

ABORIGINAL LAW CONFERENCE—2010

PAPER 3.1

Reconciliation through Litigation: Aboriginal Fishing Rights in *Ahousaht v. Canada*

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RECONCILIATION THROUGH LITIGATION ABORIGINAL FISHING RIGHTS IN AHOUSAHT V. CANADA

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I. Introduction

In its decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, the Supreme Court of Canada stated definitively that reconciliation is at the core of aboriginal and treaty rights. Speaking for the Court, Binnie J. opened the decision with this passage:

The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.¹

Time and again, courts have emphasized that this reconciliation is best achieved through negotiation. The most frequently quoted statement in this respect is the following passage from Chief Justice Lamer’s majority decision in *Delgamuukw*:

Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at 1105, s. 35(1) “provides a solid constitutional base upon which subsequent negotiations can take place.” ... Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, *reinforced by the judgments of this Court*, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1)—“the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.” Let us face it, we are all here to stay.² (emphasis added)

1 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69 at para. 1.

2 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 186 per Lamer C.J. See also La Forest J. at para. 207.

In *British Columbia v. Okanagan Indian Band*, LeBel J. stated that negotiation “remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown.”³

Yet while negotiation is critical to achieving reconciliation, it need not and should not be the exclusive domain of reconciliation. Rather, as this paper suggests, litigation has played and will continue to play an essential role in achieving reconciliation by more clearly defining rights in difficult areas and advancing negotiations on important issues that might otherwise be irreconcilable. In fact, litigation and negotiation can intersect very comfortably with one another and lay groundwork for achieving reconciliation.

This point is developed in this paper with reference to the BC Supreme Court’s decision in *Abousabt Band and Nation et al v. Canada*.⁴ That case demonstrates that the resolution of contentious issues that cannot be resolved through treaty negotiation can be advanced through focused litigation while still maintaining negotiations as the “ultimate route” to reconciliation. In *Abousabt*, Garson J. held that five Nuu-chah-nulth nations on the West Coast of Vancouver Island hold constitutionally-protected aboriginal rights to fish and sell that fish on a commercial basis. In so doing, she resolved a critically important legal and factual issue that had caused a stalemate in the Nuu-chah-nulth’s treaty negotiations. She also provided considerable definition to the right by thoroughly analyzing both the pre-contact practice on which the right is based and the modern regulatory scheme that infringes it. Yet Garson J. ultimately crafted a remedy that preserves negotiations, informed by the guidance of her decision, as the primary route to implement that right in practice. She has thus preserved the opportunity for negotiation to be the “ultimate route to achieving reconciliation” while maintaining the legal rights of the parties to return to court for further resolution if necessary.

II. Negotiation and Litigation

There is no question that good faith and productive negotiation is essential to achieving the objective of reconciliation. However, it would be both wrong and unrealistic to suggest that reconciliation of aboriginal rights and Crown sovereignty can be achieved entirely through negotiation without the need to resort, from time to time, to litigation.

The emphasis on negotiation as the preferred route to reconciliation can risk losing sight of the value of litigation in defining aboriginal rights and setting the framework for reconciliation. The website of the BC Treaty Commission (which is sometimes referred to as the “keeper” of the Treaty Process) provides a good example. That website includes a section entitled “Aboriginal Rights – Landmark Cases” in which the Commission notes the seminal decisions of *Delgamuukw*, *Haida* and *Taku*. These are among the cases that have shaped the modern law of aboriginal rights and which have laid the very foundation upon which the Treaty Process itself rests.⁵ Yet after a very brief explanation of these important decisions, the following appears on the Commission’s website:

Canadian courts have repeatedly urged the parties to resolve aboriginal title through negotiation, not litigation. Litigation is costly, generally narrowly focused, time consuming and ultimately leaves the question of how aboriginal rights and title apply unanswered.⁶

This critique of litigation loses sight of the enormous contribution that decisions of the courts have made and continue to make to the reconciliation of aboriginal rights with crown sovereignty.

3 *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71, para. 47.

4 2009 BCSC 1494.

5 Why other seminal cases such as *Sparrow*, *Gladstone* or *Sappier* are not included is not apparent.

6 http://www.bctreaty.net/files/issues_rights.php

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Without litigation, there would be no BC Treaty Process, no BC Treaty Commission and no negotiations over aboriginal rights and title. It was only after the Supreme Court of Canada's split decision in *Calder v. British Columbia*⁷ that Canada reversed its earlier refusal to deal with aboriginal title claims and initiated the comprehensive claims process which ultimately led to the modern treaty process. As Dickson C.J.C. and La Forest J. observed in *Sparrow*:

For many years, the rights of the Indians to their aboriginal lands—certainly as *legal* rights—were virtually ignored. *It took a number of judicial decisions* and notably the *Calder* case in this Court (1973) *to prompt a reassessment of the position being taken by government.* (emphasis added)⁸

Clearly cases such as *Sparrow*, *Delgamuukw*, and *Sappier; Grey*⁹ influence how reconciliation is achieved through treaty negotiations and decisions of the courts will continue to do so. Even in his oft-quoted passage in *Delgamuukw* urging negotiations, Chief Justice Lamer noted that such negotiations, and the settlements they might ultimately achieve, need be “reinforced by decisions of this court.”¹⁰

The passage from the Treaty Commission website implies that litigation and negotiation are antithetical. (This view also appears to be held by the Crown which has a practice, if not a formal policy, not to engage in treaty negotiations with First Nations that are actively pursuing litigation.) Yet at the same time, the Treaty Commission is openly concerned about the slow pace of progress at treaty tables. In its most recent Annual Report, Chief Commissioner Sophie Pierre stated:

Reconciliation between First Nations, the governments of Canada and BC is essential for economic progress. However, there is a growing perception by many that the treaty process is off track. Of particular concern are the long standing barriers to progress that have not been addressed to the satisfaction of all parties.¹¹

One of the “long standing barriers” identified by Chief Commissioner Pierre is the lack of a federal mandate on negotiation of fisheries issues. It was this issue—the lack of a federal mandate to negotiate the constitutional protection of commercial fishing rights—that led the Ahousaht, Ehattesaht, Hesquiaht, Hupacasath, Mowachaht/Muchalaht, Nuchatlaht, Tla-o-qui-aht, and Tseshah Nations to go to court to seek a declaration of their aboriginal rights to fish and sell fish. That case, which has resulted in the Supreme Court's decision in *Ahousaht et al. v. Canada* affirming the Nuu-chah-nulth plaintiffs' aboriginal rights to sell fish, demonstrates that litigation can both complement and facilitate negotiations on issues that are otherwise stalled at the treaty table. It demonstrates that strategic or focused litigation can *advance* rather than hinder the reconciliation process and elevate negotiations to a level that is unachievable through the treaty process alone.

Thus, the aspects of litigation of which the Treaty Commission is critical—narrowly focused litigation, leaving open the ultimate application of aboriginal rights—provide the very medicine (at least on certain issues) that the stalled treaty process requires.

7 *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313.

8 *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 11023-11024.

9 *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54.

10 *Delgamuukw*, para. 186.

11 BC Treaty Commission, *Annual Report 2009* at 2.

III. Background to Ahousaht

Abousaht was a case brought by several Nuu-chah-nulth First Nations located on the West Coast of Vancouver Island (“WCVI”). The Nuu-chah-nulth is a group of 14 First Nations¹² who share a common language and, as found by Garson J., a common culture up and down the coast.¹³ Since prior to contact with Europeans and into modern times, fishing was and continues to be at the heart of Nuu-chah-nulth culture and economy.

The development of the modern commercial fishery has devastated the Nuu-chah-nulth’s fishing culture. Since the 1980s, the Nuu-chah-nulth have found themselves unable to compete in the modern industrial fishery and, since the 1980s, the number of Nuu-chah-nulth commercial fishermen has fallen dramatically.¹⁴ The Nuu-chah-nulth saw that their fishing culture was dying and if they did not do something about it, they would lose that culture altogether.

The Nuu-chah-nulth were unable to find a resolution to this problem in the treaty process. In 2001, 13 Nuu-chah-nulth Nations which had been negotiating together in the treaty process reached an Agreement-in-Principle (“AIP”) with Canada and BC. However, eight of the 13 Nations rejected the AIP in Nation-wide referenda. During his evidence in the *Abousaht* case, Francis Frank, who was then the president of the Nuu-chah-nulth Tribal Council, suggested that the lack of constitutional protection for commercial fishing rights and the inadequacy of fishing opportunities provided through the AIP were key factors in its failure. These were also the key factors that led the Nuu-chah-nulth to bring the *Abousaht* litigation.

The action was initially commenced by the eight Nuu-chah-nulth Nations that had rejected the AIP. They were later joined by three other Nuu-chah-nulth Nations whose members had voted to accept the 2001 AIP (Huu-ay-aht, Kyuquot/Checklesah and Ucluelet) but these three Nations discontinued their participation in the litigation during and shortly after trial to sign the Maa-nulth Final Agreement.¹⁵ Further, the claims of three of the original eight Nuu-chah-nulth Nations (the Hupacasath, Nuchatlaht and Tseshaht) were severed to be tried in a later phase due to unresolved overlapping claims with other plaintiff nations.¹⁶ At the end of the trial, there were five Nuu-chah-nulth nations left standing in this phase of the litigation: the Ahousaht, Ehattesah, Hesquiaht, Mowachaht/Muchalaht, and Tla-o-qui-aht. The claims of the Hupacasath, Nuchatlaht and Tseshaht are yet to be tried.

The barriers to negotiation that that motivated the Nuu-chah-nulth to take their fishing rights claim to court are not unique to the WCVI. As a matter of policy, Canada will not recognize aboriginal rights to sell fish without a court judgment to that effect. In dealing with the question of costs in *Lax Kw’alaams Indian Band v. Canada*, 2009 BCSC 875, another aboriginal fishing rights case, Satanove J. observed:

12 From south to north, the 14 Nuu-chah-nulth Nations are Ditidaht, Huu-ay-aht, Hupacasath, Tseshaht, Uchuklesah, Toquaht, Ucluelet, Tla-o-qui-aht, Ahousaht, Hesquiaht, Mowachaht/Muchalaht, Nuchatlaht, Ehattesah, and Kyuquot/Checklesah. In addition, the Pachedaht (south of Ditidaht) and the Makah at Neah Bay in Washington State are considered to be closely related or even part of the Nuu-chah-nulth cultural group.

13 *Abousaht* para. 299 & 439.

14 *Abousaht* para. 680.

15 The treaty contains certain “me-too” provisions that allow the Maa-nulth to take some benefit of the *Abousaht* decision, should it be upheld.

16 The reasons for this are explained in a July 31, 2007 ruling given by Garson J. on a pre-trial motion: see *Abousaht Indian Band v. A.G. of Canada*, 2007 BCSC 1162. The claims of the Tseshaht, Hupacasath and Nuuchatlaht were severed.

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... Canada has developed a policy whereby it will not recognize commercial aboriginal rights in the absence of a Court decision or a Treaty, and will not mandate the Department of Fisheries to negotiate fisheries agreements with aboriginal peoples on the basis of potential aboriginal rights.¹⁷

Garson J. stated in *Abousabt*:

While Canada endeavours to support aboriginal participation, it does not recognize any aboriginal right to participate in the commercial fishery.¹⁸

As a result, any aboriginal nation that wishes to negotiate a constitutionally-based agreement concerning commercial fishing is compelled to first go to court and seek definition of those rights. In these circumstances, Satanove J. in *Lax Kw'alaams* noted both the necessity and benefit of litigation as a means of advancing reconciliation:

Thus aboriginal groups in the plaintiffs' position are compelled, to some degree, to bring a specific law suit relating to their alleged right before they can know their negotiating position. On this analysis, and in light of the Government policy referred to above, it is to the advantage of both parties to receive a pronouncement of legal rights, or lack thereof.¹⁹

In keeping with Canada's policy, federal treaty negotiators have no mandate to offer constitutional (treaty) protection for rights to sell fish. With the exception of the Nisga'a Treaty,²⁰ any commercial fishing opportunities that are provided through treaty negotiation process are contained in side agreements (referred to as "Harvest Agreements") which do not have constitutional protection.²¹

The commercial opportunities that are provided through Harvest Agreements are subject to the same rules as the ordinary commercial fishery.²² First Nations are issued commercial licences that are virtually identical to ordinary commercial fishing licences. Licences cannot be split or shared. *One* licence must be fished on *one* vessel and in accordance with the same rules and regulations, such as the same open times and area restrictions, as the ordinary commercial fishery. There is no ability for Treaty First Nations (other than the Nisga'a) to exercise these fishing opportunities in accordance with other means (such as community-based fisheries) outside the mainstream commercial fishery.

Further, the commercial fishing opportunities provided through Harvest Agreements are small.²³ For example, the Maa-nulth Final Agreement commits Canada to providing the five Maa-nulth Nations with only seven commercial fishing licences to share between them.²⁴ This pales in comparison to the

17 *Lax Kw'alaams v. Canada*, 2009 BCSC 279 at para. 10.

18 *Abousabt*, para. 689.

19 *Lax Kw'alaams v. Canada*, 2009 BCSC 279 at para. 11.

20 Chapter 8, s. 31 of the Nisga'a Final Agreement provides constitutional protection for the sale of Nass River salmon to a specified amount determined by a formula under the Nisga'a Treaty.

21 Maa-nulth Harvest Agreement, sections 17-20 (salmon), 28, 31-34 (halibut), 37, 40-42 (rockfish), 46 & 49-50 (roe herring), 54 & 57-59 (sablefish), 63-64 & 66 (crab), 70-71 & 74 (prawn), and 79, 81, 84, & 89 (general provisions); Tsawwassen First Nation Harvest Agreement, 15-17 (salmon), 27-28 (crab) 32-33 (general provisions).

22 Maa-nulth Final Agreement, s. 10.2.1 and Maa-nulth Harvest Agreement, s. 3; Tsawwassen First Nation Final Agreement, Chapter 9, ss. 102-103 Tsawwassen First Nation Harvest Agreement, s. 2.

23 Maa-nulth Agreement licences; Check TFN treaty.

24 Maa-nulth Final Agreement, s. 10.2.12 and Schedule 8. The licences are one salmon gill net licence, two salmon troll licences, three halibut licences and one rockfish licence.

treaty rights of the neighbouring Washington State tribes who are entitled to 50% of the State's allowable catch pursuant to treaties negotiated with Territorial Governor Governor Isaac Stevens in the 1850s (as interpreted in *United States v. Washington*, 384 F.Supp. 312).

These circumstances do not make a treaty very appealing to coastal First Nations whose culture and history built up around the fishery. It left the Nuu-chah-nulth plaintiffs with no choice but to go to court or face the loss of their fishing culture.

IV. The Claim in Ahousaht

A. The Rights Claimed

The Nuu-chah-nulth's fundamental objective in the litigation was to obtain from the court a declaration that their aboriginal fishing rights include the right to sell fish. It was hoped that success in this regard would change the playing field for negotiations such that Canada could no longer refuse to discuss the constitutional protection of commercial rights and would be compelled to make more substantive offers of commercial fishing opportunities to the Nuu-chah-nulth plaintiffs.

In keeping with this objective, the Nuu-chah-nulth put forward a very focused claim seeking declarations that they have aboriginal rights to fish for any species of fish in their respective territories and the right to sell that fish on a full commercial scale or on such smaller scale as the court may find. They also claimed that these rights are infringed by Canada's regulation of the fishery.

The primary claim was founded upon activity-based aboriginal rights to fish and sell fish (such as those contemplated in *R. v. Gladstone* and *R. v. NTC Smokehouse*). An alternative claim based on aboriginal title to fishing territories was also advanced. The basis for this alternative claim was that the economic component of aboriginal title²⁵ would give the Nuu-chah-nulth a right, parasitic on the aboriginal title, to fish and sell fish.²⁶ As a further alternative, the plaintiffs claimed rights to fish commercially based on Crown duties arising from the reserve-creation process in which the Nuu-chah-nulth were allocated mostly tiny "fishing station" reserves.

In order to maintain the focus of the case on the Nuu-chah-nulth's objectives of establishing fishing rights to preserve and enhance their troubled fishing culture, the plaintiffs:

- *did not* seek damages for infringement of their rights;
- *did not* seek declarations of infringement other than for their claimed fishing rights;
- *did not* ask the court to define the scope and content of their aboriginal title, other than to define any fishing rights that may be parasitic on that aboriginal title;
- *did not* claim aboriginal title to any upland areas (only rivers, foreshore and lands covered by water where fishing could take place);
- *did not* claim any infringements of their claimed aboriginal title, other than infringements of any fishing rights that are parasitic on that title;
- *did not* claim infringements against BC, which has no legislative jurisdiction over the significant fisheries (BC was a defendant, though, due to its interest in the aboriginal title issue); and

25 *Delgamuukw*, paras. 129, 161 and 166.

26 *Delgamuukw*, para. 111, 140; *Ahousaht*, para. 500.

- *did not* challenge any foreshore tenures granted by the province (such as fish farms) that might interfere or affect Nuu-chah-nulth fishing rights.

While many of these issues are and continue to be irritants to the Nuu-chah-nulth plaintiffs, pursuit of these issues would have made an already complex trial even more complicated and would have detracted from the primary objective of having their existing fishing rights defined to inform a larger negotiation.

Given the very specific focus of the case,²⁷ there is no reason why treaty or other negotiations over non-fisheries matters could not continue parallel to the litigation.

B. The Remedy Claimed

A further very significant limitation on the scope of the claim brought by the Nuu-chah-nulth was that the plaintiffs did not ask the court to find what *amounts* of fish or *access* to fishing opportunities would be required to properly accommodate the aboriginal rights they claimed. Rather, the plaintiffs said that this should be a matter for negotiation of the parties after judgment is given as to the existence of the claimed rights. However, the plaintiffs asked that they have the opportunity to return to court, if necessary, for further determination of the issue should negotiations prove to be unfruitful.

Thus, the plaintiffs asked for a “reconciliatory” remedy. They asked for a declaration that they have aboriginal rights to fish and to sell fish and a declaration that those rights were infringed without justification. They then acknowledged that:

The implementation of the plaintiffs’ commercial fishing rights ... is a matter of reconciliation. Negotiation with the defendants is anticipated and necessary.²⁸

Consequently the plaintiffs asked the court to retain supervisory jurisdiction so that if the anticipated negotiations ran into difficulty, the parties could return to court for further directions or declarations regarding the implementation of the plaintiffs’ rights as may be necessary.

There is Supreme Court of Canada authority for the proposition that courts may retain supervisory jurisdiction over a matter,²⁹ but it is rare. The reconciliatory remedy proposed by the plaintiffs was based primarily on that case, on the “fundamental objective” of aboriginal rights (reconciliation) as stated in *Mikisew* and on the admonitions of the courts that aboriginal rights should be negotiated. These provided a compelling basis for a reconciliatory remedy but it was far from certain that a remedy of that nature could be ordered in a civil proceeding.

As discussed in the next section of this paper, Garson J. did grant a reconciliatory remedy, although she crafted it somewhat differently than had been proposed by the plaintiffs. Nevertheless, Garson J.’s decision, and the reconciliatory remedy she ordered, demonstrates that litigation and negotiation are not antithetical and the intersection of the two creates a much-needed opportunity to advance stalled efforts of achieving reconciliation.

27 Canada might disagree that the focus was specific. Canada often raised the fact that they claim was to any species of fish in the plaintiffs territories and frequently characterized the action as a claim to harvest over 90 different species of fish, asserting that each species had to be separately established. The plaintiffs took a different view that their rights are based on the practice of fishing and selling fish. They fished and sold a broad range of fisheries resources as available to them from time to time within their territories. Consequently, the species-specific approach urged by Canada is not relevant to rights definition, although it may be for infringement and justification. The Court accepted the plaintiffs’ approach in this respect.

28 *Abousabt et al. v. Canada* Supreme Court Reg. No. S033335 (Vancouver) Plaintiffs’ Final Argument, Vol. 4, Part X, para. 1814.

29 *Doucet-Boudreau v. Nova Scotia (Department of Education)*, [2003] 3 S.C.R. 3.

V. Decision in *Abousaht*³⁰

A. The Aboriginal Rights

Madam Justice Garson found that the Nuu-chah-nulth plaintiffs have aboriginal rights to fish for any species of fish in the environs of their territories and to sell that fish.³¹ She stated that it is not a right to fish and sell fish “on a large industrial scale” but it is a right to sell “into the commercial marketplace.”³²

Garson J. found that fishing was “an overwhelming feature” of the Nuu-chah-nulth pre-contact way of life³³ and that the Nuu-chah-nulth traded “significant quantities” of fish with other tribes and groups. She said at para. 439:

At contact, the Nuu-chah-nulth were overwhelmingly a fishing people. They depended almost entirely on their harvest of the resources of the ocean and rivers to sustain themselves.³⁴

And at para. 281-82:

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.³⁵ (emphasis added)

(Garson J. included “reciprocal gift giving” as part of trade based on observations of contact-era European fur traders who observed that “gift exchange” in Nuu-chah-nulth culture was a method of barter and bargaining. Garson J. called it “a polite form of trade.”³⁶)

With regard to the species of fish, Garson J. found that the Nuu-chah-nulth fished and traded *any species* of fish that was available to them and thus it would not be appropriate to define the Nuu-chah-nulth’s present-day aboriginal rights on a “species-specific” basis, which Canada had urged. This finding is based on Nuu-chah-nulth practices rather than a legal question of whether aboriginal rights are species-specific. Garson J. wrote:

The activity in question here is fishing, and to require the plaintiffs to prove that right in respect to each species is inconsistent with the evidence regarding their way of life. The Nuu-chah-nulth people followed a seasonal round which corresponded to the seasonal availability of various species of fish. Species gained and lost importance depending upon their abundance. That was the pattern during both pre- and post-contact periods, and it has continued to modern times. In my view, it would be an artificial limitation of the characterization of the plaintiffs’ fishing right to limit it to certain species.³⁷

30 For a more extensive summary of the *Abousaht* decision, see F. Matthew Kirchner, “The Aboriginal Right to Sell Fish: *Abousaht Nation et al v. Canada*” in Pacific Business and Law Institute, *Aboriginal Law: Current Issues* (March 4th & 5th, 2010).

31 *Abousaht*, para. 383, 489.

32 *Abousaht*, para. 485-9.

33 *Abousaht*, para. 202.

34 *Abousaht*, para. 439.

35 *Abousaht*, para. 281-82.

36 *Abousaht*, paras. 241, 247 & 281.

37 *Abousaht*, para. 383.

Based on these findings of pre-contact Nuu-chah-nulth culture, Garson J. characterized the modern right that flows from these practices simply as “a right to fish and to sell fish.” She said at paras. 485-87:

In my view, the plaintiffs’ ancestral practices translate into a broader modern entitlement to fish and to sell fish than captured by “exchange for money or other goods.” The small-scale sale of fish outside the commercial market is not an adequate modern analogue for the ancestral practices. At the same time, however, those ancestral practices do not equate to an unrestricted right to the commercial sale of fish. To the extent that “commercial” as it is used in the authorities suggests sale on a large industrial scale, I would decline to choose that characterization, given my finding that trade was not for the purpose of accumulating wealth.

In my view, the most appropriate characterization of the modern right is simply the right to fish and to sell fish.

B. Infringement

Having found that the plaintiffs established aboriginal rights to fish and sell fish, Garson J. turned to the question of whether those rights have been *prima facie* infringed. With the assistance of both expert and lay evidence Garson J. analyzed the impact of what she described as “a vast and complex web of regulations, programs, and policies”³⁸ on the Nuu-chah-nulth’s fishing culture. She concluded that the cumulative effect of that scheme has been to reduce the Nuu-chah-nulth to a very small number of fishermen. She found that the scheme fails to provide the Nuu-chah-nulth with adequate fishing opportunities and by fails to afford the Nuu-chah-nulth the opportunity to fish in accordance with their preferred means. She said:

... it is the cumulative effect of Canada’s fisheries regime that I have found restricts the Nuu-chah-nulth with respect to their ability to fish and their methods of fishing, including location, time, gear and species.³⁹

Garson J.’s findings on infringement related to both the fishing opportunities that are available to the plaintiffs and the methods by which those opportunities can be exercised.

With regards to fishing opportunities, Garson J. found that the level of Nuu-chah-nulth participation in the commercial fishery has dropped dramatically from “a flourishing Nuu-chah-nulth commercial fishery” in the 1980s to only 3 or 4 active fishermen today.⁴⁰ She found that there were several factors that have contributed to this but that Canada’s regulation of the fishery was a significant factor.⁴¹ She said:

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,⁴² and they are simply unable to compete

38 *Abousabt*, para. 523.

39 *Abousabt*, para. 901.

40 *Abousabt*, para. 680.

41 Other factors include “the collapse of the salmon stock, changes in equipment, the reduction in the price of fish, the closure of local fish buying businesses, environmental factors, international treaties, and conservation imperatives.” [para. 786].

42 Garson J.’s reference to the “large amounts the market sets for licences” refers to the “limited entry” regime that is in place for all commercial fisheries. There is a finite number of licences in each commercial fishery and, while these licences are technically issued for one year only, they are renewed as a matter of routine such that the licences are effectively owned by the holder of the licence. With some very minor exceptions, DFO does not issue new licences in any commercial fishery. Thus, a person wishing to enter the commercial fishery must purchase an existing licence (or a licence eligibility) from an existing licence holder at market rates which are typically several hundred thousand dollars. See, for example, *Abousabt* para. 534.

in an economically sustainable way in the non-aboriginal fishery under the present regulatory regime. I am satisfied of that evidence.⁴³

Canada argued that while there has been a decline in Nuu-chah-nulth participation in the commercial fishery, the statistical evidence shows that it was proportionate to the decline that has occurred in the non-aboriginal commercial fishery. However, Garson J. rejected this “proportional” approach for several reasons, including that the statistical evidence “creates a distorted picture of actual Nuu-chah-nulth participation in the commercial fishery,”⁴⁴ that the decline in absolute numbers of Nuu-chah-nulth fishermen was very significant and particularly so when compared to the Nuu-chah-nulth’s pre-contact way of life based on fishing,⁴⁵ and proportionality ignores the more severe impact the loss of a fishing job has on a coastal aboriginal community compared to the general population.⁴⁶ (This latter conclusion was based on evidence given in cross-examination of a resource economist called as an expert witness by Canada.⁴⁷)

Canada led considerable evidence about programs run through the Department of Fisheries and Oceans (“DFO”) which Canada said are designed to maintain aboriginal people in the commercial fishery. Canada argued that because of these programs, any Nuu-chah-nulth aboriginal fishing rights are not infringed. Garson J. disagreed, finding that the programs are inadequate and provide little benefit to the Nuu-chah-nulth plaintiffs:

I am satisfied that these programs have been largely ineffective in assuring the plaintiffs’ reasonable participation in accordance with their preferred means in the commercial fishery. *Indeed, those programs have not succeeded in maintaining even a modest native commercial fishery.* (emphasis added)

Garson J. was particularly concerned that DFO’s programs are all qualified by the “integrated” fisheries policy to which Canada strictly adheres. Key to this policy is that all commercial fishers must be treated *identically*. Thus, Canada will not deal with any aboriginal group, including the Nuu-chah-nulth, as aboriginal rights holders. All commercial fishers must be treated the same. Garson J. described Canada’s policy as follows:

... Canada adheres to an integrated management model that treats all participants in the commercial fishery equally. While Canada endeavours to support aboriginal participation, it does not recognize any aboriginal right to participate in the commercial fishery.⁴⁸

Canada’s position and “integrated” fisheries policy is consistent with the “Harvest Agreement” model of commercial fisheries, discussed above, that has been adopted in recently-concluded treaty settlements. Any commercial fishing opportunities available in modern treaty settlements (other than the Nisga’a Treaty) have no treaty (ie. constitutional) protection and must be conducted on the same terms and conditions as the ordinary commercial fishery. It is one of the restrictions on Canada’s negotiation mandate that drove the Nuu-chah-nulth to court in this case and was soundly criticized by Garson J.

With regard to methods of fishing, Garson J. found the “integrated” fishery policy to be especially problematic because it denied the Nuu-chah-nulth the opportunity to exercise their rights in community-based, low capital fisheries, which is their preferred means of fishing, rather than in an industrial fishing model. Garson J. wrote:

43 *Abousabt*, para 788.

44 *Abousabt*, para. 679.

45 *Abousabt*, para. 684.

46 *Abousabt*, para. 685.

47 *Abousabt*, para. 676.

48 *Abousabt*, para. 689.

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.

In light of the foregoing, I conclude that Canada's regulatory regime denies the plaintiffs their preferred means of exercising their aboriginal rights.⁴⁹

Thus, Garson J. found that the cumulative effect of Canada's regulatory scheme infringed the plaintiffs' rights to sell fish by dramatically reducing the number of Nuu-chah-nulth fishermen in the commercial fishery and denying the Nuu-chah-nulth their preferred means of exercising those rights. It then fell to Canada to justify the infringement.

C. Justification and Remedy

Madam Justice Garson found that Canada was not in a position to justify its infringement of the plaintiffs' aboriginal rights because Canada had never turned its mind to the existence of the rights. Following *R. v. Gladstone*,⁵⁰ she found that in order for Canada to justify an infringement, it must *at a minimum* turn its mind to the *existence* of Nuu-chah-nulth aboriginal fishing rights, something it could not do in the face of its denials of such rights. She said:

It is thus apparent that in order to be able to justify an infringement, Canada must, at a minimum, have turned its mind to the existence of the aboriginal rights at issue here. (para. 865)

...

Accordingly, not having taken into account the existence of the plaintiffs' aboriginal rights to fish and to sell fish, Canada is not in a position to justify the infringements of that right as required by the authorities. (para. 869) (emphasis added)

Although Garson J. found that Canada was not in a position to justify the infringement, she declined to make a declaration to this effect. Rather, she stated that:

Until the release of these Reasons, it was not unreasonable in light of the prevailing case authorities for Canada to proceed on the basis that the plaintiffs did not have the aboriginal fishing rights that I have found they possess.

However, she said that Canada must now change its approach to the Nuu-chah-nulth plaintiffs:

... the fact remains that these plaintiffs have aboriginal rights to fish and to sell fish, and Canada has not taken those specific rights into account in its management of the Pacific fisheries. There is an important difference between balancing generalized aboriginal interests in participating in the commercial fishery with other competing interests on the one hand, and according recognition, however defined, to the constitutional right of these plaintiffs, on the other. (para. 866)

In light of these factors, Garson J. crafted a remedy that would give Canada an opportunity to turn its mind to the plaintiffs' aboriginal rights and give the parties time to try to negotiate the implementation of the Nuu-chah-nulth rights to sell fish. In short, while Garson J. came at the remedy in a somewhat different way than the plaintiff had proposed, she granted what was

⁴⁹ *Abousabt*, para. 775-76.

⁵⁰ *R. v. Gladstone*, [1996] 2 S.C.R. at para. 62.

substantially the reconciliatory remedy the plaintiffs had sought. In explaining the rationale for this remedy, she referred both to the need for Canada to consider the plaintiffs' rights and the submission of the plaintiffs that these matters are best left to negotiation. She stated:

In my view, it would be unfair to hold that Canada has failed to justify its *prima facie* infringement of the plaintiffs' aboriginal rights without first providing the parties the opportunity to consult or negotiate based upon the findings I have made and, in the event of unsuccessful negotiations, the opportunity for Canada to adduce further evidence relevant to a more focussed justification defence. An additional factor that guides the outcome towards negotiation between the parties is Canada's submission that the plaintiffs led no evidence with respect to the level of participation in the commercial fishery that would be sufficient to meet their requirements or expectations. It is true that the plaintiffs plead their case on a spectrum. *Not knowing where, if at all, on that spectrum the Court's decision would fall, the plaintiffs contend that the quantification of the amount of fish that would satisfy their aboriginal rights, or the determination as to the means by which their aboriginal rights will be exercised, is a question for negotiation between the parties as part of the process of reconciliation. I agree.* (para. 871) (emphasis added)

In the end, Garson J. granted the main declarations sought by the plaintiffs—that they hold aboriginal rights to fish and sell fish and that those rights had been infringed—but she suspended consideration of the justification question for two years to give the parties a chance to consult and negotiate in respect of the implementation of the plaintiffs' aboriginal rights. In crafting this remedy, she cited the opening passage of *Mikisew*, that reconciliation is the fundamental objective of the modern law of aboriginal rights, and noted that her remedy was consistent with that passage. In the entered order, Garson J. included the following declaration:

With respect to the *prima facie* infringement declared in paragraph 3 of this Order, Canada has a duty to consult and negotiate with the Proceeding Plaintiffs in respect of the manner in which the Proceeding Plaintiffs' aboriginal rights to fish and to sell fish can be accommodated and exercised without jeopardizing Canada's legislative objectives and societal interests in regulating the fishery.

Although Garson J. did not consider the justification question substantively, she made some comments about it in an effort to assist the negotiations. For example, she said:

To repeat what I said earlier, the objective of s. 35(1) is to guarantee that the government treats aboriginal peoples in a way that ensures that *their rights are taken seriously* ...

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. (para. 874-75) (emphasis added)

Balanced against these factors and her extensive findings in respect of infringement are the legislative objectives put forth by Canada in support of the *Fisheries Act* which Garson J. agreed are compelling and substantial. These are:

- a. conservation and sustainability of fisheries resources;
- b. protection of endangered species;
- c. establishing priority for aboriginal FSC fisheries after conservation;
- d. health and safety of the fishers and consumers;
- e. adherence to international treaties;
- f. facilitation of aboriginal participation in the fisheries;

- g. pursuit of economic and regional fairness including the participation in the fisheries by other aboriginal groups and recognition of the historic reliance upon and participation in the fisheries by non-aboriginal groups;
- h. achievement of the full economic and social potential of fisheries resources; and
- i. safe and accessible waterway. (para. 881)

Garson J. summarized the task before the parties as follows:

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. (para. 876)

VI. Reconciliation Through Litigation

The *Abousabt* litigation demonstrates that litigation is necessary to achieve reconciliation in at least some critical areas. Further, contrary to a perception that litigation is a "winner take all" proposition, *Abousabt* demonstrates that courts can preserve "the ultimate route to achieving reconciliation" while still fulfilling its proper adjudicative function.

Madam Justice Garson's decision has broken down four major stumbling blocks to reconciliation between the Nuu-chah-nulth and Canada on fishing rights. First, the decision has unlocked the logjam of constitutional protection. Canada cannot maintain its position that Nuu-chah-nulth rights to sell fish should not receive constitutional protection through treaty settlements. Further, in light of this decision, it should reconsider its strict approach of not recognizing any aboriginal rights to sell fish unless those rights are proved in court. This case has shown that they can be proved.

Second, Garson J.'s judgment shows that existing DFO programs aimed at enhancing aboriginal participation in the commercial fishery may be well-intentioned but do not provide adequate fishing opportunities commensurate with aboriginal rights to sell fish. As Garson J. observed, these programs do not even provide a "modest native commercial fishery." Canada is going to have to provide Nuu-chah-nulth rights holders with greater access to commercial fishing opportunities or have to justify to a court why it is acceptable to leave these rights holders without even a "modest native commercial fishery." This is a significant finding because these rejected programs form the model for modern treaty settlements.

Third, Garson J.'s judgment confirms that the "integrated" fishing policy, which has been embraced in the Harvest Agreement model found in modern treaties, infringes the Nuu-chah-nulth's aboriginal rights to fish and sell fish. Canada will have to provide more flexibility in how fishing opportunities can be exercised by the Nuu-chah-nulth (such as through community-based fisheries) or justify its failure or refusal to do so to the court. It is not acceptable to treat constitutional rights to fish and sell fish as being identical to ordinary commercial fishing privileges. Aboriginal rights have a priority that must be addressed, respected and accommodated.

Fourth, Garson J. has confirmed that the right to fish and sell fish extends to any species of fish or shellfish in the plaintiffs' territories. Thus, Canada must justify the exclusion or near exclusion of Nuu-chah-nulth from very lucrative fisheries such as the geoduck or crab fisheries.

Each of these four points was contentious issues between the Nuu-chah-nulth and Canada in pre-litigation treaty talks and were each points that drove the Nuu-chah-nulth to court. Garson J.'s decision on these points is a significant advance in defining the scope and content of the Nuu-chah-nulth rights to fish and sell fish. Given the restricted mandate of federal negotiators and Canada's steadfast refusal to acknowledge aboriginal rights to sell fish, these are advances in rights definition that could *only* be made through litigation and could not have been achieved at the treaty table.

3.1.14

Yet while Garson J. has provided crucial guidance and definition as to the plaintiffs' rights, she has left the implementation of those rights to negotiation of the parties (at least for now). She has not ordered the parties to consult and negotiate over the implementation of the rights but she has declared that Canada has a duty to do so. Prior to her decision, it was unclear whether a court, as an adjudicative body, could stop short of fully defining the scope and content of the rights that have been put before it. Nor was it clear that plaintiffs could even ask a court to limit its judgment in this way. However, Garson J.'s decision demonstrates that, at least in the unique circumstances of aboriginal rights, a court need only go as far as it is asked in defining rights while leaving the rest for negotiation and further judicial consideration only if necessary.

In this respect, Garson J.'s judgment represents a triumph for reconciliation. This litigation has advanced an issue on which negotiation had become futile but has left negotiation in place as the preferred method for implementation of the rights at issue in the case. At a time when the BC Treaty Commission is openly concerned that the treaty process may be "off track," parties to that process should consider whether strategic and focused rights or title-based litigation, such as the *Abousabt* case, can help bring down the "barriers" to reconciliation and advance a process that many stakeholders consider to be stalled.