THE ABORIGINAL RIGHT TO SELL FISH

AHOUSAHT NATION et al. v. CANADA

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I. INTRODUCTION

On November 3, 2009, the B.C. Supreme Court released its judgment in *Ahousaht Nation v. Canada*.[1] Madam Justice Garson (now J.A.) concluded that all five Nuu-chah-nulth plaintiffs have aboriginal rights to fish in their traditional territories and sell that fish into the commercial marketplace. This marks only the second case in Canada in which aboriginal rights to sell fish have been established outside of a treaty and the first such case that expressly applies that right to any species of fish available in the First Nations' territories.

The decision is the culmination of a very long (123 days) and complicated trial that examined in detail the pre-contact way of life of the Nuu-chah-nulth peoples of the West Coast of Vancouver Island and the modern regulation of the West Coast Fishery. The evidence was extensive, including of journals, reports, and letters left by the Spanish, English and American explorers and fur traders, multiple expert reports, volumes of fisheries policies, and testimony of Nuu-chah-nulth people who spoke about their territories and their fishing culture.

Madam Justice Garson's decision, which exceeds 300 pages, is a very interesting study in the application of many legal principles set down by the Supreme Court of Canada over the years to a fascinating and complex evidentiary record. Many of these legal principles had previously been understood only in the abstract because there have been few opportunities to test the application of these principles in practice. This case provided ample opportunity and the decision provides guidance on the practicalities of proving aboriginal rights.

II. BACKGROUND

The Nuu-chah-nulth are a group of 14 First Nations located on the West Coast of Vancouver Island (WCVI).[2] The Nuu-chah-nulth share a common language and, as found by Garson J., a common culture up and down the coast.[3] 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.

Yet 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

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[1] *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494 (hereinafter *Ahousaht*)

[2] From south to north, the 14 Nuu-chah-nulth Nations are Ditidaht, Huu-ay-aht, Hupacasath, Tseshaht, Uchuklesaht, Toquaht, Ucluelet, Tla-o-qui-aht, Ahousaht, Hesquiaht, Mowachaht/Muchalaht, Nuchatlaht, Ehattesaht, and Kyuquot/Cheklesaht. 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.

[3] *Ahousaht* para. 299 & 439

fishermen has fallen dramatically.[4] 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.

In 2001, after reaching a stalemate on fisheries issues in the treaty process, several Nuu-chah-nulth Nations decided to seek a judicial determination of their aboriginal fishing rights. It was hoped that success in litigation would lead to a renewed opportunity to negotiate with Canada on a different level as judicially-confirmed aboriginal rights holders.

Eleven of the 14 Nuu-chah-nulth Nations started the action in 2003. In the course of pre-trial procedures, the claims of three of those Nations were severed to be tried in a later phase due to conflicting claims with the other eight.[5] Three more plaintiffs discontinued their claims during the trial in order to sign the Maa'nulth Treaty.[6] In the end, five of the 14 Nuu-chah-nulth Nations – the Ahousaht, Ehattesaht, Hesquiaht, Mowachaht/Muchalaht and Tla-o-qui-aht – completed the case.

The claim was based primarily on aboriginal rights to fish and sell fish. An alternative claim based on aboriginal title to fishing territories was also advanced and, in the further alternative, a claim based on crown duties arising from the reserve-creation process in which tiny fishing station reserves were set apart for the Nuu-chah-nulth.

The strategy of seeking judicial recognition of Nuu-chah-nulth aboriginal rights was a resounding success. In a judgment that exceeds 300 pages, Madam Justice Garson found that the Nuu-chah-nulth plaintiffs proved that they hold aboriginal rights to fish and to sell fish into the commercial marketplace. Having done so, she did not find it necessary to consider either the aboriginal title claim or the Crown duties claim (although she would have dismissed the latter for reasons given in *Lax Kw'alaams Indian Band v. Canada*, 2008 BCSC 447 subsequently affirmed in 2009 BCCA 593). She also found that the right to sell fish (other than clams) had been infringed both legislatively and operationally by the cumulative effect of Canada's complex regulatory and policy regime applicable to fisheries management. She concluded that Canada must now consult and negotiate with the Nuu-chah-nulth plaintiffs over a "proposed Nuu-chah-nulth fishery", including proper allocation of fishing opportunities and the appropriate methods by which that fishing should take place.

In the balance of this paper, I provide a summary analysis of Garson J.'s very extensive decision.

III. ABORIGINAL RIGHTS TO FISH AND SELL FISH

A. OVERVIEW – THE RIGHTS ESTABLISHED

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[4] *Ahousaht* para. 680

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

[6] The three nations were the Ucluelet, Kyuquot/Cheklesaht, and Huu-ay-aht. A side agreement to the treaty provides for certain outcomes on fisheries matters in the treaty depending on the final result of the *Ahousaht* litigation.

Madam Justice Garson found that the Nuu-chah-nulth plaintiffs have an aboriginal right to fish for any species of fish in the environs of their territories and to sell that fish.[7] 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.[8]

She also concluded that the Nuu-chah-nulth have a right to fish for food, social and ceremonial ("FSC") purposes and that Canada acknowledges that right (but denies that it was infringed.) It is noteworthy that Canada's acknowledgement of the FSC right was not made until final argument.

The specific findings of the judge that led her to these conclusions and summarized below.

B. THE PROPER PLAINTIFF AND RIGHTS-HOLDER

As a first step in establishing an aboriginal right, the proper collectivity that holds the aboriginal right must be identified. That is, what is the collective "aboriginal nation" that holds the right and can properly claim it? In *Ahousaht*, the plaintiffs claimed that each of the five plaintiff first nations was a separate aboriginal nation, even though each shared a common language and culture with one another. Garson J. agreed with this characterization. She said:

> The evidence is clear that the plaintiffs share a common Nuu-chah-nulth language, culture and history. They do not now have, nor have they ever had, a single overarching governing Nuu-chah-nulth authority. Each plaintiff self-identifies as an autonomous nation and each claims it is the proper aboriginal group for the purpose of holding aboriginal rights and title.[9]

This approach to defining the aboriginal nation as rights holder appears different to the approach taken in *Tsilhqot'in Nation v. British Columbia* 2007 BCSC 1700 where Vickers J. described aboriginal nations as "a group of people sharing a common language, culture and historical experience."[10] Vickers J. did not consider the level of political decision-making to be a significant factor, noting that this point would be indicative of a nation-state rather than a cultural nation. However, the Nuu-chah-nulth did not advance their claim as a single cultural nation. As Garson J. observed, each has always identified as an autonomous nation and that is the basis on which she concluded that each plaintiff group is the proper rights holder for its own First Nation.[11]

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[7] *Ahousaht*, para. 383, 489

[8] *Ahousaht*, para. 485-9

[9] *Ahousaht*, para. 299

[10] *Tsilhqot'in Nation* at para. 458

[11] The plaintiffs claimed as an alternative that the Nuu-chah-nulth constituted a single aboriginal nation but this claim was only advanced in the event that the Court rejected the primary argument in favour of a broader definition of the proper aboriginal nation in this case. Ultimately, no party argued that the Nuu-chah-nulth as a whole constituted a single aboriginal nation.

That said, Garson J. found that the Nuu-chah-nulth shared a common language and culture and, as is discussed below, this permitted her to draw inferences about the practices of one group from the direct evidence respecting other groups.

C. THE ABORIGINAL RIGHTS TEST

1. The Legal Test

Aboriginal rights are modern legal rights that are founded upon the pre-contact practices of an aboriginal group.[12] In order to establish a modern aboriginal right to sell fish, the Nuu-chah-nulth plaintiffs had to establish that, prior to contact with Europeans, their ancestors engaged in the practice of fishing and trading or selling fish and that this practice was an integral part of their distinctive pre-contact aboriginal culture.[13] This legal test requires a broad examination of the pre-contact way of life of the Nuu-chah-nulth.[14]

2. Date of Contact – 1774

Garson J. found that the date of contact for the purposes of the aboriginal rights test is 1774 for the Nuu-chah-nulth. This is the date when the Spanish explorer Juan Pérez anchored about six miles offshore from Estevan Point and was greeted by 15 canoes of Nuu-chah-nulth people who paddled out to trade fish to Pérez's crew.[15] Thus, the evidence had to establish the importance of fishing and trading fish as part of Nuu-chah-nulth way life prior to 1774 - over 230 years ago.

D. ANALYSIS OF THE EVIDENCE

The main sources of evidence of the pre-contact Nuu-chah-nulth way of life included the historical documents from the early explorers and fur traders and the reports and testimony of the plaintiffs' experts, including Richard Inglis, Dr. Barbara Lane and Dr. Alan McMillan, much of which was directed at interpreting and explaining the historical records. Nootka Sound, in the territory of the present-day Mowachaht/Muchalaht Nation, was the heart of the 18th century maritime fur trade. Between 1789 and 1818, approximately 50 fur trading vessels visited the WCVI, leaving an enormous historical record that proved to be invaluable evidence in this case.

The evidence was directed at three main areas: pre-contact fishing, pre-contact trade in fish, and pre-sovereignty occupation of fishing territories. (The last point concerned the aboriginal title claim and was not addressed in the judgment.)

1. Pre-Contact Fishing

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[12] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 48; *R. v. Sappier, R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54 at para. 34

[13] *R. v. Van der Peet*, [1996] 2 S.C.R. 507;

[14] *Sappier*, paras. 22-24, 40, 45-46

[15] *Ahousaht*, para. 100-111

Garson J. found that fishing was "an overwhelming feature" of the Nuu-chah-nulth pre-contact way of life.[16] She said:

> 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.[17]

She found that the Nuu-chah-nulth fished a very wide range of species of fish. For example, she referred to a letter written by the American fur trader Joseph Ingraham in 1789 that describes the wide array of fish that the pre-contact Nuu-chah-nulth harvested:

> That account, the Ingraham Letter, described, among other things, the methods of fishing and whaling used by the inhabitants of Nootka Sound, as well as the large variety of marine products caught. With respect to the latter, Ingraham listed "whales, porpoises, salmon, a species of the salmon about the same size with its nose turning down like a hawksbill ... small bream, halibut, cod, flounders, elephant fish, sculpins, frost fish, dog fish, a fish shaped much like a bream generally from eight inches to a foot long, [other fish he could not identify] ... eels, cuttle fish, coal fish, scate, herrings, and sardines." He additionally identified various types of shellfish: "oysters, mussels, limpets, sea ears, cockles, snails, scallops, crabs, and sea eggs.[18]

2. Pre-Contact Trade in Fish

a. Summary

Garson J. found that prior to contact the Nuu-chah-nulth regularly traded "<u>significant quantities</u>" of fish with other tribes or groups.[19] She stated her conclusions on evidence as follows:

1. the Nuu-chah-nulth had longstanding trade networks both in a north/south direction along the coast and overland via the Tahsis and other trade routes;

2. trade relations existed with "strangers" who came to pay tribute to powerful chiefs but in doing so received reciprocal gifts in return;

3. marriages were arranged to facilitate trade with extended kin, kin having a broad definition;

4. dentalia [shells] were found in exotic places (that is, far from the place of origin) by archaeologists, indicating their use as a trade item;

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[16] *Ahousaht*, para. 202

[17] *Ahousaht*, para. 439

[18] *Ahousaht*, para. 142

[19] *Ahousaht*, para. 282

5. iron was noted by the earliest of the explorers to be traded up and down the coast, indicating a strong pre-contact trade network;

6. the Nuu-chah-nulth were not equally endowed with the same resources and thus the exchange of foodstuffs was necessary;

7. the systems of payment of tribute, gift giving, reciprocal exchange and trade overlapped with each other and existed within a polite form of respect for powerful chiefs;

8. the Nuu-chah-nulth did not trade for the purposes of accumulating wealth (I heard no such evidence);

9. the Nuu-chah-nulth had the ability to dry, preserve, and trade vast quantities of fish and marine products. (For a more detailed discussion, see the section above titled "Dependence on Fish"); and

10. the frequency and amount of trade, including trade in fish and marine products, suggest that such trade was a practice integral to Nuu-chah-nulth society.

Based on this, Garson J. said:

> 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.[20] (emphasis added)

b. Evidence of Inter-Tribal in Fish

The most significant evidence of pre-contact inter-tribal trade in fish came from the journal and writings of John Jewitt who was taken captive by the famous Chief Maquinna at Nootka Sound from 1803-1805. Jewittt kept a journal during his captivity and, although there are several time gaps in the journal, it represents a first-hand account of daily activities at Nootka Sound in the post-contact period.[21] It is a rare and valuable piece of evidence for an aboriginal rights claim.

Jewitt recorded 92 occasions of goods being brought in to Chief Maquinna by other tribes.[22] Canada argued that these were mere "tributary offerings" brought by groups who had a kinship connection with Maquinna and did not constitute trade. However, Garson J. rejected Canada's characterization of these transactions. In a passage that will likely provide considerable guidance for other cases, Garson J. described "trade" in these terms:

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[20] *Ahousaht*, para. 281-282

[21] *Ahousaht*, para. 162

[22] *Ahousaht*, para. 249

> **In my view, where the essence of a transaction is an exchange of goods for something of economic value, the transaction has the characteristics of trade.** I would not disregard as evidence of trade Jewitt's observations or those of the other explorers and traders where reference is made to tribute or gifts. Rather, I conclude that the terms are used loosely by different observers. Moreover, I conclude that there was considerable overlap in the Nuu-chah-nulth culture of exchange between gifts, tribute, and trade. Considering the evidence through an aboriginal perspective, I would not categorize these transactions in such neatly defined terms. (emphasis added) [23]

Garson J. thus concluded that exchanges, including exchanges of fish, that were nominally referred to as "presents" or "gifts" in the historical record were in fact "a polite form of trade."[24] This conclusion is based on the extensive evidence of the case and does not necessarily have universal application. For example, Jewitt himself characterized these exchanges as trade. He wrote:

> The trade of most of the other tribes with Nootka, was principally train oil, seal or whales' blubber, fish fresh or dried, herring or salmon spawn, clams, and mussels and the *yama* a species of fruit which is pressed and dried, cloth, sea otter skins and slaves. From the Aitizzarts [Ehattesaht], and the Cayuquets [Kyuquots], particularly the former, the best I-whaw [dentalia] and in the greatest quantities was obtained.[25]
>
> …
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> **Many of the articles thus brought, particularly the provisions, were considered as presents, or tributary offerings, but this must be viewed as little more than a nominal acknowledgement of superiority, as they rarely failed to get the full amount of the value of their presents.** I have known eighteen of the great tubs, in which they keep their provisions, filled with spawn brought in this way. (emphasis added)[26]

Similar observations were made about the Nuu-chah-nulth by other European and American fur traders. For example, Captain John Meares, who visited Nookta and Clayoquot Sounds in 1788 observed:

> … the whole of our mercantile dealings was carried on by making reciprocal presents; the ceremony of which was accompanied with the utmost display of their pride and hospitality. The particulars of these customs are related at large in that part of the work which is more particularly assigned to commercial information.

Galiano, a Spanish fur trader who was in Nootka Sound in 1792 wrote:

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[23] *Ahousaht*, para. 255

[24] *Ahousaht*, paras. 241, 247 & 281

[25] *Ahousaht*, para. 249

[26] *Ahousaht*, para. 253

> He [Quicomascia] told us that he did not receive the gifts in trade, because chiefs do not trade but make reciprocal gifts.

In 1860, Barrett-Lennard, a trader to visited Nootka Sound in 1860 stated:

> We went through the ceremony of receiving presents from our various Indian acquaintance; a fine black bear skin being sent us from Macoola….we studiously kept aloof from him [a sub-chief of the Mowichats], hoping he would abstain from making us any presents, as we should not then be called upon to make any return; **for receiving presents from Indians is merely another name for barter, an equivalent in return being in every case expected**. (emphasis added)

Thus, Garson J.'s definition of trade is grounded in the evidence and, as she noted, the Nuu-chah-nulth perspective. It is a direct application of the guiding principles of the Supreme Court of Canada which has said repeatedly (and most emphatically in *Marshall; Bernard*) that the aboriginal perspective is crucial in considering and defining pre-contact practices.[27]

Other significant evidence of trade in fish came from the journal of Don Estevan Jose Martínez who spent 8 months as the Commander of the Spanish garrison at Yuquot in Nootka Sound in 1789. Martinez wrote in his journal:

> All these natives trade among themselves from one village to another. The coast Indians trade with those of the interior villages <u>(bartering fish to them)</u>.[28] [underlining is Garson J.'s]

Gilbert M. Sproat who spent 4 years living amongst the Nuu-chah-nulth, mostly at Alberni and Barkley Sound, between 1860-1864 also made several observations of indigenous trade in fish amongst the Nuu-chah-nulth.[29] Sproat's observations included the following:

> There seems to be among all the tribes in the island a sort of recognized tribal monopoly in certain articles produced, or that have been long manufactured in their own district. For instance, a tribe that does not grow potatoes, or made a particular kind of mat, will go a long way, year after year, to barter those articles, which, if they liked, they themselves could easily procure or manufacture.[30]
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> …

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[27] *Marshall; Bernard*, paras. 46-48

[28] *Ahousaht*, para. 144

[29] Sproat established the Anderson sawmill operation in Alberni in 1860 and was appointed Justice of the Peace for the area and *de facto* government agent for the Colony of B.C. As Garson J. observed, since the end of the fur trade around 1805 until Sproat's arrival in 1860, there had been very little contact between Europeans and Nuu-chah-nulth. He would later become a Reserve Commissioner in 1876: see *Ahousaht*, para. 186

[30] *Ahousaht*, para. 188

> Every tribe, however, does not thus regularly follow the salmon; some of the tribes devote a season to whale-fishing, or to the capture of the dog-fish, and supply themselves with salmon by barter with other tribes.[31]
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> …
>
> An active trade existed formerly among the tribes of this nation, as also between them, the tribes at the south of the island and on the American shore. The root called gammass, for instance, and swamp rushes for making mats, neither of which could be plentifully produced on the west coast, were sent from the south of the island in exchange for cedar-bark baskets, dried halibuts and herrings. The coasting intertribal trade is not free, but is arbitrarily controlled by the stronger tribes, who will not allow the weaker tribes to go past them in search of customers; just as if the people of Hull should intercept all the vessels laden with cargo from the north of England for London, and make the people of London pay for them an increased price, fixed by the interceptors.[32]

Justice Garson found that although Sproat's observations were written almost 100 years after contact, his observations have "considerable time-depth" [33] and they followed on "a long period of virtually no contact between Europeans and any Nuu-chah-nulth group since the end of the maritime fur trade in the early 19th century."[34] She found that his reference to an active trade "formerly" existing was likely a reference to pre-contact circumstances. Thus, Sproat's observations provide evidence of a pre-contact way of life.

c. Evidence of Trade in Fish with Europeans

Although not "inter-tribal" trade, Garson J. found the evidence of the Nuu-chah-nulth engaging in the sale of large amounts of fish to Europeans at first contact to be significant evidence of trade as well as significant evidence of amounts of fish traded. She said:

> What is remarkably consistent about the Explorer Records is the evidence of immediate and persistent efforts by all the Nuu-chah-nulth people, the Europeans encountered, to begin trading. **Even when Pérez, the first European to contact the Nuu-chah-nulth, arrived several miles offshore, the very first act of the Nuu-chah-nulth people was to offer to trade fish with him.**[35] (emphasis added)

Garson J. also referred to the journals of Captain James Cook and his officers as to the amounts of fish that Nuu-chah-nulth traded to them, noting that "some of the observations record very sizeable amounts of fish."[36] Cook stated that he and his crew only got fish by trading with the

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[31] G.M. Sproat, *Scenes and Studies of Savage Life*, 1864 p. 38 (Exhibit 152, Vol. 7, Tab 56)

[32] *Ahousaht*, para. 189

[33] *Ahousaht*, para. 196

[34] *Ahousaht*, para. 192

[35] *Ahousaht*, para. 266

[36] *Ahousaht*, para. 120

Nuu-chah-nulth – a point that Justice Garson found to be significant. She also pointed out that Cook recorded the Nuu-chah-nulth word for exchange or barter – *ma'cook* – in his journal.[37]

Other evidence of this nature includes a 1786 journal of Alexander Walker who noted in his first encounter with the Nuu-chah-nulth that their canoes were "loaden with various kinds of fine fish" and that they sold as many fish as they could[38] and the 1788 journal of John Meares who stated "Our supplies of fish were constant and regular, and the natives never failed to bring to daily sale as much of this article as they could spare from the demands of home consumption."[39]

d. Evidence of More General Trade

In addition to the specific evidence of trade in fish, Garson J. found that trade more generally was a significant feature of the Nuu-chah-nulth pre-contact way of life. Among the support for this finding was the active trade that the Nuu-chah-nulth pursued with Europeans at first contact, the many observations in the historical records of extensive trading networks and trade relationships the Nuu-chah-nulth had with each other and with distant groups, and evidence of trading trails that crossed Vancouver Island.[40] With regard to the trading trails, she wrote:

> These trade trails are important evidence of trade between distant groups. While the existence of the trails does not prove that it was fish that was being traded, they are, nevertheless, evidence that **trade was a well entrenched custom of the Nuu-chah-nulth**. A conclusion that trade in fish occurred requires additional evidence over and above the existence of the trade trails themselves.[41]

3. Inferences

Garson J. noted that the evidence of a pre-contact trade in fish was stronger for some plaintiff nations than for others. This was largely a result of the 18th century fur trade having been concentrated in Nootka Sound so that most of the detailed observations in the fur trade records focused on that one area. However, Garson J. considered it reasonable and appropriate to infer from the evidence of a common Nuu-chah-nulth culture that fishing and trading fish was an integral practice for <u>each</u> of the plaintiff nations prior to contact. She said:

> Having concluded that the various Nuu-chah-nulth tribes shared a language and culture, I have, where appropriate, made the necessary inferences from the evidence that all the Nuu-chah-nulth peoples engaged in trade with each other even though the evidence of indigenous trade cannot on the basis of the direct observations made at contact be attributed to each of the plaintiffs. In my view, there is sufficient evidence of indigenous

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[37] *Ahousaht,* para. 122

[38] *Ahousaht,* para. 136

[39] *Ahousaht,* para. 138

[40] *Ahousaht,* para. 237

[41] *Ahousaht,* para. 237

> trade up and down the WCVI for me to conclude that each of the plaintiffs was engaged in that indigenous trade. [42]

In approaching the evidence in this way, Garson J. drew on direction from the Supreme Court of Canada as to the need to make inferences about pre-contact circumstances where direct evidence is not available. Specifically, in *R. v. Sappier*, the Supreme Court of Canada recognized the evidentiary challenges inherent in aboriginal claims and noted that "courts must be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available."[43] The inferences drawn by Garson J. are a straight application of this legal principle.

E. 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. Her conclusion in this respect is not based on a legal proposition (advanced by the plaintiffs based on, *inter alia*, the Supreme Court of Canada's decision in *R. v. Powley*[44]). Rather, it is based on a finding of fact about the Nuu-chah-nulth pre-contact and continuing practices. 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**.[45]

F. PLAINTIFFS GROUP CONTINUITY AND TERRITORY

1. Continuity Generally

The test for aboriginal rights requires the present-day claimant groups to establish "continuity" with the pre-contact ancestors that engaged in the practice relied upon to establish the aboriginal right.[46] In this case, the question of "continuity" focused on the amalgamations of numerous pre-contact "local groups" which, over time, merged and amalgamated into the present day 14

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[42] *Ahousaht*, para. 439

[43] *R. v. Sappier, R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54 at para. 33

[44] In *R. v Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43 at para. 20, the Supreme Court of Canada rejected an argument that a Metis hunting right must be species-specifc, stating:"The relevant right is not to hunt moose but to hunt for food in the designated territory."

[45] *Ahousaht*, para. 383

[46] *Marshall; Bernard*, para. 67

Nuu-chah-nulth nations. This process of amalgamation, which each Nuu-chah-nulth nation went through, started prior to contact and continued and accelerated after contact.[47]

Canada argued that the Nuu-chah-nulth had not established continuity because each plaintiff needed to establish the precise identity of each local group and show exactly when and how it amalgamated into the present-day Nation. However, Garson J. found that this set the standard for continuity much higher than what the Supreme Court of Canada requires. Relying on *Marhall; Bernard,* Garson J. found that all that is required is to show "a connection" between the pre-contact group and the present-day claimants.[48] In her view, the test was met for each plaintiff nation by simply showing that local groups that occupied a particular area prior to contact amalgamated into the nations that now occupy that area. She concluded that this test was met by each plaintiff.

2. Continuity and Territory of the Five Plaintiffs

Garson J. then briefly examined the history and fishing territory of each of the five plaintiffs. She found that the fishing territories claimed by the plaintiffs (although extending only nine miles offshore), generally coincided with the pre-contact fishing territories of the nations or the local groups that amalgamated into the nations. Justice Garson concluded that "the plaintiffs' fishing territories include the rivers, inlets, and sounds within each plaintiff's territory."

3. Offshore Fishing Territories

Canada also argued that the pre-contact Nuu-chah-nulth fished only in rivers or from near shore marine environments, such as protected inlets and sounds but Garson J. rejected this. She found considerable evidence that the Nuu-chah-nulth fished halibut and cod offshore and caught salmon by trolling in open waters as well as in rivers and inshore areas. For example, she noted a 1789 observation by fur-trader Alexander Walker of several Nuu-chah-nulth canoes returning from the open ocean "loaden with various kinds of fine fish."[49] She also made reference recorded observations of the Nuu-chah-nulth halibut fishing nine and 12 miles offshore. She further found that the Nuu-chah-nulth abilities with canoes and frequent ocean travel established their capacity to use ocean territories expansively.[50]

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[47] Canada and its ethnohistorical expert asserted that the amalgamation process did not begin until after contact and was the result of European influence. However, Garson J. rejected this. The evidence showed, for example, that the amalgamation process in Nootka Sound began around 100 years before contact.

[48] *Ahousaht,* para. 332. In *Marhsall; Bernard,* McLachlin C.J. said at para. 67: "The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right."

[49] *Ahousaht,* para. 136

[50] *Ahousaht,* para. 408. Canada's expert, Dr. Joan Lovisek, had asserted in her report that the Nuu-chah-nulth were only able to travel long distances by canoe after Europeans introduced them to sails. This was a difficult assertion to sustain in light of the considerable evidence of Nuu-chah-nulth long-distance canoe travel in the early contact records.

However, she noted that the evidence of exactly how far offshore the Nuu-chah-nulth went to fish pre-contact is sparse. She made reference to several sources including Sproat who noted the halibut banks were about 12 miles offshore and Jewitt who observed the Nootka Sound groups went about nine miles offshore. She ultimately concluded that the fishing territory extended "at least nine miles offshore" and chose to make this nine-mile radius the scope of the Nuu-chah-nulth fishing territories for the purposes of her declaration.

G. SUMMARY OF PRE-CONTACT PRACTICES AND CONTINUITY

Justice Garson summed up her conclusions on the pre-contact fishing and trading practices of the Nuu-chah-nulth and the continuity of those practices up to the modern Nations in the following paragraphs:

> 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. The Nuu-chah-nulth traded these resources with other aboriginal groups both within a loosely defined kinship network and outside that network. After contact with Europeans, that well-established trading custom was expanded to adapt to the influx of European explorers and fur traders. … In my view, there is sufficient evidence of indigenous trade up and down the WCVI for me to conclude that each of the plaintiffs was engaged in that indigenous trade.
>
> I am also satisfied that fishing and trading in fisheries resources were practices that were integral to the distinctive cultures of pre-contact Nuu-chah-nulth society. I have concluded that each of the plaintiffs has demonstrated sufficient connection to the pre-contact society from whose aboriginal practices they claim to have derived their aboriginal rights. Similarly, each of the plaintiffs has demonstrated sufficient geographic connection between their claimed fishing territories and those of their ancestors from whom they claim to derive their aboriginal rights. Fishing was the predominant feature of the Nuu-chah-nulth society and I have concluded that indigenous trade in fish was also an integral feature of Nuu-chah-nulth society. As distinct from the conclusion reached by Satanove J. in *Lax Kw'alaams Indian Band* that any indigenous trade in fish by the plaintiff band was infrequent or opportunistic, I conclude these plaintiffs have proven trade in fish to be a prominent feature of their society. [51]

H. CHARACTERIZATION OF MODERN RIGHT

1. Modification to the *Van der Peet* Approach

Having reached these conclusions about the pre-contact Nuu-chah-nulth, Justice Garson went on to characterize the modern right which she concluded had evolved from the pre-contact practices.

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[51] para.s. 439-440

This approach of characterizing the claimed right after the analysis of the evidence differs somewhat from the approach taken in previous cases. In cases such as *Van der Peet*[52] and *Gladstone*,[53] which are regulatory prosecutions in which the *actus reus* of the offence was important in defining the claimed right, the proper characterization of the claimed right was done at the outset of the analysis. However, as Garson J. noted, more recent case law emphasizes the need to translate pre-contact practices into modern legal rights.[54] This requires the court to examine pre-contact practices and the aboriginal way of life first. Further, in a civil action, there is no *actus reus* on which to base the modern characterization. Thus, Garson J. proposed to "modify the [*Van der Peet*] analysis slightly to reflect the nature of the present action" and she first made findings of fact about the Nuu-chah-nulth pre-contact practices and way of life (discussed above) before settling on the proper characterization of the right.

Garson J.'s slight modification to the *Van der Peet* analysis makes a good deal of sense in light of not only *Marshall; Bernard* but also *Sappier* which emphasized the importance of the pre-contact way of life. It is an approach to the aboriginal rights analysis that ought to and is likely to be generally adopted.

2. The Characterization of the Right in this Case

As to the correct characterization of the Nuu-chah-nulth rights to fish, Garson J. simply characterized it as "a right to fish and to sell fish". She said at paras. 485-487:

> I have concluded on the evidence that the plaintiffs' pre-contact ancestral communities fished and engaged in indigenous trade of fish. The evidence with respect to the quantity of fish that was traded is that it was substantial. Those quantities, nevertheless, were limited by the methods of fishing employed by the ancestral communities.
>
> 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.**

This general characterization of the right – to fish and sell fish – is different to other fishing rights cases that have preceded *Ahousaht*. Rights to sell fish have previously been qualified in

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[52] *R. v. Van der Peet*, [1996] 2 S.C.R. 507

[53] *R. v. Gladstone*, [1996] 2 S.C.R. 723

[54] *Marshall; Bernard*, para. 48, *Ahousaht* para. 51-53

some respect. For example, in *Gladstone*, the right was characterized as a right to sell herring spawn on kelp to an extent best described as commercial.[55] In *Van der Peet*, although unsuccessful, the claimed right was characterized as a right to exchange fish for money or other goods.[56] In *R. v. Marshall*, a treaty case, the right was characterized as a right to fish for trade or sale to produce a "moderate livelihood".[57] Here, Garson J. declined to make a specific qualification on the right, apart from its geographical scope and confirming that it is not an industrial fishing right:

> In the circumstances of this case, there is an arbitrariness in endeavouring to impose limits on the scale of sale at this stage of the analysis by quantifying a certain level of sale. Beyond stating that the right does not extend to a modern industrial fishery or to unrestricted rights of commercial sale, I decline to do so. Limitations on the scope of the right are most appropriately addressed at the infringement and justification stages of the analysis, as part of the reconciliation process.[58]

Although her judgment does not precisely delineate limitations on the right, she has provided considerable guidance as to the scope of the right, including:

- that it is not an "industrial" fishing right;
- that it is a right to sell "into the commercial marketplace"; and
- that it is based on a pre-contact practice of trading "substantial" quantities of fish.

With the assistance of these and other indicia of the nature and extent of the right, Garson J. has left it to the parties to negotiate appropriate limits on the right. This approach, although apparently unique in the aboriginal fishing rights case law, appears to be consistent with more recent expressions of the purpose of aboriginal rights which seeks to promote reconciliation through negotiation.

IV. ABORIGINAL TITLE

Aboriginal title was put forward as an alternative claim in case Garson J. found that trade in fish was not a significant feature of the pre-contact Nuu-chah-nulth culture. The claim was based on Nuu-chah-nulth use and occupation of fishing territories and the strict system of territorial ownership on the part of the *Haw'iih* (Chiefs) on behalf of their groups. The evidence showed that this indigenous legal system of territorial ownership was key part of Nuu-chah-nulth culture before and after contact. It was prevalent in the historical and ethnographic records as well as the evidence relayed by various Nuu-chah-nulth witnesses.

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[55] *Gladstone*, para. 28

[56] *Van der Peet*, para. 77

[57] *R v. Marshall*, [1999] 3 S.R.R. 456 at paras. 7 & 59-61

[58] *Ahousaht*, para. 397

While it was not necessary to decide the aboriginal title question, Garson J. did make some comments in passing that may be of interest in considering Nuu-chah-nulth aboriginal title and the character of that title. The following are some examples:

With regard to ownership of bounded territories, Garson J. said:

> The Nuu-chah-nulth exercised considerable proprietary rights over the rivers and sounds of their territories.[59]

And:

> There is considerable evidence that the Nuu-chah-nulth people had strict customs of ownership of territories and resources within their territories, as well as strict notions of boundaries.[60]

With regard to the control of trade in Nootka Sound exercised by Chief Maquinna during Captain Cook's 1778 visit, she said:

> Cook observed that Maquinna appeared to act as a gatekeeper between the other tribes and the Cook expedition. It does not seem probable to me that this was a new cultural practice; rather, it appears that **all the different tribes accepted Maquinna's "ownership" of the Europeans in his territory** and sought Maquinna's permission to partake in the trade. [61] (emphasis added)

With regard to the use of the territories, she found the evidence to show that ocean territories were used expansively:

> Observations in the historical and ethnographic record document Nuu-chah-nulth travelling very long distances and showing remarkable skill using a canoe. In my view, not only does the evidence show that the Nuu-chah-nulth used their ocean territories expansively, it also shows that they had capacity to do so.[62]

V. INFRINGEMENT

A. OVERVIEW

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

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[59] *Ahousaht*, para. 397

[60] *Ahousaht*, para. 412

[61] *Ahousaht*, para. 277

[62] *Ahousaht*, para. 408

as "a vast and complex web of regulations, programs, and policies"[63] on the Nuu-chah-nulth's fishing culture. She concluded that the cumulative effect of that scheme has reduced 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. It is not possible for me to differentiate, for instance, between Canada's policies with respect to individual quotas and gear restrictions. It is, rather, the interaction of the various aspects of the entire regulatory regime that I have found to infringe the plaintiffs' rights.[64]

B. IMPACTS OF NUU-CHAH-NULTH

1. Nuu-chah-nulth Decline in the Fishery

a. The Court's Conclusion

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 fishermen today.[65] While she found that there were several factors that have contributed to this but that Canada's regulation of the fishery was a significant factor.[66] 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,[67] and they are simply unable to compete in an

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[63] *Ahousaht*, para. 523

[64] *Ahousaht*, para. 901

[65] *Ahousaht*, para. 680

[66] 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]

[67] 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 *Ahousaht* para. 534.

> economically sustainable way in the non-aboriginal fishery under the present regulatory regime. I am satisfied of that evidence.[68]

Relying primarily on the evidence of Nuu-chah-nulth witnesses and the Nuu-chah-nulth Tribal Council's Fisheries Manager, Dr. Don Hall, Garson J. found that the rate of Nuu-chah-nulth participation in the commercial fishery has dropped dramatically:

> The uncontroverted evidence of Dr. Hall and the individual members of the Nuu-chah-nulth communities was that there are now only a handful of active full-time Nuu-chah-nulth commercial fishers. The evidence of witnesses such as Dr. Lucas, John Frank, and Charles McCarthy – that the individual quota system "squeezed" the Nuu-chah-nulth out of the halibut fishery – was not challenged. I accept the evidence of the plaintiffs as proof of the fact that Nuu-chah-nulth participation in the commercial fishery has been reduced to three or four active fishermen. I also accept the evidence of the plaintiffs, and it was not challenged, that as recently as the 1980s, there was a flourishing Nuu-chah-nulth commercial fishery in which participants fished from vessels of varying sizes. [69]

Garson J. also referred to the expert evidence of Allen Wood, a former DFO manager called by the Nuu-chah-nulth to explain why the Nuu-chah-nulth were forced out of the fishery in large numbers. Garson J. said:

> Mr. Wood opined that the conservation measures taken by the government, the industrialization of the fishery, the collapse of the salmon fishery, and the various licensing regimes have combined to largely exclude the Nuu-chah-nulth from the WCVI fishery. He said that no attempt was made by the DFO to protect the Nuu-chah-nulth artisanal fishery. Rather, the regulatory regime rewarded those fishers who moved into the industrial fishery. Mr. Wood said that the only fishery in which the Nuu-chah-nulth have a significant share is clams, but the total landed value of all clam licences was only $493,000 in 2005. With respect to the balance of the fishery, he concluded that the Nuu-chah-nulth are "now essentially excluded from accessing species that accounted for about 70% of the 2003 BC landed value of $360 million. Many of these fisheries take place in part in the WCVI area." Mr. Wood concluded that the "main force driving change has been competition for fish and profits. Although competitive pressures are inherent in common property fisheries, government programs and industry responses aggravated those pressures, sped up change, and increased competition and pressure on [Nuu-chah-nulth] fishermen." [70]

b. Value of Existing Opportunities

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[68] *Ahousaht*, para 788.

[69] *Ahousaht*, para. 679-680

[70] *Ahousaht*, para. 674

Garson J. found that even where Nuu-chah-nulth have licences, they are either in low value fisheries such as herring and clam fisheries or, where they are in higher value fisheries, the Nuu-chah-nulth lack sufficient capital to operate the licences.[71]

c. Some Specific Impacts

Garson J. commented on the "devastating" effects some specific measures taken by Canada. For instance:

- She found that Nuu-chah-nulth were excluded from many fisheries when a "limited entry" was introduced to those fisheries. "Limited entry" refers to the permanent capping of the number of available commercial licences for a particular fishery. Typically, this capping is based on catch history for the previous one or two fishing seasons. Those who met the criteria qualified for what is effectively a permanent commercial licence while those did not meet the criteria were shut out of the fishery unless they could afford to buy a licence from someone who had qualified. Garson J. gave the following illustration from the halibut fishery:

  > When the halibut fishery became limited entry in 1979, the qualifying criteria required a vessel owner to have landed 3,000 pounds of halibut in one of either the 1977 or 1978 fishing seasons. Fishers who may have fished halibut less intensively in the qualifying years were shut out. The result, after appeals were considered, was that 435 vessels qualified for a halibut licence from 1979 forward. **None of those licences were allocated to Nuu-chah-nulth fishers. Similarly, when the rockfish fishery went to limited entry, none of the more than 70 Nuu-chah-nulth fishers who fished rockfish before limited entry qualified for a licence**. Nuu-chah-nulth witnesses testified about the effect on Nuu-chah-nulth fishers of limited entry. Dr. Lucas testified that this exclusion "devastated the Nuu-chah-nulth tribes." Similarly, plaintiff members Benson Nookemis, John Frank and Chuck McCarthy were all fishermen who did not qualify for halibut licences despite having fished for halibut in the years prior to 1979. (emphasis added)[72]

- "Quotas" refer to a defined share of a Total Allowable Catch for a specific fishery that is assigned to licence holders. Garson J. said the following about the impacts of quotas on Nuu-chah-nulth:

  > The plaintiffs also submit that the fixed share and variable share quotas have operated to exclude them from the fishery. While the plaintiffs are not opposed to all quotas and do not take issue with them *per se*, they do take issue with the fact that the whole commercial TAC has been allocated to others without accommodating their rights. Dr. Hall described "the root of the problem" as being

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[71] para. 681 She also referred specifically to Don Hall's evidence on this point at para. 660

[72] para. 576

> "who gets the initial award" of the quota. **When quotas were introduced to limited entry fisheries, the only parties that were considered for the issuance of quotas were those who already had existing licences. The DFO did not have special programs to allocate quota to First Nations when quotas were put in place.** (emphasis added)[73]

- On the West Coast's most lucrative fishery – the geoduck fishery – Garson J. observed:

> The geoduck fishery ranks first in landed value of invertebrate fisheries in the province. **John Frank, a member of the Ahousaht First Nation, testified how the geoduck fishery is "a stone's throw" from the Ahousaht village but that the licence regulations prevent any Ahousaht from participating in that fishery. I do find the plaintiffs' aboriginal rights are infringed in respect to the geoduck fishery.** (emphasis added)[74]

2. Proportionality

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, Justice Garson rejected this "proportional" approach for several reasons.

First, she found that the statistical evidence skewed the true picture:

> In my view, the statistical evidence is not helpful to my analysis because it creates a distorted picture of actual Nuu-chah-nulth participation in the commercial fishery. The statistical evidence is largely focussed on licences and quota without regard to who is fishing the licence or if it is being fished. Further, the statistics do not differentiate between these plaintiffs and others, or between clam licences and other species licences.[75]

Second, she noted that the decline in absolute numbers was very significant and particularly so when compared to the Nuu-chah-nulth's pre-contact way of life based on fishing:

> While a proportionality analysis may be relevant to justification, it is not a full answer, either factually or legally, to the question of infringement in this case because **the absolute number of Nuu-chah-nulth fishers now actively fishing on a commercial**

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[73] *Ahousaht*, para. 577

[74] para. 587

[75] *Ahousaht*, para. 679

> **basis is miniscule**, both in absolute terms and in comparison to the historical way of life of the Nuu-chah-nulth people.[76] (emphasis added)

Finally, she found that a proportionality analysis ignores the unique way that the loss of a fishing job affects Nuu-chah-nulth communities in relation to the general population:

> Proportionality must also be examined in the context of the importance of the fishery to the economic and cultural survival of the plaintiffs. Mr. Gislason's evidence is important because it is another indicator of the importance of the fishery to Nuu-chah-nulth survival. Similarly, Dr. Hall noted the dependence of the Nuu-chah-nulth on the fishery because of the limited alternative economic opportunities available to them. Going back earlier to the 19th century, Superintendent Powell, Sproat and others observed that the Nuu-chah-nulth were almost entirely dependent on the harvest of the sea for their economic well-being.[77]

The Gislason evidence to which Garson J. refers was given in cross-examination by Gordon Gislason, one of Canada's experts. Essentially, Mr. Gislason agreed that because of their isolation and dependence on the commercial fishery, coastal aboriginal communities, including the Nuu-chah-nulth, feel the impact of the loss of fishing jobs more severely than non-aboriginal communities.[78] Justice Garson summarized and accepted Mr. Gislason's evidence as follows:

> Gordon Gislason, an economic expert with particular expertise in the valuation of ocean-based industries on the WCVI, testified as a witness for Canada. He gave evidence about the impact of the loss of fishing jobs on aboriginal communities. Among the points he made were the following: **any one licence and associated job loss is much more significant to First Nations people and communities than to their non-aboriginal counterparts**; aboriginal people in their home communities are particularly disadvantaged in trying to cope with their reduced employment base; **fishing jobs and income comprise a much greater share of the community economic base in aboriginal communities**; many First Nations communities are isolated and/or lack road access thereby further diminishing job opportunities; aboriginal people are less likely to move from their home communities to take a job even if one is available; many aboriginal peoples do not have assets to use as collateral to secure financing to purchase a second salmon licence; **employment earnings are spread or shared among the community and its members more so than in non-aboriginal communities;** the impacts of a job loss are more far-reaching; many reserves are remote and barren with

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[76] *Ahousaht*, para. 684

[77] *Ahousaht*, para. 685

[78] *Ahousaht*, para. 676. In fact, Mr. Gislason had made these points in some of his previous work examining the West Coast commercial fishery (see Gislason et al, *Fishing for Money* and *Fishing for Answers*). He was called by Canada for other purposes but had no hesitation in affirming his previous work when put to him in cross-examination.

> little opportunity to live off the land; **and fishing is the only life many First Nations people have ever known.** (emphasis added)[79]

3. DFO Programs

Canada led considerable evidence about many programs which it says 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.

The programs and initiatives relied upon by Canada included:

- Indian Fishermen's Emergency Assistance Program (IFEAP) (1980-1982)
- Aboriginal Cooperative Fisheries and Habitat Management Program (1994-)
- Aboriginal Fisheries Strategy (AFS) (1992-)
- AFS agreements with the Nuu-chah-nulth Tribal Council
- Contribution Agreements and Project Funding Agreements (1991-)
- Fisheries Related Community Meetings and Consultations
- Aboriginal Fisheries Guardians (1992-)
- Voluntary Licence Retirement Program (1992-)
- Allocation Transfer Program (ATP) (1994-)
- Excess Salmon to Spawning Requirements (ESSR)
- Pilot Sales Agreements
- Selective Fisheries First Nations Gear Purchase Program
- AFS Review (2002)
- Aboriginal Aquatic Resource and Oceans Management (AAROM) Program (2003)
- Salmonoid Enhancement Program (SEP)
- Pacific Integrated Commercial Fisheries Initiative (PICFI) (2007)
- New Emerging Fisheries Policy

After reviewing all these programs and initiatives, Garson J. concluded:

> …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)[80]

Even where the program or initiative provides <u>some</u> benefit, Garson J. found those benefits to be inadequate. For example, she noted that the Pilot Sales Program provides "modest benefits" to the Tseshaht and Hupacasath but despite efforts by the Nuu-chah-nulth, Canada has refused to

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[79] *Ahousaht*, para. 676

[80] *Ahousaht*, para. 790

extend the program to other Nuu-chah-nulth. She said "this type of program would undoubtedly benefit the plaintiffs but it was not offered to them."[81]

4. Integrated Fishery and Non-Recognition of Rights

What Garson J. seemed to find most troubling about Canada's programs is that they 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 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.[82]

It is apparent from Garson's J.'s repeated references to the integrated fisheries policy that she considers this to be a significant problem with Canada's regulatory regime and a fatal flaw in Canada's argument that its programs aimed enhancing aboriginal participation address aboriginal rights:

> Canada has numerous policies designed to enhance and support the aboriginal commercial fishery, but since Canada does not recognize an aboriginal right to fish commercially, any efforts to enhance the aboriginal fishery are only offered in a way that does not detrimentally impact the non-aboriginal commercial fishery.[83]
>
> …
>
> 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**. [84] (emphasis added)

5. Application to Infringement Analysis

Having considered all the above, Justice Garson applied these facts to the infringement analysis set out by the Supreme Court of Canada in *Sparrow* which looks at whether the legislative

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[81] *Ahousaht*, para. 723

[82] *Ahousaht*, para. 689

[83] *Ahousaht*, para. 697

[84] *Ahousaht*, para. 733

scheme denies the aboriginal rights holder its preferred means of exercising its right, whether it imposes undue hardship and whether it is an unreasonable restriction.

a. Denial of Preferred Means

Justice Garson noted that the preferred means of commercial fishing expressed by the Nuu-chah-nulth is in a community-based fishery using small, low-cost boats with little capitalization and within the Nuu-chah-nulth territories. She noted that Nuu-chah-nulth have made considerable efforts to attaining such a fishery but it is not provided for in DFO's regime and Canada refuses to consider any such proposal. Again, she referred to the problem of the integrated 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.
>
> In light of the foregoing, I conclude that Canada's regulatory regime denies the plaintiffs their preferred means of exercising their aboriginal rights.[85]

b. Undue Hardship

Garson J. also found that the regulations impose a significant undue hardship on the Nuu-chah-nulth in attempting to exercise their rights. She said:

> **The evidence in the present case establishes that the cost of commercial licences is out of reach for the plaintiffs.** As described by Mr. Wood, those costs range from $170,000 to $200,000, which together with the cost of equipment, would bring the total cost to license and equip a fishing vessel to a cost in the order of $600,000. Another example of the prohibitive cost of licences is the geoduck fishery. Mr. Frank testified that the geoduck fishery is a "stone's throw away" from the Ahousaht village; however, the Ahousaht cannot harvest this resource because they cannot buy a licence. The cost of such a licence, even if one were available, is well in excess of $1 million.
>
> Not only are the costs of commercial licences prohibitive, but the plaintiffs' overtures to the DFO with respect to modified or split licences have not been positively received, as discussed above.
>
> **The fact that the current regulatory regime has caused undue hardship for the plaintiffs is graphically demonstrated by the compelling evidence in this case that the participation of the Nuu-chah-nulth in the WCVI fishery has diminished to the point that there are almost no fishers left in those communities. I have no hesitation**

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[85] *Ahousaht*, para. 775-776

> **in concluding that the regulatory regime has imposed undue hardship on the plaintiffs**.[86] (emphasis added)

c. Unreasonable Limitation

Finally, Judge Garson found that the limitations placed on Nuu-chah-nulth fishing opportunities are not reasonable. Consequently, she was satisfied that Nuu-chah-nulth had established an infringement of their fishing rights with the exception of the clam fishery and the FSC fishery.

C. THE CLAM AND FSC FISHERIES – NO INFRINGEMENT

The only areas where Justice Garson found that the Nuu-chah-nulth rights had not been infringed are with respect to the commercial clam fishery and the Nuu-chah-nulth FSC fisheries.

1. The Clam Fishery

Judge Garson noted that when the clam fishery went to limited entry, Canada established a program to secure licence eligibilities for First Nations. Through this and other initiatives, the Nuu-chah-nulth now hold just over 70% of the clam licence eligibilities for the West Coast of Vancouver Island but in 2007 none of the plaintiff bands were using more than half of the licences allocated to them. Thus, Justice Garson found that there had been no infringement of the clam fishing rights.

That said, Judge Garson did find that the clam fishery was a marginal, low value fishery. She noted:

> The evidence of the Nuu-chah-nulth witnesses who do earn money from commercial clamming is that the work is physically hard but that the fishery is not very lucrative.[87]

2. FSC Fishery

Canada ultimately did not dispute that the plaintiffs have FSC rights but did dispute that those rights were infringed.[88] Judge Garson agreed with Canada on this issue. She pointed to various programs aimed at facilitating FSC fishing for the plaintiffs and concluded that the plaintiffs had not established that the annual FSC allocations were inadequate. Consequently, she found that the FSC rights of the plaintiffs had not been infringed.

Garson J. rejected an argument of the plaintiffs that their FSC rights had been "legislatively infringed". The plaintiffs had argued, based on the Supreme Court of Canada's analysis in *Adams* and *Marshall* that the *Fisheries Act* establishes a general prohibition against all fishing

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[86] *Ahousaht*, paras. 779-781

[87] *Ahousaht*, para. 803. see also paras. 672, 674, 681

[88] *Ahousaht*, para. 490. Canada did, however, dispute that there was continuity between the present-day Nuu-chah-nulth Nations and the pre-contact entities. However, if continuity was established (which it was) Canada did not take issue with the existence of FSC rights.

and only permits fishing through an exercise of ministerial discretion, which has no structure under the legislative scheme. In other words, the ability of aboriginal rights holders to exercise their rights is entirely in the Minister's unstructured discretion. In both *Adams* and *Marshall*, the SCC found that this constitutes an infringement.

Garson J., however, concluded that what must be shown is that the legislative scheme causes a meaningful diminution in the claimant group's ability to exercise their aboriginal rights. Thus, it is not enough to show mere unstructured discretion. It is necessary to show that this unstructured discretion results in a meaningful diminution.

VI. JUSTIFICATION

A. LEGAL TEST FOR JUSTIFICATION

Even if an aboriginal right is infringed (as it is here), that infringement may be justified if it meets the justificatory test set out in *Sparrow*. That test looks first at whether there is a compelling and substantial objective to the legislative regime and then at whether the infringement must be consistent with the special fiduciary relationship between the Crown and aboriginal peoples having regard to factors such as:

- Whether the right had been given adequate priority in relation to other rights
- Whether there had been as little infringement as possible to effect the desired result;
- Whether, in a situation of expropriation, fair compensation was available; and
- Whether the aboriginal group in question had been consulted.

B. ANALYSIS

1. Failure to Recognize Aboriginal Rights

Canada placed an enormous volume of evidence before the court on the justification question. This evidence sought to examine and explain almost every aspect of fisheries management on the WCVI and the entire coast more generally. Despite this tremendous volume of material, Garson J. concluded that Canada was not in a position to justify the infringement because it had never turned its mind to the existence of Nuu-chah-nulth aboriginal 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. [89]
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> …
>
> 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.[90]

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[89] *Ahousaht*, para. 865

This conclusion is based on *Gladstone* where Lamer C.J. said:

> …the doctrine of priority requires that the government demonstrate that, in allocating the resource, **it has taken account of the existence of aboriginal rights** and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. (emphasis added)[91]

However, Garson J. considered that Canada had not acted unreasonably, up to the point of her decision, in light of the result in *NTC Smokehouse,*[92] where the Supreme Court of Canada found that two Nuu-chah-nulth groups, the Tseshaht and Hupacasath, had not established aboriginal rights to sell fish. Garson J. found that it was not unreasonable for Canada to take guidance from that decision.

However, with the release of this decision in which Garson J. has found that the rights do exist, Canada must now change its approach to the Nuu-chah-nulth plaintiffs. She said:

> …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.[93]

2. Two-Year Period for Negotiation

Although Garson J. found that Canada was not in a position to justify its infringement of Nuu-chah-nulth aboriginal rights, she did not make a declaration that Nuu-chah-nulth rights have been unjustifiably infringed. Rather, she has declared that Canada has a duty to consult and negotiate the manner in which the Nuu-chah-nulth rights can be exercised and accommodated without jeopardizing Canada's legislative objectives and interests. She said:

> Almost all of the evidence that Canada led on justification was in aid of justifying the fisheries regime at large since there had been no finding of a commercial aboriginal right and infringement. The evidence did not address the justification defence made necessary by the plaintiffs' lesser claims.[94]
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> …

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[90] *Ahousaht,* para. 869

[91] *Gladstone*, para. 62

[92] *R. v. NTC Smokehouse*, [1996] 2 S.C.R. 672

[93] *Ahousaht,* para. 866

[94] *Ahousaht,* para. 870

> 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.[95]

She also found that a period of consultation was necessary for the Nuu-chah-nulth to determine the amount of fish that would be necessary to address their aboriginal rights:

> 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.[96]

It is clear from Justice Garson's decision that Canada must fundamentally change its approach to dealing with aboriginal fishing opportunities for the Nuu-chah-nulth plaintiffs. Canada has previously relied on its "integrated" model where all fishermen must be treated identically but now it must adopt a new approach for the Nuu-chah-nulth in the face of their proven rights. Garson J. said:

> …as I have endeavoured to make clear, negotiations have previously gone forth without recognition of the plaintiffs' aboriginal rights. **They must now proceed on a different footing than has heretofore taken place**, one that starts with recognition of the plaintiffs' constitutional rights to fish and to sell that fish.[97]

If an agreement is not reached in two years, either party may return to court with further evidence about justification and have that issue determined. Justice Garson, who has been appointed to the Court of Appeal, is not seized of those future proceedings, should they occur.

This is a very unique remedy that Justice Garson has crafted. On a strict application of *Sparrow*, the plaintiffs should be entitled to the declarations they sought, including the constitutional inapplicability of certain provisions the *Fisheries Act* and regulations. However, Garson J. found that this would be an unfair result and instead granted the remedy outlined above.

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[95] *Ahousaht*, para. 871

[96] *Ahousaht*, para. 871

[97] *Ahousaht*, para. 875

VII. CONCLUSION

Ahousaht represents a very considered analysis of a tremendous volume of evidence and the application of many untested legal principles that have been set out by the Supreme Court of Canada over the past 30 years. It is respectfully suggested that Garson J. has closely followed the direction of the Supreme Court of Canada in her analysis including the need examine pre-contact practices (here trade) from the aboriginal perspective, the need to draw inferences from available evidence regarding pre-contact times, the need to rely on post-contact evidence where it is indicative of pre-contact circumstances.

As only the second case in Canada to establish aboriginal rights to sell fish and the first such case brought as a comprehensive civil action, the decision should provide considerable guidance to other First Nations who may be contemplating an aboriginal fishing rights claim. It is helpful in assessing the nature of the evidence that may be required to prove such a claim and whether the evidence available to a particular First Nation is sufficient to make out the case.

Fundamentally, this case shows that proving an aboriginal right to sell fish is an enormous challenge. This case required a tremendous amount of work on the part of the litigants, counsel, experts and certainly the court. However, the case has also demonstrated that with the right evidence and the necessary hard work, aboriginal rights to sell fish, which often seem elusive, can be established. The decision in this case provides considerable guidance for how this can be done.