

**SUPREME COURT OF CANADA**

**CITATION:** Lax Kw'alaams Indian Band v. Canada (Attorney General), 2011 SCC 56, [2011] 3 S.C.R. 535 **DATE:** 20111110  
**DOCKET:** 33581

**BETWEEN:**

**Lax Kw'alaams Indian Band, represented by Chief Councillor  
Garry Reece on his own behalf and on behalf of the members of the  
Lax Kw'alaams Indian Band, and others**

Appellants

and

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

Respondents

- and -

**Attorney General of Ontario, Metlakatla Band,  
B.C. Wildlife Federation, B.C. Seafood Alliance, Gitxaala Nation,  
represented by Chief Elmer Moody, on his own behalf and on behalf  
of the members of the Gitxaala Nation, and Te'Mexw Treaty**

**Association**

Intervenors

**CORAM:** McLachlin C.J. and Binnie, LeBel, Deschamps, Abella,  
Charron and Rothstein JJ.

**REASONS FOR  
JUDGMENT:**  
(paras. 1 to 74)

Binnie J. (McLachlin C.J. and LeBel,  
Deschamps, Abella, Charron and Rothstein JJ.  
concurring)

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Lax Kw'alaams Indian Band v. Canada (Attorney General), 2011 SCC 56,  
[2011] 3 S.C.R. 535

**Lax Kw'alaams Indian Band,  
represented by Chief Councillor Garry Reece  
on his own behalf and on behalf of the members  
of the Lax Kw'alaams Indian Band,  
and  
others**  
*Appellants*

*A*

v.

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

**British**  
*Respondents*

and

**Attorney General of Ontario,  
Metlakatla Band, B.C. Wildlife Federation,  
B.C. Seafood Alliance, Gitxaala Nation,  
represented by Chief Elmer Moody  
on his own behalf and on behalf of the  
members of the Gitxaala Nation, and  
Te'Mexw  
Association**

**Treaty**  
*Interveners*

**Indexed as: Lax Kw'alaams Indian Band v. Canada (Attorney  
General)**

**2011 SCC 56**

File No.: 33581.

2011: February 17; 2011: November 10.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Aboriginal law — Aboriginal rights — Fishing — Nature of pre-contact practice — Evolution of pre-contact practice — First Nations claiming rights to commercial harvesting and sale of all species of fish within their traditional waters — Whether pre-contact trade in specific fish product could evolve into modern commercial fishery — [Constitution Act, 1982, s. 35\(1\)](#).*

*Civil procedure — Pleadings — Aboriginal rights litigation — Whether Aboriginal rights claim should be characterized based on pleadings or a broader enquiry — Whether claim for declaration of “lesser” rights was properly presented in pleadings.*

*Aboriginal law — Fiduciary duty — Whether historical record supported existence of fiduciary duty to grant claimants right to modern commercial fishery.*

This appeal involves the claim of the Lax Kw’alaams and other First Nations (“Lax Kw’alaams”), whose ancestral lands stretch along the northwest coast of British Columbia between the estuaries of the Nass and lower Skeena rivers, to the commercial harvesting and sale of “all species of fish” within their traditional waters. Such an Aboriginal fishery would be within the protection of [s. 35\(1\)](#) of the [Constitution Act, 1982](#). The basis of the pre-contact society’s culture and sustenance was the fishery. It had a subsistence economy with some trade — primarily a gift exchange between kin at feasts and potlatches or the exchange of luxury goods. The harvesting and consumption of salmon, halibut, herring spawn, seaweed, shellfish, and eulachon were integral to its distinctive culture, but trade in fish or fish products other than the grease derived from the smelt-like species called the eulachon or candle fish (because when

dried it could be burned like a candle) was held not to be integral to the distinctive culture of the pre-contact society. Eulachon grease was a preservative for perishable food stuffs such as berries, and much valued for that purpose. Such other trade in fish or fish products as took place was described by the trial judge as “low volume, opportunistic, irregular . . . and incidental to fundamental pre-contact . . . kinship relations”.

The Lax Kw’alaams claimed not only the right to the commercial harvesting and sale of all species of fish within their traditional waters but asserted that the Crown has a fiduciary duty in that respect flowing from promises made in the reserve allocation process in the 1870s and 1880s. Finally, towards the end of the trial, they claimed what they described as lesser Aboriginal rights, including a right to sufficient fish which, “when converted to money”, would enable them to “develop and maintain a prosperous economy”, and a right to a food, social and ceremonial fishery.

The trial judge was not persuaded that the pre-contact customs, practices, and traditions supported the claimed Aboriginal rights to commercial activities and dismissed the claims. The Court of Appeal agreed and dismissed the appeal.

*Held:* The appeal should be dismissed.

The practices, customs and traditions of the pre-contact society do not provide an evidentiary springboard to a constitutionally protected Aboriginal right to harvest and sell all varieties of fish in a modern commercial fishery. The pre-contact society was not a trading people, except with respect to eulachon grease. As the trial judge found, such sporadic trade as took place in other fish products was peripheral to the pre-contact society and did not define what made the pre-contact society what it was.

The Lax Kw’alaams contend that the courts below erred in their approach to the characterization of the claim, and consequently failed to analyse comprehensively the evidence in its support. In their view “before a court can characterize a claimed aboriginal right, it must first inquire and make findings about the pre-contact practices and way of life of the claimant group”. This is not correct. When dealing with a s. 35(1)

claim, the court should begin by characterizing the claimed Aboriginal right based on the pleadings. Making findings about the pre-contact way of life of the claimant group before characterizing the claimed right — the “commission of inquiry” approach — is not suitable in civil litigation, even in Aboriginal cases, where procedural rules are generously interpreted to facilitate the resolution of the underlying controversies in the public interest. Following that model would be illogical and contrary to authority, and would defy the relevant rules of civil procedure. Although the necessary flexibility can be achieved within the ordinary rules of practice (including the amendment of pleadings), a defendant must be left in no doubt about precisely what is claimed. Having characterized the claim, the court should determine whether the First Nation has proved the existence of the pre-contact practice, tradition or custom advanced in the pleadings and that this practice was integral to the distinctive pre-contact society. Then, taking a generous though realistic approach, the court should determine whether the claimed modern right has a reasonable degree of continuity with the integral pre-contact practice. Finally, if the claimed right is found to exist, it should be delineated with regard to conservation goals and other relevant objectives.

In this case, the attempt to build a modern commercial fishery on the narrow support of a limited ancestral trade in eulachon grease lacks sufficient continuity and proportionality. While an Aboriginal right is subject to evolution both in terms of the subject matter and the method of its exercise, the claim in this case to a general commercial fishery would create a right qualitatively and quantitatively different from the pre-contact trade in eulachon grease. Qualitatively, trade in fish and fish products other than eulachon grease was peripheral to the pre-contact society. It is not enough to show that some element of trade was part of the pre-contact way of life if it was not distinctive or integral to that way of life. A general commercial fishery would represent an outcome qualitatively different from the pre-contact activity on which it would ostensibly be based, and out of all proportion to its original importance to the pre-contact economy. Quantitatively, the short eulachon season and the laborious extraction method was likely of limited value relative to the overall pre-contact fishing activity of the industrious and productive pre-contact people.

As to the claims to lesser rights, the conclusion that trade in fish apart from eulachon grease was not integral to the pre-contact society was as fatal to these claims as it was to the greater commercial claim. Further, had the claim to lesser rights been justified, it bristled with difficulty. The Crown was entitled to proper notice of what was being sought and to test the evidence directed to that issue, but the focus of the pleadings and evidence was on the claim to a commercial fishery, not the lesser rights. It was not clear what the claim meant, how it would be implemented, what standard of prosperity was sought, or the basis on which it would be quantified. All of these matters had far-reaching implications for fisheries management.

As to the claim to an Aboriginal right to a fishery for food, social and ceremonial purposes, the Lax Kw'alaams presently hold communal Aboriginal licences in these respects. Their entitlement seems not to be contentious, and, as courts generally do not make declarations in the absence of a live controversy, it was within the trial judge's discretion to refuse to make such a declaration.

The arguments based on fiduciary duty or the honour of the Crown necessarily fail in the absence of any substratum of relevant facts on which to base them. The Crown had not made express or implied promises of any preferential access to the commercial fishery, and had made its intention to treat Aboriginal fishers in the same manner as other fishers clear.

## Cases Cited

**Distinguished:** *R. v. Sappier*, 2006 SCC 54 (CanLII), [2006] 2 S.C.R. 686; *R. v. Pamajewon*, 1996 CanLII 161 (SCC), [1996] 2 S.C.R. 821; **referred to:** *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075; *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507; *R. v. N.T.C. Smokehouse Ltd.*, 1996 CanLII 159 (SCC), [1996] 2 S.C.R. 672; *R. v. Gladstone*, 1996 CanLII 160 (SCC), [1996] 2 S.C.R. 723; *R. v. Marshall*, 2005 SCC 43 (CanLII), [2005] 2 S.C.R. 220; *R. v. Marshall*, 1999 CanLII 666 (SCC), [1999] 3 S.C.R. 533; *Ahousaht Indian Band v. Canada (Attorney General)*, 2011 BCCA 237 (CanLII), 19

B.C.L.R. (5th) 20; *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456.

## **Statutes and Regulations Cited**

*Constitution Act, 1982*, s. 35(1).

*Supreme Court Civil Rules*, B.C. Reg. 168/2009.

## **Authors Cited**

Mitchell, Donald, and Leland Donald. “Sharing Resources on the North Pacific Coast of North America: The Case of the Eulachon Fishery” (2001), 43 *Anthropologica* 19.

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Chiasson and Bennett JJ.A.), 2009 BCCA 593 (CanLII), 281 B.C.A.C. 88, 475 W.A.C. 88, 314 D.L.R. (4th) 385, [2010] 1 C.N.L.R. 278, [2009] B.C.J. No. 2556 (QL), 2009 CarswellBC 3479, affirming a decision of Satanove J., 2008 BCSC 447 (CanLII), [2008] 3 C.N.L.R. 158, [2008] B.C.J. No. 652 (QL), 2008 CarswellBC 735. Appeal dismissed.

*John R. Rich, F. Matthew Kirchner and Lisa C. Glowacki*, for the appellants.

*Cheryl J. Tobias, Q.C., Sharlene Telles-Langdon and James M. Mackenzie*, for the respondent the Attorney General of Canada.

*Patrick G. Foy, Q.C.*, for the respondent Her Majesty The Queen in Right of the Province of British Columbia.

*Malliha Wilson and Michael E. Burke*, for the intervener the Attorney General of Ontario.

*Maria Morellato, Q.C., and Cheryl Sharvit*, for the intervener the Metlakatla Band.

*J. Keith Lowes*, for the interveners the B.C. Wildlife Federation and the B.C. Seafood Alliance.

*David M. Robbins and Jay Nelson*, for the intervener the Gitxaala Nation.

*Robert J. M. Janes and Sarah E. Sharp*, for the intervener the Te’Mexw Treaty Association.

THE JUDGMENT OF THE COURT WAS DELIVERED BY

[1] **BINNIE J.** — This appeal involves the claim of the Lax Kw’alaams First Nation and other First Nations listed in the Appendix to these reasons (herein collectively referred to as “Lax Kw’alaams”), whose ancestral lands stretch along the northwest coast of British Columbia between the estuaries of the Nass and lower Skeena rivers, to the commercial harvesting and sale of “all species of fish” within their traditional waters. Such an Aboriginal fishery would be within the protection of [s. 35\(1\)](#) of the *Constitution Act, 1982*, subject only to such limits as can be justified under the test in *R. v. Sparrow*, [1990 CanLII 104 \(SCC\)](#), [1990] 1 S.C.R. 1075. The commercial fisheries claim was part of a larger action asserting Aboriginal title, but the Aboriginal title issue was severed and has yet to go to trial.

claim for an  
aboriginal  
right to  
commercial  
harvest and  
sale of all  
species of  
fish in  
territory

[2] The trial judge rejected the commercial fisheries claim on the basis that, despite a year of factual and expert evidence, she was not persuaded that the Coast Tsimshian people’s pre-contact customs, practices, and traditions supported such an Aboriginal right ([2008 BCSC 447 \(CanLII\)](#), [2008] 3 C.N.L.R. 158). To the limited extent that the Coast Tsimshian traded in fish and fish products, such trade was specific to a product derived from a single species, the eulachon. Trade in fish more

claim rejected at  
trial on the basis  
that plaintiffs had  
not established  
that pre-contact  
practices  
supported a right  
to a commercial  
fishery

generally was not integral to their distinctive society and thus did not provide a foundation for a s. 35(1) Aboriginal right to a modern wealth-generating “industrial” fishery. This conclusion was upheld by the British Columbia Court of Appeal (2009 BCCA 593 (CanLII), 281 B.C.A.C. 88). The Lax Kw’alaams say that the courts below erred in their approach to the characterization of the claim, and consequently failed to analyse comprehensively the evidence in its support.

Trade in fish not integral to their distinctive society

Appellants - court did not characterize the claimed right correctly

[3] In the alternative, the Lax Kw’alaams argue that, quite apart from an Aboriginal right to harvest and sell fish on a full commercial scale, the evidentiary record establishes a variety of “lesser and included” Aboriginal rights, notably the right to a more limited commercial fishery (based in part on the traditional potlatch exchange) consisting of a right to harvest and sell fish and fish products sufficient “to sustain their communities, accumulate and generate wealth and maintain and develop their economy” (Second Amended Statement of Claim, at para. 31). They seek, in the further alternative, a still more limited Aboriginal right to a food, social and ceremonial fishery. The British Columbia Court of Appeal decided, having regard to the state of the pleadings and the way in which the 126-day trial had unfolded, that the trial judge’s decision not to deal with “‘lesser’ or ‘included’” rights was a “judgment call” which she was entitled to make. In the trial judge’s view, the trial from first to last had been about the right to a full-blown commercial fishery. Everything else was peripheral and not fully presented.

Appellants - the alternative, evidence supports a right to a more limited commercial fishery

[4] The Lax Kw’alaams also support their claims on the basis of alleged promises by government officials (thus implicating the honour of the Crown) at the time of reserve creation in the 1880s. This, too, was rejected by the trial judge on the basis that no such promises had ever been made. Her finding of fact in this respect was also accepted by the British Columbia Court of Appeal.

[5] For the reasons that follow, I would uphold the conclusion of the Court of Appeal on all issues and dismiss the appeal.

Appeal dismissed.

## I. Overview

[6] The trial judge acknowledged that prior to contact with Europeans, the Coast Tsimshian largely sustained themselves by an

extensive fishery. They did not, however, engage in any significant *trade* in fish or fish products except for a grease derived from a smelt-like species called the eulachon or candle fish (because when dried it could be burned like a candle). Such other trade in fish or fish products as took place was described by the trial judge as “low volume, opportunistic, irregular . . . and incidental to fundamental pre-contact Coast Tsimshian kinship relations, potlatch and ranked society” (para. 496).

[7] Eulachon were harvested for a few weeks every spring at the Nass River. The trial judge held:

In my opinion, it would be stretching the concept of an evolved Aboriginal right too far to say that the Coast Tsimshian practice of trading in eulachon grease is equivalent to a modern right to fish commercially all species in their Claimed Territories. [para. 501]

A key issue in the case is therefore the question of continuity between the Coast Tsimshian people’s pre-contact practice of rendering eulachon grease and trading the product thereby generated, on the one hand, and, on the other hand, their claim to a contemporary commercial fishery of all species for sale to non-Aboriginal as well as Aboriginal members of the public. The legal requirement for continuity between ancestral practices, customs and traditions and the modern claimed Aboriginal right incorporates, of course, an allowance for logical evolution within limits. This case, in part, is about where such limits should be drawn.

key issues continuity and evolution.

[8] The Lax Kw’alaams live in the twenty-first century, not the eighteenth, and are entitled to the benefits (as well as the burdens) of changing times. However, allowance for natural evolution does not justify the award of a quantitatively and qualitatively different right. It was in part the lack of continuity and proportionality in the Lax Kw’alaams’ attempt to build a full-blown twenty-first century commercial fishery on the narrow support of an ancestral trade in eulachon grease that concerned the trial judge. Her concern, in my view, was well founded.

[9] The trial judge held that the focus of the pleadings and evidence was on the Lax Kw'alaams' claim to a commercial fishery. Their later argument about "lesser and included rights" seems to have been borrowed hastily from criminal law and did not surface at trial in any significant way until the final argument. The trial judge considered the defendant governments to have been prejudiced by what she saw as the Lax Kw'alaams' belated attempt to recast the claim.

[10] The argument about "lesser and included rights" is more procedural than substantive in nature, although, as will be discussed, the basis of the trial judge's rejection of the larger commercial right seems to me largely to dispose of the Lax Kw'alaams' claim to a lesser commercial right as well.

[11] The courts (including this Court) have long urged the negotiation of Aboriginal and treaty claims. If litigation becomes necessary, however, we have also said that such complex issues would be better sorted out in civil actions for declaratory relief rather than within the confines of regulatory proceedings. In a fisheries prosecution, for example, there are no pleadings, no pre-trial discovery, and few of the procedural advantages afforded by the civil rules of practice to facilitate a full hearing of all relevant issues. Such potential advantages are dissipated, however, if the ordinary rules governing civil litigation, including the rules of pleading, are not respected. It would not be in the public interest to permit a civil trial to lapse into a sort of free-ranging general inquiry into the practices and customs of pre-contact Aboriginal peoples from which, at the end of the day, the trial judge would be expected to put together a report on what Aboriginal rights might, if properly raised in the pleadings, have been established.

[12] At this point in the evolution of Aboriginal rights litigation, the contending parties are generally well resourced and represented by experienced counsel. Litigation is invariably preceded by extensive historical research, disclosure, and negotiation. If negotiations fail, the rules of pleading and trial practice are well understood. Tactical decisions are made on all sides. It is true, of course, that Aboriginal law has as its fundamental objective the reconciliation of Canada's Aboriginal and non-Aboriginal communities, and that the special relationship that exists between the Crown and Aboriginal peoples has no equivalent to the usual courtroom antagonism of warring commercial entities. Nevertheless,

Specific considerations re civil litigation and Indigenous rights issues

Importance of pleadings and characterizing the right.

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.

[13] As to the “honour of the Crown” and “fiduciary duties” branches of the Lax Kw’alaams’ claim, the trial judge held that no factual basis had been laid for such relief. She held that there was no relevant unilateral promise by the Crown in the reserve allocation process or otherwise, let alone a treaty. Accordingly, there was no conduct by the Crown by which the obligations claimed to exist could be generated. The honour of the Crown is a general principle that underlies all of the Crown’s dealings with Aboriginal peoples, but it cannot be used to call into existence undertakings that were never given.

Honour of the Crown underlies Crown's dealings with Indigenous peoples but cannot be used here to support the claim in the absence of evidence.

[14] Finally, and somewhat belatedly, the Lax Kw’alaams brought to the forefront a claim to an Aboriginal right to a fishery for food, social and ceremonial purposes. The Lax Kw’alaams presently hold federal fisheries licences for these purposes. Their entitlement seems not to be a contentious issue. It was therefore not an issue of significance in the present litigation. Courts generally do not make declarations in relation to matters not in dispute between the parties to the litigation and it was certainly within the discretion of the trial judge to refuse to do so here.

Entitlement to fishery for food, social and ceremonial purposes not disputed

## II. Facts

### A. *Historical Background*

[15] The Lax Kw’alaams First Nation consists of the descendants of an ancient “fishing people” comprising the several tribes or houses of the Coast Tsimshian. In their traditional territories and fishing sites along the northwest coast of British Columbia salmon and other fish were in abundant supply. The Coast Tsimshian were organized into a sophisticated society characterized by complex relationships based on “rank” and kinship. Their “seasonal round” of activity was determined largely by the availability and location of salmon, halibut, herring spawn, seaweed, shellfish and the eulachon. According to the trial judge, the salmon and eulachon

were revered in ritual, endowed with supernatural qualities in the halait, or adaawx, and formed the core of the subsistence economy. All other Fish Resources pale by comparison. [para. 225]

[16] The trial judge found that pre-contact (said to be around 1793) “the harvesting and consumption of Fish Resources and Products, including the creation of a surplus supply for winter consumption, was an integral part of their distinctive culture” (para. 494). The Coast Tsimshian people had existed primarily “within a subsistence economy” although “some form of loosely termed trade” prior to contact had been shown (para. 495). Such trade had involved “primarily gift exchange between kin at feasts and potlatches, or exchange of luxury goods such as slaves, coppers, dentalium [shellfish gathered from the ocean floor] and eulachon grease” (*ibid.*).

[17] On appeal, the eulachon became central to the claim for an Aboriginal right to a modern commercial fishery. These fish were harvested for a few weeks in late winter (primarily, if not entirely, at locations along the Nass River) and were eaten fresh, smoked or dried for later use, or rendered into oil or grease by a process described as follows:

Eulachon were stored in pits dug into the ground or in big cedar plank bins for a little over a week. They were then boiled in large wood vats — sometimes dugout canoes were pressed into service — and the freed oil was skimmed from the surface for storage in wooden boxes or the bulbs and long hollow stems of kelp. When cooled to around 10°C the oil firms to a butterlike consistency and does not liquefy again until the temperature has been raised to about 21°C.

(Court of Appeal reasons, at para. 1, citing D. Mitchell and L. Donald, “Sharing Resources on the North Pacific Coast of North America: The Case of the Eulachon Fishery” (2001), 43 *Anthropologica* 19, at p. 21.)

The grease thus produced was exchanged between kin at feasts and potlatches along with other “luxury goods” (Court of Appeal reasons, at

para. 2). Eulachon grease was a preservative for perishable food stuffs such as berries, and much valued for that purpose.

[18] Almost a century later, in the 1880s, the Lax Kw'alaams were allotted reserves and fishing stations within their traditional territories. They allege that quite apart from their claims to s. 35(1) Aboriginal rights, various government officials at that time made promises about access to the commercial fishery that implicate the honour of the Crown giving rise to the Crown's trust-like or fiduciary duty to ensure that the Lax Kw'alaams have access to the commercial fishery. At issue is the significance to be attached to the "explanations" given to the Coast Tsimshian by Reserve Commissioner Peter O'Reilly, who began setting apart reserves on the Northwest Coast in 1881, as follows:

I carefully explained to the Nass and Tsimpsean Indians, that in assigning to them the several stations on the coast and tidal waters, *no* exclusive right of fishing was conveyed, but that they would, like their white brethren, be subject in every respect to the laws and regulations set forth in the Fishery Acts of the Dominion. [Emphasis in original.]

(P. O'Reilly, Indian Reserve Commissioner to Superintendent-General of Indian Affairs, April 8, 1882. Copy in *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882* (1883), 88, at p. 91.)

[19] At all relevant times the Lax Kw'alaams held a communal Aboriginal licence from the federal Department of Fisheries and Oceans to harvest fish for food, social, and ceremonial purposes.

## B. *The Pleadings*

[20] As the state of the pleadings plays an important role in the outcome of this appeal, it is important to set out the essential details. In their Second Amended Statement of Claim, the Lax Kw'alaams asserted, at para. 28, that each of the ancestral coastal Tsimshian tribes was "a distinctive aboriginal society engaged in a sophisticated economy based predominantly on the harvesting, managing, processing, consuming and

trading of all species of fish, shellfish and aquatic plants . . . that were available . . . from time to time within their Tribal Territories”. Paragraphs 30-31 pleaded:

The harvesting, managing, processing, consuming and trading of Fisheries Resources were central features of each Tribe’s economy and were customs, practices or traditions that were integral to the distinctive aboriginal culture of each Tribe at and before Contact. . . .

The Lax Kw’alaams Band, or, in the alternative, each Allied Tsimshian Tribe, holds existing aboriginal rights to harvest any Fisheries Resource available to them within the Lax Kw’alaams Territory for consumption and sale to sustain their communities, accumulate and generate wealth and maintain and develop their economy. [Emphasis added.]

[21] In response to a request by the Attorney General of Canada for particulars as to what was meant by this pleading, counsel for the Lax Kw’alaams stated that

they have an aboriginal right or aboriginal rights to harvest any Fisheries Resource available to them within the Lax Kw’alaams Territory for their own consumption or to sell to others in order to acquire money, goods or services to sustain the Lax Kw’alaams communities economically, to generate economic growth in those communities, and to allow persons in the community to accumulate and generate wealth. [Emphasis added; Amended Response, at para. 27(b).]

These particulars did not, I think, add much specificity to the pleadings, but the issue was not pursued by the Crown.

[22] It was further asserted that the accumulation of wealth in the Coast Tsimshian society had depended on trade, and that fisheries resources were the essential trade item by which tribes and house groups acquired wealth. The “accumulation and redistribution of wealth to

acquire or retain a high rank” within Tsimshian society were said in the claim to be integral features of their distinctive Aboriginal culture (Second Amended Statement of Claim, at para. 49).

[23] Paragraph 62 of the Second Amended Statement of Claim is somewhat repetitious of paras. 30-31. The Lax Kw’alaams asserted an Aboriginal right “to harvest, manage, and sell on a commercial scale Fisheries Resources and [processed] Fish Products . . . for the purpose of sustaining their communities, accumulating and generating wealth, and maintaining their economy” (emphasis added).

[24] The Lax Kw’alaams stated that by “commercial scale” they meant the exchange of “Fisheries Resources for money, goods or services, on a large scale” and that they had used the words “selling” and “trading” interchangeably (see Amended Response, at paras. 54(d) and (f)).

[25] With respect to the relief claimed, the Lax Kw’alaams sought:

- (a) a declaration that the Lax Kw’alaams or, in the alternative, each of the Allied Tsimshian Tribes, have existing aboriginal rights within the meaning of s. 35(1) of the *Constitution Act, 1982* to harvest all species of Fisheries Resources within the constitutional jurisdiction of Canada in the Tribal Territories;
- (b) a declaration that the Lax Kw’alaams or, in the alternative, each of the Allied Tsimshian Tribes, have existing aboriginal rights within the meaning of s. 35(1) of the *Constitution Act, 1982* to sell on a commercial scale all species of Fisheries Resources within the constitutional jurisdiction of Canada that they harvest from the Tribal Territories; [Emphasis added; Second Amended Statement of Claim, at para. 95.]

[26] The trial judge combined the two pleas into one paragraph, characterizing the principal relief sought as follows:

The relief sought by the plaintiffs includes  
Declarations that:

- a. the plaintiffs have an existing Aboriginal right within the meaning of s. 35(1) of the *Constitution Act* of [1982] to harvest and sell on a commercial scale all species of Fisheries Resources that they harvest from their Claimed Territories; [Emphasis added; para. 97.]

The Lax Kw'alaams also sought a declaration that Canada has breached fiduciary obligations and the honour of the Crown in relation to the fisheries.

### III. Judicial History

- A. *British Columbia Supreme Court (Madam Justice Satanove (now Madam Justice Kloegman)), 2008 BCSC 447 (CanLII), [2008] 3 C.N.L.R. 158*

[27] Before trial, an order was made that severed from the proceeding the question of Aboriginal title (2006 BCSC 1463 (CanLII)). At trial, the claims not severed were dismissed. The trial judge did not address the question of infringement, because she found there to be no existing Aboriginal right.

Claim to  
aboriginal title  
to be dealt  
with in a  
separate  
proceeding

[28] The trial judge was not satisfied that trade in any fish or fish products other than eulachon grease could properly be described as integral to the Lax Kw'alaams distinctive culture (para. 495). Such sporadic trade as may have existed in other fishery resources in no way constituted "a central and significant part of the society's distinctive culture", or in any way made their society "truly . . . what it was" (*R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507, at para. 55 (emphasis deleted), cited by trial judge, at para. 496). Such sporadic trade was low volume, opportunistic, irregular, for food, social and ceremonial purposes, and purely incidental to fundamental pre-contact Coast Tsimshian kinship relations, potlatch, and ranked society (para. 496). The potlatch rested on a cultural and ceremonial basis that was quite different from a commercial marketplace.

Trial judge:  
"integral to  
distinctive  
culture" test  
not satisfied  
regarding right  
to trade in fish  
and fish  
products

[29] Ultimately, the trial judge concluded, “the plaintiffs’ simplistic position that the ancient trade in eulachon grease has transmogrified to a modern day right to commercial fishing of salmon, halibut and all other marine and riverine species of fish, ignores the fundamental fact that the Coast Tsimshian fished for sustenance, not for trade” (para. 499 (emphasis added)). Specifically,

[t]he rendering of the eulachon into oil was an unique ancestral practice that brought wealth and prestige to the society, but it was not inter-related with the subsistence fishing of salmon, halibut, and other Fish Resources and Products. [para. 499]

[30] The trial judge then added, in what could be taken as a comment on a lack of continuity and proportionality, in a paragraph already set out above but reproduced here for convenience:

In my opinion, it would be stretching the concept of an evolved Aboriginal right too far to say that the Coast Tsimshian practice of trading in eulachon grease is equivalent to a modern right to fish commercially all species in their Claimed Territories. [para. 501]

If one were to substitute for the words “is equivalent to” in this quotation the different words “provides a sufficient historical basis for”, I would respectfully agree with the proposition.

[31] With respect to the alternative claim that the Crown had breached its “trust-like or fiduciary obligatio[n]” to the Lax Kw’alaams by “restricting or denying” them access to harvest fish for commercial purposes, the trial judge found their version of the facts to be “notably one sided” (paras. 97 and 515-17). As the Crown had given “no promise of commercial fishing rights, exclusively or at all, to the Coast Tsimshian”, either as part of the reserve allotment process or otherwise, the Lax Kw’alaams lacked the legal foundation to establish that any fiduciary duty was owed to them (para. 518). Neither had the Lax Kw’alaams established that the Crown had acted dishonourably by subjecting them to the same limits and restrictions on fishing as all other fishers (para. 529). Therefore,

the argument based on the honour of the Crown or fiduciary duty did not support the Lax Kw'alaams' claim for access to commercial fishing in priority to non-Aboriginal fishers.

B. *British Columbia Court of Appeal (Newbury, Chiasson and Bennett JJ.A.)*, 2009 BCCA 593 (CanLII), 281 B.C.A.C. 88

[32] The appeal was dismissed. Newbury J.A. held that the trial judge had properly distinguished the eulachon fishery from that of other species in defining the pre-contact activity (paras. 42-43). She held that the nature and scope of the pre-contact activity is determined on the facts of each case (para. 35). Given the trial judge's finding that the eulachon trade was a species-specific activity not related to the broader harvesting of fish for subsistence is supported by *R. v. N.T.C. Smokehouse Ltd.*, 1996 CanLII 159 (SCC), [1996] 2 S.C.R. 672, it would be misdescribing the Coast Tsimshian way of life to say that trading fish resources generally was integral to their way of life when that trade was relatively minor and limited to one species (para. 38). Other species like salmon were only harvested for subsistence purposes and were so plentiful as not to be the subject of trade except in times of famine (paras. 2, 23, 26 and 43).

[33] She found that the appropriate question was whether commercial fishing is the logical evolution of the Lax Kw'alaams' traditional practices relating to eulachon grease (para. 45). There was no basis upon which to reverse the trial judge's conclusion that the pre-contact eulachon trade was not the precursor of a modern right to fish all species for commercial purposes (para. 48).

[34] As to the "lesser rights" argument, the Lax Kw'alaams argued that the reference to "sustain[ing] their communities" amounted to the assertion of a more limited commercial right (paras. 58-59, citing the Second Amended Statement of Claim, at para. 31). In Newbury J.A.'s view, however, the trial judge's refusal to consider "lesser rights" was a "judgment call" that was open to her (para. 62). The trial judge was best placed to evaluate the pleadings, argument and prejudice to the other parties.

[35] The appellants pointed to various instances in their pleadings that referred to "consumption" and "sale" or "trade", but the Court of

Appeal decision:  
Upheld finding of trial judge that pre-contact trading activities did not support a modern right to fish commercially for all species of fish

Appeal stated that “[i]t should not be necessary for a court to try to piece together various obscure references in a pleading in order to discern what is being sought” (para. 65).

[36] With respect to the assertion that the Crown had promised in the process of reserve allotment that the Lax Kw’alaams would “be kept in the fishing business alongside other fishers’ — i.e., a non-exclusive right to fish commercially” (para. 76), the trial judge had found that no such promise was made and the trial judge’s finding that there was no basis for the Lax Kw’alaams to be treated preferentially to non-Aboriginal fishers was fully justified by the evidence (para. 77).

#### IV. Issues

[37] The Lax Kw’alaams raise the following issues:

Issues on appeal at  
SCC

1. Did the courts below err by characterizing the appellants’ Aboriginal rights claim based on the pleadings rather than an enquiry into pre-contact practices?
2. Did the courts below err in isolating the ancestral practice of trading in eulachon grease “as a practice of its own” rather than focusing more comprehensively on the Coast Tsimshian “fishing way of life”?
3. Did the courts below err by refusing to consider whether the appellants had established a “lesser” right to fish on a “moderate” scale “to sell to others in order to acquire money, goods or services to sustain [their] communities” or to an Aboriginal right to fish for food, social and ceremonial purposes?
4. Did the courts below err in dismissing the claim based on the honour of the Crown by concluding that, in the allotment of fishing station reserves, the Crown did not expressly or impliedly promise the Lax Kw’alaams a preferential fishery?

#### V. Analysis

[38] The Lax Kw'alaams First Nation and its ancestors have inhabited the northwest coast of British Columbia for thousands of years. In the pre-contact period prior to 1793, the basis of their culture and sustenance was the fishery. The principal issue in the present action is whether its ancestral practices, customs and traditions provide a proper legal springboard to the right to harvest and sell all varieties of fish in a modern *commercial* fishery — a right that would be protected and privileged by s. 35(1) of the *Constitution Act, 1982*.

Main issue: are Lax Kw'alaams' pre-contact practices sufficient to support an aboriginal right to harvest and sell all species of fish commercially?

[39] In a series of decisions over the last 15 years the Court has worked out the test to establish such a right in the context of a defence to prosecutions for regulatory offences: see in particular *Van der Peet*; *R. v. Gladstone*, 1996 CanLII 160 (SCC), [1996] 2 S.C.R. 723; *N.T.C. Smokehouse*; *R. v. Marshall*, 2005 SCC 43 (CanLII), [2005] 2 S.C.R. 220 (“*Marshall (2005)*”); and *R. v. Sappier*, 2006 SCC 54 (CanLII), [2006] 2 S.C.R. 686. In such cases, it is the prosecution that establishes the boundaries of the controversy by the framing of the charge. Here, however, the Lax Kw'alaams First Nation is the moving party, and it lay in its hands to frame the action, within the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, as it saw fit.

Imp't of this being an action not a regulatory defence.

A. *Did the Trial Judge Err in Her Approach to Characterizing the Lax Kw'alaams' Claim?*

[40] The heart of the Lax Kw'alaams' argument on this point is that “before a court can characterize a claimed aboriginal right, it must first inquire and make findings about the pre-contact practices and way of life of the claimant group” (A.F., at para. 57 (emphasis in original)). I would characterize this approach as a “commission of inquiry” model in which a commissioner embarks on a voyage of discovery armed only with very general terms of reference. Quite apart from being inconsistent with the jurisprudence that calls for “characterization of the claim” as a first step, the “commission of inquiry” approach is not suitable in civil litigation, even in civil litigation conducted under rules generously interpreted in Aboriginal cases to facilitate the resolution in the public interest of the underlying controversies.

[41] I would reject the appellants' approach for three reasons. Firstly, it is illogical. The relevance of evidence is tested by

reference to what is in issue. The statement of claim (which here did undergo significant amendment) defines what is in issue. The trial of an action should not resemble a voyage on the *Flying Dutchman* with a crew condemned to roam the seas interminably with no set destination and no end in sight.

[42] Secondly, it is contrary to authority. In *Van der Peet*, Lamer C.J. emphasized that the *first* task of the court, even in the context of a defence to a regulatory charge, is to characterize the claim:

. . . in assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed; in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed. The correct characterization of the appellant's claim is of importance because whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support. [Emphasis added; para. 51.]

The first task of the court is to characterize the claimed right, not to inquire generally into pre-contact practices

[43] Thirdly, it defies the relevant rules of civil procedure. Pleadings not only serve to define the issues but give the opposing parties fair notice of the case to meet, provide the boundaries and context for effective pre-trial case management, define the extent of disclosure required, and set the parameters of expert opinion. Clear pleadings minimize wasted time and may enhance prospects for settlement.

Importance of the pleadings

[44] In support of their “characterizing the right” argument, the Lax Kw’alaams cite *Sappier*, at paras. 24 and 46, but I do not read *Sappier* as departing from *Van der Peet* and its progeny. *Sappier* was a prosecution for unlawful possession or cutting down of Crown timber from Crown lands and the Court’s inquiry was whether the accused could establish an Aboriginal right to engage in that particular conduct. The Aboriginal right asserted by the defence was broader than necessary and in its broad generality risked being rejected as invalid. In that context (as in many other prosecutions), it was necessary for the Court to re-characterize and narrow the claimed right to satisfy the

forensic needs of the defence without risking self-destruction of the defence by reason of overclaiming. See, for example, *Van der Peet* itself where a claim to a general commercial fishery was narrowed because the fish had been caught pursuant to a valid food fishery licence, and thus a claim to a right to *exchange* fish already caught “for money or other goods” would suffice to obtain an acquittal (paras. 52, 77-79). Similarly, in *R. v. Pamajewon*, 1996 CanLII 161 (SCC), [1996] 2 S.C.R. 821, in response to a charge of illegal gambling on a reserve, the Court treated a defence claim to a broad Aboriginal right “to manage the use of their reserve lands” as one of “excessive generality” (para. 27), i.e. broader than required to defeat the prosecution. The charge of illegal gambling would be met by a narrower right “to participate in, and to regulate, high stakes gambling activities” on the reserve (para. 26). In the result, it was held that even the narrower claim was not established on the evidence. The re-characterization of the defence claim in *Sappier* was another example in this line of cases.

[45] To the extent the Lax Kw’alaams are saying that, in Aboriginal and treaty rights litigation, rigidity of form should not triumph over substance, I agree with them. However, the necessary flexibility can be achieved within the ordinary rules of practice. Amendments to pleadings are regularly made in civil actions to conform with the evidence on terms that are fair to all parties. The trial judge adopted the proposition that “he who seeks a declaration must make up his mind and set out in his pleading what that declaration is”, but this otherwise sensible rule should not be applied rigidly in long and complex litigation such as we have here. A case may look very different to *all* parties after a month of evidence than it did at the outset. If necessary, amendments to the pleadings (claim or defence) should be sought at trial. There is ample jurisprudence governing both the procedure and outcome of such applications. However, at the end of the day, a defendant must be left in no doubt about precisely what is claimed. No relevant amendments were sought to the prayer for relief at trial in this case.

[46] 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:

Courts should be flexible in cases regarding Indigenous peoples' rights, but rules of practice still apply

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 reasonably regarded as a continuation of, the pre-contact practice? At this step, the court should take a generous though realistic approach to matching pre-contact practices to the claimed modern right. As will be discussed, the pre-contact practices must engage the essential elements of the modern right, though of course the two need not be exactly the same.
4. Fourth, and finally, in the event that an Aboriginal right to trade **commercially** is found to exist, the court, when delineating such a right should have regard to what was said by Chief Justice Lamer in **Gladstone** (albeit in the context of a *Sparrow* justification), as follows:

Re-articulating the Vander Peet test

Valid legislative objectives

Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-

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

See also *R. v. Marshall*, 1999 CanLII 666 (SCC), [1999] 3 S.C.R. 533, at para. 41.

[47] In my view the trial judge proceeded correctly in her approach to characterization of the claim based on the pleadings and this ground of appeal should be rejected.

B. *Did the Trial Judge Err in Refusing to Consider a Modern Commercial Fishery to Be the Logical Evolution of a Pre-Contact Trade in Eulachon Grease?*

[48] The trial judge interpreted the pleadings as a single claim to an existing Aboriginal right within the meaning of s. 35(1) of the *Constitution Act, 1982*, “to harvest and sell on a commercial scale all species of Fisheries Resources that [the plaintiffs] harvest from their Claimed Territories” (para. 97). Although the Lax Kw’alaams sought two distinct and separate declarations, the fusion into a single claim for declaratory relief made by the trial judge was quite appropriate. There can be no sale without a prior harvesting of the fish and the whole point of harvesting the fish, according to the Second Amended Statement of Claim, was for commercial sale. The two elements of the claim are inextricably tied together.

[49] If established, an Aboriginal right is not frozen at contact, but is subject to evolution both in terms of the subject matter and the method of its exercise, depending on the facts.

[50] In terms of the mode of exercise, the courts have repeatedly recognized that fishing methods continue to evolve. The Aboriginal

The trial judge's approach to characterizing the claim based on the pleading was correct

source of fishing rights does not require rights holders in the Pacific Northwest to fish from dugout canoes. Pre-contact trade in Pacific smoked salmon (if established) should not exclude preparation and sale of the frozen product when the technology became available. (All of this, of course, is subject to the interest of conservation and other substantial and compelling interests (*Sparrow*, at pp. 1108-10; and *N.T.C. Smokehouse*, at paras. 96-97).)

[51] However, when it comes to “evolving” the *subject matter* of the Aboriginal right, the situation is more complex. A “gathering right” to berries based on pre-contact times would not, for example, “evolve” into a right to “gather” natural gas within the traditional territory. The surface gathering of copper from the Coppermine River in the Northwest Territories in pre-contact times would not, I think, support an “Aboriginal right” to exploit deep shaft diamond mining in the same territory. While courts have recognized that Aboriginal rights must be allowed to evolve within limits, such limits are both quantitative and qualitative. A “pre-sovereignty aboriginal practice cannot be transformed into a different modern right” (*Marshall (2005)*, at para. 50).

Aboriginal rights must be permitted to "evolve" from their pre-contact form, but cannot be transformed into a different practice entirely

[52] The trial judge was satisfied that the ancestors of the Lax Kw'alaams “harvested a wide variety of Fish Resources and Products through an array of fishing techniques. They have proved that the harvesting and consumption of Fish Resources and Products, including the creation of a surplus supply for winter consumption, was an integral part of their distinctive culture” (para. 494 (emphasis added)). She further found

that the pre-contact Coast Tsimshian existed primarily within a subsistence economy until the arrival of the fur traders who influenced the creation of trade monopolies and chiefdoms [although they were also] involved in some form of loosely termed trade before the date of contact. This trade involved primarily gift exchange between kin at feasts and potlaches, or exchange of luxury goods such as slaves, coppers, dentalium and eulachon grease. [para. 495]

However, and this is the crucial point, the trial judge held that “trade in any other Fish Resource or Product beside eulachon grease” could *not* be described as integral to their distinctive culture (*ibid.* (emphasis added)). Such sporadic trade as took place in other fish products was peripheral to the pre-contact society and did not define what made Coast Tsimshian society what it was.

Other than eulachon grease, trade in fish products was sporadic pre-contact and not integral to distinctive culture

[53] The Lax Kw’alaams argue that such sporadic trade in other fish products was nonetheless part of their ancestral “way of life” and, on that account, they should be allowed to continue to engage in trade in fish generally under the protection of s. 35(1) of the *Constitution Act, 1982*. In other words, the Lax Kw’alaams’ argument is that proof of even sporadic trade as part of pre-contact society is sufficient to support a modern trading right in “all species of fish” and that the test applied by the trial judge is too strict. It should be enough to show that trade was part of their ancestors’ pre-contact “way of life” whether or not “distinctive” or “integral” as required by *Van der Peet*.

[54] The Lax Kw’alaams place reliance on references to “way of life” in *Sappier*, at paras. 24 and 40. However, the reference in *Sappier* to a pre-contact “way of life” should not be read as departing from the “distinctive culture” test set out in *Van der Peet*, where Chief Justice Lamer stated:

The Court walked back from the 'way of life' language in *Gray/Sappier*.

To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society’s distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive — that it was one of the things that truly made the society what it was. [First emphasis added; second emphasis in original; para. 55.]

The trial judge found on the facts that the Lax Kw’alaams had not met this threshold.

[55] Counsel for the Lax Kw'alaams argues that, even if pre-contact trade had been limited to eulachon grease (which they deny), the modern right should not be “frozen” but should be generalized and “evolved” to include all other fish species and fish products.

[56] However, such an “evolution” would run counter to the trial judge’s clear finding that the ancestors of the Lax Kw'alaams fished all species but did not *trade* in any significant way in species of fish or fish products other than eulachon. Extension of a modern right to all species would directly contradict her view that only the “species-specific” trade in eulachon grease was integral to the distinctive culture of the pre-contact society. A general commercial fishery would represent an outcome qualitatively different from the pre-contact activity on which it would ostensibly be based, and out of all proportion to its original importance to the pre-contact Tsimshian economy.

[57] The “species-specific” debate will generally turn on the facts of a particular case. Had it been established, for example, that a defining feature of the distinctive Coast Tsimshian culture was to catch whatever fish they could and trade whatever fish they caught, a court ought not to “freeze” today’s permissible catch to species present in 1793 in the northwest coastal waters of British Columbia. As the oceans have warmed, new species have come north from southern waters and the migratory pattern of some of the old species may have shifted towards Alaska. To ignore the evolution of the fisheries resources of the Pacific Northwest would be uncalled for in the absence of some compelling reason to the contrary on the particular facts of a particular case, as in the debate about geoduck harvesting in *Ahousaht Indian Band v. Canada (Attorney General)*, 2011 BCCA 237 (CanLII), 19 B.C.L.R. (5th) 20, a debate on which I express no opinion. However, this example, it seems to me, is very different from the situation we have here, where trade was an exception to the general sustenance fishery and the only subject matter of trade was eulachon grease.

[58] The trial judge made no findings regarding the quantity of eulachon grease traded in those ancient times (and presumably had no means of doing so given the lack of evidence), but it may be assumed that, given the very short eulachon fishing season and the laborious method of extraction of the grease previously described, the quantities were small relative to the overall pre-contact fishing activity of the industrious and

Evolution does not allow for practice to be distorted out of proportion to its original importance--the right can't be qualitatively different from the pre-contact practice.

productive Coast Tsimshian peoples. Accordingly, to extrapolate a modern commercial fishery from the pre-contact trade in eulachon grease would lack proportionality in *quantitative* terms relative to the overall pre-contact fishing activity as well.

the right has to proportionate to the pre-contact practice.

[59] The trial judge concluded that transformation of the pre-contact eulachon grease trade into a modern commercial fishery would not be “evolution” but the creation of a different right. On that basis, the claim failed both the integrality and continuity requirements of the *Van der Peet* test. These findings were supported by the evidence.

C. *Did the Trial Judge Err in Refusing to Make a Declaration in Relation to “Lesser and Included Rights”?*

[60] The Lax Kw’alaams seek a declaration of “lesser included” Aboriginal rights to harvest fish of all species for consumption and sale “to sustain their communities, accumulate and generate wealth and maintain and develop their economy” (Second Amended Statement of Claim, at para. 31; A.F., at para. 136(b)(ii)). The Lax Kw’alaams also seek a declaration of entitlement to a s. 35(1) right to a food, social and ceremonial fishery (A.F., at para. 136(b)(iii)).

[61] The categories of fishery are thus portrayed as falling along a spectrum with a subsistence food fishery at the bottom end and a full commercial fishery at the top end. Where this “lesser” commercial-type fishery falls on the spectrum is not altogether clear. In their final written argument at trial the Lax Kw’alaams characterized the *lesser* right as “[a] right to harvest all species of Fisheries Resources in the Lax Kw’alaams Territory for the purpose of selling those Fisheries Resources and their products, on a commercial scale, to sustain the Lax Kw’alaams community and accumulate and generate wealth” (para. 720 (emphasis added)). It is therefore a “lesser” right but nevertheless a *commercial* right, albeit on a more modest scale. How much more modest is not clear. The Lax Kw’alaams particularized the “amount of Fisheries Resources that the Plaintiffs need to sustain their communities” as “depending on a number of factors including availability of stocks and availability of markets for their Fisheries Resources. The Plaintiffs require enough Fisheries Resources which, when converted to money, will enable the communities

to develop and maintain a prosperous economy” (Amended Response, at para. 57(c)).

[62] It seems to me that by rejecting the claim to the “greater” commercial fishery on the basis that *trade* in fish other than eulachon was not integral to pre-contact society, the trial judge was equally required to reject a “lesser” commercial right to fish “all species”. Her problem on this branch of the argument was not only the scale of the commercial fishery but whether and to what extent “trade” in the pre-contact period could support *any* sort of modern commercial fishery — whether full-scale or “lesser” in scope. Her conclusion that *trade* in fish apart from eulachon grease was *not* integral to Coast Tsimshian pre-contact society was as fatal to the lesser commercial claim as it was to the greater commercial claim.

The evidence did not support any commercial fishery.

[63] In any event, the trial judge stated that “neither party led evidence regarding any pre-contact practi[c]e of sustaining the community through trade on any scale” (para. 102).

[64] In the trial judge’s view, “it is relevant to the fairness of the proceedings that a party not introduce, at the stage of final submissions, new issues that were not properly the subject of adjudication” (para. 102). The Attorney General of Canada contends that the Lax Kw’alaams’ attempt to re-cast their claim in final argument was unfair because:

- (i) Rights to fish for sale on a lesser commercial scale were not advanced until final oral argument. The Lax Kw’alaams’ opening submissions, written and oral, were directed to fishing for commercial purposes.
- (ii) The particulars provided by counsel for the Lax Kw’alaams, were directed to “commercial scale” fishing, defined as “exchange of Fisheries Resources for money, goods or services, on a large scale” (Amended Response, at para. 54(d) (emphasis added)).
- (iii) The retainer letters to three of the Lax Kw’alaams experts sought their respective opinion in relation to “access to fisheries resources for commercial purposes”.

- (iv) The lay and expert witness evidence was led in relation to a full-scale commercial fishery.

This is not altogether surprising. Counsel for the Lax Kw'alaams may have concluded that to appear to dwell on lesser claims might signal to the court a lack of confidence in their clients' prospects of success in the claim to a full commercial fishery. It is never a wise practice to push a backup argument at the expense of the primary claim, and counsel should not be faulted for pursuing a time-honoured strategy, if indeed that is what they were up to.

[65] Nevertheless, quite apart from the Attorney General of Canada's procedural objections, there remained the problem of what exactly the trial judge was expected to say in the declaration of "lesser rights". Nothing in the prayer for relief in the Second Amended Statement of Claim suggested a wording for the declaration of a "lesser" commercial right and no precise wording for a declaration in that regard was proposed by counsel during argument in this Court or, it seems, in the courts below.

[66] The "lesser" claim bristled with difficulty. It was for access to sufficient fish which, "when converted to money", would enable the Lax Kw'alaams to "develop and maintain a prosperous economy" (Amended Response, at para. 57(c)). What does this mean? How would governments responsible for its implementation go about implementing it? Quite apart from the pleadings and other more substantive objections, no guidance was provided as to what standard of prosperity the Lax Kw'alaams sought or the basis on which such a standard would be quantified. The claimed "right" to enough fish to guarantee a "prosperous economy" has very far-reaching implications for fisheries management. A *Sparrow* justification is only required once a s. 35(1) right has been established. It is at the establishment stage that the Lax Kw'alaams' claim presented difficulties which, in my opinion, the trial record did not oblige the trial judge to resolve.

[67] This is not like a treaty case where the court may be obliged to interpret its terms — however vague — because that is what the parties agreed to. Here nothing in this respect has been agreed to. The economic implications of even a "lesser" commercial fishery could be significant,

and the Crown is entitled to proper notice of what “declaration” it was supposed to argue about and to test the evidence directed to that issue.

[68] In summary, the Lax Kw’alaams’ claim to a declaration of an Aboriginal right to a “lesser” commercial fishery was properly rejected, in my opinion.

Trial judge was correct to reject alternative claim to more limited commercial fishery

D. *Did the Trial Judge Err in Failing to Award a Commercial Fishery Licence on the Basis of the Honour of the Crown?*

[69] The Lax Kw’alaams argued that the Crown had an implied obligation to preserve their access to a commercial fishery on a preferential basis as a result of Crown promises, express or implied, made during the reserve allotment process. They contended that the Crown’s express grant of fishing station reserves to the Coast Tsimshian — when interpreted in the light of the historical context and the Crown’s policy, purpose, and representations made during the allotment process — gave rise at least to an implied right to commercial fishing opportunities for the Lax Kw’alaams. The Crown’s purpose behind allotting fishing station reserves, they suggest, was to encourage coastal tribes to rely on the commercial fishery as their primary means of livelihood, as evidenced in an 1875 memorandum written by B.C. Attorney-General George Walkem and the instructions given by Canada to its Reserve Commissioner Peter O’Reilly.

[70] As stated earlier, the trial judge found that no *express* promise had been made of any preferential access to the commercial fishery (paras. 515-18 and 525).

[71] As to *implied* promises, the Lax Kw’alaams cite this Court’s judgment in *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456. In that case the claimant was charged with a series of offences related to harvesting and selling eels. At issue was an eighteenth century peace treaty between the Mi’kmaq and the Crown pursuant to which the former agreed to trade *exclusively* at British truckhouses. In his defence, Mr. Marshall argued that his treaty right exempted him from the *Fisheries Act* regulations. There was no doubt about the existence of the treaty; the issue was one of treaty interpretation. A majority of the Court held that the treaty must be interpreted in a manner that “gives meaning and

substance to the promises made by the Crown” (para. 52). It would be unreasonable to interpret the treaty to confer a trading right while withholding access to the resources it was contemplated would be traded. Accordingly, there was by necessity an implied promise to allow the Mi’kmaq to fish for trading purposes to buy “necessaries” (paras. 59 and 66). The Court was obliged to give meaning to the word “necessaries” which had been agreed to in the 1760-61 treaty negotiations.

[72] Here there is no treaty. The trial judge held there was no promise. The Crown, she found, never intended in the process of allocating reserves to grant the Lax Kw’alaams *preferential* access to the fishery. They were to be treated in the same manner as other fishers. She found that this intention was made clear to the Lax Kw’alaams and that the Crown never made any undertaking by word or conduct to the contrary (paras. 515 and 517). The Lax Kw’alaams’ arguments based on fiduciary duties or the honour of the Crown necessarily fail in the absence of any substratum of relevant facts on which to base them.

Insufficient facts and evidence brought forward at trial to support claims based on the honour of the Crown and fiduciary duty

## VI. Disposition

[73] Large amounts of time and resources were dedicated to a year-long trial to determine the commercial fisheries issue. Notwithstanding the facts that the people of the Coast Tsimshian have deep roots in the coastal fishery of what is now British Columbia, the evidence satisfied the trial judge that they were not a *trading* people, except in the limited area of species-specific eulachon grease. This is not to say the Lax Kw’alaams are without s. 35(1) rights. Their claim to Aboriginal title remains outstanding. In the meantime, as the record shows, they possess an Aboriginal fishing licence to take fish for food and ceremonial purposes.

Appeal dismissed. No general right to a commercial fishery, but record shows a right to fish for food, social and ceremonial purposes

[74] The appeal must be dismissed but, as in the courts below, without costs.

## APPENDIX

Ginaxangiik Tribe

Gitandoah Tribe

Gitwilgiots Tribe

Git'tsiis Tribe

Gitnadoiks Tribe

Gispaxloats Tribe

Gitlan Tribe

Gitzaxlaal Tribe

Gitlutzau Tribe

*Appeal dismissed.*

*Solicitors for the appellants: Ratcliff & Company, North Vancouver.*

*Solicitor for the respondent the Attorney General of Canada: Department of Justice Canada, Vancouver.*

*Solicitor for the respondent Her Majesty The Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.*

*Solicitors for the intervener the Metlakatla Band: Mandell Pinder, Vancouver.*

*Solicitor for the interveners the B.C. Wildlife Federation and the B.C. Seafood Alliance: J. Keith Lowes, Vancouver.*

*Solicitors for the intervener the Gitxaala Nation: Woodward & Company, Victoria.*

*Solicitors for the intervener the Te'Mexw Treaty Association: Janes Freedman Kyle Law Corporation, Victoria.*