Indexed as:
R. v. Haines

Regina
v.
Charles Max Haines et al.

[2003] 1 C.N.L.R. 191

Court File Number: 22340/22576-C Prince Rupert

British Columbia Provincial Court, Point P.C.J.

Swinton J.

October 3, 2002

D. Sahulka and H. Akin, for the Crown.
L. Mandell and R. Mogerman, for the defendant.
H. Seidemann, as he then was, for the defendant.

The defendants were charged with several counts of violating the Fisheries Act, R.S.C. 1985, c. F-14 and Regulations. They are members of the Nisga'a nation and are experienced commercial fishermen, whose families have made their livelihood from fishing for generations. The alleged offences occurred in 1999, shortly after the Regulations were changed to prohibit "dual fishing", i.e. food fishing while commercial fishing for halibut. Food fish are retained for personal or family use, or distributed among Aboriginal people, including elders, living in Prince Rupert.

Held: All but 2 counts were dismissed.

1. On the dates of the alleged offences, the defendants were fishing under both commercial halibut licences and Aboriginal food fish licences simultaneously. The fish in issue were harvested as food fish, in accordance with past practices. Nisga'a fishing traditions include not wasting fish, catching only what is needed, and sharing the catch. Since the prohibition against dual fishing, they have been forced to waste fish considered dead or damaged, because under the provisions of the halibut licence, this fish must be thrown overboard, and under the provisions of the Aboriginal licence, dual fishing is prohibited. From the Nisga'a perspective, to waste fish rather than to use them for food, breaks a very powerful tradition. Furthermore, the prohibition has made it more difficult for the fishers to provide enough halibut and groundfish to their people in Prince Rupert.
2. Oral history evidence, like other evidence, is to be assessed by the court for its relevance and reliability. Despite being based on out-of-court statements, oral

history is not to be excluded as hearsay, both because the oral history tradition is different in Aboriginal cultures than in European cultures, and because the honour of the Crown demands an accommodation of the fact that Aboriginal peoples do not tend to have written histories.

3. The Nisga'a have an Aboriginal right to fish for food, ceremonial and social needs. The Nisga'a fishing traditions of not wasting fish, fishing to need, and sharing the catch to meet community needs are integral to the Nisga'a culture and have continued since contact with Europeans. Thus they are included or incidental to their Aboriginal right to fish for food protected by s. 35 of the Constitution Act, 1982.
4. However the Nisga'a Aboriginal right to fish does not include the right to make inter-tribal agreements or protocols regarding access to territorial lands or waters. The only evidence of inter-tribal agreements was the 1991 Northwest Tribal Treaty. This recent evidence is not enough to ground an Aboriginal right. Evidence of pre-contact treaty making was not presented in this trial. Nor is this practice of inter-tribal treaty making a "stand-alone" Aboriginal right.
5. Two of the charges relate to fishing outside traditional Nisga'a waters, as set out in the Nisga'a food fish licence. Aboriginal rights, practices and customs can be characterized to include co-operative practices between First Nations to share access to resources which are within one another's traditional territories. In addition to formal political relationships concluded by treaty or agreements, kinship relations also bring rights of access to each nation's territorial waters. However, there was no evidence as to where the open sea boundaries of the traditional territories of either the Haida or Nisga'a First Nations were. Also the 1991 Northwest Tribal Treaty does not grant the signatories the right of access on each other's traditional territory, but envisions future agreements regarding access to resources. Also there was no evidence that the Haida Nation ever consented to the defendants fishing within their tribal territory. Nor was actual consent to enter another traditional territory for the purposes of sharing fishing resources by way of family connections proven in this case.
6. The prohibition against dual fishing is an unreasonable infringement of the defendants' Aboriginal right to fish as it prevents them from practising their preferred method of fishing. Furthermore, the infringement imposes an undue hardship on the defendants because it requires them to make separate and costly food fishing trips, the consequence of which is that their elders in Prince Rupert do not receive their food fish. The restriction against dual fishing is also an adverse restriction of their Aboriginal fishing rights because it requires them to waste good fish.
7. As the prohibition against dual fishing infringes Nisga'a fishing rights, the Crown has the onus to justify that infringement. Under R. v. Sparrow, [1990] 3 C.N.L.R. 160 (S.C.C.) in order to demonstrate that an infringement of an Aboriginal right is justified, the Crown must demonstrate, first, that the infringement took place pursuant to a compelling and substantial objective and second, that the infringement is consistent with the Crown's fiduciary obligation to Aboriginal peoples. The justificatory standard places a heavy burden on the Crown. In this case the Crown has not met either branch of the justification test.
8. There was no compelling and substantial objective. It was not necessary to prohibit dual fishing to meet the conservation objectives of the Department of Fisheries and Oceans (DFO). The rules actually resulted in more dead groundfish and less information about the overall fishery. In fact, Nisga'a past

practices provided a better conservation method. DFO's goal to keep things fair as between the non-Aboriginal and Aboriginal fishers was not a compelling and substantial objective, as it ignored the fact that Aboriginal fishing rights are constitutionally protected.

9. DFO did not fully inform itself of Nisga'a fishing practices or their views of the prohibition against dual fishing before it was imposed upon the Nisga'a. The consultation in this case was completely inadequate and failed to fulfill the fiduciary obligation the Crown owes to Aboriginal peoples.
10. In order to justify the infringement, the Crown needs to show that there has been as little infringement as possible in order to effect the desired result. In this case, DFO, by its own admission, overlooked measures that would have been far less of an infringement than a full prohibition against dual fishing. The minimal impairment test has not been met by the Crown.
11. All charges were dismissed except the two counts against the defendant Huber Haldane, who was fishing outside Nisga'a tribal territory as defined in the food fish licence.

* * * * * *

POINT P.C.J.:--

The Charges

1 Information 22340 and Information 22576C were heard together and I have attached as "appendix one" the actual informations for convenience. The defendants, Charles Max Haines, Corwin Max Haines and Ocean Virtue Fishing Ltd., were charged under Information 22340 and Hubert Haldane was charged under Information 22576-C. All of the offences alleged are pursuant to the Fisheries Act, R.S.C. 1985, c. F-14 and Regulations thereunder.

2 Max Haines and his son, Corwin Haines are Nisga'a fishermen who own and operate the vessel "Ocean Virtue", and Hubert Haldane, also a Nisga'a fisherman, operates the vessel "Pacific Challenger". (Hereinafter called "the fishermen".) The alleged offences occurred in the spring and summer of 1999, when the fishermen were fishing halibut. For each day when an offence is alleged, charges have been brought both under section 7 of the Aboriginal Communal Fishing Licences Regulations and section 22 (7) of the Fishery (General) Regulations, alleging breach of conditions of both licences, while carrying on fishing activities.

3 In 1999 the Department of Fisheries and Oceans ("DFO") issued to the fishermen (or assigned to their vessel) and the Nisga'a Tribal Council two licences regulating the fishing in issue. One was a Halibut Licence (the "Halibut Licence"), and the second was an Aboriginal and Communal Fishing Licence for the Nisga'a Tribal Council (the "Aboriginal Licence"). These licences are Exhibits 1 and 2.

Provision 5 of the Halibut Licence states:

> Release of Halibut:
>
> All undersized Halibut and legal size fish caught in excess of the amount authorized to be taken shall be immediately released outboard of roller and returned to the sea with a minimum of injury by:

(1) hook straightening;
(2) cutting the ganglion near the hook; or
(3) carefully removing the hook by twisting it from the Halibut with a gaff.

The Aboriginal Licence contains the following conditions:

> Use of fish
>
> Fish caught under this licence are for food, social and ceremonial purposes. Without prejudice to future agreements or regulations, sale of fish caught under this licence is not permitted. (p. 2)
>
> Other Provisions
>
> Commercial fishing vessels participating in the Fishery must be available for inspection prior to engaging in a commercial fishery. No fish harvested under the authority of this licence may be on board a vessel engaged in commercial fishing operations. A commercial fishing vessel shall not be used to fish under the authority of this licence twenty four (24) hours prior to, during or twelve (12) hours after a commercial opening.
>
> Fish harvested under this licence must be offloaded from a commercial fishing vessel at least six (6) hours prior to participating in a commercial fishery. (p. 3)

The Fishing Facts

4 Max Haines is a director, officer and shareholder of Ocean Virtue Fishing Ltd., which owns the vessel "Ocean Virtue".

5 Max Haines was the skipper of the Ocean Virtue during a fishing trip that ended on May 14th, 1999 and during a fishing trip that ended on June 11th, 1999. Corwin Haines was the skipper of the Ocean Virtue during a fishing trip that ended on July 2nd, 1999. On each of these fishing trips, the accused were engaged in commercial fishing.

6 On May 14th, June 11th, and July 2nd, 1999, the Ocean Virtue landed a quantity of halibut which was not tagged, and a quantity of yelloweye which exceeded the amount which was permitted to be taken under the conditions of the halibut license. On each of these occasions, the skipper of the vessel advised the dockside monitor that the untagged halibut and the excess yelloweye were going to be taken as food fish under the authority of the Aboriginal Licence.

7 The dockside monitor weighed all of the untagged halibut and all of the excess yelloweye. Each time untagged halibut and excess yelloweye were taken as food fish, the dockside monitor filled out an Occurrence Report and notified DFO. Each of the Occurrence Reports documented the weight and type of fish which were taken as food fish.

8 On May 14th, 1999, the Ocean Virtue landed 14,299 lbs. of halibut as commercial catch, which were validated by the dockside monitor. An additional 569 lbs. of halibut were taken as food fish, which were not validated by the dockside monitor.

9 The term "validated" means that the amount of halibut so validated by the monitor is subtracted from the halibut quota for that fishing vessel assigned by DFO.

10 Since a total of 14,299 lbs. of halibut had been validated, the dockside monitor calculated that the Ocean Virtue was permitted to land 858 lbs. of yelloweye. During the offload, the vessel landed a total of 1,020 lbs. of yelloweye, which is 162 lbs. over the 6% allowance. 850 lbs. of yelloweye was landed as commercial catch and was validated by the dockside monitor. The remaining 170 lbs. was landed a food fish and was not validated by the dockside monitor.

11 On the same occasion, the Ocean Virtue also landed 15 lbs. of Canary rockfish and 486 lbs. of ling cod, which were both within the legal limit of species which were permitted to be taken. No Canary rockfish or ling cod was taken as food fish during this landing.

12 The value of the commercial catch form the May 14th, 1999 offload was $36,761.40.

13 After the May 14th offload, the Ocean Virtue had 20,454 lbs. of halibut remaining on its vessel's quota for the year.

14 On June 11th, 1999, the Ocean Virtue offloaded 10,649 lbs. of halibut as commercial fish, and was validated by the dockside monitor. An additional 239 lbs. of halibut was landed by the vessel which was taken as food fish and was not validated by the dock side monitor.

15 Since 10,649 lbs. of halibut had been validated, the dockside monitor calculated that the Ocean Virtue was permitted to land 639 lbs. of yelloweye. During the offload, the vessel landed a total of 1822 lbs. of yelloweye which is 1169 lbs. over the 6% allowance. 613 lbs. of yelloweye was validated as commercial catch and the remaining 1209 lbs. was landed as food fish.

16 The Ocean Virtue also landed 85 lbs. of Canary rockfish and 1013 lbs. of ling cod both of which were validated since these amounts fell within the permissible limits set by DFO for these species of fish.

17 The value of the commercial catch from the June 11th, 1999 offload was $35,393.95.

18 On July 2nd, 1999, 7065 lbs. of halibut was offloaded by the Ocean Virtue and were validated as commercial fish. An additional 156 lbs. of halibut was landed as food fish.

19 Since a total of 7065 lbs. of halibut was landed as commercial fish, the dockside monitor calculated that the Ocean Virtue was permitted to land 424 lbs. of yelloweye. This vessel however offloaded 1559 lbs. of yelloweye which is 1126 lbs. over the allowable 6% of the halibut catch. From there yelloweye catch, 424 lbs. was validated as commercial and the remaining 1135 lbs. was landed as Native food fish.

20 The Ocean Virtue also landed a total of 2162 lbs. of ling cod which was within allowable limits set by DFO for by-catch of this species. The Ocean Virtue however landed, 2078 lbs. as commercial catch and the remaining 84 lbs. as food fish.

21 The value of the July 2nd, 1999 commercial catch was $17,885.90.

22 In 1999 the DFO issued a Class L licence, with conditions attached (the halibut licence) to the vessel "Pacific Challenger". Huber Haldane was, at all material times, the operator of that vessel and it had a halibut quota of 34,753 lbs. for 1999.

23 Between June 21 and June 28th of 1999 and between October 8th, and October 15th, 1999 the Pacific Challenger was engaged in commercial fishing in Area 101-6 which is an area not mentioned in

Hubert Haldane's communal fishing licence.

24 During the second trip in October of 1999 the latitude and longitude were not filled out on the halibut fishing log which was a condition of that vessel's halibut licence.

25 On June 28th, 1999 the Pacific Challenger landed 11,580 lbs. of halibut as commercial catch, which were validated as such by the dockside monitor. An additional 515 lbs. of halibut were taken as food fish.

26 Since 11,580 lbs. of halibut had been validated, the dockside monitor calculated that the Pacific Challenger was permitted to land 1158 lbs. of rockfish. This vessel is allowed to retain as by-catch up to 10% of its total Halibut catch. The vessel eventually landed 1154 lbs. of the rockfish as commercial catch and the remaining 702 as food fish. On the same occasion this vessel also landed 368 lbs. of sablefish as food fish.

27 On October 15th, 1999 the Pacific Challenger landed 4434 lbs. of halibut as commercial catch and an additional 272 lbs. of halibut and 553 lbs. of sablefish as food fish. Since the vessel had landed 4,434 lbs. of halibut, the dockside monitor calculated that it was permitted to land 443 lbs. of rockfish. The Pacific Challenger eventually landed 343 lbs. of rockfish as commercial catch and the remaining 60 lbs. as food fish.

28 The fishermen are all very experienced commercial fishermen whose families have made their livelihood from fishing, spanning generations. Herbert Haldane fished all of his life, as did his father Morris Haldane, who was eighty years old when he testified. Similarly, Max and Corwin Haines fished all of their lives, as did Max's father before him.

29 It has been the practice of the fishermen to food fish while commercial fishing ("dual fishing"); the food fish are retained for personal or family use, or are distributed among Aboriginal people living in Prince Rupert.

30 The Aboriginal community of Prince Rupert is comprised of members of several First Nations, including Nisga'a, Tsimshian and Haida, who are loosely linked through family, cultural or economic ties. There are approximately 2,000 Nisga'a living in Prince Rupert.

31 Some food fish are caught as an inevitable by-catch of halibut fishing. Certain groundfish, such as yelloweye, nearly always die when they are brought to the surface.

32 If such fish are caught dead, the fishermen keep them for food but if they are caught alive, they will be placed in a survival box and later returned to the water.

33 A Halibut is also retained for food if it is too small for commercial sale or if it is damaged, by shark bites or eaten by lice. Although the fish has no commercial value, the flesh of the fish remains every bit as good to eat.

34 Halibut and yelloweye are traditional food harvested by the Nisga'a. Morris Haldane, now 80 years old, testified to fishing since he was 18 years old with his uncles for halibut and groundfish.

35 Sadie Tait, who was 84 years old when she testified, fished halibut with her father as a small girl.

36 The benefit to the Aboriginal community in Prince Rupert from the distribution of food is unquestionable. Elders unable to fish depend on being provided halibut and yelloweye by the fishermen.

37 The practice of the fishermen distributing fish to the Aboriginal community of Prince Rupert is deeply rooted in the Nisga'a traditional practice of sharing their catch with member of their families, friends and elders who cannot otherwise access this type of fishery.

Management of the Halibut Fishery by DFO

38 Stock assessment work for halibut is done by the International Pacific Halibut Commission, which sets totals for all the catches for Canadian and U.S. waters. Once the level is set, DFO issues individual licences to 435 vessels to catch a portion of the overall annual allowable catch (the individual quota system). In recent years the number of active vessels in the fishery has been approximately 285.

39 Each year the halibut fishing season for commercial fishermen runs from March 15 to November 15 and the Aboriginal food fishery is open from April 1 to March 31.

40 DFO issues Halibut Food Fish Licences to 21 First Nations, called the communal licence which authorizes them to fish for halibut to meet their food, social and ceremonial needs.

41 The commercial halibut fishery is regulated according to a management plan which is reflected in the condition of licences issued by DFO. The Halibut management plan for the year 1999 is now exhibit 14 to this trial.

42 When the halibut plan was developed, it was with the understanding that some rockfish would be caught as by-catch. Limits were set by DFO which allowed for the retention of some incidentally caught rockfish (approximately six per cent of the weight of the halibut).

43 Commercial fishermen were directed by a provision in their halibut licence to throw overboard rockfish caught beyond what is permitted by the incidental catch.

44 The individual quota system has 100 per cent dockside monitoring for all halibut and all groundfish landed during a commercial fishing trip.

45 DFO required the fishermen to report their catch to dockside monitors, certified by DFO to monitor the landing of all fish caught. Beginning in 1993. the by-catch from commercial halibut fishing could be in excess of the allowable allocations and could be landed, but would be relinquished to the Crown.

46 Diana Trager, who worked in the groundfish management unit for DFO, testified that this practice reduced wastage. These fish could also be accounted for as food fish, and the dockside monitors would record their weight and numbers in their reporting sheets to DFO.

47 The fishermen retained and incidentally caught rockfish and dumped halibut, and accounted for these food fish with the dockside monitor.

Prohibition of Dual Fishing in 1999

48 Dual fishing was prohibited for the first time in 1999. The prohibition against dual fishing found expression in the Aboriginal Licence (the prohibition).

49 The prohibition was originally recommended by Susan Hahn,[1];) who was at the time the head of enforcement in the ground fishery. The recommendation was made in 1996 or 1997.

Evidence of Susan Haun

50 Ms. Haun, a fisheries officer with 25 years experience, was qualified to give expert opinion evidence, "... as an enforcement officer on what the rules are and why they're implemented from an enforcement perspective in regard to combination fishing of halibut and how that may impact enforcement on other fisheries in other area."

51 Ms Haun explained the current management system called, "Individual Vessel Quota" (IVQ).

52 This is a system of controlling the number of halibut that the [sic] each fishing vessel can catch. Each vessel is assigned a quota of halibut before the fishing season commences.

53 She said that the old system where the DFO would simply open the west coast for a period of time to all fisherman was dangerous. There would be a rush to the fishing grounds and if fishing gear got crossed or caught up it would be abandoned by the fishermen. Also the fishing could be done at anytime and anywhere within the specified areas. This allows fishing to be done in suitable weather conditions and at the times most convenient to the fishermen.

54 The current IVQ system allows each vessel a certain number of halibut that it can catch over an eight month period. This eliminates the annual rush to catch as much halibut as possible which led to over fishing, because the DFO could not control the number of halibut caught.

55 Under the IVQ system the fisherman must hail out prior to leaving for the fishing ground. This process allows the DFO to decide whether or not an on board fish monitor should go with the outgoing vessel. The "on board monitor" keeps records of species and numbers of fish caught. Not every vessel will have an on board monitor, this hailing out allows DFO the discretion to send one or not. The consequence of not having this hail out is to prevent DFO from sending out this monitor with the fisherman.

56 While at sea the fisherman is required to record where fishing takes place, and the species and quantity of fish caught. This information is recorded in a halibut harvest log book. This data is then sent to DFO for analysis and study.

57 Prior to arrival at a dock for offloading the boat's catch, the skipper must once again contact DFO, by way of the "hail in" process. This alerts them to the immanent off load and to ensure that a dock side monitor is sent to the corresponding dock.

58 Each fish caught is counted, weighed and recorded. This data is likewise used to study the fish as a management tool for DFO.

59 Every halibut is tagged. All by-catch is likewise counted, weighed and recorded.

60 She said in her evidence, "One thing about the IVQ ... the fleet themselves want it to work, they want everybody to play by the same rules, because there's one pie, and each has a share of it, and if someone else is stealing from the pie, they lose and they know it".

61 Prior to the 1999 fishing season, she made a recommendation against combination fishing. She testified that prior to making this recommendation she did not make any review of study as to how this might impact the Aboriginal Fishermen.

62 She said that she was aware that on a coast wide bases DFO ear marks 300,000 lbs. of halibut for First Nations food fish requirements, out of the ten to twelve million lbs. of halibut that is usually caught by the fleet.

63 She said that she was aware that there were, "... rigid sets of controls in the conditions of commercial fishing, and I ... I was aware of some the difficulties with obtaining, I guess compliance, if that's the right word with communal fishing license. For example, I was aware that there was very little catch reporting being done, even though it was supposed to be a component, of the communal fishing license."

64 I should note that in the 1999 Management Plan for the halibut fisheries, now exhibit 14, at paragraph 4.2 under sub title Aboriginal it says, "Reporting of Aboriginal harvests of halibut is not complete. The AFS staff are working with the Aboriginal communities to improve the level of catch reporting."

65 She said that the "IVQ system allows the commercial fishermen to maximize their value of their catch and to fish safely and to avoid bad weather. ... They can fish where and when they want."

66 She said that in the "trawl fishery" the DFO has given the fishermen a quota for by-catch of halibut. Once this quota is reached then that fisherman is out for the season. She said that this encourages them to fish nicely. I take this to mean that the fishermen would take steps to avoid over fishing the by-catch by moving to another locality where the possibility of by-catch is reduced.

67 She said that the IVQ has a system whereby the fisherman can carry over to the next year there [sic] total catch figure, in the event that they went over their fish quota.

68 In an, "impact statement" that was made an exhibit 32 to this trial, she expressed concern that combination fishing by the Natives would lead to the demise of the IVQ system because the Natives could initially go food fishing and then turn that trip into a commercial trip, and avoid an initial hail out. This would thwart the DFO plan to get on board observers on Native trips.

69 I quote from her report,

> Strict controls must be applied to the commercial Fishery as it harvests approximately 8 million lbs. per year. However, if both types of fishing were allowed to occur simultaneously the result would be a negation of the commercial harvesting rules and controls scheme on the combined fishing trip. The fisher would dictate which fish were commercial and which were FSC fish. However FSC fishing has unrestricted allowable catches. There is no hail out or hail in requirement, and fish may be landed without catch reporting or observer validation. The only means of separating the two types of fish would be the fisher themselves.

70 In cross examination she was asked, "If you take a boat and you go out on a dual trip, but you must use the commercial rules and apply them to both your aboriginal and your commercial fish, would that meet your concern?"

71 Her answer was "I think it would".

72 She also agreed that if instead of throwing away dead yelloweye or sable fish, the Natives keep them for there [sic] food then that would in fact reduce the total number of these fish taken.

73 I find that DFO implemented the prohibition because of pressure from non-Aboriginal members of the fishing community, in the words of Ms. Hahn, "to keep things fair." Fundamentally, DFO believed that it is harder to enforce strict rules necessary to manage the new quota system if some members of the commercial fleet (Aboriginal fishers) can do things that other members of the commercial fleet cannot

do. Because all halibut that are off loaded could count against a boat's quota, and because overages were now illegal, the concern was that Aboriginal fishermen might gain some advantage or be perceived to gain an advantage from dual fishing that non-Aboriginal fishermen did not have.

74 A hypothetical problem was posed to the witnesses: if every halibut boat had an Aboriginal person on board they could avoid taking overages, because overages and undersize halibut would count as food. There was no evidence that this is a current problem enforcement it was raised as potential problem only.

75 In 1999, the policy of voluntary relinquishment also changed. If a fisherman had overages, he/she would be charged with an offence under the Fisheries Act.

Issue: Were the fishermen intending to conduct dual fishing?

76 I find that on the dates of the alleged offences, the fishermen conducted their fishing under both licences simultaneously. The fish in issue were harvested as food fish, in accordance with past practises.

77 The fishermen testified that they carried with them their Aboriginal licence when they went out fishing on the day in question. Herbert Haldane testified that he knew they would be food fishing as well as commercial fishing at the same time. He described this as "a plan ... already in place when we leave the harbour." Max Haines gave the same evidence. He described the practice before 1999 on halibut trips to fish for food while halibut fishing. He testified: "We always carry a permit [Aboriginal licence] before we go out on halibut; just show the validator that we have it on board." In 1999 Max Haines testified that he did nothing different than in previous years. All the fish caught while halibut fishing were weighed, with the food fish separated and iced, as usual.

78 On July 2, 1999, Corwin Haines, who operated the Ocean Virtue, testified that he went fishing, intending to both fish for halibut commercially and for food, as he had done in previous years.

79 On each separate occasion for which a charge has been laid, the fishermen advised the offloading monitor that the untagged halibut and the excess yelloweye were food fish taken under the authority of the Aboriginal licence. The untagged halibut and the yelloweye on each occasion were weighed by the offload monitor, and recorded and reported to DFO by the offload monitor on an occurrence report, This practice is consistent with previous years before the 1999 fishing season.

The Accused's Fishing Traditions

80 There are fishing traditions among the Nisga'a. These traditions are as follows: not wasting fish, catching only what is needed, and sharing the fish caught.

81 The main question put to the fishermen by defence counsel, was what they were taught about their past fishing traditions.

82 In the following excerpts, Morris Haldane (80-year-old father of accused Hubert Haldane) offers the following testimony regarding traditional lessons learned related to Nisga'a fishing practices:

> Trial (Day 1) - direct evidence in chief by defence counsel, Mr. Seidemann, of Morris Haldane:
>
> Page 60 - Line 10

Q. Now, when you were learning to fish from your uncles what kind of fish were you fishing?
A. Salmon and halibut; groundfish.
Q. Okay. And what kind of - what rules did your uncles teach you were the rules that you had to follow?
A. The rules, we don't throw our fish away.

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Q. So, Mr. Haldane, what principles or traditions you were taught by your uncle to apply when you were engaged in your fishing activities. Can you describe that to us, what they - what you learned you were supposed to be doing?
A. Oh, out fishing?
Q. Yes
A. Oh, we learned, I used my uncle, but no matter where we go when we were young kids, grandfathers, our friends, the chieftains, they'd tell us every day what to do, not only one person. They brought us and show us what not to do, what to do, how to do it ... I learned a lot from all these people that tell me what to do. Most of us learned that way. I learned my fishing from not one person but from everybody from the Nisga'a - and we had some expert fishermans. We're the saltwater people, they call us, not the land people a little different. They do their fishing different. We're the saltwater people. We do our fishing out in the ocean.

Page 63 - Line 12

Q. Can you describe what some of the principles were that you were taught? What were the traditions?
A. Tradition is we learned how to fish halibut. There's so many different ways as the years come we learned the difference ourselves, after they taught us what to do at the beginning. I learned how to jig from them, from the old folks to get our food.
Q. What did you use -
A. The food fishing was very important to us. We don't waste nothing, and we don't throw anything away. That's one of the first thing they tell us, don't waste any - don't throw it away. Halibut, anything that comes from the ocean, the bottom fish, that's what they tell us what not to just throw away. And when we go ... halibut fishing, everybody looks forward to see what we bring, and we share it with them. Share and share alike, no matter who, especially to our elders.

For the last few years, two years since you go - last year since you stop us from bringing it in our phones are ringing off the hook, even right now they're asking when are we going to bring the fish to them. We said we can't. The white men's law stop us. That's what I have to tell my people.

Q. Okay. When you were learning to fish for halibut from your uncles or from the other people, did you catch other things at the same time?
A. Yes.
Q. Besides halibut?
A. Oh yes, we catch ling cod, red snappers.
Q. What would you do with those? ...

A. Oh, bring them home. Before they didn't buy those in earlier years. Very cheap so we bring it home and give it away to our folks, our people. It's just lately when you start buying them, good money for the red snappers and other ling cods; grey cods. We bring those home and give it away.
Q. What you describe as red snapper is that the same as what the Fisheries refer to as the yellow-eye?
A. Yes. We all call it red snapper because they all look the same to me.
Q. When you were growing up if you were fishing halibut and you caught this red snapper would you throw that away?
A. No, no, I would not do that. My grandfather would have shoot me if I do that, waste food like that. Even today we can't throw that, because there's always somebody that needs it right now. Like I said, everybody's been asking us when are we going to go out to get fish.

83 Hubert Haldane offered the following testimony related to traditional lessons learned related to fishing:

> Trial (Day 2) - direct evidence in chief by defence counsel, Mr. Seidemann, of Hubert Haldane
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> Page 2 - Line 36
>
> Q. Who taught you fishing?
> A. I learned how to fish and about fishing from my uncles or grandparents and my father, of course, who taught me how to commercial fish. When I was a little boy I started fishing with my uncles and my grandparents when I was a very little boy
> Q. Okay, and what kind of traditions were you taught about fishing and the fishery resource?
> A. First of all, we were not allowed to play with the fish, that was a big no, no, don't play with the fish.
>
> Page 3 - Line 28
>
> Q. So, if you could continue, what were you taught that you were or were not supposed to do with the fishery resource?
> A. First of all, as I said, we were not allowed to play with the fish and the second was that whatever fish that we got if we were out there food fishing we were taught to share the fish with everyone that we could and that we never wasted anything.
> Q. So, when - now, that's what you were taught. Did you - in your experience with other fishermen are those - with other Nisga'a fishermen, are those rules that were commonly applied?
> A. As far as I know, yes, everyone around me, we all did the same thing, was that we were - first of all, if you went out food fishing that's what you did, you went food fishing, you gave it to the people who needed it, you did not sell it, you just gave it away because you were food fishing, you weren't commercial fishing.

84 Sadie Tait (an 84-year-old elder from the Nisga'a Nation - Kincolith) offered the following evidence related to traditional teachings of the Nisga'a in not wasting fisheries resources:

Trial (Day 2) - direct evidence in chief by defence counsel, Mr. Seidemann, of Sadie Tait:

Page 26 - Line 27

Q. And what traditions were you taught to apply when you were engaged in fishing?
A. Well, right from when I was small they taught us not to waste fish or any animal that we got for our food, we only took what we needed, we never took more and we never wasted and we made sure - we were taught to use the whole fish what we got, the same with animals, and we never - my husband never took anything he didn't need.
Q. And did you - your husband or your father - did they share what they caught or hunted?
A. Oh, yes, yes, my husband in the spring here was a halibut fisherman and in those days what fish that the company didn't buy, he brought it back to the village and shared it with all of the people. Every year he did that, we never wasted anything.

Page 27 - Line 7

Q. Now, in the time that you were living in Kincolith and the time that you were living in Alice Arm, the other Nisga'a that you saw around you, did they waste the fish or the animals that they caught?
A. No, no, in the fall the people used to go up to Alice Arm to get their winter supply of food and we used to get cockles and clams and salmon and deer meat. We preserved all of that, enough for the winter, and we never - we never wasted anything. We used to get bear meat and we would pack everything down to the house and used everything, we even stretched the skins for our mats on our floor. We never sold anything, we just used it up.

85 Sadie Tait offered this additional information related to a Nisga'a oral tradition on not wasting fisheries resources during re-examination by Mr. Seidemann.

Page 29 - Line 14

Q. Okay, How long has it been since you have been out either food fishing or commercial fishing?
A. Oh, that's years and years now.
Q. So, you, yourself, do not know whether the same fishing techniques are being used right now as were being used years ago?
A. I - well, it depends on the fishermen. Our fishermen are Nisga'a fisherman, are - were taught to that their - that there is a story about - about the children playing with fish and about - about the children playing with fish and not - so that's why we were all taught not to waste fish, not to waste anything food, that's - because all of the food was given on earth from heaven above, and so, we are not supposed to waste it.

86 Dorothy Young, a 76-year-old elder from the Nisga'a Nation, provided the following testimony related to the Nisga'a tradition of not wasting fishery resources:

Trial (Day 2) - direct evidence in chief by defence counsel, Mr. Seidemann, of Dorothy Young:

Page 31 - Line 41

Q. Now, when you went - when you were still a child and living with your father or with your parents, can you tell the court what traditions you were instructed in to apply when dealing with the fishery resource, what were you supposed to do with fish and the fishery?
A. On the halibut we get the little baby halibut, fillet those and you make strip, dried strip halibut with it or canned it and the bone part you dried and boiled that up after too when you need it, that's the halibut, and on the salmon we canned the sockeye or spring salmon and we processed them into the jars. In the days I was that young they used quart jars to can the fish for the winter supply.
Q. Did you throw anything away?
A. No, there is nothing wasted on any - on the halibut and on the fish, just the - just the guts part is thrown away, but every bit of it is used by our native people.

87 Max Haines provided the following evidence on Nisga'a oral tradition.

Trial (Day 2) - direct evidence in chief by defence counsel, Mr. Seidemann, of Charles Max Haines:

Page 48 - Line 32

Q. So, who taught you to fish?
A. My uncles and my godfather.
Q. And what did they teach you was the tradition of how you deal with the fishery resource?
A. Tradition of - is never to waste food and generally, you know, just use most of the parts of the fish and they told a story about what happened to the boys that - people that play with fish, so we are not allowed to play with fish and our food either.
Q. What was - what was that story?
A. Well, it's a lengthy story. It's these three boys were out on a trip in a canoe and they caught three fish and then they started burning it, because it was too late to go home. They burned it on a fire and then each time they were just about to take it the frog jumps out and drags the fish away and the second one they did it again and the same thing, another frog came out and dragged the fish away. I missed the story about to begin with, they were teasing the frog, that's where that happened, and then they were playing with this fish. The third fish was dragged away, so they decided to stay, spend the night, but as they were going home they were getting frightened because they heard an old lady crying, so as they were going home along the river each point they would hear a lady saying "What happened to - what did you do with my child? What did you do with my child?" And then not too far the one in the back would drop over and die. So, the third one in the middle there, this next point they hear another voice saying, "What have you done with my child? What have you done with my child?" And then not too far he fell over and died. So when he finally made it to the camp, to the village he told his story and then he died. So the tradition is never to play with animals or play with fish or anything that - it is very taboo in our - our traditions.
Q. You were taught that and you were told that as a story that had been passed down from generations before, is that correct?
A. Yes.

88 Corwin Haines provided the following testimony related to his teachings.

> Trial (Day 3) - direct evidence in chief by defence counsel, Mr. Seidemann, of Corwin Max Haines:
>
> Page 1 - Line 43
>
> Q.Who taught you to fish?
>
> A. My father.
> Q. Anyone else have a hand in that?
> A. Yes, all - lots of elders from - from my village.
> Q. Okay. And what were you personally taught were the traditions and principles you should apply when you were involved in the fishery?
> A. It was not to waste any of our food.
> Q. Were you taught anything about how much food you should take?
> A. Not to - always respect Mother Nature and the resources, and you were never to take more than what we need.

89 Heibert Clifton, a 78-year-old hereditary chief from the Tsimshian Nation, gave the following testimony related to Tsimshian traditional teachings of not wasting fisheries resources.

> Trial (Day 2) - direct evidence in chief by defence counsel, Mr. Seidemann, of Heibert Clifton:
>
> Page 35 - Line 41
>
> Q. Okay. Now as a Tsimshian what traditions were you taught to apply to the use of the fisheries resource?
> A. Well, we were told not to waste fish and about four years ago the Tsimshian Tribal until interviewed quite a few people and they interviewed me about honouring the salmon and we have a book in the tribal council office there and the name is "Honouring the Salmon" and I talked about the commercial fishery, the food fishery where we don't waste any part of the salmon, not the bones, not the head. What they done with the halibut, the backbone they cooked, they dry that, smoke it and then when they cook it in the winter they'd cook it until the backbone is soft, and so, they would chew on the bone, like, they don't chew all of it, they just take the juice out of it and that's. I guess, calcium, why they did that. They didn't know that, but that was why they took that, this was for the bones.
>
> Page 36 - Line 29
>
> Q. How about waste of the fish, what -
> A. No, we don't waste any part of the fish, we boil the head and everything, but we only dress the fish and take out what's the word?
> Q. How about other species of fish, what if you were fishing for salmon and you caught some other species other than salmon, what did you do with that?
> A. Well, we didn't waste any, we'd take every fish that we catched to take home and we smoked it for the winter.
> Q. Now, that's what you were taught.

A. Yeah.

Page 38 - Line 10

Q. Now, when you were food fishing with, well, for either salmon or halibut, do you - everything you catch for food fish, do you keep that for yourself?
A. No.
Q. What is the Tsimshian practice with respect to that?
A. The practice is to share it with people that can't go out to get - catch their food fish, so to my family, and it doesn't have to be just my family, if I know a person that doesn't have a boat, so I give them what - whatever I can give, so we share whatever we catch with everybody, everybody does that, all of the Tsimshians, all of the First Nations people do that.

90 Morris Haldane offered the following testimony regarding the need and use of food fish by Aboriginal people living in Prince Rupert.

Trial (Day 1) - direct evidence in chief by defence counsel, Mr. Seidemann, of Morris Haldane

Page 65 - Line 32

Q. Okay. And are there very many Nisga'as who live in Prince Rupert?
A. Well, there's supposed to be about, what is it, two thousand I think it was in Rupert here, the Nisga'as.
Q. Okay.
A. That's why we're having such a hard time to keep up with the man of what they want with fish, so many of them, and they all want us to give them fish, and we're just two boats. We couldn't keep up, but we do go out. Last year there we couldn't.
Q. And when you say they were asking you for fish, did you sell these fish to them?
A. No. We give it away to the people. My grandfather told me, "Share and share alike. Give the fish to you people. There's a lot of poor people there, lot of elders. They can't go out. They got no boats. They can't do nothing. Give it to them". And I've carried that out ever since that - our learning it. A lot of us learned that. The new generation might be different, but I still follow the old tradition. Give it away.
Q. When you fish commercially do you do - if you were fishing commercially for halibut do you do anything differently than when you fish for halibut for food fish?
A. No, no difference. We saved everything what we can, with the commercial or that - that's the only time I can go - go fishing nowadays with the cost of everything. When we go out halibut fishing, the trips we make we save as much fish as we can to give away. You see, we don't get - sometimes I don't get enough red snappers and if I get an over the quota I still save it. They tell me to throw it away. I will not throw it away, even if you're going to put me in jail. I'll save it for my people. I don't waste food. That's one thing my people taught, and I repeat again, we do not throw anything away. We do not waste. Why should we waste a good food?

91 Hubert Haldane offered the following testimony regarding the need and use of food fish by Aboriginal people living in Prince Rupert, and the method by which this food fish was distributed.

Trial (Day 2) - direct evidence in chief by defence counsel, Mr. Seidemann, of Hubert Haldane

Page 6 - Line 4

Q. Now the fish that you identified as food fish, when you came in to deliver that fish, you delivered this in Prince Rupert, did you?
A. Uh, in Port Edward.
Q. Port Edward, okay. The fish that you identified as food fish, what did you do with that?
A. Oh, after the fish were inspected and looked at and weighed by the Department of Fisheries and Oceans, we showed them we had them, we then gave -- the people who came and requested the fish from us and we gave them to our elders, those who needed it most we gave them first and then we took some home for ourselves, but mostly we gave them all away.
Q. Okay, how did people come to know that you were there and had fish that was available?
A. Sometime - I don't know how that happens, but they know.
Q. They -
A. Yeah, I guess it's phone calls from one relative to another and this happens.
Q. Did you call some of your relatives to say that you were coming in and you had fish?
A. Well, they know we're coming in, I called home and told my wife I'm coming home and that's all it takes is one phone call.
Q. And by the time you got there and delivered there were people who knew you were coming in and were prepared to share the fish, is that correct?
A. Yes, that's correct.

92 Hubert Haldane offered the following evidence related to the quantity of fish distributed from the food fishery, which speaks to the relatively small amount of fish being harvested as food fish (generally).

Page 23 - Line 38

Q. One, you were asked if, Mr. Haldane, if you knew whether the people that you gave the fish to were going to eat it or sell it. How much did you - fish did you give to any individual person?
A. Um, most people, um, fairly - they're aware of other people wanting fish, so they don't ask for a large amount, we give them one or two, most of them - most of the elders ask for two pieces of fish, some of them just want one. The most we would give any given person would be five, because they have a large family we would give them maybe five pieces, but never more than that.

93 Defence witness, elder Sadie Tait, offered the following testimony of her reliance on food fish to be provided to her by Nisga'a fishers.

Trial (Day 2) - direct evidence in chief by defence counsel, Mr. Seidemann, of Sadie Tait

Page 27 - Line 25

Q. Do you have the ability yourself to go food fishing for yourself today?
A. No, no, I'm too old for that now. I have to rely on the younger fishermen, because my

husband is gone, and I really depend on the fish that I get from them. It doesn't matter which - which village they come from, they have their own areas of fishing and hunting and they give it to us, they share it with us and I am thankful for that, because every year Tsimshian people go out fishing with their big boats and Leonard Alexcee, he is the president of our organization, our group of elders, they deliver to all of the people.

94 Hubert Haldane offered the following testimony on why they collect food fish while commercial fishing, and what type of fish they harvest as food fish.

Trial (Day 2) - direct evidence in chief by defence counsel, Mr. Seidemann, of Hubert Haldane

Page 2 - Line 8

Q. Now, when you left - we will deal first with the June trip. When you left to go on that trip what was your intention?
A. Our intention or my intention was to commercial fish, but at the same time whatever we - whatever fish that was not commercial we would keep for our home use.
Q. For food fish?
A. For food fish, yes.
Q. And did you have a food fish licence?
A. Yes, I did.
Q. And what kind of things would you - would you have intended that you would be keeping for food fish?
A. The kind of fish that we like to keep are fish that come up, are not alive, are dead and they are too small, we keep them aboard because they are dead and we keep red snappers, cod, whatever fish that are on the hood and if they are dead we keep them aboard and if they are not we throw them back overboard.

Page 4 - Line 3

Q. Okay. Is it common for Nisga'a to throw away dead fish?
A. No - no, it's a taboo, actually, as far as I was taught.
Q. Now, on the occurrence report for October 15 that was filed as an exhibit it indicates that there were several halibut which were - and the note on this, ... it says there are halibut and it has "small specifically set aside." Can you comment on what was - what about those halibut that had caused them to be specifically set aside?
A. These were small fish that were dead when they came aboard and we set them aside for food fish because they were dead and they were too small to be - well, we felt they were too small to be commercial and they were already dead when we got them aboard, so we kept them.
Q. Now, is there any market, I mean, will the processors buy those fish that are of that size?
A. No, they are not marketable.
Q. Did you have - I'll take that back. How did you determine what halibut you set aside for food fish?
A. First of all how we determined it is if they come aboard dead, then - and if they are too small or they are not of legal size, then we - we keep them aboard, because they are - are dead they are kept aboard, but if they are alive and they are undersized they

go back into the water immediately,

Q. Now you kept - you kept a variety of other fish that are recorded on the occurrence reports as food fish, that is, idiots or sable fish. How did you determine which of those would be kept for food fish?

A. That is determined exactly the same way as all species that come aboard, if they are alive they go back overboard, if they are dead they stay aboard, if they are big enough to eat, such as a sable fish, if they are too small we use them for other purposes, but in most cases sable fish come aboard that we have kept are dead and we don't want to throw them back overboard.

Page 5 - Line 4

Q. Now do you keep for the food fish any of the halibut that are legal size?

A. Yes, we do. If the fish are damaged and we - in some cases are damaged too badly by say, a bite from a shark or badly scratched up from hooks and whatnot and we know that the buyers don't particularly want them and if they do take them they take them for a very low price, so we keep them aside and take them home, because they are dead and they are still a good fish.

95 Corwin Haines provides the following testimony related to why food fish is harvested during a commercial fishing trip, and what type of fish on these trips are harvested for food fish.

Trial (Day 3) - direct evidence in chief by defence counsel, Mr. Seidemann, of Corwin Max Haines

Page 3 - Line 23

Q. How would you determine which fish you would keep for food purposes? A.The fish we'd keep for food purposes would be badly scarred fish, or sometimes the fins would be eaten by the sea lice, it's a small organism that feeds on anything that would die in the ocean, I guess. And you'd get - they'd start along the sides of the fins where they'd get in, so we would just trim that off of there instead of discarding it, and keep it for food. Q.Okay. How about the species other than halibut? A.Cod, yes, we would keep cod for - for food that would be dead, the ones that we'd have to release, and - and yellow-eye have a high mortality when they're released. They would tend to float. The air from the pressure coming up, I guess, and they'd be floating and there was no way that they'd survive. Q.And so you would plan to keep those for food fish? A.Yes.

96 Since the prohibition, the fishermen have been forced to waste fish considered dead or damaged, because under the provisions of the Halibut Licence this fish must be thrown overboard, and under the provisions of the Aboriginal licence, dual fishing is prohibited.

97 From the perspective of the Nisga'a, to waste fish rather than to use this fish for food, conflicts with and breaks a very powerful tradition.

98 The prohibition has made it more difficult for the fishermen to provide enough halibut and groundfish to their people in Prince Rupert,

99 There was an objection by the Crown concerning the evidence offered by defence, The objection was that the witnesses were not experts and could not give evidence as to their fishing traditions. I

determined in the trial that they could tell the court what they were taught directly about their fishing practices. I have been referred to the law on oral evidence of Aboriginal witness and I find that it is useful to refer to this body of law since it was raised as a concern during the trial.

The Law: Oral History Evidence

100 The Supreme Court of Canada described the key principles for how the rules of evidence apply to Aboriginal oral history in Delgamuukw v. British Columbia [[1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193, 66 B.C.L.R. (3d) 285, [1998] 1 C.N.L.R. 14, 220 N.R. 161]. More recently, the Supreme Court of Canada affirmed these principles in Mitchell v. Canada (Minister of National Revenue - M.N.R.), [[2001] 1 S.C.R. 911, 199 D.L.R. (4th) 385, [2001] 3 C.N.L.R. 122, 269 N.R. 207] and described some specific details for applying these principles.

101 In Delgamuukw, the Court repeated its findings from R. v. Van der Peet [[1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289, [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, [1996] 4 C.N.L.R. 177, 109 C.C.C. (3d) 1, 50 C.R. (4th) 1, 200 N.R. 1] that a Court must be sensitive to the special nature of Aboriginal claims and the evidentiary difficulties in preserving Aboriginal rights:

> As I [Lamer C.J.] said in Van der Peet, at para. 68:
>
> In determining whether an Aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive Aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of Aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by Aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.
>
> (Emphasis by Lamer C.J.)
>
> Delgamuukw at para. 80.

102 This approach to oral history evidence is required due to the nature of Aboriginal Rights. They are sui generis, and reconcile the prior occupation of North America by First Nations with the assertion of Crown sovereignty over Canada. For this reconciliation to be effective, courts must take both the perspective of the Aboriginal people into account as well as the perspective of the common law. (Delgamuukw at para. 81.)

> In other words, although the doctrine of Aboriginal rights is a common law doctrine, Aboriginal rights are truly sui generis, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of Aboriginal peoples. However, that accommodation must be done in a manner which does not strain 'the Canadian legal and constitutional structure.' Delgamuukw at para. 82.

103 Oral history evidence is to be placed on an equal footing to other historical evidence, and approached on a case-by-case basis:

> Notwithstanding the challenges created by the use of oral histories as proof of

> historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. Delgamuukw at para. 87.

104 One element of placing oral history 'on a equal footing' is recognizing that oral history can have independent weight, and is not restricted to playing the secondary evidentiary role of confirmatory evidence. (Delgamuukw at para. 98.)

105 Placing oral history evidence on 'equal footing' is a process of balancing: oral history evidence must neither be undervalued, nor is it to be artificially strained, to carry more weight than it can reasonably support. (Mitchell at para. 39.)

106 The Supreme Court of Canada found that oral histories can be admitted for their truth, despite oral history having features which offend the general rule against hearsay:

> Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular Aboriginal nation to the present-day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay. Delgamuukw at para. 86.

107 The Court in Mitchell repeated a caution which had been articulated in Delgamuukw, that the court must resist Eurocentric assumptions about what is a historical fact when assessing the usefulness and reliability of oral history:

> Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of non-Aboriginal perspectives. Thus, Delgamuukw cautions against facilely rejecting oral histories simply because they do not convey 'historical' truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted. Mitchell at para. 34.

108 The Supreme Court described three forms of oral history in Delgamuukw, one of which is the personal recollections of members of a First Nation about family history and land use. The Court found that if oral history evidence is sufficiently precise, it could conclusively establish pre-sovereignty use and occupation by the distant ancestors of the Aboriginal claimants. Where the evidence does not meet this standard of specificity, it is still relevant for demonstrating that current occupation and rights having their origin prior to sovereignty. (Delgamuukw at paras. 100-101.)

109 The Supreme Court of Canada repeated this principle in Mitchell, where the Court stated:

> McKeown J. [the trial judge] correctly observed that indisputable evidence is not required to establish an Aboriginal right. Neither must the claim be established on the basis of direct evidence of pre-contact practices, customs and traditions, which is inevitably scarce. Either requirement would 'preclude in practice any successful claim for the existence' of an Aboriginal right.
>
> Mitchell at para. 52.

110 The Supreme Court in Mitchell also affirmed a flexible approach to oral history evidence, both to

determine admissibility and weight. The Court reiterated that this approach is necessary to give meaning to the rights protected under s. 35(l) of the Constitution, by not imposing an impossible burden of proof on those claiming s. 35(l) protection of rights. (Mitchell at para. 28.)

111 In Delgamuukw, the Supreme Court of Canada focused on describing the essential principles for why oral evidence is properly admissible. In Mitchell, the Supreme Court reiterated what it said in Delgamuukw, and provided specific details to guide courts in the actual practice of receiving, and weighing, oral history evidence:

> The flexible adaptation of traditional rules of evidence to the challenge of doing justice in Aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not 'cast in stone, nor are they enacted in a vacuum' [cite omitted]. Rather, they are animated by broad, flexible principles, applied purposely to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simply ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice. Mitchell at para. 30.

112 Oral history meets the 'usefulness' test if either (1) no other evidence of ancestral practices, or significance, is available, or (2) if the evidence provides the Aboriginal perspective on the right which is being claimed. (Mitchell at para. 32.)

113 The issue of proving reliability is fairly straightforward, and goes to both weight and admissibility:

> The second factor that must be considered in determining the admissibility of evidence in Aboriginal cases is reliability: does the witness represent a reasonably reliable source of the particular people's history? The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness's ability to know and testify to orally transmitted Aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.
>
> Mitchell at para. 33.

114 The Supreme Court of Canada found the trial judge in Mitchell properly applied the tests for determining the admissibility and weight of Grand Chief Mitchell's oral history evidence. The trial judge had found Grand Chief Mitchell's evidence reliable and credible because Grand Chief Mitchell had been trained from an early age in the history of his people. As well, Grand Chief Mitchell's evidence was confirmed by archaeological and historical evidence. As a result, the Supreme Court found the trial judge made no error in relying on Grand Chief Mitchell's oral history evidence over the evidence of the Crown's expert. However, the Supreme Court found the oral history evidence was not on point for the specific right which the claimant was trying to prove, and so could not support the claim. (Mitchell at paras. 35 and 48.)

(para 114a)[2] In summary, oral history evidence, like other evidence, is to be assessed by the court for its relevance and reliability. Despite being based on out-of-court statements, oral history is not to be

excluded as hearsay, both because the oral history tradition in Aboriginal cultures is different than the oral tradition in European cultures, and because the honour of the Crown demands an accommodation of the fact that Aboriginal peoples do not tend to have written histories.

115 The Supreme Court in Mitchell considered the source of an Aboriginal person's knowledge to be a relevant factor in accepting and weighing that person's evidence.

116 Below is a summary of the background of each of the Nisga'a witnesses who testified:

> - Morris Haldane, the father of Hubert Haldane, was 80 years old when be testified. He was born in Kincolith, and a member of the Nisga'a Nation - now residing in Prince Rupert. He has been fishing since he was 16 years old, and learned to fish and Nisga'a fishing traditions from his uncles - all of whom were Nisga'a. (Day 1, pp. 58, 59, 62)
>
> - Hubert Haldane was 59 years old when he testified. One of the fishermen, he was born at Fishery Bay on the Nass River, a member of the Nisga'a Nation. He learned to fish and about Nisga'a fishing traditions from his uncles, grandparents and his father, who began teaching him to fish when he was a little boy. (Day 2, p. 2)
>
> - Sadie Tait was 84 years old when she testified. She is a member of the Nisga'a Nation, born in Kincolith. Her father was an hereditary chief and a fisherman, and as a child she "was with him all the time." She also fished with her husband. She was taught Nisga'a fishing traditions from her father and while fishing with her husband. She brought up her eight children from foods from the land. (Day 2, pp. 25, 26, 28)
>
> - Dorothy Young was 76 years old when she testified. She is a member of the Nisga'a Nation, born in Kincolith. Her father was a fisherman and an hereditary chief, as was her husband. She grew up "on the boat" and learned Nisga'a fishing traditions within her family. (Day 2, pp. 31, 32)
>
> - One of the fishermen, Max Haines, was 66 years old when he testified, is a member of the Nisga'a Nation, born in Kincolith. His father was a fisherman and he has been fishing since he was around 14 years old, having been taught Nisga'a fishing traditions and practices as a small boy from his father, and later from his uncles and godfather. (Day 2, p. 48)
>
> - One of the fishermen, Corwin Haines, was 37 years old when he testified, is the son of Max Haines, a member of the Nisga'a Nation and a fisherman. He was taught Nisga'a fishing traditions from his father and other elders from his village. (Day 3, p. 1)

117 I find that the evidence of the witness as to their fishing traditions is reliable and necessary to the determination of the issues involved in this trial. I find that all of the Nisga'a witnesses were in the best position to provide evidence of the Nisga'a fishing tradition and practices. They were each taught by other Nisga'a fishermen in the usual way of being schooled by their uncles or other knowledgeable fishermen.

The Aboriginal Rights Defence

118 The question for determination is whether the Nisga'a have Aboriginal rights in the fishery,

protected under s. 35 of the Constitution Act, 1982, which are unjustifiably infringed by the prohibition set out in the Aboriginal Licence in the circumstances of this case.

119 More specifically the question is whether or not these fishing traditions as stated above are included or are incidental to their Aboriginal Right to fish for food, social and ceremonial needs, and if so, is the condition of their communal license that prohibits combination fishing, an unjustified infringement of that right?

120 The other proposition put by defence is that these traditions are stand alone Aboriginal rights protected in s. 35, in my view is not supported by the facts of this case. This is a case about fishing, and that right is already in my view established law that the Nisga'a have an Aboriginal right to fish for food, ceremonial and social needs. If this has not been so established I now make that finding.

121 The other question is whether or not this fishing right to fish for food, ceremonial and social purposes also includes the right to fish outside one's traditional territory or whether or not there is a stand alone right to enter another traditional territory with the owner's consent.

122 Aboriginal Rights are recognized under the common law, and became part of the Constitution within the meaning of s. 35(1) of the Constitution Act, 1982. This Section reads:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

123 Section 35(l) had the effect of elevating common law Aboriginal Rights which existed in 1982 to constitutional status, so that Aboriginal Rights could no longer be unilaterally abrogated by the government. However, the Crown retained jurisdiction to limit Aboriginal Rights for justifiable reasons, in the pursuit of substantial and compelling public objectives: Mitchell v. Canada (Minister of National Revenue - M.N.R.), [2001] 1 S.C.R. 911 [199 D.L.R. (4th) 385, [2001] 3 C.N.L.R. 122, 269 N.R. 207] at para. 11.

124 Section 35(1) is discussed in detail in R. v. Sparrow, [1990] 1 S.C.R. 1075 [70 D.L.R. (4th) 385, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, [1990] 3 C.N.L.R. 160, 56 C.C.C. (3d) 263, 111 N.R. 241], where the Supreme Court of Canada described why s. 35 requires Parliament and the provinces to justify any infringements on Aboriginal Rights:

> Section 35(l) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification.
>
> The constitutional recognition afforded by the provisions ... does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. This government is required to bear the burden of justifying any legislation that has some negative effect on any a aboriginal right protected under s. 35(l).

(Sparrow at paras. 64-5 [p. 181 C.N.L.R.], emphasis added.)

125 If there is any doubt or ambiguity as to whether a claim falls within the scope of s. 35(1), the doubt or ambiguity must be resolved in favour of the Aboriginal claimants. (R. v. Van der Peet, [1996] 2 S.C. R. 507 [137 D.L.R. (4th) 289, [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, [1996] 4 C.N.L.R. 177, 109 C.C.C. (3d) 1, 50 C.R. (4th) 1, 200 N.R. 1] at para. 25.)

126 The test for proving an Aboriginal Right was described in Van der Peet as follows:

> ... the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(l): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.
>
> Van der Peet at para. 46.

127 Evidence that a custom was an integral part of a culture at the time of contact will generally be sufficient to prove that the custom was also integral to the culture prior to contact. (R. v. Cote, [1996] 3 S.C.R. 139 [138 D.L.R. (4th) 385, [1996] 4 C.N.L.R. 26, 110 C.C.C. (3d) 122] at para. 177.)

128 In proving that a practice or custom is 'integral' to the claimant's culture, the court is to consider whether the practice or custom is "one of the things that truly made the society what it was." The significance of a practice, custom or tradition to the culture is key to determining whether it is an integral part of the culture. The practice needs to be shown to be 'distinctive', or 'characteristic', but does not need to be unique to that culture. (Van der Peet at paras. 55, 58 and 71.)

129 The Supreme Court has also required that some continuity be established between the integral custom as practised at contact to the present. However, proving 'reasonable continuity,' the claimant does not need to show "an unbroken chain of continuity" between the present and ancestral practice of the right, due to the disruptive impact of European colonization upon First Nation's cultural practices. All that need be shown is a "substantial maintenance of the connection" between the past and the present. (R. v. Delgamuukw, [1997] 3 S.C.R. 1010 [153 D.L.R. (4th) 193, 66 B.C.L.R. (3d) 285, [1998] 1 C.N.L.R. 14, 220 N.R. 161] at para. 153.)

130 The Supreme Court has held on numerous occasions that an Aboriginal or treaty right encompasses the practices necessarily incidental to exercising the right. In some cases, the activity was self-evidently incident, and proof was not required. Such was the case in R. v. Simon, where travelling on a highway with a gun was obviously incidental to hunting in an area close to their reserve. In R. v. Sundown, the Supreme Court articulated the test to prove whether an activity was necessarily indicated [sic] to a treaty hunting right. (R. v. Simon, [1985] 2 S.C.R. 387 [24 D.L.R. (4th) 390, [1986] 1 C.N.L.R. 153, 23 C.C.C. (3d) 238, 71 N.S.R. (2d) 15, 171 A.P.R. 15, 62 N.R. 366]; R. v. Sundown, [1999] 2 C.N.L.R. 289 [[1999] 1 S.C.R. 393, 170 D.L.R. (4th) 385, 132 C.C.C. (3d) 353, 236 N.R. 251], para. 30.)

131 As well, rights are not frozen in their pre-contact form but may find modem expression. (Mitchell at para. 13.)

132 The Supreme Court of Canada has described guidelines to assist courts in characterizing the nature of an asserted right. They are:

> ... (1) the nature of the action which the applicant is claiming was done pursuant to an

aboriginal right; (2) the nature of the governmental legislation or action alleged to infringe the right, i.e. the conflict between the claim and the limitation, and (3) the ancestral traditions and practices relied upon to establish the right.

(Mitchell at para. 15, referring to Van der Peet at para. 53.)

133 The nature of the right must be defined to be sensitive to the Aboriginal perspective of the right, so "it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised." (Sparrow at para. 69 [p. 182 C.N.L.R.].)

134 The nature of a right to fish is defined as more than the mere right to capture fish, as it includes "the actual practices, customs and traditions related to the fishery." (Van der Peet at para. 79.)

135 I find that the right can be characterized as an Aboriginal right to fish for food. Implicit in the right is the right to eat the fish.

136 I find that the accused fishermen have maintained a profound fisheries tradition of respect. This tradition involves practises of not wasting fish, fishing to need, and sharing the fish caught to meet the needs of the Community. These traditions I find are integral to the Nisga'a culture which have continued since contact with Europeans until the present and are thus a part of or necessarily incidental to the Aboriginal right to fish for food embraced within s. 35 of the Canadian Constitution.

137 I cannot conclude however that the Aboriginal Right also includes the right to make inter-tribal agreements or protocols regarding access to one another's territorial lands or waters.

138 The only evidence, other than Dr. Weinstein's, of inter-tribal agreements was the February 11, 1991 Northwest Tribal Treaty which is some evidence of a such a traditional practice, however, in my view this recent evidence is not enough to ground an Aboriginal right.

139 Evidence of pre contact treaty making might have been significant however this was not presented in this trial and accordingly I cannot conclude that this was an aspect of or incidental to the Aboriginal Right to fish for food, ceremonial and social needs.

140 Likewise I cannot conclude that this practice of Inter-tribal treaty making is "a stand alone" Aboriginal right

The Territorial Restriction

141 I find that Mr. Haldane fished outside of the geographic boundaries of the Aboriginal licence, which sets out boundaries for the fishery as follows: Area: Fishing is permitted in the following area:

(a) the mainstream Nass River upstream to the Kinskuch River and
(b) the following portions of Management Area 3: Sub-areas 3-12, 3-13, 3-14, 3-15 and 3-17.

142 The Crown argued that Mr. Haldane fished within the territorial boundaries of the Haida Nation on October 19th 1999.

143 Mr. Haldane had family relations among the Haida. Prior to fishing on the day in question in Haida territory, he contacted his Haida relatives who confirmed their permission for him to fish in Haida territory.

144 Mr. Haldane has been charged with breaching the territorial restriction of the Aboriginal Licence. The defence argues that he was fishing in Haida territorial waters, according to practices and protocols established between the Nisga'a and the Haida Nation.

The Law on Shared Territories

145 Aboriginal rights, practices and customs can be characterized to include co-operative practices between First Nations to share access to resources which are within one another's traditional territories. In R. v. Bartleman, a member of the Tsartlip Indian Band was charged with hunting illegally. The Tsartlip, as a signatory of the North Saanich Treaty of 1852, had a treaty right to continue to hunt as formerly within their traditional territories. The Crown claimed that this treaty right did not assist Mr. Bartleman as he had been caught hunting outside of his people's traditional hunting territory (and within the traditional hunting territory of another band, the Hallalt, who were also signatories to the North Saanich Treaty). (R. v. Bartleman (1984), 55 B.C.L.R. 78 at 80 [12 D.L.R. (4th) 73, [1984] 3 C.N.L.R. 114 at 115, 13 C.C.C. (3d) 488] (C.A.).)

146 The British Columbia Court of Appeal disagreed with the Crown, as it found these Aboriginal peoples had always had the right to hunt in one another's Territory, with permission, and that Mr. Bartleman had received permission from a member of the Hallalt people to hunt within their territory:

> [Mr. Bartleman] ... was hunting for food near Westholme at the invitation of his cousin, Douglas Wayne August. Mr. August is a member of the Hallalt people, Westholme ties ... within the land formerly occupied by the Hallalt people.
>
> Bartleman at pp. 80-81 [B.C.L.R.; pp. 115-116 C.N.L.R.].
>
> In 1852 the economy of the Saanich people was based on hunting and fishing at traditional locations throughout a large geographic area, so as to have access to resources when and where they were in the best supply. It was traditional among the Saanich people to cooperate across tribal and language divisions, sharing access to resources in one another's local territories. Rights to hunt and fish at various locations flowed from family relationships, previous residency and reciprocal inter-tribal or inter-family arrangements.
>
> ...
>
> Hunting by the Saanich people in the area of Westholme has always been, and still is, based on inter-tribal and inter-family relationships with the Hallalt people.
>
> Bartleman at pp. 89, 90 [B.C.L.R.; p. 125 C.N.L.R.].

147 The evidence of Dr. Weinstein has been summarized in the Statement of Facts. He provided examples of agreements the Nisga'a concluded to (govern territorial access in the 19th Century, and concluded that the political protocol (Ex. 25) recently signed inter alia between the Nisga'a and the Haida is a continuation of earlier practises.

148 In addition to formal political relationships concluded by inter-tribal treaty or agreements, kinship relations also bring rights of access to each respective Nation's territorial waters.

149 These agreements are needed to allow flexibility to adapt to changing circumstances. For example, many Haida today live in Prince Rupert, and the fishermen provide them with halibut and

yelloweye for food.

150 Further, because the halibut migrate, and the number of fishing trips is limited by costs, the fishermen must cross the territorial waters of another First Nation to fish halibut during the limited opportunities available to them.

151 Mr. Haldane testified that he had relations among the Haida, and they knew he was coming into Haida territory to fish on the day in question. This is consistent with Nisga'a/Haida protocol and practice regarding access by Nisga'a to Haida territorial waters.

152 Morris Haldane offered the following testimony regarding the shared use of the waters, both from a historical and contemporary perspective amongst Aboriginal communities of the northern coast.

Page 65 - Line 11

A. Then lately you must remember that when we were talking about food fish, we signed an agreement here, in Prince Rupert in civic centre, all nations of the coast, that we can go on anybody's territory. We don't need no permits, not nothing. When I try to ask a permit from the Haidas he said, "You remember what we signed over in Rupert?"

Miles Richardson told me the date of - the Haida Nation, he said, "You don't need it. We already signed that. We go to anybody's territory".

"Thank you" I said, and I fished.

153 I find however that there was no evidence placed before the court as to where the boundaries of the traditional territories of either the Haida or the Nisga'a First Nations as they might relate to the open sea. The Gingolx Village Government Food Fishing Licence does mention Area 3 but does not specify if this is Nisga'a Territory.

154 Also I find that the protocol that was put in evidence as exhibit 25 and apparently signed on February 11, 1991 at the "All Native Tournament", does not in my view grant the signatories the right of access into each other's traditional territory. The wording of the protocol is anticipatory and not in any way final.

155 The Communal License restricts the fishermen to food fishing within Area 3 and it is admitted that some of the fishing was done outside this area and I find that even though the Nisga'a have a right at common law to enter into resource sharing agreements with other First Nations regarding access to fish I cannot conclude that any such agreement has ever been entered into. The evidence of Heibert Clifton was that he was present when the "Northwest Tribal Treaty Group Protocol," now exhibit 25 was signed, although he was not a signatory he said he was involved as an older fisherman in the negotiations leading up to its creation.

156 I would find that the Aboriginal rights defence could not apply in those charges regarding the accused fishing outside their traditional territory for my reasons as stated above, but also because there is no evidence that the Haida First Nation ever consented or agreed that these accused could fish within their tribal territory.

157 Some of the evidence led by defence was to the effect that the fishermen obtained permission from relatives from the Haida First Nation but these people were never produced as witnesses to this case.

158 The evidence of consent by family connection to another tribal territory in my view is a matter of great concern to the various tribes on the North Coast as evidenced by a protocol that envisions future agreements regarding access to resources.

159 Evidence of consent in this case, in my view, must be more than a statement by the accused that he or she obtained consent to enter another's territory.

160 That type of evidence, in my view, is self serving and not reliable and as such the hearsay rule would apply to exclude that evidence notwithstanding the rules on oral evidence as stated above.

161 In other words actual consent to enter another traditional territory for the purposes of sharing fishing resources by way of family connections ought to be proven in the normal way.

162 Proof that the right exists however is a different matter that in my view can be proven by evidence from elders as to their traditions subject to the common law on the reception of oral evidence in Aboriginal rights cases.

163 In my view the Crown counsel has proven beyond a reasonable doubt therefore count 2 of Information 22576C.

164 I have also concluded based on submission of defence and the Crown that the Crown has proven its case beyond a reasonable doubt to count 4 of information 22576C.

Infringement

165 The next question is whether the prohibition against dual fishing infringes the accused's Aboriginal Rights to fish as I have found them to be.

The Law on Infringement

166 The onus is on the fishermen to show there has been a prima facie interference with the Aboriginal right. This test was first described in Sparrow:

> To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(l), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? ... the regulation would be found to be a prima facie interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish, then the first branch of the s. 35(l) analysis would be met.
>
> Sparrow at para. 70 [pp. 182-83 C.N.L.R.].

167 The Supreme Court clarified in R. v. Cote [[1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385, [1996] 4

C.N.L.R. 26, 110 C.C.C. (3d) 122] that the three factors described in Sparrow are intended to provide a guide to courts for identifying infringement:

> ... as I [Lamer C.J.] clarified in Gladstone:
>
> ... The questions asked by the Court in Sparrow do not define the concept of prima facie infringement; they only point to factors which will indicate that such an infringement has taken place
>
> The guiding inquiry at the infringement stage remains whether the regulations at issue represent a prima facie interference with the appellants' aboriginal or treaty rights.
>
> R. v. Cote at para. 75.

168 A finding that because all of these factors are not present, does not preclude a finding that there has been a prima facie infringement of the claimed right.

> The questions asked by the Court in Sparrow do not define the concept of prima facie infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a prima facie infringement has taken place, it will just be one factor for a court to consider in its determination of whether there has been a prima facie infringement.
>
> R. v. Gladstone, [1996] 2 S.C.R. 723 [137 D.L.R. (4th) 648, [1996] 9 W.W.R. 149, 23 B.C.L.R. (3d) 155, [1996] 4 C.N.L.R. 65, 109 C.C.C. (3d) 193, 50 C.R. (4th) 111, 200 N.R. 189] at para. 43.

169 The Supreme Court of Canada defined the term 'undue hardship' as referring to something more than creating a 'mere inconvenience.'

> The second question is whether the regulation imposes an undue hardship. The term 'undue hardship' implies that a situation exists which is something more than mere inconvenience. It follows that a licence which is freely and readily available cannot be considered an undue hardship. The situation might be different, if, for example, the licence could only be obtained at locations many kilometres away from the reserve and accessible only at great inconvenience or expense.
>
> R. v. Nikal [[1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658, [1996] 5 W.W.R. 305, 19 B.C.L.R. (3d) 201, [1996] 3 C.N.L.R. 178, 105 C.C.C. (3d) 481] at para. 100.

170 The British Columbia Court of Appeal has canvassed the meaning of "preferred means", finding it refers to the methods or modes of hunting or fishing which are preferred by the Aboriginal claimant. (Halfway River First Nation v. British Columbia (Minister of Forests), [1999] B.C.C.A. 470 [(1999), 178 D.L.R. (4th) 666, [1999] 9 W.W.R. 645, 64 B.C.L.R. (3d) 206, [1999] 4 C.N.L.R. 1] at para. 141.)

171 The British Columbia Court of Appeal found that a regulation which defined and restricted the methods by which members of a First Nation could fish imposed a prima facie infringement on that First Nation's right to fish according to their preferred method. The First Nation established, through oral history evidence that the method band members used to fish, for several generations, was to cast gill nets, often off of piers. The regulation in question forbid fishing by the use of nets within a certain

harbour, although permits could be obtained to allow fishing by the method of trolling. The fact that a different method for fishing was still available to the band members (trolling), or that they could fish by nets outside of that specific harbour, was not relevant for assessing whether the regulation imposed a prima facie infringement on their right to fish by their preferred method within that harbour. (R. v. Sampson, [1996] 2 C.N.L.R. 184 (B.C.C.A.) at paras. 65-70.)

172 The Supreme Court of Canada considered how the prima facie infringement test applies to a requirement that Aboriginal people hold a fishing licence in R. v. Nikal. (R. v. Nikal, [1996] 1 S.C.R. 1013 [133 D.L.R. (4th) 658, [1996] 5 W.W.R. 305, 19 B.C.L.R. (3d) 201, [1996] 3 C.N.L.R. 178, 105 C.C.C. (3d) 481] at paras. 91-100.)

173 Although the First Nations member in Nikal was charged with fishing without a licence (and not with violating the conditions of a licence), the Court found it had to examine the entire licensing scheme, including all mandatory conditions, to determine whether any of the conditions created an unjustifiable infringement, because if any condition was unconstitutional then the licensing regulation itself would be unconstitutional.

174 In Nikal, the Court had determined that the Aboriginal fishing rights in question were the rights to: determine who within the band would receive the fish, to select the use to which the fish would be put (ceremonial, food), to fish for steelhead, and to choose when to fish. As a consequence, the Court found that the following licence conditions created prima facie infringements on the First Nation's right to fish:

(i) the restriction of fishing to fishing for food only;
(ii) notes 4 and 5 of the licence, which provide:

> 4. Fishing Time Subject to Change by Public Notice
> 5. Indian Food Fishing before July 1 and after September 30th must be licenced by the Provincial Fish and Wildlife Conservation Officer

(iii) the restriction to fishing for the fisher and his family only
(iv) the restriction to fishing for salmon only. Nikal at para. 103.

175 The Court noted that other conditions of the licence may also create infringements, depending upon the nature of the right to fish. One of these conditions prescribed where fishing could take place. The Court did not hear argument on these conditions, and so did not pronounce any conclusions about them. (Nikal at paras. 105 and 107.)

The Evidence

176 Since the prohibition the Nisga'a have been forced to contradict their conservation traditions and throw dead or damaged fish overboard because under the provisions of the Halibut Licence, these fish must be thrown overboard and wasted, and under the Aboriginal Licence they cannot dual fish, and so they cannot eat the fish they catch.

177 In testimony provided by Max Haines, his evidence related to the waste of the fisheries resources that occurs by DFO not allowing food fish to be harvested on a commercial fishing trip as follows:

> Trial (Day 2) - examination in chief by defence counsel Mr. Seidemann of Charles Max Haines

Page 53 - Line 23

Q. Now, in 19 - in 2000, did you change your practice in the year 2000?
A. Yes.
Q. Did you bring any food fish in 2000?
A. No, we're not allowed to.
Q. Okay. So, did you throw small halibut back that were dead?
A. Yes.
Q. Did you throw small halibut back that were dead?
A. Yes.
Q. Did you throw yellow-eye back that were dead? A.We have no choice but to do that.
Q. Now, did you fish, in the year 2000, did you fish any differently than you had fished in 1999?
A. No.
Q. So, do you have any idea how the number of fish that you threw away in the year 2000 would compare to the number of fish you kept for food fish in 1999, would it have been similar, did you throw away a lot less or throw away a lot more or about the same?
A. About the same, but it only just goes as a waste in my mind.

178 It was Dr. Weinstein's opinion that from the perspective of the Nisga'a, the release of dead fish caught as bi-catch when halibut fishing, rather than to use this fish for food, conflicts with and breaks a very powerful law. "It moves people profoundly." (Day 4, pp. 38, 39, 40, 41)

179 In the cross examination of Mr. Haldane, Crown counsel suggested that combining food fishing with commercial fishing would result in over-fishing. Mr. Haldane offered the following testimony countering the Crown's suggestion.

Trial (Day 1) - cross examination by Mr. Sahulka of Morris Hialdane

Page 69 - Line 22

Q. What if you have an scenario where every commercial fishing boat in a halibut fleet -
A. What kind of species of fish you're referring to?
Q. For halibut
A. Oh, the halibut
Q. Yes. So what if you have a scenario where every single halibut boat that is commercial fishing brings a Native fisherman along so they will never have to worry about overages so they can simply give the overages to the Native person as food fish. Do you think that would cause a concern down the road?
A. You mean that will be over fish?
Q. Yes
A. We don't bring enough fish, we can't even get enough fish to eat when we - now. So how can we go over fish. Page 69 - Line 41
Q. ... If every commercial fisherman has a Native person on board and all the overages are taken home as Native food fish, wouldn't that mean that there would be no way to control the overage system?
A. How much are we allowed to take? I'll ask you that question. How much are we allowed? We - we don't - we don't even - we don't even take what we're supposed to have. The sport fishermen has more than we do in the fishermen. They have way

more than, double ours what we supposed to take, and we don't take that much.

Q. Okay.

A. I guarantee you that. We don't take that much fish what we - our guarantee. We couldn't do it because we don't fish right after the halibut, you know, we - our quota finished and we quit.

180 The cost for the fishermen to make a separate trip to fish halibut and yelloweye for food is prohibitive. In cross-examination of Mr. Haldane, he indicated the high costs of running a boat.

Trial (Day 1) - cross examination by Mr. Sahulka of Morris Haldane

Page 68 - Line 30

Q. It's just what we're concerned with today is food fishing while commercial fishing. So we, have a halibut opening that's open for eight months. Isn't it true that there is more than enough time in that eight months to go out commercial fishing and still have time to go food fishing at other times. Isn't that - you would have enough time to do that. Isn't that correct?

A. But we don't do it. It costs us so much money.

Q. So it's a cost factor that prohibits you?

A. Yes

Q. Okay.

A. Just to go the Nass River now it costs you a thousand dollars on the fuel.

181 As a result of the prohibition, Mr. Haldane testified he had not done any food fishing for halibut and yelloweye since these charges.

Page 71 - Line 9

Q. Did you go out and food fish last year?

A. No.

Q. Why not?

A. They wouldn't let us.

Q. Who wouldn't let you?

A. The fish - Department of Fisheries. When I come in from fishing halibut that was it, we put our gear away and never go again.

Q. But DFO is not saying to you that you cannot go food fish, are they?

A. No, they didn't but - but like I said, it costs us so much money to go on a big boat, to go halibut fishing.

182 The Aboriginal community in Prince Rupert has gone without these species for food since the prohibition. Nisga'a elder Sadie Tait provided the following testimony related to the lack of food fish she receives today, compared with years past.

Q. Is it fair to say that there are less fish around today than there were in years past?

A. Oh, that must be why we don't get it any more. We used to get halibut from the halibut fishermen and I didn't know why they weren't giving it any more, I didn't know that they changed the law that they can't bring in the little halibuts that they used to bring in. Now we don't - we don't taste halibut any more. My husband was a good halibut fisherman, he used to share what he couldn't - because other people couldn't get it, he shared it with them, what he had. Now we don't get it, it's not like

that any more.

183 Dr. Weinstein also testified to the high cost implications because DFO has no regulation permitting the fishermen to recover high costs of fishing for food alone.

184 I find that the prohibition against dual fishing is an unreasonable infringement of the accused's Aboriginal right to fish and more specifically it prevents them from practicing their preferred method of fishing which is "combination fishing".

185 I further find that the infringement imposes an undue hardship on the accused because it requires them to make separate and costly food fishing trips the consequence of which is, that their elders who reside in Prince Rupert do not receive their food fish.

186 I find that the restriction against dual fishing is also an adverse restriction of the accused's Aboriginal fishing rights because it requires them throw away halibut during commercial only fishing trips, that could be otherwise used for food fish. The effect of allowing the accused to retain a certain amount of by-catch rockfish would also have the effect of reducing the overall impact on these species of fish. It makes sense not only from the view of Aboriginal fishermen who do not want to waste good fish, but also from the view of conservation to allow the Aboriginal fishermen to retain these fish for their food consumption. The only requirement would be that for combination fishing trips, that all of the IVQ rules would apply to every fish on board the vessel for reporting purposes only.

Justification of Infringement Test

187 Since it has been shown that the Aboriginal License infringes the Nisga'a rights of fishing, the onus falls on the Crown to justify that infringement. The justification test was originally outlined in R. v. Sparrow and was summarized by the Supreme Court of Canada in R. v. Adams [[1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657, [1996] 4 C.N.L.R. 1, 110 C.C.C. (3d) 97, 202 N.R. 89] as follows [at para. 56]:

> Under Sparrow, in order to demonstrate that an infringement of an aboriginal right is justified the Crown must demonstrate, first, that the infringement took place pursuant to a compelling and substantial objective and that, second, the infringement is consistent with the Crown's fiduciary obligation to aboriginal peoples.

188 The justificatory standard places "a heavy burden on the Crown". (Sparrow, supra, at 1119 [S.C.R.; p. 186 C.N.L.R.].)

189 For the following reasons I find that in this case DFO has not met either branch of the justification test.

190 Where a valid legislative objective is found, the infringement must be considered in light of the fiduciary relationship between the Crown and the Nisga'a. Again, the onus is on the Crown to justify the infringement.

191 As was said in Sparrow, supra, at pp. 1114-15 [S.C.R.; p. 184 C.N.L.R.]:

> The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery.

192 Other contexts permit, and may even require, that the fiduciary duty be articulated in other ways (at p. 1119 [S.C.R.; p. 187 C.N.L.R.]):

> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.

Is there a Compelling and Substantial Objective

193 I find that it was not necessary to prohibit dual fishing to meet conservation objectives of DFO. Ms. Hahn testified that other measures could have been taken by DFO. Fisheries could accomplish its goals by allowing dual fishing and ensuring that the same reporting and landing rules applied to count fish caught while halibut fishing for food and ceremonial purposes.

194 The prohibition resulted in less information about the fishery to DFO for management purposes. DFO did not know how many fish were thrown back under the 1999 Halibut Licences. They also did not know very much about the methods or amount of fish taken under the Aboriginal Licences. Nor did DFO know how many yelloweye have been dumped overboard in the commercial fishery to stay within the rules.

195 The information provided to the "validators", reflected in the occurrence report as food fish, is significantly more information than DFO receives from any other source about food fish landings of halibut and yelloweye.

196 The opinion of Dr. Weinstein as to the ineffectiveness of the prohibition from a fisheries management perspective was stated in the following terms:

> Q. ... [A]nd in the context of ... fishing management strategy, could you advise ... in your opinion ... do you know of a fishing or conservation objective which is met by throwing overboard dead fish as opposed to having the aboriginal people eat them?
>
> A. ... [T]his really puzzled me, because if you bring in the yellow-eye, then at least you've got data available on harvest ... and resultant change ... to stock size. If you simply discard yellow-eye at sea, nobody is tallying it, so there's no way ... to tell if there's been a loss of ... three yellow-eye to ... thirty thousand yellow-eye ... I'm really puzzled by seeing that as a reasonable form of conservation, other than trying to prevent people from benefiting in some way from the catch.

197 Logically, the prohibition resulted in an increase in the total number of fish killed by the two fisheries - commercial halibut and Nisga'a food fishery. Because all rockfish die when they are netted, the prohibition against dual fishing caused waste in the fishery. If the rockfish are not thrown back, and are allocated to the food fishery, the total number of fish taken by the food fishery is reduced.

198 Ms. Hahn described this rule, as it applies to yelloweye, as unfortunate - a rule that nobody liked. It has subsequently been changed.

199 On questioning from the Court, Ms. Hahn conceded that she started looking at the combined fishing issue because of pressure from certain members of the fishing community to keep things fair. Fundamentally, it is harder to keep people in line if some members of the commercial fleet (Aboriginal fishers) can do things that other members of the commercial fleet cannot do.

200 In Adams, supra the Court stated that:

> 57 As with limitations of the rights enshrined in the Charter, limits on the aboriginal rights protected by s. 35(l) must be informed by the same purposes which underlie the decision to entrench those rights in the Constitution to be justifiable: Gladstone, supra, at para. 71. Those purposes are the recognition of the prior occupation of North America by aboriginal peoples, and the reconciliation of prior occupation by aboriginal peoples with the assertion of Crown sovereignty: Van der Peet, at 39 para. 39, Gladstone, at para. 72. Measures which are aimed at conservation clearly accord with both these purposes, and can therefore serve to limit aboriginal rights, as occurred in Sparrow.

201 Based on this analysis, the Court concluded that sports fishing was not a compelling and substantive objective for the purposes of s. 35(l). The Court reasoned as follows:

> 58 I have some difficulty in accepting, in the circumstances of this case, that the enhancement of sports fishing per se is a compelling and substantial objective for the purposes of s. 35(l). While sports fishing is an important economic activity in some parts of the country, in this instance, there is no evidence that the sports fishing that this scheme sought to promote had a meaningful economic dimension to it. On its own, without this sort of evidence, the enhancement of sports fishing accords with neither of the purposes underlying the protection of aboriginal rights, and cannot justify the infringement of those rights. It is not aimed at the recognition of distinct aboriginal cultures. Nor is it aimed at the reconciliation of aboriginal societies with the rest of Canadian society, since sports fishing, without evidence of a meaningful economic dimension, is not "of such overwhelming importance to Canadian society as a whole" (Gladstone, at para. 74) to warrant the limitation of aboriginal rights.

202 Theoretically, the purpose of the commercial throw back rule is to create an incentive to reduce by-catch. Yet Ms. Hahn admitted that the combination of these two rules created an unfortunate short term plan that actually resulted in more dead groundfish and less information in the overall fishery.

203 Ms. Haun also testified that by setting by-catch limits in the trawl fishery DFO has successfully limited the prospect of damage to the protected species of fish impacted. She said that once the fisher got their limit of the by-catch then their vessel was out of the water. This created an incentive for them, "to fish nice".

204 This same conservation method could be utilized to control by-catch of yelloweye and snapper for Aboriginal fishermen without requiring them to throw back their catch.

205 In fact, the fishermen's past practices provided a better conservation method than the prohibition combined with the throwback provision. They were fishing responsibly, recording their commercial and Aboriginal fishing accurately, and following all of the applicable rules.

206 They were also fulfilling a vital role in the Nisga'a and broader Aboriginal community by bringing food fish to those who could not otherwise participate in the groundfish food and ceremonial fishery. DFO, unaware of these practices, set out to fix a problem that did not exist and in the course of doing so created a set of new problems.

207 I find that DFO's goals were to protect the integrity of the IVQ system by ensuring that the Aboriginal fishing took place at a different time. Combined fishing according to DFO would result in the possibility of no catch statistics for commercially caught halibut and would result in over fishing the protected rock fishery which is impacted incidentally by the halibut fishery. These goals are not in my

view compelling and substantial because DFO could allow dual fishing but make the IVQ rules applicable which would result in more information about Aboriginal food fishing impacts on the halibut and other species.

208 Finally I find that DFO wanted to keep things fair as between the non-Aboriginal fishermen and the Aboriginal fishermen.

209 I find that this goal is not a compelling and substantial objective. By their very definition, Aboriginal fishing rights create a special class of fisher. Furthermore, the special status of Aboriginal fishers will, by definition, create differences between Aboriginal fishers and non-Aboriginal fishermen. It is likely that many non-Aboriginal fishers will not like these differences. It cannot be right for DFO to rely on the discontent of non-Aboriginal fishers as a purpose for diminishing the rights of Aboriginal fishermen.

Consultation by DFO

210 In Sparrow, the Court stated that one of the questions to be asked was [p. 187 C.N.L.R.]:

> ... whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.
>
> ... The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

211 In R. v. Jack, the Court of Appeal explained the content of consultation in the context of a fishing case. The Court stated that:

> We consider that there was a duty on the DFO to ensure that the Indian Band was provided with full information on the conservation measures and their effect on the Indians and other user groups. DFO had a duty to fully inform itself of the fishing practices of the aboriginal group and their views of the conservation measures.
>
> R. v. Jack, [1995] B.C.J. No. 2632 [[1996] 2 C.N.L.R. 113], at para 77.

212 Prior to making the recommendation, Ms. Hahn did not know about or study the impacts of the prohibition on the Aboriginal fishery in general or the Nisga'a fishing in particular. It was not until late 1999 that she proposed to study, or review, any such impacts but that study was never completed.

213 The only consultation with the Nisga'a with respect to the prohibition on dual fishing which was placed in the Aboriginal Licence in 1999/2000 was a draft Aboriginal Licence sent to the Nisga'a Tribal Council with the changes from the year before highlighted. Comments were invited on that draft. The cover letter stated that the template for the Aboriginal Licence had been changed, but there was no indication that there had been substantive changes.

214 Ms. Antilla's evidence illustrates the confusing way the prohibition was worded in the Aboriginal Licence. While the prohibition against dual fishing made sense in the salmon fishery where openings are short, it made no sense in the halibut fishery where the opening is eight months. She herself did not think the prohibition in the Aboriginal Licence applied to the halibut fishery and testified that if she had understood it applied to the halibut fishery she would have specifically pointed that out to the Nisga'a and she did not do so. She had no idea that there was a change reflected in the Aboriginal licence to the

Nisga'a halibut and groundfish fishing practises arising from the prohibition - it did not cross her mind.

215 I find that DFO did not fully inform itself of the fishing practices of the Nisga'a or their views of the prohibition before it was imposed upon them. The consultation in this case was completely inadequate and failed to fulfill the fiduciary obligation required to justify the infringement on Nisga'a rights.

216 The combined fishing prohibition was originally recommended by Ms. Hahn who was, at the time, the head of enforcement in the ground fishery. The recommendation was made in 1996 or 1997.

217 It was not until late 1999 that she proposed to study, or review, the impacts of combined fishing and, in fact, that study was not completed because Ms. Hahn moved to a new job.

218 Ms. Hahn did not know about the impact that the prohibition would have on the Nisga'a fishery. She was focusing on the impact on the commercial fishery. She also did not consider what the combined impact of the prohibition and the rule requiring by-catch to be thrown back might have on the Nisga'a and their traditional fishing practices.

219 Prior to making her recommendation, Ms. Hahn was not aware of the practices of the Nisga'a halibut fisherman in Prince Rupert.

220 Ms. Hahn also admitted that there has not been a lot of attention directed at combination fishing and that there is a need to do this. There was little or no attention directed to it prior to the 1999 licensing year which still needs to be done. She also admitted that there is definitely scope for discussions on how the prohibition might affect first nations, but those discussions had not been done by the 1999 licensing year and still have not been done.

221 Ms. Antilla also gave evidence for the Crown about consultation. The only alleged consultation with respect to the prohibition is that the 1999/2000 license was sent to the Nisga'a Tribal Council with the changes from the year before highlighted by underlining. Comments were invited on that draft. The cover letter stated that the template had been changed. It made no indication that there had been substantive changes and did not point out the impact of what the changes might have on Nisga'a rights.

222 Although the Nisga'a rejected the license as they had done in previous years. They did engage in consultations about issues that arose under the license that related to the salmon fishery.

223 To restate, the prohibition in the license provided that:

> Commercial fishing vessels participating in the Fishery must be available for inspection prior to engaging in a commercial fishery. No fish harvested under the authority of this licence may be on board a vessel engaged in commercial fishing operations, A commercial fishing vessel shall not be used to fish under the authority of this licence twenty four (24) hours prior to, during or twelve (12) hours after a commercial opening.

224 Ms. Antilla testified that, while the prohibition made sense in the salmon fishery where openings are short, it made almost no sense in the halibut fishery where the opening is eight months. She herself did not think it applied to the halibut fishery. She stated that if she had thought it applied to the halibut fishery she would have specifically pointed that out to the Nisga'a and she did not do so. She agreed that she had no idea that there was an infringement on the Aboriginal halibut and groundfish fishery that arose out of the prohibition - it did not cross her mind.

225 The Salmon fishery had been the thrust of the consultations that did occur and the Nisga'a agreed to a prohibition on combined fishing in the salmon fishery.

226 DFO led no evidence that anyone had informed themselves of Nisga'a fishing traditions or practices. Further, Ms. Antilla admitted that she did not know what the practices of the Defendants were.

227 In essence, there is no evidence that DFO did any meaningful consultation with respect to the prohibition or the by-catch rule in the ground fishery.

228 Dr. Weinstein was of the opinion that DFO's consultation was inadequate. He described the standard for meaningful consultation in the following way:

> ... extensive consultation with aboriginal members in the community, to understand what kind of potential impacts or effects that kind of regulation, or any kind of regulation, would have on the aboriginal fishery. There's a ... realm of organization that any kind of aboriginal food system relies on, and sometimes measures of government have direct effect on that, and the most notable example that I'm aware of in commercial fishery is the effects of the Davis plan that I just described ... taking that as an example, if, for example, DFO ... discussed those measures and the potential effects with the aboriginal communities, and listened to the specific organizational needs, and values needs, and rights needs of the food fishery at that time, they might have avoided those kind of implications ... First Nations' voices speak about the nitty-gritty of their needs in terms of managing the fishery. So, unless you pay primary attention to the needs of that sector of the fishery, and consult extensively with ears that are open to the needs of that style of fishing, and that's not a commercial, it's not an industrial style of fishing, you can cause very significant impacts.
>
> Day 4, pp. 45, 46

229 I find that the fishermen, who testified either did not know about the prohibition or, like Ms. Antilla, thought the prohibition applied just to the salmon fishery.

The Minimal Impairment Test

230 The Court in Sparrow noted that in order to justify an infringement, the Crown needs to show that:

> ... there has been as little infringement as possible in order to effect the desired result

231 In this case, DFO, by its own admission, overlooked measures that were far less of an infringement than a full prohibition. There were reasonable methods of regulating combined fishing available in 1999 that were not contemplated and were not used. Ms. Hahn admitted in cross-examination that it was not necessary to prohibit combined fishing. Fisheries could accomplish its goals by allowing combined fishing and ensuring that rules equivalent to the rules presently applied to commercial fishing were also applied to food and ceremonial fishing.

232 I find that the minimal impairment test set out above has not been met by DFO.

233 I find that there was no compelling or substantial objective and the infringement is not consistent with the Crown's fiduciary obligation to the Nisga'a because it did not infringe Nisga'a rights as little as

possible and did not arise in a situation where meaningful consultation occurred.

234 I find that the accused has successfully raised an Aboriginal rights defense in this case. That since I have found that the accused were combination fishing and that the prohibition against it, is an unjustified infringement of their Aboriginal right to fish for food, by this method, then I make the following dispositions regarding the charges before this court.

Conclusion

235 Having found that the accused were fishing both under their communal license and their halibut license I find that the Crown can not succeed on counts that are clearly alternative charges.

236 Count one, two, three, four, five, six, seven, eight and nine of information 22340 are all dismissed.

237 Count one is dismissed since I have found that the Aboriginal Rights defense applies.

238 Count two is dismissed for the same reason as count one.

239 Count three is dismissed, because since Charles Max Haines was fishing pursuant to his communal license which in my view did not require that halibut be tagged.

240 Count four is dismissed, the overage of yelloweye was retained by Charles Max Haines as food fish pursuant to his communal license.

241 Count five is dismissed for the same reason as count four.

242 Count six is dismissed, for the same reason as count three.

243 Count seven is dismissed for the same reasons as count one.

244 Count eight is dismissed for the same reason as count five since Corwin Max Haines could retain the yelloweye as food fish pursuant to his communal license.

245 Count nine is dismissed since Corwin Max Haines could retain the untagged halibut pursuant to his communal license.

246 As for information, 22576C, count one, three, five, and six are dismissed.

247 Count one is dismissed because I have found that Aboriginal Rights defense has succeeded.

248 Count three is dismissed since the accused, Hubert Haldane is allowed to retain these fish pursuant to his communal license.

249 Count five is dismissed for the same reasons as count one.

250 Count six is dismissed for the same reasons as count three.

251 For the reasons stated above the accused Huber Haldane is guilty of count two and count four on information 22576C.

All charges dismissed except two counts against defendant Huber Haldane, who was fishing outside Nisga'a tribal territory.

* * * * *

Appendix One

Information/dénonciation

Canada: Province of British Columbia province de la Colombie-Britannque

This is the information of / Les présentes constituent la dénonciation de [Trevor Ruelle], a Fishery Officer of Fisheries and Oceans Canada, [Prince Rupert], British Columbia (the "informant "/ le "dénonciateur")

The informant says that he has reasonable and probable grounds to believe and does believe that / Le dénonciateur declare qu'il a des motifs raisonnables et probables de croire et croit effectivement que

Charles Max Haines

Count 1 On or about the 14th day of May 1999, at or near Prince Rupert, in the Province of British Columbia, Canadian Fisheries Waters, did unlawfully fail to comply with the terms of and conditions of a licence, to wit; harvesting fish under the authority of an Aboriginal Communal Fishing Licence while engaging in commercial fishing operations, contrary to S. 7 of the Aboriginal Communal Fishing Licences Regulations

and did thereby commit an offence in contravention of S. 78 of The Fisheries Act of Canada

Count 2 On or about the 11th day of June 1999, at or near Prince Rupert, in the Province of British Columbia, Canadian Fisheries Waters, did unlawfully fail to comply with the terms of and conditions of a licence, to wit; harvesting fish under the authority of an Aboriginal Communal Fishing Licence while engaging in commercial fishing operations, contrary to S. 7 of the Aboriginal Communal Fishing Licences Regulations,

and did thereby commit an offence in contravention of S. 78 of The Fisheries Act of Canada

Charles Max Haines & Ocean Virture Fishing Ltd.

Count 3 On or about the 14th day of May 1999, at or near Prince Rupert, in the Province of British Columbia, Canadian Fisheries Waters, while carrying out an activity under authority of a licence, did unlawfully fail to comply with the terms of said licence, to wit; not tagging all Halibut caught, contrary to Section 22(7) of the Fishery (General) Regulations,

and did thereby commit an offence in contravention of S. 78 of The Fisheries Act of Canada

Count 4 On or about the 14th day of May 1999, at or near Prince Rupert, in the Province of British Columbia, Canadian Fisheries Waters, while carrying out an activity under authority of a licence, did unlawfully fail to comply with the terms of said licence, to wit; exceeding the allowable quantity of yelloweye, contrary to Section 22(7) of the Fishery (General) Regulations,

and did thereby commit an offence in contravention of S. 78 of The Fisheries Act of Canada

Count 5 On or about the 11th day of June 1999, at or near Prince Rupert, in the Province of British Columbia, Canadian Fisheries Waters, while carrying out an activity under authority of a licence, did unlawfully fail to comply with the terms of said licence, to wit; exceeding the allowable quantity of yelloweye, contrary to Section 22(7) of the Fishery (General) Regulations,

and did thereby commit an offence in contravention of S. 78 of The Fisheries Act of Canada

Count 6 On or about the 11th day of June 1999, at or near Prince Rupert, in the Province of British Columbia, Canadian Fisheries Waters, while carrying out an activity under authority of a licence, did unlawfully fail to comply with the terms of said licence, to wit; not tagging all Halibut caught, contrary to section 22(7) of the Fishery (General) Regulations,

and did thereby commit an offence in contravention of S. 78 of The Fisheries Act of Canada

Corwin Max Haines

Count 7 On or about the 2nd day of July 1999, at or near Prince Rupert, in the Province of British Columbia, Canadian Fisheries Waters, did unlawfully fail to comply with the terms of and conditions of a licence, to wit; harvesting fish under the authority of an Aboriginal Communal Fishing Licence while engaging in commercial fishing operations, contrary to S. 7 of the Aboriginal Communal Fishing Licences Regulations

and did thereby commit an offence in contravention of S. 78 of The Fisheries Act of Canada

Corwin Max Haines & Ocean Virtue Fishing Ltd.

Count 8 On or about the 2nd day of July 1999, at or near Prince Rupert, in the Province of British Columbia, Canadian Fisheries Waters, while carrying out an activity under authority of a licence, did unlawfully fail to comply with the terms of said licence, to wit; exceeding the allowable quantity of yelloweye, contrary to section 22(7) of the Fishery (General) Regulations,

and did thereby commit an offence in contravention of S. 78 of The Fisheries Act of Canada

Count 9 On or about the 2nd day of July 1999, at or near Prince Rupert, in the

Province of British Columbia, Canadian Fisheries Waters, while carrying out an activity under authority of a licence, did unlawfully fail to comply with the terms of said licence, to wit; not tagging all Halibut caught, contrary to section 22(7) of the Fishery (General) Regulations,

and did thereby commit an offence in contravention of S. 78 of The Fisheries Act of Canada

[Signatures not reproduced]

Information/dénonciation

Canada: Province of British Columbia
province de la Colombie-Britannque

This is the information of / Les présentes constituent la dénonciation de [Blair Thexton], a Fishery Officer of Fisheries and Oceans Canada, [Prince Rupert], British Columbia (the "informant"/le "dénonciateur")

The informant says that he has reasonable and probable grounds to believe and does believe that / Le dénonciateur declare qu'il a des motifs raisonnables et probables de croire et croit effectivement que

Hubert Walter Haldane

Count 1 Between on or about the 21st day of June 1999, and the 28th day of June, 1999, in sub-area 101-16, at or near the North end of the Queen Charlotte Islands, in Canadian Fisheries Waters, Province of British Columbia, while carrying out an activity under authority of a licence, did unlawfully fail to comply with the terms of said licence, to wit: retain Aboriginal Food Fish while engaged in commercial fishing, contrary to Section 22(7) of the Fishery (General) Regulations,

and did thereby commit an offence in contravention of Section 78 of the Fisheries Act of Canada

Count 2 Between on or about the 21st day of June 1999, and the 28th day of June, 1999, in sub-area 101-16, at or near the North end of the Queen Charlotte Islands, in Canadian Fisheries Waters, Province of British Columbia, while carrying out an activity under authority of a licence, did unlawfully fail to comply with the terms of said licence, to wit: fish in an area in which he is not permitted to fish, contrary to Section 22(7) of the Fishery (General) Regulations,

and did thereby commit an offence in contravention of Section 78 of the Fisheries Act of Canada

Count 3 Between on or about the 21st day of June 1999, and the 28th day of June, 1999, in sub-area 101-16, at or near the North end of the Queen Charlotte Islands, in Canadian Fisheries Waters, Province of British Columbia, did unlawfully fail to return fish incidentally caught to the place from which it was taken, contrary to Section 33(2)(a) of the Fishery (General) Regulations,

and did thereby commit an offence in contravention of Section 78 of the Fisheries Act of Canada

Count 4 Between on or about the 8th day of October 1999, and the 15th day of October, 1999, at or near sub-area 3-14, in Canadian Fisheries Waters, Province of British Columbia, while carrying out an activity under authority of a licence, did unlawfully fail to comply with the terms of said licence, to wit: fail to record all areas fished, contrary to Section 22(7) of the Fishery (General) Regulations,

and did thereby commit an offence in contravention of Section 78 of the Fisheries Act of Canada

Count 5 Between on or about the 8th day of October 1999, and the 15th day of October, 1999, at or near sub-area 3-14, in Canadian Fisheries Waters, Province of British Columbia, while carrying out an activity under authority of a licence, did unlawfully fail to comply with the terms of said licence, to wit: retain Aboriginal Food Fish while engaged in commercial fishing, contrary to Section 22(7) of the Fishery (General) Regulations,

and did thereby commit an offence in contravention of Section 78 of the Fisheries Act of Canada

Count 6 Between on or about the 8th day of October 1999, and the 15th day of October, 1999, at or near sub-area 3-14, in Canadian Fisheries Waters, Province of British Columbia, did unlawfully fail to return fish incidentally caught to the place from which it was taken, contrary to Section 22(7) of the Fishery (General) Regulations,

and did thereby commit an offence in contravention of Section 78 of the Fisheries Act of Canada

[Signatures not reproduced]

cp/d/qlklc

1 Editor's Note: The name "Hahn" also appears as "Haun" in this judgment.

2 Editor's Note: This paragraph is numbered "114a" as it was not numbered by the Court.