IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2018 BCSC 633

Date: 20180419
Docket: S033335
Registry: Vancouver

Between:

The Ahousaht, Ehattesaht, Hesquiaht, Hupacasath, 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 Humphries

Reasons for Judgment

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Place and Date of Trial: Vancouver, B.C.
March 9-12, 19-20, 23-27, 2015
April 7-10, 13-17, 20-24, 2015
May 4-8, 11-15, 2015
June 2-5, 8-12, 15-19, 22-25, 2015
September 8-11, 14-18, 21-25, 2015
October 7-9, 13-16, 19-23, 2015
November 2-6, 9-10, 12-13,16-17, 2015
December 2-3, 7, 9-11, 14-15, 2015
January 18-22, 25-29, 2016
February 1-3, 5, 15-18, 22-24, 2016
March 9, 11, 14-15, 2016
April 5, 2016
September 21-23, 26-30, 2016
October 3-7, 11-14, 17-21, 26-28, 2016

Place and Date of Judgment: Vancouver, B.C.
April 19, 2018

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INTRODUCTION

[1] The plaintiffs are five First Nations, whose territories are located on a strip of varying widths along the West Coast of Vancouver Island (WCVI), about 160 miles long as the crow flies. They are part of the fourteen Nuu-chah-nulth (NCN) group of Nations.

[2] The population of the five plaintiff Nations is slightly less than 5,000 people. The majority (about 2,083 as of 2014) belong to the Ahousaht Nation, which is located on Flores Island just north of Tofino, British Columbia. The Ehattesaht (pop. 462), Mowachaht/Muchalaht (pop. 603), and Hesquiaht (pop. 722) Nations are located to the north of Ahousaht. The Tla-o-qui-aht (pop. 1,074) Nation is located to the south of Ahousaht.

[3] This trial has taken place in two stages, although such a bifurcation of the proceedings was not anticipated by either party when the trial began.

[4] The first part of the trial was heard by another judge, Madam Justice Garson (then of the Supreme Court of British Columbia), who issued reasons in 2009 (2009 BCSC 1494).

[5] In their pleadings, set out at para. 10 of Garson J.'s decision, the plaintiffs asserted an aboriginal right to:

> harvest [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 "to sell, trade or exchange" those fisheries resources for a variety of alternative purposes: on a commercial scale, or to sustain their community, or for money or other goods.

[6] Madam Justice Garson declared that the plaintiffs have an aboriginal right in these terms: "to fish for any species of fish within their Fishing Territories and to sell that fish".

[7] The Fishing Territories were defined as a nine-mile strip from headland to headland. She also declared that the entire fisheries management regime, consisting of legislation, regulations, and policies, was a *prima facie* infringement of that right. She then adjourned the trial to allow the parties to negotiate a fishery based on her declarations, and, in the event the negotiations were unsuccessful, to return to court on the issue of whether Canada could justify its legislative, regulatory and policy regimes as they apply to the plaintiffs' aboriginal fishery. She declared herself not seized of further proceedings, which have now come before this court. The scope and purpose of this stage of the trial has been a matter of some debate throughout the proceedings.

[8] There were originally eleven plaintiffs in this action. The initial Statement of Claim claimed aboriginal title by each of the eleven, as well as aboriginal rights. Some of the title claims overlapped. Madam Justice Garson ordered the plaintiffs to choose one or more Nations whose claims to title did not overlap, and the claims of those plaintiffs would proceed in this action. Her ruling on that interlocutory issue is found at 2007 BCSC 1162. The present five plaintiffs proceeded to trial with their claims. The remaining claims are yet to be tried.

[9] Madam Justice Garson decided each plaintiff Nation is a collective connected to the group that occupied their territory at or about the time of contact. Whether the plaintiffs are legal entities and can bind all their members or how membership is determined was not before me.

[10] Before outlining the history of these lengthy proceedings, I will say that, notwithstanding the deep division between the parties, counsel were uniformly helpful, cooperative, and respectful of each other and the court. Preparation was extensive and the court hours were used efficiently. This made the long trial process much less arduous than it could have been.

[11] However, with great respect to both sides and all the extensive work they put in, this stage of the trial has been fraught with fundamental difficulties that have greatly complicated the task of this court. First, there was confusion arising from the previous judgments in this case, and I have attempted to reach conclusions on the issues arising from that confusion in order to move forward. Second, there was a fundamental difference in the respective approaches of the parties to the analysis of justification. As well, the evidence in support of the respective positions was far from complete. I will discuss all of this more fully later in these reasons.

[12] I have made a series of findings in respect of unjustified infringements, but the result is not a workable fishery ready to be implemented, because, as I must emphasize, the court cannot design a fishery. The task of allocating fishery resources belongs to the government (see, for example, *R. v. Gladstone*, [1996] 2 S.C.R. 723*,* at paras. 65-66). There is much work still to be done by the Department of Fisheries and Oceans [“DFO”] and by the plaintiffs.

[13] I have, at the conclusion of these reasons, invited the parties to appear before me to assist where they can in drafting an appropriate and precise order which will assist in moving this matter forward.

HISTORY OF THE PROCEEDINGS

[14] The history of this action is complex, and is interwoven with another action on aboriginal fishing rights (*Lax Kw’alaams Indian Band v. Canada)*, which proceeded slightly ahead of this action. The decision of the Supreme Court of Canada in *Lax Kw’alaams* has influenced the course of the present action.

[15] Before setting out a narrative history of this action, I will list a series of material decisions in chronological order:

- *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2008 BCSC 447, [2008] 3 C.N.L.R. 158: trial decision, April 16, 2008;

- *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494, [2010] 1 C.N.L.R. 1: trial decision, November 3, 2009;

- *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2009 BCCA 593, 314 D.L.R. (4th) 385: appeal decision, December 23, 2009;

- *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 237, 333 D.L.R. (4th) 197: argued December 6-10, 2010; appeal decision, May 18, 2011;

- *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535: argued February 17, 2011; appeal decision, November 10, 2011;

- *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2011 SCAA No. 353: leave to appeal denied but sent back to BCCA for reconsideration, March 29, 2012;

- *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2013 BCCA 300, 364 D.L.R. (4th) 26: reconsideration appeal decision, July 2, 2013; and

- *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2011 SCAA No. 35: leave to appeal denied, January 30, 2014.

[16] I will now review the history of these proceedings.

[17] On November 3, 2009, Garson J. issued the following declarations and orders following a lengthy trial that took place over 120 days at various times from April 2006 to March 2009:

> THIS COURT ORDERS AND DECLARES that:
>
> 1. The Plaintiffs proceeding in this phase of the action, the Ehattesaht, Mowachaht/Muchalaht, Hesquiaht, Ahousaht and Tla-o-qui-aht (the "Proceeding Plaintiffs"), have aboriginal rights to fish for any species of fish within their Fishing Territories (as defined in Paragraph 2) and to sell that fish.
> 2. The approximate boundaries of each Proceeding Plaintiff's Fishing Territory are delineated in the maps attached hereto as Appendix A, with the exception of the seaward boundary. The seaward boundary of each Proceeding Plaintiff's Fishing Territory is nine miles from a line drawn from headland to headland within each Proceeding Plaintiff's Fishing Territory.
> 3. The cumulative effect of the fisheries regime including the *Fisheries Act,* R.S.C. 1985 c. F-14 and the regulations and policies promulgated thereunder both legislatively and operationally *prima facie* infringes the Proceeding Plaintiffs' aboriginal rights to fish and to sell fish, with the exception of the Proceeding Plaintiffs' rights to harvest clams and to fish for food, social and ceremonial purposes which rights are not infringed.
> 4. With respect to the *prima facie* infringement declared in paragraph 3 of this Order, Canada has a duty to consult and negotiate with the Proceeding Plaintiffs in respect of the manner in which the Proceeding 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.

THIS COURT ORDERS that:

5. The claims of the Proceeding Plaintiffs to a declaration of aboriginal title to their Fishing Territories are dismissed as being unnecessary to decide in light of the other relief granted herein.

6. No declaration is made at this time as to whether the *prima facie* infringement of the Proceeding Plaintiffs' aboriginal rights is justified.

7. If Canada and the Proceeding Plaintiffs are unable to reconcile their various interests through consultation and negotiation, either party may, after a period of not less than two years from the date of this judgment, apply to the court for a determination of whether the *prima facie* infringement of the Proceeding Plaintiffs' aboriginal rights is justified and any of the parties will have leave to tender further evidence on justification in that subsequent proceeding.

8. Each party will have leave to apply for an extension of the two year period, if justified, to consult and negotiate.

[18] As mentioned, the parties had not expected this trial to proceed in two stages. However, in her reasons, Garson J. said that although Canada had led extensive evidence on justification of its entire fisheries regime, it did not know until she declared the right that it should be making decisions in the context of a declared aboriginal right, not merely in the context of aboriginal interests. As well, at para. 871, she noted and appeared to accept Canada's position that the plaintiffs had led no evidence of "the level of participation in the commercial fishery that would be sufficient to meet their requirements or expectations".

[19] Therefore, as set out in the declarations at para. 4, she adjourned the trial to allow consultation and negotiation on:

> the manner in which the plaintiffs' rights can be accommodated and exercised without jeopardizing Canada's legislative objectives and societal interests in regulating the fishery.

[20] Madam Justice Garson stated in her reasons that she was not seized of further matters in the action, and in fact she had been appointed to the Court of Appeal in May 2009.

[21] Since the declarations, representatives of DFO and the plaintiffs have been involved in a series of meetings and discussions, as noted above, purportedly in response to the order at para. 4. I say "purportedly" because the parties do not agree on whether or to what extent these meetings can be characterized as part of Canada's duty to consult generally or as part of the "duty to consult and negotiate with the…Plaintiffs" as set out in the order at para. 4. As well, there is an issue surrounding the meaning and content of the term "consultation", as used in the case law, versus "negotiations", which I will mention later in these reasons. However, for convenience, I will refer to that series of meetings and discussions as "the Negotiations".

[22] The right-based fishery that has been the subject of the Negotiations is referred to by both the plaintiffs and DFO as the T'aaq-wiihak, which means "permission to fish".

[23] The Negotiations involved two branches: the Main Table, where the actual informed discussions took place between the lead negotiators and their respective teams, and the Joint Working Group comprised of technical people and scientists who provided advice and information to the Main Table.

[24] The Negotiations, which began in 2010, have not been successful in “reconcil[ing] their various interests” pursuant to the 2009 order’s seventh term. However, there have been developments since 2009 which have complicated the task before this court. I will explain those developments later in these reasons.

[25] In 2012, while discussions continued, the plaintiffs reactivated the litigation for the return to court on the second stage of the trial, as contemplated in the orders at para. 7.

[26] This stage of the trial commenced in March 2015. It continued for about 150 days, including six weeks of submissions and over 1,000 pages of written argument.

[27] British Columbia did not participate in this stage of the trial. I permitted three intervenors (the Pacific Prawn Fishermen’s Association [“PPFA”], the Sablefish Fishermen’s Association [“SFA”], and the BC Seafood Alliance) to file affidavits upon which short cross-examinations took place at trial, and to make brief submissions at the conclusion of the evidence (see the ruling at 2015 BCSC 2166). In that decision, I referred to the remarks of the Supreme Court of Canada in *Lax Kw’alaams*. After noting in that decision at para. 12 that aboriginal rights litigation is of great importance to non-aboriginal communities as well as to aboriginal communities, and to the economic well-being of both, the court stated that “the existence and scope of aboriginal rights must be determined after a full hearing that is fair to all the stakeholders”.

[28] Much of the evidence called by Canada to justify its overall fisheries management regime had been called before Garson J. and had to be re-called and updated in this stage of the trial.

[29] During the many weeks of evidence, DFO called Susan Farlinger, Regional Director General (now assistant to the Deputy Minister); various senior managers, including Rebecca Reid, Regional Director of Fisheries Management (now Regional Director General); Sarah Murdoch, Regional Director for Treaties and Aboriginal Policy; Stuart Kerr, the lead negotiator at the Main Table; and a series of managers and scientists to do with each species of fish. They also called, Michelle James, who was qualified to give expert evidence on fisheries management, policy, and practice. Lengthy affidavits were filed by Ms. Murdoch, Paul Preston, Andrew Thomson and Neil Davis, each of whom were called at trial.

[30] The plaintiffs called Dr. Don Hall, zoologist and biologist, who is employed as Fisheries Program Manager by the Uu-a-thluk, which is a federally funded organization representing overall fisheries interests of the fourteen NCN Nations. The plaintiffs also called Alex Gagne, the T’aaq-wiihak Fisheries Coordinator; Ken Watts, also from the NTC fisheries program; Francis Frank, their lead negotiator at the Main Table; and Dr. Morishima, an expert on fisheries planning and management, who is involved with tribal fisheries in Washington State. They also called a number of witnesses who are involved to a greater or lesser extent in the fishery and wish to participate in a right-based fishery: Andrew Webster (Ahousaht), Elmer Frank (Tla-o-qui-aht), David Miller (Ehattesaht), William Amos (Hesquiaht), Josh Charleson (Hesquiaht), Jamie James (Mowachaht/Muchalaht).

[31] Objection was taken to a reply report from Dr. Morishima. It was ruled admissible (see rulings at 2016 BCSC 281 and 2016 BCSC 1124).

[32] Affidavits were filed from representatives of the intervenors: Bruce Turris, Chris Acheson; Christopher Sporer; Brian Mose; Robert Alford. Brian Mose, a witness called by the SFA to explain the deep-sea trawl fishery, was cross-examined on his affidavit, as was Robert Alford for the prawn fishery.

[33] I will refer to the evidence of some, but perhaps not all, of the numerous witnesses at relevant portions of the reasons. I could not do justice to the level of detail in the evidence of the scientific and species management witnesses, either from Canada or from Dr. Hall or Alex Gagne for the plaintiffs. In my view, while Canada's witnesses managed to convey the complexity of fisheries science and management and their own dedication to conservation of the fishery (shared by Dr. Hall and the other witnesses for the plaintiffs), much of the specific detail in large part is not necessary for the analysis facing this court because the task of this court is not to design a fishery. It is to conclude the trial pursuant to Garson J.'s order at para. 7 as confirmed by the Court of Appeal.

[34] There were significant developments shortly before the commencement of this stage of the trial in March 2015, which formed part of the evidence before this court.

[35] In 2014, the plaintiffs submitted to DFO a series of detailed proposals or plans for various fisheries ("the fish plans"). The plaintiffs rely on these plans in the justification analysis.

[36] In December 2014, the DFO presented the plaintiffs with a Long Term Offer ["LTO"] regarding salmon and herring. The LTO also contained an offer to negotiate plans for other fisheries. Canada relies on the LTO in the justification analysis, but also takes the position that the justification analysis should be further adjourned to allow demonstration fisheries (small experimental fisheries with flexible rules, implemented on a test basis) to take place for species other than salmon. Canada expects that further discussion and negotiation, informed by the conclusions this court reaches, would follow upon the receipt of these reasons.

[37] Also just prior to trial, Canada received instructions to release all the Ministerial briefing notes that had been sent by regional staff to the Minister in Ottawa. The plaintiffs thus became aware of factors which they say are significant in determining why the Negotiations have been unsuccessful: they say DFO was not given a mandate to negotiate in any meaningful way until late 2014, and the extent of this mandate was not clarified until mid-2015 while trial was ongoing.

[38] Meetings and communications continued during the trial, thus making the evidence at trial an ongoing cumulative process until the parties declared their respective cases closed. Evidence was completed in March 2016 and submissions began in mid-September 2016, completing at the end of October.

[39] Meanwhile, following the first stage of the trial, Canada appealed Garson J.'s decision. The appeal was dismissed by the Court of Appeal on May 18, 2011, with some minor variations (2011

BCCA 237). The court, upon application by an intervenor on behalf of the geoduck fishery, excluded that fishery from “any species” on the basis that it is such a technically difficult fishery to conduct on a commercial basis that it could not have been part of an ancestral trading practice. Relying on evidence that had been before Garson J., the court found she had erred in extending the aboriginal right to the geoduck fishery, saying, at para. 69:

> As can be seen from this narrative, because the commercial geoduck fishery is what I would describe as a high tech fishery of very recent origin, there can be no viable suggestion that the ancestors of the respondents could have participated in the commercial harvesting and trading of this particular marine resource at some time before contact with explorers and traders late in the 18th century. There is simply no adequate basis in the evidence to support an ancestral practice that would translate into any modern right to participate in harvesting and selling this marine food resource.

[40] In addition to excluding geoduck from “any species”, the two-year period given to the parties to consult and negotiate was extended to May 18, 2012, with leave to either party to apply to extend the period.

[41] Canada appealed to the Supreme Court of Canada.

[42] Meanwhile, *Lax Kw’alaams Indian Band v. Canada,* 2008 BCSC 447, had been decided at the trial level by Madam Justice Satanove of this court on April 17, 2008, just prior to the commencement of the main body of evidence in the trial before Garson J. That case concerned a First Nations group from the coast of mainland British Columbia which was making a claim similar to the one presently before this court. Madam Justice Satanove found that the Lax Kw’alaams had not proven an aboriginal right to a commercial fishery, with the exception of eulachon. That decision was upheld on appeal to the Court of Appeal (2009 BCCA 593), just after the release of Garson J.’s decision, and was further upheld by the Supreme Court of Canada (2011 SCC 56).

[43] When the present case reached the Supreme Court of Canada, it was remanded back to the Court of Appeal on March 29, 2012, with no reasons, but with a direction that the case be reconsidered in accordance with the Supreme Court of Canada’s recent decision in *Lax Kw’alaams*.

[44] In its reconsideration, the Court of Appeal again dismissed the appeal and confirmed its order from May 18, 2011 (see the decision at 2013 BCCA 300), but its reasons have created some confusion about the scope of the justification stage of the trial presently before me. I will discuss this in more detail later.

[45] Canada applied to the Supreme Court of Canada for leave to appeal the reconsideration. This application was unsuccessful on January 30, 2014. Evidence on this stage of the trial began, as already noted, in March 2015.

[46] Thus, since the evidence in this case was adduced before Garson J. and she delivered her judgment, the Court of Appeal rendered its decision in *Lax Kw’alaams,* the Supreme Court of Canada also rendered its decision in that case, and of course, the Court of Appeal has rendered two decisions in this case. In other words, there has been much judicial consideration of these issues since Garson J.

issued her reasons. All she and the present parties had the advantage of considering was the trial decision in *Lax Kw'alaams.*

[47] The issue ostensibly at the heart of this stage of litigation is whether Canada has justified the infringements, declared very broadly on a *prima facie* basis, that prohibit the plaintiffs from exercising their aboriginal right. I say "ostensibly" because this stage of trial has been largely occupied with differing views of what this court should or can actually accomplish, given various problems arising from previous judgments in this case.

[48] The parties agree that a justification analysis is required, either now or at some future time (the plaintiffs say now, Canada says in the future), in respect of each species of fish for which the plaintiffs have submitted fishing proposals. The following fisheries are addressed in the plaintiffs' fish plans:

- five species of salmon
  - § chinook (suu'haa) - both ocean and terminal,
  - § coho (cu'ẁit)- ocean and terminal,
  - § sockeye (miʔhaat),
  - § pink (č'aapi), and
  - § chum (hinkuuas)
- groundfish
  - § halibut,
  - § lingcod,
  - § dogfish,
  - § sablefish,
  - § various rockfish
- crab
- prawn
- herring
- gooseneck barnacles

[49] Sea cucumbers, red sea urchin, oysters, sardines, and tuna were mentioned in passing during submissions, but the plaintiffs have not submitted plans for those species. It is Canada's position that there is no infringement to justify in respect of oysters, red sea urchin, sea cucumber, tuna, or gooseneck barnacles. The sardine and herring fisheries on the WCVI are currently closed.

[50] Throughout the Negotiations, the plaintiffs have presented various draft fish plans to DFO. These proposals have changed and evolved over the years. In mid-2014, as mentioned, the plaintiffs presented a series of plans upon which they rely for the justification analysis. The plaintiffs say that Canada should have to justify rejecting these plans.

[51] Canada does not agree with this approach. Canada says the justification analysis is more complex and nuanced than simply requiring them to justify not accepting the 2014 proposals. I will

discuss this below in the section entitled The Mechanics of Justification.

[52] In the Negotiations, the parties have differed on every issue, including what was envisioned by Garson J. as to the scale or scope of the right, allocations of various species, the concept of priority, the meaning of “preferred means of fishing”, vessel size, standards of monitoring and catch reporting, the need for independent monitoring (particularly electronic monitoring or at-sea observers), dual fishing (fishing for commercial and home use -- the latter also referred to as Food, Social and Ceremonial [“FSC”] -- in one trip), management of multi-species catches in one trip, the significance of impact on or by other sectors of the fishery, and whether the plaintiffs agreed to be bound by the area declared by Garson J. as their fishing territories (the Court Defined Area [“CDA”]). There currently appears to be at least temporary agreement on the last issue: the plaintiffs agree that their right-based fishery operates in the CDA.

[53] All the other issues remain unresolved and have been the subject of extensive evidence by both parties. The litigation has also brought forward basic disagreements on several matters arising from an interpretation of Garson J.’s judgment. As well, fundamental issues have arisen as a result of the Court of Appeal’s reasons, particularly the reconsideration.

[54] The plaintiffs, Canada, and the intervenors take different positions on these questions, which are difficult and troubling, and which occupied at least half of the submissions. I will deal with all of these issues later in these reasons.

PRINCIPLES FROM *SPARROW, VAN DER PEET, and GLADSTONE*

[55] I will first set out briefly the basic principles from the cases that have formed the basis for the analysis of aboriginal fishing rights for the past decades. I will then review the prior decisions in this action and the fundamental ambiguities stemming from them that have allowed for such wide divergence in both the Negotiations and the positions taken in the litigation.

[56] Canada, the plaintiffs, and the intervenors all refer to the same cases. Each case was analyzed in detail. All counsel are thoroughly familiar with these cases because they have lived with them through other actions. While the basic principles are agreed upon, interpretations differ, both generally and in their application to this case.

[57] I do not intend to go through the cases in any detail. Madam Justice Garson did a thorough job of examining the relevant cases (with the exception of *Lax Kw’alaams* from the Court of Appeal and Supreme Court of Canada, which she did not have).

[58] This case deals with the *Constitution Act, 1982*, s. 35(1):

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

[59] This section is not contained in the *Charter of Rights and Freedoms*, and so is not subject to the *Charter*, s. 1. Thus the courts have created another way to deal with the interaction and reconciliation

of government objectives and sovereignty with aboriginal rights: the concept of justification.

[60] The only cases where the principles of justification have been discussed are regulatory prosecutions dealing with one species and one impugned regulation under which a charge had been laid, specifically, *R. v. Sparrow*, [1990] 1 S.C.R. 1075, and *R. v. Gladstone*, [1996] 2 S.C.R. 723. Thus, the present case is unique in that it is a civil case, and also in that justification of a widely-framed *prima facie* infringement of an aboriginal right to a multi-species commercial fishery has not yet been the subject of litigation. In *Lax Kw'alaams,* in view of the limited declaration obtained, no justification exercise was necessary.

[61] I will set out the principles briefly.

[62] The Supreme Court of Canada in *Sparrow* set out the basic framework for dealing with a claimed aboriginal right. This case concerned a charge of fishing for food fish with a drift net longer than permitted, and thus it was not dealing with a commercial right. The court must determine:

1. Is there an existing aboriginal right?
2. Has the aboriginal right been extinguished?
3. Has there been a *prima facie* infringement of the right?
    - does the legislation in question have the effect of interfering with an existing aboriginal right?
    - is the limitation unreasonable?
    - does the limitation impose undue hardship?
    - does the regulation deny the holders of the right their preferred means of exercising that right?
4. Can that infringement be justified?
    - is there a valid legislative objective?
    - has the honour of the Crown, which is at stake in dealings with aboriginal peoples, been taken into account?
    - has there been minimal infringement?
    - is the regulation in keeping with the appropriate priority?
    - has the aboriginal group been consulted?

[63] The court explained the necessity for the principle of justification at para. 1109:

> There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal right. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. 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 powers 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.

[64] Having set out the framework for analysis, the Court returned the case to the trial court for a new trial on the issues of infringement and justification.

[65] The next two cases were issued together and concerned a claimed commercial right: *R. v. Van der Peet*, [1996] 2 S.C.R. 507, which dealt with selling salmon without a licence; and *Gladstone*, which concerned selling herring spawn on kelp without a proper licence.

[66] The court in *Van der Peet* considered how a court should assess a claim to an aboriginal right. The following questions are pertinent:

- what is the precise nature of the right being claimed?
- is the activity an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right?
- does reasonable continuity exist between the pre-contact practice and the contemporary claim?

[67] No right was proven in *Van der Peet*. However, in *Gladstone*, the court found a right to the commercial trade of herring spawn on kelp to be proven and sent the matter back for a trial on justification. The court developed a different approach to justification for a claimed commercial right, which, unlike a right to fish for food, social and ceremonial use, has no internal limitation to control the fishing. That is, whereas at a certain point fish caught for food will be sufficient, fish caught for sale will not be constrained except by abundancy and market demand.

[68] In its discussion of justification, the court in *Gladstone* said the government must demonstrate:

- it was acting pursuant to a valid legislative objective;
- its actions were consistent with its fiduciary duty towards aboriginal peoples;
- for a commercial right, which has no internal limitation, it has taken the existence of aboriginal rights into account in allocating the resource and has allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users, both as to process and allocation.

[69] The court also noted that limitations placed on the rights are equally necessary to reconciliation, and include conservation, economic and regional fairness, and the recognition of the historical reliance upon and participation in, the fishery by non-aboriginal groups.

[70] These principles, albeit developed in the more constrained parameters of regulatory prosecutions, were referred to and adopted by the Supreme Court of Canada in *Lax Kw'alaams,* which I will set out in the next section of these reasons.

[71] It is the difficulty in reconciling the process enunciated in *Lax Kw'alaams* with the previous decisions in this case, in particular the British Columbia Court of Appeal's reconsideration decision, that has lengthened and complicated this stage of trial.

***LAX KW'ALAAMS* AND PRIOR DECISIONS IN THIS ACTION**

[72] One of the few things that Canada, the plaintiffs, and the intervenors agree upon is that the form of order entered pursuant to the reconsideration decision of the Court of Appeal, insofar as it purports to affirm as final the declaration of the right made by Garson J., is at odds with the content of the court's reasons.

[73] The plaintiffs say the order governs; Canada and the intervenors say this cannot be, given the content of the reasons and the decision of the Supreme Court of Canada in *Lax Kw'alaams.* They say this court must follow the directions of the Court of Appeal and the Supreme Court of Canada precisely, if this process is to make sense at all. I will examine the parties' respective positions in more detail later.

[74] At this stage it would be convenient to set out the analysis required by *Lax Kw'alaams* in respect of the delineation of a commercial fishing right. This will provide context for the discussion of why the parties are so far apart on their positions as to what this court should or should not do at this stage of the trial in light of the Court of Appeal's reasons and order.

[75] The Supreme Court of Canada in *Lax Kw'alaams* began with a discussion of the importance of the precise characterization of a claim:

> [40] The heart of the Lax Kw'alaams' argument on this point is that "before a court can characterize a claimed aboriginal right, it must *first* inquire and make findings about the pre-contact practices and way of life of the claimant group"…. I would characterize this approach as a "commission of inquiry" model in which a commissioner embarks on a voyage of discovery armed only with very general terms of reference. Quite apart from being inconsistent with the jurisprudence that calls for "characterization of the claim" as a first step, the "commission of inquiry" approach is not suitable in civil litigation, even in civil litigation conducted under rules generously interpreted in Aboriginal cases to facilitate the resolution in the public interest of the underlying controversies.
>
> [41] I would reject the appellants' approach for three reasons. Firstly, it is illogical. The relevance of evidence is tested by reference to what is in issue. The statement of claim (which here did undergo significant amendment) defines what is in issue. The trial of an action should not resemble a voyage on the *Flying Dutchman* with a crew condemned to roam the seas interminably with no set destination and no end in sight.
>
> [42] Secondly, it is contrary to authority. In *Van der Peet,* Lamer C.J. emphasized that the *first* task of the court, even in the context of a defence to a regulatory charge, is to characterize the claim:
>
> > …in assessing a claim to an aboriginal right a court must *first* identify the nature of the right being claimed; in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must *first* correctly determine what it is that is being claimed. The correct characterization of the appellant's claim is of importance because *whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support.* [Emphasis added; para. 51.]
>
> [43] Thirdly, it defies the relevant rules of civil procedure. Pleadings not only serve to define the issues but give the opposing parties fair notice of the case to meet….
>
> …..
>
> [45] To the extent the Lax Kw'alaams are saying that, in Aboriginal and treaty rights litigation, rigidity of form should not triumph over substance, I agree with them. However, the necessary

flexibility can be achieved within the ordinary rules of practice. Amendments to pleadings are regularly made in civil actions to conform with the evidence on terms that are fair to all parties. The trial judge adopted the proposition that "he who seeks a declaration must make up his mind and set out in his pleading what that declaration is", but this otherwise sensible rule should not be applied rigidly in long and complex litigation such as we have here. A case may look very different to *all* parties after a month of evidence than it did at the outset. If necessary, amendment to the pleadings (claim or defence) should be sought at trial. There is ample jurisprudence governing both the procedure and outcome of such applications. However, at the end of the day, a defendant must be left in no doubt about precisely what is claimed. No relevant amendments were sought to the prayer for relief at trial in this case.

[46] With these considerations in mind, and acknowledging that the public interest in the resolution of Aboriginal claims calls for a measure of flexibility not always present in ordinary commercial litigation, a court dealing with a s. 35(1) claim would appropriately proceed as follows:

1. First, at the characterization stage, identify the precise nature of the First Nation's claim to an Aboriginal right based on the pleadings. If necessary, in light of the evidence, refine the characterization of the right claimed on terms that are fair to all parties.

2. Second, determine whether the First Nation has proved, based on the evidence adduced at trial:

   (a) the existence of the pre-contract practice, tradition or custom advanced in the pleadings as supporting the claimed right; and

   (b) that this practice was integral to the distinctive pre-contact Aboriginal society.

3. Third, determine whether the claimed modern right has a reasonable degree of continuity with the "integral" pre-contact practice. In other words, is the claimed modern right demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice? At this step, the court should take a generous though realistic approach to matching pre-contact practices to the claimed modern right. As will be discussed, the pre-contact practices must engage the essential elements of the modern right, though of course the two need not be exactly the same.

4. Fourth, and finally, in the event that an Aboriginal right to trade *commercially* is found to exist, the court, when delineating such a right should have regard to what was said by Chief Justice Lamer in *Gladstone* (albeit in the context of a *Sparrow* justification), as follows:

> 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 type 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….
>
> …

[67] …The economic implications of even a "lesser" commercial fishery could be significant, and the Crown is entitled to proper notice of what "declaration" it was supposed to argue about and to test the evidence directed to that issue.

[underlining emphasis added in these 2018 trial reasons in *Ahousaht*; italic and double underlining emphases from prior cited reasons]

[76] As already noted, the parties and the trial judge did not have the advantage of this decision at the time of Garson J.'s decision. The approach put forward by the plaintiffs in *Lax Kw'alaams* before the Supreme Court of Canada on the hearing date of February 17, 2011, as reflected in para. 40 above, was rejected by that court in its decision of November 10, 2011.

[77] Nonetheless that is the same argument that had been made previously in *Ahousaht* on the first appeal in December 2010 before the Court of Appeal. That argument was accepted by the Court of Appeal in their May 2011 decision, a few months before the Supreme Court of Canada released *Lax Kw'alaams.* However, notwithstanding the direction to the Court of Appeal by the Supreme Court of Canada to reconsider their decision in *Ahousaht* in light of *Lax Kw'alaams*, the Court of Appeal on the second appeal in July 2013 reconfirmed their original May 2011 order.

[78] In my view, the result of the reconsideration decision in *Ahousaht* is not entirely consistent with the decision in *Lax Kw'alaams.*

[79] Of particular concern in the circumstances of the case presently before this court is the requirement to define precisely the claimed right *in the pleadings*, as amended by the end of trial, and the requirement to go through the analysis of continuity (*Lax Kw'alaams*' step 3), and then to take into account all of the factors enumerated in the fourth step, prior to delineating the right. The parties and intervenors differ fundamentally on whether or to what extent any of those steps were completed in this case before the right was declared and affirmed and reconfirmed by the Court of Appeal.

[80] The first issue is whether the claim was precisely defined in the pleadings.

[81] The plaintiffs pled their claim before Garson J. on a spectrum, as cited in her trial reasons at para. 10:

> 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.

[82] The relevant relief sought was not set out in Garson J.'s reasons. The Amended Statement of Claim, drafted in 2005, claimed:

> (a) a declaration that [the plaintiffs] have existing aboriginal rights within the meaning of s. 35(1) of the Constitution Act, 1982 to harvest all species of Fisheries Resources in the Territories;
>
> (b) a declaration that [the plaintiffs] have existing aboriginal rights within the meaning of s. 35(1) of the Constitution Act, 1982 to sell on a commercial scale all species of Fisheries Resources that they harvest from the Territories.

[83] The words "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" were added to a subsequent version of the Statement of Claim.

[84] Canada sought extensive particulars, including a request that the species for consumption and for trade be set out. The plaintiffs provided a list of 70 or 80 species of fish, shellfish, and aquatic plants, and stated that all of these were available to them for consumption and trade. The plaintiffs answered in broad general terms any questions to do with the factors that enter into an analysis of continuity.

[85] A request was made for particulars in respect of specific infringements. The plaintiffs took the position that the pleadings were sufficient.

[86] It appears that the general approach in the pleadings and particulars was to keep the claim as comprehensive and non-specific as possible, and indeed the plaintiffs were successful in obtaining a comprehensive and non-specific declaration, even broader than their pleadings.

[87] Madam Justice Garson did not choose any of the descriptions pleaded in (b) or (c) of the claim to a right to sell fish as set out by the plaintiffs. She concluded that the plaintiffs had established another description of the right, which she articulated as set out in her order at para. 1, and which she said she considered to come within the spectrum articulated in the pleadings: “the plaintiffs … have aboriginal rights to fish for any species of fish within their Fishing Territories … and to sell that fish”.

[88] Thus the declaration of the right as set out in the trial court order is very general, and without any of the qualifiers contained in the pleadings themselves. The plaintiffs say it is limited only by Garson J.’s finding that the right is not on an industrial scale, a limitation which they say is nevertheless significant and adequate to delineate or define the right as required by *Lax Kw’alaams.*

[89] On the reconsideration by the Court of Appeal, Canada argued that the claimed right had not been precisely articulated or defined as required by *Lax Kw’alaams*’ first step, and that the trial judge had not sufficiently addressed the issue of species specificity. This had also been an argument on the first appeal. The Court of Appeal did not accept that argument. In its reconsideration decision of 2013, the court reiterated its conclusion from the initial decision in 2011. The court said at paras. 15 - 20 that the trial judge had set out the pleaded claims and did not have to do more, given that the plaintiffs had pleaded a spectrum of rights.

[90] It is certainly arguable that this approach does not accord with the Supreme Court of Canada’s *Lax Kw’alaams*’ step one, which requires a precisely claimed right to be pleaded by the end of the trial, and the court to identify the precise nature of the claim, based on the pleadings and the evidence at trial. In fact, the Supreme Court of Canada in *Lax Kw’alaams* at para. 61 and following was critical of the “spectrum” approach to pleadings, reiterating that the Crown was entitled, by the end of the trial, to proper notice of the declaration sought. The Crown must know “precisely what is claimed” (para. 45).

[91] The next issue is the role of continuity (*Lax Kw’alaams’* step 3) and its relationship to specific species.

[92] Species specificity in the right itself is at the heart of the arguments of the intervenors, and was advanced before the Court of Appeal by the BC Seafood Alliance, both on the original appeal and on the reconsideration. On that issue, the court said, in the reconsideration:

> [33] The appellant and certain of the intervenors submit that the judge failed to sufficiently address species specificity and that this resulted in her characterizing too broadly the right said to be *prima facie* infringed, namely, the respondents' right to fish for any species of fish within their fishing territories and to sell such fish.
>
> [34] It seems to me that the issues the trial judge envisioned as being subject to negotiation or to be resolved by further proceedings largely encompass points 3 and 4 of the analysis mode suggested by Binnie J. in *Lax Kw'alaams*. These include the questions of continuity and the delineation of a modern right. Salient issues that remain to be addressed between these parties include those related to species and a more specific delineation of any modern right. In my view, the judge was not required to consider or articulate more than she did concerning individual marine species at this stage of the proceedings.
>
> [35] In my earlier reasons delivered in May 2011, I said this:
>
> > [59] These objections by Canada and the intervenors on what I will term the species issue are comprehensible but, in my opinion, the short answer to such submissions is that at the presently incomplete stage of this litigation, to seek a greater degree of specificity is neither possible nor practicable. The evidence that was accepted by the trial judge supported the thesis that a variety of fish species were harvested and traded by the ancestors of the respondents. The record in the case is supportive of the proposition that ancestral trade occurred in certain species such as salmon but is silent as to many other species adverted to in the particulars. As I observed during the hearing of this appeal, this case as it presently stands has about it something of an interlocutory character. Having regard to the state of the evidentiary record, to presently demand more specificity seems an impossible task.
> >
> > * * *
> >
> > [61] As I see it, the "specific practice" in this case was not, as in *Lax Kw'alaams*, found to be tied to "one species of fish and one product", namely eulachon oil, but encompassed a wide range of fisheries resources. I do not consider that it was an error for the judge in this case to find that the pre-contact practice was harvesting and trading in a broad range of marine food resources. That was the practice disclosed by the evidence. In my respectful opinion, it was open to the trial judge to conclude as she did that the trading in fisheries resources by the ancestors of NCN was integral to the culture of this society around the time of first contact.
> >
> > [62] The trial judge said this about her conclusions on trading practices:
> >
> > > [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.
> >
> > [63] I do not consider that the judge was required to go further in delineating what she found to be the trading practices of the ancestral society. It is clear from the findings of the judge that she concluded that the present regulatory system, including quotas and entry fees, has had an inhibitory effect on the respondents' former historic untrammeled right to harvest and trade in fisheries resources. She found that as a result of the present regime there was an as yet unjustified *prima facie* infringement of the respondents' rights. The appellant and intervenors object to her use of yardsticks, such as former practice as testified to by witnesses from the respondent bands, or a general lack of full access to various fisheries to establish the infringement asserted in the pleadings. As the *Sparrow* case establishes, the threshold for making a finding of infringement is not high. It seems to me that the evidence in this case sufficed to satisfy this requirement.

> [64] The issue of species specificity will be very much front and centre when what I perceive as the core issues raised by this litigation come to be addressed at the accommodation and justification stage of the process. It is the reality that if a legislative or operational limitation or a form of agreement between the parties on the harvesting and selling of fisheries resources demonstrates justification or necessary accommodation, then there would not exist any unjustifiable infringement of the Aboriginal rights of NCN. Because of that, there is a significant practical interface between any alleged infringement of Aboriginal rights and justification for such infringement. Based on the evidence she accepted, the trial judge found a *prima facie* infringement of claimed rights of NCN at this stage of the process. Other salient issues in this *lis* between the parties still remain to be addressed and resolved, either by agreement or a continuation of litigation.
>
> * * *
>
> [66] I very much doubt that it would have been either practicable or helpful for the trial judge to seek to engage in a species related analysis when dealing with the issue of *prima facie* infringement. The evidence she accepted sufficed in my respectful opinion to underpin her findings at this stage of the process. That leaves at large and properly for future negotiation and, if necessary, further consideration and decision by a court, the unresolved issues of accommodation and justification in this particular case. At a future stage of the process, which has as its ultimate end the reconciliation of Aboriginal and non-Aboriginal interests, I venture to suggest that discrete fisheries and species will need to be considered and addressed on an individual basis....

[36] In my opinion, these comments remain apposite to this litigation. I consider that the approach to and the analysis by Garson J. of the issues she dealt with in the litigation were adequate and in accord with the type of analysis mandated by *Van der Peet* and *Lax Kw'alaams*. Having reconsidered the reasons of the trial judge in light of the reasons of the Supreme Court of Canada in *Lax Kw'alaams*, I do not consider that any different result from the decision of the majority of this Court in 2011 is appropriate.

[37] I said in my earlier reasons that, in the present case, there remains for consideration and decision the question of more precise definition of the rights claimed and possible justification. Therefore, it seems to me that the process here is as yet incomplete with regard to portions of the proper methodology outlined as follows by Binnie J. in *Lax Kw'alaams* at para. 46:

> 3. Third, determine whether the claimed modern right has a reasonable degree of continuity with the "integral" pre-contact practice. In other words, is the claimed modern right demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice? At this step, the court should take a generous though realistic approach to matching pre-contact practices to the claimed modern right. As will be discussed, the pre-contact practices must engage the essential elements of the modern right, though of course the two need not be exactly the same.
>
> 4. Fourth, and finally, in the event that an Aboriginal right to trade *commercially* is found to exist, the court, when delineating such a right should have regard to what was said by Chief Justice Lamer in *Gladstone* (albeit in the context of a *Sparrow* justification), as follows:
>
> > 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 type 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.

[single underlining emphasis added in these 2018 reasons in *Ahousaht*; all other emphases from original SCC judgments]

[93] The Court of Appeal again dismissed the appeal, thus re-affirming Garson J.'s declaration of a right to fish for any species of fish and to sell that fish, despite stating at para. 37 that the *claimed* right had to be more precisely defined, as well as saying that *Lax Kw'alaams'* steps three (continuity) and four (delineation of the modern right) were yet to be completed.

[94] That is, not only the definition of the claim itself, but the analysis of continuity and the delineation of the right were not complete, yet the Court of Appeal confirmed the right as declared by Garson J. by dismissing the appeal. This dichotomy has caused some difficulty in moving forward with this case, and will be discussed further below.

ADDITIONAL CHALLENGES

[95] Before moving to a discussion of the parties' positions, I will refer briefly to other problems that arose during the trial, or during submissions. These issues will all be discussed in more detail at relevant portions of these reasons.

[96] As mentioned earlier, in December 2014, Canada made an offer (the LTO) to the plaintiffs with various facets to it, but setting out specific offers in respect of only two species: salmon and herring, leaving the rest of the species for future discussion. Canada relies on this offer in the justification analysis. The offer is unacceptable to the plaintiffs.

[97] Notwithstanding the LTO and the extensive evidence called at this stage of the trial, Canada took the position during submissions that the justification analysis should be adjourned because the parties will only now, after receiving whatever clarification this court can offer on the scope of the right and the specific infringements they must deal with, be in a position to negotiate potentially workable fisheries.

[98] Canada says it is not in a position to deal fully with justification for many species at this point. They say they require, and are entitled to, under *Gladstone* and *Lax Kw'alaams*, a precise delineation of the right, and an articulation of specific infringements for each fishery. Without that, it is not possible to know where to start a justification exercise. As well, according to the Court of Appeal's reasons in the reconsideration, they say they are entitled to a full analysis of steps 3 and 4 in *Lax Kw'alaams*.

[99] The plaintiffs oppose Canada's position, as they say continuity has already been dealt with by Garson J., the right has been properly articulated, and the analysis of Canada's attempts at justification must stand or fall on the evidence presently before the court. I will return to this topic later in these reasons.

[100] An additional problem, and one I have alluded to earlier, is that the parties disagree fundamentally on how the issue of justification should be approached. The plaintiffs set forth various proposals for a series of fisheries, and they specifically rely on the ones they submitted to Main Table in the negotiation process in 2014. They say, according to Garson J.'s reasons, Canada should have to justify not accepting them. Canada does not agree with this approach, as they say they should have to justify specific infringements, not a failure to implement a series of still-evolving plans.

[101] As well, it became clear during the evidence that many of the plaintiffs' proposals are works in progress, and that they recognize the need for ongoing discussions and cooperation with DFO. Nevertheless, they say this cannot be an excuse for Canada's failure to justify implementing their plans.

[102] Another problem has arisen during the years of Negotiations: the views and expectations of the plaintiffs have developed, partly as a result of various measures implemented in the salmon demonstration fishery (which started in 2012 and which will be described later) which were encouraged by DFO, but which are not contained in the LTO. Canada's approach has caused great resentment and disappointment amongst the members of the plaintiffs who became involved in the fishery and took advantage of these measures, only to have them, in their view, removed or significantly reduced. This will be further dealt with in the section of these reasons describing the Negotiations.

[103] To say all of this leaves this court in a difficult position is to state the obvious. However, decisions must be made to move the parties forward, if it is only to the next stage of appeals.

[104] I will now set out the positions of the parties in more detail, which will expose the differing approaches to this stage of the trial, before turning, at a later stage of these reasons, to the issues of infringement and justification for each species of fish.

OVERVIEW OF CANADA'S POSITION

[105] I will deal first with Canada's position on what is expected of this court.

[106] Canada says the process to declare the scope of the right is not final and must be completed by this court. Madam Justice Garson made that clear in her judgment when she said:

> [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.
>
> [Emphasis added]

[107] Madam Justice Garson then quoted from *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 80 B.C.L.R. (3d) 212, a case in which the plaintiffs sought a declaration of a right in the absence of an alleged infringement of any right. Madam Justice Newbury, in upholding the trial judge who had refused to issue the declaration, said at para. 18:

> 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, 137 D.L.R. (4th) 289, 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 interaction. [Emphasis added by Newbury J.A. in *Cheslatta*]

[108] The Court in *R. v. Nikal*, [1996] 1 S.C.R. 1013, then referred to *R. v. Agawa (Ont. C.A.)* (1988), 65 O.R. (2d) 505:

> 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 passage was emphasized by Newbury J.A. in *Cheslatta*]

[109] I note as an aside that the plaintiffs say the use of the words "exercise of the right" used in *Nikal,* as opposed to the "scope of the right", is important, although neither Newbury J.A. nor Garson J. made that distinction.

[110] Madam Justice Newbury went on to say:

> [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 added]

[111] Madam Justice Garson specifically adopted the underlined words as applicable to the case before her. She said, at para. 488:

> [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.

[112] Notwithstanding Garson J.'s recognition of the need to put off defining the right, she then made her findings as to the existence of the right, and this formed the basis of one of the declarations:

> [489] ….the plaintiffs have established aboriginal rights to fish for any species of fish within the environs of their territories and to sell that fish….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.
>
> [Emphasis added]

[113] She then said she would consider the "important and appropriate limitations" on the scope of the right in the sections of her reasons that followed.

[114] It is the contention of Canada and the intervenors that, despite Garson J.'s statement, no further limitations were addressed in the rest of her reasons. This appears to be the case, although as I discuss below, there are inferences regarding limitations to be drawn from her reasons.

[115] Canada then refers to the 2013 reasons of the Court of Appeal, at para. 34, set out above, where the court said "a more specific delineation of any modern right", as well as continuity, remained to be addressed. At para. 37, they said "there remains for consideration and decision the question of

more precise definition of the rights claimed and possible justification". In the Court of Appeal's original decision, repeated in the reconsideration, the court said the case as it stands "has about it something of an interlocutory character".

[116] Thus, Canada says Garson J. contemplated an ongoing process of delineation of the right, and this is obviously confirmed by the Court of Appeal's reasons. The fact that the order purports to declare a right cannot be taken as making the declaration final. Specifically, Canada says the broad right declared by Garson J. must be clarified as to the *scope* of the right itself, not merely the *exercise* of the right, as the plaintiffs contend.

[117] I will now turn to the rest of Canada's argument, which follows from its position on what this court can and should accomplish.

[118] Canada says identifying a principled basis on which to ground the parameters of the plaintiffs' aboriginal commercial fishing right is a complex legal problem. This case involves many species, and the *prima facie* infringement, according to Garson J.'s declaration, results from the entire regulatory scheme which DFO uses to manage the fishery. Management grows more complicated each year.

[119] According to Canada at para. 59 of their written submissions, the broad issues before this court are:

- With respect to the completion of the third and fourth steps of the *Lax Kw'alaams* analysis, how are the plaintiffs' Aboriginal rights to fish and sell fish to be further delineated?
- What are the infringements of the plaintiffs' right in each fishery that Canada must justify?
- Are Canada's infringements of the plaintiffs' right in a particular fishery justified? and
- Did Canada breach a duty to consult and negotiate with the plaintiffs?

[120] Notwithstanding their insistence that they need to know what specific infringements are alleged before a justification analysis can be undertaken, Canada takes the position that *Lax Kw'alaams'* steps 3 and 4 and the identification of infringements are part of the justification analysis on which they bear the burden of proof. They say the plaintiffs bear the burden on the fourth issue.

[121] As for the task facing this court, Canada says at para. 20:

> The BCCA's reconsideration of Canada's appeal, while not substantively changing the result, did clarify that "questions of continuity and the delineation of a modern right" remained outstanding. The right was upheld, in other words, insofar as the Trial Judge made findings as to its basic nature. Its full extent, however, was held by the BCCA to be as yet undetermined. The BCCA directed that at the continuation of the justification trial, the plaintiffs' rights must be further delineated in accordance with the SCC's direction in *Lax Kw'alaams,* and in particular the third and fourth steps of the *Lax Kw'alaams* analysis would need to be completed.

[122] Canada points to a summary of the challenges enumerated by McLachlin J. (in dissent) in *R. v. Marshall*, [1999] 3 S.C.R. 456 (*Marshall #1)*, at para. 112, in respect of an incompletely defined right, in that case a treaty right:

> To proceed from a right undefined in scope or modern counterpart to the question of justification would be to render treaty rights inchoate and the justification of limitations impossible. How can

> one meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope? How is the government, in the absence of such a definition, to know how far it may justifiably trench on the right in the collective interest of Canadians? How are courts to judge whether the government that attempts to do so has drawn the line at the right point? Referring to the right in the generalized abstraction risks both circumventing the parties' common intention at the time the treaty was signed, and functioning illegitimately to create, in effect, an unintended right of broad and undefined scope.

[123] In this case, the declared right "to fish and sell any species of fish" is broad and undefined. Thus, Canada says that in this stage of trial, the court must finish delineating the right pursuant to *Lax Kw'alaams.* Without that, it is not possible to focus a justification analysis.

[124] With respect to further issues of delineation, Canada says there are two broad issues. The first is whether the plaintiffs' fishing territory is nine statute miles or nine nautical miles.

[125] The second issue is much more complex:

> Where on the spectrum of commerciality does the plaintiffs' right fall?

[126] Canada says Garson J. determined that the plaintiffs' fishing right exists somewhere on a continuum between a small-scale sale of fish outside the commercial market to something less than an industrial-scale fishery. She then left the parties to "negotiate towards a quantification of the amount and means of exercise" of the right to fish and sell fish that will "recognize these principles" (para. 875). In setting out the principles, she had just said at para. 874:

> 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.

[127] Canada says the appropriate delineation of the right lies in a proper analysis of continuity. This issue, left outstanding by the Court of Appeal (but foreclosed by its order, say the plaintiffs), is that it allows for the logical evolution of both subject matter and method of exercise of the ancestral practice into a modern right, but does not justify the award of a quantitatively and qualitatively different right.

[128] Canada's position with respect to continuity and species specificity is not, with respect, entirely clear. However, as I understand its position, both from its oral submissions and written argument and from its response to a request for particulars (discussed below), Canada does not attempt to limit species in the continuity analysis, in the sense that the Court of Appeal "knocked geoduck off the list" (as counsel describe it) of "any species". Rather, Canada attempts to use the notion of continuity to obtain a more defined characterization of the right.

[129] Canada says those issues were left by Garson J. and the Court of Appeal for this court, and require an inquiry into Garson J.'s findings regarding the plaintiffs' pre-contact practices, and the evidence underlying those findings. In their arguments respecting various species, such as crab and prawn, Canada notes that there is no evidence at all of trade in those species. Therefore, the position Canada takes is that the less evidence there is of ancestral trade in a species, the easier it is to justify the present regulatory scheme (as well as allocations of fish under that scheme), in respect of that species in the modern fishery, applying the principles from *Gladstone*, *Sparrow*, and *Lax Kw'alaams* at step 4.

[130] Canada refers to certain comments in Garson J.'s judgment in support of their position on the proper characterization of the right. She said the plaintiffs did not trade fish for the purpose of accumulating wealth, and that the amount of fish they caught was limited by their fishing methods. Fish was their primary food source, which would limit the amount available for trade. In the modern era, she referred to their inability to use their "mosquito fleet" (para. 651: "a fleet of small motorized boats").

[131] Madam Justice Garson also declared that the fishing territory extended only nine miles seaward. Taking these indicia, Canada says the plaintiffs' right should be delineated as a "community-based artisanal fishery that harvests and sells fish to a low level of commercial activity".

[132] Canada says that once the right is precisely delineated, the court must rule on whether DFO's actions since the decision constitute a justified infringement of the plaintiffs' right in respect of each fishery.

[133] Madam Justice Garson stated that the plaintiffs did not identify any specific infringements, and she gave no specific guidance on infringement herself (an approach questioned but accepted by the BCCA in the Tsilhqot'in decision, *William v. British Columbia,* 2012 BCCA 285, 33 B.C.L.R. (5th) 260, at para. 307). However, her findings appear to fall into two categories, characterized by Canada as follows:

(a) the plaintiffs were squeezed out of the regular commercial fishery by its competitive nature and subsequent escalating costs

(b) steps taken by DFO to restrict, manage, and monitor fishing capacity in order to achieve both conservation and economic objectives in the commercial fishery meant that the plaintiffs were no longer able to fish and sell fish by their preferred means.

[134] Canada says problems have arisen over the course of the Negotiations because the plaintiffs' view of their preferred-means fishery has changed from "community-based, localized fisheries involving wide community participation and using small, low cost boats" (a direct quote from the plaintiffs' original submissions to Garson J., incorporated into her reasons at para. 769), to the use of fairly large commercial boats and gear, both of which work against wide community participation. As well, the plaintiffs' 2014 fishing proposals are substantially more complex than those submitted at earlier stages of the Negotiations. Canada says the 2014 plans raise conservation concerns, and restrict DFO's ability to manage all the fisheries resource in a sustainable and integrated manner.

[135] Canada says the plaintiffs' current fishing proposals diverge starkly from their preferred means of fishing as found by Garson J., and the court should not accept the plaintiffs' position that Canada must justify rejecting their proposals. Reconciliation cannot be achieved by simply accepting the fishing plans; rather it means taking the plaintiffs' rights seriously and according them the appropriate priority within the integrated fisheries management regime, working collaboratively with the plaintiffs and recognizing other rights and interests as well.

[136] Canada submits that the plaintiffs want DFO to alter its management of the established commercial and recreational fisheries, and to allow the plaintiffs to regulate themselves and manage

their right-based fisheries. DFO's role would be simply to provide an initial allocation. However, says Canada, the right as declared by Garson J. does not include a right to manage the fishery. DFO's expertise as the architect of the integrated management regime deserves deference. Canada says DFO's integrated regime is complex and closely related to the biology and physical characteristics of the various species and ecosystems. It cannot be ignored.

[137] Canada says DFO's management regime is necessary to achieve valid legislative objections:

- conserving biological and ecological diversity;
- achieving sustainable fisheries for the benefit of all Canadians now and in the future;
- providing stable and certain fishing opportunities;
- showing fairness and transparency in allocating fishing opportunities among all fishers.

[138] Canada says retaining and working within the present regime is justified. Minimal impairment does not mean *no* impairment, nor does it mean that just because other solutions might infringe less, the one chosen is not justified. Reasonableness is a necessary aspect of the inquiry into justification: see *Nikal* at 1065:

> 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 justification for infringement.

[139] The plaintiffs in their proposals request that DFO change its existing management regime, which is based on years of science and management experience. Rather than accepting the plaintiffs' request, DFO takes a justified precautionary approach. DFO must know the scale and nature of the right-based fishery in order to protect it. If they turned over management to the plaintiffs and the plaintiffs mismanaged the fishery, DFO would be unable to protect the right-based fishery for the whole community and all the plaintiffs.

[140] Canada says the main points of disagreement between the parties are the following, which encompasses virtually every issue that has come before the Main Table:

- priority;
- allocation;
- exclusivity;
- preferred means (vessel size and capacity);
- monitoring and catch reporting (whether it should be done an independent third party, whether electronic monitoring is required; who would pay for electronic monitoring);
- the impacts of the plaintiffs' right-based fishery on the commercial and recreational fisheries;
- voluntary licences relinquishment (mitigation); and

- the use of existing DFO programs and policies to provide the plaintiffs with increased access to the fisheries resource (PICFI, ATP).

[141] PICFI (Pacific Integrated Commercial Fisheries Initiative) and ATP (Allocation Transfer Program) are special programs designed to increase aboriginal participation in the fishery and to encourage First Nations fisheries to become self-sustaining. ATP has been ongoing for some time. PICFI had just started at the time of Garson J.'s decision.

[142] Michelle James explains in her report that there are two types of communal licences issued to aboriginal groups. One type applies to economic opportunity fisheries related to a specific project. Of relevance to the NCN are communal commercial (F) licences which operate in common with the regular commercial licences. There are no licence fees associated with these licences, but there are cost recovery agreements for some of them.

[143] The communal licences granted to aboriginal groups are obtained through DFO's "Mitigation Policy" -- that is, through voluntary relinquishment of licences from commercial fishers which are then purchased by DFO and transferred to First Nations in the PICFI program. PICFI, developed in consultation with the NCN, requires First Nations to form aggregates to fish. Of the five plaintiffs, only Ahousaht and Tla-o-qui-aht have formed their own aggregates. The remaining three have joined other groups. The program now provides additional new funding which allows an aggregate to obtain licences of their choice. The Ahousaht aggregate has received almost $350,000, and the Tla-o-qui-aht aggregate $375,000.

[144] Canada takes the position that access under PICFI and ATP is relevant to the access provided under the right, in particular because reconciliation is achieved through voluntary relinquishment of licences by commercial fishers. It is not necessary and is unhelpful to the principles of reconciliation to move to involuntary relinquishment of licences by the commercial sector.

[145] The AABM chinook salmon fishery is of primary importance to the plaintiffs. AABM stands for Aggregate Abundance Based Management -- that is, ocean-based mixed stock chinook, as opposed to the ISBM (Individual Stock Based Management) chinook which spawn in local WCVI rivers.

[146] The general approach in the LTO to the AABM chinook fishery is to offer a number of licences to the plaintiffs and allow the plaintiffs to decide whether to divide some or all of the licences up amongst many mosquito boats for use in the CDA, or use some or all of the licences on commercial-sized troll boats (using one vessel one per licence) throughout the whole WCVI.

[147] For other species (groundfish, crab, prawn), Canada takes the position that the consultation process is not complete and should not be subjected to a justification analysis at this time; alternatively, Canada's says its conduct is justified and the structured decision-making process now in place through the LTO is sufficient to accommodate the plaintiffs' rights and to justify a continuation of the present management regime. In general, Canada relies on conservation concerns and economic and regional fairness, the factors mentioned in *Sparrow* and *Lax Kw'alaams*, to justify retaining its present system for these fisheries.

[148] For certain other fisheries, Canada takes the position that there are no ongoing infringements. For instance, the plaintiffs have not submitted plans for sea cucumbers, red sea urchin, oysters, or tuna. The gooseneck barnacle fishery is a collaborative effort of the plaintiffs and DFO, and, in Canada's view, does not infringe the right. As mentioned earlier, the sardine and herring fisheries are presently closed.

[149] Oysters were introduced into British Columbia in the 1800s. At the time of Garson J.'s decision, oysters were under the province's control. Management of oysters is now under federal jurisdiction. The plaintiffs do not allege an infringement of their right to harvest and sell oysters.

[150] Moving briefly through the *Gladstone* factors, Canada says the relevant duty to consult in this case arises within the justification process; the amount of consultation depends on circumstances, and requires good faith on both sides.

[151] Canada draws a distinction between "fiduciary duty" in this context, and a true trust. Here, the fiduciary duty owed to a rights holder creates and informs a standard of conduct. The absence of clear delineation of the right and the uncertainty this has caused for the Negotiations provides important context for interpreting Canada's approach towards its fiduciary duty.

[152] Canada says priority requires a look at actions and outcome. The relevant determination is whether the right has truly been taken into account. There are no guarantees in fishing. However, in these circumstances for these plaintiffs, there have been years of Negotiations, very significant funding for those Negotiations and for staff, funds provided for capacity building and support, and many accommodations and flexible applications of the existing regime: reduced or waived licence fees, a salmon demonstration fishery with changed monitoring standards, extra access in all species for the plaintiffs through PICFI at the expense of other First Nations, and a special approach taken through the LTO.

[153] Overall, Canada says it has accorded appropriate priority to the plaintiffs' fishery and has remedied ongoing infringements, or is in the process of doing so through continued discussions.

THE INTERVENORS

[154] The intervenors are unhappy with Canada's approach to the issue of continuity, as the PPFA and SFA contend that their species should be excluded from "any species" in the right itself, for reasons that relate to the conduct of their respective fisheries. I will explain their concerns in more detail below when I discuss those species.

[155] Meanwhile I will turn to the intervenors' positions on the task facing this court at the second stage of the trial.

[156] The intervenors first question the dual tracks of this process -- litigation on one hand, and the Negotiations on the other. The latter, being characterized in the order and by the parties as "negotiations", rather than simply "consultations", go far beyond what the law requires.

[157] Mr. Lowes for the intervenor BC Seafood Alliance emphasized the concerns their sectors have at being told that a series of Negotiations is going on between the plaintiffs and Canada in respect of fisheries in which other sectors have an interest, but in which they have no say. They acknowledge the duty to consult, but to leave two parties to negotiate something that clearly involves all other sectors is not appropriate. They point out that Ms. Farlinger, Regional Director General, asked the plaintiffs if their plans could be discussed with the other sectors but the plaintiffs refused.

[158] The intervenors argue that once the claimed right in question is commercial, the involvement of others becomes part of the definition of the right itself. The conceptual limitations on the right occur as a result of the fourth step in *Lax Kw'alaams* which imports the factors from the justification analysis in *Sparrow*. These are not limitations on the exercise of the right; they are limitations on the right itself.

[159] The intervenors submit that Garson J. purported to rely on *Gladstone* to make these broad general declarations and to send the parties away to negotiate, but *Gladstone* was, by the time the case reached the Supreme Court of Canada, a single-count regulatory prosecution with one specific fishery in issue. The intervenors are concerned that the delineation of a commercial right concerned with all species, allegedly infringed by an entire system, was left to these two parties to negotiate.

[160] Each of the cases (*Van der Peet* at para. 21; *Gladstone* at para. 23; *R. v. Sappier; R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686) that have dealt with fishing rights have emphasized the importance of precision and specificity in characterizing the claimed right. The Supreme Court of Canada's analysis in *Van der Peet* shows the importance of considering all of the evidence before refining the characterization of even the *claimed* right. Once that analysis is complete, the court can consider the elements that go into the proof of the right itself, once more examining all of the evidence.

[161] It is the position of the intervenors that a commercial right cannot be declared until *Lax Kw'alaams*' four steps are complete. Given the Court of Appeal's reasons, that has not occurred here, despite the wording of the orders. Thus the right as declared cannot be final. The right cannot be crystalized until the end of the trial, and a declaration should not have been made mid-trial as was done here.

[162] The intervenors submit that Garson J. recognized that she was not finished with the analysis, and at para. 488, she acknowledged the statement in *Cheslatta*: that is, that the analysis surrounding justified infringements is an important part of the process of defining the right itself. However, in the next paragraph, she found that the plaintiffs had established a "right to fish for any species of fish within the environs of their territories and to sell that fish" as a "now proven aboriginal right" and said that the limitations on the right would be considered in the next stages of the analysis: infringement and justification.

[163] The intervenors say that Garson J. could not have found what the right was before going through the whole analysis to which she had just referred, and the Court of Appeal acknowledged that. The court recognized in its reconsideration decision that *the modern right* still had to be more specifically defined, having said at para. 31:

> Rights do not exist in a vacuum. As Newbury J.A. observed in *Cheslatta Carrier Nation v. British Columbia*, … Aboriginal rights, if established, do not have an absolute quality. Questions of justification and infringement are, as she observed at para. 19, "an important part of the process of defining the right itself."

[164] At para. 37, the Court of Appeal said, "there remains for consideration and decision the question of more precise definition of the rights claimed and possible justification".

[165] The intervenors acknowledge, as they must, that Garson J.'s declarations and approach were upheld by the Court of Appeal twice. However, their main point is that *Lax Kw'alaams*' four steps must be strictly followed. Madam Justice Garson did not have the advantage of that decision but the Court of Appeal did, in its reconsideration, and that court directed this court to complete steps three and four of *Lax Kw'alaams.*

[166] The intervenors say that when *Lax Kw'alaams* is applied properly, a declaration of a defined right cannot be granted without a determination of justified infringements.

[167] I will now turn to the intervenors' submissions on the issue of species specificity.

[168] Madam Justice Garson accepted the plaintiffs' position that aboriginal fishing rights are not species-specific, and that continuity did not have to be proven species by species.

[169] However, the intervenors say it is clear from the reasons of the Court of Appeal's second judgment that the court saw species specificity as relevant to both *Lax Kw'alaams*' step 3 (determination respecting continuity) and step 4 (delineation of the right), steps which the Court of Appeal said were still to be done. The intervenors say the Court of Appeal could not have written reasons directing this court to complete certain steps and then made it impossible, by its order, for the court to comply with those directions. The fact that this court, coming upon this unfinished trial, is in an almost impossible position to follow those directions, is unfortunate, but this should not prevent a proper analysis as contemplated by *Lax Kw'alaams.*

[170] The plaintiffs before Garson J. relied on the comment of Satanove J. in *Lax Kw'alaams* 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.

[171] Madam Justice Satanove's comment, which was *obiter*, was not accepted by the Court of Appeal in *Lax Kw'alaams* (para. 40), a decision rendered a month after Garson J.'s decision in this case.

[172] The court instead accepted the argument from the intervenor BC Seafood Alliance in that case that the Supreme Court of Canada has "not categorically excluded species specificity in the definition of an aboriginal right, but has left it (as in the case of other factors, such as site-or purpose-specificity), a matter of relevance and context in particular cases."

[173] The Court of Appeal in *Lax Kw'alaams* at para. 37 approved of the submissions of the BC Seafood Alliance:

> Substantively, specificity is required to ensure that the scope of the exception to the principles of universality and equality is confined to the reason and justification for that exception: i.e. the prior presence of organized societies. From this flows the search for "aboriginality", and aboriginal identity by focusing on the significant elements of aboriginal society and culture. Specificity is required: first, to distinguish between activities which are rooted in the traditions of a particular culture, and those which are common to human society generally; and second, to distinguish between practices, customs and traditions which are culturally significant, and those which are not.
>
> As a matter of process the requirement of specificity enables aboriginal rights to be defined by regular courts following regular process. To define the claimed right in specific terms enables the court to focus on a particular *lis*. In short, specificity is essential for a court of law to fulfil its function, and not usurp that of treaty negotiations, legislation or government policy.

[174] The court went on to say:

> Mr. Lowes suggests that the question in each case is whether the "practice, custom or tradition" can be accurately described without reference to a specific species -- where "to omit the reference to the species is to mis-describe the practice, custom or tradition that is integral to the aboriginal culture or way of life."

[175] After noting the position of the *Lax Kw'alaams* that the relevant "practice" should be "fishing", the court said if such a right had been claimed, it would have been too general, and cited from *Sappier* at para. 24: "it is critical that the court identify a practice that helps to define the way of life or distinctiveness of the particular aboriginal community".

[176] The court went on to say, at para. 40:

> In summary, I agree with Mr. Lowes that the trial judge may have mis-spoken when she said at para. 489 that an Aboriginal right "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." If by this she meant that as a matter of law, species can never be a relevant factor in the delineation or characterization of an Aboriginal right protected under s. 35, I would again note *Gladstone*, where the right was defined in terms of herring spawn on kelp. Again, it is a question of the specific practice in each case.

[177] The BC Seafood Alliance, which has been active at both appeals, takes the position that their argument that species specificity is relevant to the characterization of the right itself was acknowledged as "comprehensible" by the Court of Appeal (see the Court of Appeal's 2011 decision at para. 59, also adopted in the portion of the 2013 decision set out above), but was deferred to this stage of the trial. If this court refuses to consider their arguments, the BC Seafood Alliance is left without a forum in which to make them.

[178] In the first Court of Appeal decision in this case, the court said at para. 56 that the content of the rights in issue could not be precisely articulated, and the plaintiffs were entitled to plead their claim broadly. It became clear in the Supreme Court of Canada's reasons in *Lax Kw'alaams* -- subsequent to the first Court of Appeal decision in this case -- that the Supreme Court of Canada insisted upon precision in the claim.

[179] The Supreme Court of Canada, in *Lax Kw'alaams* at para. 57, commented that the situation (converting an ancestral practice to a general right to a commercial fishery) might be different if the defining feature of a culture was "to catch whatever fish they could and trade whatever fish they caught": then the "species-specific" debate might not be confined to species that were not yet present in those waters. The plaintiffs rely on this comment. The intervenors say that while there was a finding that trade in fisheries resources was integral to the plaintiffs' culture, there was no finding that everything that was caught was traded. As well, the issue of whether different species might move into those waters as the oceans warm is not the same issue as whether a species, though always present, like geoduck, was not viable as a commercial fishery without modern technology.

[180] Madam Justice Garson noted that the plaintiffs did not specify which species they claimed a right to harvest (para. 367), and that Canada sought a finding that, if trade were found to be culturally integral, it occurred in respect of a limited number of species (para. 375). She said, at para. 383:

> 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 seasonable 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.

[181] There is no mention of trade in this paragraph. It was not suggested that the word "harvest" implies trade. Nevertheless, the right to fish *and sell fish* was declared to apply to "any species".

[182] The intervenors note that the Court of Appeal said at para. 34 of the reconsideration decision that *continuity* still had to be resolved by negotiation or further proceedings; thus Garson J. did not have to be more specific in respect of individual species at that stage of the proceedings.

[183] The Court of Appeal also noted (in its 2011 reasons at para. 59, reproduced in the reconsideration reasons within para. 35) that while trade took place in a variety of species, and there was a record to support trade in some species such as salmon, the record was silent as to many species adverted to in the particulars. Thus, they said, issues of species specificity would be at the forefront in the next stage of the trial.

[184] The BC Seafood Alliance says the modern fishery is all about species specificity. Continuity must be examined from the contemporary perspective as well as the aboriginal perspective, and that cannot be done without looking at species specificity.

[185] They say it is necessary to look at the claimed contemporary right to see if its core elements are rooted in ancestral practice. To say the plaintiffs have a right to fish and sell all species of fish, and that the entire regulatory regime is a *prima facie* infringement on this right assists no one in coming to terms with what was envisioned in a practical sense. The intervenors say, at the very least, the court must apply the geoduck analysis used by the Court of Appeal to all species.

[186] The intervenors say species specificity is important because the privileged position accorded to aboriginal rights holders does not go beyond matters that are significant to their culture. The claim must be specific to rationalize a departure from universal rights. The *Constitution Act, 1982*, s. 35, is a shield: it allows for an acquittal in regulatory prosecutions, or a constitutional exemption in a civil case such as this one. It is not a sword: that is, it is not an independent source of a claim to a right.

[187] The intervenors say whatever the right is found to be, it must be scaled back to include only species for which continuity can be demonstrated. The SFA adopts the submissions of the PPFA to the effect that there is an aspect of proportionality to this exercise when determining the extent of the commercial right. That is, there would be a heavy onus on the government in respect of species that were of defining importance to the aboriginal culture and practice, but not so much for species of less or no importance to the ancestral practice, such as, in the intervenors' contention, sablefish and prawns.

[188] The intervenors say Canada has improperly agreed to bear the burden of proof on the first two issues they listed, that is *Lax Kw'alaams* at steps three and four. These are issues for the plaintiffs to prove, according to *Gladstone* and *Lax Kw'alaams*. This unfortunate situation has arisen because of the broad declarations and the adoption by the Court of Appeal of those declarations by dismissing the appeal without qualifying them to include the steps remaining under *Lax Kw'alaams*. Thus the onus has been reversed: instead of the plaintiffs precisely characterizing their claim and the alleged infringements, Canada has been left to flail about and try to guess what the infringements are in each fishery, what it has done wrong, and what it should be doing to justify their actions.

[189] As for reconciliation, the intervenors say this court cannot solve everyone's problems or set up a fishery. All this court can do is apply the template already provided by the Supreme Court of Canada and determine if the plaintiffs have proven their case or not. The court should not decide on the substance of the Negotiations or choose between the plaintiffs' plans and Canada's, such as they are. This process has involved the plaintiffs simply picking a number for their share and demanding that Canada justify why they cannot have it. The intervenors say this is not how a right should be claimed, defined or delineated.

[190] Mr. Lowes submits that this court need not accept the declarations as final or determinative because the final result of the action will be a constitutional exemption for the plaintiffs or a dismissal of their case. He says this is especially so in this case where the original trial judge is gone and there has been a number of appeals, lengthy Negotiations, and significant changes in circumstances.

[191] The SFA makes points specific to their fishery, as does the PPFA, each saying the plaintiffs have not and could never have proven an ancestral trade in either. The commercial sablefish fishery takes place far beyond the nine-mile limit near the Continental Shelf, and the commercial prawn fishery is a deep-water fishery requiring technology to haul the traps. The intervenors say the plaintiffs have not claimed that they traded any species in particular, and therefore should not be able to take advantage

of a vague “any species” declaration to assert a right to these technologically advanced commercial fisheries.

[192] As well, there are species that might one day come into the territory that could be caught by the modern equivalent of traditional means and might be included (as per the Supreme Court of Canada in *Lax Kw’alaams* at para. 57), but prawns and sablefish were always there and were not catchable at all or on a trading basis as part of an ancestral practice; it is only the development of a modern industrialized, technical fishery that has created a commercial fishery in those species. There was scant, if any, evidence before Garson J. that prawns or sablefish were caught at all, and absolutely no evidence that they were traded. This is not indicative of an integral cultural practice that could be translated into a modern commercial right.

[193] The intervenors say the plaintiffs should have the burden of proving that trade in each species was part of their ancestral practice. The PPFA and the SFA each say there is no evidence of trade in their respective species, but they should not be put in the position of having to prove a negative. It is the plaintiffs’ burden to prove their claim.

[194] As well, the intervenors point out the lack of specificity as to infringement, both in the pleadings and in the judgment of Garson J. The intervenors say it was not regulation that kept the plaintiffs out of the fishery. It was economics and logistics. DFO was forced to regulate to control the huge fishery which already existed and had forced the plaintiffs out. In other words, the fishery is simply so industrialized now that there is no place for the plaintiffs. It has moved beyond them. According to the intervenors, there is no room for a viable commercial artisanal fishery, and the plaintiffs know that. This is indicated by the plaintiffs’ move to larger vessels during the years of the Negotiations and their wish to fish outside the CDA.

OVERVIEW OF PLAINTIFFS’ POSITION

[195] I will now set out the plaintiffs’ position on the relationship of the previous orders to the Court of Appeal’s reasons, and what can and should be done by this court at this stage of the trial.

[196] In response to some of the points made by Canada and the intervenors relating to the task of this court, the plaintiffs acknowledge the difficulty created by the Court of Appeal’s reasons in this case in particular.

[197] Notwithstanding the reasons, the plaintiffs say the declaration of the right is obviously final. Since *Lax Kw’alaams* assumes a four-step process before the right is delineated, those four steps must be taken to be completed.

[198] The plaintiffs acknowledge the Court of Appeal’s reasons are at odds with their interpretation of the order. However, they say that this stage of the trial is only concerned with justification, according to Garson J.’s order at para. 7 as confirmed by the Court of Appeal. The plaintiffs say Garson J. delineated the right conclusively and made extensive and complete findings on continuity, despite the Court of Appeal’s statements that continuity still has to be dealt with. If the order is interpreted in light of

the Court of Appeal's reasons in such a way as to give Canada a chance to open up the delineation of the right again, and also require continuity to be proven in respect of specific species, the plaintiffs say they are severely prejudiced because they could not have appealed the order as it stood. They refer to *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, at para. 75 and following, where the court discussed the concept of *functus officio* in the context of the necessity for finality of judgments, which provides a stable basis from which to appeal.

[199] The plaintiffs say the problem has been exacerbated because language relating to the process of articulating a right has been used carelessly throughout the cases. They say that in respect of Garson J.'s reasons in this case and Newbury J.A.'s reasons in *Cheslatta*, referred to above, the words "the *exercise* of the right" must be read into the discussions in all of the decisions dealing with the ongoing need to define or further limit or delineate the right. In other words, the right as declared is final. The only limitations that can be forthcoming are on the *exercise* of the right, the phrase used in *Nikal* and *Agawa*, and those limitations are part of the infringement/justification analysis, not part of the delineation of the right.

[200] The plaintiffs say the order stands as it is; it was not limited in any way and if the Court of Appeal in its order in the reconsideration had purported to "unwind" the right declared by Garson J., the plaintiffs would have appealed such limitations. However, the order did not do that and as it stands, the plaintiffs could not appeal it. They fought for a broad declaration without species specificity and they received an even broader declaration on which they are entitled to rely. The parties must be bound by the orders and not the reasons. The reference in the Court of Appeal's reasons to the necessity to complete *Lax Kw'alaams*' steps 3 and 4 cannot be reconciled with the terms of its order and must simply be disregarded. The Court of Appeal in the reconsideration said they were disposing of the appeal as they had done two years earlier. Thus they could not have intended the right itself to be reopened.

[201] The plaintiffs argue strenuously that their declared right stands; it cannot be altered, either in scope or as to species. The plaintiffs say geoduck was excluded by the Court of Appeal on the basis of fishing method, not because they re-examined the historical availability of geoduck as a species. No further species can be knocked off the list.

[202] They say Canada did not plead a redefinition of the right. *Lax Kw'alaams* made it clear that parties are bound by their prayers for relief. Canada cannot now seek a rewording of the declaration. No further facts can be found with respect to the right.

[203] The plaintiffs say that in any event, the *Lax Kw'alaams* steps are watertight compartments and are to be considered sequentially; the analysis does not go back and forth and get redone two or three times as the intervenors suggest. This court would have had to have heard all of the evidence to revisit every finding related to the four steps of *Lax Kw'alaams*. Despite not having the benefit of that decision of the Supreme Court of Canada, Garson J. made her analysis in accordance with that process, at least sufficiently that her order was confirmed by the Court of Appeal. The right has been declared; a

prima facie infringement has been found, and it is based on the entire policy and regulatory scheme of the fishery.

[204] In summary, the plaintiffs say this court should not delve further into delineation and clarification: they have an aboriginal right to fish and sell all species of fish into the commercial marketplace. They are prevented from doing so in accordance with their preferred means by the entire DFO management scheme, which is unreasonable and creates undue hardship for them. Madam Justice Garson made all the necessary findings and reached final conclusions on all the four steps of delineating a right as required by *Lax Kw'alaams*.

[205] According to the order of Garson J., confirmed by the Court of Appeal, the only issue before this court and upon which evidence can be adduced is justification, and the onus is on Canada to justify the purported application of their entire fisheries management scheme to the plaintiffs' right, which is appropriately accommodated, at least for the present, in their fishing plans.

[206] I will now turn to the plaintiffs' submissions on justification.

[207] The plaintiffs emphasize that this case is about justification, and only justification. They say that at the heart of this case is their right to participate meaningfully in the significant commercial fisheries that take place in the waters at their doorstep, and their ability to exercise their aboriginal right to fish all species of fish and sell them commercially.

[208] The plaintiffs take the declarations they obtained after many years of hard-fought litigation as they stand and without the potential for further qualification: they have an aboriginal right to fish and sell any species of fish into the commercial marketplace (but not at an industrial level); and that right is infringed by the entire legislative and policy regime of DFO's fisheries management. The only issue with which this court should concern itself is whether and to what extent Canada can justify that infringement.

[209] To be able to justify the infringement, Canada must show:

(1) that its infringing actions or conduct were done in pursuit of a valid legislative objective;

(2) that its actions are in keeping with the fiduciary duty Canada owes the plaintiffs;

(3) that it has recognized and acted in accordance with the priority of the right;

(4) that the right has been minimally impaired; and

(5) that meaningful consultations in a good faith effort to accommodate the right have taken place.

[210] The plaintiffs focus on priority and minimal impairment, which they say are demonstrated in a practical fashion by Canada's failure to provide adequate allocations and means of fishing, and in its rejection of the plaintiffs' fishing proposals. They say Canada's whole approach has always been and

still is designed to avoid disruption to existing users of the fishery. With the declaration of the plaintiffs' right, that approach is no longer constitutional.

[211] The plaintiffs say Garson J. concluded that they have been unable to maintain the type of fishery they once did -- a community-based fishery that was smaller in scale than the regular commercial fisheries, and was characterized by wide participation using vessels of varying sizes, including commercial trollers, none of which compare to the large vessels now found in many commercial fisheries. They say Garson J. dealt with continuity, both quantitatively (the quantities of fish caught and traded were "substantial") and qualitatively (the fishery is "not industrial").

[212] The plaintiffs argue that all of the allocations have been restricted by the application of three policies: the Coastwide Framework, which sets notional allocations for all First Nations on the west coast; the Salmon Allocation Policy, which accords priority to the recreational fishery for chinook and coho; and the "Mitigation Policy" which requires any licences provided to the plaintiffs through PICFI or ATP to be obtained through retirement or buy-out from an existing source in the fishery. They say all of these policies give priority to other interests in the fishery ahead of the plaintiffs.

[213] The Coastwide Framework in particular was the subject of a claim of privilege by Canada. The plaintiffs take the position that, having claimed privilege over it, Canada cannot use it as justification for any decision. The plaintiffs say there is no evidence from the Minister or her office as to how she applied that policy or indeed any policy. The only witnesses called were from the regional and local offices of DFO. The plaintiffs submit such evidence from the Minister, who is the decision maker, is required by *Gladstone*. In that case, lack of an evidentiary record on how or why selection criteria were applied necessitated returning the issue of justification to the trial court.

[214] The plaintiffs say the only evidence before the court shows that the principles of priority and minimal impairment were not factored into the allocation process or the decisions made since Garson J.'s decision. In fact, there is no evidence that DFO managers properly understood the concepts of priority or that they appropriately applied them.

[215] The plaintiffs also resist the use of PICFI access to satisfy and accommodate their right. They say the use of mitigated licences obtained when other fishers are willing to sell them is not respectful of their priority. As well, only two of the plaintiffs control their PICFI aggregates. The remaining three do not.

[216] The plaintiffs say DFO has never explained what a total package for a multi-species right-based fishery would look like from their point of view.

[217] The plaintiffs, in their submissions, describe their past commercial fishery as "flourishing" and "vibrant". Their expectation was that the declaration of the right would "reinvigorate their coastal communities." Despite six years of negotiation, all they have is the LTO, which provides extremely limited opportunities which "fall well short of providing a reasonable, and secure, opportunity for the Plaintiffs to allow for wide community participation".

[218] The plaintiffs say Canada's LTO has provided them with very limited licence- based allocations, forcing them to choose between using the few licences offered to them to be split up in a multi-small-boat fishery, or to be used one licence per boat for commercial trollers. This means that the use of commercial trollers is far less than was allowed in the salmon demonstration fisheries, which they showed they could run well and responsibly.

[219] The plaintiffs point out that the LTO is all Canada has put before the court as an attempt to accommodate the exercise of the right. It will not adjust its policies, except to allow splitting the allocation associated with one licence to be harvested by multiple vessels. Other than that, there is rigid adherence to the scheme that Garson J. found infringed the right.

[220] The plaintiffs acknowledge that they do not have exclusive access to the fisheries, and not all members will be able to participate to the full extent they would like, but they say Canada's offer is not a reasonable accommodation of the exercise of their right.

[221] The plaintiffs say that whereas other economic opportunity fisheries like those run by the Somass and Musqueam give their members hundreds of fish per person per year, the allocations to the plaintiffs under their right-based fishery provide only a few fish, sometimes as little as two, per member.

[222] In summary, the plaintiffs say neither priority of their right nor minimal impairment of the right has been recognized.

[223] Turning to the issue of consultation, Garson J. directed that the plaintiffs put forward proposals for Canada's consideration, and gave the parties two years to consult and negotiate as to how the right could be accommodated and exercised within Canada's management regime. The plaintiffs note that while Canada would have to consult in any event, Garson J. made it the subject of a specific declaration.

[224] However, according to the plaintiffs, this process was not successful because Canada was operating under a very limited mandate from the minister which prevented true accommodation or reconciliation. The engagement was not meaningful. Thus the plaintiffs say Canada has not consulted or negotiated with them pursuant to the order. Nor has Canada put forward a position; they simply concentrated on trying to get the declaration overturned on appeal.

[225] Madam Justice Garson suggested in her judgment that the plaintiffs should present plans to Canada, and if there was no agreement, Canada would have to justify not accepting the plan. Thus, the plaintiffs say that, faced with Canada's lack of collaborative engagement, they developed a collection of comprehensive fish plans in 2014. Canada has an obligation to consider their plans as part of the justification process but has not done so. There has been no meaningful discussion or consultation on the plans. It is the plaintiffs' position that these plans accommodate their right, at least for the present, and are also reconcilable with Canada's legislative objectives and societal interest. They provide for "a community fishery in which allocation and fishing opportunities are shared within

and amongst the plaintiff communities and spread over a variety of small commercial type trollers and ‘mosquito’ boats”.

[226] The plaintiffs say they are entitled to a constitutional exemption from the entire fisheries regime because Canada has failed to justify it. In the alternative, these plans should be implemented, with ongoing supervisory jurisdiction being retained by the court.

[227] The plaintiffs state that they have not sought damages in this action; they seek a secure opportunity to fish commercially, as is their culture and their right. This is not about money; it is about fishing, which, given their isolation and reduced employment base, is crucial to them on many levels. Appropriate allocations and access, set after taking into account their priority, are essential parts of the right.

[228] They say their ancestral practice of regular trade in substantial quantities of a diversity of species translates to a new modern right to sell all species of fish into the commercial marketplace. The right will always have to be reconciled with other rights; their plans do this by providing for appropriate allocations through shares of each fishery which will make no one wealthy but will result in a reinvigoration of their communities.

DISCUSSION AND MOVING FORWARD

[229] In order to move forward and begin a consideration of the justification of the fisheries regime in respect of each species, which was ostensibly the only task to be performed by this court under the original 2009 order, the following issues must be addressed:

(1) how the declared right is to be applied, qualified, redefined, or interpreted, depending on each party’s position on the role of this court;

(2) how the issue of species specificity is to be treated;

(3) how the concept of infringements should be treated, in light of the broad declaration declaring the entire fisheries scheme to be a *prima facie* infringement of the declared right; and

(4) how to apply the justification analysis generally and to each species.

What Can or Should be Done with the Right as Declared?

[230] I have gone into the underlying issues in respect of the problems created by the earlier decisions in some detail in order to give context to the difficulties facing the parties as they reacted to the various court pronouncements, and to highlight the complex task facing this court, taking on a half-finished trial that has twice been the subject of consideration by the Court of Appeal. As mentioned, these foundational issues occupied at least half of the lengthy submissions and were an underlying theme in much of the evidence.

[231] The issues arising from the confusion created by the reconsideration decision in the Court of Appeal have become highlighted and refined as this long process has wended its way through the courts and the results of the practical application of the Supreme Court of Canada's decision in *Lax Kw'alaams* have become apparent.

[232] The first issue is what can or should be done with the right as declared in the 2009 order.

[233] The plaintiffs say the right is reflected in the order of the court and must stand as it is. It cannot be reduced, diminished, or "unwound" as counsel put it. Canada says it is subject to significant interpretation and should be reworded, qualified, and redelineated. The intervenors say the declaration is premature and this court should not consider itself bound by it; it is subject to the potential for substantial revision, including the removal of certain species from "any species".

[234] The arguments thus separate into two issues:

(1) can or should the right as presently declared be redefined, changed, or interpreted?

(2) can the right be "unwound" in respect of its "any species" nature?

[235] I will deal with these in turn.

[236] The first problem arises because of the procedural history to this stage of trial. The right was made the subject of a declaration, and the Court of Appeal dismissed the appeal and affirmed (with slight variations) Garson J.'s declarations. Nonetheless the Court of Appeal referred to the "case as it stands having something of an interlocutory character", and said the process was incomplete because the claimed right and the modern right -- obvious starting points in this analysis -- still had to be precisely defined and delineated.

[237] As the plaintiffs noted during their submissions, language has been used somewhat imprecisely in many of the decisions. Care has not always been taken with phrases such as "the claimed right", "the scope of the right", "the exercise of the right", "the defined right". "Declare", "delineate", and "define" have all been used to describe a process of articulating a right.

[238] In the quote from *Cheslatta*, set out above, Madam Justice Newbury appears to draw a distinction between a declared right, which she seemed to consider could be of a provisional nature, and a defined right:

> [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 added]

[239] This is a reflection of the statement of the Supreme Court in *Sparrow*, where the court said at 1109, in reference to the words from s. 35(1): "Rights that are recognized and affirmed are not

absolute.”

[240] Chief Justice Lamer in *Gladstone* at para. 71 also commented on the relationship between the definition of the right and justifiable limits on the right:

> …the purposes underlying the rights must inform not only the definition of the rights but also the identification of those limits on the rights which are justifiable….

[241] The parties disagree on whether *Lax Kw’alaams*’ step 4 should be taken to be completed because a right has been declared. The intervenors and Canada say that step has either not been done, or if it has, it should be redone. The plaintiffs say it has been done and cannot be re-examined.

[242] It is not entirely clear what stage of the analysis the Supreme Court of Canada was referring to in *Lax Kw’alaams*’ step 4: whether the fourth step is a truncated explanation of justification, or whether the court was importing factors from the *Gladstone* justification analysis into a preliminary declaration of the right itself before an independent consideration of justification is embarked upon. The latter type of analysis has obviously not occurred in this case – that is, no consideration of the *Gladstone* factors went into the right as presently declared.

[243] The circumstances in *Lax Kw’alaams* did not require a discussion of justification; the court there was concerned with precision of the claimed right and the importance of continuity. The court said at para. 66 that a consideration of justification is only required once the s. 35(1) right has been “established” (yet another term for a step in the process).

[244] However, step 4 seems to relate directly to justification. The directions in that step are clear: the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups should be considered when delineating the right, aiming toward reconciliation. To say that that step must be completed before the justification analysis is begun is circular and serves no purpose. Crucial considerations for justification are those set out in step 4, although aspects of them are described in more detail in *Gladstone*. In practical terms, before the right reaches its final form, the factors in step 4 must be taken into account in the justification analysis.

[245] In any event, despite the 2009 declarations, the final form of the right, which must incorporate justified infringements, will look very different from the initial declaration. In my view, that is what *Lax Kw’alaams*’ step 4 was addressing.

[246] I am proceeding on the basis that step 4 refers to the justification exercise by which the right and infringements on it are subjected to the justification analysis, and not to a step that has already been completed in this case as a result of the declaration of the right. I stress that I have been presented with an unusual set of circumstances in this case and I speak for this case only, although general clarification and precision in the use of such terms is desirable.

[247] Using the language of *Lax Kw'alaams*' step 4, then, and for the purposes of these reasons, I am taking the final form of the right to be the "delineated right". One might also use the term "defined right", following *Cheslatta*. For the purposes of my analysis in this case, a delineated right incorporates the concept of justified infringements, and thus is not the same as a declared right or an established right, which has not yet undergone the justification analysis.

[248] In my view, all the parts of this analysis are interconnected, as courts have said in the past. The scope of the claimed right, any conclusion respecting a declared right, infringements on the right and the justification, if any, of those infringements, are all part of a whole, with the end result of accommodating and protecting the right while reaching reconciliation with all sectors of society. The final result is the delineated right which is then exercised by the rights holder.

[249] It seems to be clear from all the authorities that a right is not absolute, even when initially declared, and in its final delineated form will include justifiable limitations. However, that is a different issue from clarifying with precision, in a civil proceeding, the *claimed* right before any analysis begins. In my respectful view, the Court of Appeal did not differentiate between these two concepts, assuming that at some future time, the right should be precisely claimed and continuity should be dealt with, but at the same time accepting the spectrum-based pleadings and confirming the broad declaration of the right before either of those steps was undertaken.

[250] I agree with the intervenors that if a declaration is to be taken to be final and immutable, it should not have been made mid-trial. As the Court of Appeal said, the proceeding had "something of an interlocutory character" about it. The difficulty is that the declaration was substantive, and was embodied in an order that was confirmed on appeal. Therefore the plaintiffs were faced with the problem they have articulated: they could not have appealed the order as it stood, but Canada and the intervenors now ask this court change its substance.

[251] This court is bound by the Court of Appeal and by the fact that the Supreme Court of Canada did not grant leave on Canada's second application. The right must stand as it has been declared, and cannot be restated in the manner suggested by Canada. The justification exercise starts from the right as it is presently declared.

[252] The anomalies left from the previous decisions tie this court's hands to some extent. That said, it ultimately serves no purpose to circumscribe the present process in a way that contravenes the directions of the Supreme Court of Canada in *Lax Kw'alaams.* According to the declarations, this stage of the trial is about justification. This court must start the justification analysis on the basis of the right as it is presently declared. In its present form, however, the declaration provides no assistance for the next stage of the analysis. To fail to interpret the declared right before beginning a justification analysis would render the process unmanageable and without meaning.

[253] The comments already set out above from the dissent by McLachlin J., as she then was, in *Marshall #1* in 1999 are apt because she outlines the problems facing this court, summarized in one line from the passage:

> How can one meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope?

[254] Mr. Justice Binnie identified the same problems when he wrote *Lax Kw'alaams* many years later, in which he stated that there is a burden on a plaintiff making a civil claim to identify precisely the claim being made. He said the plaintiffs' lesser claim (to sustain their communities and generate wealth and maintain and develop their economy), raised in oral argument, "bristles with difficulty" (para. 66):

> What does it mean? How would governments responsible for its implementation go about implementing it? Quite apart from the pleadings and other more substantive objections, no guidance was provided as to what standard of prosperity the Lax Kw'alaams sought or the basis on which such a standard would be quantified. The claimed "right" to enough fish to guarantee a "prosperous economy" has very far-reaching implication for fisheries management. A *Sparrow* justification is only required once a s. 35(1) right has been established. The economic implications of even a "lesser" commercial fishery could be significant, and the Crown is entitled to proper notice of what declaration it was supposed to argue about and to test the evidence directed to that issue.

[255] In my view, these remarks are also relevant, perhaps even more so, to a right "declared" expressed in broad terms, as is the case here.

[256] To summarize, this court cannot reword Garson J.'s declaration, but the right she declared must be interpreted by reference to the pleadings and her reasons in order to give structure to the justification analysis. Madam Justice Garson noted that the plaintiffs called no evidence before her on the scale of the right they sought. Although she declared the right, she said she was leaving the scale and scope of the right to be determined at a future time (para. 487). In my view, that does not accord with *Lax Kw'alaams,* as the Crown is entitled to know exactly what is claimed before the right is declared. In any event, the justification analysis cannot proceed without an understanding of the scope and scale of the right, so the time for that determination is now.

[257] As a first step towards interpreting the right, I will next deal with species specificity. The issue of whether the declared right should continue to apply to "any species" except geoduck is central to the plaintiffs' position, as well as to the intervenors' arguments, and underlies the extent to which this court can engage in interpreting the right.

Continuity as it Relates to Species Specificity

[258] The Supreme Court of Canada in *Lax Kw'alaams* referred to the concept of continuity as "a springboard", saying at para. 38:

> The principal issue in the present action is whether its ancestral practices, customs and traditions provide a proper legal springboard to the right to harvest and sell all varieties of fish in a modern commercial fishery – a right that would be protected and privileged by s. 35(1) of the *Constitution Act, 1982*.

[259] The parties have disagreed on the basic concept of claiming a commercial right since this case began before Garson J., that is, whether it is sufficient to claim a modern multi-species commercial right without specifying the species that are alleged to have been the basis of the pre-contact practice, tradition or custom integral to the distinctive pre-contact aboriginal society and which have a reasonable degree of continuity with that claimed modern right. Madam Justice Garson held that it

was. The Court of Appeal substantially qualified that approach in their reasons, including stating that an analysis of species specific continuity still had to be done, but nevertheless upheld her “any species” order.

[260] This issue became the subject of an application for particulars which the parties (but not the intervenors) were able to resolve between themselves. The plaintiffs asked if Canada would argue that further delineation of the right would result in the exclusion of more species. Canada said it would not argue that; but it might argue that, if there is a lack of historical evidence relevant to continuity for a particular species, or where the record is silent in that regard, no further allocation of a particular species might be justified.

[261] The plaintiffs also wanted to know whether Canada would take the position that, in submitting that the right had to be further delineated, Canada was saying that the declared right changes its nature, or whether Canada was saying that the right would remain intact, subject to justification. Such subtleties were left to final argument. I have decided, as stated above, that the right remains intact as declared, but must be interpreted in order to allow a meaningful justification analysis to take place.

[262] As already indicated, the parties’ respective viewpoints differ substantially on the scope of the right to be interpreted from Garson J.’s reasons. I will deal with this in more detail in the next portion of these reasons. Before turning to that, I will consider what this court can do with the issues of species specificity and continuity.

[263] Species specificity is important for many reasons, not least the wide variation in value of the different fisheries. It is interesting to note that, while chinook and coho salmon are important species to the plaintiffs, and a large part of the evidence in this trial has been concerned with what would constitute a viable salmon fishery, the commercial salmon fishery on the WCVI is not particularly lucrative. Other species are far more profitable.

[264] A very general overview of landed values can be obtained from a publicly available DFO document entered as an exhibit, containing a description of each Pacific Commercial Fishery. The average landed values for 2012 were:

Prawn	$130,000
Crab	$148,000
Halibut	$258,000
Sablefish	$600,000
Groundfish Trawl	$927,000

[265] On the other hand, values for salmon were much less:

Salmon Gillnet	$11,250
Salmon Seine	$44,085 (not commonly used by the plaintiffs)
Salmon Troll	$31,837

[266] In addition to the different values of each fishery, each commercially viable species requires completely different research, science, management, monitoring standards, and methods of fishing, and this is recognized by the plaintiffs as well as by Canada.

[267] Madam Justice Garson noted at para. 367 that the plaintiffs did not specify the species they claimed, other than to claim “all species of fisheries resources in their claimed territories”, that is a general multi-species fishery. The plaintiffs resisted having to specify species in their claimed right, which meant they did not have to prove continuity with respect to any particular species. At trial, Canada argued for species specificity in the right. Madam Justice Garson declined to deal with species in articulating the declared right, and the Court of Appeal agreed it was not necessary to deal with specific species at the stage of the proceedings before her because those issues would be dealt with at the second stage of the trial.

[268] However, the Court of Appeal held that geoduck should not be included in the right as the ancestors of the plaintiffs simply could not have traded in it. I do not agree with the plaintiffs that geoduck was eliminated on the basis of fishing technique -- it was eliminated because there was no evidence to show that it could have been part of an ancestral practice that would translate into a modern right to a commercial fishery, and, given the nature of the fishery, trade in it could not possibly be inferred. Thus, despite their reasons, the Court of Appeal appeared to enter into a species-specific continuity analysis with respect to geoduck, based on evidence that had been called before Garson J.

[269] The intervenors representing the valuable prawn and sablefish fisheries argue that the plaintiffs cannot show an ancestral practice of trading in either of those species. Thus continuity from an ancestral practice into a modern right cannot be demonstrated and those fisheries should not be included in the right - they should be eliminated from the “any species” right as was geoduck.

[270] Canada leaves the intervenors to argue that particular species should be removed from the list of “any species”, but does not foreclose ever taking that approach for a particular species in the future. As noted earlier, Canada takes the position that, notwithstanding the order, the issue of continuity should still be relevant to the examination of the qualitative and quantitative limits on the plaintiffs’ rights. Canada says those issues were left by Garson J. and the Court of Appeal for this court, and require an inquiry into Garson J.’s findings regarding the plaintiffs’ pre-contact practices, and the evidence underlying those findings.

[271] I have already mentioned that, as I understand Canada’s position, it is that justifiable limits on the plaintiffs’ rights to harvest and sell particular species, while still part of the “any species” right, are strengthened if there is no evidence that the plaintiffs historically caught and/or traded in those species at all, or if they did catch that species, the amounts were very small.

[272] The plaintiffs say the declared right is based on an ancestral practice to fish for any species of fish and to sell that fish, which translates into the same modern right. They say continuity was dealt with by Garson J. and cannot be reopened with respect to individual species, despite the reasons of the Court of Appeal. While there are various considerations in respect of each species that are relevant

to justification, the right pertains to any species and cannot be downgraded or undermined by removing particular species from the right.

[273] Madam Justice Garson did indeed discuss the concept of continuity, but the ancestral practice she described was vague and undefined, without reference to species; she therefore considered that any fishing practice that carried forward into modern times must be continuous, without regard to species, and she found that the plaintiffs did continue to participate meaningfully in the commercial fishery until they were squeezed out.

[274] She stated at para. 441:

> 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.

[275] The intervenors noted in their argument that Garson J. made some findings relating to trade (see paras. 282, 439, and 440 of her judgment), but she did not make any findings respecting trade in any particular species caught, nor did she make findings about species generally in respect of trade, nor is there any discussion of how the extent of fishing related to the extent of trade. Nevertheless, the right as declared was to fish for *any species of fish and to sell* that fish.

[276] As mentioned by the intervenors in their submissions, in deciding that species specificity need not be part of the right, Garson J. relied on a statement from the trial decision of *Lax Kw'alaams* which was subsequently discounted and qualified by the Court of Appeal (see above in the section dealing with the position of the intervenors). As well, she relied, in support of species generality, on *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, where the court decided that the relevant right in that case was not to hunt for moose, but to hunt for food. However, that was not a commercial case. The right being considered in *Powley* was that connected with subsistence hunting. What *Gladstone* made clear, and what *Lax Kw'alaams* emphasized, is that the assertion of a claim to a *commercial* right colours the whole analysis.

[277] Despite the remarks of the Court of Appeal in *Lax Kw'alaams* in 2009*,* the Court of Appeal in *Ahousaht*, on the face of both its orders, agreed with Garson J. that species specificity was not part of the right itself. That should be the end of the analysis for this court, bound as it is by the Court of Appeal.

[278] However, the Court of Appeal appeared to recognize in its reconsideration decision that substantial parts of the process of delineation of a commercial right under *Lax Kw'alaams*, including the analysis of continuity, remained to be done. The court, at para. 35, appears to tie in issues related to species to a "more specific delineation of any modern right". The court also said at para. 64 of the original decision, adopted in para. 35 of the reconsideration, that species specificity "will be very much front and center when what I perceive as the core issues raised by this litigation come to be addressed at the accommodation and justification stage of the process."

[279] Neither Garson J.'s nor the Court of Appeal's reasons supports an inference of the type referred to by the Supreme Court of Canada in *Lax Kw'alaams*: "that a defining feature [of the culture] was to catch whatever fish they could and trade whatever fish they caught". It is clear from the Court of Appeal's reasons that they considered continuity for specific species to be a core issue which was still outstanding, and they noted that the record was silent as to ancestral trade for many species.

[280] I do not accept the "water tight compartment" view of *Lax Kw'alaams*' four steps put forward by the plaintiffs. As I have said, the entire exercise is interconnected. The problem here arises because the "any species" right was declared at an early stage, perhaps even prematurely, thus giving rise to a presumption that the process for delineation, down to and including at least *Lax Kw'alaams*' step 3 (consideration of continuity), had been completed, when in fact the Court of Appeal recognized in its reasons that it had not.

[281] I also do not agree that the phrase "exercise of the right" should be imported into the case law as suggested by the plaintiffs. I agree with the point made by Mr. Lowes for the Seafood Alliance that *Lax Kw'alaams* makes it clear that the limits provided for in step 4 are limits on the right itself, not limits on the exercise of the right, although the former will obviously inform the latter.

[282] For the purposes of this court, however, Garson J. made her broad declaration respecting "any species". That declaration has been affirmed twice by the Court of Appeal. The plaintiffs have a valid point when they say they could not appeal the order they got. It was even wider than the claims set out in their pleadings. Despite the direction by the Court of Appeal in the reconsideration decision to consider continuity at this stage of the trial, the plaintiffs strongly resist being required at this late stage, to prove continuity species by species.

[283] Even more importantly, aside from the fact of the wording of the declaration itself, the terms of the order present a challenging stumbling block to the approach urged by the intervenors. The Court of Appeal not only confirmed Garson J.'s basic declarations, but also confirmed her order that the parties could return to court on the issue of justification only. Despite advising the intervenors that their submissions on continuity should be made before this court, the order stipulates that evidence can be called only on the issue of justification. This declaration has determined the course of this trial.

[284] It seems fairly clear on a conceptual level that *continuity* between the ancestral practice and the modern claimed right relates to the characterization or scope of the right, not to justification. Completing step 3 of *Lax Kw'alaams,* as directed by the Court of Appeal in its reasons, would require evidence on continuity.

[285] It is difficult to reconcile the Court of Appeal's direction to this court to consider continuity with its affirmation of Garson J.'s order that the parties can return to court and call evidence on the issue of justification only. It is not clear from the Court of Appeal's reasons how (or whether) they envisioned species specificity playing into the analysis of the right itself, or how the issue of continuity became reborn despite that limitation.

[286] Yet this was apparently never pointed out to the Court of Appeal in the reconsideration and it is clear from their reasons and their disposal of the appeal that the current stalemate never occurred to them. Nor was there any attempt to have the Court of Appeal revisit their order when these problems became apparent.

[287] In short, while the intervenors' arguments are not only comprehensible, as the Court of Appeal said, but compelling, they should have been raised by them or by Canada on the reconsideration, perhaps through requesting clarification of the Court of Appeal's order, or as an issue on the subsequent leave application. It is simply too late to start the entire analysis anew, as the intervenors would have it.

[288] Thus I am of the view that I am constrained by the Court of Appeal's decision, not only because the 2009 order has been confirmed in its original terms, but because this stage of the trial is to deal only with "a determination of whether the *prima facie* infringement of the proceeding plaintiffs' aboriginal rights is justified", and the parties are allowed to present evidence on justification only, not on continuity.

[289] As a result, I conclude that I must accept the plaintiffs' proposition that the present declaration as it stands is the starting point - that is, an analysis of continuity in respect of each individual species cannot result in subtraction of species from the "any species" declaration. It is too late to require the plaintiffs to deal with anything but the "any species" right as declared by Garson J.

[290] Since justification is the only issue before this court and no further evidence can be called on any issue except justification, the only sensible approach to deal with continuity is the one I take from Canada's submissions, and which had some reflection in the intervenors' position as well - the importance of the species to the plaintiffs' ancestral trade and practices as can be gleaned from Garson J.'s judgment, will enter into the accommodation/justification/reconciliation analysis.

[291] That approach, which requires a consideration of the importance of the commercial right to both the plaintiffs and to non-aboriginal fishers, takes into account the principles in *Gladstone* respecting priority, and the *Sparrow* principles of justification and reconciliation. As well, *Lax Kw'alaams*' four steps integrate findings on continuity into the process of delineating the right.

[292] There is also support for connecting the extent of the ancestral right directly to justifiable limits on the modern claim in McLachlin J.'s statement in *Van der Peet*, which was cited by Garson J. at para. 456 of her trial reasons:

> There is therefore no justification for extending [the right] beyond what is required to provide the people with reasonable substitutes for what it traditionally obtained from the resource.

[293] The plaintiffs, given the way this case has proceeded, cannot be required at this late date to prove continuity species by species. Their "any species" right remains unimpaired. However, the ancestral trading practices, if any, for specific species are still relevant in the consideration of whether infringements on that right are justified.

[294] If a better approach exists, it will have to await a court that is not bound by the orders of the Court of Appeal.

[295] Thus, the evidence from the intervenors will therefore be considered only in the context of justification.

[296] Turning briefly to the merits of the species specificity argument, if it were open to me to do so, it is simple enough to read Garson J.'s judgment to see if there is any evidence to support an ancestral trade in certain specific species, in particular prawn and sablefish. There is not. The Court of Appeal acknowledged this when they said, at para. 59 of the 2011 reasons, which was repeated in the reconsideration reasons at para. 35:

> The record in the case is supportive of the proposition that ancestral trade occurred in certain species such as salmon but is silent as to many other species adverted to in the particulars.

[297] There is only one reference to prawns in the judgment and that was in the context of a modern fishery. "Coalfish", another name for sablefish, is mentioned once in one journal.

[298] In starting from the position that the modern right, extrapolated from the ancestral practices, includes "any species", I wish to be clear that I am not making a finding that there is any evidence of continuity between ancestral trade and a modern claimed right to a commercial fishery for any particular species. I am simply moving forward within the constraints of the terms of the 2009 order. Nor am I accepting that a mid-trial declaration of an "any species" right is an acceptable approach for this type of claim. I am required, in the circumstances of this case, to work within the declarations that were confirmed by the Court of Appeal.

[299] Having determined that the right continues to include "any species", I turn now to the interpretation of the right from the reasons of Garson J.

THE EXTENT OF THE COMMERCIAL RIGHT: WHAT CAN BE INFERRED FROM MADAM JUSTICE GARSON'S JUDGMENT

[300] A major theme in both the litigation and at the Negotiations is the differing interpretations of what Garson J. might have had in mind as to the extent of the commercial right she declared. Some helpful guidance can be taken from various portions of her trial reasons and I will turn to that now.

[301] I have accepted that I cannot recharacterize the right declared by Garson J. or limit it insofar as "any species" goes, but I can interpret her reasons to determine what she meant in order to apply some precision to her broad declaration. This is fundamental to the practical problem of how to approach a justification analysis.

[302] In their written submissions, the plaintiffs say that they have a right to harvest any species of fish in their court-defined fishing territory except geoduck and to sell that fish into the commercial marketplace. The right is not on a large industrial scale, but it is a commercial right. There is no other limitation on the right, nor is one needed. The plaintiffs also say:

> The plaintiffs are entitled to exercise their Aboriginal right. The only hard limit is that it not be on an industrial scale… Beyond that hard limit, any material limitation on the exercise of the Aboriginal right must be justified (para. 1778).

[303] The plaintiffs now use phrases such as “carve out a secure place”, “restore their way of life based on the fishery”, “productive participation in the fishery”, “a vibrant thriving fishing community”, “earning a livelihood from commercial fishing”, “pushed out of the commercial fishery” , “flourishing commercial fishery of the past in which participants fished from vessels of various sizes”, “once-vibrant fishing communities”, “reinvigorate their coastal communities” through “participation in the commercial fishery”, “ a sustainable opportunity to exercise their right in a community based fishery in accordance with their right”, “develop fishing proposals to allow and facilitate the participation of their members in the different commercial fisheries in their fishing area”, “the Plaintiffs’ right to fish and sell fish in an economically sustainable way”, “restoring this fishing culture and economy”.

[304] The plaintiffs’ plans have changed over the years since 2009 as their concept of just how much they should be accorded grows, and they are clear that they intend to increase the fishery over the coming years. They appear to take the position that their fishery can grow to be very large, subject only to that outer limitation (not a large industrial fishery), although their continued response to DFO’s concern about adequate monitoring for a large commercial fishery is that their fisheries are actually quite small.

[305] The plaintiffs’ view puts them in the position of pushing as far as they can for as large a fishery as they can, (but short of their view of large industrial) until Canada pushes back and justifies its position. However, Canada submits that it does not know if it can push back or not without an understanding of the extent of the commercial right.

[306] Canada’s position, which the plaintiffs strongly resist on the basis that it unfairly “unwinds” their declared right, is that:

> The right should be further delineated as a community based artisanal fishery that harvests and sells fish to a low-level of commercial activity.

[307] While I have said I do not accept that I can restate the declared right (and I have also said I am using “delineate” only to refer to the final form of the right), this characterization of the right also underlies Canada’s approach to the interpretation of Garson J.’s reasons.

[308] Canada further clarifies that the right is to fish and sell fish, but does not, in its submission, include the right to manage the fishery, nor does the right provide a guarantee of economic viability. As I will discuss later, the plaintiffs do not submit that the right includes the right to manage the fishery, but they say they must be thoroughly consulted on management decisions that affect their right, and that management decisions or management regimes that affect their right must be justified.

[309] It is essential to interpret the right and to identify precisely its parameters. Otherwise the problems outlined by McLachlin J. in *Marshall #1* and by Binnie J. in *Lax Kw’alaams* become manifest, as they have done throughout the Negotiations and in the months of testimony and submissions that

have consumed this stage of the proceedings. I emphasize that this is a problem specific to this case, and it arises because the right was not precisely claimed by the end of the case, as required by *Lax Kw'alaams* (a decision not available to Garson J. when she made her declarations), and the declaration was made mid-trial in extremely broad terms, with limitations on its scope and scale left to a later stage. Further, evidence at this stage of the trial can only be called on the issue of justification.

[310] My interpretation of the declared right will not involve more findings of fact by this court. It will involve only an interpretation of Garson J.'s trial reasons. There are various indicators to consider when attempting to interpret Garson J.'s declaration (and that of the Court of Appeal) to determine what she had in mind as to extent of the right. When her reasons are considered as a whole, there are limitations inherent in her declaration that are clearly found in her reasons, in addition to the only phrase the plaintiffs say is relevant – that the right is not to a "large industrial fishery".

The Right as Claimed in the Pleadings

[311] The pleadings refer to "harvest 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 "to sell, trade or exchange" for a variety of alternative purposes: on a commercial scale, or to sustain their community, or for money or other goods.

[312] In the present case, as I have noted, the declaration eventually ordered ("to fish for any species of fish…and sell that fish") was not the subject of the pleadings, the prayer for relief, nor of any articulation prior to the trial judgment.

Descriptors of Rights from Cases Considered in the Judgment

[313] At para. 444, Garson J. said she was aware of the need to incorporate "contours or limitations" in the characterization analysis. She then went through a series of cases in which courts had attempted to come up with a precise characterization of the right and the purposes behind it. Various descriptive phrases have emerged from the cases:

> *Van der Peet:* the claim was determined to be for an aboriginal right to "exchange fish for money or other goods" (as opposed to selling fish commercially); phrases from the dissent - "a moderate livelihood", "traditional levels of sustenance"; right not established.
>
> *Gladstone:* "exchange of herring spawn-on-kelp for money or other goods" versus "a commercial basis": commercial basis accepted as the proper description of the claimed right. Phrases from dissent: "accumulate wealth beyond that required for a basis standard of living", "basic sustenance". Right established; returned to trial level on justification.
>
> *N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672: "right to exchange fish for money or other goods" vs. a right on a commercial scale; right not established.
>
> *Marshall #1*: trade for "'necessaries' … equivalent to a moderate livelihood"; no "accumulation of wealth"; "sustenance lifestyle". Treaty right to trade eels for necessaries resulted in an acquittal.
>
> *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700: "moderate livelihood" from trade of salmon, furs, root plants, berries, game; "necessaries of life", "not trade to accumulate wealth".

Sappier: charge of unlawful cutting of timber (not a commercial case)-right to harvest wood “for domestic uses” or “needs”.

[314] Madam Justice Garson rejected “to sustain the community” as a viable characterization as it incorporated the notion of minimum guarantee of a certain level of return, which she said would be contrary to the evidence and be a purpose-driven characterization, as well as contrary to the authorities. Thus there is no guarantee of economic return or viability within the right as declared.

[315] She rejected “exchange for money or other goods” because she interpreted that phrase to refer to “small-scale sale outside the commercial market” and this was not “an adequate modern analogue for the ancestral practices”. She found that the right allowed sale into the commercial marketplace.

[316] She found that there was no evidence that the trade of the NCN was for the “purpose of accumulating wealth”; thus it was not unrestricted. At para. 486, she said:

> 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.

[317] The phrase “’commercial’ as it is used in the authorities” appears to be a reference to the discussion of a commercial fishery in *N.T.C. Smokehouse,* to which Garson J. had just referred. Lamer C.J. in that case proceeded in the same manner as he had done in *Van der Peet* and *Gladstone*: by characterizing the claim with precision. The appellant, a food processor in Port Alberni, B.C., had sold 119,000 pounds of salmon caught by 80 members of Indian Bands under a food fish licence. Lamer C.J. said this was much closer to an “act of commerce”, on “a scale best characterized as commercial”, than the right as characterized in *Van der Peet* - a claim to the right to exchange fish for money or other goods. In the result, the court first considered whether the appellants could prove the lesser claim, and determined they could not; therefore there was no further consideration of what was meant by “on a scale best characterized as commercial”. The relation Garson J. drew between “commercial” and “large industrial scale” is not clear.

[318] Madam Justice Garson found that the NCN traded in substantial quantities of fish that were limited by the methods of fishing employed by the ancestral communities. Canada says that qualification is an important one when considering the quantitative limits on the right.

[319] After all of this analysis, Garson J. used none of the qualifiers from the cases, nor from the pleadings. She chose “the right to fish and to sell fish” as the appropriate characterization of the modern right at para. 487. She then said:

> 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.

[320] She said at para. 489:

> 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.

[321] The plaintiffs say “not large industrial” is a sufficiently precise description of the right, and refer to *Gladstone,* where the right was simply found to be a right to trade on a commercial basis. However, that was a regulatory prosecution involving an attempt to sell to a fish store 4,200 pounds of herring spawn on kelp caught under a licence to fish for food only. The court considered the difference between exchange for money or other goods versus sale on a commercial basis, and for that one species, concluded that the accused had demonstrated that, both before and after contact, the Heiltsuk were traders of herring spawn on kelp to “an extent best described as commercial”.

[322] In a memo developed for presentation at the Main Table Meeting in June 2014, in response to the LTO, the plaintiffs presented a new characterization of the right which might suggest they see it as on a scale that would allow the accumulation of wealth, in spite of Garson J.’s finding that their ancestral trade was not for the purpose of accumulating wealth:

> …we disagree with the description of our right to fish commercially as “less than industrial (not for the purpose of accumulating wealth)”. Justice Garson did not say that the modern right is not for the purpose of accumulating wealth. Rather this was an element of the pre-contact practice which led her to conclude that the modern right to fish does not extend to an unlimited right to fish on a large industrial scale.

[323] Dr. Hall also mentioned this view in his evidence, although it was not pursued in argument. This highlights how helpful it would have been to have a precise characterization of the right before the Negotiations commenced.

Nine-Mile Restriction

[324] An important indication on the scope of the commercial right is provided by Garson J.’s restriction of the plaintiffs’ fishing territories to a nine-mile strip (whether statutory or nautical does not matter for the present purposes). In its original claim before Garson J., the plaintiffs claimed that their territory extended 100 nautical miles into the Pacific Ocean. The declaration gives them around one-tenth of that distance.

[325] This nine-mile restriction gives the plaintiffs access to the shore, inlets, and rivers in their territory, to the local shellfish, groundfish and rockfish, and to the migrating salmon and other fin fish that pass through their territory within nine miles of the shoreline.

[326] This nine-mile limit, referred to in these reasons as the Court Defined Area, or CDA, has caused problems for both DFO and the plaintiffs. The plaintiffs do not want to be restricted to the CDA and, for the migrating ocean species, DFO does not manage such a small area, nor do they have the science or biological data to assist them in doing so. This issue does not arise in the same way for shellfish, which are located inshore, as it does for fin fish.

[327] While the DFO fishery management areas extend to 200 miles, most of the fishing is done out to 30-35 miles offshore in the central WCVI where the plaintiffs are located, according to Michelle James,

DFO's expert on fisheries management, with some species, such as sablefish, commercially available almost exclusively on the Continental Shelf, well outside the CDA.

[328] During cross-examination of Mr. Davis, Regional Groundfish Manager, counsel for the plaintiffs suggested that a simple solution to the problem of insufficient data for abundance in the CDA is to provide a fishery beyond the CDA as a measure to accommodate the right. Discussion ensued as to whether counsel intended that such a fishery would be constitutionally protected and it seemed that he did, based on the assumption that a fishery confined to the CDA simply would not be sufficient to accommodate the plaintiffs' right.

[329] This is an interesting position. It will be mentioned again later as it arises from time to time in respect of various species. It highlights the difficulties that have arisen as the plaintiffs' conception of their right has developed since Garson J.'s judgment. Whereas, in my view, the nine-mile restriction is an important indicator of the nature and extent of the right envisioned by Garson J., to the plaintiffs it is an annoying and perhaps unconstitutional restriction on what they view as a right limited only by the phrase "not large industrial", with the capacity to grow.

[330] The nine-mile restriction is a constraint the plaintiffs have fought against since the judgment was issued, and it continues to be a source of frustration. Their reluctance to be bound by it is evident in their fish plans. The plaintiffs' 2014 fishing proposals for species that are ocean-going calculate a share based on the Total Allowable Catch ["TAC"] for the entire WCVI, which extends to 200 miles offshore, and indicate an intention to fish outside the CDA. In fact, in their presentation to DFO in April of 2014, their Fisheries Coordinator emphasized that the plaintiffs were not bound by the CDA. The plaintiffs have now accepted that they are bound by the CDA but they propose to fish that same share based on the entire WCVI TAC in the narrow strip (although the plans were not amended to reflect acceptance of the CDA until 2016).

[331] According to Sue Farlinger, the previous Regional Director General, DFO's approach to accommodation of the right relies only on fish that are available in the CDA, insofar as they are able to predict and ascertain what those are. It is Canada's position that the TAC of fish in the entire WCVI is not available to the plaintiffs to use as a basis to assess a share for their right-based fishery which exists only in the CDA.

[332] Regardless of the difficulties it causes for the parties, the creation of the CDA in the declarations is significant. The 2009 order states that this right-based fishery exists only in a nine-mile corridor from the shoreline. It indicates that the very nature of the fishery envisioned by Garson J. is limited, local, and community-based. The plaintiffs may well obtain various permissions from DFO to fish beyond the nine miles, but those permissions are not part of the right-based fishery for the purposes of my analysis. This court is bound by the declaration of the CDA.

[333] There are many programs and opportunities for aboriginal fisheries outside this right-based fishery in larger management areas of the WCVI. In fact, DFO has included the option to fish outside the CDA in the LTO, which is at odds with the declaration, but is in keeping with Sue Farlinger's

evidence that the Negotiations were aimed at reaching an agreement, even if it encompassed more than the right-based fishery.

[334] In any event, notwithstanding the parties' willingness and desire to discuss fishing outside the CDA, for the court's purposes and for assistance in understanding what Garson J. had in mind, the right-based fishery is limited to a nine-mile strip.

Artisanal Fishery?

[335] Canada suggests that the plaintiffs' fishery should be characterized as "artisanal".

[336] The plaintiffs resist the term "artisanal" because they think it characterizes their fishery in an improper way. Canada points out that the plaintiffs actually used the term "artisanal" to describe their fishery in their written submissions to Garson J.

[337] Madam Justice Garson did not use the term "artisanal" herself, but she did refer to it at para. 674 when reviewing the evidence of Allen Wood, one of the plaintiffs' experts in the trial before her, who used it to distinguish the NCN fishery from an industrial fishery. According to his report, adduced before Garson J., Mr. Wood used 30 feet as a dividing line between vessels in an artisanal fleet and those in an industrial fleet. He testified that an artisanal fishery is one that fits into daily life, a lifestyle type of fishery, not one designed to maximize earnings.

[338] The term "artisanal" was also used by the plaintiffs' expert on this stage of the trial, Dr. Morishima, who said he considers the plaintiffs' fishery to be an "artisanal" fishery, "characterized by localized harvest where resource condition and availability are readily apparent, coupled with community-based monitoring and enforcement to ensure resource sustainability".

[339] Dr. Morishima defined "artisanal fisheries" in his second report at p. 16 as:

> Traditional household fisheries that utilize relatively small vessels that require low capital investment, are labor intensive, depend heavily on individual skill, local knowledge of fishing areas and resources, and consume low amounts of energy. These vessels typically make short fishing trips to harvest fish for local consumption or sale.

[340] Dr. Morishima did not provide clear evidence on what he meant by "small vessels". He said he considers the term to be a comparator for catching power, but would not be more specific.

Preferred Means

[341] The issue of vessel size leads me to another section of Garson J.'s reasons for assistance on interpreting the extent of the right, that is, the discussion of preferred means.

[342] The interference with the use of a preferred means of fishing is an indicator of infringement. It is not a descriptor of the right, although it can assist in determining what practice is being protected by the right.

[343] Madam Justice Garson concluded that Canada's regulatory regime denies the plaintiffs their preferred means of exercising their aboriginal rights. For some species, however, which I will discuss individually, there was no evidence of preferred means.

[344] In this case, there was no finding by Garson J. as to what constituted the plaintiffs' preferred means. During the Negotiations, lack of agreement over what Garson J. understood to be the plaintiffs' preferred means of fishing has become almost a proxy for the dispute over the extent of the right itself. At the least, DFO sees preferred means as an indication of the scale and objective of this fishery, which are things DFO considers essential to understand in order to design and manage a special fishery.

[345] A consideration of what Garson J. said about "preferred means" may assist in the interpretation of what she had in mind when she made her general declaration.

[346] Madam Justice Garson acknowledged at para. 768 that "preferred means" is established at the community level, and that it is determined by reference to ancestral practices, customs or traditions integral to the distinctive culture of the plaintiffs' pre-contact society, as they have evolved. It is a collective rather than an individual preference. She provided no further analysis of that principle nor did she show how it relates to the plaintiffs' position. She did not deal with whether commercial trollers, used by some of the plaintiffs in the 1950's to 1990's, were an evolution of ancestral practices.

[347] As is clear from *Lax Kw'alaams*, continuity deals with the evolution of pre-contact practices to a modern right. The Court of Appeal reviewed the history of contact and took the late 18th Century to be the relevant time of contact.

[348] As can be seen from the next section of these reasons, Canada attempted to obtain some precision with respect to "preferred means" when settling the order. The plaintiffs resisted it. Garson J. accepted the plaintiffs' position that no description should be included in the order.

[349] Madam Justice Garson said at para. 769:

> [The plaintiffs] 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.
>
> [Emphasis added]

[350] The description "community-based localized fisheries involving wide community participation and using small low cost boats" comes directly from the plaintiffs' submissions to Garson J.

[351] "Community-based localized fisheries involving wide community participation" appears to be commonly accepted by both parties as an integral characteristic of this right. The parties diverge on the

meaning of “small low cost boats”.

[352] The plaintiffs now resist the use of the term “small low cost boat”, which they say unfairly limits their preferred means. Even though “small low cost boats” was taken from the plaintiffs’ submissions in the first part of the trial, the plaintiffs say this description has been enhanced and expanded by Garson J.’s use of the phrase “as has been discussed earlier in these Reasons” (see above quote).

[353] Earlier in her reasons, from paras. 590 to 641, Garson J. set out the evidence of many witnesses from various Nations in which they described an active fishing fleet in earlier decades starting in 1950, consisting of a variety of types of boats, from canoes to trollers, and some who continue to participate in the commercial fishery. The witnesses who testified before Garson J. and who referred to trollers as part of the NCN fishing history were referring to vessels being used in the casually-controlled, unlimited licencing commercial fishery in the mid-twentieth century. This was in the context of Canada’s argument that the current rate of participation in the commercial fishery by the plaintiffs is equal to or greater than their historical rates of participation, which Garson J. found not to be the case.

[354] The plaintiffs say Garson J.’s reference to the NCN fisheries of the past along with evidence of the individual witnesses supports their contention that Garson J.’s view of preferred means is not limited to small boats, but includes mid-sized trollers. Thus the extent of the fishery contained within the right must be sufficient to provide opportunities for a fishery based on average-effort trollers, not simply a “mosquito fleet”.

[355] While Garson J. made no findings about what constitutes preferred means, it appears that she accepted the plaintiffs’ characterization of their preferred means. If there was an opposing position taken by Canada on what constitutes preferred means in this context, she did not refer to it.

[356] The plaintiffs say Canada should not take the earlier positions the plaintiffs put forward before Garson J. out of context. They say they always contemplated a mixed boat fishery, and their small mosquito boat approach was only one of many. At that time they were not bargaining with DFO from a position of strength. They were trying to get whatever they could. However, now they have a right and Canada has not changed its approach.

[357] In their 2014 fish plans, the plaintiffs say that some small vessels have more catching capacity than some of the larger vessels. Therefore vessel length is not useful. They use the terms “low-effort” and “average-effort”.

[358] Canada has proceeded through the Negotiations and the trial on the assumption that the plaintiffs’ preferred means is small boats, which they took to mean under 25 feet (7.6 meters), although as the Negotiations proceeded, it was clear that the issue of “preferred means” was a contentious one. At one point in the Negotiations in 2015, the plaintiffs’ chief negotiator, Mr. Frank, said the plaintiffs want to use “midsize large industrial sized scale boats.”

[359] Both DFO and the plaintiffs blame the other for the use of 25 feet as a cut-off point for “small boat”, although Canada agrees with Dr. Morishima’s statement that what matters is catching power, not length. To DFO, 25 feet is simply a proxy to ensure wide community participation and low cost.

[360] In Canada’s view, following Garson J.’s decision in 2009, the parties were initially in agreement that the T’aaq-wiihak fishery would involve small, low-cost boats, like a mosquito fleet.

[361] Canada refers to a letter dated May 27, 2011, to Sue Farlinger, Regional Director General, from the Chiefs of the five plaintiff nations referring to the plaintiffs’ wish to use “primarily small boats each having considerably less catching capacity than a standard Area G vessel”. They suggested perhaps a licence would be divided amongst five boats, and a total of 40 hooks would be used. They proposed 50 boats as an initial target.

[362] Also, in a letter dated June 15, 2011, from Don Hall to Gerry Kelly at DFO, Dr. Hall criticized DFO’s offer of five troll licences and some suggestions for some flexibility in the upcoming salmon fishery. In that letter, Dr. Hall referred to “our preferred small vessel ‘mosquito fleet’ approach”, using 50 boats, with a catching capacity for the T’aaq-wiihak boats of 20% of commercial trollers:

> Our objectives are to provide a reasonable economic benefit to each of our communities, to fairly distribute the available opportunity to take account of the level of interest in each community and its current fishing capacity, to build fishing capacity and to test approaches to the long-term implementation of a T’aaq-wiihak salmon fishery, and to give each fisher a reasonable chance of making a modest profit or at least not lose money.

[363] As to why Canada chose 25 feet as representative of small boats, Canada points to the 2011 draft fishing plan submitted by the T’aaq-wiihak, in which the plaintiffs referred to “small vessels (up to 25 feet)” and “mid-size vessels (25 to 65 feet)”. Thus it was the plaintiffs who chose 25 feet as a demarcation between small and mid-sized vessels.

[364] Canada says the concept of using medium or mid-sized vessels was first raised by the plaintiffs in 2011. The plaintiffs disagree and say their position was always for a mixed-boat fleet. Correspondence back and forth during these years often referred to the necessity to reach a resolution on “preferred means”.

[365] In 2013, the T’aaq-wiihak issued an informational brochure. This stated: “The Nuu-chah-nulth fisheries are small-scale ‘mosquito’ boat fisheries - not heavily capitalized, intensive industrial fisheries.”

[366] As mentioned above, Dr. Morishima, the plaintiffs’ expert witness, would not be specific on what he considered to be a small vessel. He said it depends on catching power but would not elucidate, even though the court asked him to assist. His overall view is that the plaintiffs propose an artisanal fishery with a small scale of participation.

[367] In a later phase of his testimony he said he would tend to put the plaintiffs’ mosquito fleet and average vessels in the middle intermediate range, a modern artisanal or semi-industrial fishery. This did not seem entirely consistent with his earlier evidence.

[368] He said the doubling of the number of trollers participating in the plaintiffs' fishery from 20 to 40 did not change his opinion. He said "industrial" is not the physical capability of catching fish; it is technology, size, conduct of the fishery and relationship to the community.

[369] Mr. Woods, who testified for the plaintiffs before Garson J., said a variety of small boats used in the mid twentieth century by the plaintiffs included small trollers, perhaps under 30 feet, which he would use as the dividing line between an artisanal fishery and an industrial one. This would make the cut-off for an "industrial" size of boat much lower than the plaintiffs suggest it should be. They do not adopt 30 feet as a demarcation for "industrial".

[370] Michelle James, the expert called by DFO, did not deal with mosquito boats *per se*, but distinguished between trollers and freezer trollers. The latter stay out longer and have higher catches per day. Of course, the plaintiffs are limited to the nine-mile CDA, so would presumably not have to stay out more than a day before off-loading their catch, depending on the availability of a designated landing site.

[371] The plaintiffs are correct to say that there were occasional mentions of trollers early on, but in my view, the focus in the early stage of discussions in the Negotiations was on small boats. This is borne out by their submissions to Garson J. and by the correspondence referred to above. However, the focus changed with the development of the salmon demonstration fishery which began in 2012.

[372] I will deal with the salmon demonstration fishery set up for the T'aaq-wiihak by DFO in 2012 in some detail below, but mention it here because it has caused certain expectations to develop respecting vessel use which the plaintiffs are loathe to give up. DFO did not restrict the size or number of boats used in the salmon demonstration fishery, and many plaintiff members have now acquired average-effort trollers which they have used in that fishery and wish to keep using.

[373] The 2014 fishing plans which the plaintiffs seek to have implemented rely heavily on "average-effort" vessels, that is vessels with considerably greater catching power than the mosquito fleet. By 2014, in the salmon demonstration fishery, there were 24 trollers falling within the 25-65 feet range, and 76 small boats. 40 average-effort trollers were expected by 2015.

[374] Ms. Gagne, the T'aaq-wiihak Fisheries Coordinator, was asked to agree that the plaintiffs' trollers were all previously used in the Area G commercial fishery. She said she did not know where they came from, but said they were acquired with a view to participating in various fisheries.

[375] From my perception of the evidence, there does not seem to be a significant difference between the trollers used by the plaintiffs in the salmon demonstration fishery and many of the trollers used in the regular Area G commercial fishery. The average vessel used by the plaintiffs in the 2015 salmon demonstration fishery was 10.9 meters (35.7 feet) (according to the plaintiffs' evidence) or 11.8 meters (38.7 feet) (according to DFO's evidence), as opposed to the average for the commercial salmon troll fleet of around 13 meters (42.6 feet). The plaintiffs participating in the T'aaq-wiihak fishery also have a

48 foot vessel (14.6 meters), a 46 foot vessel (14 meters), a 44.9 foot vessel (13.68 meters), and a 39.29 foot vessel (11.97 meters).

[376] More importantly, in 2013, when DFO had not imposed a catch per vessel limit in the salmon demonstration fishery, the plaintiffs, using trollers, caught more fish per vessel per day than the Area G trollers did and exceeded their allocation by 44% (Michelle James at p. 77).

[377] The plaintiffs argue that, in any event, their mid-sized average-effort commercial trollers are included in the description of “small low cost boats”. They say they always fished with various sized vessels, including commercial-sized trollers, and as noted, Garson J. expressly referred to their anecdotal evidence in her discussion of preferred means, and preferred it over Mr. Woods’ evidence.

[378] Madam Justice Garson did say at para. 679 that she preferred the individual evidence to statistical evidence in respect of the plaintiffs’ participation in the fishery, but she also noted at para. 678 that the plaintiffs specifically relied on their witness, Mr. Woods, who testified as to his understanding of the size of their fishery and its decline. Mr. Woods had also given evidence as set out above as to his understanding of “artisanal” versus “industrial”. That was not statistical evidence, and she did not reject Mr. Woods’ evidence on that point.

[379] To expand the description of “preferred means”, which refers to a distinctive pre-contact ancestral practice, to include a fleet of average-sized trollers requires a very liberal reconstruction of Garson J.’s judgment from one phrase – a phrase not in a finding of fact, but in a parenthetical reference in setting out the plaintiffs’ position, and referring only generally to a wide body of narrative evidence. The paragraphs that follow the one relied on by the plaintiffs discuss a mosquito fleet in several contexts, and also refer to “small boats”, “small vessels, the majority of which measured less than seven meters [23 feet]”, a “small boat fleet”, before the conclusion is reached that Canada’s regulatory regime denies the plaintiffs their preferred means of exercising their aboriginal rights. She does not refer to trollers.

[380] Madam Justice Garson found that the quantities of fish caught by the plaintiffs were limited by their methods, and she referred to ancestral methods in her description of preferred means. Thus she had that concept in mind as she considered how to approach this issue. Her declaration that the plaintiffs’ fishing territory extended nine miles only is also consistent with the use of small boats, not with a fleet of commercial trollers.

[381] Madam Justice Garson referred to “the NCN fisheries of the past”, as she described them, and her recitation of the evidence included the use of trollers during the decades from 1950. However, she clearly appeared to be of the view that any vessels used would be small and low-cost. It would have been helpful to have had a finding of fact on this issue, but there is none. In my view, taking all of her reasons into account, she considered the plaintiffs’ preferred means to be “small low cost boats”. By that, she appears to have had in mind the mosquito fleet.

[382] There is certainly evidence to support the plaintiffs' contention that the variety of boats they used in the 1950s and 1960s included some trollers, and this was referred to in Madam Justice Garson's narration of the evidence. However, there is no basis in Madam Justice Garson's judgment, or in the evidence before me, upon which to conclude that she considered a fleet of average-effort commercial trollers to be a reflection of an ancestral preferred means, evolved to modern times.

[383] Taking the plaintiffs' own description of their preferred means, Dr. Hall's letter, Mr. Woods' evidence, and Dr. Morishima's views, I conclude that Garson J. found that one indication that the plaintiffs' right was infringed was because they were prevented from using their preferred means, by which she meant small, low-cost boats in community-based localized fisheries involving wide community participation, in a multi-species fishery. It was important to her reasoning that, without licence splitting, such a fleet could not fish commercially. It is an essential characteristic of this fishery, from all of this evidence, including that of Dr. Morishima, that it is a localized small-boat fishery with restricted catching power.

[384] The plaintiffs also argue that a finding of preferred means does not limit, encompass, or define the right. The right is determined with reference to ancestral practices, not with reference to preferred means. Canada does not argue that "preferred means" defines the right, but it does say that its suggested delineation of the right as a community-based artisanal fishery that harvests and sells fish to a low-level of commercial activity fits with the plaintiffs' preferred means.

[385] I agree that a consideration of preferred means, while useful in determining the scope of the right because it is one indicator of infringement of the right, does not in itself characterize the right. The fact that the plaintiffs' preferred means of exercising their right is "small, low-cost boats" does not necessarily mean the right attaches only to small, low-cost boats. On the other hand, the fact that many of the plaintiffs have now acquired average-sized trollers with higher catching power since the salmon demonstration fishery began in 2012, and that the use of those trollers has increased and is expected to grow even further, does not change the scope or interpretation of the right into something other than was intended in the judgment from 2009, insofar as that can be determined from a reading of Garson J.'s reasons as a whole.

[386] In summary, I conclude that while the use of small trollers is not excluded from this fishery, "preferred means" does not encompass a troller fleet roughly equivalent to the average-effort troller fleet used in the regular Area G commercial fishery.

Remarks in Chambers

[387] The plaintiffs say assistance for their position in favour of a robust fishery that includes many mid-sized trollers can be found in a remark made in chambers by Garson J. during the hearing to settle the order. Canada was of the view that more precision would be helpful in the order as it might assist in the negotiation process. Canada suggested including a reference in the paragraph dealing with infringement (the order at para. 3) to the plaintiffs' preferred means, with a characterization of those means.

[388] The plaintiffs objected on the basis that such a phrase would affect the right, and that infringement in general consists of more than that -- it includes a consideration of undue hardship and unreasonableness.

[389] Madam Justice Garson agreed with the plaintiffs' wording and would not include any descriptive phrases or words in the declaration:

> I think that the appropriate language is as requested by the plaintiffs. I think the declaration of infringement is simply that: that the fisheries regime, as we have been calling it, infringes the plaintiffs' rights. I haven't quantified those rights. That is to be left to justification. And to limit the infringement, I think, would unduly hamper the negotiations. And I didn't intend to limit it. It's infringed. My reasons make clear that I am not granting the right to head out in big industrial fishing vessels. And I think that the negotiations ought to be informed by the kind of mid-sized fishing that I was describing. That's to be decided. But I am sure the plaintiffs will be able to determine from these reasons what kind of fishing I felt was within that parameter. Even though I was unable to explicitly quantify it at this stage.
>
> [Underlining added in these 2018 reasons in *Ahousaht*]

[390] The plaintiffs do not take the position that the use of the word "mid-sized fishing" has any legal effect, nor could they do so. Observations in chambers or during a hearing are not judicial pronouncements. If authority is required for this obvious proposition, I refer to *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356.

[391] However, the plaintiffs say the phrase is consistent with Garson J.'s reasons and provides support for their interpretation of the scope of the right and their concept of preferred means, which they say includes "average-effort" commercial trollers.

[392] I am unable to determine what Garson J. meant by her remarks in chambers as to "mid-sized fishing". Those words do not occur in the judgment, nor did she use the phrase "mid-sized boats". However, in my view, the words "mid-sized fishing" are consistent with the use of small, low-cost boats catching fish to sell into the commercial marketplace: that is a fishery between one aimed at the small-scale exchange of fish outside the commercial market (a characterization she did not accept), and the full commercial fishery.

[393] Part of the problem is that the plaintiffs did not lead any evidence before Garson J. about the quantity or size of fishery that they envisioned as encompassed in their claimed right. Madam Justice Garson could not quantify it, as she remarked above. As already noted, the right as set out in the declaration has no parameters at all, except a geographical one. To attach any independent significance to the term "mid-sized fishing" in these circumstances is not helpful.

Discussion of Interpretation of the Extent of the Right

[394] I agree with the plaintiffs that I cannot make findings in addition to those made by Garson J. I can interpret her reasons in order to be able to proceed with a justification analysis. The parties and this court are all required to work with the findings and results contained in her judgment and order.

[395] Fundamental to their case is the plaintiffs' assertion that Canada is bound by the right as declared. In some respects this is a two-edged sword, because the plaintiffs are bound as well, and the plaintiffs are not happy with the nine-mile limit.

[396] The right-based fishery is to be conducted in a small restricted area. It is less than one tenth of the area originally sought by the plaintiffs. It is between one third and one quarter of the area commonly fished by Area G fishers. The plaintiffs have made it very clear throughout the Negotiations and during cross-examination of DFO witnesses that this restriction is not workable for the type of fishery they envision. Nevertheless, that is the declaration they are bound by, and the scale of the fishery is informed by that declaration.

[397] As I mentioned above, one of the themes that shows up in the plaintiffs' arguments several times is the need to "over-accommodate" them, if I can use that phrase, because they are limited to the nine-mile strip and other fishers aren't. That is, if the plaintiffs cannot exercise their right within the CDA in a way that is satisfactory to them, they should have special accommodations, larger allocations, even exclusivity, because they must stay within the CDA, if fishing within the right-based fishery, and others are not so constrained. Alternatively, they should be able to fish in their right-based fishery outside the CDA.

[398] It is clear from *Gladstone* and from Garson J.'s reasons that the plaintiffs' right to a commercial fishery is not exclusive. This is a limited fishery; it does not become larger and/or attract exclusivity because it is artificially confined to a narrow strip. Confining it to a narrow strip indicates that Garson J. meant it to be small. As well, even within that strip, other sectors must be taken into account, while recognizing the plaintiffs' priority within the *Gladstone* factors.

[399] DFO has shown some willingness to expand the T'aaq-wiihak fishery outside the CDA. This underlies the theory of the LTO, with small boats fishing in the CDA with no restriction as to the number of boats per licence, and the trollers using one licence each to fish in the entirety of Area G. I have already mentioned the plaintiffs' difficulties with this approach, as it limits the use of the trollers they have purchased.

[400] In any event, despite both parties' respective suggestions or reasons for avoiding the restrictions of a nine-mile strip, as I have said, the court is confined to dealing with a fishery within the CDA. Other approaches might be considered in a negotiated, mediated, or political context, but are not open to this court.

[401] As I have mentioned, the plaintiffs also argue that the extent of the right is limited or qualified only by the words "not large industrial".

[402] There is a lack of agreement on what an "industrial" fishery is, and Garson J. did not define it or comment on it. DFO sees the regular commercial fishery as industrial. That is, in the context of the AABM (ocean-based mixed stock) chinook fishery, the Area G troller fleet, which is bound by the regular DFO management regime for the commercial fishery, is industrial. The plaintiffs say "industrial"

is the huge freezer trawlers that go out for weeks at a time. They say a fishery based on their trollers, even though those trollers are about the same size as many of the Area G trollers, is not industrial.

[403] The plaintiffs point to evidence of Dr. Morishima and from DFO witnesses that draws a distinction between industrial and “artisanal” fisheries (a description they reject for their fishery, as mentioned above). The plaintiffs say a large industrial fishery is comprised of vessels that can reach 300 feet (91.5 meters), are capital intensive, and have large investments in boats and gear. The boats are capable of going great distances and staying out for long periods of time. They can store fish for longer durations. Their primary motivation is profit.

[404] The plaintiffs include the modifier “large” in the description of the qualification of the right - they say their fishery is not a “large industrial fishery”, and this is the only limitation on it. Madam Justice Garson did use the word “large” in para. 486 of her reasons; however, in the succeeding paragraphs 487 and 489 in which she referred to the scale of the fishery as not “industrial”, she did not include the modifier “large”. All that can be said from these passages is that Garson J. did not see the plaintiffs’ commercial fishery as a modern industrial fishery.

[405] With respect, I do not share the plaintiffs’ view that the phrase “not industrial” is precise enough to fall within the requirements of the first step of *Lax Kw’alaams*, which requires precision in the characterization of the claimed right. First, this was not a phrase used in the pleadings to describe the claimed right, which *Lax Kw’alaams* requires. Second, the different interpretations of the word set out above, either of which could be correct depending on the context, is an indication of how imprecise and unusable that descriptor is for any practical application of fisheries design or management.

[406] The words “not industrial” is only one of many phrases Garson J. used when discussing the right. She reviewed the fact that the right has no internal limitation and that therefore exclusive priority must be rejected (para. 874). She concluded that the right is not simply the exchange for money or other goods. The right could not be characterized as a right to sustain the community. The right is not to accumulate wealth. She did not declare the right to be “on a commercial scale”, although she accepted that sale would take place into the commercial marketplace. She thus used none of the descriptors included in the pleadings.

[407] The plaintiffs say the right is encapsulated, for now, in their fishing plans which, while not making anyone wealthy, will provide them with a secure sustainable fishing economy with potential to grow as more members wish to participate in the fishery. While they do not use the word “prosperous” (the word the Supreme Court of Canada found “bristles with difficulty”), the present description also lacks precision and contains no guidance as to how it might be implemented.

[408] I note the Court of Appeal’s refusal in 2011 to adopt the suggested characterization of the right as enunciated by Chiasson J.A. in his dissent at para. 90 (“to fish for all species of fish … and to sell that fish for the purpose of attaining the modern equivalent of sustenance, a moderate livelihood, being the basics of food, clothing and housing, supplemented by a few amenities”).

[409] As I read the majority judgment, Hall J.A. properly refused to take on the role of a finder of fact. Although it appears that he considered Chiasson J.A.'s view of the characterization of the right to have "a measure of force having regard to the ancestral milieu", he was of the view that, as an appellate judge, he could either uphold Garson J. or not, but he could not characterize the right differently. He decided to uphold her general declaration, viewing the case at that stage as having a "somewhat interlocutory character".

[410] In any event, defining a commercial right by an end purpose, as Garson J. noted at para. 482, "incorporates the notion of a minimum guarantee of a certain level of fishing return", which she said is not an appropriate approach.

[411] She referred to McLachlin J.'s (as she then was) dissent in *Van der Peet* and her concurring reasons in *Gladstone* in which McLachlin J. differentiated between trade for sustenance and trade for the accumulation of wealth. McLachlin J. said in *Van der Peet*, as quoted at para. 456 of Garson J.'s judgment, to which I referred earlier:

> There is therefore no justification for extending [the right] beyond what is required to provide the people with reasonable substitutes for what it traditionally obtained from the resource.

[412] This is significant because Garson J. specifically found that "the accumulation of wealth" did not describe the level of the plaintiffs' ancestral trade. Thus this provides an additional indication of her view of the plaintiffs' modern right as a limited one, and is consistent with her decision to confine their fishing territory to nine miles, and to accept the plaintiffs' description of their preferred means as "small low cost boats".

[413] The limitations on the extent of the right were not specifically set out in the trial judgment. However, after taking into account all the above factors, there are actually many that can be inferred from the reasons, when read in their entirety.

[414] Some basic interpretive principles as to the extent of the right emerge:

(1) the right is restricted to the nine-mile CDA;

(2) the right provides for a community-based localized fishery with wide community participation;

(3) the right provides for the plaintiffs to be able to fish using their preferred means, that is, small, low-cost boats with restricted catching power, with wide community participation, within the CDA;

(4) the right is multi-species; therefore it is the totality of the fishery that is relevant, not one particular allocation of a species;

(5) the right is not unrestricted;

(6) the right is not exclusive;

(7) the right is not to an industrial fishery;

(8) the right is not to accumulate wealth; and

(9) the description of a right designed to sustain the community through the harvest and sale of fish was not accepted by the trial judge, and thus the right does not provide a *guaranteed* level of income, prosperity, or economic viability.

[415] It is possible to make a few additional general comments on the scope of the right.

[416] First, in my view, after a consideration of Garson J.'s reasons, the extent of the commercial right should not be interpreted in such a limited fashion as was described at one point in the evidence of Sue Farlinger as she recounted an individual example of one local fisher – merely as a supplement to welfare. DFO submits that Ms. Farlinger was not suggesting that was a characterization of the right; she was simply recounting one example. In any event, the right is not so limited.

[417] Next, the plaintiffs suggest it is useful to look at the allocations provided to the various economic opportunity fisheries.

[418] The Somass were allocated 164,000 pieces of sockeye in 2014 (110 fish per member) and 300,000 pieces of sockeye in 2015 (201 per member). The Musqueam and Sto:lo received 62 and 89 pieces per member.

[419] According to the plaintiffs' submissions, their allocations for chinook in 2014 and 2015 were, respectively, 4.7 and 2 per member. This is based on the entire membership.

[420] The right, of course, belongs to every member of the plaintiff nations, but I note that many members of the plaintiff nations do not live on the reserves; according to Indigenous and Northern Affairs Canada's 2014 population statistics, of the 4,944 members, 3,198 members live off reserve, and 1,746 members live on reserve.

[421] Canada says the economic fisheries, which are directed at only one species (which is sockeye, nowhere near as valuable as chinook) are not appropriate to use as a comparator for a multi-species fishery.

[422] Ms. Reid testified that the Somass fishery, which is a terminal fishery negotiated in 1992 when policies and demands on the fishery were different, does set a high standard, but has a different context. It is one abundant sockeye run returning to a river directly adjacent to the Somass and Tseshaht nations; the plaintiffs have a multi-species right and chinook, which is the species of most importance to them, passes through their areas, is accessed by others, and is regulated by international treaty. I accept those distinctions as valid.

[423] Michelle James used the Maa-nulth treaty fishery as a comparator, as it is multi-species and on the WCVI. This treaty covers five Nations within the Nuu-chah-nulth Tribal Council. According to her

report at 26, it provides for a harvest agreement which gives access to communal commercial licences that are fully integrated with the general commercial fishery. Ms. James' table is set out in numbers of licences and percentage of quota, so cannot be directly compared to the plaintiffs' figures for the economic fisheries. The figures for licences and quota show the plaintiffs' communal access in 2013 was more generous than that obtained by the Maa-nulth.

[424] While it is useful to keep this information in mind for general context, no direct equivalencies can be drawn from the approach of comparing the various types of aboriginal fisheries.

[425] I now turn to the concepts of viability and sustainability that underlie much of the plaintiffs' approach. The plaintiffs want a fishery that is viable, that is, which provides economic return each year, and that is sustainable in the long term.

[426] Although there is no specific statement in Garson J.'s judgment about viability and sustainability of the plaintiffs' right-based fishery, except to the extent that she is clear that the right contains no such guarantee, not even to a sustenance level, such characteristics are not irrelevant. Madam Justice Garson referred at various places in her judgment to the plaintiffs' present inability to compete in an economically sustainable way in the fishery. However, Canada points out that Garson J. did not find that trade was integral to the plaintiffs' economy before contact; she found it was integral to their culture.

[427] Ms. Farlinger agreed in cross-examination that viability is an attribute of a successful commercial fishery and is a reasonable objective. She could not speak to whether it is a right, which is a valid point. Madam Justice Garson refused to incorporate a notion of guaranteed return into her characterization of the right.

[428] Madam Justice Garson recognized at para. 786 that other factors, such as

> 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.

However, she said at para. 788, "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," thus bringing in the concept of sustainability of their fishery.

[429] It would not be a fair interpretation of Garson J.'s judgment that she declared the existence of a right to a fishery that has no capacity to be viable or sustainable, at least in years of sufficient abundance, especially in view of her apparent acceptance of the description of the past fishery as it was explained to her by the plaintiffs. She accepted that that fishery was a going concern, and had allowed many people to earn a modest income, at least in the mid twentieth century.

[430] However, as Canada points out, fish were abundant then. Licences were unlimited. Everyone fished to different expectations and regulations. Now, the resource is heavily-used, scarce, and highly

valued. Canada says reconciliation requires all parties, aboriginal and non-aboriginal, to shoulder the benefits and burdens of changing times as DFO attempts to accommodate all sectors of the fishery. I do not understand the plaintiffs to disagree with that general proposition, but they assert their priority and the concept of minimal impairment.

[431] Viability and sustainability are useful concepts, but they are not guarantees. DFO provides opportunities to fish. It does not provide a guarantee of fish. While a modest income is a reasonable inference which flows from a viable and sustainable fishery, no level of income can be guaranteed. In some years, certain fisheries may be neither viable nor sustainable, given abundance and conservation concerns, and because the fisheries are circumscribed by the nine-mile limit of the CDA.

[432] As well, the indicators of viability and sustainability are not invitations to the plaintiffs to increase the participation in the fishery beyond limits that cause DFO to be unable to fulfil its responsibilities to the rest of Canadian society, as long as it justifies any infringements on the plaintiffs' right. As stated above, the plaintiffs' right-based fishery, although deserving of priority, is a small boat fishery, is not exclusive and exists only in the CDA.

[433] While I am of the view that this right is not meaningful unless it allows the plaintiffs an opportunity to develop a sustainable and viable fishery, I have mentioned that Garson J. specifically declined to accept the description of the right as a right to sustain the community. There is, in any event, no evidence before the court at this stage of the trial to allow an assessment of what viability would look like for a small boat multi-species fishery.

[434] This does not mean the fishery cannot fulfil those purposes, but there is no guarantee that it will, and while the government must provide opportunities to the plaintiffs that accommodate their right, the plaintiffs cannot insist that the government provide allocations that guarantee sustenance. What is also clear from Garson J.'s judgment is that the plaintiffs' aboriginal trading practices, from which the modern right is drawn, were not for the accumulation of wealth.

[435] The plaintiffs resist the terms "small scale" or "artisanal" when applied to their right, but in my view, when all the above information is taken into account, that is what it is. Their own expert, Dr. Morishima, referred to their fishery as "artisanal" and "small scale", and his definition of an artisanal fishery, set out above in the section entitled "Artisanal Fishery?", is an appropriate description of this fishery:

> Traditional household fisheries that utilize relatively small vessels that require low capital investment, are labor intensive, depend heavily on individual skill, local knowledge of fishing areas and resources, and consume low amounts of energy. These vessels typically make short fishing trips to harvest fish for local consumption or sale.

[436] Mr. Woods, when testifying for the plaintiffs before Garson J., also referred to it as "artisanal", "smaller scale, fitting into daily life."

[437] The plaintiffs did not call evidence before Garson J. of their "requirements and expectations", to use her phrase, but in my view, their requirements and expectations have clearly developed since the

first stage of the trial. Due to the unexpectedly unconstrained declaration, the plaintiffs now appear to take the view that their fishery can and will expand to be whatever they need or want it to be, as long as it is not a large industrial fishery. While that is an understandable extension of their continued position that no qualifiers can be put on the declaration (other than “not large industrial”), it is not in line with either Garson J.’s reasons, taken as a whole, or with the evidence.

[438] As I have said, I accept the plaintiffs’ position that the right as declared by Garson J. should not be recharacterized or restated, given that the Court of Appeal has twice dismissed the appeal. The starting point is therefore the declarations as they exist now (which includes the declaration of nine miles), and insofar as it states that it applies to any species, it will not be further circumscribed. However, when considering how to approach the various factors that go into the justification analysis, that declaration must be coloured by all the assistance that comes from the judgment, as I have outlined above.

[439] Canada takes the position that delineating the plaintiffs’ right as a “community-based artisanal fishery that harvests and sells fish to a low level of commercial activity” provides qualitative and quantitative parameters to the plaintiffs’ right, entitling them to a commercial fishery that is different from the regular industrialized commercial fisheries. Canada submits this will provide clarity as to the objective and scale of the fishery and will assist in future negotiations. I have said I cannot reword the declared right as Canada suggests, but there are indications in Garson J.’s judgment that support some of Canada’s suggested interpretation of the right as declared.

[440] “Community-based, small low cost boats”, phrases taken from the plaintiffs’ submissions before Garson J. and used in her judgment, together with the nine-mile limit CDA, suggest a fishery more to the scale envisioned by Canada, but the phrase “harvests and sells fish to a low level of commercial activity” does not lend itself to precision or predictability of allocation any more than does the plaintiffs’ position. I will discuss predictability and priority of allocation later in the section on justification.

[441] In my view, the only conclusion to be drawn from Garson J.’s reasons as a whole, despite the lack of parameters in the declaration, is that the declared right to fish for any species and to sell that fish is to be interpreted as a small-scale, artisanal, local, multi-species fishery, to be conducted in a nine-mile strip from shore, using small, low-cost boats with limited technology and restricted catching power, and aimed at wide community participation.

The Significance of the Use of Trollers in the Salmon Demonstration Fishery

[442] This is not the end of the discussion, however, because during the course of the Negotiations, the use of average-sized trollers, comparable to those used in the regular Area G troll fishery, has become common and has increased, with the acquiescence and assistance of DFO.

[443] The advancements in the salmon demonstration fishery have allowed members of the plaintiff Nations who were not part of the commercial fishery to become interested in the fishery again and to acquire or reacquire knowledge and equipment to allow them to fish. Many trollers have been

purchased. DFO has not only allowed this to occur but has assisted the plaintiffs with capacity building. It was never made clear to me during the evidence how or where the plaintiffs obtained these trollers, or who paid for them.

[444] The trollers are much more efficient at catching fish than the mosquito boats.

[445] The important aspect from DFO's point of view is that DFO must protect the right for all of the rights-holders. This is a valid point. If the trollers catch all the fish and the mosquito fleet is quickly left out, those members of the community will look to DFO to satisfy their right, regardless of what might be seen as internal mismanagement by the plaintiffs. Theoretically, this could be reconciled by the plaintiffs themselves, but as Ms. Reid testified, good will is not a management technique. If the mosquito boats are squeezed out of the fishery by trollers, this is a variation of the same problem that led Garson J. to decide that an infringement had occurred in the first place.

[446] DFO chose to deal with this in the LTO by offering to allow the trollers to fish outside the CDA. However, that is not an option for the court which must deal with the nine-mile strip.

[447] Thus, aside from the balancing required in the reconciliation analysis between the plaintiffs and the rest of Canadian society, there is another balancing act that arises within the implementation of the right itself: that is, the use of a growing number of trollers in the T'aaq-wiihak fishery which raises the concerns enunciated by various DFO witnesses, in that DFO must protect the plaintiffs' right for all the rights-holders, and must ensure that the small boats are not deprived of their opportunities to exercise their right if the trollers take all the fish.

[448] The plaintiffs did not call evidence before Garson J. as to what their fishery would look like, and the evidence before me in the form of their fishing plans is in a state of flux, with the need for further discussion, adjustments, and compromises evident throughout the testimony as the various DFO witnesses were cross-examined. This will be expanded upon in the section dealing with each species.

[449] Obviously the plaintiffs are of the view that the present allocations do not create a viable fishery, but the plaintiffs' year end reports do not provide any net revenues, so it is not possible to say what is viable at this point. As well, Canada has provided extensive funding to date, and the difficult questions of the need for and responsibility for the cost of electronic monitoring for some of the fisheries is still outstanding.

[450] As several DFO witnesses pointed out, the management controls used by DFO to limit harvest may be too expensive for smaller vessels and therefore favour larger vessels because of the economics, but this is at the expense of smaller vessels and broad community participation. Alternatively, management controls that are appropriate for small vessels will not provide sufficient control for larger vessels.

[451] I acknowledge the point made by the intervenors that a viable local fishery, whether it is called artisanal or community-based, is simply not possible anymore. However, while the loosely-constrained

fishery of the last half of the twentieth century is no longer available to anyone, including the plaintiffs, a way must be found to allow the plaintiffs back into a fishery that allows participation into the commercial marketplace. That is the basic proposition contained in the declarations and such a fishery must be designed and implemented. There is no guaranteed economic baseline to this fishery, and unfortunately for the plaintiffs, I have not found Garson J.'s intention as to the scope of the right she declared to be as wide as they have taken it to be.

[452] The members of the plaintiffs who actually survive by fishing commercially now operate under other communal licences and use their own equipment, and can thus fish under the regular rules. They do not rely on the T'aaq-wiihak fishery and are not restricted to the CDA. It may indeed be that a non-exclusive commercial fishery operating with small, low-cost boats and fishing only within the nine-mile limit, will have difficulties succeeding on its own.

[453] It is also clear both from the evidence of Michelle James and from common sense that a fishery using small, low-cost boats in a small area may be viable for some species but not for others. From the plaintiffs' rejection of the CDA (the CDA appears to have been only reluctantly accepted as the second stage of the trial grew near), it is obvious that a fin fish fishery to be conducted with small, low-cost boats in that limited area is a problem for them. As well, to fish for groundfish, for example, from a fleet of 85 small boats, will result in a high ratio of costs to revenue, even if DFO dispenses with or absorbs the cost of electronic monitoring. As Michelle James said, the whole reason for limited-entry licences (one of the *prima facie* infringements considered by Garson J.) is economic viability. The revenue to cost ratio for bigger boats is obviously better.

[454] In any event, this is an issue that arose out of the Negotiations, not out of the reasons of Madam Justice Garson or the declarations, and there is no easy answer that this court can provide. It may be that the parties can negotiate further access outside the right, given DFO's commitment to supporting economic development for First Nations in general and for the plaintiffs in particular, or it may be that the reassessment of allocations for chinook and coho, given my conclusions on the Salmon Allocatio Policy, may assist.

[455] However, the focus of the right-based fishery is on small, low-cost boats and wide community participation. How the use of trollers will be handled to ensure that wide community participation can be maintained for the mosquito fleet will necessitate appropriate management and monitoring of the right-based fishery, but the answer is not a continued increase in allocations to compensate for all the fish being caught by a large and growing fleet of small trollers.

Summary

[456] To summarize the problems in moving forward from the declarations and orders: not only is there confusion arising from the earlier judgments, but the expectations of the plaintiffs have changed since 2009, assisted by DFO's tolerance of a growing fleet of average-sized trollers in the salmon demonstration fishery. Neither party is happy to work within the CDA, and the LTO from Canada contains a suggestion of the option of fishing outside it. The plaintiffs have not provided viability

information for the fisheries they have conducted so far, their fish plans have some significant inherent difficulties and are obviously works in progress, and Canada is not prepared to put forward detailed positions on justification without an understanding of the scope of the right and specific infringements. Other problems will become apparent as other aspects of the task facing this court are discussed.

[457] As I will explain in more detail in the section on justification, this court's task is not to mediate the negotiation positions, nor to design, manage or approve a fishery. It is not to set allocations. It is to analyze issues pertaining to justification, within a legal framework. While this court can make findings on certain issues presented to it, it must work from the evidence and within the declarations.

[458] Given the "any species" right that the plaintiffs hold, the final expression of the right, incorporating any infringements that are found to be justified, will be complicated and multi-faceted. It must be set out in a workable way so that the parties have a common basis from which to start yearly discussions and planning. As I mentioned at the beginning of these reasons, the ultimate articulation of this complex right, or at least the wording of the orders that will lead to its implementation, will require the assistance of counsel.

[459] At the end of the day, much work remains to be done, and before final answers can be given that will actually result in the implementation of a workable fishery, it is inevitable that both parties will want to appeal various aspects of the judgment.

[460] I will now deal briefly with the remaining issue respecting the interpretation of the declared right, that is, whether the nine-mile declaration should be taken to refer to statute miles or nautical miles.

STATUTE MILES OR NAUTICAL MILES

[461] A smaller discreet issue is whether, when Garson J. declared the CDA to be a nine-mile strip, she meant statute miles or nautical miles. One statute mile is the equivalent of 1.15 nautical miles. So in total, use of nautical miles would add a little over one mile to the CDA.

[462] This could have easily been dealt with when the order was settled before Garson J. It is one of several issues that has apparently surfaced as the parties began to parse the declarations and the case law after the fact.

[463] The plaintiffs claimed that their territories extend westward from the foreshore 100 nautical miles. Madam Justice Garson held that there was no evidence to support this position (para. 409), and set the boundary at "nine miles from shore, that is, from a line drawn from headland to headland within each plaintiff's territory" (para. 414).

[464] There is nothing in the trial judgment to indicate either way what Garson J. intended. Both parties began the Negotiations assuming Garson J. meant nine nautical miles, and Michelle James, Canada's expert, used nine nautical miles because, as she testified, everything at sea is in nautical miles.

[465] Madam Justice Garson did use the phrase “nautical miles” at times in her judgment, but did not use it in the declaration and it appears that neither party turned its mind to it. She took the “nine miles” from a journal that did not use the term “nautical”. On the other hand, as the plaintiffs point out, counsel for Canada took pains at one point in the trial to ensure that Garson J. understood that miles from shore was measured in nautical miles, so the plaintiffs say Canada should not now resile from that position.

[466] Madam Justice Garson was making a rough guess at best when she chose nine miles as the limit for the CDA. Rather than inserting the word “nautical”, it is equally logical to assume Garson J. deliberately used statute miles and thus her nine statute miles should be converted to nautical miles. This would result in fewer nautical miles.

[467] However, all parties assumed, until they looked at it carefully, that they were dealing with nine nautical miles. For instance, in 2012, 2013, and 2014, according to Mr. Kerr, negotiator for DFO, DFO allowed the salmon demonstration fishery to take place in nine nautical miles because licences always use nautical miles.

[468] Using the customary meaning of measurements at sea, which all parties agree is nautical miles, and in the context of the Supreme Court of Canada’s urging courts to give a liberal approach to the interpretation of aboriginal rights and to interpret ambiguities in favour of aboriginal peoples (*Van der Peet* at paras. 23 and 24), in my view it is appropriate to use nine nautical miles as the outer limit of the CDA.

[469] Before moving on to the discussion of infringement and justification, I will describe the course of the Negotiations and the attempts at accommodation that occurred during that process.

ATTEMPTS AT ACCOMMODATION THROUGH THE NEGOTIATIONS

[470] In order to give some context to the Negotiations, I will first set out the policies and legislation under which DFO has been operating throughout the Negotiations, and which the plaintiffs submit are continuing unjustified infringements.

The Legislative/Regulatory Scheme

[471] The plaintiffs, in their pleadings, specifically list as being contrary to or inconsistent with the *Constitution Act, 1982*, s. 35(1): the *Fisheries Act*, R.S.C. 1985, c. F-14, ss. 7 and 25(1); the *Fishery (General) Regulations*, SOR/93-53, ss. 22, 33, and 35(2); and the *Pacific Fishery Regulations, 1993*, SOR/93-54, ss. 19, 22(1), 26(1), 30, 39, 53, and 63.

[472] Those sections provide:

> *Fisheries Act*
>
> 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.
>
> Idem

(2) Except as otherwise provided in this Act, leases or licences for any term exceeding nine years shall be issued only under the authority of the Governor in Council.

…

25(1) Subject to the regulations, no person shall place or set any fishing gear or apparatus in any water, along any beach or within any fishery during a close time.

Fishery (General) Regulations

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;

(b) the age, sex, stage of development or size of fish that are permitted to be taken or transported;

(c) the waters in which fishing is permitted to be carried out;

(d) the location from which and to which fish is permitted to be transported;

(e) the vessel from which and to which fish is permitted to be transhipped;

(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;

(j) the distance to be maintained between fishing gear;

(k) information that the holder of the licence shall report to the Department prior to commencement of a fishing trip with respect to where and when fishing will be carried out, including the method by which, the times at which and the person to whom the report is to be made;

(l) information that the master of the vessel shall report to the Department from sea, including the method by which, the times at which and the person to whom the report is to be made;

(m) the location and times at which landing of fish from the vessel is permitted;

(n) verification by an observer of the weight and species of any fish caught and retained;

(o) the method permitted for landing of fish from the vessel and the method by which the weight of the fish is to be determined;

(p) records that the master of the vessel shall keep of any fishing activity carried out under the licence or of the sale or transporting of fish caught under the licence, including the manner and form in which the records are to be kept, the times at which and the person to whom the records are to be produced and the period for which the records are to be retained;

(q) the type, size and colour of containers to hold or transport fish and the marking of such containers for identification of the source of the fish;

(r) the marking or tagging of fish for identification of the source of the fish;

(s) the segregation of fish by species on board the vessel;

(t) the time within which findings and data obtained as a result of fishing for an experimental or scientific purpose are to be forwarded to the Minister;

(u) the manner in which fish caught for an educational or public display purpose are to be held and transported;

(v) the species and quantities of fish that may be released or transferred under a licence issued under Part VIII;

(w) the period during which the release or transfer of fish is to be carried out under a licence issued under Part VIII;

(x) the waters or fish rearing facility into which the fish are to be released or transferred under a licence issued under Part VIII;

(y) the waters or fish rearing facility from which the fish are to be taken under a licence issued under Part VIII;

(z) the method and manner of transporting the fish to be released or transferred under a licence issued under Part VIII; and

(z.1) the method of disposing of any water, container or other material used in the transporting of fish under a licence issued under Part VIII.

(2) The Minister may, for the purposes of the conservation and protection of fish, amend the conditions of a licence.

(3) A notice of any amendment referred to in subsection (2) shall be

(a) sent to the licence holder by registered mail; or

(b) personally delivered to the licence holder by a fishery officer.

(4) An amendment referred to in subsection (2) is effective from the time the licence holder receives the notice referred to in subsection (3).

(5) A notice referred to in subsection (3) forms part of the licence to which it relates and the licence holder shall, on receipt of such a notice, attach the notice to the licence.

(6) Compliance with the Act and the regulations made under the Act is a condition of every licence.

(7) No person carrying out any activity under the authority of a licence shall contravene or fail to comply with any condition of the licence.

…

33(1) Subsection (2) applies where a person catches a fish

(a) at a time or place at which the person is prohibited from fishing for that fish;

(b) by a method or with fishing gear that the person is prohibited from using to fish for that fish; or

(c) the possession or retention of which is prohibited.

(2) Except where the retention of an incidental catch is expressly authorized by any of the Regulations listed in subsection 3(4), every person who catches a fish incidentally shall forthwith return it

(a) to the place from which it was taken; and

(b) where it is alive, in a manner that causes it the least harm.

…

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*.

Pacific Fishery Regulations, 1993

19(1) The Minister may issue a fisher's registration card, a vessel registration certificate or a licence referred to in column I of an item of Part I of Schedule II upon application therefor

and payment of the fee set out in column II of that item.

(2) Where, pursuant to subsection (1), the Minister issues a fisher's registration card to a person or a vessel registration certificate in respect of a vessel, that person or vessel is deemed to be registered with the Department.

(3) Where an Indian or the Northern Native Fishing Corporation is issued a Category A licence in respect of a vessel, the Indian or the Corporation shall pay either the appropriate fee set out in subitem 3(1) of Part I of Schedule II or the fee set out in subitem 3(2) thereof.

(4) Where a vessel in respect of which a Category A licence was issued after December 31, 1979 for the fee set out in subitem 3(2) of Part I of Schedule II is sold to a person other than an Indian or the Northern Native Fishing Corporation, the Category A licence is void.

…

22(1) No person shall use a vessel, and no owner or lessee of a vessel shall permit the use of that vessel, in commercial fishing for any species of fish unless

(a) subject to subsection (2), the vessel is registered; and

(b) the use of the vessel to fish for that species of fish is authorized by a commercial fishing 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*.

…

30 No person shall catch and retain a species of fish set out in column I of an item of Schedule III from the waters set out in column II of that item with the type of fishing gear set out in column III of that item during the close time set out in column IV of that item.

…

39 No person shall fish for or catch and retain herring under the authority of a licence set out in column I of an item of Schedule V from the waters set out in column II of that item with the type of fishing gear set out in column III of that item during the close time set out in column IV of that item.

…

53(1) No person shall fish in any waters set out in column I of an item of Part I of Schedule VI for the species of salmon set out in column II of that item with the type of fishing gear set out in column III of that item during the close time set out in column IV of that item.

(2) No person shall troll in any waters set out in column I of an item of Part II of Schedule VI for the species of salmon set out in column II of that item using the type of vessel set out in column III of that item during the close time set out in column IV of that item.

…

63 No person shall fish for a species of shellfish set out in column I of an item of Schedule VII in the waters set out in column II of that item using a method set out in column III of that item during the close time set out in column IV of that item.

[473] In general terms, then, the *Fisheries Act*, s. 7, gives the Minister absolute discretion to issue licences. Section 25(1) prohibits setting gear in a close time (defined in s. 2 as a specified period during which fish to which it applies may not be fished).

[474] The *Fishery (General) Regulations*, s. 22(1), gives the Minister power to specify conditions in licences on a wide variety of matters, including species and quantity of fish to be taken, vessel requirements, gear restrictions and requirements, details of fishing, location and times of landings, catch reporting, monitoring (including reporting of times and locations of fishing, and verification of

weight and species), and the keeping of records. Section 33 deals with incidental bycatch. Section 35(2) prohibits sale of fish unless caught under a commercial licence or an Aboriginal Communal Fishing Licence.

[475] The *Pacific Fishery Regulations*, s. 19, deals with issuance of fisher's registration cards, vessel registration certificates, and licences, upon payment of the required fee. Section 22(1) prohibits the use of a vessel for commercial fishing unless registered. Section 26(1) prohibits fishing except under the authority of a licence. Section 30 prohibits catch and retention of certain species (except halibut, herring, salmon and shellfish) with certain gear and during close times, as listed in an attached schedule. Section 39 deals with herring; s. 53 with salmon, and s. 63 with shellfish. Section 74 was not listed in the pleadings, but that section prohibits anyone from fishing for or catching and retaining halibut in any area from October 31 to March 1.

[476] The plaintiffs submit that, if Canada's infringement of their right is not justified, these regulations must be declared to be inapplicable to the plaintiffs under the *Constitution Act, 1982*, s. 52.

The Policies

[477] There are three main policies to which the plaintiffs take objection: the Salmon Allocation Policy, the Mitigation Policy, and the Coastwide Framework.

The Salmon Allocation Policy

[478] Canada's allocation of salmon depends on and is restricted to the TAC allowed to Canada by the Pacific Salmon Treaty with the United States.

[479] Within the consideration of chinook (the species of most importance to the plaintiffs), there is a dispute between Canada and the plaintiffs about Canada's Salmon Allocation Policy which gives priority to the recreational fishery and sets that allocation first. Under this policy, Canada takes the Canadian Total Allowable Catch (CTAC) allowed by the Pacific Salmon Treaty with the United States, sets aside FSC and Treaty fish, sets an allocation for the recreational fishery, and then purports to accommodate the plaintiffs' aboriginal right from the remaining Canadian Commercial Total Allowable Catch (CCTAC) through buying back licences through the Mitigation Policy, and giving them to First Nations through PICFI and ATP.

[480] According to Mr. Grout, DFO's Regional Resource Manager for Salmon, the Salmon Allocation Policy giving the recreational fishery priority in chinook was developed in 1999, at a time when the recreational fishery did not have the techniques for harvesting sockeye, pink and chum.

[481] The Salmon Allocation Policy also applies to coho. There is no directed commercial fishery for coho as the stocks of coho collapsed in the 1990's. A "directed" fishery is one targeting a particular species, for which a total allowable catch (TAC) has been set. According to the policy, the recreational fishery takes priority over the plaintiffs' commercial right in respect of coho. The recreational fishery is allowed to catch and retain only tagged hatchery coho.

[482] For sockeye and pink, the commercial sector has priority over the recreational fishery so the same issue does not arise.

[483] The plaintiffs say the Salmon Allocation Policy does not take into account the priority of its aboriginal right which must come ahead of the recreational fishery. Canada says the plaintiffs have been given a right to a commercial fishery and thus priority must be considered in the context of the commercial sector, not in the overall context.

[484] This policy was a matter of contention throughout the Negotiations.

Mitigation Policy

[485] Another fundamental difference between Canada and the plaintiffs during the many years of discussions has been Canada's policy of "mitigating" fishing access in a fully subscribed fishery. A fully subscribed fishery is one in which all fish have been allocated. All fisheries but gooseneck barnacles are fully subscribed.

[486] Mitigation is a process by which, since all the fish in a particular fishery are already allocated to one or another sector, Canada buys back licences at market value from commercial fishers in order to make the allocations associated with that licence available elsewhere.

[487] Canada has been particularly active in buying licences to provide access to aboriginal fisheries. As mentioned, the older program was known as the Allocation Transfer Program (ATP). The newer Pacific Integrated Commercial Fisheries Initiative (PICFI) operates through aggregates, either within the five plaintiffs, or with other nearby First Nations including the plaintiffs. Any access Canada has made available to the plaintiffs since Garson J.'s decision has been mitigated access bought back from the commercial sector.

[488] The plaintiffs say the use of the Mitigation Policy is an infringement of their right. They say they should not have to wait for licences to become available from the regular commercial fishery, as they have priority over that fishery.

[489] Canada says there is no evidence that involuntary relinquishment of licences from the commercial sector is required to accommodate the right. Voluntary relinquishment promotes reconciliation and has not been shown to infringe the plaintiffs' right in its actual practical application.

Coastwide Framework

[490] The Coastwide Framework (CWF) is protected by public interest immunity (see ruling at 2015 BCSC 2313). Canada asserted this claim and, with some exceptions, the plaintiffs did not pursue it, but took the position that if Canada sought to rely on the CWF to justify its allocations, the plaintiffs would take the position that it was not open to them to do so.

[491] The CWF is developed within DFO and sets notional allocations for all First Nations in British Columbia, including those involved in ongoing treaty negotiations, keeping all interests in mind to

avoid, as Sarah Murdoch, Regional Director for Treaties and Aboriginal Policy, put it, “first past the post” allocations. However, the notional allocations are not fixed. Sarah Murdoch testified that the CWF as it stands now does not deal with aboriginal commercial rights, but in the plaintiffs’ case, the staff from DFO involved in the CWF are considering their right as well as their interests.

[492] The plaintiffs take the position that the CWF unjustifiably limits Canada’s ability to provide them with appropriate allocations, even though they have a proven aboriginal commercial right and no other group does. They also say the court does not have the information it needs because of the assertion of public interest immunity over the CWF.

[493] In its final argument, Canada did purport to rely on the CWF, and it was incorporated into their written submissions at numerous points. Apparently, this was in error and counsel sought to remove the references in reply. The plaintiffs took objection to this.

[494] In the end, though, Canada does not put forward the CWF as a reason or justification for not providing certain allocations to the plaintiffs, and that is all that really matters. If they are now saying that they do not purport to use the CWF as a reason to justify a constraint upon accommodation and implementation of the right-based fishery, I accept that. They cannot use it as a means of justification for any positions they take and are not purporting to do so.

[495] As already mentioned when setting out the plaintiffs’ position, the plaintiffs argue that, unless the court knows what was in the mind of the Minister (which they would argue includes the CWF), the court cannot tell whether she really accorded them their appropriate priority in the justification analysis. Canada takes the position that the court should look at the actual actions the government has taken.

[496] I will deal further with these issues and the policies in the section on justification.

History of the Negotiations

[497] I will now turn to the Negotiation process itself.

[498] Although negotiations would not necessarily be relevant to a litigation process, I will set out the history of the Negotiations because the concept of consultation is an essential element in the justification analysis and was a specific term of Garson J.’s order. As well, the plaintiffs allege that Canada has not consulted or negotiated in good faith.

[499] It will become apparent through the discussion of the fish plans that both Canada and the plaintiffs have continued their negotiating positions into the litigation. It is necessary to separate the processes but it is also useful to understand what happened in the Negotiations because the positions taken there have informed much of the litigation.

[500] Since the judgment of Garson J., a large percentage of the time of Regional and WCVI DFO staff and managers has been devoted to attempting to come to terms with their responsibilities pursuant to the right, and to organizing and administering the T’aaq-wiihak fishery. Peter Hall,

Resource Manager for salmon and herring on the WCVI, said 50% of his time has been spent on the salmon demonstration fishery, and 60% overall to the T'aaq-wiihak. Other DFO staff and managers estimate the time they have spent on this fishery as 60% and higher.

[501] The plaintiffs' negotiating team has also spent countless hours attempting to get their right-based fishery implemented. Dr. Hall, their biologist, and Alex Gagne, the T'aaq-wiihak Fisheries Coordinator, and their staff have devoted an extensive amount of time to formulating fishing plans and ensuring that their members have complied with the terms of the salmon demonstration fishery, which will be explained later.

[502] Both sides, but Canada in particular, presented extensive evidence on the bi-lateral negotiation process. Canada waived privilege over settlement discussions, but maintained cabinet and public interest privilege over their Coastwide Framework policy. The plaintiffs maintained privilege over their internal discussions.

[503] The parties have met continuously since Garson J.'s judgment was rendered, both at the Main Table and the Joint Working Group. Canada's estimate is 45 Main Table Meetings and 80 Joint Working Group meetings. The correspondence is voluminous. Canada has provided $1.7 million to facilitate the meetings and other related activities.

[504] It is the plaintiffs' position that the efforts at the negotiating table have been fruitless, undermined by lack of a mandate, and have resulted in no policy changes and no accommodation of their multi-species right-based fishery. The plaintiffs adopt the statement of Dillon J. in *Huu-Ay-Aht First Nation v. Minister of Forests*, 2005 BCSC 697 at para. 117: "Accommodation begins when policy gives way to aboriginal interests."

[505] The Regional staff of DFO has at times been stymied by an inability to get approval from Ottawa to implement demonstration fisheries which would allow testing of other management approaches. Nevertheless, Canada says many accommodations and flexibilities have been incorporated into the existing system.

[506] Although DFO has indeed provided substantial funding, additional access, and many flexibilities since 2009 in order to "get the plaintiffs out on the water", as they put it, the Negotiations have been largely unproductive in reaching agreement. The parties are further apart now than they were six or seven years ago. Every issue is still unresolved. The main issues that stalled the Negotiations, and remain unresolved by this stage of trial, are:

- priority;
- adherence to the CDA;
- exclusivity;
- allocations;
- the scope/objective of the fishery;
- the meaning of "preferred means";

- vessel size;
- the use of PICFI and ATP;
- licence splitting;
- how to incorporate and implement a multi-species fishery;
- dual fishing;
- workable management regimes within the artificial CDA; and
- forms and costs of monitoring, particularly at-sea electronic/independent observer monitoring.

[507] No meaningful discussion was ever held on allocations, because agreement on all of the other issues seemed to DFO to be prerequisites, particularly the objective of the fishery and preferred means/vessel size, and no progress was ever made on those issues.

[508] As already mentioned, one positive step was the implementation of a salmon demonstration fishery in 2012. This allowed the parties to test ways of fishing outside the regulatory framework that binds the commercial fishery. I will deal with this in more detail later.

DFO's Perspective of the Negotiations

[509] I will first summarize the evidence of the Negotiations from DFO's perspective.

[510] DFO's positions and understandings through the earlier Negotiations at the Main Table were testified to by Stuart Kerr, lead negotiator for DFO, and by Rebecca Reid, Regional Director of Fisheries Management at the time of Garson J.'s decision, and now Regional Director General. In 2014, Sue Farlinger, Regional Director General, and subsequently assistant to the Deputy Minister, took over as lead negotiator.

[511] I found all of these witnesses to be credible, well-meaning, informed, and operating in good faith throughout their dealings with the plaintiffs. All of them admitted the difficulties they faced as a result of the lack of a mandate from Ottawa. Sue Farlinger in particular struggled to articulate a plan that might receive Ministerial approval to implement, as many of the regional Briefing Notes sent to Ottawa were either rejected or disposed of without apparent consideration by the Minister.

[512] Madam Justice Garson's decision was rendered in November 2009. Communications started almost immediately, and the first meeting was held in April 2010. Madam Justice Garson had suggested in her reasons at para. 906 that if the justification stage of the trial were reached, one possibility was that it would proceed with the plaintiffs presenting fish plans and Canada either accepting them or justifying their non-acceptance. Thus the Negotiations began with the plaintiffs presenting plans.

[513] The plaintiffs, using the term "T'aaq-wiihak", which I have noted means "permission to fish", presented five fishing plans in July 2010: crab and prawns by trap; lingcod; groundfish hook and line; sockeye; and gooseneck barnacles. As Negotiations went on, few of these fisheries were the focus of intensive discussion, other than gooseneck barnacles which were dealt with away from the main

Negotiations in a separate process. The discussions at the Main Table soon centered on salmon and groundfish.

[514] Very early in the Negotiations the plaintiffs demanded to know if DFO had a mandate to implement a right-based fishery. Stuart Kerr said his mandate was to get fishers on the water immediately and keep discussions ongoing. He said he had a mandate for licences, funding, and consultations.

[515] Mr. Kerr explained some of the early problems he faced during the Negotiations. He testified to experiencing some confusion in understanding the plaintiffs' position. In the early Negotiations, the plaintiffs began what appeared to be a bargaining process based on their collective five nations, but then put forward individual fishing plans demanding huge amounts of fish, despite three out of the five nations having no commercial fishing capacity. Then they took the approach that they wanted a guaranteed income, and $35 million for vessels and gear. This was soon abandoned.

[516] DFO wanted to know what the plaintiffs saw as elements of the design of the fishery: number of boats; size of vessels; how the plaintiffs came up with their proposed allocations; and how the fishery would be monitored. Mr. Kerr testified that he asked repeatedly for the basis upon which the plaintiffs came up with the large allocations they requested but was simply told they were reasonable starting points; they would seek more. As well, the plaintiffs wanted all the allocations at once and immediately, and took the position that it was DFO's problem how that was achieved.

[517] Ms. Reid testified that their concern locally, after the decision, was to get the plaintiffs out fishing as soon as possible while they worked towards long term access. In August 2010, DFO offered salmon licences to the plaintiffs: three Area G troll and two Area B seine licences. The plaintiffs did not accept the licences because they said that was not a way to satisfy their right. As well, it was too late in the season to use them productively.

[518] In October 2010, at the suggestion of DFO, the Joint Working Group was established to provide advice to the Main Table.

[519] At the end of December 2010, DFO offered the plaintiffs $10,000 to hire a consultant with respect to gooseneck barnacles, which was listed as a priority species. As will be discussed below, DFO and the plaintiffs have worked together cooperatively through the years to design and implement a viable gooseneck barnacle fishery, although the plaintiffs want the allocations increased.

[520] Also in 2010, DFO offered the plaintiffs $100,000 to support the negotiation process.

[521] Listed as priorities in 2010, after the first set of plans were apparently abandoned, were groundfish, halibut, lingcod, AABM chinook, and Fraser sockeye.

[522] In January 2011, local DFO managers attempted to obtain a mandate from the Minister to negotiate demonstration fisheries, commencing with groundfish. As mentioned, demonstration fisheries are small test fisheries.

[523] Rebecca Reid testified that, according to the analysis that accompanied the briefing note, certain key principles underlay DFO's decision-making on the proposed T'aaq-wiihak demonstration fishery:

(1) there should be no economic marketing advantage to one group;

(2) the commercial fishery should remain an integrated fishery;

(3) there should be no additional harvest effort;

(4) there should be flexibility as to how the proposed access would be fished (such as trap splitting); and

(5) industry standards for catch monitoring and validation should be maintained.

[524] The Minister rejected the Regional recommendation to allow negotiation of groundfish demonstration fisheries in 2011. The local managers were permitted to give additional access only through the existing regime of PICFI (Pacific Integrated Commercial Fishery Initiative) licences.

[525] As was explained above when setting out Canada's position, PICFI was an initiative just coming into play as Garson J. issued her reasons. Prior to that, licences were obtained and issued to First Nations through the ATP (Allocation Transfer Program). In both programs, commercial fishers voluntarily relinquish their licences to DFO through a buyout, and the licences are provided at no cost to First Nations.

[526] Madam Justice Garson, at para. 716, enumerated and agreed with the difficulties with ATP from the plaintiffs' perspective: the program was underfunded, it had inadequate numbers of licences, there was no capacity for licence splitting, the program was not respectful of the plaintiffs' priority, it was dependent on mitigation, and the licences had costs associated with their use. She noted that PICFI was new, and that the NCN Tribal Council had been integrally involved in the consultation and formation of the program. Madam Justice Garson commented that the PICFI program may hold out more hope for success in the future, but at the time of her judgment it was new and untested.

[527] Mr. Kerr testified that DFO decided to use ATP and PICFI to provide access to the plaintiffs, as well as other licences that came directly through the Main Table. It was and is DFO's position that all access counted towards accommodation of the right.

[528] The plaintiffs disagree. The plaintiffs took the position during the Negotiations that commercial licences were not helpful in setting up a right-based fishery, and obtaining licences through PICFI was not an appropriate way to satisfy the right. During argument the plaintiffs acknowledged that PICFI access, as long as it was entirely controlled by the plaintiffs, could be considered as part of the right-based allocations.

[529] Sarah Murdoch, Regional Director for Treaties and Aboriginal Policy, said PICFI access was made available to the plaintiffs during the Negotiations if they would take it. DFO would make access available and if the plaintiffs turned it down, DFO would put it in inventory and save it for them, even if

other aboriginal groups wanted it. PICFI also provides extensive funds for training and capacity building. Ms. Murdoch testified that a good track record under a PICFI agreement will lead to a long term agreement. She said all the plaintiffs except Ahousaht were good at using PICFI or reporting under it, although Ahousaht has since improved.

[530] In fact, DFO had expected that the NCN would form a single aggregate in order to use PICFI access, but this did not occur. Other than the Ahousaht and the Tla-o-qui-aht, the plaintiffs chose to join aggregates with non-plaintiff groups, thus making the tracing of practical access for each of the plaintiffs tricky.

[531] Ms. Murdoch explained in detail the complexity of the fishing interests that arise from the large number of other First Nations in British Columbia. She said DFO does not presently have any way of dealing with the provision of access for the right-based fishery except through ATP and PICFI, and does not recognize rights outside of treaties. In other words, there is no existing mechanism in DFO to provide commercial access for a right-based fishery, and this right-based fishery is broad and covers all species.

[532] It is thus apparent that without a specific mandate from the Minister to overcome these limitations, it would not be possible to design a right-based fishery as envisioned by the plaintiffs. A much wider mandate was finally provided at the end of 2014, as part of the LTO.

[533] The plaintiffs' frustration with DFO's approach is reflected in their letter of November 7, 2011, to the Minister from the Nuu-Chah-nulth Tribal Council stating that there have not been any changes made to the management regime:

> The changes that the T'aaq-wiihak Nations seek are ones that would accommodate a community-based, small-boat commercial fishery which is the T'aaq-wiihak Nation's preferred means of exercising their aboriginal fishing rights…..Instead, [your regional staff] continue to try to force the industrial fishing model on the T'aaq-wiihak Nations, contrary to the guidance provided by the B.C. Supreme Court.

[534] In 2011, DFO was authorized to provide $230,000 to cover previous costs of the Negotiations, $15,000 to assess what was needed to repair boats, and $500,000 to support capacity building -- that is, to upgrade and obtain boats and equipment, including electronic monitoring. DFO also offered workshops to explain the quota and licence system for groundfish. These were not well attended.

[535] Access to species other than salmon were dealt with individually by the provision of free commercial licences to the plaintiffs through ATP and PICFI. On May 6, 2011, DFO offered additional access to the plaintiffs through five Area G troll salmon licences, two red sea urchin licences, ten halibut licences, four rockfish licences, and five Schedule II licences, and various amounts of quota for halibut, sablefish, lingcod and dogfish. The latter species, which are groundfish, are managed by a quota system which will be explained later.

[536] DFO also obtained an extremely expensive geoduck licence for the plaintiffs in 2011. When the Court of Appeal removed geoduck from the right-based fishery, DFO allowed the Nuu-chah-nulth Tribal

Council to keep the licence, and for the plaintiffs specifically, substituted salmon access for the geoduck access.

[537] As well, in 2011, the gooseneck barnacle study, funded in late 2010, got underway. This has developed into an ongoing emerging fishery by both the plaintiffs and DFO, working cooperatively.

[538] In late 2011, DFO obtained a mandate from the Minister to set up a salmon demonstration fishery in 2012 to test a different way of managing the fishery.

[539] This demonstration fishery allowed licences to be split among as many boats as the plaintiffs wished. All licence fees were waived. This demonstration fishery has continued year to year. The offer was for 12 Area D Gillnet licences (five had already been set aside for the plaintiffs in 2011 and seven new licences were acquired through PICFI); 14 Area G Troll licences (five were set aside in 2011; nine were acquired through PICFI), and one seine licence.

[540] This demonstration fishery is the only fishery that has allowed for wide community participation because the usual DFO requirement for one licence per boat is not applied to this fishery. As a result many members of the plaintiff nations have purchased trollers and used them in the salmon demonstration fishery, even though the allocations have not justified full scale implementation of a troller fleet. As mentioned previously, this has led to increased expectations on the part of the plaintiffs: they want to continue to use the trollers and thus they expect the allocations to be large enough to allow this to occur within the right-based fishery in the CDA. They do not want to return to the one licence per boat requirement that DFO would prefer for vessels with the catch capacity of the trollers. In other words, as alluded to earlier, the plaintiffs' own actions over the years of the salmon demonstration fishery, acquiesced in by DFO, are driving increased expectations and demands.

[541] The plaintiffs set out their fishing plan for 2012 on May 4, 2012, but did not provide a formula or basis for the numbers or shares they proposed. They proposed to use 76 small boats and 16 medium troll/gillnet vessels. They also indicated their intention to implement dual fishing (fishing for food, social and ceremonial use and commercial use on one trip), which was prohibited in the salmon fishery. The plan did not refer to the nine-mile limit.

[542] DFO responded on May 29, 2012, through Sue Farlinger, acknowledging the acceptability of numerous vessels fishing the allocation, with the T'aaq-wiihak Ha'wiih (hereditary Chiefs) designating who could fish, and having a role in management. She acknowledged the plaintiffs' concern with the Salmon Allocation Policy, which gives priority to the recreational fishery, but she suggested they move ahead with the salmon demonstration fishery for 2012. She set out DFO's proposed shares for AABM and ISBM chinook, terminal coho, and chum. She said DFO would not require Vessel Registration Numbers for the plaintiffs' vessels.

[543] The plaintiffs were encouraged by DFO's willingness to implement a demonstration fishery but were ultimately unhappy with DFO's proposal which came well into the fishing season. They responded by letter on June 19, 2012, and enumerated their concerns. They were particularly discouraged with

the small allocation. They disputed the share calculation because it was based on the Canadian Commercial Total Allowable Catch (CCTAC), rather than the Canadian Total Allowable Catch (CTAC) (as discussed earlier, pursuant to the Salmon Allocation Policy, the former would accord priority of allocation to the recreational fishery; the latter would not). They were unhappy that dual fishing was not allowed. They wanted to fish outside the commercial openings. They asserted the right to exclude others from their fishing territory, which appeared, in their view at that time, to be wider than the CDA. The plaintiffs advised DFO in their letter of response dated June 19, 2012, that they had instructed their counsel to return to court.

[544] Ms. Farlinger responded on June 21, 2012, commenting on the plaintiffs' wish to fish outside the CDA for multi-species and for dual purposes, with a variety of vessels, and also during recreational openings. While DFO would allow multiple vessels to fish under one licence, she set out concerns with certain aspects, such as dual fishing and the high amount of the plaintiffs' counterproposal, which DFO calculated at almost 50% of the AABM chinook for 2011-2012.

[545] Ms. Farlinger concluded her letter by saying the salmon demonstration fishery shares represented a reasonable step in addressing increased access, and negotiations should continue. She suggested they work together "towards longer-term clarity regarding fisheries-related community economic development and the expression of your aboriginal right to fish and to sell that fish". This split in objectives, between community economic development and a right-based fishery with wide community participation, was a theme she picked up in her evidence.

[546] Before continuing with a discussion of the Negotiations, I will describe the implementation and progress of the salmon demonstration fishery in more detail.

[547] This fishery was offered to the plaintiffs in 2012 and has continued to date. It is not conducted under the usual commercial fishery rules. The plaintiffs were provided with a number of licences, without cost, and were permitted to divide them up as they saw fit amongst boats of any size. Openings were provided throughout the season. Allocations were based on the licences provided.

[548] Mr. Kerr testified that DFO allowed many flexibilities in the salmon demonstration fishery, including expanded retention of bycatch and earlier openings and more gear in the terminal fishery. Terminal fisheries involve returns of salmon to a single river, primarily the Burman and the Conuma, as opposed to the ocean-based mixed stocks AABM chinook fishery.

[549] Additional funding was provided for catch monitoring. The plaintiffs did not have to provide vessel registration numbers. Money was provided for gear.

[550] The 2012 salmon demonstration fishery took place with twenty active boats from Ahousaht, two each from Ehattesaht and Mowachaht/Muchalaht, and nine each from Hesquiaht and Tla-o-qui-aht.

[551] According to Glenn Lario, who was Acting Resource Manager before he retired, and managed the 2012 salmon demonstration fishery "on the ground", the plaintiffs were not ready to fish in May

2012 when the salmon demonstration fishery was approved. They did not know how to handle or enhance the quality of the fish. They would not provide landing slips or logbooks. Workshops were offered. The plaintiffs accepted some, but not all of the workshops. There was not much interest and participation waned.

[552] Mr. Rusch, who managed the 2012 and 2013 fisheries on the water, testified that compliance by the plaintiffs with the rules for the salmon demonstration fishery was not good. Mr. Robson, in charge of enforcement, testified that the plaintiffs would not participate in a subcommittee on enforcement.

[553] The plaintiffs hired Alex Gagne as the T'aaq-wiihak Fishing Coordinator sometime in 2012 to manage the demonstration fishery. Her position is federally funded. It appears that she started midway through the 2012 season and assumed her full-time position in 2013. Her position is funded by DFO through PICFI. Participation and compliance improved under Ms. Gagne's management.

[554] Ms. Gagne took a training course in dockside monitoring from J.O. Thomas Associates Inc., the company certified by DFO as an independent monitor for the regular commercial fishery. There is general agreement that Ms. Gagne has done a very good job in ensuring that the T'aaq-wiihak catches are carefully monitored and reported. However, the catch went over the allocations in 2013, and Ms. Gagne testified that she realized they needed a better handle on the number of boats going out. As well, allocations were being caught in their totality too early in the season, leaving few fish for later openings.

[555] In 2015 the plaintiffs initiated a system of hailing in and out for boats that planned to stay out for multi-day trips.

[556] Ms. Gagne has attended most Main Table Meetings and has participated in the Joint Working Group. She testified that each plaintiff has a federally funded Fisheries Manager living in their respective communities. The T'aaq-wiihak had hired seven monitors as of 2015.

[557] Ms. Gagne said the T'aaq-wiihak has tightened up its paper work over the years. It requires applications for both the fisher and the vessel, and each participant must sign a Requirements and Responsibilities Agreement. The participants then receive a T'aaq-wiihak card and a vessel decal. Logbooks are required, and Ms. Gagne testified that their use has improved as the fishery has developed.

[558] Landing sites have been designated and landing slips are completed at the landing sites by Ms. Gagne and the monitors. Buyers have no access to the fish until the landing slips are complete. The T'aaq-wiihak deals with two local buyers and the rest are based in Vancouver. Fish are also sold to tourists.

[559] Despite DFO's prohibition against dual fishing in the salmon demonstration fishery, the plaintiffs have done it anyway. Ms. Gagne testified the home-use fish (FSC) are kept separate to ensure they will not be sold. The landings are reported to DFO.

[560] The independent monitor, J.O. Thomas, is there for most landings and validates 20% of the reports. The invoice from J.O. Thomas for monitoring the salmon demonstration fishery in 2014 was $3,175; for 2015 it was $4,251 because of sporadic openings and because DFO did not provide accommodation. These invoices have been paid by DFO.

[561] The plaintiffs, while consistently maintaining their position that nothing offered so far has been an accommodation of their right-based fishery, have participated in the salmon demonstration fisheries which have taken place every summer. Participation, particularly by mid-sized commercial trollers, has continued to grow.

[562] Ms. Gagne testified that interest has increased steadily since the salmon demonstration fishery was implemented in 2012.

[563] According to Michelle James' report at page 87, catches in the chinook demonstration fishery in 2013 and 2014 represented 82% and 73% of the total commercial troll harvest of chinook within entire DFO management areas 24/124 and 25/125. (Areas 24 and 25 are inshore; areas 124 and 125 are the corresponding offshore areas out to the 200-mile limit. The CDA covers the inshore areas and extends nine miles out into the offshore areas.) Thus, a high percentage of the entire troll harvest on the west coast was caught by the plaintiffs in the nine-mile CDA.

[564] For 2015, Ms. Gagne registered 56 participants from Ahousaht, eight for Ehattesaht, 15 from Hesquiaht, 26 from Mowachaht/Muchalaht, and 41 from Tla-o-qui-aht.

[565] Vessels registered and actually fishing were:

- Ahousaht: 13 trollers and 44 mosquito boats registered; 12 trollers and 16 mosquito boats actually fished;
- Ehattesaht: 4 of each were registered; 3 trollers and 2 mosquito boats fished;
- Hesquiaht: 4 trollers and 11 mosquito boats registered: 3 trollers and 9 mosquito boats fished;
- Mowachaht/Muchalaht: 2 trollers and 12 mosquito boats registered; 2 trollers and 5 mosquito boats fished; and
- Tla-o-qui-aht: 9 trollers and 16 mosquito boats registered; 8 trollers and 7 mosquito boats fished.

[566] Ms. Gagne testified to the difference in allocation of AABM chinook between what the plaintiffs wanted and what they got, using 2015 as an example: they wanted 30% of the WCVI TAC: 35, 441 pieces. They initially got 6,783 pieces, with an additional allocation from unused recreational allocation and from the 20% holdback in September for a total of 7,767 pieces. The 20% holdback is a management tool used in the regular commercial fishery by which the commercial fishery holds back on catching its entire allocation until September in case the recreational fishery goes over its allocation. Ms. Gagne said not knowing of the extra allocation until September caused problems for planning.

[567] The plaintiffs were also unhappy at having to abide by the restriction put on in August to protect interior Fraser coho -- that is, a five-mile corridor established from the surfline to let this stock pass. Recreational fishermen are allowed to fish in that corridor, which the plaintiffs object to. The plaintiffs are allowed to fish there with their mosquito fleet, but not with their trollers.

[568] In 2014, according to the plaintiffs' post season review, some modest profits were made by some fishers; in 2015, the revenues went down due to a number of factors including lower allocations. The plaintiffs reported their revenues in their year end reports but no analysis of expenses was done, so net income is not known.

[569] Predictably, the commercial trollers, which comprise 20% of the vessel numbers, caught 80% of the fish.

[570] This raised concerns among DFO managers as they are under the impression that they must protect the preferred-means fishery under the right, which they see as the small mosquito boats and wide community participation. In their view, as expressed by Ms. Farlinger, economic development which could occur through the use of commercial trollers in the entire management area is desirable and is encouraged by DFO through PICFI licences, but is not part of the right. As well, the more catch capacity there is, the more DFO sees the need for independent monitoring. The plaintiffs want to monitor their right-based fishery themselves. The issues of the adequacy of allocations, vessel size and appropriate monitoring have dogged the Negotiations throughout.

[571] Meanwhile, leaving the salmon demonstration fishery and returning to the Negotiations, the meetings at both the Main Table and the Joint Working Group continued, and became more focussed after the Supreme Court of Canada dismissed the second leave application in January 2014.

[572] Following the Supreme Court's ruling, Susan Farlinger, Regional Director General for DFO, took over as lead negotiator and began to attend the Main Table regularly.

[573] In January 2014, the regional staff under Ms. Farlinger prepared a briefing note similar to one they had sent in August 2013 which had been discontinued because it was late in the season. This Briefing Note, like the previous one, noted that the plaintiffs were seeking an expanded fishing area. Ms. Farlinger suggested that DFO could allow an expanded area as a matter of policy, as long as the right was confined to the CDA. She recommended the continuation of all the existing access plus dual fishing, sale of halibut bycatch from the salmon demonstration fishery, and demonstration fisheries for lingcod (a species of groundfish), prawn, and crab. This Briefing Note was renewed in February of 2014, after the Supreme Court of Canada's decision refusing Canada's application for leave to appeal was released. Ms. Farlinger later learned these two briefing notes, although sent to Ottawa, were not forwarded to the Minister and were simply marked "discontinued". She concentrated on how to change their approach and make a stronger presentation in order to get a mandate.

[574] Mr. Davis, Regional Resource Manager for shellfish and pelagic fish (fish found in the water column rather than on the sea bottom), testified that local management had wanted to explore

alternatives to electronic monitoring in the groundfish fishery, depending on area, gear, vessel size, allocations and opening times, and thus had proposed the aforementioned lingcod demonstration fishery in 2014. This did not receive approval from Ottawa, but the rules were bent to allow a different approach to centralize groundfish quota for the plaintiffs. DFO also modified the existing system to allow small multiple landings, trip limits, and retention of sablefish. However, DFO required electronic monitoring for all sizes of boats, which the plaintiffs have always objected to.

[575] For several years, Diana Dobson, DFO's Salmon Stock Assessment Manager, has worked with the Area 25 Harvest Committee, which consists of all groups in the salmon terminal fisheries in Area 25 to create an integrated fishing proposal. In 2014, Diana Dobson continued to work on developing terminal fisheries on the Burman and Conuma Rivers for the plaintiffs. She was concerned at the lack of a precautionary approach. A one-year demonstration fishery was set up, encouraging collaborative management with local groups.

[576] In 2014, the plaintiffs submitted fairly detailed plans for all their fisheries. The allocations they seek are based on percentages of the total fish on the WCVI. At the Main Table presentation of these plans in April 2014, Ms. Gagne stated that the plans would apply, as they indicated on their face, to the whole WCVI, not the CDA. I will return to this.

[577] In the same April 2014 meeting which contained the presentation by Ms. Gagne, Francis Frank emphasized several times that the plaintiffs want to find their "rightful place back in the industry". The discussion focussed on the word "industrial". Ms. Farlinger took this to mean the commercial fishing industry. Mr. Frank said the plaintiffs wanted to use small, low-cost boats and also "midsize large industrial sized scale boats". Ms. Farlinger testified that she was concerned that their objectives were at odds and presented management problems.

[578] During the Negotiations, Ms. Farlinger asked the plaintiffs if they could discuss the 2013/14 plans with other sectors. The plaintiffs rejected this suggestion, as they took the position their plans were instruments for negotiation.

[579] Canada did not respond to the plaintiffs' April 2014 proposals but instead presented them with the LTO on December 23, 2014. This offer was put together by all the senior regional DFO staff, with national input as well. According to Ms. Reid, the LTO was DFO's attempt to reconcile the plaintiffs' wish to fish with both small and larger boats, and to fish outside the CDA. The small boats could fish under split licences in the CDA; the larger boats would fish with a single licence each but could fish the entirety of Area G.

[580] According to Ms. Farlinger, Canada bases its approach on fish that are available in the CDA, not the whole WCVI, as the plaintiffs do. The LTO contains an offer in respect of salmon and herring only. All other species would be negotiated after demonstration fisheries were held. The philosophy of the LTO is based on a hybrid approach: licences and the concomitant share of the TAC would be provided and the plaintiffs could decide whether and to what extent they wanted to fish the licences in the general commercial fishery or in the preferred-means fishery, as DFO understands that term:

community based, multi-species, localized fisheries involving wide community participation, using small, low-cost boats (under 25'), in other words, the mosquito fleet. The licences not used in the general commercial fishery can be divided up amongst the small boats to ensure wide community participation. DFO does not consider commercial trollers of any size to be "small low-cost boats".

[581] The fishing area for the small boats would be the CDA; boats/gear, times, designation of harvesters, and monitoring standards would all be incorporated in an agreement. Ms. Farlinger testified that she could not see a situation in which the plaintiffs' preferred-means boats would not be allowed to fish in the five-mile coho conservation corridor.

[582] The LTO set out a structured approach for making decisions and for evaluating plans, following the Evaluation Framework that had been approved by DFO management previously that year (I will set out this framework later, in the context of the fish plans). Ms. Farlinger learned later that the approval from Ottawa for the LTO also contained a mandate to negotiate fisheries at the Main Table Meetings for all other species, something that had not been made clear to her until mid-2015.

[583] Argument and discussion arose about how the LTO was put together. This occurred during Ms. Farlinger's evidence while she was attempting to explain how she approaches fisheries management. She had prepared an aide memoire, which she used to explain that the objective of the fishery is an important starting point. Counsel for the plaintiffs took the position that this was not the approach of any other witness, particularly Sarah Murdoch, who had testified in limited terms about the Coastwide Framework, which is protected by privilege. As well, it appeared to counsel for the plaintiffs that Ms. Farlinger was saying that the Minister was informed of "objective and scale" in legal advice and used those factors in setting the allocations in the LTO. An argument ensued over whether privilege had been waived. I ruled it had not (2015 BCSC 2313), and that it had been clear through the evidence of many witnesses that the objective and scale of the fishery is a fishery management issue.

[584] I think it is fair to say that the plaintiffs recognize the importance of understanding the objective of a fishery before it can be designed. Francis Frank admitted as much during cross-examination, and he explained the concept in a letter dated July 18, 2006, to then Prime Minister Harper, which Garson J. quoted at para. 648 of her reasons.

[585] In the end, it does not appear that DFO used the "objective of the fishery" approach as an explanation or justification for the allocations in the LTO. In my view, it became a means to explain the difficulties both sides had in finding a common starting point. However, the Negotiations failed to accomplish agreement on this and the parties remain divided on this fundamental issue. I have now reached a conclusion on the interpretation of the scale and scope of the right declared by Garson J., as I have set out above.

The Plaintiffs' Perspective of the Negotiations

[586] Before turning to the plaintiffs' reaction to the LTO, I will refer to their view of the Negotiations, as testified to by Francis Frank.

[587] Francis Frank is a member of the Tla-o-qui-aht nation. He is the chief negotiator for the plaintiffs. He testified that the plaintiffs would meet amongst themselves with Dr. Hall prior to the Main Table Meetings.

[588] He said the plaintiffs explained their governance structure to DFO at the first meeting. They anticipated being out on the water at an early stage. He was particularly interested in dual fishing and in multi-species fishing. He said his nation has gone from 20-25 trollers to a mosquito fleet. They want a fleet similar to the 1970's, and wanted to fish all species. A salmon demonstration fishery was not satisfactory.

[589] He said a main point of disagreement was the use of the commercial TAC versus the entire Canadian TAC for the WCVI, which places the T'aaq-wiihak right-based commercial fishery behind the recreational fishery (that is, the Salmon Allocation Policy). He said he and Ms. Farlinger differed on priority; in fact he was never given an explanation of DFO's view of priority.

[590] Mr. Frank explained his reaction, as negotiator, to the LTO from DFO in December 2014. He said the plaintiffs' vision was to re-establish themselves as a presence in the commercial fishery. The salmon demonstration fishery was a start, but the LTO was a big step backwards. People had made investments in larger vessels and now the numbers of those vessels allowed to go out and fish would be very small. He said most of the fishers are struggling, and have no assurance of allocation from one year to the next.

[591] Mr. Frank was asked in examination in chief to explain the plaintiffs' position on their acceptance or rejection of the CDA. He purported not to understand why DFO would be confused about the area to which the plans applied, notwithstanding Alex Gagne's presentation in April 2014 stating that the plaintiffs would not be bound by the CDA, and the face of the plans themselves which state they apply to the entire WCVI. This was eventually clarified some months later in a letter from Dr. Hall. Nevertheless in cross-examination, Mr. Frank made it clear that the plaintiffs do not like the nine-mile restriction, and some members do not accept it.

[592] The transcripts of the Main Table Meetings were adduced into evidence. It is fair to say that all the speakers for the various plaintiffs did not always speak with one voice at the Main Table. However, usually written communication would follow in which the plaintiffs' positions were set out.

[593] The differing views expressed by the plaintiffs at the Main Table raise a concern that occurred to me from time to time through the trial, but which was not raised as an issue before me. Perhaps it was clarified before Garson J., although it is not reflected in her judgment. There were references made to the NCN Tribal Council and other positions that relate to the existence of Reserves under the *Indian Act* but which would not accord with the plaintiffs' historical governance, which appears to be centered around the plaintiffs' Ha'wiih, that is their hereditary chiefs, who govern their territories, or Ha-Ha-Houlthee. Each plaintiff also has a tribal council. Mr. Frank testified that he holds various positions and was elected by the fourteen NCN Nations as chief spokesperson and acts as chief negotiator.

[594] My concern is: what legal status does each plaintiff have? Who makes the decisions? Who is bound by those decisions and how? Who is bound by this court's decision? Albeit with some misgivings, I presume these questions have been considered by the parties and can be left there, but I will touch on this topic again later in the context of the fish plans.

[595] In summary, Mr. Frank said he has found the Negotiations frustrating and he feels he has failed to get a right-based fishery implemented. He did not expect to get everything they wanted but he did expect some movement.

[596] In cross-examination, he was asked whether he considered that the right required further definition to allow the parties to move forward. He said there is not a lot to define. He was also asked about how the plaintiffs would deal with the big-boat/small-boat catch capacities, that is, the problem of the trollers catching a large percentage of the fish. There was no clear answer to that. He agreed electronic monitoring is an option, but said the cost is prohibitive, especially for the mosquito fleet.

[597] He agreed that no study had been done of the economic viability of the salmon demonstration fishery and said that would be of assistance. He acknowledged that the relationship with regional DFO staff has been good. He takes the position that the plaintiffs' right includes management of the fishery, as a collaborative responsibility with DFO. Mr. Frank also agreed that it is helpful to understand the objective of a fishery before the fishery is designed.

[598] I will now return to the plaintiffs' reaction to DFO's LTO made at the end of 2014. The plaintiffs were very unhappy with the LTO. They responded on January 12, 2015, stating that the LTO was unresponsive to their proposals, even for the two species which were addressed in the LTO: salmon and herring. They said they required DFO proposals for groundfish, prawn, crab and goose barnacles. They described the years spent in the Negotiations as wasted. They characterized the LTO as "an affront to [their] historical practice and the modern aboriginal right". They said the salmon offer rolled back several elements of the salmon demonstration fishery that had worked well for three years, in particular the LTO's specification that there be no vessels over 25' in the community based fishery, when many trollers had been purchased and used in the demonstration fishery.

[599] The allocations were left as they have been under the salmon demonstration fishery, but the LTO now removed the flexibility of that fishery by requiring the plaintiffs to choose between small boats and commercial trollers which would be licenced under the regular commercial fishery. Thus, plaintiff fishers who have obtained a commercial troller will deprive the whole community of one of the licences if they want to use it in the commercial fishery.

[600] Since there is no limit on the number of small boats that can fish under one licence, this would not impact the number of mosquito boats, but it would limit the number of trollers if the plaintiffs have to use one licence per boat.

[601] In short, Mr. Frank expressed the view of the plaintiffs when he said the salmon offer appears to be a giant step backwards. Whereas their demonstration fishery has allowed participation by unlimited

numbers of small and mid-sized boats under 19 Area G troll licences, the LTO is still licence-based as opposed to share-based, and would allow only the small boats to participate in what DFO considers to be the preferred-means fishery. The plaintiffs could choose which of the licences they want to use in the preferred-means fishery and the remainder would be fished by the trollers in the regular commercial fishery on a “one licence per boat” basis.

[602] The plaintiffs’ answer to DFO’s concern that the trollers will deprive the mosquito fleet of opportunity is that allocations should be much larger and the plaintiffs should be allowed to control who is allowed to fish. As noted, the whole process from their perspective is known as T’aaq-wiihak: “Permission To Fish”.

[603] Herring was also dealt with in the LTO. The plaintiffs and other First Nations groups have been in conflict with DFO over the herring fishery for a number of years. The plaintiffs have maintained that the stocks are not sufficient to allow for a commercial fishery. Although local DFO management agreed with the plaintiffs in 2014 and recommended a closure, the Minister opened the fishery. The First Nations obtained an injunction in the Federal Court. The next year, the Minister opened the fishery again. The First Nations were unsuccessful in obtaining an injunction, but the commercial fishery was unable to catch any herring that year in any event.

[604] The plaintiffs were asked by DFO to propose a herring plan, which they did, but since conservation and stock rebuilding was their primary concern, the plan was an outline only. DFO’s herring offer was for 55 gillnet licences, one seine licence, and two spawn on kelp licences.

Continuation of the Negotiations During Trial

[605] This was the state of events as this second stage of the trial commenced in March 2015. However, the parties continued to meet and discuss various issues at the Main Table while the trial was in progress, and those meetings were the subject of testimony, particularly from Ms. Farlinger.

[606] To continue chronologically: as late as April 2015, according to Ms. Farlinger, one of the plaintiffs’ representatives took the position at a Main Table Meeting that their hereditary chiefs own the fish that migrate through their territories and they should set the allocations for all the fisheries. She said this was another stumbling block to productive discussions. This echoes the position taken in the plaintiffs’ letters in 2012, when discussing the salmon demonstration fishery. It also echoes the issue I raised earlier at the beginning of these reasons: whom do the plaintiffs speak for?

[607] In August 2015, DFO wrote to the plaintiffs to advise of problems in the salmon demonstration fishery for that summer: boats had been fishing outside the CDA, with barbed hooks and no flags, dual fishing had been conducted, and one large vessel had been fishing in the five-mile coho-protection corridor. The plaintiffs responded that compliance was substantial, infractions were minor, and DFO had been late with the licence.

[608] In mid-2015, while the trial was ongoing, Ms. Farlinger clarified her mandate to negotiate. She was told the approval by Ottawa of the LTO included a mandate to negotiate all the other fisheries. She

wanted to move ahead on dual fishing in the salmon fishery, retention of groundfish (specifically halibut) bycatch in the salmon demonstration fishery, test fisheries for lingcod and crab, and an experiment to test prawn management assumptions. These were raised at a Main Table Meeting in September 2015 and formally proposed in a letter of January 8, 2016. The plaintiffs responded, expressing disappointment in the delay. They disputed DFO's interpretation of "small low cost boats", and set out their position on the other fisheries, which was generally that the offers were too small.

[609] Ms. Farlinger also raised the need for a financial assessment of the salmon demonstration fishery in order to move into an exploration of the potential for cost sharing.

[610] There appeared to have been some productive discussions at some point because Dr. Hall testified that the majority of issues on catch monitoring had been resolved and the rest were to be brought back to the Main Table. Sarah Murdoch also referred to progress in this regard.

[611] What, if anything, has occurred since the evidence concluded is not before the court.

Summary of Accommodations

[612] In summary on the issue of accommodation, since the decision in 2009, Canada has, in addition to funding the Negotiations, provided funding to build capacity in the plaintiffs' fishing fleet and to allow the plaintiffs to develop and propose fishing plans. Their biological and technical staff, including Dr. Hall and Alex Gagne, are all funded by DFO.

[613] Licence fees have been waived and DFO has absorbed the costs of monitoring. Each year, hundreds of thousands of dollars have been devoted to carrying on the Negotiations, as well as building the plaintiffs' fishing capacity, training, and funding all of the staff. Between 2008 and 2015, DFO has provided $8.2 million to the Nuu-chah-nulth Tribal Council through the Aboriginal Fisheries Strategy, with $4.4 million of that amount expressly designated for the plaintiffs. Since 2012, the salmon demonstration fishery has proceeded with multiple boats of various sizes fishing under each licence.

[614] As an example of specific allocations, DFO refers to groundfish, because before Garson J., the plaintiffs used the halibut fishery as an example of their exclusion from the commercial groundfish fishery. She noted at para. 577 that the plaintiffs alleged that they were prohibited from entering the halibut fishery by the limited entry regulation which prevented them from getting licences or quota (para. 577). DFO says it has now provided to the plaintiffs 122 licences (as opposed to the 25 they held in 2008), in addition to thousands of pounds of quota of multiple species at no cost. Halibut quota to the plaintiffs has increased by 461%, lingcod by over 500%, dogfish by 200% and sablefish by 1121%.

[615] Canada says all of this should be considered in the determination of whether the plaintiffs' right is still being infringed.

[616] The plaintiffs take the position that, other than the salmon demonstration fishery which has suffered from inadequate allocations, Canada has not only not accommodated their right or justified

any infringement of it; it has taken no steps at all to work towards an accommodation. They say there have been no meaningful consultations and nothing has been done to implement a right-based multi-species fishery. As mentioned several times, with two exceptions, the plaintiffs did not acknowledge any PICFI access as an accommodation of their right, although they now agree that access provided to a PICFI aggregate controlled entirely by these plaintiffs can be counted.

[617] The plaintiffs say the various factors DFO has taken into account in setting allocations are flawed. Licence numbers are meaningless because it says nothing about actual opportunities. They need a meaningful opportunity to be economically sustainable. The plaintiffs also say comparisons to other groups, even other First Nations groups, are meaningless because the plaintiffs have a declared right and others do not. They say differences in area (Area G compared to the CDA) are meaningless for a migrating species like chinook.

[618] It is not entirely possible to reconcile the plaintiffs' complaint that DFO has provided no criteria or evidence for analysis with their criticism of the factors DFO purports to use to support their efforts at accommodation. The factors to which DFO refers mainly come from *Gladstone*, and are supported by documents and testimony. However, the plaintiffs legitimately complain that the Evaluations and explanations now provided came very late, and the lack of a mandate prevented issues from being thoroughly thrashed out at the Main Table. As well, the limit on demonstration fisheries means that many suggestions that might work or might need small adjustment have not been tested.

[619] Overall, the plaintiffs blame DFO for the failure of the Negotiations, which they say has led to a failure to accommodate their right. They say DFO has never come to grips with the fact that they are supposed to be negotiating a right-based fishery. They say that the lack of a mandate through 2014 undermines the entire consultation process to the point of bad faith.

[620] DFO, while declining to criticize the plaintiffs or cast blame their way, has nevertheless suggested that the plaintiffs' positions have changed unexpectedly throughout the Negotiations, leaving DFO attempting to understand the unanticipated changes.

Developments in the Plaintiffs' Position during the Negotiations

[621] There are two areas in particular where the evidence of the DFO witnesses shows some justification for their position that the plaintiffs' position through the Negotiations seemed to change or develop as time went on. These areas are very basic and fundamental.

Scale of the Fishery

[622] The first is the scale of the fishery, including the size and capacity of vessels.

[623] DFO witnesses testified that they wanted to know, in the early years of the Negotiations, what a small-scale commercial fishery would look like. Ms. Farlinger and Mr. Kerr testified that they were under the impression that all parties agreed that this was a small-scale fishery.

[624] From DFO's perspective, it is necessary to understand the scope of the right and the means of exercising it before appropriate allocations, monitoring and reporting standards can be formulated. The evidence of the DFO witnesses shows that they have struggled to understand the plaintiffs' view of the scope and objective of the fishery that the plaintiffs say will accommodate the right (for now), and have not understood how the plaintiffs came to arrive at the allocations they seek, which are in some cases very large.

[625] As mentioned by Garson J., the plaintiffs did not plead or call evidence on the amount of fish that would satisfy their claimed right. As I have discussed above, she did not give any overt indication of the scale of the commercial fishery she had in mind when she declared the right. Instead the scale must be inferred from various aspects of her judgment.

[626] In January 2014, Canada sought particulars of what a "reasonable allocation" might be. The plaintiffs responded in a very general way:

> A reasonable allocation is one that accommodates the Proceeding Plaintiffs' aboriginal rights within the context of the justification analysis applicable to s. 35(1) of the Constitution Act, 1982, and allows the Proceeding Plaintiffs to exercise their aboriginal right.

[627] In their December 2014 response to further particulars, the plaintiffs said each of their proposals from 2010 to 2014 "contributes to an overall allocation that is reasonable". At trial, the plaintiffs relied on their 2014 proposals which differ from earlier proposals.

[628] All of the senior managers at DFO testified that they had difficulty getting the plaintiffs to come to an agreement as to the primary objective of the fishery that was to be designed to accommodate the right: was it to get as many people as possible out fishing, keeping costs low, or was it to build the economy and get maximum revenue? While building the economy was always something DFO was prepared to assist with, did it come within the right? If trollers were the only viable economic method of fishing, and if DFO allowed the troller fleet to expand and to fish whatever allocation was given, were they undermining the mosquito fleet? Did that mean they were not protecting the right?

[629] The plaintiffs say DFO never made this dichotomy clear to them. However, although it may not have been explained in stark terms, it was a theme running through the discussions. It also shows up in the correspondence, and with all due respect, it seems fairly obvious in practical terms.

[630] Ms. Farlinger said DFO was proceeding on the basis that the right-based commercial fishery was small scale, which they understood from the judgment's reference to small, low-cost boats, wide distribution, a local community based fishery, and not an industrial scale. There is, of course, also the significant restriction of the CDA. However, she also said, as noted earlier, that the purpose of the Negotiations was to reach an agreement, and if a final agreement could have been reached, it might have included some things that were outside the right.

[631] That is, of course, not an option for the court, as this court must work within the declarations.

[632] Presently, the plaintiffs do not accept the term “small scale”, but some of the earlier correspondence supports DFO’s view that they were at least starting from the same point.

[633] On May 27, 2011, the plaintiffs wrote to Ms. Farlinger saying how disappointed they were with DFO’s offer for 2011 for salmon, which they viewed as “wholly inadequate”. They said:

> We wish to fish these allocations using primarily small boats each having considerably less catching capacity than a standard Area G vessel. If an average Area G troll vessel fishes 30-40 hooks, and, as an example, five small boats fish not more than 40 hooks combined, there is ample opportunity to expand the small boat fishery without increasing the overall catch.
>
> It is important to begin developing a small boat fleet of a reasonable size now to ensure that all five T’aaq-wiihak nations have a fair opportunity to participate in the 2011 fishery.

[634] The plaintiffs proposed an initial target of 50 boats.

[635] This was also reflected in the June 15, 2011 letter from Dr. Don Hall, Program Manager on behalf of the T’aaq-wiihak members of the Joint Working Group, referred to above. This letter does provide some support for Mr. Kerr and Ms. Farlinger’s understanding that both the plaintiffs and DFO were all operating under the assumption that the fishery is a small-boat fishery, and does not include a mid-sized troll fishery, as the plaintiffs now contend for:

> If T’aaq-wiihak Nations participate in the remainder of the Area G fishery under the constraints proposed by DFO, and each T’aaq-wiihak vessel could fish these five licences with the same catching efficiency as a standard Area G troller (which is **not** our preference…)….
>
> If T’aaq-wiihak fishers use our preferred small vessel “mosquito fleet” approach, we believe the catching capacity of a T’aaq-wiihak vessel is approximately 20% of that of an Area G troller.
>
> ….
>
> Our objectives are to provide a reasonable economic benefit to each of our communities, to fairly distribute the available opportunity to take account of the level of interest in each community and its current fishing capacity, to build fishing capacity and to test approaches to the long-term implementation of a T’aaq-wiihak salmon fishery, and to give each fisher a reasonable chance of making a modest profit or at least not lose money.
>
> …our preferred means of exercising our rights, as recognized in the court decisions, is a community based fishery where the community fishes together, using our own small boats.

[636] Dr. Hall suggested in his letter that the plaintiffs might receive 10% of the WCVI total allowable harvest of chinook. That was in 2011. The plaintiffs now seek 30% of that harvest.

[637] In their recent Salmon Management Plan, the plaintiffs define “low effort” and “average-effort” by gear type, not by length of vessel. As of 2014, the plaintiffs proposed 76 “low-effort” vessels and 20 “average-effort” vessels. Although gear type is listed, there is no catch capacity given in the 2014 salmon plan, nor is there a precise delineation of effort, as there was in Dr. Hall’s letter in 2011. The plaintiffs’ general approach to controlling fishing effort is to impose trip limits.

[638] As of 2016, the plaintiffs intended to use 76 low-effort vessels and 40 average-effort vessels. Dr. Hall said those numbers are now 100 and 30. Other than a change to the sockeye plan to incorporate a suggestion of Jeff Grout that it made more sense to base proposed allocations on the entire coastwide stock rather than on stocks passing WCVI, and a clarification that the plans now apply to the CDA, not the entire DFO management areas, the 2016/17 plan is the same as 2014.

[639] It is clear that the plaintiffs' view of the size of the fishery has increased over time. To some extent, this was acquiesced in by DFO by the unquestioned acceptance of the use of trollers in the salmon demonstration fishery.

[640] Lack of understanding or agreement on the scale of the fishery, including what the plaintiffs viewed as their preferred means of fishing, were themes throughout the Negotiations. Several DFO witnesses testified as to why it is important for DFO to understand what must be protected as a preferred means of fishing under the right-based fishery. As already mentioned, the use of commercial trollers in the T'aaq-wiihak fishery is challenging for DFO managers as they attempt to understand, accommodate, and protect the right, because use of trollers could interfere with wide community participation.

[641] Jeff Grout, the Regional Resource Manager for Salmon, emphasized the point, which appears not to be in dispute, that it is catching power, not an arbitrary vessel length, that is important. He characterized the trollers the plaintiffs wish to use and have been using as mid-sized boats, with commercial capacity. He said his understanding of the plaintiffs' plans is that they want year-long fishing. Small boats are more compatible with achieving that goal as an allocation will last longer. With mid-sized boats, there is a high removal rate and the allocation will not last long. There is thus the potential to deprive the small-boat fleet of the allocations. There are also implications for stocks of concern. In addition, the greater the catch capacity, the greater the need on DFO's part for enhanced monitoring, including, for some fisheries, electronic monitoring.

[642] The plaintiffs say they can be trusted to manage the allocation amongst themselves, accommodating both trollers (described in their fishing plans as average-effort) and mosquito boats (described as low-effort), and that vessel caps and trip limits rather than vessel size are the appropriate management tools. However, their primary response is to say that DFO should enlarge the allocations to ensure everyone can participate in a meaningful sustainable fishery.

[643] In their recent fish plans, the plaintiffs say disputes between Nations, which I assume would include overharvest by trollers at the expense of mosquito boats (Ahousaht, for example, has much greater fishing power than the Ehattesaht) would be dealt with through discussion and perhaps a mediator. DFO's concern is that they would simply demand more allocation to satisfy the right-based fishers who were squeezed out.

[644] DFO attempted to accommodate the use of trollers in the LTO by allowing the trollers to choose to take a licence from the offered allocations and fish it outside the nine-mile limit. As noted, the LTO is strongly rejected by the plaintiffs.

Size of Fishing Area

[645] The second area in which the plaintiffs' views have changed is on the extent of their fishing territories. More specifically, the plaintiffs have changed their position over the course of the

Negotiations respecting whether they accept Garson J.'s declaration regarding the nine-mile limit on their fishing territories.

[646] This was an issue on and off through the Negotiations. The plaintiffs' 2014 plans stated that the plans applied to the entire DFO management areas on the WCVI, which extend to 200 miles. This had also been their position in 2012, as reflected in the letter referred to earlier in respect of the salmon demonstration fishery. As of April 2014, a presentation given by their fisheries coordinator, Ms. Gagne, explicitly stated that the plaintiffs were not bound by the nine-mile CDA.

[647] Dr. Hall testified in cross-examination that it was always clear that the plaintiffs' plans applied to the CDA, despite what they stated on their face, and that any confusion seemed to be Ms. Farlinger's fault. He was not able to explain why Ms. Gagne made her April 2014 presentation in which she presented the plans and plainly stated that the plaintiffs were not bound by the CDA. In her evidence, Ms. Gagne took the blame, saying she did not understand the CDA. She was vague as to how she obtained her understanding that led to her presentation.

[648] Ms. Farlinger asked for clarification about the area following Ms. Gagne's presentation. Mr. Frank said he did not understand what her problem was, despite Ms. Gagne's presentation and the area as stated on the face of the plans. He said, "It is clear. It is clearly laid out in the plans….The court has said nine nautical miles".

[649] Dr. Hall wrote to DFO on July 22, 2014, including the plaintiffs' crab plan, and stated:

> With respect to the plans that were provided to DFO on March 11, 2014, the Nations understand that there is some uncertainty about their geographic scope. I take this opportunity to confirm that each of the T'aaq-wiihak plans provides fishing opportunities for members with the 9 mile outer boundary as defined by the Court. As you know, however, the Nations wish to harvest beyond the 9 mile limit, and, while the plans are limited to the 9 mile fishing area, the Nations do not want this to foreclose discussions about potential flexibilities on the issue.

[650] Notwithstanding this statement, the plan attached to that letter in respect of crab contained the standard statement from all the plans.

> The T'aaq-wiihak Fishing Area - corresponds to the aggregate Ha-ha-houlthee [territory] of the Ha-wiih [hereditary chiefs] of the five nations, correlates with DFO Pacific Fisheries Management Areas 24, 25, 124, 125 and parts of 26 and 126.

[651] The listed areas are the DFO management areas, out to 200 miles. Thus the 2014 plans themselves purport to apply to the entire DFO management areas and the shares sought by the plaintiffs, based on the entire WCVI, were not changed, despite their apparent willingness to be bound by the CDA. Finally, as mentioned, in 2016 the area in the plans was specified as the CDA, but the shares they sought remain the same, based on the entire WCVI.

[652] In cross-examination, Dr. Hall said the plaintiffs acknowledge the nine-mile restriction but there may be reasons of management, enforcement, and practicalities to consider flexibilities beyond that, species by species.

[653] As mentioned earlier, this theme also emerged during the course of the trial when counsel for the plaintiff advanced the proposition, while cross-examining Mr. Davis, that accommodation of the right could well involve a constitutionally protected fishery outside the CDA. I confess to some difficulty in understanding this, and reiterate that this court must accept the nine-mile CDA as the geographical limit of the right.

[654] Taking all of the Negotiations into account, I think it is difficult for the plaintiffs to take the position that they have not changed their positions on certain aspects of the fishery over time. However, their insistence on a multi-species right-based fishery based on shares rather than being dependent on allocations coming through licences and PICFI programs has been constant and adamant.

Results of the Negotiations and Moving Forward

[655] I will touch on the legal requirement for and significance of consultation in a later section of these reasons. At this point I will offer some comments on the Negotiations.

[656] There were no lawyers at the Main Table, and the role, if any, that legal advice played in the Negotiations is unknown.

[657] While the lack of a meaningful mandate from Ottawa was an obvious serious stumbling block to setting up demonstration fisheries, the history of the Negotiations provides some background for DFO's difficulties in understanding how to approach the plaintiffs' view of their rights.

[658] In my view, the Negotiations began and continued in an atmosphere of good will, at least on the part of the local representatives from DFO and on the part of the plaintiffs' negotiators, but that atmosphere was overlaid with and clouded by confusion and lack of focus.

[659] Madam Justice Garson pointed out in her reasons that the plaintiffs had not:

- specified the species they claimed, other than to claim a right to harvest and sell "all species of fish available to them within their territory" (para. 367);
- specified how the DFO policies and operational restrictions imposed undue hardship on them (para. 777); or
- specified how the limitations created by the regulatory regime are unreasonable (para. 784);

[660] She also acknowledged, at para. 871, Canada's position that the plaintiffs had not led any evidence with respect to the level of participation in the commercial fishery that would be sufficient to meet their requirements or expectations.

[661] Despite these deficiencies in the evidence, which in my view are important, and have become even more so in this stage of the trial, Garson J. inferred what the plaintiffs must have meant where she could, made her broad declarations, and sent the parties away to negotiate.

[662] Thus the task of negotiation began with a deliberate lack of specificity and parameters. The pleadings had been set out on a spectrum; the declaration of the right in such broad general terms was unprecedented and unexpected; the entire fisheries regime was held to be a *prima facie* infringement; the Court of Appeal had said species specific continuity still had to be dealt with but had confirmed the "any species" declaration; the order to negotiate an entire fishery in the face of a finding of a general *prima facie* infringement, was unexpected from either side.

[663] I should mention briefly that I do not fault Canada for pursuing appeals. The parties deserved clarification. Unfortunately, the appeals served to complicate everything further, and as the litigation progressed, the issues have assumed different shapes and have become even more divisive in ways that were apparently not anticipated by Canada or by the intervenors. It is difficult to say what the plaintiffs anticipated, but their expectations were obviously invigorated and energized by the unexpectedly broad declarations.

[664] It is clear to me, after hearing many weeks of evidence that DFO, responsible for the entire fishery which deals with multiple species and many sectors, struggled to come to terms with the task given to both parties. The impression I gathered from the DFO witnesses is that they were often playing catch-up as the plaintiffs' proposals and plans fluctuated and grew and confusion emerged over acceptance of the CDA.

[665] This is not meant to underplay the effect of the lack of a meaningful mandate from Ottawa, or the frustration of the local managers as their attempts to move forward were stymied by the Minister. Not only did the lack of a mandate hinder attempts to put demonstration fisheries into place to test practical approaches, but it also hampered the local DFO staff's ability to enter into full and frank discussions with the plaintiffs as to how a multi-species right-based fishery might be implemented.

[666] However, Negotiations are one thing: as Ms. Farlinger said, DFO was willing, in order to reach an agreement, to offer things outside the right, as they have done in the LTO by including T'aaq-wiihak fishing outside the CDA. Focussing issues for litigation purposes is another.

[667] Months were spent describing the Negotiations and calling evidence regarding the details of the plaintiffs' fishing plans and Canada's response to them. This is because the plaintiffs took the position that Canada had to justify not implementing the plans; the entire legislative, regulatory, and policy scheme had been declared a *prima facie* infringement. It is also because Canada sought to impart to the court the complexity and nuance of fisheries management for every species in case the court accepted the plaintiffs' approach to justification.

[668] As I will discuss below, this stage of the trial is not about whether to implement the plaintiffs' fish plans or not. The scientific, technical, and management information for each species is extensive and yet there is little a court can do with that level of detail. The court cannot be involved in setting allocations or in the details of fisheries management without a specific dispute on which to focus. General comments or criticisms on the details of fisheries management in general lead the court into areas that may not be justiciable.

[669] Even if the task of the court were to design a fishery and set allocations, this court does not have the evidence or expertise necessary to set allocations while balancing the needs of all sectors of the fishery.

[670] Notwithstanding the months of minutiae, there are gaps in the evidence restricting the ability of this court to make focussed determinations on the issue given to it by the previous order. The plaintiffs' fish plans are not complete and require clarification in many areas. Another important deficit is the lack of evidence on the economics of the salmon demonstration fishery and on a small-boat fishery generally in order to determine which costs, if any, are an infringement. There is also a lack of evidence, except from the intervenors, on the factors from *Lax Kw'alaams*' step 4 that are relevant to reconciliation.

[671] The task given to DFO in the context of the Negotiations was a very difficult one: to negotiate and implement a non-exclusive right-based fishery, which exists only in the CDA, after sufficient consultation with the plaintiffs, and to accord appropriate priority to their right, ensuring that their multi-species commercial right is minimally impaired, while achieving reconciliation with all of Canadian society. Representatives of the rest of Canadian society, most importantly, the other sectors of the fishery, would not be at the negotiating table.

[672] After months of sorting through the evidence and arguments, the impossibility of dealing with the situation as it was presented to the parties through the declarations has become evident. It is not surprising that both parties contemplated an agreement outside the declarations, particularly with respect to the CDA.

[673] The task given to this court is also extremely wide: to determine whether or to what extent Canada has justified its fisheries regime for the whole range of species on the WCVI in the face of the declaration that the entire regime is a *prima facie* infringement of the plaintiffs' right to fish for any species of fish and to sell that fish.

[674] In terms of the court's task, the material put before me has been massive. Closer examination has revealed layers of complications and interrelated issues between the fisheries which are highlighted when a multi-species fishery is contemplated. All of this underscores the impossibility of the court trying to design or approve plans for a multi-species fishery, an issue I will deal with under the discussion of "The Mechanics of the Justification Exercise".

[675] I will now attempt to focus the issues of infringement and justification so that some orders can be made to move the parties forward.

INFRINGEMENT

[676] All of the preceding case authorities that have dealt with infringement and justification are regulatory prosecutions. The aboriginal person asserting the right and the infringement of the right was required to bear the burden of showing that the particular restriction which resulted in the charge, for

instance in *Sparrow*, a restriction in net length, constituted a *prima facie* infringement of a collective aboriginal right to fish for food.

[677] The discussion of infringement in this case is very different: this action originates with a civil claim by the plaintiffs, in which they are required to state their claimed right with precision and identify the infringements to that claimed right. For the reasons already outlined, that has not occurred here.

[678] I have already set out the legislation, regulations, and policies that have been pleaded and that underlie the discussion of infringement. Madam Justice Garson concluded that the entire legislative, regulatory, and policy scheme under which DFO operates constitutes a *prima facie* infringement of the broad right she declared. The present regulatory and operational scheme remains unchanged from the scheme that was in place at the time of Garson J.'s judgment.

[679] Madam Justice Garson did not accept the plaintiffs' position 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 an infringement *per se*. She said it is necessary that the unstructured discretion result in a "meaningful diminution of the exercise of the aboriginal right" for there to be an infringement.

[680] Madam Justice Garson said Canada's stated policy of encouraging First Nations in the fishery is constrained by its view that any opportunities must not be at the expense of non-aboriginal fishers. She concluded that Canada's regime, based on an integrated fisheries model in which all commercial fishers are treated identically, denies the plaintiffs their preferred means of exercising their aboriginal rights and *prima facie* infringes the broad "any species" right she declared.

[681] Madam Justice Garson listed the characteristics of the regulatory scheme at para. 762:

a. licencing and limited entry;
b. transferability of licences or licence eligibilities;
c. quotas;
d. species-specific licencing;
e. gear restrictions;
f. area restrictions;
g. time-limited openings; and
h. recognition of aboriginal FSC fisheries.

[682] "Limited entry" refers to the approach put in place by DFO in various fisheries in the last decades of the twentieth century. Limited entry restricted the number of vessels participating in the fishery. Licences were issued only to those vessels that had landed a certain amount of fish in the previous years.

[683] Madam Justice Garson also referred to other factors which she felt inhibited the plaintiffs' ability to participate in the fishery as they had once done. In particular, she referred to several aspects of the integrated commercial fishery model:

a. mitigation of access given to the plaintiffs: that is, it must come from somewhere else if the fishery is “fully subscribed” (as noted, this is DFO’s term for the full use of all allocations in a particular fishery [all fisheries but gooseneck barnacles are fully subscribed]);

b. identical treatment of all participants in the fishery, which precludes the plaintiffs from developing community-based fisheries;

c. although the plaintiffs had not explained how the current regulatory regime was unreasonable, Garson J. concluded it was because the plaintiffs have not been able to obtain split licences; and

d. undue hardship: she noted at para. 77 that the plaintiffs had alleged this but had not articulated how it was manifest. She assumed it must be cost of licences, and used geoduck as an example. As already mentioned, the Court of Appeal found that she had erred in including geoduck in “all species”. Madam Justice Garson nevertheless concluded that the current regime has caused undue hardship because the plaintiffs’ participation in the fishery has diminished almost to the point of non-existence.

[684] She said at para. 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.

[685] It appears that, despite the broad terms of the declaration, Garson J. was not focussing on the entire management scheme (which involves many detailed decisions for each fishery, including time and area openings and closings, gear restrictions, monitoring requirements etc.), but on failure to provide allocations, cost of licences, limited entry with no splitting of licences, and restriction in use of preferred means. Other costs that keep the plaintiffs from exercising their right are also of concern.

[686] As already mentioned in a previous section of these reasons, Garson J. acknowledged at para. 786 that 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.

[687] Michelle James also referred in her report to trends that have affected the commercial fishing sector over the past one to two decades:

- a precautionary approach to fisheries management, resulting in a smaller share of the biomass being available for harvest;
- significant changes in exchange rates (seafood prices in world markets are largely set in the currency of the importing country);
- a liberalized trade environment, resulting in globalization and increased competition;
- dramatically increased oil prices, resulting in much higher vessel fuel costs;
- new marketplace standards for quality and sustainability, independently verified; and
- an aging labour force, with more emphasis on training and certification.

[688] Notwithstanding all of these factors, Garson J. found that Canada’s regulatory regime was to blame in part for the plaintiffs’ inability to fish and sell their fish as they previously did; the plaintiffs

cannot pay market value for licences and cannot compete in an economically sustainable way in the non-aboriginal fishery under the present regulatory regime. She concluded that the current programs do not allow them to participate in the commercial fishery in accordance with their preferred means.

[689] Madam Justice Garson specifically excluded the right to the clam fishery as not having been infringed under the current regime. Canada says several other fisheries should also be subject to this summary analysis so that no justification is required: red sea urchin, sea cucumber, sardines, tuna, and gooseneck barnacles. The latter is, at present, utilized for the sole benefit of the plaintiffs. The plaintiffs disagree with this approach, as they say Garson J. completed the list of fisheries that have not been infringed by Canada's regime: that is, clams and the FSC fishery. Others should not be added.

[690] In any event, as for sea urchin, sea cucumber, sardines (not currently available on the WCVI) and tuna, the plaintiffs have not submitted plans for those species and do not at present require Canada to justify any infringement, assuming there is one.

[691] During their submissions at this stage of trial, the plaintiffs acknowledge that the regulatory scheme which requires a licence to fish, and prohibits sale without a commercial licence is not *per se* an infringement (*Nikal* at 1061), but they say the Minister has exercised her discretion either not to issue licences to the plaintiffs or to issue licences with conditions that preclude the plaintiffs from exercising their right in a meaningful sustainable way.

[692] They say as well that the provision of the *Pacific Fisheries Regulations, 1993* that prohibits use of a vessel for commercial fishing unless it is licenced and registered, the regulations that restrict time, place and gear type, and the regulation that prohibits the retention of bycatch all contribute to the general infringement of their right.

[693] The plaintiffs say that if these infringements are found not to be justified, then those regulations must be declared inapplicable to the plaintiffs under the *Constitution Act, 1982*, s. 52.

[694] DFO points to some steps they have taken which they say address some of the infringements listed by Garson J., that is, the cost of licences and inability to obtain split licences. The salmon demonstration fishery is an ocean-based fishery unique to the plaintiffs and very different from the regular commercial fishery. Under the salmon demonstration fishery, DFO has allowed as many boats as the plaintiffs wish to use to fish under the licences, although allocations have not been large enough to satisfy the plaintiffs. The commercial licences have been provided free of cost to the plaintiffs, and there is no suggestion this will not continue. Monitoring has been done by the T'aaq-wiihak employees, who are funded by and work in cooperation with DFO. Additional access for other species has been provided, and the retention of various species of bycatch for sale has been offered. Dual fishing has not been allowed but has nevertheless been tolerated without consequence. DFO has, in the LTO, offered to negotiate dual fishing in the salmon demonstration fishery, subject to relevant catch monitoring requirements. The plaintiffs have been allowed to fish for commercial purposes in the five-mile coho conservation corridor, using their small boats. Canada presents these factors in support of its

position that many infringements no longer exist, or are capable of resolution through further discussion. I will discuss this in more detail when dealing with the fish plans.

[695] Besides the legislation and policies, there are other general approaches to licencing and management of the fishery that the plaintiffs argue constitute continuing unjustified infringements. I will discuss them individually.

Monitoring Standards

[696] Appropriate standards of monitoring for the various fisheries has been one of the most contentious issues in the Negotiations. This was a continuing theme in the evidence of all of the witnesses, whether for DFO or the plaintiffs.

[697] The issue of monitoring standards has foundered on the dispute over the size of the fishery. I have reached conclusions on the scale of the right-based fishery based on my interpretation of Garson J.'s reasons. The present review of the parties' positions is made somewhat redundant by my conclusions. However, I will set out the positions because different aspects of the positions may apply to different species.

[698] I do not understand the plaintiffs to assert that independent management of the fishery is part of the right (this will be discussed below in the general comments preceding the discussion of the individual fish plans). However, the plaintiffs allege that the inhibiting cost of independent monitoring infringes their right. DFO's insistence on independent monitoring is viewed by the plaintiffs as an unjustified infringement on their right-based fishery.

[699] According to Michelle James' report at p. 78, catch monitoring for commercial fisheries in BC includes:

- dockside monitoring of all landings;
- on-board or on-grounds independent observers;
- logbooks with industry funded transmission of in season data to DFO; and
- electronic monitoring systems in fisheries where on-board or on-grounds observers are not feasible or economically viable.

[700] The salmon fishery is a derby-style fishery and is managed by openings, closings, fishing effort, and gear restrictions. It does not require electronic monitoring but does require independent logbook and 20% dockside validation of catch by certified independent observers.

[701] The plaintiffs resist independent validation through observers or electronic monitoring. This is partly because of cost, and partly because they say their monitoring system is adequate and in fact more stringent than DFO's in that the plaintiffs' system requires 100% dockside monitoring. They say their T'aaq-wiihak monitors are not fishers, and thus are independent; further independent verification is not needed. They say the usual DFO monitoring is not necessary for their fishery, given its size.

[702] The plaintiffs wish to fish for home use and for sale on the same trip (dual fishing). This aspect of their fishery prompts concern on the part of DFO to ensure that adequate monitoring is done. Dual fishing has not been allowed in the salmon demonstration fishery, but the plaintiffs have done it anyway without repercussions from DFO. Ms. Gagne has separately reported FSC catch.

[703] In the current management regime for the regular fishery, DFO permits dual fishing in the groundfish fishery by longline, hook and line, or trap (not trawl). Before hailing out, the vessel master must obtain a dual fishing designation from a designating First Nation that has a communal licence authorizing the harvest of groundfish. Unless otherwise permitted, all the fish must be landed at the same place and validated by a designated dockside observer. An important distinction between the salmon and groundfish fishery is that the groundfish fishery requires 100% at-sea monitoring, either through observers or electronic monitoring systems, and 100% dockside monitoring, which the fishers pay for themselves.

[704] DFO views electronic monitoring as an appropriate and cost effective monitoring tool. They say accountability and independent validation of catch is necessary for management of the fishery. If the plaintiffs' proposed plans for large allocations of the catches on the WCVI were accepted, DFO takes the position that their monitoring system, which includes electronic monitoring, be applied to the plaintiffs' fishery. If the fishery is smaller, DFO is more flexible, and would work with the plaintiffs to set appropriate standards.

Electronic Monitoring

[705] The main issue for electronic monitoring or at-sea observers in the groundfish fishery is cost. This is an important issue in the groundfish fishery where electronic monitoring of all catch is considered to be an important tool of management to ensure conservation and sustainability of all the many species of groundfish. Both Ms. James and Dr. Morishima testified regarding electronic monitoring.

[706] Michelle James says in her report at p. 139 that various issues arose in the past before at-sea monitoring was required: misidentification of species; misreporting of at sea releases and associated mortalities; misreporting use of fish for bait; and TAC overages. She says many of the groundfish vessels in the commercial fishery are less than 25 feet, but are required to have electronic monitoring. Early in the Negotiations, DFO provided $500,000 to the plaintiffs to assist in various areas, including costs of electronic monitoring.

[707] Ms. James also noted, as mentioned earlier, that to fish for groundfish from a fleet of 85 small boats in the CDA will result in a high ratio of costs to revenue, even if DFO dispenses with or absorbs the cost of electronic monitoring. She said the whole reason for limited entry licences is economic viability. The revenue to cost ratio for bigger boats is obviously better.

[708] Ms. James also questions the efficiency of having duplicate systems operating for groundfish monitoring, if the plaintiffs have their own dockside monitoring and tagging system while the

commercial system operates alongside. As well, regardless of whether the plaintiffs have their own system, DFO still has obligations to meet under the International Halibut Treaty.

[709] Part of Ms. James' concerns arose from the fact that the plans from the plaintiffs that she had been given to review purported to apply to the entirety of the DFO management areas out to 200 miles. As already mentioned, the plaintiffs have since agreed to conform to the CDA, although the allocations they sought have not changed.

[710] Dr. Morishima, for the plaintiffs, commented in his first report at 8 on electronic monitoring for some of the plaintiffs' proposed plans:

> There is no compelling reason to require the use of EM in the proposed Nuu-chah-nulth groundfish and crab fisheries. The characteristics of the fishery, modest scale, the expected participation levels by small vessels with relatively low harvest volumes, logbook requirements, daily landings at specified locations and hail reporting when daily landings are not made, timely reporting of landings using fish tickets, limited geographic area of operation, requirements to enter in T'aaq-wiihak Requirements and Responsibilities agreements, and other considerations as stated in the section on "compliance" above do not support the necessity for mandatory use of EM by Nuu-chah-nulth First Nations or suggest that the use of EM would be expected to appreciably improve the timeliness or accuracy of data for fishery monitoring and reporting for the duration of the proposed fishing plans provided for review. Should the First Nations fisheries develop substantially in the future with larger, more profitable operations, EM could be considered as a useful means of reducing monitoring, reporting and enforcement costs for high volume, high value fisheries, particularly those involving species having bycatch or discard concerns.
>
> [Underlining added]

[711] The factors he identified under "compliance", referred to in the above quotation, can be summarized as:

- an assumption that plans and regulations that are self-imposed will be followed;
- community leadership and the potential for social censure will subject the fishery to intense scrutiny, thus promoting trust and accountability in order to ensure continued participation in the right-based fishery;
- the modest size of vessels with daily reporting in a limited geographic area; and
- collaborative enforcement arrangements with DFO.

[712] Dr. Morishima's viewpoint rests on trust and assumed accuracy of self-reporting. He said he assumes a strong incentive to be correct in logbooks under DFO's system of 10% random audits. He agreed that there is nothing in the plaintiffs' groundfish plan to ensure validation. However, he said the plaintiffs plan to retain everything and count it all at designated sites and times, which is a good system. He acknowledged that 100% retention with no discards will rely on self-reporting.

[713] Dr. Morishima agreed that there are three main categories of discards: incidental bycatch, quota discards and pre-market selection. He acknowledged that discards occur for a number of reasons: because a fish is the wrong species, the wrong size, the wrong sex, has been damaged, or spoils rapidly. As well, there can be a lack of space on board, thus leading to high grading (keeping more valuable fish). Discards can also occur because a vessel catches a prohibited species, or fishes in a prohibited season, or uses prohibited gear.

[714] In the context of the plaintiffs' crab plan, he said he assumed the plaintiffs would be using very small vessels, with a small level of participation, He understood the vessels would be the size of recreational boats, with limited capacity and little deck space. If larger vessels were used, it would depend on how the benefits would be distributed, thus raising the question of whether that would that make electronic monitoring feasible.

[715] Dr. Morishima is familiar with the Quinault Nation's aboriginal fishery. He testified that Washington State, where it is located, does not require electronic monitoring for halibut or sablefish, but those species are mainly bycatch in their salmon fishery, which does not require electronic monitoring. However, video cameras are used in the crab fishery, mainly because of gear vandalism. The Quinault Nation has no prawn fishery.

[716] It is fair to say that Dr. Morishima's comments respecting the need for electronic monitoring are all in line with his description of this fishery as a small-scale artisanal fishery. He noted that electronic monitoring has advantages: it improves monitoring, and reduces reporting and logbook burden, but it also adds costs and forces vessels to operate in a way that would allow them to get the necessary income to defray the costs.

[717] From DFO's perspective, the differing objectives put forward by the plaintiffs, referred to by Ms. Farlinger, are a stumbling block to an overall monitoring scheme. If the fishery is comprised of small, low-cost boats with low catch capacity and low impact on the fishery, as Dr. Morishima seems to assume, then monitoring can be much more flexible. If the plaintiffs choose to use trollers similar to those in the regular commercial fishery, which the plaintiffs want to do, then catch capacity is much higher and independent monitoring is more of an issue because allocations can be caught very quickly and the mosquito fleet will be deprived of opportunity. As well, despite the plaintiffs' plans which propose large allocations of individual species, the plaintiffs want a year-round, multi-species fishery with retention of bycatch and dual fishing. This enhances the need for appropriate monitoring because of impacts on bycatch and non-target species.

[718] Conservation is always the first concern, as well as the economic well-being of other sectors of the fishery.

[719] A recurring theme in the plaintiffs' position regarding monitoring is that the recreational fishery is not subject to the monitoring requirements that DFO would impose on the right-based fishery. They say the recreational fishery is large, and DFO's lack of concern about the recreational fishery answers any DFO concerns about allocation or conservation with respect to the plaintiffs' plans. Each recreational fisher does not catch a lot of fish, but the cumulative effect is significant. The lodges catering to recreational fishermen also have a commercial element.

[720] It is DFO's position that a commercial fishery is much different from an angling experience. The amount of gear and the amount fished for are much smaller. Each fisher is permitted two fish per day. There are 300,000 licences sold each year; thus the fishery consists of a large number of people

fishing for a small amount each. However, many licences are only for a day or a week, and the recreational fishery is really only active a couple of months a year.

[721] In addition, DFO is of the view that monitoring for the recreational fishery has to improve; it is not a model to be used for a new commercial fishery.

[722] Ms. James stated that a comparison to the recreational fishery fails to take into account both the need to manage over 80 species of groundfish and the problems associated with economic incentives to misreport catch.

General Comments on Monitoring

[723] The effect of monitoring standards on the right-based fishery will be discussed in the context of each species. The issue overlaps between species as well because of the multi-species aspect of the plaintiffs' fishery. As mentioned, there has been no demonstration fishery for groundfish or groundfish bycatch that would have allowed testing for appropriate monitoring for a small multi-species fishery conducted in the CDA.

[724] I would not view appropriate monitoring standards as an infringement, but as the entire management scheme has already been declared to be a *prima facie* infringement, I conclude that appropriate monitoring standards are justified. They are necessary for conservation and to protect the fishery for all participants. In general, my conclusions in respect of monitoring will be in line with my interpretation of Garson J.'s judgment – that is, monitoring standards must be appropriate for a small-boat, low-cost fishery with wide community participation conducted in the CDA. For some species, flexibilities in monitoring are necessary to accommodate such a fishery.

[725] If the fishery were a troller-based fishery equivalent to the Area G troller fleet, catching large allocations of multi-species fish for dual purposes, my conclusions would be different.

[726] DFO uses its Strategic Framework for Monitoring and Catch Reporting in the Pacific Fisheries to evaluate risk factors for the fisheries and to set appropriate monitoring standards. While changes will be necessary, it is too early at this stage to set out an overall monitoring scheme, even if this were a task the court could undertake. It will require an assessment by DFO within their Strategic Framework, once the details of the multi-species fishery are understood. It will also entail cooperation and integration with the T'aaq-wiihak Fishery Coordinator. Of primary importance of course is consultation with the plaintiffs.

[727] I will deal with the individual monitoring challenges for each species when I discuss the fish plans, but the conclusion is almost always that an assessment under the Strategic Framework for Monitoring and Catch Reporting is required, in consultation with the plaintiffs.

Licence-Based Fishery versus Share-Based Fishery

[728] The implementation of the T'aaq-wiihak fishery cannot proceed from year to year without a settled method of determining allocation. Predictability is important in order to allow the fishers to plan.

[729] The plaintiffs' proposals for allocations are based on shares of the TACs or estimated TACs for various species. DFO sets allocations based on licences.

[730] At paras. 648 - 661, Garson J. described various proposals the plaintiffs had put forward to DFO in the years preceding the action, and others that Dr. Hall had suggested in his testimony:

- the expansion of the concepts used in the Somass terminal fishery;
- a mosquito fleet with divided licences;
- the splitting of crab licences;
- pocket herring fisheries for discreet stocks;
- exemption from the quota system for groundfish; and
- communal licences to offset the cost of licences.

[731] She also heard evidence that the plaintiffs had requested a mosquito fleet licence for small vessels (less than seven meters), and that they proposed to split gillnet licences in order to legalize their mosquito fleet fishery. For Dr. Hall, the desired result would be to distribute benefits amongst more community members to give a modest level or moderate livelihood.

[732] As mentioned, Garson J. concluded, at para. 784, in the absence of an explanation from the plaintiffs as to how the regulatory limitations were unreasonable, that it must be because the integrated fishery prevented Canada from implementing measures that would facilitate fishing opportunities for the plaintiffs. She specifically referred to DFO's refusal to allow licence splitting.

[733] The issuance of licences is the basic tool by which DFO manages fisheries and provides access. Licences are issued to vessels, applying certain criteria. Entry to the various fisheries has been limited as described earlier, and Garson J. found limited entry licencing to be part of the regime that infringed the plaintiffs' rights. Various programs, such as PICFI, have been aimed at increasing aboriginal participation.

[734] According to *Nikal*, the requirement for a licence is not a breach of the *Constitution Act, 1982*, s. 35(1). However, Canada must justify any licence conditions that infringe on the right. Non-enforcement does not validate those conditions. Then the usual *Sparrow* factors are relevant: whether there is a valid legislative objective; is the honour of the Crown at stake; whether the infringement is as minimal as possible; and whether the aboriginal group has been consulted, subject to a consideration of what is reasonable in the circumstances, given that regulations must be enacted expeditiously to ensure conservation.

[735] Licence splitting is an approach DFO has already shown it is willing to use for certain species. There is no suggestion that that would not continue to be the case for a fishery based on small boats, conducted within the CDA.

[736] The plaintiffs do not say licences are an infringement *per se.* However, their approach to allocation in their fishing plans is not licence-based, as it has always been under the Regulations to the *Fisheries Act.* It is share-based, proposing a percentage share of various Total Allowable Catches and would not depend on licences.

[737] From my understanding of Canada's position, DFO does not object to setting a share of the fishery; in fact, Mr. Grout said that, as a manager, he wants to work with clearly defined fixed shares. However, DFO bases the share on a percentage of mitigated licences with reference to the CDA.

[738] As previously discussed, it is the Minister's responsibility to manage the fishery. Setting up an aboriginal fishery must be done in accordance with constitutional principles. That means ensuring that Canada's policies are applied in such a way as to accommodate the plaintiffs' right, or if the policy infringes the right, in such a way that the infringement is justified within the meaning of *Sparrow.*

[739] Overall, I conclude that DFO can manage by licences if they choose. It is convenient tool that allows them to control, allocate, and manage this fragile resource amongst many users, and does not infringe the plaintiffs' right. In fact, given that the right is not exclusive, close control of licences allows DFO to ensure the right is protected and given appropriate priority.

[740] It may be that, when the findings in these reasons are all set out, the Minister may decide that a fishery based on a percentage share of TAC without licences, or alternatively based on a percentage share of licences which can be split, or some other option, is the appropriate way to accommodate, manage, and protect a multi-species right-based fishery without infringing upon the right. However, how such a fishery would be set up and remain flexible enough to protect the right along with all the other sectors which depend on the fishery, is for the Minister to articulate, in accordance with the constitutional priority of the plaintiffs' right-based fishery, and the scope and nature of the right itself.

How Should the Concept of Infringements be Approached?

[741] The declaration respecting infringements is without parameters, and no specific infringements were argued for before Garson J., or found by her. As a result of the scope of the declaration of *prima facie* infringement, that is, that the entire scheme is presumed to be an infringement, this stage of the trial has proceeded on the basis that the plaintiffs do not have to prove specific infringements; it is up to Canada to justify all of its regulations and policies and rules, and as well, Canada should justify its refusal to implement the plaintiffs' fish plans. This has not led to efficiency or an ability to focus on specific matters of concern. There has to be some specificity in order to avoid the pitfalls expressed by Binnie J. in *Lax Kw'alaams.*

[742] I have already set out the aspects of the regulatory scheme considered by Garson J. to have an overall impact on the plaintiffs' right. Not all of these aspects of the management regime apply to every fishery. It is necessary to consider justification in respect of each fishery, and even with respect to each species within that fishery.

[743] The plaintiffs and Canada disagree on whether certain terms of licencing, such as times and area openings are matters of priority or matters of management. There are circumstances where a general closure may not respect the constitutional priority of an aboriginal fishery, such as occurred in *R. v. Jack* 131 D.L.R. (4th) 165 (BCCA), where the accused was fishing for social and ceremonial purposes in an area closed to fishing, except sport. His conviction was quashed by the Court of Appeal. Those circumstances are not readily applicable to the complicated commercial fishery with which this court is dealing.

[744] The Supreme Court of Canada has made it clear that DFO has the responsibility of managing the fishery for all users. The priority of an aboriginal fishery must be respected, but an aboriginal commercial fishery within a larger commercial fishery is still subject to management decisions by DFO. Specific licencing terms, including gear types, times of fisheries, time and area openings, closings and other details of seasonal and daily management are too myriad and changeable to be the subject of specific findings of justified or unjustified infringement. These details would all be the subject of discussion or consultation with the plaintiffs. If a barrier to the exercise of the right were alleged as a result of one of these details, a determination would have to be made with the benefit of a particular factual situation.

[745] I will concentrate on the legislation, regulations, and policies insofar as they prescribe:

- policies (as noted earlier, the CWF is not put forward by Canada as justification);
  - Salmon Allocation Policy;
  - Mitigation Policy;
- requirement in the commercial fishery for a licence (*Fishery (General) Regulations*, s. 35(2));
- requirement for species-specific licencing (*Fishery (General) Regulations*, ss. 22(1), 33(1))
- requirement in the commercial fishery for a registered vessel (*Pacific Fishery Regulations*, *1993,* s. 22(1));
- costs associated with pursuing a fishery, for instance licences (*Pacific Fishery Regulations*, *1993,* s. 19(1)) and monitoring costs, particularly electronic monitoring;
- prohibition against retention and sale of bycatch (*Fishery (General)* Regulations, s. 33(2);
- restriction on transfer of licences
- necessity for one licence per boat per species to harvest and sell fish, that is, DFO's refusal until the salmon demonstration fishery to allow split licences (*Fishery (General) Regulations*, s. 22(1));
- requirement for ITQ in the groundfish fishery.

[746] Having in mind those general areas of the regime which are presumed to be *prima facie* infringements, I now turn to the subject of justification -- the original task set for this court in the declarations.

JUSTIFICATION: WHAT IS CANADA REQUIRED TO JUSTIFY IN THE CONTEXT OF THIS CASE?

[747] It has been difficult to distill and focus the parties' respective positions on justification. I see this difficulty as having arisen not only from the parties' very different views of the scope of the right and from lack of specified infringements, but from the conflation of the Negotiation process with the litigation.

[748] Canada's primary position is that it is required to justify specific infringements. Thus, once the right is clearly delineated, specific infringements to that delineated right must be identified and then justification can be considered in that context. For the most part, Canada suggests that at present, it is premature to consider justification because this process has not been followed, although Canada submits that it has taken many steps towards addressing infringements already. Canada suggests the court can provide clarification, guidance, and suggestions; the Minister will then enter into further discussions with the plaintiffs in order to design fisheries that appropriately accommodate the delineated right and justify or accommodate specific infringements.

[749] The difficulty with this approach is that the court does not simply provide guidance or make suggestions, except incidentally. The court must adjudicate upon issues that come before it. That said, I would expect the findings and conclusions I reach in these reasons to be taken into account in future decisions. I repeat that I consider the eventual final "delineated right" to have taken account of which infringements are justified and which are not.

[750] Alternatively, Canada says their LTO is the proper starting point for the justification analysis, although it was made without knowing the scale of the plaintiffs' rights, or the specific infringements it is to justify.

[751] One of the main concerns the plaintiffs raised during the first stage of the trial is the lack of structured decision making. The authorities also establish this as a problem for Canada at the justification stage. Canada says the LTO, together with the Evaluation Framework created by DFO, now provides for structured and predictable decision making.

[752] The plaintiffs say Canada is too late to get another chance at justification – that is, there should be no adjournment to allow more negotiations and discussion. They say Canada's justification of their management scheme must stand or fall on the evidence presently before the court.

[753] The plaintiffs say Canada must meet a high standard to justify its management of the fishery in relation their right. The plaintiffs seek a constitutional exemption to the whole regime, but if that is not forthcoming, they say in the alternative that Canada should be required to justify not implementing their fishing plans. Canada says this methodology of approaching justification is inappropriate.

[754] As I will discuss below, the plaintiffs' approach arises from comments made by Garson J. However, I have reached the conclusion that it does not allow for a focussed analysis of infringements and justification within the *Gladstone* analysis, nor is it an appropriate approach for a court because it imports the negotiation process into the litigation. I will explain this in more detail shortly. The plaintiffs' approach may be a worthwhile way to begin and continue negotiations -- which was, in my view, how

Garson J. saw it -- but this court is restricted to making findings within the legal framework of justification.

[755] Canada's alternative position relies on the LTO. This does not set out a helpful approach for the justification analysis either, and gives rise to the same concern I have expressed about conflating the Negotiations with the litigation. The LTO contains a framework for evaluation of fish plans and DFO's own offers and provides a wide mandate to negotiate fisheries for all species. Those factors are useful to consider in assessing Canada's conduct in the Negotiation process. However, the LTO contains offers for only two species. Even there it purports to set up a system that allows fishing outside the CDA. The court is dealing only with fishing in the CDA, as awkward and artificial as that may be for both the plaintiffs and for DFO. Options to fish outside the CDA are not useful for the analysis the court must undertake.

[756] As well, insofar as Ms. Farlinger referred to the LTO as a negotiating position, the plaintiffs are correct in pointing out that it is inconsistent to take the position that the LTO is a minimal impairment of the right. If there is room for further negotiation, there is room to move on impairment.

[757] Both suggested approaches to justification -- that is, accepting the fish plans, or accepting the LTO -- arose out of the Negotiations. Since no infringements were specified, these approaches have led to a deluge of evidence on each species as Canada attempted to cover every possible point of the plaintiffs' plans.

[758] At the risk of repetition, I emphasize that it is beyond the expertise of a court to choose a model for a fishery, design a regulatory scheme, or set allocations. That requires not only in-depth knowledge and experience, but an ability to assess changing conditions and to make and adapt decisions on an ongoing basis. Those decisions must be made by the Minister, and once made, are analyzed by a court either through the justification process or through judicial review. Both require a specific factual situation on which to focus.

[759] Counsel for the plaintiffs referred briefly to the relevant legislative and regulatory scheme during submissions, but neither party concentrated their submissions on the specific provisions, notwithstanding Garson J.'s declaration that the infringements arose cumulatively from the entire regime, including the legislation, regulations, and policies. However, this, in my view, is where the justification analysis must focus, as I will discuss further in the section on The Mechanics of Justification.

[760] I agree generally with Canada's statement that they must justify infringements rather than justify a failure to implement the plaintiffs' fish plans. That is in line with the approach taken in *Gladstone*. It is also in line with Garson J.'s reasons because in her discussion of infringements, she listed various aspects of the legislative, regulatory, and policy regime. She did not refer in her discussion of infringements to a failure to implement whatever plans the plaintiffs might put forward. As she noted, there was no evidence before her of what the plaintiffs' "requirements or expectations" might be.

[761] However, later in her reasons, when suggesting how the parties might begin negotiations, she did suggest such an approach. This suggestion has informed the Negotiations and the plaintiffs' approach to justification in this stage of the trial. I will first reiterate the basic principles of justification before I explain the difficulties in applying the approach suggested by Garson J. to the task of this court in the litigation.

[762] The Supreme Court of Canada in *Sparrow* at 1119 recognized, regarding the requirement of justification, that:

> [the] objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

[763] *Sparrow* sets out the general considerations for a justification analysis, albeit in the more simplistic framework of a regulatory prosecution:

- is there a valid legislative objective underlying the impugned regulation (here, the *prima facie* infringements)?
- has the honour of the Crown, which is at stake in dealings with aboriginal peoples, been taken into account?
- has there been minimal infringement?
- is the regulation in keeping with the appropriate priority?
- has the aboriginal group been consulted?

[764] In *Gladstone* at para. 73, Lamer C.J. commented on the necessity for and the nature of the reconciliation analysis:

> Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained. 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.
>
> [Emphasis added in *Gladstone*.]

[765] The principles of justification from *Sparrow* and *Gladstone* have, under *Lax Kw'alaams'* fourth step, been imported into the process of delineating the right itself in a civil context such as this. These principles will inform the balancing act required for justification and reconciliation.

[766] I repeat that statement here:

> Fourth, and finally, in the event that an Aboriginal right to trade *commercially* is found to exist, the court, when delineating such a right should have regard to what was said by Chief Justice Lamer in *Gladstone* (albeit in the context of a *Sparrow* justification), as follows:

> 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 type 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 repeated in *Lax Kw'alaams* from *Gladstone*.]

[767] Madam Justice Garson did a cursory examination of the principles of justification, but since she was adjourning that portion of the trial, she did not complete the analysis before she made her declarations.

[768] I will now discuss the *Sparrow* factors as listed above in the context of this case.

Legislative Objectives

[769] Madam Justice Garson found that the legislative objectives and societal interests listed by Canada were valid:

(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 waterways.

[770] I accept her conclusions on that issue. It is clear to me, after many months of evidence, that these objectives inform the decisions DFO has made and is making in managing the fishery. Garson J. also stated that she required a proposed fishery against which to balance these objectives. While the approach I have taken differs from that proposed by Garson J., I have considered the relevant factors in the context of each fishery.

Honour of the Crown, Fiduciary Duty

[771] The principle of the honour of the Crown was discussed by the Supreme Court of Canada in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623 at paras. 65 and following. It does not arise out of a paternalistic concern to protect a "weaker" people; its

ultimate purpose is the reconciliation of pre-existing aboriginal societies with the assertion of Crown sovereignty. The Crown must deal honourably with aboriginal peoples.

[772] The principle of the honour of the Crown is referred to in *Sparrow* at p. 1079; it is thus engaged in the justification process:

> If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue: the honour of the Crown in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginal peoples must be the first consideration in determining whether the legislation or action in question can be justified. There must 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.

[773] In discussing fiduciary duty, the Supreme Court of Canada said in *Manitoba Metis* at para. 49 that "the content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected". In this case, a right has been declared. However, the content of the fiduciary duty may vary to take into account the Crown's other, broader obligations (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at para. 18).

[774] In my view, the variation in the content of the duty as articulated in *Haida* has to be recognized in the analysis of justification. This analysis necessarily requires a balancing of interests in the movement towards reconciliation.

Duty to Consult

[775] The plaintiffs, in their pleadings, seek the following declarations in respect of the duty to consult or negotiate:

> (1) a declaration that Canada's refusal to accept or implement all or some of the Fishing Proposals is a breach of Canada's duty to consult and negotiate with the plaintiffs in respect of the manner in which their aboriginal rights can be accommodated, as declared in paragraph 4 of the November 3, 2009 Order.
>
> (2) a declaration that Canada has otherwise breached its duty to negotiate with the plaintiffs in respect of the manner in which their aboriginal rights can be accommodated and exercised.

[776] Thus the plaintiffs rely both on the common law duty to consult and on the additional direction given by Garson J. They allege that Canada has failed in both.

[777] The plaintiffs say that once an aboriginal right is proven, as here, the duty to consult is elevated to a fiduciary duty and the Crown's obligation becomes more substantive. The plaintiffs suggest that consultation can potentially require consent. They rely on *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 168, although that statement was made in the context of enacting hunting and fishing regulations on aboriginal lands. The plaintiffs say that, at a minimum, the duty to consult includes honourable negotiation and consultation in good faith and with the intention of substantially addressing the concerns of the aboriginal peoples (*Haida*; *R. v. Badger*, [1996] 1 S.C.R. 771; *Delgamuukw*).

[778] In any event, the plaintiffs submit that Canada must prove substantively that the offers it has made to the plaintiffs meet the standard of a justified infringement of their declared right.

[779] Madam Justice Garson commented, at para. 877, on the consultations that had taken place:

> It is unnecessary for me to detail the extensive consultation 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 right, 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.

[780] I have described above the consultations that have taken place since the original decision, within the Negotiations.

[781] Despite the many meetings, the plaintiffs allege a failure to negotiate adequately in respect of certain species. While I may also touch on this in the discussions of each fishery, in general, the agendas at the Main Table were set cooperatively. A request to discuss a particular species was never refused, although meetings were sometimes adjourned without getting to all the items on the agenda. The plaintiffs can indeed point to their first list of priorities as supporting their position that a particular species was of interest from the start, for instance crab and prawns. However, that list was soon abandoned and replaced by another. The Main Table focussed on salmon, although other species were also discussed. It was not until 2014 that the plaintiffs put forward detailed plans on all species.

[782] In any event, the plaintiffs say the consultations have accomplished nothing, and the lack of a mandate undermines the Negotiations to the point of bad faith. They refer to *Huu-Ay-Aht* in which Dillon J. drew an analogy between “surface bargaining” in the labour sector, where, despite an appearance of good faith, “an intransigent position through passive resistant negotiation was revealed” (para. 124).

[783] In summary, the plaintiffs say that in the circumstances here, Canada has failed in its duty because of the lack of a mandate; the Minister’s disengagement; the lack of willingness to change policy or allocations; the lack of explanation accompanying Canada’s offers; and DFO’s changes in position, specifically with regard to the use of trollers in the LTO as compared to the salmon demonstration fishery.

[784] It is Canada’s position that good faith on both sides is required. A duty to consult does not import a duty to agree, nor should the obligation to consult under the justification analysis or under the terms of the order in this case be confused with the duty to consult under *Haida* and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43, [2010] 2 S.C.R. 650. In those cases, the duty to consult was triggered by proposed Crown conduct in relation to potential adverse impacts on the future exercise of an asserted or established aboriginal right. This case, Canada argues, is about justification of past infringements. The relevant fiduciary duty is simply the general obligation found in *Sparrow*.

[785] Canada says the present circumstances fall at the end of the spectrum requiring deep consultation. This will be an ongoing feature of fisheries management in relation to the plaintiffs’ right-

based fishery. The plaintiffs must participate in a meaningful way. They cannot impose demands that would preclude the ability of DFO to plan and manage the fragile resource (see *R. v. Tommy,* 2008 BCSC 1095 at para. 109).

[786] Canada says the analogy to “surface bargaining” is unfair and inaccurate. They were told by Garson J. that treating everyone identically in the fishery was an infringement of the plaintiffs’ rights. Therefore they have treated the plaintiffs differently from the beginning. The Main Table discussions were consistently about how to accommodate and implement the plaintiffs’ rights with flexibilities and new approaches such as dual fishing.

[787] Canada says the plaintiffs were aware of the lack of a mandate as early as 2011, according to a letter to the Minister from Cliff Atleo, President of the NCN Tribal Council Canada, in which he alludes to this. However, Canada submits that despite the lack of mandate, DFO took many steps to accommodate the right.

[788] Canada says the Negotiations have been challenging, partly because of the plaintiffs’ changing positions. Nevertheless, the Main Table and Joint Working Group process, which has consisted of numerous meetings, has resulted in a significant increase in commercial licences and quota, the implementation of the salmon demonstration fishery, and a large amount of funding for third-party fishery monitoring, capacity building and consulting. Licence splitting and a number of smaller accommodations have been features of the salmon demonstration fishery. The gooseneck barnacle fishery has been developed cooperatively with the plaintiffs.

[789] I have already set out the concerns of the intervenors: while consultation is a necessary factor in a justification analysis, a negotiated process to accommodate the right without the participation of other sectors, particularly in view of the comments in *Lax Kw’alaams*, is not appropriate.

Discussion

[790] I do not see much difference in the parties’ positions on the law. They disagree in the practical application of the duty to consult.

[791] Canada’s position is that this case is about past infringements. However, the plaintiffs’ position is valid that the *prima facie* infringements found by Garson J. are not just past, but ongoing.

[792] It must be clear by this time that I view the consultation process as somewhat flawed on both sides: Canada’s involvement was hampered by lack of a full mandate; the plaintiffs’ positions on crucial issues developed and changed as time went on.

[793] I accept that all the regional and local members of the Main Table and Joint Working Group for both the DFO and the plaintiffs were consulting in good faith, insofar as their respective mandates allowed.

[794] I have described above the consultations that have taken place since the original decision, within the Negotiations. Despite the plaintiffs' sceptical view of DFO, particularly of the Minister's office in Ottawa, the consultations have been extensive and have been characterized by a genuine wish on the part of local management to understand the right and to find ways to accommodate it. Attempts to understand the plaintiffs' view of the right have not been straightforward, as I described above. As well, Ottawa has at times stymied the wish of local management to move forward. In particular, Ottawa did not approve demonstration fisheries for species other than salmon. In at least one case, a carefully considered Briefing Note from the regional office containing various suggested measures to move the Negotiations forward did not even make it to the Minister. Generally, regional DFO managers and negotiators were permitted to react to proposals from the plaintiffs, but not to initiate offers themselves.

[795] This has resulted in local management reformulating their approaches and making further attempts to obtain a flexible mandate for the long term, which was finally accomplished in December 2014.

[796] The plaintiffs, for their part, did not always speak with one voice at the Main Table. Their positions on at least two large issues fluctuated as time went along. As well, many of the DFO witnesses who were involved in the Negotiations (including Stuart Kerr; Sue Farlinger; and Andrew Thomson, Area Director for the South Coast, who played an active role at the Main Table from 2013 on) testified that DFO had to understand some very basic aspects of the plaintiffs' fishery and obtained clarification from them with difficulty.

[797] The Negotiations, although affecting the interests of all the sectors of the fishery, were strictly bilateral. DFO does not represent the interests of other sectors, as the intervenors clearly demonstrated.

[798] Overall, however, Canada through DFO has the responsibility to represent the honour of the Crown. The lack of a mandate and Ottawa's stonewalling of suggestions for advancing the development of a right-based fishery are significant factors in the failure of the process to move forward. Ottawa failed to allow the Regional staff to engage meaningfully and wholeheartedly in the Negotiations, at least until the Supreme Court of Canada refused leave the second time. As the plaintiffs repeatedly pointed out, there is no evidence before the court of any engagement by Ottawa staff on this fishery, other than the occasional signature on a Briefing Note, and reference to one meeting with a ministerial assistant which was not coordinated with local managers.

[799] However, given all the other problems associated with this case, it is very difficult to say that a satisfactory result could have been reached, even if Negotiations had not been restrained by lack of a mandate.

[800] Canada took the position during argument that the process inevitably broke down when the parties were sent off to negotiate what the Court of Appeal later referred to as *Lax Kw'alaams*' steps 3 and 4. This is a task that requires findings and analysis that only a court can make. There is some validity to that position. The parties were given a task that seems unworkable, especially given *Lax*

Kw'alaams' step 4, which requires consideration of many other factors beyond the right itself, which in turn fall outside the particular interests of either party. The Supreme Court of Canada stated in *Lax Kw'alaams* that "the existence and scope of aboriginal rights must be determined after a full hearing that is fair to all the stakeholders", but no "stakeholders" except Canada and the plaintiffs were involved in these Negotiations. As for step 3, the parties were fundamentally divided on whether continuity was still open or not. The declaration was for "any species". They could not have negotiated that issue and did not even try.

[801] The legal effect of the conduct in regard to consultation or failure to consult at the Negotiations is unclear. Neither Canada nor the plaintiffs were obliged to reach an agreement through consultation and negotiation: *R. v. Marshall*, [1993] 3 S.C.R 533 (*Marshall* #2), at para. 23. Either party was always free to bring the matter back to court to have justification determined after the two years had expired, under the terms of the order. Canada could have alleged difficulties in this regard as well. In short, I do not see this situation as equivalent to the one described in *Huu-Ay-Aht.*

[802] Notwithstanding the lack of a mandate to implement test fisheries, and which I acknowledge can be seen as a refusal by Ottawa to put real effort into resolving the huge task presented to the parties by the declarations, both sides can be faulted for various aspects of the Negotiations. As well, the previous judgments and orders were very confusing and did not provide helpful structure or guidance. I will not go into those issues again at this stage, but the difficulties presented by those judgments and orders should not be discounted or underestimated.

[803] As I have stated earlier, in all of these circumstances, I do not fault Canada for pursuing appeals in the hope of further clarification.

[804] Given all these circumstances, I cannot see that it is appropriate or necessary to make a general declaration at this point in respect of a failure of the duty to consult in good faith either under the common law or under the declaration. There were stumbling blocks presented by both sides, and this process is still in progress.

Minimal Impairment

[805] Madam Justice Garson said at para. 891 that the justification stage of the trial should focus on minimal impairment of the aboriginal right:

> 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.

[806] Madam Justice Garson said at para. 851 of her reasons that she might consider whether the scheme as it already exists could be justified, or partially justified. However, she then deferred the analysis, and said at para. 867 that it was speculative to consider whether, once the right was taken into account, there might be no change required to fisheries management.

[807] The plaintiffs say Canada's failure to justify implementing their fishing plans and their failure to provide adequate allocations shows that they have not demonstrated minimal impairment of the right.

[808] Canada says there is a range of measures that can be considered within minimal impairment; the test is whether the measure could reasonably be considered to be as minimal as possible (see *Nikal).* Without knowing the extent of the right they are dealing with, it is not possible to deal with a reasonable minimal impairment.

[809] I agree that it is very difficult, if not impossible, to deal with minimal impairment of a right without understanding the scope of the right. I have now interpreted the scope of the right, relying on Garson J.'s reasons.

[810] As well, minimal impairment of the right to a multi-species commercial fishery involving other sectors will necessarily change each season, and perhaps within the season. This must be dealt with in the context of each fishery, insofar as general findings can be made, but will require decisions by the Minister and/or regional and local DFO managers, in consultation with the plaintiffs. The findings and conclusions in these reasons should assist in applying the proper principles to those decisions.

Priority

[811] The concept of priority is dealt with in *Gladstone*, beginning at para. 58.

[812] At para. 60, the court referred to a passage from *Jack v. The Queen,* [1980] 1 S.C.R. 294, which had been quoted in *Sparrow*:

> [The appellants'] position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.
>
> I agree with the general tenor of this argument. Article 13 calls for distinct protection of the Indian fishery in that pre-Confederation policy gave the Indians a priority in the fishery. That priority is at its strongest when we speak of Indian fishing for food purposes, but somewhat weaker when we come to local commercial purposes.
>
> [Emphasis added in *Gladstone*]

[813] The court said the aboriginal priority is not exclusive; the potential existence of other aboriginal rights holders with an equal claim must be considered. As well, the public common law right to fish, although secondary to aboriginal rights, has not been extinguished by s. 35(1). The government retains the right to allocate the fishery, but must demonstrate that those allocations were done "in a matter respectful of the fact that those rights have priority over the exploitation of the fishery by other users". Both the process of allocation and the allocation itself must reflect the prior interest of aboriginal rights-holders in the fishery.

[814] The court then went on to say there are circumstances in which, in order to pursue objectives of compelling and substantial importance to the broader social, political and economic community as a whole, some limitation of those rights will be justifiable.

[815] While recognizing the priority of aboriginal rights-holders in the fishery, the court in *Gladstone* drew a distinction between the approach required for priority when dealing with a commercial right, which has no internal limitation, as distinct from the food, social and ceremonial (FSC) right in *Sparrow,* which has an internal limitation (fishing will cease when the right is satisfied).

[816] Chief Justice Lamer said that *Sparrow* should not be seen as the final word on the question of priority, and that an aboriginal commercial fishing right is not exclusive. He went on to say at paras. 62 - 64:

> …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.
>
> The content of this priority -- something less than exclusivity but which nonetheless gives priority to the aboriginal right -- must remain somewhat vague pending consideration of the government's actions in specific cases. Just as the doctrine of minimal impairment under s. 1 of the *Canadian Charter of Rights and Freedoms* has not been read as meaning that the courts will impose a standard "least drastic means" requirement on the government in all cases, but has rather been interpreted as requiring the courts to scrutinize government action for reasonableness on a case-by-case basis, … 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.
>
> Under the minimal impairment branch of the *Oakes* test (*R. v. Oakes,* [1986] 1 S.C.R. 103), where the government is balancing the interests of competing groups, the court does not scrutinize the government's actions so as to determine whether the government took the least rights-impairing action possible; instead the court considers the reasonableness of the government's actions, taking into account the need to assess "conflicting scientific evidence and differing justified demands on scarce resources" (*Irwin Toy*…). 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.

[817] He suggested at para. 64 some questions that are relevant to the priority analysis, in addition to the *Sparrow* considerations:

(a) has the government accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example)?

(b) do the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders?

(c) what is the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population?

(d) how has the government accommodated the different aboriginal rights in a particular fishery (food versus commercial rights), for example?

(e) how important is the fishery to the economic and material well-being of the band in question?

(f) what criteria have been taken into account by the government in, for example allocating commercial licences amongst different uses?

[818] The court also recognized the difficulties facing the government with respect to the potential existence of other aboriginal rights-holders with equal priority claims, including those with a right to fish for FSC purposes, and those who have aboriginal rights to sell fish commercially.

[819] In this regard, I note the severance of a number of First Nations from this action, whose claims to a commercial fishery on the WCVI are still to be determined and whose potential right-based claims Canada must have in mind.

[820] The government must also take into account the existence and importance of its obligations to non-aboriginal people. At the risk of repetition, I again set out *Gladstone* at para. 75, which was imported into the fourth step of the process set out *Lax Kw'alaams*:

> 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 type 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]

Plaintiffs' Argument re Priority

[821] The plaintiffs say the manner of providing access employed by DFO is the same as the regime criticized by Garson J. It is one that does not respect their priority and is not justifiable.

[822] Basically, the plaintiffs say accommodation of their right comes first. They take the position that their right takes priority over all other sectors (except FSC and treaty allocations) and thus the access provided through ATP and PICFI, which comes from existing commercial-sector allocations, is not relevant to a right-based fishery. I have explained why the plaintiffs object to PICFI access: (1) it relies on another fisherman surrendering his licence into DFO's inventory which puts the plaintiffs in the position of having to wait for that surrender, thus interfering with their priority, and (2) the licence, once obtained, will be given to an aggregate which, with two exceptions, are not wholly controlled by members of the T'aaq-wiihak.

[823] The plaintiffs insist that all allocations aimed at accommodating their right must be provided through the Main Table at the Negotiations. While some of the PICFI access that is controlled exclusively by one of the five plaintiffs can count towards the overall allocation given to the plaintiffs, the PICFI access that includes other nearby First Nations is not in the exclusive control of one of the five plaintiffs and does not count.

[824] The plaintiffs say it was clear from Ms. Farlinger's evidence that she did not understand the concept of priority, so DFO could not possibly have applied it in its actions so far. The plaintiffs say the subjective knowledge and approach of DFO personnel, specifically the Minister, should guide the analysis of whether Canada has justified any infringement.

Canada's Argument re Priority

[825] Canada says the plaintiffs take too technical an approach to priority. The court must consider, when looking at both the process of allocation and the actual allocations, whether Canada has truly taken the plaintiffs' right into account and accorded the right the proper priority. As well, the plaintiffs improperly import a subjective element into the decisions, wanting to know what the Minister considered and understood, when the test is objective. The actions and outcomes are to be considered, and the test is reasonableness, not whether there is some other course of action that might impair the right less. This cannot be done in the absence of a specific set of facts.

[826] From Ms. Reid's testimony, it seemed that DFO had difficulty with understanding what the concept of priority meant to the plaintiffs, as the concept was discussed during the Negotiations: if DFO fully accommodated a preferred-means fishery, did that provide appropriate priority? Or does priority mean simply that the plaintiffs come before any other fishery? How can that be, if the fishery is not exclusive and not an industrial commercial fishery?

[827] Nevertheless, despite the difficulties, Canada says the priority of the plaintiffs' right has clearly been at the forefront of DFO's approach to the Negotiations. The court should take into account the many years of negotiations, the reduced fees offered to the plaintiffs and the significant funding they have been given to build capacity and to support their fishery. As well, the salmon demonstration fishery was set up especially for the plaintiffs and operated by different rules. The plaintiffs have been given extra access to other fisheries under PICFI and ATP, in priority to all other fishers. The LTO has set out a different approach for dealing with the plaintiffs which accords their right priority over other interests.

[828] Canada says times and area preferences are not matters of priority in this context; they are considerations of minimal impairment, as Canada attempts to manage the fishery sustainably on an ongoing basis.

[829] Canada also takes issue with the plaintiffs' contention that the concept of priority incorporates security of access. Although the plaintiffs seek a secure opportunity, there are no guarantees, which is why Garson J. refused to characterize the fishery as one to sustain the community. Canada says long term opportunities to exercise their right provides the best security for the plaintiffs, and this is what they have offered to negotiate.

[830] Canada takes the position that the mitigation policy and PICFI and ATP do not stand in the way of granting appropriate priority to the plaintiffs' right. It says that policy achieves reconciliation between the plaintiffs with their aboriginal right and all the other sectors. If reconciliation can be achieved in a way that properly accommodates the right, then it should not be necessary to require involuntary relinquishment of licences from other sectors.

[831] Canada also points out that the allocations under the Maa-nulth Treaty, which deals with Nations who are not members of the plaintiffs, come from the general commercial fishery; the shares associated with those Treaty rights will therefore shrink along with any reallocation away from the

commercial fishery to the plaintiffs' fishery. Thus the concept of priority is complex and multi-faceted as Canada attempts to manage the entire fishery for all species.

Discussion of Priority

[832] In my view, the application of the principle of priority of aboriginal rights varies depending on the many factors that go into each individual fishery. This will be discussed for each species. However some general comments can be made.

[833] I consider that Canada is correct on the issue of the necessity to apply an objective test to a consideration of decisions made by the government. It is the actual process and allocations that must be looked at when deciding whether the government has appropriately taken into account the existence and importance of the aboriginal right. It is not useful to consider what the court may or may not know about the inner workings of the Minister's mind. It is the government's actions that must ultimately be looked at, not what individuals knew or thought. Evidence from the Minister might or might not have been helpful to Canada but is not available. Madam Justice Garson held that the fact of broad and unstructured discretion on the part of the Minister is not in itself an infringement, as long as the decisions did not result in a meaningful diminution of the right. Thus, it is actual decisions and their effect that are relevant considerations in determining whether that has occurred.

[834] If the plaintiffs are saying that the concept of priority means that they always come first for every fishery unless Canada can justify not proceeding on that basis, in my view that is too simplistic. Setting priority for a commercial fishery is a complex exercise. It does not mean that the plaintiffs get everything first for every fishery -- allocations, timing, openings, competitive market advantage. In order to complete the analysis of whether or not infringements are justified for each species, the government must take into account the existence, importance, and priority of the right, that is, the considerations set out in *Gladstone,* above, together with a consideration of the factors reiterated in *Lax Kw'alaams*' step 4.

[835] I also agree with Canada that according preferences to the plaintiffs as to time and area is not a proper approach to priority. The exercise is much more complex than simply saying the plaintiffs come first, whatever, whenever and wherever they wish to fish.

[836] The parties differ fundamentally over the issue of priority over allocations. It is not the job of the court to set allocations, as I have already stated; the factors that go into allocations are subject to a wide variety of considerations within the knowledge of the Minister at any particular time. However, the court can ensure that the Minister applies the proper priorities within that process.

[837] As I have mentioned, factors respecting priority of allocation will change for various species, as will the manner of providing access (e.g. through the mitigation process or not). This will be discussed in the context of the individual species.

The Mechanics of the Justification Analysis

[838] This is a case of first impression. There are no guidelines on how to address the justification analysis in a civil claim for a multi-species fishery. The parties and the previous courts, as well as this one, have tried and are trying to come to terms with their respective tasks.

[839] Justification of any particular aspect of a fisheries regime is not static. It is clear from all the evidence before me that most fisheries are changeable, largely unpredictable, and subject to wide variations. A justified measure one year may not be justified the next when all the priorities are considered. Madam Justice Garson noted at para. 875, after making a general finding of infringement, that Canada might be able to justify considerable restraint on this special fishery, depending on health and abundance of fish stocks. Health and abundance are changeable, even in season. Justification was thus acknowledged to be an ongoing and fluctuating exercise.

[840] The Supreme Court of Canada acknowledged this in *Marshall* #2, at para. 22:

> The factual context….is of great importance, and the merits of the government's justification may vary from resource to resource, species to species, community to community and time to time.

[841] That was true even in a regulatory prosecution in which the infringements to be justified were easily identifiable. The concept of what infringements may or may not be justified in a civil claim such as this, for a multi-species right to fish and sell fish, is multi-faceted and subject to many potential fluctuations.

[842] Madam Justice Garson suggested a way to approach the justification stage which I will explain below. That approach was a useful way for the parties to begin discussions. It has informed the Negotiations and the plaintiffs rely on it in the litigation as well. However, I will explain why I do not view the approach used for the negotiation process to be an appropriate one for this court to adopt in fulfilling its task under the order at term 7.

Plaintiffs' Argument

[843] I have already noted that it is the plaintiffs' position that the right has been clearly and finally declared and delineated; the entire regime *prima facie* infringes the right; and if Canada is not ready to justify their position, the result is that Canada has provided no justification for failing to provide them with a workable commercial fishery. Therefore this court should declare that the *prima facie* infringements are not justified and the plaintiffs are entitled to a constitutional exemption from the entire regulatory scheme applicable to the WCVI.

[844] Such a declaration would be a simple remedy. However, the plaintiffs take the position that an alternative way to proceed at this stage, following upon Garson J.'s suggestion, is to consider the respective fishing plans they have put forward for the many fisheries for which they seek a share of the overall fishery. The actual fish they are entitled to would vary each year with available catches and abundance. They say this provides a workable model for the present and Canada should be required to justify its refusal to implement the plans as a whole or portions of them. If Canada cannot, then the plaintiffs' plans would be implemented.

[845] The plaintiffs rely on the following paragraph of Garson J.'s reasons:

> [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.
>
> [Emphasis added]

[846] The plaintiffs say they waited for Canada to put forward positions, or at least enter into meaningful discussions about their earlier proposals. Canada did not do so, as its negotiators did not have a mandate from Ottawa to implement even the limited demonstration fisheries (other than salmon) proposed by the regional managers.

[847] The plaintiffs also refer to *Marshall #2* at para. 44, which stated that "the concerns and proposals of the native communities must be taken into account and this might lead to different techniques of conservation and management in respect of the exercise of the treaty right."

[848] Therefore the plaintiffs say the series of fishing plans they put forward in 2014 should be the starting point for justification.

Canada's Argument

[849] Canada says the remarks of Garson J. set out above should be taken as suggestions to facilitate discussions, not as a change from the law on justification. Canada must justify its regulatory and policy conduct to the extent it infringes the plaintiffs' aboriginal rights. Canada is not required to justify not implementing the plaintiffs' fishing proposals in the absence of a clearly delineated right and specified infringements.

[850] Canada says the measures already taken, along with the LTO, should be considered in the analysis of whether infringements still exist that require justification.

Intervenors' Position

[851] The intervenors emphasize that the justification exercise involves "all the stakeholders", according to *Lax Kw'alaams,* and that a non-exclusive fishery involving all sectors should not be negotiated by only two parties. In the litigation context, they take the position that all the court should determine is whether or not the plaintiffs have proven their case. The court should not get involved in the workings of the fishery.

Discussion

[852] With this background I will turn to the approach I will take towards the justification analysis.

[853] The court in *Gladstone* started from the proposition that the government makes decisions and must justify them, because, of course, that was a regulatory prosecution. In the context of this case, Garson J. suggested that the plaintiffs propose fisheries and if no agreement were reached, the government would justify not accepting them.

[854] This makes sense on one level because it is the plaintiffs' claim. However, in my view, this approach would import the Negotiation process into the litigation in a manner that is not appropriate. I have referred earlier to the broad nature of the evidence that has been adduced, which I see as having come from the approaches used in the Negotiations, and not from a focus on whether particular infringements should be accommodated or can be justified in the context of litigation. In short, the course of this trial bears some resemblance to just what Mr. Justice Binnie warned against in *Lax Kw'alaams*: a commission of inquiry.

[855] The plaintiffs claimed an aboriginal right to harvest all species of Fisheries Resources (defined as all species of fish, shellfish, and aquatic plants). In the alternative, they claimed a right to harvest one or more species, without specifying which. The right as declared was for "any species of fish", but it seems that "fish" was taken by Canada and the plaintiffs to mean "Fisheries Resources" (the term used in the pleadings, defined to include fish, shellfish and plants) with the exception of plants, about which no evidence was called before this court. The PPFA views the omission of the term "Fisheries Resources" as significant. I will explain this in the discussion of prawn.

[856] The evidence has demonstrated that each fishery is different, not only in its science and management, but in its ancestral importance to the plaintiffs, insofar as assistance on that latter aspect can be gleaned from the evidence that was before Garson J.

[857] Each fishery has an Integrated Fishery Management Plan (IFMP). These documents are lengthy and detailed. Each management plan is distinctive. Each has different concerns and management measures associated with maintaining their sustainability, within the overall primary principle of conservation.

[858] As noted already, the parties disagree on what is required for every fishery, specifically: allocations or share; nature and scale of the fishery; number of participants; vessel size; the meaning of "preferred means"; the meaning of "wide community participation"; timing, area, and gear restrictions; monitoring standards; management requirements; the role of the plaintiffs in management; whether and how dual fishing (for commercial and FSC purposes on one trip) can be accomplished; retention of bycatch; and whether and how multi-species fishing can be monitored and managed.

[859] Against this background, I will now consider the mechanics of the justification process as suggested by Garson J.

[860] Madam Justice Garson suggested at para. 906 that the plaintiffs propose specific fisheries. She took as an example a terminal fishery (aimed at a single stock of fish returning to their terminal spawning grounds in a single river) on one of the rivers in their territories. After negotiations, if the parties could not agree, they could return to court for a determination as to whether Canada's refusal to implement that fishery could be justified. However, she said she expected them to return with a total scheme for the plaintiffs' commercial fishery, suggesting two years was sufficient to design an entire fishery.

[861] This is difficult to envision in practice and has not been successful. The river terminal fisheries Garson J. used in her example are limited and relatively small fisheries: the plaintiffs' fishing plans make brief mention only of the ISBM chinook and coho fisheries in the Burman and Conuma Rivers which are of significance to the Mowachaht/Muchalaht and Ehattesaht. Their plan for the terminal fisheries is premised on cooperative discussions with DFO to set escapement rates, although DFO expressed some reservations about the lack of detail respecting terminal fisheries.

[862] Those terminal fisheries generally consist of one location, one stock, fewer participants, predictable gear, and fairly simple management regimes. The multi-species fisheries in which the plaintiffs strive to participate are ocean-based, large, complex fisheries with many species, mixed stocks, many participants, many openings throughout the year, a range of gear types, and demanding monitoring requirements. The plaintiffs seek very large allocations of some of those fisheries. They also want dual fishing, which is subject to entirely different considerations, both right-based and practical. Monitoring considerations differ widely, depending on the catch capacity of the boats and the species being fished. Bycatch requirements themselves are very complex, especially those involving groundfish quotas, and are important to conservation of numerous species. Interference with quotas affects all sectors of the fishery.

[863] The issues are complex, the respective positions are the subject of strong and basic disagreement, and the approach to the justification analysis, suggested by Garson J., which is perhaps overly simplified, is not feasible in this case. As I have said, it can be an appropriate way in a suitable case to approach negotiations, but it does not lend itself to resolution of the issues in this litigation.

[864] I reiterate, however, that my view of Garson J.'s reasons is that she contemplated a small-scale artisanal localized fishery, using small, low-cost boats, with wide community participation, to be exercised within nine miles of shore. Within those parameters, her suggested approach is more feasible in practical terms. Given the evidence I have heard about the consultations from early 2010 onward, along with the extensive documentation and correspondence that has accompanied the Negotiations through the years, the concept that existed in 2009 as taken from my interpretation of Garson J.'s reasons is very different from the plaintiffs' present proposal for a somewhat less than large industrial fishery that seeks to fish substantial shares of the entire WCVI TAC of each individual fishery, using average-sized trollers (or even, as Francis Frank said, "midsize large industrial sized scale boats"), aiming to grow even larger and to reach outside the CDA.

[865] The result of the approach suggested by Garson J. as interpreted by the plaintiffs appears to be that the exercise of the right expands or adapts to whatever species and allocations the plaintiffs put forward, with Canada required to identify any relevant potential infringements for each fishery (since everything is a *prima facie* infringement) and required to justify at large any refusal to implement a particular proposal. This could be seen as a reversal of the burden of proof with respect to infringement, as the intervenors argue, but is what the declarations appear to require.

[866] I emphasize again that Garson J. did not have the advantage of the *Lax Kw'alaams* decision when she wrote her reasons. Having said that, it would have been helpful, as required by *Lax Kw'alaams,* to have precision in the claim and in the articulation of the right, together with specific findings as to continuity, the scope of the right, and infringements. While the effect of the infringements can be considered cumulatively, identifying them is important. All of these conclusions would then be integrated with findings on justification before a right is finally delineated.

[867] It must be kept in mind that the court cannot make political decisions or design a fishery, nor is this a mediation where the court can work with the parties to reach a satisfactory arrangement, helping the parties to agree on one or another of their respective approaches. It is not an arbitration where the parties have agreed that the court can set allocations. This is not a commission of inquiry -- although as I have said, at times it seemed to resemble one, despite the caution against such an approach in *Lax Kw'alaams*. This is a trial in which, according to the declarations made previously, the parties have now come to this court "for a determination of whether the *prima facie* infringement of the plaintiffs' aboriginal rights is justified," in respect of a right that was given no parameters when it was declared and infringements that were not specified, while achieving reconciliation with the rest of Canadian society. That task is difficult enough. The court was not also given the task of designing and supervising a fishery, or of setting or approving allocations arising from a negotiated context. In my view, that is what the approach suggested by Garson J. for the Negotiations, and adopted by the plaintiffs for the litigation, leads to.

[868] Even if that were the court's role, the state of the evidence before the court in respect of each fish plan and DFO's position on each plan was, by the end of the evidence, incomplete and in a state of flux. This would not assist in allowing the court to make pronouncements on allocations or the way this unique fishery should be implemented, even if the court saw its role as approving a particular plan. DFO's Evaluations and the witnesses who testified about each species pointed out many aspects that required clarification and discussion. Propositions were put during cross-examination of various DFO witnesses that obviously require discussion or compromise, and that could resolve some but not all of the identified problems. Whatever may come, or has already come, of ongoing discussions that I assume continued after the conclusion of evidence is not before the court, but it on the evidence before me, it is clear that the plans are not complete.

[869] It is also important to note that the justification exercise is an ongoing one and some decisions could change every year. What is justified one year may not be the next, and *vice versa*. Thus, a decision about allocations and management of a particular terminal fishery, the example used by

Garson J., and indeed for any of the fisheries, will change with the situation that exists year to year and even in season, as expressed by the earlier quote from the Supreme Court of Canada in *Marshall #2* at para. 22.

[870] This is highlighted by the plaintiffs' position that their current proposals are simply temporary steps on the way to full accommodation of their right. Their participation is expected to grow and thus their impact on the various fisheries and the balancing act required to achieve and maintain reconciliation would be an ongoing exercise.

[871] As I have noted, Canada says it is not ready to deal with justification for many species. It says the information is simply not before the court to allow a proper analysis because the extent of the right and the nature of the infringements were not specified until now. In Canada's submission, the case should be adjourned once more so that more negotiation and accommodation can be attempted, using these reasons as a guide.

[872] The plaintiffs say if Canada is not ready, the regime should be declared to be an unjustified infringement and final declarations made accordingly.

[873] This brings me to a very real problem when considering a remedy in this case. If the court were to declare simply that the *prima facie* infringements, which encompass the entire legislative, regulatory, and policy framework of DFO, are not justified because Canada is not yet ready to articulate its position on justification, the plaintiffs would theoretically be exempt from the regulatory scheme and not subject to any regulation whatsoever. This is contrary to the entire concept of reconciliation. More importantly, conservation and sustainability of the resource are essential. An unregulated fishery, even one constrained by the nine-mile limit, is not appropriate.

[874] Alternatively, to implement the plaintiffs' 2014 fishing plans as the default position is also not an appropriate approach to justification. The other sectors have not been involved in the Negotiations, even though the Supreme Court of Canada stated that the process of finally delineating a right had to be fair to all stakeholders. As well, although some aspects of some of the plans are reasonable, some are not compatible with common sense or with the concept of reconciliation. In addition, the plans are not complete. I will explain the last points in more detail when I deal with each species.

[875] Neither would it be appropriate to say the plaintiffs are not entitled to all declarations they seek; therefore the case is dismissed. This is not an "all or nothing" exercise. The task given to the court is much more complex and nuanced than that.

[876] Returning to Canada's suggestion of an adjournment for further discussion and negotiations, using these reasons as a guide: it is obvious that discussions and consultation over this fishery will be ongoing year after year. However, the bilateral negotiation process ordered by Garson J. within the litigation has been unsatisfactory so far and has not engaged the other sectors. As well, the parties have already lost one trial judge and have had to start almost anew with another. I cannot remain

available for the years it will take to come back to the court on the many issues that will arise with such a multi-faceted fishery.

[877] This prompts a passing mention of another one of the remedies sought by the plaintiffs: that the court order an ongoing supervisory jurisdiction over this fishery. I will return to this later when I discuss remedies.

[878] In an attempt to move forward, I have set out what I consider to be the correct interpretation of Garson J.'s reasons in respect of the right she declared. I have also set out the areas of infringement I will deal with, in an effort to focus the declaration that the entire scheme infringes the right.

[879] The legislation, regulations, and policies, which were declared in their entirety to be a *prima facie* infringement of the plaintiffs' right to fish and sell any species of fish, have remained unchanged since Garson J.'s judgment.

[880] In my view, the justification exercise should involve a consideration of those infringements – that is, it should focus on the legislative and regulatory sections that were pleaded and which give rise to the characteristics of the overall regime that Garson J. referred to, as well as the specific policies to which the plaintiffs take objection.

[881] Following that approach, there are general conclusions on infringement and justification that can be reached, given the nature of the right-based fishery as I have interpreted it from Garson J.'s judgment. Those findings relate to the legislation, regulations, and policies.

[882] The management and regulation of each fishery can also be considered against the various factors from *Gladstone* and *Sparrow,* particularly those factors relating to priority of allocation and to reconciliation.

[883] For the latter part of the analysis, it is useful to take the proposals as a starting point for discussion, and use DFO's Evaluations of the plans and the evidence of the many witnesses as a means of focussing the many factual issues that arise in each fishery. When I move on to discuss the individual species, I will set out a fair amount of this evidence because it is important to understand the complexity of each species and the difficulty of setting up a non-exclusive multi-species commercial fishery. Each species is managed differently and the measures taken by DFO within the regulatory structure have to be considered in the context of each one to identify infringements that are relevant to that particular species or fishery and then to determine if they are justified.

[884] As well, each fishery has different considerations to take into account when assessing priority of allocation. While the court cannot set allocations, it can assess the principles from *Gladstone* and *Sparrow* in the context of each species.

[885] Also, if I am wrong in my conclusions on the scope and scale of the fishery and on the proper approach to justification of infringements, it is important that the reasons why I would find DFO to be

justified in not accepting all or parts of the plaintiffs' plans should be reflected in the decision so that the months of evidence are not wasted.

Summary of Problems Arising from the Structure of the Present Case

[886] Before moving to the various infringement/justification analyses, both general and species-specific, I will briefly recapitulate the problems that have complicated the task before this court. These conclusions, which arise out of the unusual circumstances of this case, are all reached with the benefit of hindsight, and having been confronted in this stage of the trial with problems that the previous courts (and perhaps, for some of the problems, even the parties) had not anticipated:

(1) the right was not precisely claimed or articulated by the end of the first stage of the trial as required by *Lax Kw'alaams*;

(2) no infringements were specified in respect of each species or at all;

(3) the Court of Appeal in its reasons directed either the parties in the Negotiations or this court to consider continuity species by species, but confirmed the order which declared that the right is to sell *any species* of fish, and confirmed that this court can consider and hear evidence on *justification* only, which precludes hearing evidence on or deciding continuity;

(4) the infringements are based on legislation, regulations, and policies, but the parties were ostensibly sent away to negotiate allocations, which may be suitable approach for a mediated or political settlement, but not for a court;

(5) the fourth step of *Lax Kw'alaams*, which must involve "all the stakeholders", cannot be done by bilateral negotiations, but it was nevertheless left to the plaintiffs and Canada to negotiate this non-exclusive fishery, involving many other sectors – and they were also left to negotiate or otherwise come to terms with the issues of continuity and justification (issues not amenable to negotiation), and if unsuccessful, to return to court;

(6) the parties approached the task of this court as if it were a continuation of the Negotiations, that is, as if this court could pick one approach or parts of different approaches and that would be the fishery;

(7) even if the above approach were the right one, the evidence on what might be an appropriate fishery for each species was unfinished from both sides;

(8) it is the task of the Minister, not the court, to set allocations, but even if it were appropriate for the court to set or even approve allocations suggested by the plaintiffs, the plaintiffs' plans are not acceptable or ready for reasons that will be discussed below; Canada's offers are for two species only, and have deficiencies as well, to be outlined below; and

(9) the expectations of the plaintiffs have been informed and increased by steps taken through the Negotiations, for instance the widespread use of commercial trollers in the salmon demonstration fishery, acquiesced in by DFO, that are not entirely consistent with my interpretation of the right declared in 2009.

[887] While the attempts at accommodation by DFO are steps in the right direction, no agreement has been possible. This is an indication of why negotiations should not commence prematurely and without adequate underpinnings and parameters.

[888] This case has come before a court to be resolved. Political or mediated approaches are not open to the court. The steps a court must take can be set out with reference to the considerations from *Sparrow, Gladstone, Lax Kw'alaams,* and the Court of Appeal's reasons in this case. In my view, and once again, with the benefit of hindsight, a case such as this would be greatly assisted if the following approach were taken:

(1) the modern right must be precisely claimed in the pleadings, at least by the end of trial, and before a declaration is made;

(2) findings must be made about the existence of the claimed right, which includes findings on continuity;

(3) the scope and scale of the modern right should be precisely described, with reference to the claimed right;

(4) continuity should be determined species by species; (I leave for future consideration on appropriate evidence the hypothetical situation mentioned by the Supreme Court of Canada in *Lax Kw'alaams* at para. 57 - catch everything and trade everything they catch – in respect of species that have moved into the area since contact);

(5) infringements should be specified, including a finding on the preferred means that the plaintiffs allege is infringed;

(6) conclusions should be arrived at respecting justification of those infringements; and

(7) the final form of the right, which incorporates the concept of justified infringements, can then be delineated.

[889] Only then can the parties be sent away to negotiate allocations and a workable management and monitoring scheme in order to appropriately accommodate the exercise of the right. Determination on the points set out above inform allocations and management and monitoring. Allocations do not inform those determinations.

[890] Following negotiations and consultations, there may be further impediments to the *exercise* of the right that occur as a result of decisions by DFO, and which DFO may be required to justify. This could involve allocations or various management decisions and requirements. If those cannot be resolved by agreement or another process, they will likely find their way to court on judicial review.

[891] Since many sectors and interests are involved in these fisheries, the trial judge will have to determine whether to allow intervenors to participate, given the statement of the Supreme Court of Canada in *Lax Kw'alaams* that the process must be fair to all stakeholders.

[892] Some guidance for the task presently before this court is contained in the comments in *Gladstone* starting at para. 51, which are directed at the process of beginning the justification exercise. *Gladstone* involved one Nation and one species. First the court broke down the constituent elements of the government's regulatory scheme for the specific species in the context of the single impugned charge. The court then stated that while the cumulative effect of those individual parts on the right is relevant at the infringement stage, each part would have to be considered separately at the justification stage. Having clarified the scope of the right, and having enunciated specific infringements, the court

said the evidence to justify the government's particular allocation of herring spawn on kelp was lacking and that aspect was sent back to trial on the issue of justification.

[893] It is important, however, that the elements were precisely identified before their cumulative effect was considered.

[894] As an aside, it appears that was no further trial on justification in *Gladstone*. How or whether that issue has been resolved in the past twenty years is not before this court.

[895] In the present case, the circumstances are very different. All species are involved. The right was not defined in scale or scope; every element of the management regime for every species has been declared to be a *prima facie* infringement, without any identification of separate elements relevant to each fishery. The parties were sent away to negotiate allocations for an entire fishery, based on proposals to be submitted by the plaintiffs, and to return to court to have the issue of justification determined if negotiations were unsuccessful.

[896] I reiterate that Garson J. did not have the advantage of the judicial considerations I now have, nor did she anticipate the course these proceedings have taken. I say with respect that in a civil case such as the present one, I cannot see a reason to make a declaration of a right mid-trial, but if one is to be made, it will have a "somewhat interlocutory character", to use the Court of Appeal's phrase, and its substance, provisional nature, and limitations should be clear in the order.

[897] In the circumstances of the present case, I have now made findings on the scope and scale of the right, and on preferred means. I am prevented from making findings on continuity by species for the reasons I have set out, and will approach that issue as I have described, as part of the analysis of justification. I have attempted to focus the discussion of infringements, and will now move on to consider whether those infringements are justified.

Aspects of Infringement and Justification Applying to All Species

[898] I start the justification analysis bearing in mind the scale and scope of the right as I have interpreted it from the entirety of Garson J.'s reasons: it is a small-scale, artisanal, local, multi-species fishery, to be conducted in a nine-mile strip from shore, using small, low-cost boats with limited technology and restricted catching power, and aimed at wide community participation.

[899] I also reiterate my interpretation of Garson J.'s declaration as intended to provide a viable and sustainable fishery, albeit with no guarantee of any particular level of economic return. I also note the lack of evidence before her of the level of fishing the plaintiffs contemplated, and the lack of evidence before me of the economics of the salmon demonstration fishery or any other fishery.

[900] The plaintiffs say their right-based fishery can never be appropriately accommodated as long as DFO adheres to its legislation, regulations and policies: they refer to Dillon J.'s statement that accommodation requires policies to give way to their right.

[901] I have listed the ongoing *prima facie* infringements upon which I will concentrate and will include them again for convenience:

- policies (as noted earlier, the CWF is not put forward by Canada as justification);

  Salmon Allocation Policy;

  Mitigation Policy;

- requirement in the commercial fishery for a licence (*Fishery (General) Regulations*, s. 35(2));
- requirement for species-specific licencing (*Fishery (General) Regulations*, ss. 22(1), 33(1))
- requirement in the commercial fishery for a registered vessel (*Pacific Fishery Regulations*, *1993,* s. 22(1));
- costs associated with pursuing a fishery, for instance licences (*Pacific Fishery Regulations*, *1993,* s. 19(1)) and monitoring costs, particularly electronic monitoring;
- prohibition against retention and sale of bycatch (*Fishery (General)* Regulations, s. 33(2);
- restriction on transfer of licences
- necessity for one licence per boat per species to harvest and sell fish, that is, DFO's refusal until the salmon demonstration fishery to allow split licences (*Fishery (General) Regulations*, s. 22(1));
- requirement for ITQ in the groundfish fishery.

[902] I will turn first to the legislative and regulatory scheme.

The Legislative and Regulatory Scheme

[903] I will make some general comments on the licencing regime presently in place. This involves a mixture of legislative, regulatory, and policy requirements. I have listed the legislation, regulations, and policies at the start of the section of Attempts at Accommodation and will not repeat them. They remain unchanged since Garson J.'s judgment.

[904] It is not difficult to see that the existing regime which requires (1) one commercial licence per vessel, (2) all vessels to be registered, (3) licence fees, (4) a restriction on splitting or transferring licences, (5) one licence per species, would be too costly for a small boat multi-species fishery. As well, licence allocations that depend on limited entry based on previous catch is not justified for this fishery. DFO has not attempted to justify these approaches for a small-boat fishery.

[905] Thus I think it is fair to say that Canada does not take the position that the entire regime, found to be a *prima facie* infringement, can be justified and should remain unchanged. DFO has funded the training and salaries of the T'aaq-wiihak biologists, fishing coordinator, and other staff, including monitors, and has already addressed many aspects of the regime in the salmon demonstration fishery. PICFI licences provided outside the right have always been free of cost. This has continued for the PICFI licences provided since 2009 in the salmon demonstration fishery and in other fisheries. DFO has not required adherence to the regular commercial rules for the plaintiffs' PICFI salmon licences.

DFO has not required registration numbers for the vessels. Licence splitting has been allowed in the salmon demonstration fishery. Expanded bycatch retention for sale has been offered. DFO has allowed the amalgamation of groundfish quota onto one licence for the plaintiffs' use.

[906] The accommodations listed above engage certain aspects of the *Fishery (General) Regulations*, ss. 22(1), 33(1) and 35(2), and of the *Pacific Fishery Regulations, 1993*, ss. 19(1) and 22(1), as they apply to the plaintiffs' right-based fishery. The precise application of those sections will have to be the subject of discussion with counsel.

[907] I conclude that the regulations setting out these requirements are not justified for the plaintiffs' right-based fishery. While these are decisions DFO has already made, the regulations remain unchanged. Thus the present accommodations and flexibilities are not a permanent solution. It may be that a new regulatory mechanism or some sort of formal protocol will be required for this fishery.

[908] The source of licences and associated allocations through PICFI does not necessarily mean all the usual commercial rules apply to the use of those licences. DFO does not currently apply those rules to the T'aaq-wiihak salmon demonstration fishery, but that approach must be formalized and adapted to a multi-species fishery. The use of PICFI licences will be discussed in the context of each fishery.

[909] The considerations for a commercial troller fleet would not necessarily result in the same findings of infringement, but I have concluded that a less than large industrial fishery using a commercial troller fleet is not the correct interpretation of the right that Garson J. declared to exist.

[910] The prohibition against the sale of bycatch (s. 33(2) of the *Fishery (General) Regulations*) is more difficult, particularly since the plaintiffs wish to retain and sell all bycatch. While the general application of that subsection to a multi-species fishery may seem an obvious infringement, retention of bycatch requires appropriate monitoring and catch reporting in order to ensure conservation and sustainability of species of concern.

[911] The requirement for quota for groundfish both as bycatch and as an aspect of a small-boat multi-species fishery also seems to be an obvious infringement, but DFO is justified in requiring an appropriate monitoring and catch reporting standard to ensure conservation and sustainability of the fishery. I will discuss this in the context of the groundfish fishery.

[912] In general, as I have mentioned before, I will not be dealing with details of gear restrictions or requirements, specific area restrictions or requirements, and openings and closings. Those things are aspects of daily fisheries management and it would be impossible to anticipate them or pronounce on them. It should be clear that DFO cannot manage the fishery in such a way that unjustifiably infringes on the right, and consultation is required. However, it is still important to keep in mind that, although consultation is essential, details of management are not necessarily part of the right *per se* unless they infringe on its exercise.

[913] If the effect of a specific in-season management decision is alleged to have infringed the right, it will have to be dealt with individually, through discussion and resolution, or failing that, judicial review. I realize that judicial review may not be timely enough in many cases, but there is simply no way for this court to anticipate and prescribe an approach for these details of seasonal management.

The Policies

[914] I will next examine the general policies that I have already described in the "Attempts at Accommodation" section which have informed DFO's approach during Negotiations. Those policies are part of the regime held, in its entirety, to be a *prima facie* infringement of the plaintiffs' right.

[915] I will first discuss the Salmon Allocation Policy and mitigation policy in a general sense. I will clarify further as each species is addressed.

Salmon Allocation Policy

[916] I have explained earlier, at the beginning of the section on "Attempts at Accommodation", that the Salmon Allocation Policy sets the allocation for chinook for the recreational fishery ahead of the commercial fishery. DFO treats the T'aaq-wiihak fishery as part of the commercial fishery; therefore their allocation is set after that given to the recreational fishery. The recreational fishery also has priority with respect to coho.

[917] Canada's position from the beginning of the Negotiations has been that the plaintiffs have been given a *commercial* right of unknown scope; that is, the right takes its character from the word "commercial". However, I agree with the plaintiffs that the right is an *aboriginal* fishing right. Its essential character is as an aboriginal right. Because it is also a commercial right, *Gladstone* states clearly that it is not an exclusive right, and does not extinguish the right of public access to the fishery. Nevertheless, as an aboriginal right, it has priority over the other sectors, after FSC and treaty rights (limitations the plaintiffs acknowledge), as long as the other factors in *Sparrow* are properly balanced.

[918] Once the right is properly characterized as an aboriginal right and not simply a new type of commercial right, there appears to be no justification for starting from the position that the recreational fishery has priority over chinook and coho.

[919] Canada did not purport to put forward any explanation or justification for the Salmon Allocation Policy in respect of chinook and coho, other than to say that it makes economic sense. Canada attempted to enter as an exhibit a report respecting the recreational fishery that would update revenue figures given in the first stage of the trial. However, this was through a witness who had no knowledge of the report and could not interpret it. I ruled it inadmissible (2015 BCSC 2418).

[920] The only evidence respecting the recreational fishery therefore is the evidence entered before Garson J. from Mr. Gislason, a DFO employee, to the effect that the recreational fishery brought in $135 million to the province's economy in 2005. Michelle James refers to an updated report from Mr. Gislason in 2012 stating that the recreational fishery represents 30% of the total dollar output of

commercial and recreational fisheries combined. There is also a general statement in the Salmon Allocation Policy, echoed by Jeff Grout, that the recreational sector represents the best economic use of the chinook resource. This is reflected in Michelle James' report at p. 52 which refers to a 1996 study which found that the value of a chinook or coho salmon is greater to the recreational fishery than to the commercial fishery.

[921] Common sense might say that the recreational fishery is extremely lucrative to the province's economy, and thus of great value, but that is not a sufficient justification in itself to give the recreational fishery priority over the plaintiffs' right-based fishery. *Gladstone* is clear: aboriginal rights come ahead of the recreational fishery and the general commercial fishery.

[922] Ms. Farlinger testified that DFO was aware of the issue with respect to the Salmon Allocation Policy, but DFO was satisfied that an appropriate plan to protect the right was possible, even under the existing policy.

[923] Canada says that despite the Salmon Allocation Policy, they have been flexible in their approach to the plaintiffs' commercial fishery and have treated it differently from the regular commercial fishery. They have given them extra and extended openings, allowed their small vessels to fish without plugs (a requirement for regular commercial fishing vessels to protect stocks of concern), allowed the plaintiffs' small vessels to fish commercially in the five-mile corridor, exempted the plaintiffs' commercial fishers from the 20% holdback for AAMB chinook, and as of 2016, proposed halibut bycatch and dual fishing in the salmon demonstration fishery.

[924] All of these measures are valuable and useful accommodations for the plaintiffs, notwithstanding the plaintiffs' objection to the allocations provided through the salmon demonstration fishery.

[925] However, the fact that the declared aboriginal right is to fish and sell fish into the commercial marketplace does not lessen the priority to be accorded to the aboriginal right -- it does not allow Canada to start out on the allocation process by treating the plaintiffs' fishery as simply another commercial fishery. To accord priority to the recreational fishery over the plaintiffs' aboriginal commercial fishery is not justified.

[926] Coho has no directed commercial fishery, but insofar as the recreational fishery is given priority over coho, the same considerations apply.

[927] There is no evidence thus far that would allow me to determine whether the Salmon Allocation Policy has actually infringed the plaintiffs' right in respect of their access to chinook and coho, but DFO has set the present allocations using it as a backdrop. The Salmon Allocation Policy has proved to be a stumbling block in the Negotiations. It should not continue to be a factor preventing resolution, if a conflict arises between accommodating the plaintiffs' right of access to chinook and coho and keeping the recreational fishery's allocations unchanged.

Mitigation Policy

[928] The mitigation policy requires voluntary relinquishment of commercial licences from the regular commercial fleet. Canada purchases these licences and provides them to aboriginal nations under the ATP or PICFI programs.

[929] This is one area where the relationship between the right and justified infringements of the right is clearly highlighted. The accommodation of the right must be a balanced with the factors set out in *Lax Kw'alaams*' fourth step, which adopted the justification analysis from *Gladstone.*

[930] Canada's position is a valid one: that voluntary relinquishment of licences promotes reconciliation, whereas involuntary relinquishment does not. However, accommodation of the plaintiffs' right cannot be stymied by the necessity to obtain licences only through the mitigation policy if that policy prevents a full realization of their right. This will differ species to species, and I will discuss it in the context of each species.

[931] For instance, the case for not applying the mitigation policy to chinook salmon is strong because the plaintiffs have an extensive historical and modern relationship with that fishery that supports commercial trade. However, this is not necessarily the case for commercial fisheries that have been developed by the commercial sector itself in recent years and for which there is no evidence of ancestral involvement of the plaintiffs in trade of that species, such as the prawn, crab, and sablefish fisheries. In those cases, a policy which relies on voluntary relinquishment of licences might well be justified.

[932] If the number of licences in the PICFI inventory were not enough to appropriately accommodate the right, and if DFO chose not to tamper with the recreational fishery allocation, the mitigation policy might stand in the way and its effect on the right would have to be justified. Whether this is the case will be discussed in the context of each individual fish plan because the balancing factors will differ between species.

[933] The strength of the plaintiffs' ancestral claim to each species is still subject to the limits of the justification/reconciliation analysis, and I will discuss that in the context of the individual plans.

[934] Thus it is not possible to deal generally with this policy. It requires evidence in relation to a specific species. I would not declare the entire mitigation policy to be inoperable as an infringement of the right, but in certain circumstances it may act as an unjustified barrier to accommodation. This will be considered in respect of each species.

General Comments on the Priority Factors from *Gladstone*

[935] For convenience, I reproduce the *Gladstone* factors on priority:

(a) has the government accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example)?

(b) do the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders?

(c) what is the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population?

(d) how has the government accommodated the different aboriginal rights in a particular fishery (food versus commercial rights, for example)?

(e) how important is the fishery to the economic and material well-being of the band in question?

(f) what criteria have been taken into account by the government in, for example allocating commercial licences amongst different uses?

[936] In respect of (a), the information presently before me is that DFO has assumed the cost of all the licences associated with the plaintiffs' fishery. DFO has paid for all the management and monitoring of the T'aaq-wiihak fishery and has funded the T'aaq-wiihak staff. DFO has paid for training and vessel upgrades. Presently they pay the monitoring costs although they would like to discuss some cost sharing at some point. They have allowed some retention of bycatch for sale, and have offered more.

[937] I lack information on other important aspects that relate to factor (a). I have no financial information as to the viability of the fishery that has taken place over the past few years, which has been the salmon demonstration fishery with some bycatch. I have no information from test fisheries other than salmon because they were not conducted, due to a lack of mandate. I do not have information about income per nation or per fisher from PICFI allocations to which the plaintiffs have access, should I find those to be relevant for a particular species, nor do I have information on how the PICFI licences, in the situation where they are held by aggregates which include non-plaintiff nations, operate for the included plaintiff nations. I have proposals from Canada on only two species, one of which, herring, is not presently viable. In addition, I have Canada's position that further negotiations and discussions are necessary, presumably in the name of accommodation.

[938] In respect of (b), I have concluded that DFO's Salmon Allocation Policy should not allow the policy of priority of allocation to the recreational fishery over the plaintiffs' right-based fishery for chinook and coho to affect appropriate allocations to the T'aaq-wiihak fishery. I will discuss the mitigation policy in the context of the individual fish plans.

[939] As for (c), each of the Evaluations contain the information that the plaintiffs' population is 4,855, which is 46% of the WCVI, 15% of Vancouver Island First Nations, and 7% of the 80 First Nations with reserves in coastal areas in British Columbia. They are 8% of the total WCVI population and 1% of the total Vancouver Island population. I do not have information on the extent of participation in the fishery for each nation, except that the plaintiffs hope and expect it will grow. As I said earlier, only about one-third of the plaintiffs' members currently live on reserve, according to Canada's statistics.

[940] In respect of (d), there is no disagreement that FSC takes priority over any commercial right, and that every first nation in British Columbia has that right. As well, for some fisheries, many First Nations depend on access to the same fish for FSC uses.

[941] In respect of (e), although the number of vessels expected to participate each year is estimated in the plaintiffs' fish plans, there is no information about the numbers of people from each nation who fish, and of course, this litigation is about increasing that number as interest and capacity grow. Thus any indication of the present importance of the fishery to the plaintiffs is not determinative of the fishery's eventual importance in their economic and material well-being. As well, so far there is no information about net revenues from the current licences.

[942] However, the information before Garson J. and from the individual witnesses who testified before me is that, given the remoteness of these Nations, and the lack of any other sources of income, the fishery is of fundamental importance to their economic and material well-being.

[943] As well, I bear in mind that there are extensive programs aimed at increasing the participation of aboriginal fishers generally, with substantial numbers of communal licences held by WCVI nations who fish the entire region. PICFI was developed in cooperation with the NCN and has been used extensively.

[944] It must be kept in mind that the plaintiffs' right-based fishery exists only in the CDA -- nine nautical miles from shore. As mentioned earlier, DFO's expert on fisheries management, Michelle James, testified that although DFO's management areas extend to 200 miles, most fishing on the WCVI takes place within 20-25 miles from shore at the northern end of Vancouver Island, and within about 30-35 miles in the central WCVI where the plaintiffs are located. Some fisheries, such as the commercial sablefish fishery are conducted out on the Continental Shelf and slope. Ms. James estimated that this area starts about 10 to 15 miles seaward of the CDA.

[945] Turning to (f), the relevant paragraph from *Gladstone* (para. 75) as set out in *Lax Kw'alaams* at the Supreme Court of Canada (para. 46) has been referred to before in these reasons:

> 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 type 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 added in *Gladstone*]

[946] There is information before the court about the number of licences and active vessels in each fishery, as well as average revenues for landed catch, and some information about average costs of vessels. There is no evidence respecting criteria of allocation, other than that based on licence shares and on the Salmon Allocation Policy. There is no specific information before me, except through the intervenors, as to the historical reliance upon and participation in the fishery by non-aboriginal groups.

[947] As is clear from the conflicts over conservation and sustainability of the herring fishery, there are political factors entering into Ottawa's decisions that may differ from the local managers' views of health of the stock and abundance, and certainly from the First Nations' position. However, as the

plaintiffs pointed out many times, there is no evidence before the court of the considerations taken into account by the Minister. All the court has before it is the evidence respecting actions taken or not taken. These have been outlined already and will be dealt with in more detail through the discussion of the fish plans.

PLAINTIFFS' FISH PLANS and CANADA'S LONG TERM OFFER

[948] I will now turn to issues that arise in the context of the individual species.

[949] I will include some general facts about each fishery, mostly obtained from the relevant IFMP (Integrated Fisheries Management Plan) and Michelle James' descriptions in her expert report. I will then set out the plaintiffs' proposed approach for allocations for each species as a starting point and as background to the arguments that follow. This will be followed by Canada's justification arguments for that species, including reference to its LTO and Evaluation and its reasons for refusing to implement the plaintiffs' plans, followed by the plaintiffs' response to Canada's argument.

[950] I will then set out the conclusions I am able to reach in respect of the legislation, regulations, and policies which, in my view, have or have not been justified for each fishery, taking into account the factors in *Gladstone* relating to priority, and the factors in *Sparrow* and *Gladstone,* adopted in *Lax Kw'alaams*, relating to justification.

Some General Comments on the Plans

[951] As I have noted, Canada takes the position that it need not justify rejecting the fish plans put forward by the plaintiffs. It must justify specific infringements. I accept this position as correct in law, and for the reasons discussed above, it is the only practical way to proceed through a justification analysis in the circumstances before this court. The justification exercise is to be centered on specific infringements, not around the plaintiffs' proposals. However, those proposals, together with DFO's Evaluation and the witnesses' comments about them, provide an overview and basis for a general understanding of each species. They can also assist in an analysis of priority of allocation, and various management issues.

[952] The plaintiffs rely on their 2014 plans, which they say demonstrate an appropriate accommodation of their right, at least for the present. At the close of the evidence, an issue arose as to the use of the updated 2016 plans that were presented after Canada had closed its case. Counsel eventually agreed that the evidence regarding the 2016 plans would be referred to in the usual course, but the 2014 plans are the ones the plaintiffs stand by.

[953] Canada argues that the plaintiffs, in defence of their proposals, often make broad statements with no underlying validity or research, whereas Canada has called extensive and detailed evidence from DFO managers and scientists with years of experience in their respective species.

[954] As mentioned above, my impression of the actual practical application of each of the plaintiffs' proposals was that it was a work in progress during the evidence at trial. Various criticisms or

suggestions were raised, other options were then put to DFO witnesses in cross-examination, and the response was usually that these suggestions were deserving of further discussion, but as they were not in the plans, they had not yet been considered.

[955] The plaintiffs can legitimately say some of this is because DFO never entered into meaningful negotiations or discussions with them. Many important things, including the plaintiffs' plans, the LTO, and the structured Evaluations occurred in year before the trial recommenced. DFO's Evaluations did not form part of the Main Table discussions. In fact, the plaintiffs did not see them until shortly before or during trial. It certainly seems to me that a full and frank exchange of ideas, objections, reconsiderations, and possible solutions did not take place at the Main Table.

[956] My view, after listening to the evidence, reading their fish plans, and considering the comments made by DFO witnesses, is that the plaintiffs do not have the extensive knowledge or experience that DFO has with respect to several species that are the subject of their plans, at least as far as a commercial fishery goes. Of course, the plaintiffs can reasonably answer that this is because they have been prevented from full participation in the fishery, but the fact remains that DFO has the responsibility and the required knowledge and experience for managing the entire fishery.

[957] As a general comment, it is useful to note once again the context of the modern fishery. It is fragile, intensively exploited, and in need of constant and in-depth management. After months of listening to the DFO scientists and managers, and with due respect to their many years of training and experience, the phrases "fisheries science" or "fisheries management" seemed at times to be an oxymoron, as so little is certain or prone to predictable outcomes. As one manager put it, the entity they are managing cannot be seen and moves around all the time. However, within these limitations, I found the local and regional DFO personnel who testified as witnesses to be dedicated and knowledgeable.

[958] On the other hand, the plaintiffs have been a fishing people for thousands of years and have a profound connection with many aspects of the fishery. As an example, the plaintiffs have shown their particular knowledge of herring, beyond that displayed by DFO's decisions from Ottawa. In their introduction to their fish plans, the plaintiffs say they harvest resources with "iisaak" or "respect" in order to ensure that those resources are available for future generations. I accept that the plaintiffs are as concerned with the sustainability of the fishery as are other participants, and probably more so.

[959] The plaintiffs' wish to fish and trade fish freely and without restriction is completely understandable, but this court must deal with the declarations and evidence before it, keeping in mind what Lamer C.J., in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1123, called "a basic purpose of s. 35(1)", referring back to a phrase from *Van der Peet*:

> "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."
> Let us face it, we are all here to stay.

[960] Michelle James is DFO's expert on fisheries management. In the Executive Summary of her report, she encapsulates, from her perspective, the changes to the present regime, sought by the

plaintiffs:

> The Ahousaht et al are seeking both greater access to commercial fisheries, both within and outside their fishing territories, and to self manage and self monitor much of that access. Specific proposals to date for the salmon, groundfish, prawn and crab fisheries are for self management of larger allocations of fish without the fishery management measures that have been developed over time for those fisheries, such as: limited entry for each fishery; IVQ's [Individual Vessel Quotas] for groundfish; trap limits and trap haul limits for prawns; trap haul restrictions for crabs; independent dockside monitoring for groundfish and a portion of Area G salmon landings; and independent at sea monitoring for groundfish, prawn and crab fisheries. Furthermore, the proposals for prawn and crab fisheries would fundamentally change the fisheries management framework for all recreational and commercial participants in the Ahousaht et al fishing territories. In groundfish, the Ahousaht et al proposals include access to some species not caught in their fishing territories. They are also seeking access to some groundfish species only caught by bottom trawl gear when they say they will not be using bottom trawl gear.

[961] Ms. James' reference to "outside their fishing territories" refers to the indication in the 2014 proposals, which I have noted previously, to fishing the sought-after allocations in the whole management area of the WCVI, which extends for 200 miles, although for practical purposes it encompasses about 30-35 miles from shore. The CDA is nine miles, and as of 2016, the plans reflect that, but the sought after allocations remain the same. To simply say "we'll leave the allocations we seek as they are but we'll fish it all in the CDA" is not a logical nor a practical answer. It is difficult, as everyone has discovered, to put together fish plans for a nine-mile strip, but that is where the right-based fishery is situated, and it is, in my view, one of the most significant indicators of the size of the fishery Garson J. had in mind.

[962] Michelle James had written her report assessing the plaintiffs' fish plans on the understanding that the plaintiffs proposed to have their plans apply to the entire WCVI, rather than the CDA. When questioned about her views on the nine-mile restriction, Michelle James agreed the area is quite small, and other Area G fishers have the option of fishing in the whole area to avoid problem bycatches in the salmon fishery, such as lingcod or halibut which require quota and attract dockside monitoring fees, whereas the plaintiffs are restricted to the CDA and do not have that flexibility. Once again, it was suggested in cross-examination that one approach is to let the plaintiffs' fish beyond the CDA. Ms. James pointed out that the plaintiffs did fish outside the CDA at times, and the regular communal licences held by members of the plaintiff nations outside the right-based fishery apply to the entire WCVI. However, as I have said earlier, enlarging the area of the right-based fishery is not the concern of this court, which must deal with the right within the CDA.

[963] Dr. Morishima is the plaintiffs' expert in fisheries management. As already mentioned, he is based in Washington State where he assists the Quinalt nation with their aboriginal fishery. He also commented on the plans. Dr. Morishima saw the plaintiffs' fishery as consisting of a mosquito fleet and a few average-sized trollers, although he did not know what the proposed distribution of mosquito and larger vessels would be.

[964] Dr. Morishima also seemed to be under the impression that the CDA did not apply. He assumed that the plaintiffs would be operating in a larger area, but he said he anticipated that the vast majority of the fleet would be mosquito boats and would not go far offshore. The few trollers could go out further

but would have to land at certain times. He commented on the differential fishing power of mosquito boats and trollers with a lot more catching power. He said regulations would be needed to protect the mosquito boats.

[965] When asked to comment on the 2015 post season review of the salmon demonstration fishery, where the trollers took 77% of the chinook and 98% of the coho, Dr. Morishima said most fisheries operate in such a way that 90% of the fish are caught by 10% of the fleet, although it was not clear whether he meant this was a result of differential catching power or the skill of the individual fishers. Later he clarified this to be a rule of thumb, with a mix of vessels, power and skill levels. In any event, he assumed an overall limit on catch and on participants.

[966] This was not particularly helpful in the circumstances of this case: the main *raison d'être* for this particular fishery is wide community participation, which is adversely impacted by some boats with much larger catching power.

[967] Taking his evidence as a whole, Dr. Morishima appeared to consider the plaintiffs' plans to be somewhat simplistic and in need of further definition. As well, he questioned whether the plans could work, if put into place in a small geographical area (the CDA). He said managing and monitoring to such a small scale would be difficult, but small vessels operating in a small area under fixed quotas would not cause a conservation concern.

[968] Dr. Morishima did not comment on the appropriateness of allocations. His concern was whether they would affect conservation or throw DFO's fisheries into disarray. He said as long as allocations given to the plaintiffs came from existing sectors, there would be no added pressure on the resource, which is obvious. The concern from DFO's point of view, aside from priority of allocation, is that, without adequate monitoring, the TAC could easily be exceeded.

[969] The plaintiffs' key principles for negotiation, which inform their plans, were set out in a letter to Ms. Farlinger dated May 27, 2011, to which they invited response. They included:

- a significant share of the WCVI resources, with reasonable sharing with others
- a diversified set of fishing opportunities that can access the full range of available WCVI resources to allow participation in commercial use of fisheries resources
- the T'aaq-wiihak fisheries must not be limited to the existing rules, and must not be at a competitive disadvantage with the mainstream fishery
- predictability to allow a return to healthy social and economic support once provided by the fishery
- sustained phase-in
- interim demonstration fisheries

[970] To that I would add various features of fisheries management to which the plaintiffs object: less than full participation in the management and monitoring of their fishery, independent monitoring, electronic monitoring and the restriction on dual fishing in the salmon fishery.

[971] The 2014 plans, unlike earlier plans, make no reference to vessel size (the terms “low-effort” and “average-effort” are used), and do not refer to a small-scale fishery. In fact, the plaintiffs resist that term as they seek a significant share of the fishery resources on the entire WCVI (rather than the fish in the CDA, which is the declared limit on their fishing area). Despite the plaintiffs’ emphasis on a multi-species fishery conducted from many boats with split licences, the allocations they seek are large and species-specific. Each of their plans is for a specific species.

[972] The plaintiffs also say most of the fisheries, if not all, are expected to grow as participation increases.

[973] The respective individual arguments on each plan were extensive and detailed, but there are some topics common to each plan on which the positions of the plaintiffs and DFO diverge.

Allocation

[974] First, there is a fundamental divergence in approach arising from the parties’ differing perspectives on allocation *per se*, aside from the issue of priority of allocation. Each side says the other has not provided a basis upon which to properly quantify what a viable fishery would look like.

[975] The plaintiffs consider the amount they seek divided up amongst an increasingly large number of boats; thus they say each boat is taking such a small amount, they cannot maintain viability, and they certainly cannot afford the costs of monitoring. The more boats they put into the fishery, the smaller the share for each boat.

[976] Canada emphasizes the overall allocations, and argues that the plaintiffs ignore the cumulative effect of all the allocations they seek. DFO must manage the effect of the allocations on the entire fishery. DFO looks at the percentages of WCVI resources sought by the plaintiffs for various species (e.g. 30% of AABM chinook, 50% of coho, 25% of halibut), and sees them as substantial portions of the WCVI fishery as a whole, which they clearly are. This is a real concern as DFO considers how to monitor and control such a large fishery, and maintain conservation and sustainability.

[977] Canada says all of DFO’s offers for all of the species should be considered when deciding whether infringements remain, and if they do remain, whether they are justified. DFO argues that just because one fisher gets a small amount of one species in a multi-species fishery does not mean that the consideration of accommodation stops there.

[978] As well, DFO says they must understand the extent of the fishery they are dealing with as they set out to manage the resource for all sectors. An increase in participation does not necessarily translate into larger allocations. Canada says if the shares become smaller and smaller because the plaintiffs do not control the size of their fishery and the number of participating members, or because they allow the trollers to quickly take the entire allocation, that is their problem, not DFO’s.

[979] The differing positions on allocation arise from the respective views of the scope of the right.

[980] Some of the issues that arise from the basic difference over the scope of the right should be resolved by my conclusion that the interpretation of the right, when Garson J.'s reasons and all the evidence is considered, provides for a small-scale, artisanal, multi-species fishery aimed at small, low-cost boats, ensuring wide community participation, to be conducted in the CDA, not a close-to-(large)-industrial fishery of average-effort commercial trollers with flexibility to venture outside the CDA.

[981] I accept the validity of DFO's position that the overall allocation is what counts, and that overall allocation must be considered in the context of their management of the entire resource. As well, priority of allocation will differ species to species. While I repeat that the court cannot set allocations, it can consider whether legislation, regulations, policies, and various management requirements are an infringement, and this will be done species by species.

[982] As I have mentioned, there was no evidence before Garson J. as to what size of fishery the plaintiffs contemplated. There is also a lack of evidence before this court as to what constitutes a viable fishery, whether viability means for the community as a whole or for each individual fisher who chooses to participate.

[983] No matter how many words or phrases are used to describe the fishery, it is predictability that will allow the parties to move forward with a minimum of disputes. Predictability for both the proportional size of an allocation and the method of setting it is a problem that has permeated the Negotiations. In the context of offering some predictability the plaintiffs' share-based approach could be a useful one, although, as will be seen, I accept that DFO is justified in not accepting their current proposed shares, even if that approach were the correct one to use for justification.

[984] I repeat that although I will deal with as many specific issues as I can in order to set parameters and provide guidance for the Minister, the court cannot set allocations. Notwithstanding the many months of evidence and submissions, that is not a task the court is equipped to undertake. Setting allocations is for the Minister, who must ensure it is done with a proper respect for the plaintiffs' priority.

Management

[985] Another issue arising in each of the Evaluations is the lack of clarity in the plaintiffs' plans, from DFO's point of view, as to how their proposed management of the fishery would interact with DFO's management and the Minister's discretion. Garson J. said at para. 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.

[986] Canada takes the position that the right as declared does not include a right to participate in management of the fisheries. DFO agrees that the catch reporting under the salmon demonstration fishery, coordinated by Ms. Gagne, the T'aaq-wiihak Fisheries Coordinator, has gone well. However, while the salmon demonstration fishery worked well because DFO and Alex Gagne cooperated to ensure it did, DFO is concerned, according to Rebecca Reid, with long term compliance. As I have

mentioned, she said good will is not a long term management tool. DFO emphasizes, and I accept, that their rejection of the plaintiffs' "trust us" management position is not based on a lack of trust, as the plaintiffs might see it, but on the ongoing need to manage this complex and fragile resource in a sustainable manner for all sectors.

[987] The plaintiffs do not say that management of the fishery is part of the right, that is, they do not assert a right to manage the fishery independently with no role for the Minister. However, they say they are entitled to meaningful consultation with the Crown regarding conservation and management measures that may infringe or otherwise affect their right. Thus their plans contemplate participation with DFO in management and implementation of the fishery.

[988] The plaintiffs say they intend, through their plans, to manage the internal aspects of the fishery that involve distributing benefits and opportunities among community members: designating fishers, identifying vessels, T'aaq-wiihak monitoring, in-season recording and managing of harvest and joint enforcement. They say they would work collaboratively and consult with DFO to plan openings and other elements of management.

[989] The plaintiffs say DFO, having not accepted their alternative management regime, which includes participation by the plaintiffs, must justify that refusal or provide an alternative means to manage the fishery that accommodates their right.

[990] I agree with Canada's position that management of the fishery is not part of the right, and I do not understand the plaintiffs to disagree with that fundamental proposition. The Supreme Court of Canada has repeatedly confirmed the Minister's responsibility for overall fisheries management in the commercial context (see *Sparrow* at page 1119, *Gladstone* at para. 65, and *Marshall # 2*, at paras. 25 and 40, and cases cited therein). Therefore I do not accept that Canada must justify not accepting the plaintiffs' management scheme, which was not, in any event, detailed or fully formulated. Cross-examination of various DFO witnesses contained suggestions for improvements or other approaches not yet in the plans, and revealed areas requiring discussion from both sides.

[991] The concern of this court is whether a particular aspect of the government's management regime is creating a barrier to the exercise of the plaintiffs' right, and if so, whether Canada has justified that aspect.

[992] DFO has the responsibility to manage the entire fishery, and must consult with the plaintiff over decisions that affect their right. Obviously, DFO cannot manage the fishery in a manner that unjustifiably infringes the right, and I do not understand their position to be that there is no role for the plaintiffs in managing their fishery, even if management is not part of the right itself. The plaintiffs must be consulted, and the consultation process is already set up and ongoing. One problem from DFO's perspective is how to control a mixed-vessel fleet so that the larger vessels do not catch so much fish that their catch jeopardizes wide community participation with small vessels.

[993] Madam Justice Garson found that the plaintiffs were prevented from fishing with their preferred means, which I have found to be small, low-cost boats. However, the plaintiffs are not prevented from exercising their right using trollers, and the vessels many of them have been using are roughly the same length and capacity as the Area G fleet trollers. DFO had suggested in the LTO that those trollers who chose could take a licence and fish the entirety of Area G, but that is not a measure open to the court's consideration, as the court is bound by the CDA. The plaintiffs reject this approach in any event as the number of licences is limited and it would restrict the ability of many of their trollers to participate in the right-based fishery.

[994] The answer from the plaintiffs is to simply increase allocations to allow the widespread participation of trollers, but this assumes that the scope of the right-based fishery, or at least the allocations under it, has room to expand as required to accommodate all participants, at least to a much larger extent than presently exists. DFO anticipates that the plaintiffs would expect them to accommodate the small vessels even if all the allocations were already taken by the average-effort vessels.

[995] However, I have said that the use of trollers does not drive the scope of the right as I have interpreted it from Madam Justice Garson's reasons into something larger than it is.

[996] The disappointment of the plaintiffs in the LTO is understandable and has been brought about at least partially by DFO allowing the use of trollers in the salmon demonstration fishery. There are now many trollers and, according to the plaintiffs, a large number of them would have to sit idle under the LTO. The trollers are an important part of the economic development of these communities and DFO has indicated a willingness to enhance those opportunities through the usual programs (ATP and PICFI). However, the right is about wide community participation in a multi-species fishery in the CDA, allowing the use of small, low-cost boats, not about economic development *per se*, although a successful right-based fishery will almost certainly enhance the economic well-being of the community as well.

[997] The plaintiffs' fishery is multi-species, potentially dual-purpose, and based on small, low-cost boats with wide community participation. There is no template for management of such a fishery. The T'aaq-wiihak management of the salmon demonstration fishery worked well, but that is one species only with some bycatch. An appropriate management scheme has to be worked out cooperatively once the conclusions and findings in these reasons are incorporated into a complete and integrated regime.

[998] For some species, it appears likely that some of the aspects of management set out above – designating fishers, identifying vessels, in-season recording and managing of harvest – can be done efficiently within the T'aaq-wiihak fishery by its own monitors, with no impact on DFO's overall management concerns once the allocations are set. It would be wasteful to fail to use and incorporate the existing expertise and experience of the T'aaq-wiihak coordinators into a cooperatively negotiated and managed regime for the entire fishery.

[999] DFO has indicated willingness to work with the plaintiffs towards joint enforcement, although I have referred to Mr. Robson's evidence of difficulties getting the plaintiffs to cooperate in 2012/13. The details of an enforcement system is best discussed by the plaintiffs and DFO after the fishery has assumed a workable shape.

Monitoring

[1000] Monitoring is an important aspect of the management of a fishery, and is a significant one from the perspectives of both parties. Common to each proposal and Evaluation for each species is the divergence of views on the scope of the fishery and thus on appropriate monitoring requirements. This has been a continuing theme in the Negotiations, and has also been the subject of much evidence at trial.

[1001] I have touched on the plaintiffs' objection to independent monitoring in the section on infringements.

[1002] In their 2014 plans, the plaintiffs propose a standard monitoring approach for all the fisheries which they say is commensurate with the risk to the resource and is not unduly onerous. They say it is manageable, effective, and appropriate for a multi-species fishery in which they can harvest both fish for sale and fish for home use.

[1003] The plaintiffs say they can be trusted to do their own monitoring. The basic principles of their monitoring system are that it would apply to all the fisheries, with no electronic monitoring, and no third-party independent validation.

[1004] The primary features of the plaintiffs' proposed monitoring system are:

- each participant must sign and comply with the T'aaq-wiihak Requirements and Responsibilities Agreement;
- each participant must submit to 100% dockside monitoring at designated landing sites;
- the monitoring will be done by T'aaq-wiihak-hired monitors overseen by the T'aaq-wiihak Fisheries coordinator;
- all catch must be recorded and landing slips must be issued for both sale fish and FSC fish; sale of fish cannot take place without a landing slip;
- logbooks are to be filled out and submitted for each fisher, available to DFO on request;
- there will be no expensive independent third party monitors; however, the T'aaq-wiihak monitors will be independent of the fishermen; and
- there will be full retention of all fish caught (except undersized and fish with health concerns) to avoid the incentive to discard at sea (high grading); fish not caught for sale will be retained for home use.

[1005] The plaintiffs promote their monitoring system as appropriate for a small fishery, but they also submit that they are entitled to large shares of the overall TAC, and will continue to grow. There is a

difficulty in reconciling these two approaches.

[1006] The plaintiffs say their monitoring and catch reporting system has worked well in the salmon demonstration fishery. They have shown themselves to be conscientious and careful. The plaintiffs say they have been willing to demonstrate the effectiveness of their proposal in other fisheries but DFO has rejected their suggestion, which they now realize is the result of the local staff having been given no mandate to negotiate further demonstration fisheries until 2015.

[1007] The plaintiffs point out that they have worked well with DFO staff and have set up a new gooseneck barnacle fishery that has been given a “highly effective” rating by the Monterey Bay Aquarium’s Seafood Watch.

[1008] In support of their proposal the plaintiffs point to the various economic opportunities fisheries conducted and monitored by other First Nations, with no DFO oversight. As well, they say the monitoring standards for the recreational fishery are very loose.

[1009] DFO has so far remained committed to commercial standards of monitoring because independent validation of catch and discards is important to fisheries management for all species. Those include electronic monitoring or independent certified at-sea observers. In general, the plaintiffs resist the current DFO monitoring standards on the basis that they are too cumbersome and expensive for their small vessels.

[1010] For the regular commercial fishery, DFO requires independent third party validation of catch, either through electronic monitoring (EM), independent at-sea observers, and/ or independent dockside validation of catch. In recent years, DFO has off-loaded the expense of monitoring onto the fishing industry and it has become increasingly expensive. The plaintiffs say only the large conglomerates can afford it.

[1011] The plaintiffs take the position that the cost of monitoring as required by DFO is an infringement which prevents the exercise of their right. They refer to the evidence of the various managers from DFO as to the costs of standard monitoring:

- the commercial prawn fishers monitoring system costs $1800, with an annual service fee of $3400 for spawner index sampling and independent monitoring;
- the electronic monitoring system for commercial crab costs $3,500-4,500 to install, with annual maintenance and reporting fee of $3,000-3,500 per vessel, or an at sea observer of $250-400 per day; and
- the groundfish electronic monitoring equipment is $8,000-10,000 per vessel, with a $2,000 annual program fee and a series of other costs, such as fees for logbooks, hails, dockside monitoring, logbook validation; Ms. James estimated the average annual cost per vessel at $12,000 excluding the capital cost of the equipment.

[1012] The plaintiffs say their fishery should not be burdened with these requirements, which are unnecessary.

[1013] Various DFO witnesses, including Ms. Farlinger, acknowledged that costly monitoring standards could pose unexpected constraints. Michelle James pointed out the difficulty associated with EM for multiple small boats in the groundfish fishery: in general, this approach is not economically feasible.

[1014] However, Canada argues that the regular commercial Area G fleet uses approximately the same size trollers for the most part, and those licence holders abide by DFO's monitoring requirements. There is a lack of financial information from the plaintiffs as to the economics of the salmon demonstration fishery.

[1015] DFO points out that the plaintiffs have increased their troller fleet and wish to continue to expand it. DFO takes the position that higher monitoring standards are needed if the plaintiffs will be using trollers, rather than small speed boats with a small capacity. This is required in order to understand exactly what and how much is being caught, what and how much is being discarded, and to prevent high-grading (that is, keeping valuable fish and throwing away less valuable fish to keep within the overall limits for catch and bycatch).

[1016] As well, as pointed out above, fishery based on shares, although their fish plans are all based on large allocations of individual species. Their management plan is based on individual catch, which may in each instance be small, but DFO is concerned about the overall allocation, especially if commercial trollers are used. Thus more rigorous monitoring becomes important.

[1017] There are various specific points that arise within the context of monitoring.

Standards of Monitoring and Risk to the Fishery

[1018] DFO sets up monitoring standards for all fisheries based on a risk assessment called the Strategic Framework for Fishery Monitoring and Catch Reporting, which provides for an assessment of risk followed by an appropriate monitoring standard. DFO uses the term "effort" to describe the size and impact of the fishery. The more concentrated and "effortful" the fishery, the higher the monitoring standards. DFO maintains this is necessary to achieve sustainability and ensure conservation, and I accept that.

[1019] If the fishery is larger, DFO is more concerned with the risk to the fishery, including monitoring of bycatch and discards. Therefore they require more stringent independent monitoring, including electronic at-sea monitoring, which can be costly. If the fishery is smaller, DFO is more inclined to look at flexible monitoring systems with lower cost. At-sea discards and high grading will always be a concern without independent observers or electronic monitoring. DFO could potentially manage a small-scale fishery without requiring these expensive tools.

[1020] The plans are species-based, but the right is multi-species, and the plaintiffs wish to fish for and retain all species for sale. This heightens the concern for adequate monitoring and catch reporting. This is ameliorated by the small-boat aspect of the fishery, but not by an increasingly large troller fleet.

Dual Fishing

[1021] The plaintiffs' proposal for dual fishing (fishing for commercial use and for FSC use on the same trip) presents another problem. Dual fishing increases the complexity of monitoring and makes appropriate monitoring and catch reporting even more important.

[1022] Although FSC fishing is a right-based fishery, and the T'aaq-wiihak fishery is a right-based fishery, dual fishing itself is not a right *per se*, and therefore its prohibition is not necessarily an infringement, unless it prevents a small-boat fishery from exercising the right. Even if dual fishing were part of the right, DFO's ability to control it in the context of a commercial fishery being operated from the same boat is not hard to justify: conservation, sustainability, and adequate control to protect the entire fishery and the other sectors are clear grounds for justification.

[1023] FSC fishing was never well-monitored or reported by the plaintiffs in the past, according to Paul Preston, the Aboriginal Fisheries Strategy Resource and Treaty Manager. At times Mr. Preston was unable to get any data at all, even though DFO provided funding for reporting.

[1024] Jeff Grout, DFO's Regional Resource Manager for salmon, said DFO is willing to consider the plaintiffs' monitoring proposal, but on-board observers prevent pre-offloads, that is offloading at other than designated landing sites. He is concerned that, in dual fishing, there is no limit on FSC fish -- large amounts could be caught and all offloaded for sale.

[1025] DFO fairly approaches dual fishing with caution. It has not been allowed in the salmon demonstration fishery, but the plaintiffs have done it in any event for several years without repercussions. The plaintiffs resisted logbook production in the demonstration fishery, apparently because they were dual fishing without authorization. Their position was that any large catches over the trip limits imposed on each vessel would simply be considered FSC. DFO has now offered, in the LTO, to negotiate dual fishing within the ongoing salmon demonstration fishery, subject to appropriate monitoring.

[1026] As mentioned earlier, dual fishing has been permitted in the groundfish fishery in which aboriginal fishers participate with various communal licences. That fishery, which is outside the right-based T'aaq-wiihak fishery, requires electronic monitoring, which the plaintiffs resist for the T'aaq-wiihak fishery.

[1027] The concerns expressed by the DFO managers in respect of dual fishing are, in my view, valid. I agree with DFO that dual fishing requires special monitoring considerations. The FSC fishery is a large fishery, poorly reported, and is often leased out. The potential for abuse or misuse is evident.

[1028] It is possible that a prohibition against dual fishing might operate as an infringement in a specific situation. For a small-boat fishery, the costs of two trips, one to catch fish and for sale and one to catch fish for home use, might well be an unjustified barrier to the exercise of the right, as long as conservation is not threatened by inadequate monitoring. DFO mentioned in its Evaluation that dual fishing could help with viability of the fishery. However, in the absence of financial information or evidence dealing with that issue, I cannot reach further conclusions on it.

[1029] As already stated, DFO has offered to work cooperatively with the plaintiffs on appropriate monitoring for dual fishing in the salmon demonstration fishery. In my view, that approach is appropriate.

Bycatch

[1030] The plaintiffs propose 100% retention of bycatch in their multi-species fishery. DFO acknowledges in its Evaluation that the multi-species nature of their proposed fishery might assist its viability. The plaintiffs would sell the bycatch or count it as FSC. Since I have concluded that the plaintiffs are not restricted by single licences per vessel or by species, and can, according to the declaration, fish for all species of fish and can sell that fish, the term “bycatch” is not as significant as it might otherwise be.

[1031] I have alluded to the prohibition against bycatch retention and sale in the regulations as a potential unjustified infringement for a small-boat multi-species fishery, subject to the conclusion that DFO is justified in requiring an appropriate monitoring standard for this fishery. As I have noted, consultation is essential, and cooperation will be necessary from both sides in putting together a process to deal with bycatch.

Comments on Monitoring Issues

[1032] In the plaintiffs’ submissions, they say that they are “seeking to develop a monitoring approach”. DFO refers to this as an indication that the plaintiffs do not yet have a concrete proposal. All the plaintiffs have done so far is monitor the salmon demonstration fishery and the gooseneck barnacle fishery; yet they say DFO must justify not implementing their incomplete and untested monitoring proposal.

[1033] I accept that DFO needs a monitoring and reporting system that is concrete, defined, and accountable, year after year, and not dependent on one particular person. Requiring appropriate standards of monitoring for this complex fishery is not an infringement. Conservation and sustainability of the fishery for all users depends on it.

[1034] While costs and fees might well be impediments to the exercise of the right, that cannot be the end of the discussion. It must also be kept in mind that the other sectors of the fishery must pay these costs themselves, and unbalanced preference and treatment of the holder of an aboriginal right is not an effective route to reconciliation. However, at present, DFO is absorbing the costs of licencing, monitoring, and the management and administration of the T’aaq-wiihak fishery.

[1035] Generally, there are challenges that remain that can only be worked out through discussion and cooperation. The first challenge is how to set up a workable model for managing and monitoring a multi-species dual purpose fishery aimed at wide community participation, conducted from small boats, but without excluding trollers from participating. The second is how to integrate the T’aaq-wiihak monitors into the management of the fishery while ensuring sufficient independent validation. All parties agree on the importance of the third challenge: to train the plaintiffs to run their own fishery, and

increase their education in fisheries management even to the point of obtaining certification as independent monitors.

[1036] I have mentioned I do not view a requirement for appropriate monitoring *per se* to be an infringement. Even if it were, DFO is justified in requiring an assessment for an appropriate monitoring standard under their Strategic Framework, in consultation with the plaintiffs. Everyone involved acknowledges conservation to be a key consideration, and appropriate monitoring and catch reporting are crucial to conservation and sustainability.

[1037] The plaintiffs seek to draw a comparison between what DFO expects of them and what the plaintiffs see as lax standards of monitoring in the recreational fishery. I accept that a comparison of monitoring standards for sports fishers with those required of commercial fishers is not apt. The ability to catch fish for sale is a crucial factor in setting monitoring standards. In any event, as various witnesses pointed out, the recreational monitoring standards are unsatisfactory and must be improved. It would serve no purpose to incorporate them here or use them as an example.

[1038] Management and monitoring concerns will be discussed in the context of each species. As I have already mentioned, it is too early to make definite pronouncements on many of these aspects. It is not for the court to set up a management and monitoring scheme. The court can only determine if a particular aspect is an unjustified ongoing infringement in that it prevents appropriate accommodation of the plaintiffs' right.

[1039] This is a topic that will require further discussion and negotiation once the parameters of the fishery are understood as a result of the findings in these reasons, and the Strategic Framework for Monitoring and Catch Reporting has been applied, in consultation with the plaintiffs.

Consultation on Each Species

[1040] I will turn to another issue that is a common complaint in respect of each fishing plan: consultation, or lack thereof. In this context, I am referring to discussions of specific species, rather than the overall context of the duty to consult in respect of the right generally, which has been discussed previously in these reasons.

[1041] Discussions at the Main Table have focussed on salmon, but other fisheries have been the subject of the agendas at the Main Table and the Joint Working Group. I think it fair to say neither side has forced an agenda on the other, so there is no issue that either DFO or the plaintiffs have refused to consult on a particular fishery. The plaintiffs' lists of species upon which to focus also changed. As well, several DFO witnesses commented that they received information from the plaintiffs with little notice before the meetings.

[1042] However, DFO's Evaluations of the plans were not provided to the plaintiffs much, if at all, in advance of trial. DFO's Evaluations contain its position on the plaintiffs' proposals. Aside from the LTO, DFO has not reciprocated with proposals of its own.

[1043] As I mentioned in the section on consultation, the issue from the plaintiffs' point of view is that DFO has not fully engaged in meaningful discussion. For the most part, the DFO negotiators would simply tell the plaintiffs what was wrong with their various sequential proposals without suggesting a constructive alternative. This appears to be because DFO did not have a mandate to negotiate fisheries other than salmon until December 2014, and local DFO initiatives to implement demonstration fisheries, other than salmon, were not approved.

[1044] There were also "chain of command" issues that emerged through cross-examination. For example, a phone call from a member of DFO's staff to Dr. Hall might have resulted in an answer to a concern on the part of DFO. However communications were always left to the Main Table. This is understandable, given the sensitivity of all the issues under discussion and the need for the Main Table to be fully informed and instructed, but it resulted, at times, in cross-examination of various witnesses that resembled an on-going discussion. It became clear that further dialogue would be very productive.

[1045] It is correct that certain species were debated more thoroughly than others. However, I note that extensive discussions have taken place, albeit within the constraints of the limited mandate provided to the Regional staff. I also note DFO's commitment to ongoing deep consultation. Therefore I do not see this as an issue upon which the justification analysis should stand or fall.

Continuity

[1046] The Court of Appeal said in its reconsideration that the issue of continuity should be considered species by species. I have concluded that the result of the discrepancy between what the court obviously intended in their reasons and what is reflected in their order confirming Garson J.'s declaration should be resolved in the plaintiffs' favour insofar as further species cannot be knocked off the list. The plaintiffs have an aboriginal right to fish for any species and to sell that fish. I have noted that this is not a finding on my part that there is continuity for any particular fishery. I am simply accepting the terms of the order.

[1047] I have decided, as explained above, that if there is no evidence in the record to support trade in several species, and if the evidence that is available supports the inference that trade in a particular species was unlikely, then that is a factor to take into account in the justification analysis when weighing issues such as the scope of the modern right in terms of the ancestral practice, as well as priority and minimal impairment under *Gladstone* and *Sparrow*.

[1048] These factors include non-aboriginal groups' reliance on the commercial fishery, as well as the extent to which the plaintiffs actually participated in a commercial fishery for each species. In that regard, I have already referred to McLachlin J.'s statement in *Van der Peet*, as quoted by Garson J.:

> There is therefore no justification for extending [the right] beyond what is required to provide the people with reasonable substitutes for what it traditionally obtained from the resource.

Information on Viability of the Fishery

[1049] From my perspective, a significant hurdle in assessing whether cost is an infringement to the exercise of the plaintiffs' right is the lack of evidence of what a viable fishery looks like. I have mentioned this earlier.

[1050] The plaintiffs are critical of Canada for not considering how much fish is needed to make a boat viable, or to get wide community participation, but Canada notes the lack of similar evidence from the plaintiffs in the first stage of the trial, which is one reason Garson J. sent the parties away to negotiate. She noted at para. 871 Canada's position that the plaintiffs had not led any evidence with respect to the level of participation in the commercial fishery that would be sufficient to meet their requirements or expectations.

[1051] This information was not forthcoming from the plaintiffs in any organized fashion until their more detailed plans were put forward in 2014. Prior to that, various approaches had been put forward and abandoned.

[1052] Even now, there is no information as to what level of economic success, if any, has been obtained in the salmon demonstration fishery, or what might be predicted from the other proposals. The plaintiffs take the position that the salmon demonstration fishery is too small to be economically viable, but their reviews of the salmon demonstration fishery contained no information on net income or losses.

[1053] Cross-examination of Michelle James on this issue did establish the common sense proposition that costs of multiple boats going out after smaller amounts of fish will be higher, and thus revenues will be lower.

[1054] A Financial Profile for 2009 for the Pacific Commercial Fishing Fleet done for DFO by an independent consultant, Stu Nelson, in 2011, was put to Michelle James in cross-examination, along with a Financial Profile for the salmon fishery for 2009 done by DFO's Gordon Gislason. One of the purposes of these reports is to inform DFO's decisions on allocations of salmon between species, which are made on the basis of a unit that DFO calls "sockeye equivalents" to maintain consistency. Michelle James acknowledged that she would accept these reports as the best reliable data available.

[1055] However, in 2009, when the reports were made, DFO still paid for monitoring for the whole commercial fishery. The regular fishery now bears its own costs, even for sampling and monitoring.

[1056] Without going in to detail, it is clear from these reports that the salmon fishery alone is not particularly lucrative for anyone. Any fisher in the regular commercial fishery, which includes members of the plaintiffs, would likely have to obtain additional licences and fish for other species as well. Michelle James refers in her report to a larger share of fishing vessels now fishing more than one species group or more than one licence within a single fishery (James report at p.10). There is more money to be made from halibut and prawn and somewhat less from crab. The plaintiffs' plans do not include any allowance for costs to be paid by them; in their view, all costs should be borne by DFO. As

mentioned previously, at present DFO is paying all the costs. Depending on how the fishery develops, DFO would like to discuss cost sharing with the plaintiffs.

[1057] Also of note from Canada's point of view is that the plaintiffs have significant access under PICFI and this access is free.

Use of PICFI

[1058] PICFI began in 2008 and is the program generally used now; ATP is not used as much. As noted earlier, the NCN Tribal Council was integrally involved in the formation of this program. PICFI obtains its inventory by buying licences from commercial fishers willing to sell and providing them to First Nation aggregates.

[1059] According to Sarah Murdoch, $5 million was given to ATP, whereas PICFI has received at least $100 million. The access granted to the plaintiffs through the Main Table as of 2010 came through ATP and PICFI. Some aggregates invest their revenues from PICFI back into development of their fisheries; others lease their access out.

[1060] Ms. Murdoch acknowledged that PICFI does not recognize the right-based fishery *per se*. However, DFO was not provided with another way to accommodate the right, so DFO used PICFI.

[1061] PICFI licences in general apply one licence per boat, and are used under the usual commercial rules. However, Sarah Murdoch explained that despite the source of licences given to the plaintiffs, DFO recognizes their right. PICFI access was allocated to the plaintiffs first, before being offered to other nations. DFO does not require the plaintiffs to comply with the regular commercial rules for the salmon PICFI licences which are provided to them through the Main Table, nor do the plaintiffs have to provide a business plan. PICFI provides extensive funding for training and management support, which DFO hopes will ensure that the plaintiffs are ready to continue when PICFI ends. Under DFO's current policy, PICFI licences for halibut must be fished as regular commercial licences.

[1062] PICFI licences are issued only to aboriginal communal fishing aggregates. Although not required to do so, the Nations could have chosen to form single aggregates with other plaintiffs. Except for Ahousaht and the Tla-o-qui-aht, the plaintiffs chose to join with other First Nations and thus argue they cannot control that access. However, according to Sarah Murdoch, DFO has allowed groups to change membership at their request.

[1063] In a letter dated November 17, 2010, the plaintiffs told DFO that the inventories built up through PICFI could be used to help with building right-based demonstration fisheries, but those inventories are not sufficient to accommodate their right, and compliance with the regular rules was not appropriate accommodation. The plaintiffs also say that having to await the availability of a licence from the regular commercial fishery (the mitigation approach) does not recognize their priority.

[1064] During the trial, the plaintiffs objected to having PICFI access counted in the consideration of whether their right-based fishery has been accommodated. However, during argument they conceded

that the licences given through PICFI to the wholly controlled aggregates of the Ahousaht and Tla-o-qui-aht could count.

[1065] At present, the other three Nations have only small portions of PICFI licences at their disposal. Ehattesaht and Hesquiaht are part of the Hayu Commercial Fishing Enterprise, and have one-quarter of that interest; and Mowachaht/Muchalaht has two out of seven shares of the Nuu-chah-nulth Seafood Development Corporation aggregate. Exactly what this means in practical terms was not clearly explained, but it seems that being part of aggregates that are not wholly within the T'aaq-wiihak fishery means the plaintiff members of those aggregates cannot control how or where the licences are used, at least for some species.

[1066] It was not explained why the smaller Nations chose to join aggregates with other groups. It may be that they are simply too small to form an aggregate themselves, or geography may have played a part. Whether the ability to split licences would be of assistance to the Ehattesaht, Hesquiaht and Mowachaht/Muchalaht in respect of their percentages of PICFI licences is not clear.

[1067] I have concluded that the provisions requiring one licence per boat and per species in this small boat multi-species fishery are unjustified infringements. Insofar as a portion of a PICFI licence that is used by a right-holder who has joined a PICFI aggregate with nations outside the plaintiff group carries with it an obligation to fish within all the usual commercial rules, it may be an infringement, depending on species. This can only be dealt with in the context of a specific factual situation.

[1068] I will deal with the mitigation policy through which the PICFI inventory is obtained when it comes to each species. In general, I am unable to conclude that the source of the licence negates its effect on accommodation. It is important to note that a PICFI licence is a free licence provided to the plaintiffs. The salmon PICFI licences used by the plaintiffs are not currently constrained by the usual rules, and the findings I have made will affect conditions of other licences provided through PICFI. The relationship of PICFI to the plaintiffs' fishery will be discussed for individual species.

[1069] The mitigation policy itself cannot act as a bar to appropriate accommodation for some species, as I will discuss below. However, the fact that a licence came through PICFI is not a reason to discount it.

[1070] The plaintiffs have chosen to use some of the licences that have been provided since the 2009 decision outside the CDA. It is important to note that the exemption from some of the regular commercial rules that attach to a PICFI licence only operates when the licence is being fished in the CDA. Exemptions for particular aspects of the rules are subject to the application of the Strategic Framework for Monitoring and Catch Reporting for each species, in consultation with the plaintiffs.

Whom do the Plaintiffs Speak For?

[1071] In addition to these issues, which are common to all the species, I also reiterate my concern that the plaintiffs' stance in the litigation is not necessarily that of all their members. This is evident from Ms. Farlinger's testimony and from my review of the transcripts of the Main Table Meetings. Some take

the position that they do indeed control all the fish in the territories, which they see as wider than the CDA, and that the Ha'wiih can declare the fishery to be exclusive. Thus management of the fishery is their exclusive prerogative. Nevertheless, the position taken by counsel in the litigation reflects the case law as well as Garson J.'s reasons and is the one I must work with: the plaintiffs accept that the CDA governs, there is no stand-alone right to manage the fishery, and the fishery is not exclusive.

[1072] There are other problems that arise from the fact that these five plaintiffs are pursuing this litigation jointly. There were six other plaintiffs who were originally part of this action, but whose claims were severed. The original eleven plaintiffs filed the claim jointly, in part due to budgetary considerations. As noted earlier, the decision of Garson J. which resulted in these particular five plaintiffs being allowed to pursue this litigation in the face of obvious conflicts among the original eleven plaintiffs is found at 2007 BCSC 1162. At the time of that ruling, the claim for title was still outstanding. She stated that, whereas claims for rights could overlap, claims for title could not.

[1073] Therefore the plaintiffs were ordered by the court to choose one or more Nations to proceed with the litigation. However, Garson J. noted that each Nation asserted its exclusive right to fish within its own territory. She noted specific disagreements between the Ahousaht and the Hesquiaht, and both of these Nations are still plaintiffs in this action. This suggests that those disputes did not have to do with title, but with fishing rights, because a dispute over title would have disqualified them from proceeding as joint plaintiffs. How this dispute over fishing rights might manifest itself is not before me.

[1074] According to Garson J.'s reasons on that application, the position of the plaintiffs at that early stage was simply based on an assumption that if they could just push forward on any basis at all, it would help in future negotiations. This was overly optimistic, even in the context of negotiations. As *Lax Kw'alaams* has made clear, it is not an appropriate approach for litigation.

[1075] The claim for title is no longer a concern for this court. This makes the present litigation even more artificial insofar as the five Nations present a unified claim, despite their separate territories and histories. In the Statement of Claim, it is alleged that each Nation owns and occupies the water in its respective fishing territory.

[1076] If a particular species (e.g. crab or prawn) is not the subject of a commercially viable fishery in one territory, what does that mean for that plaintiff? Does that plaintiff get to attach itself to a right to a commercial fishery because one exists in another territory belonging to one of these five plaintiffs? Why should they have that advantage if the six Nations whose claims will be pursued separately do not, given that it was only the overlapping title claim that forced the others to pursue their claim separately? If one Nation has chosen to join a PICFI aggregate with non-plaintiff Nations, does their portion of the PICFI access get counted?

[1077] Some of this was touched on in evidence, but none except the last point was the subject of argument before me, and most of it may be something the Nations themselves simply have to work out amongst themselves.

[1078] For the crab and prawn fisheries, however, where commercial fisheries do not exist in all Territories, it is not logical to accord the Nations who have no potential for a commercial fishery in their territory an allocation associated with a commercial right to fish for and sell that species. That is because on the present evidence, their claim could likely not have survived the traditional continuity analysis set out in *Lax Kw'alaams*' step 3. However, because of the factors discussed above in the sections dealing with the previous decision and in the section on "Continuity", this does not result in the species being "knocked off the list" for those Nations. In the unusual circumstances of this case, this is instead a factor for the justification analysis, which I will discuss in the context of each species.

The Evaluation Framework

[1079] The Evaluation Framework was prepared in 2014 and has been applied to each of the plaintiffs' proposals. It is completed by the appropriate managers and scientists under standardized categories:

1. Conservation

1.1. Is the proposed fishery based on resident or migratory fisheries resources?

1.2. For each species, what is the total exploitation rate (i.e. proportion of the biomass removed by fishing) and how much of this total exploitation rate (or overall harvest) would result from the proposed fishery access?

1.3. How does the proposal rate with respect to current scientific advice and established conservation and rebuilding objectives for the target species and potential bycatch species?

1.4. How does the proposal rate with respect to avoiding or mitigating impacts of fishing on sensitive benthic [ocean floor] areas?

1.5. How does the proposal rate with respect to fishing methods that will minimize bycatch and discards as well as account for their mortality?

2. Fishing Area

2.1. How does the proposal rate with respect to fishing within the court-defined fishing territory?

3. Fishery Access and Allocation

3.1. How does the proposal rate with respect to the quantity of commercial harvest proposed relative to other aboriginal and non-aboriginal harvesters?

4. Conduct of the Fishery

4.1. How does the proposal rate with respect to the preferred means of fishing characterized by the court?

5. Fishery Monitoring and Catch Reporting

5.1. How does the proposal rate with respect to fisheries monitoring and catch reporting?

6. Enforcement and Compliance

6.1. How does the proposal rate with respect to enforcement and compliance?

7. Financial Considerations

7.1. How does the proposal rate with respect to fostering financially viable fishing operations?

7.2. How does the proposal rate with respect to a cost-effective approach to managing the fishery?

7.3. How does the proposal rate with respect to cost sharing provisions for fisheries management services such as catch reporting?

8. Societal Interests - Other Aboriginal Groups and Third Party Impacts

8.1. How does the proposal rate with respect to implications for other aboriginal and non-aboriginal fisheries?

8.2. How does the proposal rate with respect to eco-certification and broader fish marketing efforts?

9. Legislation, Regulations, Authorities and International Obligations

9.1. How does the proposal rate with respect to consistency with the relevant legislation and regulations?

9.2. How does the proposal rate with respect to consistency with the decision-making authority of the Minister of Fisheries and Oceans?

9.3. How dos the proposal rate with respect to the First Nations' process to specify individual community members who are authorized to fish and under what conditions?

9.4. How does the proposal rate with respect to consistency with Canada's international obligations?

10. Other Considerations

10.1. Are there regulatory or policy changes that would be required to implement the proposal?

[1080] Many of the comments in the Evaluations for each of the plaintiffs' fishing proposals indicate that further discussion and clarification are necessary. As well, it was a common theme through the evidence of many DFO witnesses that the nine-mile CDA is difficult to assess for management purposes as DFO's management areas are much bigger. In particular, abundance of stocks in that small area is not easy to predict.

[1081] The plaintiffs suggested that, for some species, DFO should devote whatever resources are required to develop the science for the CDA in order to implement their fish plans. However, according to various witnesses, this would take years and would not necessarily result in meaningful data. As well, the plaintiffs' plans were not sufficiently concrete to base a new regime upon.

[1082] I am not persuaded that redoing the science for the CDA would be an appropriate use of scant government resources. Other witnesses said they could do their best to manage a fishery within the limits of the CDA and in any event, I have not accepted the plaintiffs' plans as the basis for the justification analysis.

[1083] As I have mentioned, the Evaluations were not shared with the plaintiffs until very late in the process. Despite the years of Negotiations, meaningful communication from DFO on the perceived deficits in the plaintiffs' fishing plans since 2014 has been sparse, until these deficits were the subject of testimony at trial.

SALMON PLAN

[1084] I will first set out some general facts about salmon, which I have obtained from the IFMP and the evidence of both DFO witnesses and plaintiffs witnesses, and which I accept. For the most part, these facts are uncontested.

[1085] According to Garson J.'s decision at para. 534, a salmon troll licence for the WCVI costs approximately $145,000.

[1086] Mr. Grout, DFO's Regional Resource Manager for salmon, listed the many boards and committees that are involved in salmon management, and explained the complexities of structuring

and controlling the fishery.

[1087] Each species of salmon migrates in different rhythms and patterns. Different stocks pass through the CDA at different times. Some are stocks of concern and must be protected. DFO times its openings carefully with conservation in mind.

[1088] The plaintiffs' nine-mile strip has not been the subject of particular management or scientific studies. DFO management and science for salmon is aimed at larger management areas.

[1089] Management of salmon is often done in-season because of the uncertainty in pre-season stock size estimates. Management measures include opening and closing fisheries, setting an acceptable level of effort, and restricting gear types.

[1090] Area G is the WCVI Management Area for salmon. Each fisher fishes one licence per boat. It is a derby-style fishery on the WCVI -- DFO declares an opening, perhaps a day or two, or even part of a day, and licence holders fish to capacity.

[1091] The commercial salmon fishers must submit logbooks from an independent service provider, and provide start fishing, end fishing, pause fishing, cancel trip and daily catch reports to the same independent logbook service provider. Individual Vessel Quota (IVQ) management, a management technique used in the groundfish fishery, has been implemented in other areas, but not in Area G.

[1092] For Area G, there are designated landing sites, and a requirement for catch estimates to be communicated prior to offload. As of 2013, DFO implemented a pilot project requiring 20% dockside monitoring. Independent verification of effort, catch, at-sea releases, and compliance with fishery rules was also required in this project, but according to the background material filed by Michelle James, this was not implemented in Area G because other areas were identified as having higher risk factors.

[1093] Chinook and coho are troll fisheries, and are of most interest to the plaintiffs. The salmon troll fishery for AABM (Aggregate Abundance Based Management) chinook is a significant fishery for the plaintiffs.

[1094] The AABM stocks are defined in the Pacific Salmon Treaty and have a mixture of populations. According to Michelle James, the WCVI commercial fisheries rely on chinook as it is a high value and consistent stock.

[1095] According to Michelle James' report, the AABM chinook fishery is governed by the Pacific Salmon Treaty (signed in 1985) because so many of the stocks migrating through the west coast of Canada are returning to spawn in waters in the United States. As a result, the WCVI troll fishery has been significantly curtailed and it is to be further reduced. In 2011, under the treaty, Canada was provided with $30 million to help mitigate the reduction in fishing opportunities on chinook. One hundred and three licences have already been retired, with the potential for 156 more. Dr. Morishima testified that there is generally a trend away from mixed stock salmon fisheries to terminal fisheries, due to excessive exploitation of chinook. Mr. Grout also testified to this effect.

[1096] Both AABM chinook and coho migrate through the DFO management areas, but in different areas and from different sources, and return to various rivers in Canada and the United States. Other First Nations have an aboriginal right to fish for chinook for FSC purposes, which is a protected right. The United States also has a right to that fish, protected by the Pacific Salmon Treaty.

[1097] Canada receives its allocation under the Pacific Salmon Treaty. Canada's domestic Salmon Allocation Policy then gives priority of allocation to the recreational fishery for chinook and coho -- that is, a fixed allocation for the recreational fishery is set after FSC and Treaty allocations and before the commercial fishery. The management of the AABM commercial chinook fishery includes a holdback of 20% of the CCTAC until after August 31 in case recreational harvests are larger than expected.

[1098] For the AABM chinook fishery, an important aspect is avoiding coho bycatch. Halibut bycatch is also prohibited in the commercial fishery. WCVI chinook, that is chinook returning to rivers on the WCVI, is a stock of concern.

[1099] Coho is also managed under the Pacific Salmon Treaty. Coho stocks of concern pass through the WCVI in the summer.

[1100] Coho stocks are subject to a recovery plan both domestically and through the Pacific Salmon Treaty. There is no directed commercial coho fishery, so no Total Allowable Catch is set. Coho is treated as bycatch only. Coho bycatch is managed to an exploitation rate, that is a cap, usually 3%, which was increased to 16% in 2014 and reduced to 10% in 2015. Time and area closures minimize coho encounters for the commercial fishers.

[1101] Since there is no directed commercial fishery for coho, there are no licences to buy back under the mitigation policy.

[1102] Recreational and aboriginal FSC and Treaty fisheries are permitted to fish for coho. The recreational fishery can retain hatchery coho only.

[1103] DFO sets a five-mile corridor from shore in which fishing is restricted until September 15 of each year to protect passing coho stocks of concern. Only the recreational fishery and the plaintiffs' mosquito boats are allowed to fish in the five-mile corridor. The plaintiffs' trollers are not permitted to fish in that corridor. Bycatch of coho by commercial fishers is allowed after September 15 when Interior Fraser Coho are assumed to have passed the WCVI.

[1104] The commercial fishery has priority over the recreational fishery in respect of sockeye. Fraser-bound sockeye migrate through the CDA, depending on the size of the run and the diversion rate (how many fish decide to return to the Fraser via the WCVI and how many via Johnston Strait on the east side of Vancouver Island). This varies widely from year to year. First Nations groups up to the end of the Fraser River depend on the Fraser River sockeye that migrate through the WCVI.

[1105] Pink salmon are present only in odd numbered years. The presence of pink salmon on the WCVI also depends on its diversion rate, that is, how many migrate down the WCVI as opposed to the

east coast. The pink diversion rate also varies widely year to year, and the diversion rates for pink and sockeye are not necessarily the same. Sockeye and pink are usually caught by gillnets or seiners.

[1106] There is no directed commercial fishery for chum. It is caught as bycatch.

[1107] Lingcod can be caught when trolling for salmon. Up to 500 lbs may be retained if quota is held. Catches of over 500 lbs require the vessel to have EM. The salmon fishery can also retain 20 rockfish (with some exceptions) per day.

Plaintiffs' Salmon Plan - March 11, 2014

[1108] Both Canada and the plaintiffs agree that the FSC fishery for all First Nations is the first priority after conservation, followed by an allocation for the Maa-nulth Treaty domestic use. As mentioned, the Maa-nulth Treaty pertains to certain Nations on the WCVI and allows for commercial harvest within the regular commercial fishery.

[1109] The plaintiffs say they will protect stocks of concern with various measures that they have set out in their plans.

[1110] The plaintiffs' 2014 salmon plan was rolled over into 2015, and updated for 2016, but has remained substantially the same.

[1111] The main features of the plaintiffs' plan for fishing salmon are as follows:

- community based;
- managed by plaintiffs, including monitoring and catch reporting;
- mixed fleet of vessels, including average-sized commercial trollers;
- based on shares of different salmon species; and
- uses existing TAC but redistributes some of it from commercial or recreational fishery to the plaintiffs, after FSC and treaty allocations.

[1112] The plaintiffs intend catch to be controlled by the overall allocation, T'aaq-wiihak registration requirements, and trip limits. The T'aaq-wiihak monitoring system, which has been tried out in the salmon demonstration fishery, would apply.

[1113] The allocations the plaintiffs seek on the face of the plan are percentages of the entire WCVI harvests, to be fished in the large DFO management areas. As of 2016, the plans indicated the plaintiffs would be bound by the CDA, but the shares they seek remain the same.

[1114] The plaintiffs claimed privilege over the methodology they used in coming up with their allocations, although Dr. Hall provided some general comments on how he decided on particular share percentages.

[1115] The proposed allocations are as follows:

Chinook

[1116] The plaintiffs seek a 30% share of the WCVI AABM Canadian TAC, plus 5,000 pieces for a winter fishery. Dr. Hall testified that the basis upon which they propose 30% is that there are two other major fisheries on the WCVI, and there are other smaller users. Therefore they chose slightly less than a third of the entire WCVI TAC, after only FSC and Treaty allocations.

Terminal Chinook

[1117] The plaintiffs seek a share of the ISBM chinook that return to spawn in rivers in their territory, currently managed by DFO to a 10% exploitation rate. The plaintiffs acknowledge that information to allow a definitive harvest rate to be set is lacking for these rivers. They seek 10-30%, based on escapement (the number of fish needed to sustain the stock).

Coho

[1118] The plaintiffs take the position they should be able to harvest coho, and should have priority of allocation such that they are entitled to a directed commercial coho fishery ahead of any recreational opportunity.

[1119] The plaintiffs seek 50% of the harvest of coho on the WCVI. That is, they would split it with the recreational fishery, since there is no regular commercial fishery for coho, unlike chinook. DFO does not set a TAC for coho, and instead manages an exploitation rate. The plaintiffs would prefer to have a TAC set, but if that does not occur, they would propose to use the previous year's catch to determine their 50% share.

[1120] The plaintiffs object to being bound by the five-mile conservation corridor put in place until September 15 of each year in order to protect the threatened interior coho stocks that are passing by their territories. The recreational fishery is allowed to fish in the five miles, and the plaintiffs' small boats are allowed to fish there as well. However, commercial trollers are not allowed in the corridor. The plaintiffs want their commercial trollers allowed in, because they cannot fish beyond nine miles whereas the rest of the commercial fleet can fish in the whole of Area G. They dispute that DFO has shown that conservation is a concern if their plan, which would not increase harvest, is implemented.

Terminal Coho

[1121] The plaintiffs also seek a share of terminal coho, based on escapement (the number of fish needed to sustain the stock), to be set in collaboration with DFO.

Sockeye

[1122] The plaintiffs' plan originally sought 10% of the WCVI TAC of sockeye. After hearing the testimony of fisheries manager Jeff Grout who explained the difficulties associated with managing that approach, the plaintiffs changed their proposal to 5% of the TAC for the entire British Columbia west coast.

Pink

[1123] There is a pink salmon run only every second year, and it is dependent on the diversion rate. If the run is abundant enough for a commercial harvest, the plaintiffs seek 2.5% of the total TAC.

Chum

[1124] For ocean chum, the plaintiffs propose a bycatch fishery only. For terminal fisheries, their share would be escapement-based, to be set with DFO.

Bycatch

[1125] The plaintiffs want to retain for sale 20 rockfish per day for medium-sized vessels and five rockfish per day for small vessels; 200 lbs of halibut and 500 lbs of lingcod, with no requirement for quota.

[1126] The plaintiffs' plan also includes the following:

Dual Fishing

[1127] The plaintiffs want to fish for sale and for home use on the same trip. Any catch over the trip limits would be retained for FSC purposes.

Participants, Gear, and Timing

[1128] The plaintiffs propose a mixed-vessel fishery, with (at present) 76 low-effort vessels and 20 average-effort vessels (now up to 40 vessels as of 2016). The primary gear would be troll, with some gillnetting, weirs and beach seines. The harvest would be distributed over the year, based on availability and abundance, value, and conservation.

Canada's Position on Salmon

[1129] DFO did not respond to the plaintiffs' plan, although by the time of trial they had done an Evaluation of it. As mentioned, DFO presented the plaintiffs with the LTO in December 2014 which contains an offer for salmon. I will first set out the Evaluation of the plaintiffs' salmon plan.

DFO Evaluation

[1130] Canada raised the following points in its Evaluation of the plaintiffs' salmon plan:

- management of mixed salmon stocks to ensure conservation is extremely complex;
- the proposal as it stands is not confined to the CDA;
- the inclusion of medium scale commercial vessels is not consistent with the court characterization of a preferred-means fishery;
- reductions to other fisheries would be required;
- proposed allocations would have a negative and adverse effect on other First Nations, recreational and commercial sectors;

- it is unlikely the allocations could be accomplished through voluntary relinquishment so access to others will be reduced;
- the IFMP has an annual consultation process involving all sectors;
- salmon runs are greatly variable from year to year;
- impact on non-target stocks must be sustainable;
- current DFO stock information is too imprecise to support the risk associated with the proposed fishery (in a nine-mile strip); management costs are very high;
- the quantity of salmon harvest proposed for chinook is a large portion of the total Canadian harvest, and in years of low abundance could eliminate any access for the commercial sector;
- winter harvest of chinook raises the problem of endangered/stocks of concern of chinook (although this is reduced by sticking to the nine-mile area) and closed times or areas will be required;
- the terminal fishery plans are vague;
- coho is not managed to a TAC and information is not available to set one;
- provision of the coho allocation sought by the plaintiffs would require substantial reductions in the current harvests for the recreational fishery;
- it is important that Interior Fraser River coho not be affected; further assessment is required;
- specific details are required to evaluate risk to coho;
- chum plans are non-existent or vague;
- the pink plan is vague;
- bycatch of stocks of concern in a years of high abundance for sockeye and pink;
- plaintiffs' approach is inconsistent with current management;
- landing sites are technically open 24 hours a day over an extended period;
- hail in/hail out provision are not adequately explained;
- the Pacific Salmon Treaty has reporting requirements that must be met;
- how will total participation in any given opening or total removals be controlled or managed?
- more detail is necessary to assess bycatch retention implications;
- more discussion is needed of enforcement protocols;
- how will release at sea be adequately reported?
- independent validation of catch or at sea monitoring is missing; EM/VMS (vessel monitoring system) is not included in their plan;
- further discussion is needed to explore cost effective approaches to monitoring while ensuring proper management and control;
- plaintiffs are not prepared to pay for independent validation; no information on costs or how they will be shared, including stock assessment information, fishery management activities, enforcement, sampling;
- lack of independence in monitoring could impact eco-certification;
- multi-species and dual fishing may permit more financially viable operations;
- formal recognition of Minister's overall authority is not explicit.

[1131] The main concerns are the size of the proposed allocations, lack of information (both science-based and in the plaintiffs' plans themselves), and lack of independent validation.

[1132] Many if not all of the points raised in the Evaluation were testified to by Mr. Grout and other witnesses. As well, Mr. Grout was asked a series of questions in cross-examination about the willingness of DFO to set up studies and monitoring projects, to do all the science and research necessary to support the plaintiffs' plans. He said the plaintiffs' plans have so many unknowns that it is difficult to create models.

[1133] I have said that using the LTO as a basis for justification brings the Negotiations into the litigation in the same way the plaintiffs' plans do. It is not my task to choose the more reasonable negotiating position. However, I will set out Canada's defence of and rationale for the LTO.

[1134] Canada argues that the preparation and presentation of DFO's LTO followed extensive consultations with the plaintiffs over five years, and is informed by things they learned in the salmon demonstration fishery. By contrast, they say the plaintiffs' plan poses conservation risks, is not precautionary, proposes unworkable changes to DFO's management methods and includes some changes that are not demonstrably connected to the plaintiffs' rights.

[1135] The LTO contains a general approach for negotiating all fisheries, but has a specific offer for salmon. Of the 123 salmon licences on the WCVI, the plaintiffs currently have 19 troll licences, 16 Area D gillnet licences, and one Area B seine licence.

[1136] The LTO continues this allocation:

- the plaintiffs would receive 19 Area G Troll Licences, 15 Area D Gillnet Licences, and one Area B Seine Licence;
- terminal fisheries would be identified during the season; and
- multi-species fishing and dual fishing would be negotiated within the salmon "preferred-means fishery", subject to appropriate allocations and monitoring and catch reporting requirements.

[1137] Under the LTO, if the plaintiffs decide to use the licences in the regular commercial fishery with commercial-sized trollers, they will have access to the entire Area G. Otherwise, they will take the licences and apply them to as many small mosquito boats as they wish, fishing in the CDA. If a licence is used in the commercial fishery, it will attach to only one troller.

[1138] To set an allocation, Canada takes the commercial TAC for the area and provides the plaintiffs with the percentage attached to their number of licences (15.8%) over the total number of licences, which would mean 19 Area G troll licences, 15 Area D gillnet licences, plus the Area B seine licence.

[1139] Mr. Grout acknowledged that the Area B sockeye seine licence is currently for use only outside the plaintiffs' territories, but he said the shares associated with it can be converted into an economic

fishery that the plaintiffs can use, subject to DFO evaluation to ensure conservation and monitoring is appropriate.

[1140] DFO takes the position that their LTO appropriately accommodates the right as it sets up a system outside the regular rules which were declared to create a *prima facie* infringement of the plaintiffs' right. It is consistent with community-based, multi-species, localized fisheries involving wide community participation using small, low-cost boats. It contemplates a hybrid approach, allowing both a small-vessel fleet and trollers to fish the allocation. It also contains any terminal fishing opportunities that are available year to year.

[1141] DFO has offered to negotiate additional flexibilities within the salmon demonstration fishery, where the parties have experience. These flexibilities would be outside the rules for the regular fishery: different openings, adding species for multi-species fishing opportunities, and dual fishing.

[1142] Canada put the LTO into context within some of the factors relevant to the *Sparrow/Gladstone* justification analysis: there are 71 aboriginal groups in British Columbia with a treaty or a treaty claim, and 73 groups with a claim to fish. There are 20 aboriginal groups on the WCVI with communal licences, and 480 such groups in the Pacific Region; there are 76 aboriginal groups on the BC coastline; there are 141 groups with access to Fraser River sockeye. Aboriginal groups hold 41% of the commercial salmon fishery licences, so further mitigation would have to come from non-aboriginal participants. Despite the many interests affected by this fishery, so far the consultation process has been bilateral only.

[1143] Canada says its offer respecting salmon is consistent with the restriction of the CDA; abundance; the plaintiffs' population (4,855 or 0.64% of the total population of Vancouver Island; 8.3 % of the WCVI, and 46.4% of the aboriginal groups on the WCVI); level of commercial access relative to other WCVI aboriginal groups and other sectors; the plaintiffs' preferred means; DFO's standards of monitoring and catch reporting; other aboriginal fisheries who have access to the same salmon stocks; and treaty obligations.

[1144] With respect to the relative levels of commercial access, Canada compared the chinook catch of the three sectors in 2014: the LTO would provide the plaintiffs with 21,773 pieces of AABM chinook, plus the ISBM terminal fisheries opportunities; the Area G commercial troll fishery caught 21,587 pieces, and the recreational fishery caught 39,692 pieces.

[1145] The 2014 LTO converts to 180,199 pieces of the five salmon species, based on 2013 numbers (although this would have to be reduced for pink, as there was no pink run in 2014).

[1146] Canada returns to the issue of preferred means to demonstrate the logic of the LTO. The LTO allows the plaintiffs the choice of fishing with commercial trollers in the regular Area G fishery, or fishing with small, low-cost boats in the right-based fishery in the CDA.

[1147] Canada says their management tools are justified if the plaintiffs' fishery is to be a fairly large one conducted with many trollers. The use of trollers has demonstrably worked against the objective of wide community participation because the trollers have caught a large percentage of the fish, and have caught them in a short amount of time. The plaintiffs have chosen to operate the demonstration fishery as a derby-style fishery, leading to competition for fish. By 2016, 40 average capacity trollers were expected, with 76 low capacity vessels. Of those average capacity vessels, at least ten also participated in the Area G regular commercial fishery. Without an accurate assessment of effort, Mr. Grout said it is difficult to employ management tools that can constrain the fishery to the appropriate TAC.

[1148] Mr. Grout testified that the discussion surrounding midsized vessels is challenging. If the plaintiffs want to fish year round, small vessels are more compatible. The allocation will last longer. With mid-sized vessels, the removal rates will be higher and the allocation will not last long. There are also implications for stocks of concern. In 2014, when commercial trollers were allowed in the salmon demonstration fishery, 20% of the vessels caught 80% of the fish. As more commercial trollers enter the fishery, the capacity goes up. The resulting pressure on the allocation requires control.

[1149] Mr. Grout says DFO needs certain information: the number of vessels, when they are out, catches retained and landed, releases, and biological sampling information. They need timely information, both fisher-dependent and -independent. For dual fishing, a clear understanding of the FSC allocation is needed, as opposed to what could be harvestable for commercial sale. Commercial vessels would be constrained by bycatch limits and dual fishers would not. The commercial gear should not be used in rockfish conservation areas.

[1150] It is clear that Mr. Grout, and indeed all the DFO managers, would be more comfortable with independent verification and on-board monitors in this multi-species fishery. He agreed that the trip limits put in place by the plaintiffs in 2012 limited the harvest of the larger boats, but DFO has not found vessel caps an adequate management tool, although DFO agreed to test them in the salmon demonstration fishery. In 2015, the plaintiffs caught fish in excess of the vessel cap and reported it as FSC instead. Thus there were no restrictions on the total pieces that high powered vessels could bring in.

[1151] This illustrates that dual fishing is another problem from DFO's point of view. Canada points out that the plaintiffs have been dual fishing in the demonstration fishery without prior agreements from DFO. This increased the complexity of managing the fishery. Certain areas are closed to commercial fishing but open to FSC. This makes enforcement impossible. Mr. Grout said the plaintiffs' proposal for dual fishing requires special monitoring standards – he would need pre-trip communication regarding the allocation to be harvested and for which purpose.

[1152] While there has been a test of a salmon fishery, the plaintiffs' right is multi-species which raises other concerns beyond those that were examined in the salmon demonstration fishery. Canada says

the salmon demonstration fishery has shown that it is not feasible to move forward with a mixed-fleet fishery with the same controls applying to all participating boats.

[1153] DFO witnesses also expressed difficulty with the plaintiffs' plan to retain 100% of bycatch. DFO says this is not selective and does not avoid stocks of concern. In the salmon demonstration fishery, the plaintiffs are able to retain lingcod and rockfish, and now halibut (proposed to be added), as bycatch when fishing for chinook; where abundance has permitted, they have had the opportunity to fish for coho, chum, and sockeye as bycatch.

[1154] In general, the plaintiffs want to add groundfish as bycatch; the groundfish fishery requires quota allocations and at-sea monitoring, which is another problem, and if the number of vessels is unlimited, this could affect the availability of lingcod. Michelle James mentioned that in the 2013 salmon demonstration fishery, for some vessels more lingcod were caught than salmon. There is thus a potential to target lingcod as a directed fishery, and the TAC could be exceeded without proper monitoring. DFO says a proper assessment is required to add more species.

[1155] Given these concerns, DFO has assessed the plaintiffs' proposed fishery as requiring an enhanced level of monitoring because of the multi-species element of their fishery and the multi-purpose element of their fishery, that is dual fishing. DFO commented in their Evaluation that multi-species and dual fishing could permit more financially viable operations.

[1156] DFO has done a risk assessment, but had no input from the plaintiffs. DFO wants the plaintiffs to work through the assessment with them and determine the level of risk. DFO will then reassess an appropriate monitoring standard, which will be flexible over time.

[1157] The plaintiffs look on DFO's requirement for independent monitoring as a lack of trust. DFO says "trust us" is not an appropriate basis upon which to set monitoring standards. DFO recognizes that some of its requirements may pose a barrier for smaller fisheries in more remote locations, and is willing consider flexibilities, applying their Strategic Framework for Fishery Monitoring and Catch Reporting to assess the risk.

Canada's Response to the Plaintiffs' Proposed Shares

[1158] I will now mention some of the issues DFO raised with respect to the proposed shares or allocations put forward by the plaintiffs.

[1159] Michelle James pointed out in her report at 70 that the Pacific Salmon Treaty requires retirement of 35% of the current licences because of endangered Puget Sound stocks. In her report at p. 57, she stated that the Area G fleet has accordingly decreased by 103 licences as a result of the Pacific Salmon Treaty buy-back and area reselection. This decrease in licences is expected to continue and as the number of commercial licences decreases, the share associated with the plaintiffs' licences will increase. According to Ms. James, the plaintiffs' present approach to a share would require DFO to demand relinquishment of at least 30% of the Area G licences, although she agreed that this number could change depending on how many licences were active.

[1160] Mr. Grout testified that the plaintiffs have early access to the salmon as a result of geography. Their location on the WCVI gives them first access to stocks that are on their way somewhere else where there are many fishers, First Nations and non-aboriginal, waiting for them in both Canada and the United States. This early access necessitates a precautionary approach when giving allocations to the plaintiffs to ensure there are enough fish to fulfil later requirements. Each salmon species is managed differently, and there are different conservation concerns for each.

[1161] As well, DFO requires the use of barbless hooks in the commercial fishery because it leads to better survival of bycatch. The use of larger plugs for trollers reduces coho bycatch. The plaintiffs wish to retain everything caught, which is a 100% mortality rate, and in his view, not precautionary. It does not protect stocks of concern.

[1162] He testified that taking a percentage allocation from a large area (the WCVI) and fishing it in a small area (the CDA), as the plaintiffs suggest, would raise conservation concerns. As well, the stock mixture may be different in the small area.

[1163] Canada also argues that the plaintiffs' approach is not supported in law. Canada says the plaintiffs' right exists in the CDA. They are not entitled to go outside that area to set their allocations. Many other First Nations depend on those overall allocations and abundances.

[1164] In respect of the *Sparrow* justification factors, Canada points out that Garson J. recognized that conservation and sustainability are valid legislative objectives. Canada also argues that priority does not necessarily mean priority of harvest; it requires a proper balancing of the plaintiffs' rights before others. Canada says consultation has been more than thorough. If the infringements have not already been cured by the access granted, any impairment of the right is minimal.

[1165] The plaintiffs want shares. That is the same approach DFO uses to provide the plaintiffs with access, although Canada bases the shares on licences. However, Canada urges deference to the Minister's management decision to calculate the share on the commercial TAC under the Salmon Allocation Policy. That is, under Canada's approach, the share should come from the Commercial TAC, as the Salmon Allocation Policy dictates, because Canada has so many interests and types of commercial fisheries to integrate and balance.

[1166] Canada says giving the plaintiffs a share of the commercial fishing licences is a reasonable way to reconcile the plaintiffs' rights with the different gear types that fish in the same area as the CDA. This number will rise as the salmon fishery shrinks under the voluntary licence relinquishment program, as Michelle James pointed out. Canada submits that, according to Mr. Grout's calculations, DFO's method gives the plaintiffs more of some species than they ask for in some years. There is thus minimal impairment of their right.

[1167] I have already set out my conclusion on the application of the Salmon Allocation Policy to chinook.

[1168] I have set out Canada's general concerns and position. Mr. Grout and other witnesses provided comments in respect of the individual salmon species proposals to which I will now turn.

Chinook

[1169] From Mr. Grout's evidence, I understand that there are sufficient chinook passing by the WCVI to accommodate the plaintiffs' proposed allocations, if the commercial fishery allocations are substantially reduced (33 - 63% of the Area G commercial fishery, depending on abundance. Canada would keep the recreational fishery as it is rather than reduce it, because it is placed ahead of the plaintiffs' fishery in the Salmon Allocation Policy. However, Mr. Grout expressed concern about the ability to catch 30% of the WCVI chinook in the CDA, and pointed out the stocks of concern migrating through there in the summer.

[1170] Andrew Thomson, Area Director for the South Coast, questioned where the plaintiffs' proposal for 30% of the TAC came from – he testified that if that figure is extrapolated to only the rest of the NCN, it comes to 100% of the fishery, thus excluding the commercial and recreational fisheries entirely.

[1171] To give some idea of the comparison between the two approaches, the following is Mr. Grout's calculations for chinook in pieces, based on DFO providing the plaintiffs with 15.8% of the Canadian Commercial TAC (CCTAC), as opposed to the plaintiffs' proposal for 30% of the Canadian TAC (CTAC). To reiterate, Canada's approach sets the plaintiffs' share from the commercial total allowable catch; the plaintiffs assert their priority over the recreational fishery and seek a share of the total allowable catch provided to Canada under the Pacific Salmon Treaty:

	DFO	T'aaq-wiihak
2009	proposal based on 15.8% of the CCTAC: **8,342**	T'aaq-wiihak's proposal based on 30% of the CTAC: **30,840** (which translates to 58.4% of the Canadian Commercial TAC, leaving the rest of the commercial fishery in Area G with 21,960 pieces)
2010	**13,225**	**41,610** - 49.7% of CCTAC (42,090 left)
2011	**21,614**	**57,540** - 42.1% of the CCTAC (79,260 left)
2012	**10,744**	**38,400** - 56.5% of the CCTAC (29,600 left)
2013	**7,315**	**31,890** - 68.9% of the CCTAC(14,410 left)
2014	**21,393**	**58,620** - 43.3 % of the CCTAC (76,780 left)

[1172] Canada says this table shows that in years of low abundance the commercial fishery would be seriously affected. The table assumes 50,000 pieces for the recreational fishery in 2009, 55,000 in

2010 and 2011, and 60,000 for 2012, 2013, and 2014. The plaintiffs suggest any allocation to the recreational sector could be adjusted to leave more for the commercial fishers in Area G.

[1173] Ms. James states that the plaintiffs' proposed share of the WCVI AABM commercial chinook fishery would have been 70% of the total catch in 2013 and 46% in 2014. The bycatch retention proposed by the plaintiffs is in excess of the limitations in the regular commercial troll fishery.

[1174] Canada says the proposed 5,000 piece chinook winter fishery is not consistent with the Pacific Salmon Treaty, which starts the chinook year on October 1 and includes all harvests to September 30. That is the approach DFO has adopted, and sets its allocations accordingly. However, the plaintiffs want an additional winter allocation.

[1175] Overall, Canada says the plaintiffs' proposal is not supportable, leads to conservation concerns, and is potentially an exclusive fishery. Canada says its offer for chinook is stable, predictable, and does not cause any meaningful limitation on the plaintiffs' right.

Coho

[1176] Mr. Grout testified that coho is not as predictable as chinook; nor is chum, pink, or sockeye. There is no in-season monitoring in place for stocks of concern with coho.

[1177] There is presently no directed coho fishery on the WCVI due to the crash in coho stocks in the 1990's, particularly Interior Fraser Coho; thus there are no licences to retire, unlike with chinook. DFO says it does not have sufficient data to provide a coho TAC, so they set an exploitation rate for bycatch that must not be exceeded. The recreational fishery is allowed to retain hatchery fish only, but there is an impact on wild coho as well. The rules have been relaxed as stocks have recovered.

[1178] The plaintiffs propose taking the entire total of the recreational, commercial bycatch and aboriginal harvest of coho for one year in Areas 23-26 and 123-126 and setting their allocation for the next year as 50% of the previous year. However, Mr. Grout testified that coho varies considerably year by year, and DFO does not manage coho on abundance-based assumptions.

[1179] According to Mr. Grout, the variation in abundance means that in some years it is unlikely that there would be sufficient coho in the CDA to provide the allocation sought by the plaintiffs since it derives from the larger management areas, and a target set on the basis of an abundant year will raise conservation concerns if the next year is of lower abundance.

[1180] Mr. Grout pointed out that the plaintiffs' proposal for coho increased from 25% to 50% between 2012 and 2014. He also noted that when DFO allowed a coho bycatch fishery in 2014, the plaintiffs actually caught more than their proposal would give them. DFO provided 7,885 pieces to the plaintiffs (18.2% of the resources available). The Area G commercial fleet caught 765 pieces; the recreational fishery caught 12,957 pieces. Thus Canada argues that DFO's approach is reasonable and does not impair the right, whereas the plaintiffs' proposal is unpredictable and raises conservation concerns.

Terminal Fisheries - Chinook and Coho

[1181] Canada says DFO has provided the plaintiffs with flexibilities for terminal fisheries that are not available to regular Area G fishers through earlier openings, wider areas, additional gear types, and additional allocations beyond the shares associated with their licences.

[1182] Ms. Dobson is in charge of salmon stock assessment for DFO. She coordinates integrated management committees involving all sectors of the fishery for various terminal fisheries in the Burman and Conuma Rivers. Terminal fisheries in Area 25 (the area closer to shore in the Ehattesaht, Mowachaht/Muchalaht territories) have been the subject of round table discussions involving all sectors which have been fairly successful.

[1183] Ms. Dobson testified to her concern at the plaintiffs' proposed harvest rates for terminal fish. She said the Burman and Conuma rivers are not good spawning habitat, unlike interior rivers. Climate change has impacted survival dramatically for ISBM fish entering the ocean, although she said AAMB chinook has also declined overall.

[1184] DFO supports an ISBM chinook terminal fishery and a coho terminal fishery as long as there is credible stock assessment. The plaintiffs' plans call for a percentage of fish based on escapement. Such an approach calls for cooperation with DFO, which DFO is willing to accommodate.

Sockeye

[1185] Mr. Grout testified that sockeye is the most intensively managed species. FSC use by First Nations is high. The TAC is assessed in season and can change day to day. He said the calls on Fraser River sockeye after they pass through the WCVI are considerable, as First Nations all the way up the Fraser depend on sockeye for FSC. Therefore DFO takes a precautionary in its approach to sockeye management.

[1186] As mentioned earlier, Mr. Grout testified that it is important to harvest carefully when taking fish early in the season, which is when the fish are passing through the plaintiffs' area. Assessments for the sockeye passing the WCVI will not be done until a week after the openings in that area and this is the problem with giving the plaintiffs a fixed share up front. The plaintiffs' territories are outside the fishery assessment areas, and therefore to give them a directed sockeye fishery in advance of receiving the test information poses risks to conservation and sustainable use.

[1187] Mr. Grout testified that it would not be possible to manage sockeye in a way compatible with the plaintiffs' proposals. Their proposals are dependent on the WCVI TAC which is not realistically ascertainable. In fact, as mentioned earlier, after hearing Mr. Grout's testimony, the plaintiffs changed their position to seek a smaller percentage of the overall west coast TAC as opposed to basing their percentage on the WCVI TAC. They seek 5% of the overall west coast commercial TAC; DFO offers 1.14%, providing the plaintiffs with a directed fishery for Fraser River sockeye in the CDA when abundance permits.

[1188] Mr. Grout said the DFO offer would actually result in more sockeye for the plaintiffs than they would get under their own proposal, and the variety of commercial licences offered in the LTO would

allow the plaintiffs to move into other areas to fish if the sockeye did not run down the WCVI in a particular year.

[1189] The number of sockeye passing the WCVI varies with the diversion rate -- that is whether the salmon choose to go down the east or the west coast of Vancouver Island. According to Mr. Grout's figures, the number of sockeye pieces associated with the LTO, if applied from 2010 to 2013 would have varied widely: 2010 - 119,137; 2011 - 5050; 2012 - none; 2013 - 24; 2014 - 98,354.

[1190] The plaintiffs would hypothetically have obtained 98,354 pieces of sockeye in 2014 under the LTO, three times the amount they sought under their own proposal. DFO did offer an opportunity for 20,000 sockeye that year, but because the diversion rate did not turn out as expected, the plaintiffs were able to catch fewer than 100 sockeye. In years of low return, the plaintiffs' proposal would be three times the LTO. It is Canada's position that these unexpected results are best handled by flexibilities within DFO.

Pink

[1191] Mr. Grout testified that there is not much information about pink salmon in the CDA, and he has not seen much pink taken in that area. There is no directed fishery for pink. It can be retained as bycatch in the demonstration fishery. DFO does not manage pink with a TAC (the allocation method sought by the plaintiffs) and there are no in-season assessments. He testified the plaintiffs' suggestion for a percentage is variable because it depends on the diversion rate. DFO offers a licence-based approach which is stable.

[1192] The Area B seine licence offered to the plaintiffs, although outside their area, would allow the plaintiffs to harvest pinks. As mentioned, the plaintiffs consider the seine licence to be useless because it is outside their area and cannot be converted under the present rules to access in their territories. However, Mr. Grout testified that measures are underway to convert the seine licence to chinook shares.

[1193] Pink salmon show up in odd years only, and harvest depends on the diversion rate which differs from sockeye. The approach under the LTO would have given: 2009 - 71,644; 2010 - none; 2011 - 65,182; 2012 - none; 2013 - 96,802; 2014 – none. The plaintiffs' proposal for pink would give them 233,811 pieces in 2013, a year of high abundance; DFO's offer would give them 96,804 pieces.

[1194] Fraser River sockeye and pink migrate up the Fraser for long distances and are the only opportunity that interior aboriginal groups have for an FSC fishery. Canada says DFO is uniquely positioned to balance the plaintiffs' rights along with all the other interests for these salmon species.

Chum

[1195] Chum is not abundant in the CDA. There is not enough to support a directed fishery, and stocks are declining. Not much data is available. The plaintiffs do not currently seek a chum fishery. The LTO allows harvest as bycatch.

Plaintiffs' Position

[1196] The plaintiffs say the Evaluation done by DFO either contains assumptions not proven, or does not support Canada's argument, and Canada has not justified its refusal to implement the plaintiffs' salmon plan. The plaintiffs say they abide by the total catch levels that DFO determines, but want a significant portion of those catches redistributed from the commercial or recreational sector to them.

[1197] The plaintiffs object to the Evaluation on the basis that it is largely a collection of statements, and does not make reference to priority, minimal impairment, or the importance of the fishery to the Nations. Some of it is speculative (e.g. impacts on other users) and does not constitute proper justification. While it identifies the need for further consideration, cooperative planning has already been taking place each year for the salmon demonstration fishery.

[1198] The plaintiffs say that Canada, while objecting to the allocations contained in the plaintiffs' plans as disproportionate, has done no analysis on what might be a proper allocation for them. Just because reallocation is required from other sectors, that is not a justification to refuse to implement the plan. Canada led no evidence of actual impacts on other users.

[1199] Generally, the plaintiffs say the only relevant points are conservation and the priority of FSC and treaty fish. They do not suggest the overall TAC should be increased so conservation is not a problem. They just want a greater share of what is there, and of course it has to come from the other users. However their right has priority and how to compensate the other users is DFO's problem to deal with, not theirs.

[1200] The plaintiffs say that they propose a community-based fishery in which they coordinate and manage the fishing opportunities for community members over the salmon season. They also say they propose to work with DFO to ensure a well-managed fishery, and will be responsible for appropriate monitoring and catch reporting.

[1201] The plaintiffs have now confirmed that their plans, although originally apparently designed for the entire Pacific Management Areas, are now limited to the CDA. The plaintiffs propose to spread out the harvest over the year. They would use opening times as a management measure.

[1202] The plaintiffs state that conservation is their primary objective. They accept DFO's stock abundance figures and TACs. They would reallocate the shares currently provided to the commercial and recreational fishery within that abundance in order to provide them with what they view as an appropriate accommodation of their right. For the most part, they accept DFO's management for stocks of concern. They would apply a one-mile closure outward from the surfline to protect returning WCVI chinook who migrate close to shore, but they would not apply the five-mile corridor to protect Interior Fraser Coho because the recreational sector is not bound by it, and because the plaintiffs do not accept the conservation rationale for it.

[1203] As for Canada's points regarding mixed vessel size, the plaintiffs say they can manage the fishery for all their members, but the allocations are too small. Their witnesses did not raise the issue of

conflicts between vessels of various sizes.

[1204] The plaintiffs' answer to Mr. Grout's concern that the bigger boats would quickly catch all the allocation, is to make the allocations big enough so there can be as much community participation as possible for as long as possible, using a variety of boat sizes. The plaintiffs say they will ensure a fair distribution amongst their members, and they will put a limit on vessels at some point.

Allocations of Species

[1205] The plaintiffs seek 30% of the WCVI AABM Canadian TAC. The plaintiffs say their proposed allocation of 30% of the entire WCVI TAC of AABM chinook is simply based on the way Canada assesses and manages this migrating stock. Canada's proposed allocation is no more or less tailored to the CDA than is the plaintiffs'. It is just much lower and less secure.

[1206] For terminal chinook, managed to a 10% exploitation rate, there is little assessment data, except in the Burman River, where intensive assessment has been done, funded by the Pacific Salmon Commission. The plaintiffs propose a harvest rate of 10-30% after escapement, or an allowable harvest rate after escapement and FSC requirements are met. The Burman River has a very small return but is important for the Mowachaht/Muchalaht who do not have the capacity to travel to the AABM areas. The Conuma can provide an additional opportunity for them, as well as the Ehattesaht. The plaintiffs would work with DFO to develop stock assessments.

[1207] Since the recreational fishery is the only other sector allowed to harvest coho, the plaintiffs seek a 50% share, which they want to have established ahead of the season so they can plan and distribute the opportunity. The plaintiffs say that they are not accorded their proper priority if DFO allows a recreational harvest and not a directed commercial harvest, or if DFO allows a larger amount of coho bycatch to the commercial fishery to facilitate commercial harvest of Fraser sockeye.

[1208] Dr. Hall did not appear to have a good answer for the concern that using numbers from a good year could result in overfishing the next year, but he was of the view that the plaintiffs and DFO should negotiate on coho. In his opinion, there should be a TAC for coho, which would require data collection. Since coho has not been a directed fishery for many years, there is little data available to DFO, according to Ms. Dobson.

[1209] The plaintiffs acknowledge DFO's concern with using the previous years' catch as a basis for setting a coho allowance, but say they are in good faith attempting to provide a basis to identify a share with no assistance from DFO and without a TAC. The plaintiffs say that almost all the coho goes to the recreational fishery or FSC. The recreational fishery must release wild coho and can retain hatchery fish, although retention of wild coho was allowed in 2014 and 2015. As well, there is no cap on recreational or commercial bycatch of coho, whereas the plaintiffs' approach, they say, is much more precautionary in that they at least propose a cap.

[1210] The plaintiffs, after hearing Mr. Grout's testimony, adjusted their sockeye plan to propose 5% of the overall TAC rather than 10% of the WCVI TAC. The plaintiffs say their proposed share has no effect

on FSC, and DFO can manage accordingly. They take a similar approach for pink, but seek only 2.5% of the overall TAC.

[1211] The plaintiffs have not proposed any specific allocation or share of chum. They say this should be a bycatch only in outside water; terminal chum would be escapement-based, working with DFO.

Management and Monitoring

[1212] The plaintiffs acknowledge the Minister's authority to manage commercial fisheries but say they have a role, including authorizing members to participate. They require a participant to sign a Rights and Responsibilities Agreement, and propose an appropriate monitoring plan, which includes full retention; 100% dockside monitoring, with data to be provided to DFO on request; all catch including at-sea releases to be recorded in logbooks; landing slips in order to sell their catch; and coordination with DFO for biological sampling.

[1213] The plaintiffs' plans propose participation of community members irrespective of vessel size -- whether low-effort or average-effort vessels. They propose primarily troll gear, which is very low capacity compared to seining, and also gillnetting, weirs and beach seines near the terminal areas. However, the plaintiffs do not foreclose seining.

[1214] The plaintiffs want to maintain and increase their expertise in monitoring and catch reporting that they have developed over the course of the salmon demonstration fishery. They say Canada has not justified refusing to use their method. They also say the cost of independent monitoring is too high and Canada has failed to justify requiring it. The plaintiffs say their monitors are independent because the monitors are not fishers.

[1215] The plaintiffs say at-sea monitoring for bycatch and refusal to allow FSC dual fishing has not been justified. They point out that Area G or recreational fishers are not required to use at-sea monitoring. The plaintiffs also mention that Canada only requires 20% dockside validation of Area G and essentially no independent monitoring of the recreation harvest. The salmon demonstration fishery monitoring has been effective.

Policies

[1216] The plaintiffs say Canada notes their proposed shares are likely more than can be provided through licence mitigation, that is through PICFI. Even if this is true, and the plaintiffs say Canada did not establish this, the plaintiffs do not accept voluntary retirement as a justifiable constraint.

[1217] As well, while not opposing recreational access *per se,* the plaintiffs strongly object to the priority accorded to the recreational fishery under the Salmon Allocation Policy, which has its allocation set first, after FSC and treaty, an allocation that has increased from 55,000 to 60,000 in the past few years. The plaintiffs also argue that the recreational fishery, which continues to grow, has sloppy reporting requirements and monitoring, yet it gets a fixed allocation, and the plaintiffs propose only a share, which they say stops short of fully prioritizing their right. The plaintiffs say Canada did not justify

the need for recreational priority or why that fishery is managed so poorly. I have noted my conclusion on this policy above.

Reaction to the LTO

[1218] The plaintiffs say the LTO provides very limited opportunities and would not allow the many trollers currently fishing in the salmon demonstration fishery to continue fishing in the right-based fishery. Requiring the mosquito boats and the trollers to distribute licences amongst themselves in the manner suggested in the LTO results in very harsh choices for the T'aaq-wiihak.

[1219] Overall, the plaintiffs say that Canada is determined to ensure that there is no impact to either the commercial or recreational harvest arising from the declared right. That does not accord with the plaintiffs' priority, and does not justify Canada's position.

Discussion

[1220] The difference between the Negotiations and the litigation is highlighted not only by the plaintiffs' use of the entire WCVI TAC upon which to base their proposals, but by DFO's LTO: it presumes that the plaintiffs will have the option to go outside the CDA to fish the allocations. That is, if the plaintiffs choose to use one of the licences for a troller, then that troller can fish in the entirety of Area G. As well, the Area B seine licence applies outside the CDA. Those might be legitimate bargaining positions within the Negotiations, but this court has to operate within the geographical limitations of the CDA created by Garson J., and has to address infringements and justification. Whether a particular negotiating position is the most reasonable is for a different kind of process.

[1221] I have determined that Garson J. must have intended this right-based fishery to be a small-scale fishery, localized and dependent on wide community participation and restricted catching power. It is to be conducted within the CDA. I have also determined that the plaintiffs' preferred means of fishing is small, low-cost boats, and although trollers are not prevented from fishing in the right-based fishery, the size of the appropriate allocations for this fishery is not driven by a requirement to accommodate a growing fleet of average-sized commercial trollers. I also proceed on the basis that DFO manages the fishery, but must consult on decisions and approaches of importance to the plaintiffs.

[1222] I have also concluded, when discussing the policies that the plaintiffs allege continue to infringe their right, that the Salmon Allocation Policy cannot interfere with a proper allocation to the plaintiffs by putting the recreational fishing ahead of their right-based fishery for chinook and coho. As well, for chinook, a species of such historical importance to the plaintiffs, the mitigation policy is not a justifiable barrier to accommodation. That is, DFO may not be able to provide an appropriate allocation of chinook to the plaintiffs, relying only on PICFI.

The Plaintiffs' Proposed Shares

[1223] I have concluded that it is infringements that must be justified, not a refusal to implement the plaintiffs' plans. Even if the latter were the correct approach, I would find Canada's rejection of the

plaintiffs' approach to shares and allocation to be justified. However, there are aspects of Canada's approach to salmon allocation that require modification.

[1224] I will consider the plaintiffs' salmon plan from two perspectives. I will examine the internal logic of the proposal and will also consider it within the *Sparrow/Gladstone* reconciliation factors.

Internal Logic

[1225] The plaintiffs' plans as originally formulated sought shares of the whole of the WCVI TAC and were based on the entire DFO management areas on the WCVI (out to the 200-mile limit). This was the T'aaq-wiihak fishing coordinator's position when she presented the plans to the Main Table in April 2014. This is, of course, not compatible with the declared right-based fishing area of nine miles. The plaintiffs now agree, at least purportedly, that they are bound by the nine miles. However, no change has been made to the share they seek, which is still based on the entire TAC for the WCVI.

[1226] The regular commercial salmon fishery in Area G obviously fishes the entirety of the management area, although generally not out to the edge, which extends 200 miles. I have noted the difficulty arising from the nine-mile declaration, which leads the plaintiffs to seek "over-accommodation" to compensate for that restriction, instead of accepting that the right is inherently limited by that restriction.

[1227] There seems to be no logical reason to assert a large share of the entire WCVI TAC and propose fishing it first on the entire WCVI, and then propose to fish the same share but within the nine-mile CDA. I agree with Canada's submission that allocations from the entire area are not available to satisfy the right which exists only in the nine miles.

[1228] Even if Dr. Hall's overly simplified method for chinook salmon allocation were accepted -- taking the three fisheries (right-based, recreational, and commercial) and dividing the WCVI roughly in thirds (or halves for coho, for which there is no directed commercial fishery) -- the plaintiffs do not have a right to fish on the whole of the WCVI. All they have for their right-based fishery is a nine-mile strip, about 160 miles long. That is about one third of the concentrated fishing area (nine nautical miles compared to 25-35 miles) from shore. For these purposes I will not bother with the consideration that the CDA covers only about half the length of the WCVI.

[1229] Using the fractional method of calculating a share, that would give the plaintiffs one third of the TAC for the three fisheries over one-third of the area out from shore. That results in one ninth, or a little more than 10% of the WCVI TAC, which is less than the 15.8% of the Area G licences for AABM chinook currently offered to the plaintiffs by DFO in the LTO (see the discussion of the LTO set out above under Canada's position). Thus the plaintiffs' rationale for their proposed share is not supported by logic.

[1230] One objection raised by the plaintiffs is that, in calculating their share of licences, where the numerator is the number of their vessels, the denominator should be the number of vessels actively fishing their licences in Area G, not the total number of licences issued in Area G. Ms. Reid testified

that DFO does not know who of the licence holders will go out fishing until they actually go, so they calculate shares between fleets on the entire number of licences. Jeff Grout, Regional Resource Manager for salmon, testified that certainty and stability are more important than adjusting the allocations for active vessels in any particular year. Mr. Grout agreed that if fewer vessels fish, the regular individual commercial licence holder has more fish available to it, whereas the plaintiffs' share does not change. However, if active licences were used, there would have to a pooling arrangement to ensure that the number remains stable if some boats become active.

[1231] I accept that the need for predictability is a valid reason for using the number of licences rather than the number of active vessels to set shares. The number of active vessels would change during the season and, in a derby-style fishery like salmon, management would be difficult. There may be specific circumstances where this method of management might result in an infringement of the right because the plaintiffs' share would be significantly smaller than a regular commercial share, but I do not see this management technique as a general infringement at present. Particular examples of unfairness resulting from significant differences in the two numbers, if they come to exist, will have to be dealt with if and when they arise.

Sparrow/Gladstone Factors

[1232] While there is thus no internal logic to the method used by the plaintiffs to determine an appropriate allocation, there are factors under *Sparrow* and *Gladstone* that offer more support for the plaintiffs' position that the present system of allocation is not appropriate for their fishery.

[1233] For the reasons already stated, I agree with the plaintiffs that a proper accommodation of their right should not be obstructed by the Salmon Allocation Policy. In the case of chinook, the priority factors in favour of the plaintiffs are so pronounced that mitigation of licences cannot be a stumbling block to appropriate allocation insofar as that policy puts the interests of other fishers ahead of the plaintiffs' right-based fishery.

[1234] The *Gladstone* reconciliation/justification factors require the court to consider "economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups", as well as the priority factors listed above.

[1235] The plaintiffs' population is 4,855, which is 46% of the WCVI First Nations, 15% of Vancouver Island First Nations, and 7% of British Columbia First Nations with reserves in coastal areas. They are 8% of the total WCVI population and 1% of the total Vancouver Island population.

[1236] How the population numbers relate to the percentage that participates in the fishery, either in the general population or for the plaintiffs, only one-third of whom live on reserve, is not before me.

[1237] The large demand made by the plaintiffs in their 2014 salmon plan for 30% of the entire WCVI TAC would necessitate reducing the commercial licences by around 30%, and perhaps more, depending on abundance. The plaintiffs say to fail to implement their plan is to fail to accommodate their right. It is the plaintiffs' position that DFO cannot rely on the mitigation policy and must do what it

has to in order to accommodate their proposal - take those shares from the regular commercial fishery or from the recreational sector.

[1238] Even if the plaintiffs' proposal were accepted as a reasonable basis from which to start a justification analysis as per Garson J.'s suggestion, Canada could well justify refusing to reduce the regular commercial fishery by that much. The plaintiffs say Canada called no evidence to support its position that there would be an unreasonable disruption of the regular commercial fishery if it were reduced by that significant amount. However, in my view, the effect of such a huge dislocation on economic and regional fairness is a matter of common sense.

[1239] While this is a significant percentage and would have an obvious effect on the regular commercial fishers, the plaintiffs are correct in saying I do not have much if any information on the regular AABM chinook commercial fishery on the WCVI, and thus cannot assess the *Gladstone* reconciliation factors in a concrete fashion.

[1240] I consider that in the context of this case, the reconciliation considerations referred to in *Gladstone* would be more appropriately aimed at individual non-aboriginal fishers who have depended on this fishery for many years, rather than at large conglomerates.

[1241] There was evidence of large commercial interests in the general fishery, and obviously there are Area G licences that are issued to non-aboriginal fishers, aside from the aboriginal communal licences and the licences used in the T'aaq-wiihak fishery, but I do not know if there are there a number of individual fishers who depend on their AABM chinook allocation to earn a living. If so, is their participation of long standing? Do they have to obtain other licences for other species to make their participation viable? Are there recreational fishing enterprises that depend on this fishery? Are those large commercial outfits or small individually owned lodges and outfits? This information is not before me, but are all factors that the Minister must take into consideration and balance.

[1242] Other factors will affect allocations of this particular species, and are as yet unresolved.

[1243] For one, the Area G chinook troll fishery will inevitably decline, as it was reduced by 30% under the Pacific Salmon Treaty. A further 35% of the current licences must be retired pursuant to Canada's obligations under the Treaty. However, I do not know how or when that will occur, or how it is expected to affect allocations. The plaintiffs' shares are expected to increase as this occurs, according to Michelle James.

[1244] A further consideration relevant to this particular fishery relates to the 20% holdback. The regular commercial fishery is required to hold back catching 20% of its allocation until later in the season in case the recreational fishery exceeds its allocation. Since this 20% holdback is not required of plaintiffs, this means the regular commercial fishery is even more restricted if DFO decides to protect the recreational sector at the expense of the commercial sector when setting the plaintiffs' allocations.

[1245] In addition, I have also noted the incompleteness of the plaintiffs' positions and the new issues that arose in cross-examination. This problem was evident for every plan.

[1246] For instance, during cross-examination of Ms. James, she expressed concern that the plaintiffs had no management options in their salmon plan that would govern catch, and that the plan was simply a "race for the fish". It was suggested to her that management of individual catch was obviously implicit. Various options were suggested to her, including trip limits, although she said trip limits raised the potential for discards and high grading. She agreed the problems she saw could be addressed, but the options coming up in cross-examination were not in the plan she had been asked to review.

Conclusion

[1247] I have concluded that Canada is not required to justify a refusal to implement the plaintiffs' plans. However, assuming that were the correct approach, Canada is justified in rejecting the plaintiffs' proposal for a 30% share of the WCVI TAC on the basis that 30% of the fish in the larger area are not available to satisfy the narrowly based right. As well, such a percentage, based on the entire WCVI TAC would disrupt the regular fishery and would not lead to reconciliation. In respect of the 5,000 piece winter allocation of chinook sought by the plaintiffs, I find Canada to be justified in rejecting it because of the logistics of allocating salmon to Canada under the Pacific Salmon Treaty.

[1248] However, a generous approach is required for allocations of AABM chinook, given the importance of that species to the plaintiffs, the lack of evidence of effects on the rest of the commercial fishery if the mitigation policy is not adhered to for this species, and the priority the plaintiffs have over the recreational fishery, despite the present Salmon Allocation Policy. While DFO makes a legitimate point that the mitigation policy is useful in terms of reconciliation, it may stand in the way of appropriate allocations if DFO chooses not to interfere with the recreational allocation for AABM chinook.

[1249] The method of setting the present allocation for chinook, which has been based on the Salmon Allocation Policy and the mitigation policy, is not justified. It is up to the Minister to reassess DFO's approach to allocation of chinook with these principles in mind.

[1250] Coho is of some importance to the plaintiffs, but coho stocks are fragile. Presently, the recreational fishery has priority over the plaintiffs to the limited coho that is available, prior to September 15 of each year, although the recreational fishery can only retain hatchery coho. While DFO's precautionary approach is justified for coho, this priority is not justifiable.

[1251] Another approach to coho is required in order to respect the plaintiffs' priority to this species, given that the recreational fishery cannot assert priority over the plaintiffs' right-based fishery. Once again, it is up to the Minister to reassess DFO's approach to coho for the plaintiffs' fishery

[1252] I find that DFO's treatment of terminal fisheries for chinook and coho, which is based on an escapement rate, is justifiable in the name of conservation. Although the plaintiffs' might seek larger allocations than DFO is comfortable with, there has been cooperation over terminal fisheries, and this cooperative approach should continue. However, the same considerations in respect of the priority of

the plaintiffs' fishery over the recreational fishery in respect of chinook and coho apply to the terminal fisheries in those species as well.

[1253] The issues surrounding sockeye are interesting because they underline the extensive science and management knowledge that DFO has as they manage this species for the entire First Nation population of British Columbia. The plaintiffs do not have this expertise, nor, of course, do they have the responsibility to ensure sufficient sockeye is available for all the Nations up to the end of the Fraser River. As Mr. Grout, said, the sockeye, if they decide to take the western route down Vancouver Island, pass the plaintiffs very early, before any stock information is available. This is also the case with pink.

[1254] The plaintiffs' dependence on sockeye is not equivalent to chinook and coho. In some years, sockeye is not present in the CDA. This is also the case for pink. As well, the commercial fishery has priority over the recreational fishery for these species, so the problem with the Salmon Allocation Policy does not exist for these species of salmon.

[1255] I conclude that DFO's regime for managing and allocating sockeye and pink, based on its precautionary approach and its responsibilities to many other nations located throughout British Columbia, is justified.

[1256] Chum is not of much concern as it is sought as bycatch only. Insofar as it must be dealt with, DFO is in the best position to do so.

[1257] As I have said, I do not intend to make pronouncements on the many aspects of the fishery's area and openings/closings since those change daily. Even gear requirements are subject to adjustment as DFO manages the fishery. If a particular aspect is alleged to infringe the plaintiffs' ability to exercise their right, it will have to be dealt with in context.

[1258] However, the five-mile corridor set in place until September 15 of each year to protect passing stocks of coho is an ongoing feature of management. In my view, it is justified in the name of conservation. Since I have interpreted the scope of this fishery to be aimed at small boats, and since DFO has, in its discretion, allowed the small boats into the corridor to fish for commercial purposes, I accept that allowing small boats to fish in that area does not pose a problem for conservation. In the interests of making this discretionary decision formal, I conclude that DFO is not justified in excluding the plaintiffs' small boats from fishing for commercial purposes in the five-mile corridor. Obviously, if conservation were to become a concern for some presently unforeseen reason, this conclusion might be revisited.

[1259] Both DFO and the plaintiffs agree with a one-mile corridor to protect WCVI chinook.

[1260] This brings me to the remaining issue of monitoring.

[1261] It is not useful to compare monitoring of the regular Area G fishery to the T'aaq-wiihak fishery. The regular fishery is not multi-species and does not have the option of putting extra catch into FSC. Nor is the monitoring approach put together for the salmon demonstration fishery necessarily adequate

for a multi-species fishery that includes groundfish bycatch retention for sale, and one that is potentially dual purpose (FSC and fish for commercial sale).

[1262] There are issues that require specific consideration for the T'aaq-wiihak fishery. One feature of managing the salmon fishery is the interaction between that fishery and groundfish bycatch. The salmon troll fishery can also retain up to 20 rockfish per day but cannot retain halibut. Quota is required for regular commercial fishers who catch groundfish. DFO has amalgamated quota requirements in the salmon demonstration fishery to allow this to occur. Some groundfish bycatch is already allowed, and DFO has also offered to allow halibut bycatch in the salmon demonstration fishery.

[1263] Canada is also prepared to allow dual fishing in this fishery, subject to appropriate monitoring.

[1264] The T'aaq-wiihak monitoring system for the salmon demonstration fishery has been successful, but so far that fishery has not included these additional factors of retention of various species of groundfish bycatch for sale, and dual fishing (except through non-enforcement by DFO). The full multi-species nature of this fishery has not yet been realized.

[1265] Given these additional features of the T'aaq-wiihak fishery, DFO is justified in subjecting this multi-species fishery to the Strategic Framework for Catch Reporting and Monitoring in order to determine appropriate monitoring standards justified in requiring a risk assessment for a salmon fishery, ocean going and terminal, in the context of a multi-species fishery with dual fishing. The need for a proper risk assessment is heightened by the use of trollers, and in particular for groundfish bycatch in the salmon fishery when trollers are used. Consultation with the plaintiffs in setting up an appropriate system is essential.

[1266] As I said earlier, it would be wasteful to dismantle the federally funded T'aaq-wiihak monitoring and catch-reporting system. Their participants have obtained a level of expertise and should be retained and further trained.

Result

[1267] I have set out several areas of unjustified infringements arising from the licencing regime above, in the section Aspects of Infringement and Justification Applying To All Species, as set out above. The following conclusions are specifically applicable to the salmon fishery:

1. the Salmon Allocation Policy insofar as it accords priority to the recreational fishery over plaintiffs' right-based fishery for chinook is not justified;

2. Canada's allocations for AABM and ISBM chinook, insofar as they have been set based on giving priority to the recreational fishery pursuant to the Salmon Allocation Policy, are not justified;

3. the use of PICFI to provide salmon licences to the plaintiffs is justified, but the mitigation policy itself, in the event of an inability to allocate sufficient chinook to the plaintiffs through PICFI alone, is not justified;

4. Canada is justified in not allowing a 5,000 piece winter fishery, given the logistics of allocating salmon to Canada under the Pacific Salmon Treaty;

5. Canada's management scheme for coho (ocean-based and terminal), based on an escapement rate, is justified, but Canada is not justified in according priority in coho to the recreational fishery over the plaintiffs' right-based fishery;

6. the five-mile corridor to protect coho stocks of concern is not justified for low-effort boats in the right-based fishery;

7. Canada's management regime for sockeye, pink, and chum is justified, subject to the licencing regime infringements already noted;

8. Canada is justified in amalgamating quota requirements for groundfish bycatch in the salmon demonstration fishery and in conducting a review of monitoring standards pursuant to the Strategic Framework for Catch Reporting and Monitoring; and

9. The court will not make findings on the reasonableness of negotiating positions. Canada is not required to justify refusing to implement the plaintiffs' proposal, but in any event would be justified in not accepting the salmon allocations set out in the plaintiffs' plan. However, the allocation for chinook contained in the LTO must be reassessed insofar as it has been set on the basis that the recreational fishery has priority and that licences must be mitigated.

GROUNDFISH

[1268] I will set out some background for the complicated groundfish fishery, using information from the IFMP and Michelle James' report.

[1269] The groundfish fishery includes many species and fishing methods. Management is integrated through the ITQ system. The terms Individual Vessel Quota (IVQ) and Individual Transferable Quota (ITQ) were both used in the evidence to refer to aspects of the basic tool of groundfish management. Michelle James referred to IVQs; other witnesses referred to ITQs.

[1270] There are seven commercial groundfish fisheries on the Pacific Coast - groundfish trawl, and six hook and line fisheries: halibut, sablefish (also caught by trap), rockfish (inside and outside), lingcod, and dogfish.

[1271] The plaintiffs' current proposals do not include groundfish trawl, which is a fishery which involves nets towed behind large vessels along the seafloor (bottom trawl) or off bottom (mid-water trawl), although there was some indication in the evidence that they do not foreclose a trawl fishery of some sort in the future. They have presented plans for the remaining hook and line fisheries, targeting halibut, lingcod, dogfish and sablefish. The first three are available in the CDA. Rockfish allocations are required because they will inevitably be caught as bycatch.

[1272] According to Michelle James' report, limited entry licencing was introduced in the groundfish fisheries in the 1970s. Fishing became very competitive. DFO's management was not adequate. IVQ was introduced into the groundfish fisheries in the 1990s. In the past decade, DFO determined that conservation, sustainability, and socio-economic performance necessitated a new approach to groundfish management.

[1273] There are over 200 species of groundfish. About 30-50 are commonly caught in the fishery. Targeting one species inevitably means others will be caught, including species at risk. The entire

groundfish fishery became the subject of integrated management in 2006. The integrated approach for groundfish includes 100% at-sea monitoring (electronic or independent observers), and recording all groundfish caught; 100% dockside validation; overall TACs which are allocated to the seven groundfish fisheries, individual accountability for all fish mortality, and 100% retention of all rockfish caught.

[1274] Unlike the salmon fishery, which is a derby-style competition fishery, the groundfish fishery is managed by ITQs, with reallocation of these quotas between vessels and fisheries to cover bycatch of non-directed species. Each harvester is individually accountable for their catch. Log books and 100% at-sea and dockside monitoring is required, and each individual vessel is accountable for all catch, both retained and released.

[1275] In the current system, each fisher obtains a defined share or quota for each species. An individual fisher cannot exceed their quota. Running out of quota for a particular species means the fisher must stop fishing altogether. Therefore fishers can transfer quota amongst themselves to continue fishing. Leasing, trading, and purchasing different quotas is commonplace. To ensure one fisher does not obtain so much quota that others cannot fish, there are sector and licence quota caps and trip limits for bycatch.

[1276] Because bycatch is inevitable, the fleet obtains quotas for all the species of rockfish and lingcod, dogfish, etc. that will be caught in the targeted halibut fishery (and vice versa if their main target is lingcod or dogfish). Some species, such as bocaccio rockfish, are known as choke point species, because the total allowable catch for that species can quickly be reached before the main targeted species is caught, thus requiring all fishing to stop. In the general fishery, bycatch quotas are traded to allow continued fishing.

[1277] The halibut fishery is one of the primary groundfish fisheries. Halibut is a migratory fish, regulated by international treaty. The treaty established the Pacific Halibut Commission, which makes recommendations for total allowable catches and regulations to the Canadian and U.S. governments. The treaty provides for a three-month closure in the winter to protect spawning females migrating to Alaska.

[1278] In her report, Ms. James refers to the change in halibut management which resulted in allocating quota for halibut based on vessel length and catch history, together with 100% independent monitoring of landings. Thus entry into the fishery was limited. Garson J. at paras. 567 and 577 also made reference to the plaintiffs' objections to their exclusion from the fishery because of limited entry and high monitoring costs.

[1279] In Canada, halibut is managed coastwide. The management areas for the west coast of British Columbia are designated 5 A-E for the northern portion of the province and 3C and 3D for the southern portion, which encompasses the WCVI. Although halibut is plentiful in the CDA, the main halibut fishery is centered around northern Vancouver Island and Haida Gwaii. A predetermined percentage of halibut is set for the recreational sector, with the remainder to the commercial fishery. This was 12% and 88%, but in 2012, the Minister allocated an additional 3% to the recreational fishery.

[1280] The lingcod fishery is not separately licenced. It can be fished as part of other licences as long as the fisher has lingcod quota. It is plentiful in the CDA, although Canada questions the availability of the amount sought by the plaintiffs. It is a common bycatch in the salmon fishery, and fishers in the regular commercial fishery expecting to retain lingcod, for which they must have quota, hail in their intention and have their fish validated dockside. The commercial fishery is allowed to retain up to 500 lbs of lingcod, if they hold sufficient quota.

[1281] The dogfish fishery is a low-value fishery. Quantities have dropped off in the past few years. It is managed to a coastwide TAC, and, like lingcod, is not separately licenced, but can be fished on other licences. Dogfish, once caught, must be gutted, bled and chilled immediately, or it will contaminate other fish.

[1282] The sablefish (black cod) fishery is a valuable fishery. The commercial sablefish fishery is conducted on the continental shelf, outside the CDA, at considerable depth. The fish spawn there. Juvenile sablefish migrate inshore to mature, and for the most part, return to the continental shelf when mature. The SFA has intervened in this case, and takes the position that there is not and should not be a commercial sablefish fishery in the CDA.

[1283] Rockfish are also part of the integrated groundfish fishery. There are dozens of types of rockfish. “Inside rockfish” are found on the east coast of Vancouver Island and are obviously not of concern to the T’aaq-wiihak fishery. “Outside rockfish” are found in the CDA, both inshore and offshore. Rockfish will inevitably be caught along with other groundfish.

[1284] Once caught and brought to the surface, rockfish cannot live. Incidental harvest of rockfish in the commercial fishery is accounted for by quota allocations that are leased and traded as required. Quota for a particular type of rockfish cannot be exceeded.

[1285] All fleets in the commercial groundfish fishery except for trawl and sablefish, are hook and line fleets. The average length of a commercial halibut vessel is 13 m (42.6 ft).

[1286] There are about 220 hook and line vessels actively fishing each year. As of 2013, the Nuu-chah-nulth First Nations and their commercial fishing enterprises held, through PICFI and ATP, 40 communal commercial groundfish licences. Thirty-one licences were available to the plaintiffs, both individually, and through PICFI aggregates, comprising 1.71% of the coast-side halibut quota, 1.66% of the coastwide sablefish quota, 1.12% of the non-Strait of Georgia dogfish quota, 5.18% of the 3C lingcod quota, and 4.09% of the 3D lingcod quota.

[1287] It was clear, after hearing all the evidence, that many concerns and suggestions raised by the witnesses in the context of the groundfish fishery would profit from discussion by both sides, and perhaps by a properly designed demonstration test fishery for groundfish. This is particularly so because of the unique issues that arise with this large fishery: not only is it inherently multi-species but its management system, based on ITQs, is very different from the one tested in the salmon demonstration fishery.

[1288] However, all efforts since 2009 by local DFO managers to obtain a mandate from Ottawa to test demonstration fisheries for the T'aaq-wiihak in the groundfish fishery were unsuccessful.

[1289] In 2015, the parties met to discuss DFO's evaluation of the plaintiffs' groundfish proposal. The usefulness of monitoring controls versus effort controls were discussed. I am unaware of the results, if any, from that discussion.

The Plaintiffs' Groundfish Plans

[1290] In line with their general approach to all fisheries, the plaintiffs want their groundfish fishery to be separate from the regular commercial fishery. They do not want to be governed by ITQs, the system which governs the commercial fishery. They resist the regular commercial monitoring system, which includes electronic monitoring, and do not want to be part of the quota system, which is market-based and capital-intensive, often managed by brokers.

[1291] The plaintiffs say they attempted to have a collaborative and useful discussion with DFO about groundfish, but when that was not forthcoming, they developed their Groundfish Plan on their own, which they say is supported in large part by a series of "heat maps" produced by DFO after the plaintiffs' plans were advanced, showing the average commercial catch between 2010 to 2014 in five-kilometer-square grids.

[1292] The plaintiffs set a TAC for the WCVI for each of four targeted species (halibut, lingcod, dogfish, sablefish), recognizing that catch of non-directed species, particularly rockfish, is inevitable in the groundfish fishery. They base their estimated WCVI TACs on extrapolated amounts from the coastwide TAC.

[1293] The plaintiffs currently anticipate 85 vessels of mixed sizes in the groundfish fishery. They propose to account for all catch, whether kept or released at-sea in order to remain within their allocation.

[1294] The plaintiffs plan to manage the fishery with aggregate trip limits for species with TACs and individual species trip limits for species without TACs, and dockside monitoring at designated landing sites. The plaintiffs would transfer any unfished quota into the regular commercial fishery as of the first week of September.

[1295] I will list the plaintiffs' proposed allocations and approach for each of the groundfish fisheries, and then set out Canada's position on their proposals and the plaintiffs' response. The SFA also made submissions in respect of sablefish.

Halibut

[1296] The plaintiffs seek 25% of a TAC which they estimate based on commercial and recreational harvest for Area 3C/3D, which is the WCVI, or 3.2% of the coastwide TAC, which they say would be 225,000 lbs in 2014, coincidentally one quarter of the recreational allocation. Part of this would be harvested as bycatch during the salmon fishery.

[1297] The plaintiffs propose a jig/troll fishery (a jig is a type of lure), with 5 lines, up to 25 hooks, 5 skates (1 skate equals 1800 feet) with up to 500 hooks for small vessels; 10 lines and 75 hook for average vessels - 10 skates and 1,000 hooks. A commercial halibut vessel could have up to 2,000 hooks.

[1298] Similar to their proposal for AABM chinook, the plaintiffs want a percentage share of the entire TAC, not the Commercial TAC, thereby asserting their priority over the recreational fishery. The plaintiffs' say the Minister's reallocation of 3% of the halibut fishery from the commercial sector to the recreational sector in 2012 emphasizes how arbitrarily their share, if seen only as part of the commercial sector, can be affected by such a random discretionary act.

Lingcod

[1299] The plaintiffs seek a 10% share of the fish in Area 3C/3D. This would have amounted to 385,805 lbs in 2014.

[1300] The plaintiffs say that the amount they seek is far less than the portion of the TAC that the trawl fishery leaves unharvested each year in the larger management Areas of 3C and 3D.

Dogfish

[1301] Dogfish is plentiful in the CDA, but is a low-value fish. The plaintiffs seek 2.5% of the 3C/3D TAC, which they estimate from the coastwide TAC.

Sablefish

[1302] The "heat maps" produced by DFO show a very small amount of sablefish caught in the CDA, and the plaintiffs rely on those maps to say that there is the potential for commercial sablefish fishery in the CDA. They seek 5% of the 3C/3D TAC -- this would have amounted 79,207 lbs in 2014.

[1303] DFO has provided sablefish quota to the plaintiffs, but this has been done through PICFI which the plaintiffs do not acknowledge as part of the accommodation of the right.

Rockfish and Other Species

[1304] The plaintiffs say they need a TAC for rockfish to facilitate their four target species fisheries and cover any bycatch. They seek 25% of the inshore rockfish which are abundant in the CDA; 10% of other rockfish; 5% of pacific cod; 0.03 % of hake, and 25% of skate, which is abundant in their area. They say if they find they do not use these allocations in a season, they will reallocate these amounts to the regular commercial fishery in September.

Canada's Argument

[1305] Canada says consultations and negotiations on groundfish are ongoing, and a justification analysis is premature. Canada says it is committed to the process of working out an acceptable accommodation. It also refers to the extensive consultations that have already taken place, and says

more discussions are needed, with more demonstration fisheries. An LTO for groundfish is still to be made.

[1306] Canada says that in any event, any ongoing infringements are justified by conservation concerns, and because of the priority already given to the plaintiffs in respect of groundfish.

[1307] DFO says the plaintiffs' proposals do not contain enough information to be capable of implementation. They seek allocations of all species of groundfish, based on TACs in large management areas, whether or not those species are harvested in the CDA, and whether or not they are caught by their proposed gear.

[1308] Canada says the plaintiffs' proposed management approach is out of date and unsustainable; the proposals seek to shift management functions away from DFO, which is not part of the right; the latest proposals are significant in size and comparable to the regular commercial hook and line fleet and are beyond the scale of the plaintiffs' artisanal fishery and their preferred means. The allocations do not reflect availability of those species in the CDA and do not leave a share for others.

[1309] Canada says there is no present impediment to the plaintiffs' ability to use their communal commercial groundfish allocations, and there is little indication of any cost-based infringement to justify.

[1310] All in all, DFO says they are justified in rejecting the proposed allocations, and more generally, given the allocations and flexibilities presently in place, there is no longer an unjustified infringement in the groundfish fishery. A long term responsible agreement should be reached, but allocations should be based on appropriate priority.

[1311] DFO made the following points in the Evaluation of the plaintiffs' groundfish plan, and commented several times on the need for further clarification:

- estimates of groundfish abundance in the CDA are difficult to provide because stock abundance information is geared to much larger areas -- the only proxy available currently is commercial catch;
- clarification for retention/discard is required;
- further discussion is needed re sensitive benthic areas;
- various gear types are proposed and have different selectivity properties;
- the plaintiffs seek 25% of the total WCVI TAC of halibut; the 5 Maa-nulth treaty nations have only 1%;
- larger allocations need more discussion of suitable monitoring;
- incentive to discard catch is significant, and without at-sea monitoring, the information could be compromised with risks to the resource;
- some of the allocations (e.g. halibut and inshore rockfish) are significant proportions of the allowable WCVI harvest, especially relative to the plaintiffs' population;

- allocations sought by the plaintiffs are in addition to PICFI allocations already given to them;

- vessels characterized as “average-effort” are similar to a typical commercial groundfish hook and line vessel for some groundfish fisheries;

- amounts of gear proposed would take significant time to set and retrieve, which may not be feasible in the absence of efficient industrial technology;

- interest in investigating a mid-water trawl fishery implies larger vessels;

- 100% dockside monitoring as proposed is good, but independent at sea monitoring is missing, given that gear amounts are similar to some of the vessels in the commercial fishery -- why is EM too expensive and what cost is associated with any alternatives? The proposal references continued funding from DFO to support monitoring; why is cost sharing not addressed? Further clarity is required;

- how can the vessels be identifiable while fishing and landing fish;

- the proposal would result in a significant reduction in the amount of groundfish harvested in the general commercial groundfish fishery and in the recreational fishery;

- for some species it is unlikely the proposed allocations could be harvested in the CDA without compromising conservation, causing local depletions, and establishing an exclusive fishery for the plaintiffs;

- there is no information on enforcement and compliance;

- absence of independent at sea monitoring could pose a risk to eco-certification; and

- more information is required on consistency with existing regulations, how the Minister’s authority would be incorporated, fishing authorization process, consistency with international obligations.

[1312] Many of the smaller concerns could be clarified with further discussion. It is clear that the main concerns DFO has, which have been evident throughout the Negotiations, are the scale of the fishery, the size of the proposed allocations, and the need for electronic monitoring.

[1313] DFO called as a witness Neil Davis, Regional Groundfish Manager, and Greg Workman, groundfish science, both of whom had had input into DFO’s Evaluation of the plaintiffs’ groundfish plan. Mr. Davis was not at the Main Table; his task was to assess the implication of the proposals and determine how he would manage such a fishery and ameliorate the risks for the entire fishery. His concerns mirrored those in the Evaluations, for instance, the lack of independent at-sea monitoring and uncertainty as to the size of boats and gear in respect of the risk associated with the plaintiffs’ proposal. During his cross-examination, various subjects were raised that demonstrated the need for further discussions.

[1314] There are many subjects within the groundfish fishery that are commented on in the Evaluation and which were touched upon in the evidence of various DFO witnesses. I will mention the main ones.

Size of Fishery

[1315] DFO says the plaintiffs propose a high level of effort for the groundfish fishery, so this is not a small fishery. Ms. Farlinger testified that she had difficulty with the plaintiffs' position because they do not want the same restrictions as the general commercial fishery because they claim to be smaller in scale, but they propose to use commercial vessels and catch a large percentage of the available WCVI TAC.

[1316] In Canada's view, the plaintiffs' 2014 proposal sets out a fleet that is similar in scale and effort to the existing commercial groundfish fishery - 85 vessel of small and medium size, although there may be more. It is unclear how many of each type of vessel there would be.

[1317] Dr. Hall testified that the vessels are smaller than the regular commercial groundfish fishery; however, Canada says the plaintiffs propose up to 2,000 lbs of mixed groundfish for a low-effort vessel, which is considerably above the capacity of small recreational vessels. They propose a catch of 7,500 lbs for average-effort vessels.

[1318] Mr. Davis said the mixed-boat fleet the plaintiffs now propose is not a small-boat fishery. The entire commercial hook and line fleet only had 206 active vessels in 2013. Their amount of gear is similar to the plaintiffs' proposal. If 85 vessels participate, he says they will catch 1.86 million pounds of fish, including some with conservation concerns. The gear to be used on an average-effort vessel (10 skates -- 1,000 hooks) is significant and is comparable to that used by a regular sized commercial vessel. As the allocation increases, the risk to the fishery increases.

[1319] However, Mr. Davis agreed in cross-examination that the DFO document entitled Pacific Commercial Fisheries that contains a general description of all of the fisheries states that commercial halibut vessels could have 2,000 hooks. He also agreed that commercial halibut vessels can fish anywhere in areas 3C or 3D, whereas the plaintiffs' right is constrained to the CDA.

[1320] In any event, in terms of ongoing infringements, Canada says it is not the size of boat that keeps the plaintiffs from fishing groundfish at present. According to Mr. Amos, a groundfish fisher called by the plaintiffs, it is the start-up costs of obtaining a boat and gear, and the terms of leasing licences and quota obtained from the First Nations aggregates.

Allocations

[1321] DFO has expressed difficulty in the Evaluation with the allocations sought by the plaintiffs.

[1322] They seek 25% of the halibut, 5% of the sablefish, 10% of the lingcod and 2.5% of the dogfish in the entire management area 3C/3D of WCVI, not the CDA, although they would limit their harvest area to the CDA, which is about 1.5% of the total area of 3C/3D. This is estimated in their plan at 1.86 million lbs of fish. They also seek directed fisheries of species usually considered bycatch. They intend to increase allocations as circumstances change.

[1323] DFO says the rationale for the large allocations sought by the plaintiffs for halibut, sablefish, lingcod, and dogfish simply appears to be that they are highly accessible -- that is, they exist in the

CDA and the plaintiffs know how to catch them.

[1324] According to their proposals, the plaintiffs seek allocations as a share of the whole of the 3C and 3D management areas, but would fish it in the CDA only. Mr. Davis testified that the amounts sought are significant and could give rise to sustainability concerns, given what may be available in the CDA. As well, he questioned whether DFO could generate stock assessment and advice for such a small area. There are many species that would be affected; good catch monitoring is essential, especially if dual fishing is allowed.

[1325] The creation of the nine-mile CDA creates problems for both DFO and the plaintiffs: stock information is not available for that area and, according to DFO, that information would be difficult, time-consuming and costly to produce.

[1326] Mr. Davis was questioned in cross-examination about the possibility of extending the right-based fishery beyond nine miles, if it were necessary to fully accommodate the right. He was confined to answering the question in practical terms only, not legal terms, and he said although DFO has limitations on getting information on such a small scale, they are used to setting up management regimes based on uncertainties. There are ways to address the plaintiffs' interests, whether they manage within the CDA or whether they obtain permission to fish in a larger area. In his view, that is what the LTO was trying to do.

[1327] Mr. Davis prepared a table comparing the plaintiffs' proposals for 2014 to DFO's offer for lingcod, dogfish, sablefish and halibut, expressed in pounds and as a percentage of the 2014 commercial TAC (for purposes of licence allocation):

	Plaintiffs	DFO
Lingcod	385,805 lbs (10.01%)	48,900 lbs (1. 27%)
Dogfish	291,007 lbs (1.18%)	181,151 lbs (0.73%)
Sablefish	79,207 lbs (1.80%)	93,927 lbs (2.13%)
Halibut	225,560 lbs (3.93%)	103,598 lbs (1.18%)

[1328] For halibut, the plaintiffs estimate a TAC for Areas 3C/3D of about 900,000 lbs and seek 25% of it. Mr. Davis testified he did not know how the estimate was done. In any event, while 225,000 lbs may divide up into quite small amounts, depending on the number of boats, Mr. Davis said his concern for management purposes is the total catch, not the small amounts caught by individual vessels.

[1329] In cross-examination, it was put to Mr. Davis that the total Canadian TAC for halibut for 2015 (5,914,450 lbs), divided by the number of active halibut boats (155), resulted in 38,157 lbs. per boat. Mr. Davis agreed that the plaintiffs' proposal of 225,560 lbs. was the equivalent of six commercial vessels. However, Mr. Davis did not accept the validity of the assumptions put to him, and also said it is not useful to frame the fishery that way (using commercial vessels as a base) as the plaintiffs propose a different fishery from that pursued by the regular halibut fishery. The plaintiffs plan to use what they see as smaller vessels, frequent landings, day trips, and multi-species fishing.

[1330] Mr. Davis also testified that he was aware as of 2013 into 2014, the plaintiffs wanted to retain certain groundfish bycatch (rockfish, lingcod and halibut) in the salmon demonstration fishery. Lingcod and rockfish bycatch were already part of the commercial fishery so the regional managers adapted the existing provisions for those species to the salmon demonstration fishery. However, there was no similar provision for halibut, so Mr. Davis helped develop a briefing note for a test fishery including halibut bycatch, dual fishing, and an increased area to compensate for the closure of a five-mile conservation corridor through the CDA. This was dated August 1, 2013. It was not approved. Mr. Davis did not know why. However, DFO has now offered retention of halibut bycatch to the plaintiffs.

[1331] Mr. Davis questioned whether the large allocation of lingcod sought by the plaintiffs would be available in their area -- he said he would like to know how the plaintiffs arrived at their figures. He said it has potential implications for commercial fishers, both aboriginal and non-aboriginal.

[1332] As well, the plaintiffs start from a TAC that includes the groundfish trawl fishery that catches significant volumes of fish well outside the CDA. Canada says the appropriate TAC from which to draw the plaintiffs' allocations is the hook and line commercial TAC.

[1333] Groundfish trawl vessels are very large vessels with freezer capacity that stay out for many days. Mr. Davis agreed in cross-examination that the entire groundfish allocation sought by the plaintiffs would be caught by two commercial groundfish trawl vessels. However he said the comparison is not apt as the gear, species composition, and area would be significantly different.

[1334] Michelle James' review in her expert report of the plaintiffs' proposals was misdirected by their plans which said they intended to fish their proposed allocations in the entirety of Areas 24/124 and 26/126. She says for many of the species, less than 1% of the coastwide catch was landed in the CDA. Many other species are almost exclusively caught by trawl gear, which the plaintiffs are not suggesting they will use, at least for the present. The trawl fishery is conducted with very large boats, averaging more than 20 meters (65.6 ft).

[1335] The requested allocations, according to Ms. James, are, at a minimum, three times the amount of estimated catch generally within the CDA in 2013. For halibut, dogfish, and sablefish, the amounts already provided by DFO exceed the amounts caught commercially within the CDA. The proposed allocation for lingcod is three times the commercial catch in the CDA. The proposed allocation for halibut allocation, if added to the existing access, would be more than 17 times the commercial harvest of halibut in the CDA in 2013.

[1336] Ms. James agreed that the percentage of halibut the plaintiffs seek is small coastwide, as 90% of the halibut on the west coast of Canada is caught on the northern coast, but 25% is a substantial part of the WCVI fishery. She sees the plaintiffs' proposed fishery as similar to the regular commercial fishery.

[1337] The plaintiffs say their various allocations for the many bycatch species should be allowed to go forward to see how they work in practice. However, DFO says it has put a lot of consideration into its

allocation decisions and this approach is not sound. As well it is unlikely that many of the allocations proposed are even available in the CDA (yellowtail, widow, silvergray, yellowmouth, rougheye, shortraker, redbanded, redstripe rockfish; Pacific ocean perch, shortspine and longspine thornyheads, Pacifc cod, mature sablefish, and longnose skate). Others are all in the CDA (canary, yelloweye, quillback, copper, china, tiger, bocaccio rockfish; dover, petrale, rock and lemon/English sole; lingcod, big skate, arrowtooth flounder, and Pacific cod), but it is uncertain if the allocations sought could be caught there.

[1338] Many of the rockfish listed by the plaintiffs are caught exclusively by the midwater and bottom trawl fisheries (hake, Pacific Ocean perch, Pacific cod, Dover sole, rock sole, lemon/English sole, petrale sole, and arrowtooth flounder).

[1339] Hake is high-volume and low-priced. It is typically caught with midwater trawl gear, which the plaintiffs say they have yet to develop. Canada says its economic viability by hook and line is questionable.

[1340] Canada says as well that the plaintiffs seek allocations of “shelf” or “slope” species that are obviously outside the CDA. The plaintiffs initially said their average-effort vessels would fish in waters deeper than the CDA, that is 125 meters, but when this was pointed out, they removed the reference to 125 meters in their 2016 plan.

[1341] Obviously conservation and FSC come first. However, DFO says allocations for research and assessment are also high priority because they are directly associated with conservation. There is also the Maa-nulth Treaty to consider. Halibut, dogfish, and hake are available and are accessed by multiple fisheries, including other aboriginal groups.

[1342] With respect to accommodation measures so far, Canada says that, in addition to the funding already delivered, DFO has provided licences and quota to the plaintiffs at no cost. DFO also put all the plaintiffs’ groundfish quota onto a single holding licence allowing the plaintiffs to reallocate the quota to their other licences. DFO has accommodated the plaintiffs’ small volumes and multiple landings. They adjusted for trip limits and retention of sablefish.

[1343] In discussions in 2016, DFO proposed the retention of lingcod and rockfish and the retention of halibut bycatch in the salmon demonstration fishery. They also proposed the retention of sablefish on halibut licences, and offered a lingcod demonstration fishery. Whether those offers have been implemented is not before the court.

[1344] In practical terms, DFO submits that it has incrementally increased the groundfish allocations for the plaintiffs since 2008. Halibut licences have increased from 2 to 19.5, with a quota increase of 383%; the plaintiffs have been given part of a sablefish licence with associated quota; lingcod quota has increased by 572% and 5465 in Areas 3C and 3D; dogfish quota has increased by 202%, and outside rockfish by 500%. Despite DFO’s position that mature sablefish are not available in the CDA,

more sablefish has been offered than was proposed by the plaintiffs. This would obviously be caught outside the CDA.

[1345] The plaintiffs now have access to 31 licences for groundfish for which they hold quota or can acquire quota. DFO has offered access for hook and line species through PICFI: halibut, sablefish, lingcod, rockfish and dogfish, in amounts in excess of harvests in the CDA, except for lingcod. In 2013, halibut access offered by DFO was almost six times the estimated commercial catch of halibut within the CDA. Lingcod was 38% of the CDA harvest. There was no harvest of sablefish within the CDA.

[1346] With reference to Ms. James' evidence that the plaintiffs' proposed allocations for groundfish are, at a minimum, three times the amount of estimated catch available in the CDA, Canada says the present allocations already provided to the plaintiffs by DFO for dogfish, halibut, sablefish, and rockfish exceed the amounts caught commercially within the CDA. The lingcod access is 38% of the amount caught in the CDA (James at p. 147).

[1347] As mentioned, access through PICFI or ATP is not acceptable to the plaintiffs, with limited exceptions. The access they seek is in addition to the PICFI and ATP access they already have, and the amount of fish they start with in order to determine their share is the entire WCVI, not the CDA.

[1348] The only groundfish species which triggers the recreational priority issue is halibut. In respect of the plaintiffs' concern that the Minister's decision in 2012 to reallocate 3% of the halibut fishery from the commercial fishery to the recreational fishery demonstrates the wrong approach to priority, Canada says any future decision that might impact on the plaintiffs' right could be reviewed when or if it occurs. At present, such a result is only speculative.

[1349] All in all, DFO says they are justified in rejecting the plaintiffs' proposed allocations, and more generally, given the allocations and flexibilities presently in place, there is no longer an unjustified infringement in the groundfish fishery. A long term responsible agreement should be reached, but allocations should be based on appropriate priority.

Management

[1350] One of the main points in the Evaluation is DFO's difficulty with the plaintiffs' wish to manage their groundfish fishery themselves, rather than be subject to Canada's ITQ system. The regular PICFI rules apply to the halibut licences provided to the plaintiffs/

[1351] DFO maintains its position that the plaintiffs' right does not include management of the fisheries.

[1352] In Garson J.'s judgment at para. 577, she noted that the plaintiffs are not opposed to quotas *per se*, but they take issue with the fact that the whole commercial TAC was allocated to others without accommodating their rights. Thus Canada says that as long as the allocation is commensurate with the right, Canada does not have to justify the use of ITQs, or implement an alternative management scheme because the right does not include management.

[1353] Canada adds that the plaintiffs also objected to the complexity of the groundfish rules, but when a workshop was offered, only 16 attended.

[1354] DFO has concerns with the plaintiffs taking over the management of the groundfish fishery, duplicating or replacing DFO management authority and tools. Canada says ITQ management operates similarly to notional allocations as proposed by the plaintiffs.

[1355] Ms. James assumed the notional allocations in the plaintiffs' plans were between small and larger boats. In cross-examination it was suggested this might be individual allocations, subject to mid-season change. She said that would be similar to an ITQ, that is, each fisher would have an estimated allocation that would change as needed.

[1356] Canada submits that the plaintiffs' insistence on an isolated fishery results in other fishers not being able to access unused bycatch allocated to the plaintiffs, or in the plaintiffs' case, being unable to access extra bycatch quota held by commercial fishers. The plaintiffs suggest they will return unused quota in September, but that is too late for many fishers.

[1357] It is Canada's position that the present ITQ system clearly engages conservation and is justifiable. A hundred-percent at-sea monitoring is also a key component, and this will be discussed in the next section.

[1358] DFO says individual accountability is important to groundfish management. Logbook production is an improvement but the T'aaq-wiihak Requirements and Responsibilities Agreement states that the Nation agrees not to identify the individual reported catches. If there are no hard limits on each fisher, there is no motivation to remain within limits at all. Fish will simply be reallocated within the overall allocation or designated FSC, making overall management almost impossible. There is no incentive to avoid stocks of concern. Trip limits can slow a fishery down but do not protect a stock of concern.

[1359] Canada submits that, given limited space on vessels, high grading is a temptation. This is especially a problem if a fisher reaches a bycatch allocation and wants to avoid having the fishery closed. Dr. Hall's view -- that these problems are speculative and should be tested -- is not precautionary, and is not amenable to reliable results.

[1360] Canada says that overall, the plaintiffs' proposed management is cumbersome, duplicative, and likely unworkable. As well, it is directly contrary to conservation, and the role the plaintiffs see for the Minister and DFO is not clear.

[1361] In summary, Canada says the plaintiffs' alternate management proposals do not improve their access; they are not aimed at their preferred means; they do not emphasize conservation; the existing ITQ system is justified and minimally impairs their rights.

Monitoring/Catch Reporting

[1362] Another aspect which manifests itself in the comments in the Evaluation is DFO's problem with the plaintiffs' proposal for monitoring. DFO proposes independent at-sea monitoring, while the plaintiffs propose self-monitoring and reporting and reject electronic monitoring as too costly. They would use trip limits and notional allocations to manage the fishery.

[1363] DFO takes a precautionary approach to this fragile resource. DFO subjects each fishery to a risk assessment to determine what monitoring standard is necessary under their Strategic Framework for Monitoring and Catch Reporting,

[1364] In the regular commercial fishery, hook and line fisheries must hail out, and identify their intention to fish to the service provider. They must have quota to get a number. They must hail in before landing. All discarded and retained catch must be recorded in logbooks. EM is 100%, is paid for by the fisher, and provides independent verification for at-sea discards and fishing location. All landed catch is validated for species, piece counts and weight.

[1365] After an assessment of the proposed size of the plaintiffs' groundfish fishery, DFO concluded in its evaluation that independent at-sea monitoring is required. The allocations are substantial and the size of vessels they propose to use are about the same as those used in the commercial fishery. DFO says the plaintiffs' proposal is for a fully commercial fishery.

[1366] Independent observers are very expensive and not feasible on small vessels. DFO and the industry have worked together to develop the less expensive electronic monitoring alternative for smaller vessels. DFO says 100% EM is essential to proper groundfish management. It is the only means of independently verifying discards and the area fished.

[1367] The plaintiffs resist the quota system and say EM is not necessary in their fishery and is too costly. Mr. Tadey, who is the hook and line coordinator for groundfish and the manager for lingcod, dogfish, and rockfish, acknowledged that the plaintiffs have said the costs of EM are prohibitive to their way of fishing, and that this is a key issue.

[1368] According to Michelle James, the plaintiffs' monitoring proposal eliminates the most important conservation benefits of the integrated system, which are IVQs, individual accountability, and independent verification.

[1369] Ms. James acknowledged in cross-examination that costs will be high in this fishery because of the number of boats proposed by the plaintiffs. A small, low-cost boat fishery is a problem; Ms. James said one of the most important reasons for limited entry into the fishery is economic viability. The entire groundfish fleet is only 220 vessels. Eighty-five vessels as proposed by the plaintiffs will result in high costs per vessel.

[1370] Mr. Davis' testified that he has heard good things about Alex Gagne's efforts in the salmon demonstration fishery, but good fisheries management is not about an individual. A proper system is required for government and public confidence. This requires independent validation of catch. He

supports the plaintiffs' proposal for 100% dockside monitoring. He also agreed that trip limits can figure into a useful monitoring system and may work for salmon, but he maintained his position that proper at-sea monitoring, catch reporting, and data collection are more important for the groundfish fishery as a whole. With ITQs and verifiable monitoring, the size of the boat or the effort is not so important. Without those things, there has to be another way to minimize risk. With small boats, the risk is less and DFO is prepared to discuss flexibilities.

[1371] Mr. Davis said DFO could explore conditions under which at-sea electronic monitoring was not necessary: a constrained area, size of allocation, effort control, and time of opening can all minimize risks. He said various things were discussed at DFO but the Minister wanted a longer-term approach. As of the close of evidence, this had not yet been developed, although DFO now has a mandate to do so.

[1372] Canada says the plaintiffs appear to be willing to incur the costs of managing and monitoring their own fishery (funded by DFO) but say they cannot afford EM, although they have received funding from DFO for this purpose. That is, as a result of the Joint Working Group Meeting, DFO provided $500,000 to the plaintiffs to fund EM, although the plaintiffs spent only $18,000 of this on EM. DFO suggests that the plaintiffs are willing to pay the internal leasing costs Mr. Amos mentioned; it appears that their real concern is having to comply with monitoring standards at all, not with cost.

[1373] Canada acknowledges that there may be more cost-effective ways of monitoring an artisanal fishery, but they say the plaintiffs do not propose an artisanal fishery. Canada says there is no evidence that EM cannot be installed on small boats. There is no reason provided as to why the plaintiffs' logbooks cannot be the same as those required by DFO. The plaintiffs want only multi-day fishers to hail in and out to the T'aaq-wiihak Fisheries Coordinator. They give no reason why they can't hail in and out as everyone else does.

[1374] Canada says there is little evidence to support cost of independent monitors as an impediment to the plaintiffs' access to the fishery. There is no evidence of the present costs of electronic monitoring to the plaintiffs, or their ability to afford it, given their current allocations through PICFI and the Main Table. There is only hearsay anecdotal evidence of very high costs from Dr. Hall ($47,000 per vessel), which is contradicted by DFO's meeting with the independent service provider at a Joint Working Group Meeting at which a much lower estimate was provided.

[1375] Mr. Amos said an audit costs $1,500 per trip. He did not testify as to his revenues. However, information from the service provider is that an audit of 30+ sets costs at most $443. Chris Acheson, a sablefish fisher, said EM costs $670 a trip on average, varying with the size of the trip.

[1376] Mr. Davis agreed that 100% retention of rockfish (although not of undersized fish), as proposed by the plaintiffs, is a good thing. They can be kept for FSC use. However, if total allocation is approached, this will not prevent discards so that storage capacity can be used for more valuable species.

[1377] Michelle James questioned how the plaintiffs' proposal to reallocate unused quota of rockfish would work. As mentioned, the salmon fishery is required to refrain until September from catching 20% of their allocation as a precautionary measure in case the recreational fishery catches too many fish. In that fishery, the 20% holdback, once released, can be dealt with simply by another opening. In a quota fishery, it is much more complex.

[1378] In Michelle James' view, trip limits in this fishery create an incentive to discard. One hundred percent retention of FSC could address the problem if FSC is unlimited, but her concern is exceeding the TAC, which is what occurred in the past. The plaintiffs propose aggregate trip limits. Ms. James said there is nothing in the plaintiffs' plan to address species-specific limits, nor what happens to the whole fishery when a limit is reached. DFO's solution is electronic monitoring, IVQs, and individual accountability which all work together to sustain the fishery for all species. Each fisher relies on the transferability of quota to keep fishing.

[1379] It was suggested by Dr. Hall that DFO should simply let the plaintiffs try out their proposal and see what happened. Ms. James said DFO has management obligations which require them to consider the implications of just letting the plaintiffs try something to see what happens. Once again, the plaintiffs say their proposal is appropriate because their fishery is small. DFO says it is not small; significant allocations of over 30 species of groundfish are sought, totalling over 1.86 million lbs of fish, with expectations to increase it.

[1380] Ms. Farlinger commented that the plaintiffs' position that FSC can deal with bycatch is too simplistic. DFO has to understand where the fish come from and how much was caught, particularly with stocks of concern. Bycatch in groundfish will affect the directed fisheries, and good monitoring is key.

[1381] The plaintiffs say there is no conservation risk because their allocation would come from the existing TAC, but DFO says its concern is to stay within the TAC and that requires adequate monitoring. Just because an allocation is set does not mean it will be adhered to.

[1382] One additional practical concern is that DFO has many staff and an independent service provider devoted to groundfish management, and implementation of the plaintiffs' plan would all fall on one person, the T'aaq-wiihak Fisheries Coordinator, who also handles all other species.

[1383] The plaintiffs use the recreational fishery as a comparator but DFO points out that the plaintiffs would not expect to stay within the vessel limits imposed on the recreational fishery.

[1384] Canada makes the same point with respect to recreational fishing that its witnesses made throughout the trial: monitoring in the recreational fishery is poor, must be improved, and is not a model for anything. All DFO witnesses testified that monitoring in the recreational fishery is not reliable and should not be used by the plaintiffs as a benchmark of what DFO might consider to be adequate monitoring. However, all the witnesses also emphasized the difference between a recreational fishery and a commercial fishery and said the two are not comparable.

[1385] Canada says the only reasonable process is to subject the fishery to the Strategic Framework for Fishery Monitoring and Catch Reporting, assess the risk, set an appropriate monitoring standard, and develop methods to meet that standard with the plaintiffs. They have done this to the proposals, and based on their size, EM is required. Sue Farlinger acknowledged that for small fisheries in remote locations, flexibilities will likely be required. However, this groundfish proposal is not a small fishery.

[1386] Canada says that given the size of the proposed fishery and all the other above factors, if DFO is required to justify the use of EM in the groundfish fishery, it is a minimal impairment.

[1387] Before turning to the plaintiffs' argument, I will briefly touch on points related to sablefish and outside rockfish, both of which have unique concerns.

Sablefish

[1388] Canada says species that are not available in the CDA in the amounts proposed by the plaintiffs cannot be commensurate with their right. This includes sablefish.

[1389] Mr. Davis provided a table which showed that DFO's present sablefish allocation to the plaintiffs through PICFI is larger than that sought by the plaintiffs. He said his understanding was that the sablefish allocation from DFO is bigger than that sought by the plaintiffs because DFO includes access through PICFI and ATP, which the plaintiffs do not agree should be included. He was not aware the plaintiffs do not want any access at all through PICFI and ATP.

[1390] Mr. Workman, DFO's groundfish scientist, said sablefish migrate out as they grow, although they can be found inshore in inlets as adults. This can be seen from the "heat maps" produced for each species, although there was a difference of opinion in whether the maps were being read properly or not by Dr. Hall when he used them to support the sablefish allocation in the fish plan.

[1391] Dr. Morishima seemed to have difficulty agreeing that setting a legal size limit to allow the majority of sablefish to reach sexual maturity was a conservation measure. He said the objective was to prevent exploitation of fish before they reach an age to reproduce. Frankly the difference is difficult to see and he eventually admitted it might be two sides of the same coin.

SFA Argument

[1392] I have already set out the position of the intervenors on the larger issues that arise from the previous judgments. At this point I will recite only the specific arguments in respect of sablefish.

[1393] The SFA says a commercial sablefish fishery is not available in the CDA. Sablefish spawn on the Continental Shelf, many miles from the CDA, and move inshore as juveniles. They then return to the Continental Shelf. Sablefish are long-lived and are difficult to find. There is no discernible pattern to their migratory movements. The commercial harvest is found at depths of 500-1,000 meters on the Continental Shelf, and is generally caught by live traps. Only modern materials and stable boating platforms allow for a commercial harvest.

[1394] The SFA takes the position that there could have been no trade in sablefish prior to contact. Although the heat maps produced by DFO indicate the possibility of a very small number of mature sablefish in the CDA, the sablefish bycatch that was recorded in the halibut fishery in the CDA over several years is almost non-existent. The SFA says this shows that there are few, if any, mature sablefish available in the CDA. Thus if there were any pre-contact exploitation of sablefish, it would be limited to fish just at or below maturity, prior to their movement to deep water.

[1395] There is only one mention of “coal fish”, another name for sablefish, in Garson J.’s reasons, from one journal containing a long list of various marine produces caught by the inhabitants of Nootka Sound. There is no mention of trade or of abundance. The SFA argues that the most that can be said is that Captain Cook mentioned “now and then a small Cod”, which is more likely Pacific cod, but assuming it is sablefish, it must have been very limited. Thus, the SFA says the plaintiffs have not established a pre-contact practice, tradition, or custom in the trade of sablefish with is integral to their distinctive culture. There is also no evidence of continued commercial activity involving sablefish.

[1396] Thus, if continuity were still an issue going to inclusion of individual species in the “any species” right, the SFA says sablefish could not be included as continuity with a commercial sablefish fishery has not been established.

[1397] The SFA says the sablefish present in the CDA are almost exclusively immature fish which are protected for conservation reasons. The allocations sought by the plaintiffs exceed any amount due as a result of an aboriginal right to trade, even if such trade existed. Any right to fish such an allocation must be part of the public right to fish within the current management regime. The SFA objects to any allocation of sablefish being provided to the plaintiffs.

[1398] The SFA says conservation and the need for an integrated fishery are justification enough for rejecting an allocation of sablefish for the plaintiffs. For instance, the whole groundfish fishery could be shut down if the plaintiffs used up their bocaccio bycatch allocation and were not part of an integrated fishery so that additional allocation could be obtained.

Outside Rockfish

[1399] The plaintiffs have submitted proposals for all species of groundfish except inside rockfish, which are found in the Strait of Georgia. Some outside rockfish are found inshore on the sea bottom (benthic) and some are found in the water column (pelagic).

[1400] The plaintiffs have sought percentages of the TACs for all outside rockfish species.

[1401] The DFO witnesses testified that in the past, concern grew for rockfish because of significant levels of undocumented discarded bycatch and poor compliance. Fishers would keep valuable species in their hold and discard the rest (also known as high grading). Once brought to the surface, rockfish cannot survive, even if released. It is important to DFO to obtain a full picture of total mortalities in order to manage the fishery within the TAC.

[1402] Mr. Workman expressed concerns about local depletions of inshore rockfish. They are a long-lived, sedentary species and the information needed to properly assess the plaintiffs' proposal is not available.

[1403] Mr. Davies said not all the listed species, including rock fish to cover incidental bycatch, are available in the CDA, and if the TAC grows, the plaintiffs will want more. For instance, the plaintiffs seek 55,000 lbs of yellowtail rockfish; Mr. Davis had a concern about catching that amount in the CDA. There is no stock assessment information for the CDA.

[1404] Canada points out that the plaintiffs want their fishery to be an isolated one, so the ability to transfer quota from other fishers is not there. This could cause problems if they reach their quota allowance on one species, which could lead to depletions or to an exclusive fishery.

[1405] While the rockfish proposals are intended to be incidental harvest or bycatch only, Mr. Davis said the large allocations end up looking like a commercial fishery for that species: if you have the allocation, why not catch it all? With yellow eye, for instance, that raises a concern about local depletions and choke points, with risks to other users. This is also the case with Quillback, China, Copper and Tiger rockfish, which would affect the hook and line commercial fleets and result in foregone fishing opportunities if there were no quota available.

[1406] Mr. Davis testified that discussions regarding skate were ongoing through 2014 and 2015, both with the plaintiffs and the Commercial Industry Caucus, to develop a TAC and allocation/quota process.

[1407] Michelle James, in her report, commented on the allocations of various species, including bocaccio. DFO treats bocaccio as in the critical zone, subject to special provisions for stock rebuilding. According to her report at 135, by 2015-16, the entire coastwide hook and line mortality cap was expected to be 4,700 kg. The plaintiffs seek an allocation of 3,300 kg of bocaccio, which Ms. James says is a very high amount.

[1408] As with all of the groundfish allocations, the plaintiffs propose relinquishing their allocations if they are not needed and returning them to be used by other sectors, but Mr. Davis was concerned that that might be too late to be of use. He said DFO has a responsibility to consider broad implications in the long term. However, he said the plaintiffs' suggestion of reallocation required further thought.

Plaintiffs' Argument

[1409] The plaintiffs acknowledge that discussions did take place about groundfish, but they say that although they tried to get engagement with DFO, they were unsuccessful, so they put together their plan. They say that since Canada had no mandate there was never a genuine intention to consult or accommodate. The plaintiffs say it is not acceptable to simply say, as Canada does, that negotiations should continue. Canada must accept its responsibility to implement the plaintiffs' right; the current management approach is too rigid to accommodate the right appropriately.

[1410] The plaintiffs say their plan targets four main species: halibut, lingcod, sablefish, and dogfish, with bycatch allocations, aimed at providing an economically viable opportunity for a range of vessels with a sound management and monitoring plan to ensure that their rights are exercisable in a community-based format.

[1411] The plaintiffs take the position that their plan recognizes the integrated nature of the groundfish fishery, and contemplates 85 vessels with trip limits, notional allocations, underage/overage rules, with the timing to be determined by DFO or the International Pacific Halibut Commission. The plan is limited to the CDA and would use about half the maximum amount of gear allowed in the regular commercial fishery. All catch would be accounted for. Monitoring is similar to DFO's requirements, except for EM. They say the ITQ system, with EM, is a barrier to their participation in accordance with their right.

[1412] The plaintiffs say they will use the vessels they have, while they rebuild capacity, based on a predictable allocation. They will develop markets. They have allowed for sufficient allocations for incidental harvests, many of which will not be used and are precautionary only. The allocations are expected to grow.

[1413] The plaintiffs say they are cognizant of conservation, but since they plan to use the existing TAC, conservation is not a concern. The plaintiffs say Mr. Davis agreed with this, but that is perhaps a little simplistic: of course, staying within the TAC pays lip service to conservation, but all DFO witnesses were concerned that, without adequate monitoring, the TAC could easily be exceeded.

Size of the Groundfish Allocation Sought by Plaintiffs

[1414] Halibut: the plaintiffs say the allocation they seek is supported by their knowledge of that fishery and the recreational and commercial catch data. They say the licences supplied by DFO are diminished by shared use in PICFI, but in any event, they are of no value without quota. While the licences offered by DFO represent 4.5% of the total commercial halibut licences, the quota offered is only 1.79% of the total halibut quota.

[1415] Under Canada's offer, the plaintiffs would get only 1,250 lbs per vessel (about $8,250 gross, at Ms. James' figure of $6.60 per pound), whereas a commercial halibut fisher such as Mr. Amos from Hesquiaht caught about 15,000 lbs. in 2015, and Mr. Mose, a representative of the sablefish fishery places about 58,000 lbs of quota on his 55 foot vessel. The plaintiffs say the present allocations from DFO are not economically viable when costs of monitoring are factored in.

[1416] Dr. Morishima was asked if, in his opinion, there was a concern if plaintiffs set a percentage of catch for halibut based on the entire DFO management area, and then propose to catch it all in the CDA. He could only say that the overall exploitation rate set by the International Pacific Halibut Commission would remain the same so the stock would be protected. He said he had no information on stock abundance in the CDA so he could not be of assistance on this issue.

[1417] Lingcod: the average catch of lingcod per vessel in 2009 was 30,073 lbs. Under their proposal, the plaintiffs would get 4,539 lbs per vessel with 85 vessels, or about 15% of the regular commercial

fleet average. Some lingcod will be caught in the salmon fishery. As mentioned, the plaintiffs say the lingcod they seek is far less than the portion of the TAC that the trawl fishery leaves unharvested in the large management Areas 3C and 3D. The DFO witnesses did not disagree with this statement, although the trawl fishery does not generally fish in the CDA. The trawl fishery, according to Michelle James report, fishes in outside waters and in the Strait of Georgia.

[1418] Sablefish: the plaintiffs say they seek a very small allocation of sablefish, and DFO's heat maps demonstrate that they can catch some mature sablefish in their territory. Interpretation of the maps was a matter of some contention.

[1419] In their submission, the plaintiffs maintain that there are "substantial amounts" of mature sablefish in the CDA. The plaintiffs would not count the existing access because it came through PICFI and is not available as a community-based allocation. As mentioned, they say PICFI licences currently held by other aggregates in which one or more of their members have a share is not an appropriate accommodation of their right. The plaintiffs say they seek only two-thirds of the catch of one regular commercial vessel. Eighty-five vessels would catch 932 lbs each, grossing $3,255. The plaintiffs say the only real ability they have to harvest sablefish is as bycatch in the halibut fishery.

[1420] Dogfish: this species is readily available in the CDA, although it is low value.

[1421] Rockfish: the plaintiffs say the allocations they propose to cover bycatch are estimates only, and some shares are very low. There is little data to assist. They say Canada should accept these shares since they did not engage on this issue prior to trial, but alternatively, Canada should provide shares that will not hinder harvest of the four targeted species. Excess will be returned to DFO in September for reallocation.

[1422] The plaintiffs say they recognize this is a new fishery and if many of the bycatch species are not harvestable in the CDA, they will learn that within a year or two and those amounts can be reallocated.

[1423] The plaintiffs say the allocations they seek are not unduly large as this is a community-based fishery for 5,000 people. Eighty-five vessels harvesting the halibut allocation would give 2,650 lbs per vessel. The Maa-nulth get up to 2% of the commercial TAC, with less than half the population of the plaintiffs, who seek 3.2% coastwide.

[1424] The plaintiffs say their proposed shares are based on available information, knowledge of the fisheries, their historical familiarity with the stocks and Dr. Hall's knowledge. To obtain their estimated TAC, they used a portion of the coastwide TAC, which they set at 44%, for the aggregated commercial and recreational catch data for the WCVI. Dr. Hall acknowledged that there is no information from the CDA, but he said he subsequently obtained heat maps from DFO which he felt supported his figures.

[1425] Heat maps show commercial catch of each species on a grid, and are admittedly rough approximations with significant qualifications. DFO uses commercial catch data despite its limitations, which the plaintiffs say is a poor proxy for abundance. However, they are prepared to use the catch

data to support their position that a species is present in the CDA, for instance sablefish, or as a means to establish catch for coho.

[1426] The plaintiffs acknowledge that stock assessments of the CDA would be pointless, given the migratory nature of most of the groundfish species. However, the plaintiffs say Canada must dedicate part of the overall TAC to the plaintiffs' fishery, and must demonstrate that it has minimally impaired the exercise of the right.

[1427] The plaintiffs refer to DFO's transfer of 3% of the commercial halibut TAC to the recreational fishery in 2012. They say this demonstrates no concern for conservation, as those fishers have no monitoring requirements. They say the percentage they seek is about the same. The plaintiffs say Canada's own witnesses did not articulate a conservation concern with the requested allocations. Any impacts on other harvesters through the bycatch allocations are simply speculative, and they question Canada's division of opportunities for choke point bycatch. They point out that they are restricted to the CDA; therefore they have to compensate for that by higher bycatch allocations. Other fishers can fish anywhere. I have referred to this concept of "over-accommodation" earlier in these reasons.

[1428] On the issue of mature sablefish being available in the CDA, Dr. Hall said he talked to some fishermen who reported catching mature sablefish in inlets. Now that he has received the heat map, it provides comfort to him that a directed inshore sablefish fishery is feasible. He said much lingcod remains uncaught, and a large amount of low-value dogfish is needed to make the fishery viable.

[1429] When asked to comment on DFO's view that the proposed allocations were large, relative to population, he said he felt they were reasonable and appropriate, given the plaintiffs' presence in the area. Overall, he said, their request is very small.

Management

[1430] As noted by Garson J., the plaintiffs did not object to the quota system *per se*. They said they had not been given allocations under the existing system.

[1431] Regardless of their position before Garson J., the plaintiffs are now opposed to both the quota system and at-sea monitoring, although their approaches have changed over time. By the time of their 2014 plans, the plaintiff proposed to control individual fishing effort through notional, that is estimated, allocations and trip limits, all of which will remain within the overall communal allocation. It is not clear if trip limits would be enforced per individual fisher, or if an overcatch will be transferred to another fisher or claimed as FSC. Dr. Hall admitted accountability is still an unresolved issue.

[1432] In any event, the plaintiffs say the ITQ system is not appropriate for a community-based fishery. They say Canada must show why it cannot modify its current system.

[1433] This is an arguable position, given the broad declaration that the entire regime infringes the plaintiffs' rights, but as mentioned before, it raises the issue of the reversal of the burden of proof in respect of infringements. An appropriate and workable approach is to say Canada must justify specific

aspects of the management regime that are barriers to the exercise of the right. The plaintiffs have concentrated on the costs of EM and the necessity for quotas.

[1434] The plaintiffs' plans indicate an intention to use low-effort and average-effort vessels, but they say even their average vessel is only half the effort of the regular commercial fleet. Any trawling would be mid-water and can be done within the existing plan, although nothing of that nature has been developed yet.

[1435] The plaintiffs set levels of catch by species, with overall trip limits of 7,500 lbs for average vessels and 2,000 lbs for small vessels. Variations and additions to the plans were suggested to Michelle James in cross-examination. Her view was that species levels were more important than overall aggregates because of the temptation to high grade the valuable species.

[1436] The plaintiffs say their plan is not single-species, as is the regular commercial fishery, although their plans provide for specific allocations of individual species. Their plan has an aggregate vessel-based trip limit. Dr. Hall was of the view that discards at sea would be eliminated by spreading out the catch through trip limits and/or by putting the extra catch on to an FSC allocation. He said he felt there is little incentive to skirt the rules and suggested this be tested with a demonstration fishery.

[1437] The plaintiffs say notional allocations serve as targets, but can be accommodated in season for individual variables. Any overages on allocations would be forwarded to the next year.

[1438] The plaintiffs say Canada's concern that their plan is vague as to effort seems to show that DFO is not familiar with their fishery. They would use the same vessels as in the salmon fishery. Thus anyone familiar with them would know what is being used. Once they get an opportunity to fish, they will let DFO know who is going out with what vessel.

[1439] Mr. Mose was called as a witness by the SFA. The plaintiffs point to his description of how he runs his fishing business. He does not fish himself. He owns or is part-owner of three fishing vessels, and acquires licences and large amounts of quota for each. He develops business plans which are rationalized by way of numerous transactions each season -- that is, quota is traded back and forth dozens of times a year.

[1440] The plaintiffs do not want to be part of such a fishery. They say Canada cannot continue to insist on their traditional management system. Any access to date has been within this system, which imposes real limits on the plaintiffs who do not have the resources to engage in this quota trading. As well, Canada offered to include halibut in the salmon fishery as bycatch. Thus the quota system is not the be-all and end-all for groundfish management.

Monitoring

[1441] The plaintiffs say their general monitoring scheme is appropriate for groundfish. It provides individual accountability with flexibility to manage individual harvests to stay within the allocations. EM is not necessary. It is expensive, difficult, and unnecessary. They estimate the capital cost to be $7,500

per vessel, when DFO contributed to the cost of monitoring, which it no longer does. Thus it is closer to $10,000 plus installation. For 85 vessels, this is substantial. The annual program costs are $2,000 per vessel, along with other fees (logbooks, hails, dockside monitors, data service providers and validators).

[1442] On the issue of costs of monitoring, the plaintiffs say Ms. James estimated the average annual cost per vessel in the general commercial fishery at $12,000 for vessels landing an average of 17,000 lbs of halibut per trip. This includes the capital cost of purchasing and installing the equipment. Although there was no first hand evidence, Dr. Hall said he had discussed this with the service provider, and said the costs would be $47,000 per vessel. The plaintiffs say there is no evidence that a mosquito boat could support such equipment. I have noted that the plaintiffs themselves have not provided any evidence of net income from the salmon demonstration fishery, which might be a start.

[1443] The plaintiffs acknowledge that EM is highly effective, but they say it is a real impediment to their participation in the groundfish fishery. Proportionality of impact should govern (see *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44 at para. 87). Accommodation requires policy to give way to aboriginal interests, and reconciliation requires give and take on all sides. They say Canada is too rigid on the issue of EM.

[1444] The plaintiffs say monitoring requirements and insistence on ITQs is an infringement. Madam Justice Garson identified the costs of monitoring as a barrier. She then said the whole system is an infringement, so that must include the costs of monitoring, as well as ITQs. The plaintiffs say this proposal is not for an industrial fishery. The allocations are small. It is contained within the CDA. The recreational sector gets 15% of the halibut but those fishers have no monitoring requirements.

[1445] The plaintiffs point out that DFO's suggested demonstration fisheries for groundfish would not employ EM. Ms. Eros, Regional Catch Monitoring Coordinator, testified that she thought 100% independent validation is potentially too much for the plaintiffs' fishery. My notes indicate that her remark seems to have been made in the context of dual fishing in the Area G troll fishery, which has 20% independent validation and 80% done by T'aaq-wiihak monitors. This is salmon only, not groundfish retention for sale, although her comment may have been intended to be taken more generally. She testified that with training and discussion, DFO hoped to design a program that would encompass First Nation monitors.

[1446] In summary, the plaintiffs' say their plans are viable, provide for wide community participation, and achieve conservation objectives. They say Canada's present inability to make an offer for groundfish is not a basis to avoid a justification analysis.

Discussion

[1447] I have already stated that my interpretation of the entirety of Garson J.'s reasons is that the right she declared is a multi-species small-boat fishery with wide community participation, to be exercised within the CDA. Thus I am proceeding on the basis that the right-based fishery will be conducted

mainly with small, low-cost boats (I use the term because it is the term referred to by Garson J., and I also take it to mean low-effort). Although trollers are not precluded, they do not recharacterize the scale and scope of the right into something larger than it is.

[1448] The plaintiffs reiterate their position that they are entitled to more accommodation because they are restricted to the CDA, whereas the regular commercial fishery is not, rather than accepting that their right is limited to the CDA. Within the CDA, of course, the plaintiffs' priority must be respected. I have already noted that "over-accommodation" outside the CDA is not open to the court in this litigation, even though it is an approach that both the plaintiffs and DFO have considered within the Negotiations. The right-based fishery exists only in the CDA; the court is bound by this declaration, and it circumscribes the size of the plaintiffs' right-based fishery.

[1449] Several developments relating to groundfish took place during the trial.

[1450] One ongoing aspect of concern to the fishers in the regular commercial fishery is the prohibition against retaining halibut bycatch in the salmon troll fishery. Therefore in October 2015, DFO offered a directed lingcod demonstration fishery and the addition of halibut retention for sale in the salmon demonstration fishery.

[1451] As well, adjustments to the quota policy were made for the T'aaq-wiihak fishery to account for bycatch. In discussions in 2016, DFO proposed retention of lingcod, rockfish, and halibut bycatch in the salmon demonstration fishery. They also proposed retention of sablefish on halibut licences. My understanding is that these measures had not been implemented by the end of trial.

[1452] In 2016, the plaintiffs made several changes to their 2014 plans, including a statement that they applied to the CDA rather than the entire management area. They also agreed to provide logbooks and landing slips to DFO, and to implement hail provisions for vessels embarking on multi-day trips.

[1453] It is obvious that the groundfish plan is a work in progress, and the court is not aware of the present state of the discussions. Canada says discussions should continue, as some parts of the plaintiffs' plans may be truly reflective of what Canada sees as the artisanal nature of the right and the use of preferred means.

[1454] There have been extensive conversations about groundfish over the course of the Negotiations, focussed on the plaintiffs' various proposals. Allocations have been increased and various accommodations provided. However, agreement has not been reached and I have gone through the various stumbling blocks in the Negotiations.

[1455] For example, it is clear that demonstration fisheries would have been extremely useful, as the plaintiffs' proposals are for an independent fishery outside the regular integrated fishery. Whether any demonstration fisheries have taken place since the evidence concluded in this case is not before me, but Ottawa stymied attempts to implement one in 2013 and 2014.

[1456] While the plaintiffs legitimately blame DFO for not having been given a proper mandate to negotiate, part of the confusion for many of the species arose from the problem mentioned already: the plaintiffs' fish plans propose large shares of the overall WCVI TAC of various species to be fished in the entire WCVI management areas, and then agreed to be bound by the CDA, but left the shares the same. While the plaintiffs claim this misunderstanding was cleared up quickly, that is not quite accurate. Mr. Frank did refer to the nine miles later in the April 2014 meeting, but the whole power point and oral presentation was clearly opposed to the application of the CDA. It took several months in 2014, which was a crucial time period, for an informal letter from Dr. Hall purporting to address it, but the face of the plans did not change for two years.

[1457] As well, as I have mentioned, there were problems created by the earlier decisions that made it difficult for the parties to move forward.

[1458] Madam Justice Garson discussed the problems the plaintiffs have with limited-entry licensing for the halibut fishery, and she specifically mentioned that aspect of fisheries management as a *prima facie* infringement of the plaintiffs' right. She noted that DFO did not have programs in place to allocate quotas to First Nations.

Allocations

[1459] Garson J. said that the plaintiffs did not object to quotas *per se*; their complaint was they had not been provided with any allocations under that system. The plaintiffs have now been provided with substantial allocations for groundfish, but maintain in their present submissions that those allocations are not adequate.

[1460] The parties' respective positions differ in respect of the significance of groundfish allocations. As with other species, a basic divergence in approach for groundfish between the plaintiffs and Canada is that the plaintiffs assess the ability to conduct a viable fishery by the size of individual catches, which would get smaller the more boats are fishing, while DFO is concerned with the overall allocation and the effect on its ability to manage the resource without what DFO considers to be adequate monitoring.

[1461] Ms. James agreed a small-boat fishery would likely not be economical but she said that this is supposedly a multi-species fishery involving many small boats wishing to catch a TAC overall that is quite large. As I have mentioned before, there is no information about what is or is not economically viable before the court.

[1462] The plaintiffs say that, when comparing the T'aaq-wiihak to the commercial fishery, the focus of the right-based fishery is wide community participation and small, low-cost boats, as opposed to the economic return of a commercial fishery. They support their position that their fishery is not an industrial size by pointing out that they seek only half of the number of hooks used by a regular commercial vessel.

[1463] The plaintiffs describe their groundfish fishery as "low impact." For example, in a letter dated March 1, 2012, the plaintiffs stated that they proposed reasonable alternatives to EM "so that a low

risk, low impact T’aaq-wiihak groundfishery can be well-monitored and economically viable.” However, it is difficult to characterize the present proposals as “low impact”.

[1464] Again, the proper analysis does not rest on whether Canada is justified in refusing to implement the plaintiffs’ proposal for groundfish. That aside, I am of the view that the plaintiffs’ proposal is not a reasonable one. The shares sought are large percentages of the WCVI estimated TACs. In my view, the plaintiffs’ proposed shares are not based on anything concrete. I also accept Michelle James’ calculations that the amounts sought of halibut, lingcod, and dogfish are several times the amounts that can be extrapolated into the CDA from the data available. These proposals are not compatible with the description “low impact”, and are based on larger areas than the CDA.

[1465] For instance, the plaintiffs’ proposal for each species is not based on the CDA, but on the entirety of Area 3C/3D. In respect of lingcod, Neil Davis questioned whether such a large allocation is available in the CDA. The plaintiffs say the trawl fishery leaves unfished an amount of lingcod larger than the amount they seek. How this relates to the CDA is not clear. According to Michelle James, the trawl fishery trawls the ocean bottom further offshore for large quantities of low-value fish. It is prohibited from retaining halibut or salmon. It is not comparable to the plaintiffs’ multi-species plan or methods of fishing.

[1466] Scarcity of information on abundance in the CDA is reflected in both parties’ reliance on heat maps, which are created from commercial data. Both Canada and the plaintiffs referred to the heat maps when advancing various propositions. However, both parties acknowledge the problem with using commercial catch data as an indicator of abundance. A commercial fisher might avoid a certain area for reasons other than lack of fish (for instance a wish to avoid particular bycatch), and any grid with fewer than three commercial vessels reporting catch is excluded for privacy reasons. Yet commercial catch data is often the only data available.

[1467] Both sides are hamstrung by the lack of information that would allow management of a multi species small-boat fishery which includes groundfish, exercised within the small CDA. However, I accept the evidence from the DFO scientists that a number of species, particularly various rockfish are not available in the CDA, especially in the quantities sought by the plaintiffs.

[1468] There is little evidence, if any, to assist in assessing priority with respect to ancestral trade in groundfish, but I accept that plaintiffs’ connection to halibut is longstanding and substantial.

[1469] It is obvious that the plaintiffs could not obtain quota if it were based on vessel length and catch history. The system of limited-entry licencing attached to groundfish quotas has not been justified. In itself, it remains an infringement to the plaintiffs’ right.

[1470] DFO has ameliorated this to a large extent with the quotas already provided, but the exemption for this fishery must be formalized.

[1471] DFO has taken some steps to accommodate the right since the 2009 decision. Retention of halibut bycatch for sale in the salmon fishery, which is not allowed in the regular Area G fishery, is a useful step and an important accommodation to the multi-species right.

[1472] PICFI has allowed DFO to allocate significant licences and quota to the plaintiffs at no cost. The increase has been several hundreds of percentages, as set out in the recitation of Canada's position.

[1473] The quota has been put onto a single holding licence so the plaintiffs can reallocate it as they choose, and DFO has accommodated multiple landings with small volumes.

[1474] The plaintiffs say they have been provided with licences but inadequate quota. However, the figures provided by DFO do not support this, given the scope of the right. In my view, the mitigation approach has allowed for appropriate allocations of halibut for this fishery. However, the access must be predictable and long term. Significant and appropriate allocations for lingcod and dogfish have also been provided. Those must also be predictable and long term. I will deal with sablefish and rockfish separately.

[1475] The plaintiffs have also raised the issue of the priority of their fishery over the recreational fishery in respect of halibut. They refer to the 3% reallocation of halibut in 2012 from the commercial fishery to the recreational fishery and say if their share comes from the commercial TAC, it will be diminished by any future arbitrary transfer.

[1476] Ms. Reid testified that the regional office recommended against this transfer to the recreational sector, but Ottawa rejected their recommendation. Mr. Davis, DFO's regional groundfish manager, testified that his understanding was that this 2012 transfer was done in the name of sustainability and economic prosperity. Other than that, there was no specific explanation given for the transfer.

[1477] I agree with Canada that, at present, the potential for another reallocation of halibut from the commercial sector to the recreational sector, such as occurred in 2012 is speculative. However, for the reasons set out in the discussion of the Salmon Allocation Policy, it is clear that the plaintiffs' fishery has priority over the recreational fishery. Any other reasons DFO might put forward to justify such a transfer would have to be considered in the context of a specific factual situation.

Management and Monitoring

[1478] The next consideration is whether Canada is justified in applying the ITQ system of management to this fishery, together with EM.

[1479] DFO has extensive experience in managing these species. The plaintiffs' knowledge of the groundfish fishery is of course much less than DFO's as they have not been allowed full participation in it for years, and are not familiar with the ITQ system.

[1480] Michelle James described the basic aspects of the groundfish management scheme: electronic monitoring, IVQs, transferability of quota, and individual accountability.

[1481] Despite their rejection of the present system, the plaintiffs do not appear to be opposed to the concept of transferable quotas, although they call them “notional allocations”. The plaintiffs say a vessel-based trip limit will address incentives to discard, but it is not clear how, as capacity will always be limited, giving rise to the temptation to keep space for more valuable species to sell.

[1482] The plaintiffs’ alternative for management is not fully considered and is not complete. The concept of estimated notional allocations assigned to individual fishers which might be changed in season is similar to ITQs, but as Dr. Hall acknowledged, accountability is still unresolved.

[1483] The plaintiffs’ monitoring plan and accountability of individual fishers is also not clear. Nor is their plan well thought out as it relates to trip aggregates without accounting for species. I agree with DFO that it is a “trust us and let’s see what happens” approach, and is not appropriate.

[1484] In my view, the transferability of quota in an integrated fishery is not in itself an infringement of the plaintiffs’ right; it can only be helpful to each individual fisher. If the plaintiffs remain separate from the integrated groundfish fishery, they may find their fishing halted because they have reached a bycatch quota limit and have nowhere to turn to get extra quota, and vice versa for nearby commercial fishers.

[1485] I also accept that individual accountability is important in this fishery; it is a justifiable approach because of the number of vulnerable species that are susceptible to bycatch.

[1486] Because of the nature of this fishery, I accept that integrated management is justified in order to protect the resource for all participants. I conclude that Canada is justified in maintaining its management system based on ITQs for groundfish, and in demanding individual accountability for catch for each species.

[1487] However, the costs of a quota transfer from the regular commercial fishery could, in certain circumstances, act as a barrier to the right-based fishery. This problem can commonly arise with certain species of rockfish, although it can occur with the targeted species as well. Since DFO is providing access to the plaintiffs through PICFI, however, that appears to be something DFO can deal with if a problem arises. I will set out the responsibility of DFO in respect of rockfish shortly, as depletion of rockfish quota has the potential to affect the entire fishery.

[1488] I have concluded earlier in these reasons that this is a multi-species fishery conducted from small, low-cost boats within the CDA. Thus, there are three points on which I find that the application of the present regime to the T’aaq-wiihak groundfish fishery is a continued unjustified infringement.

[1489] The first, as is the case with the salmon fishery, is the requirement of one licence per vessel. Licence and quota splitting among the small-boat fleet must be permitted.

[1490] The second point concerns bycatch retention. A general prohibition against the retention of bycatch for sale is not justified for the plaintiffs’ right-based fishery, but if there are species in dispute, this will have to be resolved on specific facts. At the conclusion of trial, offers respecting retention of

bycatch for sale were outstanding. The requirement for individual quotas for each species of bycatch is not justified for the plaintiffs' right-based fishery. Amalgamated quota, already provided by DFO, is appropriate for this multi-species small boat fishery.

[1491] However, monitoring of individual species is justified in the interests of conservation. How this relates to amalgamated quota and how it can be properly monitored must be the subject of further assessment and consultation.

[1492] Third, Canada is not justified in imposing the cost of licences and quota on the small-boat fishery.

[1493] The above aspects of the regular regime are thus not applicable to the plaintiffs when they are fishing within the CDA, even if the source of the licence is through PICFI. I do not have information on whether or how other PICFI rules might still unduly constrain a particular plaintiff which does not control their PICFI aggregate from exercising their right to fish and sell fish. This must be dealt with on specific facts.

[1494] This leaves the issue of the requirement for EM. I have concluded that this fishery is a small-scale fishery to be conducted in small, low-cost boats, with wide community participation. There is no evidence of how the cost of EM will impede the T'aaq-wiihak fishery, given this scope and scale. The plaintiffs simply assume it will, and the costs of EM are generally acknowledged by DFO witnesses to be a barrier, especially for small boats.

[1495] Adequate monitoring is required to ensure the TAC is not exceeded, and that individual species are adequately accounted for, but given the scale of the fishery, EM may not be required.

[1496] Overall, there is a serious deficit in information before the court in respect of the monitoring of a groundfish fishery within a multi-species fishery, including the cost of such monitoring. The plaintiffs have not had experience in monitoring anything but the salmon demonstration fishery. A groundfish demonstration fishery would have been of help, but was not approved by Ottawa until a time that was too late for trial. At present, DFO has not conducted a risk assessment on the T'aaq-wiihak fishery as it pertains to groundfish. It appeared from the evidence of Dr. Hall and Ms. Murdoch that the parties were making progress on monitoring discussions, but the results of those discussions are not before the court.

[1497] This is a unique multi-species fishery, and DFO has already agreed that dual fishing and bycatch retention can take place in the T'aaq-wiihak salmon fishery, subject to appropriate monitoring. I assume that the small boats will be fishing for a variety of species and for dual purposes on one trip. To try to anticipate adequate monitoring requirements at this stage is pure speculation.

[1498] As I stated above in the context of the salmon fishery, DFO is justified in subjecting this multi-species fishery to the Strategic Framework for Catch Reporting and Monitoring in order to determine

an appropriate standard. Consultation with the plaintiffs is required, and should include discussions on how to integrate the T'aaq-wiihak coordinators into the appropriate monitoring regime.

[1499] If this process results in DFO deciding that EM is required, information is needed to determine if cost or cost sharing causes a barrier to the exercise of the right. As mentioned during the discussion of the Negotiations, DFO has already funded the initial costs of EM but there was not much uptake. If a demonstration fishery is necessary, DFO is not justified in imposing the cost of EM, if any, on the small boats while that fishery is being conducted.

[1500] For the reasons I have already articulated in connection with the salmon fishery, recreational priority over halibut is not justifiable. However, whether that actually results in an infringement of the plaintiffs' right-based fishery would have to be determined on specific facts.

[1501] Finally, I agree that Canada is justified in placing research and assessment allocations ahead of the plaintiffs' fishery because these measures protect the fishery for all fishers.

Rockfish

[1502] I will deal with rockfish separately, as they are a bycatch species, rather than a targeted species.

[1503] DFO is not required to justify not accepting the plaintiffs' proposed allocations for rockfish. However, if they were, their rejection of those allocations would be justified on the basis of conservation and on general economic and regional fairness. The entire groundfish fishery relies on rockfish quota to keep fishing. The plaintiffs' largely proposed allocations could interfere with the general fishery unnecessarily, with no advantage to the plaintiffs.

[1504] DFO is best placed to manage rockfish bycatch allocations and is justified in taking a precautionary approach to those species.

[1505] However, DFO would not be justified in setting TACs for rockfish that prevent the plaintiffs from fishing their targeted species. DFO should set TACs for rockfish once the three target groundfish species (halibut, lingcod, dogfish) allocations are determined. Allocations of rockfish should be sufficient to allow the plaintiffs' small-boat multi-species fishery to proceed. Thus there will be minimal impairment of the plaintiffs' right.

Sablefish

[1506] I will also deal with sablefish separately, given the intervention of the SFA.

[1507] The evidence supports the proposition that there are a few mature sablefish in the CDA in some of the inlets, but there is no support for an amount of fish that would sustain a commercial fishery. To invite the plaintiffs to set up any kind of commercial sablefish fishery in the CDA would be to threaten the juvenile sablefish that stay inshore, and thus threaten the conservation and sustainability of the

sablefish fishery. The plaintiffs have been given PICFI access to sablefish, and can fish that offshore, out of the CDA, but not as part of the right.

[1508] There is no evidence of preferred means in the sablefish fishery to consider, nor is there undue hardship or unreasonableness in DFO's more than generous approach to a fishery that exists commercially beyond the CDA.

[1509] As well, there is minimal impairment of the right in respect of sablefish because any trade the plaintiffs might have had for this species ancestrally (for which there is no evidence), would be very small, if it existed at all. The present commercial fishery for sablefish exists outside the CDA, and has been developed by the regular commercial fishery, the SFA. The plaintiffs' priority is therefore weak.

[1510] In my view, there is no infringement with respect to a commercial sablefish fishery to justify. However, if am wrong on that, given the "any species" right and the presence of some sablefish in the CDA, I conclude that any infringement is justified because conservation of that fishery is engaged if a commercial fishery were allowed to occur in the CDA.

[1511] Even if DFO were required to justify not providing a commercial sablefish fishery to the plaintiffs in the CDA, the existence of such a fishery could threaten juvenile sablefish stock. Thus DFO is justified in not providing a commercial sablefish fishery to the plaintiffs in the CDA.

[1512] DFO has provided the plaintiffs with PICFI licences for sablefish which can be fished in the regular commercial fishery and need not justify not providing any further allocation of sablefish.

Result

[1513] My conclusions on this fishery are set out in the discussion above, in particular at paras. 1484 to 1501. In addition, I have concluded:

(1) The use of PICFI for allocations of halibut, lingcod and dogfish is justified, but the allocations must be predictable and long term.

(2) There is no infringement of a right to a commercial sablefish fishery; if I am wrong on that, any infringement is justified on the basis of conservation;

(3) DFO is justified in setting adequate allocations of rockfish to enable the T'aaq-wiihak groundfish fishery for halibut, lingcod, and dogfish to proceed;

(4) Canada is not justified in setting an allocation for halibut that gives priority to the recreational fishery, but the practical effect of this has to be examined in a specific context, if one arises.

(5) DFO is justified in subjecting this fishery to the Strategic Framework for Monitoring and Catch Reporting in consultation with the plaintiffs.

CRAB

[1514] I will set out some basic facts on the crab fishery, obtained from the IFMP, Ms. James' report, and various witnesses from DFO.

[1515] Unlike salmon, crabs are resident and not migratory. The commercial crab fishery takes place in the Ahousaht, Tla-o-qui-aht, and Hesquiaht portions of the CDA, unlike the fishery for prawn, which is limited in those areas. Commercial harvest of crab is minimal in the Ehattesaht and Mowachaht/Muchalaht territories. According to both DFO witnesses and Dr. Hall, sea otters have decimated the crab population in some areas, for instance, the Hesquiaht territory.

[1516] On the WCVI, Dungeness crab is the species that is commercially harvested. Dungeness crab are found in shallow water to depths of 230 meters. Retention of female crabs and soft shell crabs is prohibited.

[1517] This is a trap fishery. Its management is very different from that for fin fish, such as salmon and groundfish. Annual natural fluctuations are difficult to predict so there is no TAC set prior to the season. Instead, detailed effort controls are applied. DFO limits the number of vessels and traps through area licencing, gear specifications, and restrictions on harvest methods (trap soak time, size minimums, non-retention of female and soft shell crabs). All commercial crab vessels are subject to EM, in order to provide vessel position and activity, including trap-hauling activity using a radio chip on each trap. The regulations do not allow licence splitting.

[1518] Juanita Rogers, South Coast Coordinator of Invertebrates and Shellfish, testified that crab fishing vessels are all sizes, with an average length of 30 feet (about 9 meters). She testified that the commercial gear is large heavy weighted steel traps, requiring a hydraulic hauler. Traps can be shallow or down to 150 feet, but most are set at 30-80 feet. Crab deteriorates very quickly once harvested and must be kept alive for sale, according to the Fish Inspection Regulations of B.C.

[1519] The commercial licence holders select one of seven areas. If they select Area E (WCVI), they further select a sub-area: Quatsino, Sooke, or Tofino. As of 2014, Area E had 36 licences, distributed as follow: Quatsino -- 2; Tofino – 25; Sooke -- 10.

[1520] Area 25, near shore, and the corresponding outer areas (124 and 125) overlap the CDA. Area 24, the Tofino Option of Area E, near shore, is of most relevance to the plaintiffs. There are no other First Nations in Area 24.

[1521] There is no crab fishery beyond 9 miles, so the problems arising in other fisheries from the declaration of the CDA are not present here.

[1522] Area 24 has a total trap limit of 1,600 traps, or 67 traps per vessel. Each licence holder has a limit of 350 traps, and can set the remainder outside Area 24. As of 2016, more licence holders selected Area 24, so the maximum trap limit has now been reduced to 50.

[1523] The number of traps in other areas is not so limited.

[1524] There is no overall trap limit for the recreational crab fishery. Effort is controlled by limiting harvesters to the use of no more than two pieces of gear (dip net, ring net, trap, handpicking while diving, or handpicking), with a daily limit of six per day.

[1525] There are 221 limited entry commercial crab licences in British Columbia, 32 of which are communal commercial licences provided to First Nations. Those are exempt from the $590 annual licence fee. A crab licence in 2009, according to Garson J.'s reasons (para. 534) cost $480,000.

[1526] Ahousaht holds two commercial crab licences. The Mowachaht/Muchalaht have a one-sixth interest in a licence held by the Nuu-chah-nulth Seafood Development Corporation. These crab licences, all obtained through PICFI, have a market value of over $1.3 million ($620,000 average licence value as of 2014). None of the other nations has access to a crab licence. Ahousaht has elected to fish one of their licences in Area E, that is the WCVI. The other two licences are fished on the east coast of Vancouver Island.

[1527] There are no crab licences currently available in the ATP or PICFI inventory, although at the time of trial, DFO was actively attempting to obtain another one for the plaintiffs. Ms. Farlinger testified that provision of unmitigated access to crab would require Ministerial approval.

[1528] Crab is also caught for FSC. According to the IFMP for crab, catch reporting for First Nations has been limited.

The Plaintiffs' Crab Plan, 2014

[1529] The plaintiffs' proposal is for 50% of the traps in the CDA, that is, half the trap limits from each of Areas 24, 25, 124 and 125 (these management areas which are used for other purposes do not correspond directly with the three crab management subareas of Area E). This would total 2,200 traps. Sixty-five vessels are interested at present; the number is expected to grow. With 65 vessels, that would be 34 traps per vessel, or 1/10 the trap limit of a regular commercial vessel.

[1530] The plaintiffs would set an overall trap limit, and would retain certain incidentally caught species for sale of FSC, and would fish without EM. They would determine the level of participation – that is, the presently proposed number of 65 vessels with an unknown number of traps.

[1531] The plaintiffs propose that the crab fishery would then operate within the regular commercial rules and times, with all the limits applied by DFO. They say their system is even more restrictive as to the use of hanging bait. The plaintiffs say they would cooperate with DFO in respect of biological sampling.

[1532] While the plaintiffs resist electronic monitoring in the crab fishery (and generally) due to expense, they propose 100% dockside monitoring, which is not required in the commercial fishery. Monitoring would be done by the T'aaq-wiihak staff.

Canada's Position

[1533] In Canada's submission, continuity of participation between ancestral practices and the modern commercial crab fishery is impossible to determine. There was evidence before Garson J. that crab were harvested by the plaintiffs but there was no evidence in respect of trade in crab, nor how they were harvested.

[1534] No specific infringements are identified by the plaintiffs, nor were any found by Garson J. Canada thus has tried to anticipate what might be seen as infringements. Canada's approach is to explain why it has not implemented the plaintiffs' proposals.

[1535] DFO has evaluated the plaintiffs' 2014 crab plan but has not presented the plaintiffs with an offer on crab, much to the plaintiffs' dismay. Local DFO managers had proposed a crab demonstration fishery in 2014 but it was not approved by Ottawa.

[1536] The DFO Evaluation of the plaintiffs' crab plan includes the following points:

- the commercial crab fishery fishes in rockfish conservation areas. If the plaintiffs intended to retain bycatch rockfish as part of dual fishing for FSC, conservation becomes a concern;
- discussion is needed to ensure the protection of sensitive benthic [sea bottom] habitats;
- the plaintiffs propose to provide limited fishing location information, with optional GPS only; there is a concern about control of effort;
- the plaintiffs intend to retain Graceful Crab, which is prohibited coastwide, which could raise conservation concerns;
- with no guidance from the court as to allocations, DFO has identified abundance, relative population, commercial access relative to other First Nation and non-First Nation groups as relevant factors;
- the proposed plaintiffs' access would have a significant impact on other access, and would significantly impact the management of the recreational fishery;
- a risk assessment is needed to determine whether the plaintiffs' proposal for monitoring is satisfactory;
- a detailed compliance and enforcement plan is required; and
- further financial information required.

[1537] The main concerns are the risk to the fishery through the lack of fishing location information (that is, no electronic monitoring), and impact on the commercial and recreational fisheries.

[1538] Canada and the plaintiffs disagree on amount of access, fishery monitoring and catch reporting, the inability to split traps under a single licence, the prohibition against retaining bycatch for sale, and dual fishing. The plaintiffs also propose a change to the management of the commercial and recreational fisheries so as to provide them with a defined share of access.

[1539] It is Canada's position that discussions on crab are ongoing and should be allowed to continue. Canada admits it had no mandate to implement a crab demonstration fishery until 2015, but says the

plaintiffs' evolving proposals and the lack of substantive discussion also contributed to the lack of progress in the crab fishery. Crab was not the focus of either party. Ms. Farlinger testified that DFO wishes to hold a demonstration fishery for crab, based on shares of traps, not a share of catch as the plaintiffs' propose.

[1540] Ms. Rogers, DFO's South Coast Shellfish Coordinator, acknowledged having seen a crab plan from the plaintiffs as early as 2012 but said it was one page with little detail, as opposed to the more detailed prawn plans. She said from her perspective, the focus was on other species after that. She was told gooseneck barnacles were a priority. She acknowledged in cross-examination that there were letters mentioning a crab fishery after that that had not been referred to her.

[1541] Canada says the plaintiffs' crab proposals have evolved and changed. The plaintiffs began with a trap-splitting proposal in 2010. In 2013, DFO considered splitting a licence over several vessels in order to ensure wide community participation. However, the plaintiffs' most recent plan shifted to a defined share and priority access, requiring modification of the recreational and commercial fisheries to accommodate the T'aaq-wiihak fishery. The plaintiffs now seek a complete change in DFO's management of the recreational fishery through the imposition of overall trap limits, and propose to use a different monitoring and catch reporting system that does not provide needed information to DFO. Vessel size and number of traps per vessel are not provided.

[1542] Canada says the share sought by the plaintiffs is in an area that has 50-60% of the harvest in Area E. The 50% share proposed by the plaintiffs would give them access to more than 50% of the regular commercial effort in the area.

[1543] Canada says the plaintiffs' plan would mean a substantial change to the recreational fishery, and would have a significant impact on the commercial fishery in both the plaintiffs' area and other areas as the commercial fishers would move elsewhere.

[1544] The plaintiffs intend to retain Dungeness crab and other bycatch for sale and FSC, which is prohibited in the regular fishery. DFO is concerned about the species the plaintiffs propose to retain for sale or FSC, not only for conservation reasons but for fairness among other commercial harvesters. It was suggested to Ms. James on cross-examination that concerns could be alleviated if DFO set an allocation for retention. She agreed, but said that was not in the proposal.

[1545] In her report at 200, Ms. James said it is difficult to evaluate the proposal without knowing what effort will be applied to the 50% of traps sought, and how the combined commercial and recreational trap limits are managed. Taking 2013 catch, and assuming the plaintiffs catch half the crab, the total value of 50% of the traps would be $1,126,596, plus the 2.166 licences already held, for a total of $1,480,122.

[1546] The landed value of crab in 2013 in just Areas 24 and 124 was $2.3 million. Canada says this is well beyond the scale of the plaintiffs' right, which Garson J. held is not for the purpose of accumulating wealth.

[1547] Canada says it is too early to deal with justification of any plan for crab since consultation and negotiation are required, but Canada alternatively argues that DFO's current regime, including its monitoring and catch reporting requirements, is justified on the basis of conservation, enforcement, and economic and regional fairness.

[1548] Canada says DFO manages the commercial crab by trap fishery through size limits, sex restrictions (non-retention of females), area closures, gear restrictions, logbooks, fish slips and electronic monitoring in all areas.

[1549] Mr. Ryall, Director of Resource Management for Shellfish and Pelagic Fish (those species located in the water column, that is neither on the bottom nor near shore), testified that the plaintiffs' crab plan would be a considerable change for DFO. Trap limit by area is significantly different than the present system of individual trap and catch limit. As well, the present Tofino management area -- the area with the most crab catch in Areas 24/124 and 25/125 -- is not aligned with the CDA.

[1550] Dennis Rutherford, shellfish science for DFO, said his concern with the plaintiffs' plan was whether there would be an increase in the number of traps: there is already enough gear to catch all available male crabs, so his concern would be mortality of female, softshell, and molts (crabs shedding their shell as they grow).

[1551] Mr. Ryall acknowledged that he could not say the plaintiffs' plan would increase overall effort on the crab fishery. Although the plaintiffs' plan would set 1,800 traps in Area 24, which is 200 more than the current 1,600, the recreational traps might increase the current 1,600, as they are not tracked. Thus he could not be sure the plaintiffs' plan would increase overall effort.

[1552] In Ms. James' opinion at 196-198, while earlier proposals would have greatly increased effort, later proposals limited the number of traps, but allocated 75% of them to the plaintiffs. By 2014, the allocation sought was 50%, in conjunction with the plaintiffs' proposed change to the management structure of Area E by expanding the Tofino option, which would result in a reduction of the current trap limit for the commercial fishery from 67 to 38 traps per vessel.

[1553] Turning to the issue of appropriate monitoring, Canada says EM is justified, although a demonstration fishery would assist in determining an appropriate level of monitoring. Dockside monitoring is not sufficient, according to the DFO managers. Even Dr. Morishima wondered why the plaintiffs were not proposing to use EM.

[1554] DFO says EM is critical to conservation of the crab fishery. It allows DFO to obtain timely and reliable information on where fishing is occurring and where the traps are being used. It also prevents ghost fishing -- lost traps that continue to catch crabs which will die. The monitoring equipment costs $3,500-4,000, and thereafter, $3,000-$3,500 per year for reporting. An at-sea observer is $250-400 per day.

[1555] DFO emphasizes that it must know how may traps per vessel are fishing, which is not included in the plaintiffs' plan. As well, the plaintiffs say additional vessels may be added.

[1556] Mr. Ryall testified that, although 100% dockside monitoring is more stringent than the commercial fishery, it does not provide information on where the fishing is occurring, and where the traps are being set and hauled. He agreed that EM does not record retention and discards. He also said further discussion is needed on vessel type, gear type, bio-sampling and enforcement.

[1557] Canada says EM for crab is not a problem on small boats. The evidence suggesting cost is an issue for this lucrative fishery is scant. A precautionary approach necessitates retaining the present system until a demonstration fishery is conducted.

[1558] Ms. James agreed that the plaintiffs' proposal for 100% dockside monitoring and designated landing sites are measures that are not required in the general commercial fishery. However, the plaintiffs' plan to retain all bycatch for sale, and to fish with an unlimited number of vessels with no onboard monitoring, and their refusal to pay for biological sampling puts DFO's objectives of conservations, sustainability, effective management and enforcement, accountability and economic viability at risk, and provides an economic benefit to the plaintiffs not available to the rest of the fishery.

[1559] Ms. Rogers, South Coast Coordinator of Invertebrates and Shellfish, testified that EM in the crab fishery is very important to DFO for conservation reasons. It shows where traps are, and how often they are set and hauled. She said that crab is subject to a well-established commercial fishery with large participation, and lots of FSC fishing, as well as recreational fishing. She said that a small vessel can fish more often and harder, haul more often, and put local populations at risk. As well there is a risk with a small boat of damage to the crabs because of so much handling. She agreed that a haul limit was worth discussing.

[1560] She said management measures have evolved between DFO and the commercial fishery, putting sustainability first. Independent validation is important, and if equivalent information could be obtained, DFO would consider it. She acknowledged the cost concern associated with EM, particularly if a boat wanted to fish both crab and prawn, which would require different monitoring equipment. However, with the bulk of the fleet required to have EM, she anticipates significant complaints if a small part of the fleet is allowed to harvest without it.

[1561] Ms. Rogers testified that the plaintiffs, through Mr. Jim Lane (who participated on behalf of the plaintiffs in the Joint Working Group), suggested that DFO simply allow them to go out and try it their way, that is with trap tags, trap limits, and dockside reporting, but not EM; they would show that it works or would adjust as needed. She said DFO is very concerned with that approach, not just for management reasons but especially for conservation.

[1562] Ms. Rogers explained that the gooseneck barnacle fishery was developed by the plaintiffs and DFO cooperatively. While the gooseneck barnacle fishery has worked, it is small-scale and experimental with a low risk to the resource. The crab fishery is well established with large participation

from all sectors. Management measures have evolved collaboratively between DFO and the commercial crab fishery, to put sustainability first.

[1563] According to the IFMP, the crab fishery is currently managed under a precautionary regime as DFO strives to understand its biology better. Regular biological sampling is paid for by the industry. Under their plan, the plaintiffs would not pay for any biological sampling. Canada says biological sampling needs to be discussed further with the plaintiffs, but in any event, it is needed for conservation.

[1564] Canada says part of regional and economic fairness is providing an allocation that is commensurate with the abundance of the resource in the CDA, as well as with the right.

[1565] As mentioned, there have not been any real negotiations or discussions regarding crab because emphasis has been on other species. DFO says its offer to use the plaintiffs' existing communal commercial access in a demonstration fishery is reasonable and justified.

Plaintiffs' Argument

[1566] Despite DFO's concerns, the plaintiffs do not see their crab plan as very different from current DFO management. They say they adopt the general management plan of DFO for crab, with modifications to allow them a secure, community-based opportunity to exercise their right to allow for more participants, a communal share, and minimization of costs.

[1567] The plaintiffs would adopt DFO's operational management rules including trap size and specifications, size limits, hard shell male-only harvest, soak time limits and haul limits, with prohibition of hanging bait in all areas. Retention of non-target catch could be sold only if the fisher holds an allocation for that species. Otherwise it would be retained for FSC. Undersize, soft-shell or female crabs would not be retained. Rockfish die when brought up from depth so rockfish bycatch should be retained in any event.

[1568] The plaintiffs question the need for EM. They say the cost is too high, given that their vessels will fish far fewer traps. They say Canada has not established that EM better serves the fishery. Their system is actually better.

[1569] The plaintiffs say EM was introduced in northern British Columbia because of theft of traps and poor catch reporting. A version was introduced in southern British Columbia, mainly to do with catch reporting. For trap location and haul frequency information, the plaintiffs would have their tags, and they are subject to the single-haul requirement that applies to commercial harvesters.

[1570] The plaintiffs point out that EM in the crab fishery does not assist in recording discards. They say dockside monitoring is preferable for this issue. They say the harvesters would be allotted a certain number of tags for specific areas and would provide the location of each trap to the T'aaq-wiihak Fisheries Coordinator, and on to DFO. Dockside monitoring would be 100% and would require logbooks and sales slips. The regular commercial fishery has no dockside monitoring.

[1571] The plaintiffs say the 50% share is for 5,000 members. With 65 vessels, it gives them 34 traps per vessel, or one tenth the effort of a regular commercial harvester. Thus this is not industrial. Assuming 50% of $2.3 million divided by 65 harvesters, the average landed value before costs is $17,692. If one third of that is costs, the result is $11,794.88. This is very modest.

[1572] The plaintiffs emphasize here, as in many other fisheries, the lack of control over the recreational fishery. They say that, while setting a trap limit on the recreational fishery may present challenges, DFO has not established that it is unworkable.

[1573] The plaintiffs say Canada cannot justify refusing this proposal on the basis of significant displacement of existing commercial effort. This reverses the priority that must be accorded to the right-based fishery. As well, Canada already issues trap limits in Area 24, the most productive crab area, so an imposition of trap limits would not displace anyone. Area 25 and 125 have no trap limits so there is the potential to disrupt the regular commercial fleet, but there is limited effort in that area, so the imposition of an area trap limit would not result in any displacement. There is no evidence to assist with respect to Area 124.

[1574] Although commercial harvesters would have access to fewer traps in Area 24, the plaintiffs say this is their area and they have a right-based fishery in it. Other commercial users can select other areas. They can reselect in the next round of licence selection. Significant displacement of existing commercial harvesters is no answer to the priority that must be given to the plaintiffs' right-based fishery.

[1575] The plaintiffs say that biological sampling would be done in cooperation with DFO. They propose to share information with DFO including designated vessels, trap tag and location information. This will control effort and enable enforcement. Canada has not explained why it has to know traps per vessel or the size of vessels. Canada does not know this information for other sectors. The plaintiffs will not be able to set more traps than a regular commercial harvester, given their overall trap limits. The likelihood is they will set far fewer. There is thus no regional or economic unfairness. In any event there is no evidence of the circumstances of the harvesters in Area E.

[1576] The plaintiffs say their plan proposes a minor change: a total trap limit, which would include the recreational sector. Canada did not provide its draft evaluation of the crab plan until April 2015, after the trial had begun. DFO could have proposed another way to deal with this fishery, and should have engaged with the plaintiffs instead of simply rejecting their entire proposal. This is not in keeping with their fiduciary duty.

[1577] As well, the plaintiffs say DFO was not responsive to their various crab plans. They have now learned that the local DFO staff tried to get a mandate for a demonstration fishery, but this was not approved.

[1578] The plaintiffs say the court should determine if the rejection by Canada of the plaintiffs' crab plan and the requirement for EM is justified. Without a long term commitment for meaningful access to crab,

and in the absence of evidence of compromise to conservation or regional and economic fairness, DFO's rejection of the crab plan is not justifiable.

Discussion

[1579] The plaintiffs' focus on infringement in the context of crab is based on Canada's refusal to implement their proposal. I have stated that I do not view that as the appropriate way to approach the task given to this court.

[1580] The plaintiffs say DFO has also failed to recognize their "any species" right and their priority over the regular commercial fishery and the recreational fishery. They say this has resulted in inadequate access to this resource.

[1581] Canada has made no counter-proposal and argues that their present approach to allocation and management/monitoring of the crab fishery is justified.

[1582] As with all other species, issues respecting continuity of an ancestral trade in crab to a modern right to a commercial crab fishery go to justification, not to removing crab from the list of "any species".

[1583] There was no evidence before Garson J. concerning trade in crab or a preferred means for catching crab. This is an easily perishable species that must be preserved alive for commercial sale, at least for the present market. I note the references in the Jewitt journal, a source referred to by Garson J., to the different tastes of Europeans and Indigenous peoples. Mr. Jewitt noted that the latter preferred fermented or even putrid-smelling fish, salmon and herring in particular. That is, fresh seafood was not necessarily prized. However, even if that were true for crab as well, there is no information about trade in crab in that journal or in Garson J.'s reasons generally.

[1584] There is no evidence respecting the importance of the commercial crab fishery to the plaintiffs, but two of the nations do participate in it. The plaintiffs have been provided with free PICFI licences since the 2009 decision – the Ahousaht hold two licences; the Mowachaht/Muchalaht have one-sixth of the NSDC (Nuu-chah-nulth Seafood Development Corporation) Seafood Society licence. The nations have elected to fish the NSDC licence and one of the Ahousaht licences in the Strait of Georgia and in Johnstone Strait respectively, not on the WCVI, and thus obviously outside the CDA.

[1585] Many of the plaintiffs' points revolve around Canada's failure to discuss the crab fishery. The plaintiffs submitted, at various times, plans with different approaches and little detail. There is no evidence that Canada ever refused to discuss crab at the Main Table, but other species took priority and crab was never the focus. However, local managers wanted to implement a demonstration fishery for crab and Ottawa would not approve it.

[1586] The failure to have evidence from a demonstration fishery available to help the parties and the court must be laid at the feet of the Minister who refused to allow the test fisheries to go ahead. However, it is no answer to say simply that implementation of the plaintiffs' plan is the proper response to any ongoing unspecified infringement, and I have refused to use that method in the justification

analysis in this case. Nevertheless, it is useful to consider the various points raised in their plan in order to attempt to identify infringements that are capable of being addressed.

[1587] First, the plaintiffs seek a large share of the commercial prawn in their area. They say an appropriate allocation for them is 50% of the commercial traps in the areas they describe.

[1588] Unlike their plans for fin fish, the plaintiffs do not seek to set allocations for crab based on abundance or catch in an area wider than the CDA. Their position is that their priority requires more accommodation within the CDA, not only because they have a right in priority to everyone else, but also because other commercial or recreational harvesters can elect to fish elsewhere and they cannot, at least in the right-based fishery. As noted, only one of the PICFI licences for crab held by members of the plaintiffs in the regular commercial fishery is fished in their territories. The others are fished in other areas.

[1589] As is generally the case with all of the species, the plaintiffs turn the focus away from the overall size of the fishery they propose, somehow assuming that dividing it up amongst many boats ensures that there is no need for independent monitoring. The plaintiffs give an estimate of a fairly low overall income per fisher to be derived from the crab fishery. However, they anticipate a large number of boats will participate in the fishery, which is a multi-species fishery. The success or failure of their right-based opportunity does not rest on one species alone.

[1590] There was evidence before Garson J. that the plaintiffs caught crab in ancestral times. Although the commercial crab fishery occurs at some depth, crab is readily available in shallow water as well. There is, however, a dearth of evidence of an ancestral trade in crab. I am of the view that the plaintiffs' priority in respect of this commercial fishery is somewhat lower than for fisheries such as salmon and herring, which have a strong historical basis in the evidence to support potential trade.

[1591] The plaintiffs, according to the declaration, have an aboriginal right to sell crab into the commercial marketplace. Their access to commercial licences has been provided free of cost to them. However, I conclude that to accord a high priority to the plaintiffs' right to a commercial crab fishery and to accede to their proposal for a 50% share of the commercial crab fishery (assuming the justification exercise should proceed that way) is not aligned with the *Gladstone* factors on priority and would not lead to reconciliation, given the substantial impact on other fisheries, particularly the commercial fishery that has developed the modern trade.

[1592] However, when considering infringement in the context of appropriate access to a commercial crab fishery for the plaintiffs, a more nuanced approach is required for the unusual situation that exists with this fishery.

[1593] The first issue was touched upon in an earlier section of these reasons respecting whom the plaintiffs speak for. The Ehattesaht and the Mowachaht/Muchalaht have no commercial crab fishery in their area. While all nations have the right to fish for crab for FSC (in fact, Garson J. noted at para. 830 that DFO has closed the commercial fishery at times to ensure there is adequate crab for FSC

purposes), are those nations that have no commercial crab fishery at all in their territory entitled to a crab allocation for a modern commercial fishery? I will consider this in the context of each nation.

[1594] The *Gladstone* factors for priority and the *Sparrow* justification considerations are strongly highlighted here. A commercial trade in crab cannot have been of importance to these nations ancestrally since there is little crab in their territories. There is no direct evidence that they traded in it, and given the nature of this species, which is kept alive for transport and trade, it is very difficult to draw an inference that trade in crab was possible. The plaintiffs have priority over the recreational fishery for chinook and coho in the event of a conflict for those species, but as I have said, that priority is not as easily asserted for crab, as there is no evidence to support a claim that trade in crab was important to them.

[1595] Thus, within the context of the *Gladstone* priority factors and the *Sparrow* justification analysis, incorporated into *Lax Kw'alaams*, there is a strong case to be made in favour of mitigated access only for this fishery. That is, access, which is very valuable and will be provided free to the plaintiffs, should be through voluntary relinquishment only.

[1596] I conclude that for nations that have no commercial crab fishery in their territory, DFO is justified in awaiting available licences in the PICFI inventory. The present allocation of crab, which has been provided free of cost to the plaintiffs, is not an infringement, or if it is, it is justified because of the lack of evidence of historical participation in trade in crab, and because the present commercial crab fishery has been developed by industry.

[1597] I note that two thirds of the licences the plaintiffs have at present are fished outside the CDA, leading to the question of whether this is a site-specific fishery of importance to the plaintiffs.

[1598] This is not the same situation for the Hesquiaht and Tla-o-qui-aht however. They have no crab allocation, but there is a commercial crab fishery in their territories, or at least the potential for one, although the Hesquiaht crab have been the subject of predation by sea otters. There is also recreational harvest of crab over which the plaintiffs' right-based fishery has priority.

[1599] At the time of trial, there was no access to crab available through the PICFI inventory, but the evidence from Ms. Farlinger was that Minister can create additional access for them. If PICFI access is now available, that is an appropriate way to accommodate the right. However, DFO is not justified in failing to provide any crab access for those plaintiffs if no PICFI access is presently available.

[1600] The plaintiffs' priority for a commercial crab fishery is low but there is a recreational fishery in crab. As with any other species, recreational fishing cannot take priority over the aboriginal right. Therefore some access must be provided for these two nations.

[1601] If there is still no PICFI access available, the Minister will have to determine a method to provide some access to those plaintiffs which can be fished in their territories. Whether this affects the commercial share or the recreational share is something that the Minister can determine. As well, if

there is no crab fishery possible in their territories, for instance because of sea otter predation in the Hesquiaht territory or other natural causes, the answer, unfortunately, is not access outside the CDA. I have explained that the court is bound by the CDA. The lack of access to a commercial crab fishery because of natural causes is not an infringement DFO must justify.

[1602] Next, while the plaintiffs accept the general management approach used by DFO, there are difficulties with the plaintiffs' proposal for monitoring.

[1603] I accept as valid the concerns articulated by Michelle James and the other DFO witnesses. Consistent and independent monitoring is important for this fishery. The plaintiffs plan to have many vessels hauling many traps, even if their number per vessel will be fewer than the regular commercial fishery. The plaintiffs do not explain how they will monitor hauls, how they will keep track of how many traps are set per vessel or where the traps are set, nor how dockside monitoring is actually better than DFO's system. I accept Ms. Rogers testimony, which seems common sense, that the presence of many small boats can do a lot of damage to a fishery such as this. I also accept as valid the concerns raised by DFO in respect of incidental catch, bycatch retention, and the interaction of FSC fishing with the commercial fishery.

[1604] I conclude that Canada is justified in maintaining its present management and monitoring system for crab. A demonstration fishery would have been helpful and might have assisted in setting out flexibilities that are more suitable to the T'aaq-wiihak fishery, but one has not been held. This is DFO's fault as Ottawa only provided a mandate for general demonstration fisheries late in the day. However, for the court to give its approval to an entire revamping of the management system for the whole fishery with no idea of how it will work in practice is irresponsible and incompatible with reconciliation.

[1605] As with other fisheries, the requirement for one licence per boat, along with vessel registration, is not justified. DFO was prepared to allow licence splitting as a means to ensure wide community participation. However, the logistics of additional dozens of little boats fishing for crab in a small area with a few traps each might well create problems not yet foreseen. I refer again to Ms. Rogers' testimony regarding the potential for quality deterioration with excessive handling in small boats. If this is going to diminish the value of crab from this area generally, further limitations on numbers of vessels may well be justified.

[1606] There is no evidence as to how the cost of monitoring will affect a small boat with a few traps. DFO is justified in setting a trap limit on each small boat until the number of boats and the effect on the fishery is known. Obviously, a demonstration fishery would be helpful, and the Strategic Framework must be applied to determine an appropriate monitoring standard, in consultation with the plaintiffs. If DFO is still of the view that fisher-paid EM, or at least cost sharing, is the only way to protect the fishery, and if the plaintiffs disagree either generally or because of cost, then this will have to be dealt with on a specific set of facts with evidence that will allow a court to determine the issue of whether the imposition of the costs of EM is a barrier to the exercise of the right.

[1607] The effect of dual fishing in this fishery must be assessed by DFO, which will include the application of the Strategic Framework for Monitoring and Catch Reporting.

[1608] As with other fisheries, the regular PICFI rules do not apply to the plaintiffs if they are fishing their licences in the CDA.

Result

[1609] The plaintiffs have an aboriginal right to sell crab into the commercial market place, and their licences have been provided free of cost. However, priority in respect of a commercial crab fishery is low and mitigated accommodation through PICFI is appropriate.

[1610] Canada's management regime for crab is justified, subject to the general finding above respecting the licencing system which requires one licence per boat. Provision of access through PICFI, which is without cost to the plaintiffs, is justified.

[1611] The Hesquiaht and Tla-o-qui-aht nations have the potential for a commercial crab fishery in its territory, but have no present access to crab and there is no PICFI inventory available. DFO is not justified in relying only on PICFI to provide these nations with some access to crab, unless that access is not possible due to sea otter predation or other natural causes.

[1612] DFO is justified in determining the effect of many additional small boats catching crab and setting monitoring standards through the Strategic Framework for Catch Reporting and Monitoring, and setting an appropriate monitoring standard after that is completed, in consultation with the plaintiffs. If DFO determines that EM is necessary for the plaintiffs' small boat fleet when harvesting crab, and if there is a disagreement on cost or cost sharing, and whether cost will interfere with the exercise of the right, this will have to be determined on specific facts.

PRAWN

[1613] I will first set out a general description of prawn biology and the prawn fishery, using information from the IFMP and from DFO prawn managers.

[1614] There are seven species of shrimp and prawn in BC. The commercial trap fishery targets mainly spot prawns. The regular commercial prawn fishery starts no earlier than May 1 and generally closes by the end of June.

[1615] The prawn fishery is coastwide, with no area selection. The 250 licence holders can harvest anywhere on the coast during the short commercial season. Each licence can fish up to 300 traps. There is no TAC and no quota: once the fishery opens, all the licence holders go out and attempt to catch as much prawn as they can.

[1616] Prawn are bottom dwellers and the commercial fishery occurs at deep depths (40 to 100 meters). Once harvested onto commercial vessels, the prawns are put in live tanks or dipped in sulphites and packed, or frozen.

[1617] There are 250 commercial prawn licences, of which 13 are grandfathered and will expire when the holder leaves the fishery. Fifty-five of the commercial licences are designated communal commercial licences for aboriginal groups. Most prawn harvest takes place on the east coast of Vancouver Island. On average, 12 commercial prawn licences have chosen to fish in Area 25 in the CDA; only four in Area 24.

[1618] It is a very competitive and valuable fishery. A prawn licence costs around $680,000. The fishery was valued at $35.2 million in 2013.

[1619] Since 2009, the plaintiffs have been provided with a number of prawn licences under PICFI at no cost. The Ahousaht hold three prawn licences (one obtained in 2005 through ATP, and two in 2010 and 2012 through PICFI) and the Tla-o-qui-aht has one, obtained in 2010 through PICFI. The plaintiffs have a share in three other prawn licences under PICFI, which provide the Ehattesaht and Hesquiaht with one quarter of a share each, and one fifth to the Mowachaht/Muchalaht, for a total of 5.33 licences. Those licences were obtained in 2010 and 2011 through PICFI.

[1620] The CDA has a relatively small percentage of the overall commercial harvest of prawn, and that is largely in the Mowachaht/Muchalaht territory, with some in Ehattesaht, and much smaller amounts in the other three. There is no commercial harvest of prawn in the Hesquiaht territory. This is the reverse of the crab fishery abundance, of which there is almost none in the Ehattesaht and Mowachaht/Muchalaht territories, but a significant amount in the other three.

[1621] The regular commercial prawn fleet includes small boats, ranging from 16 feet to 68 feet. The average size is 36 feet. In 2015, 18 commercial vessels in the fleet were smaller than 26 feet.

[1622] According to Michelle James' report, vessels are required to have and pay for a DFO-approved satellite Vessel Monitoring System (VMS) and to prove vessel location to DFO every 15 minutes. This system also records trap setting and hauling.

[1623] The main management tool is the spawner index, which will be explained below. There are also closures, gear limits, gear marking requirements, trap mesh size requirements, minimum size limit, daily fishing time restrictions and a daily single haul limit. DFO limits traps per licence to 300, at 50 traps per string. If two licences are fished from one vessel (or "stacked"), there is a limit of 500 traps.

[1624] At present FSC prawn fishing has no limits, but due to increased use of commercial gear in that fishery, DFO has started consultations regarding new rules.

[1625] Prawn management is based on their unique life cycle. Their life cycle starts in April. A prawn is born male and undergoes a sex change in midlife. Each prawn reaches maturity as a male in a year and a half to two years. By two years, they may be large enough to be harvested in a commercial fishery. In their second year in the fall, the male mates with a mature female prawn. After mating, each male prawn undergoes a sex change and by August, becomes a mature female prawn. The three year old female prawns mate with the younger males and become "berried" with eggs in the fall and winter,

which they carry externally until the eggs hatch in the spring. Two thousand to four thousand eggs are released between January and March. The four-year-old females then die within a few weeks.

[1626] Management of the prawn fishery is based on the spawner index. This is a measure of the average number of females or transition pre-females (but not males) caught per standard trap fished for a 24-hour period. This is determined through catch sampling to determine the biological status of the spot prawn through the commercial fishing season. DFO allows fishing to continue as long as there appear to be sufficient egg-bearing females or spawners remaining in the populations. Once that number decreases to a pre-determined minimum, multiplied by 110% to account for variations, fishing is closed. DFO looks for an average 1.7 spawners per trap in March, and 6.5 in May and 5.9 in June.

[1627] The fishery opens no sooner than May 1. Sampling begins on actively fishing vessels. In-season management is intensive. Consistency in sampling is important, and is maintained by use of a vessel monitoring system, funded by the industry. All sampling is paid for by the PPFA.

[1628] The sampling is closely monitored throughout the region. There are weekly in-season conference calls at which the spawner index sample results are reviewed. A minimum number of reproductive females must be maintained. All undersized and berried females must be released and returned to the water immediately. High proportions of berried females in the catches may result in closure of the fishery.

[1629] FSC fishing has not been closed upon reaching the spawner index.

[1630] Recreational fishing for prawn has increased, but is quite small in the CDA. Recreational fishers are allowed four marked traps each, 200 prawns per day, and 400 in possession at one time. Additional sampling is done in the fall in higher use areas, and the recreational fishery will be closed if the spawner count is too low.

[1631] There is a Prawn Advisory Board that meets three times a year, consisting of DFO, commercial fishers, recreational fishers, First Nations, and a representative from the provincial government. In 2014, DFO offered to allow the plaintiffs to present a detailed plan to the Board, but nothing further occurred.

[1632] The DFO prawn managers made it clear in their testimony that they are proud of their management system for prawn, which has been recognized world-wide as eco-friendly, sustainable, and effective.

Plaintiffs' Prawn Plan, 2014

[1633] The plaintiffs propose an adjustment to the management scheme that they say would provide them with 50% of the available commercial size prawns in the CDA. They would catch prawns at a point on the spawner index before and after the commercial fishery. While these additional periods of fishing would not guarantee them a 50% share, they would accept it as a proxy, and they say it could

be adjusted over time. The plaintiffs say they are unable to compete with the regular commercial fishery and require a staged fishery to obtain some security.

[1634] The plaintiffs suggest a test fishery during April to test out their contention that the prawn fishery can tolerate wider margins on the spawner index and still be sustainable.

[1635] Other than timing, the plaintiffs accept the regular commercial fishery restrictions. Although currently allowed to retain undersize and berried females for FSC purposes only, the plaintiffs recognize a legitimate concern by DFO in this regard and say they will not retain those prawns when engaged in commercial or dual fishing.

[1636] Regular spawner index catch sampling is conducted by an independent third party. The plaintiffs say they will cooperate with DFO on this, but they would like to develop a capacity to participate in sampling themselves.

[1637] The regular commercial fishery must have VMS that uses GPS to report vessel location primarily for spawner index sampling. The plaintiffs do not propose to use VMS as they say it is expensive and cumbersome. They would notify their fishing coordinator of their location and the information would be passed on to DFO.

[1638] The plaintiffs point out that, as there is no area restriction, many vessels could choose to fish in the CDA. If that occurred, the spawner index abundance would drop to the limit quickly, the fishery would be closed, and the plaintiffs' opportunities would be foreclosed simply by the choices of other fishermen. This has never occurred, but the plaintiffs say it could. They say if it did occur, their own proposed regime would assure them of a chance of a viable prawn fishery.

The PPFA's Argument

[1639] The PPFA disputes the plaintiffs' claim to a commercial prawn fishery. They say the plaintiffs pleaded a claim to "Fisheries Resources", which was defined as "all species of fish, shellfish and aquatic plants". However, the declaration as given is only for fish. The PPFA's position is that the use of the term "fish" in the declaration (as opposed to "Fisheries Resources") therefore excludes prawn, which is an invertebrate.

[1640] The next argument made by the PPFA is that, like geoduck, prawns could not have been the subject of trade or sale in the ancestral practice, and should be excluded from the right.

[1641] The PPFA says there could have been no trade in prawns in ancestral times that could translate into a modern right to a commercial prawn fishery. Madam Justice Garson noted in her reasons that quantities of fish caught by the plaintiffs historically were limited by their methods. The PPFA says species were limited by methods as well. There is only one mention of prawns in one of the journals and no mention of ancestral trade in prawns. Again, prawns are harvested deep in the ocean at 40 to 100 meters below the surface, even deeper than geoduck, and are caught in weighted traps that are

brought to the surface by hydraulic gear. Once harvested, they decompose rapidly and thus could not have been the subject of trade.

[1642] The PPFA says that in any event, the 50% share of prawns caught in the CDA as sought by the plaintiffs is out of all proportion to the historic practice upon which it is ostensibly based.

[1643] The PPFA says the free prawn access provided to the plaintiffs through the regular PICFI communal licences is the equivalent of between 21% and 133% of the total prawn harvest within the CDA. While the CDA has between 1.86% and 10.2% of the coastwide prawn harvest, the plaintiffs can fish the licences they already hold anywhere. Thus there is no infringement of their right in respect of prawn -- they hold a number of valuable communal licences at no cost.

[1644] The PPFA says the plaintiffs' plan is ambiguous -- sometimes it focusses on wide community participation, and sometimes on economic return. The PPFA says that since the prawn fishery operates from fairly small boats, about 11 meters (36 feet), the reality is that splitting traps amongst mosquito vessels simply will not work. In order to maximize profits and minimize expenses, the 300 traps per licence have to be fished from a single boat. The annual cost of operating a prawn boat (excluding monitoring costs and bait) is $26,000 to $36,000, according to Mr. Alford's affidavit. The PPFA suggests that the only way the plaintiffs could conduct a viable prawn fishery is to rotate crews on a single boat, because a mosquito fleet will not work in the prawn fishery.

Canada's Argument

[1645] DFO has never made a prawn proposal to the plaintiffs. Local DFO staff attempted to get a mandate to negotiate a demonstration fishery for prawns, perhaps based on trap splitting, in January 2014, but this did not proceed.

[1646] Canada says it is premature to rule on the justification analysis of the prawn fishery as negotiations are ongoing; however, whatever infringements there might be are justified on the basis of conservation and economic and regional fairness as long as there is a long term approach in place to address accommodation of the right.

[1647] Canada says there were only five meetings from 2010 to 2014 to discuss prawn, as the focus was on the salmon demonstration fishery, gooseneck barnacles, and groundfish. As well, the plaintiffs' proposals changed significantly over time and were completely out of line with DFO's precautionary management approach. Thus most of the communications were educational in nature as DFO tried to explain the prawn management system.

[1648] Canada says the focus should have been on trap splitting to facilitate broader community participation. Instead, the plaintiffs propose far-reaching untested changes in the management of the prawn fishery aimed at getting them a competitive advantage over regular commercial fishers through exclusive openings, and changing the scheme to allow them a large secure share of the fishery.

[1649] DFO says the plaintiffs' plan is unworkable, but DDFO is now willing and has a mandate to discuss a test fishery regarding the expanded spawner index idea. DFO offered to test the plaintiffs' proposal to catch prawns in April with a scientific experiment. The plaintiffs rejected this offer, preferring a demonstration fishery in April that would allow them to harvest prawns in April and see what would happen.

[1650] DFO's Evaluation of the plaintiffs' proposal makes the following points:

- retention of undersized and berried prawns is a concern;
- without EM, DFO cannot be certain the plaintiffs' vessels are avoiding sponge, coral, and other conservation areas;
- 50% is a large share;
- the plaintiffs would use deep-water commercial traps but would not restrict fishing effort in the same way (limited entry, trap limits, daily fishing time restrictions);
- the plaintiffs seek an exclusive commercial opening;
- more detail is needed to ensure spawner index data is adequate, and who will pay for it;
- without EM, set/haul data cannot be properly assessed;
- general enforcement is more difficult with an expanded season -- no fresh prawns are on the market in April now; it will be harder to trace illegally caught prawns if the plaintiffs are allowed to fish in April;
- the plaintiffs will have a market advantage through pre- and post-season fishing;
- the recreational fishery would likely be affected;
- in the long term, local depletions could occur and conservation could be compromised; and
- FSC prawn fishing is much greater than it used to be, and this warrants further consideration.

[1651] Canada called Laurie Convey as a witness. Ms. Convey manages the prawn fishery on the west coast. She attended a series of technical working group meetings. She said the main issues of contention were:

- the concept of a share;
- how to use biological sampling;
- the plaintiffs' desire to fish for prawns in April;
- enforcement concerns; and
- monitoring and catch reporting.

[1652] Ms. Convey testified that of the 250 commercial prawn licences, 55 are held communally by First Nations. Ahousaht has held a prawn licence since 2005 which was obtained under ATP.

[1653] Since Garson J.'s decision, the plaintiffs have been provided an additional 4.3 communal commercial licences at no cost, through PICFI. They now have over five licences at their disposal. The licences have a market value of over $3.5 million. This is an ability to harvest between 21% and 113% of the commercial catch in the CDA. However, these licences have not been provided at the Main Table, and some are shared with other groups; the plaintiffs take the position therefore that these licences are not an accommodation of their right.

[1654] Ms. Convey testified that, prior to the 1990s, trap hauling was only by hand, but electronic haulers, even on small boats, are now used. In the past, there has been no limit to FSC prawn fishing, but now the First Nations are using commercial gear to harvest prawn and DFO would be introducing control measures as of 2016. Thus any suggestion of dual fishing for prawn is a concern.

[1655] Ms. Convey testified she has reviewed ten prawn proposals and provided extensive comments. She has had many discussions and a lot of interaction with representatives of the plaintiffs at joint working group meetings. She was concerned that the plaintiffs did not appear to appreciate the unsuitability of the spawner index system to setting a share. The system is complex and the results are highly variable, season to season. Closure decisions are made taking all adjacent areas into account.

[1656] She expressed her concern at the plaintiffs' proposed early fishery with 25 plus participants, no trap limits or no effort limits. Intensive sampling would be required to determine whether an early fishery is viable. She queried who would do the sampling for the extended period and who would pay for it. She said sampling cannot be done with too many traps. It is important to keep track of the effort.

[1657] In cross-examination, Ms. Convey testified that the plaintiffs' approach is for a share. The spawner index cannot provide that. She said a better way to look at it is to provide an additional opportunity, but there would be no security of abundance.

[1658] Dennis Rutherford, who is DFO's head of shellfish science, testified that there is no linear measure for prawns, and DFO does not know what the spawner index will be until they start sampling. He said the prevalence of berried prawns in April is a concern because their present system accounts for prawns having spawned by the time sampling is commenced, so removal in April would not be good; as well the prawns will inevitably be smaller, as well. He agreed that this is more of a problem in the north.

[1659] He said DFO cannot make projections for prawn, but they know the spawner index works and sustains the stock. He agreed there is a general downward trend in the spawner index over time, but said it is not precise enough to manage to a specific number. However, he said if samples are collected properly, their science could give a best estimate of the spawner index at a particular time, although it is the total use of the spawner index that is important.

[1660] Overall, DFO takes the position that the spawner index cannot be used as the plaintiffs want to use it. Their plan is oversimplified and has no effort controls. The plaintiffs want various fisheries cut off at different percentages of the spawner index to create shares, but the numbers do not decrease at a

predicable rate or pattern. They can even increase. Sampling is used only to close fisheries, not open them.

[1661] The spawner index is not a bright line: DFO may close areas before the cut off is reached, to maintain their precautionary approach. The spawner index is used to minimize the catch of berried females over the four-year life-cycle of the spot prawn. It allows the prawns that will be harvested to grow larger, and to increase in value. There is no abundance estimate or stock forecast. Yearly abundance is unpredictable and highly variable. Management is done in season, reactively, based on twice-weekly sampling. DFO does not know how long the season will last, how much will be harvested, or how quickly it will be harvested. The fishery is not managed on abundance. Mr. Ryall, Director of Resource Management for Shellfish, testified at least twenty years would be needed to determine abundance in a way that would be useful to the plaintiffs' proposal.

[1662] The plaintiffs proposed a fishery starting as early as April 1. While DFO has reviewed ten proposals from the plaintiffs and provided extensive feedback, Ms. Convey says DFO does not support an April fishery. All the science supports a May fishery at 25 months' maturity. As for the early April opening proposal, the plaintiffs are after a secure market with no competition; DFO has no research on berried prawn in April, although some sampling has been done.

[1663] Ms. Convey testified that DFO has a lot of history in this fishery and wants to ensure conservation and sustainability. The plaintiffs' position is "let's do it and see what happens", which is not satisfactory.

[1664] During cross-examination of Ms. Convey, the suggestion of a one-week opening in the last week of April was raised. This is not what is contained in the plaintiffs' plan, and Ms. Convey said details are important to their management. However, she seemed to think it was worth considering, if properly monitored and sampled. Ms. Convey said an additional opportunity might make more sense but a mismanaged April opening could result in very early closures. In addition, she noted that the plaintiffs have stated they want a better price for prawns and the prawns are larger and more valuable in May. As well, Ms. Convey was concerned because the plan does not specify any trap or effort limits, and an April opening could affect sustainability.

[1665] This is typical of the kind of issue that arose during cross-examination, thus showing that these issues have not been fully considered.

[1666] Ms. Convey testified that her impression was the plaintiffs thought the commercial fishery was a lot bigger than their small boats, but a trap is a trap. The commercial fishery operates from small boats. The commercial prawn fishery is not an industrial-sized fishery. She agreed that the plaintiffs need training and capacity building in this fishery; her view is they do not understand it very well. She said once the plaintiffs obtain training and capacity, their gear is as good as anyone else's.

[1667] She was asked if the plaintiffs' fishery would be a smaller fishery, but she said their proposed trap string amount was a standard size, and they have mentioned mid-sized vessels, so their intent

was not clear. She agreed that the plaintiffs have said they would eventually impose trap limits. They wish to start with 25 vessels and add more. The proposal is designed to protect the plaintiffs from the other sectors, but there is no evidence that they are affected by those sectors.

[1668] Ms. Convey said she was asked by DFO to look at trap splitting as an option, as well as trap limits for commercial boats. She said trap splitting was still open for discussion, but the plaintiffs had dropped that approach in their current proposal.

[1669] The plaintiffs want to be exempted from the Vessel Monitoring System. The system is a small satellite unit on top of the vessel and a small unit in the wheelhouse, suitable for small vessels. Latitude and longitude are tracked and hauls and location are sent to the spawner index sampling service. Initial cost is $1,500-$1,800; yearly monitoring and post season evaluation is $3,800/year. Log books are required.

[1670] Ms. Convey did not agree with Dr. Hall that VMS would be a problem for small-boat fleet. She said the units are small and waterproof, and are ideal for small vessels. She said this is necessary to find the boats on the water. The plaintiffs would not know the number of boats until the fishery took place, and again, she questioned how DFO would obtain adequate sampling, who would do it, and who would pay.

[1671] Ms. Convey noted that the plaintiffs want to be involved in management decisions but she said that is not how the fishery works, given the intense monitoring required and the constant decisions regarding closure. DFO has to know the vessel locations and haul locations. Log books do not assist in these decisions. Ms. Convey said DFO could look at other options, but VMS is effective. She agreed there may be cost issues, but the commercial fishery has found it cost effective. It is her impression that the plaintiffs want to have the advantage of information that comes from an industry-funded fishery.

[1672] Canada says DFO’s VMS requirements do not interfere with the plaintiffs’ rights and are justified on the basis of conservation, enforcement and fairness to commercial harvesters. VMS was developed by the commercial fishery and is ideal for small vessels. There is no evidence that the cost of this system interferes with the plaintiffs’ rights in this very lucrative fishery.

[1673] Canada submits that notwithstanding all of these problems, the plaintiffs want the entire prawn management system changed to allow them an exclusive early fishery, with 25 vessels (36 as of 2016). The plaintiffs’ proposal contains no limit on vessels or traps and would have no vessel monitoring system. Their fishery is expected to grow. DFO emphasizes that it needs to know the effort and participation in the fishery. It must know how many vessels are fishing and how many traps per vessel are fishing.

[1674] DFO points out that the commercial fishery funds the present sampling process. The plaintiffs’ proposal does not contain information to explain how their proposed system, which would open before the commercial fishery, would work, or how the sampling would be conducted or paid for. DFO says consistency of measurement is essential.

[1675] Canada's approach to justification of its policies and regulations in respect of the prawn fishery is also informed by the evidence, or lack thereof, of continuity between ancestral trade in prawn and the modern right. Canada repeats the PPFA's submission that there was no evidence before Garson J. that the plaintiffs traded prawn, and almost no evidence to support harvesting of prawn. Prawn deteriorates quickly once harvested. Spot prawns are harvested at depths of 40 to 100 meters on a rocky or hard seabed. There is no evidence from which to assess continuity between ancestral practices and a modern right.

[1676] In any event, the prawn fishery is conducted from small boats so in Canada's submission, there is no restriction on the plaintiffs' participation from that perspective.

[1677] DFO says that to allow the plaintiffs an exclusive fishery is unfair to the regular commercial prawn fishers who developed this fishery. This began around 1914 but only began to grow at the end of the 1970's. An early fishery could become completely exclusive due to untracked overfishing or unpredictable impacts on the prawn population. This could compromise conservation. DFO also submits that shutting down the commercial fishery undermines the objectives of reconciliation and fairness. As well, DFO says such a separate fishery would create problems for enforcement because of the difficulty of tracing live prawns for sale out of season.

[1678] DFO says the plaintiffs' proposal to retain many species of bycatch for sale or FSC should be rejected until all of those issues can be discussed.

Plaintiffs' Argument

[1679] The plaintiffs want a secure 50% share of the prawn in the CDA, with participation expected to grow. Since DFO's current management system does not provide an easy way to provide a share, they propose a staged fishery which would give them an exclusive fishery in April. The commercial fishers would then fish in May, but would stop at a higher spawner index indicator than is presently used, that is at an earlier point than they do now, and the plaintiffs would resume their exclusive fishery.

[1680] The plaintiffs recognize that this method does not guarantee a share of prawns, but they say the spawner index can serve as a proxy for a guaranteed share to give them a secure opportunity.

[1681] The plaintiffs say that without their method, they will be outfished by the commercial fishery. They speculate that the commercial fishers, many of whom use very small boats, might choose to come into the CDA, even though that has not yet occurred. If too many vessels came in, DFO might close the area.

[1682] The plaintiffs say this small early harvest would not provide any undue market advantage; it is merely an expression of their priority. Canada has not said the allocation they seek is inappropriate or unreasonable. Canada has not led any evidence on how it would it impact other commercial harvesters. All commercial vessels can fish the whole coast; if Areas 24 and 25 are closed to them a little early, they can go elsewhere. The plaintiffs cannot, if they are to fish in their right-based fishery.

[1683] Other than timing, the regular DFO management restrictions would apply. The plaintiffs say they will set out trap limits as part of the pre-season planning, in consultation with DFO. However, this is not contained in their plan. They say their catch reporting requirements will assist DFO in tracing illegal prawns.

[1684] The plaintiffs resist VMS and would apply their usual monitoring methods: 100% dockside monitoring (which is not a condition of the commercial fishery), logbooks and sales slips. They would submit to sampling, which is currently funded by the commercial fishery, and want to develop the capacity to participate in it themselves. The harvesters would notify the T'aaq-wiihak Fishery Coordinator of the location of their traps, and the coordinator would tell the sampler and DFO. The plaintiffs say Ms. Convey approved of this. My notes indicate she was concerned about the quality of information and the method of communication, but she acknowledged the plaintiffs indicated some interest in monitoring.

[1685] The plaintiffs say if cost is an impediment, DFO must pay. As I have noted, I have little if any evidence of the effect of costs on the various fisheries.

[1686] The plaintiffs say Canada cannot rely on ongoing discussions to defend infringements. DFO received no mandate to truly negotiate until 2015. Local staff tried to get a mandate for a demonstration fishery in January 2014 but were unsuccessful. DFO has never approached the plaintiffs with a trap-splitting proposal.

[1687] The plaintiffs resist the term "exclusive fishery". They say there is a separation in time only. A careful demonstration fishery for the proposed April opening would protect the fishery.

[1688] The plaintiffs also do not accept the suggestion of a scientific experiment by DFO. The practical difference is not clear to me between a demonstration fishery and a scientific experiment to test an early opening, given the unusual way this fishery is managed and monitored.

[1689] In short, the plaintiffs says Canada is not justified in rejecting their plan, especially since Canada has proposed no alternative.

Discussion

[1690] The position of the PPFA that the declaration in respect of fish does not include prawn is a legitimate one, given the difference between the pleadings and the declaration. However, Garson J. ostensibly used the term "fish" to refer to all species including invertebrates, and the parties, in drafting the order, did not apparently turn their minds to the term "Fisheries Resources". Madam Justice Garson listed the various species as she dealt with regulations of specific fisheries (para. 560 ff): salmon, groundfish (halibut, sablefish, rockfish, lingcod and dogfish), herring, clams, and geoducks, and at para. 734 ("salmon, halibut, groundfish, herring and sardines, and other invertebrates"), and said her findings on infringement applied to all of them equally.

[1691] Thus it appears from various passages in Garson J.'s reasons that she used the term "fish" to encompass all species including invertebrates. It is unfortunate that the order was not more precisely worded to accord with the pleadings, but I accept that "prawn" falls within "any species of fish", at least within the Court of Appeal's present order.

[1692] I repeat that I am not making findings respecting continuity between ancestral trade and a modern claimed right to a commercial fishery for any particular species. I have concluded, in the circumstances of this case, that continuity need not be proven for each species, despite the Court of Appeal's reasons, and because of the Court of Appeal's order, I have also concluded that the "any species" right cannot be interfered with.

[1693] Given that Garson J. apparently intended to include prawn within the declaration, I accept the plaintiffs' position that is not open to the intervenor to "knock prawns off the list," based on the reasoning I have set out previously. Fishing for and selling prawns into the commercial marketplace is part of the plaintiffs' right. The question that remains for this court is whether the present regime for prawn infringes that right, and if so, whether that regime is justified in whole or in part.

[1694] I have concluded that the existence of evidence that could support an ancestral trade in prawns, or lack of such evidence, is relevant within the *Gladstone* factors for justification. Therefore I turn to the issue of continuity within that context.

[1695] Madam Justice Garson referred to "invertebrates" twice in her reasons, although not in connection with ancestral trade, and she does not refer to prawns in the context of any ancestral practices. The only mention of prawn is in the evidence of a member of the plaintiffs expressing a wish to catch them. Thus there is no evidence that the plaintiffs caught prawns ancestrally, let alone traded them.

[1696] As a separate species, then, there is no evidence before the court to support an ancestral trade in prawns, or that such a trade was integral to the plaintiffs' respective cultures. Prawn are caught commercially at depths in heavily weighted traps that cannot be hauled by hand. They are not easily preserved once caught. These factors are similar to those considered by the Court of Appeal for geoduck, and the capability for ancestral trade in prawn could arguably be subjected to the geoduck analysis, but that is not open to this court given the Court of Appeal's order.

[1697] I am unable to conclude that there was ever any commercial prawn fishery pursued by the plaintiffs, that is, through ancestral trade, or since. That said, the plaintiffs have, according to the "any species" declaration, an aboriginal right to sell prawn into the commercial marketplace.

[1698] I will turn to the specific list of factors to consider under *Gladstone* and *Sparrow* in respect of priority and justification.

[1699] This is not a commercial fishery upon which the plaintiffs relied historically. There is no evidence that the commercial prawn fishery itself is important to the economic and material well-being of the

respective nations. However, the historical and present participation in and reliance upon the commercial prawn fishery by non-aboriginal groups is extensive. It is a commercial fishery that has been developed and funded by the regular commercial fishers, who pay for their own licences and monitoring.

[1700] Conservation of this fishery is paramount, and is agreed to be a valid objective. This is a closely monitored fishery, with a complex, interactive, and fluid system which maintains its sustainability. Extensive and continued sampling is necessary, expensive, and funded by the fishers themselves. It seems not to be in dispute that the plaintiffs have little experience or knowledge of this commercial fishery.

[1701] There have been many discussions and consultations on this species. The plaintiffs fault DFO for not providing an alternative plan. While this has been a stumbling block in the context of ongoing discussions for some species, I do not see this as a failure to consult on DFO's part with respect to prawn. DFO justifiably stands by its successful and internationally recognized management system for prawn and attempted to educate the plaintiffs on it. The honour of the Crown and its fiduciary duty in respect of the plaintiffs' access to the commercial prawn fishery is not contravened by insufficient consultation in this instance.

[1702] Since there is no ancestral practice, or indeed any description of a modern commercial prawn fishery conducted by the plaintiffs, their priority for this fishery is low. There is little to consider under the infringement/justification analysis. Canada's regime for prawn is not unreasonable; it does not impose undue hardships. It ensures conservation and sustainability of the fishery.

[1703] The commercial prawn fishery is conducted from small boats. That is a similar means to the one preferred by the plaintiffs, so the existing regime does not deny the plaintiffs their preferred means of fishing for prawn for trade (whatever that might have been for prawn since there was no evidence on this).

[1704] The same issue arises in the prawn fishery as in the crab fishery – these five nations do not all have equal access to prawn. While the CDA has a small percentage of the overall prawn fishery in British Columbia, most of it is in the Mowachaht/Muchalaht territory, with some in Ehattesaht. There is little prawn fishing in the Ahousaht, Hesquiaht, and Tla-o-qui-aht territories.

[1705] Canada has already provided several very expensive prawn licences to the plaintiffs at no cost through PICFI since Garson J.'s decision. Only the Ahousaht and Tla-o-qui-aht control their own aggregates for the prawn fishery. They hold three licences, even though there is little prawn fishing in their territories. The Mowachaht/Muchalaht, Ehattesaht and Hesquiaht share three other licences with PICFI aggregates with non-plaintiff members. As noted earlier, these smaller nations do not control the aggregates to which they belong – aggregates which include non-plaintiff nations. If there is a specific instance of unfairness to a particular plaintiff nation in respect of access under their shared PICFI licence, it will have to be dealt with individually.

[1706] However, for the present, DFO is justified in not providing further allocations of prawn to the plaintiffs. Mitigated access is justified for prawn. However, as with the entire fishery, access must be predictable and long term.

[1707] I note here, as for the other fisheries, that I do not accept that Canada must justify not implementing the plaintiffs' plan.

[1708] Even if the proper approach were to require Canada to justify not implementing the plaintiffs' plan for prawn, the general concerns raised by Ms. Convey are valid and justify not implementing that plan.

[1709] In their proposal, the plaintiffs seek 50% of the prawn caught in the CDA. Canada is justified in not acceding to this proposal in view of the plaintiffs' priority to this commercial fishery and the other factors in *Gladstone* and *Sparrow* as discussed above. It seems that the plaintiffs also seek exclusive opportunities for this fishery. It is not clear to me why a fishery separated into a block of time in which only the plaintiffs can fish is not an exclusive fishery.

[1710] This fishery is independently recognized as a well-managed sustainable fishery. The plaintiffs' proposal would involve a significant extension of the prawn fishing season with unspecified effort. The consequences would not be predictable, since the effort is not specified. While DFO is willing to test out some aspects of the plaintiffs' proposal, this has not yet been done.

[1711] The present accommodations offered by DFO are appropriate, but must be formalized. The plaintiffs' licences have been provided free of cost; imposing the cost of licences is not justified, nor is the requirement to provide vessel registration numbers.

[1712] DFO has been willing to consider trap splitting in this fishery. Further discussion is required but trap splitting is obviously a viable option. Thus the requirement for a single licence per boat is not justified.

[1713] The practical problems pointed out by the PPFA are real. Small boats are used effectively in the commercial prawn fishery, each fishing to the maximum trap limit to remain economical. Each boat has costs associated with it, so splitting a licence -- or in practical terms, trap splitting -- may be an uneconomic proposition. However, that remains to be seen. Economic guarantees are not part of the right.

[1714] There is no evidence from which I can make a determination that cost of vessel monitoring is or is not an infringement to the T'aaq-wiihak prawn fishery. Obviously, DFO should not have to pay to install VMS on every small boat that wants to go out and set a few traps, but they are justified in determining, in consultation with the plaintiffs, a method of determining catch and location of hauls.

[1715] I accept that careful sampling and monitoring of this fishery is justified. If there is a trap limit per vessel and a participant limit set on the plaintiffs' vessels that are participating in the T'aaq-wiihak prawn fishery, it may be that the current monitoring system, VMS, is not required, and dockside

accounting is adequate. This will have to await a specific factual situation, but I would expect DFO to apply the Strategic Framework for Catch Reporting and Monitoring, in consultation with the plaintiffs, in order to develop a cooperative approach for monitoring that works for all parties. If cost or cost sharing and/or responsibility for it became a matter of dispute, it will have to be dealt with on specific facts.

[1716] I accept Ms. Convey's concern as valid: that, given the nature of this fishery, the use of commercial gear to harvest prawn for FSC gives rise to problems of control. Dual fishing *per se* is, as I have said, not part of the right, and its prohibition in this fishery is therefore not an infringement. Even if it were, it would be justified, given conservation and sustainability concerns.

[1717] As is the case with many of the plans, the plaintiffs say they will work with DFO to develop a workable plan. Yet they also say DFO's suggestion of further negotiations and discussions is not appropriate. In any event, DFO has indicated a willingness to conduct experiments to see if a fishery commencing in the last week of April is appropriate for the plaintiffs, subject to appropriate sampling and monitoring. These cooperative measures are useful and should continue.

Result

[1718] This court accepts that the declared right is for all species (except geoduck), and thus it applies to prawn. I conclude that the plaintiffs' priority for the commercial prawn fishery is low, for the reasons set out above.

[1719] Nonetheless, I conclude that DFO's present management and regulatory systems with respect to prawn are justified, with the exception of the requirement one licence per boat, and vessel registration.

[1720] The plaintiffs have received, free of cost, several very expensive prawn licences through PICFI, since the declaration of 2009.

[1721] When the priority factors from *Gladstone* and the justification analysis from *Sparrow* are applied to this fishery, I conclude that mitigated access, that is, free PICFI access obtained through voluntary relinquishment of commercial licences, is not an infringement of the plaintiffs' right to fish for and sell prawn.

[1722] The present allocations through PICFI and ATP are appropriate accommodations of the right and are not an infringement of the plaintiffs' right to trade in prawn into the commercial marketplace.

[1723] DFO is justified in conducting appropriate testing through a demonstration fishery or other means, to determine if an earlier fishery in April is feasible, and if so, how that should be sampled and monitored. The Strategic Framework for Monitoring and Catch Reporting should be applied. This must all be done in consultation with the plaintiffs. If DFO determines that the VSM system is necessary for the plaintiffs' small boat fleet when harvesting prawn, and if there is a disagreement on cost or cost sharing and whether it causes a barrier to the exercise of the right, this will have to be determined on specific facts.

GOOSENECK BARNACLES

[1724] The gooseneck barnacle fishery was opened for a short time as an experiment in 2003-2005, but was closed because of poor market demand, poor compliance, and habitat impact concerns.

[1725] It was reopened in 2010 under DFO's New Emerging Fishery Policy. The plaintiffs and DFO have worked closely together to develop a gooseneck barnacle fishery. Cooperation has been good.

[1726] This fishery can be dangerous, as the barnacles are harvested by hand, using a tool, on exposed rocks that are open to the ocean. At present, the plaintiffs are the only holders of a licence to harvest gooseneck barnacles in the CDA.

[1727] The plaintiffs monitor the fishery. Currently the licence authorizes 11,000 pounds per year. The plaintiffs want the level of access increased to 30,000 pounds per year.

[1728] They are also concerned that, while DFO has said it is content with the monitoring, changes may be required in the future. An additional concern is that DFO has not foreclosed the potential for other harvesters in the CDA.

[1729] Most of this is speculative. The only concrete concern at present is the level of harvest.

[1730] It is DFO's position that there is no infringement to justify in respect of this fishery. There was no gooseneck barnacle fishery at the time of the original trial decision. The fishery is being developed under the New Emerging Fisheries Policy and is at the exploratory stage. Funding has been provided to assist development. Both DFO and the plaintiffs have worked cooperatively. Assessments are ongoing to determine if the fishery can sustain a commercially viable operation. This includes developing a protocol for stock assessment. The joint assessment framework developed by the plaintiffs and DFO is being reviewed through the Canadian Science Advisory Secretariat Regional Peer Review process. This work has overtaken the plaintiffs' proposal.

[1731] Both sides are working towards a long term approach.

[1732] DFO submits that, even if there were an infringement, it is justified on the basis of the precautionary approach which ensures conservation, given the early stage of this fishery.

[1733] I agree. Although Garson J. declared the infringements to apply to all species, this developing fishery was not ongoing at that time. I am unable to see that any rights are infringed in respect of gooseneck barnacles. The plaintiffs are not prevented from fishing for gooseneck barnacles. They have an exclusive fishery at present, so there is no question of an infringement of their priority, or of minimal impairment. Consultations are significant and ongoing. There are no impediments to their fishing plan. There are reviews ongoing in order to determine appropriate levels of harvest. Conservation and sustainability support a careful approach, and consultation and cooperation is good.

[1734] In the alternative, if there is an infringement, the cooperative and precautionary approach presently being used is justified on the basis of conservation and maintaining the sustainability of a

new fishery.

[1735] If in future DFO takes steps in respect of management or other users that the plaintiffs view as an infringement, they can seek to have the decision reviewed at that time.

HERRING

[1736] Herring are a pelagic fish (existing in the water column) and are harvested in Areas 24 and 25 of the CDA. There are four different commercial fisheries which harvest herring: roe herring, spawn on kelp, food and bait, and special use. The latter two do not occur in the CDA.

[1737] The aboriginal FSC fisheries are primarily for herring spawn on kelp and/or spawn on bough. Recreational herring fishing is minimal. Most of the commercial spawn on kelp fishery is aboriginal -- 37 out of 46 licences are held by aboriginal groups or individuals. On the WCVI, the spawn on kelp fishery is 100% aboriginal. The plaintiffs hold two of the four spawn on kelp licences for the WCVI; Nuu-chah-nulth groups hold the other two.

[1738] The discussions between the plaintiffs and DFO have focussed on the roe herring fishery. Licences are issued for gillnets or seines, and the licence holder must choose one of five major stock areas. The WCVI is one of those stock areas. The fishery is managed as a pool fishery, where groups of at least eight vessels are limited to a specific quota.

[1739] Conflict over herring openings on the WCVI has been ongoing. The fishery was closed from 2006-2013 and again in 2016 due to low abundance. The plaintiffs oppose any commercial herring openings on the WCVI and were successful in obtaining an injunction in 2014. They were unsuccessful in 2015, but no herring were caught in any event.

[1740] DFO requested a herring plan from the plaintiffs, but given their position that the herring fishery should not be opened, the plaintiffs presented an outline only.

[1741] The plaintiffs have concerns about DFO’s model for herring assessment. However, if herring stocks recover, the plaintiffs want a guaranteed share of the TAC, set in advance: that is 50% of the WCVI TAC. Their plan proposes that if the TAC falls below a certain level, only the plaintiffs could fish in the CDA, as the rest of the commercial herring fleet has the whole of the WCVI to fish. The plaintiffs realize they run the risk of there being no herring in the CDA in a particular year.

[1742] The plaintiffs say that in years where the returns are below abundance levels, there would be so little available for commercial harvest that in order for them to have a viable community-based fishery in the CDA, other harvesters should not be permitted to fish in the CDA.

[1743] Canada objects to the proposed allocation and the concept of an exclusive fishery, but overall, DFO takes the position that it is premature to consider justification of issues respecting herring, even though they requested a herring plan from the plaintiffs.

[1744] In 2012, although the fishery was closed, DFO allocated 15.5 roe herring gillnet licences and 0.5 roe herring seine licences to the plaintiffs through PICFI.

[1745] DFO has, in its December 2014 LTO, made an offer of herring licences to the plaintiffs at no cost. The offer includes the option of fishing in the right-based fishery or in the general commercial fishery, the split to be negotiated.

[1746] DFO offered the plaintiffs an additional 22 roe herring licences with 17.5 more to come, and an addition 0.5 seine licence for a total of 55 gillnet licences, one seine licence and two spawn on kelp licences. That would be 79% of the gillnet licences for WCVI, 50% of the spawn on kelp licences for WCVI, and 13% of the seine licences for WCVI.

[1747] DFO intends to develop a method for calculating the TAC specifically for the CDA. Using the total WCVI commercial TAC in 2015, the offer would have allowed the plaintiffs to harvest almost 2.5 million lbs of herring, or 36.4% of that TAC.

[1748] DFO says the plaintiffs' outline is not sufficiently detailed, nor are the discussions complete, so a justification analysis is premature. However, they point out that the plaintiffs plan to use purse seines as well as gillnets. Purse seine vessels are generally 50 to 80 feet long, crewed by four to six people, and can harvest up to 400 metric tonnes in a single set. DFO says this is not small, low-cost boat fishery.

[1749] The herring roe fishery is different in that it is conducted from pools of vessels concentrated in a particular area, with herring roe as the target. Therefore the concepts that have been found to be infringements, such as prohibition against licence splitting and single species licences, may not have practical application for this fishery. The right-based fishery for herring is in a state of development, in that DFO is attempting to develop a TAC for the CDA, despite having to set locations and timing of roe fisheries in season which would cause difficulties in management (James, p. 157). As well, at the time of this stage of the trial, herring stocks on the WCVI were precarious.

[1750] The parties focussed their arguments on allocation of herring roe. The plaintiffs want 50% of the WCVI TAC. Canada's share based on licences would be 36.4%. As with other species, I do not accept the WCVI TAC as a basis for assessing accommodation for the plaintiffs. The LTO also makes mention of using licences outside the CDA. Once again, that is not something that is open to this court. As well, the court does not set allocations, or approve speculative and hypothetical positions.

[1751] Nevertheless, Canada suggests the court's guidance on allocation and exclusivity would assist the negotiations. Madam Justice Garson has already said the plaintiffs' fishery is not exclusive. I would not venture another opinion in the abstract, and uninformed by a specific set of facts, which could impinge on future determinations.

[1752] Herring differs from some of the other fisheries in that there is no question that the plaintiffs' involvement in that fishery has been of significant importance to their people and culture, both currently

and ancestrally. Mention was made in the Jewitt journal of many huge tubs of herring spawn being collected and used for feasts. While there is no particular evidence of an ancestral commercial trade in herring that might translate to a modern right to a commercial fishery, I have concluded that it is not open to me, given the Court of Appeal's order, to consider that aspect within a discussion of continuity. The priority of the plaintiffs' interest in herring is easily asserted by them within this multi-species fishery.

[1753] However, given the lack of a herring fishery in the CDA for the years preceding this stage of the trial, there is not much information before the court. As I have said, the parties' positions are speculative and hypothetical. I accept DFO's position, and I do not understand the plaintiffs to disagree, that an analysis of justification for any ongoing infringements of the plaintiffs' right to fish for and sell herring at this point is premature.

DIVE FISHERIES

[1754] In general, Mr. Ryall, the Director for Resource Management for Dive Fisheries, testified that the commercial dive fisheries (geoduck, horse clams, red and green sea urchins, sea cucumbers and abalone) developed in the 1970's. The Court of Appeal excluded geoduck, although DFO gave the licence to the Nuu-chah-nulth in any event, and extra salmon access was provided to the plaintiffs to compensate.

[1755] According to the Court of Appeal's present order, the "any species" right covers these species as well. No plans have been submitted for them.

[1756] According to Marilyn James, red sea urchins are not available in the CDA because of sea otter predation. There is no commercial fishery for green sea urchin on the WCVI. Two of the plaintiffs hold communal access for sea cucumbers, but the licences are for the east coast of Vancouver Island and the North Coast.

[1757] No plans have been submitted for any of these species. It is difficult to anticipate what might be alleged to be infringements for these small specialized fisheries. I do not intend to deal with them further.

REMEDIES

[1758] Paragraph 29 of the plaintiffs' Seventh Amended Statement of Claim reads as follows:

> 79. But wherefore there is a continuation of trial, that being the Justification Hearing, the Proceeding Plaintiffs claim for relief in the Justification Hearing:
>
> (a) A declaration that the prima facie infringement of the Proceeding Plaintiffs' aboriginal rights to fish and sell fish is not justified and is contrary to the Constitution Act, 1982, s. 35(1);
>
> (b) A declaration that Canada's refusal to accept or implement all or some of the Proceeding Plaintiffs' Fishing Proposals is not justified and is contrary to the Constitution Act, 1982, s. 35(1);
>
> (c) A declaration that Canada has failed to accommodate the Proceeding Plaintiffs' aboriginal rights and the exercise thereof;

(d) A declaration that Canada's refusal to accept or implement all or some of the Fishing Proposals is a breach of Canada's duty to consult and negotiate with the Proceeding Plaintiffs in respect of the manner in which their aboriginal rights can be accommodated, as declared in paragraph 4 of the November 3, 2009 Order;

(e) A declaration that Canada has otherwise breached its duty to negotiate with the Proceeding Plaintiffs in respect of the manner in which their aboriginal rights can be accommodated and exercised;

(f) A declaration that all or some the following legislative and regulatory provisions are contrary to or inconsistent with the Constitution Act, 1982, section 35(1), and specifically with the Proceeding Plaintiffs' aboriginal rights protected by section 35(1) as declared in paragraph 1 of the November 3, 2009 Order, and are therefore inapplicable to the Proceeding Plaintiffs:

(i) Fisheries Act, R.S.C. 1985, c. F-14, ss. 7 and 25(1);

(ii) Fishery (General) Regulations SOR/93-53, ss. 22, 33 and 35(2);

(iii) Pacific Fishery Regulations, 1993, SOR/93-54, ss. 19, 22(1), 26(1), 30, 39, 53 and 63.

(g) In the alternative to a declaration of invalidity as per paragraph (f), a declaration that Canada has a duty to implement fisheries as set out in the most recent Fishing Proposal presented to Canada by the Proceeding Plaintiffs or elements thereof; or,

(h) In the further alternative to a declaration of invalidity as per paragraph (f), a declaration that Canada has a duty to implement fishing opportunities for the Proceeding Plaintiffs consistent with findings of or as may be set out by this Court;

(i) A declaration that Canada's duty as declared pursuant to paragraphs (g) or (h) must be fulfilled within one year of the Order of the court or such other amount of time as this Court deems appropriate;

(j) An order that the Supreme Court of British Columbia retain supervisory jurisdiction over this proceeding with liberty for the parties to apply to the Court for further directions or declarations regarding the implementation of the Proceeding Plaintiffs aboriginal rights as may be necessary;

(k) costs of the Justification Hearing; and

(l) such further relief as this Honourable Court may consider just.

[1759] The plaintiffs have been successful in some parts of some of the declarations they seek, particularly parts of (a), (c), (f,) (h), and potentially (i), although this will require discussion with counsel. They have not been successful in obtaining relief under (b), (d), (e), (g), or (j).

[1760] I have concluded that I should interpret but not redefine the right declared by Garson J. The right continues to apply to "any species". The plaintiffs have a right to fish and sell any species of fish, in a small scale multi-species fishery conducted from small boats, with wide community participation.

[1761] The plaintiffs in this stage of the trial sought a fishery that is not in line with my interpretation of Garson J.'s reasons, together with very large allocations. Their view of the fishery has expanded considerably from 2009, and they have emphasized that the plans they now present are appropriate accommodation only for the present. They expect to increase their participation in the fishery. They have presented fish plans requesting large allocations of fin fish from the entire WCVI catches. They have taken the position that the justification exercise should be focussed on why Canada has refused to implement their plans. I have found that that is not the appropriate approach to justification.

[1762] Even if I am wrong in that conclusion and instead decided to follow that path, the plans are not complete and there are fundamental aspects of them that I would find Canada justified in refusing to implement. Although it is not necessary to do so, given the conclusions I have reached, I have examined each of the plans from this perspective.

[1763] Canada seeks a further delineation of the right, a finding that certain fisheries are not infringed or have been adequately accommodated, or alternatively, that any infringements are justified. In the further alternative, Canada asks the court to precisely identify any unjustified infringement, declare the offending sections to be inapplicable to the plaintiffs by way of a constitutional exemption under s. 52(1) and suspend the declaration for two years.

[1764] This approach more closely aligns with the one I have followed in these reasons, as I have concentrated on whether the legislation, regulations, and policies that were declared by Madam Justice Garson to be *prima facie* infringements have ultimately been justified by Canada. The final delineation of the right remains to be articulated in accordance with the conclusion I have reached.

[1765] The parties were sent away to negotiate an entire fishery, but reached no agreement on the underlying principles and issues, and have been fundamentally divided on the scope and scale of the right that arises from the broad declaration made by Garson J. However, I have reached the conclusion that attempting to negotiate allocations before the scope and scale of the right was determined, and before justified infringements were dealt with, is not an appropriate approach for a court in a civil claim such as this. I am not, as I have said several times, making decisions in a political or a mediated context.

[1766] The plaintiffs have already obtained, through the course of the Negotiations, a general approach from DFO in the salmon demonstration fishery that deals with many of the legislative and regulatory infringements noted by Garson J. to be particular problems. This approach includes multiple small boats, licence splitting, and no costs to the plaintiffs. They have built a cooperative management and monitoring system with DFO, and it has worked well for that one fishery. They have also received significant allocations of licences and quota for groundfish, another specific issue Garson J. raised. They have been given funding for capacity building, training, and staff.

[1767] The measures DFO has taken are useful accommodations but are discretionary and on the evidence before me (which deals with the situation only up to March 2016) were devised for the salmon demonstration fishery. Those measures must be incorporated into a formal structure or protocol, and must be adapted to the multi-species fishery that is the subject of the right.

[1768] I have considered the various sections that are engaged in the infringement analysis and have determined that some aspects of the licencing regime that affect the plaintiffs' multi-species small-boat right are unjustified infringements. I have set out which aspects of the legislative, regulatory and policy scheme are or are not justified for each fishery. I will require the assistance of counsel for a precise articulation of the applicability of each section, as counsel did not approach their arguments that way. I

have also set out the principles governing allocations for each species, and have noted the species for which DFO must reassess its approach to allocations.

[1769] I have already alluded to the form of remedy sought by the plaintiffs. They say Canada has not justified its regime, and therefore it is inapplicable to them; they say they are thus entitled to a constitutional exemption from the entire fisheries management scheme. I have already said I do not view that as the appropriate approach for a civil claim, nor is it an acceptable path to reconciliation.

[1770] I refer again to the paragraph from *Gladstone* that was adopted in *Lax Kw'alaams.* The goal of the justification exercise is the reconciliation of aboriginal societies with the rest of Canadian society. In any event, the plaintiffs are not entitled to a declaration that they are exempted from the entire regime, as I have discussed in the results of my consideration of each fishery.

[1771] Nevertheless, in my view, the plaintiffs have obtained a large measure of the relief they sought before Garson J. That is, the *prima facie* infringements she found to exist within the legislative, regulatory and policy regime have in large part not been justified. Accommodations have been offered, some appropriate, some inadequate.

[1772] The plaintiffs have not been as successful in obtaining what I view as significantly expanded claims arising from the nature of the declarations they obtained in 2009.

[1773] The plaintiffs also seek ongoing court supervision of their fishery. Canada resists the concept of ongoing judicial supervision, as proposed by the plaintiffs. The plaintiffs do not suggest I remain seized, as ongoing years of supervision by me is not possible. However, Canada says it is not feasible or necessary to supervise the fishery on an ongoing basis, even if such a thing were possible without being conversant with all the issues. Canada says the court can assume Canada will comply with any orders.

[1774] The concern is not that Canada will fail to comply with orders. It is that so many decision need to be made on an ongoing basis and there will inevitably be disagreements. I have said many times that the evidence before me is insufficient to make general pronouncements that will resolve differences, present or anticipated, over management details, even if that were the court's role, and even if I had the expertise to do so, which I do not.

[1775] The plaintiffs appear to want to have the management of their fishery removed from the Minister and placed in the court's hands. That is not in accord with many statements from the Supreme Court of Canada. The Minister, with the large trained DFO staff, has the responsibility for the entire fishery.

[1776] The course of these proceedings has shown the impossibility of a court assuming the role proposed by the plaintiffs. From my experience on this case it is simply not feasible. It has taken many many weeks of evidence from dozens for witnesses and submissions from many lawyers for this court to get even the most superficial understanding of the complexities of fisheries and science and management.

[1777] To require the court to assume an ongoing supervisory role over this fishery seems to me to be an inappropriate use of the court's resources, despite the fact that this occurred in Washington State following what is commonly called the *Boldt* decision (*United States v. Washington,* 383 F. Supp. 312 (W.D. Wash.1974)). The Minister of Fisheries has the responsibility to run all of the multi-faceted interrelated fisheries. The court is available for judicial review of Ministerial decisions and should deal with specific questions put to it to resolve particular disputes, but should not be put in the position of supervising a whole fishery, especially one as complex as this one. If the parties find themselves returning to court for a specific ruling on a particular dispute, the question or questions that the court will be called upon to determine must be concise, limited, and capable of clear definition.

[1778] As I commented earlier, this stage of the trial has resembled a commission of inquiry, despite (or perhaps partly because of) the extensive effort put in by counsel. The task given to the parties and then to this court has been unfocussed and unwieldy. It has required the court to gain some familiarity with the entire fishery and the entire regulatory and management scheme. In order to be of assistance, the proposed judicial supervisor would have to spend months hearing evidence again. That is not feasible. I have noted that judicial review is the appropriate legal mechanism to deal with many of the individual decisions based on sets of facts that may arise as the parties attempt to come to terms with the exercise of the right. Ongoing court supervision dedicated to this fishery is not appropriate.

[1779] Negotiations have so far not been successful, and have not engaged the other sectors of the fishery. A mediated approach or other form of alternate dispute resolution may be appropriate to set allocations within the framework I have provided, and to deal with disputes as they arise. If any additional determinations, within the confines of the court's role, would assist in furthering a mechanism for resolution, counsel have liberty to address this.

[1780] Canada seeks a two-year suspension of any order. The plaintiffs suggest one year. Further discussion will have to take place in order to determine the form of order and appropriate timing, and what might be accomplished during such a period. One or two years of further negotiations without the framework of a clear and precise order will be no more successful than the previous years have been.

[1781] I invite counsel to appear before me to discuss what should be done at this stage in order to formulate a precise order capable of being entered.

[1782] Short submissions were made on costs at the conclusion of the arguments in October of 2016. I presume counsel will want to deal with that issue further and may set a time through the registry to address that issue or other matters arising from these reasons.

"The Honourable Madam Justice Humphries"

SUMMARY OF FINDINGS

[1783] Rather than attempt to put together an executive summary in narrative form, I have excerpted various paragraphs from the judgment on some of the significant issues. This provides a very cursory review. For the full discussion of these issues, refer to the reasons for the headings below. A summary of the conclusions for specific species can be found in the “Results” section for each fishery.

What Can or Should be Done with the Right as Declared?

(251) This court is bound by the Court of Appeal and by the fact that the Supreme Court of Canada did not grant leave on Canada’s second application. The right must stand as it has been declared, and cannot be restated in the manner suggested by Canada. The justification exercise starts from the right as it is presently declared.

(252) The anomalies left from the previous decisions tie this court’s hands to some extent. That said, it ultimately serves no purpose to circumscribe the present process in a way that contravenes the directions of the Supreme Court of Canada in *Lax Kw’alaams*. According to the declarations, this stage of the trial is about justification. This court must start the justification analysis on the basis of the right as it is presently declared. In its present form, however, the declaration provides no assistance for the next stage of the analysis. To fail to interpret the declared right before beginning a justification analysis would render the process unmanageable and without meaning.

(256) To summarize, this court cannot reword Garson J.’s declaration, but the right she declared must be interpreted by reference to the pleadings and her reasons in order to give structure to the justification analysis. Madam Justice Garson noted that the plaintiffs called no evidence before her on the scale of the right they sought. Although she declared the right, she said she was leaving the scale and scope of the right to be determined at a future time (para. 487). In my view, that does not accord with *Lax Kw’alaams*, as the Crown is entitled to know exactly what is claimed before the right is declared. In any event, the justification analysis cannot proceed without an understanding of the scope and scale of the right, so the time for that determination is now. [256]

Continuity as it Relates to Species Specificity

(289) As a result, I conclude that I must accept the plaintiffs’ proposition that the present declaration as it stands is the starting point - that is, an analysis of continuity in respect of each individual species cannot result in subtraction of species from the “any species” declaration. It is too late to require the plaintiffs to deal with anything but the “any species” right as declared by Garson J.

(290) Since justification is the only issue before this court and no further evidence can be called on any issue except justification, the only sensible approach to deal with continuity is the one I take from Canada’s submissions, and which had some reflection in the intervenors’ position as well - the importance of the species to the plaintiffs’ ancestral trade and practices as can be gleaned from Garson J.’s judgment, will enter into the accommodation/justification/reconciliation analysis.

Preferred Means

(383) Taking the plaintiffs' own description of their preferred means, Dr. Hall's letter, Mr. Woods' evidence, and Dr. Morishima's views, I conclude that Garson J. found that one indication that the plaintiffs' right was infringed was because they were prevented from using their preferred means, by which she meant small, low cost boats in community-based localized fisheries involving wide community participation, in a multi-species fishery. It was important to her reasoning that, without licence splitting, such a fleet could not fish commercially. It is an essential characteristic of this fishery, from all of this evidence, including that of Dr. Morishima, that it is a localized small boat fishery with restricted catching power.

(385) I agree that a consideration of preferred means, while useful in determining the scope of the right because it is one indicator of infringement of the right, does not in itself characterize the right. The fact that the plaintiffs' preferred means of exercising their right is "small, low-cost boats" does not necessarily mean the right attaches only to small, low-cost boats. On the other hand, the fact that many of the plaintiffs have now acquired average-sized trollers with higher catching power since the salmon demonstration fishery began in 2012, and that the use of those trollers has increased and is expected to grow even further, does not change the scope or interpretation of the right into something other than was intended in the judgment from 2009, insofar as that can be determined from a reading of Garson J.'s reasons as a whole.

Discussion of Interpretation of the Extent of the Right

(441) In my view, the only conclusion to be drawn from Garson J.'s reasons as a whole, despite the lack of parameters in the declaration, is that the declared right to fish for any species and to sell that fish is to be interpreted as a small-scale, artisanal, local, multi-species fishery, to be conducted in a nine-mile strip from shore, using small, low-cost boats with limited technology and restricted catching power, and aimed at wide community participation.

Statute Miles or Nautical Miles

(468) Using the customary meaning of measurements at sea, which all parties agree is nautical miles, and in the context of the Supreme Court of Canada's urging courts to give a liberal approach to the interpretation of aboriginal rights and to interpret ambiguities in favour of aboriginal peoples (*Van der Peet* at paras. 23 and 24), in my view it is appropriate to use nine nautical miles as the outer limit of the CDA.

The Mechanics of the Justification Analysis

(867) It must be kept in mind that the court cannot make political decisions or design a fishery, nor is this a mediation where the court can work with the parties to reach a satisfactory arrangement, helping the parties to agree on one or another of their respective approaches. It is not an arbitration where the parties have agreed that the court can set allocations. This is not a commission of inquiry -- although as I have said, at times it seemed to resemble one, despite the caution against such an approach in *Lax Kw'alaams*. This is a trial in which, according to the declarations made previously, the parties have

now come to this court “for a determination of whether the *prima facie* infringement of the plaintiffs’ aboriginal rights is justified,” in respect of a right that was given no parameters when it was declared and infringements that were not specified, while achieving reconciliation with the rest of Canadian society. That task is difficult enough. The court was not also given the task of designing and supervising a fishery, or of setting or approving allocations arising from a negotiated context. In my view, that is what the approach suggested by Garson J. for the Negotiations, and adopted by the plaintiffs for the litigation, leads to.

(878) In an attempt to move forward, I have set out what I consider to be the correct interpretation of Garson J.’s reasons in respect of the right she declared. I have also set out the areas of infringement I will deal with, in an effort to focus the declaration that the entire scheme infringes the right.

(879) The legislation, regulations, and policies, which were declared in their entirety to be a *prima facie* infringement of the plaintiffs’ right to fish and sell any species of fish, have remained unchanged since Garson J.’s judgment.

(880) In my view, the justification exercise should involve a consideration of those infringements – that is, it should focus on the legislative and regulatory sections that were pleaded and which give rise to the characteristics of the overall regime that Garson J. referred to, as well as the specific policies to which the plaintiffs take objection.

(881) Following that approach, there are general conclusions on infringement and justification that can be reached, given the nature of the right-based fishery as I have interpreted it from Garson J.’s judgment. Those findings relate to the legislation, regulations, and policies.

Aspects of Infringement and Justification Applying to All Species

(904) It is not difficult to see that the existing regime which requires (1) one commercial licence per vessel, (2) all vessels to be registered, (3) licence fees, (4) a restriction on splitting or transferring licences, (5) one licence per species, would be too costly for a small boat multi-species fishery. As well, licence allocations that depend on limited entry based on previous catch is not justified for this fishery. DFO has not attempted to justify these approaches for a small-boat fishery.

(905) Thus I think it is fair to say that Canada does not take the position that the entire regime, found to be a *prima facie* infringement, can be justified and should remain unchanged. DFO has funded the training and salaries of the T’aaq-wiihak biologists, fishing coordinator, and other staff, including monitors, and has already addressed many aspects of the regime in the salmon demonstration fishery. PICFI licences provided outside the right have always been free of cost. This has continued for the PICFI licences provided since 2009 in the salmon demonstration fishery and in other fisheries. DFO has not required adherence to the regular commercial rules for the plaintiffs’ PICFI salmon licences. DFO has not required registration numbers for the vessels. Licence splitting has been allowed in the salmon demonstration fishery. Expanded bycatch retention for sale has been offered. DFO has allowed the amalgamation of quota onto one licence for the plaintiffs’ use.

(906) The accommodations listed above engage certain aspects of the *Fishery (General) Regulations*, ss. 22(1), 33(1) and 35(2), and of the *Pacific Fishery Regulations, 1993*, ss. 19(1) and 22(1), as they apply to the plaintiffs' right-based fishery. The precise application of those sections will have to be the subject of discussion with counsel.

(907) I conclude that the regulations setting out these requirements are not justified for the plaintiffs' right-based fishery. While these are decisions DFO has already made, the regulations remain unchanged. Thus the present accommodations and flexibilities are not a permanent solution. It may be that a new regulatory mechanism or some sort of formal protocol will be required for this fishery.

(911) The requirement for quota for groundfish both as bycatch and as an aspect of a small-boat multi-species fishery also seems to be an obvious infringement, but DFO is justified in requiring an appropriate monitoring and catch reporting standard to ensure conservation and sustainability of the fishery. I will discuss this in the context of the groundfish fishery.

(912) In general, as I have mentioned before, I will not be dealing with details of gear restrictions or requirements, specific area restrictions or requirements, and openings and closings. Those things are aspects of daily fisheries management and it would be impossible to anticipate them or pronounce on them. It should be clear that DFO cannot manage the fishery in such a way that unjustifiably infringes on the right, and consultation is required. However, it is still important to keep in mind that, although consultation is essential, details of management are not necessarily part of the right *per se* unless they infringe on its exercise.

(913) If the effect of a specific in-season management decision is alleged to have infringed the right, it will have to be dealt with individually, through discussion and resolution, or failing that, judicial review. I realize that judicial review may not be timely enough in many cases, but there is simply no way for this court to anticipate and prescribe an approach for these details of seasonal management.

Salmon Allocation Policy

(917) Canada's position from the beginning of the Negotiations has been that the plaintiffs have been given a *commercial* right of unknown scope; that is, the right takes its character from the word "commercial". However, I agree with the plaintiffs that the right is an *aboriginal* fishing right. Its essential character is as an aboriginal right. Because it is also a commercial right, *Gladstone* states clearly that it is not an exclusive right, and does not extinguish the right of public access to the fishery. Nevertheless, as an aboriginal right, it has priority over the other sectors, after FSC and treaty rights (limitations the plaintiffs acknowledge), as long as the other factors in *Sparrow* are properly balanced.

(925) However, the fact that the declared aboriginal right is to fish and sell fish into the commercial marketplace does not lessen the priority to be accorded to the aboriginal right -- it does not allow Canada to start out on the allocation process by treating the plaintiffs' fishery as simply another commercial fishery. To accord priority to the recreational fishery over the plaintiffs' aboriginal commercial fishery is not justified.

Mitigation Policy

(930) Canada's position is a valid one: that voluntary relinquishment of licences promotes reconciliation, whereas involuntary relinquishment does not. However, accommodation of the plaintiffs' right cannot be stymied by the necessity to obtain licences only through the mitigation policy if that policy prevents a full realization of their right. This will differ species to species, and I will discuss it in the context of each species.

(931) For instance, the case for not applying the mitigation policy to chinook salmon is strong because the plaintiffs have an extensive historical and modern relationship with that fishery that supports commercial trade. However, this is not necessarily the case for commercial fisheries that have been developed by the commercial sector itself in recent years and for which there is no evidence of ancestral involvement of the plaintiffs in trade of that species, such as the prawn, crab, and sablefish fisheries. In those cases, a policy which relies on voluntary relinquishment of licences might well be justified.

(934) Thus it is not possible to deal generally with this policy. It requires evidence in relation to a specific species. I would not declare the entire mitigation policy to be inoperable as an infringement of the right, but in certain circumstances it may act as an unjustified barrier to accommodation. This will be considered in respect of each species.

Duty to Consult

(804) Given all these circumstances, I cannot see that it is appropriate or necessary to make a general declaration at this point in respect of a failure of the duty to consult in good faith either under the common law or under the declaration. There were stumbling blocks presented by both sides, and this process is still in progress.

Consultation on Each Species

(1045) It is correct that certain species were debated more thoroughly than others. However, I note that extensive discussions have taken place, albeit within the constraints of the limited mandate provided to the Regional staff. I also note DFO's commitment to ongoing deep consultation. Therefore I do not see this as an issue upon which the justification analysis should stand or fall.

Use of PICFI

(1068) I will deal with the mitigation policy through which the PICFI inventory is obtained when it comes to each species. In general, I am unable to conclude that the source of the licence negates its effect on accommodation. It is important to note that a PICFI licence is a free licence provided to the plaintiffs. The salmon PICFI licences used by the plaintiffs are not currently constrained by the usual rules, and the findings I have made will affect conditions of other licences provided through PICFI. The relationship of PICFI to the plaintiffs' fishery will be discussed for individual species.

(1069) The mitigation policy itself cannot act as a bar to appropriate accommodation for some species, as I will discuss below. However, the fact that a licence came through PICFI is not a reason to discount it.

(1070) The plaintiffs have chosen to use some of the licences that have been provided since the 2009 decision outside the CDA. It is important to note that the exemption from some of the regular commercial rules that attach to a PICFI licence only operates when the licence is being fished in the CDA. Exemptions for particular aspects of the rules are subject to the application of the Strategic Framework for Monitoring and Catch Reporting for each species, in consultation with the plaintiffs.

ACRONYMS

AABM	Aggregated Abundance Based Management (relating to ocean-based chinook on the WCVI)
ATP	Allocation Transfer Program
CCTAC	Canadian Commercial Total Allowable Catch
CDA	Court Defined Area
CTAC	Canadian Total Allowable Catch
CWF	Coastwide Framework
DFO	Fisheries and Oceans Canada
EM	Electronic Monitoring
FSC	Food, Social and Ceremonial
IFMP	Integrated Fishery Management Plan
ISBM	Individual Stock Based Management (relating to salmon fisheries for chinook and coho spawning in individual rivers on the WCVI)
ITQ	Individual Transferable Quotas
IVQ	Individual Vessel Quotas
LTO	Long Term Offer (by DFO)
PICFI	Pacific Integrated Commercial Fishing Initiative
PPFA	Pacific Prawn Fishermen’s Association
PST	Pacific Salmon Treaty
SFA	Sablefish Fishermen’s Association
TAC	Total Allowable Catch

VMS	Vessel Monitoring Systems
WCVI	West Coast of Vancouver Island