Editor's Note: Corrigendum released on May 26, 2011. Original judgment has been corrected with text of corrigendum appended.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2011 BCCA 237

Date: 20110518
Docket: CA037704

Between:

The Ahousaht Indian Band and the Ahousaht Nation, represented by Shawn Atleo on his own behalf and on behalf of the members of the Ahousaht Indian Band and the Ahousaht Nation

The Ehattesaht Indian Band and the Ehattesaht Nation, represented by Dawn Smith on her own behalf and on behalf of the members of the Ehattesaht Indian Band and the Ehattesaht Nation

The Hesquiaht Indian Band and the Hesquiaht Nation, represented by Simon Lucas on his own behalf and on behalf of the members of the Hesquiaht Indian Band and the Hesquiaht Nation

The Mowachaht/Muchalaht Indian Band and the Mowachaht/Muchalaht Nation, represented by Lillian Howard on her own behalf and on behalf of the members of the Mowachaht/Muchalaht Indian Band and the Mowachaht/Muchalaht Nation

The Tla-o-qui-aht Indian Band and the Tla-o-qui-aht Nation, represented by Benedict Williams on his own behalf and on behalf of the members of the Tla-o-qui-aht Indian Band and the Tla-o-qui-aht Nation

Respondents
(Plaintiffs)

And

The Attorney General of Canada

Appellant
(Defendant)

And

Her Majesty the Queen in Right of the Province of British Columbia,
Intervenor

And

B.C. Wildlife Federation, The B.C. Seafood Alliance, and The Underwater Harvesters Research Society

Intervenors

Corrected Judgment: The text of the judgment was corrected at paragraph [65] on May 26, 2011

Before: The Honourable Mr. Justice Hall
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Neilson

On appeal from the Supreme Court of British Columbia, November 3, 2009, (*Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494, Vancouver Registry No. S033335)

Counsel for the Appellant, Attorney General of Canada:	C. Tobias, Q.C., B. Marleau, M. Parkes
Counsel for the Respondent First Nations:	J. Rich, M. Kirchner, K. Blomfield
Counsel for the Intervenor, Attorney General of British Columbia	J. Hunter, Q.C., J. Owen
Counsel for the Intervenors, BC Wildlife Federation and The BC Seafood Alliance	J.K. Lowes
Counsel for the Intevenor, The Underwater Harvesters Research Society	C. Harvey, Q.C.
Place and Date of Hearing:	Vancouver, British Columbia December 6-10, 2010
Place and Date of Judgment:	Vancouver, British Columbia May 18, 2011

Written Reasons by:
The Honourable Mr. Justice Hall

Concurred in by:
The Honourable Madam Justice Neilson

Partially Dissenting Reasons by:
The Honourable Mr. Justice Chiasson (page 35, paragraph 75)

Reasons for Judgment of the Honourable Mr. Justice Hall:

[1] This is an appeal from a judgment of Garson J. (as she then was) who made findings in favour of the plaintiff/respondents of Aboriginal rights and infringements thereof. The reasons can be found at 2009 BCSC 1494. Canada appeals from these findings. The various intervenors, in part generally in agreement with the appellant, Canada, addressed a number of specific issues in the proceedings. The plaintiffs seek to sustain the conclusions of the trial judge concerning Aboriginal rights and infringement.

[2] From a time stretching back to the mists of prehistory, ancestors of the plaintiff First Nations, now collectively known as Nuu-chah-nulth ("NCN"), have inhabited the West Coast of Vancouver Island. This coastal area has relatively mild winters, although at times stormy, and has been blessed with an abundance of fisheries resources. Because of the relative remoteness of the area from Europe, it was near to the last area in North America to receive attention from European explorers.

[3] As far as can be discerned from the historical record, the first European group to initiate contact with the then inhabitants were Spanish explorers coming north by sea from Spanish America in the late 18th century. As with most explorers, the motivation was a search for valuable resources and a desire to establish some type of sovereignty.

[4] Soon after the Spanish explorers initiated contact in 1774, the Nootka Sound area was visited by that intrepid British explorer Captain Cook. He was on the coast for a time in 1778. Representatives of England and Spain commenced something of a contest for dominance in the area and shore works were eventually constructed at a place called Yuquot in Nootka Sound. Presumably because this particular area afforded a safe anchorage, it seems to have become a primary focus for European explorers and traders as well as American traders interested in the sea otter peltry trade.

[5] Shortly after the Cook expedition, British traders discovered that this resource, sea otter pelts, had great value for the China trade already initiated by the East India Company. The British traders did not have this commerce in their exclusive hands for long before American traders, often referred to in the narratives as “Boston men” came into the trade in a very active way.

[6] The trade in sea otter pelts was very intense but of limited duration. Farther north towards Alaska, Russian traders based on that coast also were engaged in this trade. As was too often sadly the case (witness the American buffalo and the Atlantic cod), concentrated harvesting of the resource resulted in drastic depletion and by the time of the Napoleonic wars, the sea otter came to be largely extinct in the area of the West Coast of Vancouver Island. From around 1810 to 1850, there was but little contact between natives and non-natives because this trade, the magnet for British and American traders, had ceased to be viable. Interestingly, in recent times, the sea otter has been re-introduced into the area, apparently not always to the benefit of certain marine food resources sought to be harvested by modern fishers.

[7] To some extent, the sad history of the sea otter trade at the end of the eighteenth century has an echo in recent times with many of the species of marine resources being harvested on the West Coast of Canada. The sea is bountiful but not inexhaustible and modern fishing technology has posed a threat to the continuing plenitude of a number of species.

[8] Under Canadian constitutional arrangements, prime responsibility for governance of ocean resources is assigned to the Federal government. This responsibility in working terms is exercised by Fisheries and Oceans Canada (“DFO”). Commencing about 35 or 40 years ago, DFO on the West Coast began to implement limited entry schemes. As time went by, closures of areas to the harvesting of various species became more intense and frequent. Such measures were in aid of the preservation of such resources for present and future generations. However, a concomitant of this increasingly restrictive regime was that many

harvesters, particularly smaller fishers, were being squeezed out of access to resources as a result of what had evolved into a limited entry system. Both native and non-natives were affected by this evolution.

[9] One methodology adopted by DFO to take pressure off of ocean resources was a licence retirement program. It was hoped fewer fishers would ease the pressure on stock depletion. In 1990, the Supreme Court of Canada rendered a landmark decision in the case of *R. v. Sparrow*, [1990] 1 S.C.R. 1075. The practical effect of this decision was to afford a measure of priority to Aboriginal fishers for food, social and ceremonial purposes (the FSC fishery). At least partly as a result of this decision, DFO instituted policies that built on earlier policies such as the Indian Fishermen's Emergency Assistance Program of 1980-82 that had sought to provide enhanced financial assistance for native fishers. I earlier noted that the increasingly restricted harvesting regime was making it difficult for many fishing in a modest way to continue in the fishery industry on the West Coast.

[10] The trial judge made reference to the current policy that arose from the *Sparrow* case in her reasons:

> [690] ...
>
> Taking into account the current state of the law on Aboriginal fishing rights, DFO has adopted the following policies related to Aboriginal fishing:
>
> - Aboriginal fishing should occur within the areas that were used historically by the aboriginal group or First Nation.
> - Aboriginal fishing opportunities will be provided to the First Nation having historical use and occupancy of the area in question. The First Nation will administer the fishing opportunities for the benefit of its members collectively rather than individually.
> - Aboriginal fishing for food, social and ceremonial purposes will have first priority, after conservation, over other user groups. Aboriginal fishing for such purposes will only be restricted to achieve a valid conservation objective, to provide for sufficient food fish for other Aboriginal people, to achieve a valid health and safety objective, or to achieve other substantial and compelling objectives.

> [691] Cameron West, a DFO manager, testified that this policy has been used to regulate the west coast fishery since August 1993.

[11] The judge also noted specific agreements between DFO and Nuu-chah-nulth Tribal Council from 1992 to the recent past.

> *d. AFS agreements with the Nuu-chah-nulth Tribal Council*
>
> [707] A seven-year framework fisheries agreement was reached on August 20, 1992, between the DFO and the Nuu-chah-nulth Tribal Council representing 14 bands. The agreement included a DFO contribution of up to $1.5 million for Nuu-chah-nulth Tribal Council fisheries programs. The Initial Interim Fisheries Agreement expired in 2000 and since then, the DFO and the Nuu-chah-nulth Tribal Council have entered into nine additional agreements. This program enables the Nuu-chah-nulth Tribal Council to operate.
>
> *e. Contribution Agreements and Project Funding Agreements (1991-)*
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> [708] The DFO has entered into a series of annual funding agreements both with the Nuu-chah-nulth Tribal Council and individual Nuu-chah-nulth Tribal Council bands for specific projects. The DFO and the Nuu-chah-nulth Tribal Council have from time to time entered into Amending Contribution Agreements to adjust funding levels or add funding for additional projects. In 2004, AFS Contribution Agreements were revised as Project Funding Agreements. These agreements generally provided funding for a 12-month period and since 1991, the agreements have provided approximately $20 million to the Nuu-chah-nulth Tribal Council and individual Nuu-chah-nulth Tribal Council bands.

"AFS" refers to the Aboriginal Fisheries Strategy, a DFO program created in the aftermath of the *Sparrow* decision in order to provide increased fisheries access to Aboriginal groups.

[12] DFO also undertook measures to have "retired" licences transferred to Aboriginal groups and individuals and to enhance the allocation of harvesting opportunities to groups like the plaintiffs under an Allocation Transfer Program from 1994, ("ATP"). The judge said this in her reasons:

> [714] ATP was introduced in 1994 as a successor to the Licence Retirement Program. It facilitated the voluntary retirement of commercial licences and the issuance of licences to eligible aboriginal groups. The initial program had a duration of six years, and a total of $42 million was approved for funding.
>
> [715] ATP licences are issued as communal licences to aboriginal organizations rather than individual licences. As of March 31, 2008, 35 of the 38 aboriginal organizations that were eligible received an ATP licence. No

> licence fee is payable for licences issued under the *Aboriginal Communal Fishing Licences Regulations*, including ATP. For profitable fisheries, First Nations have been required to make contributions to fisheries co-management. Between 1994 and March 2008, there have been 354 transactions to retire licences and quota plus an additional 14 transactions to acquire commercial fishing vessels; 259 licences were allocated to aboriginal organizations throughout coastal British Columbia. The DFO has provided for the issuance of a number of licences to the Nuu-chah-nulth Tribal Council and member First Nations. These licences are set out in a series of Communal Commercial Fisheries Access Sub-Agreements beginning in 1997. After 1999, ATP licences were specifically designated to particular bands rather than generally to the Nuu-chah-nulth Tribal Council.

[13] As Dr. Hall, a witness who has been long employed as a fisheries consultant to the plaintiff respondents, testified, the West Coast fisheries have been under pressure for many years. To keep the resource from a disastrous decline is a mandate of DFO. DFO often finds itself in the difficult role of mediating the needs and wishes of Aboriginal and non-Aboriginal fishers. To satisfy all is a challenging task. The judge noted in her reasons that despite the above-noted measures adopted to enhance their interests, the plaintiffs felt and feel that the measures adopted by DFO have been to date inadequate:

> [716] The plaintiffs agree that the ATP and its forerunner, the Licence Retirement Program, provide some commercial fishing opportunities to First Nations by retiring ordinary commercial licences and reissuing licences to First Nations as communal "F" licences. However, the plaintiffs say the program is wholly inadequate to meet their needs or to begin to accommodate their aboriginal rights for the following reasons. First, the plaintiffs say the program is underfunded. Second, the plaintiffs say that contrary to Canada's submission, the ATP does not provide community access to commercial fisheries. They submit that if the ATP provides a commercial fishing licence to an aboriginal community, the licence can only be fished on one vessel. Thus, while the monetary benefits of the licence may flow to the community (depending on the terms of use of the licence agreed to by the community and the fisher) the actual fishing opportunity is limited to one boat. A single licence cannot be split amongst two or more smaller (mosquito) vessels. The plaintiffs also submit that licences issued under the ATP must be fished in accordance with the ordinary commercial fishery. Fishing must take place at the times and locations that are designated by the DFO and which are open to all in that fishery, Nuu-chah-nulth or otherwise. The plaintiffs say this is not respectful of the priority nature of aboriginal rights and is not responsive to the plaintiffs preferred means of fishing or their wish for a community-based fishery. The plaintiffs say the program depends on "willing sellers" to provide licences to the program through the market place. Sellers, especially in profitable fisheries like the geoduck fishery, may not exist and the cost of acquiring licences

> severely limits the program. The plaintiffs also contend that the number of licences available through the ATP is inadequate. The result, they say, is that First Nations, even within the Nuu-chah-nulth Tribal Council itself, must compete for the few licences that are available.

[14] The result of this dissatisfaction was the genesis of the present litigation in which the plaintiffs sought declarations of both Aboriginal rights to harvest and market fisheries resources and a declaration that Canada's regulatory regime infringed those rights. They also sought declarations of Aboriginal title to submerged lands adjacent to their dry-land ancestral territories.

[15] In their statement of claim as further particularized, the respondents claimed rights to harvest various species of fisheries resources in their territory for "food purposes, social purposes, ceremonial purposes, trade purposes, purposes of exchange for money or other goods, commercial purposes, (or) purposes of sustaining the communities." The respondents also claimed the right to sell fisheries resources on a commercial scale or, in the alternative, "to sell for the purpose of sustaining that band's or nation's community or, in the further alternative, to exchange for money or other goods." As can be seen, the claims advanced by the respondents were multifarious and sought on a spectrum a variety of declarations of rights.

[16] After reviewing the evidence, the trial judge made a number of findings of fact. She concluded that at the time of contact, groups comprising ancestors of the NCN fished extensively and used the resources harvested both for food and for trade, regularly exchanging substantial quantities of fisheries resources with other groups for economic purposes (paras. 243, 282, 439, 485). She concluded that these practices were integral to the pre-contact culture of the ancestors of the NCN (para. 285).

[17] The trial judge considered that the rights at issue should be characterized by reference to the plaintiffs "ancestral practices" rather than by exclusive reference to the pleadings. She rejected the characterization of a limited right to "sustain the community" as not viable and contrary to the evidence and the authorities as it

seemed to be a “purpose-drive characterization” and suggested a guaranteed harvest level (para. 482). She also rejected the characterization of “exchange for money or other goods” as inappropriately narrow in light of her view of the evidence of pre-contact NCN practices (paras. 485, 486).

[18] Ultimately the trial judge characterized the right as one to “fish and to sell fish”. She considered this to be a wider right than a claimed right to exchange fish for money or other goods. She said this:

> [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. ...

[19] The trial judge found that the harvest right was a site specific one and would be exercisable only within each claimant group’s traditional territory (to a limit of nine miles from shore). She declined to presently delineate limitations on the harvesting rights and sales rights concerning individual species on the basis that the evidence had demonstrated the ancestors of the NCN harvested and traded in numerous species of fish within their territories. She concluded that the respondents had proven continuity between pre-contact practices of fishing and trading in fisheries resources, which translated into a contemporary right to harvest and sell fisheries resources in the commercial marketplace. I doubt that at the present stage of these proceedings more precision of the nature of the right could be adumbrated.

[20] I have read in draft the concurring reasons of Chiasson J.A. wherein he concludes that the Aboriginal right found by Garson J. should be properly delineated as a right to sell fish for the modern equivalent of sustenance. While the characterization of this right by Chiasson J.A. has a measure of force having regard to the ancestral milieu, I am doubtful that we, as an intermediate appellate court, are free to adopt such a characterization in light of existing authority and the conclusions

of Garson J. at paras. 486 and 487 of her reasons. Chiasson J.A. places considerable reliance upon the case of *R. v. Marshall*, [1999] 3 S.C.R. 456. I note that *Marshall* was a treaty rights case as contrasted to the present case which concerns pleaded Aboriginal rights. I doubt the applicability of the reasoning in *Marshall* to this case and I am therefore not disposed to differ from the characterization of the rights enunciated by the trial judge.

[21] At paragraph 489, the trial judge summarized her findings with respect to the establishment of the plaintiff's Aboriginal rights:

> Accordingly, I conclude that the plaintiffs have established aboriginal rights to fish for any species of fish within the environs of their territories and to sell that fish. (In these Reasons, when I refer to the plaintiffs' right to fish and sell fish, the term "to sell fish" refers to the right to sell only that fish caught pursuant to their now proven aboriginal right.) The approximate boundaries of the plaintiffs' respective territories are delineated in the map at Appendix A to these Reasons and in Exhibit 26, except that the seaward boundaries of the territories extend only nine miles. Broadly speaking, the right is not an unlimited right to fish on an industrial scale, but it does encompass a right to sell fish in the commercial marketplace. …

[22] The respondents had argued before the judge that the seaward limit of their right to harvest resources ought to be found to extend a hundred miles from shore but the judge did not accept that broad claim, possibly having regard to the technical limitations of the ability of their ancestors to operate offshore at a time anterior to first contact.

[23] The trial judge went on to hold that Canada's legislative regime and regulation of the fisheries constituted a *prima facie* infringement of the plaintiffs' rights (other than of their food, social and ceremonial rights and the operation of a clam fishery). She declined to adjudicate on issues of accommodation and justification which, failing an agreement between the parties in the time she directed for consultation, would fall to be settled in subsequent proceedings if such became necessary.

[24] The judge dismissed the claims advanced for Aboriginal title as being unnecessary to decide having regard to her findings on Aboriginal rights. She also

did not find it necessary to deal with a claim advanced by the respondents against Canada for breach of fiduciary duty.

[25] As has been observed in many previous cases, these types of cases present quite difficult evidentiary issues. In seeking to determine pre-contact practices of the ancestors of Aboriginal claimant groups, courts are almost always faced with the conundrum that no satisfactory written record exists. Garson J. adverted to this difficulty in the course of her reasons. She said this:

> [58] In *Van der Peet*, at para. 62, Lamer C.J. acknowledged "the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community." He recognized that the burden of proof must not be applied in such a way as to conflict with the spirit and intention of s. 35(1) of the *Constitution Act, 1982.* At para. 68, he wrote:
>
> > [A] court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in.
>
> [59] The Supreme Court of Canada has also held that owing to the difficulties in proving aboriginal rights, courts must be prepared to draw inferences from what evidence is available:
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> > Flexibility is important when engaging in the *Van der Peet* analysis because the object is to provide cultural security and continuity for the particular aboriginal society. This object gives context to the analysis. For this reason, courts must be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available.
> >
> > *Sappier,* at para. 33
>
> [60] This flexible approach to the evidence does not, however, negate the operation of general evidentiary principles. In *Mitchell,* McLachlin C.J. stated, at para. 38:
>
> > ... it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law ...
>
> [61] McLachlin C.J. commented upon the evidentiary concerns in proving aboriginal rights beginning at para. 27:
>
> > 27 Aboriginal right claims give rise to unique and inherent evidentiary difficulties. Claimants are called upon to demonstrate

> features of their pre-contact society, across a gulf of centuries and without the aid of written records. Recognizing these difficulties, this Court has cautioned that the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection *(Simon v. The Queen,* [1985] 2 S.C.R. 387, at p. 408). Thus in *Van der Peet, supra,* the majority of this Court stated that "a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in" (para. 68).
>
> 28 This guideline applies both to the admissibility of evidence and weighing of aboriginal oral history *(Van der Peet, supra; Delgamuukw, supra,* at para. 82)

[26] The trial judge noted that traditional rules of evidence apply in these cases as in all cases but the court must "recognize the evidentiary challenges inherent in proving events and circumstances that took place hundreds of years ago, and apply those rules flexibly in a manner that is consistent with the spirit and intent of s. 35(1) of the *Constitution Act, 1982*." In some cases, of which *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010, was an example, there is a large amount of oral history evidence to consider. In the present case, there was comparatively little of that sort of evidence adduced. The primary foundational evidence in the present case consisted largely of historical records of explorers and traders from the 18th century, records of commercial traders operating in the area in the 19th century and ethnographic studies based on such. This evidence came before the judge in large measure via reports and testimony of expert witnesses called by the parties. One notable and probably unique evidentiary feature of this case was the existence of a record and journal of an individual, John Jewitt, who with a sailor companion was held captive at Nootka Sound by Chief Maquinna between 1803 and 1805.

[27] After 1795, when as a result of the Third Nootka Convention, matters in controversy had been settled between the Spanish and English governments to allow free trade in the area, the area became less attractive to traders because the sea otter peltry had been pretty much decimated in this area and harvesting activity moved northwards towards Alaska. The result was that there was a dramatic

diminution in the number of trading ships visiting the Nootka area. This was an undesirable economic development for the ancestors of the respondents.

[28] An American ship, the Boston, arrived in Nootka Sound on March 12, 1803. Jewitt and his fellow captive, Thompson, were members of the crew of this ship. A dispute arose between the captain of the ship and Chief Maquinna over an apparently faulty musket that had been traded to Chief Maquinna. The captain berated Chief Maquinna when a complaint was made to him and the Chief took this ill. In the course of early contact between natives and non-natives in this area and in Washington State, there were instances of over reaction on both sides. The Boston was an extreme case. The result of the controversy between the captain and the Chief was that the ship was attacked, the crew was ambushed and everyone was killed except for Jewitt and Thompson. They apparently escaped destruction because for a time during the attack they had been out of sight. When they were found, the Chief decreed that both Jewitt and Thompson should be spared because of their skills that could be useful to the inhabitants over whom he ruled. The two men were kept captive at Nootka until the summer of 1805 when they were allowed to leave by fiat of the Chief when another ship visited that coast.

[29] The tale of their captivity at times makes harrowing reading. They were two Americans cast ashore on a remote coast in a condition of slavery. At times there seems to have been a strong sentiment on the part of the common people to do away with them but Chief Maquinna was steadfast in preserving their lives. However, they did suffer from the vagaries of weather on this coast and at times experienced shortages of food. Their chief torment was the fear that they would never again see friends and family. However, they managed to survive until their fortuitous rescue. Jewitt came to have some familiarity with the language of the inhabitants and kept a form of diary detailing events as they occurred over the period of some 28 months of his captivity. About 10 years after their rescue, Jewitt co-authored a narrative of his captivity. There was much debate between the experts at trial as to the relative merits of his diary and the narrative as to the accuracy of the respective accounts of events. Probably the diary is more exact because it was

made at a time contemporaneous to the events recorded but it is relatively sparse and the narrative fleshes out what was recorded in the diary.

[30] The availability of the Jewitt material is something that could fairly be said to set this case apart from most others in British Columbia where historical records are being examined. For instance, the records of Spaniards such as Perez and Martinez and British and Americans such as Cook and Meares and Gray and Kendrick record what was going on when European explorers and traders were interacting with the ancestors of the plaintiffs. The remarkable feature of the Jewitt records is that here was reflected a situation where a literate observer could be present to record events that occurred when no traders or explorers were present. It was in effect an inside view of what took place in that ancestral community at a time when no non-native influence was extant. It could however be observed that the Jewitt records rather cut both ways concerning the respective cases of the appellant and the respondents. On the one hand, these materials represent a unique inside view of the relevant Aboriginal society at a time not long after first contact with Europeans and Americans. On the other hand, it is a record of events that occurred some 30 years after contact and the considerable history of trading between outsiders and the inhabitants with the inevitable change that this would have wrought in local custom and practice over the course of about a generation. It must also be borne in mind that the situation Chief Maquinna found himself in during Jewitt's captivity was a highly favorable one to inspire activity by other surrounding groups of natives. As a result of the capture of the Boston, he had come into possession of something of a treasure trove of manufactured goods. Such items of course would be a magnet for other Aboriginal groups who sought access to these desirable products.

[31] The trial judge was alive to the issues surrounding what weight ought to be given to Jewitt's observations:

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

> their own making which grew out of a desire of the Nuu-chah-nulth to acquire European goods, particularly metals.
>
> [265] Jewitt's observations were written 29 years following contact.

[32] Ultimately, as I observed above, the evidentiary foundation of this case is not oral history, rather the foundational basis here was the evidence from the Jewitt records and other explorer and commercial records from the 18th and 19th centuries, as interpreted by a number of experts who gave evidence before the trial judge. In the case of *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2008 BCSC 447, the claim of that group for Aboriginal fishing rights was largely unsuccessful. The claims advanced there were similar to claims advanced in the present case. The trial judge in *Lax Kw'alaams* seems not to have been especially impressed with the quality of the expert evidence that was adduced before her on behalf of those plaintiffs. Her decision was sustained in this Court: 2009 BCCA 593. On 17 February 2011, the Supreme Court of Canada heard an appeal from this Court and reserved judgment in the matter. In the present case, the trial judge took a more favorable view of the evidence adduced from experts. She said this in the course of her reasons: "All of the expert witnesses were impressive. All researched an astonishing volume of material to reach their conclusions. I have accepted parts of all their opinions, and found other parts less persuasive."

[33] The respondents called evidence from experts who supported the thesis that significant trade in fisheries products existed in ancestral NCN society at the time of contact. Dr. Lane said this in her report of January 2006 (pp. 61-63):

> From most accounts, it is evident that the fisheries and other products were offered to the vessels' crews by the Nuu-chah-nulth on the basis of sale or trade. Where "presents" were exchanged, the primary purpose was to promote goodwill and to establish and maintain trading relationships. Some contact period records characterize transactions with the Nuu-chah-nulth, or amongst the Native tribes, as "commerce" or, in Spanish, as "comercio."
>
> The contact period accounts also provide information about trade between native groups. Several observers early in the contact period, describe seeing imported materials in the possession the Nuu-chah-nulth; goods obtained by intertribal trade. Such materials include iron, copper and "wool" blankets. The Nuu-chah-nulth were also familiar with, and eager to acquire, the large Monterey abalone shells from California and Mexico.

> There is other evidence of intertribal trade. Captain Meares, after trading with natives at Nootka Sound and Clayoquot, later saw some of the goods he had traded at those locations in the possession of natives at another place many miles distant. Crew members on several vessels were informed by the natives that there was extensive trade between native groups. …
>
> The Nuu-chah-nulth also described overland trade routes to their visitors. Many sources describe a trade route that extended from Tahsis in Nootka Sound across to the mouth of the Nimpkish River on the northeast coast of Vancouver Island. One description states that 6,000 sea otter pelts were traded annually by the "Nuchimas" Nation over this route to the Nuu-chah-nulth. Another account, characterizing Nuu-chah-nulth trade states: "All these natives trade among themselves from one village to another. The coast Indians trade with those of the interior villages (bartering fish to them.)"
>
> Most Nuu-chah-nulth intertribal trade was conducted by canoe in the waters along the west coast of Vancouver Island. In 1794, Captain Magee described a chief coming from Clayoquot Sound to Barkley Sound with the purpose of buying dried fish from the local natives.
>
> The most detailed descriptions of intertribal trade were provided by John Jewitt, who lived amongst the Nuu-chah-nulth for over two years, between 1803 to 1805. Jewitt's accounts are reviewed later in this section.
>
> In summary, many of the vessels during the contact period were engaged in commercial trade, seeking to obtain sea otter pelts from the Nuu-chah-nulth. These, as well as the vessels that visited the west coast of Vancouver Island for exploration, also engaged in trade with the Nuu-chah-nulth for items other than furs, and in particular for food and other items of provision. The members of the trading and exploring vessels acquired significant amounts of food from the Nuu-chah-nulth, most of it fish or other types of seafood. Most of the goods, food, and other items obtained from the Nuu-chah-nulth were acquired on the basis of trade. Contact period records characterize the Nuu-chah-nulth as experienced and skilled traders, conducting substantial trade amongst themselves and with neighbouring native groups.
>
> [Footnotes omitted.]

[34] Dr. McMillan, another expert whose evidence was adduced by the respondents, observed in his report of November 2005 that the NCN shared a common way of life and noted that "differences in local resource availability and abundance led to widespread trade and ceremonial exchange". He also observed that "the overwhelming importance of fishing in the NCN economy was recognized by almost all early outside observers".

[35] After observing that trade was an important part of the ancestral NCN economy, he stated this in his report (pp. 39-40):

> Traditionally most Nuu-chah-nulth trade was between Nuu-chah-nulth groups, as well as with the closely related Ditidaht and Makah to the south. Close social relations facilitated such trade, which tended to be by canoe along the coast. However, overland trails across Vancouver Island also served as important arteries of commerce. Two major trails, from the heads of Kyuquot and Nootka Sounds, led across the island to the Kwakwaka'wakw people of Queen Charlotte Strait. The importance of these trails is evident in the names of the villages where they began; in both cases the village carried the name of Tahsis, from a word meaning "doorway" (Drucker 1951:228). Dugout canoes were left in Nimpkish Lake to speed travel time across the island. Early European observers were well aware of this trade corridor across the island, which Hoskins in 1792 described as taking "one night and part of a day" (Howay 1990:265). Drucker (1951:375) gives a somewhat longer estimate in describing a specific case in which the trading expedition required six days to make the return trip from Nootka Sound. Trails also led from the heads of Muchalat and Alberni Inlets to various Salish groups on the east side of Vancouver Island. Trade along these trails provided access to goods that were unavailable or in short supply on the west coast of Vancouver Island. For example, Drucker (1951:375) relates a story in which a Kyuquot chief sent a group of young men across the trail to the Nimpkish River to buy eulachon (oolichan) oil, a commodity that was not available on the west coast. The young men returned carrying kelp bottles of the fish oil, which was then served at a feast to impress the guests.
>
> In the ethnographic accounts, much of the trade involved foodstuffs, including such goods as dried salmon and halibut, herring and salmon roe, and dried clams and mussels. Other items mentioned include furs or hides, baskets, cedar planks and slaves.

[36] In his response to the evidence of Dr. Lovisek, Dr. McMillan**,** an expert called by the respondents, disagreed with her suggestion that economic self sufficiency of the various ancestral NCN groups would have diminished the necessity for exchange of resources other than perhaps luxury items. He was of the view that a demand would have existed for fisheries resources not available or in limited supply in the different groups' restricted territories. He also made reference to the Tahsis trail that permitted cross-island trade. In his reply report, he stated that "oral history supports the position that trade across the island began long before contact with Europeans". It was his opinion that since the NCN needed to obtain oolachan (or eulachon) oil (not available in their territories) and could only obtain this product by trade, the trading traffic across Vancouver Island must have been of considerable antiquity, well before contact.

[37] Dr. Lovisek was of the opinion from her researches that there was a dearth of historical evidence that at the time of contact the ancestors of the NCN were exchanging marine resources on a trading basis with other native groups. She was of the view that marine resource transfers between groups did not have a true commercial aspect:

> For the Nuu-chah-nulth, the exchange of food, which was primarily marine resources, was undertaken in a ceremonial, social or political context. Food was readily exchanged or rather shared between people related by kinship. The purpose of exchanging food was to demonstrate social or political ties, not to engage in a commercial transaction. The food exchanges took the form of meals and feasts.
>
> …
>
> Property was a social institution which implies a system of social relations among individuals. As a social institution, property (and its exchange) involves rights, duties, powers and privileges. The core of the institution of property is rights, rather than material objects. This differs from the transfer of objects in commercial transactions which characterize Western capitalist notions.
>
> [Footnotes omitted.]

[38] The judge said this after making reference to the evidence of the experts concerning trade:

> [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.
>
> …
>
> [255] In my view, where the essence of a transaction is an exchange of goods for something of economic value, the transaction has the characteristics of trade. I would not disregard as evidence of trade Jewitt's observations or those of the other explorers and traders where reference is made to tribute or gifts. Rather, I conclude that the terms are used loosely by different observers. Moreover, I conclude that there was considerable overlap in the Nuu-chah-nulth culture of exchange between gifts, tribute, and trade. Considering the evidence through an aboriginal perspective, I would not categorize these transactions in such neatly defined terms.
>
> [256] Another important feature of trade is the question of with whom the trade occurred. Here, I refer again to Dr. Lovisek's exclusion of kin from her definition of trade.

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

[39] The judge adverted to the differences of opinion of the expert witnesses relied upon respectively by the respondents and the appellant. I draw from her discussion of this subject in her reasons that she was prepared to accept the view that the Jewitt material, upon which the respondents' experts placed significant reliance, was supportive of the practice of trade in fisheries resources by the ancestors of the respondents. Although the observations of trade by Jewitt occurred a generation after first contact by explorers, his observations were found by the judge to be congruent with the observations of the early explorers about the trading practices of the ancestors of NCN.

> [266] What is remarkably consistent about the Explorer Records is the evidence of immediate and persistent efforts by all the Nuu-chah-nulth people, the Europeans encountered, to begin trading. Even when Pérez, the first European to contact the Nuu-chah-nulth, arrived several miles offshore, the very first act of the Nuu-chah-nulth people was to offer to trade fish with him.
>
> [267] The older maritime explorers made similar observations that almost all their encounters with the Nuu-chah-nulth were marked by requests to trade fish and other indigenous items for metal, fabric, guns or other European goods. I do not detect in the records any note of hesitancy on the part of the Nuu-chah-nulth to trade with the Europeans. Mr. Inglis commented that "this trade was obviously not a new thing to the [Nuu-chah-nulth]." He opined that "they aren't learning trading from the Europeans in fact Europeans are fitting into their trading system."
>
> [Emphasis added.]

Mr. Inglis, referred to in the above excerpt, was another expert called by the respondents.

[40] The judge also placed some reliance on the writings of Gilbert Sproat, a settler who was engaged in commerce in the Alberni area after 1850 and familiarized himself with the history of the respondents' ancestors. He expressed

the opinion in an ethnographic work published in 1868 that the respondents' ancestors were active traders in fishery resources.

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

[41] As to the relative weight she was prepared to place on expert opinion evidence, the judge observed in her reasons that those experts primarily relied upon by the respondents had a deep knowledge of NCN culture and history:

> [274] …In rejecting Dr. Lovisek's definition of commercial trade, I have certainly not rejected all her conclusions. I do note, however, that she has relatively little previous research experience directly related to the Nuu-chah-nulth, whereas Mr. Inglis, and Dr. McMillan, in particular, have spent much of their professional careers researching Nuu-chah-nulth history and culture. Thus, they have acquired an intimate and nuanced understanding of the Nuu-chah-nulth culture and history.

[42] The judge who heard and saw these witnesses being examined and cross-examined in the lengthy proceedings before her was entitled to place the weight she thought fit on the evidence of the various experts. It is apparent to me from a perusal of her reasons that ultimately she was of the view that she should place greater reliance upon the evidence of those witnesses called on behalf of the respondents. This makes a substantial factual distinction between the present case and *Lax Kw'alaams* where the trial judge concluded she was prepared to rely on the evidence of Dr. Lovisek, an expert called by Canada in that case (as well as here), and largely rejected competing evidence adduced from experts called on behalf of the plaintiffs in *Lax Kw'alaams*. Having reviewed the evidence of the several experts who gave evidence in the present case, I consider it was open to the judge to take the view she did of the weight to be accorded to the evidence that was given by the experts.

[43] The appellant Canada submits that the judge erred in her factual findings that the respondents' ancestral communities were engaged in trading significant quantities of fisheries resources pre-contact and in finding that this was an integral

practice of such pre-contact societies. Canada also takes issue with her finding of infringement of the respondents' rights by the regulatory regime. The intervenors support Canada in the submission that the judge in effect relied on what should have been found on the evidence to be ceremonial or tribute practices to underpin the trade related right she found, a right to harvest and sell fisheries resources into the commercial marketplace. The respondents seek to support the conclusions of the trial judge concerning their Aboriginal rights to harvest and sell fisheries resources as found by the judge.

[44] Counsel for Canada in her careful submission took us through the Jewitt material with a view to demonstrating that what is found in his diary and journal furnish inadequate support for those experts who placed considerable reliance on such, particularly Dr. Lane, a major witness for the respondents. I have earlier noted that the Jewitt material provides a unique window into early native trading, a point stressed by Dr. Lane in her evidence. However, his experience was post-contact by about thirty years and his observations must be considered in light of the circumstance that Chief Maquinna had during his time of captivity in 1803-05 a trove of European manufactured products to trade.

[45] If the Jewitt evidence stood alone, it might be that the criticisms of Canada would be unanswerable, but Dr. Lane and the other experts whose evidence was adduced by the respondents, also had regard to the early explorer and sea otter trader records plus considerable ethnographic material that was found by these experts to confirm the trading patterns attested to by the Jewitt materials. These include the aforementioned cross-island trading patterns and references to travel of native groups by canoe along the West Coast. Some of the explorers, including Meares, make reference to the rapidity with which European goods moved along the coast after receipt of such by members of any group that traded with Europeans.

[46] Canada and the intervenors, particularly the intervenor British Columbia, submit that, properly construed, the Jewitt records point almost exclusively to gifting or tribute of fishery products for feasting or ceremonial purposes as opposed to an

aspect of commercial trade. In my opinion, the gist of these submissions by Canada and the intervenors is an invitation to this Court to retry the case and reach our own factual conclusions. However, the ability of an appellate court to place its own gloss or interpretation on the facts of a case is much constrained by the proper scope of appellate review of such matters as made clear in authorities such as *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. A reasonable degree of deference must be accorded the factual findings of a trial court. In my view, the observations of the trial judge at paras. 255-57 of her reasons about the intertwining between trade and ceremonial or feasting transactions are supportable on the evidence. I doubt that any bright line can be drawn in connection with such activities as was urged by Canada and the intervenor British Columbia.

[47] If it were the case that the source of information about earlier times in the Nootka area was only Jewitt or only the early explorers and traders, perhaps the material would afford too slender a foundation upon which the trial experts could have based satisfactory opinions. It is axiomatic that the strength of any expert opinion is conditioned by its underlying factual basis. However, it seems to me that these sources collectively, plus the ethnographic material from 19th century observers in the area such as Barrett-Lennard and Sproat, all tend to be supportive of the judge's finding that there was significant intertribal trade in early times at and before contact in fisheries products on the coast and across Vancouver Island by the ancestors of the respondents.

[48] It is a noteworthy aspect of the evidence in this case that the Jewitt material discloses active inter group trade at a time not long after contact. That is a source and type of evidence that is a unique hallmark of this case. I consider it was a fair summation by Dr. Lane to say this about the Jewitt material:

> Jewitt's journal and narrative provide us with a unique "interior" view of Nuu-chah-nulth life and society during the contact period. His observations describe, from the perspective of the community led by chief Maquinna, an active network of travel and trade amongst many Nuu-chah-nulth and other tribes, extending along and across Vancouver Island.
>
> Most of the goods that Jewitt mentions are items of food, primarily fisheries products, wealth goods (dentalia, dog-hair or mountain goat wool

> blankets, cloth, blankets), other products (canoes, muskets, mica, ochre, elk or moose hide). Jewitt's descriptions also indicate that significant quantities of goods were being traded.

[49] I do not see this case as having any particular factual similarity to *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, where the Supreme Court of Canada found the evidence hopelessly deficient to support the claimed right. Here there existed a reasonably diverse number of sources of evidence supportive of the conclusion of the trial judge in favour of the ancestral practices asserted by the respondents of harvesting and trading in fisheries resources. The trial judge found this translated into a modern Aboriginal right of NCN to fish and sell fish.

[50] Although I am not persuaded that it has been demonstrated that we ought to interfere with the factual findings of the trial judge, this still leaves for consideration certain alleged errors of a legal nature asserted on behalf of the appellant and the intervenors. These errors can be essentially categorized as follows:

1. She erred in her legal analysis when she failed to characterize the rights claimed by the respondents at the outset of her reasons.

2. She erred in failing to categorize the rights she found by reference to distinct species of fisheries resources.

3. She erred in finding that trade in fish was integral to the distinctive culture of the ancestors of the plaintiffs.

4. She erred in finding that there had been a *prima facie* infringement of the plaintiffs' rights.

[51] The intervenors, B.C. Wildlife Federation and B.C. Seafood Alliance, generally support the position of Canada and particularly stress the alleged error the judge fell into in failing to characterize an Aboriginal right according to species. They submit her methodology caused her to define the rights she found in too indefinite terms. The intervenor, Underwater Harvesters Research Society, submits that the judge erred in finding an Aboriginal right respecting the geoduck fishery, having

regard to the circumstance that that is a high tech modern methodology of harvesting that did not exist until the very recent past and could not have been carried on in a pre-contact time.

[52] In support of its argument that the trial judge erred in failing to characterize the claimed Aboriginal rights at the outset of her reasons, Canada relies upon cases such as *R. v. Van der Peet*, [1996] 2 S.C.R. 507, where it was said that the first step a court should take in a case involving claimed Aboriginal rights is to properly characterize the claim. The Court said at para. 53 of that case:

> To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. ...

[53] I note that the judge did refer at para. 10 of her reasons to what it was the respondents sought by way of claimed relief:

> [10] The plaintiffs claim that prior to and at contact, the Nuu-chah-nulth were a fishing people whose way of life was characterized by trade, including trade in fish. They submit that these pre-contact practices translate into modern aboriginal rights, which they plead as follows:
>
> a. To harvest all species of fisheries resources from within their territories, or portions thereof, and, in the alternative, one or more of those species;
>
> b. To harvest those fisheries resources for any purposes including for food purposes, social purposes, ceremonial purposes, trade purposes, purposes of exchange for money or other goods, commercial purposes, purposes of sustaining the plaintiff communities, or one or more of those purposes; and
>
> c. To sell, trade or exchange those fisheries resources:
>
> i. on a commercial scale; or
>
> ii. in the alternative, to sustain their communities; or
>
> iii. in the further alternative, for money or other goods.

[54] I conclude from her reference to this at an early stage of her reasons that she was fully cognizant of what was at issue in this litigation. After characterizing the *lis*, she then went on to consider the evidence with a view to assessing whether it sufficiently established the ancestral practices alleged to be integral to the culture of

the ancestors of the NCN which were said to underpin the modern right claimed by the NCN. The majority in *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220, stressed the importance of the pre-contact practice in determining whether a s. 35(1) rights claim will give rise to a declaration of an Aboriginal right. At para. 48, McLachlin C.J. said:

> The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right.

In that case the relevant time was sovereignty, in the present case it is contact.

[55] It seems to me that the complaint of the appellant and intervenors about the methodology of the trial judge is not well founded. She demonstrated at the outset of her reasons that she was mindful of the pleaded claims of the respondents. She then properly went on to assess the evidence and make findings of fact with a view to deciding if the evidence tendered supported the ancestral practice that translated into the modern right claimed. In short, it seems to me that the process and procedure adopted by the trial judge was a fit one to adopt in aid of deciding the issues raised before her in the action. In a criminal case there might exist a greater need to characterize claimed rights at the outset of any analysis because of an absence of pleadings but it must be remembered this was a civil case in which pleadings and particulars existed. Here, the respondents pleaded a broad spectrum of fishing rights in terms derived from earlier authorities. Their statement of claim set out each of the constituent factors established in *Van der Peet*. The respondents further defined their claim by providing particulars at the request of the appellant. The appellant's statement of defence effectively conceded that the respondents had historically used fisheries resources for FSC purposes, but denied the existence of any broader right. The *lis* was thus clearly joined at the commercial end of the spectrum of potential rights, represented by the broadly framed prayer for declaratory relief.

[56] It was neither possible nor desirable for the trial judge to articulate the precise content of the Aboriginal rights at issue at the outset of her analysis. The

respondents were entitled to plead their claim broadly. The judge properly placed primary focus on evidence about the pre-contact practice. See *R. v. Sappier*; *R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686, particularly at paras. 20-24. In that case, Bastarache J. observed on behalf of the majority that "the jurisprudence of this Court establishes the central importance of the actual practice in founding a claim for an Aboriginal right" (para. 21). I would not accede to the submissions that the method of analysis of the trial judge was in error.

[57] The appellant and the intervenors, particularly B.C. Wildlife Federation and the B.C. Seafood Alliance, submit that the judge also erred when she failed to analyze the ancestral practice, the alleged modern rights to harvest and sell fisheries resources and any infringement thereof by the extant regulatory system on a species by species basis and for each individual band. It is a fact, as the judge noted, that there are discrete regulatory regimes for different fisheries and different bands have a variety of licence authorizations to harvest resources under the present regulatory system mandated by DFO.

[58] Generally speaking, the trial judge based her conclusions regarding ancestral NCN trade in fish on inferences she drew based on the writings of European visitors to NCN territory at or shortly after the time of first contact. In these writings, European observers documented NCN trade with other Aboriginal groups and with Europeans. The documentation of NCN trade with other Aboriginal groups (including among the various NCN tribes), referred to "fish"'(paras. 144 and 181), "whale oil" (para. 153), "blubber, oil, herring-spawn, dried fish and clams" (para. 165), "principally train oil, seal or whale's blubber, fish fresh or dried, herring or salmon spawn, clams, and muscles" (para. 166), "spawn" (para. 166), and "dried halibuts and herrings" (para. 189). Records of trade between NCN and Europeans most often simply refer to "fish" (at paras. 105, 120, 123,137, 138,143,190), as well as to "sea otter skins and many sardines" (para. 101), "Mussels and Cockles" (para. 125), "sprats and flat fish" (para. 128), and "fine fish, particularly ... Salmon and Trout" (para. 136). On the basis of this evidence, the trial judge described the NCN pre-

contact practice as “trade in fisheries resources” (para. 282). She specifically declined to characterize the right on a species-specific basis.

[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.

[60] Newbury J.A., speaking for this Court in the recent case of *Lax Kw’alaams Indian Band v. Canada*, 2009 BCCA 593, observed at para. 40:

> [40] In summary, I agree with Mr. Lowes that the trial judge may have mis-spoken when she said at para. 498 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. The particular practice in this instance happened to be tied to one species of fish and one product traded in a particular manner. I see no error in the trial judge’s overall conclusion.

[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.

[65] As I earlier noted in my reasons, because of the diminished amplitude and viability of Pacific fisheries resources over time, it has been found necessary by DFO to severely limit participation in the fishing industry. In the case of *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Supreme Court of Canada made it clear that Aboriginal rights would always be subject to justifiable governmental regulation or limitation and "management and conservation of resources is indeed an important and valid legislative object". In *R. v. Gladstone*, [1996] 2 S.C.R. 723, Lamer C.J. said this at p. 775:

> ... Moreover, because conservation is of such overwhelming importance to Canadian society as a whole, including aboriginal members of that society, it is a goal the pursuit of which is consistent with the reconciliation of aboriginal societies with the larger Canadian society of which they are a part. In this way, conservation can be said to be a compelling and substantial objective which, provided the rest of the *Sparrow* justification standard is met, will justify governmental infringement of aboriginal rights.

[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. I refer again to the judgment of Newbury J.A. in *Lax Kw'alaams* where she noted the governing aspect of the particular factual context of each individual case. The level of generality of the ancestral practice found by the trial judge in the instant case afforded a legitimate basis for her declining at this stage of the litigation to enter upon a species related analysis. It follows that I would not

accede to the submissions of the appellant and the intervenors that she erred as alleged in her approach to this issue.

[67] The trial judge considered that the respondents' Aboriginal rights to fish and sell fish extend to "all species of fish within the environs of their territories" (para. 489). So characterized, the respondents' rights could include the right to harvest and sell geoduck clams within their territories. The intervenor, The Underwater Harvesters Research Society ("UHA"), submits that the trial judge erred by so finding in the absence of any support in the evidence of such an ancestral practice. UHA submits that since the geoduck fishery is a modern fishery that has only been operational for about 35 years, it would have been quite impossible for the ancestors of NCN to engage in this type of marine resource harvesting prior to contact with Europeans. In my opinion, there is substance in this argument.

[68] Mr. Harbo, a program coordinator working for DFO, furnished an affidavit about the geoduck fishery. He said this:

> 70. …Geoduck clams are the largest clams in B.C., characterized by a large, meter long siphon that extends just out of the sand. The body of the clam lives deep in sand, silt, gravel and soft substrates and are found from extreme low tide to water depths of 300 feet. They are common at 30 to 60 feet. Geoducks may live to 160 years and more and as a consequence exploitation rates are very low, 1 % of the original estimated biomass annually, and in 2008, 1.2 to 1.8 % annually of the standing stock. Geoducks are not abundant in the intertidal area.
>
> …
>
> 72. The commercial fishery grew out of the experience of American navy divers recovering torpedoes with high pressure water jets to wash them out of the ocean floor. The technique also resulted in an efficient method of harvesting geoduck clams. American harvesters from Washington State trained Canadian divers in harvest methods in the early 1970's.
>
> 73. Harvesting methods have not changed much over time but the gear has advanced. Harvesters use specialized dry suits and related personal gear for warmth as they spend several hours in the cold water. They often swim without fins but since they are required to reach significant depths to reach the geoduck, they are weighted with up to 100 pounds strapped on a full body brace or directly around the waist. The divers' air is supplied on board the vessel and delivered by hoses up to 250 feet long. This surface supplied air method allows divers to stay submerged and harvest efficiently in productive areas. The vessel also runs a high pressure water hose with a

> pipe at the end (stinger) which the divers insert into the seafloor adjacent to the clam to loosen sand/mud and remove the clam.
>
> 74. Geoduck harvesting commands a high degree of physical fitness and training. Divers are regularly required to descend to up to 60 feet and more, dragging the hose and stinger and walk (or sometimes run) on the ocean floor, looking for the protruding neck or dimple in the substrate that reveals the presence of geoduck clams. Using the stinger, the diver liquefies the sand around the creature, reaches down quickly, and grabs its neck. Since the body of the clam is three feet down, the diver must continue to liquefy the sand around it to reach the animal and remove it undamaged. The diver then places it in a mesh bag attached to his hip. In a productive area, a diver can harvest as many as five clams per minute.
>
> 75. Although some geoduck are found in the lowest low intertidal zone, they are not abundant. Harvesting in the intertidal zone is available only a few times annually on the lowest tides of the year. Such harvesting is accomplished by hand digging with a shovel but this is difficult and laborious because of the depth of the clam and their ability to shrink their neck down to escape predation. Intertidal harvesting is not permitted in the commercial dive fishery for reasons explained below.
>
> 76. The commercial fishery in B.C. began in 1976 in the Strait of Georgia and on the West Coast of Vancouver Island in 1977. During my time as a Management Biologist, South Coast Division, I oversaw the fishery and reported to the area manager with management recommendations. The earliest management tool introduced was exclusion of intertidal and shallow water from commercial harvest, preventing the commercial fishery from impacting on sensitive intertidal habitats, including intertidal and shallow water vegetation that provides an important substrate for herring spawn. This also reduced competition with intertidal harvesters, including First Nations. From the beginning of commercial activity, geoduck and horse clam harvest by divers was restricted to depths of ten feet below the lowest tide and this restriction remains as a licence condition.
>
> [Emphasis added.]

[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. In my respectful view, having regard to the state of the evidence, the learned trial judge erred in her finding that the evidence demonstrated that the

respondents' Aboriginal rights should be found to extend to the geoduck fishery. I would allow the appeal with respect to this aspect of the trial judgment.

[70] The judge accepted the submission of the respondents that it would be a difficult task for Canada to presently justify the infringement she found because Canada did not accept the existence of the Aboriginal rights she found. She considered it would be necessary "for the parties to consult and negotiate the manner in which the plaintiffs' rights can be exercised and accommodated without jeopardizing Canada's numerous legislative objectives and interests." Canada placed before the judge a considerable body of evidence concerning efforts over many years to enhance the native fishery and access to fisheries resources by NCN. The efficacy of extant initiatives as well as considerations of the health and abundance of resource stocks will fall to be considered as part of anticipated negotiations in the next stage of the process when issues of accommodation and justification will be very much to the fore. If agreement proves elusive consequent upon further discussion by the parties, it may eventuate that unresolved issues would become the subject of further proceedings before a court of first instance.

[71] Near the conclusion of her judgment, the trial judge said this:

> [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.

[72] The judge delivered her reasons for judgment on November 3, 2009. At the time of delivery of the reasons, the trial judge granted the parties two years to enable them to consult about accommodation and justification and to attempt to negotiate a regulatory regime for the NCN that could accommodate the rights of the respondents that she had found to be *prima facie* infringed. Bearing in mind that the appeal process has occupied about 18 months from the date of the trial judgment, it seems appropriate to me that the parties be presently afforded some additional time to engage in the process directed by the trial judge. I would therefore vary the order of the trial judge to the extent of ordering that the parties will have one year from the date of this judgment to engage in consultation and negotiation.

[73] At the conclusion of the hearing, we indicated to counsel that all issues relating to costs would stand adjourned pending delivery of reasons for judgment. In addition to questions concerning the costs of this appeal, there is currently outstanding an appeal with respect to an award of trial costs made by the trial judge. We directed that all issues relating to costs, including the appeal from the award of trial costs, should be dealt with in written submissions. Normally intervenors are not granted costs or required to pay costs, but if any party involved in this litigation wishes to make submissions seeking an alteration of the usual practice, that too can be addressed by written submissions. We will leave it to the participants in this litigation to work out the mechanics of the timing of written submissions, but we would direct that all written submissions on costs should be in our hands within 60 days from the date of this judgment.

[74] In the result, I would allow the appeal in part and dismiss the appeal in part as enunciated in the above reasons.

"The Honourable Mr. Justice Hall"

I agree:

"The Honourable Madam Justice Neilson"

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

[75] I have had the privilege of reading a draft of the reasons for judgment of Mr. Justice Hall. I agree with his conclusions concerning the findings of fact of the trial judge and the geoduck fishery, but would alter the order of Madam Justice Garson to describe the scope of the aboriginal right to sell fish to read, "to sell 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".

[76] Without disagreeing with the comments of my colleague regarding the historical regulation of the fisheries, I do not necessarily subscribe to them. In particular, I question the extent to which the policy of limited entry to the commercial fishery was motivated by conservation. In my view, limited entry was driven more by considerations of the efficient and effective management of the commercial fishery. Closures were and are concerned more directly with conservation. It seems to me that in this case the respondents are more concerned with the effect of the former on their aboriginal rights.

[77] The order of Garson J. states that the respondents "have aboriginal rights to fish for any species of fish within their Fishing Territories ... and to sell that fish". In my view, the breadth of that language does not accord with the judge's finding that the respondents do not have "an unrestricted right to the commercial sale of fish" because "[t]o 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". That finding was unequivocal.

[78] The trial judge stated in para. 281(8), "the Nuu-chah-nulth did not trade for the purposes of accumulating wealth (I heard no such evidence)". She added that "the right does not extend to a modern industrial fishery or to unrestricted rights of

commercial sale", but beyond those comments she was not prepared to put limits on the scope of the right. In my view, the judge erred with this approach.

[79] The trial judge quoted from the cases that have considered the significance of accumulation of wealth. In my view, they provide essential guidance for defining the scope of the aboriginal right.

[80] In *R. v. Marshall*, [1999] 3 S.C.R. 456, Mr. Justice Binnie stated in paras. 7 and 8:

> [7] ... I should say at the outset that the appellant overstates his case. In my view, the treaty rights are limited to securing "necessaries" (which I construe in the modern context, as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth. The rights thus construed, however, are, in my opinion, treaty rights within the meaning of s. 35 of the *Constitution Act, 1982*, and are subject to regulations that can be justified under the *Badger* test (*R. v. Badger*, [1996] 1 S.C.R 771).
>
> [8] Although the agreed statement of facts does not state explicitly that the appellant was exercising his rights for the purpose of necessaries, the Court was advised in the course of oral argument that the appellant "was engaged in a small-scale commercial activity to help subsidize or support himself and his common-law spouse". The Crown did not dispute this characterization and it is consistent with the scale of the operation, the amount of money involved, and the other surrounding facts. If at some point the appellant's trade and related fishing activities were to extend beyond what is reasonably required for necessaries, as hereinafter defined, he would be outside treaty protection, and can expect to be dealt with accordingly.
>
> [Emphasis added.]

[81] *Marshall* was a treaty case. I am aware that treaty rights flow from the language of the instrument whereas aboriginal rights are determined largely by the pre-contact practices of the claimant aboriginal group. The issue for the Court in *Marshall* was the expectations of the parties to the treaty at the time it was made. The Court concluded that they anticipated the Mi'kmaq would fish to secure "necessaries". The question then became what this meant. Binnie J. equated "necessaries" with "sustenance". He concluded the Mi'kmaq fished not to accumulate wealth, which was consistent with the type of fishing done by the accused which led to the charges.

[82] He provided guidance on the meaning of the word "necessaries" in paras. 59 - 61:

> [59] The concept of "necessaries" is today equivalent to the concept of what Lambert J.A., in *R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75, at p. 126, described as a "moderate livelihood". Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth (*Gladstone*, *supra*, at para. 165). It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today.
>
> [60] The distinction between a commercial right and a right to trade for necessaries or sustenance was discussed in *Gladstone*, *supra*, where Lamer C.J., speaking for the majority, held that the Heiltsuk of British Columbia have "an aboriginal right to sell herring spawn on kelp to an extent best described as commercial" (para. 28). This finding was based on the evidence that "tons" of the herring spawn on kelp was traded and that such trade was a central and defining feature of Heiltsuk society. McLachlin J., however, took a different view of the evidence, which she concluded supported a finding that the Heiltsuk derived only sustenance from the trade of the herring spawn on kelp. "Sustenance" provided a manageable limitation on what would otherwise be a free-standing commercial right. She wrote at para. 165:
>
> > Despite the large quantities of herring spawn on kelp traditionally traded, the evidence does not indicate that the trade of herring spawn on kelp provided for the Heiltsuk anything more than basic sustenance. *There is no evidence in this case that the Heiltsuk accumulated wealth which would exceed a sustenance lifestyle from the herring spawn on kelp fishery.*
>
> In this case, equally, it is not suggested that Mi'kmaq trade historically generated "wealth which would exceed a sustenance lifestyle". Nor would anything more have been contemplated by the parties in 1760.
>
> [61] Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would *not* constitute an infringement that would have to be justified under the *Badger* standard.
>
> [Underlining added; italics added by Binnie J.]

[83] An examination of the reasoning in *R. v. Gladstone*, [1996] 2 S.C.R. 723, confirms that the Court distinguished between fishing confined to sustenance and fishing for the accumulation of wealth. The majority held that based on the findings

of fact of the trial judge, the appellants had established a commercial right to fish. Madam Justice L'Heureux-Dubé stated in para. 137:

> [137] ... case law on treaty and aboriginal rights relating to trade supports the making of a distinction between, on the one hand, the sale, trade and barter of fish for livelihood, support and sustenance purposes and, on the other, the sale, trade and barter of fish for purely commercial purposes ....

In the result, she agreed with the Chief Justice that the appellants had established a right to fish commercially.

[84] In her concurring reasons, McLachlin J., as she then was, distinguished between a full commercial right and a right to sell fish for sustenance She had this to say:

> [164] The next question is whether the Heiltsuk's use of the resource of herring spawn on kelp was confined to sustenance or whether the trade in question allowed the band to accumulate wealth beyond that required for a basic standard of living. The evidence indicates that large quantities of herring spawn on kelp were traded -- amounts that would yield great wealth today because of large demand for herring spawn on kelp by foreign markets. However, the right to derive from a resource what was traditionally derived from that resource is not necessarily a right to harvest the same quantity of fish from that resource as was traditionally harvested. The right is rather to take from the fishery enough to secure "the modern equivalent of what the aboriginal people in question formerly took from the land or the fishery".
>
> [165] Despite the large quantities of herring spawn on kelp traditionally traded, the evidence does not indicate that the trade of herring spawn on kelp provided for the Heiltsuk anything more than basic sustenance. There is no evidence in this case that the Heiltsuk accumulated wealth which would exceed a sustenance lifestyle from the herring spawn on kelp fishery. It follows that the aboriginal right to trade in herring spawn on kelp from the Bella Bella region is limited to such trade as secures the modern equivalent of sustenance: the basics of food, clothing and housing, supplemented by a few amenities.
>
> [Emphasis added.]

[85] This definition of the scope of the aboriginal right, adopted by Binnie J. to describe the treaty right in *Marshall*, derives from the dissenting comments of McLachlin J. in *R. v. Van der Peet*, [1996] 2 S.C.R. 507:

> [311] ... On the historical view I take, the aboriginal right to fish for commerce is limited to supplying what the aboriginal people traditionally took

> from the fishery. Since these were not generally societies which valued excess or accumulated wealth, the measure will seldom, on the facts, be found to exceed the basics of food, clothing and housing, supplemented by a few amenities. This accords with the "limited priority" for aboriginal commercial fishing that this Court endorsed in *Sparrow*. Beyond this, commercial and sports fishermen may enjoy the resource as they always have, subject to conservation. As suggested in *Sparrow*, the government should establish what is required to meet what the aboriginal people traditionally by law and custom took from the river or sea, through consultation and negotiation with the aboriginal people. In normal years, one would expect this to translate to a relatively small percentage of the total commercial fishing allotment. In the event that conservation concerns virtually eliminated commercial fishing, aboriginal commercial fishing, limited as it is, could itself be further reduced or even eliminated.
>
> [Emphasis added.]

[86] The distinction between a sustenance right, to sell fish to provide the basics of food, clothing and housing, supplemented by a few amenities and a full commercial right was the basis on which McLachlin J. disagreed with the majority in *Gladstone*.

[87] The trial judge quoted from *Van der Peet* and *Marshall* where the concept of fishing not to accumulate wealth was discussed. She concluded that the respondents' right was not a full commercial right. This was based on her finding that the respondents did not fish to accumulate wealth, but the judge appears not to have considered the implications of that finding because she declined to limit the right accordingly. It is not appropriate simply to ignore the finding. The finding requires content: what are the implications of a determination that pre-contact Nuu-chah-nulth traded fish extensively, but did not do so for the accumulation of wealth? I proceed on the basis the finding was not irrelevant; indeed, it anchored the judge's limitation of the commercial right.

[88] In my view, effect should have been given to the judge's finding of fact. The judge used the phrase initiated by McLachlin J. in *Van der Peet.* In my view, she should have given some meaning to the finding of fact that the respondents did not fish to accumulate wealth. Guidance could and should have been provided. The language she used derives from existing authority to which she referred, as is apparent from tracing the concept of fishing for sustenance articulated in the

judgments of McLachlin J. in *Van der Peet* and *Gladstone* and adopted in *Marshall*. In my view, pre-contact fishing not for the purpose of accumulating wealth translates to the modern right to sell 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.

[89] In para. 482 of her reasons, the judge rejected "the harvest and sale of fish 'to sustain the community' [as] a viable characterization". It may be that she had in mind sustenance as that concept was understood before the observations of Binnie J. in *Marshall*, that is, fishing for survival. If so, the rejection was compatible with her unequivocal finding that the respondents had a significant trade in fish. The finding that the respondents did not fish to accumulate wealth and the judge's rejection of a right to participate in an "industrial" fishery[1], lead inexorably to the conclusion the respondents' aboriginal right is to sell 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.

[90] I agree with the reasons and conclusion of Hall J.A. that the geoduck fishery must be removed from the aboriginal right and with his comments concerning the timing for negotiations and costs. I would allow the appeal to the extent of altering the order of Garson J. to read that the respondents have an aboriginal right to fish for all species of fish within their Fishing Territories and, except geoduck, 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.

"The Honourable Mr. Justice Chiasson"

[1] I confess that I do not know what an "industrial" fishery is, but I read the term as limiting the respondents to something less than full participation in the commercial fishery.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 237

Date: 20110526
Docket: CA037704

Between:

The Ahousaht Indian Band and the Ahousaht Nation, represented by Shawn Atleo on his own behalf and on behalf of the members of the Ahousaht Indian Band and the Ahousaht Nation

The Ehattesaht Indian Band and the Ehattesaht Nation, represented by Dawn Smith on her own behalf and on behalf of the members of the Ehattesaht Indian Band and the Ehattesaht Nation

The Hesquiaht Indian Band and the Hesquiaht Nation, represented by Simon Lucas on his own behalf and on behalf of the members of the Hesquiaht Indian Band and the Hesquiaht Nation

The Mowachaht/Muchalaht Indian Band and the Mowachaht/Muchalaht Nation, represented by Lillian Howard on her own behalf and on behalf of the members of the Mowachaht/Muchalaht Indian Band and the Mowachaht/Muchalaht Nation

The Tla-o-qui-aht Indian Band and the Tla-o-qui-aht Nation, represented by Benedict Williams on his own behalf and on behalf of the members of the Tla-o-qui-aht Indian Band and the Tla-o-qui-aht Nation

Respondents
(Plaintiffs)

And

The Attorney General of Canada

Appellant
(Defendant)

And

Her Majesty the Queen in Right of the Province of British Columbia
Intervenor

And

B.C. Wildlife Federation, The B.C. Seafood Alliance, and The Underwater Harvesters Research Society

Intervenors

Before: The Honourable Mr. Justice Hall
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Neilson

On appeal from the Supreme Court of British Columbia, November 3, 2009, (*Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494, Vancouver Registry No. S033335)

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Counsel for the Intevenor, The Underwater Harvesters Research Society	C. Harvey, Q.C.
Place and Dates of Hearing:	Vancouver, British Columbia December 6-10, 2010
Place and Date of Judgment:	Vancouver, British Columbia May 18, 2011
Date of Corrigendum:	May 26, 2011

Corrigendum to Written Reasons by:
The Honourable Mr. Justice Hall

HALL J.A.:

[1] The last sentence in paragraph 65 of my reasons for judgment, released 18 May 2011, is corrected as follows:

> In *R. v. Gladstone*, [1996] 2 S.C.R. 723, Lamer C.J. said this at p. 775:

The Honourable Mr. Justice Hall