

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Citation: ***Lax Kw'alaams Indian Band v. Canada (Attorney General)***,  
2008 BCSC 447

Date: 20080416  
Docket: L023106  
Registry: Vancouver

Between:

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

Plaintiffs

And

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

Defendants

Before: The Honourable Madam Justice Satanove

**Reasons for Judgment**

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Date and Place of Trial:

November 20 – 24; 27 – 30,  
December 1; 4 – 8; 11 – 15, 2006.  
January 8 – 12; 15 – 19; 23 – 26,  
February 2; 5 – 9; 12 – 16; 19 – 23,  
March 12 – 16; 19 – 23; 26 – 30,  
April 2 – 5; 16 – 20; 23 – 27; 30,  
May 1 – 4; 14 – 18; 28 – 31,  
June 1; 4 – 7; 11 – 15; 18 – 22;  
25 – 27,  
August 9 – 10,  
September 24; 25; 27 – 28,  
October 1 – 5; 9; 11; 12 & 15, 2007.  
Vancouver, B.C.

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## I. INTRODUCTION

### A. OUTLINE OF CLAIM

[1] The plaintiff Lax Kw'alaams is an Indian Band whose name means "place of small wild roses". It is comprised of approximately three thousand members. Most members reside on the Lax Kw'alaams Indian Reserve located approximately 30 km North of Prince Rupert.

[2] They are known colloquially as a “fishing people” and claim to have descended from nine Tsimshian tribes (the “Coast Tsimshian”) who long before contact with any European soul, occupied territories and fishing sites in or near the coastal area of Northwest British Columbia, along and between the Lower Skeena and Nass Rivers, and on the inlets and islands between their estuaries, and extending to the North end of Grenville Channel (the “Claimed Territories”).

[3] They also claim to have utilized the fruits of the seas and rivers in their Claimed Territories for food, social, ceremonial and commercial purposes long before the white man came, and would have continued to do so to the present day but for the unjustifiable interference of the Government of Canada as represented by the defendant.

[4] The plaintiffs claim that their right to fish on a commercial scale is an integral part of their distinctive culture, and ask this court to declare it as such. They say that the *Fisheries Act*, R.S.C. 1985, c. F-14 and the *Fisheries Act*, R.S.B.C. 1996, c. 149 and ancillary legislation infringes on this aboriginal right and breaches the protection granted to aboriginal rights under s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982 c. 11, reprinted R.S.C. 1985, App. II, No. 44. They also say that the defendant has breached its unique duty to the plaintiffs based on fiduciary principles and the honour of the Crown.

[5] The defendant Canada vehemently denies that the Lax Kw'alaams have any aboriginal right to fish commercially. It maintains that before the arrival of the Europeans, any trading in fish other than eulachon by the Coast Tsimshian was low volume, personal, opportunistic, irregular, for food, social and ceremonial purposes and incidental to kinship relations, potlatches and ranked Coast Tsimshian society. In the alternative, it denies any infringements of the plaintiffs' aboriginal rights, or says that such infringements are justified for valid and compelling legislative objectives and consistent with the fiduciary duty of the defendant.

[6] Thus, an aboriginal rights suit is born.

[7] Counsel on both sides have meticulously and conscientiously advanced their clients' positions throughout this year long trial. It must be recognized that aboriginal cases are unusual in that they find their genesis in a time before written historical records, continue through hundreds of years of recorded history, and rely on the views of scholars, authors and critics to collate and interpret (and sometimes speculate!) on what took place in a time that pre-existed the memory of any living being today. It must also be recognized that no matter how unusual the subject matter, or how politically sensitive some of these issues are, aboriginal cases are law suits and must be treated as such. That means the party who has the burden of proof on an issue must establish on the evidence that what they assert is more probable than not. As with any court proceeding, a decision in a civil suit cannot be decided on sympathy or emotional feelings of any sort.

[8] At the end of the day, the parties have chosen to bring their claim to a court of law, not to a political forum, and they are entitled to receive an impartial adjudication that resolves their dispute by the application of the laws of Canada to the facts as I find them from the evidence before me.

[9] Having said that, I am cognizant of the admonition of Madam Justice McLachlin in *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 that the rules of evidence must be applied flexibly in these cases, in a manner commensurate with the inherent difficulties posed by such claims, and the promise of reconciliation embodied in Section 35(1) of the *Constitution Act, 1982*.

## B. GENERAL LEGAL PRINCIPLES

[10] Fortunately for trial judges, the Supreme Court of Canada has set down helpful guidelines to provide a framework within which to decide the complex and sometimes esoteric issues that arise in aboriginal cases. These guidelines have evolved over the last decades and no doubt will continue to be refined as different aboriginal cases make their way through the legal system. At present, the significant guiding principles can be summarized as follows:

1. In 1982, Section 35(1) of the *Constitution Act* was passed to recognize and affirm the existing aboriginal and treaty rights of the aboriginal peoples of Canada.
2. The doctrine of aboriginal rights exists, and is recognized and affirmed, because when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land and participating in distinctive cultures as they had done for centuries. Therefore, a declaration of substantive rights must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, 23 B.C.L.R. (3d) 1).
3. “Existing”, as the term is used in Section 35(1) of the *Constitution Act*, means rights that were in existence when the *Act* came into effect. It also means unextinguished. It suggests that those rights are affirmed in a contemporary form rather than in their primeval simplicity and vigour (*R. v. Sparrow*, [1990] 1 S.C.R. 1075, 46 B.C.L.R. (2d) 1). The evolution of practices, customs and traditions into modern forms will not prevent their protection as aboriginal rights, provided that continuity with pre-contact practices, customs and traditions is demonstrated (*R. v. Van der Peet*). Although the nature of the practice must be considered in the context of a pre-contact distinctive culture, the nature of the right must be determined in light of present day circumstances (*R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686).
4. The time relevant for identification of aboriginal rights is the period prior to the arrival of the Europeans (*R. v. Sparrow*; *R. v. Van der Peet*; *R. v. Gladstone*, [1996] 2 S.C.R. 723, 23 B.C.L.R. (3d) 155; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 66 B.C.L.R. (3d) 285). If the pre-contact activity was an integral part of the aboriginal community's culture prior to contact with the Europeans, the fact that it continued after the arrival of the Europeans and adapted in response to their arrival is not relevant. On the other hand, where the practice, custom or tradition arose solely as a response of European influences then it will not meet the standard for recognition of an aboriginal right (*R. v. Van der Peet*).
5. There are three basic steps to assessing a claim to an aboriginal right:
  1. Identify the nature of the right being claimed. In this step, the court should consider:
    - (a) the nature of the action which the claimant says was done pursuant to an aboriginal right;
    - (b) the nature of the governmental regulation, statute or action being impugned; and
    - (c) the practice, custom or tradition being relied upon to establish the right.

The right claimed must be characterized in context and not distorted to fit the desired result. It must be neither artificially broadened nor narrowed. An overly narrow characterization risks the dismissal of valid claims and an overly broad characterization risks distorting the right by neglecting the specific culture and history of the claimants society (*R. v. Pamajewon*, [1996] 2 S.C.R. 821, 27 O.R. (3d) 95).

2. Establish the aboriginal right protected under Section 35(1) by proving:
  - (a) the existence of the ancestral practice, custom or tradition (i.e. the activity advanced as supporting the claimed right);
  - (b) that the activity was integral to the pre-contact society (i.e. that it was marked as distinctive); and
  - (c) reasonable continuity between the pre-contact practice and the contemporary claim.

(*Mitchell v. M.N.R.*; *R. v. Van der Peet*)

3. Establish the effect of the legislation on the proven, existing aboriginal right:
  - (a) if the legislation imposes unreasonable limits, or undue hardship, or denies the holders of the right their preferred means of exercising that right, then the legislation represents a *prima facie* infringement under Section 35(1). The onus of proving *prima facie* infringement is on the holder of the right.
  - (b) if a *prima facie* interference is found, the onus shifts to the government to establish that the legislation is justified. Factors to consider on justification include:
    - i) the legislative objective. Is it compelling and substantial, not just reasonable? (*R. v. Sparrow*, *R. v. Côté*, [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385).

- ii) the extent of the infringement. Does the infringement unduly restrict the aboriginal right, or has there been as little infringement as possible to effect the desired result? (*R. v. Sparrow, R. v. Côté*).
  - iii) the honour of the Crown. Is the special trust relationship and responsibility of the government *vis a vis* the aboriginals preserved? (*R. v. Sparrow, R. v. Côté*).
  - iv) consultation. Has there been a reasonable effort to inform and consult with respect to the implementation of legislative measures? (*R. v. Nikal*, [1996] 1 SCR 1013, 19 B.C.L.R. (3d) 201).
  - v) expropriation. Is there compensation available? (*R. v. Sparrow*).
6. In order to be an aboriginal right protected by Section 35(1) of the *Constitution Act*, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.
  7. "Integral to the distinctive culture" means:
    - (a) a central and significant part of a society's distinctive culture, one of the things that made this society truly what it was (*R. v. Van der Peet*);
    - (b) "distinctive" does not mean "distinct". The use of the word distinctive as a qualifier is meant to incorporate an element of aboriginal specificity (*R. v. Sappier*);
    - (c) "culture" means the pre-contact way of life of a particular aboriginal community including their means of survival, socialization methods, legal systems and potentially their trading habits (*R. v. Sappier*).

In other words, the court must identify a practice that helps to define the distinctive way of life of this particular aboriginal group as an aboriginal community.
  8. Aboriginal rights are not generally universal. Their scope and content must be defined on a case by case basis. The words "distinctive culture" refer to the aboriginal specificities sought to be captured. A court must focus on:
    - (a) the specific practices, customs and trades of the particular aboriginal group claiming the right (*R. v. Van der Peet*); and
    - (b) the specific sites of these activities and recognize that a right to perform a site specific activity does not become an abstract right exercisable anywhere; it continues to be a right to exercise an activity on the tract of land in question (*R. v. Adams*, [1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657; *R. v. Côté; Mitchell v. M.N.R. and R. v. Powley* 2003 SCC 43, [2003] 2 S.C.R. 207).
  9. In determining whether a claimant has produced evidence sufficient to demonstrate that the activity is integral to a distinctive aboriginal culture, a court should:
    - (a) 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 when there were no written records of the activities engaged in (*R. v. Van der Peet*);
    - (b) note that evidence of an activity that was part of a distinctive culture at contact will generally be sufficient to demonstrate that prior to contact the activity was also significant to that particular culture (*R. v. Côté*);
    - (c) admit evidence of post-contact activities to prove continuity with pre-contact practices, customs and traditions (*Mitchell v. M.N.R.*);
    - (d) accommodate, where appropriate, the admission of oral histories, but not imbue them with more weight than they can reasonably support (*Delgamuukw v. British Columbia*);
    - (e) be prepared to draw necessary inferences about the existence and integrity of a practice when direct evidence is not available; and
    - (f) be flexible when engaging in the *R. v. Van der Peet* analysis because the object is to provide cultural security and continuity for the particular aboriginal society. Flexibility is also important with regard to the relevant time frame being the period prior to contact with Europeans.
  10. The court must take into account the perspective of the aboriginal claimants; however, that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure (*R. v. Van der Peet*).
  11. The Crown has a fiduciary duty to aboriginals with the result that in dealings between the Government and aboriginals the honour of the Crown is at stake. Section 35(1) must be given a generous and liberal interpretation (*R. v. Van der Peet*).

[11] The above guidelines are relatively general and apply to most aboriginal cases. As I deal with the specific aspects and issues of the case before me, I will have resource to further, more detailed principles of law. In the meantime before characterizing the plaintiffs' aboriginal right, or analyzing the evidence to determine if they have established that right, and whether it has been *prima facie* unjustifiably infringed by the defendant, I wish to review in more detail the kind of evidence with which I was provided and analyze its strengths and weaknesses.

## II. TYPES OF EVIDENCE

[12] The types of evidence adduced in this case runs the ambit from expert to lay witnesses, historical to modern documents, and primary to secondary to tertiary sources. The disciplines of archaeology, anthropology, ethnography, sociology, economics and biology all make their appearance, some more extensively than others.

[13] I have chosen to describe in the present tense all written works by expert witnesses, or the written sources on which they rely, because it is my view that these scholarly works, like case law and legislation, may have been written in the past but still speak to us currently. In order to differentiate between an expert witness' testimony and his or her report, I have chosen to describe the testimony in the past tense as something that took place during the trial and is now completed.

### A. PRIMARY, SECONDARY AND TERTIARY SOURCES

[14] There is no doubt that the best evidence of historical facts is the most immediate evidence. Artefacts that existed, or the observations of a person who was present, at the relevant time and place provide direct evidence of what happened. Depending on how much time has passed since the historical event, such evidence can be oral, written or demonstrative and is considered primary evidence. Secondary evidence usually consists of oral or written hearsay, composed by a person who collects or comments on the original information provided by the primary source. Tertiary sources consist of works where the author uses primary sources to provide factual data about the past that may be incomplete or selective, together with secondary sources to provide interpretations of the factual data, such as the theses and other scholarly works with which I was provided.

[15] Examples of primary evidence in the context of this case are artefacts and impressions from archaeological sites, ships' logs, journals and charts of fur traders, and later accounts of missionaries. There is no actual primary oral evidence available to me because no eye witnesses to the events of the 18th and 19th centuries are still alive; however, the oral traditions of the Coast Tsimshian people that have been collected by various ethnographers from informants who lived in the 19th and early 20th centuries are a valuable source of information. The secondary literature that contains collections and discussions of these oral traditions also provide valuable insight, as do some of the theses and scholarly works that would be considered tertiary sources.

[16] Each of these forms of evidence has its strengths and weaknesses, as do the academic disciplines seeking to interpret them. For the purposes of this lawsuit, I have taken into account these strengths and weaknesses in determining the weight to be given to the sources, and consequently the weight of the expert opinions that have relied upon them.

## B. ARCHAEOLOGY

[17] In some ways archaeology may seem to be the most concrete form of evidence available to speak of prehistoric times. Extracting tangible objects from archaeological survey sites can produce information about many aspects of the society that occupied the lands from which the objects are uncovered. For example, the plaintiffs submit that the discovery of exotic materials in their Claimed Territories leads to an inference of trade. Archaeology alone, however, will not tell us how or when exotic material arrived at a site, only that it was transported from one place to another. To interpret their findings, archaeologists must rely on the ethnographic record and other data.

[18] Furthermore, archaeology is limited by the durability of the object in question. Organic, faunal material is not usually preserved in a manner that allows it to survive through long passages of time, although shell casings and fish bone remnants have been recovered from areas of interest in this case.

[19] Therefore, archaeological evidence is useful, but too limited to support conclusions on its own.

## C. HISTORICAL DOCUMENTS

[20] By definition, no historical documents exist prior to European contact with the oral culture of aboriginal societies. The maritime fur traders' records and those of the Hudson Bay Company ("HBC") are probably the most contemporaneous with European contact; these records contain observations of activity between indigenous peoples at the time of contact. Evidence of such activity may reasonably support an inference that similar activity took place pre-contact.

[21] The plaintiffs criticize the maritime and HBC trade journals because they argue that the writers did not pay sufficient attention to the indigenous economy. The plaintiffs' expert anthropologist, Dr. Margaret Anderson, testified that the trading vessels were only in the territory of the plaintiffs in the summer and the traders only recorded their own transactions with the aboriginals. This is Dr. Anderson's explanation for why there is no mention in the journals of aboriginal groups trading amongst themselves for the years 1787 to 1831. Of course, another possible explanation is that no such trading took place within the observation of the fur traders.

[22] The defendant's expert anthropologist, Dr. Joan Lovisek, agreed that the maritime reports did not distinguish between aboriginal groups, but she maintained that they focused on the material aspects of the aboriginal culture which included fishing and trading. She was of the opinion that if inter-aboriginal trading had been taking place, the maritime fur trade reports would have noted it.

[23] I accept that the maritime and HBC records are limited by the geographical areas within which the traders explored, and by the extent of the aboriginal activities to which they were privy; however, I find the reports clearly set out where the reporter is directly observing something and where he is only speculating. Those observations carry weight and should be accepted as direct evidence of what was being recorded.

[24] The plaintiffs submit that the lack of observation of certain activities cannot be taken as conclusive proof that they did not occur, only that they were not observed. I agree, but I must also consider Dr. Lovisek's comment that the maritime fur traders, and especially the HBC traders, were in the area for a commercial purpose. They recorded in detail each business transaction they had with the "natives" and their focus was on the goods and materials for which the aboriginals were eager to trade furs. As will be seen, the fur traders in an effort to cut out the middle men, began to trade indigenous as well as European goods to the aboriginals. I cannot accept that they would not be impressed by the existence of indigenous trade and record it, although they may not have been afforded much opportunity to observe it.

## D. ETHNOGRAPHY

[25] Ethnography is an attempt to describe a culture on the basis of data collected from the memories of informants about an earlier time. Most ethnographers, and particularly the ones discussed below, use "salvage ethnography", which relies on "memory culture", that is, the memories of elders to provide information, post-contact, about the past. The information derives from memory, and thus the actual activity or event is rarely observed by either the informant or the ethnographer.

[26] Ethnographers speak to an "ethnographic present" as representing an aboriginal time in the past. Unfortunately, such data contains little time depth, and can be misleading.

[27] Archaeologists David Archer, Paul Prince and Bruce Trigger, all caution generally against using the "ethnographic present" to reconstruct past cultures.

[28] The reason for the concern is that most ethnographic data was collected in the twentieth century without sufficient distinction or allowance made for European influences on the cultures. Ethnographers did not consult historical documents to measure time depth, nor did they compare their data against archaeological evidence that would have highlighted discrepancies.

Ethnographers working on the Northwest Coast have not generally sufficiently appreciated the fact that, for the most part, their informants were not recounting facts about an unchanging "traditional" past. Rather they were mixing information about more than one time period from an era of very rapid cultural change. Insufficient historical controls make such ethnographic data a shaky base for generalization. (Leland Donald, "The Slave Trade on the North West Coast of North America" (1984) 6 Research in Economic Anthropology 121 at 126).

As will be seen, this temporal conflation is largely responsible for some divergent opinions amongst the experts, both in this case and within the scholarly community.

## E. ORAL HISTORIES

[29] Much of the ethnographic data for the study of the Coast Tsimshian culture is in the form of Tsimshian oral histories or transcriptions of interviews with Tsimshian elders recorded by a select group of ethnographers. Although these oral histories are referred to by the plaintiffs' experts as "adaawx", true adaawx are more than just oral histories.

[30] Dr. Anderson explains in her report that an adaawx is an epic recounting of a family's quest for its own territories, acquisition of land, and defence of it. These histories are safeguarded by each of the matrilineal House Groups (see section V. A. 1. Houses and House Groups) and are recounted in abbreviated form at feasts. A much longer and more complex version is taught to members of the House Group who are in line for important roles. The longer versions include details of territories and resources and the knowledge that is needed to care for them, and information on relationships between House Groups, privileges, crests and names belonging to the family.

[31] The important feature of a true adaawx is that the public recounting of it is a statement of rights that is affirmed by witnesses. Dr. Anderson states:

When told at a feast, the guests acknowledge the right of the hosts to their adaawx and their claims made at the feast, rather than the literary merit or literal factuality of all events recounted in an adaawx.

[32] The plaintiffs' expert archaeologist, Dr. George MacDonald, testified that adaawx actually means "true witnessed histories" in Tsimshian, with the emphasis on the word "witnessed". He said they were transferred from one generation to the other in a ceremonial, ritual occasion where the attending witnesses were essentially paid for their duty through the distribution of potlatch goods. He likened it to our form of court.

[33] Dr. Anderson testified that it is acceptable to vary the style of an adaawx, and embellish it with mythical material. There are a large number of versions of the same histories with minor differences; however, she insisted that the story of how the House Group acquired its rights and territories and passed them down the generations remains firm at the core. She stated that a naive reading of English translations of a few adaawx may be virtually useless, whereas patient analysis of the entire body of adaawx allows a reader to recognize intrusive mythic episodes.

[34] Dr. Anderson also pointed out that it is important to realize that the adaawx are not focused on economic activities or trade, but such

information is frequently included in narratives incidental to accounts of the acquisition of a privilege, or territory, or a migration to a new area.

[35] The difficulty is that true *adaawx* are not widely known in communities now and there are few occasions on which they are publicly recounted. Dr. Anderson advised that very few Tsimshian are able to recount their *adaawx*. This sad loss has been exacerbated by the loss of language, the influence of missionaries, teachers and government regulations and the suppression of the feast system. None of the members of the plaintiffs' Band who testified before me was able to recount any true *adaawx*.

[36] Other forms of oral history are the *malsk* (folktales that drift from tribe to tribe), hero myths (myths of origin of a clan, crest or chief), stories of war, battles or migrations and remembrances of individuals (life histories as opposed to oral traditions). These other forms of oral history do not have the same safeguards of accuracy because they are not recounted in a formal ceremony with witnesses who contradict or confirm the accuracy of the recitation.

[37] It is also important to note that the directions of the Supreme Court of Canada to trial judges on how to treat oral histories in the context of aboriginal cases usually pertain to true *adaawx*, or at least to testimonies of declarations made by a now deceased member of a Band as to land use and traditions.

[38] In *Delgamuukw v. British Columbia*, the court finds that the importance of the *adaawx* was underlined by the fact that they were repeated at important feasts where dissenters had the opportunity to object if they questioned any detail and in this way helped to ensure authenticity.

[39] In *Mitchell v. M.N.R.* the court says that oral histories (both *adaawx* and declarations of deceased persons) are admissible as evidence if they are both useful and reliable. Such oral histories may meet the test of usefulness by firstly, offering evidence of ancestral activities and their significance that would not be otherwise available, and secondly, by providing the aboriginal perspective on the right claimed. 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 the non-aboriginal perspectives. They should not be rejected simply because they do not convey historical truth, or contain elements that may be classified as mythology, or lack precise detail, or embody material tangential to the judicial process, or are confined to the community whose history is being recounted.

[40] Once such oral history evidence has adhered to the admissibility threshold, however, it is imperative that the laws of evidence operate to ensure that the aboriginal perspective is given due weight by the courts, but not interpreted or weighed in a manner that fundamentally contravenes the principles of the laws of evidence. Evidence adduced in support of an aboriginal claim can run the ambit of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing due weight on the aboriginal perspective, or ensuring that its supporting evidence is on equal footing with more familiar forms of evidence, emphasizes the words "equal" and "due". While the evidence presented by aboriginal claimants should not be undervalued simply because that evidence does not conform precisely to the evidentiary standards that would be applied in a private law case, neither should it be tasked to carry more weight than it can reasonably support (*R. v. Van der Peet; Mitchell v. M.N.R.; R. v. Sappier*).

[41] Therefore, the rules of evidence must be adapted to accommodate oral histories, but the admissibility and weight of such evidence must be determined on a case-by-case basis. I agree with the list of factors that the defendant submits may affect the admissibility and weight to be given to oral history evidence:

- a) the date and context in which the data was collected including the instructions under which the fieldworker was operating;
- b) the identity of the informants, their age, tribal affiliation and connection to the Aboriginal culture;
- c) whether a narrative is an *adaawx*, and, if so, whether or not it was recorded within the context of a feast;
- d) whether the information that is to be relied upon is part of the "core" of the narrative;
- e) the source and nature of the data upon which any conclusions are based from ethnographic summaries prepared by ethnographers; and
- f) a comparison of alternative versions of oral narratives historical or archaeological data.

[42] The oral history evidence in the case before me was adduced by way of ethnographic collections. It did not arise from recounting at a feast but rather through an interview by an ethnographer, or individual trained by an ethnographer to gather information on the ethnographic present. Dr. Anderson admitted that she did not know anyone from the plaintiffs' band with whom she would be confident in receiving a true *adaawx*. She maintained that the continuity of the *adaawx* has been "ruined" by Canadian laws over the years (referring to the banning of feasts where these were recounted) and thus we have to rely on oral histories preserved by the ethnographers. Dr. Anderson agreed with anthropologist James McDonald who states that "Oral histories have a way of changing over time, especially when they are important and not subject to the scrutiny of public recitation provided by the context of the feast". (James A. McDonald, "An Historic Event in the Political Economy of the Tsimshian: Information on the Ownership of the Zimacord District" (1983) 57 B.C. Studies 24 at 37).

[43] Dr. Anderson seemed critical about the interpretation of some ethnographers although she didn't agree that external verifiability by archaeologists or geographers was necessary. She was aware of instances where evidence obtained by these latter two disciplines contradicted the oral narratives, and she admitted that it could be useful to try and corroborate the Tsimshian narratives by comparing them to historical or archaeological material. She agreed that stories are often converted from true *adaawx* into *malsk*. They are also subject to the bias of the informants. She didn't accept all of the elements in the oral histories as factual, and conceded instances of conscious stretching, unconscious drift and amalgamation of stories.

[44] Dr. Anderson agreed with Jonathan Dean's comment that "...chronologies of past events are difficult to re-construct from a dynamic oral tradition" and Robert Galois' concept of "temporal compression" that becomes apparent when different versions are compared. (Jonathan R. Dean, *Rich Men, Big Powers and Wastelands – the Tlingit – Tsimshian Border of the Northern Pacific Littoral, 1779 – 1867*, PhD Thesis, University of Chicago, 1993 at 146 – 147; Robert Galois, ed., *Introduction: A voyage to the North West side of America: The Journals of James Colnett, 1786 – 89*, (Vancouver: UBC Press, 2004)).

[45] Other Tsimshian experts besides Dr. Anderson have criticized the oral histories of the Coast Tsimshian. Wilson Duff, an anthropologist and curator at the B.C. Provincial Museum (now called the Royal B.C. Museum) known for his extensive research of the Tsimshian and Haida, pointed out these failings in the oral histories he reviewed:

- a) Chiefs' names, places and locales changed over time.
- b) House Groups borrowed each other's histories.
- c) Imperfections of memory arise after generations.
- d) Traditions were consciously counterfeited.
- e) The *adaawx* of higher rank and larger potlatches have survived over smaller, less important ones (i.e. the ones that survived belonged to the most prestigious, richest Houses).

[46] Andrew Martindale, archaeologist, writes that the accuracy of oral histories increases if one finds multiple versions of the same story written from different perspectives, especially if the informant does not have a personal stake in the outcome. He also said that one is on firmer ground if one sticks to the events of the past rather than the intentions of cultural meanings to be derived from the narratives (Andrew R.C. Martindale, *The River of Mist: Cultural Change in the Tsimshian Past* (PhD Thesis, University of Toronto, 1999) at page 360).

[47] Even the plaintiffs submit that although the oral histories are a rich source of information, significant gaps exist because certain aspects were not pursued by the ethnographers.

[48] Most of the oral histories pertaining to the Coast Tsimshian culture were recorded by Frans Boas, Henry Tate, Marius Barbeau, William Beynon, and Viola Garfield. The methodology and results of each of these ethnographers has borne scholarly criticism over the years.

## 1. Boas

[49] Frans Boas was born in Victoria in 1886. In the late 19th century he performed field work in the Nass and Skeena River areas. He never personally conducted any fieldwork in Fort Simpson and thus Marius Barbeau, another ethnographer, characterizes his work as “secondary evidence”. Barbeau is of the view that the aboriginal myths and tales were usually common to tribes scattered over vast and not necessarily homogeneous culture areas. A description of a local custom or belief based upon such data is likely to be inadequate, or in some cases incorrect.

[50] In cross-examination, Dr. Anderson admitted that one has to read Boas with a critical eye. His work depends heavily on myths and must be used with caution because it is not a reliable source of the information on the pre-contact behaviour of the Coast Tsimshian. She writes in her book *The Tsimshian: Images of the Past, Views for the Present* (Vancouver: UBC Press, 1984) at page 54 that “Boas, obviously, does not concern himself with the every-day life of people who were a part of cash economy, even though the very people he interviews were workers...” The 19th century must be sorted out and reconstructed not as a stage, or as a series of stages, but as a complex and continuous process of change, in order to understand the interplay between the new economic possibilities and changing social life of the Coast Tsimshian, both in the 19th and the 20th centuries.

## 2. Tate

[51] Henry Tate, a Tsimshian from Fort Simpson, was hired by Boas to conduct interviews from 1903 – 1914. Tate did not record the information verbatim but wrote it down later. There is a concern amongst ethnographers that he likely forgets or slightly alters things, or supplies information from his own notions. He adds interpolations, including details on the cultural perspective. He eliminates what he thinks is inappropriate to expose to the European culture. Finally, he has read and may have been influenced by Boas’ published collections of the Kwakiutl and Nishka traditions.

[52] Barbeau in his article “Review of Boas’ Tsimshian Mythology” (1917) 19 *American Anthropologist* no. 4, pages 548 – 563, based on Henry Tate’s records, illustrates the weaknesses of ethnography and in particular, the weaknesses of Tate. Barbeau acknowledges that the material is of high quality both in form and content. If Tate was not guided by scientific methods, his shortcomings were more than compensated by his life long familiarity with the environment of his subject; however, Tate was not in the habit of taking down the stories under dictation. He didn’t like to divulge that he was recording them at all. Although he appears to have given a literal translation, he is liable to have forgotten or slightly altered many items or even supplied some out of his own stock. Barbeau notes that his information as to the identity of crests spoken of in myths differs from one or two that Barbeau records with expert informants. He says at page 562 that “Tate’s views are not altogether acceptable and, as they are supposedly part of a traditional text, they are decidedly misleading”.

## 3. Barbeau

[53] Barbeau focuses mostly on the Coast Tsimshian myths between 1915 and 1957. He worked with William Beynon from 1916 to 1957. Not all the narratives that were collected by him were true *adaawx* and some related to the other Tsimshian Groups. William Duff criticizes Barbeau for proposing a number of theories and conclusions that were not supportable. For example, Barbeau suggests that the culture of Northwest Coast tribes was predominantly a result of recent importations from Asia and responses to European contact. Duff believes that the culture was partly an indigenous aboriginal accomplishment and partly imported from American aboriginal society.

## 4. Beynon

[54] William Beynon was a Coast Tsimshian raised in Victoria by his Nishka grandmother. He married into a Coast Tsimshian tribe at Lax Kw’alaams and moved to Fort Simpson in 1913. He worked for Boas, Barbeau, and Garfield. His Columbia manuscripts were a valuable oral history resource, but unfortunately they were lost for over 40 years and didn’t resurface until the mid 1980’s. They are literal translations of 256 narratives from 75 informants who came mostly from Kitkatla. The narratives are personal accounts and reminiscences, not true *Adaawx*. Their emphasis is primarily on language, ritual, myth, social organization and historical events, not subsistence, tenure, population, settlement patterns, or trade. It must be remembered that most of Beynon’s narratives were recorded outside of the feast context, that many informants were not members of lineages that owned the narratives, and that they were answering specific questions put to them by Beynon.

## 5. Garfield

[55] Viola Garfield was a student of Boas who performed fieldwork in Lax Kw’alaams during the summers of 1932, 1933, and 1935. She did not write about what she observed, but rather what she heard from informants. She relies on memory culture and the narratives collected by Boas and Barbeau. All her informants were born after 1850, two generations post-contact. Dr. Anderson admitted in cross examination that this period between contact and 1850 was a period of transition during which the Coast Tsimshian encountered an enormous number of new things and influences. McDonald cautions that Garfield’s material on the economy and political life of the people with whom she spoke may be inadequate because she is primarily interested in traditional organization, ceremony and feasts.

[56] Despite the litany of weaknesses in the recordings of the above ethnographers, it must be recognized that their body of work is a rich source of information and when properly analyzed, may provide valuable insight into the past culture of the Coast Tsimshian. The key is to recognize the elements that may speak to pre-contact activities, or provide a basis for drawing reasonable inferences. Common sense should enable the reader to appreciate the mythical or super-natural elements of the stories and extract the more factual information.

## F. LAY WITNESSES

[57] There are no credibility issues with respect to either the plaintiffs’ or defendant’s lay witnesses. I particularly appreciated the candour with which the plaintiffs testified, their readiness to acknowledge the priority of conservation measures, and the lack of rancour with which they viewed the defendant’s position. I also appreciated the professionalism and sincerity of the Department of Fisheries and Oceans officials who gave detailed testimony about Canada’s administration of British Columbia’s fisheries.

[58] By contrast, each party attacked the credibility and reliability of the other party’s expert witnesses, sometimes for the same reasons. I summarize below some of the relevant background and criticisms of each of these witnesses.

## G. EXPERT WITNESSES

### 1. Dr. George F. MacDonald

[59] Dr. MacDonald has over forty years experience as an archaeologist, most of which was spent as the chief of the archaeology division of the Canadian Museum of Mankind. He has taught and published extensively. I qualified him as an anthropologist with expertise in archaeology, ethnography and ethnohistory. His importance to the case is that he started the North Coast History Project in 1966 which resulted in significant excavations in the area of Prince Rupert Harbour, where the plaintiffs claimed to have lived for thousands of years.

[60] The defendant criticizes Dr. MacDonald’s report as an excessively broad overview that should only be given weight if supportable on a review of all the available evidence. It criticizes his reliance on undefined sources, lack of referencing, poor time controls, and unsupported conclusions.

[61] Some of these criticisms are justified. For example, Dr. MacDonald relies heavily on the *adaawx*, but fails to say which ones. He also fails to refer to the work of archaeologists James Haggarty or David Archer with respect to the Dundas Island Group (see section VI. 4. Dundas Island Group). His opinion that the Tlingit pushed the Tsimshian out of Prince Rupert Harbour 2000 years ago is a highly relevant aspect of his report yet he fails to mention Haggarty’s opinion that the Tlingit occupied Dundas Island until the mid 1700’s.

## 2. Dr. Margaret Anderson

[62] Dr. Anderson is a professor of native studies at the University of Northern British Columbia. She has studied the Tsimshian culture for 30 years, speaks the Coast Tsimshian language of Smalgyax, has published many studies and has lived in the Tsimshian community for over 20 years. I qualified her as an anthropologist with expertise in the Tsimshian culture and language.

[63] The defendant's biggest complaint about Dr. Anderson's report is her lack of time depth. She does not distinguish between pre- or post-contact events, or take into account the impact of the fur trade on Coast Tsimshian society. She does not define what she means by trade. She talks about kinship exchanges but does not analyze them. She neglects historical sources, fails to identify archaeological evidence supposedly relied upon by her, provides no analysis of the Tsimshian narratives, or ethnographic data, and relies upon questionable and non-authoritative sources.

[64] For example, Dr. Anderson appears to have ignored the maritime fur traders' logs and HBC journals which contain a lot of information about the Coast Tsimshian. She admitted on cross-examination that these documents are significant and are a valuable form of primary data when reviewed in context and considered in light of other data. Her criticism that the documents only incidentally record indigenous trade can also be made of the adaawx upon which she bases her opinion.

[65] I agree with the defendant that Dr. Anderson's "Primary Source Compilation" is a confusing, overly repetitive 15 volume collection of extracts sometimes taken out of context and mostly unreferenced. Although she describes it as the collection of primary sources upon which she based her expert opinions, it is really a form of secondary evidence without any corresponding analysis of reliability.

[66] I do not agree with the defendant that there is a perception of bias against Dr. Anderson because she was married to a Hartly Bay aboriginal fisherman and became a member of his Band and House Group through adoption. I am cognisant, however, of the fact that before Dr. Anderson was retained by the plaintiffs, she had already expressed her opinion to anthropologist Dr. Frederica de Laguna that the Tsimshian have the constitutional right to fish commercially and to manage their fisheries. Cross examination established that after expressing this opinion she went about searching for evidence to support her view, as opposed to forming the opinion as a result of her research.

[67] An expert witness is chosen because of his or her area of expertise and ability to perform, understand, and interpret the research required to form an opinion. If the opinion isn't helpful to the party's position it doesn't usually see the light of day. If it affirms the party's position, it is tendered in court with the reassurance that the opinion was honestly arrived at and not manufactured to support or oppose a claim.

[68] The most shocking example of my perception that Dr. Anderson was grasping for material to support her opinion was her treatment of the Chief Kelly Manuscript, an 89 page document that she cited in her expert report over and over again.

[69] In her report, she describes the source of the Chief Kelly Manuscript as coming from Victor Kelly of the Gispaxlots, as told to her by Bobby Sankey of Prince Rupert. She testified in her examination in chief, that it was one of the most important documents in her report. She used it to describe the movement of the tribes, the use of their Claimed Territories and the harvest of their resources.

[70] She further testified that after writing her report, she ran into "parallels" in language between the Chief Kelly Manuscript and a book by John Arctander called *The Apostle of Alaska* which was about William Duncan, a missionary of the Tsimshian. She concluded, then, that the Manuscript had been written down by one James Wallace, who was a handyman and gardener at Duncan's Mission. She said the manuscript had the "vitality and exuberance of Tsimshian oral performance".

[71] Dr. Anderson was of the definite opinion that Arctander had inserted pieces of the Manuscript in his text, and not the other way around. She relied on the fact that Arctander, at page 69 of his book, refers to Indians returning to Fort Simpson, whereas a similar passage in the Manuscript refers to Indians returning to Metlakatla. She said at first, that Arctander changed the place from Metlakatla to Fort Simpson because he didn't know about the Metlakatla villages. When other passages of the book were pointed out to her that showed Arctander knew of Metlakatla, she came up with the excuse that he wanted to refer to a better known contemporary community.

[72] On cross-examination, it was pointed out to her firstly, that James Wallace did not speak Smalgyax, the language of the Coast Tsimshian, and therefore would not have been able to capture the "vitality and exuberance of Tsimshian language" to which she had referred in her evidence in chief. Secondly, she was referred to Peter Murray's article, *The Devil and Mr. Duncan* (Victoria: Sono Nis Press, 1985), that describes Arctander as a "clever and crooked" lawyer who was suspended from practising law for six months for falsifying dates on documents, and finally disbarred. Arctander provided a draft of his book to William Duncan who was very concerned about the errors that had gone forth to the public and were "a cause of great pain" to him. Duncan seized 300 copies of *The Apostle of Alaska* in order to destroy them.

[73] Dr. Anderson also said in examination in chief that the Arctander material has been considered reliable by Garfield. However, Garfield did not consider Arctander's book to be reliable and in fact expressly stated that it "cannot be taken as authoritative ... the list of trade goods is fragmentary and of doubtful accuracy ... of little value except for dates, names and other specific details ... the natives consider it an inaccurate description of their culture" (see Viola Garfield, *Tsimshian Clan and Society, Volume 7(3)* (Seattle: University of Washington Publications in Anthropology, 1939)).

[74] In my opinion, there is no doubt that the Chief Kelly Manuscript was manufactured after publication of Arctander's book. Defendant's counsel put to Dr. Anderson that the 21 passages of Arctander's book appear in identical or similar wording in the Chief Kelly Manuscript. Nonetheless, Dr. Anderson refused to agree that her interest and confidence in the Chief Kelly Manuscript were undermined.

[75] The two juxtaposed excerpts below are a sample of the apparent plagiarism that runs throughout the Chief Kelly Manuscript, the fact of which Dr. Anderson refused to admit.

Arctander	Chief Kelly Manuscript
<p>"When the first of March came, the Indians of the different tribes at Fort Simpson broke camp, left the Houses untenanted and unlocked, and came, with their families, to occupy, for a month or two, their ancient fishing grounds on the banks of the Nass River, forty-five miles or so farther north, where the waters of the great river tumble over the bar into Portland Canal.</p> <p>They know that this is the time of the oolakan to run up the river, and it is important to be at hand at the great event. The oolakan, or candle fish (<i>thalcichthys pacificus</i>), a wonderfully sweet fish to eat when freshly caught, is in appearance a good deal like a smelt, most of them about twelve to fourteen inches, and is said to contain more oil than any other known fish. In the frying-pan it will melt away like a lump of butter, and, when dried and provided with a wick, it will burn like a candle. Hence its name.</p> <p>Between the 16th and 20th of March, each year, you can see the come by the</p>	<p>"In the early part of March. The Tsimshians of the different tribes at Maxlthig-gxathah left their homes, and came with families to their ancient fishing grounds on the banks of the Nass River, forty miles or so farther North, where the waters of the great river tumble over the sand bar into Portland Canal. They know that the time is very near for the oolakan fish would run up the river. The oolakan is a wonderful sweet fish to eat when freshly caught, is in appearance a good deal like a smelt, and contain more oil than any other known fish. In the flying pan it will melt away like a lump of better, when fried and provided with a wick, it will burn like a candle. Between the 16th and 20 of March, each year, you could see them coming by the millions or by billions, up through Portland Canal, and hustle over the bar of Nass River, their great stamping ground. At the time we are now interested in, their coming furnished a great sight. On the banks of the river, and in hundreds of canoes near and on the bar, from five to eight thousand natives, all crying and yelling as they attempt to fill their canoes with the shining silver fish."</p>



millions, yes, by the billion, up Portland Canal, and hustle over the bar of Nass River, their great stamping ground.

At the time we are now interested in, their coming furnished a great sight. On the banks of the river, and in hundreds of canoes near and on the bar, from five to eight thousand Indians, all crying and yelling: "You are all chiefs, every one of you!" as they attempt to fill their canoes with the shining, silvery fish."

[76] In my opinion, all that can be said about the Chief Kelly manuscript is that William Duff had it in his files with a note that he had obtained it from William Kelly in 1960. There is no way to determine the author, purpose, age, authenticity or reliability of the document. In light of the plagiarism of sections of Arctander's text, which itself is of suspect authority, and the lack of reliable information as to the genesis of the Manuscript, it carries no weight and only serves to compromise Dr. Anderson's report and opinions.

### 3. Dr. Steven Langdon

[77] Dr. Steven Langdon is an economic anthropologist with three degrees from Stanford University. He is now a professor at the University of Alaska and focuses on the study of economic theory, in particular fishing economies with groups on the Northwest Coast. I qualified him as an anthropologist with expertise in cultural and economical anthropology, ethno-history, archaeology and maritime societies on the Northwest Coast.

[78] The defendant submits that Dr. Langdon has a tendency to reach conclusions based on insufficient and inappropriate evidence, and to speculate with regard to the pre-contact Coast Tsimshian economy. In addition, his expertise in myth interpretation is questionable. At trial he stated that he utilized myths in his interpretation of aspects of the cultural behaviours he found amongst the Tlingit, but he admitted that he had no special training in mythic interpretation other than what is common as part of a cultural anthropologist's background.

[79] I am concerned that Dr. Langdon relied too much on the two texts, People of 'Ksan, *Gathering: What the Great Nature Provided - Food traditions of the Gitksan* (Vancouver: Douglas & McIntyre, 1980), and Richard Heywood Daly's, *Our Box was Full: an Ethnography for the Delgamuukw Plaintiffs* (Vancouver, UBC Press, 2005). The latter text was written for the Gitksan and the Wet'suwet'en litigation, and the former was written by Gitksan people from the village of 'Ksan. Both make interesting reading but cannot be considered authoritative.

[80] I also have a concern that Dr. Langdon was prepared to reach broad based and far reaching conclusions on the strength of three or four oral narratives which I analyze in section IX. C. I found his background information on economic anthropology and how the different economic theories might apply to the Coast Tsimshian to be helpful.

### 4. Dr. Joan Lovisek

[81] Dr. Lovisek has a P.H.D. in anthropology and ethnohistory from McMaster University. She has more than 20 years experience in First Nation issues and has received academic and fieldwork training in archaeology. Her report contains a thorough review of the maritime fur trader logs and HBC company records. Her methodology of ethnohistory is one that is used primarily by anthropologists, historians, historical geographers, and archaeologists because of the dating problems associated with early anthropology and ethnography. Ethnohistory is the study of the past of a non-literate people, and therefore uses all three types of archaeological, historical and ethnographical data to arrive at what ethnohistorians claim to be a more accurate picture of the past than what any of these three disciplines can provide on its own.

[82] The plaintiffs criticize Dr. Lovisek's methodology for being unduly rigid. They complain that this method was not used in British Columbia and was not acceptable to the Supreme Court of Canada in *R. v. Van der Peet*. They complain that she relies on sources selectively and fails to use the best evidence available to her. They submit she was partisan in her views.

[83] I found Dr. Lovisek to be a meticulous and very careful witness, perhaps overly so. There were occasions where she seemed reluctant to concede a point, not because she denied it, but because she refused to draw any inference where there was more than one available. On balance, however, I found her evidence and opinions to be more reliable in most areas than those of the plaintiffs' experts.

### 5. Conclusion on expert witnesses

[84] The attack by each party on the other party's expert witness was not always justified. I agree that sometimes cross-examination disclosed errors in observations and assumptions. I agree that sometimes the fine line between inference and speculation was crossed over inappropriately; however, my overall view is that the experts were immensely helpful in collecting and collating data that only persons with their years of experience and depth of knowledge could do. Their opinions, while not necessarily accepted by me, were helpful to highlight certain perspectives and provide hypotheses against which to test the evidence. I have not ignored any of the expert reports of Drs. MacDonald, Anderson, Langdon and Lovisek but have availed myself of their conclusions only where I am satisfied they are truly supported by the specific evidence in this case, and not merely broad-based assertions pronounced in favour of the position of one or other of the litigants.

[85] The one exception is Dr. Anderson's reliance on the Chief Kelly Manuscript. In my view, her quickness to accept it as an authentic recording of Tsimshian oral history without proper research and analysis to determine its source and authenticity seriously undermined her credibility with respect to her interpretation of the oral histories upon which she relied.

## III. NATURE OF THE CLAIM

[86] In *R. v. Van der Peet*, the Supreme Court of Canada states that the first step in determining the existence of an aboriginal right that is protected by s. 35(1) of the *Constitution Act, 1982* is to identify the nature of the right being claimed. The focus in this step is to ascertain the true nature of the claim, not to assess the merits of the evidence offered in its support (*Mitchell v. M.N.R.*). The right must be delineated in terms of the particular practice, custom or tradition under which it is claimed.

[87] In this case, the plaintiffs submit in writing that the proper characterization of their claim is the right to harvest all species of fish, shellfish and aquatic plants (the "Fish Resources and Products") in their Claimed Territories and fishing sites for the purpose of selling those Fish Resources and Products on a commercial scale to sustain the Lax Kw'alaams community, and accumulate and generate wealth.

[88] In oral submissions the plaintiffs attempted to restate the nature of the claim as seeking a right to harvest all species of Fish Resources in the Claimed Territories for all purposes, including selling Fish Resources and Products on a commercial scale.

[89] The defendant submits that the plaintiffs' claim, even as expressed in their written submissions, is tantamount to seeking a right to harvest as much of any and all species of fish as they wish, subject to conservation, and in priority to other users.

[90] It is important to note that this case is a civil proceeding, unlike all the other aboriginal fishing rights cases that have been considered by the Supreme Court of Canada, which were prosecutions of regulatory offenses. Here the aboriginal right cannot be characterized by the *actus reus* of the accused, or the breach of any legislation. As with any civil proceeding, the nature of the plaintiffs' claim must be governed by the pleadings.

### A. THE AMENDED STATEMENT OF CLAIM

[91] The plaintiffs plead that they are the descendants of nine tribes that were organized, self-governing aboriginal societies who communally used or occupied the claim area at the time of contact. They had a common language, customs, practices, traditions, laws, economic structures, spiritual beliefs and culture.

[92] The plaintiffs plead that any rights held by these nine tribes have continued until today.

[93] They plead that they owned, used and occupied the area along and between the Skeena and Nass rivers, inlets and islands between their estuaries and extending south to the upper part of Grenville Channel, including the off-shore and in-shore water bodies, foreshore, rivers, lakes and streams (their Claimed Territories). They say that they used fishing sites in these areas to gather Fish Resources.

[94] They further claim that the harvesting, managing, processing, consumption, creation of surplus, and trading of Fish Resources and Products, and the accumulation of wealth therefrom, was of central significance and integral to their distinctive culture. More specifically, they claim that through trade they acquired:

- a. goods to sustain their community and advance economic development;
- b. fish and fish products not otherwise available;
- c. fish that could be attained more economically through trade than through harvesting;
- d. utilitarian goods necessary to generate and develop their economy and enhance their culture;
- e. wealth that enhanced their standard of living, established rank and prestige of individuals;
- f. social, strategic, and economic relations within the tribe and with other tribes and nations.

[95] The plaintiffs plead that their practice of harvesting, processing, and trading of Fish Resources and Products continued to be of central significance after contact (post 1793) through the post-confederation period to the modern day, even though there were adaptations in gear, fishing techniques, type of product, trading patterns and new markets.

[96] They plead that the Crown encouraged them to earn their livelihood through participation in the modern commercial fishery and they continued to endeavour to do so. As a separate claim, the plaintiffs' allege a fiduciary duty between the Band and Canada. This fiduciary duty is based on:

- a. the trust relationship between the Crown and the plaintiffs;
- b. the absolute power or discretion of the Department of Fisheries to manage fish;
- c. the plaintiffs' loss of control over management;
- d. the plaintiffs' reliance on harvesting for commercial purposes;
- e. the setting aside of reserves for fishing; and
- f. the encouragement by the Crown to rely on commercial fishing to earn their livelihood and sustain their economy.

[97] The relief sought by the plaintiffs includes Declarations that:

- a. the plaintiffs have an existing aboriginal right within the meaning of s. 35 (1) of the **Constitution Act** of 1992 to harvest and sell on a commercial scale all species of Fisheries Resources that they harvest from their Claimed Territories;
- b. the **Fisheries Act**, R.S.C. 1985, c. F-14 and the **Fisheries Act**, R.S.B.C. 1996, c. 149 and their respective Regulations infringe upon this aboriginal right; and
- c. the Crown has breached their trust-like or fiduciary obligations to the plaintiffs by restricting or denying their ability to harvest Fish Resources from their Claimed Territories for commercial purposes.

## B. RIGHT TO HARVEST AND SELL ALL SPECIES

[98] The defendant submits that the plaintiffs should not be permitted to characterize their claim as encompassing all species of Fish Resources in their Claimed Territories. The defendant submits that because this is a civil, not criminal case, the aboriginal right being identified must be more precisely circumscribed.

[99] The defendant argues that:

- a. it is the pre-contact practices of the Coast Tsimshian that form the substance of the aboriginal right to exchange fish. The evidence disclosed that pre-contact, the Coast Tsimshian commercially fished eulachon only. Trading in all other species of fish was low volume, personal, opportunistic, irregular, for food, social and ceremonial purposes and incidental to fundamental pre-contact Coast Tsimshian kinship relations, potlatch and ranked society.
- b. defining modern Aboriginal rights to fish commercially as limited to those fish harvested and exchanged at contact is consistent with the principle that Aboriginal rights must be established on a specific rather than general basis. Otherwise, a pre-contact practice of harvesting and exchanging one or two species of fish could then become a modern right for commercial exchange of anything: elk skins, horses, cattle, and cars.
- c. in **R. v. Gladstone**, the Heiltsuk were granted the specific right to harvest herring spawn on kelp for commercial purposes, not a general right to fish commercially.

[100] In my view, the preponderance of legal authority (specifically **R. v. Van der Peet** and **R. v. Sappier**) supports the position of the plaintiffs. The specificity with which the claim must be characterized does not pertain to the species fished, rather it relates to persons, area and purpose. In the case at bar, the appropriate description of the right claimed, is the right of the plaintiffs to harvest and sell the Fish Resources and Products in their Claimed Territories on a scale akin to commercial.

## C. RIGHT TO SUSTAIN THE COMMUNITY

[101] The defendant objects to the plaintiffs' attempt to characterize their aboriginal right to fish commercially as including the right to sustain their community from the Fish Resources in their Claimed Territories. It submits that:

- a. the claim to sustain their community was not included in the Declarations sought in the Amended Statement of Claim and was not made by the plaintiffs until their written submissions filed on August 15, 2007. The attempt to do so is tantamount to amending their pleadings. I should not allow this because it is far too late in the proceedings and the defendant has been highly prejudiced;
- b. the plaintiffs are really seeking a guaranteed economic position in Canadian society under the guise of aboriginal fishing rights;
- c. the term "sustain the community" is ambiguous and unclear;
- d. the Supreme Court of Canada held in **R. v. Sappier** that there could be no aboriginal right to sustenance. It is not the significance of the pre-contact practise but the practise itself that establishes the right;
- e. there is no evidence of the Coast Tsimshian sustaining themselves from the sale of fish; and
- f. the plaintiffs' theory at trial was that the pre-contact Coast Tsimshian traded fish to accumulate wealth to support a social organisation that emphasized wealth, status and ceremonial displays. This is inconsistent with a present day right to sustain the community by fishing on a commercial scale.

[102] I agree with most of the defendant's submissions above. I am particularly concerned that neither party led evidence regarding any pre-contact practise of sustaining the community through trade on any scale. The evidence regarding sustenance centred around hunting and fishing; the evidence regarding trade centred on wealth, rank and kinship. It is irrelevant at this stage of the analysis whether the evidence as a whole supports the plaintiffs' claim, but it is relevant to the fairness of the proceedings that a party not introduce, at the stage of final submissions, new issues that were not properly the subject of adjudication.

[103] I am aware that the plaintiffs use the phrase "sustaining their community" in their Amended Statement of Claim; however, when I consider the context of the whole Amended Statement of Claim, and the manner in which the plaintiffs conducted their case and presented their theory, that phrase appears to refer to their right to fish for sustenance or subsistence, not commerce.

[104] More importantly, however, is the Supreme Court of Canada's admonition in both *R. v. Sappier* and *R. v. Van der Peet* that it is not the significance or purpose of the pre-contact practise that supports the aboriginal right, but whether the practise was integral to the distinctive culture of the group. Of course, as pointed out in *R. v. Sappier*, a traditional means of subsistence (i.e. a pre-contact practise relied upon for survival), can in some cases be considered integral to the distinctive culture of the particular aboriginals. I have considered this, but am of the opinion that in the case before me, it would not be appropriate at this late stage to characterize the plaintiffs' claim to sell fish on a commercial scale as including a right to "sustain their community".

#### D. FOOD, SOCIAL AND CEREMONIAL PURPOSES

[105] Surprisingly, the issue of an aboriginal right to fish for food, social and ceremonial purposes ("FSC") was never placed before me as an issue in this trial until final submissions. I assumed that this was because the defendant had never taken the position that the plaintiffs were not entitled to a FSC fishery and in fact issued a FSC license to the plaintiffs even though the plaintiffs refused to negotiate for one. Nonetheless, the plaintiffs now seek a Declaration of an aboriginal right in this regard.

[106] The defendant opposes such a Declaration on the grounds that it was not sought in the Amended Statement of Claim and it is too late to do so now. The defendant complains it would be highly prejudiced if it could not lead evidence focussed on the extent of the FSC right that is claimed and the lack of any alleged interference.

[107] As I have stated, the issue of the plaintiffs' aboriginal right to FSC fishing was never before me. Obviously the evidence touched on aspects of the plaintiffs' pre-contact fishing practices, including consumption for FSC purposes, but this evidence was never proffered or received as relating to a separate claim. The focus of this law suit has always been on commercial fishing.

[108] FSC fishing is a very different right because it contains an inherent limitation that does not exist in commercial fishing (*R. v. Gladstone*). In my opinion, to express the nature of the claim to include a right to fish for FSC purposes changes the complexion of the case from what was presented at trial.

[109] The Amended Statement of Claim does not seek any declaration of a right to fish for FSC purposes. In *Williams v. British Columbia*, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112, the plaintiffs were unable to establish their claim to the whole of the lands in issue, so they too subsequently attempted to resile to a lesser claim. Vickers J., relying on the decision of the English Court of Appeal in *Biss v. Smallburgh Rural District Council*, [1964] 2 All E.R. 543 (CA), refused to allow the plaintiffs to seek declarations that were not pleaded. Vickers, J. quoting Harman L.J. from *Biss* at page 554, succinctly states:

... He who seeks a declaration must make up his mind and set out in his pleading what that declaration is.

[110] That quote is applicable to the situation before me and I will not allow the characterization of the nature of the right being adjudicated upon to include FSC purposes.

[111] Therefore, I will describe the nature of the plaintiffs' claim as seeking an aboriginal right to harvest and sell on a commercial scale the Fish Resources and Products found in their Claimed Territories.

#### IV. DATE OF CONTACT

[112] The time period that a court should consider when identifying whether the aboriginal right as claimed meets the standard of being integral to the aboriginal society, is the period prior to contact between aboriginal and European societies (*R. v. Van der Peet*). The date of contact is also significant because evidence from the time of contact will generally demonstrate what customs were significant to that particular culture, pre-contact (*R. v. Côté*).

[113] Little guidance appears in the case law as to what is meant by "contact". The decisions of *R. v. Van der Peet* and *R. v. Gladstone*, confirmed by *R. v. Sappier*, refer to "the arrival of Europeans in North America" as the relevant time of contact. In *Delgamuukw v. British Columbia*, the Supreme Court of Canada states that the activities that were protected were only those carried out at the time of contact or "European influence". In *R. v. Adams*, the court finds that the date of contact with respect to the accused's Mohawk ancestors was the arrival of Samuel de Champlain in 1603 because that was when the French "established effective control" over what would become New France. In *Mitchell v. M.N.R.* the court uses 1609 (not 1603) as the date of first contact relevant to the Mohawks, because the case involved a different group of Mohawks than the one in *R. v. Adams*.

[114] In my opinion, given the Supreme Court of Canada's admonition in *R. v. Van der Peet* that courts must focus on the particular aboriginal group claiming the aboriginal right, and that aboriginal rights are not generally universal but that their scope and content must be determined on a case by case basis, then the date of contact should be the date on which occurred the first direct arrival of Europeans in the area of the particular group of aboriginals, in this case, the Coast Tsimshian.

[115] The defendant submits that the first direct contact with the Coast Tsimshian can be dated to 1787 when James Colnett sailed from Rose Harbour towards Hecate Strait. Robert Galois, in his compilation of the journals of James Colnett (Robert Galois, ed., *Voyage to the Northwest side of America: The Journals of James Colnett, 1786 – 89* (Vancouver, UBC Press, 2003)) states that Colnett concludes that although the aboriginals he met possessed a number of European artefacts, no European had ever been among them. It was later determined, however, that these aboriginals were Kitkatla, or Southern Tsimshian, not Coast Tsimshian.

[116] Similarly, Joseph Ingraham and Jacinto Camaano in 1791 and 1792 respectively came into contact with Southern Tsimshian, but did not encounter any aboriginals in the area of Metlakatla or Pearl Harbour.

[117] By 1793, the maritime fur traders were present during both the summer and winter seasons trading European, American and native goods to various native groups. By that time Captain Vancouver had reached Dundas Island, and the tip of Work Channel and Portland Inlet, which he named Point Maskelyne.

[118] Both the plaintiffs' and the defendant's experts agree that it is likely that the aboriginal people Captain Vancouver describes meeting were Coast Tsimshian. Therefore, in my opinion, the most reasonable date of contact to be fixed for the purpose of this law suit is 1793.

[119] I derive some comfort from the fact that since my conclusion in this regard, Vickers J. also chose 1793 as the date of contact pertaining to British Columbia in *Williams v. British Columbia*, *supra*. This is not to say, however, that indirect European influences were not at play before 1793, or should be ignored.

[120] In the case at bar, there is strong evidence that the Coast Tsimshian began to experience the effects of European (Russian) trade goods as early as 1700 – 1750. There is further evidence that the Haida and Tlingit both came into direct contact with Europeans upon the arrival of Juan de Perez in the Queen Charlotte Islands in 1774, and that the Coast Tsimshian had kinship and exchange ties with both these aboriginal groups. Therefore, the practice, custom or tradition relied upon in this case to support the aboriginal right must be carefully analyzed to ensure it was an indigenous practice and not one that arose solely as a response to European influences.

#### V. THE COAST TSIMSHIAN PRE-CONTACT SOCIETY

[121] The next step in the analysis, according to *R. v. Van der Peet* and *Mitchell v. M.N.R.*, is for the plaintiffs to establish the aboriginal

right protected under S. 35(1) of the **Constitution Act, 1982**. They must do this by proving the existence (and continuity in modern form) of the ancestral activity upon which the right is based, and its integrality with the distinctive aboriginal culture of the pre-contact society from which the plaintiffs claim to have descended.

[122] In **R. v. Van der Peet**, the court says that the claimant must do more than demonstrate that the ancestral activity was an aspect of, or took place in, the aboriginal society. It must demonstrate that it was a central and significant part of a society's distinctive culture, one of the things that made this society truly what it was. Therefore, the court cannot look at aspects that are true of every human society such as eating to survive, nor can it look at aspects of aboriginal societies that are only incidental or occasional. The court must look to the defining and central attribute, the core of the culture.

[123] In **R. v. Sappier**, the court clarifies the meaning of the phrase "distinctive culture" by referring to the aboriginal specificity sought to be captured. "Aboriginality" means more than interesting cultural practices and anthropological curiosities. Culture on its own is a difficult concept to grasp. It has implicitly been taken to mean a fixed inventory of traits or characteristics. Distinctive aboriginal culture must be taken to refer to the reality that despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands. The focus of the court should be on the nature of this prior occupation. What is meant by aboriginal culture is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, socialization methods, legal systems, and potentially, their trading habits.

[124] Applying the principles of **R. v. Van der Peet** and **Mitchell v. M.N.R.** to the allegations in the Amended Statement of Claim, the plaintiffs must prove that before contact with the Europeans:

- A. the Coast Tsimshian were members of an organized society;
- B. from which the plaintiffs have descended;
- C. who used and occupied the Claimed Territories;
- D. from which they harvested Fish Resources and Products as an integral part of their distinctive culture;
- E. traded them on a scale akin to commercial as an integral part of their distinctive culture; and
- F. have continued to do so in a contemporary fashion.

## A. ORGANIZED SOCIETY

[125] In addition to being an element of proof of their aboriginal rights, Dr. Langdon points out that a general description of the social organization, cultural institutions, processes and values of the Coast Tsimshian is required to properly contextualize the characteristics and purposes of trade practiced by them. Alleged trade, or more particularly alleged trade in Fish Resources, is the ancestral activity that lies at the heart of this lawsuit.

[126] Determining the pre-contact stage of social organization of the Coast Tsimshian is also important to establish the time depth of the cultural practices distinctive to the Coast Tsimshian.

[127] There is some confusion in the ethnographic literature regarding the levels of social organization. It is important to note that what Dr. Anderson and Martindale call a village group, Boas and Barbeau call a tribe, and Garfield calls a local group. Similarly, Dr. Anderson and Martindale refer to a House while Boas refers to a lineage, and Garfield refers to a lineage/Household/local segment. They all agree on the term family as being the lowest level of organization.

### 1. Houses and House Groups

[128] Dr. Anderson explains that a Tsimshian individual is by birth a member of his or her mother's matrilineal family group called a "Waap" or House. Houses were generally occupied by twenty to forty persons including the chiefs and their families, lower ranking common relatives and varying numbers of slaves. She uses the word House Group to distinguish the social group from the physical residence. House Groups are the basic territorial and resource owning unit.

### 2. Clans

[129] Each House Group is a local segment of one of four matrilineal clan groups identified by major crest animals: Giscutwada (killer whale/black fish), Laxsgiik (eagle), Ganhada (raven), and Laxgibuu (wolf). Clans are identified publicly by certain totemic images or crests.

[130] Dr. Anderson states that the Nishga and Gitksan, who had the same type of matrilineal clan system as the Haida and Tlingit, had only two clans, while the Tsimshian had four.

[131] It is interesting to note that the plaintiffs' lay witnesses did not approve of the expression "clan" to describe their social organization. They believed that the word clan belonged to groups of Scottish people. They preferred the expression "crest" because of the physical crests on clothing displayed by members of a particular group to announce their identity. I shall continue to refer to these crest groups as clans, not out of any disrespect, but because that is how they are referred to in the literature and throughout most of the evidence.

[132] Dr. Anderson testified that it was prohibited to marry within a clan group even if no actual kinship connection could be traced. Bands of clan group loyalty cut across the bonds of local village origin and residence, and so intercommunity relations were facilitated by providing a local connection for those who married into a village, and for travellers and traders to be recognized by their clan relatives.

[133] This dynamic of dual identification between clan and Household residents is one of the important and complicating features of Coast Tsimshian society. The discussion of tribes below pertains to social organization, not clan lineage.

### 3. Tribes

[134] Groups of Houses referred to as villages, or tribes by Dr. Anderson, were the most important social and economic divisions, but are anthropologically the most enigmatic.

[135] Dr. Anderson explained that the words "village" and "tribe" roughly designate the same groupings of people but in different contexts. A tribe is the unit of social organization comprised of a number of House Groups with members of at least two different clans, while the village is the residential unit generally occupied by the members of the tribe including spouses and children. Individuals who are members of a tribe may reside outside the tribal village while individuals who are not members of a tribe may reside in the tribe's village.

[136] Dr. Anderson states in her report that the authority of the Tsimshian leaders encompassed the entire village rather than each House leader leading an autonomous House Group. She claims that the village chief was the chief of the highest ranked House Group in the village; however, she cites no support for this statement.

[137] Martindale, in his thesis *The River of Mist: Cultural Change in the Tsimshian Past* (PhD thesis, University of Toronto, 1999), seems to agree with Dr. Anderson that each pre-contact village was an autonomous entity, acting coherently in matters of economy, trade, feasting and war under a village leader and his or her councillors. Each owned territory in common which was distinct from, though contiguous with, other villages. The majority of land within the village territory was owned by separate House Group lineages. Some House Group land was held communally, but other areas were the private property of individuals.

[138] All the sources seem to agree that at some point in time there were actually ten, then nine village groups that make up the Coast Tsimshian tribes as we know them today. The difficulty lies in deciding when these villages or tribes actually came into existence.

[139] The defendant submits that pre-contact there was no higher level of social organization amongst the Coast Tsimshian than a local House Group and that the concept of tribes was a post-contact phenomenon. The plaintiffs submit that a tribe was a recognized and named unit within the Coast Tsimshian before the arrival of the Europeans.

[140] The issue of whether tribes existed pre-contact is important because it may have bearing on:

- a. whether the nine tribes that comprise the Coast Tsimshian today are the descendants of the pre-contact aboriginal society that engaged in the activity upon which the aboriginal right is based;
- b. the extent to which the pre-contact aboriginal society was organized;
- c. the Claimed Territories and fishing sites that are sometimes identified using tribal names; and
- d. trading prerogatives that are sometimes described as belonging to tribes and tribal leaders.

[141] Dr. Anderson states that the Coast Tsimshian consisted originally of ten Tsimshian tribes living in the lower Skeena River and surrounding islands and estuaries. One tribe disappeared during the contact period, or shortly before, and thus only nine remain today.

[142] Dr. Langdon purports to rely on Susan Marsden, Registrar and Acting Director of the Museum of Northern British Columbia in Prince Rupert, and Martindale to state that pre-contact, the chiefs of the nine tribes constituted a coordinating and cooperating network who worked together in war and in the management and allocation of trade rights. He relied on Mitchell and Donald for the statistics that at contact the Coast Tsimshian population was about three to four thousand, divided into nine tribes consisting of between 350 and 400 people each. He relied on Garfield's descriptions of the nine tribes as follows:

Ginaxangi'k – People of the Hemlock  
 Gitando – People of the Other Side  
 Gispaxlo'ts – Elderberry Place People  
 Gilutsa'u – People in Inside  
 Gitlan – Canoe Stern People  
 Gitwaga'ts – People Where Kelp Is  
 Gitsi's- Seal Trap People  
 Ginandoiks – People of the Swift Current  
 Gitsaxla'l – People from the Side of

[143] He states that the above tribes functioned as critical units for certain social and economic purposes. They had fishing, trapping and hunting camps in the lower Skeena River between mid-summer to fall, camps and facilities at the mouth of the Nass from mid-February to April, and in winter they congregated in close proximities at villages located initially at Pearl Harbour and later at Old Metlakatla.

[144] Dr. Lovisek maintains that pre-contact, there was no political organization above the House Group, i.e. there were no political roles at the village level, although some House Groups were as large as villages. She states in her report that "the Tsimshian did not develop their own lineage political leadership into village chieftainship until the early 19th Century".

[145] Dr. Lovisek was prepared to agree that the predecessors of the plaintiff Band (together with the Metlakatla Band) consisted of an amalgamation of members of four phratries (clans) and ten local groups, or tribes that traditionally wintered along Metlakatla Pass. She points out in her report, however, that whether these ten named tribes described by the ethnographic literature existed during the pre-contact period has not been examined in the scholarly literature. She maintains that these Coast Tsimshian ten tribes are the products of political and economic pressures that arose after contact with Europeans.

[146] Dr. Lovisek maintains that the Houses developed into ten named groups some time in the proto-contact period that she describes as occurring between 1700 and 1787. The tenth group, Gitwalksabae, became extinct on or before 1867, probably due to epidemics. The remaining 9 tribes are the ones from which the plaintiffs claim to have descended.

[147] Dr. Lovisek relies on several sources to support her opinion that tribes and tribal leaders were a post-contact development:

- (a) Barbeau defined the Tsimshian tribe as a "local agglomerate of families belonging to different clans, and in the course of time gradually assembled for political reasons". (*Growth and Federation in the Tsimshian Phratries* (1915) Proceedings of the 19th International Congress of Americanists 402 at 406 – 407).
- (b) Susan Marsden has stated that the nine tribes of the modern period may not have used these terms to describe themselves in earlier times, and may have changed their tribal composition by adding new Houses over time (Susan Marsden, "Defending the mouth of the Skeena: Perspectives on Tsimshian Tlingit Relations" in J. Cybulski, ed., *Perspectives on Northern Northwest Coast Prehistory* (Hull: Canadian Museum of Civilization, 2001) 61).
- (c) Anthropologists, Paula Rubel and Abraham Rosman and Martindale, all suggest that the original social structure of the Coast Tsimshian consisted of two clans only, where one-half provided services to the other, including exchange of goods and women. It was only after the wealth of the fur trade produced more complex structures that the clans increased in number to four. ("The Evolution of Exchange Structures and Ranking: Some Northwest Coast and Athabaskan Examples" (1983) 39 *Journal of Anthropological Research* 1, together with Marjorie Halpin in *The Tsimshian Crest System: A Study Based on Museum Specimens and the Marius Barbeau and William Beynon Field Notes* (PhD Thesis, University of British Columbia, 1973)).
- (d) Garfield is also of the view that tribes as entities consisting of multiple villages led by a tribal Chief were formed as a response to Russian trade on the North West Coast in the early 18th century. She states that pre-contact occupation of fishing sites in the Skeena were year round, and seasonal rounds between the coast and interior that resulted in the multi-villages did not occur until post-contact, (Viola Garfield, *Tsimshian Clan and Society, Volume 7(3)*, *supra*).
- (e) Dr. Lovisek thought that Martindale supported Garfield's conclusions about the seasonal round, and multi-villages, but on cross-examination she admitted that the portion of Martindale's thesis that she was relying upon dealt with the origin of one over-arching tribe known as the Coast Tsimshian, not whether the nine Tribes existed before contact. As I discuss below, a closer reading of Martindale's work would have shown her that contrary to Garfield's views, he concluded there was evidence of a seasonal round before 1787.

#### a) Seasonal Round

[148] One of the features of Coast Tsimshian life that may resolve the issue of whether the Coast Tsimshian tribes existed pre-contact is what the experts and scholars refer to as the "seasonal round". The seasonal round is a structured schedule of activities in which people collect resources from different ecological zones across the landscape when they are most abundant.

[149] Martindale addresses the issue of the seasonal round in his thesis, *The River of Mist: Cultural Change in the Tsimshian Past*, *supra*. He finds that the view of the ethnographers does not accord with the archaeological evidence he uncovered from several archaeological surveys, most important of which was at the Psacelay and Ginakangeek sites.

[150] Psacelay was located in the Gitnadoix Valley and contained two well preserved House features dating to just before 1787, which date Martindale attributes to the arrival of Europeans in Tsimshian territory. Excavations have provided comprehensive archaeological data from this interior zone, pre-contact habitation site. From his findings, Martindale determines that the seasonal round of the Coast Tsimshian changed as their social complexity changed.

[151] Martindale writes that prior to 1787, Tsimshian local groups occupied small, extended family Household communities such as Psacelay, dispersed throughout the interior zone. These groups would follow an annual cycle of migration from the interior territory in the summer to the coastal territory in the winter with a short stay at the Nass River in the early spring for the seasonal exploitation of eulachon, a small anadromous fish.

[152] After contact, the settlement pattern changed to include larger habitation sites, such as Ginakangeek, containing multiple Houses and Households, located within the local group territory along the Skeena River. Thus Martindale concludes that the pre-contact settlement pattern

was substantially modified after 1787 by the abandonment of habitation sites in the lower Skeena River tributary valleys in favour of larger village sites along the Skeena River. He argues that the changes were part of a regional hierarchy of indigenous settlements which developed during the first fifty years after the arrival of Europeans.

[153] He concludes that the archaeological changes he discovered between the Psacelay and Ginakangeek sites are evidence of an increase in social complexity within Tsimshian society, after contact, from a segmentary regional organization to an incipient paramount chieftain.

[154] Martindale points out that two primary Tsimshian scholars, Boas and Garfield, do not agree on the nature of the settlement pattern and seasonal round. In Boas' cycle, the entire local group lived together in winter villages. In the Spring only part of the group moved North to the Nass River where they lived for the 3 to 4 weeks it took to catch and process the eulachon before rejoining the local group at Metlakatla. In early summer, the entire local group moved to the interior where they occupied a summer village analogous to the coastal winter village. Boas presented this pattern as characteristic of late pre-contact society, and is a pattern to which most anthropologists subscribe.

[155] Garfield discusses changes in the 19th Century, but her patterns do not agree with Boas'. She states that the seasonal round developed in the late 18th Century as a response to the developing coastal fur trade. In her 1939 ethnography she writes that once the seasonal cycle began, local groups split into lineages and did not reside together in summer villages (Tsimshian Clan and Society, *supra*). However, in her 1966 book she implies that both the coastal and interior villages were occupied year round. (Viola Garfield, *The Tsimshian and Their Neighbours* in V. Garfield and P. Wingert, eds., *The Tsimshian Indians and their Arts* (Seattle: University of Washington Press, 1966)).

[156] Martindale attempts to reconcile these conflicting views by concluding that Boas' scheme refers to the early 19th century, and Garfield likely conflates a much longer time span of changes than she was aware. He maintains that the seasonal round was in effect at least 1500 years ago.

[157] Dr. Anderson opines that on the basis of the archaeological literature she had read, ten tribes of the Tsimshian maintained a pattern of residing in up river villages for hunting, fishing and gathering, and in permanent winter villages in the Prince Rupert Harbour area, for about 1700 years before the Europeans came. When Fort Simpson was established by the HBC in 1834, these ten tribes moved their winter village site around the Fort. It is these ten tribes that resided during the 19th century around Fort Simpson and Metlakatla that are known as the Coast Tsimshian. (Although the Kitselas and Kitsumkalem Groups share the same Coast Tsimshian smalyax language and similar cultures, they never moved to the coast and thus never had territory below what is now Terrace. There were kinship and trade relationships, and interaction between the groups but they were politically distinct).

[158] On cross examination, Dr. Anderson agreed with Martindale's conclusions that after contact, the 10 tribes' settlement pattern changed and interior sites such as the one excavated by Martindale at Psacelay became depopulated while new sites such as Ginakangeek emerged along the Skeena River. The early 19th century settlement shift correlated with the development of a regional political hierarchy and accommodated the changing economic requirements of the post-contact period. The construction of villages such as Ginakangeek allowed village groups to maintain access to both their traditional food supplies which were scattered throughout the tributary valley, and the emerging interior-to-coast trade along the Skeena River. She agreed that it was during this time that the Coast Tsimshian and their neighbours established incipient paramount Chieftains.

[159] I am prepared to find on a balance of probabilities that the ten named tribes of the Coast Tsimshian likely were in existence and had permanent winter villages on the coast before the coming of the Europeans. They may not have existed in exactly the same composition as after contact, nor occupied exactly the same territory as the Claimed Territories, but the core of the ten tribes, or village groups, was there.

[160] I further find that there was no cohesive, over arching, political regional organization until after the commencement of the fur trade, although there were social bonds and relationships amongst clan members of different villages. As Dr. Anderson writes in her Introduction to *The Tsimshian: Images of the Past, views for the Present* Margaret Seguin Anderson, ed., (Vancouver: UBC Press, 1984) XV, "the major subdivisions of the Tsimshian rarely functioned as political or economic units, though there were some long term alliances, particularly among the Coast Tsimshian near the mouth of the Skeena. In general, each village was an independent territorial, economic and political unit".

## B. DESCENDANTS

[161] Since aboriginal rights are communal, it is the community that has descended from the pre-contact community that must be identified as the proper plaintiff.

[162] In its Statement of Defence, Canada refuses to admit that the members of the plaintiffs' band are present day members of the nine Coast Tsimshian tribes, or that Chief Garry Reece and the Lax Kw'alaams Band are authorized to bring this law suit. Counsel did not argue either of these points in any detail.

[163] I am satisfied from the evidence of the lay and expert witnesses that the plaintiffs are descendants of the nine tribes discussed above and that these nine tribes, known collectively as the Coast Tsimshian, existed in the form I have described above, at the time of contact. Therefore, the plaintiffs are entitled to claim aboriginal rights arising from the existence and past practises of the nine tribes. Furthermore, the plaintiffs are authorized to bring this lawsuit.

## C. RANK

[164] It appears that all the experts agree that Tsimshian society was highly structured. Rank and social position were determined partly by tradition and inheritance, but were maintained and enhanced by on-going accumulation of wealth.

[165] Dr. Anderson agreed with the work of Coupland, Martindale, and Marsden, who stated that:

Tsimshian society was highly structured. The principal of rank or social precedence was rigidly adhered to, and was used to differentiate people into named positions of status. Lineage based House Groups and local groups were also ranked. Positions of rank pertaining to individuals, House Groups and local groups were established and reaffirmed at elaborate feasting and exchange ceremonies, the famous potlatches. The groups that hosted the most frequent and most elaborate potlatches were, invariably, highest ranked.

("Does Resource Abundance Explain Local Group Rank among the Coast Tsimshian?" in Jerome C. Cybulski, ed., *Perspectives on Northern Northwest Coast Prehistory* (Hull: Canadian Museum of Civilization, 2001) 223).

[166] Dr. Anderson testified that the ranked structure of the pre-contact Tsimshian society was an integral and distinctive element of that society. Rank to the Coast Tsimshians was a significant political and economic asset achieved through economic transactions.

[167] Dr. Langdon said the elevation of status through attaining high ranking names was one of the primary motivations of the elite in conducting their productive efforts, although prestige could be obtained through other means besides wealth. He separates rank into two main groups: (i) freemen consisting of noble lineage, title holders, non-noble lineage and commoners; and (ii) slaves.

[168] Dr. MacDonald testified that the archaeology of Prince Rupert Harbour shows rank through House size and location, storage spaces, wealth goods, and lavish life style. It was Dr. MacDonald's theory (in testimony) that because the North West Coast was not a harsh environment and the occupants did not require a co-operative society to survive, ranked societies and structures developed through time. There was co-operation amongst the autonomous groups but not amongst the ranks.

[169] Martindale writes in his thesis, *The River of Mist: Cultural Change in The Tsimshian Past*, *supra*, that in terms of social complexity the pre-contact Tsimshian were a ranked type of unstratified society. The highest rank was leadership of a local group. Village chiefs were similarly ranked, but there is no indication that the position of the highest ranked chief came with any regional political authority. There was no regional political organization, although the ten local groups shared cultural, linguistic and ceremonial characteristics. Political authority was thus a function of one's lineage status. Such factors as a lineage's success at trading, value of its trading prerogative, acumen of its leaders, traditional status in recent history, and net wealth contributed to its rank within the village, and by extension, within the region. The power and authority of local group leaders did not extend to members outside of their own local group.

[170] Dr. Anderson testified that high rank could be lost or gained through gifts and payments. There were more than 100 types of economic transactions involving wealth goods, provisions or prerogatives. Enhanced or decreased social status was achieved through feasting and ceremonies or the lack thereof. Thus the potlatch as it has come to be known, played a very significant part in Coast Tsimshian society.

#### D. WEALTH

[171] Both sides led a lot of expert evidence regarding the attitude of the Coast Tsimshian towards what they considered to be wealth.

[172] The plaintiffs submit that wealth was a key source of attaining rank and therefore was integral to their distinctive society. They submit that the Coast Tsimshian were an opulent people long before the arrival of the fur traders, largely because they were able to trade their Fish Resources.

[173] The defendant submits that there is a significant distinction between the type, magnitude and source of wealth in the pre-contact Coast Tsimshian society from the post-contact society.

##### 1. Types of Wealth Goods

[174] There were different types of wealth in pre-contact Coast Tsimshian society. Dr. Langdon describes wealth as including adaawx accounts, crests, regalias and names, not just material goods. It also included territorial resources and exotic goods such as copper. He says wealth goods were not for personal comfort, but for display and distribution.

[175] The "halait" or supernatural power was also key to rank and wealth. This separated the elites from the "real people". Special regalia for the Shamans were made of caribou obtained only from the Athabascans. Exotic goods were part of the creation and reinforcement of the elite and shamanic class because they raised the status of the possessor.

[176] Dr. MacDonald points to the existence of exotic goods (goods that originated outside the region or territory) dating to 2500 B.P. that were imported into Prince Rupert Harbour in order to buttress rank. Exotic goods such as amber, jade, obsidian and argillite equalled wealth.

[177] Dr. Anderson refers to wealth items that the Tsimshian had to get through trade such as canoes, slaves, furs, coppers, hides, horned spoons, woven blankets and exotic goods. Boas refers to martin, sea otter, raccoon, elk skins and dancing blankets. Dr. Langdon refers to dentalium, caribou and crests.

[178] Dr. Lovisek, in keeping with Martindale, maintains that salmon and other marine resources were not considered wealth objects, unlike eulachon grease.

[179] In "The Tsimshian and Their Neighbours", *supra*, Garfield states that wealth on the entire coast was in slaves, accumulated stores of food, manufactured goods and in the northern part of the area, a large percentage of what was produced from the resources of lands and waters.

##### 2. Means of Obtaining Wealth

[180] There were three possible means of obtaining wealth: surplus production (see VIII. B.), potlatch distribution (see below), and trade (see sections VIII. and IX.).

[181] Dr. Langdon testified that rank and wealth were supported by surplus production of food that could be traded by groups over long distances. He also said there is evidence in the oral traditions about wealth, how change in prior trade was used to obtain wealth items, how objects from a distance and outside of the productive systems were highly regarded and displayed, all contributing to prestige.

[182] Dr. Lovisek testified that the accumulation of wealth for feasting was accomplished through the organization of labour, specialization and production supplemented by a network of intertribal trade ties that facilitated the importation of exotic prestige goods. Subsistence production was diverted into non-subsistence activity such as competitive feasting and obtaining of exotic trade items.

[183] The main means by which wealth was displayed and distributed was through feasts and potlatches. Dr. Langdon refers to these as "core institutions". They comprised a central and essential, perhaps even determining institution, upon which the social consciousness and energy in Coast Tsimshian society focused. The lineage mode of production operates in order to make the potlatch possible. He explains that potlatches ranged in their social significance and importance from those given by high ranking chiefs on social occasions of great significance to those given by aspiring lower ranking persons to recognize a ceremony in which their children have participated. All significant changes in social status and many insignificant ones were validated through distribution of goods. Dr. Langdon says "these events were a constant and ongoing feature of Coast Tsimshian life as frequent and inescapable as the rainfall which drenches the coast".

[184] Dr. Anderson admitted that gifts given at a feast were not a form of trading. A major feast was referred to as a potlatch and it was used to redistribute food. She agreed with Dr. Langdon that the potlatch has embedded within its distributions, economic transactions that are not gifts but payment for services rendered in goods received. Therefore, potlatches were used to distribute food, but the constant element was a public distribution of wealth. Prestige depended on the amount of wealth displayed and given away.

[185] Dr. Anderson said that potlatches were the foundation of the economic system, the stimulus for accumulation of goods and the one source through which wealth might be acquired. Accumulation and distribution of goods affected the relationships between the clan and tribal members. Potlatches were also instrumental in overcoming shortage in salmon.

[186] Dr. Lovisek maintains that the pre-contact potlatch was different than post-contact potlatches. According to Dr. Lovisek, the main purpose of the pre-contact potlatch was to validate property rights or rank. There were no elaborate demonstrations of wealth until the fur trading influence took effect. The early potlatches rarely involved exotic goods and then these were only for show, not to give away. The post-contact potlatches not only increased in size but also opportunity, because of new buildings, rum and rice feasts, and raids and epidemics leading to deaths.

[187] She relies in part on Dean who writes in his thesis '*Rich Men, Big Powers and Wastelands*', *supra* that as ceremonialism was founded on sacred concepts of legitimate behaviour and social consensus, there was little motive to accumulate more wealth than needed to celebrate title or advance children. Therefore, one cannot extrapolate from post-contact times back to pre-contact times when analyzing potlatches and feasts. Post-contact, there was a combined increase in purchasing power plus depopulation that led to an increase in potlatches and feasts.

[188] Dr. Lovisek states that another difference between the pre and post-contact potlatch was that the gift giving of food during the pre-contact feast was from a group's own territories and not outside of them. This demonstrated a control of specific lands and resources.

[189] Martindale writes in his thesis that Tsimshian society was organized not only to produce economic resources for survival, but also to create wealth above the subsistence needs of the population. Prior to contact, one of the most successful means of producing wealth was by producing storable food in excess of needs. Other means also existed such as raiding for wealth and slaves, production of manufactured items, and trade in exotic materials, but the most reliable means was through surplus production of food staples. After contact, the desire for wealth remained the same but a new means developed: trade with Europeans. The interior to coast fur trade became so significant that many Tsimshian abandoned the production of the subsistence economy in favour of the trade economy; however, this subsistence economy remained the only means of producing food. This caused a shift in the settlement pattern after contact which is visible in the archaeological record.

[190] Martindale concludes that in post-contact times wealth, which traditionally had been based on surplus of subsistence goods, now became available through the production of commodity furs. Trade in the first half of the 19th century converted furs directly into wealth. This undermined the production of surplus food stuff, but could not replace the need for subsistence goods. The early changes split the indigenous economy into a subsistence production sphere and a wealth production sphere. This permitted the Tsimshian to maintain social and economic traditions independent of the early influence of European culture. The wealth production sphere remained linked to the traditional mechanisms of status and political authority. Therefore, the early Tsimshian beneficiaries of European trade were indigenous leaders.

[191] In cross examination, Dr. Lovisek appeared to agree with Martindale that wealth, which had been obtained through trade in surplus

food stuff prior to the fur trade, became available directly through trade in furs in the post-contact era. The plaintiffs say this is an important point because it may explain why little trade in food stuff between aboriginals was observed by the early traders, since through the fur traders the Coast Tsimshian were able to acquire wealth directly.

[192] From a review of the evidence concerning the Coast Tsimshian relationship to wealth, I agree that the concepts of wealth and rank were inextricably tied into the social organization and were an integral part of the distinctive culture of the pre-contact Coast Tsimshian. It remains to be seen, however, whether trade in Fish Resources was the primary means of attaining this wealth and status, and thereby inextricably linked to the culture, or whether the impact of the fur trade, a post-contact phenomenon, was responsible for the opulence of the Coast Tsimshian.

## VI. CLAIMED TERRITORIES

[193] The parties agree that aboriginal rights must be defined in the context of a specific geographical region.

...if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land. A site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it becomes a right to hunt or fish on the tract of land in question (*R. v. Adams*, 119).

[194] As the plaintiffs are attempting to establish aboriginal rights, not aboriginal title, there is no need for them to prove that their Claimed Territories were or are used and occupied exclusively by them. Furthermore, I am of the opinion that it is not incumbent on the plaintiffs, at this stage of the litigation, to prove the precise metes and bounds of the places where they say they have the aboriginal right to fish.

[195] The plaintiffs submit that they owned and occupied territories on the lower Skeena River, winter villages at Prince Rupert Harbour, and coastal areas including the outer islands around Prince Rupert like the Dundas group of islands and Stephens Island. Their Claimed Territories also include areas to the north of the Skeena River up to Portland Inlet, including Work Channel and the Khutzeymateen Inlet.

[196] The defendant submits that there is very little evidence of specific pre-contact Coast Tsimshian fishing sites, apart from the evidence that the Coast Tsimshian fished at eulachon sites at the Nass River, which are outside the Coast Tsimshian territories. There are some general references to fishing at locations along the Skeena River tributaries, but the evidence falls far short of the evidentiary burden required to prove site specific aboriginal fishing practises.

[197] The submission of the defendant is not quite in accord with the evidence of its expert, Dr. Lovisek who appears to agree that the evidence established fishing sites and occupation of the Coast Tsimshian in the Prince Rupert Harbour area and some of the lower Skeena tributaries and coastal islands. She opined that parts of the claim areas in the Dundas Island groups, and areas to the North and West of Work Channel, including Work Channel, were used by Nishka and Tlingit groups, but some of these peoples may have later amalgamated with the Coast Tsimshian peoples. In 1846 through to the early 1900's, the Dundas Island group continued to be used by Haida and Tongas as well as Coast Tsimshian.

[198] The real dispute over territories appears to concern the following areas:

1. Skeena River mainstream;
2. Zymoetz River;
3. Zimacord River and Valley;
4. Dundas Island group;
5. Nass River and Fishery Bay.

### 1. Skeena River Mainstream

[199] Martindale wrote in his thesis, *The River of Mist: Cultural Change in the Tsimshian Past*, *supra*, that the Tsimshian have continued to live in and use their interior territories from pre-contact to the present. Indeed, in the period after contact, rather than abandoning the interior, the Tsimshian developed a new form of regional settlement which included the construction of new villages on the Skeena River.

[200] The two primary Tsimshian ethnographers do not agree on the nature of the Tsimshian settlement pattern in the interior zone. Most archaeologists follow Boas' scheme in which the seasonal round is a pre-contact pattern which dissipates after the Tsimshian begin to participate in the European trade economy. Garfield's scheme for the history of the settlement pattern (see section VII. A. The Seasonal Round) is not frequently supported in the literature, but neither has it been adequately refuted. Martindale suggests that her late 18th century developments are a conflation of settlement patterns of three phases.

[201] Martindale explains that when the anthropologists refer to the "lower Skeena", they are referring to the river and tributaries below Kitselas Canyon. The Coast Tsimshian had summer villages and camps at various fishing sites in this area. They may have had winter villages in the Skeena territories originally, but over time their occupation of the lower Skeena watershed occurred seasonally.

[202] On cross examination, Dr. Anderson agreed with Martindale's conclusions that after contact, the northern Tsimshian settlement pattern changed and interior sites such as the one excavated by Martindale (Psacelay) became depopulated while new sites such as Ginakangeek emerged along the Skeena River. The early 19th century settlement shift correlated with the development of a regional political hierarchy and accommodated the changing economic requirements of the post-contact period. The construction of villages such as Ginakangeek allowed village groups to maintain access to both their traditional food supplies which were scattered throughout the tributary valley, and the emerging interior-to-coast trade along the Skeena River.

[203] Dr. Lovisek opines that Tsimshian local groups occupied discreet localized parcels, mostly segments of tributaries of the Skeena River which they used for lodges, hunting, fishing and gathering. She states that it is apparent from ethnographic data that many branch rivers and creeks had fishing access over only part of the length of the water course and not the whole tributary as indicated on the Lax Kw'alaams Fisheries Resources Site Map. She also notes that Martindale listed locations which he considered to be common ground used by all Coast Tsimshian, but these areas do not appear on the Lax Kw'alaams map.

[204] Dr. Lovisek writes in her report that at some undefined time during the proto-contact period (about 1700–1787), the clan groups reorganized politically into ten or more named local groups. Two groups of the Lax Kw'alaams who had both summer and winter territories on the seacoast were Gitzaxlaal and Gitwilgyoots. The groups who had winter villages on the coast and summer territories on the lower Skeena River below Kitselas Canyon included Gitsi's, Gitlan, Ginaxangi'k, Gitnadoiks, Gitando, Gilutsa'u, Gispaxlo'ts and Gitwilebwa.

[205] The Gispaxlo'ts, Gitando, and Gilutsa'u are not shown to have sites with houses or campsites on the Skeena River during the late pre-contact period, but in the contact period, all Coast Tsimshian groups are shown to have village sites on the Skeena River.

[206] By the late 19th century, the annual journey to the interior for subsistence food collection had become unnecessary. The Coast Tsimshian's dependency on marine resources in the former interior areas was reduced as other foods brought by visiting groups, and food from the fur trading post at Fort Simpson and schooners became readily available. The areas along the tributaries of the Skeena River were increasingly used for hunting and trapping game animals for the European fur trade.

[207] In conclusion, the evidence is ambiguous whether the Coast Tsimshian fishing territories included the Skeena River mainstream or not, by the time of contact. The settlement patterns indicate a growing occupation along the Skeena River mainstream in correlation with the increase of the fur trade, but the fishing pattern didn't change until modern times and the use of the gill net. In pre-contact times the fishing techniques required shallower, calmer, water to be successful.

[208] On a balance of probabilities, the plaintiffs have established that at the time of contact they fished in the tributaries of the Skeena River, but not in its mainstream.



## 2. Zymoetz River

[209] The Zymoetz River flows into the Skeena River, but the defendant submits that it is a part of Kitselas territory.

[210] Duff places the Kitselas in both the lower and upper Zymoetz River. He also places them in Lake Else Lake which he says was shared with the Gilatsa'u of the Coast Tsimshian.

[211] On balance, the only evidence before me supports the defendant's position, that the Zymoetz River was not within the Coast Tsimshian traditional fishing grounds.

## 3. Zimacord River and Valley

[212] There has been a longstanding conflict between the Coast Tsimshian and the Kitsamkalem who say that their use of land along the Skeena River and the coast grants them legal status to the resources in those territories. For example, the Gitlan of the Coast Tsimshian once occupied the Upper Zimacord Valley but were pushed out by the Kitsamkalem. Dr. Anderson suggested that this fact was disputed, but Dr. MacDonald refers to this in his thesis.

[213] Wilson Duff also places the upper Zimacord Valley in Kitsamkalem territory. In 1891, Kitsamkalem received Indian Reserve No. 3 at the mouth of the Zimacord River in recognition of their use of the local as a fishing ground.

[214] In conclusion, it has not been established on a balance of probabilities that the Zimacord River and Valley were part of the Coast Tsimshian traditional fishing grounds.

## 4. Dundas Island Group

[215] The plaintiffs' claim for territories and camps along islands such as Dundas, Stevens and Portland Island is in serious dispute. The plaintiffs rely on the archaeologist David Archer who stated that the Tsimshian and Tlingit co-existed on these islands 2500 years ago. Then a group of hostile Tlingit forced out the Tsimshian and existing Tlingit. Then the Tsimshian forced out the hostile Tlingit by 800 A.D. and continued to use Dundas as a seasonal fishing camp.

[216] The defendant relies on Dr. Lovisek who in turn relies on archaeologist, James Haggerty, for the proposition that the Tsimshian did not return to Dundas Island until 1700 or 1750. (James Haggerty, "Zayas Island Archaeological Survey Project" (1988) 20 The Midden 1).

[217] The story of Dundas Island and the competing factions of the Tlingit and Coast Tsimshian is very interesting from a historical point of view, but probably irrelevant for the purpose of this Judgement. The fact of the matter is there were a series of battles between the Tlingit and Coast Tsimshian and these battles were eventually won by the Tsimshian who continued to use Dundas Island seasonally from the 1700's to the present.

[218] At least since the time of the last war with the Tlingit, the Coast Tsimshian have occupied this territory. It is fair to say that all of the experts, archaeologists and anthropologists agree that the Tlingit were pushed out at the latest by 1750, which is still before the date of contact. Therefore, the plaintiffs have proved that the Dundas Island group belong to the areas of pre-contact fishing sites of the Coast Tsimshian.

## 5. Nass River and Fishery Bay

[219] The use of the Nass River for fishing raises the issue of the aboriginal laws of permission and trespass that existed in pre-contact times.

[220] Dr. Anderson testified that according to Tsimshian law, territories were owned by a House and administered by the chief of the House. People passing through a territory could take food but only a limited quantity. Permission was required to enter a territory.

[221] At contact, a Coast Tsimshian person could harvest resources from his own House territory and could harvest from another House's territory with permission or if married to a member of that House Group. This applied to hunting, harvesting berries and medicines, and fishing.

[222] The evidence was not clear whether historically, the Coast Tsimshian could fish for eulachon at Fishery Bay or elsewhere on the Nass River without the permission of the Nishka. It appears that the Nishka, Tlingit, Coast Tsimshian, Southern Tsimshian, Kitkatla and sometimes even the Haida participated in the eulachon fishery. What is clear is that the Nass River and Fishery Bay are part of the Nishka claimed territories.

[223] The Nishka have always claimed that the other aboriginal groups had to seek permission to fish in the Nass River and Bay areas. Permission, when granted, was limited to the period of time that the eulachon ran. In fact, the Coast Tsimshian have an arrangement today whereby they provide access to the Nishka for a road through their reserve in exchange for a license of occupation for the eulachon fish camps at the Nass River.

[224] Without deciding whether the Nishka have a valid claim over the non-treaty areas of the Nass river, such as Fishery bay, I find that it is more likely than not that the Coast Tsimshian fished there only with the permission of the Nishka, only for eulachon, and only during the few weeks of eulachon season.

## VII. HARVESTING OF FISH RESOURCES AND PRODUCTS

[225] No one disagrees that the pre-contact Coast Tsimshian and the present day Coast Tsimshian are a fishing people. Indeed, their very existence is attributed to the abundance of marine and riverine foods available to them. There are, however, two types of Fish Resources that supersede all others in their influence on Coast Tsimshian history and culture, and those are eulachon and salmon. These fish dictated where and how the pre-contact Coast Tsimshian spent their time during the year. They were revered in ritual, endowed with supernatural qualities in the halait, or adaawx, and formed the core of the subsistence economy. All other Fish Resources pale by comparison.

[226] Dr. Anderson writes that most authors seem to agree that the Tsimshian were fortuitously placed in the geography in the province. Salmon was abundant and easy to catch in the tributaries of the Nass and Skeena watersheds; however, salmon has always been a finicky fish and prone to fluctuating periods of scarcity.

[227] Dr. Anderson points out that the interior tribes were less lucky. While they, too, had access to salmon it was less reliable and more susceptible to fluctuation in quantity. When the salmon failed they had less to fall back on, whereas the Coast Tsimshian had access to other marine resources.

[228] Dr. Lovisek writes that pre-contact, the primary marine environmental zone on the coast for the harvesting of marine resources was the shallow waters of the continental shelf, called the Neritic zone. This zone was directly exploited by pre-contact peoples for marine mammals, fish, shellfish, bird and marine plants.

[229] Dr. MacDonald's archaeological research at the village sites in Prince Rupert Harbour found some faunal remains of halibut, rock sole, starry flounder, aerotooth flounder, cabezon, green ling, copper rock, cod, four species of salmon, spiny dogfish and rattfish, as well as land mammals. (George F. MacDonald and Richard I. Inglis, "An Overview of the North Coast Prehistory Project (1966 – 1980)" (1980 – 81) 48 BC Studies 56).

[230] Other Prince Rupert Harbour areas, like McNicholl Creek and a site on Ridley Island were dominated by fish bones. The McNicholl Creek site showed that eulachon and sea mammals were apparently not used by occupants. This pre-contact model of subsistence differs from the historical ethnographic pattern, as it shows that certain key resources were not used in the early pre-contact period. This site also represents the occupation of a local group which did not have sea mammal hunting territories outside the inner harbour area.

## A. THE SEASONAL ROUND

[231] Dr. MacDonald and the other experts describe how the seasonal round was at the core of the pre-contact subsistence economy.

[232] Frans Boas discusses Coast Tsimshian seasonal activities from which McDonald extracts a reconstruction of the aboriginal cycle. He writes that at the end of winter, before the river ice broke up, the main activity was eulachon fishing on the Nass. The fish were either dried or processed into nutritious grease that was highly prized.

[233] May was the time for the Coast and Southern Tsimshian to gather and dry seaweed from rocks along the coast. While there, men fished for halibut that women sliced into thin fillets for drying on racks in the sun. Large quantities of herring spawn were also gathered at this time.

[234] The eggs of seagulls and oyster catchers were gathered in early June and abalone was taken at the lowest tides during the summer months. The first salmon of the year began to enter the tidal waters during the seaweed season, at which time they were caught by trolling. As the salmon began to enter the rivers in early summer, people moved to traditional fishing sites where they maintained seasonal camps.

[235] Early autumn was a period for preserving the major supplies of salmon, especially chum, which was ideal because of its less fatty content. The failure of a salmon run could cause a winter of deprivation. Access to all five salmon species provided some insurance against famine.

[236] Most Coast Tsimshian spent winter in the permanent villages. Shellfish such as cockles, clams and mussels abounded in the coastal waters. Archaeological remains from Ridley Island show that there were winter and spring collection of shellfish, and minor use during the summer and fall. Evidence from McNicholl Creek, Grassy Bay and Ridley Island indicates seasonal occupations in which the occupants exploited specialized resources such as salmon from elsewhere.

[237] Archaeologist Kenneth Ames says during the 18th and 19th centuries the Coast Tsimshian started to maintain principal villages in Prince Rupert Harbour. Dr. Lovisek says this suggests that the Coast Tsimshian occupation of the coast and seasonal use of the Skeena River likely occurred during the 18th and 19th centuries, and not earlier. (Kenneth Ames, "Economic Prehistory of the Northern British Columbia Coast" (1998) 35 *Arctic Anthropology* 68).

[238] Garfield writes that there was a strong tendency for the winter village to break up into individual family units, particularly for salmon fishing. The seasonal runs of salmon, herring and eulachon set the pattern for the yearly cycle of economic activities. "Hoards of fish milled about the estuaries or fought their way along the streams to spawning grounds and attracted native fishermen as they do commercial fishermen today". Spring and summer was when food was preserved and stored for November through February. Families had to store sufficient provisions to meet the demands of trading, feasting, potlatching, purchase of services and payment of debts in addition to daily needs. (Viola Garfield, *Tsimshian Clan and Society, Volume 7(3), supra*).

## B. HARVESTING

[239] Dr. Lovisek writes that pre-1775 northwest groups including Coast Tsimshian engaged in a troll fishery in channels or inlets where salmon were caught from baited hooks behind canoes and generally eaten fresh. Pre-contact native peoples used tidewater salmon traps with either stake and pole or stone weirs, cylindrical river traps with or without a funnel entry, a trapdoor for removal of fish in a weir construction, open top traps in a frame of posts used with the weir across a stream, grid traps with a barrier of oblique stakes, pot hanger traps, weirs made of oblique stakes, and small rectangular, baited saltwater traps. Not all pre-contact groups used all methods because use depended on local conditions.

[240] Dr. Anderson writes that besides trolling, nettle fibre nets, trawling, gaffing, river mouth traps, tidal traps, weirs and dip nets, fishing techniques included gill nets. She also says that the major river system in the lower concourse of the Skeena watershed was less susceptible to resource variation and thus the Coast Tsimshian chose to fish there.

[241] Dr. Lovisek points out that the pre-contact Coast Tsimshian engaged in a shallow water fishery, most importantly the inland tributaries. Large rivers like the Skeena were too wide, deep and powerful to permit the construction of weirs. Most of the salmon harvest was taken with the aid of weirs or traps so she concluded it must have been taken in smaller streams.

[242] Dr. Lovisek relies on Coupland, Martindale and Marsden who find that the Tsimshian intensively fished the tributary streams, rather than the Skeena River. They say that pre-contact fishing technology consisted of weirs and traps, such as basket traps and dip nets and were not effective on the lower Skeena River, but were effective on tributary streams. Coupland, Martindale and Marsden also write that while the most effective salmon fishing technique was the gill net, these nets were unknown or unused, pre-contact. (Gary Coupland, Andrew Martindale, and Susan Marsden, "Does Resource Abundance Explain Local Group Rank Among the Coast Tsimshian" in Jerome C. Cybulski, ed., *Perspectives on Northwest Coast Prehistory* (Hull, Canadian Museum of Civilization, 2001)).

[243] The preponderance of evidence suggests that Dr. Anderson is wrong in her statement that pre-contact Coast Tsimshian used gill nets for fishing, or that they fished in the main stream of the Skeena River.

## C. TYPES OF FISH

[244] Archaeologist Francis Stewart, analyzes fish fauna dating from 5,000 years ago to the 18th century from archaeological remains on Digby Island in the Prince Rupert Harbour area. Stewart determines that immature halibut was one of the species that was heavily fished by the pre-contact peoples and most other marine resources such as sculpen, flat fish, sea perch, rock fish, mussels, barnacles, rat fish, green lings, cabezon and shore crabs were obtained from the shallow water bordering the coast. Fish such as eulachon and herring that lived in schools in open ocean water migrated to shallower waters to spawn, together where they were caught along with predators like dogfish, sharks, salmon, albacore and possibly cod. (Frances L. Stewart, "*The Seasonal Availability of Fish Species used by the Coast Tsimshians of Northern British Columbia* (1975) 8 *Syesis* 375).

[245] Stewart also concludes from fauna recovered from Digby Island that salmon were used by both pre-historic and historic coastal groups.

### 1. Salmon

[246] Dr. Anderson testifies that the Coast Tsimshian were heavily dependent on salmon as a staple storage food, a core economic resource.

[247] Dr. Anderson relies on Garfield who, in her book, *The Tsimshian and Their Neighbours, supra*, states that salmon was the decisive food resource of most northwest coast tribes. Coho, spring and sockeye furnished the bulk of dried fish for winter use, though humpback were also stored in quantity.

[248] R.W. Nolan in his thesis on the pre-contact Coast Tsimshian use of Fish Resources, finds that the ethnographic descriptions do not agree with the salmon types reported on the Skeena River. For example, Boas states that spring salmon (or Chinook) was a major species caught by the Coast Tsimshian in the winter. Chinook was a variety of salmon that could be caught in spring, but they were not the most important fish harvested by pre-contact Coast Tsimshian. Furthermore, Garfield claims that the most important salmon species for the Tsimshian was coho followed by sockeye and pink. Nolan finds that Garfield confused spring salmon with coho. (R. W. Nolan, *The Utilization of Fish Resources by the Coast Tsimshian: Predicting Optimal Patterns of Exploitation* (M.A. Thesis, Trent University, 1977)).

[249] McDonald states that originally salmon seemed to have been plentiful on the Skeena. Not only were the salmon runs large on the Skeena (judging from early escapement figures) but their four-year cycles are not synchronized across the species, so that cyclical patterns of scarcity did not occur. These are points noted by the early fishery officers who remarked in 1889 that there had not been a salmon shortage on the Skeena since 1863, and that the scarcity that had occurred then had been avoided through trade. (James McDonald, *Trying to Make a Life: The Historical Political Economy of Kitsumkalum* (PhD Thesis, University of British Columbia, 1985)).

### 2. Eulachon

[250] Garfield writes that eulachon, a variety of candlefish with high oil content, was second in importance among the basic seafood resources. Eulachon runs began in late February and continued as late as May. It was especially welcome because it came early in the spring when dried food stores were low and fresh food was scarce. All the Tsimshian fished for eulachon at the mouth of the Nass where they were joined by Haida and Tlingit fishermen and traders. (Viola Garfield, "The Tsimshian and Their Neighbours" in Viola Garfield, Dr. Marius Barbeau and Paul S. Wingert, eds., *The Tsimshian: their Arts and Music* (New York: Publications of the American Ethnological Society, 1956)).

[251] Dr. Lovisek states that the ethnographic record shows that not all of the Coast Tsimshian went to fish eulachon, as some fished for halibut or hunted deer and birds, and others remained in the winter village. Beynon described how some Tsimshian would go to the Nass River for eulachon and grease, while others went for herring eggs.

### 3. Halibut

[252] There was some controversy about how much halibut was fished by the pre-contact Coast Tsimshian. Dr. Lovisek maintains that the Coast Tsimshian only fished in shallow waters and would not have had access to the large, deep sea halibut. She relies on archaeologist Francis Stewart who has determined from the type of fish bones found at the archaeological site on Digby Island in the Prince Rupert Harbour area that the halibut was consumed by the occupants of the shallow water, immature variety; however, in spring the adult halibut would be moving into shallower waters and would be easier to capture. (Frances Stewart, *The Seasonal Availability of Fish Species used by the Coast Tsimshians in Northern British Columbia*, *supra*).

[253] Dr. Anderson disagrees that the Coast Tsimshian only fished in shallow waters. She reported that deep sea fishing off Dundas, Porcher and Bank Islands was another important activity where cod and halibut were caught by the Coast Tsimshian.

### 4. Herring

[254] Dr. Anderson says not only eulachon, but also herring were caught and dried and rendered into oil. Herring spawn in late winter and appear in highest density in early spring along the coast. They lay their eggs in the inter-tidal area which adhere to seaweeds, rock or other supports that are generally abundant along the coast. Dr. Lovisek said there was no archaeological data recovered from the boardwalk site to indicate herring bones, but she agreed that the pre-contact Coast Tsimshian relied on herring as a food resource.

### 5. Other Resources

[255] Dr. Anderson says that shellfish and seaweed were collected by the women as important barter and food items. Minor resources such as shoots, roots, crab apples, barnacles, tritons and barks were also eaten.

### 6. Processing and Preserving

[256] Martindale writes that prior to contact, collection, processing and storage of food resources was the most significant activity and most common means by which economic surpluses in excess of annual subsistence were produced. The settlement pattern of this period maximized Tsimshian ability to intensify production of subsistence goods. (Andrew Martindale, "A Hunter-Gatherer Paramount Chiefdom Tsimshian Developments Through the Contact Period" in R. G. Matson, Gary Coupland and Quentin Mackie, eds., *Emerging from the Mist: Studies in Northwest Coast Culture History* (Vancouver, UBC Press, 2003) 188).

[257] Dr. Anderson opines that because salmon was the most important resource for the Coast Tsimshian they developed a means to harvest, dry, store and transport it. Staple foods were consumed when fresh but when game and fish were unavailable and necessary for feasting and trade, they fell back on dried foods.

[258] Dr. Lovisek agrees that salmon was important not only because of its abundance but also because of its storability, and that spawning salmon which could easily be preserved for winter food was integral to the distinctive culture of the Tsimshian.

[259] Garfield in "The Tsimshian and their Neighbours", *supra*, describes in detail the Tsimshian storage of food. Goods were kept in boxes underground. Dried foods were stored on shelves suspended from the beams and rafters, or hung in bundles from the beams. When the whites came into the area new ideas and styles in House interiors developed. Tsimshian families also built smoke houses and camp cabins at each fishing and hunting site. Preserved foods were stored in cabins or smoke houses until the family returned to the winter town or until needed. As with all Garfield writings, there is some question about whether this took place pre-contact or not.

## D. FISHING RIGHTS/LAWS

[260] Dr. Anderson opines that pre-contact, each House Group owned a territory from which resources were harvested. Property rights over fish were generally vested in ten basic corporate groups or extended families. Accepting food and gifts of wealth at a feast signalled acceptance of ownership. It was customary for a House Group to grant permission to someone outside the House Group to collect food on the understanding that they would be repaid in kind.

[261] Dr. Anderson relies on secondary sources, Niblack and Pinkerton, who seem to agree that the kinship base or extended family group held the property rights to fishing, and permission had to be obtained and sometimes paid for by non-members. However, Niblack and Pinkerton are very general in their descriptions, almost treating the aboriginal population from Alaska to California as one group, without distinction. (Albert Niblack, *The Coast Indians of Southern Alaska and Northern British Columbia*, *supra*; Evelyn Pinkerton, "Indians in the Fishing Industry" in Patricia Marchak, Neil Guppy and John McMullan, eds., *Uncommon Property: The Fishing and Fish Processing Industries in British Columbia* (Toronto: Methuen, 1987)).

[262] Dr. Anderson also relies on Beynon's Columbia manuscripts in support of her propositions, but I note that the excerpts she has chosen refer to seals, mountain goats, cranberries and crab apples, not fish.

[263] Beynon's observations about fishing rights and laws from his *Ethnical Geography*, Vol. 1:5 are more relevant. He wrote:

Each tribe have their own village sites and each individual group in the tribe, House Groups, have their individual hunting, berry, sea lion rocks and salmon rights. For other food gathering such as eulachon, herring spawn, seaweed, clams, all other shellfish, halibut fishing, there were many tribal camps used in common by each tribe.

(William Beynon, *Ethnical and Geographical Study of The Tsimshian Tribes*, volume 1 [unpublished, archived at the Smithsonian]).

[264] Dr. Anderson reports that ownership of resource territories was proved through crests and feasting and that it was all interrelated. Guest chiefs received food from the Claimed Territories, which were enumerated as food was served. Accepting the food and the gifts of wealth at a feast signalled acceptance of the fact of ownership. Dr. Anderson also relies on the way in which totem poles signified territorial and resource possession, according to Garfield. However, Dr. Anderson admits that there is controversy amongst the authorities as to whether totem poles existed in Coast Tsimshian pre-contact society, or whether they are a form of expression which arose post-contact.

[265] Dr. Lovisek concludes that both offshore and onshore marine resource harvesting locations were subject to ownership and rights of access by a House Group. She refers to anthropologists Donald and Mitchell who say that throughout the northwest coast, resource locations and any apparatus constructed for resource extraction were owned, and in virtually all cases, were held by the few rather than the many. Ownership did not extend to the resource itself.

[266] For example, Mitchell and Donald are careful to state that it was the right to fish for eulachon at a particular portion of the fishing grounds that vested in a House Group. Rights to fish for eulachon, for example, did not extend to other rights to resources like salmon; however, certain other rights came with the rights to take eulachon, like the right to put up a dwelling for the duration of the fishery, and the right to collect firewood for the processing of oil or drying fish, and for domestic purposes. (Donald Mitchell and Leland Donald, "Sharing Resources

on the North Pacific Coast of North America: The Case of the Eulachon Fishery” (2001) 1 Anthropological 19).

## E. CONSERVATION

[267] Dr. Anderson insists that there existed aboriginal practices for conservation of fish. She relies on Pinkerton, *supra* and others whose list of conservation practices include limiting quantities, timing and in-season closures. Dr. Anderson says preservation of Fish Resources was not so much intentional conservation as a consequence of ceremonial life and limitations arising from fishing methods. For example, salmon was usually only captured after entering the spawning territory or the river systems.

[268] Dr. Lovisek writes that the Coast Tsimshian idea of conservation was to attract marine resources by conjuring, ritual cleansing and other ritual observances. They believed that the proper respect and ritual actions would lead to the future abundance of species. This was an important function of the lineage leader or Shaman. The most intensive ritual observances concerned the salmon and eulachon which were collectively harvested and processed.

[269] For salmon to return the next year, the Coast Tsimshian believed that salmon flesh had to be consumed within a year and the bones burned. “First eulachon rites” were practiced by the Coast Tsimshian. There were taboos concerning the eulachon and a specific practice for making eulachon oil in the exact and appropriate way.

[270] On-shore marine resources were managed more closely by House Group owners because spawning salmon, eulachon and herring required intensive preparation, harvesting and storage. Off-shore resources like halibut were primarily taken from shallow waters and required less direct management.

[271] All production capabilities of significant schooling marine resources, like salmon and eulachon, were limited not exclusively by the abundance of the species, but by the capability to preserve these species.

[272] Dr. Anderson says these management practices tie in with trade because when fishing a scarce resource such as salmon became too hard, the Coast Tsimshian would resort to trading for salmon with other things such as halibut, carved items and meat. Therefore, she maintains, there was trade in salmon even between two groups who had access to it (see section IX. Trade in Fish).

## VIII. TRADE IN GENERAL

[273] The plaintiffs submit that trade in a variety of products, especially Fish Resources, was an integral part of the distinctive Coast Tsimshian pre-contact culture. They submit that the abundance of Fish Resources in their Claimed Territories enabled their predecessors to build a surplus in food products over and above what they needed for their own sustenance, and that they traded this surplus for wealth goods to enhance their prestige and rank which was a core element of their social organization.

[274] The defendant submits that any exchange of goods amongst the Coast Tsimshian, or between the Coast Tsimshian and other groups, was for sustenance, or incidental only, and not integral to their society. The defendant admits that late pre-contact Coast Tsimshian society produced a subsistence surplus, but submits it was only used for survival during winter months and to allow House Groups to participate in the prestige economy of ceremonial exchange. There was no form of market trade in Fish Resources and Products that could be transmuted to a modern commercial fishing right, except perhaps with respect to eulachon.

[275] I think it is necessary to separate trading activities by the Coast Tsimshian in other goods from trading specifically in Fish Resources and Products. The specific activity relied upon by the plaintiffs to support their aboriginal right is trading in Fish Resources and Products on a scale akin to commercial. Thus, even though trade by the pre-contact Coast Tsimshian of slaves, or coppers, or other luxury products might have been an integral part of their culture, this trade alone would not be sufficient to prove an aboriginal right to commercial fishing. Similarly, I think it is important to consider the activities of harvesting and producing Fish Resources separately from trading Fish Resources. The activity of harvesting and processing Fish Resources and Products might be an integral part of the plaintiffs' culture, but would not on their own support a right to fish for commercial purposes.

[276] Dr. Anderson describes Tsimshian trade as having lasted hundreds, even thousands of years, being extensive and far flung, and including trade of sea food and other goods. She says that trade continued well after the establishment of settlers in Tsimshian territory.

[277] Dr. Anderson refers to Dean's thesis *'Rich Men', 'Big Powers' and Wastelands (supra)* wherein he states that the arrival of the Euro-American traders did not regulate the movement of prestige goods along the coast. Dean, however, also says that most ethnographic material is mute on the nature of pre-contact Coast Tsimshian trade which had already been shaken by the maritime traders, followed by the HBC and Russian American Company, well before the arrival of Frans Boas on the coast.

[278] Dr. Anderson concedes that the ethnographic literature is almost silent on the more mundane aspects of economic production and trade; however, she says that “oral history” and “traders' records” document that there was extensive trade among the Tsimshian as well as between Tsimshian and other ethnic groups. In the conclusion to her report, she makes a surprising reference to the “great magnitude of the documentation of widespread and large scale trade” in the Primary Source Compilation. She provides no footnotes, however, and my review of her Primary Source Compilation suggests that she is grossly exaggerating. I discuss Dr. Anderson's Primary Source Compilation in more detail in section IX. Trade in Fish.

[279] Dr. Lovisek confirms that from the documents she has seen, the ethnographic examples of exchange and trade were all post-contact.

[280] The practice of trade is integral to the economy of a society. Dr. Langdon states that Coast Tsimshian society operated in a coherent and orderly manner without a coercive centralized power of state so a question arises concerning how the economy, including trade and other things, was conducted and regularized among the autonomous tribal groups. To assist in answering this question, it is helpful to consider economic anthropology, surplus production, standard units of exchange, specialization, wealth goods, trade routes and post-contact trade.

## A. ECONOMIC ANTHROPOLOGY

[281] Dr. Langdon has expertise in economic anthropology. He explains that economic anthropology is a sub-discipline of cultural anthropology. It concerns the practices and concepts through which human populations provide food, clothing, and shelter for existence as well as a wide variety of culturally defined material and services. The manner in which trade is practised is integral to the economy of a society.

[282] Dr. Langdon refers to Karl Polanyi, one of the first economic historians to explore distinctions in human systems of exchange. In his publication, “The Economy as Instituted Process” in K. Polanyi, C. Arensberg, and H. Pearson, eds., *Trade and Markets in the Early Empires: Economics in History and Theory* (New York: Free Press, 1957) 243 he asserts four principles of exchange:

- a. Reciprocal exchange or instantaneous equivalent transactions;
- b. Redistributive exchange production flowing to a central authority who makes decisions about allocation and redirects to various peoples or groups;
- c. Market exchange following the principles of supply and demand provisioning through a price mechanism; and
- d. Autarchy which is a mode of non-exchange.

[283] Dr. Polanyi's theory was that each society had one of the above as a dominant feature which could not be effectively understood as a distinct set of practices or activities divorced from the social and cultural context. Applying Dr. Polanyi's theory to the case at bar, one could say that the specific type of exchange system of a defined group is integral to its distinctive society.

[284] The question is which type of exchange system did the pre-contact Coast Tsimshian experience – a market economy or a kinship economy?

### 1. Market Economy

[285] In a capitalist society, goods and services are exchanged primarily through money. Abstract markets of supply and demand set the prices, and allow for the potential of profit that can be converted into capital and invested. In a market driven society, most things can be purchased and are therefore commodities.

[286] The idea of "market" includes:

- a. market principle (some form of supply and demand of resources is in operation although the relation may be relatively weak);
- b. market places (specific locations where buyers and sellers bring their products or skills to exchange); and
- c. markets (fully integrated economic forms where transactions are made through money, and prices are a function of supply and demand).

[287] Dr. Langdon states in his report that the Coast Tsimshian utilized the market principle above. The amounts of food, materials or goods were produced with a view toward how they would be used in consumption or exchange. He also says they participated in market places such as the gathering of the tribes at the Nass River.

[288] On cross examination, he admitted that a potlatch, by which he said trade was conducted and regularized, is not a marketplace because there are no direct exchanges. People are not bringing surplus production with the expectation of finding others with whom to exchange goods. Distribution and sharing amongst the foraging community is not a marketplace because the notion of a marketplace involves populations from discrete communities coming together at a place to exchange goods that they do not have access to on a yearly basis. Even feasts and reciprocating feasts, although a form of exchange, are not a marketplace.

[289] There is no doubt that the pre-contact Coast Tsimshian economy was vastly different from today. It is important to remember, however, that even the European economy in the 18th century was not nearly as sophisticated as it became after the industrial revolution of the 19th century. Nevertheless, all the experts agree that the pre-contact Coast Tsimshian economy was not a western style capitalist one. I am satisfied from the evidence that the pre-contact Coast Tsimshian economy cannot be described as a market economy.

## 2. Kinship Economy

[290] Dr. Lovisek describes the pre-contact Coast Tsimshian economy as a "kinship economy". She opines that pre-contact trade was personal and was negotiated between kin structured relations on a clan basis of familial relationships. The production and distribution of material goods were organized by transactional principles distinctly different from market exchange.

[291] Dr. Lovisek relies on Kalervo Oberg's anthropological work involving North West Coast peoples and the subject of trade (Kalervo Oberg, *The Social Economy of the Tlingit Indians* (Seattle: University of Washington Press, 1973)). Oberg distinguishes between "gift exchange" which takes place within a network of social relationships, and "barter" or "trade" in which individuals seek their own advantage to bargaining, without the benefit of a social relationship. He concludes that barter did not exist among the Tlingit before European contact.

[292] According to Frederica DeLaguna, another Tlingit expert, the economic motive for trade of the Tlingit was secondary since the items exchanged were luxury food stuffs and goods. She implies that the primary motive was in the sheer pleasure of handling wealth, and visiting relatives in new areas. She says that even as late as 1880, the Tlingit were in no way dependant upon European trade goods. (Frederica DeLaguna, "Tlingit" in Wayne Shuttles, ed., *Handbook of North American Indians, Volume 7, The Northwest Coast* (Washington: Smithsonian Institution, 1990)).

[293] Dr. Anderson does not agree that the Coast Tsimshian economy was merely kinship based. She says that the Tlingit may have been kinship based because they only had two clans, but the Coast Tsimshian had four which allowed them greater latitude to trade. She also pointed out that the Tlingit did not barter among themselves, but they did trade for profit to other non-Tlingit Groups.

[294] In the joint publication by Rita Smith Kipp and Edward M. Schortman, "The Political Impact of Trade in Chiefdoms" (1989) 91 *American Anthropologist* 370, the authors provide a practical explanation for the importance of kinship in pre-contact society. It determined with whom one may exchange foods and gifts. In the absence of specialized traders, luxury goods changed hands for personal and political reasons such as wedding gifts, funeral offerings, and other life crisis gifts between kin. Reciprocal gift-giving also occurred between leaders, such as tokens of apology, invitation, treaty or alliance. A kin-like or ethnic bond would have cushioned the delayed returns and perpetual imbalances of reciprocal exchanges between distant partners. Kipp and Schortman also state that commercial market exchange would have posed structural problems because it would have disrupted the existing socio-political patterns. These authors restrict the term "trade" to entrepreneurial behaviour, a form of exchange different from those entailed by personal obligation.

[295] Dr. Lovisek also refers to Susana Narotzky, who described in her work *New Directions in Economic Anthropology*, (London and Chicago: Pluto Press, 1997) generalized reciprocity as "goods that are entangled in the social fabric in such a way that they appear as extensions of personal obligations and never seem to acquire the autonomy necessary for establishing equivalences of value". Bonds are produced to establish a long lasting social relationship, and this is done through trading partners. By extension, commercial exchange exists where there is no kinship relationship between the partners in the transaction, except for purely economic reasons.

[296] In his report, Dr. Langdon does not agree that the Coast Tsimshian economy was wholly a kinship one. He argues that describing it as such leaves out a number of practices and institutions through which the long distance trade of the Coast Tsimshian functioned. Coast Tsimshian economy included slavery, appropriations through raiding, and certain rule driven distributions from Household producers to the elites, and from elites back to their kinsmen upon receipt of certain potlatch distributions. Neither reciprocity, nor exchange, nor kinship economy, encompasses these elements of Coast Tsimshian economy.

[297] However, in cross examination, Dr. Langdon admits that what he was talking about was in fact a kinship economy, with a feasting and potlatch distribution system. In his report, Dr. Langdon refers to Richard Daly's publication *Our Box Was Full: an Ethnography for the Delgamuukw Plaintiffs, supra*, wherein he uses the concept of kinship economy to describe the basic means by which production, distribution, exchange and use occurs amongst the Gitksan. Dr. Langdon says two features of Daly's analysis are also characteristic of the Coast Tsimshian economy: i) the limited ability to mobilize labour beyond the range of kinship; and ii) the facilitation by kinship mechanisms of the establishment of relations with distant groups from other ethnic backgrounds.

[298] Garfield, in her 1939 publication, *Tsimshian Clan and Society, Volume 7(3), supra*, comments that her Coast Tsimshian sources made a point of telling her that there was little evidence of impoverishment in pre-contact Coast Tsimshian society, which might be taken as evidence that the institutions were regarded as "fair". They operated according to principles of a kinship economy which emphasized personal exchange as the primary, but not sole, means of accomplishing the movements of goods and services.

### a) Gift Exchange

[299] Personal exchange, or "gift giving" as it is sometimes described, is at the heart of a kinship economy.

[300] Dr. Anderson agrees on cross examination that trade is an exchange of goods between two parties other than gifts, or loans, or compensation. Transfer of goods from one person to another, or one group to another, is simply an exchange. She said there are at least a hundred types of economic transactions in the Tsimshian culture. Barter is the mutual exchange of goods or services with no money changing hands. Dr. Langdon explains that money wasn't needed because one of money's main attractions is durability for hoarding, which was culturally proscribed amongst the Tsimshian.

[301] There is a continuum of pure gift at one end through to reciprocity at the other end. Commercial transactions with a stranger are at the latter end of the spectrum. Therefore, any evidence of exchange must be analyzed within the social context.

[302] In his report, Dr. Langdon says Coast Tsimshian institutions of exchange and trade were elaborate, sophisticated and complex. They used a wide array of gifts and trade or exchange mechanisms.

[303] Christopher Gregory, *Gifts and Commodities* (London: Academic Press, 1982) distinguishes between the giving of a gift, which requires personal ties, and establishing a continuing social link, from the selling of a commodity that results in the two parties being once more independent and free of obligation to each other. Gifts may have multiple dimensions of value ranging from exchange, to historic, to symbolic,

to sacred; commodities are items that gain their values mainly from their convertibility. Commodities are considered to have had their origins on the margins or fringes of kinship economies where it is often socially easier to maximize one's return than is the case among kin folk.

[304] In Coast Tsimshian society there are different forms of gifting defined by social contact, such as peer gifts, obligatory gifts and personal loans. It is these latter concepts of reciprocity and the necessity of fulfilling obligations that makes Coast Tsimshian economy more complex. Food stuff, goods and other materials could even be acquired as loans that were typically brought forth by the staging of a small feast by a prospective chief.

[305] Dr. Lovisek refers to a HBC Fort Simpson Post Journal of 1838 which says "the Indians in making presents and giving away things always do so with the understanding of some time or other getting an equivalent in return". She says this underscores an important understanding about the nature of exchange in Tsimshian and other North West Coast society. Material goods or wealth become valuable by being given away: exchange in the form of gift giving was expected to be reciprocal.

#### b) Trade Relationships

[306] The second key element to a kinship economy is trade ties or relationships.

[307] The plaintiffs submitted that trade amongst the pre-contact Coast Tsimshian and their neighbours was of sufficient development and importance that the Coast Tsimshian had established trade relationships and prerogatives, which were fomented and protected.

[308] Dr. Anderson describes the relationships and partnerships as sometimes being exclusive monopolies where others paid tribute to join a trading party. Access to some trade routes was controlled by limiting those who could pass through narrow river canyons, or move along the ancient grease trails that linked the communities of the region.

[309] Dr. Lovisek states in her report that tributes or tolls related to trading along the Skeena River were post-contact. Death from smallpox between trading partners would have disrupted established trade ties based on kinship ties. Some villages or Houses would have been displaced, and others would have had to re-establish trade prerogatives.

[310] Dr. Lovisek refers to Albert Niblack, U.S. Navy Surveyor of Alaska in the 1880's, who states that in earlier days, previous to the advent of the whites, the trading was carried out less systematically and with formality on account of the feuds between the different tribes. He acknowledges the shift in trading to the then present (1880) by stating that "the Indians of this whole region are expert traders". ("The Coast Indians of Southern Alaska and Northern British Columbia" in *Annual Report of the U.S. National Museum for 1888* (Washington, 1890)).

[311] Dr. Lovisek also notes that Frans Boas attributed the trading prerogative to clans, and not tribes, in his publication *The Tsimshian Mythology* (Washington, DC: Smithsonian Institution, 1916). Finally, she notes that the references to trading prerogatives between kin in the Tsimshian narratives parallels that of the neighbouring Tlingit, who have been cited as trading partners of the Tsimshian.

[312] Dr. MacDonald says it appears that every one of the nine Coast Tsimshian groups had major external trading partners. He says that formal trade relationships had been reported for a number of groups, both within and between the Tsimshian-speaking divisions and the Haida and Tlingit; however, he does not cite any source for these statements.

[313] Dr. MacDonald discusses the efforts dedicated to protecting trade routes and relationships. He considers warfare and conflict to be the complement to the trading system. He speaks about the archeological evidence of conflict dating back several thousand years which he infers related to the defence of resources for trade, and trading rights and relationships.

[314] Dr. Lovisek points out that warfare not only interfered with trade, but with the acquisition of food provisions. The examples of violence in the historical record demonstrated the fragility of trade between individuals and its potential to escalate into violence.

[315] In my opinion, the evidence is overwhelming that the pre-contact Coast Tsimshian economy was indeed a form of kinship economy, as that term is used by the anthropologists.

## B. SURPLUS PRODUCTION

[316] No one denies that the Coast Tsimshian were able to produce a surplus in food stuffs. There is some disagreement whether that surplus took the form of Fish Resources or not, but that is discussed below.

[317] Dr. Lovisek refers to Martindale who says that the late pre-contact Coast Tsimshian society was organized to produce a sufficient subsistence surplus to permit people to survive on stored food for five months of the year and to allow Households to produce sufficient excess food stuff to participate in the "prestige economy of ceremonial exchange", that is, the feast and potlatch system. After contact, these concerns remained, but a new way of participating in the prestige economy developed as a result of the fur trade. In the late pre-contact period, trade in portable objects of highly valued material was characteristic of the pre-contact exchange system.

[318] Dr. Lovisek says in her evidence in chief that Martindale identifies the surplus item as berries stored in eulachon grease, not salmon, but on cross examination she was taken to another passage which clarified that Martindale thinks there were surpluses in salmon as well.

[319] From his Psacelay findings, Martindale speculates that by the end of the fall, the Households would have prepared to move back to their coastal villages and would have taken with them stores for the coming winter, such as dried salmon and venison, as well as berries and other plant food preserved in eulachon grease. They would be shipping a supply of resources for trade, and for ceremonial exchange. Berries and grease would have been prominent among these. He said feasting was a primary exchange purpose of surplus production.

[320] Dr. Anderson says that having reliable surpluses during periods of scarcity among neighbours was the foundation of Tsimshian influence. A portion of production of the House Group (in direct correlation to status) was allocated to trade for goods that would sustain and enhance the standing of the group and ensure successful potlatches and feasts. Dr. Anderson thought that the reference in the oral histories to the abundance and surplus of products indicated acceptance of the people by the spirits of the territory.

[321] Dr. Langdon concludes that more than fifty percent of production went to the chief, but he was unable to support this statement. It supposedly refers to a note made by Garfield, but the only reference he was able to produce spoke about one-half of production going to the chief for prestige purposes, not trade.

[322] I am satisfied from the evidence that the pre-contact Coast Tsimshian managed to create surpluses of food products, including surpluses of Fish Resources and Products; however, as will be seen, the evidence indicates that such surpluses were primarily used for subsistence during the winter months. The use of surpluses for trade appears to have occurred only incidentally, in rare times of famine.

## C. STANDARD UNITS OF EXCHANGE

[323] Dr. Langdon explains in his report that in simple economies, objects are traded without standard rates or medium of exchange. In more elaborate economies, both standard rates and mediums of exchange may occur, but multiple items may be involved in the exchange, and there is no single item such as money that can unify valuation and exchange. Highly complex economies are integrated to an extremely high degree by markets, and money makes possible the exchange of objects necessary.

[324] Dr. Langdon opines that the Coast Tsimshian economy did not operate with single purpose money, but through standardized transactions of a wide variety of products according to fixed rates. True market integration was not present in the traditional, pre-contact Coast Tsimshian economy, but standard measures were developed for various materials, such as bundles of salmon, boxes for eulachon grease, herring eggs, seaweed, hemlock cakes and other foods. In the elite sphere of exchange, standard measures were slaves, coppers, and marmot or groundhog skins.

[325] Dr. Langdon admits that standard values are not inconsistent with a barter system. People still negotiate for the best price. He also admits that Garfield expected to find a standard fixed rate and discovered that rates might fluctuate according to the occasion. He said one must distinguish a measure (bundles, boxes, baskets) from a rate (ten bundles, etc.). Garfield finds standard mediums and standard measures, but not standard exchange rates.

[326] There is disagreement in the ethnographic literature whether a standard or unified measure of goods existed pre-contact. In Appendix 1, Exchange Values of Goods, located in *Tsimshian Clan and Society*, *supra*, Garfield says that before white contact most of the goods which changed hands in trade or as potlatch gifts were made by the natives or acquired from neighbouring tribes. Everyone in the community was able to make or prepare most articles. Even chiefs helped with the fishing and hunting.

[327] Garfield also says that trade values of various commodities were very difficult to obtain. Few of the natives knew even the approximate exchange values of goods previous to the introduction of European trade articles. All insisted that values depended upon the relative status and ability of the traders to negotiate. A chief expected to pay more for his purchases than commoners and also expected to receive more for what he sold. Scarcity was also a factor in that the rarer the object, the more likely the higher perceived value.

[328] Three informants gave Garfield information which she puts into a list of exchange values. She warns that the list is not complete and includes articles of both native and European manufacture. There is no doubt that this list was created with post-contact information.

[329] I am satisfied from the evidence, or the lack thereof, that there were no standard exchange values in the pre-contact Coast Tsimshian exchange system.

#### D. SPECIALIZATION

[330] Dr. Langdon also refers to specialization as a key dimension indicating what an economy is able to accomplish. Specialization means "the degree to which production of particular items is accomplished by separate, discrete units of production who therefore must exchange their products with other specialized producers in order to obtain the necessities of existence and the discretionary of being".

[331] Dr. Anderson says that specialization is indicative of a trade economy rather than a subsistence one. She refers to forms of Tsimshian specialization such as prestige hunting, raiders, and halait, ceremonial regalia for the halait, carvers, weavers and performers. Prestige foods were ones that required skill or supernatural efficacy to obtain them, such as mountain goat or eulachon grease.

[332] Dr. Langdon states that Coast Tsimshian society rests in an intermediate position with regard to the amount of specialization. The production unit for most food stuffs was the Household of which the Chief was coordinator and manager. There do not appear to have been any full time specialists, but there were individuals and groups known for their specialty products, some of which derived from the resource territories they controlled, some of which derived from their trading practices, and some of which derived from the technical or aesthetic skills the makers displayed. This pattern has been termed "incipient specialization". Dr. Langdon admitted that even at the time of contact there was no evidence of full time specialization, only incipient specialization which refers to specific skills that are recognized.

[333] Martindale writes that prior to contact there appeared to have been a level of regional economic specialization in which Households produced a surplus of specific resources to maintain and generate status by participating in ceremonial exchanges. For example, Boas writes that the coastal groups produced containers and the interior groups produced food stuffs. Local groups specialized in the production of economic surpluses including both manufactured goods and surplus subsistence production. It is interesting to note that in Martindale's tables it is only the Kitsumkalem, (who are not Coast Tsimshian), who provided dried salmon as a trade article.

[334] Dr. Lovisek maintains that there is no indication that pre-contact Tsimshian society had professional traders, or that Tsimshian villages produced specialized goods for trade purposes. She makes this statement despite references in the mythological literature attributed to Boas. She relies on Garfield who rejected Boas' depiction of various Tsimshian villages producing specialized goods and trading them.

[335] On balance, there is insufficient evidence to enable me to conclude on a balance of probabilities that there was product specialization to any significant degree in pre-contact Coast Tsimshian society.

#### E. WEALTH GOODS

[336] As mentioned in section V. D. Wealth there is evidence of a variety of wealth or luxury goods that were exchanged amongst the Coast Tsimshian and their neighbours. The most important of these pre-contact wealth goods were slaves, coppers and dentalium.

##### 1. Slaves

[337] Dr. Langdon states in his report that slaves were sources of labour, wealth items for trade, and wealth items convertible at potlatch rituals to prestige for their owners. They were usually traded for other highly valued or rare goods such as copper, caribou skins, marmot and groundhog furs, and special quality feasting objects such as spoons and bowls. Also ocean going canoes or other more functional items could be procured by slaves. The enormous importance of the slaves was to produce surpluses needed for the feasts and religious ceremonies that were held.

[338] Dr. Langdon relies on Leland Donald's article, *The Slave Trade on the North West Coast of North America* (1984) 6 Research in Economic Anthropology 121, but admits that Donald avoids absolutely affirming the pre-contact existence of slavery anywhere on the North West Coast due to a lack of clear evidence from archaeological, linguistic or explorer accounts. Dr. Langdon says the presence and work of slaves is shown in the stories and *adaawx* recorded by Beynon and Tate.

[339] In his article, Donald criticizes both ethnographic data because of its poor time controls, and archaeology because it doesn't offer many clues about trade of any kind, including the slave trade. The most he can say about the pre-contact slave trade is that there are almost certainly some transactions in slaves usually involving short distance contact between neighbours. Although the slave trade was most certainly important before contact, Donald says its early 19th century scale in both numbers and distance is probably a by-product of opportunities created by contact.

[340] The other important thing to note about the slave trade is that slaves weren't exchanged for food but rather for other prestige goods.

[341] Albert Niblack describes slaves as the most important expression of wealth in the 1840's. He states that the Tsimshian were the principals in this slave trade to the northern Tlingit and Carrier in exchange for furs. Slave labour enabled the accumulation of a larger surplus which led to more extensive exploitation, greater specialization and artistic development. ("The Coast Indians of Southern Alaska and Northern British Columbia", *supra*).

##### 2. Coppers

[342] Dr. Langdon testifies that the primary role for coppers in pre-contact society was use in the potlatch, but he also testifies that coppers could be converted to a wide variety of materials including salmon and other food stuffs, although he cited no source for this statement.

[343] Martindale confirms the existence of coppers pre-contact. He writes that copper from native sources on the Copper River in Alaska had long been a highly prized resource. Iron may have arrived from earlier exchanges with Russians or salvaged from wrecked ships. Already formed tools were accepted, but metals were most valuable as sheets from which indigenous tool makers could craft their own style of tools. Copper was especially valued for making crest images. In return, the Tsimshian offered food and supplies, but the most significant trade resource was sea otter pelts.

[344] Garfield also wrote that the use of copper was definitely pre-European on the North West Coast. There is sufficient testimony of 18th century traders and explorers to establish the fact that the Tlingit, Haida and Nootka, with whom traders made their first contact, were thoroughly familiar with the metal, manufactured it and traded it widely.

##### 3. Dentalium

[345] Dentalia are a shell fish found on the ocean bottom near the shore in waters off the West Coast of Vancouver Island. They were highly valued and used for ornamentation, status marking and embellishment on ceremonial garments as far north as the Athabaskan speaking people. Dr. Langdon maintains that they do not appear to have been used internally within Coast Tsimshian society for ornamental, spiritually or economic exchange purposes, but they were used in trade with the Tlingit and Haida to acquire copper.

[346] Albert Niblack also noted that dentalia shell was valued: "Amongst the Coast Indians themselves ... sea otter skin was the basis of exchange, although the shell currency seems to have had a relative value. This latter lost its function when the Europeans began to import large quantities of shell later on". In "The Coast Indians of Southern Alaska & Northern British Columbia", *supra*, Dr. Lovisek said this was probably referring to the maritime fur traders selling dentalia in the 1820's.

#### 4. Other Trade Goods

[347] Dr. Anderson lists other highly prized trade commodities such as sea mammals, mountain goat and eulachon grease. Dr. Lovisek stated that copper plates, beaver skins, slaves, eulachon oil and elk skins were consistently represented in the ethnographic and historic records as constituting wealth for the Tsimshian. She quoted from Albert Niblack, who wrote "The Tsimshian were the middle men and were, and are still, the great traders in oil and grease of which they prepare large quantities from the eulachon, sea blubber, deer and goat flesh", (*The Coast Indians of Southern Alaska and Northern British Columbia, supra*).

[348] Garfield writes of Tsimshian women bartering woven goods and preserved foods.

[349] Dr. MacDonald lists trade goods as including eulachon and grease, halibut, seaweed, soapberries and carved horns, spoons and slaves.

[350] As can be seen from the above lists, there is little mention of Fish resources and Products. I discuss that subject in more detail in section IX. Trade in Fish.

#### F. TRADE ROUTES

[351] Martindale relies on archaeological evidence of early trade routes. He writes that trade in portable objects of highly valued material was characteristic in the Era 5,000 to 1,500 B.P.. Late in the pre-contact period, trade included subsistence goods. Rendered eulachon oil was most significant among these and the Tsimshian were at the center of its production and distribution. The oil was highly valued as a preservative; perishable resources such as berries when soaked in grease would store throughout the year. In return, the Tsimshian imported products of the interior such as moose hides, groundhog pelts and moose meat. The indigenous exchange routes in the area were called "grease trails" which were mapped by Dr. MacDonald (George F. MacDonald, *Kitwanga Fort Report* (Hull: Canadian Museum of Civilization, 1989)). Thus large scale pre-contact trade dealt mainly with exporting eulachon grease from the Nass estuary throughout the North West Coast. The Tsimshian effected control over coast to interior trade in part by relocating their summer residences from resource producing zones in the tributary valleys to the Skeena River itself.

[352] The evidence of the grease trails together with the rest of the evidence on eulachon establishes without a doubt that the pre-contact Coast Tsimshian were important traders in eulachon oil.

[353] The evidence on wealth goods as a whole is a strong indicator that pre-contact Coast Tsimshian trade revolved around these types of goods and the prestige that they signified, as distinct from subsistence goods.

#### G. POST-CONTACT TRADE

[354] Martindale explains that there are three major economic themes of the contact period reflected in the *adaawx*. First, the *adaawx* contain many stories describing how Tsimshian local group leaders adapted the economic potential offered by the Europeans to their own advantage. Second, Tsimshian leadership was keen to maintain the social status quo so they restricted access to European traders to those in leadership roles. Finally, the leadership of some local groups was able to gain considerable advantage in status and political power over their peers by applying the wealth derived from European trade to traditionally Tsimshian status mechanisms. For example, the Gispaxlo'ots did not own many productive salmon fishing areas so part of their political status derived from the economic benefits of their fur trading arrangements with interior groups. They held traditional and exclusive rights as the only lower Skeena Tsimshian group to trade with the upper Skeena Gitksan and Wet'suwet'en.

[355] Martindale writes that the demand for sea otter pelts created a new industry amongst the Tsimshian. Within a decade of 1785, the sea otter trade had become the primary forum for European contact with the aboriginals.

[356] While the increasing role of trade permeated changes within the Tsimshian society in the early contact era, it is significant that the initial commodity fur trade was incorporated within the traditional indigenous trading spheres. Pre-contact trade relationships, especially involving eulachon grease and hides, were founding principles upon which the European fur trade was built.

[357] Martindale finds that during the contact period, local groups started to consolidate into single summer villages, rather than staying in their resource territories. This suggests that the pre-contact small local groups had shifted away from habitation sites and their subsistence resource Claimed Territories during the contact period to occupy sites along the Skeena River. The attraction was that the Skeena River had become a main artery of trade. Martindale concludes "this means there was decrease in the significance of subsistence resources in favour of economic activity within the trade economy".

[358] Martindale emphasizes that in what he calls the proto-contact phase (1787 – 1850), the trade economy was increasing in importance but the subsistence economy had not yet been abandoned.

[359] Archaeologist Paul Prince concludes that it was competition for trade between natives groups in the proto-contact period that contributed to increased warfare, population movement, amalgamation and increase in settlement of upper Skeena River Groups, particularly near trade routes. Native trade may have brought iron across the Bering Strait as early as 1648 and these European goods reached the Skeena River at the beginning of the 18th Century. Prince says it was the combination of population movement and amalgamation in the early 18th Century that brought the Coast Tsimshian together into ethnographically recognized groups called tribes. This can be important because trading prerogatives always refer to tribes and not clans, and to tribal leaders, not lineage leaders. This suggests that widespread trade amongst the nine tribes had a post-contact origin. ("Protohistoric Settlement and Interaction on the Upper Skeena in Long Term Perspective" in M. Boyd, J.C. Erwin and M. Hendrikson, eds., *The Entangled Past: Integrating History and Archaeology* (Calgary: Archaeological Association of the University of Calgary, 1999)).

[360] Prince's archaeological findings for the upper Skeena River which indicate a shift to more sedentary occupation as a result of proto-contact European trade are independently supported by Martindale's findings on the lower Skeena River. Both archaeologists found a similar pattern and a similar rationale for the change, namely European trade.

[361] According to Dr. MacDonald wars in the early 18th Century were organized for control of trade routes and historic trade in metals and improved weapons. This general pattern of movement was related to groups pushing other groups to secure the trading trails that ultimately connected through to South East Alaska and the new wealth of Russian trade goods. ("The Epic of Nekt: The Archaeology of Metaphor" in Margaret Seguin, ed. *The Tsimshian: Images of the Past, Views for the Present* (Vancouver, UBC Press, 1984)).

[362] Dr. Lovisek states that the Russians held a thirty year lead in the sea otter trade before Captain Cook arrived in 1778. The records created by the maritime fur traders are the first primary source data to tell us which aboriginal activities had been carried on until then. Dr. Lovisek maintains that the maritime fur traders had a commercial interest in the area and so reported on activities by Coast Tsimshian people. They observed exchanges of eulachon amongst aboriginals, but nothing else. So they bought large quantities of grease to trade for furs but they didn't buy any other native products, except some dentalia.

[363] The American maritime fur traders had gained a near monopoly on the fur trade by the late 1790's. In 1791, Captain Gray, an American coaster, discovered that the Haida traded with the mainland Tsimshian; however, by 1799, the American fur traders had intercepted this native trade and cut into, or cut off, the profits of the Haida.

[364] By 1793, the maritimers were not only trading European and American trade goods to the Tsimshian, but also native produced goods to other native groups. For example, the maritimers traded Tsimshian produced eulachon oil directly to the Haida. In or before 1793, the traders also started to winter on the coast which contributed to the development of a new market for food stuffs from native people for things such as deer, duck, clams, geese, halibut, salmon, herring, berries and birds' eggs.



[365] In or about 1793, Captain Brown learned that there was an extensive inland river communicating with the sea to the northward that took three months to reach. He was told this was where the natives traded for whale oil, sea otter skins and other marine products. Historians today believe he was referring to the Nass River.

[366] When Captain Vancouver first met the Coast Tsimshian, they refused all presents, but tried to encourage Captain Vancouver to come to their village to trade sea otter skins which were apparently of very poor quality.

[367] The 1790's saw a merger of the Russian fur trading companies into the United American Company. In 1795, the Russian American Company established a post at Yakutat Bay and in 1799, Csar Paul awarded an imperial monopoly to the Russian American Company.

[368] In 1811, the New Hazard ship reported trading native produced goods between native villages including eulachon grease, canoes, elk skins, abalone shells, native foods and slaves. In 1812 – 1813 vessels started to winter on the coast at Kitkatla. There was little fur trading during the winter and the traders started to depend more on local food stuffs produced by the native people.

[369] In 1812, Daniel Harmon of the North West Company visited the Babine Carrier at Babine Lake and was the first European on the headwaters of the Skeena River. He found that the Carrier received goods from the Coast by way of barter from their neighbours, the Gitksan, who purchased them indirectly from white people. The Gitksan actually bartered from coastal native middlemen as there are no known descriptions of maritime fur traders ascending the Skeena River.

[370] HBC fur trader Peter Skene Ogden visited the Carrier in the 1820's and found to his surprise that although the Carrier were perfect strangers to the site of Europeans, they possessed many articles "indicative of a commercial intercourse". In *Traits of American-Indian Life and Character by a Fur Trader* (London: Smith, Elder and Co., 1853), he concluded that:

... the river afforded a communication between the races and the Indians inhabiting the coast and its mouth known as the Tsimshian. Through this channel a constant barter of furs in exchange for articles of European merchandise procured from the traders by the Tsimshian, upon a scale of magnificence of which the example cited must suffice.

[371] By the 1820's, the maritime fur trade was no longer strictly maritime because it was based more on land fur than marine species, although ships were still used to trade and transport.

[372] The first recorded trip along the Skeena River by Europeans was documented by Donald Manson of the HBC in 1832. If there were a well organised trade monopoly operating on the Skeena River at that time, he makes no note of it.

[373] HBC fur trader and physician William F. Tolmie, reports in 1834 that the Bella Bella received dressed elk skins from the Tsimshian. He also reported other transactions between the two nations involving elk skins, slaves and small quantities of powder, ball, paint, tobacco, et cetera, in other words, European goods (William F. Tolmie, *The Journals of William Fraser Tolmie: Physician and Fur Trader* (Vancouver: Mitchell Press, 1963)).

[374] McDonald says that the fur trade and contact with the European market led to the creation of new mercantile leaders, the concentration of wealth in their hands, consolidation of power of leaders, centralisation of tribes around Fort Simpson and the use of European trade as a factor in inter-tribal politics ("Images of the Nineteenth – Century Economy of the Tsimshian" in Margaret Seguin, ed.; *The Tsimshian Images of the Past, Views for the Present* (Vancouver, UBC Press, 1984) 40).

[375] Historians like Dean who have examined the historical records in detail, doubt that the famous Gispaxlo'ots Chief Legaic trading monopoly existed prior to the historical period. Legaic's monopoly was not a complete shut down, but might have consisted of titular control. Strangers from the interior continued to trade down the Skeena to Fort Simpson, and the Nass Valley continued as an important trade route. Dean clarifies that this trade did not regulate the movement of prestige goods along the coast. He distinguishes between a native trade in prestige goods from a native trade in European goods, although both could be traded at the same time. Prestige goods lent importance in feasting or potlatches and these included marmot pelts, berries and moose skins, herring eggs, seaweed, grease, dried halibut and other foods.

[376] Dr. Lovisek concludes that regardless of the time period identified by any of the scholars, the rise in importance of the legendary Tsimshian Chief Legaic and his trading abilities arose post-contact as a result of the introduction of the fur trade. The Legaic name was taken up by a successor who took over the Skeena River route.

[377] William Beynon describes how trading privileges were controlled by tribal chiefs which as a level of political organization did not develop until post-contact ("The Tsimshians of Metlakatla, Alaska" (1941) 43 *American Anthropologist* 83).

[378] R.L. Olson describes trade before the Klondike gold rush as intermittent and involving an exchange of dried fish and eulachon oil for furs and dressed skins. Olson states that the coming of the fur trade "stimulated this trade to a marked degree and at the same time brought about a change in the type of goods moving inland, European wares displacing fish and oil" (R.L. Olson, "Some Trading Customs of the Chilkat Tlingit" in Robert L. Lowie, ed., *Essays in Anthropology Presented to A. L. Kroeber* (Berkeley, University of California Press, 1936) 211).

[379] By the 1860's, a number of independent schooners traded rum and later whiskey in exchange for furs from native people on the northern northwest coast. Missionary William Duncan arrived at Fort Simpson in 1857 and was instrumental in the conversion of many Coast Tsimshian to Christianity and their exodus to the old winter village of Metlakatla.

[380] Dr. Anderson has acknowledged that the highly structured world of the Tsimshian was ultimately radically transformed by the intrusion of Europeans and Euro-Canadians:

The chiefs who controlled the trade became wealthy, and the 19<sup>th</sup> century was probably the zenith of opulence for the traditional Tsimshian. Huge amounts of wealth entered the native economy from trade and a ready supply of iron tools permitted greater productivity among carvers; at the same time traditional established relationships of rank were destabilized by new aggregations which formed around the trading post, and staggering mortality rates owing to old world diseases such as smallpox, influenza and venereal disease, that swept through populations lacking immunity. Competition for scarce furs led traders to supply firearms and alcohol to the Tsimshian and their neighbours, further complicating relationships. (Margaret Seguin Anderson, "Introduction", *supra*).

It is notable that Dr. Anderson made these comments without having information about the extensive maritime fur trade records.

[381] Dr. Langdon was asked in cross examination whether he agreed that Coast Tsimshian society did not become involved in commercial trade of subsistence products until after contact. He was fairly evasive in responding until he finally admitted to statements made in an article by R. Wurl and him, entitled *Distribution and Exchange of Subsistence Resources in Alaska* (Anchorage, Alaska: University of Alaska Arctic Environmental Information and Data Center, 1981). In this article he defines "subsistence economic system" as one which has production, whether from naturally occurring biological and other resources, or from domesticated resources primarily for personal or Household consumption. Distribution is for the most part carried out through traditional non-commercial channels. Consumption of the overwhelming majority of items produced takes place within the Household or the community. Resources used are derived from local and regional areas in the vicinity of the community. Production and distribution are not organized to obtain the greatest possible return given available labour and technology, but are organized for security and continued existence. Then he says:

Taking these various factors into consideration most studies indicate a significant alteration in traditional subsistence distribution and exchange resulting from commercial exchange for subsistence products.

[382] Later on in the article he says:

... there are a number of examples of group intensifying cultural traditions after becoming involved in commercial trade for subsistence products.

He admits that he would include the Coast Tsimshian within the societies to which he was referring.

[383] Thus the evidence is overwhelming that the nature of trade by the Coast Tsimshian changed dramatically in form and scale as a result of the fur trade which permeated the beginning of European contact and influence.

## IX. TRADE IN FISH

[384] At the heart of the plaintiffs' claim is the aboriginal right to trade in fish. As I stated earlier, to prove this right they must show more than that the pre-contact activities of harvesting and processing of Fish Resources and Products, or trading in luxury goods to obtain wealth and status, was an integral part of their distinctive culture. They must show that the Fish Resources and Products that they harvested and processed were traded, and traded on a scale large enough to be considered akin to commercial.

[385] The plaintiffs submit that there is strong evidence upon which to infer that substantial trade in Fish Resources was integral to Coast Tsimshian society. They rely on evidence of the abundance of Fish Resources, and the surplus production, specialization and transportation technology that they say provided the Coast Tsimshian with the ability and means to engage in substantial trade in Fish Resources and Products.

[386] The Supreme Court of Canada has recognized the need to make inferences about the existence and integrality of a pre-contact aboriginal practice when direct evidence is not available (*R. v. Sappier*). It is trite law, however, that inferences can only be drawn from proven facts, otherwise they are mere speculation. Furthermore, other equally reasonable inferences that can be drawn from the same proven facts may prevent the finder of fact from relying on an inference alone to reach a conclusion.

[387] The plaintiffs rely on the opinions of Dr. MacDonald, Dr. Anderson and Dr. Langdon, all of whom conclude in their reports that the Coast Tsimshian were great traders in Fish Resources and Products. On a closer analysis of these three opinions, however, it appears that the evidentiary basis for their conclusion is seriously lacking.

### A. DR. MACDONALD

[388] Dr. MacDonald concludes that the pre-contact Coast Tsimshian had an extensive system of tribal trade which included large scale exchange in regionally available materials and processed food items. He states that prior to contact, the Coast Tsimshian pursued an economic cycle in which they harvested their seasonal availability of anadromous fish, particularly salmon and eulachon, at their summer and fall villages on the rivers where they were most effectively caught and processed for delayed consumption or trade.

[389] Dr. MacDonald writes that inter-tidal resources, especially in vertebrates, as well as salmon, halibut, herring and cod were very significant. They contributed greatly to the processed food stuffs that were traded into the interior for a variety of other foods and raw materials. He concludes that using advanced preservation techniques, Coast Tsimshian processed the fish runs on the two large rivers, and the coast in between, into exchange commodities that attracted trade exchange for hundreds of miles around the Prince Rupert Harbour.

[390] Dr. MacDonald's report contains very little specific data or references regarding actual trade in fish to support his conclusion. The purpose of his report is to provide a general overview of Coast Tsimshian life pre-contact. It is helpful as an introduction to the evidence led by the plaintiffs in the months that followed Dr. MacDonald's testimony; however, Dr. MacDonald's broad based conclusions are not able to withstand any close scrutiny.

[391] For example, Dr. MacDonald lists a number of trade items in his report, including salmon and herring (and sea urchin). When challenged on cross examination to provide the source for this list he agreed that it was based on the plate he co-authored for the *Historical Atlas of Canada* (George MacDonald, G. Coupland and D.J.W. Archer, "The Coast Tsimshian Ca. 1750" in C. Harris, ed., *The Historical Atlas of Canada* (Toronto: University of Toronto Press, 1907) 32). However, several items that Dr. MacDonald says in his report that were traded by the Coast Tsimshian are not included in the Historical Atlas, most importantly salmon, sea urchin and herring roe. Furthermore, the list of trade items in the earlier drafts of his expert report do not contain reference to salmon or herring roe. It was only in the final draft of his report that he added these two very important items. As an excuse, he made an oblique reference to the *adaawx* containing mention of these.

[392] As another example, Dr. MacDonald states that eulachon from the Nass were both dried and rendered into a congealed fish oil that was traded in large quantities to other tribes residing further south on the coast, up the Skeena and especially to the Haida. He states that the grease trade followed established canoe routes and a network of interconnected "trading trails" into the interior.

[393] On cross examination, Dr. MacDonald insisted that the trails were for the purposes of trading, not just transporting the grease for personal consumption, but he had to admit that archaeology could not distinguish between trade or transportation. In particular, he had not researched the archaeological work from sites on the Nass valley to see what trade goods had come into the valley as part of the alleged reciprocity with the Coast Tsimshian. Without such evidence, there is no way of divining the purpose of movement along the grease trails.

[394] Further in his report Dr. MacDonald describes activities on the tidal flats, including preparation of clams for immediate consumption and processing the surplus for trade to inland communities who he says valued dried shell fish highly. The reference that he relies on regarding this point is Frans Boas, quoting an earlier observer, R. C. Mayne in his work, *Four Years in British Columbia and Vancouver Island* (London: John Murray, 1862), who describes collecting, boiling and drying clams on strips of bark or reeds and putting them away for winter storage. There is no reference by Boas or Mayne to trading them.

[395] Dr. MacDonald states that if the shell fish were destined for trade to other communities, they were threaded onto thin split cedar sticks that were smoked until dry. The sticks of dried shell fish were then platted using plain sticks into roughly square mats that could be fitted in layers into a storage box. The boxes were of roughly uniform dimension so that the number of shell fish in the container could be taken for granted and not have to be examined and counted.

[396] Dr. MacDonald relies on this theory of the development of standardized quantities to facilitate change with other tribes to support his conclusion that there was an extensive trade in shell fish to the interior. He writes a whole description about the use of boxes and baskets, remnants of which are found at the Canadian Museum of Civilization. He draws certain assumptions and inferences from them, but on cross examination it became very apparent he really couldn't draw any conclusions about them. He had not done a cluster analysis of the boxes in the museum and there was no archaeological evidence to support the proposition that baskets were traded to other areas, or that foreign baskets were found in Tsimshian sites.

[397] His attempts at drawing parallels with containers used today failed miserably. He maintains that the Tsimshian had standardized box sizes that could hold approximately five gallons of eulachon grease. On cross examination he admitted that this was based on his personal observations of people trading goods forty years ago, not pre-contact. He relies on Garfield but had to admit that she had not come across an informant who could provide her with reliable equivalencies. In fact, she refers to the informant she interviewed in this regard, Matthew Johnston, as "an old fraud".

[398] In reference to herring, Dr. MacDonald says that herring roe was a "prime delicacy" and a significant trade item to the interior. Firstly, herring roe is not included in Dr. MacDonald's list in the *Historical Atlas, supra*, as a trade good that was traded to the interior. Secondly, Dr. MacDonald admitted in cross examination that his statement was based upon reports from the Gitksan people and their comments directly to him that herring roe was one of the key features of their feast. Dr. MacDonald is using a modern activity, of a different aboriginal group, to support what he describes as a pre-contact activity of the Coast Tsimshian.

[399] Dr. MacDonald relies on the *adaawx* to support his report without any references to specific narratives or their reliability. As shown below there is very little reference to trade in the *adaawx*, particularly with respect to trade in Fish Resources or Products.

### B. DR. ANDERSON

[400] In essence, Dr. Anderson's report is geared to rationalizing her key opinion that the Tsimshian engaged in extensive and far flung trade of large quantities of Fish Resources and Products long before contact with Europeans, and that this trade was integral to the distinctive features of Tsimshian culture, that it continued after contact, and that it can be observed in the present day in altered form.

[401] In general, I did not find Dr. Anderson's opinion to be adequately supported. Her broad sweeping statements about trade do not distinguish between trade of wealth goods and trade of subsistence goods, nor do they distinguish between Fish Resources and Products and other goods. She similarly fails to distinguish between evidence from the pre-contact, contact or post-contact periods.

[402] For example, she barely touches upon how the advent of the fur trade impacted the economy of the Coast Tsimshian, which is the singlemost distinguishing feature between pre- and post-contact trade. Much of the time she does not even distinguish among the Tsimshian

Groups, which include the Nishga, Gitksan, Southern Tsimshian and Coast Tsimshian.

[403] Most importantly, her Primary Source Compilation upon which she relies as the basis for her opinion contains little or no reference to trade in Fish Resources and Products. Where such reference does appear, which is usually obliquely or through inference, she makes no attempt to analyze the reliability of the source, or the social context of the exchange or exchange relationship that is mentioned, or the time period to which it refers.

[404] Dr. Anderson states in her report that it is widely known and accounted for throughout the scholarly, and even popular literature, that “for hundreds of years the Tsimshian had engaged in extensive and far flung trade of sea foods and other goods”. Then she quotes from the Canadian Museum of Civilization website that speaks of “rare stones, pigments, medicinal substances, rare woods, furs, preserved meats, shell fish and berries ... eulachon oil was the Tsimshian’s main trade commodity”.

[405] On cross-examination, Dr. Anderson admitted that this website was not an academic source. She agreed that the website did not provide foot notes or references so that the validity of any of the assertions could be checked. She said that the website referred to preserved “meats” which in her view would include salmon; however, the very next primary source she relies on to support her opinion refers to deer and goat flesh, not fish (Albert Niblack, *The Coast Indians of Southern Alaska and Northern British Columbia*, *supra*). Dr. Anderson also agreed that the website refers to Tsimshian generally and does not distinguish between Nishga, the Coast Tsimshian, the Kitkatla, the Gitgaat or the Gitksan.

[406] Further on cross examination, Dr. Anderson stated that she relies on archaeologists Dr. MacDonald and Phillip Drucker; ethnographers Boas, Barbeau, Beynon and Garfield; and the oral historical evidence that includes Adaawx, malsk, tales and interviews of twentieth century Tsimshian. Unfortunately, in her report, she does not identify the archaeological evidence, nor does she provide much in the way of footnotes to check her ethnographic sources.

[407] Later in her report, she expresses a similar opinion that “the oral histories and traders’ records document extensive trade amongst the Tsimshian people and between the Tsimshian and other groups”. She writes that sale of food (which she claims to be fish) was one of several mechanisms to circulate wealth and goods in the tribe. Once again she does not adequately set out the specific supporting evidence for this conclusion.

[408] Therefore, I am left to review and analyze Dr. Anderson’s fifteen volumes of so called “primary sources” in an attempt to find the evidentiary basis which she should have provided. As I stated in section II. Evidentiary Issues, most of her Primary Source Compilation consisted of repetitive excerpts that did not reflect the context in which they were made. I am grateful to all counsel for their painstaking isolation and charting of the bits and pieces of evidence that can be extricated from these volumes, and their helpful criticisms and comments. I have endeavoured to summarize the results below.

## 1. Texts

[409] There are ten extracts from various written works of Garfield, of which only four refer to exchange of food stuffs. The other extracts refer to informal exchanges and potlatches between tribes and villages, and with other groups, and trade in eulachon oil.

[410] The first extract concerning fish is as follows:

The seasonal runs of salmon, herring and eulachon set the pattern for the yearly cycle of economic activities ... each family had to store sufficient provisions to meet the demands of trading, feasting, pot latching, purchase of services and payments of debts in addition to its daily needs.

(Viola Garfield, *“The Tsimshian and Their Neighbours”*, *supra*).

[411] The defendant submits that the above passage refers to post-contact activities because of a later reference in the same text to tribal chiefs and trading potatoes with the Haida, which are both post-contact developments.

[412] The second extract concerning fish states:

The coastal people brought trade goods from Fort Simpson and preserved sea food which they bartered to the Babines for furs.

The entire passage clearly shows it refers to post-contact times:

The coastal people brought trade goods from Fort Simpson and preserved sea foods which they bartered to the Babines for furs. It was probably as early as 1836 that Legaic, a tribal chief of Fort Simpson, undertook to monopolize Skeena River trade with the Coast, a monopoly which he maintained until about 1868.

(Viola Garfield, *“The Tsimshian and Their Neighbours”*, *supra*).

[413] The third extract from *The Tsimshian and Their Neighbours*, *supra*, refers to women bartering woven goods and preserved or fresh foods that they collected, but it does not mention what kind of foods. The fourth extract from *Tsimshian Clan and Society*, volume 7(3), *supra*, pertains to Garfield’s table of exchange values in which she mentions dried salmon. As discussed earlier, however, Garfield herself warns that the list was not reliable.

[414] The next series of excerpts is derived from the work of Albert Niblack, the US Navy Surveyor who visited the coast in the 1880’s and wrote a study of *The Coast Indians of Southern Alaska and Northern British Columbia*, *supra*. His comments about trade are all made in the context of eulachon grease, slaves or dentalia.

[415] The next excerpt is from Frans Boas and refers to obtaining wealth by selling “provisions”, without specifying what kind of provisions. In the part that Dr. Anderson expressly deletes from the excerpt, Boas writes:

It seems that the ordinary road to wealth was through success in sea hunting or in land hunting.

There is no reference to fishing and the suggestion is that the “provisions” were sea or land mammals, such as sea otters and mountain goats. (Frans Boas, “Description of the Tsimshian” in *Tsimshian Mythology* (Washington, DC: Smithsonian Institution, 1916)).

## 2. Oral Histories

[416] Dr. Anderson states that she included in her Primary Source Compilation all the excerpts from the Tsimshian Narratives that referred to trade in Fish Resources. I found that in general, they do not refer at all to trade in Fish Resources. Some refer to trade in other goods; some refer to mythological gifts of fish, but not to trade. Some contain no context or clue whether they are talking about Coast Tsimshian or some other aboriginal peoples.

[417] As I have stated, I have read the entirety of Dr. Anderson’s Primary Source Compilation, including the oral narrative extracts. The following is a summary of the twenty-nine narratives which Dr. Anderson says support her opinion.

[418] Eleven out of twenty-nine of the narratives refer to trade, either expressly or impliedly, but not in Fish Resources and Products. *Gamlugides* is a Nishga narrative wherein a mythical wolf helps a young man obtain deer, moose and bear. *The Myth of the Crest Guxlha* is about a mythical stranger that causes a tree to break into pieces thereby allowing a boy to sell firewood. In the *Crests of the Royal Gispewudwada of Temlaham*, a stranger who is welcomed into a home when the people of Temlaham are starving, kills many grizzlies and black bears until the House is full of meat and the owner becomes wealthy. The *Myth of the Crest Guxlha* contains a brief reference to a House Group of sea otter hunters who got rich and became head representatives of their House Group. The *Myth of Crest Maxnogam* is about a deserted boy who is given a supernatural club by ravens with which he is able to hunt sea lions, repulse the Haida, and give a feast upon the tribe’s return.

[419] The *Family History of Jonathon Johnson* is a Gitksan narrative myth that refers to the Tsimshian trading with them, but contains no

details as to what was traded or with which Tsimshian group. The Beynon story of *Gernk*, a Ginaxangiik trader, describes trade in long canoes for blankets. A trading expedition is mentioned in *The Battle of the Tsimshian and Cape Mudge People*, but there is no discussion of what was traded. *The Myth of the Prince Taken by the Salmon* relates to the sale of eagle down. The narrative of *How Txagexs Overcame Legaic* describes preparation for a Coast Tsimshian feast but no discussion of Food Resources and Products, only “valuable goods which they had gotten from the Haidas and the Tlingit”. *The Myth of the Shaman Who Tied up his Wrinkles* does not mention the sale of Fish Resources and Products, only the sale of arrows.

[420] The last narrative in Dr. Anderson’s collection, *Why Red Cedar Now Grows on Queen Charlottes*, is from a Haida and Kitkatla source and the only reference to trade is with respect to canoes.

[421] The remaining eighteen narratives refer to food and some times fish, but not all of them are Coast Tsimshian stories and many contain elements of post-contact times. For example, *The Young Chief who Married his Cousins*, is a Kitkatla narrative about a woman who received large quantities of food from a supernatural being, and her chief sells it to a number of starving aboriginal Groups. *The Last Raid of Legaic* describes Legaic trading in foods of the salt water, but is obviously a post-contact narrative because it mentions an umbrella. *The Halait of Legaic* mentions selling grease to villages and gathering salt water food, salmon, berries and meats for a feast, but it is unclear whether this relates to the Legaic of post-contact fame or not. *The Myth of Dasada and Haluos* impliedly suggests trade of grease for copper, but there is no indication of the aboriginal identity of the traders.

[422] There are two narratives, *The Kitlan Location Along the Salt Water* and *The Story of the Founders of the Kilugan Tribe*, which refer to selling fish, but their source is the Chief Kelly Manuscript whose authenticity is questionable, and to which I give no weight.

[423] There is an extract of a myth in Duff’s notes that is similar to *The Story of the Deserted Prince*. Both these stories deal with supernatural eagles who bring a deserted youth a lot of food resources while the tribe that deserted him starves. He sells the food and becomes wealthy.

[424] This theme of supernatural animals, or beings, assisting people to obtain food during a time of hunger is common to the Narratives of T’alamha’ax, *Why the Tsimshian Know How to Make Fish Nets*, *Myths of the Princess Who Married the Sea Otter*, the *Myths of the Robin Woman*, the *Myth of the Blue Billed Duck Woman Who Married a Chief*, and the *Prince Who Gambled Off His Family*. In these myths, the food bestowed by the supernatural power expressly or impliedly includes Fish Resources that are sometimes sold to other groups who are suffering from a food shortage.

[425] In summary, none of the authentic pre-contact Coast Tsimshian oral histories upon which Dr. Anderson relies deal with or refer to trading of Fish Resources and Products as a commercial type of enterprise. Any exchanges that do take place are in the context of feasts, or distribution of plenty to those in need.

[426] On this latter point, Dr. Anderson’s theory is that the Coast Tsimshian attained affluence because they were able to supply those who were more susceptible to fluctuations in salmon. She maintains that the Coast Tsimshian had a more reliable resource base during periods of scarcity because of better technologies and richer territories. If the salmon runs failed, the Coast Tsimshian could fall back on other sea resources and trade them for food. Other less fortunate groups in the interior were forced to purchase their salmon or other Fish Resources from the Coast Tsimshian.

[427] If Dr. Anderson’s theory were correct, I would expect to find more references in the oral histories and historic records to trading in fish, particularly salmon, since it was the most variable in quantity. Yet the oral histories I have analyzed above only mention salmon in times of actual famine.

[428] In my view it is reasonable to infer that salmon is not mentioned in the narratives because it was common to all, and usually in such abundance that it was not a sought after trade good.

[429] On cross examination, Dr. Anderson admitted that McDonald had researched the ethno-historical records and the only evidence he found of a salmon shortage along the Skeena River was one excerpt from the 1863 records of the Department of Fisheries. (James Andrew McDonald, *Trying to make a life: The Historical Political Economy of Kitsumkalum*, *supra*).

[430] Geoffrey Meggs, quoted by Dr. Anderson in her report, states “to the earliest explorers and fur traders, salmon seemed as common place and as easy to obtain as fresh water or clean air”.

[431] Cybulski, in his work on the Prince Rupert Harbour area, observes that there is nothing in the way of stunted growth lines in the bones he dug up to indicate periods of famine. (Jerome Cybulski, ed., *Perspectives on Northern Northwest Coast Prehistory: Mercury Series Archaeological Survey of Canada Paper 160* (Hull: Canadian Museum of Civilization, 2001)).

[432] Dr. Anderson admitted that in most of the Tsimshian stories of famine the House group of the person who accumulated the surplus shared, not sold, food to their own lineage. Feasts and potlatches were used to distribute the surplus.

[433] There is no doubt that the Coast Tsimshian supplied the marine fur traders and the HBC with large quantities of fresh and processed Fish Resources in exchange for European goods and sometimes other aboriginal goods, such as grease. The HBC depended on the Coast Tsimshian for fish and meat in relatively large volumes, although the demand for salmon was never sufficient for HBC to market it commercially. (Alicja Muszynski, “Major Processors for 1940 and Early Labor Force: Historical Notes” in Patricia Marchak, Neil Guppy and John L. McMullan, eds., *Uncommon Property* (Toronto: Methuen, 1987)).

[434] The market and exchange system, however, created by the fur traders’ necessity for sustenance cannot be attributed to the indigenous society. In my opinion, this is a prime example of an activity that came about “solely as a response to European influences” (*R. v. Van der Peet*, p. 562).

[435] I have concluded that the Coast Tsimshian did trade in prestige goods, such as eulachon or mountain goat grease, before the arrival of the Europeans. Dr. Anderson, however, makes no distinction between trade in subsistence goods and trade in luxury items. In my view, this is a key flaw in her expert opinion. I agree that trading in luxury, exotic, specialized goods such as coppers, slaves, dentalium or grease was integral to potlatch exchange, wealth, rank, etc. and therefore can be said to be integral to the distinctive Coast Tsimshian society. However, the little evidence of trade in subsistence goods such as Fish Resources and Products indicates that with respect to these items, such trade that did exist was only occasional and for survival, not commercial purposes.

[436] I am aware of Justice Bastarache’s comment in *R. v. Sappier* that a survival activity is usually not (although sometimes can be) a distinctive element of a society. I do not think that selling food during occasional periods of famine fits within the definition of “integral to a distinctive society”.

### C. DR. LANGDON

[437] Dr. Langdon’s opinion echoes that of Dr. Anderson:

The evidence indicates that trade in fish, fish products and sea food items was likely an important component of export trade for Coast Tsimshian ancestors for hundreds if not thousands of years prior to contact.

[438] In his conclusion, he states that trade and exchange practices among the Coast Tsimshian approach the threshold of commerce. According to him the most important trade items were food stuffs including salmon, eulachon, halibut, herring, cod and fish products. A wide variety of foods, raw materials and finished products that were obtained through trade provided for food sales in times of shortage, the enhancement of nutrition and medicine, and the quality of life. His final statement is that “trade and trade in fish products was essential to the functioning of Coast Tsimshian society and without it the fundamental and integral character of the society would have been different”.

[439] The weaknesses in Dr. Langdon’s opinion are similar to the weaknesses in Dr. Anderson’s report. Although, unlike Dr. Anderson, Dr. Langdon distinguishes between trade in subsistence resources and trade in wealth goods, he attempts to establish that the trade in wealth was the direct result or consequence of trade in food. Put another way, he tries to create an inseparable connection between trade in wealth goods and trade in foodstuffs to bolster his opinion that trade in Fish Resources and Products was an integral part of the Coast Tsimshian pre-contact distinctive culture.

[440] I do not find Dr. Langdon's opinions to be borne out by the evidence upon which he relied. In some cases the evidence directly contradicted his opinions.

[441] For example, in his report, he discusses the five species of Pacific salmon and describes the variety of biological characteristics belonging to each. He says that these variables led to differential distribution and abundance of different species in various streams in the Coast Tsimshian area. He says that all anthropologists agree that salmon was the primary food stuff on which the pre-contact people depended. Given this, he maintains that it was highly likely that Coast Tsimshian groups exchanged among themselves salmon from different species in order to increase the variety of taste and textures that would be consumed during the winter. Also, like Dr. Anderson, he believed that it was the abundance of resources in Coast Tsimshian territory that enabled the Coast Tsimshian to convert salmon into wealth in order to gain rank and prestige.

[442] On cross examination, however, he had to admit that research has revealed that there is either no correlation, or a negative correlation, between the size of the group's population and the average salmon return to the territories controlled by the group. Nor is there any positive correlation between group social rank and the average salmon return to the territories controlled by the group. For example, two of the highest ranking Coast Tsimshian tribes, the Gixpaxlo'ots and Ginakangeek, had the least productive salmon territories. (G. Coupland, A.L. Martindale, and S. Marsden, "*Does Resource Abundance Explain Local Group Rank Among the Coast Tsimshian*", *supra*).

[443] If Dr. Langdon is correct in his thesis that trade was conducted in the context of the ability to convert salmon into wealth goods, then the statistics should show that the more salmon traded, the wealthier were those groups with the most salmon. He agreed in cross examination that this did not appear to be the case in fact, and finally admitted that salmon was not a "big determiner" in the trade for wealth. This is in sharp contrast to the theme running throughout his report.

[444] Another example of direct contradiction between one of Dr. Langdon's sources and his opinion is when he makes the statement that:

A wide variety of salmon products was traded between the Coast Tsimshian tribes and likely on occasion with "foreign tribes" as well. Of the "foreign tribes" by far the greatest range of fish, fish products and sea food items were traded with the Gitksan.

[445] Following on his conclusion that the Coast Tsimshian traded fish with the Gitksan, Dr. Langdon draws an inference that:

In order to provision a Gitksan population of 3,000 with the fish and fish products and sea food items so that fish was a main stay of their diet, a very large number of Coast Tsimshian canoes filled with such products must have travelled up the Skeena River.

[446] The implication here is that the Gitksan were dependant upon the Tsimshian for their supply of Fish and Fish Resources Products as the mainstay of their diets.

[447] In cross examination it became very apparent that Dr. Langdon was wrong when he suggested that the Gitksan must have got all their salmon and fish products from the Coast Tsimshian. It is clear that Fishing Zone C, which includes Babine Lake and the Skeena Valley, are within Gitksan claimed territory. Zone C has historically been a major centre of salmon production for North Western British Columbia and parts of south east Alaska. Specifically, major salmon fishing sites are located in this Zone, where the rivers are either sufficiently constricted to concentrate the fish or at least to allow the placement of weirs and traps.

[448] Part of Zone C encompasses all the present day Gitksan Wet'suwet'en villages. It also appears that all five species of salmon run in this area. Enough sockeye were taken traditionally by the Gitksan to feed the immediate residential group throughout the winter, and to provide for the elderly and all those unable to catch fish for themselves.

[449] On cross examination, Dr. Langdon had to agree that the Gitksan had their own healthy supply of salmon so there was no need for any trade in salmon coming up from the coast. He finally conceded that trade in salmon between the Coast Tsimshian and Gitksan would seem to be rare.

[450] Even the publication upon which Dr. Langdon relies to support his proposition, Bookbuilders of 'Ksan, *Gathering What the Great Nature Provided: Food Traditions of the Gitksan*, *supra*, which is a 20th century collection of Gitksan interviews, states that:

Fish was the basic item among the foods we smoked and stored. *Our abundant rivers and lakes kept us well supplied.*  
[emphasis added]

[451] Another example of direct contradiction between Dr. Langdon's conclusions and his source material is his suggestion that the Coast Tsimshian traded with the Haida and Gitksan to import, among other things, sea otter teeth and mountain goat horn. On cross-examination he admitted that both sea otter and mountain goat were present in Coast Tsimshian territory and hunted by the Coast Tsimshian. The availability of these resources in Coast Tsimshian territory makes it unlikely that they were a source of "extensive trade" with outside aboriginal groups.

[452] Dr. Langdon relies on four oral histories to support his conclusions. Three out of four are supposedly *adaawx*; however, they are not true *adaawx*, as shown by William Beynon who refers to them as "stories". The first story, "*Origin of The Salmon Net*", is taken from John Cove's *Shattered Images: Dialogues and Meditations of Tsimshian Narratives* (Ottawa: Carlton University Press, 1987) and the statement upon which Dr. Langdon relies is that "other villages purchase food from them when future shortages occur". He states that this narrative establishes that the pattern of trade was "recurring and ongoing as shortages were perceived to be likely into the future and not rare or unique events". However, on cross-examination he admitted that some of the ethnographic literature offers solutions other than trade to situations of starvation. For example, an extract from Boas, 1916 states that during a famine the rich people would leave the poor; and widows, old people and orphans would die of hunger. Another example is that if one lineage had poor salmon runs, other lineages in the village with better runs would participate in gift exchanges between the different halaits in the Household.

[453] Dr. Langdon admitted that the solution to the starvation mentioned within the story was the shamanic power that taught them to make salmon nets. He admitted that the story does not speak directly to the issue of trade at all, but rather to the use of the shamanic halait to generate the surplus of salmon. It is interesting to note that another story relied on by Dr. Langdon, "*The Shaman Women of the Ginandoiks Tribe*", also refers to the making of salmon nets as a solution to starvation. This story was collected by Beynon in 1981, but Dr. Langdon relies on it to show that the abundance of salmon caught, processed and sold allowed the Ginandoiks to become wealthy through trading their salmon for other goods.

[454] Dr. Langdon's assertions are not supported by any evidence of regularly recurring shortages amongst the Coast Tsimshian. As previously stated, Dr. MacDonald admitted there were no dramatic growth arrest lines showing starvation in the Prince Rupert Harbour. Dr. Langdon admitted the Coast Tsimshian had access to more than one salmon stream and to a variety of resources that would have ameliorated their dependence on salmon.

[455] The third story is the "*Deserted Youth*" recorded by Henry Tate and published by Ralph Maud. The portion Dr. Langdon emphasises is "then on the next day, all different tribes were coming to buy some provisions". He draws the inference that the provisions sold to the other tribes was salmon. He does not consider that the provisions may refer to the other resources brought by the eagles in the story, such as seals, sea lions and whales. (Ralph Maud, ed., *The Porcupine Hunter and Other Stories: The Original Tsimshian Texts of Henry W. Tate* (Vancouver, Talonbooks, 1993)).

[456] Tate writes in the *Deserted Youth* that the quantity of whale was so great that "a great many boxes were filled with their greases [sic] and all the waters' surface are covered with grease" and "many Houses were full with whale blubbers [sic]". Maud, who edited the story, points out that the Tsimshian are not known for eating large quantities of whale meat. He says that:

Tate loves to see a good man thrive and amass riches. There was never so much blubber. The heaping up that ends this story is that Tsimshian way of expressing ecstasy. One should read the list of potlatch goods as pure poetry. It is repeated by Tate simply for the enjoyment of hearing the music of success.

[457] The differences in interpretation between Dr. Langdon and Ralph Maud demonstrate the danger in attempting to reach factual conclusions from mythical interpretation.

[458] The final story, called "*A Trading Story*", is about a powerful Coast Tsimshian chief who wanted to have his face painted on a cliff face

at the mouth of the Nass River. The story goes on to say how the great chief held a feast and brought in salmon of the Upper Skeena, herring eggs from the Haida, and other foods from all directions and strange countries because the great chief wanted to show all the tribes of the Tsimshian how far his influence reached.

[459] Dr. Langdon admits in a footnote to his report that the story actually concerns the exploits in the 19th century of the powerful Chief Legaic, but he says the underlying motivations, considerations, trade practices, valuations of goods and other features of the story are illustrative of core features and fundamental characteristics of trade in pre-contact Coast Tsimshian society. He makes no attempt to analyze the Legaic exploits and monopoly which other anthropologists refer to as a prime example of a paramount chiefdom that was created solely by the European fur trade.

[460] Finally, Dr. Langdon relies heavily on two sources which do not attract the weight he appears to give them. One is Richard Daly in "Our Box Was Full": An Ethnography for the Delgamuukw Plaintiffs, supra. This was an ethnographical description of the Gitksan Wet'suwet'en prepared for the plaintiffs in the trial of *Delgamuukw v. British Columbia*. The second book is the Bookbuilder's text previously mentioned. The interviews contained therein were collected in 1970 by the Gitksan themselves, not an anthropologist. There is no way of assessing the reliability of the sources, the time periods to which they refer, or even if there is any connection between them and the Coast Tsimshian. Dr. Langdon never read any of the Gitksan oral histories himself and could not say how far back in time the Bookbuilder's text could be considered valid.

#### D. DR. LOVISEK

[461] Dr. Lovisek's opinion with respect to the pre-contact Coast Tsimshian trade in Fish Resources and Products is that it did not exist outside of the context of eulachon and the potlatch. She states that in the reported instances of "trade or barter" of marine resources between the Coast Tsimshian and other native peoples, the context is within its use value as food, gift, feast, tribute, or kinship based barter, facilitated through a trading partnership.

[462] Dr. Lovisek does not restrict herself to the oral histories of the Coast Tsimshian, but has recourse to archaeological, ethnological and historical sources. Her list of sources do not differ significantly from Dr. Anderson's bibliography, but whereas Dr. Anderson only incorporates the historical documents by reference, Dr. Lovisek actually analyzes them in her report. I accept that even though she finds next to no evidence of trading in Fish Resources and Products in the oral histories, if she were to have found evidence in the written historical record of the Coast Tsimshian trading salmon around the time of contact, she would have reached a different conclusion; however, she finds no such historical evidence of trading in salmon between aboriginal groups in her extensive research. She finds that throughout the early maritime trade and land fur trade, the trade in salmon between the aboriginals and maritime fur traders was described as insignificant. Salmon could be obtained for a mere trifle, principally leaf tobacco in small quantities.

[463] Dr. Lovisek's reasoning why there was no market for salmon was because most groups had access to salmon. It was not a commodity for trade because it was considered sustenance. It may have been traded for hospitality and used to distribute at feasts, but it did not play a role as a commodity.

##### 1. Archaeology

[464] Dr. Lovisek explains that archaeological data cannot provide evidence that fish was traded. Archaeological evidence can identify what types of species were used by occupants and it can provide dates for that use, but it cannot establish whether fish were exchanged or traded with other people. One has to rely on ethnographic data or historical data to make or draw inferences about the exchange of fish.

[465] She concedes that there is archaeological evidence of exchange between groups, and that exotic materials were exchanged between various groups during such functions as the potlatch and other kinship related activities. She is concerned, however, about the use by archaeologists of the word "trade" without making a distinction between the type of exchange indicated.

##### 2. History

[466] The HBC journals refer to the exchange of eulachon and some halibut, but only in single instances. Dr. Lovisek notes that the historical documents do show some post-contact trade in marine products; however, the pre-contact Coast Tsimshian motivation to acquire wealth was different from what it became post-contact. This is evidenced by the fact that pre-contact potlatches were not nearly as elaborate as the post-contact events.

[467] The HBC records disclose that HBC employed fort hunters and fishers who would hunt or fish specifically for the trading post. Dr. Lovisek agreed on cross-examination that there was a considerable amount of trade between the tribes at the Fort, including trade in marine resources, although it was not always consistent. Duncan Finlayson, chief factor at Bella Bella wrote in 1836 that:

The resources and the way of living which the Fort Simpson affords are deer, halibut and salmon which however may be considered as precarious while our dependence is placed on the natives for providing them, as they entertain such hostile feelings towards one another that frequent and fatal disturbances arise which will prevent their fishing or hunting more than is barely sufficient for their daily subsistence.

[468] Dr. Lovisek makes the point that the establishment of Fort Simpson favoured the emergence of a few prominent Coast Tsimshian leaders who came to act as middlemen in the trade between the HBC and various native groups. For example, the Tsimshian traded eulachon oil to the Haida for potatoes. The Tsimshian would then trade the potatoes to the HBC for rum.

[469] McDonald compiled from HBC files for selected years items of food which were traded at Fort Simpson. These included: deer meat, salmon, halibut, grease, whale oil, potatoes, eggs, berries, cranberries, geese, ducks, smoked fish, porcupine, cod, crabs, seals, dry meat, swan, lynx meat flounders, and small fish.

[470] Not all food provisions brought to the HBC trading post were produced by the Coast Tsimshian. The coastal people brought trade goods and preserved sea foods from Fort Simpson which they bartered to the Babines for furs. This barter in food stuffs was given over to the women after the land-based fur trade became more important than the production of surplus food stuffs.

##### 3. Ethnography

[471] Contrary to the plaintiffs' submission, Dr. Lovisek does review and analyze ethnographic descriptions of pre-contact life amongst the Coast Tsimshian. The plaintiffs complain that she discards those descriptions that she cannot corroborate in the historical or archaeological record. While it is true that it is not necessary to corroborate oral history evidence in order to attribute weight to it (*Delgamuukw v. British Columbia*), other forms of evidence will assist sometimes in identifying the time period about which the oral history speaks. Dr. Lovisek quite rightly focuses her research on the period just prior to the proto-contact period which she describes as 1700 - 1750 and the contact period, which she dates as starting in 1787.

[472] Dr. Lovisek says that while ethnographic material is critically important, she is concerned that arbitrarily applying ethnographic findings to the pre-contact period, especially without considering the impact of culture change, can lead to substantial errors in interpretation of what constitutes a pre-contact practice.

[473] The plaintiffs endeavour to use Dr. Lovisek's ethnographic sources to support their position. They refer to the work of Kalervo Oberg, *The Social Economy of the Tlingit Indians* (Seattle: University of Washington Press, 1973). In his work, Oberg distinguishes between the post-contact and pre-contact practices, but the plaintiffs seem to rely primarily on his post-contact observations. Dr. Lovisek agrees with Oberg that there were kinship related exchanges through trading partnerships. During the proto-contact there was evidence of a relationship between the interior peoples and Coast Tsimshian based on kinship exchange and exotic goods. She acknowledges that the Tlingit were customers of the Tsimshian for the eulachon oil trade.

[474] Kenneth Dean Tollefson also writes about the Tlinglit. He says that the Tlinglit developed the practice of converting local temporary surplus harvests into wealth goods through the development of a thriving trading enterprise which included networks of trading partners in the interior and along the coast, and included Tlinglit and non-Tlinglit. He also said the custom of trading undoubtedly existed long before European contact; however, he does not refer to the Tsimshian people and appears to treat all groups from the Nass down to the Columbia River as one. This lack of specificity makes it difficult to place much weight on his statements.

[475] David Archer in his article *A Heritage Overview Assessment of the Coast Tsimshian Territory in Relation to Proposed Development Projects* (Victoria: Heritage Conservation Branch, 1983) makes references to a trading circle that included the Haida, Tlinglit and Coast Tsimshian. He relies on Boas who states that the coastal tribes had always been great traders in dentalia, skins and slaves. Boas doesn't refer to fish.

[476] Charles Bishop speaks of ancient coastal-interior relationships, but describes pre-contact trade as "inter and intra community exchanges in non-essential luxury goods involving a trading partner". He also doesn't refer to fish.

[477] Dean, in his thesis, refers to inter-tribal trade before and after incursion by the Europeans. He states that the pre-contact trade of the Tsimshians was organized into a riverine and coasting trade. He maintained that in the Haida-Tsimshian-Tlinglit sphere, there existed well developed commerce and socio-political relations beyond the mere elaboration of kinship ties; however, he also states that most ethnographic material is mute on the nature of the pre-contact coasting trade, which had already been influenced by the maritime traders followed by the Hudson's Bay Company and Russian American Company well before the arrival of Frans Boas on the coast. Dean also notices how the kinship system limited trade between unrelated peoples;

Relations with non-kin seemed to have fewer considerations of fair dealing in trade, and hostilities might escalate out of control, given the lack of organization of clan opposites and brothers-in-law to act as go betweens.

(Jonathan Dean, *'Rich Men', 'Big Powers' and Wastelands – the Tlingit – Tsimshian Border of the Northern Pacific Littoral, 1779 to 1867, supra*).

[478] Dean implies that trade with non-kin was a dangerous activity that could escalate into hostilities. Dr. Lovisek opines that therefore, this type of trade was often unsustainable because it had little means of diplomatic control.

[479] Dean ascribes to the "regional resource disparity" theme which he says clearly supports a pre-contact coastal trade. Dr. Lovisek points out that the bulk of what Dean relies on to support this statement comes from the Tsimshian Narratives. I have analyzed the Narratives earlier on in this judgment.

[480] Paul Prince, archaeologist, refers to an extensive network of trade between the coast and interior along the Skeena and its tributaries. In the 1810's and 1820's, the Gitksan occupied a middleman position in this trade. This situation may have been in existence pre-contact. Upon closer review, it is obvious that Prince is talking about the exchange of eulachon oil, dentalium, European goods and furs, but not fish. (*Settlement, Trade and Social Ranking at Kitwanga, B.C.* (PhD thesis, McMaster, 1998)).

[481] Finally, Dale Croes in his article "Northwest Coast Wet-Site Artifacts: A key to Understanding Resource Procurement, Storage, Management and Exchange" in R.G. Matson, Gary Coupland and Quentin Mackie, eds., *Emerging from the Mist: Studies in Northwest Coast Culture History* (Vancouver: UBC Press, 2003) states that as complex societies emerged on the northwest coast, trade became a major form of economic interaction. He notes that members of the nobility had to acquire, display and distribute large quantities of valuables through potlatching. He draws a conclusion that some of this wealth acquisition had to be through long-distance trade; however, Croes does not mention the Tsimshian, nor trade in fish. His comments are made with respect to the Tlinglit and Haida only.

[482] In conclusion, Dr. Lovisek is not able to find data to support the proposition that trading in Fish Resources and Products on a scale akin to commercial was an integral part of the pre-contact Coast Tsimshian's distinctive culture. She does find evidence in the historical, archaeological and oral history data that the harvesting of selected marine resources like spawning salmon was integral to the distinctive culture of the Coast Tsimshian for food and ceremonial purposes; however, she states that:

the **commercial use of marine resources** was not integral to the distinctive culture of the Skeena River Peoples, [Coast Tsimshian] who instead valued marine resources for their food and ceremonial value and associative social and political importance related to the potlatch or feast. The existence of property concepts associated with the ownership of access to certain marine resources like salmon and eulachon (although not all precontact groups had access to eulachon), the deposition of usufructuary rights to access marine resources, the use of marine resources for feasts and gifts, and the exclusion of most marine resources as "wealth" items which were exchanged, moderated against the importance of marine resources for commercial purposes.

[483] Dr. Lovisek defines commercial as the exchange of large quantities of a marine resource to unrelated persons or persons outside a kinship network. While I do not necessarily agree with her definition of commercial, I do not intend to debate it in this Judgment, because in my opinion the evidence of trade in Fish Resources and Products by the pre-contact Coast Tsimshian clearly shows it was not of "a scale akin to commercial".

[484] The only exception to this finding of fact is eulachon grease. Dr. Lovisek states:

Often called a luxury good, it is debatable if it can be considered integral to the distinctive culture of the Skeena River Peoples, since not all precontact groups as identified in the archaeological record at Prince Rupert Harbour, had access to it. While it was a desirable commodity for food and exchange, it was often described as a luxury and used by elites to obtain other wealth related goods. Eulachon, which were preserved into grease, were not harvested or preserved from locations owned by the Skeena River Peoples, but from locations along the Nass River where they had usufructuary rights of access, along with many other native groups.

[485] I do not agree with Dr. Lovisek that "it is debatable" that eulachon oil was integral to the distinctive culture of the Coast Tsimshian; it clearly was so. I do agree, however, that it was harvested from locations along the Nass River where the Coast Tsimshian had usufructuary rights of access only, along with many other aboriginal groups.

[486] The absence of references to Fish Resources and Products in the ethnographic and historical sources, when contrasted with the importance of pre-contact Coast Tsimshian kinship, availability of food, and elaboration of the potlatch post-contact, carries significant weight. In other words, the facts upon which the plaintiffs rely on to support the inference that there must have been plenty of trade in fish, should also have led to plenty of references to trade in fish in the historical and ethnographic sources. The fact that there is a dearth of references in the historical and ethnographic sources leads to the equally reasonable inference that trade in subsistence goods was not a significant aspect of Coast Tsimshian pre-contact culture and not integral to their distinctive society.

[487] In my opinion, simply put, the plaintiffs have not discharged their burden of proof on a balance of probabilities that they traded in Fish Resources and Fish Products on a sale akin to commercial, before 1793, the date of contact.

## **X. CONCLUSION OF ABORIGINAL RIGHTS**

[488] In section I. B. General Legal Principles I set out the three basic steps to assessing a claim to an aboriginal right. I have completed the first step by identifying the nature of the right claimed by the plaintiffs as their right to harvest and sell on a commercial scale the Fish Resources and Products in their Claimed Territories.

[489] In the second step, I have considered how this claimed aboriginal right is predicated on proof of the alleged existence of an ancestral practice of trade by the Coast Tsimshian in Fish Resources and Products on a widely spread and large scale akin to commercial.

[490] The claimed aboriginal right is further predicated on proof that the alleged large scale and widespread trade in Fish Resources and Products was integral to the Coast Tsimshian pre-contact distinctive society, and that this alleged ancestral practice has evolved and continued today in a modern form.



[491] In my opinion, the plaintiffs have proved some, but not all of the elements necessary to prove their claimed aboriginal right. They have proved that pre-contact Coast Tsimshian society was organized by way of four clans, numerous house groups and ten tribes. They have proved that they have descended from these ten tribes, nine of which still exist today.

[492] They have established generally that their predecessors fished and lived in the Prince Rupert Harbour area, on the coastal islands known as the Dundas Island Group, and along the mouth and some of the tributaries of the lower Skeena River.

[493] In my opinion, the plaintiffs have not proved that their predecessors used and occupied fishing sites along the Skeena mainstream, Zimacord or Zymoetz Rivers. Furthermore, I have found that they did not occupy, but were permitted limited use of fishing sites, along the Nass River and at Fishery Bay.

[494] I find that the plaintiffs have proved that their predecessors harvested a wide variety of Fish Resources and Products through an array of fishing techniques. They have proved that the harvesting and consumption of Fish Resources and Products, including the creation of a surplus supply for winter consumption, was an integral part of their distinctive culture.

[495] In my opinion, the evidence establishes that the pre-contact Coast Tsimshian existed primarily within a subsistence economy until the arrival of the fur traders who influenced the creation of trade monopolies and chiefdoms. Notwithstanding this fact, the plaintiffs have proved that their predecessors were involved in some form of loosely termed trade before the date of contact. This trade involved primarily gift exchange between kin at feasts and potlatches, or exchange of luxury goods such as slaves, coppers, dentalium and eulachon grease. I can not find, on the evidence before me, that trade in any other Fish Resource or Product beside eulachon grease could properly be described as integral to their distinctive culture.

[496] In particular, I am of the view that the plaintiffs have failed on the second step to prove on a balance of probabilities that their predecessors conducted a trade in Fish Resources and Products, before contact with Europeans, that in any way was "a central and significant part of their society's distinctive culture", or in any way "made [their] society truly what it was" (*R. v. Van der Peet*). I agree with the defendant's submission that trading in all species of Fish Resources and Fish Products, besides eulachon grease, was low volume, opportunistic, irregular, for FSC purposes, and incidental to fundamental pre-contact Coast Tsimshian kinship relations, potlatch and ranked society.

[497] The plaintiffs submit that at the very least, there is significant direct evidence that the Coast Tsimshian traded large amounts of eulachon and eulachon grease to other groups who did not have the same access to eulachon as they did. They submit that this evidence should be enough to satisfy the second step of establishing an aboriginal right. They rely on the principle espoused in *R. v. Van der Peet* and *R. v. Sappier* that the specificity of the right does not pertain to the species fished, but rather to the persons fishing, the area in which they fished and the purpose for which they fished.

[498] I agree that an aboriginal right, once proven, is not limited in terms of species of the specific resource which formed the subject of the ancestral activity on which the aboriginal right is based.

[499] However, the plaintiffs' simplistic position that the ancient trade in eulachon grease has transmogrified to a modern day right to commercial fishing of salmon, halibut and all other marine and riverine species of fish, ignores the fundamental fact that the Coast Tsimshian fished for sustenance, not for trade. The rendering of the eulachon into oil was an unique ancestral practice that brought wealth and prestige to the society, but it was not inter-related with the subsistence fishing of salmon, halibut, and other Fish Resources and Products.

[500] Furthermore, eulachon were not harvested and preserved in Coast Tsimshian territory, but from locations where they, along with other aboriginal groups, received limited permission from the Nishga to fish. The Plaintiffs cannot support a claim to fish commercially all species in their Claimed Territories on a pre-contact practice that was carried on outside of their Claimed Territories. The Plaintiffs may be able to establish an aboriginal right to fish eulachon at the Nass for commercial purposes along with other First Nations, but this was not the issue before me, and I make no judgement in this regard

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

[502] As the plaintiffs have failed to satisfy the onus of proof on them in the second step, they have not proved an aboriginal right capable of protection under s. 35 of the *Constitution Act*. There is no need to consider step three, the effect of existing fishing legislation, because there can be no infringement if there is no proven existing aboriginal right.

[503] The plaintiff's claim for a Declaration that they hold an aboriginal right to harvest and sell on a commercial scale all species of Fish Resources and Products in their Claimed Territories must be dismissed.

## **XI. FIDUCIARY DUTY AND HONOUR OF THE CROWN**

[504] The plaintiffs claim as an alternative to the aboriginal right to harvest and sell Fish Resources and Products on a scale akin to commercial, that the defendant has trust like or fiduciary obligations to them to ensure they have commercial fishing opportunities sufficient to earn their livelihood and sustain their community. The plaintiffs rely upon the relationship they say arose between the Crown and the plaintiffs after the Crown's assertion of sovereignty over the plaintiffs and their Claimed Territories.

[505] The plaintiffs submit that the trust relationship includes the obligations of management, allocation and use, and arises from the reserve process. The plaintiffs say that the Crown was aware that fishing was their primary means of livelihood at or before the entry of British Columbia into Confederation. Most reserves set aside for the plaintiffs had been customarily used by them for fishing, and were primarily suited for fishing and little else. The Crown's primary purpose in setting aside the reserves was to facilitate and encourage the plaintiffs' reliance on commercial fishing.

[506] The plaintiffs submit that other aspects of the fiduciary duty arise from the reasonable expectation that the Crown would act in the plaintiffs' best interest, but that it has acted to their detriment by building a community that relied on commercial fishing, and then restricting their right to pursue that enterprise.

[507] The defendant submits that this fiduciary duty alleged by the plaintiffs is not one that is known to law because:

- a. it does not pass the test of establishing a claimed, fixed, specific, cognizable aboriginal interest that can ground the fiduciary duty claim;
- b. it would conflict with the Crown's public law administration of the Fisheries; and
- c. on the facts, there was no reliance on the Crown, and the Crown gave no undertaking which would give rise to a private law duty.

### **A. FACTS**

[508] A review of the extensive historical record tendered by both parties establishes without a doubt that the plaintiffs did not agree to the Reserve process. The historical documents are replete with complaints, pleas, supplications and threats from the plaintiffs' predecessors. The consistent theme running through these documents is that no treaty had been negotiated by the Tsimshian. The Lax Kw'alaams continued to protest the unilateral allocation of reserves until 1927 when they were prohibited from doing so by Section 141 of the *Indian Act*, R.S.C. 1927, c. 98. That ban stayed in place until 1952.

[509] There is also no doubt that both the Provincial and Federal Governments were cognizant that the "Coast Indians ... obtain all their necessities or desires required from the sea and its tributaries". (Report to Superintendent General of Indian Affairs, 1 October 1875, page 50). In the process of reserve allocation, effort was made to "embrace all the fishing stations pointed out by the Indians" (correspondence to Superintendent General of Indian Affairs, 8 April 1882, page 91).

[510] In 1882, Reserve Commissioner O'Reilly stated to Superintendent General of Indian Affairs MacDonald with respect to the Coast Tsimshian that:

... This tribe has been liberally dealt with, their main Reserve embraces one hundred and ten square miles, besides which every patch of land used for the purposes of cultivation, and every fishing station claimed by them had been set apart for their use....



[511] The plaintiffs submit that in fact, the Tsimshian did not receive all the fishing sites they claimed, but the majority of the limited reserves set aside for the Lax Kw'alaams were established to enable fishing.

[512] The plaintiffs submit that in reserving fishing stations to the Lax Kw'alaams, the Crown was preserving the opportunities to fish upon which the Tsimshian were to sustain their communities. The plaintiffs submit that such opportunities include the right to sell fish on a commercial basis.

[513] The plaintiffs submit that this is further re-enforced through the encouragement of the Tsimshian by the Crown to participate in the cannery industry as fishermen:

In common with all Coast Indians, the Tsimtseans [sic] depend largely for a living on fishing. During the spring many of them go to the Nass for the oulachon fishing, and about June 1, commence to prepare for the salmon operations on the Skeena. The men are good fishermen and the women earn good wages in the canneries; consequently they are much sought after and the demand for them is always in excess of the supply. (Annual Report, Department of Indian Affairs, 1904, page 264).

[514] However, when it came to issuing licenses independent of the canning industry, only white men were eligible. This form of discrimination was expressed in a positive light as being "preferential treatment for Indians who were provided attached (cannery fishing) licenses":

...The commission is of the opinion that a policy designed to secure preferential treatment of Indian fishermen in the allotment and operation of attached license having been adopted, the fisheries branch ... should see that the intent of the department in this regard is fairly carried out, and that cannery men refusing to engage Indian fishermen should be required to show reasonable cause for so doing. (final report of the MacKinnon McBride commission, 30 June 1916, pages 16-17).

[515] The plaintiffs recitation of facts is notably one sided. It conveniently ignores the plethora of historical documents that show quite clearly it was always Crown policy not to add exclusive fishing rights to Reserves and that Indians were to have no special commercial rights over and above other fishermen.

[516] Continuing correspondence on the issue between the Department of Marine and Fisheries and the Department of Indian Affairs culminated in a responding memorandum of June 7, 1898 from Secretary MacLean of Indian Affairs to E.S. Prince of the Department of Marine and Fisheries. He acknowledges the position of the Department of Marine and Fisheries that because the common law and statutes entitle every subject to use such fishing privileges, Indian Affairs could not undertake to debar the public fishermen from exercising their legal rights; that the Indian Reserve Commission has no power to grant fishing rights; and that any allotment of fisheries was subject to ratification by the Department of Marine and Fisheries. The plaintiffs expert historian, Richard Inglis, acknowledged that from 1881 onwards, the Department of Marine and Fisheries position that Indian Reserves could not, or should not include exclusive rights to fish, remained consistent throughout.

[517] Furthermore, there is evidence that the Lax Kw'alaams were advised and well aware of this policy when Fisheries Inspector Anderson provided assurances to them that their fishing interests would be treated in common with those of white fishermen by the Crown:

The good effect of this visit, under the prudent assurances given to the Indians that their interests, in common with those of white fishermen, will be carefully watched, has been to me very apparent. (Report of Fisheries Inspector Anderson to Superintendent of Indian Affairs Powell, 7 August 1879, page 134.

[518] Therefore, from a factual perspective, the Crown gave no promise of commercial fishing rights, exclusively or at all, to the Coast Tsimshian, nor is it reasonable for the Coast Tsimshian to rely on the allotment of their reserves as granting them such a right.

## B. THE LAW

[519] The decision of the Supreme Court of Canada in *Wewaykum Indian Band v. Canada* 2002 SCC 79, [2002] 4 S.C.R. 245 is helpful in defining the parameters of the relationship between the plaintiffs as an aboriginal group and the defendant as representative of the Crown. Historically, the relationship was described as a "political trust" (*St. Catherines Milling and Lumber Co. v. the Queen* (1887), 13 S.C.R. 577; *St. Ann's Island Shooting and Fishing Club Ltd. v. the King*, [1950] S.C.R. 211, [1950] 2 D.L.R. 225).

[520] After *Guerin v. the Queen*, [1984] 2 S.C.R. 335, 59 B.C.L.R. 301 it was recognized that the concept of political trust was not the only form of legal relationship between aboriginal peoples and the Crown. Most particularly, it was recognized that the existence of a public law duty did not exclude an undertaking by the Crown of obligations in the nature of a private law duty towards aboriginal people.

[521] It is also important to note that in *Ross River Dena Council Band v. Canada* 2002 SCC 54, [2002] 2 S.C.R. 816 the court held that fiduciary remedies were not limited to Section 35 rights or existing reserves. The fiduciary duty, where it exists, is called into existence to facilitate supervision of a high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples.

[522] However, the Supreme Court of Canada in *Wewaykum* set clear limits to this fiduciary duty and emphasized at para. 81 that: The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

[523] Again at para. 83 that:

... Not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals, supra*, at page 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligational interest that is the subject matter of a particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

[524] Therefore, the defendant is correct when it states that a fiduciary relationship between the Crown and an aboriginal group depends on the identification of a cognizable aboriginal interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility in the nature of a private law of duty.

[525] In the case at bar, I have already found as a fact that firstly, the plaintiffs have not established an aboriginal right to harvest and sell Fish Resources and Products on a commercial scale. Therefore, there is no cognizable aboriginal interest to which a *Wewaykum* type of fiduciary duty can attach. Secondly, the historical record, common law and legislation is clear that no special right to fish commercially on an exclusive basis in priority to other fishers was ever granted to the plaintiffs, as part of the reserve process or otherwise. Therefore the plaintiffs lack the foundation for establishing the type of fiduciary duty upon which they claim to rely.

## C. HONOUR OF THE CROWN

[526] It is not clear whether the plaintiffs were submitting that the honour of the Crown doctrine on which they rely was an adjunct of the fiduciary duty they claim the Crown owed them in this instance, or whether it was a separate ground which entitled them to access commercial fishing in priority to other users. The plaintiffs' submission refers to the decision of the Supreme Court of Canada in *Haida Nation v. British Columbia* 2004 SCC 73, [2004] 3 S.C.R. 511 wherein the court stated that the government's duty to consult with aboriginal peoples and accommodate their interests was grounded in the principle of the honour of the Crown, which must be understood generously. While asserted but unproven aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over aboriginal interests where claims affecting these interests are being seriously pursued in the process of Treaty negotiation and proof.

[527] *Haida Nation v. British Columbia* was decided in the context of aboriginal rights and title, not some sort of general claim for relief. The honour of the Crown that gave rise to a duty to consult did not arise in a vacuum; it was attached to the aboriginal rights and title claim of the Haida.

[528] The root of the plaintiffs' argument is that the Crown secured fishing stations for the Lax Kw'alaams and established fishing as the

means by which the Lax Kw'alaams would sustain themselves in the new Canada. Therefore, the plaintiffs submit, the Crown should be taken to have promised that it would not prevent the Lax Kw'alaams in that pursuit.

[529] The difficulty with this premise is that the plaintiffs have not established a promise, express or implied, that the Lax Kw'alaams would not be subject to the same limits and restrictions on fishing as other fishers; in fact the opposite has been established. Fish, as a living, moving, dynamic, and variable resource has always belonged to the public at large, and the defendant's administration of the fisheries has always had to take into account the rights of all Canadians to exploit this resource.

[530] Once again, on a factual basis alone, the plaintiffs have not established the dishonourable conduct of which it accuses the Crown.

[531] In my opinion, these alternative arguments of breach of fiduciary duty and honour of the Crown do not assist the plaintiffs in obtaining the relief they seek. Their claim for a Declaration on this ground must be dismissed as well.

[532] In conclusion, the plaintiffs have failed on the evidence, and the facts that I have found therefrom, to prove their entitlement to any of the Declarations of aboriginal rights, or fiduciary duty set out in their Amended Statement of Claim. This part of the relief sought in the action as a whole is dismissed.

"The Honourable Madam Justice Satanove"