COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2013 BCCA 300

Date: 20130702
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, B.C. Seafood Alliance, and the Underwater Harvesters Research Society

Intervenors

And

Saugeen First Nation and Chippewas of Nawash Unceded First Nation

Intervenors

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

On reconsideration of appeal from: Supreme Court of British Columbia, November 3, 2009 (*Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494, Vancouver Docket S033335)

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Counsel for the Intervenors, Saugeen First Nation and Chippewas of Nawash Unceded First Nation	H.W.R. Townshend and S. Luk
Place and Date of Hearing:	Vancouver, British Columbia February 13, 14 and 15, 2013
Place and Date of Judgment:	Vancouver, British Columbia July 2, 2013

Written Reasons by:
The Honourable Mr. Justice Hall

Concurred in by:
The Honourable Madam Justice Neilson

Dissenting Reasons by:
The Honourable Mr. Justice Chiasson (Page 20, Para. 40)

Reasons for Judgment of the Honourable Mr. Justice Hall:

[1] This is an appeal from the decision of Garson J. (as she then was) pronounced November 3, 2009. The reasons are indexed as 2009 BCSC 1494. An earlier appeal to this Court was in part dismissed and in part allowed on May 18, 2011 – see 2011 BCCA 237. An application for leave to appeal from this decision to the Supreme Court of Canada was made by the Attorney General of Canada. On March 29, 2012, the Supreme Court of Canada directed that the case would be remanded to this Court to be reconsidered in accordance with the decision of the Supreme Court in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535. Pursuant to this direction, a rehearing occurred in February 2013.

[2] As stated by this Court in *United States of America v. Gillingham*, 2004 BCCA 226, 239 D.L.R. (4th) 320 at para. 9, a hearing on remand is to be treated as a fresh appeal from the order of the trial judge:

> [9] In *Metzner v. Metzner* (2000), 190 D.L.R. (4th) 366, 80 B.C.L.R. (3d) 133, 2000 BCCA 474, paras. 21-26, this court held that on a remand from the Supreme Court of Canada we had no jurisdiction to sit on an appeal of our previous decision. We treated the hearing on remand as a fresh appeal from the order made in the court below. I therefore regard this appeal as if it were an initial appeal from the committal order made on 29 December 1998, the correctness of which is to be decided applying the law as now stated by the Supreme Court of Canada ..., as well as any other considerations that may affect the order's validity.

[3] While the Court can inform itself from its earlier reasons, we must reassess anew the appeal from the trial decision in light of the decision of the Supreme Court in *Lax Kw'alaams*. The appellant, supported by the intervenors, Her Majesty the Queen in right of British Columbia and the B.C. Wildlife Federation and the B.C. Seafood Alliance, allege the trial judge erred as follows:

1) failing to identify the precise nature of the claim based on the pleadings;
2) relying on pre-contact practices that were not pled and, in any event, could not support the right claimed;
3) misinterpreting the requirements of integrality and continuity; and

> 4) granting a declaration of an Aboriginal right to sell fish without adequately delineating the scope of the right.

[4] Ground 4 encompasses arguments advanced by the latter intervenors concerning species specificity.

[5] It is submitted that the judge erred in the framework of her analysis by failing at the outset to identify the precise nature of the right claimed based on the pleadings. In our earlier reasons, we said this:

> [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 [Nuu-chah-nulth] 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 [food, social and ceremonial] 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.

[6] Our initial decision was made in May 2011. At the time, we had before us, and adverted to, the decision of this Court in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2009 BCCA 593, 314 D.L.R. (4th) 385 – see paras. 60-66 of our May 2011 reasons. Reasons for judgment in the case of *Lax Kw'alaams* were delivered by the Supreme Court of Canada some six months later in November 2011. The appeal from the judgment of this Court was dismissed.

[7] In *Lax Kw'alaams*, the trial judge hearing the case dismissed a broadly claimed right to a commercial fishery advanced by the Lax Kw'alaams Indian Band. As noted at para. 56 of 2011 SCC 56, the trial judge made a clear finding that while the ancestors of the Lax Kw'alaams fished a great number of species of fish, they "did not *trade* in any significant way in species of fish or fish products other than eulachon".

[8] However, Garson J. came to a quite different conclusion from the trial judge in *Lax Kw'alaams* in her reasons for judgment:

> [281] In summary, I have concluded from the evidence the following:
>
> 1. the Nuu-chah-nulth had longstanding trade networks both in a north/south direction along the coast and overland via the Tahsis and other trade routes;
> 2. trade relations existed with "strangers" who came to pay tribute to powerful chiefs but in doing so received reciprocal gifts in return;
> 3. marriages were arranged to facilitate trade with extended kin, kin having a broad definition;
> 4. dentalia [shells] were found in exotic places (that is, far from the place of origin) by archaeologists, indicating their use as a trade item;
> 5. iron was noted by the earliest of the explorers to be traded up and down the coast, indicating a strong pre-contact trade network;
> 6. the Nuu-chah-nulth were not equally endowed with the same resources and thus the exchange of foodstuffs was necessary;
> 7. the systems of payment of tribute, gift giving, reciprocal exchange and trade overlapped with each other and existed within a polite form of respect for powerful chiefs;
> 8. the Nuu-chah-nulth did not trade for the purposes of accumulating wealth (I heard no such evidence);
> 9. the Nuu-chah-nulth had the ability to dry, preserve, and trade vast quantities of fish and marine products. (For a more detailed discussion, see the section above titled "Dependence on Fish"); and
> 10. the frequency and amount of trade, including trade in fish and marine products, suggest that such trade was a practice integral to Nuu-chah-nulth society.
>
> [282] I conclude that at contact, the Nuu-chah-nulth engaged in trade of fisheries resources. I conclude that that trade included the regular exchange

> of fisheries resources in significant quantities to other tribes or groups, including groups with kinship connections. I do not exclude from this definition reciprocal gift giving or barter.

[9] Our task on this rehearing is to decide whether the decision of the trial judge is sustainable having regard to the decision of the Supreme Court of Canada in *Lax Kw'alaams*, which decision, as I noted, was pronounced subsequent to the judgment of this Court in May 2011. The appellant submits that, having regard to the *Lax Kw'alaams* reasons for judgment of the Supreme Court of Canada, the methodology of analysis of a rights claim should be as follows:

> 1) at the characterization stage, identify the precise nature of the claim based on the pleadings;
>
> 2) determine whether the claimant has proved, based on the evidence:
>
> a) the existence of the pre-contact practice, tradition or custom advanced in the pleadings as supporting the claimed right; and
>
> b) that this practice was integral to the distinctive pre-contact aboriginal society;
>
> 3) determine whether the claimed modern right has a reasonable degree of continuity with the "integral" pre-contact practice; and
>
> 4) if an aboriginal right to trade commercially is found to exist, the court, when delineating such a right, should have regard to the objectives in the interest of all Canadians and aimed at reconciliation.

[10] In my view, this submission of the appellant accurately summarizes the approach enunciated by the Supreme Court in the *Lax Kw'alaams* case.

[11] The appellant and intervenors (other than the intervenors Saugeen First Nation and Chippewas of Nawash Unceded First Nation) submit that the analysis of the trial judge was deficient having regard to the methodology enunciated in *Lax Kw'alaams*. The respondents submit the analysis of the judge is consistent with the methodology set forth in that case.

[12] As regards the requirement to identify the nature of the Aboriginal right claimed based on the pleadings, I advert to the passage from para. 10 of the trial decision set forth in these reasons at para. 5 above. Garson J. also stated at an early stage of her reasons (para. 34) that, "The first step is to characterize the right

claimed." She noted at para. 35 that such characterization is important because "whether or not the evidence will support the claim will depend in large measure on what that evidence is being called to support". The judge also observed at para. 51 of her reasons that in a civil proceeding (as opposed to a regulatory prosecution), "it is necessarily the pleadings that will govern the nature of the plaintiffs' claim".

[13] As I see it, what the appellants take issue with is the methodology posited by Garson J. at para. 54 of her reasons:

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

[14] Was Garson J., when she said this, embarking upon what Binnie J. at para. 40 of *Lax Kw'alaams* criticized as "a 'commission of inquiry' model in which a commissioner embarks on a voyage of discovery armed only with very general terms of reference"? When he said this, he was responding to what he characterized as the heart of the Lax Kw'alaams' argument that "before a court can characterize a claimed Aboriginal right, it must first inquire and make findings about the pre-contact practices and way of life of the claimant group" (emphasis of Lax Kw'alaams). At para. 41 of his reasons, he trenchantly observed that "[t]he trial of an action should not resemble a voyage on the *Flying Dutchman* with a crew condemned to roam the seas interminably with no set destination and no end in sight." After some further discussion of proper analytical methodology in a rights case, he set out at para. 46 of the reasons the approach articulated in the argument of the appellant.

[15] There would be considerable force in the submission of the appellant that the trial judge erred in her approach to the analysis in the present case if all she had said about the method of analysis was her comments in para. 54 of her reasons. However, this would be, in my respectful opinion, to take an unduly restrictive view of what she said about how she proposed to approach and decide the case. As well, the fact that the respondents pleaded a spectrum of rights made it most difficult for the trial judge to identify a single right as the focus at the outset of her analysis. As I have set forth in passages quoted above, at paras. 10, 24 and 35 of her reasons she expressly adverted to the rights claimed (pleaded) by the claimant respondents and the necessity to "characterize the right claimed" (para. 34). Also in para. 34, she made reference to *R. v. Van der Peet*, [1996] 2 S.C.R. 507, a leading case in this area.

[16] Justice Binnie, at para. 42 of *Lax Kw'alaams*, referred to what was said by Lamer C.J. in *Van der Peet*:

> In *Van der Peet*, Lamer C.J. emphasized that the *first* task of the court, even in the context of a defence to a regulatory charge, is to characterize the claim:
>
> > . . . in assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed; in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed. The correct characterization of the appellant's claim is of importance because whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support. [Emphasis [of Binnie J.]; para. 51.]

[17] I would note that the underlined passage in this enunciation by Lamer C.J. was expressly set out by Garson J. at para. 35 of her reasons.

[18] In my respectful opinion, Garson J. did exactly what was declared requisite by Binnie J. in *Lax Kw'alaams* insofar as identifying what right or rights were being claimed by the respondents. In my earlier reasons delivered in May of 2011, I stated at para. 54 that the trial judge was "fully cognizant of what was at issue in this litigation". I would reiterate that comment here.

[19] I consider the judge made plain in the opening paragraphs of her lengthy reasons that she was alive to the necessity to characterize the rights claimed and she did set out the pleaded claims. I do not know what more she could have done to demonstrate that she appreciated the requirements set forth by the Supreme Court of Canada in *Van der Peet* and reaffirmed in *Lax Kw'alaams*.

[20] Before she said, in para. 54 of her reasons, how she intended to deal with the various relevant issues in the litigation, the trial judge had demonstrated she was fully aware of what rights were being claimed and what was encompassed by the pleadings. In my view, in light of the statements contained in the early portion of the reasons of the trial judge, it cannot be successfully argued that she was in anywise embarking on a "commission of inquiry" approach to deciding the case before her. Accordingly, I would not accede to the submission that it can be demonstrated that the analytical approach adopted by Garson J. on this issue was incorrect in light of the reasons of the Supreme Court in *Lax Kw'alaams*.

[21] However, that is not the end of the matter because it was also submitted by the appellant and certain of the intervenors that her analysis was flawed concerning integrality, a reasonable degree of continuity between the historic and modern practices, and the delineation of the modern right.

[22] The appellant and the intervenor, Her Majesty the Queen in right of the Province of British Columbia, submit the trial judge erred in applying an unduly low standard concerning trade in fish being integral to the Aboriginal society. It is suggested the judge may have placed inappropriate reliance on certain passages in *R. v. Sappier; R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686, passages it is submitted have been modified by the Supreme Court of Canada in more recent authority. The relevant passages from *Sappier* are the following:

> [39] McLachlin C.J. explained in *Mitchell* [*Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911] that in order to satisfy the *Van der Peet* test, the practice, custom or tradition must have been integral to the distinctive culture of the aboriginal peoples, in the sense that
>
> > it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining

> feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet*, *supra*, at paras. 54-59 . . .). [Emphasis deleted; para. 12.]

[40] As I have already explained, the purpose of this exercise is to understand the way of life of the particular aboriginal society, pre-contact, and to determine how the claimed right relates to it. This is achieved by founding the claim on a pre-contact practice, and determining whether that practice was integral to the distinctive culture of the aboriginal people in question, pre-contact. Section 35 seeks to protect integral elements of the way of life of these aboriginal societies, including their traditional means of survival. Although this was affirmed in *Sparrow*, *Adams* and *Côté*, the courts below queried whether a practice undertaken strictly for survival purposes really went to the core of a people's identity. Although intended as a helpful description of the *Van der Peet* test, the reference in *Mitchell* to a "core identity" may have unintentionally resulted in a heightened threshold for establishing an aboriginal right. For this reason, I think it necessary to discard the notion that the pre-contact practice upon which the right is based must go to the core of the society's identity, i.e. its single most important defining character. This has never been the test for establishing an aboriginal right. This Court has clearly held that a claimant need only show that the practice was integral to the aboriginal society's pre-contact distinctive culture.

[41] The notion that the pre-contact practice must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it, has also served in some cases to create artificial barriers to the recognition and affirmation of aboriginal rights.

* * *

[45] The aboriginal rights doctrine, which has been constitutionalized by s. 35, arises from the simple fact of prior occupation of the lands now forming Canada. The "integral to a distinctive culture" test must necessarily be understood in this context. As L'Heureux-Dubé J. explained in dissent in *Van der Peet*, "[t]he 'distinctive aboriginal culture' must be taken to refer to the reality that, despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands: *Calder v. Attorney - General of British Columbia*, *supra*, at p. 328, *per* Judson J., and *Guerin*, *supra*, at p. 379, *per* Dickson J. (as he then was)" (para. 159). The focus of the Court should therefore be on the *nature* of this prior occupation. What is meant by "culture" is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word "distinctive" as a qualifier is meant to incorporate an element of aboriginal specificity. However, "distinctive" does not mean "distinct", and the notion of aboriginality must not be reduced to "racialized stereotypes of Aboriginal peoples" (J. Borrows and L. I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997), 36 *Alta. L. Rev*. 9, at p. 36). [Emphasis added.]

[23] The appellant notes that the trial judge inquired into the respondents' pre-contact way of life, as suggested in para. 45 of *Sappier*, when she found that trading in fish was integral to the distinctive culture of the respondents' pre-contact society. The appellant maintains that she set the bar too low, and that she erred in failing to apply the "distinctive culture" test from *Van der Peet*. The appellant points to paras. 53-54 of *Lax Kw'alaams* in support of its view. In that passage, the court dealt with a similar argument, and Binnie J. made it clear that the references to "way of life" in *Sappier* should not be read as departing from the "distinctive culture" test in *Van der Peet*.

[24] It is submitted also that the judge took an overly expansive view of what constituted trade in fish and fish products by including practices such as tribute and gift giving in this category. It is argued that the records relied upon by experts, including the Jewitt records, demonstrate that exchanges related to the latter practices proportionally outweigh instances of trade. It is also said she considered an irrelevant subject, namely trade in items other than fish and fish products.

[25] The need to prove integrality to the culture in this class of case arises from the earlier decisions of the Supreme Court of Canada in *Van der Peet*; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; and *R. v. Gladstone*, [1996] 2 S.C.R. 723. In *Van der Peet*, Lamer C.J. said:

> [55] ...The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive – that it was one of the things that truly made the society what it was.
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> * * *
>
> [59] A practical way of thinking about this problem is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the question affirmatively, whether or not a practice, custom or tradition is a defining feature of the culture in question.
>
> [Emphasis of Lamer C.J.]

[26] It was pointed out in *N.T.C. Smokehouse* that a finding of integrality is highly fact dependent (para. 24). In that case, it was decided that because instances of

trading in fish in the pre-contact culture of that group's ancestors were "few and far between" (para. 26), it had not been demonstrated that the exchange of fish for money or other goods was integral to that particular culture. By contrast, in *R. v. Gladstone*, the evidence was found to demonstrate integrality and to support a modern commercial trading right:

> [28] ...The appellants have provided clear evidence from which it can be inferred that, prior to contact, Heiltsuk society was, in significant part, based on such trade. The Heiltsuk were, both before and after contact, traders of herring spawn on kelp. Moreover, while to describe this activity as "commercial" prior to contact would be inaccurate given the link between the notion of commerce and the introduction of European culture, the extent and scope of the trading activities of the Heiltsuk support the claim that, for the purposes of s. 35(1) analysis, the Heiltsuk have demonstrated an aboriginal right to sell herring spawn on kelp to an extent best described as commercial. The evidence of Dr. Lane, and the diary of Dr. Tolmie, point to trade of herring spawn on kelp in "tons". While this evidence relates to trade post-contact, the diary of Alexander Mackenzie provides the link with pre-contact times; in essence, the sum of the evidence supports the claim of the appellants that commercial trade in herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk prior to contact.

[27] I am not persuaded that Garson J. applied the wrong test in concluding that fishing and trade in fish were integral to the respondents' culture. At para. 38 of her reasons, Garson J. noted, correctly I believe, that although the Supreme Court of Canada seems to have, in *Sappier*, perhaps modified language about a practice being "the core of the society's identity", the Court has not resiled from the requirement that a custom or practice must be "a central and significant part of the society's distinctive culture". She is here adverting to the pre-contact culture. At para. 98 of her reasons, she said:

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

She summarized her understanding of integrality and expressed her factual conclusion at paras. 284-285:

> [284] The next question prescribed by *Van der Peet* concerns the integrality of trade to the plaintiffs' culture. To be integral, a practice must be a central and significant aspect of the aboriginal society's distinctive culture, and

> cannot be merely incidental to an integral practice: *Van der Peet*, at para. 56. "Culture" in this context entails an inquiry into the pre-contact way of life of a particular aboriginal community, while "distinctive" incorporates an element of aboriginal specificity: *Sappier*, at para. 45.
>
> [285] Much of the earlier discussion incorporated evidence relevant to the question of whether fishing and trade in fish were integral to Nuu-chah-nulth culture. I am satisfied that the evidence just reviewed demonstrates that fishing and trade in fish were integral to the Nuu-chah-nulth culture.

She went on to find that fishing was a predominant feature, and indigenous trade in fish a prominent feature, of the respondents' culture (at para. 440).

[28] I am satisfied that a review of the trial judge's reasons as a whole on the question of integrality reveals she was well aware of the test established in *Van der Peet* and properly applied it.

[29] The judge characterized some gift giving as a polite or reciprocal type of trade and observed (para. 223) that marital arrangements were made between groups to facilitate trade. As I see it, she did not view trade in fish and fish products as a watertight compartment by excluding other forms of inter-group exchanges that facilitated the trading relationship. As I earlier observed, these cases are going to be always evidence (fact) dependent. Sporadic trade in a resource, as was found to be the historic situation in both *Lax Kw'alaams* and *N.T.C. Smokehouse*, will not suffice. The evidence of trade must indicate a substantial practice. If a judge is alert to what is requisite, and I consider the trial judge here manifested a correct appreciation of what was required to be proven by claimants, an appellate court should show due deference to factual findings of the trial court. I am not persuaded that the trial judge here set the bar too low or took account of irrelevant matters when she made her findings that the evidence about the practices of the ancestors of the plaintiffs demonstrated the integrality of trade in fish and fish products to the cultural identity of the ancestors of the claimant groups. I would not accede to the submissions that she erred in her analysis of this issue.

[30] The appellant and the intervenors, B.C. Wildlife Federation and B.C. Seafood Alliance, submit the judge paid too little attention to the issue of species specificity as a relevant consideration in her analysis. At para. 40 of the reasons of this Court

in *Lax Kw'alaams*, Newbury J.A. noted that, while trading in a particular species may be a relevant factor, the particular practice in each case will be the most cogent consideration in describing which rights can be proven. In the present case, the trial judge found the ancestors of the plaintiff group fished and traded in a wide variety of fish and fish products. Of course, in *Lax Kw'alaams*, the factual finding was very different, the judge there finding that significant trade had occurred only in eulachon products. In his decision in *Lax Kw'alaams*, Binnie J. observed:

> [57] The "species-specific" debate will generally turn on the facts of a particular case. Had it been established, for example, that a defining feature of the distinctive Coast Tsimshian culture was to catch whatever fish they could and trade whatever fish they caught, a court ought not to "freeze" today's permissible catch to species present in 1793 in the northwest coastal waters of British Columbia....

[31] I earlier adverted to the methodology advocated by Binnie J. concerning the analysis to be undertaken in these cases (see para. 9, *supra*). In my earlier reasons delivered in 2011, I noted that what was at issue in this case was only in part resolved by the trial judge. While the judge made affirmative findings about significant historic fishing and trading and concluded there had been a *prima facie* infringement of the Aboriginal rights of the plaintiff groups by the extant fisheries regulation regime, she did not enter upon the task of resolving the significant issues of accommodation and justification. Rights do not exist in a vacuum. As Newbury J.A. observed in *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344 at paras. 18-19, Aboriginal rights, if established, do not have an absolute quality. Questions of justification and infringement are, as she observed at para. 19, "an important part of the process of defining the right itself."

[32] It should be recalled that prior to this action, the appellant never recognized that the respondents had an Aboriginal right to fish. The appellant had, however, provided evidence at trial of the efforts made to enhance and provide access to fishery resources for the benefit of the respondents. Garson J. said this near the conclusion of her reasons:

> [875] Here, it is for the parties to negotiate towards a quantification of the amount and means of exercise of the plaintiffs' aboriginal rights to fish and to

> sell fish that will recognize these principles. For example, Canada may be able to justify, depending upon the health and abundance of fish stocks, considerable constraint on a special Nuu-chah-nulth fishery. However, as I have endeavoured to make clear, negotiations have previously gone forth without recognition of the plaintiffs' aboriginal rights. They must now proceed on a different footing than has heretofore taken place, one that starts with recognition of the plaintiffs' constitutional rights to fish and to sell that fish.
>
> [876] The delicate and challenging task now facing the parties is to recognize the plaintiffs' rights within the context of adherence to Canada's legislative objectives and to fairly balance the plaintiffs' priority with other societal interests.

[33] The appellant and certain of the intervenors submit that the judge failed to sufficiently address species specificity and that this resulted in her characterizing too broadly the right said to be *prima facie* infringed, namely, the respondents' right to fish for any species of fish within their fishing territories and to sell such fish.

[34] It seems to me that the issues the trial judge envisioned as being subject to negotiation or to be resolved by further proceedings largely encompass points 3 and 4 of the analysis mode suggested by Binnie J. in *Lax Kw'alaams*. These include the questions of continuity and the delineation of a modern right. Salient issues that remain to be addressed between these parties include those related to species and a more specific delineation of any modern right. In my view, the judge was not required to consider or articulate more than she did concerning individual marine species at this stage of the proceedings.

[35] In my earlier reasons delivered in May 2011, I said this:

> [59] These objections by Canada and the intervenors on what I will term the species issue are comprehensible but, in my opinion, the short answer to such submissions is that at the presently incomplete stage of this litigation, to seek a greater degree of specificity is neither possible nor practicable. The evidence that was accepted by the trial judge supported the thesis that a variety of fish species were harvested and traded by the ancestors of the respondents. The record in the case is supportive of the proposition that ancestral trade occurred in certain species such as salmon but is silent as to many other species adverted to in the particulars. As I observed during the hearing of this appeal, this case as it presently stands has about it something of an interlocutory character. Having regard to the state of the evidentiary record, to presently demand more specificity seems an impossible task.
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> * * *

[61] As I see it, the "specific practice" in this case was not, as in *Lax Kw'alaams*, found to be tied to "one species of fish and one product", namely eulachon oil, but encompassed a wide range of fisheries resources. I do not consider that it was an error for the judge in this case to find that the pre-contact practice was harvesting and trading in a broad range of marine food resources. That was the practice disclosed by the evidence. In my respectful opinion, it was open to the trial judge to conclude as she did that the trading in fisheries resources by the ancestors of NCN was integral to the culture of this society around the time of first contact.

[62] The trial judge said this about her conclusions on trading practices:

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

[63] I do not consider that the judge was required to go further in delineating what she found to be the trading practices of the ancestral society. It is clear from the findings of the judge that she concluded that the present regulatory system, including quotas and entry fees, has had an inhibitory effect on the respondents' former historic untrammeled right to harvest and trade in fisheries resources. She found that as a result of the present regime there was an as yet unjustified *prima facie* infringement of the respondents' rights. The appellant and intervenors object to her use of yardsticks, such as former practice as testified to by witnesses from the respondent bands, or a general lack of full access to various fisheries to establish the infringement asserted in the pleadings. As the *Sparrow* case establishes, the threshold for making a finding of infringement is not high. It seems to me that the evidence in this case sufficed to satisfy this requirement.

[64] The issue of species specificity will be very much front and centre when what I perceive as the core issues raised by this litigation come to be addressed at the accommodation and justification stage of the process. It is the reality that if a legislative or operational limitation or a form of agreement between the parties on the harvesting and selling of fisheries resources demonstrates justification or necessary accommodation, then there would not exist any unjustifiable infringement of the Aboriginal rights of NCN. Because of that, there is a significant practical interface between any alleged infringement of Aboriginal rights and justification for such infringement. Based on the evidence she accepted, the trial judge found a *prima facie* infringement of claimed rights of NCN at this stage of the process. Other salient issues in this *lis* between the parties still remain to be addressed and resolved, either by agreement or a continuation of litigation.

* * *

[66] I very much doubt that it would have been either practicable or helpful for the trial judge to seek to engage in a species related analysis when dealing with the issue of *prima facie* infringement. The evidence she accepted sufficed in my respectful opinion to underpin her findings at this

> stage of the process. That leaves at large and properly for future negotiation and, if necessary, further consideration and decision by a court, the unresolved issues of accommodation and justification in this particular case. At a future stage of the process, which has as its ultimate end the reconciliation of Aboriginal and non-Aboriginal interests, I venture to suggest that discrete fisheries and species will need to be considered and addressed on an individual basis....

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

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

> 3. Third, determine whether the claimed modern right has a reasonable degree of continuity with the "integral" pre-contact practice. In other words, is the claimed modern right demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice? At this step, the court should take a generous though realistic approach to matching pre-contact practices to the claimed modern right. As will be discussed, the pre-contact practices must engage the essential elements of the modern right, though of course the two need not be exactly the same.
>
> 4. Fourth, and finally, in the event that an Aboriginal right to trade *commercially* is found to exist, the court, when delineating such a right should have regard to what was said by Chief Justice Lamer in *Gladstone* (albeit in the context of a *Sparrow* justification), as follows:
>
> > Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at

> least in the right circumstances) satisfy this standard. *In the right circumstances*, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment. [Emphasis in original; para. 75.]

[38] I note that there was some difference between the reasons of the majority and the reasons of Chiasson J.A. in our earlier judgment concerning the appropriate characterization of rights as enunciated by Garson J. At para. 487 of her reasons, she said, "the most appropriate characterization of the modern right is simply the right to fish and to sell fish". The majority reasons found adequate, at this stage of the proceedings, this characterization of the right claimed, with the exception of the geoduck fishery. Issues concerning that particular fishery are not before us. Chiasson J.A., in partial dissent, would have characterized the right as an "aboriginal 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."

[39] I have concluded that what the trial judge did is not out of accord with the methodology adumbrated by the Supreme Court in *Lax Kw'alaams*. It follows that I would partially dismiss this appeal from the judgment of Garson J. pronounced November 3, 2009. The partial dismissal is because of the previous allowance of the appeal concerning the geoduck fishery. I would dispose of this appeal as set forth in my earlier reasons delivered in May 2011.

"The Honourable Mr. Justice Hall"

I agree:

"The Honourable Madam Justice Neilson"

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

[40] I have had the privilege of reading the reasons for judgment of Mr. Justice Hall on this reconsideration. As I stated in our previous decision:

> 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.

[41] In my previous reasons, I considered the implications of the judge's finding of fact that the plaintiffs did not fish to accumulate wealth, as she stated in para. 281(8) of her reasons. After reviewing what I consider to be the relevant and controlling authorities, I stated:

> [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…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.

[42] I remain of this view. Determining the scope of an Aboriginal right is a question of mixed fact and law. Once the nature of the Aboriginal activity is ascertained as a matter of fact, a determination of the scope of the modern right must be guided by the law as articulated in the authorities. Simply put, the authorities hold that a finding that Aboriginal people did not fish to accumulate wealth translates into a limited modern right. In my view, the comments of the judge in para. 482 are not consonant with the law as stated in the authorities.

[43] From a practical perspective, the right the respondents contend was infringed is consistent with a 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. The judge referred to the evidence of many witnesses who described "the mosquito fleet [which] fish[ed] commercially on a modest basis". In para. 700, the judge observed:

> While they lasted, the mosquito fleets enabled Nuu-chah-nulth members who no longer had commercial licences to sell their fish to earn a moderate income.

[44] As stated in my previous reasons:

> 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"