MANDELL PINDER LLP
BARRISTERS & SOLICITORS

422 - 1080 MAINLAND STREET | VANCOUVER, BC | V6B 2T4
RECEPTION SUITE 300 | T 604.681.4146 F 604.681.0959

Ahousaht Indian Band and Nation v Canada (Attorney General) 2021 BCCA 155
CASE SUMMARY

On April 19, 2021 a unanimous decision of the British Columbia Court of Appeal ("**BCCA**" or the "**Court**"), was issued for A*housaht Indian Band and Nation v. Canada (Attorney General)* (the "**Ahousaht Appeal**"). This decision is the latest in a long series of judgments issued in this case brought by various Nuu-Chah-Nulth First Nations (the "**Nuu-Chah-Nulth**" or the "**Plaintiffs**") related to their Aboriginal rights to fish and harvest for commercial purposes.

The case proceeded in two phases: Phase 1 - which went all the way to the Supreme Court of Canada ("**SCC**"), confirmed and defined the Nuu-chah-Nulth fishing right; followed by Phase 2 which focused on whether Canada's infringements of the Plaintiffs' rights, as defined in Phase 1, were justified.

During Phase 1 the Nuu-Chah-Nulth established an Aboriginal right to harvest and sell any species of fisheries resources. The established right was confirmed by Justice Garson (Phase 1 trial judge) as the "aboriginal rights to fish for any species of fish" in an area nine-miles seaward from the Plaintiffs' respective territories and to sell the fish caught.[1] This description of the right, with the exception of geoduck, was upheld by the SCC.[2] The Phase 1 Court directed the parties to enter into negotiations to attempt to resolve issues of justification.[3] The Nuu-Chah-Nulth returned to the court for Phase 2 after negotiations with DFO failed to resolve key issues. The Ahousaht Appeal was an appeal of the Phase 2 trial judge's decision on justification.

Some of the key issues before the BCCA in this appeal were: a) whether the Phase 2 trial judge had improperly qualified the right with terms including "artisanal", "local" and "small-scale", and improperly restricted the types of boats that could be used as part of the defined right; b) whether the Phase 2 trial judge had improperly applied a species-specific analysis to the all-species right; and c) whether the Phase 2 trial judge had wrongly concluded that the Crown did not breach its duty to consult with the Plaintiffs in good faith.

Justice Groberman's decision for the BCCA confirmed that the Phase 2 trial judge did not have the authority to reinterpret the declared right at the justification phase. The Court also held that for an

[1] Para 20.
[2] Decision to Exclude geoduck from the order was upheld by the BCCA upon reconsideration, *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2013 BCCA 300. Leave to appeal to the Supreme Court of Canada denied, upholding the exclusion of geoduck, *(Application for Leave) Attorney General of Canada v. Ahousaht Indian Band and Ahousaht Nation, represented by Shawn Atleo on his own behalf and on behalf of the members of the Ahousaht Indian Band and the Ahousaht Nation, et al.*, 2014 CanLII 3511 (SCC).
[3] Para 25.

all-species right, the historical importance of a resource is only one consideration in the justification analysis. Species-specific continuity is not required for the Aboriginal right to provide a modern priority to the Plaintiffs in relation to a particular species under an all-species right.

1. Description of the Nuu-Chah-Nulth economic fishing right

The Ahousaht Appeal is a victory for defending against "frozen in time" approaches to defining Aboriginal fishing rights. The Court rejected the Phase 2 trial judge's reinterpretation of the Plaintiff's right, finding that the description of the right as "artisanal", "small-scale" "using small, low-cost boats with limited technology and restricted catching power" was either not helpful or not appropriate. The BCCA was clear that the Phase 2 judge did not have jurisdiction to place new limits on the rights declared during Phase 1, and that the limitations on technology and the types of vessels that could be used did not take into account the need to allow Aboriginal rights to evolve to meet modern conditions and requirements.[4]

When considering the commercial right, the BCCA recognized that the phrase "moderate livelihood" is not a precise standard. The Court noted that presumably a moderate livelihood would need to include some accumulation of wealth in today's world, given that a home, buying equipment and a boat, and having savings for retirement, would all be part of a moderate livelihood and require some accumulation of wealth.[5]

The BCCA also expressed doubt that a clear line can be drawn between culture and economy given that fishing and trading in fish was historically an integral part of the Nuu-Chah-Nulth existence, and served an economic purpose. Justice Groberman, relying on Justice Garson's description of fishing as a "predominant feature of the Nuu-chah-nulth society", found that it "clearly had great economic importance" and therefore "sustainability and viability are important to the question of whether the Aboriginal right is being respected."[6]

2. Infringement and Justification Analysis - general findings

The Court clarified that the justification analysis should be specific (not overbroad) and that it was appropriate to use a species-specific examination of infringement at the justification stage.[7] The Court held that this approach is necessary to give meaning to the justification analysis so as to identify the instances of unjustifiable infringement. For multi-species Aboriginal rights, the parties should identify where an infringement is unjustified towards a particular species as opposed to framing the entire regulatory regime as unjustified.

The BCCA upheld the Phase 2 trial judge's finding that Canada's licencing scheme, requiring separate licencing for each vessel and for each species, constituted significant barriers to the Plaintiffs' participation in the fishery. The Phase 2 trial judge was entitled to consider a fishery's type and scale to assess infringement. The Phase 2 judge, however, was equally required to take

[4] Para 149.
[5] Para 75.
[6] Para 195.
[7] Para 163.

into account the finding that the Plaintiffs historically had the ability to trade "vast quantities of fish".[8]

The Phase 2 judge did not fully address allocation and provided limited species-specific findings regarding allocation. The BCCA accepted that it was not possible for the Phase 2 judge to deal with the question of allocation comprehensively due to the nature of the evidence and the changing nature of the regulatory regime.[9] However, as noted above, the BCCA did comment on what would need to be included in a moderate livelihood and the importance of sustainability and viability when respecting Aboriginal fisheries.

On the issue of monitoring, the BCCA upheld the Phase 2 trial judge's finding that a monitoring system would need to be suited to the Plaintiffs' fisheries which included using smaller vessels. The Court accepted that when fishing for dual purposes (FSC and commercial) at the same time, specific monitoring considerations arise. The BCCA acknowledged the Phase 2 judge's finding that the Parties should develop a monitoring system better tailored to the Plaintiff's rights and affirmed that the federal government could consider a requirement to separate commercial and non-commercial fishing to help facilitate monitoring.[10]

3. Infringement and Justification Analysis - specific species

Following the discussion of the Phase 2 judge's general findings on licencing, monitoring, mitigation and allocation, the Court undertook a species-specific analysis of the lower court's findings. Some of the highlights include:

Salmon:

- The Court rejected the approach which suggested that if a particular species was not of historical importance to the Plaintiffs (eg. pink or sockeye salmon were not heavily relied upon at time of contact) that it had less priority in a modern fishery. The Court reaffirmed that the sockeye and pink salmon fisheries remained within the Plaintiffs' established multi-species Aboriginal right. The Court clarified that historical importance of a resource is but one of the many considerations that should be assessed when considering infringement and justification in a modern context. A lack of historical importance does not exclude the Aboriginal right holders' entitlement to have that right respected and given a degree of priority. Historical importance is a consideration in the justification analysis but it cannot be relied on to freeze an Aboriginal right in time. The Plaintiffs' all-species right is characterized by the Plaintiffs' responsive adaptation to their changing fisheries. It is therefore foreseeable that a less frequently caught species now may gain greater importance in the future.[11]

- The Court could not find the rationale for denying the Plaintiffs' exercise of their rights within the exclusion zone when the exclusion zone remained open to recreational fishers.

[8] Para 164.
[9] Para 198.
[10] Para 191.
[11] Para 227.

- When reviewing DFO's reliance on the voluntary relinquishment under their PICFI[12] program, the Court indicated that compulsory acquisition of licences may be necessary in some instances to accommodate the Plaintiffs' right.[13]

Groundfish

- The Court supported the Phase 2 judge's order on sablefish and groundfish except to not limit the groundfish fishery to small vessels. Should the Plaintiffs choose to apply their quota to their trollers, they should be able to do so. Fishing with trollers, however, will not increase their overall quota and must not result in greater environmental damage than small vessel fishing.[14]

Prawns

The BCCA rejected the Phase 2 trial judge's finding that DFO's mitigation policy based on voluntary relinquishing of existing licences to prawns was sufficient to justify the infringement of limiting the Plaintiffs' access to the prawn fishery.[15] The Court remarked that these measures did not respect the Plaintiffs' priority. Canada must explore reasonable alternatives and cannot simply wait until someone chooses to relinquish their licence in order to provide the right holding nations commercial activities.[16]

4. DFO's conduct during Negotiations

The Plaintiffs advanced the argument that DFO had not conducted negotiations in good faith after Phase 1. The Court upheld the Phase 2 judge's comments on the complexity of fisheries issues and the justification negotiations; in particular that the state of the fisheries and fisheries regimes were never static resulting in points of negotiations constantly changing. The Court referred to the negotiation context as a "moving target".

The BCCA did however identify aspects of Canada's negotiation strategy that, "rendered successful negotiations unlikely". Namely, Canada relied on local negotiators who had difficulty communicating with and seeking approval from the Minister and the central DFO office in Ottawa. Canada gave its negotiators a limited mandate, which did not allow them to develop or implement regulatory schemes outside of the ordinary commercial fishing regimes. This meant that no new or innovative regulatory regime specific to the Plaintiffs' right was possible.

While the complexity and novelty of these fisheries negotiations meant that the Court did not find the negotiations had been conducted in bad faith, by identifying deficiencies in Canada's negotiation strategy and providing direction for future negotiations of similar complexity, it is arguable that inadequate lines of communication and prohibitively restrictive mandates will be less likely to be considered in "good faith" going forward.

[12] Pacific Integrated Commercial Fisheries Initiative
[13] Para 226.
[14] Para 244.
[15] Para 276.
[16] Para 279.

5. Some Implications

The Court was clear that an all-species right should be able to evolve, including changing priorities and species as the resources change.[17] Similarly, modern preferred means of exercising the all-species right must be respected. These findings reaffirm that Aboriginal fishing rights must be able to evolve with the times and in respect of a changing world. With environmental and human factors affecting abundance and the sustainability of fisheries, the importance of or reliance on a resource may fluctuate over time. Historical differences in the importance of a species during the justification analysis may still be considered, but do not negate the priority resulting from an all-species Aboriginal fishing right.

While the BCCA did not make findings on allocation, the judgement clearly requires that DFO work with the Nuu-Chah-Nulth to carve out a space for their fisheries in priority to other fisheries. The viability and sustainability of the fishery in a modern context is relevant to respecting the aboriginal commercial right. In addition, simply relying on the voluntary relinquishment will not be enough in specific fisheries.

This case was not about Aboriginal title. While the issue of the role of the Nuu-chah-nulth in fisheries management was not a central issue at trial or on appeal, the Court noted that it is an important background issue. The Court noted that in a context where collective fishing rights are at stake, the management of the fisheries will require Aboriginal participation from a practical standpoint.[18]

The Court emphasized that fisheries matters are complex and that this case's history before the courts exemplified the complexity of bringing broad questions and issues to the courts. The Court stressed that negotiation is often the best forum for resolving highly complex Aboriginal fishing rights issues. The comments from the Court have the potential to improve negotiations by identifying deficiencies in how DFO had conducted negotiations. The Court also noted on appeal that a case that attempts to remedy all deficiencies of a regulatory regime in one case may become unwieldy and unfeasible, and too complex for a court to address.

The Ahousaht Appeal reoriented the justification analysis away from significantly limiting all-species rights because of changes in importance or reliance on a species. During uncertain times, recognizing the inherent adaptability of the Plaintiffs' all-species right protects its meaningful expression for the future. This case also reaffirmed that negotiation are the preferred forum for establishing mutual understanding on the meaningful expression of an all-species right. The Crown must approach negotiations in good faith, and these approaches are now better defined by the Court.

[17] The only limitation imposed by the Court is that the fishery must involve an evolution of traditional practices. When the fishery has no close resemblance to any traditional fishery, then that species will be excluded. In this case geoduck was excluded from the Nuu-Chah-Nulth all-species fishing right based on that rationale.
[18] paras 183-188.

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R. v Desautel
2021 SCC 17
CASE SUMMARY

In a 7-2 decision, the Supreme Court of Canada found in *R. v. Desautel*[1] that in certain circumstances "persons who are not Canadian citizens and who do not reside in Canada can exercise an Aboriginal right that is protected by s. 35(1)"[2] of the *Constitution Act, 1982*. Justice Rowe wrote the majority decision. The legal basis for this ratio is the Court's interpretation of "aboriginal peoples of Canada" in s. 35(1), which "must mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact."[3]

The Court's reasons rely in part on the two purposes of s. 35(1) identified by the Court, which are "to recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown's assertion of sovereignty over them."[4] The Court found that "[w]hether a group is an Aboriginal people of Canada is a threshold question" although this "threshold question is likely to arise only where there is some ground for doubt, such as where the group is located outside of Canada."[5] The Court also found that the test for establishing Aboriginal rights (*Van der Peet* test) is otherwise the same whether or not the modern-day successor is in Canada.[6]

Justice Rowe clarified several points with respect to how continuity is part of the *Van der Peet* test. First, he rejected British Columbia's argument that "continuity requires an ongoing presence in the lands over which an Aboriginal right is asserted."[7] Second, he clarified that the requirement for continuity from the time of contact to the present day is with respect to the practice itself, as opposed to the locations of the pre-contact and present-day communities.[8]

This decision has two central effects in British Columbia. The first is that it upholds the trial decision that Mr. Desautel was exercising a constitutionally protected Aboriginal right to hunt for food, social and ceremonial purposes in British Columbia when he shot a cow-elk near Castlegar, BC in 2010. Mr. Desautel is a member of the Lakes Tribe of the Colville Confederated Tribes, which was found at trial to be a modern-day successor group to the Sinixt. There was no finding at trial or on appeal whether the Lakes Tribe is the only modern-day successor group to the Sinixt. The trial judge found that the ancestral territory of the Sinixt "ran as far south as an island just above Kettle Falls,

[1] *R. v. Desautel*, 2021 SCC 17 [*Desautel*].
[2] *Desautel* at para. 1.
[3] *Ibid*.
[4] *Desautel* at para. 22.
[5] *Desautel* at para. 20.
[6] *Desautel* at paras. 50, 61.
[7] *Desautel* at para. 63.
[8] *Desautel* at paras. 52-55.

in what is now Washington State, and as far north as the Big Bend of the Columbia River, north of Revelstoke in what is now British Columbia."[9]

The second effect is that it opens up the possibility of other modern-day successor groups located outside of Canada to claim s. 35 Aboriginal rights in Canada if they can meet the threshold question and the *Van der Peet* test in an area that is now part of Canada. The Court specifically rejected the position of the Attorney General of Canada that "non-resident rights claimants … find a connection with a contemporary Aboriginal collective residing in Canada, and [] obtain recognition and authorization by that collective to exercise the claimed s. 35(1) rights."[10] The Court found that this "would place a higher burden on Aboriginal communities who seek to claim rights if the group moved, was forced to move, or was divided by the creation of an international border between Canada and the United States"[11] and declined to include such a requirement.

While the test to establish s. 35 Aboriginal rights is the same for modern-day successors outside of Canada, the Court raises several ways in which the rights held by Indigenous groups located outside Canada may not be the same as the rights held by communities within Canada.[12] More specifically, the Court notes that the scope of the duty to consult,[13] the justification analysis[14] and the test for Aboriginal title[15] may be different for communities outside of Canada. With respect to consultation, the Court notes that "[i]ntegrating groups outside Canada into consultations by the Crown with groups inside Canada may involve discussions **within** Aboriginal communities and with the Crown."[16] The Court leaves these issues unresolved and creates an opening for arguments to be advanced in future cases.

The Court declined to answer a number of other issues as they were not necessary to dispose of this appeal. First, the Court did not set out criteria for successorship of Aboriginal communities from pre-contact societies to modern-day collectives. On that point, the Court noted the challenges in determining modern successorship:

> This is a complex issue that should be dealt with on a fuller factual record, with the benefit of legal argument. For example, consideration would have to be given to the possibility that a community may split over time, or, that two communities may merge into one, as well as to the relative significance of factors such as ancestry, language, culture, law, political institutions and territory in connecting a modern community to its historical predecessor.[17]

Second, the Court declined to decide whether an Aboriginal right can be lost or abandoned by non-use.[18] Third, the Court found that it was not necessary to engage issues of sovereign incompatibility

[9] *Desautel* at para. 4.
[10] *Desautel* at para. 56.
[11] *Desautel* at para. 60.
[12] *Desautel* at para. 71.
[13] *Desautel* at paras. 72-76.
[14] *Desautel* at paras. 77-79.
[15] *Desautel* at paras. 80-81.
[16] *Desautel* at para. 76 [emphasis added].
[17] *Desautel* at para. 49.
[18] *Desautel* at para. 64.

(i.e. whether it would be incompatible with Canada's sovereignty for non-Canadian citizens to have Aboriginal rights in Canada).[19] Fourth, the Court declined to decide whether there are common law Aboriginal rights that may not be constitutionally protected as s. 35(1) Aboriginal rights.[20] Finally, the Court notes that it "would leave for another day the differences that may exist between the test for Aboriginal title claims by Aboriginal peoples within Canada and the test for such claims by peoples outside Canada."[21]

In closing, Justice Rowe makes an important comment recognizing the right of Indigenous peoples to define themselves and determine their own governance structures and practices in accordance with their own laws:

> In my view, the authoritative interpretation of s. 35(1) of the *Constitution Act, 1982*, is for the courts. **It is for Aboriginal peoples, however, to define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices**.[22]

The Court also emphasized the importance of negotiations. Justice Rowe notes that it is up to the parties to decide how to proceed, but that negotiation can foster reconciliation, and "[b]oth processes [negotiation and litigation] are complementary to each other and must interact with each other within their proper limits."[23]

[19] *Desautel* at para. 66.
[20] *Desautel* at paras. 67, 70.
[21] *Desautel* at para. 81.
[22] *Desautel* at para 86 [emphasis added].
[23] *Desautel* at paras. 91, 92.