COMMERCIAL FISHERIES

SHOULD COMMERCIAL FISHING RIGHTS BE INCLUDED IN MODERN TREATIES – PROS, CONS AND ALTERNATIVES

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I. INTRODUCTION

The question I have been asked to address for this conference is:

Should commercial fishing rights be included in modern treaties?

Given the cultural and economic importance of commercial fishing to BC First Nations, and in particular coastal First Nations, the answer to this question is obviously "yes". However, this answer must be qualified somewhat: "Yes, provided the inclusion of commercial fisheries in the treaty meets the cultural and economic needs of the respective First Nation".

Thus, to answer the question, it is necessary to consider:

- modern treaties in BC to date, as they deal with commercial fishing;
- the potential for favourable provisions respecting commercial fishing in future treaties; and
- alternatives.

II. THE IMPORTANCE OF COMMERCIAL FISHING

Commercial fishing has always been important to First Nations. From pre-contact times to late in the 20th century, the economies of British Columbia coastal First Nations[1] were based on fishing, trading and selling fish. However, beginning in the 1960s, and continuing to the present day, Canada's policies and regulations, designed to encourage an industrial fishery, have effectively forced First Nations to the margins of the commercial fishery or out of it altogether.

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[1] Fisheries were also important to inland river-based First Nations, however this paper is largely concerned with commercial fisheries from the perspective of coastal First Nations.

For many coastal First Nations, given geography and the nature of development in BC, fishing is the only realistic economic activity available, making commercial fishing opportunities essential to both cultural survival and economic sustainability.[2]

The Nuu-chah-nulth First Nations may be considered typical of coastal first nations. The evidence and findings in the *Ahousaht* case[3] provide a picture of Nuu-chah-nulth commercial fishing activities from pre-contact to the present. The findings of Madam Justice Garson were handed down following 122 days of trial, which included extensive expert and documentary evidence, as well as the oral history of the plaintiffs. A summary of relevant findings of Garson J. respecting the plaintiffs' commercial fishing is attached to this paper as Appendix 1.[4]

Up to the 1960s/70s, coastal First Nations engaged in what may be called community-based fisheries, with fishing spread over a long season, targeting multiple species, and low capital investment with vessels of varying size. However, starting in the late 1960s, Canada introduced policies designed to reduce the number of participants and generally make the industry more efficient. The effect of these policies was an environment and regulatory scheme that favoured large-scale, capital-intensive industrial fisheries that marginalized the community-based model. Although community-based Aboriginal fishing has not disappeared entirely, it has come very close to doing so for many coastal First Nations. The Nuu-chah-nulth, for example, were reduced to "only a handful of active full-time Nuu-chah-nulth commercial fishers",[5] a "miniscule [number], both in absolute terms and in comparison to the historical way of life".[6] While there

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2 Gordon Gislason, an economist with expertise in BC fisheries, gave compelling evidence in the *Ahousaht* case about the significant impact that the loss of commercial fishing has had on coastal First Nations. See *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494 at para 676 [*Ahousaht*].

3 *Ibid.*

4 Garson J's findings regarding Nuu-chah-nulth commercial fishing activities were substantially upheld at the BC Court of Appeal: see *Ahousaht Indian Band v. Canada (Attorney General)*, 2011 BCCA 237. The Supreme Court of Canada did not grant leave to appeal that decision: *Canada (Attorney General) v. Ahousaht Indian Band*, [2011] SCCA No 353 (QL).

5 See *Ahousaht*, *supra* note 2 at para 680.

6 *Ibid* at para 684.

may have been many good reasons for Canada's policy decision, it had the unintended and very serious consequence of making viable fishing opportunities unavailable to First Nations and their members.

The requirement for greater capital investment in boats and equipment, shorter seasons, and limits on multi-species fishing, which came into force from the 1960s through the 1990s, effectively forced most First Nation fishers out of the industry. Although Canada introduced various programs intended to assist First Nation members to stay in, or return to, fishing, Garson J found those programs to be "largely ineffective".[7]

The most recent initiative by DFO to include First Nations in commercial fishing is the Pacific Integrated Commercial Fisheries Initiative (or "PICFI") program. This program provides both licences and financial assistance to First Nations wishing to engage in commercial fishing. However, a fundamental requirement of the program is that all fishing must be fully "integrated" as part of the general commercial fishery (discussed below), meaning that Aboriginal people fishing under a PICFI licence are subject to the same rules, regulations and restrictions as the general commercial fishery. Thus, the PICFI program does not and will not enable multi-species, community-based fisheries.

III. CONSIDERATIONS FOR FIRST NATIONS COMMERCIAL FISHING

There are a number of issues that most coastal First Nations will want to consider if they hope to maintain a fishing culture and economy through treaty negotiation:

- Community Based: First Nation communities are generally located in the vicinity of desirable fisheries (likely the reason for the choice of a village site in the first place). However, these local fisheries are frequently not available under DFO regulations, or are only available to those who hold licences for specific fisheries. A community-

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[7] *Ibid* at para 790. Further findings of Madam Justice Garson in the *Ahousaht* case respecting the impact of DFO regulations, and the ineffectiveness of programs designed to assist First Nations, are found in Appendix 1.

based fishery may be expected to provide employment in the community, both for fishers and for others involved in landing fish, monitoring fisheries, etc. A community-based fishery also serves to reinforce the cultural connection to fishing;

- Multi-Species: The ability to fish for a variety of species from the same vessel, and potentially at the same time, provides greater opportunities, and is consistent with traditional fishing;

- Share of Available Harvest: A guaranteed share of available harvest would permit fishers to harvest over a longer season, avoid bad weather, and use lower cost boats and equipment. A guaranteed share could be secured in terms of a fixed number of fish each year (subject to necessary conservation measures) or a share of the total available catch (as determined by proper fisheries management);

- Flexible Harvesting and Monitoring Requirements: Current monitoring requirements, particularly in the groundfish fisheries, are directed at large operations that harvest tens of thousands of pounds of fish. These often involve electronic monitoring and require expensive camera and computer equipment, which prove costly and prohibitive for smaller community fishing operations.

- Low Capital Investment: The requirement for a significant investment to fish in the integrated commercial fishery has proved to be a substantial barrier to First Nations' participation. Flexibility in fishing regulations may substantially reduce the requirement for capital;

- Constitutional Protection: If commercial fishing rights were included in a modern treaty, constitutional protection would follow. Constitutional protection not only provides greater certainty that the rights will persist into the future, but also arguably increases the likelihood that the First Nations exercising the right will have priority over the general commercial fishery, subject to the terms of their treaty. However, as described below, most modern treaties in BC have dealt with commercial fisheries

outside of the formal treaty, which means that they are not afforded constitutional protection under s. 35(1).

IV. COMMERCIAL FISHERIES IN MODERN TREATIES TO DATE

Five modern treaties have been completed in BC to date. The Nisga'a Final Agreement was signed in 2000, outside of the BC Treaty Commission ("BCTC") process, while the remaining four were negotiated within the BCTC framework:

- Tsawwassen First Nation Final Agreement (signed in 2007);
- Maa-nulth First Nations Final Agreement (signed in 2009);[8]
- Yale First Nation Final Agreement (signed in 2013); and
- Tla'amin Final Agreement (signed in 2014).

All but one of these agreements, the Yale First Nation Final Agreement, have been ratified and implemented.

The commercial fishing rights within these agreements vary considerably. However, each treaty shares the common construct of setting out some (or in some cases, all) of the First Nation's commercial fishing rights in a separate Harvest Agreement. Under provisions that are common to each treaty, a Harvest Agreement is excluded from having treaty status, is not intended to recognize Aboriginal rights, and has no constitutional protection. As a result, Harvest Agreements are subject to amendment or termination according to their terms.[9]

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[8] The BC Treaty Commission counts the Maa-nulth treaty as five separate treaties, one for each of the First Nations within the Maa-nulth group. For purposes of this paper, the Man-nulth treaty is considered a single treaty. The Maa-nulth First Nations are: Huu-ay-aht First Nations, Ka:'yu:'k't'h'/Chek'tles7et'h' First Nations, Toquaht Nation, Uchucklesaht Tribe, and Ucluelet First Nation. Four of the First Nations along with British Columbia signed in July of 2008, while Canada and Huu-ay-ah First Nations signed in April of 2009.

[9] If Canada reduces or eliminates fish allocations under the Harvest Agreement, the treaty First Nation is generally entitled to "fair compensation" or "money" from the terminating party. See e.g. Canada, British Columbia & Nisga'a Nation, "Nisga'a Nation Harvest Agreement" (2000), s. 24 [Nisga'a Harvest Agreement];

Below is a brief overview of the commercial fishing rights that each treaty First Nation received:[10]

A. NISGA'A NATION

- **Treaty fishery**: Nisga'a Nation has a treaty right to harvest, without restriction as to purpose, a fixed percentage of the total allowable catch of the five species of Nass River salmon, subject to an absolute limit on the number of fish of each species that can be harvested in years with particularly high returns. Because the right of access is expressed in terms of the total amount of fish available for any type of harvesting in a year, Nisga'a Nation's access is not subject to DFO's priority hierarchy.
- **Management of treaty fishery**: under the treaty, Nisga'a Nation have jurisdiction over licensing, methods, timing and location of harvest, monitoring and enforcement, and terms and conditions for the sale of fish under its treaty fishery. The Minister retains jurisdiction over the management of fisheries and fish habitat generally. In addition, the Minister is required to review and approve Nisga'a annual fishing plans, but only has a limited power vary those plans, and no power to reject them.
- **Access to integrated commercial fishery**: in addition to establishing a treaty fishery, the Nisga'a Final Agreement provides money to increase the Nation's capacity to fish in the integrated commercial fishery (i.e. buying commercial licences, or vessels and licences). The Nisga'a Harvest Agreement, on the other hand, provides access within the integrated commercial fishery to additional shares of the total allowable catch of Nass Sockeye and Nass Pink salmon. The Minister affords these Harvest Agreement fisheries the same

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Canada, British Columbia & Tsawwassen First Nation, "Tsawwassen First Nation Harvest Agreement" (2009), ss 54-59 [Tsawwassen Harvest Agreement].

The Harvest Agreements typically have an initial term of 25 years, with an "evergreen" option for the treaty First Nation to extend the agreement for an additional 15 years in perpetuity. See e.g. Tsawwassen Harvest Agreement, *supra*, ss 3-4; Canada, British Columbia & Maa-nulth First Nations, "Harvest Agreement" (2011), ss 4-5 [Maa-nulth Harvest Agreement].

[10] A more detailed comparison of commercial fisheries provided to each treaty First Nation is set out in Appendix 2.

priority as other commercial and recreational fisheries in making fisheries management decisions.[11]

B. TSAWWASSEN, TLA'AMIN, AND YALE FIRST NATIONS

No commercial fisheries under treaty: the treaty right to harvest fish for the Tsawwassen, Tla'amin, and Yale First Nations is limited to fishing for domestic purposes. Thus, none of these treaty First Nations have their own treaty-protected commercial fishery.

Tsawwassen First Nation's access to the integrated commercial fishery: the Tsawwassen treaty provides money to increase the Nation's capacity to fish in the integrated commercial fishery, while the Harvest Agreement provides an allocation of Fraser River Sockeye, Chum, and Pink salmon that is equivalent to fixed percentages of the total allowable catch for each of those species. However, the Minister only issues licences to catch the Harvest Agreement salmon allocations if there is a general commercial fishery authorized for the particular species and if a portion of the total allowable catch for that species could be harvested within Tsawwassen's treaty-defined fishing area. The licences issued under the Harvest Agreement are generally restricted to this fishing area, and are otherwise comparable to general integrated fishery licences.

Yale First Nation's access to the integrated commercial fishery: the Yale First Nation Harvest Agreement provides an allocation of Fraser River Sockeye and Pink Salmon that is equivalent to percentages of the total allowable catch for each of those species. However, as in Tsawwassen's Harvest Agreement, the Minister will only issue licences for these salmon allocations if there is a commercial fishery opening for that species within a defined "Yale Harvest Agreement Fishing Area". Licences issued under the Harvest Agreement are specific to that Fishing Area and are otherwise comparable to general integrated fishery licences.

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[11] Nisga'a Harvest Agreement, *supra* note 8, c 8, s 13.

Tla'amin First Nation's access to the integrated commercial fishery: Tla'amin First Nation did not enter into a Harvest Agreement. Instead, Tla'amin received under its treaty, in exchange for its existing Allocation Transfer Program commercial licences, one prawn and one halibut license and associated quota. The treaty provision is clear that these licences are not "treaty rights"; the Minister "may amend the conditions attached to the general commercial fishing licences and may choose not to renew those licences."[12] Although not set out in its treaty, Tla'amin also received, or will receive, funding associated with its entering into treaty to increase capacity to participate in the integrated fishery.[13]

C. MAA-NULTH FIRST NATIONS

No commercial fisheries under treaty: Like the Tsawwassen, Tla'amin, and Yale First Nations, the Maa-nulth First Nations do not have their own treaty-protected commercial fisheries; their treaty right to harvest fish is limited to fishing for domestic purposes.

It is important to note that the constituent First Nations within the Maa-nulth treaty group are Nuu-chah-nulth. Given that the parties to the *Ahousaht* case are also Nuu-chah-nulth First Nations, questions arise as to what impact that case will have on the commercial fishing rights of Maa-nulth First Nations. The treaty contemplates this possibility with a provision sometimes referred to as the "me-too clause".[14] Should the highest court that hears the *Ahousaht* case find that the plaintiff First Nations have existing commercial fishing rights, this provision, together with provisions of the Harvest Agreement, triggers possible amendments to the Maa-nulth treaty.

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[12] *Tla'amin Final Agreement*, Canada, British Columbia & Tla'amin First Nation (2014), c 9, s 124 [*Tla'amin Final Agreement*].

[13] Indigenous and Northern Affairs Canada , "Tla'amin Final Agreement: Fisheries" (accessed January 26, 2017), online: <www.aadnc-aandc.gc.ca/eng/1460134338293/1460134402943>.

[14] *Maa-nulth First Nations Final Agreement*, Canada, British Columbia & Maa-nulth First Nations (2009), s 10.2.3 [*Maa-nulth Final Agreement*].

In addition, should the *Ahousaht* decision establish that the plaintiffs have rights to any species not contemplated in the Maa-nulth Harvest Agreement, or that they are entitled to operate under new fisheries management and/or licencing schemes, a separate side agreement between Maa-nulth, Canada, and British Columbia commits the parties to discuss the impact of that decision on Maa-nulth.[15] However, the triggered amendments and side agreement will not create a "treaty fishery" for Maa-nulth in which the treaty First Nations would manage independent commercial fisheries based on a share of the total allowable catch (as is the case for the Nisga'a Nation). Instead, the amendments would move provisions of the Harvest Agreement that grant Maa-nulth First Nations access to the integrated commercial fishery out of the Harvest Agreement and into the treaty, and provide for future negotiations.

Maa-nulth First Nations' access to the integrated commercial fishery: leaving aside the *Ahousaht* litigation, the Maa-nulth have, in both their treaty and their Harvest Agreement, rights to access the integrated commercial fishery. Access under the treaty includes licences and quota for salmon, halibut, and rockfish, while additional licences and quota for those species, as well as roe herring, sablefish, crab, and prawn, are provided for in the Harvest Agreement.

V. ISSUES FOR FUTURE TREATIES

To date, modern treaties have failed to deliver commercial fishing opportunities to First Nations sufficient to meet their cultural and economic needs. It appears that the reason for these shortcomings is not that First Nations are satisfied to forego commercial fishing opportunities for other benefits, but rather that Canada refuses to deviate from established policy.

There are three major policies which appear to be fundamental to Canada's position, and which make negotiation of appropriate commercial fisheries opportunities difficult, if not impossible.

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[15] Canada, British Columbia & Maa-nulth First Nations, untitled agreement (2009) ["Me-Too" Agreement]. The full text of this agreement is set out in Appendix 2, below.

A. THE INTEGRATED COMMERCIAL FISHERY

In the *Ahousaht* case, Madam Justice Garson commented on Canada's policy respecting the integrated commercial fishery:

> Canada's policies reflect its adherence to an integrated fisheries model, whereby all participants in the commercial fisheries must be treated identically. This precludes the plaintiffs from developing community-based fisheries in their own territories. Those with commercial licences must fish in the mainstream commercial fishery, and can only fish in management areas in which the DFO opens the fishery to all licensed vessels, regardless of whether those management areas are within Nuu-chah-nulth territory.[16]

The "mainstream commercial fishery" to which Garson J. refers, involves significant capital investment in boats and equipment, licences which are generally restricted to a single species and limits on the times and locations of fisheries.

If Canada is not prepared to allow First Nations to deviate from the integrated fishery model in treaties, it will likely be impossible to have viable community-based fisheries.

B. COASTWIDE FRAMEWORK

The Coastwide Framework is a policy of the Government of Canada designed to limit the amount of fish to be obtained by First Nations. Most details of this policy are confidential,[17] however, aspects of the policy and its effect on negotiations were disclosed in the evidence and cross-examination of DFO managers when testifying in the recent justification phase of the *Ahousaht* case.[18]

The Coastwide Framework establishes a maximum amount of fish, referred to as the "Endpoint" number that may ultimately be allocated to all First Nations in British Columbia through treaty

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[16] *Ahousaht*, *supra* note 2 at para 775.

[17] Canada claimed cabinet privilege over the policy during the trial.

[18] *Ahousaht* trial, BCSC No S033335, justification phase proceedings, April 16-17, 2015.

or other settlements or resolutions of Aboriginal fishing claims.[19] There are two "Endpoint" numbers: one for salmon and one for non-salmon fisheries. The actual amounts, and the method by which they were derived was withheld from disclosure in the litigation as a "cabinet confidence".[20]

In order to remain within the Endpoint number, DFO has established notional allocations for each First Nation in BC.[21] Five factors are generally considered by DFO managers when determining the notional allocation: (1) the geographic location of the First Nation; (2) the size (population) of the First Nation; (3) the preferences or key interests of the First Nation; (4) the existing allocations that are provided to the First Nation for both FSC and communal commercial opportunities; and (5) the interests of others involved in the fishery in the same area.[22]

These notional allocations may be modified on a case-by-case basis.[23] However, the Endpoint is fixed, so that allotting to one First Nation will involve a reduction to others.[24]

Regional DFO staff are bound to follow the policy and their mandate with regard to negotiations is restricted to providing opportunities that fall within the Coastwide Framework.[25]

C. CONSTITUTIONAL PROTECTION

Canada's position on constitutional protection for commercial fisheries is that it is unnecessary, and that harvest agreements will be honoured. Given Canada's obligations, and the honour of

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19 *Ibid*, testimony of R. Reid, April 16, 2015 at p. 80:3-8, p. 83:25-30.

20 *Ibid*, testimony of R. Reid, April 17, 2015 at p. 3:44-6:3; 6:31-7:3; *ibid*, testimony of S. Murdoch, October 7, 2015, p. 33:36-43.

21 *Ibid*, testimony of R. Reid, April 16, 2015 at p. 82:14-43, p. 88:13-26.

22 *Ibid*, testimony of S. Murdoch, October 7, 2015 at p. 35:35 – 36:43.

23 *Ibid*, testimony of R. Reid, April 16, 2015 at p. 83:8-14.

24 *Ibid*.

25 *Ibid*, testimony of R. Reid, April 17, 2015 at p. 3:7-24.

the Crown, this would certainly be expected. However, it leaves First Nations vulnerable to changes in regulations which have the effect of altering opportunities in harvesting.

D. CONCLUSION

It is important to note that these policies, which are obstacles to the inclusion of commercial fisheries in treaties, are purely a consequence of policy decisions by Canada. They are not necessary for conservation or proper fisheries management.[26]

However, Canada remains steadfast in these policies, and at the present, any treaty based commercial fishing opportunities will have to conform.

VI. ALTERNATIVES

If Canada insists on maintaining current policies, some First Nations may not be prepared to enter treaties, and must consider the alternatives. Essentially, these alternatives are to resort to the courts or to take what opportunities are available under the status quo.

A. LITIGATION

At the present time, litigation is the only way in which a First Nation can achieve a constitutionally protected, culturally acceptable, community-based and economically viable commercial fishery. For some First Nations this is the only alternative, as they see their fishing culture slipping away.

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[26] Consider, for example, the fisheries management regime in Washington State. That regime governs the harvest of many of the same fisheries resources that are under Canada's jurisdiction along the southwest coast of BC, and must account for the same challenges faced by Canada in regulating multiple migratory stocks and species of fish within any given area. Yet the Washington regime is able to retain overall conservation objectives while accommodating significant rights-based, tribal commercial fisheries that, for some fisheries, account for 50% of the total allowable catch. For a general overview, see *Ahousaht*, justification phase proceedings, testimony of Gary Morishima, February 22, 2016, p. 17-47. See also *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975) [the "Boldt decision"].

As a general principle, litigation is best avoided, due to cost and risk. However, when there is no alternative to achieve the desired end, these factors become less important. There may be little benefit in saving money when the cultural and economic survival of a First Nation community is at stake. Similarly, risk becomes less important when refraining from litigation will result in the unsatisfactory *status quo* or an unsatisfactory treaty agreement.[27]

There have been five cases to date in British Columbia that have dealt with claims to Aboriginal rights to fish commercially. Two of these have been successful, *Ahousaht* and *Gladstone,* and three were not, *Van der Peet*, *NTC Smokehouse*, and *Lax Kw'alaams*. Brief summaries of these cases are attached as Appendix 3 to this paper.

For lawyers and clients contemplating litigation to establish commercial fishing rights, it is important to note that all of these cases were brought when there was considerable uncertainty respecting both the test for aboriginal commercial fishing rights, as well as the evidentiary standard needed to meet the test and the proper way to plead fishing rights cases. The decisions of the courts in these cases, as well as other cases respecting rights and title, such as *Tsilhqot'in*, have provided much needed guidance.

B. STATUS QUO

First Nations which are not prepared to enter a treaty with unsatisfactory commercial opportunities, and who do not wish to engage in litigation to assert their rights, may still participate in commercial fisheries by acquiring boats and licences on the open market or participate in DFO programs such as PICFI.

However, these options do not achieve the goals of a community based fishery, flexibility respecting fishing methods and species, or a greater say in management.

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[27] Indeed, there are examples of First Nations that, despite having been unsuccessful in establishing commercial fishing rights in litigation, continue to be offered the same or even better commercial fishing opportunities relative to other First Nations who have not gone to court.

VII. CONCLUSION

Reconciliation requires that First Nations whose cultures and economies have depended on fisheries since long before contact, maintain a share of these fisheries. This share must be provided in a way that recognizes their distinct cultural and economic requirements, which are significantly different than those of the general commercial fishery.

Reconciliation appears to be impossible unless Canada revises its rigid policies respecting the negotiation of commercial fishing opportunities in modern treaties.

APPENDIX 1:
FINDINGS FROM *AHOUSAHT*

In the BC Supreme Court case, *Ahousaht Indian Band and Nation v. Canada (Attorney General)* 2009 BCSC 1494, Madam Justice Garson found that: "The Plaintiffs have aboriginal rights to fish for any species of fish in the environs of their territories and to sell fish."

The following summarizes some of the findings in that case.

A. HISTORY AND IMPORTANCE OF COMMERCIAL FISHING

Pre-Contact

The pre-contact Nuu-chah-nulth were "overwhelmingly a fishing people" who "depended almost entirely on their resources of the ocean and rivers to sustain themselves." They engaged in the "regular exchange of fisheries resources in significant quantities to other tribes or groups" as a prominent feature of their pre-contact society.[28]

The evidence disclosed early European observers of Nuu-chah-nulth First Nations described fishing on a scale that far surpassed domestic needs. For example, in 1786 John Meares described the quantity of fish being harvested by the Nuu-chah-nulth as "prodigious".[29]

Contact

After contact with Europeans, the well-established trading custom of the Nuu-chan-ulth was expanded to adapt to the influx of European explorers and fur traders.[30]

19th Century – Colonial Period

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[28] *Ahousaht*, *supra* note 2 at paras 282, 439-440, 485.

[29] *Ibid* at para 203.

[30] *Ibid* at para 439.

In the colonial period, Nuu-chan-ulth were major producers and traders of dogfish oil, halibut and herring, as well as salmon.[31]

Garson J. noted the observation of early colonial official, Gilbert Sproat:

> "Thousands of halibut, some of them weighing more than 200 pounds, are caught by the natives and are exchanged for the potatoes, gammaas [camas], brush mats and other articles."[32]

Early Confederation Period

During the period from confederation to 1920, fishing and trading in fish in its various forms remained important and integral activities to the Nuu-chah-nulth, which gradually evolved into modern commercial fishing either for wages or for sale.[33]

Modern Period 1920 – 1960

Fishing and commercial fishing were integral activities to Nuu-chah-nulth society in the modern period. Participation in the fishing industry was very high and "the evidence is compelling that the Nuu-chah-nulth remained a fishing people during this period".[34]

Modern Period 1960s to Present

The period of the 1960s to the present day has been marked by fisheries reforms that have significantly impacted Nuu-chah-nulth participation in the fishery. While Garson J accepted that as recently as the 1980s, "there was a flourishing Nuu-chah-nulth commercial fishery in which participants fished from vessels of varying sizes", the regulatory reforms of the 1990s that introduced individual quota systems for halibut and limited fishing opportunities squeezed out

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31 *Ibid* at para 422.

32 *Ibid* at para 423.

33 *Ibid* at para 434.

34 *Ibid* at para 436.

Nuu-chah-nulth fishers from the halibut fishery and left the Nuu-chah-nulth with "only a handful of active full-time [fishers]".[35]

B. IMPACT OF GOVERNMENT REGULATION

Madam Justice Garson found:

> It is indisputable that the plaintiffs cannot fish and sell their fish as they previously did, in part because of Canada's regulatory regime. It is impossible for the plaintiffs to pay the large amounts the market sets for licences, and they are simply unable to compete in an economically sustainable way in the non-aboriginal fishery under the present regulatory regime.
>
> The cumulative effect of the fisheries regime including the *Fisheries Act*, R.S.C. 1985 c. F-14 and the regulations and policies promulgated thereunder both legislatively and operationally *prima facie* infringes the Proceeding Plaintiffs' aboriginal rights to fish and to sell fish…[36]

Garson J. found that Canada' strict adherence to an "integrated fisheries model" precluded the Plaintiffs from fishing in accordance with their preferred means of exercising their fishing rights:

> Canada's policies reflect its adherence to an integrated fisheries model, whereby all participants in the commercial fisheries must be treated identically. This precludes the plaintiffs from developing community-based fisheries in their own territories. Those with commercial licences must fish in the mainstream commercial fishery, and can only fish in management areas in which the DFO opens the fishery to all licensed vessels, regardless of whether those management areas are within Nuu-chah-nulth territory.[37]

C. SPECIAL ABORIGINAL PROGRAMS

Garson J. reviewed 17 DFO programs and policies designed to assist First Nations involved in fisheries:[38]

a. Indian Fishermen's Emergency Assistance Program (IFEAP) (1980-1982)

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35 *Ibid* at para 680.

36 *Ibid* at para 901.

37 *Ibid* at paras 775-776.

38 See *ibid* at paras 398-732.

b. Aboriginal Cooperative Fisheries and Habitat Management Program (1994-)
c. Aboriginal Fisheries Strategy (AFS) (1992-)
d. AFS agreements with the Nuu-chah-nulth Tribal Council
e. Contribution Agreements and Project Funding Agreements (1991-)
f. Fisheries Related Community Meetings and Consultations
g. Aboriginal Fisheries Guardians (1992-)
h. Voluntary Licence Retirement Program (1992-)
i. Allocation Transfer Program (1994-)
j. Excess Salmon to Spawning Requirements (ESSR)
k. Pilot Sales Agreements
l. Selective Fisheries First Nations Gear Purchase Program
m. AFS Review (2002)
n. Aboriginal Aquatic Resource and Oceans Management (AAROM) Program (2003)
o. Salmonoid Enhancement Program
p. Pacific Integrated Commercial Fisheries Initiative (PICFI) (2007)
q. New Emerging Fisheries Policies

She concluded:

> I find that these programs, while well-intentioned, have not significantly supported Nuu-chah-nulth participation in the commercial fishery. These programs are designed to incrementally increase aboriginal participation without causing negative impacts to established fishers. The fact remains that Canada adheres to an integrated management model for each fishery with no recognition of the plaintiffs' aboriginal rights. [39]

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[39] *Ibid* at para 733.

APPENDIX 2:
COMPARISON OF COMMERCIAL FISHING RIGHTS
IN MODERN BC TREATIES

	Treaty fisheries	Access to the integrated commercial fishery
Nisga'a Nation	**Treaty fishery for Nass salmon** Fixed share of the total allowable catch of Nass salmon: • 10.5% of Sockeye; • 0.6% of Pink; • 21.0% of Chinook; • 8.0% of Coho; and • 8.0% of Chum,[40] subject to absolute limits on harvesting in large-run years. No non-salmon commercial fisheries. **Management of Nass salmon treaty fishery** Nisga'a jurisdiction over licensing, harvesting methods, timing and location, monitoring and enforcement, and terms and conditions for the sale of fish. The Minister is required to review and approve Nisga'a annual fishing plans, but only has a limited power to vary those plans, and no power to reject them.[41]	**Access under the Treaty** • $11.5 million in funding to increase access to integrated fishery.[42] **Access under the Harvest Agreement** Additional fixed share of the total allowable catch of Nass salmon: • 13% of Sockeye, and • 15% of Pink. Harvesting of this allocation is in the regular integrated commercial fishery and regulated by DFO licences. In making fisheries management decisions, the Minister gives fisheries under the Harvest Agreement the same priority as other commercial and recreational fisheries.

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[40] The Nisga'a Final Agreement provides for possible adjustments in the share of total available catch as between salmon species. There is a formula for "sockeye equivalents" to effect this adjustment. See *Nisga'a Final Agreement*, Canada, British Columbia & Nisg'a Nation (2000), c 8, Schedule C.

[41] See *ibid*, c 8, ss 68-69, 89-90. The Minister reviews the plans after receiving recommendations from the Joint Management Committee. See *ibid*, c 8, s 89-90.

[42] This money was intended to be spent on licences or a combination of vessels and licences. The actual amount received was likely higher, as it was indexed to inflation. See *ibid*, c 8, ss 111-113, Schedule G.

Tsawwassen First Nation	No commercial fishery protected by treaty	**Access under the Treaty** • $1 million in funding to increase access to integrated fishery.[43] **Access under the Harvest Agreement** Licences to harvest Fraser River salmon in the integrated fishery, if available for harvest within the treaty-defined Tsawwassen Fishing Area, in amounts equivalent to the following share of total allowable catch: • 0.78% of Sockeye; • 3.27% of Chum; and • 0.78% of Pink.[44] Licences are usually restricted to the Tsawwassen Fishing Area, unless otherwise agreed by Canada and Tsawwassen First Nation.[45]
Yale First Nation	No commercial fishery protected by treaty	**Access under the Harvest Agreement** Licences to harvest Fraser River salmon in the integrated fishery, if there is a commercial fishery opening within the Yale Harvest Agreement Fishing Area,[46] in amounts equivalent to the following share of total allowable catch: • From 1.0027% to 1.15% of Sockeye; and • 0.17% of Pink.[47]

[43] *Tsawwassen First Nation Final Agreement*, Canada, British Columbia & Tsawwassen First Nation (2007), c 8, s 105.

[44] See "Tsawwassen First Nation Harvest Agreement, *supra* note 9, ss 11-18. This allocation is contingent on Tsawwassen relinquishing one Area E Gill Net Licence: *ibid*, s 10.

In addition to salmon, the Harvest Agreement provides that the Tsawwassen can exchange up to five of its commercial crab licences for Area I or J commercial crab licences, but the net impact of this exchange on the amount or area of Tsawwassen's crab harvesting is unclear. See *ibid*, ss 23-28.

[45] *Ibid*, s 17.

[46] Canada, British Columbia & Yale First Nation, "Yale First Nation Harvest Agreement" (2010), s 1 (area defined as "the Fraser River between the downstream side of the . . . railway bridge at Mission, upstream to the southern confluence of Sawmill Creek").

[47] *Ibid*, ss 12-13. The Sockeye allocation varies according to the number of Area E gill net licences relinquished by Yale First Nation in that year.

		Licences are intended to be restricted to all or part of Yale's Harvest Agreement Fishing Area.[48]
Tla'amin First Nation	No commercial fishery protected by treaty	**Access under the Treaty** Two licences for the commercial integrated fishery replace previous Allocation Transfer Program ("ATP") licences: • One Category W prawn licence (max vessel length 8.08 meters); and • One Category L halibut licence (max length 11 meters) with quota for halibut, dogfish, and lingcod.[49] **Other access** • According to its website, Indigenous and Northern Affairs Canada ("INAC") will provide $1.4 million in funding to increase Tla'amin access to integrated fishery.[50]
Maa-nulth First Nations	No commercial fishery protected by treaty Pending the outcome of the *Ahousaht* litigation, possibility of treaty protection for specific allocations set out in Harvest Agreement and/or participation in new fisheries management and licencing scheme.[51]	**Access under the Treaty** • Salmon: One Area D Gillnet and Two Area G Troll licences;[52] • Halibut: licences and quota comparable to 0.3506476% of the total allowable catch;[53] • Rockfish: one Category ZN outside area licence with quota of 1/191st of the Rockfish total allowable catch in that area.[54] **Access under the Harvest Agreement** Additional licences based on the relinquishment

[48] *Ibid*, s 10.

[49] *Tla'amin Final Agreement*, *supra* note 12, c 9, s 123-125, Schedule 3.

[50] Indigenous and Northern Affairs Canada , "Tla'amin Final Agreement: Fisheries" (accessed January 26, 2017), online: <www.aadnc-aandc.gc.ca/eng/1460134338293/1460134402943>.

[51] See *ibid*, ss 106-107; *Maa-nulth Final Agreement*, *supra* note 14, ss 10.2.1–10.2.4. See also the "Me-Too" Agreement set out below this table.

[52] Maa-nulth Harvest Agreement, *supra* note 9, Schedule 8, ss 1-3.

[53] *Maa-nulth Final Agreement*, *supra* note 14, c 10, Schedule 8, ss 4-6.

[54] *Ibid*, c 10, Schedule 8, s 7.

		by Maa-nulth First Nations of ATP licences that are the equivalent of the following: • Salmon: Area D Gillnet and Area G Troll licences;[55] • Halibut: licences and quota;[56] • Rockfish: Category ZN outside area licences with quota of up to 2.6178% of the Rockfish total allowable catch;[57] • Roe herring: up to four Gillnet licences;[58] • Sablefish: licences that have been allocated no more than 0.34% of the total allowable catch;[59] • Crab: one Area E Crab licence;[60] • Prawn: one Commercial Prawn licence.[61] **Access under the "Me-too" Agreement** • As set out below, Canada and British Columbia are committed to discuss possible changes to fisheries management and licencing for Harvest Agreement access, as well as possible additional access to species not contemplated by the Harvest Agreement, pending the outcome of the *Ahousaht* litigation.

The Maa-nulth First Nations' additional "Me-Too" Agreement with Canada and British Columbia, entered into April 1, 2011, states the following:

> **WHEREAS**:
>
> A. The Parties have entered into the Maa-nulth First Nations Final Agreement which is a resolution of any outstanding aboriginal rights and title claims of the Maa-nulth First Nations (the "**Final Agreement"**);
> B. The Parties have entered into a Harvest Agreement as contemplated by paragraph 10.2.1 of the Final Agreement (the "**Maa-nulth Harvest Agreement**");

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55 Maa-nulth Harvest Agreement, *supra* note 9, ss 12-20.

56 *Ibid*, ss 33-41.

57 *Ibid*, ss 42-50.

58 *Ibid*, ss 51-58.

59 *Ibid*, ss 59-67.

60 *Ibid*, ss 68-75.

61 *Ibid*, ss 76-83.

C. The Parties wish to provide for discussions in relation to certain fisheries related matters which have potential implications for the Final Agreement and the Maa-nulth Harvest Agreement;

NOW THEREFORE, for good and valuable consideration, the Parties agree as follows:

1.0 Changes to Fisheries Management and Licensing

1.1 Where as a result of a decision of the highest domestic court that considers the *Ahousaht et al*. fisheries litigation (Supreme Court of British Columbia Action No. S033335) (the "**Litigation**"), Canada changes the fisheries management and licensing system for a commercial fishery referred to in the Maa-nulth Harvest Agreement for one or more of the plaintiffs, the Maa-nulth First Nations and Canada, on the written request of the Maa-nulth First Nations or Canada made within a year of the change:

a) within 60 days of the written request, will discuss the application of the change in the management and licensing system for the licences, in respect of that commercial fishery, described in the Maa-nulth Harvest Agreement;

b) within 90 days of the written request, will discuss options for the implementation of the change in the management and licensing system to licences, in respect of that commercial fishery, described in the Maa-nulth Harvest Agreement with each other and at the appropriate integrated management advisory board; and

c) will negotiate and attempt to reach agreement on the implementation of a comparable change in the management and licensing system for the licences, in respect of that commercial fishery, described in the Maa-nulth Harvest Agreement, such negotiation to commence within 180 days of the written request.

1.2 Any negotiations and discussions contemplated by 1.1 will take into account:

a) the integration of commercial fisheries;
b) conservation and sustainable fisheries;
c) orderly fisheries management;
d) common standards for monitoring, validation, compliance, enforcement and health and safety;
e) impacts to all other licence holders;
f) the costs to any of the parties to the negotiation of the implementation of any proposals; and
g) any other matters relevant to Maa-nulth First Nations or Canada.

2.0 Discussion on Other Fisheries

2.1 If the highest domestic court that considers the Litigation determines that one or more of the plaintiffs has an aboriginal right to fish for a species of Fish not identified in paragraph 10.2.3 of the Final Agreement, and to sell the Fish caught under that right on a commercial basis, upon the written request of the Maa-nulth First Nations, the Parties will meet to discuss the decision of that court.

3.0 General

3.1 In this Agreement, the words "will negotiate and attempt to reach agreement" have the same meaning that they do in the Final Agreement.

3.2 This Agreement takes effect as of the effective date of the Final Agreement.

3.3 Each of the Parties is responsible for its own costs in relation to the discussions contemplated by 1.0 and 2.0.

3.4 The discussions contemplated by this Agreement and all discussions and information relating to those discussions are without prejudice to the respective legal positions of the Parties, unless the Parties otherwise agree, and nothing made or done in respect of the discussions or negotiations, including the discussions themselves or the responses provided by the Parties, creates any legally binding rights or obligations.

3.5 For greater certainty, none of the Parties is required to agree to amend any agreement as a result of the discussions contemplated by 1.0 or 2.0.

3.6 Except for the Parties' commitment to discuss as described in this Agreement, neither the discussions contemplated, nor the decisions or actions of the Parties in any way relating to the discussions, are reviewable by a court or in any other forum.

3.7 The Parties confirm that this Agreement is privileged and without prejudice to their legal positions in any litigation, including the Litigation, and will not be introduced into evidence by any of them.[62]

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[62] "Me-Too" Agreement, *supra* note 15.

APPENDIX 3:
COMMERCIAL FISHING CASELAW

R. v. Van der Peet, [1996] 2 SCR 507

Dorothy Van der Peet was charged under *Fisheries Act* regulations for selling 10 salmon that were caught under an Indian food fishing licence. Van der Peet claimed, as a member of the Sto:lo Nation, that she was exercising an Aboriginal right to sell fish and alleged and that the regulatory provision infringed that right in violation of s. 35(1) of the *Constitution Act, 1982*.

Writing for the majority of the Supreme Court of Canada ("SCC"), Lamer CJC upheld Van der Peet's conviction, concluding that the exchange of fish for money or other goods was a pre-contact practice of the Sto:lo but was not one that was a central or significant part of Sto:lo culture prior to contact (not "integral to the distinctive culture"), and therefore was not among Sto:lo's modern Aboriginal rights protected by s. 35(1).

R. v. NTC Smokehouse, [1996] 2 SCR 672

NTC Smokehouse Ltd owned and operated a food processing plant near Port Alberni, BC. The company was charged under *Fisheries Act* regulations for buying and selling approximately 119,000 lbs of salmon that had been caught by members of the Sheshaht (Tseshaht) and Opetchesaht (Hupacasath) First Nations under Indian food fish licences and without commercial licences. On appeal, the company argued that the *Fisheries Act* regulations were of no force and effect because the Sheshaht and Opetchesaht had an Aboriginal right to exchange fish on a commercial basis.

The conviction was upheld at the SCC. Writing for the majority, Lamer CJC characterized the Aboriginal right being claimed as a right to exchange fish on a commercial scale—a more expansive right than that claimed in *Van der Peet* to exchange fish for money or other goods.

Lamer CJC did not need to address this distinction, however, because he found that the company had not met the lower burden of proving that the exchange of fish for money or other goods was integral to the cultures of the Sheshaht and Opetchesaht prior to contact. Therefore, neither First Nation were found to have Aboriginal rights to sell fish, regardless of scale.

R v. Gladstone, [1996] 2 SCR 723

Donald and William Gladstone, members of the Heiltsuk First Nation, were charged under *Fisheries Act* regulations for attempting to sell 4,200 lbs of herring spawn on kelp without a commercial licence. The appellants claimed to have been exercising an Aboriginal right to sell herring spawn on kelp.

Again writing for the majority at the SCC, Lamer CJC characterized the right being claimed as the "commercial exploitation" of herring spawn on kelp.[63] Unlike in *NTC Smokehouse*, the trial judge's findings were sufficient to establish that the exchange of herring spawn on kelp on a commercial scale was integral to Heiltsuk culture prior to contact, and was thus among the Heiltsuk's Aboriginal rights. Lamer CJC found that the past and present fishery regulations constituted a prima facie infringement of that right, but had not extinguished it. Due to the lack of evidence on whether the infringement was justified, Lamer CJC allowed the appeal and directed a new trial on the issue of justification. That trial did not proceed.

Lax Kw'alaams Indian Band v. Canada (Attorney General), 2011 SCC 56

At trial, the Lax Kw'alaams claimed an Aboriginal right to harvest and commercially trade all fisheries resources within their territorial waters, and sought a declaration that the *Fisheries Act* and its regulations unjustifiably infringed that right. In the alternative, the Lax Kwa'alaams claimed a "lesser and included" right to a commercial fishery consisting of a right to harvest and

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63 *R v. Gladstone*, [1996] 2 SCR 723 at para 24.

sell fish and fish products sufficient "to sustain their communities, accumulate and generate wealth and maintain and develop their economy".[64] The trial judge found that Lax Kw'alaams' pre-contact practice established a right to trade in eulachon, but was insufficient to ground a right to harvest and commercially trade any other species. She declined to deal with the narrower, alternative claim.

In a unanimous judgment, the SCC upheld the trial judge's decision, finding that she had neither erred in her characterization of the right being claimed, nor in her species-specific approach to the evidence. The Court further held that the trial judge had properly rejected Lax Kw'alaams' claim to a declaration of a right to a "lesser" commercial fishery.

Ahousaht Indian Band and Nation v. Canada (Attorney General), 2009 BCSC 1494, aff'd 2011 BCCA 237, leave to appeal dismissed, [2011] SCCA No 353 (QL)

Five Nuu-chah-nulth First Nations[65] claimed an Aboriginal right to harvest and sell fisheries resources on a commercial scale or, in the alternative, "for the purpose of sustaining that band's or nation's community or, in the further alternative, to exchange for money or other goods."[66]

The trial judge characterized the plaintiffs' claimed right as one to "fish and to sell fish". She stated that the claim did not extend to a right to a "modern industrial fishery" or to "unrestricted rights of commercial sale", but it did include sales into the commercial marketplace. She found on the evidence that the plaintiffs had established Aboriginal rights "to fish for any species of fish within the environs of their territories and to sell that fish".[67] Although the trial judge found

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64 *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at para 3, citing Second Amended Statement of Claim, at para 31.

65 The five First Nations were: Ehattesaht, the Mowachaht/Muchalaht, the Hesquiaht, the Ahousaht, and the Tla-o-qui-aht. See *Ahousaht, supra* note 2 at para 1.

66 *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 237 at para 15.

67 *Ibid* at 21.

that Canada's fisheries regulatory regime constituted a prima facie infringement of the plaintiffs' rights, she declined to rule on justification. Instead, she granted the parties two years in which to negotiate an agreement on how the plaintiffs' commercial fishing rights could be accommodated. Failing resolution, the parties could return to the court for further adjudication.

Having failed to reach agreement, the parties returned to court in 2015. Proceedings before Madam Justice Humphries on the justification phase of litigation ended on October 27, 2016, with judgment reserved.