive industrial fishery on the Pacific coast, with the effect that the Nuu-chah-nulth have been excluded from the fishery and are unable to re-enter. Canada, on the other hand, contends that it has done much to enhance and facilitate aboriginal participation in the fishery through its many policies. Some of those policies and Canada's general approach to aboriginal participation in the fishery are conveniently summarized in the executive summary to a DFO document entitled "An Integrated Aboriginal Policy Framework":

> ... Fisheries and Oceans Canada (DFO), as the federal agency with primary responsibility for oceans and the management and protection of aquatic resources, has had increasing involvement with Aboriginal communities since the 1990s, particularly in areas where DFO administers the aquatic resources and ocean spaces. Supreme Court of Canada (SCC) decisions have provided guidance on the nature and scope of Aboriginal and treaty rights and of governments' responsibility to manage natural resources in a manner consistent with the constitutional protection provided to Aboriginal and treaty rights.
>
> The fundamental **theme** of DFO's Integrated Aboriginal Policy Framework is on fostering a respectful and mutually beneficial relationship with Aboriginal groups who are seeking a greater share of the fisheries resource, on contributing to the growth and well-being of their communities, and on providing them with a greater role in integrated aquatic resource and oceans management.

> The **purpose** of the Integrated Aboriginal Policy Framework is to provide guidance to DFO employees in helping to achieve success in building on our relations with Aboriginal groups. The **objective** of the Integrated Aboriginal Policy Framework is to serve as a guide for DFO employees of the renewal of DFO's Aboriginal policies and programs, to provide strategic policy direction for the development of operational guidelines and programs, and to guide DFO in discussions and collaboration with other federal agencies, provinces, territories, stakeholders and Aboriginal groups.
>
> This framework recognizes the DFO's core mandate has broadened considerably since earlier SCC decisions such as *Sparrow* and *Marshall* and now includes new ecosystem-based management responsibilities under the *Oceans Act*, expansion of its presence in inland habitat management, *Species at Risk Act* (SARA) implementation, an aquaculture framework, and an increasingly sophisticated approach to science. In addition, DFO must continue to take into account new developments in case law.
>
> The need to renew DFO's policies and programs as they relate to Aboriginal communities has been recognized the Department's five-year Strategic Plan "*Our Waters, Our Future*" 2005 – 2010. It sets out as a special over-arching objective the need to strengthen and foster the relationship between the Department and Aboriginal groups through the identification of five-year goals. This Integrated Aboriginal Policy Framework builds on and further elaborates the objectives of the Strategic Plan through the activities outlined in the Action Plan.
>
> DFO has developed a Sustainable Development Strategy 2007-2009 that commits the Department to working with interested partners and resource users to drive a cultural shift in decision-making when it comes to fisheries and oceans policy. It outlines objectives and commitments for incorporating sustainable development into daily work.
>
> The Integrated Aboriginal Policy Framework is intended to provide a context of DFO's Aboriginal experience, its program and policy evolution and current state of play in helping to meet DFO's key objectives.
>
> The Integrated Aboriginal Policy Framework further elaborates the objectives ... It cuts across various sector-based legislation, regulations, policies and programs, including the Oceans Strategy, Fisheries Management renewal, and the way forward on Pacific and Atlantic integrated commercial fisheries with all harvesters (Aboriginal and non-Aboriginal), fishing under common and transparent rules.
>
> [Emphasis in original]

[760] The policy document goes on to refer to the "*Our Waters, Our Futures*" 2005-2010 Strategic Plan, and reads, in part, as follows:

> The Strategic Plan calls for the development of a fully integrated departmental policy and program approach. It sets out as a special over-arching objective, the need to strengthen and foster the relationship between the Department and Aboriginal peoples.

The Strategic Plan further identifies the following five-year goals for maintaining and strengthening relationships between DFO and Aboriginal groups:

1. Enhance the involvement of Aboriginal groups in fisheries management decision-making processes using a model of shared stewardship in which Aboriginal groups collaborate with eh Department in decision-making.
2. Increase the involvement of Aboriginal groups in the decision-making processes in other areas of DFO's responsibility including integrated oceans management, species at risk, habitat management, scientific research and aquaculture development.
3. Improve the stability of the west and east coast fisheries by resolving commercial access issues.
4. Continue to manage the fisheries in a manner that is consistent with the constitutional protection provided to Aboriginal and treaty rights by Section 35 of the Constitution Act, 1982 and the Fisheries Act.
5. Contribute to the broader Government of Canada objective of greater economic development for First Nations by assisting with greater access to economic opportunities, such as commercial fishing.

This Integrated Aboriginal Policy Framework builds on and further elaborates on the objectives of DFO's Strategic Plan.

An Integrated Aboriginal Policy Framework

The Vision

Supporting healthy and prosperous Aboriginal communities through:

- **building and supporting strong, stable relationships;**
- **working in a way that upholds the honour of the Crown; and**
- **facilitating Aboriginal participation in fisheries and aquaculture and associated economic opportunities and in the management of aquatic resources.**

[761] This policy illustrates the division between the parties' positions. The plaintiffs say that no amount of consultation aimed at facilitating their interests will allow them to achieve sustainable participation in the fishery so long as it is not premised on the recognition of their aboriginal rights. Canada's position reflects an incrementally supportive enhancement of aboriginal participation in the fishery, but does not acknowledge the existence of aboriginal rights.

[762] It is not necessary to examine each component of Canada's regulatory regime individually to determine whether it infringes the plaintiffs' aboriginal rights: *Gladstone*. The components of the regime operate in a comprehensive and integrated manner, and it is the overall impact on the plaintiffs' rights that is important. It is sufficient for present purposes to recognize that the DFO's regulatory scheme is characterized by the following:

a. licensing and limited entry;

b. transferability of licences or licence eligibilities;

c. quotas;

d. species-specific licensing;

e. gear restrictions;

f. area restrictions;

g. time-limited openings; and

h. recognition of aboriginal FSC fisheries.

[763] As well, Canada endorses an integrated commercial fishery model, as summarized in a July 2007 policy document tellingly entitled "*One Fishery For All of Us*". As that policy document explains, "Achieving a fair, sustainable, integrated commercial fishery on Canada's west coast, in which all commercial participants fish under common and transparent rules, is an important priority of Canada's new Government ...". The current Integrated Fisheries Management Plan with respect to salmon, for instance, indicates that the share of fish harvested by First Nations economic opportunity fisheries must be "fully mitigated" over time by the retirement of commercial salmon licences from the commercial fishery. Fisheries Manager, Mr. Ryall explained that one of the primary objectives of this approach was to avoid negative impacts on established fishers. Thus, Canada's stated policy of encouraging economic opportunity in the fisheries for First Nations is constrained by

its view that any such commercial fishing opportunities not be at the expense of non-aboriginal fishers.

b. Plaintiffs' preferred means of exercising their aboriginal right

[764] Part of the third inquiry, proof of meaningful diminution, requires the Court to examine whether the impugned fisheries regime denies to the plaintiffs their preferred means of exercising the aboriginal rights.

[765] Few authorities specifically address what is meant by "preferred means" in the context of the infringement analysis. *Sampson* is one. The appellants in that case were caught gill net fishing in Ladysmith Harbour on Vancouver Island, a location in which they had an aboriginal right to fish. Fishing by net in the Harbour was prohibited, but trolling was permitted upon issuance of a permit. On the question of whether the prohibition on fishing by net interfered with the appellants' preferred means of exercising the aboriginal right, the Court referred to evidence that until recent years, the Chemainus Band had caught salmon in the Ladysmith Harbour area through use of weirs, by clubbing, hooking or gaffing, and by means of a gill net. These, the Court held, were the Band's preferred means of fishing. The regulations prevented them from fishing by any of those means in Ladysmith Harbour, and on issuance of a permit, they were restricted to trolling, which was not their preferred method of fishing.

[766] The appellants in *R. v. Seward*, 1999 BCCA 163, 66 B.C.L.R. (3d) 49, had an aboriginal right to hunt deer for sustenance and ceremony. The appellants had been convicted of hunting deer with a firearm during prohibited hours (at night) contrary to the *Wildlife Act*, S.B.C. 1982, c. 57. At issue was whether legislation which prohibited one method of hunting was a *prima facie* breach of the broader right to hunt. The trial judge had concluded that the appellants were denied their preferred means of exercising their right because they were deprived of a method which was more convenient to them. Ryan J.A., for the Court, explained:

> [39] The Supreme Court justice held that the trial judge misinterpreted the meaning of "preferred means". The Supreme Court justice held that "The

definition of 'preferred' does not ... incorporate elements such as what the respondents chose to do because of the availability of a ride, or that they could kill deer faster." He said (at para. 71):

> "Preferred" must be considered in the cultural context of the aboriginal right to hunt to which the Penelakuts were entitled. There is academic speculation that the Penelakuts might have followed the traditions of other coastal tribes. However, the evidence does not support any conclusion that night hunting was the Penelakuts preferred means of exercising the right to hunt. The most that can be taken from the evidence is, as noted by the trial judge, that night hunting with lights was not "precluded" as being a part of the Penelakut culture.

[40] On this appeal, the appellants accepted that the Supreme Court justice correctly identified the error of the trial judge in defining "preferred means" as an individual choice. The appellants accepted that "preferred means" are established at the community level (R. v. Sampson (1995), 67 B.C.A.C. 180 at p. 194). The appellants submitted that the Supreme Court justice was wrong however, in the meaning he gave to the phrase. The appellants submitted that he erred in looking only to the methods of hunting which existed at the time of contact rather than the customs and practices of the Penelekut people as they have evolved over time.

[41] In my view the Supreme Court justice did not err in examining the methods the Penelekut used for hunting at the time of contact. In the passage I have quoted above the Supreme Court justice was simply pointing out that the appellants had not established that night hunting was ever a "preferred means". The appellants are right when they say that traditions evolve over time and that it must be present day practices that are examined. The point here is that the evidence established Penelekut hunters were known to hunt at night on occasion but that such activity had never reached the level of a preferred means.

[767] I additionally note that in *Gladstone*, the Court, in considering infringement, compared the Heiltsuk's ability to harvest herring spawn-on-kelp prior to the arrival of Europeans in North American and subsequent to the enactment of Canada's regulatory scheme in concluding that the latter infringed their aboriginal rights.

[768] It follows from these authorities that "preferred means" connotes more than the literal meaning of those words. Rather, it refers to the aboriginal community's preferred means of exercising the particular aboriginal right in question, which in turn is determined by reference to the ancestral practices, customs or traditions integral to the distinctive culture of the claimant's pre-contact society as they have evolved.

[769] Turning to the present case, the plaintiffs submit that DFO regulations and policies have prevented them from exercising their aboriginal rights by their preferred means. They characterize their preferred means as community-based, localized fisheries involving wide community participation and using small, low cost boats. They say this is a fair characterization of Nuu-chah-nulth fisheries of the past, as has been discussed earlier in these Reasons, and is reflected in the evidence of the individual Nuu-chah-nulth witnesses. The plaintiffs also contend that they have attempted to maintain this type of fishery but have been frustrated in doing so by the forces of the industrial fishery and DFO policies. The DFO's adherence to an integrated fishery, they say, prevents it from implementing measures to facilitate fishing opportunities for the plaintiffs that provide for a community-based multi-species fishery.

[770] With the development of limited entry and the industrial fishery, Nuu-chah-nulth communities attempted to maintain their participation in the commercial fishery through a mosquito fleet of smaller, unlicensed vessels. The evidence is that fishers in the mosquito fleets who did not have their own licences caught fish and then sold them through fishers who did have the appropriate licences. While they lasted, the mosquito fleets enabled Nuu-chah-nulth members who no longer had commercial licences to sell their fish to earn a moderate income. As the number of Nuu-chah-nulth members who held commercial licences declined, however, this method became less of an option.

[771] Chief Edward Jack testified that in the mid-1980s, the Mowachaht/Muchalaht Band Council looked into the possibility of purchasing a mosquito fleet licence for use by fishers with small boats but that the licence was too expensive. In 1985, the Ucluelet Band Council requested issuance of temporary commercial licences for use by small vessels, the majority of which measured less than seven meters. That request was also not accommodated by the DFO. As discussed in the review of Dr. Hall's evidence, the Ahousaht First Nation made a proposal in 1997 to split five gillnet licences into 30 licences on a tonnage basis in order to legalize their mosquito fleet fishery. The DFO did not approve the proposal.

[772] Evidence was also led with respect to the Somass Pilot Sales fishery. This pilot has provided a modest community fishery for two Nuu-chah-nulth groups, neither of which is a plaintiff in this phase of the trial. Dr. Hall explained how the Nuu-chah-nulth had made unsuccessful proposals to the DFO in the early 1990s to extend pilot salmon sales to other locations and First Nations.

[773] The Nuu-chah-nulth have also made various other proposals for alternative fisheries, both within existing policies and through requests for reform of DFO policies. Some examples include:

a. In 1994, the Nuu-chah-nulth Tribal Council requested that the DFO establish pocket fisheries for herring stocks in the Kyuquot Sound area.

b. In approximately 1994, the Nuu-chah-nulth Tribal Council pursued one communal commercial licence for rockfish for each Nuu-chah-nulth First Nation to be operated on more than one vessel per First Nation in order to facilitate involvement of a small boat fleet. The DFO did not approve licence splitting of this sort.

c. In the last several years, Dr. Hall has raised the possibility of splitting halibut quota to facilitate community fisheries and broaden participation by Nuu-chah-nulth members.

[774] While the *Aboriginal Communal Fishing Licensing Regulations* have the potential to permit community-based fishing based on communal licences, Mr. Radford testified that in practice, a very limited range of licensing measures for commercial fisheries have actually been implemented by the DFO since the introduction of those regulations. He discussed the idea of licence splitting or trap-sharing, and, while confirming that such measures are possible, indicated that the DFO is unlikely to facilitate such measures.

[775] Canada's policies reflect its adherence to an integrated fisheries model, whereby all participants in the commercial fisheries must be treated identically. This

precludes the plaintiffs from developing community-based fisheries in their own territories. Those with commercial licences must fish in the mainstream commercial fishery, and can only fish in management areas in which the DFO opens the fishery to all licensed vessels, regardless of whether those management areas are within Nuu-chah-nulth territory.

[776] In light of the foregoing, I conclude that Canada's regulatory regime denies the plaintiffs their preferred means of exercising their aboriginal rights.

c. Undue hardship

[777] The second *Sparrow* question that I consider part of the meaningful diminution analysis is whether the impugned regime imposes undue hardship on the plaintiffs' exercise of their aboriginal rights. Although the plaintiffs allege that DFO policies and operational restrictions impose undue hardship upon them, they do not specifically articulate how. Nevertheless, it is implicit in their submissions that their position is that the severe restrictions that the regulatory regime imposes on their fishing opportunities create an undue hardship. The evidence, they say, demonstrates that their communities have suffered acutely from the decline in their fishing opportunities.

[778] "Undue hardship" implies more than mere inconvenience: *Nikal*, at para. 100. In that decision, Cory J. contrasted a requirement for a licence that was freely and readily available with one where a licence was accessible only at great inconvenience or cost. The former did not constitute an undue hardship; the latter might well.

[779] The evidence in the present case establishes that the cost of commercial licences is out of reach for the plaintiffs. As described by Mr. Wood, those costs range from $170,000 to $200,000, which together with the cost of equipment, would bring the total cost to license and equip a fishing vessel to a cost in the order of $600,000. Another example of the prohibitive cost of licences is the geoduck fishery. Mr. Frank testified that the geoduck fishery is a "stone's throw away" from

the Ahousaht village; however, the Ahousaht cannot harvest this resource because they cannot buy a licence. The cost of such a licence, even if one were available, is well in excess of $1 million.

[780] Not only are the costs of commercial licences prohibitive, but the plaintiffs' overtures to the DFO with respect to modified or split licences have not been positively received, as discussed above.

[781] The fact that the current regulatory regime has caused undue hardship for the plaintiffs is graphically demonstrated by the compelling evidence in this case that the participation of the Nuu-chah-nulth in the WCVI fishery has diminished to the point that there are almost no fishers left in those communities. I have no hesitation in concluding that the regulatory regime has imposed undue hardship on the plaintiffs.

d. Is the limitation unreasonable?

[782] The third *Sparrow* question to be addressed here is not whether the impugned legislation is unreasonable, but whether the limitation it creates is an unreasonable infringement: *Seward*, at para. 46. *Seward* addressed whether a statutory restriction on hunting at night infringed the aboriginal right to hunt deer for sustenance and ceremony. Ryan J.A. held that when measured against the standard of safety which had been a tradition in the particular aboriginal group's culture, legislation which prohibited hunting at night with a rifle and illumination could not be said to be an unreasonable limitation of the aboriginal right.

[783] *Sampson* provides another illustration. The appellants were caught gill net fishing in Ladysmith Harbour, a location where they had an aboriginal right to fish for food. Fishing by net in the area was prohibited, but fishing by trolling was permitted upon application for a permit. A permit would have been issued to the appellants upon their request. In concluding that the prohibition against fishing by net at that location was not unreasonable, the Court noted that while fishing by trolling would not have been productive because chum salmon do not readily take a lure, a supply of other chum salmon would have been available to the appellants from the surplus

stocks at other nearby rivers or the hatchery near Chilliwack. Further, had the appellants applied for and obtained an Indian food fish permit for Ladysmith Harbour, they would have been entitled to catch four coho salmon per day by trolling throughout the year.

[784] Returning to the present case, the plaintiffs have not specifically explained how the limitations created by the regulatory regime are unreasonable. Again, however, it is implicit in their submissions that their position is that Canada's rigid adherence to an integrated fishery has prevented it from implementing measures that would facilitate fishing opportunities for the plaintiffs, and that such limitation is unreasonable.

[785] In contrast to the situation described in *Sampson*, it is not open to the plaintiffs to fish in other locations nearby. They have sought DFO approval for measures such as split licences but have not had their proposals approved. I find that the regulatory regime imposes an unreasonable limitation on the exercise of the plaintiffs' aboriginal rights.

e. Conclusion on infringement

[786] I pause here to acknowledge that to the extent that some aboriginal fishers have been able to continue in the fishing industry with some economic success, it could be argued that the regulatory regime is not the cause of the lack of aboriginal participation. Undoubtedly, factors that I have described above, including the collapse of the salmon stock, changes in equipment, the reduction in the price of fish, the closure of local fish buying businesses, environmental factors, international treaties, and conservation imperatives have all contributed to drive the plaintiffs out of the fishing industry.

[787] The licensing regime is not entirely responsible for the plaintiffs' non-participation in the fishery. I have mentioned several times, however, the evidence that there are now only three or four full-time Nuu-chah-nulth fishers compared to 70 or 80 who fished in 1992. I concluded that as late as the early 1990s and possibly

up until the collapse of the salmon fishery in 1995, there remained a somewhat active Nuu-chah-nulth commercial fishing fleet. The point I make is that if the fishery had remained as healthy and abundant as in previous decades, the Nuu-chah-nulth may have been able to compete, even within the existing licence regime. Put another way, there are other causes besides the impugned regulatory regime for the lack of Nuu-chah-nulth participation in the WCVI fishery. In my view, however, it is sufficient for the present analysis that the plaintiffs have proven that the regulatory regime as it currently exists prevents them from exercising their aboriginal rights by their preferred means through the imposition of unreasonable limitations that create undue hardship for them. That is not altered by the fact that the regulatory regime has evolved over time in response to such factors as changes in the fishery, conservation requirements and advances in scientific knowledge.

[788] It is indisputable that the plaintiffs cannot fish and sell their fish as they previously did, in part, because of Canada's regulatory regime. It is impossible for the plaintiffs to pay the large amounts the market sets for licences, and they are simply unable to compete in an economically sustainable way in the non-aboriginal fishery under the present regulatory regime. I am satisfied of that evidence.

[789] Canada's stated policy of encouraging economic opportunity in the fisheries for First Nations is constrained by its view that any such commercial fishing opportunities must not be at the expense of non-aboriginal fishers.

[790] The plaintiffs assert in this lawsuit an aboriginal right to sell their fish commercially. Although Canada has many programs designed to enhance commercial fishing opportunities for aboriginal fishers, fundamentally Canada does not recognize the right of those fishers to fish and to sell their fish commercially as an aboriginal right. Canada argues that the plaintiffs are the beneficiaries of these special programs that protect and enhance their participation in the commercial fishery. However, I am satisfied that these programs have been largely ineffective in assuring the plaintiffs' reasonable participation in accordance with their preferred

means in the commercial fishery. Indeed, those programs have not succeeded in maintaining even a modest native commercial fishery.

[791] I conclude that the plaintiffs have proved that Canada's fisheries regulatory regime *prima facie* infringes their aboriginal rights to fish and to sell fish by their preferred means, both legislatively and operationally. I exclude the clam fishery and the FSC fishery from this conclusion.

f. Clam fishery

[792] I now turn to the clam fishery and the question of infringement as it relates solely to that fishery. Intertidal clams became a limited entry fishery in 1998 following a consultative process commenced in the mid-1990s. Commercial access to the fishery was restricted to those licence holders who had held licences in five of the six years between 1989 and 1994. Z2 commercial clam licences were issued to those qualifying under the licence limitation criteria.

[793] Recognizing that First Nations would be almost entirely shut out of the clam fishery by these licence limitations, the DFO negotiated measures to secure the participation of First Nations through the provision of aboriginal commercial licences ("ACL"), as well as the establishment of pilot programs for exclusive First Nations harvesting on beaches fronting or adjacent to reserves.

[794] ACLs are communal licences issued under the authority of the *Aboriginal Communal Fishing Licences Regulations*, and were developed to recognize historical First Nations representation in the fishery. A "Z2" ACL clam licence provides the same access to the clam fishery as all other Z2 licences except that it is communally held by a First Nation, who then designates their preferred members to exercise the licence. Thus, on an annual basis, aboriginal bands are allotted a quantity of Z2 ACL licences; each band then allocates the Z2 ACL licences to individual members who conduct the harvest and sell their catch. The cost of a Z2 ACL licence is $90; $30 for the clam licence and $60 for a mandatory Fishers Registration Card.

[795] At the time that clams became a limited entry fishery, the DFO provided 564 ACLs for First Nations throughout the province. The licences were allotted to each First Nation based roughly on what was known of the history of the individual band's clam digging activities and a measure of common sense. The goal was to have approximately 50% aboriginal participation in the clam fishery. Of the total 564 ACLs, 237 were given to various Nuu-chah-nulth groups on the WCVI: the Ahousaht have 70; the Ehattesaht have 24; the Hesquiaht have 6; the Mowachaht-Muchalaht have 7; and the Tla-o-qui-aht have 16.

[796] Additionally, 96 Z2 commercial clam licences were issued for the WCVI, totalling 333 licences in Management Area F. Of these 96 Z2 licences, approximately 30-40 are held by Nuu-chah-nulth Tribal Council individuals. Holding 237 of the total 333 clam licences for Area F, the Nuu-chah-nulth have just over 70% of the licence eligibilities. When the Z2 licences held by Nuu-chah-nulth members are factored in, the number is closer to 80% of the total licence eligibilities for the management area.

[797] It is rare for any of the plaintiff bands to use all of the Z2 ACLs allotted to it for each year, as set out below:

First Nation	Eligibility	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998
Ahousaht	70	32	37	47	69	58	52	52	65	61	55
Ehattesaht	24	11	24	23	23	24	22	24	17	20	12
Hesquiaht	6	6	5	6	3	4	6	6	6	4	4
Mowachaht	7	3	7	3	4	5	3	1	2	2	4
Tla-o-qui-aht	16	3	13	12	16	16	16	16	14	13	13
TOTAL	123	55	86	91	115	107	99	99	104	100	88

[798] From time to time, different First Nations have requested additional clam licences; for instance, the Tla-o-qui-aht did so in April 2004. The DFO declined the request on the basis that the clam fishery was oversubscribed and could not support any new licences.

[799] Collaborative mechanisms such as clam boards have been established to improve consultation between the various stakeholders in the fishery. The primary consultative body for intertidal clams in the south coast area is the Pacific Region Clam Management Committee. A Pacific Region Integrated Fisheries Management Plan with respect to intertidal clams governs management of the fishery.

[800] Clams are harvested by hand during low tide cycles throughout the year and require only a rake to harvest.

[801] None of the foregoing evidence is controversial and I accept all of it.

g. Infringement analysis in respect to clams

[802] Z2 ACL licences are issued under the authority of the *Aboriginal Communal Fishing Licences Regulations*. Section 4 of the Regulations provides that the Minister may issue a communal licence to an aboriginal organization to carry on fishing and related activities. The Regulations do not set out criteria regarding the issuance of communal licences, with the result that the allocation of such licences is a discretionary act. On a strict application of *Adams* and *Marshall*, this alone would constitute a *prima facie* infringement of the plaintiffs' aboriginal rights. However, as I explained earlier, it is necessary, in my view, to engage in a factual analysis to determine whether the regulatory regime meaningfully diminishes the aboriginal rights in question.

[803] The evidence of the Nuu-chah-nulth witnesses who do earn money from commercial clamming is that the work is physically hard but that the fishery is not very lucrative. However, I did not hear evidence that the regulatory regime unreasonably limits their ability to earn income from this fishery.

[804] The Nuu-chah-nulth hold approximately 70% of the total clam licence eligibilities for the relevant management area. More significantly, as of 2007, none of the plaintiff bands were using more than half of the licence eligibilities that had been allocated to them. Moreover, the cost of a Z2 ACL licence is a modest $90. This being the case, there is no limitation at all on the present exercise by the

plaintiffs of their aboriginal rights with respect to the harvesting of clams, let alone one that is unreasonable, imposes undue hardship or interferes with their preferred means of exercising their aboriginal right. The existing regulatory regime has no apparent adverse effect on the plaintiffs' aboriginal rights in the context of the clam fishery. Accordingly, I find no *prima facie* infringement of their rights in regard to inter-tidal clams. For clarity, this finding applies only to clams, and not to other shellfish or geoduck.

h. FSC fishery

[805] FSC licences are issued under the authority of the *Aboriginal Communal Fishing Licences Regulations*, discussed above. Fisheries management controls for the FSC fishery are set out in multi-species licences according to area, species, quantity, dates, times, gear, and other conditions where applicable. Broadly speaking, FSC fishing is permitted as follows.

[806] Fishing is open throughout the year. Any type of vessel may be used, including small boats. One restriction on vessel-type is that if FSC fishing is conducted with a vessel larger than 30 feet, or with one equipped with commercial fishing gear, the First Nation must designate the vessel and advise the DFO in advance in order to distinguish it from the regular commercial fleet. FSC fishing is permitted within wide management areas, broadly intended to represent areas that were historically used by the particular First Nation. There are few gear restrictions on FSC fishing. If nets or traps are used, they must be marked with the name of the participant and First Nation in order to ensure that the DFO is aware they are being used for FSC fishing. Fishing for and retaining FSC groundfish under the authority of a communal FSC licence is permitted while commercial fishing for groundfish under a valid commercial licence. This provides for FSC and commercial fishing on the same trip. FSC allocations (or maximum harvest levels) are set out in a variety of ways applicable to each fishery, such as maximum pounds or number of mammals. Catch monitoring of the quantity of fish harvested under FSC fishing are to be reported on a quarterly basis to the DFO.

[807] Aboriginal groups sometimes coordinate their fishing efforts by using a seine boat to fish at a time and location when and where fish are abundant. Nuu-chah-nulth Tribal Council member bands have arranged for this type of coordinated harvest in Barkley Sound for sockeye salmon.

[808] It was, and remains, the DFO's intent to reach negotiated comprehensive fisheries agreements with each First Nation in the province regarding the terms and scope of its FSC fishing. To date, the DFO has reached such agreements with 37 aboriginal organizations representing 54 individual First Nations, all of which contain an FSC schedule. The DFO has also reached comprehensive fisheries agreements with 17 aboriginal organizations that do not contain a FSC schedule. So far, the Nuu-chah-nulth Tribal Council has remained with the old style format of framework agreements, sub-agreements and project funding agreements under the Aboriginal Fishing Strategy.

[809] The plaintiffs submit that their aboriginal right to fish for FSC purposes is legislatively infringed by the fisheries regime. They further cite various policy and operational infringements of that right, specifically: (1) the DFO has not responded to Nuu-chah-nulth Tribal Council requests for increased allocations of fish for inclusion in communal licences; (2) although aboriginal food fishing should be accorded first priority after conservation, DFO management measures do not ensure that this is actually the case for the plaintiffs; and (3) restrictions on Nuu-chah-nulth participation in the commercial fishery create obstacles to their access to the food fishery, principally, their inability to afford boats to use in the exercise of their food fishery rights.

[810] Canada's response to the plaintiffs' claim of legislative infringement is that the *Aboriginal Communal Fishing Licence Regulations* and comprehensive DFO policies provide explicit guidance for the exercise of ministerial discretion. These policies, it says, ensure that the exercise of discretion is principled and consistent with practices which accommodate the plaintiffs' rights.

[811] Canada also disputes the policy infringements alleged by the plaintiffs. It says that the plaintiffs have not led evidence to establish any particular level of FSC needs, and that according to available catch reports, the Nuu-chah-nulth bands have reported FSC catch levels significantly lower than their current FSC allocations. Contrary to the plaintiffs' submission that DFO management measures do not ensure their priority after conservation, Canada says that its measures do ensure this is the case. It further points to a variety of DFO management activities which it says demonstrate the DFO's commitment to realizing the objective of FSC harvesting as the first priority after conservation. Finally, Canada submits that the plaintiffs have not demonstrated on the evidence that their FSC needs are not satisfied, and says that no government policy interferes with their right to fish species opportunistically for FSC purposes using their preferred means.

[812] I earlier expressed my view that the plaintiffs take an overly technical position in arguing that their FSC rights are legislatively infringed through the current fisheries regime. Although the legislative regime confers absolute discretion on the Minister, DFO policies do firmly incorporate the proposition that the aboriginal food fishery is to be accorded first priority after conservation. In my view, these policies are sufficiently entrenched to guide the Minister's discretion such that the concerns expressed in *Adams* and *Marshall* are not live ones here.

[813] FSC licences are issued under the authority of the *Aboriginal Communal Fishing Licences Regulations*, which have been discussed elsewhere. Over the years, the DFO has developed a substantial number of policies that either directly address or touch upon the FSC fishery. These include:

- Policy for the Management of Aboriginal Fishing;
- National Procedural Guidelines for Enforcement of Aboriginal Fishing for FSC Purposes;
- Guidelines Respecting the Issuance of Licences under the ACFLRs;
- Escapement Surplus to Spawning Requirements Policy;
- Allocation Policy for Pacific Salmon;

- Integrated Fisheries Management Plans;
- Pacific Guidelines on Changes to Shellfish Management Plans to Address Requests by First Nations Regarding Harvesting for FSC;
- First Nations Access to Fish for FSC Purposes Part 1: Pacific Regional Operational Framework;
- First Nations Access to Fish for FSC Purposes Part 2: Pacific Region Evaluation and Decision Framework;
- First Nations Access to Fish for FSC Purposes Part 2A: Pacific Region Evaluation and Decision Framework, Request for Allocation Change;
- First Nations Access to Fish For FSC Purposes Part 2B: Pacific Regional Evaluation and Decision Framework, Request for FSC Fishing Area Change to Facilitate FSC Access;
- First Nations Access to Fish for FSC Purposes Part 2C: Pacific Regional Evaluation and Decision Framework, Request for Commercial and/or Recreational Closure to Facilitate FSC Access; and
- Integrated Aboriginal Policy Framework: 2005-2010.

[814] Canada has expressly acknowledged and affirmed in policy that aboriginal FSC fishing has first priority after conservation, including, for instance, in its "Policy for the Management of Aboriginal Fishing" of August 1993. Under the heading "Aboriginal Fishing", the policy document reads:

> Taking into account the current state of the law on Aboriginal fishing rights, DFO has adopted the following policies related to Aboriginal fishing:
>
> - Aboriginal fishing should occur within the areas that were used historically by the aboriginal group or First Nation.
> - Aboriginal fishing opportunities will be provided to the First Nation having historical use and occupancy of the area in question. The First Nation will administer the fishing opportunities for the benefit of its members collectively rather than individually.
> - Aboriginal fishing for food, social and ceremonial purposes will have first priority, after conservation, over other user groups. Aboriginal fishing for such purposes will only be restricted to achieve a valid conservation objective, to provide for sufficient food fish for other Aboriginal people, to achieve a valid health and safety objective, or to achieve other substantial and compelling objectives.

[815] Described by Mr. West as the "building block" upon which other FSC policies are based, this policy sets out the principles and procedural guidelines for the DFO's management of aboriginal fishing.

[816] Another example is the "Allocation Policy for Pacific Salmon" issued in 1999. In setting out a salmon allocation framework, it provides for priority of FSC requirements after conservation. It reads, in part, as follows:

> **Allocation Principle 2 – First Nations**
>
> **After conservation needs are met, First Nations' food, social and ceremonial requirements and treaty obligations to First Nations have first priority in salmon allocation.**
>
> ...
>
> **Fish for Food, Social and Ceremonial Purposes**
>
> Each year, Fisheries and Oceans Canada staff will consult with First Nations on their needs for food, social and ceremonial fish and matters that may affect their fishing and preferred fishing methods. Fisheries and Oceans Canada respects that fishing has a cultural component for First Nations.
>
> [Emphasis in original]

[817] A further example is the 2007/2008 Southern B.C. Salmon Integrated Fisheries Management Plan. FSC fisheries are incorporated into IFMPs, which provide the overall fishing plan for the season. The salmon IFMP thus covers aboriginal, recreational and commercial fisheries for Pacific salmon in southern areas of the province. The management plan summarizes the objectives of managing aboriginal fisheries at s. 3.2 as follows:

> 3.2 First Nations Objectives
>
> The objective is to manage fisheries to ensure that, subject to conservation needs, first priority is accorded to First nations for opportunities to harvest fish for FSC purposes and any treaty obligations.
>
> Feedback from consultation sessions is relied on to measure the performance of providing first priority to First Nations for opportunities to catch fish for FSC purposes and any treaty obligations.

[818] Various DFO policies set out guidelines regarding different aspects of the FSC fishery. For example, arising from its policy of issuing communal licences instead of individual food fishing licences, the DFO established "National Procedural

Guidelines for Enforcement of Aboriginal Fishing for Food, Social and Ceremonial Purposes". These guidelines describe DFO's enforcement policies and procedures with respect to FSC fishing, responsibilities and functions of various DFO staff, and instructions regarding annual evaluation of the policy and procedures.

[819] The "Guidelines Respecting the Issuance of Licences under the *ACFLR*s" were issued in February 2001. These guidelines indicate that flexibility is required in order to manage the fisheries in a manner consistent with *Sparrow* and subsequent decisions, taking into account whether an aboriginal group has aboriginal or treaty fishing rights and that the nature and scope of any such rights will vary between groups. After describing the *Aboriginal Communal Fishing Licences Regulations*, the Guidelines set out directives for licensing, as follows:

> DFO seeks to manage fisheries in a manner consistent with the Sparrow and subsequent decisions. Consistent with the direction provided by the courts and federal government policies that encourage negotiation with Aboriginal groups, DFO consults with various Aboriginal organizations and attempts to reach agreement with them on their fishing effort and the measures to be implemented.
>
> It may not be possible or appropriate to consult with every Aboriginal organization that wishes to be involved in the process. In this regard it should be remembered that DFO does not have a mandate to determine whether an Aboriginal group has aboriginal or treaty rights to fish, or the nature and scope of any such rights. In deciding which are the most appropriate organizations with which to consult, there are a number of factors that should be considered. These factors will include:
>
> (i) whether the Aboriginal organization is an Indian band or represents one or more Indian bands;
>
> (ii) whether the Aboriginal organization represents a territorially based Aboriginal community or a group of territorially based Aboriginal communities;
>
> (iii) what access to fisheries resources is available to the Aboriginal organization;
>
> (iv) is access to fisheries resources available to the Aboriginal organization or its members through access provided to another Aboriginal organization;
>
> (v) the likelihood that the particular organization speaks for a community or communities that today best represent Aboriginal societies that may be able to claim Aboriginal or treaty rights to fish; and
>
> (vi) the likelihood that the particular organization may represent individuals with a connection to a community referred to in (v).

> Where an agreement is reached, licences issued will reflect the fisheries access and licence conditions described in the agreement.
>
> Where an agreement is not reached, the Minister will review the consultations held. The Minister will take into account the preferences and concerns expressed by the Aboriginal organization, conservation requirements and other relevant matters. Licences issued will contain conditions that the Minister believes would meet the requirements of the Sparrow and subsequent decisions. The conditions would be for the proper management and control of fisheries and the conservation and protection of fish.
>
> Where an Aboriginal organization does not participate in consultations with DFO, the Minister will review the efforts made to consult. The Minister will take into account DFO's understanding of the preferences and concerns of the Aboriginal organization, conservation requirements and other relevant matters. Licences issued will contain conditions that the Minister believes would meet the requirements of the Sparrow and subsequent decisions. The conditions would be for the proper management and control of fisheries and the conservation and protection of fish.

[820] In 2006, the DFO summarized its FSC policies in a series of draft documents. To improve consistency in terms of how FSC requests were dealt with, they set out a structured and regularized process to consider such requests.

[821] To take a request for an allocation increase, as an example, the evaluation and decision framework asks the following questions:

> **Criteria #1: Legal Considerations**
>
> 1.1 Will approving/not approving request result in a conservation issue?
>
> 1.2 Will approving/not approving the request have implications for other valid legislative objectives (e.g. human health & safety)?
>
> 1.3 Issues with priority of access for FSC purposes?
>
> 1.4 FN preferences – social and/or cultural importance
>
> 1.5 Possible infringement on other FSC harvests if increase approved?
>
> 1.6 If the request is for "new" species, is there historical information relevant to this request?
>
> 1.7 Other
>
> **Criteria #2: Fisheries Resource Diversity, Abundance and Parity Issues**
>
> 2.1 Current & requested allocation of species/stock (total units and units per capita)
>
> 2.2 Compare current allocation of requested species/stock with other FNs in same Geographic Aggregate (GA).

2.3 Current allocation of all fish species/stocks (Total lbs per capita)

2.4 Using AFS summary table, compare current allocations for each species with average for Aboriginal groups in same GA.

For shellfish, evaluate availability (high, medium or low) as usually there is no allocation.

2.5 Changes in Aboriginal Groups' fish needs (e.g. population, etc.)

2.6 Other

Criteria #3: Fisheries Capacity, Governance, and Operational Issues

3.3 How does request compare with reported FSC catch data?

3.2 Does the FN have the capacity to harvest the requested allocation?

3.3 Concerns regarding compliance with licence conditions?

3.4 Is the request to facilitate short-term access to unusually high stock abundance?

3.5 Can the requested allocation be caught within the FN's current fishing area?

3.6 Is request linked with a commercial issue (e.g. by-catch retention)?

3.7 Other

Criteria #4: Treaty-Related Issues

4.1 Is the requesting FN participating in the Treaty process?

4.2 Compare the requested allocation with what has been offered (or planned) for the requested species.

4.3 Can the requested allocation (or species) be caught within the SOI? Within the negotiated Fishing Area?

4.4 Compare the requested allocation to treaty allocations proposed/offered for neighbouring First Nations.

4.5 Other

[822] The umbrella document (entitled "First Nations Access to Fish for Food, Social and Ceremonial Purposes, Part 1: Pacific Regional Operational Framework") further outlines a sequence of 10 detailed procedural steps to be followed upon receipt of a request for an allocation increase from a First Nation. It is difficult to conceive of more structured decision-making than directed by these policies.

[823] As noted, these are draft documents, and it is not entirely clear from the evidence whether they are currently in operation. However, I observe that Mr. Preston referred in his affidavit to an allocation change request from the Nuu-chah-nulth Tribal Council in 2006; attached to his affidavit was a draft FSC allocation

change request evaluation package prepared with respect to the Nuu-chah-nulth Tribal Council request. This would suggest that the frameworks are currently in effect.

[824] The Supreme Court's concerns in *Adams* and *Marshall* with respect to "an unstructured discretionary administrative regime" are not concerns I share in the context of the DFO's approach to the FSC fishery. I recognize that policies do not carry the force of legislation or regulation. Nevertheless, the proposition that the aboriginal food fishery is to be accorded first priority after conservation is firmly entrenched in DFO policies. Those policies, in turn, provide considerably more concrete and practical guidance with respect to decisions affecting aboriginal food fishing rights than would a bare statement in the *Fisheries Act*, for example, that FSC rights are to be given first priority after conservation, ever could.

[825] I find support in the comments of McLachlin C.J. at para. 51 of *Haida Nation*. Echoing her words, I conclude that while falling short of a regulatory scheme, DFO policies with respect to the FSC fishery cumulatively guard against unstructured discretion and provide appropriate guidance for decision-makers.

[826] Moreover, I am not satisfied that the plaintiffs have demonstrated that Canada's fisheries regime meaningfully diminishes the exercise of their asserted FSC rights.

[827] Citing the evidence of Dr. Hall, the plaintiffs say that the Nuu-chah-nulth Tribal Council has requested increased allocations of fish for inclusion in communal licences but that no changes from the DFO have been forthcoming. I note, as well, the evidence of Mr. Luedke that in recent years, the DFO and the Nuu-chah-nulth Tribal Council have discussed FSC allocations at the Spring *Uu-a-thluk* meetings. At these meetings, the Nuu-chah-nulth Tribal Council has usually presented written requests for FSC allocations that are approximately double the current Nuu-chah-nulth Tribal Council FSC allocations.

[828] However, the plaintiffs have not demonstrated that their present FSC allocations are insufficient to meet their FSC needs. The evidence that does exist on this point would appear to suggest otherwise. A spreadsheet prepared by Mr. Preston regarding the plaintiffs' communal licence allocations and reported catches of salmon from 2000 to 2008 indicates the following with respect to sockeye salmon: the Ahousaht have never exceeded their licence allocations for sockeye salmon; the Ehattesaht equalled or exceeded their allocation in four of eight years; the Hesquiaht and Tla-o-qui-aht have largely been successful in catching their allocations; and, since 2006, the Mowachaht have met their allocations. None of the plaintiffs has ever met its allocations for the other species of salmon.

[829] I recognize that these numbers are based on the First Nations reporting to the DFO and that there is some uncertainty regarding the accuracy of these numbers; for example, catches in large-capacity FSC fisheries, such as the hiring of a seine boat or reliance on the First Nations Marine Society, are recorded, while catches in occasional smaller scale fisheries may not be necessary. However, the evidence is consistent with Mr. Preston's testimony that their allocations are not being increased because they are currently not being caught. Initial FSC allocations were a negotiated amount based upon the specific needs of individual First Nations. In some cases, those amounts have been increased. The Tla-o-qui-aht First Nation sought an increased allocation for sockeye salmon in 2004; their allocation was increased from 3,500 salmon to 5,000 in 2004 and thereafter. The evidence does not establish that existing allotment levels are insufficient to meet the plaintiffs' FSC needs.

[830] Canada has undertaken a variety of measures to enhance FSC opportunities for the plaintiffs. For instance, commercial closures of the crab fishery and clam harvesting to facilitate FSC access have been implemented from time to time. Another example is the Excess Salmon to Spawning Requirements Policy, which sets out priorities for the allocation of surplus salmon from hatcheries; the first priority is meeting any outstanding FSC requirements which could not be met through licensed fisheries.

[831] I am satisfied, on the whole, that the plaintiffs' FSC rights are being adequately met. Pursuant to FSC licences, the plaintiffs are largely able to fish whenever they wish and in the manner they prefer; they are also not strictly restricted to their traditional fishing grounds. I do not find that the plaintiffs have demonstrated any meaningful limitation on their food fishing rights such that they are enduring undue hardship. Consequently, the regulatory regime has no apparent adverse effect on the plaintiffs' FSC rights. I therefore conclude that there is no *prima facie* infringement of the plaintiffs' FSC rights.

[832] I now turn to my consideration of Canada's defence of justification.

IX. JUSTIFICATION

[833] In this section of my Reasons, I consider whether Canada's *prima facie* infringement of the plaintiffs' aboriginal rights is justified. In doing so, I will consider not only whether Canada has proven that the entirety of its fishery regulatory regime is a justified infringement but also whether some lesser encroachment would serve the objects of its regulatory regime.

A. Legal Principles

[834] As Dickson C.J. and La Forest J. explained in *Sparrow*, at para. 62:

[835] Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.

[836] Thus, once a *prima facie* infringement has been found, the onus shifts to the Crown to demonstrate that the infringement is justifiable. *Sparrow* sets out a two-part test for justification:

a. The infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial.

b. The infringement must also be consistent with the special fiduciary relationship that exists between the Crown and aboriginal peoples.

1. Compelling and substantial objective

[837] The first consideration in the justification analysis is whether the infringement of the aboriginal right is in furtherance of a legislative objective that is compelling and substantial. The Court here inquires into whether the objective of Parliament in authorizing a government department to enact regulations is valid, as well as the objective of that department in setting out the particular regulations.

In *Gladstone*, Lamer C.J. explained that compelling and substantial objectives are those which are directed at either one of the purposes underlying the s. 35(1) recognition and affirmation of aboriginal rights, as identified in *Van der Peet:*

> … first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.

[838] At the level of justification, it is the latter purpose which may well be most relevant, as Lamer C.J. explained, at para. 73 of *Gladstone*:

> Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.

[839] In *Sparrow*, the Court identified conservation/resource management and the prevention of harm as objectives that satisfied this part of the justification test. The "public interest", however, it held, was too vague a justification to limit constitutional rights. In *Gladstone*, Lamer C.J. elaborated with respect to other objectives that might satisfy this standard, at para. 75:

> Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the types of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances*, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.
>
> [Emphasis in original]

[840] In *Delgamuukw*, the Court provided further examples of legislative objectives that would satisfy the standard, this time in the context of aboriginal title: the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims.

[841] As noted earlier in the discussion of infringement, the Supreme Court in *Gladstone* held that where the constituent parts of a government scheme (there, the regulation of the herring spawn-on-kelp fishery) had different objectives, it was sufficient to consider the cumulative effect of the scheme when considering infringement; at the justification stage, however, it was necessary to consider the constituent parts separately. In the present case, I have already concluded that it is the cumulative effect of the current fisheries regime that infringes the plaintiffs' aboriginal rights. In the circumstances, it is simply not possible to identify each individual aspect of that regime to subject it to a justification analysis. Moreover, given my conclusions regarding justification, it is not necessary that I do so.

2. Consistent with fiduciary relationship

[842] If a valid legislative objective is found, the analysis proceeds to an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples. As the Supreme Court explained in *Sparrow*, at p. 1114:

> If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin*, *supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility vis-a-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

[843] Factors which the Court identified as relevant in assessing whether the Crown's actions were consistent with its fiduciary duty include:

a. Whether the right had been given adequate priority in relation to other rights;

b. Whether there had been as little infringement as possible to effect the desired result;

c. Whether, in a situation of expropriation, fair compensation was available; and

d. Whether the aboriginal group in question had been consulted.

[844] In *Nikal*, Cory J. discussed how the notion of reasonableness infuses the justification analysis, at para. 110:

> It can, I think, properly be inferred that the concept of reasonableness forms an integral part of the *Sparrow* test for justification. For example, in these last questions reasonableness will be a necessary aspect of the inquiry as to justification. For instance, when considering whether there has been as little infringement as possible, the infringement must be looked at in the context of the situation presented. So long as the infringement was one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible then it will meet the test. The mere fact that there could possibly be other solutions that might be considered to be a lesser

> infringement should not, in itself, be the basis for automatically finding that there cannot be a justification for the infringement. So too in the aspects of information and consultation the concept of reasonableness must come into play. For example, the need for the dissemination of information and a request for consultations cannot simply be denied. So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement. ...

[845] In *Sparrow* and *Gladstone*, the Supreme Court applied the Crown's fiduciary duty in terms of priority. *Sparrow* concerned aboriginal food fishing rights, and the Court made the following comments, at p. 1114:

> The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource. The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocational problems that arise regarding the fisheries.

[846] The Court went on to find that the constitutional nature of aboriginal food fishing rights meant that any allocation of priority after valid conservation measures have been implemented must accord top priority to aboriginal food fishing, followed by commercial and recreational fishing.

[847] In *Gladstone*, Lamer C.J. articulated a convenient distinction between an aboriginal right that was internally limited, such as food fishing (at a certain point the needs of the particular aboriginal group will be sated), and one that had no such internal limitation (for example, the claim to sell herring spawn-on-kelp on a commercial basis, as was the case in *Gladstone* itself). At para. 62, he wrote:

> Where the aboriginal right is one that has no internal limitation then the doctrine of priority does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the

> fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.

[848] Lamer C.J. noted that the content of this priority, which was something less than exclusive but which nonetheless gave some priority to the aboriginal right, necessarily had to remain vague pending assessment on a case-by-case basis as to whether the government had acted in a fashion which reflected that it had truly taken the existence and importance of aboriginal rights into account. In this regard, he compared the analysis to the minimal impairment branch of the *Oakes* test where the government balances the interests of competing groups; the Court does not require that the government have taken the least rights-impairing action possible, and considers instead the reasonableness of the government's actions, taking into account differing justified demands. At para. 64, Lamer C.J. suggested questions that may be relevant to the determination of whether the government has granted priority and has taken into account the existence and importance of such rights:

(1) whether the government has accommodated the exercise of the aboriginal right to participate in the fishery;

(2) whether the government's objectives in enacting the particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders;

(3) the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population;

(4) how the government has accommodated different aboriginal rights in a particular fishery (food versus commercial rights, for example);

(5) how important the fishery is to the economic and material well being of the band in question; and

(6) the criteria taken into account by the government in, for example, allocating commercial licences among different users.

[849] Lamer C.J. spoke of the challenges of balancing the various competing interests, at para. 66:

> The existence of such difficult questions of resource allocation supports the position that, where a right has no adequate internal limitations, the notion of exclusivity of priority must be rejected. Certainly the holders of such aboriginal rights must be given priority, along with all others holding aboriginal rights to the use of a particular resource; however, the potential existence of other aboriginal rights holders with an equal claim to priority in the exploitation of the resources, suggests that there must be some external limitation placed on the exercise of those aboriginal rights which lack internal limitation. Unless the possibility of such a limitation is recognized, it is difficult to see how the government will be able to make decisions of resource allocation amongst the various parties holding prioritized rights to participate in the fishery.

[850] In summary, to succeed in its justification defence, Canada must establish the following:

(1) that the impugned regulatory regime was enacted pursuant to a valid legislative objective or objectives; and

(2) that it has acted in a manner consistent with its fiduciary obligation toward aboriginal people, and that in allocating the fisheries resource, it has been respectful of the plaintiffs' aboriginal rights and has encroached upon those rights to the minimal extent possible.

[851] It is possible within this aspect of the analysis that I will examine whether the entirety of the regime can be justified or whether some lesser encroachment of the plaintiffs' aboriginal rights would still serve the objectives of the regime.

B. Canada's Position on Justification

[852] Canada submits that its management regime constitutes a legitimate regulation of the plaintiffs' commercial fishing rights, and that its actions in managing

the fisheries are reasonable. DFO's legislation, regulations, and policies, it says, are in pursuit of valid legislative objectives, which include:

a. conservation and sustainability of fisheries resources;

b. protection of endangered species;

c. establishing priority for aboriginal FSC fisheries after conservation;

d. health and safety;

e. adherence to international treaties;

f. facilitation of aboriginal participation in the fisheries;

g. pursuit of economic and regional fairness, including participation in the fisheries by other aboriginal groups and recognition of the historic reliance upon and participation in the fisheries by non-aboriginal groups;

h. achievement of the full economic and social potential of the fisheries resources; and

i. safe and accessible waterways.

[853] In its submissions, Canada has detailed how, in its view, the various features of the regulatory regime – limited entry licensing, quotas and gear restrictions, for instance – duly accommodate and minimally impair aboriginal interests. To take limited entry licensing as an example, Canada submits that such licensing was implemented for the valid legislative objectives of conservation and effective management of commercial fisheries on a species specific basis. The DFO consulted with aboriginal groups and accommodated their interests in both the implementation and ongoing administration of limited entry licensing programs in various fisheries. Canada says that special consideration was given to aboriginal peoples during the introduction of limited entry licensing by means of a host of

measures including reduced-fee licences and licence retirement programs. Moreover, Canada submits that the DFO also established a variety of programs that provided financial assistance to support individual aboriginal commercial fishers during this period, such as the Indian Fishermen's Assistance Program, the Aboriginal Business Development Program and special provisions for band councils to apply for limited entry licences for certain fisheries in circumstances where they did not met the limited entry licensing criteria.

[854] Canada says that following the release of the Supreme Court's decision in *Sparrow*, the DFO recognized and supported communal aboriginal participation in its implementation of limited entry licensing through a range of programs including: the Aboriginal Fishing Strategy; pilot sales programs; voluntary licence retirement programs; the Allocation Transfer Program; reduced fee licences; special consideration for aboriginal communities in new and emerging fisheries; Aboriginal Aquatic Resource and Oceans Management access; the Integrated Pilot Groundfish Program; and the Pacific Integrated Commercial Fishing Initiative. Canada submits that any impairment that may have resulted from the initial allocation of limited entry licences in a particular commercial fishery would have been minimal and can be justified by the DFO's ongoing efforts to continue to transfer further commercial opportunities to aboriginal groups through many of the programs referred to above.

[855] Canada makes similarly detailed submissions with respect to other aspects of the regulatory regime, and contends that each has been implemented in a manner consistent with Canada's fiduciary relationship with aboriginal peoples.

[856] Canada further submits that consultation is one of the factors that may be considered in determining whether the honour of the Crown has been upheld, and it details the extensive consultations in which it says the DFO has engaged with aboriginal peoples throughout the province and with the Nuu-chah-nulth Tribal Council specifically. The DFO has implemented and funds a multi-faceted consultation program that ensures: bilateral and multilateral consultations by funding the Nuu-chah-nulth Tribal Council's participation in 43 committees and

advisory boards; a co-management approach through the Aquatic Management Board and the Aboriginal Aquatic Resources and Oceans Management funded *Uu-thluk* Joint Technical Meetings; annual consultations with 197 First Nations with fisheries programs in the province, including the Nuu-chah-nulth; a Consultation Secretariat with a calendar and programs specifically addressing aboriginal consultation; and direct involvement in the Pacific Integrated Commercial Fisheries Initiative.

[857] Finally, Canada emphasizes the importance of recognizing the multitude of competing interests, both international and local, that it must balance and reconcile in managing the fisheries. At the international level, Canada has entered into various international treaties to assist with the conservation and sustainability of fisheries resources that migrate through international waters. A few of these include the International Pacific Halibut Convention, the Pacific Salmon Treaty, the North Pacific Anadromous Fisheries Convention and the U.N. Accord for Protection of Species at Risk. Canada summarizes the provincial interests it must balance as follows: 197 First Nations groups; 143 First Nations located along Fraser sockeye migration routes; 87 inland First Nations reliant solely on Fraser salmon; 6,307 licenced commercial fishers; 1,146 commercial clam fishers; approximately 350,000 tidal and 300,000 non-tidal recreational fishers; plus numerous other environmental groups and local communities.

C. The Plaintiffs' Position on Justification

[858] The plaintiffs respond that Canada has failed to discharge its onus of justifying its infringement of their aboriginal rights. They submit that Canada's attempt to individually justify each major development in the commercial fishery, such as the introduction of limited entry and quotas, fails to consider how the regulatory regime in its totality has adversely affected the Nuu-chah-nulth plaintiffs. Canada seeks, according to the plaintiffs, to justify individual programs and developments on the basis that they are necessary for the management of the entire fishery rather than considering them in the context of the plaintiffs' aboriginal rights.

Citing *Gladstone*, the plaintiffs say that the priority doctrine in the context of commercial fishing rights requires Canada to demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by others. They argue that notwithstanding the DFO's various aboriginal fishing strategies, those programs are not based on aboriginal rights and that in implementing those programs, Canada has not considered the plaintiffs as rights holders in the way that the *Gladstone* analysis requires them to do.

[859] The plaintiffs do not take issue with Canada's regulation of the fishery generally. Rather, they seek to have fishing opportunities which are specific to them and which permit them to fish in accordance with their preferred means. Their principal complaint is against Canada's failure to accommodate their aboriginal rights within its larger management scheme. The plaintiffs point to two examples in the evidence of instances in which Canada has established programs outside the mainstream commercial fishery in order to accommodate aboriginal and treaty rights. One is the Somass Pilot Sales Program, which provides the Tseshaht and Hupacasath First Nations with fishing opportunities. As well, Canada permits the Nisga'a First Nation, which has a treaty right to sell Nass River salmon, to conduct their salmon fishery under their own rules at different times and in different areas than the regular commercial fishery.

D. Analysis

[860] At the core of the plaintiffs' submissions on justification is the proposition that it is impossible for Canada to justify infringements since it has never acknowledged the existence of aboriginal commercial fishing rights on the part of the Nuu-chah-nulth. They say that Canada cannot, on the one hand, deny the existence of the claimed right and then, on the other, demonstrate that they have taken the existence of that right into account and allocated the resource in a manner respectful of the plaintiffs' priority (however limited) over other users of the fishery.

[861] Canada acknowledges that the plaintiffs claim commercial fishing rights but says that whether they are in fact rights holders will be determined in these proceedings. It says that *N.T.C. Smokehouse* (which involved the Tseshaht and Hupacasath First Nations) offers the best guidance as to the likelihood of the plaintiffs establishing commercial fishing rights; such rights were not recognized in that decision. Nevertheless, Canada says that it has continued to strive to address and fulfill aboriginal groups' interests in increasing commercial fishing opportunities through the various programs and policies detailed in the evidence. Where aboriginal rights are claimed but not yet established, it submits, the government must balance societal and aboriginal interests in making decisions that may affect aboriginal claims.

[862] *Gladstone* is clear that in order to satisfy the doctrine of priority in the context of an aboriginal right without internal limitation, the government must take into account the fact that the aboriginal group in question has a constitutionally protected right. As Lamer C.J. wrote, at para. 62:

> ... the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. ...
>
> [Emphasis added]

[863] At para. 63, in explaining the content of the priority, he wrote, in part:

> ... priority under *Sparrow*'s justification test cannot be assessed against a precise standard but must rather be assessed in each case to determine whether the government has acted in a fashion which reflects that it has truly taken into account the existence of aboriginal rights. ... Similarly, under *Sparrow*'s priority doctrine, where the aboriginal right to be given priority is one without internal limitation, courts should assess the government's actions not to see whether the government has given exclusivity to that right (the least drastic means) but rather to determine whether the government has taken into account the existence and importance of such rights.
>
> [Emphasis added]

[864] In later applying the justification analysis to the facts before him, Lamer C.J. commented upon the inadequacies of the evidentiary record with respect to the

priority analysis. He identified various evidentiary shortcomings, and then addressed how the lower courts had sought to overcome them, at para. 81:

> In the courts below, the judges considering the justification issue avoided the difficulties created by the inadequacy of the evidentiary record in two ways: they either held that the nature of the appellant's actions rendered the government's actions justifiable (the approach of the trial judge) or they held that the allocation of 60 per cent of Category J licences to aboriginal groups demonstrated that the government's regulatory scheme was justifiable. The problem with the first of these approaches is that the nature of the appellants' actions is not relevant to the inquiry into the constitutionality of the regulation under which they were charged. The problem with the second approach is that the fact that 60 per cent of the Category J licences were held by aboriginal people does not demonstrate, in itself, that the licences were allocated in a manner which took into account the existence of aboriginal rights. It is, perhaps, consistent with that having taken place, but absent some further evidence as to how or why this result was reached, about the percentage of aboriginal people in relation to the population of the British Columbia coast as a whole, and about the other allocation issues in the herring roe and herring spawn on kelp fisheries, the fact that 60 per cent of the Category J licences are held by aboriginal peoples does not, on its own, serve to justify the government's actions.
>
> [Emphasis added]

[865] It is thus apparent that in order to be able to justify an infringement, Canada must, at a minimum, have turned its mind to the existence of the aboriginal rights at issue here. Until the release of these Reasons, it was not unreasonable in light of the prevailing case authorities for Canada to proceed on the basis that the plaintiffs did not have the aboriginal fishing rights that I have found they possess. I recognize, as well, that even without recognizing those rights, Canada has endeavoured to facilitate aboriginal participation in the commercial fishery by means of its various programs that benefit only aboriginal fishers. Nevertheless, the DFO has been committed to an integrated commercial fishery model under which all fishers are treated equally. It has attempted to walk a fine line in this regard, as noted by Mr. Ryall. He stated that "If First Nation participation in the commercial fisheries were increased without mitigation or some other management measures such as defined shares, this would make fisheries more difficult to manage and to achieve conservation and allocation objectives." I interpret this to mean that the DFO considers it unfair to established non-aboriginal fishers to create more than

incremental increases in the aboriginal share of the commercial fishery. The DFO has many stakeholders to contend with and it performs a delicate balancing act in its attempts to fairly manage the expectations and demands of all the competing stakeholders.

[866] However, the fact remains that these plaintiffs have aboriginal rights to fish and to sell fish, and Canada has not taken those specific rights into account in its management of the Pacific fisheries. There is an important difference between balancing generalized aboriginal interests in participating in the commercial fishery with other competing interests on the one hand, and according recognition, however defined, to the constitutional right of these plaintiffs, on the other.

[867] While it may be suggested that the fact that Canada did not specifically consider the plaintiffs' aboriginal rights should not matter so long as the outcome would have been the same, it would be speculative to assume that would be the case. The evidence is clear that Canada has not recognized aboriginal rights in the commercial fishery. On the issue of licence splitting, for example, the testimony of Mr. Radford is illustrative of Canada's approach:

> The other concern, of course, is that we like to – or were directed to manage all commercial access in a -- from a level playing field, …if we were to allow one class of commercial licence holders to do this, then we would also be obligated to allow all commercial licence holders to do this. So while one licence split may not make a big difference, if you split them all up and provide everybody with an opportunity to work their gear that much harder, it has potential to negatively impact on conservation in the current management regime. It's not to say that there isn't a way to do this at some point in the future, but it requires a different set of controls that would require us to negotiate with the broader industry as a whole. …[I]t's not impossible but we're not there at this point.

[868] It cannot be known whether the DFO would have responded differently to the plaintiffs' proposals for licence splitting had it taken into account their constitutional rights to fish and to sell that fish.

[869] Accordingly, not having taken into account the existence of the plaintiffs' aboriginal rights to fish and to sell fish, Canada is not in a position to justify the infringements of that right as required by the authorities.

[870] Almost all of the evidence that Canada led on justification was in aid of justifying the fisheries regime at large since there had been no finding of a commercial aboriginal right and infringement. The evidence did not address the justification defence made necessary by the plaintiffs' lesser claims. For instance, there is evidence that the plaintiffs' requests, made primarily through Dr. Hall, for specific exemptions to permit them to conduct modest commercial fisheries were not accommodated. In some cases, Canada's witnesses indicated favourable views of such proposals under cross-examination, and in other cases, not. Canada did not lead evidence justifying its refusal to entertain these limited proposals on the grounds that it adheres to a fully integrated management model.

[871] In my view, it would be unfair to hold that Canada has failed to justify its *prima facie* infringement of the plaintiffs' aboriginal rights without first providing the parties the opportunity to consult or negotiate based upon the findings I have made and, in the event of unsuccessful negotiations, the opportunity for Canada to adduce further evidence relevant to a more focussed justification defence. An additional factor that guides the outcome towards negotiation between the parties is Canada's submission that the plaintiffs led no evidence with respect to the level of participation in the commercial fishery that would be sufficient to meet their requirements or expectations. It is true that the plaintiffs plead their case on a spectrum. Not knowing where, if at all, on that spectrum the Court's decision would fall, the plaintiffs contend that the quantification of the amount of fish that would satisfy their aboriginal rights, or the determination as to the means by which their aboriginal rights will be exercised, is a question for negotiation between the parties as part of the process of reconciliation. I agree.

[872] For these reasons, it is my view that it is necessary for the parties to consult and negotiate the manner in which the plaintiffs' rights can be exercised and

accommodated without jeopardizing Canada's numerous legislative objectives and interests.

[873] This is consistent with the objectives of the law of aboriginal rights. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* [2005] 3 S.C.R. 388, 2005 SCC 69, the judgment of the Court began with the statement:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests, and ambitions.

[874] To repeat what I said earlier, the objective of s. 35(1) is to guarantee that the government treats aboriginal peoples in a way that ensures that their rights are taken seriously: *Sparrow, Gladstone*. What this means in practical terms is explained, in part, in *Gladstone*: where an aboriginal right has no internal limitation, as here, the notion of exclusive priority must be rejected. However, in demonstrating that it has taken the aboriginal right seriously in balancing legislative objectives and other interests, the government must take account of the existence of the right and allocate the resource in a manner respectful of the fact that that right does have a priority.

[875] Here, it is for the parties to negotiate towards a quantification of the amount and means of exercise of the plaintiffs' aboriginal rights to fish and to sell fish that will recognize these principles. For example, Canada may be able to justify, depending upon the health and abundance of fish stocks, considerable constraint on a special Nuu-chah-nulth fishery. However, as I have endeavoured to make clear, negotiations have previously gone forth without recognition of the plaintiffs' aboriginal rights. They must now proceed on a different footing than has heretofore taken place, one that starts with recognition of the plaintiffs' constitutional rights to fish and to sell that fish.

[876] The delicate and challenging task now facing the parties is to recognize the plaintiffs' rights within the context of adherence to Canada's legislative objectives and to fairly balance the plaintiffs' priority with other societal interests.

[877] The Supreme Court of Canada confirmed in *Haida Nation* that government has a duty to consult and, where circumstances warrant, accommodate First Nations before taking actions that may affect their asserted aboriginal rights. It is unnecessary for me to detail the extensive consultations that Canada has undertaken with the plaintiffs with respect to their participation in the fishery. Suffice it to say that the evidence is overwhelming that there have been comprehensive and thorough consultations. Canada has not, however, recognized the plaintiffs as holding aboriginal rights, as opposed to simply aboriginal interests, in those consultations. In the future, it will be necessary that all such relevant consultations be informed by the declarations granted in these proceedings.

[878] Given the possibility of further hearings on justification in light of the outcome in this case, it is necessary for me to make certain limited findings of fact. I do so not only to assist the parties in their negotiations but also to avoid, to the extent possible, duplication of the evidence tendered at this trial at any such future hearings.

[879] There is absolutely no question that fisheries management is extraordinarily complex: the resource is wild, it cannot be seen, and it often crosses international boundaries. Abundance, productivity and allowable harvests must be estimated, and input controls (such as vessel and gear restrictions) limit harvest only indirectly. The fishery occurs over a tremendously large area of ocean, making it difficult and expensive to patrol effectively. Moreover, fish stocks are subject to significant variations in abundance caused by a wide variety of biological and environmental factors. The present regime is the product of at least a century of experience, with input from biologists, management specialists, economists and numerous other experts. Based as it is on that level of expertise and experience, Canada's approach to fisheries management should be afforded considerable deference.

[880] To take the salmon fishery as an example, para. 2387 of Canada's written submissions illustrates the sheer complexity of managing the fishery for even FSC purposes:

> Today, with increased Aboriginal populations, a reduced abundance of some fish stocks, (most notably salmon), and a more precautionary approach to fisheries management, FSC fisheries require a more specific allocation policy. For example, according first priority to the Aboriginal fishery presents a practical problem, since the FSC fishery comes last in the sequence of fisheries targeting or intercepting migrating salmon. This is most notable for Fraser River sockeye which swim past the WCVI and then continue up the Fraser River. As noted above, there are 143 First Nations that are reliant on Fraser River sockeye. DFO must balance the interests of First Nations wishing access to Fraser River sockeye, including those of the 87 First Nations that are solely reliant on Fraser River sockeye. The Plaintiff Bands have one of the first opportunities to catch Fraser bound sockeye. DFO must provide FSC opportunities and ensure that sufficient sockeye return to the Fraser to spawn. As a result of the many demands on Fraser River sockeye and other stocks of salmon, DFO responded by developing an Allocation Policy for Pacific Salmon, which lays out principles of allocation (*e.g.* conservation is first priority, FSC fishing is the next priority) and describes how allocation works.

[881] There are a range of legislative objectives that may justify infringement of aboriginal rights, arising from the need to reconcile the fact that aboriginal societies exist within and are part of a broader social, political and economic community: *Gladstone*, at para. 73. In summarizing Canada's position on justification earlier, I set out what it contends are valid legislative objectives in the context of the current fisheries regime. For convenience, I repeat that list:

a. conservation and sustainability of fisheries resources;

b. protection of endangered species;

c. establishing priority for aboriginal FSC fisheries after conservation;

d. health and safety of the fishers and consumers;

e. adherence to international treaties;

f. facilitation of aboriginal participation in the fisheries;

g. pursuit of economic and regional fairness including the participation in the fisheries by other aboriginal groups and recognition of the historic

reliance upon and participation in the fisheries by non-aboriginal groups;

h. achievement of the full economic and social potential of fisheries resources; and

i. safe and accessible waterway.

[882] In my view, some of these are legislative objectives, while others are perhaps more appropriately characterized as societal interests. I would loosely differentiate between the two on the basis that legislative objectives are those objectives that specifically underlie the fisheries and other related legislation. Societal interests, on the other hand, I consider to be broader issues within the government's constitutional jurisdiction that it may take into account and balance in its management of the fishery; for example, the interests of other First Nations.

[883] The evidence satisfies me that each legislative objective or societal interest in this list is a valid one that Canada may legitimately take into account in its regulation of the fishery as a whole. However, without the contextual evidence of a proposed Nuu-chah-nulth fishery against which they are to be balanced, I am not in a position to make any further finding as to their validity as justificatory factors in the circumstances of this case. I recognize, as well, that there may well be other factors that Canada is entitled to consider in negotiating an appropriate recognition of the plaintiffs' fishing rights as part of the reconciliation process: *Gladstone*, at paras. 73 and 74. The scope of objectives and interests that may properly be taken into account in the balancing process is captured in the following passage from *Delgamuukw*, at para. 165:

> The general principles governing justification laid down in *Sparrow*, and embellished by *Gladstone*, operate with respect to infringements of aboriginal title. In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para.

> 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.

[884] To illustrate the complexity of the balancing process in which Canada must engage, I mention some of the considerations that Canada raises in its submissions.

[885] Canada has numerous obligations under international treaties, including: the International Pacific Halibut Convention; the Pacific Salmon Treaty; the North Pacific Anadromous Fisheries Convention; the Canada/U.S. Pacific Albacore Tuna Treaty; the Canada/U.S. Pacific Hake/Whiting Agreement; the U.N. Fish Stock Agreement; and, the U.N. Accord for Protection of Species at Risk. The goal of the International Pacific Halibut Convention, for instance, is to ensure international conservation of halibut while ensuring a sustained yield of halibut for the fisheries of Canada and the United States. The Convention annually reviews new research and the progress of the commercial fishery in order to prepare regulations for the upcoming fishing season, and sets the allocations as between Canada and the United States. In turn, Canada sets the total allowable catch and, ultimately, the individual quota amounts.

[886] Canada says that it must balance the interests of the 143 First Nations in British Columbia located along the migration routes of Fraser sockeye. Of that total, 87 First Nations are without access to other marine species. Therefore, these inland First Nations are reliant on all Fraser salmon runs, including sockeye, as salmon migrate through the plaintiffs' claimed area. The DFO must take the interests of these other First Nations into account in managing the salmon fishery.

[887] Canada also submits that it must balance provincial interests. The DFO has a mandate to manage the fisheries for all Canadians. Canada says that it is relevant to examine populations to understand the size of the plaintiffs' population compared to the non-aboriginal population in the province.

[888] Canada further submits that it must balance the FSC fishery of all First Nations with the plaintiffs' claims. The DFO adheres to an "adjacency policy" for the purposes of FSC fishing. Canada draws attention to the fact that there are 52 First Nations on the south coast of British Columbia. On the WCVI, FSC fishing is conducted by 14 Nuu-chah-nulth First Nations, as well as the Paacheedaht and T'Sou-ke to the south and the Quatsino to the north. Mr. West described how the DFO looks at treaty maps to balance requests for changes to FSC fishery areas.

[889] Geographically, Canada notes that the plaintiffs' claim area, that is, its claimed traditional territory, supports not only aboriginal peoples but also commercial and recreational fishers. These competing interests identified by Canada are as follows:

a. Commercial: Commercial fishers harvest over 80 species including salmon, herring and other pelagic fish, groundfish and invertebrates (molluscs and bivalves). The harvest including all species exceeds 115,000 tonnes annually (2002-2005 average) with a landed value of $78 million annually.

b. Recreational: DFO Pacific Region estimates angling efforts in the plaintiffs' claim area is approximately 80,000 angling boat-trips annually in recent years for the June to September period. This suggests an annual effort of about 450,000 angler days. Mr. Gislason estimates that recreational fishing in the tidal waters of the plaintiffs' area generated $135 million in angler expenditures in 2005.

[890] Another interest which must be balanced is the fishing interests of non-plaintiff aboriginal groups that hold commercial or communal commercial licences on the WCVI and which may overlap with the plaintiffs' territorial fishing claims. Canada says there are more than 20 non-plaintiff First Nation groups that currently have commercial fishing licences in DFO management areas that are within the plaintiffs' claim area.

[891] I mention these by way of illustration only. There are undoubtedly many other factors that are appropriate for Canada to balance in its allocation of the fishery. As noted, I cannot make any findings on the validity of these interests as justificatory factors in the absence of the necessary contextual evidence of a proposed Nuu-chah-nulth fishery. Such findings must be left to another day, in the event the parties are unable to negotiate the terms of a Nuu-chah-nulth fishery that will both recognize Nuu-chah-nulth rights and balance Canada's legislative objectives and societal interests. The plaintiffs must, of course, recognize that I find Canada's legislative objectives to be valid. It is only with respect to Canada's failure to demonstrate minimal impairment that Canada's evidence falls short. It may seem surprising that I have found Canada's justification evidence to be inadequate given the immense volume of evidence Canada tendered on this issue. However, much of that evidence focussed on an unnecessarily detailed examination of Canada's fishery regime as a whole and, as I have said, failed to address the question of minimal impairment.

X. CROWN OBLIGATIONS CLAIM

[892] As an alternative to their claims for aboriginal rights and title, the plaintiffs claim that the defendants have trust-like or fiduciary obligations to them to ensure they have commercial fishing opportunities to earn their livelihood and sustain their community. In so pleading, the plaintiffs rely upon the relationship they say arose between the Crown and the plaintiffs following the Crown's assertion of sovereignty over the plaintiffs and their claimed territories.

[893] This is an alternative claim, and counsel during submissions advised that it becomes significant only in the event that the plaintiffs do not succeed in their claims to aboriginal rights or title. Consequently, I do not propose to consider this argument in detail other than to note that an identical argument was raised in *Lax Kw'alaams Indian Band*. At para. 525 of that decision, Satanove J. dismissed this argument partly on the basis that:

> ... the historical record, common law and legislation is clear that no special right to fish commercially on an exclusive basis in priority to other fishers was ever granted to the plaintiffs, as part of the reserve process or otherwise. Therefore the plaintiffs lack the foundation for establishing the type of fiduciary duty upon which they claim to rely.

[894] Very similar evidence was tendered in this case, illustrating a sharp dispute between the reserve commissioners and the DFO. The DFO, which has jurisdiction over fisheries, maintains its position that the reserve commissioners did not have authority, as part of the reserve creation process, to set aside exclusive fisheries for aboriginals. Consequently, had it been necessary for me to consider this alternative claim, I would have reached the same conclusions as did Satanove J. in *Lax Kw'alaams Indian Band*.

XI. REMEDIES

[895] The plaintiffs seek various declarations that can be summarized as follows:

a. that they have aboriginal rights to harvest all species of fisheries resources in their territories for any purpose, including for food, social use, ceremonial use, trade, exchange for money or other goods, commercial sale and/or sustaining the plaintiffs' communities;

b. that they have aboriginal title to their fishing territories and, as a component of that title, rights to harvest all species of fisheries resources in their title territories for any purpose;

c. that the *Fisheries Act* and regulations promulgated thereunder unjustifiably infringe the plaintiffs' rights and title, and are inapplicable to the plaintiffs to the extent of the infringement; and

d. in the alternative, that Canada has breached the duty it owes to the plaintiffs by restricting their ability to fish for commercial purposes or to otherwise access fisheries resources from their territories.

[896] I have found that the plaintiffs are entitled to a declaration that they have aboriginal rights to fish and to sell fish. I have already determined that it is unnecessary to address the plaintiffs' aboriginal title claim, and I make no declarations in that regard.

[897] With respect to infringement, the plaintiffs seek the following declaratory relief:

> A declaration that the Fisheries *Act* (Canada*)* and regulations promulgated thereunder infringe upon the Nuu-chah-nulth's aboriginal rights …

[898] They set out the specific infringements they allege in their Reply to Canada's Demand for Particulars which, as noted earlier, is attached as Appendix B to these Reasons.

[899] In summary, the plaintiffs plead that s. 7 of the *Fisheries Act* places the authority to issue licences in the "absolute discretion" of the Minister. Pursuant to s. 22(1) of the *Fishery (General) Regulations* the Minister is given a broad and unstructured discretion to impose licence conditions. The plaintiffs also plead that license limitations conditions and restrictions are effected through policy decisions carried out in the Minister's discretion. They additionally claim that further restrictions are imposed through operational decisions. In totality, the plaintiffs plead that the exercise of the Minister's discretion authorized pursuant to the *Act* and the regulations, and effected through policy and operational management decisions, infringes their aboriginal right to fish and to sell fish.

[900] I have concluded that the plaintiffs have proven that the fisheries regulatory regime (which includes statutes, regulations and policies) has excluded them from the fishery and infringed their aboriginal rights.

[901] Unlike most aboriginal fishing rights cases, there is no one single or isolated regulatory provision in issue in these proceedings. Rather, it is the cumulative effect of Canada's fisheries regime that I have found restricts the Nuu-chah-nulth with respect to their ability to fish and their methods of fishing, including location, time,

gear and species. It is not possible for me to differentiate, for instance, between Canada's policies with respect to individual quotas and gear restrictions. It is, rather, the interaction of the various aspects of the entire regulatory regime that I have found to infringe the plaintiffs' rights.

[902] Although I have concluded that the entirety of the fisheries regime *prima facie* infringes the plaintiffs' constitutional rights, I have not ruled on Canada's justification defence. Consequently, although the plaintiffs are entitled to a declaration of the existence of their aboriginal rights to fish and to sell fish, they are not yet entitled to a declaration of unjustified infringement.

[903] The parties argued at trial that in the event I found in favour of the plaintiffs, I should suspend any remedy for one or two years while they entered into negotiations. However, as I have concluded that it is not yet appropriate to grant any declarations with respect to infringement or justification, there is no need to suspend any remedy. The plaintiffs also submitted that if this Court found in their favour, it should retain supervisory jurisdiction over the implementation of any fishery negotiated pursuant to these Reasons. In my view, the exercise of supervisory jurisdiction is not appropriate at this time because my order contemplates, in the absence of successful consultations, further evidence pertaining to justification and potentially a further judgment on that issue. In this regard, the outcome is similar to *Gladstone* in which the case was returned to trial for, *inter alia*, further justification evidence.

[904] The task ahead of Canada and the plaintiffs is a complex one, and they should be afforded sufficient time to structure a response to these Reasons. I therefore grant the parties two years, with leave to apply for a further extension if justified, to consult and negotiate a regulatory regime for the Nuu-chah-nulth that recognizes their aboriginal rights. The parties are not required to return to court. Hopefully these Reasons will provide a foundation for successful negotiations. What I intend, however, is that in the absence of a further order, no such subsequent trial

should take place before there has been time for reasonable negotiations to run their course. I set this time as a minimum of two years.

[905] I am confident in the ability of Canada and the plaintiffs to engage in constructive consultations and to ultimately arrive at a resolution. Optimistically, the findings in this case might assist the parties in furthering their treaty negotiations. However, I recognize the complexity of the consultations that will be necessary in order to achieve this outcome. I would not expect the parties to return to court to adduce further evidence concerning justification unless and until they have completed negotiations and consultations.

[906] In summary, my conclusions are that Canada led evidence to justify the entirety of its fisheries regime but not to justify its failure to permit the Nuu-chah-nulth to exercise their aboriginal fishing rights, as I have now outlined those rights. As noted in *Powley*, and particularly in the absence of such justification evidence, it is not the function of this Court to design an appropriate regulatory scheme. If the plaintiffs and Canada are unable to reconcile the various interests at stake during the next two years, the parties have leave to return to court to tender, as necessary, further evidence concerning Canada's justification of its infringement of the plaintiffs' aboriginal rights to fish and to sell fish. For greater clarity, I provide an example. The plaintiffs may propose a terminal fishery on one of the rivers within their fishing territories. If, after consultations and negotiations, the parties are at an impasse regarding that proposal, the orders I have made would grant them leave to return to court in order to determine whether Canada's refusal could be justified. In citing this example, I do not suggest that the parties would return to court in respect of each individual proposal but, rather, in respect of proposals for a total scheme for the plaintiffs' commercial fishery. This Court could then further consider Canada's justification defence.

[907] I am not seized of further hearings in these proceedings.

[908] The parties have leave to seek further directions at this time, if that is necessary, and to speak to costs.

XII. DISPOSITION

[909] In summary, the following are the orders I have made:

1. The plaintiffs have aboriginal rights to fish for any species of fish in the environs of their territories and to sell fish. The approximate boundaries of each plaintiff's territory is delineated in Appendix A and further particularized for each plaintiff at Exhibit 26, with the exception of the seaward boundary. The seaward boundary is nine miles from a line drawn from headland to headland within each plaintiff's territory.

2. The plaintiffs' claims to aboriginal title to their fishing territories are dismissed.

3. I conclude that the plaintiffs have established that the *Fisheries Act*, as well as the regulations and policies promulgated thereunder, *prima facie* infringe their aboriginal rights to fish and to sell fish, with the exception of their rights to harvest clams and to fish for FSC purposes. However, I have not ruled on Canada's justification defence, and, accordingly, I do not make any declaration of unjustified infringement.

4. The parties now have the opportunity to consult and negotiate the manner in which the plaintiffs' aboriginal rights to fish and to sell fish can be accommodated and exercised without jeopardizing Canada's legislative objectives and societal interests in regulating the fishery. To the limited extent made necessary by its constitutional jurisdiction, I assume that British Columbia will participate in such negotiations.

5. In the event that consultations and negotiations in this regard are unsuccessful, after a period of two years, Canada has leave to apply at a subsequent trial to tender further evidence on justification. In that event, the plaintiffs will also have leave to tender further evidence on justification. Following any such hearing, and subject to further orders of this Court, the plaintiffs have leave to reapply for the declarations

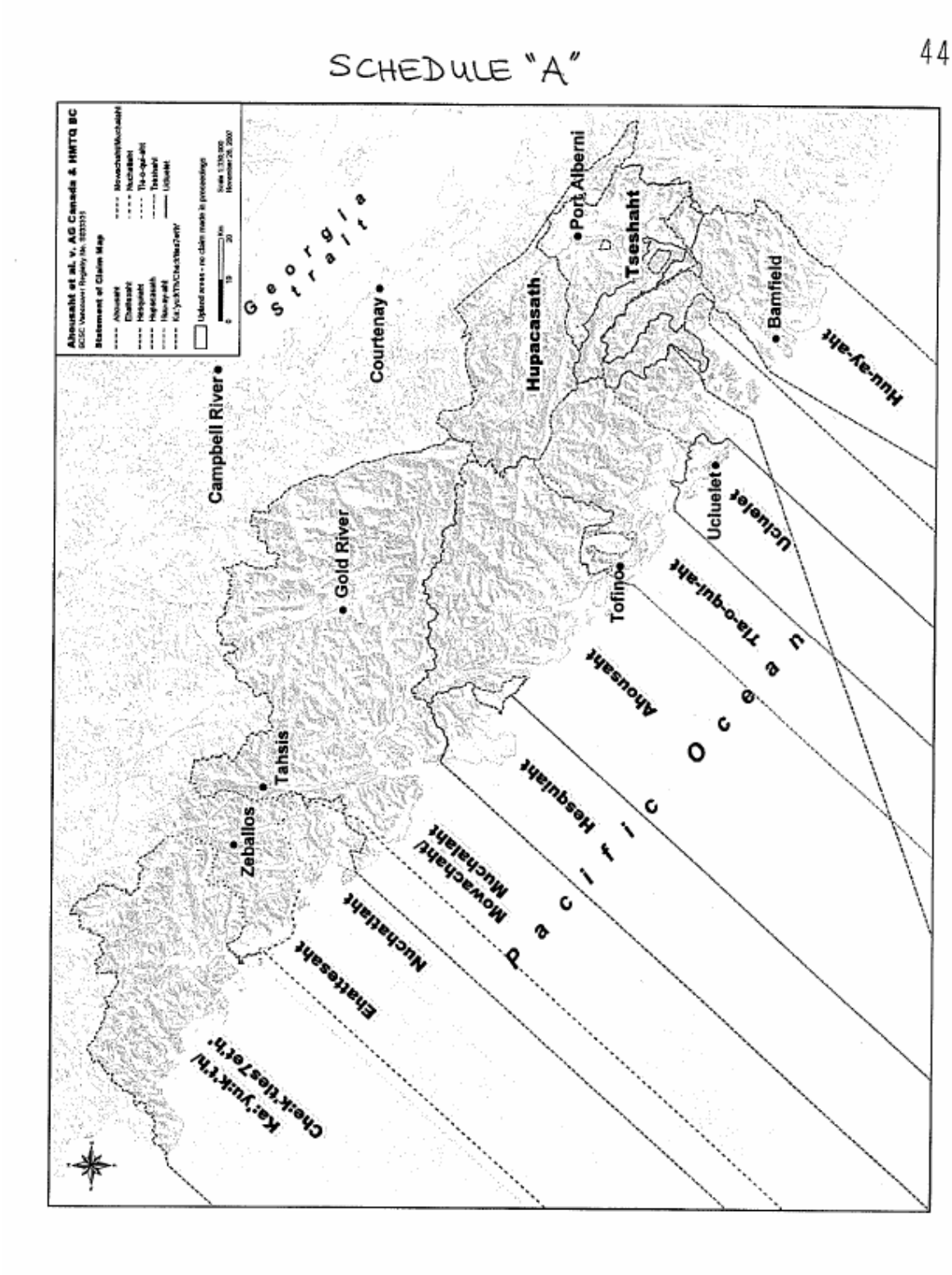
they seek respecting infringement and justification and any consequential further orders.

6. Both parties have leave to apply for further directions and costs, if necessary.

[910] I am indebted to all counsel for their able and thorough submissions and presentation of evidence throughout this trial.

"N. GARSON, J."

APPENDIX A



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EXCERPT FROM PLAINTIFFS' AMENDED RESPONSE TO CANADA'S DEMAND FOR FURTHER AND BETTER PARTICULARS

...

20. Paragraph 35

(a) Please provide facts and particulars of the "laws, regulations and policies" enacted by Canada that are referred to in this paragraph;

(b) Please provide facts and particulars of how the "laws, regulations and policies" referred to in this paragraph have significantly restricted the Nuu-chah-nulth's ability from 1970 to the present, to exercise their customs, practices and traditions associated with harvesting, processing and selling of Fishery Resources and Fish Products.

In this action, the plaintiffs seek a declaration that the *Fisheries Act (Canada)* and regulations promulgated thereunder as presently in force infringe the plaintiffs' aboriginal rights. Particulars of this infringement are set out below in response to question 22.

The scheme that is presently in force and its effects on the Nuu-chah-nulth, both as described in answer to question 22 below, has evolved since 1970 under various iterations of the *Fisheries Act (Canada)* and regulations. Those iterations of the *Fisheries Act* and regulations are identified below. The structure of regulatory scheme in its present form and the infringing effects of that scheme are described in answer to question 22.

To specifically answer the present question, the laws, regulations and policies that have restricted the Nuu-chah-nulth's ability since 1970 to exercise their customs, practices and traditions associated with harvesting, processing and selling Fisheries

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Resources and Fish Products are as follows. To be clear, the plaintiffs only seek declarations in respect o those which are presently in force:

Legislation

Presently In Force

- *Fisheries Act*, R.S.C. 1985, c. F-14

...

Regulations

Presently In Force

- *Fishery (General) Regulations*, SOR/93-53
- *Pacific Fishery Regulations*, SOR/93-54
- *Pacific Fishery Management Area Regulation*, 2007 SOR 2007/77
- *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332

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Policies

The policies that have restricted the plaintiffs' ability to exercise their customs, practices and traditions associated harvesting, processing and selling fish are, in general terms, as follows:

- licencing and limited entry;
- transferability of licences or licence eligibilities;
- quotas, variously described as Individual Quotas or Individual Transferable Quotas;
- species-specific licencing;
- gear restrictions;
- area restrictions;
- "Food, Social and Ceremonial" Fishing; and
- time-limited openings.

As explained below in answer to question 22, much of Canada's regulation of the Pacific fishery is done through the discretionary authority of the minister and not directly through legislative or regulatory instruments. As such, Canada is in a better position than the plaintiffs to identify any specific policies to which the above pertain.

The effects of these policies on the plaintiffs' fishing activities are described in answer to question 22.

…

22. *Paragraph 39*

(a) Please provide particulars of the alleged infringement by Canada of the Plaintiff's alleged aboriginal rights and aboriginal title pleaded in this paragraph.

In this action, the Plaintiffs claim aboriginal rights and rights as a component of aboriginal title to fish for all purposes, including food purposes, social purposes, ceremonial purposes, commercial purposes, trade purposes, purposes of exchange for money or other goods and purposes of sustaining the plaintiff communities or one or more of those purposes. These claimed rights are hereinafter referred to collectively as the "Fishing Rights".

The plaintiffs' case is primarily about access to all fisheries resources for all purposes, including sale. Thus, the plaintiffs' primary infringement claim is that

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Canada restricts Nuu-chah-nulth access to fishing opportunities, especially commercial opportunities, in a manner that disregards the plaintiffs' Fishing Rights.

Secondarily, the plaintiffs' case is about restrictions that are imposed on the Nuu-chah-nulth regarding methods of fishing, including the locations at which fishing, and commercial fishing in particular, may take place and the methods by which the Nuu-chah-nulth may use to catch fish. Thus, the secondary infringement claim is in respect of these operational infringements.

What follows is a list of the general infringements claimed by the plaintiffs. It addresses various elements of the infringement claim as particularized in paragraph 22 of the Plaintiffs' Amended Response to Canada's Demand for Further and Better Particulars (the "Amended Particulars"). The infringements are divided into three categories:

- Legislative Infringements, which are infringements apparent on the face of the *Fisheries Act* and *Regulations*;
- Policy Infringements, which are infringements based on relatively permanent management policies adopted by DFO; and
- Operational Infringements, which refer to the season-by-season decisions such as when to open a fishery and where fishing is permitted.

A. LEGISLATIVE INFRINGEMENT

The *Fisheries Act* and regulations impose a general prohibition against fishing without a licence (*Fisheries Act,* R.S.C. 1985, c. F-14, s. 25(1) & *Pacific Fishery Regulation, 1993* SOR/93/54, ss. 22 and 26) and against selling fish without a licence (*Fishery (General) Regulation*, SOR/93-53, s. 35).

Section 7 of the *Fisheries Act* places the authority to issue licences in the "absolute discretion" of the Minister. Pursuant to s. 22(1) of the *Fishery (General) Regulation,* the Minister is given a broad and unstructured discretion to impose licence conditions.

Neither the *Fisheries Act* nor the regulations provide any structure or guidance to the Minister's discretion in respect of how that discretion is to be exercised to accommodate the plaintiffs' Fishing Rights. In the absence of such structure or guidance, this legislative scheme, in and of itself, constitutes an infringement of the plaintiffs' Fishing Rights.

Further, the effects of this unstructured discretion have been to further infringe the plaintiffs' fishing rights by permitting Canada to implement a management scheme

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that excludes or minimizes the plaintiffs' participation in the fishery. These effects are discussed in sections B and C below.

B. POLICY INFRINGEMENTS

1. Licencing and Limited Entry

Canada has placed limits on the number of licences that are made available generally. This is referred to as "limited entry" or "licence limitation." This has been effected through policy decisions carried out pursuant to the Minister's discretion and not specific legislative or regulatory enactment. Nevertheless, it has been effectively a permanent arrangement in the salmon fishery since in or about 1969 and expanded to other fisheries since then.

When limited entry is introduced in a particular fishery, the number of licences that are available for that fishery is frozen and access to those licences is, for that year and each year thereafter, confined to those who met the qualifications to receive a licence the initial year of limited entry or to such persons' transferees. All of this is effected through an exercise of Ministerial discretion pursuant to s. 7 of the *Fisheries Act*.

In implementing licence limitation in the various fisheries, Canada has not reserved or allocated adequate fishing opportunities for the Nuu-chah-nulth. Nuu-chah-nulth must acquire fishing opportunities the same as other persons whose interest in the fishery is not based on aboriginal rights, aboriginal title or fiduciary or related obligations.

The plaintiffs do not challenge the notion of limited entry licencing *per se* but rather say that Canada has failed to accommodate the plaintiffs' Fishing Rights within the licencing scheme it has chosen to pursue.

2. Transferability of Fishing Licences

Through the limited entry scheme, Canada has permitted commercial fishing licences (or eligibilities to obtain commercial fishing licences) to be made transferable. As a result, licences or licence eligibilities have a capital value meaning that, except where Nuu-chah-nulth people already hold licences, the plaintiffs or their members must purchase licences for market value in order to exercise their Fishing Rights.

The requirement to purchase licences at market values to exercise Fishing Rights is an unreasonable restriction on the exercise of those rights and, in many cases operates as a complete or near complete barrier to the plaintiffs in accessing the fishery.

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The plaintiffs do not challenge the transferability of licences *per se*. Rather, they say that Canada has failed to ensure that the plaintiffs have appropriate fishing opportunities that are commensurate with their Fishing Rights within the licencing scheme Canada has chosen to pursue.

3. Access to Adequate Amounts of Fish

Through various measures, including licence restrictions, time-limited openings and quotas (discussed below), Canada imposes limitations on the amount of Fisheries Resources that the plaintiffs may harvest to amounts that are insufficient to sustain their communities through the exercise of their Fishing Rights. The plaintiffs do not challenge such limitations as they apply generally to the fishery but say that Canada has failed to provide the plaintiffs with an allocation that is commensurate with their Fishing Rights.

The plaintiffs do not suggest that they have unlimited rights of access to fish but rather that insofar as limitations are imposed on their rights of access, those limitations must be justified by Canada. The plaintiffs say that the present limitations are not justified.

4. Quotas

Canada has apportioned the Total Allowable Catch ("TAC") in various fisheries to the existing licence (or licence eligibility) holders in those fisheries on a percentage basis. Thus, each licence holder is given the opportunity to harvest a fixed share of the TAC. This is variously described as a "quota" an "Individual Quota" or an "Individual Transferable Quota."

Quotas have been implemented pursuant to the Minister's discretion rather than legislative or regulatory enactment. Nevertheless, they are effectively permanent in that quota entitlements are routinely renewed on an annual basis and, in most cases, those entitlements (or the eligibility to receive those entitlements) are transferable.

In imposing quotas in various fisheries, Canada did not consider the plaintiffs' Fishing Rights and failed to apportion an appropriate amount or any of the TAC in various fisheries to the plaintiffs commensurate with the plaintiffs Fishing Rights. As a result, persons whose interest in the fishery that is not based on Fishing Rights are entitled to fishing opportunities that are denied to the plaintiffs.

In many cases, quotas are transferable. This is facilitated by the permanency of the quota allocation. Transferability gives the quota a capital value and requires the plaintiffs to purchase quota at market rates in order to exercise their Fishing Rights. In many cases, this operates as a complete or near complete barrier to the plaintiffs' access to the fishery.

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The plaintiffs do not challenge quotas per se but rather Canada's failure to allocate a sufficient portion of that quota to the plaintiffs in accordance with the plaintiffs' Fishing Rights.

5. Species-Specific Licences

Canada has imposed a licencing scheme whereby different species of fish are separately licenced. This has been done through the gradual expansion of limited entry licencing to various fisheries.

In most cases, limited entry licencing was introduced in respect of various species without providing any special programs or opportunities to ensure aboriginal access to licences. In all cases it was done without accommodating or considering the plaintiffs' Fishing Rights. As a result, the plaintiffs are denied the opportunity to harvest a range of fisheries resources for commercial purposes. The plaintiffs are also denied the opportunity of having a community-based fishery where a range of fishing opportunities for various species can be shared amongst plaintiff community members.

The plaintiffs do not take issue with single-species licencing *per se* but only with Canada's failure to address the plaintiffs' Fishing Rights within that scheme.

6. Gear Restrictions

Canada has imposed gear restrictions that prevent the plaintiffs from fishing using preferred methods and thus infringe the plaintiffs Fishing Rights. These restrictions include, without limitation, single-gear licencing in the salmon fishery whereby licenced fishermen are confined to using a single gear type.

Gear restrictions are aimed at reducing the fishing capacity of the commercial fishing fleet. However, at no time did Canada consider the particular impact of gear restrictions on the plaintiffs' Fishing Rights in isolation from the impacts on the larger fishing fleet whose interest in the fishery is not based on Fishing Rights. Nor has Canada considered whether any exceptions or exemptions to the gear restrictions might be made for the plaintiffs to accommodate their Fishing Rights.

7. Individual Licences

With some limited exceptions, commercial fishing licences are issued by Canada to individuals, either as personal licences or, more commonly, as vessel-based licences (in which case the licence is issued to the owner of the vessel). This is inconsistent with the communal nature of aboriginal rights which are collectively held by the entire community.

As a result, the plaintiffs' communal participation in the fishery is subject to actions of individual Nuu-chah-nulth persons. The Plaintiffs Bands and Nations as collectivities

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have no ability to prevent individual Nuu-chah-nulth persons from selling their licences, either on the open-market or through licence buy-back programs conducted by Canada, thus further eroding Nuu-chahnulth participation in the fishery.

8. "FSC" and "Commercial" Distinction

Through its licensing scheme, Canada makes a distinction between fishing for "food, social and ceremonial" purposes and fishing for commercial purposes. Each year, Canada issues communal licences to the Plaintiffs permitting them to fish for certain amounts of fish but, with limited exceptions, restricts the uses that can be made of that fish to "food, social and ceremonial" purposes. The plaintiffs are not entitled to sell fish caught under this communal licence.

The distinction between fishing for "food, social and ceremonial" purposes and fishing for other purposes is a distinction that has been created by Canada and has been imposed on the plaintiffs.

The plaintiffs say that their Fishing Rights are to fish for all species and for all purposes.

Please see additional comments in response to Canada's Third Request for Further and Better Particulars.

9. Bycatch Restrictions

Under the *Fishery (General) Regulations*, the plaintiffs are restricted in retaining "bycatch", namely species of fish that are incidentally harvested while targeting another species. This infringes the plaintiffs rights by requiring them to discard rather than retain fish they harvest.

10. Licence Fees

Canada imposes annual licence fees through the *Pacific Fisheries Regulation*. These fees are considerable in the case of many fisheries, establish a financial impediment to the plaintiffs and operate as a complete or near complete barrier to the plaintiffs' access to the fishery. They also impose an obligation on the plaintiffs to pay a fee to exercise their Fishing Rights.

C. OPERATIONAL INFRINGEMENTS

Operational Infringements herein refer to those restrictions that are imposed through in-season management decisions such as where to open a commercial fishery and for how long. They are authorized under the *Fisheries Act* and regulations. The plaintiffs do not challenge particular decisions in this action. For instance, the plaintiffs do not ask the court to review whether it was appropriate for Canada not to

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open a particular management area on a particular day. Rather, the plaintiffs submit that Canada makes these operational decisions without accommodating or giving regard to the plaintiffs' Fishing Rights and the failure to do so constitutes an infringement.

1. Time-Limited Openings

Canada's management scheme is based to a large degree on seasonal restrictions and time-limited openings. Insofar as these restrict the time that plaintiffs may choose to exercise their Fishing rights, time limited openings infringe the plaintiffs' rights.

Time Limited Openings also impair the plaintiffs' ability to fish commercially in sufficient amounts to sustain their communities. Through time-limited openings, the plaintiffs must conduct their fishing activities within a specified time which is often very limited. The plaintiffs are therefore compelled to invest in more efficient fishing vessels and equipment in order to maximize their fishing opportunities within a short time. The need for such investments is a financial impediment to the plaintiffs and operates as a significant barrier to the plaintiffs' access to the fishery.

In addition, time-limited openings favour larger fishing vessels with higher catching capacity. This affects the plaintiffs insofar as they use smaller vessels with less catching capacity.

2. Area Restrictions

Canada restricts fishing opportunities in some fisheries by closing the entire coast to commercial fishing generally but opening particular Management Areas or subareas as defined by the *Pacific Fishery Management Area Regulation* SOR/2007-77 for limited periods of time during the fishing season. This impairs the plaintiffs' in the exercise of their Fishing Rights by restricting or prohibiting access to preferred fishing areas and at preferred times.

The plaintiffs do not say that closing areas to the general commercial fishery is an infringement. Rather they say that the application of these general closures to the plaintiffs constitutes an infringement.

The plaintiffs also say that opening certain areas of the fishery to other sectors, such as the recreational fishery, while closing them to the plaintiffs is an infringement in that it gives preferential access to the fishery to persons whose interest in the fishery is not based on aboriginal rights, aboriginal title or fiduciary or related obligations.

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D. Infringing Legislation and Regulations

The following table identifies those legislative and regulatory provisions that infringe the plaintiffs' Fishing Rights either by establishing the unstructured discretionary scheme referred to above or by directly restricting Nuu-chah-nulth fishing opportunities. The plaintiffs say that these provisions are of no force or effect in respect of the plaintiffs and seek a declaration as to their inapplicability.

Section	**Infringing Action**
Fisheries Act, s. 7	Confers on the Minister the "absolute discretion" to issue licences without any guidance as to how to exercise that discretion to accommodate aboriginal rights.
Fisheries Act, s. 25(1)	Imposes a general prohibition against fishing during a close time. Pursuant to the *Fishery (General) Regulation*, most fisheries are closed all year unless specifically opened.
Pacific Fisheries Regulations s. 19	Imposes licence fees for the annual issuance of a commercial licences. These fees are considerable in respect of many fisheries.
Pacific Fisheries Regulations, s. 22(1)	Prohibits the use of a vessel for commercial fishing unless the vessel is licenced and registered.
Pacific Fisheries Regulations, s. 26(1)	Imposes general ban on fishing except under authority of a licence.
Pacific Fisheries Regulations, ss. 30, 39, 53, 63	Restricts the time, place and method (gear type) of fishing for various species of fish.
Fishery (General) Regulations, s. 22	Confers on the Minister broad discretionary powers to impose licence conditions that restrict the plaintiffs' ability to exercise their aboriginal rights and amend such conditions.
Fishery (General) Regulations, s. 33	Prohibits the retention of by-catch. This prohibits the plaintiffs from retaining by-catch, for any purpose.
Fishery (General) Regulations, s. 35(2)	Prohibits the plaintiffs from selling fish without a commercial licence.