IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2015 BCSC 2166

Date: 20151125
Docket: S033335
Registry: Vancouver Registry

Between:

The Ahousaht, Ehattesaht, Hesquiaht, Hupacasath, Mowachaht/Muchalaht, Nuchatlaht, Tla-O-Qui-Aht and Tseshaht Indian Bands and Nations et al
Plaintiffs

And

The Attorney General of Canada and Her Majesty the Queen in Right of the Province of British Columbia
Defendants

Before: The Honourable Madam Justice Humphries

Ruling on Applications to Intervene

Counsel for the plaintiffs:	F. Matthew Kirchner, Lisa Glowacki
Counsel for the defendant Canada:	Brett Marleau, Lisa Nevens
Pacific Prawn Fishermen Association:	Christopher Harvey Q.C., I. Knapp
Canadian Sablefish Association:	Gary Wharton, M. Nicholls
B.C. Seafood Alliance, B.C. Wildlife Federation:	Keith Lowes
Place and Date of Hearing:	Vancouver, B.C. October 22-23, 2015
Place and Date of Judgment:	Vancouver, B.C. November 25, 2015

[1] The Pacific Prawn Fishermen's Association ("the PPFA"), the Canadian Sablefish Association and Christopher Acheson ("the CSA"), and the B.C. Seafood Alliance and B.C. Wildlife Federation ("BCSA/BCWF") each apply to intervene in these proceedings.

[2] The plaintiffs oppose these applications. The defendant the Attorney General of Canada ("Canada") takes no position.

[3] The PPFA and the BCSA/BCWF first brought this application in December, 2014, but it was adjourned as being premature. At that time, the PPFA was given leave to serve an expert report, although not to file it, and they have done so.

[4] The test for intervention is agreed: interventions will generally be permitted in two situations - where the applicant has a direct interest in the litigation, or where the applicant brings a different and useful perspective on an issue of public importance (*Faculty Association of the University of British Columbia v. University of British Columbia,* 2008 BCCA 376; *Gehring v. Chevron Canada Limited,* 2007 BCCA 557).

[5] It is not common to allow interventions at the trial level or to allow an intervenor to add to the record by calling evidence or cross-examining witnesses, for the reasons stated in *Birchwood Dairy Farm Ltd. v. Milk Board* [1989] B.C.J. No. 1229. That is, having not filed pleadings or been the subject of discovery, their positions would not be defined and the actual parties could be prejudiced. The participation of intervenors should not "take the litigation away from those directly affected by it": *Canada (Attorney General v. Aluminum Company of Canada Ltd.* (1987), 10 B.C.L.R. (2d) 371; *Cambie Surgeries Corporation v. British Columbia Medical Services Commission)* 2014 BCSC 1028.

BACKGROUND

[6] The plaintiffs are five First Nations situated on the West Coast of Vancouver Island.

[7] The first stage of this trial, which took place before Madam Justice Garson, then in the Supreme Court of British Columbia, concluded in 2009. In November of 2009, Garson J. declared that the plaintiffs:

> … have aboriginal rights to fish for any species of fish within their Fishing Territories and to sell that fish.

[8] She set the boundaries of the Fishing Territories at nine miles from the coast, on a line drawn from headland to headland.

[9] Garson J. declared that the cumulative effect of Canada's fisheries regime including the *Fisheries Act*, regulations and policies legislatively and operationally *prima facie* infringes the plaintiffs' Aboriginal rights to fish and to sell fish.

[10] She declared that Canada:

> has a duty to consult and negotiate with the plaintiffs in respect of the manner in which the plaintiffs' aboriginal right to fish and to sell fish can be accommodated and exercised without jeopardizing Canada's legislative objections and societal interests in regulating the fishery.

[11] Garson J. ordered that if Canada and the plaintiffs were unable to reconcile their various interests through consultation and negotiation, either party may apply to the court for a determination of whether the *prima facie* infringement of the plaintiffs' Aboriginal right is justified. The plaintiffs have applied for such a determination, and the second stage of the trial began in March of 2015. The court has heard a great deal of evidence about the ongoing negotiations which continue while the litigation progresses.

[12] Canada, who bears the burden on this stage of the trial, has called its case first. The hearing was originally set for 40 days, then 60, then 80. We have now sat more than 80 days and the end date is undetermined. Canada is hoping to close its case before the Christmas break.

[13] The plaintiffs state that they want to know the nature of the case they have to meet before they open their case, and therefore the applications of the intervenors have been heard at this stage. The applications from last December were adjourned

originally because the PPFA raised an issue that, in the court's view, can only be determined at the end of the case, and with the full participation of Canada. I will go into this issue, which involves the continuity of the claimed modern right with the pre-contact practice, in a little more detail later in these reasons, but will say at this point that nothing has changed in that regard. Whether that issue is still extant will not be determined in this ruling. In fact, this entire ruling has a provisional character about it, given the important issues that are essential to an understanding of how and whether intervenors should play a role, and which cannot be decided at this point.

[14] After the applications by the three potential intervenors were heard, and before I had ruled on them, Canada called Susan Farlinger, who was until recently, the Regional Director General of Fisheries and Oceans for the Pacific Region. Her evidence has been helpful in recalling many of the larger issues that formed part of the evidence I heard several months ago, and I advised counsel I wanted to hear her testimony before ruling on this application. As well, I have scanned, but not read in detail, the lengthy report of Michelle James, Canada's expert in fisheries management, who is yet to be called.

[15] The plaintiffs filed an application for particulars against Canada that has as its focus some of the issues that were raised during the present application. That application was heard on November 18, 2015, after the motion brought by these applicants. The discussion at the time of the particulars motion resulted in some clarification of the issues that will remain at the end of the trial, and which have some relevance to the present applicants. In particular, Canada has agreed to respond formally to a demand relating to whether they will argue that species be, as counsel informally refer to it, "knocked off the list" of "any species", the phrase used by Garson J. in the declaration. Canada advised during submissions that they will not argue that there are particular species that should not be included in the declared right. Rather, as I understand it, they will argue that all of the evidence, or lack thereof, respecting a particular species, should be taken into account in determining whether Canada is justified in refusing to provide any allocation for a particular

species. This is not the position the present applicants propose to take, should they be allowed to present argument.

[16] Those and other larger issues of interpretation of the various preceding judgments from this court and the Court of Appeal underlie some of the arguments of all three applicants, but I will first set out the arguments specific to each group before attempting to articulate those that are more complex.

PPFA

[17] The PPFA says the plaintiffs claim a greater share of the prawn fishery, and any share will come at their expense, therefore its members have a direct interest in these proceedings. It says its members have economic interests at stake, and have, as well, a common law right to fish which will be affected by the present proceedings. It says it would not repeat any evidence called by Canada, but would give greater specificity and detail respecting the commercial prawn fishery and the impact of the plaintiffs' plans on its existing interests.

[18] The PPFA wishes to adduce into evidence the report that was served following the previous appearance and to present its expert, Mr. Nelson, for cross examination.

[19] Mr. Nelson was asked to

> 1. Trace the development of the modern prawn fishery based on whatever sources are available.
>
> 2. Identify/describe the operative DFO objectives evident in the current distribution of access to the commercial prawn fishery after conservation and First Nations food, social and ceremonial needs are met.

[20] His report is 48 pages long, and has about 500 pages of tables and figures attached. I was not taken through the report in submissions. I have now read the body of the report but have not studied it in detail.

[21] In the first part of his report Mr. Nelson cites Michelle James, who was called on the first stage of the trial and will be called as Canada's last witness in this stage, with respect to the lack of information about an early commercial prawn fishery and

agrees with her. He then goes on to explain how he has attempted to cover different ground from Ms. James. He traces the development of the B.C. prawn fishery from a period of "dormancy", which he says lasted up to 1977, which he says was due to insufficient technology and inadequate storage capabilities. He then goes on to examine the increasing development of the fishery to its present robust state, which he says is due partly to the collapse of the salmon fishery in the 1990s. He comments on DFO objectives, with reference to the Integrated Fisheries Management Plan for the prawn fishery ("IFMP") and the *Fisheries Act*. He also comments on various policies, including the Allocation Transfer Program ("ATP") and the Pacific Integrated Commercial Fisheries Initiative ("PICFI"), about which the court has heard considerable evidence. These are policies that allow the Department of Fisheries and Oceans ("DFO") to request voluntary relinquishment of licences from members of the commercial fishery, who are then reimbursed by DFO (a process referred to as "mitigation", which DFO says is necessary to ensure the conservation and sustainability of a fully subscribed fishery). These licences are then put into an inventory and distributed to First Nations. Mr. Nelson says that PICFI has resulted in the creation of active First Nations aggregates which fish commercially for prawn.

[22] Mr. Nelson was also specifically asked to comment on:

> 1. Whether [the plaintiffs' proposal for prawn] impacts on DFO's objectives in the prawn fishery
>
> 2. Whether non-aboriginal regional/community dependencies and the interest of all Canadians would be impacted by the [plaintiffs' proposal].

[23] The PPFA also wants to call a lay witness to explain the prawn fishery post 1950, giving evidence from the practical day-day perspective of a prawn fisherman, including the impact on the industry of PICFI licences, the plaintiffs' proposed prawn fishery, if it were accepted, and the effect of allowing the plaintiffs to fish before the regular season. The PPFA filed the affidavit of Paul Bevandich, who deposes that he is an experienced prawn fisherman. He refers to some of the history of the prawn fishery and explains the management model used in that fishery. He cites the prawn IFMP as his source for some of his information and attaches it to his affidavit.

[24] Mr. Bevandich sets out the parameters of the financial investment a prawn fisherman makes to his own costs and his contribution to the general management of the fishery.

[25] Mr. Harvey also wishes to argue one of the larger issues in this case - continuity of the modern prawn fishery with pre-contact practice. He will argue, if permitted, that there is no evidence of prawn fishing pre-contact, and that the right as declared by Garson J. must be further delineated, species by species. That is, he wishes to argue that the right, once delineated, may not include all species; specifically, prawn may be "knocked off the list". The plaintiffs strongly opposed this approach, as I will set out below.

CSA

[26] The CSA says it wishes to present evidence that is relevant for all the fisheries that can only be exploited *outside* the plaintiffs' territories.

[27] The CSA says the sablefish fishery is a recent fishery in deep water, difficult to conduct successfully, and only recently harvestable at a commercially viable level. Sablefish in harvestable form cannot be caught in the plaintiffs' fishing territory. Only juvenile sablefish are found close to shore; if juveniles are caught, the fishery will not be sustainable. Thus the CSA says its members' rights to fish for sablefish outside the plaintiffs' territory should not be affected by an Aboriginal right that is exercisable only within that territory.

[28] Despite this, during the negotiation process, the plaintiffs have put forward a proposal for a sablefish fishery, and Canada has responded with an offer of sablefish. The CSA wishes to call evidence from two sablefish fishermen, relying on comments by Garson J. that she found the anecdotal evidence of plaintiff fishers more reliable than statistics and studies. The CSA says it will call evidence from their unique perspective which would be helpful to the court in balancing the various interests at stake, that is, evidence of:

a. the development and economic impact of the sablefish fishery

b. the technology required to fish sablefish profitably

c. the availability of sablefish in the plaintiffs' fishing territory

d. the potential impact of the outcome of this trial on "K" licence holders.

[29] The CSA has filed an affidavit from Chris Acheson, a sablefish fisherman, setting out how this fishery, which he describes as unique, has been developed by the CSA. He deposes to the methods of fishing for sablefish, the difficulties inherent in harvesting this species, and he describes how closely the CSA works with DFO in managing the sablefish fishery.

[30] The CSA says its members take responsibility for and pay for detailed catch monitoring, biological sampling, surveys, administration of quota transfers and other management functions. They do this based on the policy that licences for each year are issued to previous licence holders, and they say they stand to lose some of their rights if the plaintiffs' preferred means fishery is implemented.

[31] The CSA says that while the BCSA/BCWF will ask to call somewhat similar evidence on some points, the evidence the CSA proposes to call is specific to the sablefish fishery. Canada must balance competing interests and in fact has offered quota to the plaintiffs in spite of evidence that the quota could not be caught in the plaintiffs' territories. Therefore Canada cannot adequately represent the CSA's perspective. It is important to have the evidentiary record created in this court and the CSA can add to it in an important way.

[32] The CSA does not question the use of PICFI, but they say their licence holders contribute a lot in time and money to the management of the fishery generally and they should not have to support the PICFI fishery.

[33] The CSA would seek cross examination of the plaintiffs' witnesses only if they testified to something that was contrary to the evidence it wishes to call.

BCSA/BCWF

[34] The BCSA, according to the affidavit of Christina Burridge, Executive Director, represents BC's seafood industries, including harvesters, processors, marketers and

exporters. Its membership includes the CSA, the PPFA and the Underwater Harvesters Association (UHA), as well as many other groups (B.C. Tuna Fishermen's Association, Deep Sea Trawlers Association of B.C., Fisheries Council of Canada, Gulf Trollers Association (Area H), Pacific Coast Shrimpers Cooperative Association, Pacific Halibut Management Association of B.C., Pacific Sea Cucumber Harvesters Association, Pacific Urchin Harvesters Association, and the West Coast Green Urchin Harvesters Association). There are a number of associate members (B.C. Salmon Marketing Council, Canadian Groundfish Research & Conservation Society, Canadian Pacific Kazunoko Association, Herring Conservation and Research Society and the Pacific Coast Fishermen's Mutual Marine Insurance Company).

[35] Its mandate is wide and includes promotion of conservation and sustainable use of seafood resources, the public image of the seafood industry, optimizing value of the resource, and promoting high quality, safety, and effective management of seafood resources.

[36] The BCWF represents hunters and anglers, and thus has a large membership which includes members of the recreational fishery.

[37] The BCSA/BCWF has been accorded intervenor status at the appellate level in many of the Aboriginal fishing cases, including the appeals of the first stage of the present trial.

[38] The BCSA/BCWF has witnesses it wishes to call, but its first position is that it can assist the court in negotiating the legal and procedural complications that have resulted from the previous decisions in this case.

[39] Mr. Lowes took the court through the history of these proceedings and pointed out what he sees as difficulties with the process, which will be referred to below. In particular, he referred to the Supreme Court of Canada's decision in *Lax Kw'alaams Indian Band v. Canada (Attorney General)* [2011] 3 S.C.R. 535, where

the court recognized the importance of litigation such as this to the whole community, at para. 12:

> Nevertheless, Aboriginal rights litigation is of great importance to non-Aboriginal communities as well as to Aboriginal communities, and to the economic well-being of both The existence and scope of Aboriginal rights protected as they are under s. 35(1) of the Constitution Act, 1982, must be determined after a full hearing that is fair to all the stakeholders.
>
> [emphasis added]

[40] In addition to the arguments they wish to present, the BCSA/BCWF wishes to call evidence. The witnesses proposed by the BCSA /BCFW would explain the industrial fishery from an eco-certification, economical, and business perspective that they say is not necessarily within the knowledge of Canada, or to which they could add useful information. For instance, they would explain what is meant by an "industrial fishery", a term used by Garson J. when setting out some parameters of the fishery, and which was the subject of comment by Chiasson J.A. in his dissent in the Court of Appeal. The BCSA/BCFW witnesses would describe how the BCSA in particular contributes in time and money to the regulatory regime and why. Mr. Lowes would propose to call evidence on how quotas work, and on particular issues in respect of roe herring.

[41] Each of the applicants refers to the existence of the fishery as a common property resource giving rise to a public right to fish, admittedly circumscribed by the licensing system under the *Fisheries Act* administered by DFO, which they say means they necessarily have a different perspective from Canada.

[42] The applicants say they will not add to the trial in an appreciable degree and will not prejudice the plaintiffs.

[43] Before explaining the plaintiffs' position, it is convenient at this stage to examine briefly the more complex issues referred to above, since the plaintiffs' principal objections to the potential intervenors' participation require an understanding of those issues.

Issues Arising from the Previous Decisions

[44] The description that follows of the larger issues is for the purpose of setting out the discussion that occurred during the submissions on this application, and is cursory, preliminary, and uninformed by Canada's position (except as it emerged on the particulars application referred to above). The parties are not to be taken as bound by my expression of their positions in this interlocutory ruling.

[45] Garson J. rendered her judgment in November of 2009, making the declarations and orders set out above. Canada appealed. The BCSA/BCWF and the Underwater Harvesters Association ("UHA") were allowed to participate in the appeal, which was heard in December of 2010. The PPFA and CSA sought intervention status in the Court of Appeal but were denied. Judgment was rendered May 18, 2011 (2011 BCCA 237).

[46] An order was entered dismissing the appeal, with two variations: the Court excluded geoduck which the UHA had been successful in arguing should be excluded from "any species" and the Court extended the period for negotiations by six months. Chiasson J.A. dissented on the issue of the form of the order that, in his view, should have been entered in the court below.

[47] Canada sought leave from the Supreme Court of Canada. The Supreme Court of Canada had recently decided *Lax Kw'alaams, supra,* in which they set out a four stage process for dealing with a claim for an Aboriginal right:

> With these considerations in mind, and acknowledging that the public interest in the resolution of Aboriginal claims calls for a measure of flexibility not always present in ordinary commercial litigation, a court dealing with a s. 35(1) claim would appropriately proceed as follows:
>
> 1. First, at the characterization stage, identify the precise nature of the First Nation's claim to an Aboriginal right based on the pleadings. If necessary, in light of the evidence, refine the characterization of the right claimed on terms that are fair to all parties.
>
> 2. Second, determine whether the First nation has proved, based on the evidence adduced at trial:
>
> (a) the existence of the pre-contact practice, tradition or custom advanced in the pleadings as supporting the claimed right; and

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

[48] The "standard" referred to in the quotation from *Gladstone*, when read in the context of the preceding paragraphs in the decision, is the justification standard set out in *R. v. Sparrow* [1990] 1 S.C.R.1075.

[49] On March 29, 2012, the Supreme Court of Canada sent the plaintiffs' case back to the Court of Appeal to be reconsidered in light of the Supreme Court of Canada's decision in *Lax Kw'alaams*.

[50] On July 2, 2013, the Court of Appeal confirmed their earlier judgment (2013 BCCA 300). The Court of Appeal said they viewed Garson J.'s decision as having "something of an interlocutory character" and acknowledged that the four stage process was not complete. They said issues of species specificity, accommodation, justification, and delineation of any modern right remained to be addressed. The court specifically referred to steps three and four from *Lax Kw'alaams* as yet to be done - that is continuity, and delineation of the right in the context of reconciliation.

However, the order was entered in the same terms as before. Chiasson J.A. dissented on the same terms as he had articulated in the first judgment.

[51] The applicants take the position before me that the Court of Appeal appears to have told them, both in the original decision and in the reconsideration, to raise their issues elsewhere, presumably at this stage of the trial. Thus they say it follows that they should be allowed to participate in this proceeding.

[52] In their first decision, the Court of Appeal set out Canada's and the BCSA/BCWF's position that the analysis of the pre-contact practice and the modern right (the "continuity" issue) should have been dealt with species by species, for each individual band. The court said, said at para. 59:

> These objections by Canada and the intervenors on what I will term the species issue are comprehensible but, in my opinion, the short answer to such submissions is that at the presently incomplete stage of this litigation, to seek a greater degree of specificity is neither possible nor practicable. The evidence that was accepted by the trial judge supported the thesis that a variety of fish species were harvested and traded by the ancestors of the respondents. The record in the case is supportive of the proposition that ancestral trade occurred in certain species such as salmon but is silent as to many other species adverted to in the particulars. As I observed during the hearing of this appeal, this case as it presently stands has about it something of an interlocutory character. Having regard to the state of the evidentiary record, to presently demand more specificity seems an impossible task.
>
> …
>
> The issue of species specificity will be very much front and centre when what I perceive as the core issues raised by this litigation come to be addressed at the accommodation and justification stage of the process.
>
> …
>
> At a future stage of the process, which has as its ultimate end the reconciliation of Aboriginal and non-Aboriginal interests, I venture to suggest that discrete fisheries and species will need to be considered and addressed on an individual basis.

[53] However, the Court agreed with the position of the UHA that geoduck should be excluded on that appeal from "any species", notwithstanding its specific inclusion by Garson J. in her reasons for judgment. Their decision was based on the evidence adduced at trial, not on any additional evidence put forward by the UHA. The court said, at para. 69:

> …because the commercial geoduck fishery is what I would describe as a high tech fishery of very recent origin, there can be no viable suggestion that the ancestors of the respondents could have participated in the commercial harvesting and trading of this particular marine resource at some time before contact with explorers and traders late in the 18th century. There is simply no adequate basis in the evidence to support an ancestral practice that would translate into any modern right to participate in harvesting and welling this marine food resource. In my respectful view, having regard to the state of the evidence, the learned trial judge erred in her finding that the evidence demonstrated that the respondents' Aboriginal rights should be found to extend to the geoduck fishery.

[54] Thus the court seems to have excluded geoduck because, on the evidence at trial, there could have been no pre-contact practice of harvesting geoduck. This species was "knocked off the list" of "any species".

[55] In its reconsideration, the Court of Appeal repeated and adopted their earlier remarks. The court said at para. 33:

> The appellant and certain of the intervenors submit that the judge failed to sufficiently address species specificity and that this resulted in her characterizing too broadly the right said to be prima facie infringed, namely the respondents' right to fish for any species of fish within their fishing territories and to sell such fish.
>
> It seems to me that the issues the trial judge envisioned as being subject to negotiation or to be resolved by further proceedings largely encompass points 3 and 4 of the analysis mode suggested by Binnie J. in *Lax Kw'alaams.* These include the questions of continuity and the delineation of a modern right. Salient issues that remain to be addressed between these parties include those related to species and a more specific delineation of any modern right.
>
> [emphasis added]

[56] The court then repeated paras. 59-66 of its earlier decision, in part set out above.

[57] Notwithstanding their apparent recognition that the process required to declare a right was not complete, the court dismissed the appeal, thus confirming Garson J.'s declaration of the right a second time. The order was entered in the same terms as before.

[58] Canada again sought leave to appeal to the Supreme Court of Canada, but leave was denied in 2014 and this trial commenced in March of 2015.

[59] The BCSA/BCWF apparently assumed the Court of Appeal's order was informed by their reasons and they would be afforded the opportunity to argue the issues the Court of Appeal said would be relevant to the second stage of the trial. The plaintiffs disagree, and I will set out their position below.

[60] Counsel for the BCSA/BCFW raised a number of other issues which he says arise from the current negotiations which should be addressed, and on which he says he could assist the court independently from whatever submissions Canada might make. In particular he questions whether Canada, in the negotiations from which the applicants are excluded, is seeking to accommodate the plaintiff's right or settle the case on some larger basis, the outcome of which is of significant interest to his clients.

[61] After listening to Ms. Farlinger, it appears that, from the point of view of DFO (insofar as she represents it), the scope of the negotiations is wider than simply seeking to reach resolution on the accommodation of the right, an issue upon which there is considerable confusion and disagreement. The plaintiffs' views of the scope of the negotiations has yet to be heard.

[62] More specifically from his clients' point of view, Mr. Lowes wishes to address the issue of where and to what extent he is to be allowed to argue the specifics of species exclusion or inclusion. He points out that he raised this before the Court of Appeal, as noted above, but says the court deferred the issue of species specificity to the second stage of the trial without providing guidance on how or where to argue other exclusions, who could participate, or the nature of the argument that would be acceptable.

[63] Mr. Lowes says that species specificity is relevant to delineation of the right, not just to justification, and asks how a right can be defined without delineating it. He relies particularly on *Cheslatta Carrier Nation v. British Columbia* [1999] B.C.J. No. 2639, where this court refused to rule upon the existence of an Aboriginal right because there was no question of (unjustified) infringement before it. The Court of

Appeal said at paras. 18 and 19 of their judgment (2000 BCCA 539), relying on *R. v. Van Der Peet* [1996] 2 S.C.R. 507:

> …such rights cannot be properly defined separately from the limitation of those rights. The latter are needed to refine and ultimately define the former.
>
> …
>
> …it is clear that any aboriginal "right to fish" that might be the subject of a declaration would not be absolute. …the definition of the circumstances in which infringement is justified is an important part of the process of defining the right itself.

[64] The BCSA/BCWF says this approach is now confirmed by *Lax Kw'alaams*, and by the reasons of the Court of Appeal in this case, and the law cannot be overcome by the wording of the order in this case.

Plaintiffs' Position

[65] The plaintiffs take the position that a declared right is a declared right. The issues referred to by the Court of Appeal in their reasons are subsumed by the declaration of the right and are no longer open for consideration by this court. The plaintiffs acknowledge that the Court of Appeal's reasons do not accord with the plaintiffs' view of the order. However, the plaintiffs say they have a right to rely on that order, because if it had been qualified as the reasons suggested it should be, they would have appealed. Being faced with the final declaration of an existing right, it is not up to this court to go back and do the tasks the Court of Appeal said in the reasons that it should - determine continuity and delineate the right.

[66] Mr. Kirchner acknowledges and relies on the reasoning in *Lax Kw'alaams* - there cannot be a declared right without a finding of continuity between the Aboriginal practice and the modern right, and there is a declared right here; therefore continuity is presumed to have been dealt with. The plaintiffs say the issue of continuity is *res judicata* and finished, unless and until the Supreme Court of Canada decides to deal with it in an eventual appeal. No matter how challenging the reasons of the Court of Appeal are, the order is dispositive.

[67] According to the plaintiffs, the only task remaining to this court is to determine if Canada has justified the *prima facie* infringement of the declared right, species by species. That is, has Canada shown that their rejection of each of the plaintiffs' various fishing plans, which have been put forward for nearly all, if not all, species, is justified.

[68] The plaintiffs say justification can take place species by species, but no species can be individually examined with the aim of "knocking it off the list", as occurred with geoduck in the Court of Appeal (a decision with which they take issue). It may be that Canada can justify not providing an allocation of a particular species, but that could change year to year. The declaration says "any species" and that is not to be interfered with, whether or not the species is at present found or harvestable in the plaintiffs' territory.

[69] The plaintiffs are particularly concerned that the PPFA wishes to call evidence on continuity, and it is possible the CSA would get into that as well. That would raise an issue that the parties are precluded from addressing because this trial is about justification only and thus the parties themselves are entitled to lead evidence only on that issue. The plaintiffs say the applicants, should they be accorded status as intervenors, cannot be allowed to lead evidence on an issue that is closed to the parties. Mr. Kirchner says Garson J. made findings on everything but justification, and she left that issue open only because she felt it was unfair to Canada to analyze it on the justification evidence before her since she had only just declared a right. Thus this stage of the trial must be confined to the issue of justification of the *prima facie* infringement of the existing declared right.

[70] The plaintiffs say the only avenue for the applicants is to attempt to get standing in the Court of Appeal when the judgment on this stage of the trial is inevitably appealed, and argue that this court erred in the decisions it will eventually make respecting justification on individual species. Thus, in the plaintiffs' submission, the PPFA's wish to call evidence on the continuity of the prawn fishery is irrelevant to this proceeding.

[71] The plaintiffs also take issue with the significance of a public right to fish, as asserted by the applicants, in the context of Aboriginal rights. They rely on *R. v. Kapp,* 2006 BCCA 277 which described the common law right to fish in Canada as "substantially limited by the *Fisheries Act*", and refer to the distinction drawn between a commercial licence and a constitutionally protected right in *Arsenault v. Canada* (*Attorney General*), 2009 FCA 300.

[72] As well, the plaintiffs say there is no need for the expert report of Stu Nelson. A history of the prawn fishery back to the 1950s is irrelevant, and the subject is already covered by Michelle James, Canada's expert. The rest of the report deals with DFOs objectives, about which the court has already heard substantial evidence.

[73] The plaintiffs say the PPFA's proposed lay witness's evidence was vague and counsel was unable to offer further detail when questioned by the court.

[74] As for the issue raised by the CSA, the plaintiffs do not agree that there are no harvestable sablefish in their territory, but even if that is so, they say that if Canada wants to accommodate their right by allocating fish from outside the court defined territory, Canada can do that. If the CSA want to raise that issue, it is a new one between them and Canada, to be raised elsewhere. As things stand now, Canada only offers licences to the plaintiffs that it holds in inventory as a result of voluntary relinquishment by members of the commercial fishery, and it has offered the plaintiffs even more than they asked for, so that share has already been fully mitigated and will not affect the commercial sablefish fishery.

[75] Thus, even though the plaintiffs may seek more sablefish in the future, at present there is no effect on the commercial sablefish fishery, so the CSA has nothing useful to add to these proceedings.

[76] The plaintiffs say the many witnesses offered by the BCSA to testify about the commercial perspective on the fishery do not appear to add anything to the evidence of Michelle James, and as for offering an opinion on what Garson J. meant by an industrial fishery, it would require an expert report and is covered by Ms. James in

any event. Mr. Kirchner says the industrial fishery's perspective on PICFI, quotas, and licenced fisheries is not relevant, and does not contribute to a public law issue.

[77] The plaintiffs take several other more general objections to the involvement of the intervenors.

[78] First, they say it is not sufficient to come into the case late and flag issues they want to raise. Potential intervenors need to have a useful and different perspective. To establish that, they should produce detailed synopses of the evidence they propose (see *Cambie Surgeries Corp.*). They should give names of witnesses, summaries of proposed evidence, and the specific issues to be addressed. These applicants have not done that. Their material is general and vague, an articulation of themes only. It would not be appropriate at this late stage to give directions and allow the applicants to return with such material, as was done in *Cambie Surgeries*. This application came on in December and was adjourned to the present date; thus the intervenors should have known the law and come prepared.

[79] Second, they say Canada is there to protect the interests of all the stakeholders. The only issue in this stage of the trial is whether Canada has justified its infringement of the plaintiffs' declared right to catch and sell any species of fish. It is up to Canada to deal with the interests of other sectors of the fishery, while allocating the resource to the plaintiffs in a way that is respectful of their priority arising from the Aboriginal right.

[80] More generally, the plaintiffs say it is simply not fair to allow intervenors into this action, which they have pursued diligently since 2003, and add a number of witnesses, without pleadings, discovery and notice of what their evidence will be (see *Birchwood Dairy Farm Ltd.*, *supra*, and *College Institute Educators' Assn. v. British Columbia*, 2002 BCSC 1480).

[81] In the context of the statement in *Lax Kw'alaams* that the process must be fair to all the stakeholders, I understand the plaintiffs to say that the process of balancing of other interests is Canada's job, not the court's.

[82] The court questioned Mr. Kirchner on whether this approach is realistic, given that Canada has been ordered in this case to negotiate and consult with the plaintiffs, a process that is ongoing and paralleling the litigation, and from which the other sectors of the fishery are excluded. The Statement of Claim alleges that Canada has failed to conduct those negotiations in good faith and in a timely manner.

[83] Mr. Kirchner disagrees that Canada's position is compromised, but in any event, he says it is Canada's job and the intervenors have nothing to add. Allocations of the fishery amongst all the sectors is a political decision, not a legal one, as has been established in *Houvinen*, 2000 BCCA 427, *Arsenault, supra*, and *Malcolm v. Canada (Minister of Fisheries)* 2014 FCA 130. There is no right on the part of the intervenors to have input into Ministerial decisions on allocations of fish.

DISCUSSION

[84] As stated above, the larger questions will not be resolved on this application. The scope of this trial has always been in dispute from the earliest days of the case management conferences, although it appears from Canada's position expressed at the recent particulars application that the parties themselves are closer to agreement on the scope of some of the issues than the applicants would be, if allowed to participate.

[85] This is the first civil case to deal with justification, reconciliation, accommodation, and how (or whether) a right is to be defined and delineated at the conclusion of the four stage process set out in *Lax Kw'alaams*. *Lax Kw'alaams* itself does not provide assistance on the procedure to be used in a justification trial because the right found to exist in that case was a very limited one related to the trade of eulachon only, and thus there was no need for a justification phase.

[86] What is a "full hearing that is fair to all stakeholders" (*Lax Kw'alaams,* para. 12)?

[87] One approach is the one I understand the plaintiffs to suggest: it is up to Canada to balance all the interests and up to the court to decide only if, in its balancing exercise, Canada has justified the infringement of the plaintiffs' right. That will be a process that is fair to all stakeholders.

[88] However, in my view, *Lax Kw'alaams* makes it clear that it is the *court*'s process that must be flexible and fair to all the stakeholders.

[89] In determining the present applications, I start from the following statements in *Lax Kw'alaams*, which are of some assistance:

> para. 12: …Aboriginal rights litigation is of great importance to non-Aboriginal communities as well as to Aboriginal communities, and to the economic well being of both. The existence and scope of Aboriginal rights protected as they are under s. 35(1) of the *Constitution Act*, 1982, must be determined after a full hearing that is fair to all the stakeholders.
>
> [emphasis added]
>
> para. 46: …acknowledging that the public interest in the resolution of Aboriginal claims calls for a measure of flexibility not always present in ordinary commercial litigation, a court dealing with a s. 35(1) claim would appropriately proceed as follows [the four steps are then set out].

[90] In the quote from *Gladstone* that is included in step 4 to do with the distribution of the fisheries resource after conservation goals have been met, are the phrases:

- objectives such as the pursuit of economic and regional fairness
- the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups

  [emphasis added]

[91] It appears that participation by groups other than Canada and the First Nations is contemplated in the four-step process outlined in *Lax Kw'alaams*, with particular emphasis on the economic well-being of all groups.

[92] What has become clear from listening to Ms. Farlinger is that, from her perspective, DFO is trying to determine the extent and definition of the right they are ordered to protect, and which they are attempting to do through a process of negotiation and consultation that they have been ordered to undertake, but which may ultimately involve wider issues than the accommodation of the right. This negotiation process, about which I have heard weeks of evidence, involves only Canada and the plaintiffs. As mentioned, the plaintiffs' claim against Canada includes an allegation that Canada has not negotiated in good faith or in a timely manner.

[93] In all these circumstances, Canada is not in an unfettered position to consider the interests of "all Canadians" (*Gladstone)* or "all the stakeholders" (*Lax Kw'alaams*). They have obligations to the First Nations, court ordered, constitutional, and fiduciary, that, in the context of this litigation and the negotiations, have the potential to put them at odds with other groups such as the potential intervenors.

[94] Thus in order to have a process that is fair to all the stakeholders, it is appropriate to give intervenors a voice. If reconciliation is one of the ultimate objectives of this process, as *Gladstone* says it is, it is difficult to see how it can be accomplished without some participation by the rest of the fishery.

[95] I turn now to whether these particular applicants have met the test set out above to allow them to be accorded status as intervenors.

[96] The Court of Appeal in its previous decision respecting the intervention of the PPFA and CSA in this case (2012 BCCA 404), expressed the following view on the subject of "direct interest":

> In the present case, the applicant contends that the interests of its members will be prejudicially affected in a direct sense by the decision on the reconsideration by this Court, if the Court concludes that the respondents have a right to harvest and sell prawns.
>
> The licences of the applicant's members may, in the discretion of the Minister of Fisheries, be renewed annually. The fact that renewal of prawn fishing licenses is discretionary gives no right to the applicant's members to any

> future prawn harvest: *R. v. Huovinen*, 2000 BCCA 427 at para. 24. If some or all of the licenses of the applicant's members are renewed, but priority were given to the fishing rights of the respondent Aboriginal bands pursuant to *R. v. Sparrow*, [1990] 1 S.C.R. 1075, there will likely be fewer prawns available to harvest by those of the applicant's members whose licences are renewed. I consider the reference by the Justice in chambers to a "significant interest in the outcome of the appeal" to be a reference to an impact on the quantity of prawns available to be harvested by the UHA's members. Any interest that the applicant's members have is thus, at best, an indirect interest.

[97] The reference to the "Justice in chambers" appears to be a reference to the reasons of the Justice who, in a previous application, had allowed the UHA to intervene in the first appeal, since that passage is quoted at para. 11 of this particular decision; that had to do with geoduck, not prawns, so the penultimate sentence is somewhat confusing. This division of the Court of Appeal appears to have had reservations about the intervention of the UHA in the first appeal, notwithstanding that it resulted in the elimination by the Court of Appeal of geoduck from the list of "any species".

[98] In any event, the Court of Appeal in this particular ruling held that the discretionary nature of licences precludes groups of fishers from having a direct interest in a matter such as this.

[99] The trial is now at a different stage, and I have considerably more evidence before me than was in the record before the Court of Appeal, including evidence that certainty and predictability in the fishery is acknowledged by all participants, including DFO and the plaintiffs, to be essential to a viable and sustainable fishery. While a licence is not a right, there is a legitimate expectation of some continuity in the industry, and thus members of the fishing communities invest considerable sums into the continuation of their livelihoods, which includes the management of the fishery.

[100] As well, there is evidence before me that, so far, DFO has sought to accommodate the plaintiffs' right through voluntary relinquishment of licences by other commercial fishermen. As already noted, the plaintiffs do not accept this as a valid method of accommodation. Thus accommodation of the right from their

perspective would have to come from allocations presently designated for other groups who presently depend on fishing for their livelihood.

[101] Given the statements in *Lax Kw'alaams,* which deal with this unique proceeding as opposed to the more limited issues in cases such as *Huovinen* and *Arsenault*, there does seem to be room to revisit the concept of "direct interest" in this context.

[102] However, intervention may also be permitted where the applicant has an indirect interest, and in view of the comments of the Court of Appeal, I will proceed on the second branch of the test for allowing intervenors to participate in the trial, as set out in *Gehring,* quoting, at para. 7, from *R. v. Watson,* 2006 BCCA 234:

> …where the applicant does not have a 'direct' interest in the litigation, the court must consider the nature of the issue before the court (particularly whether it is a 'public' law issue); whether the case has a dimension that legitimately engages the interests of the would-be intervenor; the representativeness of the applicant of a particular point of view of 'perspective' that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issue or whether, as noted in *Ward v. Clark*, the proposed intervenor is likely to 'take the litigation away from those directly affected by it.'

[103] In its earlier decision respecting these intervenors, the Court of Appeal, after determining there was no direct interest, went on to say that species specificity was not yet an issue, although the court on the reconsideration might determine that is should become one. That would be an issue for "further proceedings" but was not an issue for that particular appeal, so intervention was not allowed. The parties before me on this application disagree on whether "further proceedings" is this stage of the trial (the applicants' position), or whether it is another action entirely (the plaintiffs' position).

[104] I do not have to decide that issue yet. All I am considering on this application is whether, at this incomplete stage, I am prepared to allow the applicants to have a role in the four-step process set out in *Lax Kw'alaams.*

[105] In view of the comments set out above from *Gladstone* and *Lax Kw'alaams,* I accept that this particular case is one of interest to a wide variety of sectors of the

public, that it legitimately engages the interests of each of the applicants, and there is the potential for the applicants to demonstrate that they bring a unique perspective to the litigation that may be of assistance to the court in the resolution of the rather fluid issues as they appear at this unfinished stage of the trial.

[106] I also consider the views expressed by the Court of Appeal on the reconsideration to do with the further delineation of the right and species specificity, as an indication that further involvement of at least the BCSA/BCWF was not outside their contemplation. The Court's deferral of those issues to this stage of the trial is not necessarily an invitation to intervenors, but in my view it left the door open to their participation. While the PPFA and CSA were not permitted to be involved at that earlier stage, each is a representative of a relevant stakeholder in this process, with an argument to present that is specific to their group.

[107] I accept, therefore, that it will be useful to hear each of the applicants in final argument, as long as they do not duplicate submissions made by Canada. The PPFA and the CSA each has a particular perspective to offer on the issues that pertain to their respective fishery. The BCSA/BCWF has argument to make on issues some of which may be addressed by Canada, but upon which they have a different and perhaps wider perspective.

[108] Each applicant is granted status as an intervenor to make submissions at the close of the evidence. The extent and scope of the issues and argument will be determined at a later date. This is not to be construed as an opportunity for other groups to try to intervene in the future. That would not be fair to the plaintiffs who are entitled to know what intervenors they will be dealing with when they open their case.

Can the Intervenors Call Evidence?

[109] The more difficult issue at this moment is whether the applicants will be allowed to call evidence and add to the record.

[110] As already noted, this decision is being made in the absence of evidence from the plaintiffs, given the current stage of the trial, and with the non-participation by Canada in the application, and before having heard Michelle James.

[111] I have not set limits, at present, on the issues that may be argued at the close of the case as it is too early to do so. However, the participation of the intervenors in adding to the record must be circumscribed by the issues that are within the scope of the litigation as defined in the pleadings, that may assist in its resolution, will contribute to a process that is fair to all stakeholders, but will not prejudice the conduct of the case by the parties.

[112] Paragraph 7 of Garson J.'s order states "any of the parties will have leave to tender further evidence on justification in that subsequent proceeding". For the purpose of these applications, I accept that the issue on which evidence may be called is one of justification only.

[113] From the information I have before me at this stage, and based on the evidence Canada has called, the parties themselves will not be attempting to lead evidence in respect of continuity. Mr. Bevandich's affidavit raises the continuity issue with respect to prawn. Some of the evidence in Mr. Acheson's affidavit explaining how difficult it is to fish successfully for sablefish, and how commercial harvesting has only been possible recently, appears to be aimed at that issue as well. The intervenors cannot expand the case beyond the order and out of the hands of the parties. Thus if arguments are to be made that are similar to that respecting geoduck in the Court of Appeal, that is on the continuity issue, they will have to be done on the basis of evidence already before the court.

[114] Whether such an argument is an appropriate one, given the dispute that currently exists over the effect of the Court of Appeal reasons in light of its order, may be the subject of submissions at the end of the case.

[115] In general, a consideration of the proposed evidence has been difficult because of the problem outlined by Mr. Kirchner - lack of specificity and detail. I am

proceeding on the basis that the evidence the individual fishermen might offer is as set out in the affidavit of Mr. Bevandich from the PPFA and in the affidavit of Mr. Acheson from the CSA. A fully informed ruling would require a study of Mr. Nelson and Ms. James' reports, as well as each IFMP, and a comparison of the information in them with the proposed evidence. This is not my role, or at least it is one I do not have time to undertake for this ruling.

[116] I will deal with the lay witnesses first.

[117] From my review of the material provided to me, a large part of the evidence proposed to be called by the PPFA and CSA on general issues, approaches, and policies, even in respect of particular fisheries, is already before the court through the evidence of the many fisheries managers and scientists who have testified, and through the IFMPs for the various fisheries. In fact, the PPFA potential witnesses refer to the IFMPs as the source of much of their proposed evidence.

[118] The CSA's position is mainly one of argument - that they are a deep sea fishery conducted outside the plaintiffs' fishing territory as defined by the court, and thus should not be affected by Garson J.'s declaration. It is understandable that the sablefish fishermen want their story told in their own words and their contribution to the development of this fishery recognized, but their proposed evidence on those issues is not necessary to the argument they wish to make, and it has the potential to veer into evidence on continuity.

[119] Michelle James sets out the basic statements which support the CSA position. There is also sufficient evidence before the court from DFO managers and scientists to allow the CSA argument to be made, if it is an appropriate argument to hear within the issues of this case.

[120] However, there is one area of evidence proposed by the PPFA and CSA that is not yet before the court because it is within the knowledge of members of the commercial fishery, rather than in the knowledge of DFO: that is, evidence on the

financial investment made by the members of the commercial fishery to their own costs and to the management of the fishery generally.

[121] According to the evidence I have heard, there are costs associated with the management of the fishery that are paid for by the commercial fishermen themselves: for instance, biological sampling (DNA and coded wire tags), catch monitoring, including electronic monitoring and at sea observers, and catch reporting. These tasks are performed by independent companies who have been certified by DFO. The arrangements take place between these companies and the fishermen and do not involve DFO. Although I am aware that these costs are paid for by the commercial fishermen, I do not have evidence of the amounts or how they are paid. The funding for these costs for the plaintiffs' fishery is an ongoing source of dispute in the negotiations.

[122] Given the emphasis in *Lax Kw'alaams* and *Gladstone* on the "pursuit of economic and regional fairness" and the "economic well-being" of both Aboriginal and non-Aboriginal communities in reconciling an Aboriginal right, I am of the view that evidence of the investment of individual fishermen to their ability to fish, as well as the contributions by individual members of the regular commercial fishery to the management and regulatory scheme pertaining to the fishery on the west coast of Vancouver Island, including to the costs of biological sampling, catch monitoring and reporting, may be of assistance in considering the objectives referred to in step 4 of *Lax Kw'alaams.*

[123] As well, while the plaintiffs dispute the relevance of PICFI to the accommodation of their right, the role those licences play has yet to be determined. If those licences are eventually held to be relevant to the plaintiffs' allocations, it may assist the court, in considering justification, to know if the management, regulatory scheme, and monitoring of the entire fishery, including the PICFI portion, is assisted or funded to some extent by the members of the regular commercial fishery.

[124] I have heard evidence that fishermen fish in groups and aggregates and for large fishing conglomerates, and there may be various ways of paying for and

contributing to these costs, and they may vary with the respective fishery. However, the trial cannot be sidetracked into an examination of the organization of the entire commercial fishery.

[125] The affidavits from Mr. Bevandich and Mr. Atcheson contain information on the investment and contributions by individual fishermen to their own costs and to the costs of the management of the fishery generally.

[126] Therefore I will permit the PPFA and the CSA to adduce evidence on these issues:

> -Investment of an individual fisherman who fishes on the West Coast of Vancouver Island to his costs related to fishing gear, boat, crew and other direct costs of fishing.
>
> -Contribution of an individual fisherman who fishes on the West Coast of Vancouver Island to the costs of biological sampling, fish monitoring and catch reporting and other direct contribution to the costs of the management of the fishery on the West Coast of Vancouver Island.

[127] I am unable to say if the income of an individual fisherman derived from fishing on the West Coast of Vancouver Island is a factor is assessing these costs or whether it is otherwise a relevant consideration in arriving at a contribution. Further discussion may be necessary on this aspect.

[128] Whether and how the evidence from the intervenors should be considered on the issue of justification is a difficult question, and one the plaintiffs will no doubt argue against at the conclusion of the case. The alternative is to proceed without the involvement of the intervenors' witnesses and regret the lack of evidence later. This case has already occupied many months and will continue for several more. It is better in my view to err on the side of limited inclusion of evidence from the intervenors.

[129] Whether cross examination will be permitted if issues arise on these limited areas will be decided at the appropriate time.

Report of Stu Nelson

[130] As already noted, I was not taken through Mr. Nelson's report in submissions. I have scanned the report but not examined it in detail.

[131] Mr. Nelson's concerns about proper monitoring and working collectively with all other sectors in a fully subscribed fishery are already before the court from a number of witnesses, as are the concerns he expresses about a separate fishery for the plaintiffs with earlier opening times. Mr. Nelson also mentions the heightened uncertainty in the fishery if a new and separate fishery were created.

[132] The evidence presently before the court has addressed these issues in some detail. The managers from DFO who have testified for Canada have consistently mentioned the importance of certainty and predictability in the fishery. The manager responsible for the prawn fishery also testified extensively to the difficulties with the plaintiffs' approach to setting a prawn allocation and with allowing the plaintiffs to fish earlier than the regular commercial fishery. The commitment of DFO prawn and shellfish managers to a continued viable, ecologically sustainable, and internationally respected fishery was put forward in their testimony. The prawn IFMP, to which Mr. Nelson refers in detail, is already in evidence.

[133] The more general issues are dealt with in the IFMP and in the evaluations of both the plaintiffs' proposal and DFO's offer, done pursuant to DFO's evaluation framework.

[134] From my brief perusal of the report, it appears that there may be some new information in it relating to the financial contributions made by the commercial fishery to the management of the fishery and regarding the impact of PICFI. Mr. Nelson says that each holder of a licence in the commercial fishery contributes $3,700 annually to PPFA to support fishery monitoring, stock assessment, and other programs, and he says it is not clear if the plaintiffs will make similar contributions. The evidence respecting financial contributions to the fishery may be useful, but it will be duplicated by more direct evidence from the lay witness.

[135] The evidence respecting PICFI is already included in the IFMP and in Ms. James' report and the testimony of DFO shellfish managers. While Mr. Nelson may offer his opinion from a different perspective and in more detail, his report is so extensive that it has the potential to prejudice the plaintiff and open up issues they should not have to deal with from a non-party.

[136] I am not persuaded that Mr. Nelson's report would contribute usefully to the evidence already before the court.

Evidence from the BCSA/BCWF

[137] I will turn to the proposal by the BCSA/BCWF to call evidence.

[138] Mr. Lowes referred to having 8 to 10 witnesses to testify on various aspects of the commercial fishery. The areas to be covered were fairly extensive. No detail was provided. The proposed witnesses were not named. That has the potential to take this case away from the parties and make it into a general inquiry into the fishery. I am not inclined to open the record to the BCSA/BCWF in such a way.

[139] Whether there is a convenient way to address the limited issues set out above for the remaining fisheries, similar to the evidence to come from the PPFA and CSA, can be further discussed.

RESULT

[140] The applicants BCSA/BCWF, PPFA, and CSA, are given status as intervenors in order to present final argument, the parameters of which will be subject to further discussions at the conclusion of the evidence.

[141] Subject to further clarification, the PPFA and CSA (and potentially the BCSA/BCWF) may call evidence on:

> - The investment of an individual fisherman who fishes on the West Coast of Vancouver Island to his costs related to fishing gear, boat, crew and other direct costs of fishing.
>
> - The contribution of an individual fisherman who fishes on the West Coast of Vancouver Island to the costs of biological sampling, fish monitoring and

> catch reporting and other direct contribution to the costs of the management of the fishery on the West Coast of Vancouver Island.

[142] In my view, the limited participation I have agreed to allow, which may be further defined after discussion with counsel, will not lengthen the case to any extent and will assist in providing "a full hearing that is fair to all the stakeholders".

[143] As I mentioned to counsel at the conclusion of the arguments, I would issue these reasons in writing, but if the result were to allow the intervenors to participate, further discussion would likely be necessary.

[144] I would expect the proposed evidence to be forthcoming by affidavit on a date agreed to either by counsel or with the assistance of the court.

[145] Failing agreement, counsel should schedule a hearing at their earliest convenience to clarify the terms of the intervention, including the details of the evidence to be called by the intervenors, the form of the evidence, and timing.

"M.A. Humphries J."