EXTINGUISHMENT BY EXTIRPATION: THE NUXALK EULACHON CRISIS

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A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

The Faculty of Graduate and Postdoctoral Studies

(Law)

THE UNIVERSITY OF BRITISH COLUMBIA

(Vancouver)

AUGUST 2013

Abstract

De facto extinguishment of Aboriginal rights occurs when Aboriginal peoples are factually precluded from practicing their rights. While the Supreme Court of Canada has established that *de facto* extinguishment of constitutionally protected Aboriginal rights is an infringement of those rights, its acceptance of sweeping Canadian interests as valid objectives to justify the infringement of Aboriginal rights means the recognition of those rights provides limited protection.

This thesis analyzes the nature of Aboriginal rights in Canadian legal system through an examination of the extirpation of eulachon from Nuxalk territory. It describes Nuxalk legal order prior to European arrival in Nuxalk territory, and the imposition of colonial laws to the detriment of Nuxalk sovereignty, territory, and people. It investigates the management of fisheries under Canadian law to show the inefficiencies of the fragmented Canadian legal system. An analysis of Canadian jurisprudence demonstrates that section 35(1) Aboriginal rights have minimal protection under the Canadian legal regime. A consideration of Nuxalk concerns regarding the *Species at Risk Act* indicates that the consultation doctrine has hindered the protection of Aboriginal rights. A review of the honour of the Crown in relation to Aboriginal rights suggests that fiduciary duties are confined to exceptional circumstances, and effectiveness of lesser obligations remains uncertain. This thesis concludes that the current state of Canadian law leaves the Nuxalk people with little prospect for any meaningful resolution to the eulachon crisis under the Canadian legal system.

If Aboriginal rights are to have any substance under Canadian law, courts and governments must acknowledge the existence of these rights on a broader scale. Reconciliation requires the recognition and affirmation of Indigenous sovereignty by the Canadian legal system.

Preface

This dissertation is the original, unpublished, and independent work of the author.

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Acknowledgements

I would like to express my deepest gratitude to the Nuxalk people: to the ancestors for their resistance, to the current generation for their resilience, and to future generations for their inspiration. I acknowledge Banchi Hanuse for giving me the idea to develop a thesis on the Nuxalk eulachon crisis, and my cousin, Megan Moody, for providing the scientific foundation for my research with her Master of Science thesis. I am grateful to the Wuikinuxv Kitasoo Nuxalk Tribal Council for sharing documents that were extremely helpful in my research.

I appreciate the patience and guidance of my supervisor, Douglas Harris, who pushed me to conduct rigorous research in my pursuit of clarity and resolution regarding the eulachon crisis. I am grateful for the insights and advice provided by my secondary readers, Gordon Christie and Darlene Johnston. I also appreciate my many mentors and colleagues who provided helpful feedback and suggestions along the way. Although I acknowledge that many people have contributed to the development of my thesis, any errors or omissions are mine alone.

I am thankful for the support that I received from my parents, siblings, niece, extended families (Siwallace, Moody and Hilland), and adopted family (Auger). I am also grateful to my friends who provided me with encouragement and incentive to complete my thesis.

Finally, I would like to acknowledge my niece who asked me the question that compelled me to document this tragedy, and my uncle, *Qwatsinas* (Edward Moody), whose spirit motivated me to continue, even though my research topic was emotionally difficult to pursue.

Stitwiinitscw. (Thank you.)

For those yet unborn

Chapter 1 *Ista*: "the first woman"

"*Ista* is the…first woman who descended to earth…. She came down to earth and decorated her crest on a blanket with abalone shell…. She was greatly admired for how she chose to show her connection to the Creator."[1]

1.1 Introduction

I am Nuxalkmc.[2] I was raised in the Nuxalk community and trained in Nuxalk traditions. At university, I have trained in anthropology and law. My Nuxalk name is "*Asits'amniyaak*," which means "carries a blanket". My name is associated with *Ista*, one of the Nuxalk people's first ancestors. *Ista* applied buttons, arranged to represent the symbol of her ancestral animal, onto a blanket. Nuxalkmc believe that our ancestors were sent to earth by *Altquntam* (the Creator) in the form of one of four animals: eagle, raven, bear or killer whale. Nuxalkmc continue to associate with our ancestral animals through a clan system. Nuxalk names come from origin stories and connect living Nuxalkmc with our first ancestors.

My name, *Asits'amniyaak*, is a metaphor. To carry a blanket is to carry the tapestry of Nuxalk oral traditions.[3] My extended family gave me the name *Asits'amniyaak* in recognition of

[1] Karen Anderson, "The Story of Ista" online: Nuxalk Smayusta <http://nuxalk.net/html/ista_story.htm> (accessed August 29, 2013). I am relying on written sources because I do not have the authority or fluency to tell Nuxalk oral traditions in my own words. Websites are generally not very authoritative sources of information because they are not subject to validation processes such as peer review. However, I know that the Nuxalk Smayusta website was created and is maintained by Nuxalk hereditary chiefs who have authority to share Nuxalk oral traditions. The oral traditions revealed on the website are brief overviews that I have compared against my own knowledge as a Nuxalk citizen who has witnessed the validation of oral traditions that occurs in potlatches. Although I recognize the shortcomings of internet sources, I refer to Nuxalk Smayusta website accounts of Nuxalk oral traditions because: I want to include text written by Nuxalkmc; I lack the position in Nuxalk society to share Nuxalk oral traditions; and the hereditary chiefs who are authorized to share these stories do not have any other published writings about Nuxalk oral traditions. The Nuxalk Smayusta website is public.

[2] The Nuxalk Nation is an Indigenous people located on the central coast of British Columbia (see Figure 1). "Nuxalkmc" means Nuxalk person or people, and they were formerly known as "Bella Coola Indians".

[3] I acknowledge that "oral tradition" is a contested term. Julie Cruikshank (professor emerita of anthropology at the University of British Columbia, who specializes in Indigenous oral histories) says that oral tradition is sometimes used to refer to either "a body of material retained from the past" or "a process by which information is transmitted from one generation to the next" (Julie Cruikshank, "Oral Tradition and Oral History: Reviewing Some Issues" (1994) 75:3 Canadian Historical Review 404 at 404). The stories within oral traditions provide a framework for

my aptitude for remembering details of Nuxalk stories. My responsibility as a Nuxalk citizen with the name *Asits'amniyaak* is to carry the details of Nuxalk oral traditions forward for future generations. Although all Nuxalkmc have this responsibility, I understand that my Nuxalk name endows me with heightened responsibilities within Nuxalk society to comprehend and communicate Nuxalk oral traditions.

Nuxalk stories convey a Nuxalk worldview and provide the foundation for Nuxalk legal order. My primary understanding of law originates from my Nuxalk upbringing from participating in countless potlatches, feasts, ceremonies, rituals, traditions, and practices in Nuxalk territory (Figure 1). My perception of Canadian law is filtered through my Nuxalk worldview. I have a unique perspective as a "bicultural"[4] and "bi-vocal"[5] anthropologically trained legal academic. This thesis explains a contemporary Nuxalk crisis from my perspective, in an academic context, in written form, and at a specific point in time. Like *Ista*, by writing this thesis, I am applying an innovative method to demonstrate my connection to *Altquntam*.

My community, the Nuxalk Nation, is confronting a cultural, ecological and economic crisis. When I was growing up in Nuxalk territory, the eulachon were a big part of Nuxalk lives.[6] The fish were one of the Nuxalk Nation's most valuable resources, central to Nuxalk sustenance, culture, economy and relations with neighbouring tribes.[7] Until 1999, eulachon

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understanding both historical and contemporary issues. (Julie Cruikshank, *Do Glaciers Listen?* (Vancouver: UBC Press, 2005) at 60). I adopt Cruikshank's definition of "oral traditions" as encompassing the material, process, and framework of conveying Indigenous knowledge across generations.

[4] Darlene Johnston, *Litigating Identity: the Challenge of Aboriginality* [forthcoming in 2013].

[5] *Ibid*. at 12.

[6] Eulachon (*Thaleichthys pacificus*; *sputc* in Nuxalk) are a small, migrating fish similar to sardine or herring that live in the eastern Pacific Ocean.

[7] Nigel Haggan & Associates, "The Case for Including the Cultural and Spiritual Values of Eulachon in Policy and Decision-Making" *Report Prepared for Fisheries and Oceans Canada* (Vancouver, 2010) [unpublished] at 4.

arrived in ten Nuxalk rivers every March (Figure 2).[8] They were the first fish to arrive in Nuxalk territory after a long winter; their return signaled the beginning of spring and was celebrated by the Nuxalk community. The fish were cooked or smoked for eating, or were rendered into oil to be used as medicine and nutrition and for its social, cultural and economic value. Eulachon oil was a central trade commodity for the Nuxalkmc. Ancient Indigenous trade routes (dubbed "grease trails") connected coastal and interior trading partners before Nuxalk contact with Europeans. The Nuxalkmc traded eulachon grease for smoked moose meat, soap berries, and buckskin moccasins, gloves and coats from the Ulkatcho Nation whose territory lies to the east of Nuxalk territory.[9] Alexander Mackenzie, the first European to cross Canada by land, reached the Pacific Ocean at Nuxalk territory on July 20, 1793 via the grease trail between Nuxalk and Ulkatcho territories. The Nuxalkmc also traded eulachon grease with their western neighbours, the Heiltsuk, for abalone, seaweed, red cod, black cod, halibut, clams, and herring eggs.[10]

Each year from the time I was born until I moved away from Nuxalk territory to attend university, I participated in the eulachon fishery and the accompanying celebrations. In 1999, the eulachon stopped returning to the Bella Coola River in significant numbers and the Nuxalkmc stopped harvesting them. The extirpation of eulachon – their localized extinction from Nuxalk territory – is an enormous loss for the Nuxalkmc. An integral part of Nuxalk diet, culture, tradition, and economy is gone. The gravity of the situation struck me in the summer of 2008 when I was in Nuxalk territory procuring salmon for the upcoming winter. I was hanging salmon in a smoke house with my niece who was born in 1999, the year the eulachon failed to

[8] Megan Moody & Tony Pitcher, "Eulachon (*Thaleichtys Pacificus*) Past and Present" (2010) 18:2 University of British Columbia Fisheries Centre Research Reports at 23. The ten rivers in Nuxalk territory known to have eulachon runs are the: Dean, Kimsquit, Taleomy, Noeick, Aseek, Kwatna, Quatlena, Bella Coola, Paisla and Necleetsconay.
[9] Grant Edwards, "Oolachen Time in Bella Coola." *The Beaver* (Autumn 1978) 32 at 37.
[10] Evidence of the exchange of Nuxalk eulachon oil for Heiltsuk herring eggs was used in *R v Gladstone* [1996] 2 SCR 723 to affirm the Heiltsuk's commercial right to sell herring roe.

return. She asked me about some small sticks that were leaning against the smoke house. I explained that the sticks were for hanging eulachon. She then asked "What's eulachon?" This question affected me deeply; it made the cultural dispossession palpable. The eulachon, which were central to my life as a Nuxalkmc, are absent from my niece's. Their absence has created a social void. A key community event involving multiple generations of Nuxalkmc no longer occurs. As a result, the connection between the generations is diminished, and the conveyance of cultural knowledge from older to younger generations is impeded. Indeed, knowledge about the eulachon is fading. More than a decade has passed since Nuxalkmc last harvested and prepared eulachon and those Nuxalkmc born after 1999 have never participated in the eulachon fishery or preparations, making the transmission of practical experience with eulachon impossible.

1.2 Research Objectives

I know that my research will not bring the eulachon back to the Nuxalkmc, but I feel compelled to research the Nuxalk eulachon situation. My research objectives are to understand the legal circumstances that led to the extirpation, to consider whether the Nuxalkmc have any legal remedies, and to document a significant crisis in Nuxalk society from a Nuxalk perspective.

There is also an element of resistance in my research. Indigenous peoples research their stories to reclaim our past, to resist against colonialism, and to reverse the misappropriation of their stories by outsiders.[11] Indigenous peoples understand the importance of doing thorough research on their own terms, for their purposes, and conveying the results of their research from their own perspectives. As Indigenous legal theorist Linda Smith explains:

> Telling our stories from the past, reclaiming the past, giving testimony to the injustices of the past are all strategies which are commonly employed by

[11] Linda Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Zed Books, 1999) at 34-35.

> [I]ndigenous peoples struggling for justice….the need to tell our stories remains the powerful imperative of a powerful form of resistance.[12]

A strong impetus behind my research is to record the eulachon crisis for future generations of Nuxalkmc. If they never have the opportunity to fish eulachon, I want them to know what happened to this cherished resource. In line with Smith's *Decolonizing Methodologies*, I am conveying the Nuxalk eulachon crisis as an act of resistance and an exercise in recovering Nuxalk stories; in doing so, I am adding to the breadth of Nuxalk legal order. By revealing this story, I also hope to prevent other Indigenous nations from suffering a similar tragedy.

1.3 Research Question

What can be done to prevent *de facto* extinguishment of Aboriginal rights via species extirpation? *De facto* extinguishment occurs when factual circumstances preclude Aboriginal peoples from exercising an Aboriginal right. My analysis reveals how courts and governments in Canada have failed to effectively recognize and affirm Aboriginal rights, resulting, in some cases, the *de facto* extinguishment of these rights. My position is that section 35 of the *Constitution* puts a positive duty on governments to protect species that are central to the exercise of Aboriginal rights. I will propose recommendations to prevent *de facto* extinguishment from occurring in the future.

1.4 Theoretical Frame

It is important that I explain the two theoretical underpinnings of my thesis at the outset. "Theory describes the elements of the world that are relevant for a particular inquiry. By focusing observation, it guides the empirical inquiry of the investigator."[13] Theories provide the

[12] *Ibid.*
[13] Frank Munger & Carroll Seron, "Critical Legal Studies versus Critical Theory: A Comment on Method" (1984) 6:3 Law & Pol'y 257 at 270.

foundation for the methodological framework that guides research. My thesis will be predominantly informed by two key theories: critical legal theory and Indigenous legal theory.

Critical legal theory acknowledges: "first, the indeterminacy of law; second, the political or ideological nature of law; [and] third, the idea that law promotes the interests of the powerful and legitimates injustice".[14] According to critical legal theory, "the law reflects nothing more than ongoing power-struggles between competing interests."[15]

Indigenous legal theory accepts that Indigenous peoples have legal orders and traditions that are valid, continue to exist, and may be helpful in challenging dominant legal systems and in finding resolutions to contemporary legal issues. Indigenous legal scholar Valerie Napoleon differentiates between "legal orders" (law that is embedded in social, political, economic, and spiritual institutions), "legal traditions" (legal protocols and laws), and "legal systems" (state-centred legal systems in which law is managed by legal professionals in legal institutions that are separate from other social and political institutions.)[16] I adopt Napoleon's definitions, and further, acknowledge the difference between "domestic Canadian Aboriginal law" (which is governed by section 35 of the Canadian *Constitution*[17]), and "Indigenous law" (which finds its authority within Indigenous legal orders and traditions). Moreover, I appreciate and apply the nuance between "Indigenous" (grounded in Indigenous society and predating colonial society) and "Aboriginal" (a construct of colonial society). This distinction is important in my research.

[14] Aileen Kavanagh & John Oberdiek, "Critical Legal Studies, Critical Race Theory, and Feminist Theory" in Aileen Kavanagh & John Oberdiek, eds, *Arguing About Law* (New York: Routledge, 2009) at 571.
[15] Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67 at 107.
[16] Valerie Napoleon, "Thinking About Indigenous Legal Orders," *National Centre for First Nations Governance Report* (June 18, 2007) [unpublished] at 4.
[17] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, c 11 [*Constitution*].

1.5 Methodologies

Legal methodology is unique in a number of ways. It is: 1) reactive, in that legal systems respond to events external to law; 2) normative, because it is informed by scholars' beliefs; 3) involved, since scholars are intensely involved with their subject matter; 4) interpretive, because scholars examine the range of possible meanings of text; 5) prescriptive, in that scholars suggest how law should be improved; and 6) non-cumulative, because scholars do not reach full agreement on their findings.[18] All of these characteristics exist in my research.

My research applies a number of interrelated methodologies. My primary methodology is critical legal analysis – a doctrinal analysis of mixed sources defined by a problem and informed by critical legal theory. Critical legal analysis is inherently qualitative and subjective. My analysis is also prescriptive. Fundamentally, my analysis requires the application of normative methodology. Although I am conducting a doctrinal analysis (which may be considered conventional legal research), my perspective as an Indigenous person affected by the issue that I am researching is a significant aspect of my analysis. Accordingly, I apply Indigenous methodology as well. Much of my methodology involves understanding my position in relation to my research question.

Some scholars allege that critical legal analysis is too deconstructionist. Harry Edwards suggests that at its worst, critical legal studies "is hopelessly destructive because it aims to disrupt the accepted practice of judges, administrators and legislators with no prescriptions for reform."[19] I intend to disrupt the *status quo* in my research, but I also intend to offer prescriptions for reform. However, I anticipate that my prescriptions will not be adopted by the

[18] Edward Rubin, "Law and the Methodology of Law" (1997) Wis L Rev 521.
[19] Harry Edwards, "The Growing Disjunction between Legal Education and the Legal Profession" (1992-1993) 91 Mich L Rev 34 at 47.

Canadian legal system. Despite this, conveying alternatives to the *status quo* can be beneficial; the consideration of options outside the mainstream is helpful to effecting positive change.

In relation to Indigenous peoples, Indigenous legal theorist Gordon Christie observes that by challenging essentialist conceptions of self, critical legal scholars may undermine Indigenous identity, beliefs and knowledge. Christie urges Indigenous peoples to "resist attempts by others to undercut Aboriginal peoples' senses of identity."[20] A significant technique of resistance "lies in guarding against attempts by the state to use the authority of the law and the power of legal discourse to undermine the nature of Aboriginal interests, and how they might be protected by the law."[21] My motivation for my research originates from my perceived responsibilities as a Nuxalk person. I ground my critical legal analysis in my perspective, thus upholding my Nuxalk identity.

My analysis is also normative. In his article "Normative Methods for Lawyers,"[22] Singer explains that normative methodology encompasses four stages of analysis. The first stage is orientation in which the researcher must: 1) explain their background understandings and assumptions, 2) frame the issue, and 3) narrate the facts. The orientation stage highlights the fact that research begins from the unique perspective of the researcher; this perspective is not objective or neutral. The second stage is evaluative assertion which requires the researcher to: 1) begin with "a fundamental assumption that human beings are entitled to be treated with dignity and respect,"[23] 2) assert values by considering what respect for humanity requires, and 3) understand and articulate responsibilities in human relationships. The third stage is

[20] Christie, *supra* note 15 at 113. While he uses the term "Aboriginal," I believe that he is using the term interchangeably with "Indigenous," so his analysis can be applied to "Indigenous" peoples as well.
[21] *Ibid*.
[22] Joseph Singer, "Normative Methods for Lawyers" (2009) 56 UCLA LR 899.
[23] *Ibid* at 959.

contextualization and requires researchers to: 1) focus "on the social setting within which the issue is being addressed,"[24] 2) "narrow the scope of the application of the value in question so that it does not conflict with the legitimate interests asserted by the other side,"[25] and 3) "fit the case into current social practice, historical tradition, and emerging values and principles."[26] The fourth stage is prioritization in which researchers must: 1) balance competing interests, 2) try to see the world from the opposing point of view as well as their own, and 3) try to find coherence using a system of precedent combined with analogy. I proceed through these four stages in my research.

A critique of normative analysis is that it involves bias. Such bias may be compounded by the fact that legal scholars "are inevitably and intensely involved with the subject matter of their research."[27] This may cause a researcher to lose objectivity and downplay or ignore evidence that fails to support their preconceived assumptions.[28] Singer acknowledges that "[n]ormative argument is inescapable."[29] Rather than feigning neutrality, researchers must be "self-critical in the sense that they examine their ideological position."[30] I anticipate that my research will be subject to the criticism of bias. In my view, a researcher's close proximity to research is not necessarily a negative feature. When researchers are deeply involved with their research question, they have increased incentive to find meaningful resolution. I admit that I am deeply personally motivated to find resolution to my research question, but I have tried to be self-critical throughout my research process.

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[24] *Ibid* at 969.
[25] *Ibid* at 971. Although this seems offensive, I will be approaching this from an Indigenous perspective: narrowing mainstream values so that they do not conflict with the legitimate interests asserted by Indigenous peoples.
[26] *Ibid* at 972.
[27] Rubin, *supra* note 18 at 529.
[28] John Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Traditions* (Thousand Oaks, California: Sage, 1998).
[29] *Supra* note 22 at 911.
[30] Munger & Seron, *supra* note 13 at 274.

Indigenous methodology is essential in guiding my research. In *Decolonizing Methodologies,* Smith instructs Indigenous researchers to conduct research: 1) with Indigenous identity in mind; 2) through an Indigenous worldview; 3) with cultural pride; and 4) with Indigenous interests in mind.[31] Similarly, Christie promotes Indigenous methodologies by encouraging Indigenous peoples to resist "attempts to remove the link Aboriginal people must maintain to traditional notions of knowledge, ways of coming to know, of the self, and of the place of self in community."[32] He observes that "Aboriginal people can only continue to be Aboriginal people to the extent they can maintain within them a deep sense of responsibility to their ancestors and their descendants."[33] My research is driven by my responsibilities within Nuxalk society; it is influenced by my Nuxalk identity and my corresponding worldview.

Nils Oskal observes that there is a danger of Indigenous methodology becoming too theoretical, thus impractical and unable to provide realistic solutions.[34] Regarding my own research, I do not believe that any realistic solutions exist under Canadian law as it is currently constructed; a fundamental shift from the *status quo* is required to effectively protect Aboriginal rights. I am aware that my prescriptions may be dismissed as unrealistic. Some people may believe that my perspective on balancing the Aboriginal and economic interests of broader Canadian society gives too much favour to Aboriginal interests. While some may disagree with me, it is important that I share my Nuxalk perspective so that it is not silenced. I intend to push the boundaries and reveal that Canadian law has the potential to protect Aboriginal rights, but has yet to realize this possibility.

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[31] Smith, *supra* note 11 at 35.
[32] Christie, *supra* note 15 at 113.
[33] *Ibid*.
[34] Nils Oskal, "The Question of Methodology in Indigenous Research: a Philosophical Exposition" in Henry Minde, ed, *Indigenous Peoples: Self-Determination, Knowledge, Indigeneity* (Delft, Netherlands: Eburon, 2008) 331.

Napoleon raises another concern with Indigenous methodology. She perceives a tendency among Indigenous legal scholars to romanticize Indigenous legal orders. Such romanticizing undermines the practical applicability of Indigenous legal orders. To restrain romanticization, Indigenous scholars "have to apply the same critical thought to our Indigenous legal orders and laws as we do to western law."[35] I have kept this in mind in my examination of Nuxalk legal order. Even so, I anticipate criticism that I have romanticized Nuxalk legal order. I am admittedly jaded by the current application Canadian law and its failure to protect Aboriginal rights. When I contrast Nuxalk legal order against the current application of Canadian law, it appears as though I am romanticizing Nuxalk laws. This is not my intention. Instead, I am trying to show that the holistic Nuxalkmc worldview that underlies Nuxalk legal order provides better ecological protection than does the compartmentalized Canadian legal system. Another factor contributing to the perceived romantacization of Nuxalk legal order is that Nuxalk worldview has been ignored and disrespected by mainstream society and the Canadian legal system. I am emphasizing the benefits of Nuxalk worldview with the intention of demonstrating that Nuxalk legal order contains principles that could enhance the Canadian legal system.

My analysis is largely doctrinal. The subjectivity of legal researchers influences doctrinal analysis. Conventional legal research in the common law generally proceeds in the following order. First, a legal researcher receives facts, filters the relevant facts, and considers whether the relevant facts present one or more legal issues. Second, the researcher frames the issues and sets out to resolve them. Third, to find resolution, the researcher performs legal analysis by comparing each issue against a hierarchy of sources: i) legislation, ii) case law, and iii) secondary sources. Finally, the researcher proposes a solution to each issue. The normative

[35] *Supra* note 16 at 16.

orientation of the researcher influences every aspect of the research: the facts that are deemed relevant, the characterization of issues, the comparisons made, and the prescribed remedies.

Munger and Seron contend that the "[d]octrinal method assumes the normative authority of the law."[36] My analysis critiques the *status quo* to show that a new norm is required. My research acknowledges the reality that there is power in the law and that the exercise of the law's power has real implications for Indigenous peoples. In case of Nuxalkmc, the exercise of legal power obliterated a culturally significant species. Christie instructs "Aboriginal peoples…to reaffirm the validity of their perception that the law is alien and oppressive and come to terms with the reasons for the validity of this perception."[37] This is my intention in my research. My critique of Canadian law necessitates a doctrinal analysis that is informed by my Nuxalk perspective.

Another complaint regarding doctrinal legal scholarship is that it written exclusively for a legally trained audience.[38] My intended audience includes the Nuxalkmc, other Indigenous peoples, legal academics, and an interested Canadian public. I have attempted to write to satisfy these diverse audiences in a way that is understandable and meaningful for all.

I structure my doctrinal analysis along Singer's normative methodology model.[39] The background, facts, issues, as well as my relationship to my research question all fit within the orientation stage of Singer's model. My analysis of the relevant legislation, case law and secondary sources involve evaluative assertion (I determine the purpose underlying the protection of Aboriginal rights), contextualization (I examine the state of the law at the time the Nuxalk eulachon crisis arose), and prioritization (I look to analogous cases to consider what

[36] Munger & Seron, *supra* note 13 at 274.
[37] Christie, *supra* note 15 at 114.
[38] Munger & Seron, *supra* note 13 at 258.
[39] *Supra* note 22.

should have happened in the Nuxalk situation). Finally, I prescribe certain steps to alleviate the Nuxalk eulachon crisis, and to avoid *de facto* extinguishment of Aboriginal rights in the future.

1.6 Research Process and Sources

Critical legal scholarship requires researchers to acknowledge their subjectivity in their research. I appreciate that I am a source of information within my research project. I am Nuxalkmc and I carry a Nuxalk name which endows me with responsibilities within Nuxalk society. I was raised in the Nuxalk community and my worldview is shaped by my Nuxalk upbringing. I was trained in Nuxalk traditions, as well as in anthropology and Canadian law. I also practice Canadian law. I understand that my identity is dynamic and fluid; it shifts depending on context and is not stagnant or singular. While I would categorize myself as an insider to the Nuxalk community, I understand that I am also an outsider in some ways. I have been living away from Nuxalk territory since 1995. Although my father was adopted into the Nuxalk community when he married my mother, my father's ancestry is not Nuxalk. Moreover, he is employed by the Department of Fisheries and Oceans Canada (DFO) – the governmental department at the focus of my criticism. I have held summer employment with the DFO, so to some extent I am an insider with the DFO as well. My research is shaped by my complex identity that is constantly in flux. I am aware that insider research is often accused of bias as a result of the researcher's close proximity to the research question. Additionally, Smith warns insiders not to take their insider status for granted or rely on their insider status to circumvent rigorous research. She advises that insider research must be ethical, respectful, reflexive, critical and humble.[40] I have heeded Smith's advice throughout my research project.

[40] Smith, *supra* note 11 at 139.

Although my analysis is grounded in a critical perspective, I am analyzing the Nuxalk eulachon case within the Canadian legal system and my focus is doctrinal sources. Doctrinal research begins when a legal researcher receives facts and determines that the facts present one or more legal issues. In doctrinal analysis, it is beneficial to have documented facts. My analysis will consider two streams of relevant facts: first, the importance of the eulachon to the Nuxalkmc, and second, scientific evidence regarding the cause of the eulachon decline.

Evidence of the Nuxalk people's relationship with eulachon is relevant in establishing that the Nuxalkmc have an Aboriginal right to fish eulachon. My primary sources for this are one historical text and one ethnographical text that predate the eulachon crisis. Both texts are well-known to Nuxalkmc, and the community understands them as important textual sources for information on Nuxalkmc. I also searched the Early Canadiana online database[41] and the Nuxalk Nation database[42] for "Nuxalk" and "Bella Coola" and did not come up with better sources.

The historical text is the Alexander Mackenzie Journal.[43] Alexander Mackenzie was the first European to cross Canada by land and reached the Pacific Ocean at Nuxalk territory on July 20, 1793. He arrived at the Pacific Ocean via the grease trail that connected Nuxalk and Ulkatcho trade partners. Mackenzie was one of the first Europeans to interact with the Nuxalkmc.[44] Mackenzie was only among the Nuxalkmc for ten days, but he observes Nuxalkmc use of eulachon at one of the earliest times of contact between Nuxalkmc and Europeans.

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[41] Early Canadiana online <http://www.canadiana.ca> is a large-scale online collection of early Canadian texts (accessed August 29, 2013).
[42] Nuxalk's online database <http://www.nuxalknation.org/component/option,com_jombib/limit,25/limitstart,25/> provides sources specifically on the Nuxalkmc (accessed August 29, 2013).
[43] Alexander Mackenzie, *Voyages from Montreal, on the River St. Laurence, through the Continent of North America to the Frozen and Pacific Oceans in the Years 1789 and 1793* (London: T Cadell, 1801).
[44] There is evidence that Nuxalkmc had interacted with European traders before Mackenzie arrived in Nuxalk territory. For example, Captain George Vancouver had passed through Nuxalk oceanic territory 48 days before Alexander Mackenzie arrived by land. (*Ibid.*)

The ethnographic text is *The Bella Coola Indians*,[45] written by Thomas McIlwraith, an anthropologist with the National Museum of Canada who lived among the Nuxalkmc for part of each year from 1922 to 1924. The ethnography he compiled is the most comprehensive written text on Nuxalkmc. In it, he observes the importance of the eulachon as a food staple, assigning it second rank in importance after salmon in the Nuxalk diet. He also documented trade in eulachon oil as central to the Nuxalk economy.

I acknowledge that there may be issues of reliability with these sources. First, their contents were influenced by the worldview of the observers. The authors were non-Nuxalkmc and were only in Nuxalk territory for brief periods. They had differing worldviews from the Nuxalkmc, and the biases of the authors influenced their recorded observations. Second, observations were likely affected by language competence – particularly the ability of observers to understand Nuxalk language, idioms, and nuances. Third, the observations were made within professional conventions and for particular objectives which likely impacted the observations that were reported. In an effort to deal with these concerns about reliability, I have compared my sources to see where there are overlaps and assumed that there is a higher probability of accuracy where there are more overlaps. One point of comparison is my own knowledge that I carry as a Nuxalk citizen. By comparing these outsider accounts with what I have been taught and assessing their validity from a Nuxalk perspective, I am applying Nuxalk law in my analysis.

Regarding the scientific evidence, I understand that scientific sources are not neutral, objective, or unbiased. There are often differing interpretations of raw data, and legal researchers may be required to choose between competing scientific explanations and justify their preference. In my case, scientific information about Central Coast eulachon is scarce.

[45] Thomas McIlwraith, *The Bella Coola Indians*, vol 1 & vol 2 (Toronto: University of Toronto Press, 1948).

Because eulachon are not economically important to the mainstream Canadian fishing industry, they have not been the centre of much scientific research.[46] The lack of scientific evidence about eulachon poses unusual challenges in my research.

The most comprehensive scientific study on the Central Coast eulachon is a paper written by a Nuxalk biologist (who also happens to be my cousin).[47] The research was conducted while she was at UBC's Fisheries Centre, and the paper is my primary source of scientific evidence. It presents two potential problems. First, it is written by an "insider," which could raise the perception of bias, or even compounded bias (i.e. I, as an insider, am using another insider's findings to support my insider research). Second, the researcher is my cousin, which could raise the allegation that this relationship unduly influenced my work. I suspect that Moody's motivation in writing her paper on the topic of the Central Coast eulachon is influenced by her orientation within the Nuxalk community. As with my research, I believe that Moody's close proximity to her research subject provides an incentive for rigorous examination. Moody's paper combines traditional ecological knowledge with scientific sampling to provide an overview of the Central Coast eulachon population over time. Her paper acknowledges a number of factors that may have contributed to the eulachon crisis, and identifies the shrimp trawl fishery as a key element in the Central Coast eulachon extirpation.

Additional scientific evidence to support my thesis exists. For example, Terry Beacham, Douglas Hay, and Khai Lee have done extensive sampling of specific eulachon runs, including

[46] Douglas Hay & P McCarter, "Status of the eulachon *Thaleichthys pacificus* in Canada" *Department of Fisheries and Oceans Canada, Canadian Stock Assessment Secretariat, Research Document 2000/145* (2000).
[47] Moody & Pitcher, *supra* note 8. The paper was originally submitted as Moody's Master of Science in Resource Management and Environmental Studies thesis in 2008, and was subsequently published in the UBC Fisheries Reports series in 2010. Pitcher was Moody's thesis supervisor.

the Central Coast eulachon.[48] Hay and McCarter, marine biologists associated with the DFO, attribute the extirpation of Central Coast eulachon to the untimely opening of a shrimp trawl fishery which, they estimate, caught 90 tonnes of the Central Coast eulachon stock as by-catch.[49] The generally accepted hypothesis is that the majority of eulachon from Nuxalk rivers were killed as by-catch in the 1997 shrimp trawl fishery. As a result, few returned to their spawning grounds in Nuxalk territory in 1999. I am adopting this explanation for the cause of the Central Coast eulachon extirpation in my thesis.

I have considered additional sources such as DFO reports that are available online through the DFO's website.[50] I have also surveyed the bibliography of Moody and Pitcher's paper for additional sources. During my internet search, I found an annotated bibliography about eulachon biology. I reviewed the relevant sources from these bibliographies to find additional scientific evidence. I also assessed the scientific data against traditional ecological data that was documented in two ethnographic reports[51] regarding the extirpation of the Nuxalk eulachon fishery.

The second step in doctrinal research occurs when the researcher uses relevant facts to frame the issues. As mentioned above, I am framing the issues within the domestic Canadian legal system. I am not considering how the Nuxalk eulachon crisis would be framed within the Nuxalk legal order, or under the international legal system. The facts pose a number of issues.

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[48] Terry Beacham, Douglas Hay, & Khai Lee, "Population Structure and Stock Identification of Eulachon (*Thaleichtys pacificus*), an Anadromous Smelt, in the Pacific Northwest" (2005) 7 Mar Biotech 363.
[49] Douglas Hay, "Decline of the Eulachon in British Columbia Rivers: Biological and Political Implications for Recovery" (UBC Fisheries Centre Seminar Series Lecture, October 1, 2010).
[50]< http://www.pac.dfo-mpo.gc.ca/science/species-especes/pelagic-pelagique/eulachon-eulakane-eng.htm > (accessed August 29, 2013).
[51] Jacinda Mack, "Making Grease: Cultural Effects of Depleted Eulachon Stocks in the Nuxalk Nation" Report for the Nuxalk Nation Band Council, 2000 [unpublished], and Janet Winbourne, "2002 Central Coast Eulachon Project: Final Report of Traditional Ecological Knowledge Surveys." Report for Oweekeno Kitasoo Nuxalk Tribal Council, 2002 [unpublished].

First, can the Nuxalkmc establish an Aboriginal right to fish eulachon? Second, assuming they have an Aboriginal right to fish eulachon, was this right violated? Third, if so, who violated it? Specifically, did the DFO's management decisions regarding the Pacific shrimp trawl fishery violate the Nuxalk right to fish eulachon? Fourth, is the DFO meeting its duty of consultation owed to the Nuxalk people in the *SARA* listing process regarding eulachon? Fifth, did the Department of Indian Affairs or the DFO breach any fiduciary duties or solemn obligations owed to the Nuxalk people? Sixth, do the Nuxalkmc have any legal recourse under the Canadian legal system? Finally, can reconciliation between the Nuxalkmc and the federal Crown be achieved?

These issues fall into two intertwining streams: fisheries law (regarding DFO's management of the shrimp trawl fishery under section 91(12) of the *Constitution Act, 1867*) and Aboriginal law (regarding Nuxalk Aboriginal right to fish eulachon under section 35(1) of the *Constitution Act, 1982*). These streams are intertwined because DFO has jurisdiction over "sea coast and inland fisheries"[52] in Canada, and many Aboriginal peoples have Aboriginal fishing rights in the same waters. Not surprisingly, Canadian fisheries often conflict with Aboriginal fisheries. The DFO has a constitutional duty to recognize and affirm Aboriginal rights in its management of Canadian fisheries. Therefore, I will analyze both fisheries law and Aboriginal law in this thesis.

The next step in legal research requires the researcher to analyze the issues with the goal of resolution. To find resolution, the researcher compares each issue against a hierarchy of sources: 1) legislation, 2) case law, and 3) secondary sources.

[52] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(12) [*Constitution Act, 1867*].

For my research, the governing statute is the *Fisheries Act*[53] and its associated regulations. I used the Quicklaw Point-in-Time feature to locate the provisions that were in effect in 1997 (the year that Hay believes 90 tonnes of eulachon were caught as by-catch in one specific shrimp trawl opening). To locate relevant sections, I surveyed the table of contents to find that: section 7 authorizes the Minister of Fisheries and Oceans to grant fishing licences, and section 43 authorizes the Governor in Council to make regulations. The Quicklaw *Fisheries Act* webpage contains a list of associated regulations, which I scanned to find relevant regulations. There are two key regulations relevant to the Canadian Pacific shrimp trawl fishery. First, the *Fisheries (General) Regulations*[54] govern the open and close times for fishing, fishing quotas, and permissible fishing gear. Open and close times are set in the *Fisheries Regulations*, but may be varied when a designated authority issues a variation order. The second key regulations are the *Pacific Fishery Management Area Regulations* which divide the Canadian fisheries waters of the Pacific Ocean into areas and subareas (Figure 3).[55] The areas and subareas are often referenced when describing fishery open and close times. As part of my doctrinal analysis of fisheries legislation I also considered policy documents related to the DFO's management of the shrimp trawl fishery. I found relevant policy documents by searching the Library and Archives Canada website.[56]

For the Nuxalk right to fish eulachon, the relevant legislation is section 35(1) of the *Constitution* which states: "the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed." This is vague and the courts have elaborated the meanings of section 35(1).

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[53] RSC 1985, c F-14 [*Fisheries Act*].
[54] SOR/93-53 [*Fisheries Regulations*].
[55] SOR/82-215.
[56] < http://www.collectionscanada.gc.ca/index-e.html > (accessed August 29, 2013).

Accordingly, I proceeded to the second source of legal research: case law. Case law analysis is guided by the doctrines of *stare decisis* ("to stand by decided matters"[57]) and precedent. "Under the doctrine of *stare decisis*, the decision of a higher court within the same jurisdiction acts as binding authority on a lower court within that same jurisdiction."[58] In Canada, decisions of the Supreme Court of Canada are binding.

Following the doctrine of *stare decisis*, I began my case law analysis with Supreme Court of Canada decisions regarding Aboriginal rights. Because I have studied and practiced Aboriginal law, I am aware of the authoritative decisions on Aboriginal rights. *R.* v. *Sparrow* was the first case to interpret section 35(1) and established that this provision only protects Aboriginal rights existing in 1982 when the *Constitution* took effect.[59] The burden is on the Crown to establish that an Aboriginal right was extinguished through explicit legislation or treaty prior to 1982.[60] *R.* v. *Van der Peet* created the test for proving Aboriginal rights: claimants must show that the claimed right was integral to their distinctive culture prior to contact with Europeans.[61] Aboriginal rights are not absolute. *Sparrow* introduced a test to justify infringement of Aboriginal rights. Aboriginal rights may be justifiably infringed if there is a valid objective, such as conservation. *R.* v. *Gladstone* broadened the scope of valid objectives to include Canadian economic interests.[62] Infringement of Aboriginal rights must be consistent with the honour of the Crown. A number of factors are indicative of the honour of the Crown: 1) Aboriginal rights were given priority over conflicting interests; 2) Aboriginal rights were minimally infringed; 3) fair compensation was offered; and 4) Aboriginal peoples were

[57] Gerald Gall, *The Canadian Legal System*, 5th ed (Toronto: Carswell, 2004) at 431.
[58] *Ibid*.
[59] *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].
[60] Since the constitutional protection of Aboriginal and treaty rights in 1982, the government can no longer unilaterally extinguish Aboriginal or treaty rights.
[61] *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*].
[62] *Supra* note 10.

consulted. *Haida Nation* v. *British Columbia* expanded on the consultation requirement, confirming that the Crown has a duty to consult with Aboriginals prior to Aboriginal rights being proven through legal processes such as litigation and negotiation.[63] However, consultation has further eroded effective protection of Aboriginal rights because courts have taken a procedural approach to consultation which detracts from the substance of consultation. Courts focus on the process of consultation, not on the outcome. For example, in *Haida* the SCC determined that "there is no duty to agree; rather, the commitment is to a meaningful process of consultation."[64] If the court deems the consultation process fair, then it considers the outcome fair, even if Aboriginals are dissatisfied with the outcome for failing to effectively protect their rights.[65]

My critical analysis reveals that Canadian case law has developed in a way that precludes effective protection of Aboriginal rights. Although section 35(1) is supposed to recognize and affirm Aboriginal rights, Canadian jurisprudence instructs a balancing of societal interests against Aboriginal interests which allows governments to infringe Aboriginal rights. While the Supreme Court of Canada has clearly established that *de facto* extinguishment of Aboriginal rights is not legally valid,[66] its acceptance of Canadian economic interests as a valid objective to justify infringement of Aboriginal rights may lead to this result.

The next step in my case law analysis involves applying the doctrine of precedent. "Precedent is the doctrine that requires a judge, in resolving a particular case, to follow the decision in a previous case, where the fact situations in the two cases are similar."[67] Where courts may have decided a similar case in the past, the researcher will be required to demonstrate

[63] *Haida Nation v British Columbia*, 2004 SCC 73 [*Haida*].
[64] *Ibid* at para 52.
[65] *Taku River Tlingit v British Columbia*, 2004 SCC 74.
[66] For example, the SCC found that the Crown must demonstrate a clear and plain intention to extinguish an Aboriginal right; the Crown cannot inadvertently extinguish Aboriginal rights via legislation or regulations that are inconsistent with such rights. (*Sparrow*, *supra* note 63 at 1099.)
[67] Gall, *supra* note 57 at 431.

the similarities or differences between the decided case and the current case. To find similar cases, I searched two online databases,[68] searching the full text of cases that contained both search terms: "Aboriginal" and "extirpation". My searches yielded four cases.[69] Both online databases provide a highlighted search term feature, which helped me skim through the cases to determine whether they are analogous to the Nuxalk situation. Only one case, *West Moberly First Nations* v. *British Columbia*, involved Aboriginal claimants asserting their section 35(1) right to protect a species from extirpation. The other cases involved Aboriginals charged with harvesting threatened species in contravention of conservation measures (e.g. in closed areas or during closed times. In *West Moberly*, the British Columbia Supreme Court stayed the effect of permits issued by the Province in relation to a tract of land in West Moberly's treaty territory which is critical habitat for endangered woodland caribou. The Court held that:

> a balancing of the treaty rights of Native peoples with the rights of the public generally, including the development of resources for the benefit of the community as a whole, is not achieved if caribou herds in the affected territories are extirpated.[70]

This decision is relevant to the Nuxalkmc. Following the reasoning in *West Moberly*, a balance between the Nuxalk right to fish eulachon and economic benefits for Canadian society is not achieved if eulachon stocks are extirpated.

The third source of information for doctrinal research is contained in secondary sources in which legal scholars have examined legislation, case law, or principles relevant to the current case. I use secondary sources to establish the facts,[71] to explain nuances in the case law, and to

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[68] Quicklaw <http://www.lexisnexis.ca/en/quicklaw/> (accessed August 29, 2013) and the Canadian Legal Information Institute <www.canlii.org> (accessed August 29, 2013).
[69] *West Moberly First Nations v British Columbia*, 2010 BCSC 359, aff'd *West Moberly First Nations v British Columbia*, 2011 BCCA 247, leave to appeal to the SCC refused, 34403 (February 23, 2012) [*West Moberly*], *R v Morris* 2010 BCPC 207, *R v Lefthand*, 2007 ABCA 206, and *R v Eagle Child*, 2005 ABQB 275.
[70] *West Moberly*, *ibid*, BCSC at para 53, aff'd BCCA at para 166.
[71] I described my methods for finding factual sources in detail above.

develop prescriptions. I have found some secondary sources by locating texts that judges have referred to in the relevant case law. To find additional secondary sources, I have skimmed the bibliographies of the texts that I have located, as well as the lists of publications of influential scholars. I also searched online databases such as Quicklaw and Google scholar to identify further relevant secondary sources.

The final stage of doctrinal legal analysis is when the researcher proposes remedies to the issues raised. For my prescriptions, I consider domestic remedies that are available within the current Canadian legal system. My analysis reveals that the existing laws could have been applied to prevent the eulachon extirpation. I suggest how Canada's existing laws should be applied to prevent *de facto* extinguishment of Aboriginal rights in the future. I reveal that the Nuxalkmc are asserting Nuxalk authority in an attempt to mitigate the eulachon crisis – regardless of whether the Canadian legal system recognizes Nuxalk jurisdiction. I examine how the *Species at Risk Act*[72] is being applied to the eulachon situation, and how this legislation should be used to protect species that are central to Aboriginal and treaty rights. I advocate for deeper respect for Aboriginal traditional knowledge by responsible authorities under the *SARA.* Finally, I review secondary sources for additional insights into the effective protection of Aboriginal rights.

1.7 Scope

The Nuxalk eulachon crisis incorporates Aboriginal law, fisheries law and environmental law. The Nuxalk case also contains the issue to a manageable research project in a number of ways. It focuses on the intersection of Canadian Aboriginal law and fisheries law which has been at the center of a lot of jurisprudence and academic literature which I can draw from. It

[72] RSC 2002, c 29 [*SARA*].

involves the eulachon fishery which is purely an Aboriginal fishery; non-Aboriginals have minimal interest in the eulachon fishery itself. The issue arose because non-Aboriginal fishers caught eulachon as by-catch in the commercial shrimp trawl fishery, not from a direct conflict over the same fishery. The collapse of the Central Coast eulachon fishery was abrupt, and scientific evidence attributes the extirpation primarily to an untimely opening of a commercial shrimp trawl fishery.

I am limiting my research to the Nuxalkmc experience of the loss of the eulachon. Before the extirpation, the Central Coast eulachon were used by many Indigenous Nations, not just the Nuxalk Nation. Even so, my focus will remain on the Nuxalkmc experience of the extirpation for primarily pragmatic reasons. For example, I am Nuxalkmc so limiting my scope allows me to research from an insider perspective and use my knowledge obtained during my upbringing in the Nuxalk community to benefit my research. I have studied Nuxalk issues in the past and therefore know where to find documents pertaining to the Nuxalk Nation. My insider status has also helped me access documents that would otherwise have been difficult for me to obtain. Expanding my analysis to include other Central Coast Indigenous Nations would unnecessarily complicate my analysis.

In addition, I am only considering Aboriginal rights which are free standing rights, not Aboriginal title which is a right to land itself.[73] Although my primary focus will be Aboriginal fishing rights, my analysis requires some discussion of Aboriginal rights more generally. Aboriginal rights are constitutionally protected; section 35(1) provides "the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty

[73] Kent McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) Alta L Rev 117.

of the Crown."[74] Canadian courts have elaborated that Aboriginal rights are *sui generis* (unique and not comparable to other rights), communal (held by Aboriginal groups rather than individuals), and context specific (they do not exist generally but are determined on a case-by-case basis).

My focus is on domestic Canadian Aboriginal law (which is governed by section 35 of the Canadian *Constitution*), although I will include a discussion of Nuxalk Indigenous legal order (which finds its authority within Indigenous traditions) at the outset to frame of my foundational understanding of law.

Finally, I focus my attention on the federal Crown and primarily on the DFO, although I also consider the role of the Department of Indian Affairs with respect to the Nuxalk eulachon crisis. While I briefly discuss provincial jurisdiction in relation to sports fisheries, my analysis does not require an extensive discussion of constitutional division of powers in relation to Aboriginal rights.

Also lying beyond the scope of my research is the historical development of how Indigenous fisheries management was colonized by the Canadian legal system. Douglas Harris[75] and Dianne Newell[76] have done comprehensive historical legal analyses of the colonial displacement of Indigenous participation in, and jurisdiction over (primarily salmon) fisheries in British Columbia. Although colonial overthrow of Indigenous fisheries management is relevant to my research, it is not the focus of my analysis.

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[74] *Van der Peet, supra* note 61 at para 31.
[75] Douglas Harris, *Fish, Law and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001) and *Landing Native Fisheries: Indian Reserves and Fishing Rights in British Columbia, 1849-1925* (Vancouver: UBC Press, 2008).
[76] Diane Newell, *Tangled Webs of History*: *Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993).

1.8 Justification of Research

Much has been written about Aboriginal fisheries jurisprudence which instructs the balancing of societal interests against Aboriginal interests. The existing literature critiques this balancing for allowing legislation, government action, and economic development to infringe on Aboriginal rights.[77] Many scholars contend that the balancing requirement is contrary to constitutional supremacy because it allows constitutionally protected Aboriginal rights to be subordinated by economic rights which do not enjoy constitutional protection. My research will examine a case in which DFO management of a commercial fishery led to the obliteration of an Aboriginal fishery. In other words, the DFO allowed economic rights to effectively extinguish an Aboriginal right.

Scholars have previously written about the extinguishment of Aboriginal rights prior to the constitutional protection of these rights,[78] and the extinguishment doctrine with respect to Aboriginal title (which is an Aboriginal right to the land itself).[79] However, *de facto* extinguishment of constitutionally protected Aboriginal rights practices (such hunting and fishing rights) has yet to be thoroughly explored. This is because Canadian Aboriginal jurisprudence clearly indicates that *de facto* extinguishment of Aboriginal rights is not permitted. In *Sparrow*, the Supreme Court of Canada explained that section 35 protects Aboriginal rights

[77] See for example: Sharma Parnesh, *Aboriginal Fishing Rights: Laws, Courts, Politics* (Halifax: Fernwood, 1998), Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" (1997) 8:2 Const Forum Const, 33, and Darlene Johnston, "Lo, How *Sparrow* Has Fallen: A Retrospective of the Supreme Court of Canada's Section 35 Jurisprudence" in J Bass, WA Bogart & FH Zemans, eds, *Access to Justice for a New Century: The Way Forward*, (Vancouver: UBC Press, 2005).

[78] See for example: P Joffe and ME Turpel, "Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives", CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Libraxus, 1997) and P. Doyle-Bedwell, "The Evolution of the Legal Test of Extinguishment: From Sparrow to Gitskan" (1993) 6 CJWL 193.

[79] Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33 Ottawa L Rev 301, and "Racial Discrimination and Unilateral Extinguishment of Native Title" in K McNeil, ed, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 357.

existing in 1982, when the *Constitution* took effect. Before constitutional protection of Aboriginal rights, the federal government[80] could unilaterally extinguish Aboriginal rights with clear and plain legislation intending that effect.[81] Aboriginal rights could also be extinguished through surrender agreements between Aboriginals and the federal government. In either case, the burden is on the government to "prove a clear and plain intention to extinguish such rights, before courts will find they have been extinguished."[82] The clear and plain intention requirement is a high standard to meet. *De facto* extinguishment is not legally valid. Even so, as environmental degradation increases, the likelihood of *de facto* extinguishment of Aboriginal rights through extirpation of a species also increases. Therefore, it is likely that Aboriginal peoples will increasingly seek to address this problem.

Certainly, *de facto* extinguishment of Aboriginal rights is a live issue for West Moberly First Nations. In the *West Moberly* case, the West Moberly sought to protect a specific herd of caribou on the brink of extirpation from coal exploration activities. The BC Court of Appeal suspended the exploration permits pending further consultation – specifically, the development and implementation of a plan for the protection and augmentation of the endangered caribou herd.[83] Although West Moberly First Nations were able to achieve temporary relief from the incursion of economic development that is threatening a culturally significant species, their struggle is not over. Resource development continues to encroach upon West Moberly territory, including the endangered caribou habitat.[84] The Nuxalkmc are not alone in their experience with

[80] Under section 91(24) of the *Constitution Act, 1867*, the federal government has jurisdiction over "Indians and Lands Reserved for Indians," so provinces never had the authority to extinguish Aboriginal rights.
[81] Since the constitutional protection of Aboriginal and treaty rights in 1982, the government can no longer unilaterally extinguish Aboriginal or treaty rights.
[82] *R v Badger*, [1996] 1 SCR 771 at para 41.
[83] *West Moberly*, *supra* note 69, at para 83.
[84] RS McNay, D Cichowski, & BR Muir, *Draft Action Plan for the Klinse-Za Herd of Woodland Caribou (Rangifer tarandus caribou) in Canada* (Moberly Lake, BC: *Species at Risk Act* Action Plan Series, 2013) [unpublished] at 20.

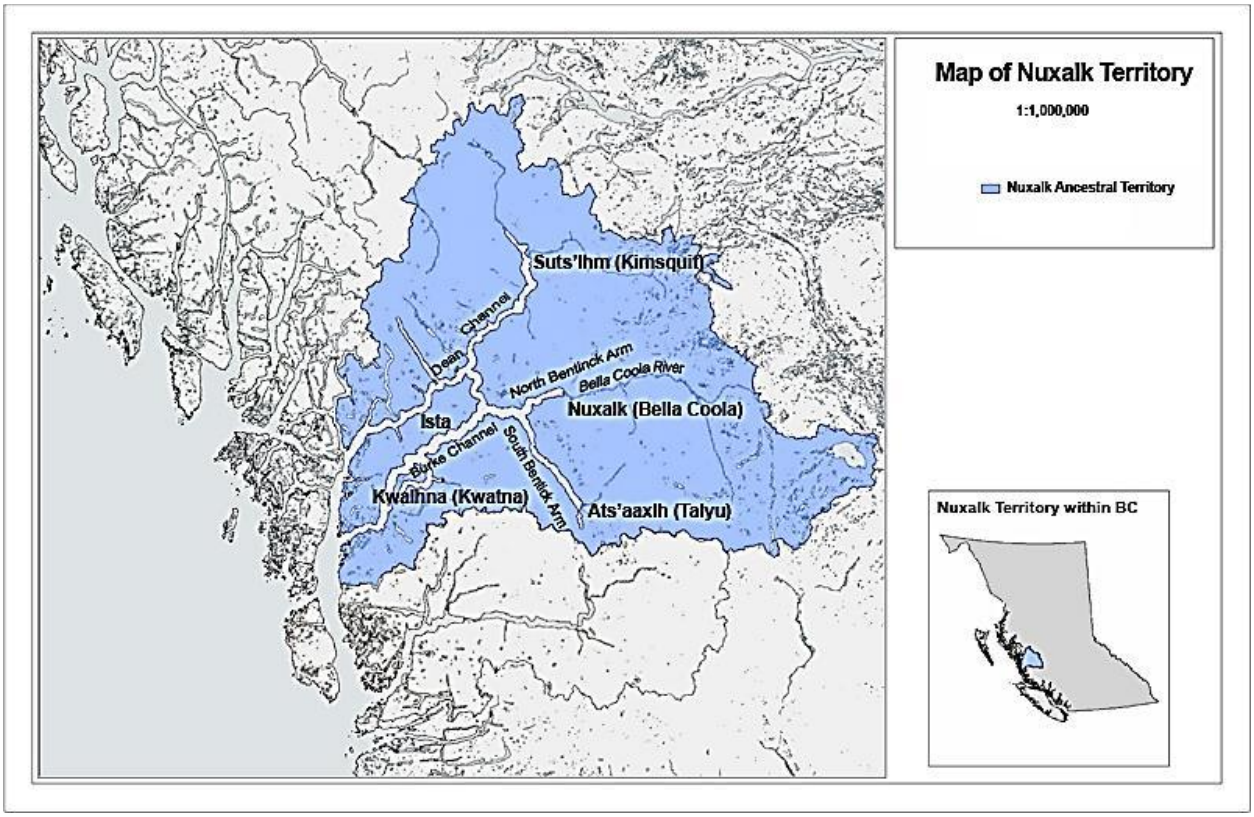
de facto extinguishment of Aboriginal rights. My legal analysis of *de facto* extinguishment of Aboriginal rights through species extirpation will assist in the development of strategies to prevent future *de facto* extinguishments.[85] Accordingly, a comprehensive investigation of the phenomenon constitutes a timely and relevant contribution to Aboriginal legal literature.

1.9 Overview of Thesis

The introductory chapter has provided the background and context of my research project by explaining who I am and how my research question arose. It has also outlined my research objectives, research question, theoretical orientations, methodologies, research process, scope, and justification of my thesis project. Chapter 2 describes Nuxalk origin stories as the basis of Nuxalk legal order. The Nuxalk legal order is based on a holistic worldview that perceives Nuxalkmc to have deep spiritual relationships between territory and living things. Chapter 3 explains the intrusion of the Canadian state into Nuxalk territory, and the imposition of the Canadian legal system to the detriment of the Nuxalk legal order. This chapter highlights DFO's failure to effectively manage fisheries, culminating with the extirpation of the Central Coast eulachon. Chapter 4 considers whether Nuxalkmc have any recourse for the eulachon crisis under the Canadian legal system. This chapter reveals that the evolution of Canadian jurisprudence regarding Aboriginal rights has diminished effective protection of these rights, and provides few meaningful remedies. Accordingly, it is unlikely the Nuxalk will find sufficient remedy to the eulachon extirpation under the Canadian legal regime. Chapter 5 reflects on the eulachon crisis, and contemplates whether reconciliation is possible within the Canadian legal system.

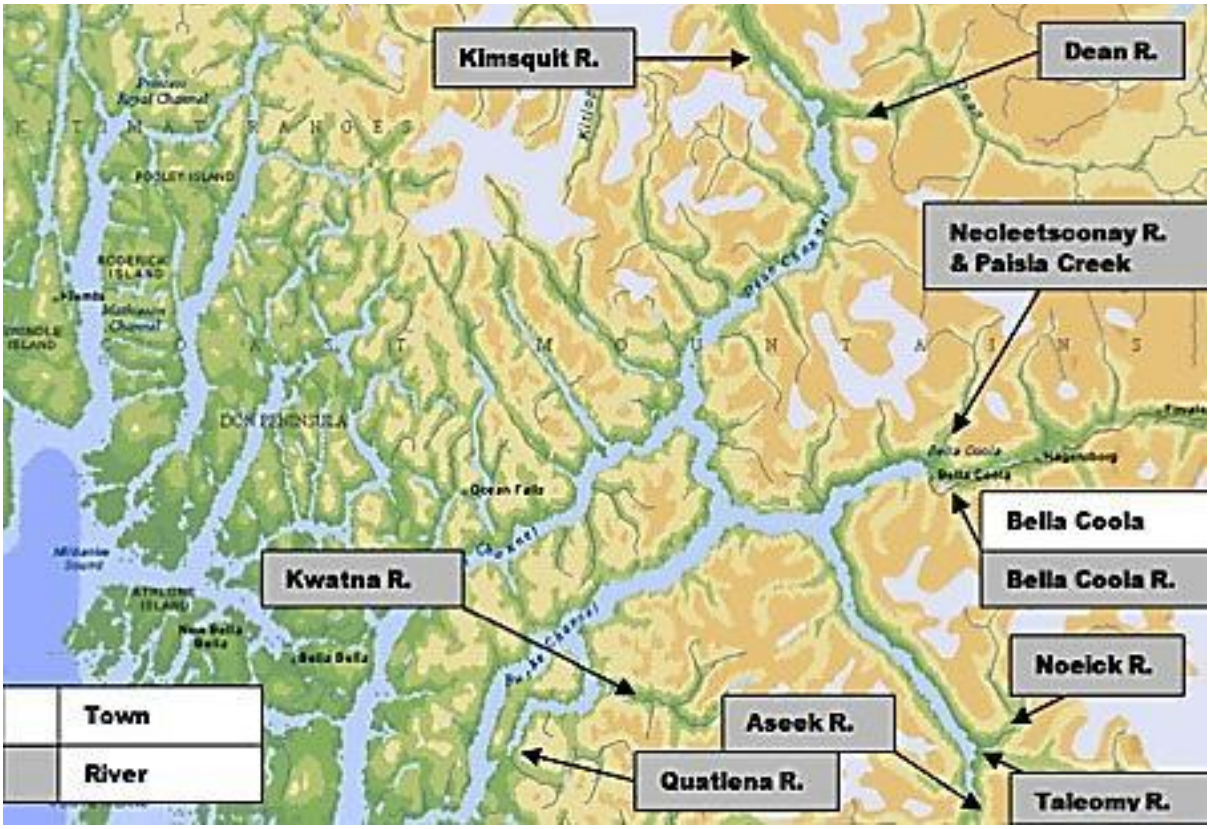
[85] My research findings will likely be reviewed by the Nuxalk Nation and other Central Coast First Nations affected by the eulachon crisis. My analyses may provide some insight into various functions of the Canadian legal system that they, and other Aboriginal peoples can draw from in developing legal strategies. Legal academics, lawyers, judges, and the broader Canadian public may also benefit from my research findings.

Figure 1: Map of Nuxalk Territory



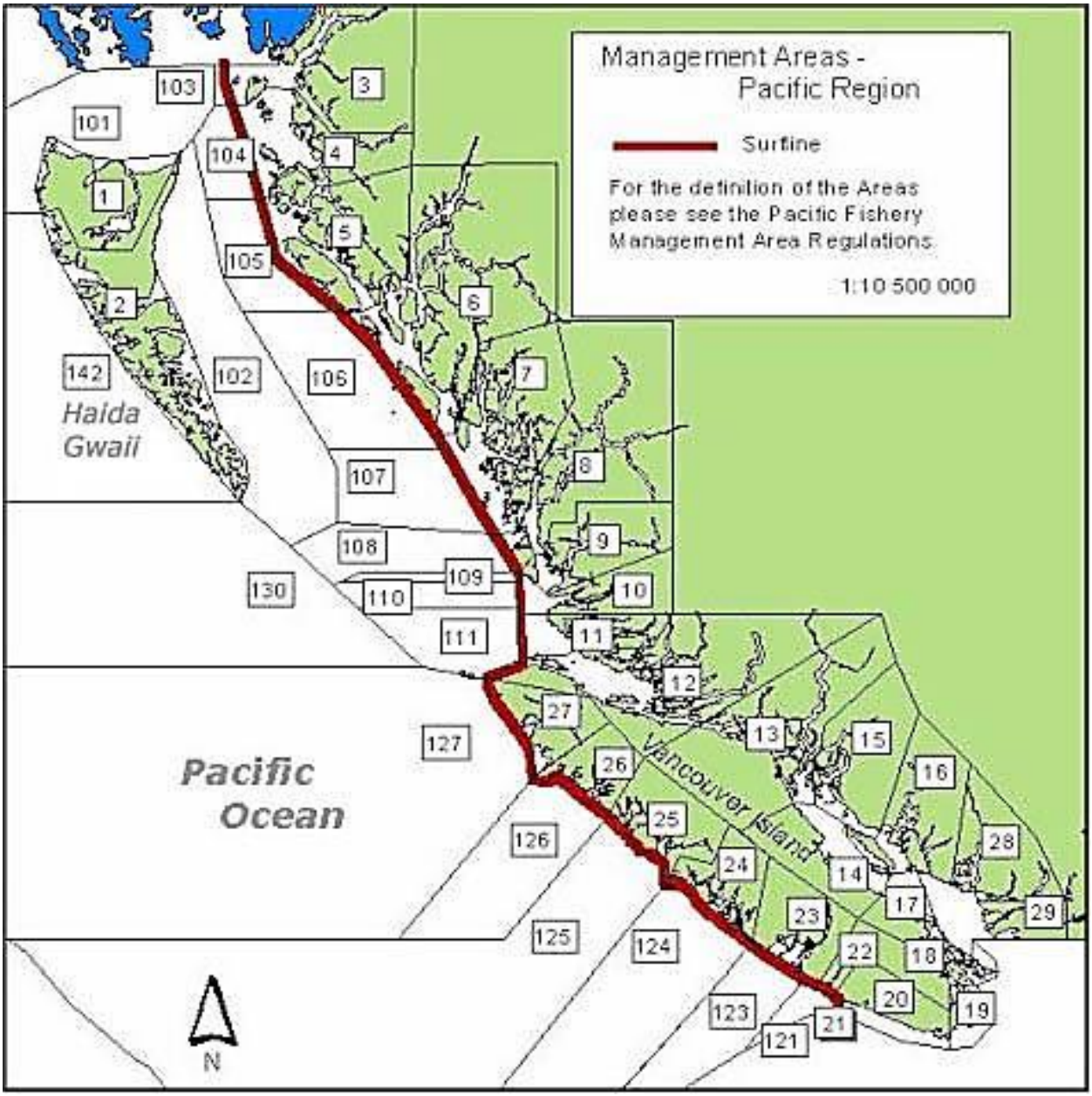
Source: Nuxalk Nation, *About Us* online: Nuxalk Nation <http://www.nuxalknation.org/content/blogcategory/16/40/> (accessed August 29, 2013)

Figure 2: Map of Ten Nuxalk Rivers with Eulachon Runs



Source: Megan Felicity Moody & Tony J Pitcher, "Eulachon (*Thaleichtys Pacificus*) Past and Present" (2010) 18:2 University of British Columbia Fisheries Centre Research Reports at 23.

Figure 3: Map of Management Areas in the Pacific Region



Source: DFO, *Management Areas – Pacific Region* online: Fisheries and Oceans Canada <http://www.pac.dfo-mpo.gc.ca/fm-gp/maps-cartes/areas-secteurs/index-eng.htm> (accessed August 29, 2013).

Chapter 2 *Smayustas*: "our highest stories"

"*Wic its'ik ska acwsalctimutaw wa mnmntsilh ats wa ts'ktalhilh ats n wa smayusta tuu ats.*"
"It is important that our children learn where we come from and the creation of our people; our highest stories."[1] ~ Nuxalk Head Chief Nuximlayc (Lawrence Pootlass)

2.1 Introduction

This chapter describes the Nuxalk origin story as the foundation of the Nuxalk legal order. I acknowledge that the Nuxalk legal order is dynamic and evolving, not stagnant or absolute. I also realize that, as with all legal traditions, Nuxalk legal order is complex, full of nuances, and subject to contention, multiple interpretations, and differing understandings. This chapter is my attempt at explaining Nuxalk legal order, in an academic context, in written form, at a specific point in time. While this is not traditionally how Nuxalk legal order would be conveyed, academic writing about Nuxalk legal order from a Nuxalk perspective is a beneficial development. Sharing Nuxalk legal order with a broad audience enriches provincial, national, and international dialogues about the significance of Indigenous legal orders in resolving contemporary problems. My description of the Nuxalk legal order also provides context to the eulachon crisis.

2.2 Nuxalk Legal Order

The Nuxalk legal order emerges out of a people's long relationship with a particular territory. The Nuxalkmc have been occupying their territory for millennia – from their perspective, since the beginning of time. To comprehend the Nuxalk legal order requires an

[1] The late Chief Nuximlayc, Head Chief of the Nuxalkmc, spoke these words at the beginning of every Nuxalk potlatch to express the importance of conveying Nuxalk oral tradition to future generations.

understanding of Nuxalk worldview. Valerie Napoleon, an Indigenous legal academic, explains the importance of cosmology in understanding Indigenous legal orders:

> One of my tenets is that a society's legal order and laws will reflect how its members understand themselves and their world, their place in the universe, and others, including non-human life forms. It is our cosmologies and ontologies that determine the kind of legal traditions we create, because fundamentally our laws will reflect what we think of ourselves and others.[2]

This is certainly the case for the Nuxalkmc. Nuxalk worldview infiltrates every aspect of Nuxalk legal order. McIlwraith, an ethnographer who researched the Nuxalkmc from 1922 to 1924, observed that "[a]mong the Bella Coola…their religious beliefs colour every aspect of their life, and these must be understood by anyone who wishes to comprehend their culture as a whole."[3] Nuxalk cosmology forms the foundation of Nuxalk legal order.

Nuxalk cosmology begins with the Nuxalk conception of genesis. The Nuxalk understanding of the origin of the world is captured in the following teaching:

> *Alquntam* [the Creator] created four supernatural Carpenters…. These beings…chiseled from wood a number of human beings, the forefathers of mankind…. The Carpenters did not confine their attention to men and women. Supernatural beings, animals, birds, trees, flowers, fish, mountains, rivers…all were created almost simultaneously….
>
> Around the walls of *Nusmata* [sky world] were hanging a number of bird and animal cloaks, representing ravens, eagles, whales, grizzly bears…. *Alquntam* asked each individual which of these cloaks he preferred to wear…. Each donned his choice from the wall and immediately became the bird or animal chosen. *Alquntam*…then sent him down in avian or mammal form…. [E]ach landed on the peak of a mountain in the Bella Coola country, took off his cloak, and reassumed human form. The discarded coverings floated back up to *Nusmata*.[4]

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[2] Valerie Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (Ph D Thesis, University of Victoria Faculty of Law 2009) [unpublished] at 164.
[3] Thomas McIlwraith, *The Bella Coola Indians*, vol 1 & vol 2 (Toronto: University of Toronto Press, 1948) at 117.
[4] *Ibid* at 35-36. McIlwraith uses masculine nouns and pronouns to refer to both men and women. Although the use of "man" to describe humans is archaic, sexist, and ambiguous, I have quoted the authors directly with the proviso that, as a Nuxalk citizen, I know that Nuxalk women are included as first ancestors and as chiefs in Nuxalk society.

This account reveals the Nuxalk belief that a deity[5] created their first ancestors and sent them from sky world to earth in the form of an animal. Upon reaching the earth, the first ancestors transformed from animals to humans. The Nuxalkmc are still connected to their ancestral animals through a clan system. Under the clan system, the Nuxalkmc identify the animal cloak that their original ancestor descended to earth with. In Nuxalk society, there are four clans: raven, eagle, killer whale, and grizzly bear. Each Nuxalk family has a specific origin story – *smayusta* – that describes the coming to earth of a Nuxalkmc's first ancestors in the beginning of time.[6]

Smayustas are origin stories, names, songs, dances, and prerogatives that the first Nuxalk ancestors brought with them from heaven to earth. *Smayustas* are the Nuxalkmc's "highest stories". McIlwraith described their importance: "A [person's] most treasured possessions are the names brought down from above by his ancestor in the beginning of time, the knowledge of the form taken by that ancestor, and information about the place where he landed."[7] Nuxalkmc take great pride in their origin stories because they connect currently living Nuxalkmc with their ancestors, and also demonstrate the ongoing relationship that the Nuxalkmc have with their ancestral territories. McIlwraith explains that *smayustas* "authorize such different phases of culture as dances, rights to hunting-grounds, professions, names…, or…prerogatives…. [A] *smayusta* is a myth possessed by the individual…whose prerogatives are derived from it."[8] McIlwraith's description reveals that *smayustas* are not just stories, but rather bestow rights on Nuxalk citizens. Each Nuxalk citizen holds a name that traces back to an origin story. These names tie each Nuxalk citizen to a specific territory within the broader Nuxalk landscape.

[5] Nuxalkmc are polytheistic, believing in many deities.
[6] McIlwraith, *supra* note 3, vol 1 at 78.
[7] *Ibid* at 36.
[8] *Ibid* at 293.

Nuxalkmc have inherent rights in their territory of origin. *Smayustas* articulate Nuxalk history and anchor Nuxalk identity in Nuxalk territory. The history of the Nuxalkmc, their territories, and their laws fuse together in the distant past and are intertwined and inseparable in the Nuxalk worldview.[9]

2.3 Nuxalk Territory

Smayustas also convey territorial rights. According to McIlwraith:

> The easiest way to understand the rights of the ancestral family in land is by first considering the mythological explanation...on reaching the earth the first people are believed to have prospected for suitable settlement sites, places where salmon and [eulachon] could be caught, and if possible, near side valleys where berries were abundant…. The members of the group pre-empted these areas for themselves.[10]

Nuxalk territoriality stems from an understanding that the first ancestors to descend to earth secured territorial rights to the areas upon which they first settled. Because Nuxalk cosmology holds that a deity created and sent their first ancestors to earth, the Nuxalkmc believe that their territorial rights are bestowed upon them by this deity. The Nuxalkmc perceive a sacred bond with their territories and therefore consider land to be inalienable. As McIlwraith explains, "The Bella Coola regard land as…inalienable…. In the old days wars between the coastal tribes were common, but…land was never seized; such is unthinkable to a Bella Coola...to take land was unheard of."[11] This deep sense of spiritual connection to land persists among the Nuxalkmc.[12] According to McIlwraith:

> The system of land tenure follow[s] the same…principles that govern the possession of names in an ancestral family. Hunting and collecting grounds

[9] Napoleon, *supra* note 2 at 165.
[10] McIlwraith, *supra* note 3, vol 1 at 131.
[11] *Ibid* at 132-33.
[12] Lauren Penny, *Empowerment Strategies for Native Groups Facing Resource Crises: A case-study of the Nuxalk Nation, Bella Coola, British Columbia*, MA Thesis, Concordia University 2004) [unpublished] at 72.

> appropriated by the first people…are the property of their offspring, the ancestral family. [13]

Nuxalk land ownership originates upon the arrival of the first ancestors in Nuxalk territory and follows the same succession as clan stories; it is passed down through generations of clan members who occupy the original village where their clan ancestors settled on earth. This original ownership has been transmitted through the succession of *smayustas* from generation to generation, starting from the first Nuxalk ancestors onward to currently living Nuxalkmc. The Nuxalkmc believe they have a responsibility to carry this ownership onward to future generations of Nuxalkmc.[14] Nuxalk land tenure is inextricably linked to Nuxalk origin stories, and inseparable from Nuxalk identity.

Regarding hunting and collecting grounds, "[t]he Bella Coola term for such an area is *sol'loam…*which means 'Food Supply'."[15] The Nuxalkmc perceive land as a "food supply" rather than a possession. "Since land is only valued for hunting or collecting purposes, it is not divided into small areas."[16] Nuxalk land tenure is based on access to large tracts of land that contain nutritional resources. Nuxalk land is owned communally: "A hunting area is not the property of any single individual, but belongs to a group of persons, most of whom live in a single town."[17] Land in and around specific village sites constitute the "food supply" that descendants of the first settlers of each particular village site may access.

Fish are the staple of the Nuxalk diet, so fishing grounds are central to the Nuxalk land tenure system. According to *smayustas*, the first ancestors arrived at fishing sites equipped with fishing technologies. Franz Boas, an anthropologist who spent approximately two weeks in

[13] McIlwraith, *supra* note 3, vol 1 at 131.
[14] Penny, *supra* note 12 at 73.
[15] McIlwraith, *supra* note 3, vol 1 at 131.
[16] *Ibid* at 133.
[17] *Ibid* at 131.

Nuxalk territory in 1897, explains: "each of these ancestors, when sent down to the world, received a salmon-weir, which was placed across the river at the locality where they built their village."[18] Similarly, McIlwraith observes: "Each group [of first ancestors] took possession of a suitable part of the river for a salmon-weir, or, if located on the coast, a convenient place for an ocean fish-trap."[19] The Nuxalkmc derive fishing rights from the first ancestors who received them from the supreme deity. These fishing rights have passed throughout the generations to current Nuxalk citizens. Regarding the extent of these fishing rights, Alexander Mackenzie made the following observation:

> It is on this river alone that one man appears to have an exclusive and hereditary right to what was necessary to the existence of those who are associated with him. I allude to the salmon weir, or fishing place, the sole right to which confers on the chief an arbitrary power…the chief's power of it, and the people, was unlimited, and without control. No one could fish without his permission, or carry home a larger portion of what he had caught, than was set apart for him.[20]

McIlwraith confirms the individual power that chiefs held in relation to fishing sites: "The system of ownership…was that individuals, not groups, had rights to certain sections of the weir which were willable like other personal property."[21] Because of the importance of fish to the Nuxalkmc, authority over fishing sites was strict. The chief of the village in proximity to each fishing site controlled and managed the fisheries. Chiefs dictated the methods of fishing, the allowable catch, as well as who had the right to fish at each site.

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[18] Franz Boas, "The Jesup North Pacific Expedition: The Mythology of the Bella Coola Indians" (1898) American Museum of Natural History, Memoir no 2, 25 at 50.
[19] McIlwraith, *supra* note 3, vol 1 at 118.
[20] Alexander Mackenzie, *Voyages from Montreal, on the River St. Laurence, through the Continent of North America to the Frozen and Pacific Oceans in the Years 1789 and 1793* (London: T Cadell 1801) at 375.
[21] McIlwraith, *supra* note 3 vol 1 at 136. I use the past tense because Nuxalk chiefs' actual authority over fishing sites has been diluted by the imposition of the Canadian legal system in Nuxalk territory; despite the dilution, Nuxalkmc continue to recognize chiefs' ties to specific fishing grounds.

2.4 Nuxalk Authority

However, although a chief has some level of control, a chief's power is not automatic or absolute. Nuxalkmc "regard the ancestral family as a social unit…. The ancestral family consists of those whose ancestral names…are embodied in a single origin myth."[22] Society is structured along extended family lines, each headed by a hereditary chief. In the Nuxalk hereditary chief system, the chieftainship does not automatically flow to a specific relation.[23] Instead, chieftainships are, to some extent, merit based. Often a hereditary chief will choose a successor, but the successor must be endorsed by the extended family.[24] If the extended family will not support the successor, then the successor will not be able to fulfill his or her obligations as chief, and the chief's name will lose prestige.[25]

Each hereditary chief, with the endorsement of his or her extended family, receives an ancestral chief's name. An ancestral chief's name ties each chief back to one of the original Nuxalkmc who descended to earth and settled at a specific area within Nuxalk territory.[26] Each chief is responsible for the territory on which his or her origin ancestor settled. A chief, a representative for his or her family, is responsible to protect the ancestral territory associated with the chief's name, and is obliged to uphold the Nuxalk legal order embedded in his or her *smayustas*.

However, a chief's authority is only as strong as the chief's reputation. A chief must repeatedly validate his or her name by redistributing wealth in potlatches. According to McIlwraith:

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[22] *Ibid* at 126-127.
[23] *Ibid* at 163.
[24] *Ibid* at 127.
[25] *Ibid* at 179-180.
[26] *Ibid* at 130.

> Chieftainship among the Bella Coola does not depend on hereditary rank, still less on the elective principle, but on the individual's prestige as displayed, especially in his ability to acquire for himself a firm seat by the giving of presents. As he continues to do this his influence becomes ever greater. Consequently, it is impossible to state clearly what are the powers of a chief; such depend on his prestige and influence. For a Bella Coola chief has no executive or judicial authority; what deference is shown to him depends on his success as a man, a factor which is constantly rising or falling.[27]

Nuxalk chieftainship is based primarily "on the number and value of presents distributed at any kind of ceremonial."[28] Such redistribution of wealth plays a central role in resource management in a number of ways. First, the chief's public demonstration of resource abundance and generosity provides evidence that the chief is properly taking care of his or her territory and people.[29] If a chief fails to meet chiefly responsibilities, s/he will lose stature and his or her authority will be depleted. Second, the generosity shown by the chief deters individualistic greed; Nuxalkmc understand that their chiefs will take care of their communal needs, so individuals do not need to fend for themselves. Third, redistribution of wealth affords some protection against resource instability.[30] Societal expectations of reciprocity motivate chiefs to take turns redistributing wealth; such expectations go far beyond the extended family to neighbouring villages and nations. While one area may suffer a temporary shortage of resources (e.g. due to a natural disaster such as a landslide inhibiting the productivity of a fishing ground), another area may be enjoying resource abundance. Social norms encourage a chief to share abundance, with an understanding that generosity will be reciprocated at a later date by the chief who is currently facing a shortage. The redistribution of wealth as a resource management

[27] *Ibid* at 173.
[28] *Ibid* at 131.
[29] Martin Weinstein & Mike Morrell, "Need is Not a Number: Report of the Kwakiutl Marine Food Fisheries Reconnaissance Survey" Report Prepared for the Kwakuitl Territorial Fisheries Commission, (Campbell River 1994) [unpublished].
[30] Thomas Lonner, "Subsistence as an Economic System in Alaska: Theoretical Observations and Management Implications" in Steve Langdon ed, *Contemporary Alaskan Native Economies* (Lanham, MD: University Press of America 1986) 15.

strategy is contingent upon strong social values that celebrate generosity and scorn greed and selfishness. These values are significant in Nuxalk society which considers avarice a serious shortcoming.[31] The ongoing significance of sharing in Nuxalk society is demonstrated in the continual gift-giving that occurs at Nuxalk potlatches. Evidence of the enduring disdain for selfishness is the "Stingy Man" dance, which is performed at contemporary Nuxalk potlatches. The dance involves two masked clowns who steal items from audience members, pretend to give the items to other guests, and then snatch the stolen items back from the would-be recipients, all the while laughing ridiculously.[32]

2.5 Nuxalk Responsibilities

As described above, the Nuxalkmc believe they came to earth in animal form. When the first ancestors arrived and settled on Nuxalk territory, "they released the animals and plants which they had brought with them, on which they henceforth subsisted, in accordance with the supreme deity's instructions."[33] A number of implications flow from these beliefs. First, the Nuxalkmc "do not regard birds and animals as being of a lower order than themselves, for all were created by the same power, at the same time."[34] In fact, the Nuxalkmc consider animals to be in a purer form than humans; humans are in a degraded state because they have removed their cloaks.[35] Second, the Nuxalkmc believe that animals are a gift from the Creator; the sanctity flowing from this belief causes them to treat animals with a high level of respect. Third, the Nuxalkmc consider animals to be capable of communication with humans. The Nuxalkmc talk to animals and assume that the animals understand. Two examples are that the Nuxalkmc say: 1)

[31] McIlwraith, *supra* note 3, vol 1 at 286.
[32] I have witnessed this dance countless times.
[33] McIlwraith, *supra* note 3, vol 1 at 163.
[34] *Ibid* at 35.
[35] *Ibid.*

a prayer of gratitude to thank an animal that has given its life to a hunter;[36] and 2) calming words meant to prevent an animal from attacking a human.[37] A fourth and related point is that the Nuxalkmc perceive animals as anthropomorphic. For example, McIlwraith records the Nuxalkmc beliefs that "Wolves do not kill their prey with their fangs, but with bird arrows which shamans alone can see; beaver do not cut with their teeth, but with crook-handled adzes."[38] Moreover, fish "live a human-like existence in their homes far beneath the surface of the ocean."[39] McIlwraith conveys the following Nuxalk narrative:

> [A youth who had fallen through ice on a river] found a road under the water which led him to the land of the herring; then…he passed in succession the countries of the [eulachon], the steel-head salmon, the spring salmon, the sockeye salmon, the hump-back salmon, the dog salmon, and lastly the [coho]. Each kind of fish dwelt in its own country, the [coho] salmon, being the last to reach the Bella Coola River, living at the greatest distance from it.[40]

Nuxalk reasoning holds that the distance between Nuxalk territory and the underwater villages of fish corresponds with the timing at which fish to return to Nuxalk territory. The Nuxalkmc perceive that fish are visiting during their annual runs into Nuxalk territory.[41] Fifth, the Nuxalkmc consider animals to have souls and to be reincarnate. According to Nuxalk worldview, the supreme deity:

> Decreed that beasts and birds should serve as food for mankind, but it is only their clothing…which they give to the hunter…. When an animal is slain, it merely discards its visible self while its spirit ascends to the land above whence, in course of time, it comes down to earth again to reanimate a new body.[42]

This account reveals that animals have souls and sacrifice their bodies to humans, but that their souls are reborn. These spiritual elements cause the Nuxalkmc to treat animals with great care.

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[36] *Ibid* at 76.
[37] When I was growing up in Nuxalk territory where bears are common, I was taught that if I ever came across a bear, I should tell the bear that I mean no harm, and to ask the bear to carry on.
[38] McIlwraith, *supra* note 3, vol 1 at 73.
[39] *Ibid* at 77.
[40] *Ibid* at 651.
[41] *Ibid* vol 2 at 189.
[42] *Ibid* vol 1 at 75-76.

The above-mentioned factors influence Nuxalk worldview and compel the Nuxalkmc to respect animals.

The Nuxalk first salmon ceremony provides a concrete example of Nuxalk reverence for animals. The Nuxalkmc celebrate the arrival of the first salmon each year with a ceremony to welcome the salmon and give thanks for its annual return. The first salmon that is harvested each year is laid on a bed of cedar boughs, with a cedar mat underlying the boughs. A cedar headband is placed on the head of the salmon, and eagle down is blown over the salmon. In Nuxalk society, eagle down is a symbol of peace and goodwill. Spreading eagle down over the salmon is a sign of respect for the salmon that has given its flesh to the Nuxalkmc. The cedar mat holding the salmon is placed in the river, and a song of gratitude is sung to honour the salmon as the cedar floats downstream.[43] The Nuxalkmc conduct this ceremony every year to ensure that fish feel respected in Nuxalk territory, so the fish will continue to return.

As mentioned above, the Nuxalkmc believe their first ancestors brought plants and animals with them from the land above, along with instructions from the supreme deity regarding how to care for them. These instructions are contained within *smayustas* which convey lessons on appropriate use of Nuxalk territories and resources, and articulate consequences for breaching responsibilities.

The *smayusta* regarding the origin of the eulachon is that one of the first ancestors brought with him some eulachon in a concentrated form. The ancestor stopped at certain rivers to place the eulachon, and they multiplied in abundance.[44] The Nuxalkmc have specific formalities they follow with respect to eulachon. Many of the practices appear neutral, but a

[43] I have witnessed the first salmon ceremony numerous times, so my description comes from personal observation.
[44] McIlwraith, *supra* note 3, vol 1 at 301-02, 310-11, 319-20, and 326.

closer analysis reveals underlying conservationist reasons. For example, McIlwraith describes the beginning of the eulachon run:

> eager fishermen keep watching for their arrival and catching the straggling forerunners in hand dip-nets. These fish must not be eaten immediately. Each fisherman arranges a box in the front part of his house in which he deposits them as taken…. [E]agle down is blown over the receptacle to placate the [eulachon] and prevent them from being disturbed by noise. As soon as a man has caught enough for a feast, he invites all his fellows to his house and the fish are distributed…. [I]t is most improper for a man to summon his neighbours until he has enough [eulachon] to allow each guest to carry home a plentiful supply for his family…. After the first meal of [eulachon], stakes for the nets can be driven, and the restrictions become less exacting.[45]

McIlwraith's description reveals three protective measures that the Nuxalkmc applied in their management of eulachon: 1) allowing the first wave of eulachons to pass before Nuxalkmc set nets, 2) sharing the first catch of eulachon, and 3) showing eulachon reverence.

Allowing the first wave of eulachon to go up the river before the Nuxalkmc set nets ensured that a sufficient number of eulachon reached their spawning grounds, so that eulachon would be able to reproduce and the eulachon population would regenerate. The practice of allowing the first run of eulachon to pass before setting eulachon nets continued as long as the eulachon returned to Nuxalk territory. One Nuxalkmc explains: "it was tempting to [go fishing] but there was a hard law that said 'no, we don't touch it', that is our way of managing; that is our conservation method."[46] The Nuxalkmc refrained from fishing the first run of eulachon as a resource management strategy geared toward facilitating the ongoing propagation of the eulachon population. The second rule, sharing the first catch of eulachon, also has a conservation element. As mentioned above, sharing is a fundamental element of Nuxalk society. Chiefs have a responsibility to share, and the expectation that chiefs will appropriately

[45] *Ibid* at 758-59.
[46] Megan Moody & Tony Pitcher, "Eulachon (*Thaleichtys Pacificus*) Past and Present" (2010) 18:2 University of British Columbia Fisheries Centre Research Reports (quoting Informant 048 Nuxalk Interviews 2006), at 102.

redistribute harvests likely deters individual citizens from overharvesting resources for personal gain. The third rule, showing eulachon reverence, is embedded in McIlwraith's statement that "eagle down is blown over the receptacle to placate the [eulachon] and prevent them from being disturbed by noise."[47] As mentioned earlier, eagle down is a sign of benevolence in Nuxalk society. Spreading eagle down over eulachon is a sign of respect for the eulachon that have given their lives to the Nuxalkmc. The Nuxalkmc were careful to treat eulachons respectfully with the intention of ensuring that eulachons would continue to return to Nuxalk territory.

Additional conservation measures are apparent in a number of rules that the Nuxalkmc followed to avoid offending eulachon:

> No refuse may be thrown in [a river], otherwise the [eulachon] would remain in the ocean. For the same reason, women at certain periods are not allowed to bathe lest a speck of blood should blind the fish and prevent them from seeing the route. Occasionally an [eulachon] with red eyes is caught; this is caused by some heedless woman. When the fish are running in the river, women are not allowed on the bank, nor to repair the nets. At high tide, it is forbidden to drive stakes for [eulachon] nets.[48]

These rules originate from *smayustas*; Nuxalk citizens believe they must act in accordance with behavioral codes conveyed in *smayustas* to ensure adequate continuity of resources. However, the codes are not locked in pre-contact history. For example, motor boats were used briefly in the Bella Coola River in the late 1970s and early 1980s, but Nuxalk elders disapproved of the use of motors in the river, believing that the noise from the motors was offensive to fish.[49] As a result of their concern, "an unwritten rule exists today, respected by both non-Aboriginal and Nuxalk communities, to avoid the use of motor boats in the Bella Coola and Atnarko rivers."[50] These behavioral codes work on three levels. On a personal level (since Nuxalkmc believe they

[47] McIlwraith, *supra* note 3, vol 1 at 758-759.
[48] *Ibid* at 263.
[49] Moody & Pitcher, *supra* note 46 at 48.
[50] *Ibid.* The Atnarko River is at the east end of the Bella Coola Valley, within Nuxalk territory.

have personal relationships and can communicate with animals) they help to avoid offending fish; on an ecological level, they keep rivers clean to provide vital habitat for fish; and on a spiritual level, they show appreciation to the supreme deity for the sacred gifts bestowed upon Nuxalkmc.

Before 1999, the Nuxalkmc had been fishing eulachon for millennia with only minor changes in eulachon fishing technologies. When Europeans arrived, the Nuxalkmc fished with basket traps made of cedar bark and with trap nets made of stinging nettle fiber. Cedar bark traps were cylindrical cones that fishers rolled in front of them as they walked along shallow parts of a riverbed.[51] Trap nets were about thirty feet long and purse-like, wider at one end, and gradually tapering towards the closed end. The nets were attached to four poles that were driven at least six feet into the river bed.[52] Eulachon became trapped in the net after they had spawned, as they floated downstream. By the early 1980s, these methods had largely been replaced by the use of seine nets. The seine net method operates by dragging a large, fine-meshed net across the bottom of the river. Seine nets were sixty to seventy feet long with the top of the net suspended above water by cork line, and the bottom of the net weighted with a lead line. Fishers set the nets by walking the net into a river, and then pulled the net toward the shore to catch eulachon.[53]

Nuxalk society engaged *Ixwanaisa* (River Guardians) who carry the prerogative of the enforcement of obedience of river restrictions, such as the rules regarding eulachon outlined above. As McIlwraith explains:

> Disregard of any of these injunctions is displeasing to the [fish] and it is the duty of the River Guardian to punish the offender, irrespective of his rank. In case of

[51] McIlwraith, *supra* note 3, vol 2 at 536. McIlwraith recorded this method, but it had not been witnessed by any living Nuxalkmc when Moody and Pitcher conducted their research in 2006. (Moody & Pitcher, *supra* note 46 at 48).
[52] McIlwraith, *ibid* at 535-6. This method had been used by 62% of the eulachon fishers interviewed in Moody & Pitcher's 2006 study. (Moody & Pitcher, *ibid* at 48).
[53] Moody & Pitcher, *ibid* at 100.

> slight infringements, he beats the guilty person or throws him into the river. The guilty person usually scrambles out, but should he be swept away and drowned, no recompense can be claimed by his relatives. This punishment is customary in cases of the upsetting of a canoe. Death is the penalty for throwing refuse into the river…and until the coming of the white man the River Guardian exacted it without hesitation.[54]

Before contact, there were consequences for violating Nuxalk fisheries laws, and River Guardians were the enforcers. McIlwraith's observation reveals that there has been a shift since Nuxalkmc contact with Europeans. The role of River Guardians, and Nuxalk laws more generally, have been subverted by colonial laws.

2.6 Conclusion

The foundation of Nuxalk legal order is a holistic worldview that perceives the Nuxalkmc as having deep spiritual relationships with their territory and all living things. The Nuxalk legal order reflects the Nuxalk perspective that the world as inherently interconnected. The Nuxalk worldview considers land to be inalienable; it is a gift from the supreme deity that contains the food supply that has sustained and continues to sustain the Nuxalk people. Nuxalk territories are inextricably linked to the first ancestors of the Nuxalkmc. No current Nuxalkmc has the right to sever that tie. In fact, Nuxalk names put a positive duty on Nuxalk citizens to protect their territory, resources, and traditions. For the Nuxalkmc, rights are integrally tied to responsibilities and stem from privileges and obligations handed down through *smayustas*. The Nuxalkmc consider past, present and future generations in land and resource use decisions. *Smayustas* provide Nuxalk citizens with a strong sense of responsibility to protect Nuxalk territory from degradation and to ensure that future generations of Nuxalkmc will enjoy the gifts that the supreme deity has provided. Nuxalk legal order has not been extinguished, continues to exist, and deserves recognition and affirmation by the Canadian legal system. The next chapter will

[54] McIlwraith, *supra* note 3, vol 1 at 263-4.

consider the consequences of the subversion of the Nuxalk legal order by the Canadian legal system.

Chapter 3 *Stskiutl*: "what has been divided"[1]

3.1 Introduction

This chapter will demonstrate how the intrusion of the Canadian state into Nuxalk territory, and the imposition of the Canadian legal system to the detriment of the Nuxalk legal order has contributed to the extirpation of the eulachon. Under Canadian law, the *Constitution Act, 1867* divides jurisdictional power between provincial and federal governments.[2] Provinces have jurisdiction over public lands, property, non-renewable natural resources, timber, and forestry resources; the federal government has jurisdiction over Indians and lands reserved for Indians, and seacoast and inland fisheries. Those powers are then further compartmentalized. However, such divisions are constructed, and separate compartments of control overlap in various ways. As will become apparent, these overlaps have implications for eulachon.

Land policy, Indigenous peoples, and fisheries are intertwined in British Columbia. British Columbia signed the Terms of Union with Canada to join Confederation in 1871.[3] At that time, "The governments of Canada and British Columbia had not been able to agree on many issues after Confederation, including the size of Indian reserves and the underlying issue of Native title."[4] The creation of Indian reserves was a crucial matter for the development of British Columbia. British Columbia's land policy was geared toward opening land for non-Indigenous settlers and resource extraction; lands reserved for Indians would be a federal responsibility. Legal historian Douglas Harris whose research has focused on the relationship

[1] Thomas McIlwraith, *The Bella Coola Indians*, vol 2 (Toronto: University of Toronto Press, 1948) at 619.
[2] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].
[3] *Order of Her Majesty in Council Admitting British Columbia into the Union*, 16 May 1871 (reprinted in RSC 1985, App II, No 10), Term 11 [*Terms of Union*].
[4] Douglas Harris, *Landing Native Fisheries: Indian Reserves & Fishing Rights in British Columbia, 1849-1925* (Vancouver: UBC Press 2008) at 36.

between land policies and fisheries on the Pacific Coast of Canada suggests that the mountainous geography of coastal British Columbia and the orientation of Indigenous peoples to their fisheries led to the creation of small reserves that "were allotted to secure Native peoples their fisheries."[5] This was certainly the case for the Nuxalk Indian reserves,[6] which were allotted between 1882[7] and 1916.[8] They encompass a mere 0.13 percent of traditional Nuxalk territory.[9] The vast majority of Nuxalk territory was accordingly opened to settlement and resource extraction by non-Nuxalkmc.[10] As a result of European diseases to which the Nuxalkmc had no immunity, the Nuxalk population had decreased by 60 percent of its pre-contact population by 1889,[11] reaching an all-time low of 249 individuals in 1929.[12] The surviving Nuxalkmc gathered at the village of Qomqo'ts (now commonly known as Bella Coola Indian Reserve Number One) on the southern bank of the Bella Coola River. This is the only Nuxalk Indian reserve that is currently populated.

3.2 Provincial Authority

The Province's assumption of jurisdiction over unreserved lands has implications for fish. Although the federal government has jurisdiction over seacoast and inland fisheries, the Province

[5] *Ibid* at 58.
[6] *Ibid* at Appendix A4.
[7] Canada, *Annual Report of the Superintendent of Indian Affairs* (Ottawa: Department of Indian Affairs 1882).
[8] Canada, Royal Commission on Indian Affairs in the Province of British Columbia, *Report of the Royal Commission on Indian Affairs for the Province of British Columbia* (Victoria: Acme Press 1916) at 272.
[9] William T Hipwell, "Environmental Conflict and Democracy in Bella Coola: Political Ecology on the Margins of Industria" in Laurie E Adkin, ed, *Environmental Conflict and Democracy in Canada* (Vancouver: UBC Press 2009) at 146.
[10] Although beyond the scope of this paper, many academics have considered Indian reserve creation as a tool for colonial dispossession of Indigenous territories. See for example: Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press 2002) and Kenneth Brealey, "Mapping Them 'Out': Euro-Canadian Cartography and the Appropriation of the Nuxalk and Ts'ilhqot'in First Nations' Territories, 1793–1916" (1995) 39:2 Canadian Geographer 140.
[11] George Woodcock, *Peoples of the Coast: The Indians of the Pacific North West* (Edmonton: Hurtig Publishers 1977) at 202.
[12] Robert Boyd, *The Coming of the Spirit of Pestilence: Introduced Infectious Diseases and Population Decline among Northwest Coast Indians, 1774-1874* (Vancouver: UBC Press 1999) at 319.

has jurisdiction over non-tidal fisheries and exercises that authority under the provincial *Fisheries Act*[13] and *Wildlife Act*.[14] Moreover, matters under provincial power such as forestry and mining may have implications for fish and fish habitat. For example, forestry operations (licenced and regulated by the provincial government) have been identified as a major cause of salmon habitat degradation in some parts of the province.[15] Therefore, fish that spend part of their life cycle in fresh water may be affected by decisions made under provincial jurisdiction.

3.3 Federal Authority

Sea coast and inland fisheries fall under federal responsibility and are managed by Fisheries and Oceans Canada (DFO). The *Fisheries Act* and its associated regulations govern fisheries.[16] Section 7 authorizes the Minister of Fisheries and Oceans to grant fishing licences, and section 43 authorizes the Governor in Council to make regulations. The *Fisheries (General) Regulations* govern the open and close times for fishing, fishing quotas, and permissible fishing gear.[17] Open and close times are set in the *Fisheries Regulations*, but may be varied when a designated authority issues a variation order. The *Pacific Fishery Management Area Regulations* divide Canadian waters of the Pacific Ocean into fisheries management areas and subareas (Figure 3).[18] The areas and subareas are often referenced when describing fishery open and close times. Policy documents such as Integrated Fisheries Management Plans also play a role in the DFO's management of fisheries. The DFO develops separate plans for separate fisheries; they are integrated in that they "identify goals relating to conservation, management and science, as well as resource management protection and conservation measures […and]

[13] RSBC 1996, c 149.
[14] RSBC 1996, c 488 [*Wildlife Act*].
[15] TG Northcote & GF Hartman, eds, *Fishes and Forestry: Worldwide Watershed Interactions and Management*, (Ames, IA: Blackwell, 2004).
[16] RSC 1985, c F-14 [*Fisheries Act*].
[17] SOR/93-53 [*Fisheries Regulations*].
[18] SOR/82-215 (see Figure 3 for a map of the DFO Pacific Management Areas).

determine resource distribution between various users and fleet areas."[19] "The federal approach to fisheries management relies on the calculation of harvest levels and escapement needs to determine allocations and conserve fish stocks."[20] The Supreme Court of Canada (SCC) clarified that "federal power over fisheries is not confined to conserving fish stocks, but extends to the management of the fisheries as a public resource [including] to yield economic benefits to its participants and more generally to all Canadians."[21]

Considering the importance of fisheries to Aboriginal peoples, it is not surprising that the first SCC case to deal with the constitutional recognition and affirmation of Aboriginal rights was a fisheries case. *R.* v. *Sparrow* established that existing Aboriginal rights must be given priority over interests that are not constitutionally protected.[22] The SCC defined the DFO's management priorities in the following order: conservation, Aboriginal fisheries, commercial fisheries, and recreational fisheries. It also introduced the concept of consultation with Aboriginal peoples as a method to uphold the honour of the Crown. Following *Sparrow*, the DFO introduced the Aboriginal Fisheries Strategy (AFS) to manage Aboriginal fisheries in a manner consistent with the SCC's instructions. In 1992, the DFO began negotiating AFS agreements with Aboriginal communities. AFS agreements typically contain details regarding fish allocations, permitted fishing areas, gear, and times, reporting requirements, and co-operative management projects.[23]

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[19] DFO, *Integrated Resource Management Plans* online: Fisheries and Oceans Canada <http://www.glf.dfo-mpo.gc.ca/e0008079 > (accessed December 15, 2012).
[20] Janet Leigh Winbourne, *Taking Care of Salmon: Significance, Sharing, and Stewardship in a Nuxalk Food Fishery* (MES Thesis, Dalhousie University 1999) [unpublished] at 124.
[21] *Ward v Canada*, 2002 SCC 17 at para 2.
[22] *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].
[23] The DFO, *Aboriginal Fisheries Strategy* online: Fisheries and Oceans Canada <http://www.dfo-mpo.gc.ca/fm-gp/aboriginal-autochtones/afs-srapa-eng.htm> (accessed August 29, 2013).

The DFO negotiates AFS agreements with band councils which derive their authority from the *Indian Act*,[24] rather than with leaders who derive authority from Indigenous governance structures. There is a significant difference between the two. Inherent Indigenous jurisdiction originates within Indigenous legal orders and predates contact with Europeans. Band council authority originates from colonial legislation. The *Indian Act* dictates the administration of Indians and Indian lands through the Department of Indian Affairs. The *Indian Act* was originally administered by non-Indigenous Indian Agents; eventually, administration was delegated to band councils.[25] The effect was to diminish Indigenous autonomy by subjugating Indigenous citizens to federal authority.[26] Canada intended to supplant Indigenous governance with colonial governance through the exercise of the *Indian Act*. A prominent and poignant example of this intention was the 1884 *Indian Act* amendment to ban potlatches,[27] thus destabilizing a foundational institution of Indigenous governance in British Columbia.

In 1997, the DFO negotiated an AFS Agreement with the Nuxalk Nation Band Council. Janet Winbourne documented Nuxalk opposition to the imposition of an AFS Agreement in Nuxalk territory:

> Nuxalk representatives wrote a summary of the terms of the AFS Agreement in Principle. This was distributed in the community with a petition voicing their opposition to the Agreement, and stating their refusal to comply with it. It represents the feelings of greater than fifty percent of the voting Band membership. The letter was sent to a number of local, regional and national DFO and Aboriginal Affairs representatives including the Director General of Aboriginal Affairs, and the Regional Negotiator for the Aboriginal Fisheries Strategy.[28]

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[24] RSC 1985, c I-5 [*Indian Act*].
[25] Although Indian band council members are Indigenous, they are administering the *Indian Act* system rather than traditional Indigenous laws. It is not uncommon for traditional Indigenous leaders to participate in the *Indian Act* band council system; however, the authority they exercise in each role originates from different sources.
[26] The *Indian Act*'s role in the diminishment of Indigenous authority over Indigenous territories was discussed above.
[27] *Indian Act*, RSC 1884, c 27 (47 Vict) s 3.
[28] Winbourne, *supra* note 20 at 72.

Despite this objection, the Nuxalk Band Council signed the AFS Agreement, which many Nuxalkmc continue to resent for several reasons. First, the Nuxalkmc assert that they remain a sovereign people and have never surrendered their jurisdiction over Nuxalk territory.[29] Nuxalk legal order dictates that hereditary chiefs maintain authority in relation to fish and fisheries; accordingly, objectors reject the federal government's assumption of jurisdiction.[30] Second, the AFS Agreement designates the Nuxalk Band Council (a construct of the federal *Indian Act*), rather than the Nuxalk hereditary chiefs (whose authority comes from Nuxalk legal order), as the local Nuxalk authority for fisheries concerns. Many Nuxalkmc consider the hereditary chiefs to be the appropriate decision-makers regarding inherent responsibilities including those relating to fish; they perceive the Nuxalk Band Council as an arm of the federal government that should not interfere with matters of traditional governance.[31] Third, the AFS agreement creates numeric allocations that disregard the Nuxalk system for distributing fish resources. Such allocations are problematic in a number of ways. First, the DFO attempts to assign allocations using a per capita model, but the DFO relies on the *Indian Act* band membership list to determine the Nuxalk population. The legal definition of "Indian" under the *Indian Act* excludes some citizens who would be recognized as Nuxalkmc under the Nuxalk legal order, so the band membership list does not provide an adequate representation of the entire Nuxalk population. Second, Nuxalk harvests vary from year to year for a variety of reasons (e.g. potlatches, weddings, funerals, etc.). And third, the numeric allocations underestimate Nuxalk salmon harvests.[32] Finally, there is a significant difference between Nuxalk and DFO approaches to management of fisheries. While

[29] Cynthia L Burke, "When the Fishing's Gone: Understanding how fisheries management affects the informal economy and social capital in the Nuxalk Nation", (MA Thesis, University of British Columbia, 2012) [unpublished] at 132.
[30] Winbourne, *supra* note 20 at 122.
[31] Hipwell, *supra* note 9 at 146-47. See also Burke, *supra* note 29 at 40.
[32] Winbourne, *supra* note 20 at 72.

the Nuxalk approach is guided by their relationships with, and spiritual obligations towards fish, the DFO's approach strives to secure maximum sustainable yields.[33]

3.4 Crises

Based on past experiences, the Nuxalkmc are doubtful of the Canadian legal system's ability to manage fisheries effectively. Two fisheries crises reveal the basis of this skepticism: the 1995 steelhead crisis and the 1998 coho crisis.

Steelhead is an anadromous species; they spend most of their life in the ocean, and returning to their natal rivers to spawn.[34] There are two runs of steelhead each year and steelhead remain in freshwater for up to three years. Some steelhead live to spawn a second time, whereas Pacific salmon die after spawning once.[35] Steelhead is valued by the Nuxalkmc and by recreational fisheries. It is not targeted in the commercial fishery, although some are intercepted as non-targeted catch.[36] Abundance estimates of the steelhead population in the Bella Coola watershed showed a rapid decline from 1987 to 1991.[37] Since the 1990s, the steelhead population has been nearing extirpation in the Bella Coola watershed.[38] Steelhead escapement estimates were 200 in 1997 and 220 in 1998.[39] Factors contributing to the steelhead decline include habitat degradation as a result of landslides from roads, riparian area disturbance

[33] Noel Cardigan & Daniel Duplisea, "Technical Expertise in Stock Assessment: Maximum Sustainable Yield Reference Points and the Precautionary Approach when Productivity Varies" (Terms of Reference for the Department of Fisheries and Oceans National Workshop, Montreal, 13-15 December 2011).
[34] Carl Walters & Josh Korman, "Salmon Stocks" *Report Prepared for the Pacific Fisheries Resource Conservation Council* (Vancouver: Pacific Fisheries Resource Conservation Council 1999) at 28.
[35] *Ibid*.
[36] *Ibid*.
[37] TC Nelson et al, "Compilation of stock assessment information for Bella Coola River steelhead. *Report for the Ministry of Environment, Lands and Parks and the Ministry of Fisheries* (Victoria: Ministry of Environment 1998) at 48.
[38] *Ibid*.
[39] KK English, RF Alexander, & TC Nelson, "Assessment of distribution, timing and abundance of adult steelhead returns to the Bella Coola Watershed in 1997 and 1998" *Report for Ministry of Fisheries* (Victoria: Ministry of Fisheries 1998) at 15.

(e.g. from forestry operations), and channelization from diking.[40] Overfishing is another factor. The Nuxalkmc fished steelhead, but their steelhead harvest was minor in comparison to their salmon harvests. For example, between 1965 and 1973 on the Bella Coola River, the Nuxalkmc harvested an average of 300 steelhead compared to 6800 salmon overall.[41] The 1985 to 1986 recreational steelhead catch on the Bella Coola River was 537 (caught and kept), and 1758 (caught and released).[42]

The management of the recreational fishery is problematic. The recreational fishery is regulated by both provincial and federal governments. The provincial government issues licences for non-tidal waters; the federal government issues licences for tidal waters and for salmon – regardless of whether salmon are in tidal or non-tidal waters.[43] Federal and provincial regulations limit each fisher to one licence, although a single fisher may hold one tidal licence and one non-tidal licence. Retention limits regulate how many fish of a given species a fisher may catch and retain per day, per month, or per year.[44] These limitations only create quotas for individual fishers; neither federal nor provincial regulations put a cap on the overall number of

[40] Summit Environmental Consultants Ltd, "Sediment Source Inventory, Stream Channel Assessment, and Fish Habitat Assessment: Lower Bella Coola River Watershed" *Report for Ministry of Environment, Lands and Parks* (Williams Lake: Ministry of Environment 1997).
[41] John P Boland, "The Socio-Economic Importance of Fishery Resources to the Bella Coola Valley" *Report for Environment Canada, Northern Operations Branch, Pacific Region* (Bella Coola: Environment Canada 1974) at 21. The 6800 number consists of: 2500 sockeye, 1600 coho, 1200 pink, 800 chum and 700 chinook.
[42] Susan J Billings, "Steelhead Harvest Analysis, 1985-1986" *Ministry of Environment and Parks, Recreational Fisheries Section, and Wildlife Biometrics Section, Fisheries Technical Circular No. 76* (Victoria: Ministry of Environment 1987) at 8.
[43] Commission on the Inquiry into the Decline of Sockeye Salmon in the Fraser River, *Policy and Practice Report, Recreational Salmon Fishing: Licencing, Management, and Related Issues* (Ottawa: Department of Fisheries and Oceans, February 2011) at 7.
[44] *Ibid* at 6.

recreational fishing licences issued each year.[45] This lack of a limit on the number of fishers may have contributed to an overharvest of steelhead by recreational fishers.[46]

Because of conservation concerns, in April 1995 the Province issued a non-retention hook and release notice regarding steelhead on the Bella Coola River.[47] Even so, the mortality rate for steelhead caught and released is approximately 10 per cent.[48] The Nuxalkmc consider "catch and release" of fish by recreational fishers to be abhorrent. Because Nuxalk worldview perceives fish as spiritual beings that sacrifice their flesh to humans, the Nuxalkmc are offended that recreational fishers trivialize this sacrifice. The Nuxalkmc perceive the release of captured fish as a rejection of a sacred gift, and disapprove of capture that is motivated by amusement rather than necessity.[49] Since November of 1995, all steelhead fishing in the Bella Coola River system has been prohibited for all fishers.[50] While this may help to protect what is left of the steelhead, one of the consequences of closing the steelhead fishery may have been to increase pressure on the coho fishery. Because there are two annual runs of steelhead, they are available in the Bella Coola River year-round, so fishers could fish them during the winter months. Coho are the last run of salmon on the Bella Coola River, returning to spawn between September and January each year. After steelhead fishing was prohibited, fishers focused their efforts at coho during the winter months.

In 1998, a coho crisis emerged on the Pacific Coast of Canada. Coho are targeted by commercial and recreational fisheries. They are also harvested by Aboriginal fishers, but tend to

[45] *British Columbia Sport Fishing Regulations*, SOR/96-137, and *Angling and Scientific Collection Regulation* BC Reg 125/90).
[46] Winbourne, *supra* note 20 at 116.
[47] BC Fisheries Public Notice: FN0130 – Recreational Steelhead: Region 5 - Non-Retention, April 5, 1995.
[48] Walters & Korman, *supra* note 34 at 28.
[49] Winbourne, *supra* note 20 at 130.
[50] BC Freshwater Sport Fishing Variation Order 95-36.

be preferred less than sockeye and chinook.[51] DFO stock assessments published in 1997 indicated a declining abundance of coho.[52] "Abundance declines were attributed to over-harvesting…, habitat degradation, and poor marine survival rates." [53] In 1998, the federal Minister of Fisheries announced a moratorium on coho fishing for the entire Pacific Coast.[54] The moratorium meant that "there would be no directed fisheries on coho and mandatory non-retention in all fisheries."[55] The Minister of Fisheries implemented a Coho Recovery Plan which included funds to enhance salmon habitat, "fleet restructuring, including license retirement, fishery diversification, and the development of selective fishing techniques."[56] As will become apparent, the DFO's response to the coho crisis created another crisis, this time affecting eulachon.

Before 1999, the DFO knew little about eulachon. Because eulachon are not economically important to the fishing industry, abundance and catch information have been poorly documented.[57] Lack of baseline data makes it difficult for scientists to understand the extent of the eulachon declines or to identify contributing factors.[58] Eulachon came onto the DFO's radar as a by-catch species in the commercial shrimp trawl fishery.[59] As a result of these by-catch concerns, marine biologists began to investigate the lifecycle and migrations of

[51] Caroline Butler, "Understanding the Coho Crisis: Political Knowledge in a Fractured Salmon Fishery" (2006) 4:2 MAST 73 at 75.
[52] K Simpson et al, "A 1996 update of assessment information for Strait of Georgia coho salmon stocks (including the Fraser River)" *Department of Fisheries and Oceans, Canadian Stock Assessment Section, Research Document 97/05* (Ottawa: DFO 1997).
[53] DFO *Stock Status of Skeena River Coho Salmon*. DFO Science Stock Status Report D6-02 (1999).
[54] David Anderson, *Announcement of Canada's Coho Recovery Plan and Federal Response Measures.* (Vancouver June 19, 1998).
[55] Butler, *supra* note 51 at 75.
[56] *Ibid*.
[57] Douglas Hay & P McCarter, "Status of the eulachon *Thaleichthys pacificus* in Canada" *Department of Fisheries and Oceans Canada, Canadian Stock Assessment Secretariat, Research Document 2000/145* (2000).
[58] Megan Moody & Tony Pitcher, "Eulachon (*Thaleichtys Pacificus*) Past and Present" (2010) 18:2 University of British Columbia Fisheries Centre Research Reports at 2 and 41.
[59] D Hay et al, "Catch composition of British Columbia shrimp trawls and preliminary estimation of bycatch with emphasis on eulachons." *Department of Fisheries and Oceans Canada, Canadian Science Advisory Secretariat Research Document 1999/26* (1999).

eulachon, which were previously unknown to scientists. They determined that eulachon are born in rivers and juveniles spend two to four years in the ocean before returning to their natal rivers as adults to spawn.[60] From the high number of eulachon caught as by-catch in shrimp trawl fisheries, it became apparent that eulachon likely live in the same oceanic area as shrimp when eulachon are in the juvenile stage.[61]

Before 1996, the British Columbian shrimp trawl fishery was open year-round with no catch limitations in three major areas of the Pacific Coast: the inshore waters of the Strait of Georgia, the coastal areas off the North Coast inlets, and the West Coast of Vancouver Island.[62] As shrimp prices rose, British Columbian shrimp catch yields increased sharply. As shrimp prices were increasing, there was a decline in Washington and Oregon shrimp catches, and shrimp stocks on the British Columbia Coast were seemingly abundant.[63] Thus, landings increased dramatically:

> Changes over 1994 to 1995 showed an increase in the number of active shrimp trawl vessels from 165 to 222, a doubling effort from 7,311 to 14,324 fishing days, a doubling of shrimp landings from 3,192 tonnes to 6,777 tonnes and an increase in the annual landed value from $4.7 to $13.7 million.[64]

In 1996, the DFO allowed the shrimp trawl fishery to expand into areas previously not fished by shrimp trawlers, such as the Queen Charlotte Sound shrimp management area[65] and the total 1996 catch increased to 7,386 tonnes.[66] Fishers put more pressure on the shrimp stocks as the

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[60] J Clarke et al, "Life history and age at maturity of an anadromous smelt, the eulachon *Thaleichtys pacificius*" *Journal of Fish Biology* (2007), 1479. Clarke et. al conclude that spawning age of eulachons depends on the geographic location of their spawning rivers: southern eulachons spawn at 2 years, central coast eulachons spawn at 3 years, and northern eulachons spawn at 4 years.
[61] Moody & Pitcher, *supra* note 58 at 118.
[62] Jason Clarke & Wendy Huston, "1997 Shrimp Trawl Fishery Review" *Report for DFO and the Pacific Coast Shrimpers' Cooperative Association* (1998).
[63] *Ibid*.
[64] DFO, *Internet Information Supplement to the Shrimp by Trawl Integrated Fisheries Management Plan* (2001) [*Internet Information Supplement*] at 7.
[65] DFO, *1996 Pacific Region Management Plan: Shrimp Trawl* (1996).
[66] DFO, *1998/99 Pacific Region Management: Shrimp By Trawl Plan* (1998) at 6.

DFO reduced fishing opportunities in the ground fish and salmon fisheries. For example, an increased shrimp fishing effort occurred after the DFO instigated a Pacific salmon license buyback in 1997. Many fishers who sold back their salmon licences acquired shrimp licences.[67] As a result, the DFO issued more shrimp licences than ever before.[68] This produced an upsurge in fishing efforts and concern for the sustainability of shrimp resource. The DFO announced the closure of the shrimp trawl fishery on March 21, 1997 until an acceptable management plan for the fishery was reached.[69]

To create an acceptable management plan, the DFO consulted with the Shrimp Trawl Sectoral Committee (STSC). The STSC has been the DFO's primary consultative body for shrimp by trawl since 1995.[70] At that time, the STSC consisted of industry and DFO representatives and the focus was the conservation of the shrimp resource and not by-catch.[71] The STSC advises the DFO on the management of the commercial shrimp trawl fishery on issues such as setting harvesting plans, scheduling research activities, and investigating selective fishing techniques and management strategies.[72] The DFO consults with the STSC to develop integrated fisheries management plans (IFMPs) for shrimp by trawl. IFMPs set out goals and objectives, an enforcement plan, fishing plans (which include open times, closures, management areas, catch ceilings, licence conditions, reporting requirements, by-catch restrictions, and

[67] DFO, "Shrimp trawl fishery off the West Coast of Canada" *DFO Science Stock Status Report C6-08* (1999).
[68] 248 licences were eligible to fish in 1997. (1997 Shrimp Trawl Fishery Review, *supra* note 61 at 14.) "The number of shrimp licensed vessels holding no other commercial licence eligibility increased from six in 1995 to 67 in 1996 and again to 102 in 1999 following buy-back of salmon licences through the Voluntary Salmon Licence Retirement Program." (*Internet Information Supplement*, *supra* note 63 at 7).
[69] DFO, News Release, NR-PR-97-07E., "DFO announces closure of shrimp trawl fishery" (1 April 1997).
[70] Moody & Pitcher, *supra* note 58 at 101-2.
[71] *Ibid*. Now the STSC consists of six licence-holders, three processors, one Aboriginal and one other representative. (The Aboriginal representative is not a licence-holder.)
[72] DFO, *Shrimp Trawl Sectoral Committee Terms of Reference* online: Fisheries and Oceans Canada <http://www.pac.dfo-mpo.gc.ca/consultation/fisheries-peche/shell-inv/crev-trawl/torman-eng.htm > (accessed August 29, 2013).

sanctions).[73] The DFO retains the decision-making authority regarding management of the fishery.[74]

The DFO reopened the shrimp trawl fishery on April 8, 1997 after the DFO had made an agreement in principle with the STSC to continue to develop a management plan for the fishery. The 1997/98 Shrimp Trawl Management Strategy "resulted in the establishment of catch ceilings for most areas and the development of industry funded programs to monitor catch, record by-catch, and undertake stock assessment surveys."[75] However, by then, it was too late for the eulachon.

A DFO analysis of 1997 shrimp trawl by-catch found that 90 tonnes of eulachon was taken from the Queen Charlotte Sound shrimp trawl fishing area; this was considered fairly high.[76] The DFO knew little about eulachon before 1997, so it is difficult to speculate what percentage of the total eulachon population the 90 tonnes represents. At that time, it was also unclear whether the offshore eulachon represented one large single stock that entered different rivers at random to spawn, or if there were distinct genetic stocks that returned to natal rivers to spawn. If there were one large single stock, then 90 tonnes of by-catch might not have a significant impact on the overall eulachon population. However, if the eulachons represented genetically distinct populations, then individual (particularly less populous) runs might be seriously diminished. Even a small by-catch can have a significant negative impact on a small eulachon run.[77]

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[73] *Internet Information Supplement*, *supra* note 64.
[74] *Ibid*.
[75] *1998/99 Shrimp By Trawl Management Plan*, *supra* note 66 at 6.
[76] Hay et al, *supra* note 59.
[77] *Ibid*.

Marine biologists have now determined that eulachon "do display genetic differentiation among spawning aggregations of major rivers."[78] In other words, they are genetically distinct stocks. In addition, the 1997 "by-catch levels were greater than the estimated stock size of some Central Coast eulachon stocks."[79] Two years later, eulachon failed to return to Nuxalk territory. These events are likely connected. Moody and Pitcher explain that "[t]he drastic decline of the Bella Coola eulachon population in 1999 suspiciously occurred two years after the large 1997 eulachon by-catch taken in the B.C. commercial shrimp trawl fishery in the Queen Charlotte Sound area."[80] The generally accepted hypothesis is that the majority of eulachon from Nuxalk rivers lived as juveniles in Queen Charlotte Sound and were killed as by-catch in the 1997 shrimp trawl fishery. As a result, few returned to their spawning grounds in Nuxalk territory in 1999. Moody and Pitcher conclude: "It is unfortunate that the largest by-catch occurred in the offshore areas inhabited by Central Coast eulachon, as they are some of the smaller eulachon populations."[81] The substantial by-catch most likely had a devastating impact on the small runs of Central Coast eulachon. In 2000, the DFO closed shrimp trawl fishing in Queen Charlotte Sound because of eulachon by-catch concerns.[82] This area has remained off limits for shrimp trawl fishing. Even so, eulachon have not returned in fishable numbers to Nuxalk territory. Moody and Pitcher speculate that these populations have "been reduced to extremely low levels past the point of recovery."[83]

The eulachon collapse could have been avoided. The DFO knew that shrimp trawl by-catch was an issue to be concerned about. It began experimenting with by-catch reduction

[78] Terry Beacham, Douglas Hay, & Khai Lee, "Population Structure and Stock Identification of Eulachon (*Thaleichtys pacificus*), an Anadromous Smelt, in the Pacific Northwest" (2005) 7 Mar. Biotech 363.
[79] *Ibid.*
[80] Moody & Pitcher, *supra* note 58 at 105.
[81] *Ibid.*
[82] J Clarke & S Boehner, *2000 Shrimp Trawl Fishery Review* (2002) at 6.
[83] Moody & Pitcher, *supra* note 58 at 105.

devices in the 1970s, but fishers were reluctant to use the devices as they believe them to increase the cost of shrimp trawling.[84] Nonetheless, the DFO took action to reduce by-catch in shrimp trawl fisheries on the East Coast of Canada in the early 1990s: "The use of by-catch reduction devices in the eastern Canadian shrimp fishery became mandatory in 1993."[85] Concerns regarding shrimp trawl by-catch also existed on the Pacific, and the DFO conducted an analysis of by-catch in 1997.[86] The DFO's Pacific Selective Fishing Policy came into effect in 1999. The policy states:

> All Pacific fisheries, in which by-catch is an issue, will meet specified standards of selectivity. In fisheries where selective fishing standards are not met and by-catches remain a constraint to achievement of conservation objectives, fishing opportunities will be curtailed.[87]

In 2000, partly in response to the failure of eulachon to return to the Bella Coola River, the DFO made by-catch reduction devices mandatory in the Pacific shrimp trawl fishery.[88] Before that, "there were no regulations in place to monitor or to reduce the amount of by-catch taken and use of by-catch reduction devices was purely voluntary."[89] By then, the eulachon that returned to Nuxalk territory were gone, possibly depleted past the point of recovery.[90]

3.5 Eulachon Recovery Efforts

The Nuxalkmc have taken a lead role in responding to the eulachon crisis. For example, Megan Moody, a Nuxalk biologist, has produced the most comprehensive scientific study on the

[84] *Ibid* at 106.
[85] G Brothers, "Shrimp Selectivity" (Paper presented to the Department of Fisheries and Oceans Workshop on Responsible Fishing: New and Selective Harvesting Technologies Workshop at Department of Fisheries and Oceans, St. John's Nfld. 4 and 5 December 1996) [unpublished].
[86] Hay et al, *supra* note 59.
[87] DFO, "A Policy for Selective Fishing in Canada's Pacific Fisheries" *A new direction: the third in a series of papers from Fisheries and Oceans Canada* (1999).
[88] DFO, *Pacific Region Integrated Fisheries Management Plan 2000/2001 Shrimp by Trawl* (2000) at 8.1.
[89] Moody & Pitcher, *supra* note 58 at 105.
[90] *Ibid*.

Central Coast eulachon.[91] Her work combines traditional ecological knowledge with scientific sampling to provide an overview of the Central Coast eulachon population over time. Ms. Moody was the director of the Nuxalk Band Council Fisheries Program (Nuxalk Fisheries Program) from 2000 – 2005 and is now the Coordinating Biologist for the Central Coast Indigenous Resource Alliance. In this position, Moody continues to work with the Nuxalk Fisheries Program on eulachon restoration efforts through the Nuxalk Eulachon Project. The Nuxalk Eulachon Project observes eulachon life cycle migrations, maps eulachon spawning areas, investigates contributing factors in eulachon population declines, conducts enhancement experiments, performs habitat restoration initiatives, and supports eulachon conservation efforts.[92]

Although the Nuxalkmc were divided about the Nuxalk AFS Agreement, they are united about the eulachon. In 2007, the Nuxalk hereditary chiefs, in collaboration with the Nuxalk Band Council, hosted "A Feast to Commemorate – and Mourn – the Eulachon".[93] The Nuxalkmc invited other Central Coast Indigenous Nations and Band Council delegates, DFO representatives, and fisheries scientists to participate. "The feast combined traditional dances and personal remembrances of eulachon…with presentations by fisheries scientists."[94] The purpose of the gathering was to reiterate the cultural and economic significance of the eulachon to Central Coast First Nations, to learn about research findings since the eulachon collapse, and to develop strategies to revitalize the Central Coast eulachon population.[95] While the Feast started with a sense of despair, it concluded with a sense of optimism that Indigenous peoples,

[91] *Ibid*.
[92] AFJ Lewis & PJ O'Connor, "Bella Coola eulachon study 2001" *Report for Nuxalk Fisheries Commission* (Bella Coola 2002) [unpublished].
[93] Sonya Senkowsky, "A Feast to Commemorate – and Mourn – the Eulachon" (2007) 57:8 *Bioscience* 720 at 720.
[94] *Ibid*.
[95] N Read, "Conference to Discuss Loss of Oolichan" *The Vancouver Sun* (31 May 2007) B2.

government representatives, and scientists could work together at achieving their shared objective: to revitalize the eulachon.[96]

Efforts are now being made to protect and recover eulachon using endangered species legislation. At the provincial level, "British Columbia blue listed eulachon in 2000 and maintained the listing when it was reviewed in 2004."[97] The "blue list" is a *Wildlife Act* designation that:

> includes any ecological community, and indigenous species…considered to be of special concern (formerly vulnerable) in British Columbia. Elements are of special concern because of characteristics that make them particularly sensitive to human activities or natural events. Blue-listed elements are at risk, but are not Extirpated, Endangered or Threatened.[98]

It is uncertain what action the British Columbian government has taken in response to this listing.[99] Because eulachon spawn in rivers, they enter areas where provincial decisions may affect them. Provincial authority over public lands, property, non-renewable natural resources, timber, and forestry resources may have implications for eulachon spawning habitat. Even so, it does not appear as though British Columbia has taken any affirmative measures to protect eulachon.[100]

At the federal level, eulachon is being considered for protection under the federal *Species at Risk Act* (*SARA*).[101] The purposes of the *SARA* are "to prevent wildlife species from being extirpated or becoming extinct, and to provide for the recovery of wildlife species that are

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[96] Senkowsky, *supra* note 93 at 720.
[97] COSEWIC, *Assessment and Status Report on the Eulachon* Thaleichthys pacificus *Nass/Skeena Rivers population, Central Pacific Coast population, Fraser River population in Canada* (2011) [COSEWIC Report] at vii.
[98] Ministry of Environment, *Endangered Species and Ecosystems, Provincial Red and Blue Lists* online: Ministry of Environment <http://www.env.gov.bc.ca/atrisk/red-blue.htm > (accessed August 29, 2013).
[99] COSEWIC Report, *supra* note 97 at vii.
[100] *Ibid*.
[101] SC 2002, c 29 [*SARA*].

extirpated, endangered or threatened as a result of human activity."[102] In May, 2011, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) assessed Central Coast eulachon as endangered.[103] On July 27, 2011, the DFO provided an update with the following timelines: management scenarios were due to be completed by the spring of 2012, a socio-economic analysis was expected to be completed in the fall of 2012, and public consultations on the potential listing of eulachon were supposed to occur in the fall of 2012.[104] However, these target dates were not met; the DFO's updated timelines aim for the completion of: management scenarios in 2013, a socio-economic analysis in 2014, and public consultations in 2014-2015.[105] Actual listing of eulachon on the *SARA* registry, if it occurs, is anticipated in 2015,[106] sixteen years after eulachon failed to return to Nuxalk territory. If eulachon become listed as endangered under *SARA*, then it will be illegal to kill, harm, harass or capture eulachon (although permits could be issued, such as for enhancement initiatives),[107] recovery strategies and action plans will be developed,[108] and critical habitat will be identified and protected.[109]

On December 8, 2011, the Minister of Environment issued a Response Statement to COSEWIC's assessment of the Central Pacific Coast eulachon population:

> The Minister of Fisheries and Oceans will undertake consultations with the government of British Columbia, Aboriginal peoples, stakeholders, and the public on whether or not the eulachon of the Central Pacific Coast population should be

[102] *Ibid*, s 6.
[103] COSEWIC Report, *supra* note 97.
[104] First Nations Fisheries Council, *Update on the Recovery Potential Assessment for Eulachon* (27 July 2011) online: First Nations Fisheries Council <http://fnfisheriescouncil.ca/index.php/more-info/search-documents/cat_view/77-species/82-eulachon> (accessed May 24, 2012).
[105] *Pacific Region Integrated Fisheries Management Plan Fraser River Eulachon* (April 1, 2013-March 31, 2014), at 16-17.
[106] *Ibid*. The 2015 target date "may be extended dependent on extent of consultation" (*ibid* at 16).
[107] *SARA*, *supra* note 101, s 32.
[108] *Ibid* s 37.
[109] *Ibid* s 56.

> added to the *List of Wildlife Species at Risk* (Schedule 1) under the *Species at Risk Act* as Endangered.[110]

However, the Nuxalkmc want more than mere consultation, and in fact are not satisfied with the lack of consultation they have experienced in the process thus far.[111] *SARA* recognizes that Aboriginal traditional knowledge (ATK) "should be considered in the assessment of which species may be at risk and in developing and implementing recovery measures."[112] Even so, the COSEWIC Report disregarded Nuxalk ATK regarding the diversity of eulachon populations (i.e. that each eulachon river is a unique population).[113] Instead, COSEWIC divided eulachon into three "Designatable Units": 1) the Nass/Skeena; 2) the South Central Coast (which includes Nuxalk rivers); and 3) the Fraser River.[114] The Nuxalkmc do not believe that such broad units will effectively protect the smaller runs of eulachon that spawn in Nuxalk territory.[115] As Moody and Webber explain, "by identifying only three Designatable Units over such a large area, multiple eulachon rivers are lumped together so that some strong runs are in the same unit as weaker ones."[116] Responsible authorities under the Canadian legal system (i.e. the DFO and Environment Canada) might focus their efforts on eulachon runs that have a better chance of survival. The development and implementation of restrictions, recovery strategies, and habitat protection for stronger runs could divert much needed resources and attention away from weaker

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[110] Minister of Environment, *Response Statement – Eulachon, Central Pacific Coast Population* (December 8, 2011), online: Species at Risk Public Registry <http://www.sararegistry.gc.ca/virtual_sara/files/statements/rs_1163_430_2011-9_e.pdf > (accessed May 24, 2012).
[111] Megan Moody & Wally Webber, "2012 Nuxalk Ooligan Update" *Flyer Prepared for the Nuxalk Nation* (Bella Coola: April 2012) [unpublished] at 2.
[112] DFO, "Guidance on Considering Aboriginal Traditional Knowledge in *Species at Risk Act* Implementation" *Draft Document – Phase 2, V7* (September, 2011) at 4.
[113] Moody & Webber, *supra* note 111 at 2.
[114] *SARA* includes "subspecies, varieties or geographically or genetically distinct population" in its definition of wildlife species. This recognizes that conservation of biological diversity requires protection for subgroups below the species level (i.e. Designatable Units), and gives COSEWIC a mandate to assess those entities when warranted. (COSEWIC, *Guidelines for Recognizing Designatable Units*, online: COSEWIC <http://www.cosewic.gc.ca/eng/sct2/sct2_5_e.cfm> (accessed May 24, 2012).
[115] Moody & Webber, *supra* note 111 at 2.
[116] *Ibid*.

runs. The current Designatable Unit structure may also create a false sense of progress. The eulachon population in the large Central Coast Designatable Unit may increase overall if the stronger runs grow stronger while the smaller populations are ignored and weaken.[117] Although the *SARA* process is underway to rectify the eulachon problem, the process is further diminishing Nuxalk jurisdiction by minimizing Nuxalk participation in redressing the eulachon crisis.

The Nuxalkmc had a community meeting on April 17, 2012 "to create a recovery plan and a management plan using their own data and traditional knowledge."[118] They are also working with neighbouring Indigenous nations to develop a Central Coast plan, and with the province-wide First Nations Fisheries Council to share their concerns and strategize on eulachon issues.[119] The Nuxalkmc and other concerned Indigenous nations realize that such collaborations will provide a stronger voice that they hope will be more effective at protecting the eulachon than acting alone.

3.6 Conclusion

In 1999, the Nuxalkmc waited on the banks of the Bella Coola River with anticipation for the eulachon to return. As time passed, their anticipation turned to anxiety, and when it was obvious that the eulachon were not coming, their anxiety turned to despair.[120] The initial reaction from the Nuxalkmc was inward looking; the Nuxalkmc felt responsible for failing to protect the eulachon.[121] However, the loss of the eulachon is a tangible example of all that the Nuxalkmc have lost since European contact. Many Nuxalkmc died in the nineteenth century from disease epidemics. Those who survived were left on small reserves while the much larger

[117] *Ibid.*
[118] *Ibid* at 3.
[119] *Ibid.*
[120] Jacinda Mack, "Making Grease: Cultural Effects of Depleted Eulachon Stocks in the Nuxalk Nation." Report for the Nuxalk Nation Band Council, 2000 [unpublished] at 1.
[121] Moody & Pitcher, *supra* note 58 at 59.

traditional territory was appropriated by non-Nuxalkmc. They have also lost jurisdiction, or the power to uphold their responsibilities to care for the land and water and to maintain positive relationships with living things. Nuxalk authority has been subverted by the imposition of colonial laws. Their loss of jurisdiction has materialized in the loss of three fisheries – the steelhead, the coho, and the eulachon. A Nuxalk prophecy holds that "once the [colonizer] gains control of the fish, they will become no more."[122] It seems as though this prediction is coming true.

Although the eulachon crisis seems hopeless, it has galvanized the Nuxalkmc in a number of ways. The eulachon crisis has demonstrated Nuxalk leadership in research, enhancement, and restoration initiatives to address the problem. It has also encouraged the Nuxalkmc to strengthen their alliances with other Indigenous nations to support eulachon revitalization initiatives. Moreover, the story of the eulachon is a new teaching to be added to the Nuxalk legal order. The eulachon story is a cautionary tale, warning of the damage that can be done when one legal order usurps another. It is also a story of resistance. For the Nuxalkmc, the root of the eulachon crisis is not the disappearance of the eulachon in particular, but rather the dilution of Nuxalk jurisdiction to protect the gifts that *Atquntum* (the Creator) bestowed upon their first ancestors. That jurisdictional right has not been ceded or extinguished, and the eulachon crisis provides an impetus for the Nuxalkmc to assert it.

[122] Winbourne, *supra* note 20 at 117, quoting informant 0024.

Chapter 4 *Snutkanals*: "empty box"[1]

4.1 Introduction

In this chapter, I set out the framework for considering Aboriginal rights under section 35 of the Canadian *Constitution*. I then apply this framework to the Nuxalk eulachon crisis to examine whether Canadian law provides the Nuxalkmc with any legal recourse for the extirpation of the eulachon. I will not consider possible remedies under international law or within the Nuxalk legal order. Instead this chapter focuses on the judicial interpretation of section 35 and the analysis reveals the limited extent to which it protects Aboriginal rights.

Following my analysis in the preceding chapters of the Nuxalk legal order and the history of the eulachon fishery in Nuxalk territory, I have identified three possible breaches of Nuxalk Aboriginal rights to fish eulachon. The first is the direct breach of Nuxalk eulachon fishing rights by the DFO for permitting shrimp trawl fishing, beginning in the 1990s, without considering how shrimp trawling could impact the Nuxalk Aboriginal rights to fish eulachon. The scientific evidence, reviewed in Chapter 3, suggests the shrimp trawl fishery was a primary cause of the eulachon decline, and thus of the loss of the Nuxalk eulachon fishery. The second potential breach lies in the DFO's consultation under the *Species at Risk Act*,[2] which it did in a manner that disregarded Nuxalk rights to fish eulachon. Finally, the third potential breach is found in the Crown's fiduciary duty to recognize and protect the connection between the Indian reserves, which the Crown allotted based on access to the fisheries, and the fisheries themselves. I will analyze these three potential breaches in turn.

[1] Thomas McIlwraith, *The Bella Coola Indians*, vol 2 (Toronto: University of Toronto Press, 1948) at 616.
[2] SC 2002, c 29 [*SARA*].

4.2 Constitutional Protection of Aboriginal Rights

Section 35(1) of the *Constitution* provides that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed".[3] In *R.* v. *Sparrow*, the first case in which the SCC interpreted section 35(1), the Aboriginal defendants asserted an Aboriginal right to fish in defence of a regulatory charge of fishing with a net longer than federal fisheries regulations permitted.[4] The SCC explained that section 35 protects Aboriginal rights existing in 1982 when the *Constitution* took effect and does not revive extinguished rights. The central issue was whether regulation of the claimed Aboriginal right had extinguished that right prior to its constitutional protection in 1982. The burden fell on the federal government to prove a clear and plain intention to extinguish Aboriginal rights, and the SCC held that the DFO had failed to discharge its burden.[5] *Sparrow* established that Aboriginal rights that were not extinguished before 1982 continue to exist and must be recognized and affirmed by government.

4.2.A. The Test for Aboriginal Rights

Sparrow confirmed that unextinguished Aboriginal rights deserve constitutional protection, but the later case of *R.* v. *Van der Peet* established a difficult test for Aboriginal peoples to meet in order to establish an Aboriginal right.[6] According to this test, Aboriginal claimants must show:

1. The precise nature of the claim being made;[7]
2. That the practice, custom or tradition was integral to their distinctive culture[8] at the time of Aboriginal contact with Europeans;[9] and

[3] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, c 11 [*Constitution*].
[4] *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].
[5] *Ibid* at 1099.
[6] *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*] at para 31.
[7] *Ibid* at para 50.
[8] *Ibid* at para 46.
[9] *Ibid* at para 60.

3. There is continuity between the claimed right and the pre-contact practice, custom or tradition.[10]

Defining the Aboriginal Right

The first criterion requires Aboriginal claimants to characterize their claimed right with clarity. The right "must be delineated in terms of the particular practice, tradition or custom under which it is claimed."[11] It is characterized considering factors such as the nature of the action which the applicant is claiming was done pursuant to an Aboriginal right, the nature of the government action alleged to infringe the right, and the practice, custom or tradition relied upon to establish the right.[12] Aboriginal peoples cannot cast their claims "at a level of excessive generality."[13] Broad rights, such as the right to self-government, may be considered too general by the courts. If necessary, the court may refine the characterization of the claimed right on terms that are fair to all parties.[14] The court may take the Aboriginal perspective into account in characterizing the right, but the Aboriginal perspective "must be framed in terms cognizable to the Canadian legal…structure."[15]

Recently, the SCC decided that, depending on the facts of the case, a species-specific approach to Aboriginal rights may be required.[16] In *Lax Kw'alaams* v. *Canada*, the SCC recognized a general right to fish for subsistence, but required that the claimants meet the test set out in *Van der Peet* for individual species in order to establish commercial fishing rights. In that case, the SCC concluded that Lax Kw'alaams had only established an Aboriginal right to

[10] *Ibid* at para 63.
[11] *Ibid* at para 52.
[12] *Ibid* at para 53.
[13] *R v Pamajewon* [1996] 2 SCR 821 [*Pamajewon*] at para 27.
[14] *Lax Kw'alaams Indian Band v Canada*, 2011 SCC 56 [*Lax Kw'alaams*] at para 46.
[15] *Van der Peet*, *supra* note 6 at para 49.
[16] *Lax Kw'alaams*, *supra* note 14 at para 57. The Supreme Court of Canada in *Lax Kw'alaams* agreed that a general right of Aboriginals to fish for subsistence exists, but a commercial right to fish only attaches to eulachon, not to all fisheries.

conduct a commercial fishery for eulachon, not for all fish species. In some cases, the Aboriginal claimants may aim to have a species-specific Aboriginal right protected. For example, in *West Moberly First Nations* v. *British Columbia*, the West Moberly sought to protect a specific herd of caribou on the brink of extirpation from coal exploration activities.[17] The Province argued that West Moberly's treaty right included a general hunting right, not a right to hunt the specific herd at issue. The BC Court of Appeal upheld the lower court's species-specific approach,[18] acknowledging that section 35 of the *Constitution* requires more from the Crown than an expectation that Aboriginal peoples should be satisfied with an opportunity to hunt something else, or somewhere else. Based on the claim that Aboriginal claimants are trying to establish, a species-specific approach to characterizing Aboriginal and treaty rights may be required.

Aboriginal rights are also community specific. The SCC in *Van der Peet* held that:

> Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.[19]

Moreover, Aboriginal rights are sometimes also site-specific. For example, in *R.* v. *Côté*,[20] Lamer C.J. explained:

> An…aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact. As such, an aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised upon a specific tract of land.[21]

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[17] *West Moberly First Nations v British Columbia*, 2011 BCCA 247 [*West Moberly*].
[18] Garrison J. dissented on this issue.
[19] *Van der Peet*, *supra* note 6 at para 69.
[20] *R v Côté*, [1996] 3 SCR 139 [*Côté*].
[21] *Ibid* at para 39.

At the first stage of the *Van der Peet* test, the court establishes the level of specificity that will be applied to the right at issue.

Applying the tests for establishing Aboriginal rights from the case law to the Nuxalk eulachon fishery then, it seems clear that although the Lax Kw'alaams First Nation established an Aboriginal right to fish and trade eulachon, the case-by-case approach under Canadian law would appear to require the Nuxalk Nation to initiate a new claim for Nuxalk rights to fish and trade eulachon. It seems likely, based on the evidence reviewed in Chapter 2, that the Nuxalk Nation will also be able to establish these rights, but the courts will not automatically accept Nuxalk rights to fish and trade eulachon based on the *Lax Kw'alaams* decision.

The *Van der Peet* test would require the Nuxalkmc to characterize their claimed rights with clarity. According to Nuxalk worldview, eulachon is a particularly prestigious gift that Nuxalk *smayustas* recount. Eulachon are important to Nuxalk culture because of their unique nutritional, medicinal, spiritual, and economic values. The Nuxalkmc would likely take a species-specific approach to the right to fish eulachon because the eulachon fishery is distinct from other fisheries, and eulachon's unique characteristics could not be replaced by other species. The characterization of the Nuxalk action would also be influenced by the fact that the Nuxalkmc would be claiming a breach of their Aboriginal rights, not making a claim for broad recognition of rights or title. The Nuxalk Nation (as opposed to a Nuxalk individual) would likely assert the claim for a right to fish eulachon, the associated right to trade eulachon products, as well as the right to protect eulachon from environmental degradation and from destruction as by-catch in other fisheries, and the right to restore the eulachon population to a harvestable level of abundance.

The rights to fish and trade eulachon involve practices that would easily fit into the *Van der Peet* test for Aboriginal rights, and the *Lax Kw'alaams* decision serves as a helpful precedent that would likely facilitate a successful Nuxalk claim to fish and trade eulachon. On the other hand, the claim to the rights to protect and restore eulachon might be more difficult to establish through the practice-based *Van der Peet* test because to such a claim would require recognition of Nuxalk jurisdiction. The right to protect eulachon would require the Nuxalkmc to exercise authority (inherent in the Nuxalk legal order) to prevent activities that could harm eulachon or eulachon habitat. The right to restore eulachon requires the Nuxalkmc to take active measures to ensure the continual propagation of the species. To prove the right to protect and restore eulachon, the Nuxalkmc would likely need to establish a broader right of Nuxalk legal order, which a court would likely deem too general for judicial consideration. However, the practices involved in protecting and restoring the eulachon could be rendered meaningless if the Nuxalkmc have no power to influence decisions made under the Canadian legal system that have ramifications for eulachon.

The judiciary's restrictive approach to the characterization of Aboriginal rights has made the recognition and affirmation of Aboriginal rights largely elusive through Canadian courts in a number of ways.

First, litigation within the Canadian legal system is "adversarial by nature".[22] The Aboriginal rights claimed in litigation are not taken at face value. Rather than recognizing and affirming Aboriginal rights, the Crown opposes their existence, or minimizes their significance. The Aboriginal claimant has the burden to prove the Aboriginal right being claimed. The court

[22] Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence*. (Halifax: Fernwood, 1999) at 48.

is the ultimate decision-maker in determining whether the Aboriginal claimant has provided sufficient evidence to prove the claimed right to the standards imposed by Canadian courts.

Second, the success of an Aboriginal rights claim is largely influenced by how it is framed. In the context of Aboriginal rights litigation, smaller claims are easier to prove than larger, overarching claims. While Aboriginal claimants are compelled to constrain their claims for pragmatic reasons (such as court procedures, litigation costs, or the nature of the controversy that has instigated the claim), the narrow framing of Aboriginal rights claims may not adequately reflect the underlying claim for the recognition and affirmation of Indigenous sovereignty by the Canadian legal system. I will examine the viability of achieving this goal through Canadian courts in the concluding chapter.

Third, in the Canadian court system, Aboriginal claimants are forced to define Aboriginal rights from a defensive position. Litigation requires a live controversy to proceed.[23] This principle was applied in *Cheslatta Carrier Nation* v. *British Columbia* in which a claim for a declaration of Aboriginal rights to fish was struck on the basis that there was no live controversy requiring the declaration.[24] Similarly, in *Lax Kw'alaams*, the SCC confirmed that "Courts generally do not make declarations in relation to matters not in dispute between the parties to the litigation."[25] If Aboriginal claimants are entering court to have their rights recognized, they are doing so to prevent their rights from being harmed. Rather than defining the claimed rights proactively, Aboriginal claimants are defining their rights in reaction to an imminent or actual infringement. The reactive context taints the characterization of the right from the outset.

[23] *Borowski v Canada*, [1989] 1 SCR 342.
[24] *Cheslatta Carrier Nation v British Columbia*, 2000 BCCA 539.
[25] *Lax Kw'alaams*, *supra* note 14 at para 14.

Fourth, the case-by-case approach to Aboriginal rights has been likened to an "empty-box" because section 35 does not actually protect anything until Aboriginals assert Aboriginal rights to the satisfaction of the Canadian legal system (e.g. in consultation processes, in court, or in treaty).[26] Even when Aboriginal rights are confirmed in the courts, Monture-Angus observes:

> the delineation of rights is consistently narrowed in such a fashion that valuable…time and energy must be repeatedly expended to secure narrow victory upon narrow victory with the great consequence of failure looming around every judicial corner.[27]

Moreover, the case-by-case aspect means that Aboriginal peoples cannot collectively share in the legal successes of other Aboriginal nations (although they tend to share in the losses). Borrows recognizes that "[i]f claimants cannot rely on the victories of other communities, because cases may always be distinguishable through particular histories, then this provides very little basis for Aboriginal peoples to build a principled protective jurisprudence."[28] As litigator Michael Ross acknowledges:

> The case-by-case approach means that establishing all the Aboriginal rights of Canada's indigenous peoples is an impossibility, practically speaking. And this in turn means that, under Canada's current Aboriginal rights regime, most Aboriginal rights will never, and indeed cannot ever, be given legal effect through the courts.[29]

[26] Borrows and Rotman note that "[t]he 'full-box/empty box' terminology comes from the discussions of the meaning of s. 35 (1) of *the Constitution Act, 1982.* In the course of the First Ministers' Conferences on Aboriginal Constitutional Matter from 1983 to 1987 it became clear that the federal Department of Justice saw s. 35(1) as an 'empty box.' Section 35(1) was likened to a box of rights but the box was empty." ("The *Sui Generis* Nature Of Aboriginal Rights: Does It Make A Difference?" (1997-1998) 36 Alb L Rev 9 at 33.) See also Ardith Walkem & Halie Bruce, eds, *Box of Treasures or Empty Box?: Twenty Years of Section 35*. (Penticton, BC: Theytus Books, 2003).
[27] Monture-Angus, *supra* note 22 at 105.
[28] John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997-1998) 22 Am Indian L Rev 37 [Borrows, "Frozen Rights"] at 50.
[29] Michael Ross, *First Nations Sacred Sites in Canada's Court* (Vancouver: UBC Press, 2005) at 187.

The case-by-case approach renders the recognition of Aboriginal rights by the Canadian courts inaccessible for most Aboriginal peoples.[30]

Fifth, the judiciary's focus on practices is also problematic. While the SCC mentioned practices, customs, and traditions with respect to Aboriginal rights, Zalewski identifies that:

> [T]he Court did not use customs and traditions to establish the general beliefs and laws of an Aboriginal culture, or to imbue that culture's activities with a significance beyond that of mere "practices"; to the contrary, it seems to have focused primarily on "practices" in and of themselves.[31]

In her dissenting opinion in *Van der Peet,* L'Heureux-Dubé J. contends that this level of specificity is flawed because it "considers only discrete parts of aboriginal culture, separating them from the general culture in which they are rooted."[32] Only "individualized" practices, traditions and customs, not broader rights, are taken into account.[33] As Rotman observes:

> Engaging in this form of rights reductionism allows courts to dismiss individual Aboriginal claims without having to consider the broader right being asserted…. By reducing broad Aboriginal and treaty rights…to specific practices…the judiciary divorces those rights from the larger context within which they both originated and continue to exist.[34]

Practice rights appear less significant when viewed out of context, detached from holistic Indigenous perspectives. Aboriginal societies are broader than specific activities; they are held together by legal orders and they are grounded in territories. Rights need to be attached to their original Indigenous context to have meaning. Aboriginal rights in the Canadian legal system are displaced from their original context. A practice right that is not attached to any authority to influence its sustainability is a right devoid of substance. If Aboriginal rights are to have

[30] Although there is a lot of Aboriginal rights litigation currently happening in Canada, the Canadian court system is costly in terms of time, effort, and money, and the courts may be unable or unwilling to provide the remedies Aboriginal peoples are seeking.
[31] Anna Zalewski, "From *Sparrow* to *Van der Peet:*The Evolution of a Definition of Aboriginal Rights"(1997) 55 UT Fac L Rev 435 at 446.
[32] *Van der Peet, supra* note 6 at para 150.
[33] *Ibid* at para 152.
[34] Leonard Rotman, "Creating A Still-Life Out Of Dynamic Objects: Rights Reductionism At The Supreme Court Of Canada" (1997-1998) 36 Alta L Rev 1 at 3.

substance, the Canadian legal system must recognize and affirm Aboriginal rights on a broader scale.

Finally, to avoid dealing with broad rights, the courts have the discretion to re-characterize the rights claimed by Aboriginals. Borrows indicates that "the Court's characterization of the claim in some instances changed the very question the [Aboriginal] people were attempting to litigate."[35] For example, in *Delgamuukw* v. *British Columbia,*[36] the Aboriginal claimants "argued at the trial level for 'ownership' and 'jurisdiction' over their traditional territories. By the time this case had reached the Supreme Court, the question of ownership had been transformed into a claim for 'Aboriginal title'."[37] Similarly, in *R.* v. *Pamajewon* the claimants asserted "a broad right to manage the use of their reserve lands."[38] However, Lamer C.J. found that this characterization "would cast the Court's inquiry at a level of excessive generality."[39] Lamer re-characterized the claim as "the right to participate in, and to regulate, high stakes gambling activities on the reservation."[40] McNeil provides insight into the repercussions of Lamer C.J.'s re-characterization:

> He demanded greater specificity, thereby obligating Aboriginal peoples to prove their right of self-government on a piecemeal basis, activity by activity. Any possibility of establishing a broad right of self-government over their lands and peoples appeared to have been foreclosed by this decision.[41]

Borrows comments that the SCC's re-characterization in *Pamajewon*:

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[35] Borrows, "Frozen Rights", *supra* note 28 at 47.
[36] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].
[37] Gordon Christie, "A Colonial Reading of Recent Jurisprudence: *Sparrow, Delgamuukw and Haida Nation*" (2005) 23 Windsor YB Access Just 17 at 40.
[38] *Pamajewon*, *supra* note 13 at para 27.
[39] *Ibid* at para 27.
[40] *Ibid* at para 26.
[41] Kent McNeil, "Aboriginal Rights in Transition: Reassessing Aboriginal Title and Governance" (2001) 31 Am Rev Cdn Studies 317 at 327.

> illustrated its unwillingness to consider self-government rights on any general basis. This approach defeats many Aboriginal peoples' aspirations for a fuller articulation of powers relative to the federal and provincial governments.[42]

Although the courts take the Aboriginal perspective into account when characterizing the claimed right, the courts may re-characterize the right to fit within a scope that is more acceptable to the Canadian legal system.

A final and related point is that the courts characterize Aboriginal rights "in terms which are cognizable to the non-aboriginal legal system."[43] As Zalewski observes:

> Effectively, this couches the Aboriginal perspective in the common law…. [T]heir translation inescapably entails a loss of nuance. Certain sets of meanings that are possible from the point of view of one culture are precluded by their translation into the Canadian legal idiom. Specifically, the idea of "rights" cannot adequately capture the way in which Aboriginal peoples think about themselves and their relationship to their community, land, and resources.[44]

Darlene Johnston explains that placing "the burden of cognizability on the Aboriginal perspective privileges the master narrative of Crown sovereignty."[45] The requirement that Aboriginal rights be defined in terms cognizable to the Canadian legal system distorts them; the Aboriginal perspective becomes lost in translation.

Integral to the Distinctive Culture at the Time of Contact

The second part of the *Van der Peet* test requires Aboriginal claimants to show that their claimed right was integral to their distinctive culture at the time of contact. Lamer C.J. explains, "To satisfy the integral to distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the

[42] Borrows, "Frozen Rights", *supra* note 28 at 48.
[43] *Van der Peet, supra* note 6 at para. 49.
[44] Zalewski, *supra* note 31 at 445.
[45] Darlene Johnston, *Litigating Identity: the Challenge of Aboriginality* [forthcoming in 2013] at 20.

[A]boriginal society of which he or she is a part."[46] Instead, the custom, practice, or tradition underlying the claimed right must be of central significance to the Aboriginal group claiming the right, in the sense that it distinguished their traditional culture and lay at the core of their identity.[47] It must be a defining feature of the Aboriginal society, such that the culture would be fundamentally altered without it.[48] The right "cannot exist simply as an incident to another practice, custom or tradition."[49] The focus is on "the individualized practices, traditions and customs of a particular group of Aboriginal people,"[50] not on broader considerations such as ownership and jurisdiction (e.g. *Delgamuukw*), or self-governance (e.g. *Pamajewon*). The SCC identifies the applicable timeframe: the practices, traditions and customs must have existed in North America prior to contact with the Europeans.[51] Asserted rights must not exist "solely as a response to European influences."[52]

In the Nuxalk case, there is ample oral tradition[53] and textual evidence to show that the rights to fish, trade,[54] and protect[55] eulachon were integral to the distinctive culture of the Nuxalkmc at the time of contact. However, pre-contact restoration practices may be more difficult to establish in the Canadian legal system. The Nuxalkmc certainly restored the eulachon prior to contact. In Chapter 2 I reviewed various Nuxalk expressions of respect toward the eulachon, which were intended to ensure the continual return of the eulachon to Nuxalk

[46] *Van der Peet, supra* note 6 at para 55.
[47] *Ibid* at para 56.
[48] *Ibid* at para 59.
[49] *Ibid* at para 70.
[50] *Ibid* at para 152.
[51] *Ibid* at para 44.
[52] *Ibid* at para 73.
[53] As explained in Chapter 1, I adopt Julie Cruikshank's definition of "oral tradition" as encompassing the material, process, and framework of conveying Indigenous knowledge across generations. (Julie Cruikshank, *Do Glaciers Listen?* (Vancouver: UBC Press, 2005) at 60).
[54] Interestingly, the Heiltsuk Nation used historical documents showing the Heiltsuk trade of herring roe to the Nuxalk people in exchange for eulachon products as evidence to establish the Heiltsuk commercial right to trade herring roe on kelp in *R v Gladstone* [1996] 2 SCR 723 [*Gladstone*].
[55] For example, Chapter 2 described the Nuxalk people's strict rules about keeping the river pure, and allowing the first run of eulachon to pass before fishing begins.

territory. Accordingly, the right to restore eulachon is also integral to the distinctive culture of the Nuxalk people, but proving this to the satisfaction of a court would likely require more extensive interpretation of evidence than would be required to establish the rights to fish, trade, and protect eulachon.

The second stage of the *Van der Peet* test has been widely criticized for its use of racist conceptions of Aboriginality. Borrows and Rotman observe that "the test draws on inappropriate racialized stereotypes of Aboriginal peoples by attempting to distil the essence of Aboriginality by reference to their pre-contact activities."[56]

Barsh and Henderson identify three problems. First, "[t]he extent to which an idea, symbol or practice is central to the cultural identity of a particular society is inescapably subjective to that society."[57] McLachlin J. (as she then was) acknowledges the problem of subjectivity in her dissenting opinion:

> [D]ifferent people may entertain different ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be coloured by the subjective views of the decision maker.[58]

Indeed, members of one society would likely have differing opinions as to the centrality of an idea, symbol or practice within their society. Accordingly, it is safe to assume that outsiders to the society are not appropriately positioned to make a fair determination of the centrality of a practice, custom, or tradition of a society that is not their own.

Barsh and Henderon's second criticism is that:

> The application of "centrality" to Aboriginal rights…exacerbates the problem of distinguishing between what is "central" to a culture, and what is merely

[56] Borrows & Rotman, *supra* note 26 at 36.
[57] Russell Barsh & James Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1996-1997) 42 McGill L J 993 at 1000.
[58] *Van der Peet*, *supra* note 6 at para 257.

> "incidental". Making any such distinction presumes that cultural elements can exist independently of one another, so that the loss of one element does not compromise the perpetuation or enjoyment of the others. This presumption of independence is, in and of itself, utterly incompatible with Aboriginal philosophies, which tend to regard all human activity (and indeed all of existence) as inextricably inter-dependent.[59]

This criticism reflects L'Heureux-Dubé J.'s dissent (mentioned above) that the court's focus on individualized practices is flawed because it decontextualizes the practices from the societies that encompass them.[60]

Finally, the SCC's use of the date of contact as the defining moment for Aboriginal rights is problematic. As Rotman observes:

> Arbitrarily establishing the date of European contact - which is, itself, a contentious issue - as the cut-off date for establishing constitutionally-protected Aboriginal rights fails to recognize that contact itself generated the need for Aboriginal groups to alter their lifestyles to ensure their survival in post-contact North America.[61]

Moreover, Borrows suggests that, "[b]y limiting Aboriginal rights to integral practices not developed solely as a result of European influences, the Court is denying these cultures the right to survive by adapting to new situations never before encountered."[62] Barsh and Henderson understand that:

> Cultures continue to change, reorder their priorities and revise their conceptions of themselves…. To presume that Aboriginal societies are less dynamic or creative than other cultures, or that they must remain stuck in time in order to remain authentic and deserve to retain their rights, is sociological nonsense recalling the discredited social-Darwinist conception of "primitivity".[63]

The reality of societal evolution requires an alternative approach to properly recognize and affirm Aboriginal rights that have arisen since the time of contact.

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[59] Barsh & Henderson, *supra* note 57 at 1000.
[60] *Van der Peet*, *supra* note 6 at para 150.
[61] *Supra* note 34 at 6.
[62] "Frozen Rights", *supra* note 28 at 59.
[63] Barsh & Henderson, *supra* note 57, at 1001.

Although the SCC in *Van der Peet* indicated that Aboriginal rights must be "integral," courts have recognized "incidental rights" where they are necessary to exercise or to protect the practice of an "integral" Aboriginal right. Collins and Murtha contend that environmental preservation may be an incidental right implicit in Aboriginal rights.[64] Morse states the obvious: "[H]aving a right to hunt and fish recognized by the state…is illusory and even meaningless if there is nothing in fact to harvest."[65] Similarly, Kapashesit and Klippenstein observe that:

> A group right to conduct a particular activity (such as hunting, fishing and trapping) is meaningless when the object of that right (the deer stock and the deer's habitat, the fish stock and the fish habitat) is subject to damage or depletion by external individuals or groups, unless the group has some means to protect that stock or habitat from those external factors.[66]

This observation recognizes the jurisdictional element that is required for Aboriginal peoples to protect culturally significant species and their habitats from damage or depletion.

The courts have recognized that the right to fish may include an incidental right to maintain a healthy fish habitat. For example, in *Claxton* v. *Saanichton Marina,* the Tsawout Indian Band obtained an injunction to prevent a marina development that would have interfered with their Douglas Treaty fishery by disturbing the eel grass required to sustain the crab.[67] Similarly, in *Pasco* v. *Canadian National Railway Co.* the Oregon Jack Creek Indian Band obtained an injunction to prevent the Canadian National Railway (CNR) from twin-tracking a

[64] Lynda Collins & Meghan Murtha, "Indigenous Environmental Rights in Canada: the Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap," (2010) 47:4 Alb L Rev 959.
[65] Bradford Morse, "Indigenous Rights as a Mechanism to Promote Environmental Stability," in Laura Westra, Klaus Bosselmann & Richard Westra, eds *Reconciling Human Existence with Ecological Integrity* (London: Earthscan, 2008) 159 at 159.
[66] Randy Kapashesit & Murray Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1990-1991) 36 McGill LJ 925 at 957.
[67] *Claxton v Saanichton Marina Ltd*, [1989] 3 CNLR 46 (BCCA).

rail line through the band's reserve lands.[68] The CNR was stopped from filling in the river bank and river bed because this would have interfered with an Aboriginal fishing right.

In the Nuxalk case, the primary concern is to protect the eulachon from being depleted as by-catch in the commercial trawl fisheries. The secondary concern is to preserve eulachon habitat from destruction. Arguably, section 35 obliges the Crown to ensure that the Nuxalkmc have a meaningful capacity to fish eulachon, which incidentally includes incidental rights to preserve eulachon populations. Based on the available evidence, it seems likely that the Nuxalkmc would be able to establish a right to protect eulachon and eulachon habitat within Nuxalk territory. However, these rights likely do not extend beyond Nuxalk territory; Aboriginal rights may have territorial limitations "depending on the actual pattern of exercise of such rights prior to contact."[69] Because the trawl fisheries occur outside of Nuxalk territory, the Nuxalkmc would likely not be able to directly exert authority to stop the trawl fishers. On the other hand, section 35 requires the Crown to recognize and affirm Aboriginal rights, so the Crown cannot ignore the impact that activities outside of Nuxalk territory have on Nuxalk rights. Arguably, Nuxalk eulachon rights should factor into the DFO's management of the trawl fisheries; the Crown should manage the trawl fisheries in a way that effectively protects the Nuxalk right to fish eulachon.

Continuity

To meet the third stage of the *Van der Peet* test, Aboriginal peoples must prove that their claimed right has a reasonable degree of continuity with the practices, traditions or customs that existed before Europeans arrived in Aboriginal territories.[70] Continuity must be established from

[68] *Pasco v Canadian National Railway Co*, [1986] 1 CNLR 34 (BCCA).
[69] *Côté*, *supra* note 20, at para 39.
[70] *Van der Peet*, *supra* note 6 at para 60.

the date of European contact with Aboriginals. The SCC attributes this timeframe to the court's recognition of pre-existing Aboriginal societies prior to the Crown's assertion of sovereignty in Canada.[71]

Aboriginal claimants do not need to show an unbroken chain between current and pre-contact practices, but they must demonstrate how their claimed rights have pre-contact origins.[72] The courts acknowledge that Aboriginal rights may evolve, but add a stipulation that modern rights must have "logical continuity" with pre-contact rights. As the SCC set out in *Marshall and Bernard*, "contemporary…activities must have some logical continuity with the traditional… activities… – they must be the same kinds of activities carried out by modern means."[73] Similarly, in *Lax Kw'alaams*, Binnie J. noted that Aboriginal rights must be permitted to evolve from pre-contact society to modern times, but such evolution has limits that are both qualitative and quantitative.[74] The courts will not recognize any Aboriginal right that is entirely new or which arose exclusively from contact with Europeans.[75]

To meet the continuity requirement, the Nuxalkmc will be required to show that their asserted rights have a reasonable degree of continuity with pre-contact practices. The year 1793, when Alexander Mackenzie arrived in Nuxalk territory by way of a "grease trail," would likely be the relevant date for assessing the Nuxalk claim. In the *Tsilhqot'in* decision, the BC Court of Appeal held that 1793 is the single date of contact that should apply throughout British Columbia

[71] *Ibid.*
[72] *Ibid* at para 65.
[73] *R v Marshall*; *R v Bernard*, [2005] 2 SCR 220 [*Marshall and Bernard*] at 236-37.
[74] *Lax Kw'alaams*, *supra* note 14 at para 51.
[75] *Van der Peet*, *supra* note 6 at paras 62 and 65, and *Marshall and Bernard*, *supra* note 73 at 237.

because that date was significant in terms of European exploration of what later became British Columbia.[76]

The Nuxalkmc have not been able to engage in the eulachon fishery since 1998 because the eulachon have failed to return to Nuxalk territory in harvestable numbers. The fact that the Nuxalk eulachon fishery stopped in 1999 would not be a sufficient break in continuity to extinguish their Aboriginal rights. As Monture-Angus suggests:

> In the Canadian articulation of a right it is not necessary for the right to be acted upon for it to exist. Rights that lie dormant are not rights without meaning; nor are they rights that have ceased to be. These dormant rights can be picked up and used again; they are "existing" Aboriginal rights within the meaning of section 35.[77]

For the Nuxalkmc, the capacity to exercise their rights to fish and trade eulachon has been interrupted, but because the rights were not extinguished prior to the constitutional protection of Aboriginal rights, they continue to exist even if the Nuxalkmc are unable to exercise them because of the loss of the eulachon in their territory. These rights to fish and trade eulachon are devoid of substance if these practices are separated from the underlying Nuxalk legal order that contextualizes them. The Nuxalk legal order compels the Nuxalkmc to protect the remaining eulachon and to endeavor to restore eulachon populations to harvestable abundance, so that in the future the Nuxalkmc will be able to fish eulachon again. Because of the extirpation of eulachon the rights to protect and restore (more clearly tied to Nuxalk legal order) have central significance in the Nuxalk eulachon crisis whereas the rights to fish and trade (practices that the courts could consider in isolation from Nuxalk legal order) have been overshadowed in importance. Although the practice of the right has been interrupted, the continued existence of the Nuxalk legal order provides substance to the continuing right of Nuxalk people to fish and

[76] *William v British Columbia*, 2012 BCCA 285 [*Tsilhqot'in*] at para 93.
[77] Monture-Angus, *supra* note 22 at 92.

trade eulachon. The Nuxalk practice rights to fish and trade eulachon are now dormant, and the rights to protect and restore have been engaged. The foundation of all of these rights is Nuxalk legal order, grounded in Nuxalk sovereignty (which will be discussed in the concluding chapter).

The Nuxalk eulachon restoration initiatives have been heavily influenced by scientific methods. In an effort to restore eulachon populations, the Nuxalkmc are employing eulachon enhancement techniques by taking eggs from female eulachons and fertilizing them with milt from male eulachons so that more eggs are fertilized than would be in a natural environment. The fertilized eggs are then reared in a controlled environment to increase survival rates by avoiding mortalities from environmental hazards such as predators and water turbidity.[78] The Nuxalkmc would be required to show that eulachon enhancement is a logical evolution of pre-contact practices geared toward ensuring the perpetual return of eulachon to Nuxalk territory.

A review of Canadian case law involving the logical evolution standard suggests that the courts have created the requirement as a mechanism to limit the scope of Aboriginal commercial rights, which are often perceived as conflicting with the economic interests of mainstream Canadians. I would anticipate a more liberal interpretation of the logical evolution requirement with respect to an Aboriginal right that promotes conservation, which is a benefit to all Canadians. Although the Nuxalkmc would likely be able to meet the continuity requirement, the logical evolution requirement poses an additional hurdle.

As with the first two stages of the *Van der Peet* test, the continuity requirement has also received much criticism. A fundamental concern is the date from which continuity must be established: the date of contact. A number of criticisms of the fixed date approach to characterizing Aboriginal rights have already been described above. In relation to the continuity

[78] I have witnessed the Nuxalk eulachon enhancement research, and I have worked as a summer student with the DFO on salmon enhancement projects, so this description comes from personal observations.

requirement, the fixed date approach also increases the burden of proof for Aboriginal rights. As L'Heureux-Dubé J. explains:

> [it] imposes a heavy and unfair burden on the natives: the claimant of an aboriginal right must prove that the aboriginal practice, tradition or custom is not only sufficiently significant and fundamental to the culture and social organization of the aboriginal group, but has also been continuously in existence…for a certain length of time, for an indeterminate long period of time prior to British sovereignty.[79]

The date of first contact is arbitrary, vague and varies significantly across Canada.[80] Although the BC Court of Appeal has settled on 1793 as the date of contact that applies across British Columbia,[81] the requirement that Aboriginal claimants prove their rights back to a fixed date is a task that detracts focus from the current exercise of the Aboriginal rights at issue. In addition, Murphy acknowledges, "[w]here a reasonable degree of continuity with pre-contact…customs or practices is difficult to establish, the legal foundation of the indigenous right in question is correspondingly weakened or possibly eliminated."[82] Moreover, the earlier the date of contact, the longer the period of continuity required. This in turn, requires additional proof, as well as cultural resilience on the part of Aboriginals to maintain pre-contact traditions despite the incursion of colonizers into Indigenous territories.[83]

Another problematic aspect of the continuity requirement is that it distorts the common law doctrine of continuity. The doctrine of continuity originates from the common law recognition of the continuance of Aboriginal legal systems upon the arrival of Europeans. A

[79] *Van der Peet*, *supra* note 6 at para 168, *per* L'Heureux-Dubé J. (dissenting).
[80] *Ibid* at para 167.
[81] *Tsilhqot'in*, *supra* note 76 at para 93.
[82] Michael Murphy, "Prisons Of Culture: Judicial Constructions Of Indigenous Rights In Australia, Canada, And New Zealand" (2009) 87:2Can Bar Rev 357 [Murphy, "Prisons of Culture"] at 363.
[83] *Ibid* at 373.

number of Canadian cases have applied this doctrine.[84] The majority in *Van der Peet* misapplies the doctrine of continuity. Walters explains the difference between the notion of continuity applied in *Van der Peet*, compared to the original common law principle: "*Van der Peet* focuses on the continuity of pre-contact cultures and identities; the imperial common law focuses upon the continuity of one legal system upon the assertion of sovereignty by another system."[85] Similarly, Barsch and Henderson observe:

> the Court has discarded the traditional British Commonwealth framework, whereby Aboriginal peoples retained the rights defined by their own laws (unless subsequently extinguished by Parliament), replacing it with a doctrine of *ex post facto* judicial extinguishment.[86]

Van der Peet marks a shift from common law recognition of continuity of Aboriginal legal systems to an evidential requirement for factual continuity in Aboriginal rights claims. This shift has simultaneously increased the burden of proof for Aboriginal rights and decreased the scope of their content.

Summary of the Test for Aboriginal Rights

The *Van der Peet* test for Aboriginal rights is fraught with problems. *Van der Peet* offered a much narrower recognition of Aboriginal rights than that anticipated in *Sparrow*. As Murphy observes, the SCC's "characterization of constitutionally protected Aboriginal rights [in

[84] In his article "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*" (1999) 44 McGill LJ 711, Mark Walters provides the following examples: in *Connolly v Woolrich*, ((1867) 17 RJRQ 75 (Qc Sup Ct) aff'd (1869) 17 RJRQ 266 (Qc QB)) the court found that no legislative instrument could be found "abolishing or changing the customs of the Indians" (*Ibid* at 96); therefore, Cree marriage customs continued and British colonial courts were required to "acknowledge and enforce them" (*Ibid* at 138). More recently, in *Côté*, the Supreme Court of Canada held that "under the legal principles of British conquest," the "pre-existing laws governing the acquired territory of New France were received and continued in the absence of subsequent legislative modification." (*Côté, supra* note 20 at para 49). In *The Queen v Nan-E-Quis-A-Ka* ((1889) 1 Terr LR 211) a general legislative measure introducing English law was held not to displace Aboriginal marriage custom in western Canada.

[85] Walters, *ibid* at 736.

[86] Barsh & Henderson, *supra* note 57 at 1008-09.

Van der Peet] was a surprising and disappointing step back from its own prior jurisprudence."[87] Murphy frames the *Van der Peet* test as "yet another means of facilitating denial and extinguishment [of Aboriginal rights]."[88] It increases the already difficult burden of proof for Aboriginal claimants, renders Aboriginal rights more vulnerable to the impact of colonialism, and places discriminatory restrictions on the capacity of Aboriginal peoples to translate their rights into modern society.[89]

The weaknesses of the *Van der Peet* test become apparent when applied to the Nuxalk crisis. The *Van der Peet* test focuses on practice rights, not broader rights such as jurisdiction or territorial rights. The Canadian legal system does not perceive practice rights to be rooted in the continuing existence of Indigenous sovereignty, although from the Nuxalk perspective, the practices and Nuxalk sovereignty are inseparable. A claim in the Canadian courts would have a higher likelihood of success if the Nuxalkmc focused their claims on practices, not on broader rights.

Until 1998, the Nuxalkmc exercised the rights to fish, trade, protect, and restore eulachon. These practices were integral to their distinctive culture, and the modern practices of all of these rights closely resembled their pre-contact practices. The Nuxalkmc can likely provide sufficient evidence to prove those rights existed in 1998. When the eulachon failed to return to Nuxalk territory in harvestable numbers in 1999, the Nuxalkmc could no longer exercise their rights to fish and trade eulachon. At this point, the rights to protect and restore eulachon became prominent. The interruption in fish and trade practices would probably not preclude a finding of reasonable continuity. Under the Canadian legal system, all of the claimed

[87] Michael Murphy, "Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights?" (2001) 34:1 Can J Political Science 109 [Murphy, "Culture and the Courts"] at 110.
[88] Murphy, "Prisons of Culture", *supra* note 82 at 377.
[89] *Ibid*.

rights would likely be limited by territory. Although the Nuxalkmc would not be able to assert their right to protect eulachon to directly stop trawl fisheries from occurring outside of Nuxalk territory, they could assert their rights to persuade the Crown to manage the trawl fisheries in a way that effectively protects Nuxalk eulachon-related rights. They would likely be able to establish a right to protect eulachon and eulachon habitat from destruction within Nuxalk territory. They would also likely be able to establish a right to restore eulachon by applying enhancement techniques. However, it is unlikely that the Nuxalkmc would be able to establish broader rights, such as a right to Nuxalk sovereignty, using the *Van der Peet* test.

Even if an Aboriginal claimant is able to meet the requirements to prove Aboriginal rights in court, there is no guarantee that the established rights will be protected. The next section describes how Canadian jurisprudence has evolved to widen the scope of "justifiable infringements" of Aboriginal rights, thus eroding the protection promised in section 35.

4.2.B. The Test for Justification

In *Sparrow*, having found the existence of an Aboriginal right, the SCC went on to find that Aboriginal rights are not absolute. Interference with Aboriginal rights is permitted in accordance with a justification analysis. The justification analysis for section 35 Aboriginal rights mirrors the analysis for section 1 of the *Charter*. Section 1 of the *Charter* states:

> The…*Charter*…guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[90]

Many scholars have observed that the application of a section 1 *Charter* analysis is inappropriate for section 35 Aboriginal rights. As Chris Tennant suggests, "Because s. 35 is part of *the Constitution Act 1982*, and not part of the *Charter*, the justificatory standard in s. 1 of the

[90] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 1.

Charter does not apply to s. 35. Nor is there any justification requirement explicitly articulated in the text of s. 35 itself."[91] W.I.C. Binnie explains that "the framers of the *Constitution Act, 1982* left section 35 out of the *Charter* in part to allay Native concerns about the possible impact of section 1…on their rights."[92] According to Harris, "Aboriginal rights were placed in the *Constitution* and outside the *Charter* to protect them from the vagaries of political expediency."[93] Although Aboriginal rights are outside of the *Charter*, "the Supreme Court has read a justificatory standard into s. 35(1),"[94] and has "provided for a similar limiting of Aboriginal rights in order to recognize the interests of the 'broader community."[95]

Prima Facie Infringement

Under the justification analysis, once an Aboriginal right is established, the next step is for the Aboriginal claimant to show a *prima facie* infringement of the right. The SCC described *prima facie* infringement as "some negative effect"[96] or "an adverse restriction"[97] and posed three questions to ascertain a *prima facie* infringement:

1. Is the government action unreasonable?
2. Does the government action impose undue hardship? And
3. Does the government action deny the holders of the right their preferred means of exercising that right?[98]

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[91] Chris Tennant, "Justification and Cultural Authority in s. 35(1) of the Constitution Act, 1982: Regina v. Sparrow" (1991-92) 14 Dal LJ 372 at 381-82.
[92] WIC Binnie, "The *Sparrow* Doctrine: Beginning of the End or End of the Beginning?" (1991) 15 Queen's LJ 217 at 237.
[93] Douglas Harris, "Indigenous Territoriality in Canadian Courts" in Ardith Walkem & Halie Bruce eds, *Box of Treasures or Empty Box?: Twenty Years of Section 35* (Penticton, BC: Theytus Books, 2003) 176 [Harris, "Indigenous Territoriality"] at 188-89 [citation omitted].
[94] Tennant, *supra* note 91 at 381-82.
[95] Harris, "Indigenous Territoriality", *supra* note 93 at 187.
[96] *Sparrow*, *supra* note 4 at 1112.
[97] *Ibid.*
[98] *Ibid.*

Subsequent cases have clarified that these are relevant factors to indicate a *prima facie* infringement, but all three do not need to be answered affirmatively to establish an infringement.[99]

There are two types of government actions in the Nuxalk eulachon fishery case. The first is the DFO's permitting of trawl fisheries that destroyed, and continue to destroy, eulachon as by-catch. In 1997, this interfered with Nuxalk rights to fish and trade eulachon, and the ongoing openings continue to interfere with these rights. At present, the DFO's permitting of trawl fisheries also interferes with Nuxalk rights to protect and restore eulachon. The second infringement is the DFO's characterization of eulachon in the *Species at Risk Act* (*SARA*) listing process. How the DFO eventually lists eulachon under *SARA* (i.e. as not at risk, special concern, threatened, endangered, extirpated, or extinct) will have implications for Nuxalk rights to fish and trade eulachon, as well as their rights to protect and restore eulachon going forward.

The infringements caused by the DFO's initial permitting of trawl fisheries in the Nuxalk eulachon case are extensive, and are largely a result of the DFO's ignorance about eulachon. The 1997 opening of the shrimp trawl fishery in Queen Charlotte Sound was arguably unreasonable because the DFO failed to exercise precaution. The DFO did not limit the number of shrimp trawl permits in the Queen Charlotte Sound,[100] apply restrictions to mitigate by-catch from shrimp trawling gear on the Pacific Coast (even though by-catch reduction devices were required in East Coast shrimp trawl fisheries),[101] or understand eulachon lifecycle and migration

[99] See for example: *Gladstone*, *supra* note 54 at para 43, and *Côté*, *supra* note 20 at para 75.
[100] Jason Clarke & Wendy Huston, "1997 Shrimp Trawl Fishery Review" *Report for DFO and the Pacific Coast Shrimpers' Cooperative Association* (1998).
[101] G Brothers, "Shrimp Selectivity" (Paper delivered at the Department of Fisheries and Oceans Workshop on Responsible Fishing: New and Selective Harvesting Technologies, St. John's, 4 and 5 December 1996), [unpublished].

patterns that could be impacted by the shrimp trawl fishery.[102] The DFO may not have known enough about eulachon in 1997, but the constitutional protection of Aboriginal rights puts a positive duty on the government to collect sufficient information to assess potential impacts on Aboriginal rights.[103] The DFO failed to do so, and the Nuxalk rights to fish and trade eulachon were effectively suspended as a result. This has imposed extreme hardship on the Nuxalkmc and has denied the Nuxalkmc the capacity to exercise their rights by their preferred means. Indeed, the Nuxalkmc are precluded from exercising their rights to fish and trade eulachon entirely. A court would likely find a *prima facie* infringement on Nuxalk rights to fish and trade eulachon.

The DFO's current openings of trawl fisheries would also likely constitute a *prima facie* infringement. Although the DFO has closed Queen Charlotte Sound to shrimp trawlers, the DFO continues to open shrimp trawl and ground trawl fisheries in other areas and these fisheries continue to catch eulachon as by-catch. It is unclear whether the eulachon currently being caught by trawlers are Central Coast eulachon, but in light of COSEWIC's recommendation that both Central Coast and Fraser River eulachon populations be listed as "endangered," and that the Nass eulachon population be listed as "threatened" under the *SARA*, the continuing trawl fisheries that catch eulachon as by-catch appear to be unreasonable. The Nuxalkmc are concerned that the DFO's management decisions with respect to trawl fisheries have significant impacts on Nuxalk protection and restoration efforts. Aboriginal rights to environmental protection and restoration have not been fully considered by the Canadian courts, so it is difficult to speculate how the courts would deal with them. But because the threshold to establish a *prima facie* infringement is low, it is likely that a court would find that the current DFO trawl fishery openings constitute a

[102] Douglas Hay & P McCarter, "Status of the eulachon *Thaleichthys pacificus* in Canada" *Department of Fisheries and Oceans Canada, Canadian Stock Assessment Secretariat, Research Document 2000/145* (2000).
[103] *Tsilhqot'in*, *supra* note 76 at para 341.

prima facie infringement of Nuxalk rights to fish and trade eulachon, as well as their rights to protect and restore eulachon.

Although the DFO's listing of eulachon under the *SARA* is not yet finalized, the result of the listing will inevitably have implications for Nuxalk rights to fish, trade, protect, and restore eulachon. A *prima facie* infringement is currently being contemplated by the DFO. The DFO's duty of consultation (which will be discussed below) is the central consideration at the pre-infringement stage.

Justification

Once an Aboriginal claimant has demonstrated a *prima facie* infringement of an existing Aboriginal right, the government must justify its actions. To justify infringement of Aboriginal rights, the government must show that:

1. There is a valid objective for the government action, and
2. The government is upholding the honour of the Crown in its action by:
    a. Giving Aboriginal rights priority over other interests;
    b. Infringing the Aboriginal rights as minimally as possible;
    c. Compensating Aboriginal peoples for the infringement; and
    d. Consulting Aboriginal peoples about the infringement of their rights.[104]

Valid Objective

With respect to the first branch, the SCC originally took a narrow approach to assessing valid objectives. The examples of valid objectives from *Sparrow* include "objectives that either maintain the rights by conserving the resources on which the rights depend or ensure that the rights are not exercised in a dangerous way."[105] The SCC initially determined "the 'public

[104] *Sparrow*, *supra* note 4 at 1113 and 1119.
[105] Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?"(1997) 8:2 Const Forum Const 33 [McNeil, "Infringements"] at 35.

interest' justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."[106]

However, in *Gladstone* Lamer C.J. assumed that an Aboriginal commercial right might create an exclusive right for Aboriginals that would not be available to the broader public, and he opined that this would be unacceptable. As Theresa McClenaghan observes, "It is not clear why, even if a right was 'exclusive'…this would be unacceptable."[107] In any event, Lamer C.J. held that Aboriginal societies exist within the broader Canadian community over which the Crown is sovereign, and so "objectives of compelling and substantial importance to that community as a whole" may be justifiable in certain contexts.[108] In the context of fisheries, such objectives might include "the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-[A]boriginal groups."[109]

In Chapter 3, I suggested that the DFO was well intentioned in opening the initial shrimp trawl fishery in Queen Charlotte Sound in 1997. The goal was to alleviate pressure on the coho fishery while still allowing commercial fishers to maintain livelihoods by pursuing new fishing opportunities that targeted species other than coho. The extirpation of the eulachon was an unintended consequence of a well-intended objective. It is likely that a court would perceive the DFO's objective as a valid reason to infringe Nuxalk Aboriginal rights with respect to eulachon. Now that the unintended consequence is known, the Queen Charlotte Sound shrimp trawl fishery remains closed, but the DFO continues to open trawl fisheries in other areas. The Nuxalkmc are concerned that the ongoing openings could impact Central Coast eulachon, and therefore, would

[106] *Ibid.*
[107] Theresa McClenaghan, "Why Should Aboriginal Peoples Exercise Governance over Environmental Issues? 51 UNBLJ (2002) 211 at 224.
[108] *Gladstone*, *supra* note 54 at para 73.
[109] *Ibid* at para 74.

prefer that the DFO halt all trawl fisheries within Canadian waters on the Pacific Coast. This outcome is unlikely, now that the court considers broad community interests (such as economic objectives and non-Aboriginal fisheries) to be valid objectives to infringe Aboriginal rights.

The second concern for the Nuxalkmc is the DFO's application of the *Species at Risk Act* (*SARA*). *SARA* is aimed at conservation, and the courts recognize conservation as a valid objective which has priority over Aboriginal rights. Ironically, the Nuxalkmc are concerned that the DFO is undermining eulachon conservation by applying *SARA* in a way that will likely circumvent listing Central Coast eulachon as "endangered". As will be discussed later, the Nuxalkmc (and others) worry that economic considerations may also influence the treatment of eulachon under *SARA.*

Since *Sparrow*, the courts have widened the scope of objectives deemed valid to infringe Aboriginal rights thereby narrowing the protection of Aboriginal rights. *Sparrow's* limitation of justifiable infringements to conservation and safety was likely influenced by the nature of the right at issue in that case. The SCC characterized the right as one to fish for food, social, and ceremonial purposes.[110] The existence of the right was not the subject of serious dispute.[111] W.I.C. Binnie predicted that a case with more contentious facts would lead to a less favourable balancing of Aboriginal rights against other interests,[112] and his prediction proved to be correct.

The SCC's next consideration of Aboriginal rights occurred in three Aboriginal commercial fishing rights cases, commonly referred to as the "*Van der Peet* Trilogy". Lamer C.J. was uncomfortable with the commercial aspect of Aboriginal rights, so he constructed categories of Aboriginal rights: those with limits (food, social, and ceremonial) and those

[110] *Sparrow, supra* note 4 at 1099.
[111] *Ibid* at 1095.
[112] Binnie, *supra* note 92 at 236.

without (commercial). Harris suggests that Lamer C.J.'s characterization of commercial Aboriginal rights as rights without limits is inaccurate: "The claims by First Nations to commercial fisheries are not without internal limit. Each claim is geographically bounded and derived from traditions that allocated fish between competing users within and between nations."[113] Similarly, Borrows observes that Lamer C.J.'s concern about Aboriginal rights without internal limit "is curious, from an Aboriginal perspective, because there are limitations placed on these rights – the laws and traditions of Aboriginal peoples. Aboriginal peoples have laws which dictate the appropriate exercise of a right."[114] Lamer C.J.'s concern highlights the problem of the court's separation of Aboriginal practices from broader rights such as legal orders. The courts fail to acknowledge Aboriginal rights to legal orders and consider the practices separately and out of context, and then, based on this narrow and distorted perception of the practice right, make a finding that undermines the exercise of the right.

The diminishment of Aboriginal rights has become common practice in Canadian courts. As Goldenberg acknowledges, "Ultimately, Lamer C.J. determined that the fact that commercially based rights are 'without internal limit' mandates a widening of the range of possible valid legislative objectives that could justifiably infringe Aboriginal rights."[115] Although Lamer C.J. allowed the wide range of valid legislative objectives specifically in relation to Aboriginal rights he deemed to be potentially "exclusive," following the *Van der Peet* Trilogy, the courts have applied the widened scope with respect to all Aboriginal rights, not just Aboriginal commercial rights.

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[113] Douglas Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery" (2000-2001) 34 UBC L Rev 195 [Harris, "Heiltsuk Territoriality"] at 229.
[114] Borrows, "Frozen Rights", *supra* note 28 at 59.
[115] André Goldenberg, "'Salmon for Peanut Butter': Equality, Reconciliation and the Rejection of Aboriginal Commercial Rights" (2004) 3 Indigenous LJ 61 at 92.

For example, in *Halfway River* v. *British Columbia*, the British Columbia Court of Appeal found that the *Forest Act* and *Forest Practices Code* whose objectives include both economic development and sustainable forestry meet the test of valid objectives.[116] The SCC in *Kitkatla* v. *British Columbia* held that the need to exploit natural resources to maintain a viable economy must be balanced with the need to preserve Aboriginal heritage objects. [117] *Delgamuukw* established that, in the case of Aboriginal title:

> the range of legislative objectives that can justify the infringement of Aboriginal title is fairly broad…and [includes] the development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those claims.[118]

Although this list was set out in relation to Aboriginal title, the underlying mindset – that Aboriginal interests may be infringed by other Canadian interests – applies to both Aboriginal title and Aboriginal rights. Ardith Walkem argues that the list from *Delgamuukw*:

> effectively defines the continuation of the colonial project as the valid objective that the courts, through the mechanism afforded by s. 35(1), will protect, including the settlement of foreign populations, and all manner of land and resource development in order to support that settlement.[119]

The judiciary's current broad interpretation of valid objectives is effectively (judicially) extinguishing Aboriginal rights.[120]

McNeil contends that, in widening the scope of objectives deemed valid to infringe Aboriginal rights, what the SCC has done is:

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[116] *Halfway River v British Columbia*, 1999 BCCA 470 [*Halfway*] at para 151.
[117] *Kitkatla v British Columbia*, 2002 SCC 31 at para 76.
[118] *Delgamuukw*, *supra* note 36 at para 165.
[119] Ardith Walkem, "Constructing the Constitutional Box: The Supreme Court's Section 35(1) Reasoning" in Ardith Walkem & Halie Bruce eds, *Box of Treasures or Empty Box?: Twenty Years of Section 35* (Penticton, BC: Theytus Books, 2003) 196 at 207.
[120] Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33 Ottawa L Rev 301.

> virtually to abdicate the Supreme Court's responsibility for upholding what are supposed to be the constitutional rights of the Aboriginal peoples…. Those rights can now be overridden on broad policy grounds relating to economic and regional fairness, and even to support the interests of particular groups such as commercial fishers whose historic use of the fishery may well have been a violation all along.[121]

Under the current regime, Aboriginal rights are not effectively protected. As Harris points out:

> Objectives such as "the pursuit of economic or regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups," however, when balanced against Aboriginal rights, negate those rights rather than protect them.[122]

For each objective deemed valid to justify the infringement of Aboriginal rights, Aboriginal rights are correspondingly diminished. Murphy observes that:

> In recent years the standard of protection has been lowered to the point where even fundamental constitutionally protected Aboriginal rights can be infringed by rights and interests of the non-Aboriginal majority that are not themselves constitutionally enshrined. Constitutional rights are by no means absolute, but when their purpose is to protect the vital interest of vulnerable minorities against the whims of powerful majorities, they demand a higher standard of immunity than Canada's highest court currently seems committed to upholding.[123]

As Harris and Millerd suggest, "[a]t present the scope for justifiably infringing constitutional rights is unconscionably broad."[124] The current scope leaves little room for the recognition and affirmation of Aboriginal rights.

McLachlin J. (as she then was) questions the legitimacy of the broadening of justifiable infringements to include economic interests. In her dissenting opinion in *Van der Peet*, she observes:

> The extension of the concept of compelling objectives to matters like economic and regional fairness and the interests of non-aboriginal fishers…would negate

[121] McNeil, "Infringements", *supra* note 105 at 39.
[122] Harris, "Heiltsuk Territoriality", *supra* note 113 at 232.
[123] Murphy, "Prisons of Culture", *supra* note 82 at 387.
[124] Douglas Harris & Peter Millerd, "Food Fish, Commercial Fish, and Fish to Support a Moderate Livelihood: Characterizing Aboriginal and Treaty Rights to Canadian Fisheries" (2010) 1:1 Arctic Rev on Law and Politics 82 at 103.

> the very aboriginal right to fish itself, on the ground that this is required for the reconciliation of aboriginal rights and other interests and the consequent good of the community as a whole. This is…limitation on the basis of the economic demands of non-aboriginals. It is a limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*.[125]
>
> …
>
> The exercise of the rights guaranteed by section 35(1) is subject to reasonable limitation to ensure that they are used responsibly. But the rights themselves can be diminished only through treaty and constitutional amendment. To reallocate the benefit of the right from aboriginals to non-aboriginals would be to diminish the substance of the right that section 35(1)…guarantees to the aboriginal people. This no court can do.[126]

Certainly, widening the scope of valid objectives that may interfere with section 35 rights to include interests that do not enjoy constitutional protection undermines constitutional supremacy. Other interests (which are not constitutionally protected) are now considered sufficiently valid objectives to infringe constitutionally protected Aboriginal rights under the first branch of the justification test. This circumscription of constitutional supremacy detracts from the protection of Aboriginal rights.

Honour of the Crown

The next part of the justification test requires the government to show that the infringement is consistent with the honour of the Crown in relation to Aboriginal peoples. A number of factors are required to prove the honour of the Crown, including priority, minimal infringement, compensation, and consultation. Although these factors arise depending on the circumstances and do not represent an exhaustive list,[127] the "Crown must satisfy all aspects of the test if it is to succeed."[128]

[125] *Van der Peet*, *supra* note 6 at para 310.
[126] *Ibid* at para 315.
[127] *Sparrow*, *supra* note 4 at 1119.
[128] *Halfway*, *supra* note 116 at 167.

Priority

The first indicator of the honour of the Crown is that government has given Aboriginal rights priority. McNeil provides this example:

> Where utilization of a resource must be limited to meet the valid objective of conservation, the impact of the conservation measures must limit non-Aboriginal use of the resource first. The reason for this is that Aboriginal rights to the resource are constitutionally protected, and therefore must be given priority over the rights of other users which are not constitutionally protected.[129]

Sparrow established that after conservation, Aboriginal food fisheries have priority over commercial and recreational fisheries.

Gladstone changes the priority requirement by distinguishing between Aboriginal rights with inherent limitations and those without. According to *Gladstone*, an Aboriginal right with an "inherent limitation" (meaning a right which is clearly satisfied at some point, such as a right to fish for food) may be worthy of priority over non-Aboriginal interests.[130] The SCC found that, for Aboriginal rights without such internal limits (such as a right to fish commercially) such a notion of priority would give exclusive access to the Aboriginal rights holder.[131] To avoid this outcome, the SCC imposes a lesser test:

> [T]he doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users.[132]

Another case reveals that actual priority may be precluded by factual circumstances. In *R.* v. *Jack*, the geographic locations of commercial and Aboriginal fisheries precluded effective priority because fish were intercepted in commercial fishing grounds (located in the ocean)

[129] McNeil, "Infringements", *supra* note 105 at 34.
[130] *Gladstone*, *supra* note 54 at paras 57-58.
[131] *Ibid* at para 59.
[132] *Ibid* at para 62.

before reaching Aboriginal fishing grounds (located in rivers).[133] So, as a matter of fact, commercial fishers had the first opportunity to harvest salmon. Even though priority exists at law, it might not occur on the ground.

Sparrow, *Jack*, and *Gladstone* were considering priority with respect to the allocation of a single resource. The concept of priority becomes more complicated when different resources are at issue. For example, in *Tsilhqot'in* v. *British Columbia*, the BC Supreme Court weighed forestry developments against Aboriginal title and rights. In doing so, Vickers J. held that the absence of baseline information indicated that the Crown did not, and could not, properly prioritize Aboriginal rights.[134] Moreover, he acknowledged that the provincial forestry legislation's primary objective was to maximize the economic return from provincial forests, while the preservation of wildlife for the continued well-being of Aboriginal people was very low on the scale of priorities; this stated objective revealed that British Columbia had not given Aboriginal rights adequate priority.[135] The BC Court of Appeal affirmed the lower court's decision on priority, based on the Province's failure "to gather important information before choosing its course of conduct."[136] Because *Gladstone* has introduced a "reasonable priority" standard, priority for Aboriginal rights is not automatic, but instead subject to the discretion of the Crown and the courts to determine how much priority (if any) Aboriginal rights are afforded in relation to competing interests.

The concept of priority in the Nuxalk eulachon case is complicated. The case is not about allocating a single resource from a single location. Instead, the case involves two separate fisheries, and their harvests occur at two separate locations. The shrimp trawl fishery occurs in

[133] *R v Jack*, [1996] 5 WWR 45 (BCCA).
[134] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 [*Tsilhqot'in Nation*] at paras 1293-94.
[135] *Ibid* at para 1286.
[136] *Tsilhqot'in*, *supra* note 76 at para 341.

the open ocean, outside of Nuxalk territory. The Nuxalk eulachon fishery occurs primarily in the Bella Coola River. Eulachon spend the majority of their lives in the ocean, and return to rivers to spawn. Shrimp trawlers intercepted the vast majority of Central Coast eulachon as by-catch in the ocean, before the eulachon could return to the rivers in Nuxalk territory. At a very pragmatic level, the geographic locations of each fishery precluded the Nuxalk eulachon fishery from enjoying actual priority because the eulachon were caught by the shrimp trawl fishery in the ocean before they could return to Nuxalk territory. Arguably, section 35 arguably obliges the Crown to give Aboriginal rights priority over commercial interests regardless of where each fishery occurs, so the Crown arguably breached this obligation by managing the trawl fisheries in a way that undermined Nuxalk eulachon fishing rights.

At a commercial level, the DFO valued shrimp more than eulachon, and accordingly prioritized the commercial shrimp trawl fishery over Aboriginal eulachon fisheries. Eulachon is primarily an Aboriginal fishery; non-Aboriginal fishers have minimal interest in it.[137] Because the eulachon fishery has a low significance to other Canadians, the DFO knew little about eulachon.[138] When the DFO opened the shrimp trawl fishery in Queen Charlotte Sound, it was unaware of the potential impact of that fishery on eulachon. The courts instruct that a proper determination of priority must be based on sufficient information otherwise the Crown cannot properly assess the potential impacts of government action on Aboriginal rights.[139] It is impossible for the Crown to prioritize Aboriginal rights in the absence of adequate information.[140] Therefore, it is unlikely that the DFO would be able to demonstrate that it gave adequate priority to the Nuxalk Nation's Aboriginal rights to fish and trade eulachon under the

[137] Hay & McCarter, *supra* note 102 at 37.
[138] Megan Moody & Tony Pitcher, "Eulachon (*Thaleichtys Pacificus*) Past and Present" (2010) 18:2 University of British Columbia Fisheries Centre Research Reports 1 at 2 and 41.
[139] *Tsilhqot'in Nation*, *supra* note 134 at para 1294, aff'd *Tsilhqot'in*, *supra* note 76 at para 341.
[140] *Ibid.*

justification analysis in relation to the 1997 Queen Charlotte Sound Shrimp Trawl Fishery opening. With respect to the DFO's current openings of trawl fisheries, there is an ongoing lack of clarity about eulachon by-catch populations. Priority must be determined using adequate credible information, so in these circumstances, it would be difficult for the DFO to show that it has given Nuxalk eulachon rights appropriate priority.

The priority requirement has been diluted since *Sparrow* as a result of Lamer C.J.'s differentiation between Aboriginal rights with inherent limitations and those without. Harris and Millerd observe that:

> Constitutional status for [commercial Aboriginal fisheries] does not confer the same priority as that enjoyed by the food fisheries. Instead, the standard for establishing constitutional status is higher, the priority that results is weaker, and the capacity of the government to justifiably infringe the right is notably greater than for food fisheries.[141]

Academics argue that the distinction between Aboriginal commercial and food fisheries is arbitrary: regardless of the end-use of the product of the exercise of an Aboriginal right (e.g. for personal consumption, trade, or sale), Aboriginal rights are constitutionally protected by section 35 and deserve priority over interests that are not constitutionally protected. McNeil agrees:

> The main problem with Lamer C.J.'s approach [in *Gladstone*] is that it ignores the *Sparrow* rationale for giving top priority to Aboriginal fishing rights, namely that those rights are constitutionally protected while the rights of non-Aboriginal users of the resource are not. It is the constitutional status of the Aboriginal right which determines its priority, not the nature of the specific Aboriginal right in question.[142]

What remains post-*Gladstone* is a vague notion of priority "requiring the courts to scrutinize government action for reasonableness on a case-by-case basis."[143] Subsequent decisions have

[141] Harris & Millerd, *supra* note 124 at 100.
[142] McNeil, "Infringements", *supra* note 105 at 38.
[143] *Gladstone*, *supra* note 54 at para 307. McNeil notes that "in *Sparrow* the Court specifically rejected reasonableness as a standard…because reasonableness was not a sufficient justification for infringing constitutional rights." ("Infringements", *supra* note 105 at 38.)

applied the "reasonable priority" standard, regardless of whether they are commercial rights or not.[144] The concept of reasonableness is subjective: what the Crown and courts perceive as reasonable may vary significantly from what Aboriginal peoples consider to be reasonable.

Minimal Infringement

The second signifier of the honour of the Crown is that the government infringed Aboriginal rights as little as possible in pursuit of its objective. Government must demonstrate that there has been as little infringement of Aboriginal rights as possible to achieve the desired objective. Minimal infringement does not mean no interference, and the mere fact that alternatives might have imposed a lesser infringement does not, in itself, lead to an automatic finding of no justification.[145] Instead, the question is whether the infringement "in the context of the circumstances…could reasonably be considered to be as minimal as possible."[146] Under the minimal infringement requirement, government should choose the course of action that impacts the least on Aboriginal rights, and should demonstrate that other options were explored.

In the Nuxalk eulachon case, the DFO was initially unaware that opening the Queen Charlotte Sound Shrimp Trawl Fishery would extirpate the Central Coast eulachon. As mentioned above, the Department had a duty to base its action on adequate information, and it failed to do so. The government must consider the existing state of affairs in determining the extent of infringement that the current decision will have on an Aboriginal right.[147] COSEWIC has recommended that Central Coast eulachon be listed as "endangered" on the *SARA* list. Considering the current state of the eulachon, the continuing trawl openings likely have

[144] See for example: *R v Douglas*, 2007 BCCA 265, *R v Quipp*, 2011 BCCA 235, and *R v Aleck*, 2008 BCSC 1096.
[145] *Halfway*, *supra* note 116 at para 153.
[146] *R v Nikal*, [1996] 1 SCR 1013 at para 110.
[147] *West Moberly*, *supra* note 17 at para 119.

significant impacts on a species that is on the brink of extinction. Certainly, in the Recovery Potential Assessment of Eulachon, Schweigert et al observe that:

> It is clear that eulachon can be captured and killed in shrimp nets as bycatch…. [T]he mortality related to bycatch may impede potential recovery…. It follows that reduction and elimination of bycatch in shrimp fisheries is a worthwhile objective.[148]

Moreover, they recommend that "all reasonable measures should be taken to avoid interception of eulachon in groundfish nets."[149] Some of the eulachon caught as by-catch in ongoing trawl fisheries may be Central Coast eulachon, so the by-catch destruction could be exacerbating the already infringed Nuxalk Aboriginal rights in relation to eulachon. The extirpation of a species central to the exercise of a constitutionally protected Aboriginal right would likely constitute a major infringement, so arguably, a significant factor in the imminent extirpation of the eulachon (the ongoing destruction of eulachon as by-catch in trawl fisheries, permitted by the DFO) would likely fail to meet the minimal infringement standard.

However, it is difficult to predict what the courts will do. In *Tsilhqot'in*, the BC Court of Appeal turned the minimal infringement requirement on its head:

> the goal of reconciliation…demands that, so far as possible, the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians.[150]
>
> ...
>
> [T]here is a need to search out a practical compromise that can protect Aboriginal traditions without unnecessarily interfering with Crown sovereignty and with the well-being of all Canadians.[151]

Under the Court of Appeal's approach, Aboriginal rights are perceived as an inconvenience to Crown sovereignty and mainstream Canadians. Seemingly, the minimal infringement

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[148] J Schweigert et al, "Recovery Potential Assessment of Eulachon *(Thaleichthys pacificus)*" *Canadian Science Advisory Secretariat Research Document 2012/098* (Ottawa: DFO, 2012) at 8.
[149] *Ibid* at 7.
[150] *Tsilhqot'in*, *supra* note 76 at para 219.
[151] *Ibid* at para 239.

requirement has been reversed: the exercise of Aboriginal rights must inconvenience the sovereignty of the Crown and mainstream society as minimally as possible.[152] It is difficult to imagine how Aboriginal rights could be respected without requiring the Crown or Canadian society to budge.

Compensation

The third element in determining whether the Crown has acted honorably in infringing an Aboriginal right is whether government has offered adequate compensation. As Metcalf observes:

> The day has not yet arrived when the Supreme Court establishes the principles that might help structure compensation entitlements arising from the justified infringement of aboriginal rights. The issue of how compensation for unjustified infringement of aboriginal rights should be determined is also outstanding.[153]

However, the courts have outlined principles for compensating breaches of Aboriginal rights. In a situation of expropriation, government must demonstrate that fair compensation is available. The mere fact that government offered compensation to Aboriginals is not sufficient to meet the justification test; the proposed compensation must be reasonable.[154] In *Delgamuukw*, Lamer C.J. explained that "[t]he amount of compensation payable will vary with the nature of the particular Aboriginal title affected and with the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated."[155] Although articulated in an Aboriginal title case, this principle would likely apply with respect to Aboriginal rights as well.

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[152] The BCCA decision in *Tsilhqot'in* has been appealed to the SCC. I anticipate that the reversed application of the minimal infringement standard will be corrected by the SCC.
[153] Cherie Metcalf, "Compensation as Discipline in the Justified Limitation of Aboriginal Rights: the Case of Forest Exploitation" (2007-2008) 33 Queen's LJ 385 at 405.
[154] E.g. the BC Supreme Court found that the government failed to justify infringement in offering Aboriginal nations economic compensation based on a fixed formula that was not acceptable to the Aboriginal nations. See: *Gwasslam v British Columbia*, 2004 BCSC 1734 and *Huu-ay-aht First Nation v British Columbia*, 2005 BCSC 697.
[155] *Delgamuukw*, *supra* note 36 at para 169.

There may be situations in which the loss of constitutionally protected rights cannot be adequately compensated, and the Nuxalk eulachon fishery likely constitutes such a situation. From the Nuxalk perspective, eulachon is irreplaceable, and monetary valuation of eulachon would be problematic for the Nuxalkmc. For instance, Power, Hagan, and Pitcher observed that Aboriginal participants at an ecosystem modeling and valuation workshop on the North Coast of British Columbia strongly objected to putting a dollar value on eulachon.[156] Nigel Hagan reflects on the objection:

> This is not to deny that eulachon have economic value, it is just that the monetary metric is inappropriate to represent the 'covenant' that reaches back to the time of creation, unites people to their lands, waters and cultural keystone species today and that can be maintained, through right action, into the deep future.[157]

The details provided in Chapter 3 suggest that the Nuxalkmc would share this outlook. For example, Janet Winbourne's thesis on the cultural significance of salmon reveals that Nuxalk people abhor assigning monetary value to salmon,[158] and it is logical to assume that this sentiment extends to eulachon as well. No amount of monetary compensation could make up for the loss of such a culturally significant species, and the Nuxalkmc would likely not be satisfied by compensatory relief, even if they could get it.[159] Instead, they want to restore eulachon to a harvestable level of abundance. To that end, the DFO has been supportive of Nuxalk eulachon research, enhancement, and restoration initiatives. That is not to say that the Canadian legal system is working – it has already failed the Nuxalkmc. Although it is likely that the Nuxalkmc could obtain compensation for the loss of the eulachon, I anticipate that the Nuxalk Nation would not pursue monetary compensation in any event.

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[156] MD Power, N Haggan, & TJ Pitcher, "Back to the Future: Advances in Methodology for Modeling and Evaluating Past Ecosystems as Future Policy Goals" (2004) 12:1 UBC Fisheries Centre Research Reports 1 at 128.
[157] Nigel Haggan, "The Case for Including the Cultural and Spiritual Values of Eulachon in Policy and Decision-Making" *Report Prepared for Fisheries and Oceans Canada* (Vancouver, 2010) [unpublished] at 16-17.
[158] Janet Winbourne, *Taking Care of Salmon: Significance, Sharing, and Stewardship in a Nuxalk Food Fishery* (MES Thesis, Dalhousie University, 1999) [unpublished] at 133-35.
[159] *Ibid* at 95.

The notion of compensation for breaches of Aboriginal rights is cause for concern. As Roach observes:

> In general, an assumption that monetary damages can compensate infringements of Aboriginal rights ignores that an important purpose of Aboriginal rights is to protect the collective ways of life of future generations as well as the threatening environmental, social and cultural context that many Aboriginal people find themselves in.[160]

Walkem asserts that:

> In effect, the compensation element – absent the need to seek Indigenous Peoples' consent – creates a judicially sanctioned form of expropriation, exercisable by government, in the broad public interest.
>
> …
>
> The *Constitution* itself does not protect Indigenous Peoples from infringement of their Aboriginal Title and Rights; what it does is entitle Indigenous Peoples to compensation *in lieu* of protection.[161]

Under the Canadian legal system, it is common for the Crown and companies to offer economic incentives to Aboriginal peoples as part of the consultation process. However, the Canadian courts have not dealt extensively with compensation for breaches of Aboriginal rights after the fact.[162]

This is not for lack of opportunity, as two cases involving asserted Aboriginal rights reveal. In *Lax Kw'alaams Indian Band* v. *British Columbia*, the Band sought to have forestry permits quashed. The forest company proceeded to log, and the BC Court of Appeal found the issue moot: "The permit the Band…sought to have quashed is exhausted and the trees are gone. The subject of the proceedings no longer exists and there is no continuing utility in the appeal. It is moot."[163] The same fact scenario occurred in *Campbell* v. *British Columbia* where the BC Court of Appeal decided: "whether the Crown had a legally enforceable duty to…the Sinixt with

[160] Kent Roach, "Remedies for Violations of Aboriginal Rights" (1991-1992) 21 Man LJ 498 at 507.
[161] Walkem, *supra* note 119 at 215-216.
[162] Metcalf, *supra* note 153 at 405.
[163] *Lax Kw'alaams Indian Band v British Columbia*, 2005 BCCA 140 at para 21.

respect to the issuance of [a] Timber Sale Licence…has now become academic. No 'concrete controversy' remains."[164] These cases reveal flagrant breaches of asserted Aboriginal rights. Even so, the Court of Appeal in these two cases declined to provide the Aboriginal claimants with declaratory relief or compensation. Such decisions set the precedent that disregarding asserted Aboriginal rights is inconsequential; accordingly there is no incentive for the Crown to recognize or affirm Aboriginal rights in its decisions.

Consultation

The final element in determining the honour of the Crown is whether government has consulted with the affected Aboriginal nation before infringing Aboriginal rights. The degree of government consultation is part of the justifiable infringement test, but consultation has evolved into a significant doctrine that the Canadian legal system applies when dealing with Aboriginal rights. The Crown's duty of consultation applies to Aboriginal rights before they are proven through Canadian legal processes. Consultation is meant to preserve an Aboriginal interest pending claims resolution.[165]

As the SCC in *Haida* v. *British Columbia* explains, "[t]he government's duty of consultation arises when the government has knowledge of the potential existence of an Aboriginal…right and contemplates conduct that might adversely affect it."[166] This wording is very broad. There are just two requirements to trigger the duty: knowledge of a potential Aboriginal right and contemplated adverse effect. The Crown's contemplated conduct must have the potential to cause a novel adverse impact on an asserted Aboriginal right.[167]

[164] *Campbell v British Columbia*, 2012 BCCA 274 at para 16.
[165] *Haida Nation v British Columbia*, 2004 SCC 73 [*Haida*] at para 38.
[166] *Ibid*.
[167] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* 2010 SCC 43 [*Rio Tinto*] at para 49.

Once triggered, the amount of consultation required depends on the strength of the Aboriginal claim and the potential impact on the asserted right.[168] The SCC described the scope of consultation as a spectrum. At the low end of the spectrum, where the Aboriginal claim is weak or the potential impact is minor, the government may only be required to give notice, disclose information, and discuss Aboriginal responses to the notice.[169] At the high end of the spectrum, where a strong claim is made and the potential infringement is significant, deep consultation aimed at finding a satisfactory solution may be required.[170] The more important the right and the more impact there is, the higher the duty of consultation.

When consultation reveals the need to change government action, the duty of accommodation is triggered.[171] In circumstances involving a strong Aboriginal claim and a significant impact on the claimed right, the government may be required to take steps to avoid irreparable harm or to minimize the effects of the infringement.[172] Where accommodation is required, the government must balance Aboriginal concerns reasonably with non-Aboriginal interests.[173] Despite consultation and accommodation, ultimate decision-making authority remains with the Crown. Consultation "does not give Aboriginal groups a veto,"[174] but where an Aboriginal right is proven and the impact on the right will be severe, Aboriginal consent may be required.[175] The government is not under a duty to reach an agreement with Aboriginals.[176] All

[168] *Haida*, *supra* note 165 at para 39.
[169] *Ibid* at para 43.
[170] *Ibid* at para 44.
[171] *Ibid* at para 47.
[172] *Ibid*.
[173] *Ibid* at para 50.
[174] *Ibid* at para 48.
[175] This is hypothetical; Canadian jurisprudence has never required Aboriginal consent under the duty of consultation.
[176] *Haida*, *supra* note 165 at para 10.

that is required is that the government commit to a meaningful process of consultation in good faith.[177]

The duty of consultation is most pertinent prior to the infringement of Aboriginal rights – to preserve asserted Aboriginal interests pending claims resolution.[178] In the Nuxalk case, consultation is most relevant to the DFO's continued openings of trawl fisheries, and to the DFO's *SARA* listing process.

When the DFO initially opened the Queen Charlotte Sound Shrimp Trawl Fishery in 1997, the requirements under the duty of consultation had not yet been clarified by Canadian courts. Now that the duty of consultation has been clarified, the Nuxalkmc cannot go back to seek redress for an earlier breach of the duty of consultation.[179] The DFO closed the Queen Charlotte Sound shrimp trawl fishery once it realized the impact on the eulachon. Nevertheless, other fisheries management areas on the Pacific Coast are opened to trawlers each year. The Nuxalkmc are concerned that Central Coast eulachon may be caught in the areas that are open, and are dissatisfied with the DFO's lack of consultation regarding ongoing trawl openings on the Pacific Coast.

Where a strong case for an Aboriginal right exists, and "the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm".[180] Any impact that could threaten the viability of a culturally significant species might be so severe that any proposed infringement would not be justifiable. Arguably, the possible extirpation of a culturally significant Aboriginal right deserves an Aboriginal veto with respect to the proposed

[177] *Ibid* at para 42.
[178] *Ibid* at para 38.
[179] *Rio Tinto*, *supra* note 167 at para 45.
[180] *Haida*, *supra* note 165 at para 47.

infringement. Even so, the courts are unlikely to require Aboriginal consent. Because the courts weigh Aboriginal rights against societal interests such as economic benefits, it would be particularly difficult for an Aboriginal claimant to establish a veto if the veto would have major economic repercussions. In the case of the eulachon fishery, an Aboriginal veto could shut down all trawl fisheries on the Pacific Coast of British Columbia. This is a highly unlikely outcome under the Canadian legal system.

West Moberly First Nations v. *British Columbia* involves similar facts to the Nuxalk eulachon crisis. The West Moberly First Nation challenged exploration permits that interfered with the habitat of an endangered species of caribou that the First Nation had a treaty right to hunt.[181] The BC Court of Appeal held that the current status of a culturally significant species is relevant to determining the severity of a proposed infringement. The Court suspended the exploration permits, but sent the impact of proposed exploration on endangered woodland caribou back for further consultation. The possible extirpation of woodland caribou did not persuade the BC Court of Appeal to provide the First Nation with a veto with respect to the contested exploration permits. *West Moberly* was influenced by the precedent set in *Haida* – that consent is only required for established Aboriginal rights, and only in rare circumstances.[182] If the endangered status of the woodland caribou was not sufficient to provide West Moberly First Nation with a veto in relation to exploration permits that threatened caribou habitat, then it would be difficult to expect that the Nuxalkmc would hold a veto in relation to the ongoing trawl fisheries that threaten eulachon.

Instead, the DFO would likely argue for a lower threshold of consultation with the Nuxalkmc based on geographic proximity. As explained above, Aboriginal rights may have

[181] The First Nation had refrained from hunting the species because of its endangered status.
[182] *Haida*, *supra* note 165 at para 48.

territorial limitations.[183] The courts might find that Aboriginal rights that are exercised in closer geographic proximity to a proposed activity will generate a higher duty of consultation than Aboriginal rights that are grounded farther away from the activity. Because the trawl fisheries occur outside of Nuxalk territory, the courts might find a low standard of consultation with the Nuxalk Nation is required.

In relation to the *SARA* consultations, the Nuxalkmc foresee that a listing of eulachon as anything other than "endangered" will likely have serious implications for the viability of the species. If eulachon become extinct, then Nuxalk rights to protect and restore eulachon would be extinguished as a matter of fact. Arguably, the Nuxalkmc should have a veto with respect to a culturally significant species on the brink of extinction, but this outcome is unlikely.

As explained in Chapter 3, the Nuxalkmc are frustrated with the DFO's low level of consultation with respect to the potential listing of eulachon under *SARA*.[184] Chapter 3 left off where COSEWIC had established three Designatable Units (DUs) of eulachon populations, contrary to the Nuxalk assertion that there should be at least eight. For reasons explained in Chapter 3, COSEWIC's current DU structure increases the possibility that eulachon will not be listed as "endangered" and accordingly would not be protected from industrial fisheries. Such an outcome would likely thwart Nuxalk efforts to protect and restore eulachon populations. COSEWIC'S DU structure has set the stage for the DFO's ensuing consultations.

Once the DFO receives COSEWIC's assessment, the DFO proceeds with the *SARA* listing process using the DUs that COSEWIC has provided. Although COSEWIC should have

[183] *Côté, supra* note 20.
[184] Megan Moody & Wally Webber, "2012 Nuxalk Ooligan Update" *Flyer Prepared for the Nuxalk Nation* (Bella Coola: April 2012) [unpublished] at 2.

considered Nuxalk traditional knowledge in the assessment of DUs, it did not.[185] It is unlikely that the Nuxalkmc would be able to challenge COSEWIC's DU structure through the courts. Despite applying three DUs instead of eight, COSEWIC recommended that Central Coast eulachon be listed as "endangered" under *SARA* – which is the result the Nuxalkmc wanted. The Nuxalkmc would not be able to challenge a favourable end result in court, even if they disagreed with characterization of the facts that led to the result. Moreover, COSEWIC is an independent scientific body whose role is to provide recommendations to government regarding whether to list species under *SARA*; "the government ultimately decides whether to add the species in question to the *SARA* registry."[186]

The DFO's consultation with the Nuxalkmc based on a flawed DU structure reveals a problem that results from a failure to consult Aboriginals in the initial phases of decision-making processes. The Nuxalkmc were left out of the determination of the number of DUs, and all consultations that follow are based on the flawed DU structure. The Nuxalkmc believe that the effective protection of eulachon would require that eulachon be listed as "endangered" under *SARA*, and that a recovery strategy for eulachon be based on eight DUs rather than the three that are currently being considered by the DFO.[187] The DFO is consulting the Nuxalkmc on the three DUs, and there is no way for the Nuxalkmc to change that premise through the courts.

In addition to the flawed DU structure, the DFO's approach to the *SARA* consultation regarding the eulachon is modest. The DFO's stated objectives for eulachon consultations are to:

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[185] Committee on the Status of Endangered Wildlife in Canada, *Assessment and Status Report on the Eulachon* Thaleichthys pacificus *Nass/Skeena Rivers population, Central Pacific Coast population, Fraser River population in Canada* (2011) [COSEWIC Report] at xiv.
[186] Mooers et al, "Science, Policy, and Species at Risk in Canada" (2010) 60:10 BioScience 843 [Mooers et al, "Policy"] at 843.
[187] Fisheries and Oceans Canada, "Nuxalk First Nation Meeting: Central Pacific Coast Population Potential SARA Listing of Eulachon" *Meeting Report* (Bella Coola, BC: April 24, 2012) [unpublished] at 3.

> provide information to First Nations on the *Species at Risk Act* (*SARA*) process for the possible listing of Eulachon; seek input and feedback from First Nations that will inform the Eulachon *SARA* listing recommendation; and provide opportunities for clarification and dialogue/discussion about issues related to the listing process.[188]

The DFO is conducting consultation at the low end of the consultation spectrum – merely informing the Nuxalkmc about the listing process, and allowing the Nuxalkmc to discuss issues related to the process – without any pretence that Nuxalk concerns will be substantively addressed.[189]

The low standard of consultation is likely influenced by the fact that the listing process is still at a preliminary stage in relation to the overall *SARA* scheme. Although the Nuxalkmc foresee that the eventual listing of the eulachon (as "endangered" or not) will have major implications on Nuxalk rights to protect and restore eulachon populations, the DFO's listing decision will not have an immediate impact on the eulachon; decisions that have more direct impacts on eulachon will happen later (e.g. the development of a recovery strategy and the identification of critical habitat if they are listed as "endangered," or the granting of permits that could harm eulachon or eulachon habitat if they are not). Although the SCC has instructed that Aboriginal nations should be involved in strategic level decisions affecting their rights, government decision-makers tend to break decisions down into separate phases, and then take the position that each decision at each phase minimally interferes with Aboriginal rights. For example, in *Rio Tinto Alcan* v. *Carrier Sekani Tribal Council*, the SCC held that the duty to consult is confined to "adverse impacts flowing from the specific Crown proposal at issue – not to larger adverse impacts of the project of which it is a part. The subject of the consultation is

[188] *Ibid* at 2.
[189] *Ibid*.

the impact on the claimed rights of the *current* decision under consideration."[190] However, when all of the decisions are combined, the end result of incremental decisions may severely impact Aboriginal rights.

Another factor that likely influences the DFO's minimal approach to consultation with respect to the *SARA* listing process is the fact that *SARA* is geared toward conservation. Under *Sparrow*'s justification doctrine, conservation is a legitimate mandate to subordinate Aboriginal rights, so the courts would likely presume that the conservation goal of *SARA* allows the DFO to apply a low standard of Aboriginal consultation. Ironically, the Nuxalkmc would prefer a higher standard of consultation to advocate for increased conservation with respect to the eulachon. The Nuxalkmc want eulachon to be listed as "endangered" which would limit their ability to fish eulachon, but would increase their ability to protect and restore eulachon. The Nuxalkmc are worried that the DFO will not list eulachon as "endangered," thus undermining Nuxalk eulachon protection and restoration efforts.

As with Aboriginal rights, the *SARA* listing process is also influenced by economic interests. The process requires the DFO to prepare a socio-economic analysis and to consult with stakeholders, including commercial fishers. A number of scholars have criticized the political factors that influence the *SARA* listing process, as well as the implementation of *SARA*. These scholars have observed that the protection and recovery of species at risk is undermined by competing policy objectives, including economic considerations.[191] They perceive the

[190] *Rio Tinto*, *supra* note 167 at para 53. See also *Apsassin v BC Oil and Gas Commission*, 2004 BCSC 92 [*Apsassin*].

[191] See for example David Vanderzwaag & Jeffrey Hutchings, "Canada's Marine Species at Risk: Science and Law at the Helm, but a Sea of Uncertainties" (2005) 36 Ocean Devel & Int'l L 219; David Vanderszwaag, Maria Engler-Palma, & Jeffrey Hutchings, "Canada's *Species at Risk Act* and Atlantic Salmon: Cascade of Promises, Trickles of Protection, Sea of Challenges" (2011) 22 J Envtl L & Prac 267; Mooers et al, "Biases in Legal Listing under Canadian Endangered Species Legislation" (2007) 21:3 Conservation Biology 572; and Mooers et al, "Policy", *supra* note 186.

government's consideration of economic factors in relation to *SARA* to be detrimental to the protection of species at risk.[192]

If eulachon are listed as "endangered" under *SARA*, then it will be illegal to kill, harm, harass or capture eulachon.[193] This could have huge implications for trawl fisheries on the Pacific Coast. Eulachon by-catch concerns could impact trawl fisheries, which will likely deter the DFO from listing Central Coast eulachon as "endangered".[194] The DFO's socio-economic analysis and stakeholder consultations will likely override the Nuxalkmc Aboriginal rights to fish, trade, protect, and restore eulachon. It is unlikely that the Nuxalkmc could force the DFO to list eulachon as "endangered" through the consultation process.

Moreover, even if eulachon were to be listed as "endangered," effective protection and restoration of eulachon would not be guaranteed. For example, *SARA* only applies within the realm of federal jurisdiction, but as explained in Chapter 3, British Columbia exercises jurisdiction in a number of ways that directly or indirectly impact fish. In addition, section 73(c) of *SARA* allows the DFO to permit an activity that is "incidental in the effect on the species". Although trawl fisheries likely have direct impacts on eulachon,[195] section 73(c) opens the door for trawl fishers to make the argument that their by-catch of eulachon constitutes an incidental effect of trawling. If the DFO accepts this argument, then it could permit by-catch harvests of eulachon by trawlers to continue. Even so, a listing of "endangered" would provide certain

[192] See Findlay et al, "Species Listing Under Canada's Species at Risk Act" (2009) 23 Conservation Biology 1609, which provides statistical evidence that economic concerns were given as an explicit reason for denying *SARA* listings in 50% of the cases in 2007.
[193] *SARA*, *supra* note 2, s 32.
[194] Mooers et al reveal that marine fish have the lowest rate of *SARA* listing as "endangered". From 2004-2006, only 9% of marine fish proposed to be listed under *SARA* were listed, compared to 100% of herpetofauna, 100% of birds, 97% of plants, and 89% of invertebrates. ("Policy", *supra* note 186 at 573.) They attribute the low marine fish listing to the economic value of commercial fisheries which, they contend, deters the DFO from listing marine fish species. (*Ibid*.)
[195] J Schweigert et al, *supra* note 148 at 8.

protections such as the identification of critical habitat and the development and implementation of recovery strategies. Moreover, "endangered" status would carry political and symbolic weight that could help the Nuxalk people in raising awareness and garnering support for their eulachon protection and restoration efforts.

The application of the consultation doctrine to the Nuxalk eulachon crisis reveals a number of shortcomings regarding the Canadian legal system's approach to consultation.

First, the Crown's perspective is paramount under the doctrine of consultation. As Christie points out:

> When the Crown is obligated to consult with an Aboriginal nation, the consultation does not involve how this nation might see itself in relation to its lands. Nor does the consultation concern how the latter vision might inform how people in general will interact with that land. Rather, the Crown is obligated to consult about how *its* visions of land use will be implemented.[196]

Similarly, Collins and Murtha acknowledge that "The consultation requirement as articulated by the Supreme Court of Canada is a process in which the Crown sets the terms for the discussion and has the power to unilaterally impose a result."[197] Indigenous legal order and jurisdiction do not factor into the consultation doctrine. Ultimate decision-making authority remains with the Crown.

Second, consultation is an aspect of the justification analysis from *Sparrow*, so the balancing of Aboriginal rights against other interests has infiltrated the doctrine of consultation. Where accommodation is required, the government must balance Aboriginal concerns reasonably with non-Aboriginal interests.[198] This does not go far enough. The *Constitution* instructs that Aboriginal rights must be "recognized and affirmed"; the Supreme Court of Canada

[196] Christie, *supra* note 37 at 42 [citations omitted, emphasis in original].
[197] Collins & Murtha, *supra* note 64 at 989.
[198] *Haida*, *supra* note 165 at para 50.

introduced "accommodation" as a concept to reconcile asserted Aboriginal rights and mainstream interests, which appears to be a weaker standard than the recognition and affirmation that the *Constitution* requires. Because the Canadian courts weigh Aboriginal rights against societal interests (and the balance is weighed in favour of economic benefits), it would be particularly difficult for an Aboriginal claimant to establish a veto if the veto would have major economic impacts.

Third, consultation is focused on procedure and rarely requires government to address the substance of Aboriginal concerns. Since Aboriginal consent is not required, process is more important than substance in consultation. If the courts perceive the process to be fair, then they will find consultation is sufficient, regardless of whether Aboriginal concerns were actually addressed in the outcome. Where courts have found breaches of consultation, courts have suspended licences[199] and granted injunctions in favour of Aboriginal claimants,[200] and have ordered the parties to consult with each other. Because the consequences for failing to meet consultation requirements are minor, governments have little incentive to substantially address Aboriginal concerns through consultation. Consultation and accommodation have done little to protect Aboriginal rights.

Fourth, the fragmentation of the Canadian legal system also affects the consultation doctrine. Aboriginal rights are considered separately from underlying Indigenous sovereignty, on a case-by-case, site-specific, and (sometimes) species-by-species basis. Moreover, consultation is limited to "the impact on the claimed rights of the current decision under consideration."[201] Aboriginal rights are considered on a decision-by-decision basis under the

[199] *Musqueam Indian Band v British Columbia*, 2005 BCCA 128.
[200] *Platinex v Kitchenuhmaykoosib Inninuwug First Nation*, [2006] OJ No 3140 (Ont SCJ).
[201] *Rio Tinto*, *supra* note 167 at para 53.

doctrine of consultation, even though Aboriginal rights may be affected by multiple decisions made simultaneously, and by incremental decisions made over time. The Canadian legal system's consideration of Aboriginal rights in isolation – in all of these ways – contributes to the erosion of Aboriginal rights, weakens the Crown's duty of consultation, and impedes their effective protection.

The Canadian legal system's requirement for consultation regarding cumulative effects is unclear. Cumulative effects are "the effects on the environment, over a certain period of time and distance, resulting from effects of a project when combined with those of other past, existing, and imminent projects and activities."[202] In *Apsassin* v. *BC Oil and Gas Commission*, the Saulteau First Nation argued that the failure of the British Columbia Oil and Gas Commission (the Commission) to consider cumulative impacts prior to issuing a permit for the construction of a sour gas test well site within Saulteau traditional territory threatened to eliminate their Aboriginal rights via "death by a thousand cuts."[203] Even so, the BC Supreme Court held that the Commission had no legal obligation to conduct a cumulative impact assessment prior to issuing the permit.

More recently, in *West Moberly* the BC Court of Appeal considered whether it is appropriate to consider past wrongs, cumulative effects, or future impacts on the Aboriginal right in question, or whether consultation should focus only on the effect of the particular decision at issue. In a split decision, all three judges agreed that "the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt."[204] Finch, C.J. explains:

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[202] *Bow Valley Naturalists v Canada*, (CA) [2001] FCJ No 18 at para 40.
[203] *Apsassin*, *supra* note 190 at para 4.
[204] *West Moberly*, *supra* note 17 at para 117.

> To take those matters into consideration as within the scope of the duty to consult is not to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from pursuit of the exploration programs.[205]

According to *Rio Tinto*, the duty of consultation is confined "to adverse impacts flowing from the specific Crown proposal at issue – not to larger adverse impacts of the project of which it is part."[206] Under this model of consultation, the cumulative effects of multiple developments permitted by the Crown through individual approval processes could completely negate an Aboriginal nation's rights over time. If separate consultations are required for separate developments, each development may have impacts on Aboriginal rights. Impacts from each development will add up, and each time, Aboriginal rights will be further diminished. Over time, Aboriginal rights may become completely eroded and no longer practicable. Although the law surrounding consultation on cumulative effects remains unclear, it is apparent that narrowly defined consultations are undermining the effective protection of Aboriginal rights.

Fifth, under the current approach to consultation, Aboriginal peoples are often left out of strategic level planning and only consulted regarding operational decisions. Decisions made at the strategic level inform overarching long-term objectives such as whether and where resource development might occur. This contrasts with the operational level of decision making where the presumption is that resource development will proceed, and the decisions concern specific details about how the activity will be carried out. Meaningful consultation requires Aboriginal involvement at the strategic and operational levels.[207]

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[205] *Ibid* at para 119.
[206] *Rio Tinto, supra* note 167 at para 53.
[207] For example,. in *Haida*, *supra* note 165 at para 76, the SCC found that for consultation to be meaningful, it should occur at the strategic level.

Sixth, another potential difficulty is that the Crown's duty of consultation may be tied to geography. As mentioned above, Aboriginal claimants can only exercise Aboriginal rights within their own territories.[208] If Aboriginal rights are geographically constrained, then it is likely that the courts would find that a closer geographic proximity will yield a higher duty of consultation. An Aboriginal nation with a territorial claim to an area where a development is proposed might have a higher level of consultation than a downstream Aboriginal nation that is also affected by the development.[209]

So although consultation is meant to enhance Aboriginal rights by providing some form of recognition before proof under Canadian law, in practice consultation further erodes Aboriginal rights. The common law's creation of a pre-recognition status for Aboriginal rights discourages courts and governments from recognizing or affirming such rights. Consultation, as it is currently applied by courts and governments, is an evasion tactic that provides little substance to Aboriginal rights. Consultation is a distraction from the real issue: Indigenous authority to make decisions with respect to their territories and rights.

Summary of the Justification Analysis

In view of this analysis, the likely outcome of the justification analysis in relation to the Nuxalk eulachon is, first, that a court would find that the DFO is responsible for two types of *prima facie* infringements of Nuxalk rights to fish, trade, protect, and restore eulachon: allowing the by-catch of eulachon in trawl fisheries, and considering eulachon for listing under the *SARA*. Second, based on the SCC's expansion of valid objectives to include "the recognition of the

[208] *Côté*, *supra* note 20.
[209] In *Neskonlith Indian Band v Salmon Arm*, 2012 BCCA 379, the Aboriginal claimants raised the issue of downstream effects. However, the BCCA found that municipalities do not owe Aboriginal peoples a duty of consultation, so did not consider the downstream effects issue.

historical reliance upon, and participation in, the fishery by non-aboriginal groups"[210] in *Gladstone*, a court would likely find that the 1997 and ongoing trawl fisheries constitute a valid legislative objective to justify an infringement of the Nuxalk Nation's rights to fish and trade eulachon. However, a court would likely find that the DFO failed to meet the honour of the Crown with respect to the past and present trawl fisheries. In 1997, the DFO failed to give Nuxalk eulachon-related rights priority over commercial trawl fisheries. At present, the DFO is not using sufficiently credible information in order to determine priority. A court would likely find that the DFO has failed to meet the minimal infringement standard as well. The DFO's 1997 opening of the shrimp trawl fishery in Queen Charlotte Sound extirpated the Central Coast eulachon – a major infringement of Nuxalk rights. The DFO's current trawl openings would likely fail to meet the minimum infringement standard, because the DFO did not consider the current state of affairs in determining the extent of the impact of trawl fisheries on Nuxalk rights. COSEWIC's recommendation that Central Coast eulachon be listed as endangered reveals the severity of the situation; any additional interference with eulachon has the potential to extinguish Nuxalk rights. Since COSEWIC has recommended that Central Coast eulachon be listed as "endangered," the DFO's ongoing openings of trawl fisheries in other areas would likely not meet the minimal infringement requirement. Although a court may award compensation to the Nuxalk Nation, it is unlikely that the Nuxalkmc would be satisfied with that result. Finally, the extent of the DFO's duty of consultation with respect to the 1997 shrimp trawl fishery was unknown at that time, and the Nuxalkmc cannot seek retroactive redress for that consultation breach. The Nuxalkmc could demand consultation for ongoing trawl openings, but a court would likely find a low standard of consultation, primarily as a result of the lack of geographic proximity between Nuxalk territory and the trawl fisheries.

[210] *Gladstone*, *supra* note 54 at para 74.

With respect to the *SARA* infringement, it is likely that a court would find the *SARA* listing process is a valid objective for infringing Nuxalk eulachon rights. Because the DFO has not yet made a decision regarding the *SARA* listing of eulachon, consultation is presently the pertinent stage of the justification analysis. A court would likely find a low consultation requirement, and would likely determine that the DFO is meeting its consultation duties under the *SARA* listing process.

4.2.C. Remedies for Breaches of Aboriginal Rights

There are few remedies available to Aboriginal claimants for the breach of section 35 rights. Roach indicates that:

> The only explicit remedial provision governing s. 35 litigation is s. 52(1) of the *Constitution Act, 1982* providing "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."[211]
>
> …
>
> The ultimate remedy for the violation of Aboriginal rights is striking down state authority to the extent of its inconsistency with those rights.[212]

The courts have not exercised this power, but have instead balanced Aboriginal rights against the interests of broader society, and applied lesser remedies such as declarations with orders for the parties to continue negotiations.[213] For asserted but not yet established Aboriginal rights, orders for further consultations are standard.[214]

It is also common for the courts to avoid the consideration of remedies by denying the existence of Aboriginal rights at the outset. As Roach observes, "By denying Aboriginal claims,

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[211] Roach, *supra* note 160 at 501.
[212] *Ibid* at 528.
[213] For example, although *Sparrow* established an Aboriginal right to fish, a retrial was ordered, and the DFO proceeded to negotiate Aboriginal Fisheries Strategy agreements with First Nations. Similarly, *Gladstone* established an Aboriginal commercial right to harvest herring spawn-on-kelp, a new trial was ordered, and the DFO negotiated Aboriginal herring spawn-on-kelp allocations with First Nations.
[214] See for example: *West Moberly*, *supra* note 17, *Musqueam v British Columbia*, 2005 BCCA 128, *Gitanyow First Nation v British Columbia*, 2004 BCSC 1734, *Homalco Indian Band v British Columbia*, 2005 BCSC 283, and *Hupacasath v British Columbia*, 2005 BCSC 1712.

courts have often avoided the problems of devising remedies."[215] He speculates on the judiciary's reluctance to grant remedies in Aboriginal rights litigation:

> The judiciary is hesitant to provide remedies to Aboriginal groups due to the uncertainty which surrounds the existence, content, and exercise of those rights: Rights and remedies are, of course, interconnected. Judges do not decide questions of rights without worrying about remedies and the fact that judicial remedies for violations of Aboriginal rights are unexplored may deter some judges from recognizing Aboriginal rights.[216]

Borrows and Rotman make a similar observation:

> Without an understanding or awareness of the remedial implications of their decisions, the courts are reluctant to provide relief which could have much farther-reaching implications than what initially appears. The danger of creating a floodgate of similar claims is another consideration which creates resistance to the provisions of remedies that are not purely monetary.[217]

Roach suggests that "courts should design their remedies to facilitate negotiations between First Nations, governments and other affected interests."[218] This is a common remedy that the courts apply with respect to breaches of Aboriginal rights.

However, the Nuxalk Nation would likely be seeking a stronger remedy than the courts typically supply. It is unlikely that further negotiations would help to alleviate the eulachon crisis. Instead, the Nuxalk Nation would likely seek affirmation of their rights to protect and restore eulachon. Such affirmation might include an order obliging the DFO to list eulachon as "endangered" under the *SARA*. This would trigger additional mandatory actions on the part of the DFO to develop and implement a recovery action plan, and to define and protect critical eulachon habitat. For the reasons explained above, this outcome is unlikely.

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[215] Roach, *supra* note 160 at 498.
[216] *Ibid*.
[217] Borrows & Rotman, *supra* note 26 at 45.
[218] Roach, *supra* note 160 at 498.

The other available remedy for the breach of section 35 Aboriginal rights is compensation. As already explained, this result would likely be insufficient from the Nuxalk perspective.

Although it is likely the Nuxalk people will be able to establish a right to fish and trade, and to protect and restore eulachon, it is unlikely that section 35 would provide any effective remedies to assist the Nuxalk people in their efforts to alleviate the repercussions of the extirpation of the Central Coast eulachon.

4.3 Fiduciary Duty

In addition to constitutional duties, the Crown also owes Aboriginal peoples fiduciary duties in certain circumstances. McLachlin J. (as she then was) explains the concept of fiduciary duty:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person.
>
> …
>
> The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.[219]

In *Frame* v. *Smith,* Wilson J. offered three signifiers of a fiduciary relationship:

1. The fiduciary has scope for the exercise of some discretion or power.
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [220]

[219] *Blueberry River Indian Band v Canada,* [1995] 4 SCR 344 at 371-2.
[220] *Frame v Smith,* [1987] 42 DLR (4th) 81 [*Frame*] [citations omitted] at 99.

In *Hodgkinson* v. *Simms*, La Forest J. advanced the concept of "reasonable expectations" to identify the existence of a fiduciary relationship, and the content of the duties that arise as a consequence of that relationship: "[T]he question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue."[221] In *Hodgkinson*, the SCC established that a fiduciary breach does not require the fiduciary to exercise a positive action; a fiduciary breach may occur as a result of the fiduciary's failure to take action.

In *Guerin* v. *The Queen*, the SCC found that a fiduciary relationship may exist between the Crown and Aboriginal peoples.[222] The origin of the Crown's fiduciary duty with respect to Aboriginal lands can be traced to the *sui generis* nature of Aboriginal title and the protective provisions of the *Royal Proclamation of 1763*, which states:

> it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.[223]

The *Royal Proclamation* made the Crown an intermediary between Aboriginal peoples and settlers. As Dickson J. explains:

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title…. The conclusion that the Crown is a fiduciary depends upon the…proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.[224]

In *Osoyoos Indian Band* v. *Oliver*, the SCC explained that the legal justification for the inalienability of Aboriginal interests in land is partly a function of the common law principle that

[221] *Hodgkinson v Simms*, [1994] 3 SCR 377 [*Hodgkinson*] at 409.
[222] *Guerin v The Queen*, [1984] 2 SCR 335 [*Guerin*].
[223] George R, Proclamation, 7 October 1763 (3 Geo III) reprinted in RSC 1985, App II, No 1 [*Royal Proclamation*].
[224] *Guerin*, *supra* note 222 at 376.

settlers in colonies must derive their title from Crown grant, and partly a function of the general policy to ensure that Aboriginals are not dispossessed of their entitlements.[225] The fiduciary relationship:

> had its positive aspects in protecting the interests of aboriginal peoples historically…but the degree of economic, social and proprietary control and discretion asserted by the Crown also left [A]boriginal populations vulnerable to the risks of government misconduct or ineptitude.[226]

The *Royal Proclamation* gave rise to a fiduciary duty because the Crown assumed unilateral power to purchase or reserve Aboriginal territories, and Aboriginal peoples became vulnerable to the exercise of the Crown's discretion. The fiduciary duty applies to the Crown's creation of Indian reserves in certain circumstances. In *Ross River Dena Council Band* v. *Canada*, Lebel, J. explained that "[t]he process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into consideration the *sui generis* nature of native land rights."[227]

However, in *Quebec (Attorney-General)* v. *Canada (National Energy Board)*, Iacobucci J. stated that "not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation…. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed."[228] In relation to Aboriginal interests, "the fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests."[229] The SCC in *Wewaykum* v. *Canada* instructed that:

> It is necessary…to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown has assumed

[225] *Osoyoos Indian Band v Oliver*, 2001 SCC 85 at paras 43-47.
[226] *Ross River Dena Council Band v Canada*, [2002] 2 SCR 816 [*Ross River*] at para 80.
[227] *Ibid.*
[228] *Quebec (Attorney-General) v Canada (National Energy Board)*, (1994) 112 DLR (4th) 129 (SCC) at 147.
[229] *Wewaykum Indian Band v Canada*, 2002 SCC 79 [*Wewaykum*] at para 81.

> discretionary control in relation thereto sufficient to ground a fiduciary obligation.[230]

A fiduciary obligation arises from a very specific interest, and the Crown must exercise discretionary control over that interest.

Harris has written extensively on the connection between fisheries and the creation of Indian reserves in British Columbia. In *Landing Native Fisheries: Indian Reserves & Fishing Rights in British Columbia, 1849-1925,*[231] he summarizes his research conclusions:

> British Columbia's Indian reserve geography presumes that Native peoples have access to their fisheries. This is revealed numerically: the Indian reserve commissions linked nearly half of the more than 1,500 reserves allotted between 1849 and 1925 to fisheries. It is displayed in maps that show the proximity of the vast majority of reserves on the coast and in the interior to fish-bearing bodies of water. It is expressed in governmental correspondence in which the Dominion and province justified the land policy in British Columbia, characterized by small reserves and per capita acreages, with the argument that Native peoples in British Columbia were fishing peoples and needed only a small land base to protect their traditional economies and to facilitate their participation in the wage economy. It is underscored by the work of the Indian reserve commissioners, who consistently told Native peoples that their fisheries were secure and their access to them undiminished. It is revealed in the voices of Native peoples, who, to the extent that they were participants in the process, insisted that the governments reserve and protect their fisheries…. In sum, the reserve geography of British Columbia was built around Native peoples' access to their fisheries. Given the small land base, fish were the one resource that might have enabled Native peoples to build viable reserve-based economies.[232]

As Harris asserts, "in most regions of the province the allotment of land was an appendage to the fishery, not the other way around. Land followed fish."[233] Because the Crown's fiduciary duty exists in relation to the creation of Indian reserves and to the Crown's promises made to induce Aboriginal peoples into accepting reserve allocations, one could argue that where the Crown

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[230] *Ibid* at para 83.
[231] Douglas Harris, *Landing Native Fisheries: Indian Reserves & Fishing Rights in British Columbia, 1849-1925* (Vancouver: UBC Press, 2008) [Harris, *Landing Native Fisheries*].
[232] *Ibid* at 187.
[233] Douglas Harris, "Indian Reserves, Aboriginal Fisheries, and the Public Right to Fish in British Columbia, 1876-82" in John McLaren, AR Buck & Nancy Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 266 at 289.

made promises to Aboriginal peoples for continued access to fisheries in the allocation of Indian reserves, fiduciary obligations attach to both the lands reserved for Indians, and to the fishing interests promised.

The Lax Kw'aalams made this assertion in relation to a commercial right to fish a number of species. They alleged that during the reserve creation process:

> various government officials…made promises about access to the commercial fishery that implicate the honour of the Crown giving rise to the Crown's … fiduciary duty to ensure that the Lax Kw'alaams have access to the commercial fishery. [234]

The trial judge found that the Lax Kw'alaams lacked the legal foundation to establish a fiduciary duty. [235] By the time the case reached the SCC, the claim of a fiduciary duty had been diluted to a claim of a breach of the honour of the Crown.[236] Binnie, J. summarizes the claim:

> The Lax Kw'alaams argued that the Crown had an implied obligation to preserve their access to a commercial fishery on a preferential basis as a result of Crown promises, express or implied, made during the reserve allotment process. They contended that the Crown's express grant of fishing station reserves to the Coast Tsimshian — when interpreted in the light of the historical context and the Crown's policy, purpose, and representations made during the allotment process — gave rise at least to an implied right to commercial fishing opportunities for the Lax Kw'alaams.[237]

The SCC upheld the BC Supreme Court's finding that "the Crown never intended in the process of allocating reserves to grant the Lax Kw'alaams *preferential* access to the fishery."[238] The SCC held that "The Lax Kw'alaams' arguments based on fiduciary duties or the honour of the Crown necessarily fail in the absence of any substratum of relevant facts on which to base them."[239]

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[234] *Lax Kw'alaams, supra* note 14 at para 18.
[235] *Lax Kw'alaams v Canada,* 2008 BCSC 447 at para 518.
[236] *Lax Kw'alaams, supra* note 14 at para 37.
[237] *Ibid* at para 69.
[238] *Ibid* at para 72 [emphasis in the original].
[239] *Ibid.*

Despite the negative outcome on the fiduciary issue in *Lax Kw'alaams*, another Aboriginal nation may be able to establish a fiduciary duty with respect to fisheries based on the Indian reserve allocation process. This would require the Aboriginal claimants to clarify the specific interest that the fiduciary duty attaches to, and demonstrate that the Crown exercises discretionary control over that interest.

In the Nuxalk case, Harris identifies three Nuxalk Indian reserves that were allotted with specific reference to eulachon fisheries:

> Bella Coola 1 O'Reilly 11/08/1882**,** 01/11/1882 F.M. "The Bella Coola which flows through this reserve, contributes a bountiful supply of both salmon and oolachans, and renders this reserve of special value to the Indians."
>
> …
>
> Taleomy 3 01/11/1882 F.M. "A large supply of salmon is taken here, and also a limited number of oolachans during the season."
>
> …
>
> Kemsquit 1 O'Reilly 14/08/1882, 01/11/1882 F.M. "The Kemsquit river yields a large supply of salmon, and in the spring oolachans are abundant; halibut are also found in close proximity to the reserve."[240]

These sites were designated as Indian reserves because of their significance to the Nuxalkmc as fishing sites, with specific reference to eulachon. Underlying this causal connection is the reasonable assumption that the fisheries at the fishing sites are assured as part and parcel of the Indian reserves. Here, the specific interest is the Nuxalk interest in eulachon as specified in the field minutes of the reserve creation process. However, it may be difficult for the Nuxalk Nation to demonstrate that the Crown exercises sufficient discretionary control over the Nuxalk's interest in eulachon to engage a fiduciary duty.

The Aboriginal Fisheries Strategy (AFS) provides another basis for a fiduciary duty claim. Following *Sparrow*, the DFO implemented the AFS in an effort to meet the Crown's

[240] Harris, *Landing Native Fisheries*, *supra* note 231.

fiduciary duty with respect to Aboriginal peoples.[241] The Nuxalk Nation Band Council Administration has signed an AFS agreement. If the Nuxalk Nation can show that the AFS creates a specific interest that the DFO exercises discretionary control over, then they may be able to establish a fiduciary duty.

While the Nuxalk Nation may have difficulty establishing a fiduciary duty using the *Wewaykum* criteria, the Nuxalk interest in eulachon arguably meets *Frame's* three indicators of a fiduciary duty: 1) the fiduciary holds power, 2) can unilaterally exercise that power to affect the beneficiary's interests, and 3) the beneficiary is particularly vulnerable. In the case of the Nuxalk eulachon fishery, the federal Crown as represented by the Department of Indian Affairs (DIA) and the DFO hold fiduciary powers. During the creation of Nuxalk Indian reserves, the DIA had the power to allocate the reserves, and exercised that power to affect the Nuxalk people's interests. The Nuxalk people were peculiarly vulnerable to the DIA's exercise of power. In relation to the eulachon extirpation, the DFO had the power to open the shrimp trawl fishery in Queen Charlotte Sound, and continues to have the power to open trawl fisheries that destroy eulachon as by-catch. The DFO's exercise of this power occurs outside of Nuxalk territory, and so the Nuxalk people were – and are – rendered powerless to stop the openings. The Nuxalk people are at the mercy of the DFO's decisions. Moreover, the DIA has failed to assist the Nuxalk people in protecting the eulachon fisheries that the Crown promised during the creation of the Nuxalk Indian reserves, and the DFO has failed to protect the eulachon allocations that were promised in the AFS. Arguably, both the DIA and the DFO have breached their fiduciary duties in relation to the Nuxalk eulachon fishery.

[241] Fisheries and Oceans Canada, "Aboriginal Fishery Strategy" online: <http://www.dfo-mpo.gc.ca/communic/fish_man/afs_e.htm > (accessed December 15, 2012).

The potential existence of a fiduciary duty is important to the Nuxalk eulachon crisis. A fiduciary duty acknowledges that the Crown has imposed a vulnerable situation upon the Nuxalk people through the exercise of its power to the detriment of the Nuxalkmc. This acknowledgement evokes a strong moral obligation requiring a higher standard of care than the honour of the Crown. As explained in *Ross River*:

> In a substantive sense the imposition of a fiduciary duty attaches to the Crown's intervention the additional obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary.[242]

The fiduciary duty also deters defences that might otherwise be available to the Crown. The DFO might argue that the shrimp trawl fishery did not cause the eulachon extirpation, and instead attribute the eulachon demise to other factors, suggesting that the correlation between the shrimp trawl fishery and eulachon extirpation is too remote to attribute blame to the trawlers. The DFO might also assert that there was no way for the Department to foresee the eulachon extirpation. However, causation, remoteness, and foreseeability are not relevant defences for breaches of fiduciary duties.[243] Finally, "the imposition of a fiduciary duty opens access to an array of equitable remedies."[244] As McLachlin J. (as she then was) explained, "[e]quitable remedies are flexible: their award is based on what is just in all the circumstances of the case."[245] In developing a remedy for a breach of fiduciary duty, courts will use "discretion to fashion a remedy that is appropriate to the nature of the wrong and the nature of the loss."[246] The principle of restitution is applied in remedying a breach of fiduciary duty. Restitution means that "the appellant is entitled to be put in as good a position as he would have been in had the breach

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[242] *Ross River*, *supra* note 228 at para 94.
[243] James Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples*, (Saskatoon: Purich Publishing 2005) at 209.
[244] *Ross River*, *supra* note 226 at para 94.
[245] *Soulos v Korkontzilas*, [1997] 2 SCR 217 at para 34.
[246] Reynolds, *supra* note 243 at 206.

not occurred."[247] Moreover, "remedies for breach of fiduciary duty contain an element of deterrence"[248] to dissuade the Crown from repeating similar breaches. Compensation is also a remedy for breach of fiduciary duty, but for the reasons detailed above, compensation may not be an adequate remedy for the loss of the eulachon.

Although the Nuxalk people may be able to establish a fiduciary duty with respect to their eulachon fishery, this outcome is unlikely. Since the *Weywaykum* decision in 2002, the courts are no longer applying the fiduciary duty to generic Aboriginal rights, instead limiting the duty to specific interests over which the Crown exercises discretionary control. The courts have yet to recognize fish as an interest that is sufficiently connected to an Indian reserve to warrant a finding of a fiduciary duty. Moreover, it may be difficult to demonstrate that the Crown exercises sufficient discretionary control over the Nuxalk's interest in eulachon to warrant a fiduciary duty. A strict application of *Weywaykum* would likely preclude the Nuxalk from establishing a fiduciary duty.

There are drawbacks to asserting notion of the Crown as a fiduciary to protect Aboriginal rights. As Barsh and Henderson explain:

> The fiduciary concept…is inherently ambiguous and two-edged. It can be construed…by analogy to a trust relationship in private law, which implies strict accountability to the interests of the beneficiary. Alternatively, it recalls the 'sacred trust of civilization' notion, which former generations of bureaucrats in London and Ottawa wielded in justification of paternalism and oppression.[249]

Macklem similarly criticizes the fiduciary duty concept for being based on a hierarchical relationship in which Aboriginal peoples are seen as dependent on the Crown.[250] However, as

[247] *Hodgkinson, supra* note 221 at 199.
[248] Reynolds, *supra* note 243 at 209.
[249] Barsh & Henderson, *supra* note 57 at 1002.
[250] Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill LJ 382 at 448-449.

Roach points out, "Judicial efforts to remedy abuses of that imbalance of power should not be tainted by objections to the imbalance."[251]

4.4 Honour of the Crown

Although a fiduciary duty would be difficult to establish, the Nuxalk would likely be able to demonstrate a breach of the honour of the Crown with respect to the eulachon. As explained in *Haida*, "the Crown's duty of honourable dealing toward Aboriginal peoples...arises...from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people."[252] "With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation."[253] The honour of the Crown is a rather vague concept that has been described as "an undefinable abstract notion stated in almost mystical terms."[254] However, Rothstein J.A. offers some guidance:

> [T]he concrete practices required of the Crown so far identified by the Supreme Court of Canada in the Aboriginal context are: acting appropriately as a fiduciary; interpreting treaties and documents generously; negotiating, and where appropriate, consulting with and accommodating Aboriginal interests; and justifying legislative objectives when Aboriginal rights are infringed. However, I do not suggest that this is an exhaustive list of the ways in which the honour of the Crown may be manifest.[255]

The Canadian legal system accepts that the nature of the relationship between the Crown and Aboriginal peoples requires the Crown to act honourably in its dealings with Aboriginal peoples and interests.

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[251] Roach, *supra* note 160 at 525.
[252] *Haida*, *supra* note 165 at para 32.
[253] *Mitchell v MNR*, 2001 SCC 33 at para. 9.
[254] W Hurlburt, "Case Comment on R. v. Marshall" (2000) 38 Alta L Rev 563 at 573.
[255] *Canada v Stoney Band*, 2005 FCA 15 at para 18.

The duties associated with the honour of the Crown vary depending on the circumstances. The SCC in *Manitoba Métis* introduced the concept of a "solemn obligation" which appears to be a lower obligation than a "fiduciary duty," but a higher obligation than the "honour of the Crown". To analyze the level of the obligation, and to determine whether the obligation has been fulfilled, the SCC poses this central question: "Viewing the Crown's conduct as a whole in the context of the case, did the Crown act with diligence to pursue the fulfillment of the purposes of the obligation?"[256] In a situation involving a solemn promise made by the Crown, the following standards apply:

> The honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation.[257]
>
> …
>
> [T]he honour of the Crown requires it to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests.[258]
>
> …
>
> Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise.[259]
>
> …
>
> [A] persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise.[260]

It is unclear what potential remedies could arise from a breach of a solemn obligation. The Métis claimants were only seeking declaratory relief, not compensation or equitable remedies, so the SCC did not consider what remedies (beyond declaratory relief) a breach of solemn obligation might require. Because a solemn obligation originates from the honour of the Crown (a public interest), and engages a lesser obligation than a fiduciary duty (a private interest), it is unlikely

[256] *Manitoba Métis Federation v Canada*, 2013 SCC 14 [*Manitoba Métis*] at para 83.
[257] *Ibid* at para 77.
[258] *Ibid* at para 78.
[259] *Ibid* at para 80
[260] *Ibid* at para 82.

that remedies available for fiduciary breaches (e.g. equitable remedies) would be awarded for a breach of a solemn obligation.

Promises made in relation to the allotment of Indian reserves would likely engage the solemn obligation standard. In *Ross River*, Lebel J. observed that the Crown persuades Aboriginal peoples to enter into arrangements, such as the creation of reserves, through promises:

> [A]n agent of the Crown, duly authorized, acts in the exercise of a delegated authority to establish or further elaborate upon the relationship that exists between a First Nation and the Crown. The Crown agent makes representations to the First Nation with respect to the Crown's intentions. And…the honour of the Crown rests on the Governor in Council's willingness to live up to those representations made to the First Nation in an effort to induce it to enter into some obligation or to accept settlement on a particular parcel of land.[261]

Solemn obligations likely exist in the Crown's creation of Indian reserves, and would apply to the promises made by the Crown to induce Aboriginal peoples into accepting reserve allocations.

As explained above, three Nuxalk Indian reserves were allotted with specific reference to eulachon fisheries. The Nuxalk may argue that the creation of these reserves constitutes a solemn promise that the reserves would be protected. Moreover, the interests in the land and the fish at the reserve locations are so interconnected that any solemn obligation that exists in relation to the land also extends to the fish. Accordingly, it is likely that the Crown owes the Nuxalk people a solemn obligation to uphold the promises made during the Crown's allotment of Bella Coola Indian Reserve Number 1, Taleomy Indian Reserve Number 3, and Kimsquit Indian Reserve Number 1. The Nuxalk AFS may also constitute a solemn obligation that requires a high standard of Crown conduct. As explained in Chapter 3, many Nuxalkmc were opposed to the allocations specified in the AFS because the allocations signified a limit on Nuxalk fisheries

[261] *Ross River*, *supra* note 226 at para 65.

imposed by the DFO. On the other hand, the allocations defined under the AFS should provide some guarantee of continued fisheries for the Nuxalk people. It would be unconscionable for the DFO to allocate a number of fish for Aboriginals and then manage the fisheries in a way that precludes Aboriginals from getting their allocation. The DFO's breach of commitments made under the AFS may constitute another breach of the Crown's solemn obligations. For both solemn obligations (the promises made during reserve allotment, and contained in the AFS), the Nuxalk could provide evidence that the Crown's persistent pattern of errors and indifference led to the eulachon's demise, and substantially frustrated the purposes of the Crown's solemn obligations. The Crown's conduct likely constitutes a breach of the Crown's solemn obligations with respect to the three Nuxalk reserves and to the Nuxalk AFS.

The Nuxalkmc likely have a more persuasive case than the Lax Kw'alaams. In *Lax Kw'alaams*, the claimants failed to establish either a fiduciary duty or the honour of the Crown, but this was likely influenced by the fact that they were trying to establish these obligations in relation to Aboriginal commercial fishing rights. The Canadian courts seem to have an aversion to acknowledging commercial rights for claimants who are seeking them in their capacity as Aboriginal peoples. As Goldenberg explains:

> A careful review of Aboriginal rights jurisprudence and of academic commentary on the subject clearly demonstrates that there is a general political and judicial reluctance in Canada to recognize, affirm and protect those Aboriginal rights that include a commercial or monetary dimension. The line of SCC cases extending from *Sparrow* to *Mitchell* displays a pattern of increasing judicial "anxiety" over the accommodation and recognition of commercial Aboriginal rights, given the powerful voices of non-Aboriginal opponents of such rights, namely, non-Aboriginal natural resource harvesters and corporations that seek to expand the size and scope of resource extraction areas and allocations for commercial gain.[262]

[262] Goldenberg, *supra* note 115 at 92.

In *Lax Kw'alaams*, the SCC was likely hesitant to recognize a broad and general Aboriginal commercial fishery. The SCC may have been concerned about the precedential effect of such a decision. As Harris demonstrates, the reserve creation process in much of British Columbia was similar to that of the Lax Kw'alaams: deeply interconnected with fisheries. If the SCC accepted the Lax Kw'alaams' argument that the interconnection between fisheries and Indian reserves results in a fiduciary duty or engages the honour of the Crown, thus compelling the Crown to protect broad Aboriginal commercial fisheries, the decision could open the floodgates for other Aboriginal claimants to make similar claims. The floodgates concern likely deterred the SCC from finding that the creation of Indian reserves created a fiduciary duty or triggered the honour of the Crown in relation to Lax Kw'alaams' commercial fisheries. However, a different factual scenario supported by sufficient facts might yield a positive result for Aboriginal claimants. A court may be more willing to find that a fiduciary duty or a solemn obligation exists with respect to non-commercial (e.g. food, social, or ceremonial) Aboriginal fishing rights that were promised during the Crown's allotment of Indian reserves.

Although it would be extremely difficult for the Nuxalkmc to establish a fiduciary duty with respect to the eulachon fishery, it is more likely that they would be able to show that the Crown owes the Nuxalkmc solemn obligations in relation to two interests: the three Indian reserves that were allotted to the Nuxalk people with specific reference to eulachon, and the eulachon allocations specified in the Nuxalk AFS. Moreover, the Nuxalk would likely be able to show that the Crown's conduct substantially frustrated the purposes of these solemn promises,[263] and ultimately breached solemn obligations. However, it is not clear what remedies would be

[263] *Manitoba Métis*, *supra* note 256 at para 82.

available for a breach of a solemn obligation, or whether they would be sufficient to remedy the Nuxalk eulachon crisis.

4.5 Conclusion

This chapter has demonstrated the ineffectiveness of section 35 in protecting Aboriginal rights. As a result of the evolution of case law interpreting section 35, the Nuxalkmc are unlikely to secure meaningful remedies under the Canadian legal system for the DFO's breaches of the Nuxalk Nation's Aboriginal rights in relation to eulachon. While it is unlikely that the Nuxalkmc would be able to meet the level of specificity required to establish a fiduciary duty, they would likely be able to establish a solemn obligation. However, the available remedies for breaches solemn obligations remain unclear, so it is difficult to speculate on their potential effectiveness.

In any event, Nuxalk rights to fish, trade, protect, and restore eulachon exist regardless of court recognition of these rights. As Goldenberg explains:

> The reality of Aboriginal rights is…not diminished by their fictitious "birth" or "death" in Canadian courts. This argument is also reinforced by the language of s. 35(1), which clearly states that the rights affirmed and recognized under the *Constitution* are already "existing"; whether they are also proven in court is a matter of legal interpretation and evidentiary sufficiency.[264]

The Nuxalk Nation has not launched a law suit regarding the eulachon crisis, but Chapter 3 has demonstrated how the Nuxalkmc are currently exercising inherent Nuxalk authority to protect and restore the eulachon (e.g. through eulachon enhancement initiatives). Borrows and Rotman appreciate the significance of such actions:

> Political pressure, economic development, social recovery and the grass-roots practices of Aboriginal rights are more effective than "the law" in creating the conditions for liberation. In fact, without this more direct action, associated

[264] Goldenberg, *supra* note 115 at 107.

> common law gains will not be realized. Aboriginal rights arise from Aboriginal customs and practices, they do not originate from a grant of power by the common law.[265]

The Nuxalk Nation's response to the eulachon crisis exemplifies that Aboriginal rights are inherent, and do not require recognition by the Canadian legal system to be exercised. However, the Nuxalk eulachon crisis also reveals that powers beyond the scope of Nuxalk jurisdiction are undermining Nuxalk eulachon rights. In the eulachon situation, trawl fisheries occurring outside of Nuxalk territory and authorized by the DFO are likely continuing to harm Central Coast eulachon populations. Moreover, the DFO's decisions regarding the listing of eulachon under *SARA* will have implications for the eulachon. So while the Nuxalkmc are exercising their inherent rights to protect and restore eulachon, the actual protection of their rights requires cooperation from the Crown,[266] and from Canadian society.[267]

[265] Borrows & Rotman, *supra* note 26 at 31-32.

[266] The Crown's methods of supporting Nuxalk protection and restoration efforts were detailed above and include: listing eulachon as endangered, developing and implementing eulachon recovery strategies, identifying and protecting critical eulachon habitat, and closing trawl fisheries at certain times and in certain locations to minimize eulachon by-catch. Governmental decision-makers should also be mindful of potential impacts that other decisions could have on eulachon (e.g. risks posed by tanker-traffic in relation to proposed pipelines).

[267] Canadian citizens could support the Nuxalk efforts by confirming that environmental conservation concerns are a Canadian interest that align with Nuxalk interests, and should be considered in favour of Nuxalk rights when the Crown balances Nuxalk rights against mainstream interests, by urging governments to assist Nuxalk protection and restoration efforts, and by pressuring industry to refrain from activities that have the potential to harm eulachon.

Chapter 5 *Slexwxnix*: "the spreading of eagle down to make peace"[1]

"An abundant supply of [eulachon] is a source of joy, and all listen eagerly for the singing of the thrush…which signifies that the nets are full to bursting. Half jocularly, people invite the bird to come and eat, but his melody is interpreted as: 'I shall eat when the river is full.'."[2]

5.1 Introduction

I am Nuxalkmc, and I have been personally affected by the loss of the eulachon. The eulachon are symbolic of much deeper losses that the Nuxalk people, including me, have suffered. In researching the Nuxalk eulachon crisis, I became very aware of the racism, disrespect, and dispossession that colonization has inflicted (and continues to inflict) on my people, and on me. I was raised in Nuxalk territory, in a community with a resilient Nuxalk worldview, by an extended family with a strong ideology of existing Nuxalk sovereignty. Growing up in this context, I had a profound interest in Nuxalk legal order, and in the stories of dispossession conveyed to me by Nuxalk authorities – hereditary chiefs and elders. I pursued a Canadian legal education to better understand the colonial legal processes that continuously dispossess my people, with the intention of finding resolution to the injustices that the Nuxalkmc have experienced (and continue to experience) as a result of the imposition of colonial legal system onto Nuxalk people and territory. The eulachon is a tangible example of the enormous losses that the Nuxalk people have suffered since contact with Europeans. My examination of the Nuxalk eulachon crisis has demonstrated how various aspects of colonization have led to the demise of the eulachon.

[1] Thomas F McIlwraith, *The Bella Coola Indians*, (Toronto: University of Toronto Press 1948) vo1 2 at 614.
[2] *Ibid*, vo1 1 at 759.

I began my thesis by positioning myself in relation to my research question. I am deeply connected to the Nuxalk eulachon crisis, and I feel a sense of responsibility to convey my understanding of the crisis from my perspective as a Nuxalk person trained in Canadian law.

In Chapter 2, I explained Nuxalk legal order, including Nuxalk laws relating to eulachon. Nuxalk legal order is based on a holistic worldview. Nuxalk oral traditions connect the Nuxalk people with their territory, and also guide respectful relationships between the Nuxalk people and all things within Nuxalk territory. The Nuxalk people perceive their territory, and all things within it, as gifts from the Creator, and thus feel endowed with a sacred responsibility to care for the gifts.

In Chapter 3, I described how Nuxalk legal order was usurped by the imposition of the colonial legal system, to the detriment of Nuxalk people, territory, governance, and resources. My analysis demonstrated a stark contrast between the Nuxalk legal order and the Canadian legal system. While Nuxalk law is holistic, Canadian law is premised on a fragmented worldview. Under the Canadian legal system, jurisdiction is divided between the federal government and the provinces. That jurisdiction is then broken down further into various areas of authority; legislation and regulations guide governmental decision-makers within their spheres of authority. Decisions are often made in isolation, with little consideration of the long term or cumulative impacts of multiple discrete decisions. Fragmented decision-making by the colonial courts and governments has negative repercussions for Aboriginal rights. The imposition of Canada's legal system onto the Nuxalkmc has had devastating consequences for Nuxalk sovereignty, legal order, governance, people, territory, and resources.

In Chapter 4, I demonstrated that although section 35 is intended to recognize and affirm Aboriginal rights, the current application of Canadian laws does not effectively protect them.

The Canadian legal system's capacity to help the Nuxalk protect and restore something as important as the eulachon appears limited. The courts have narrowed the scope of section 35 to recognize and affirm Aboriginal rights by making it difficult to establish the rights, and then by allowing the Crown broad scope to infringe the rights that are recognized. I have provided an in-depth analysis of the weaknesses of consultation to expose how the Crown's pre-recognition balancing of constitutionally protected Aboriginal rights against other societal interests undermines rather than protects Aboriginal rights. I have also shown that the connection between Indian reserves and fisheries in British Columbia may create fiduciary duties that require heightened protection of Aboriginal fisheries by the Crown, but fiduciary duties only arise in exceptional circumstances. Although the Nuxalkmc may be able to demonstrate that the Crown breached solemn obligations, it is unclear whether this outcome would provide any meaningful recourse. My analysis has revealed that, although the eulachon crisis is a poignant issue that the Canadian legal system ought to resolve, effective remedies for the eulachon extirpation are unlikely through this regime.

I am critical of the Canadian legal system. That critique is influenced by my experience as an Aboriginal law practitioner, so I feel compelled to be realistic in my analysis. I feel my criticism is appropriate to convey the dire situation that the Nuxalkmc confront. Despite the shortcomings of the existing Canadian legal regime, I believe that resolution to the Nuxalk eulachon crisis is possible.

Underlying the inadequacies of the Canadian legal system is the Crown's ability to unilaterally exercise authority over Indigenous territories and peoples, which is founded upon the assumption of European superiority over Indigenous peoples. This chapter will critique this assumption and consider whether reconciliation is possible under the Canadian legal system.

5.2 Sovereignty

There are two basic theories of sovereignty at play in the Canadian legal context. The first is that Indigenous sovereignty existed when Europeans arrived in North America. This is the legal basis for treaty making between Indigenous nations and the Crown. As McLachlin C.J. acknowledges in *Haida*: "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty"[3] Treaties are also meant to protect Indigenous sovereignty – albeit, in a modified form.[4] Where no treaties exist, Indigenous sovereignty remains in its original form, and the reconciliation of Indigenous and Crown sovereignties is still required.[5]

The second theory of sovereignty is based on the presumptions of European superiority and Indigenous inferiority. As Macklem explains:

> European assertions of territorial sovereignty in North America were premised on the assumption that Aboriginal nations were not sovereign nations at the time of European contact, an assumption in turn founded on the belief that Aboriginal peoples were inferior to European peoples.[6]

Under this theory, European sovereigns perceived Indigenous peoples as inferior, and therefore, without sovereignty. Europeans might then unilaterally assert sovereignty over Indigenous peoples and territories, thus subsuming them under European authority. The Canadian legal system is founded upon, and continues to be heavily influenced by, the second theory of sovereignty.

During the negotiations that preceded the amendment of the *Constitution* to include section 35, many legal scholars and Indigenous peoples were optimistic that the provision would

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[3] *Haida Nation v British Columbia*, 2004 SCC 73 at para 20.
[4] Kiera Ladner, "Take 35: Reconciling Constitutional Orders" in Annis M Timpson, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada*, (Vancouver: University of British Columbia Press, 2009) 279 at 282.
[5] *Ibid* at 287.
[6] Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) [Macklem, *Indigenous Difference*] at 6.

provide an opportunity for the Canadian legal system to reconsider colonial perceptions of sovereignty and reverse the injustices that Indigenous peoples have suffered under the colonial regime. Noel Lyon conveys this optimism: "Section 35 calls for a just settlement for Aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."[7] Many academics and Indigenous peoples anticipated that section 35 would motivate the Canadian legal system to acknowledge and respect Indigenous sovereignty. The wording of the provision: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" – is broad enough to permit the recognition and affirmation of Indigenous sovereignty. Ladner contends that "section 35(1) recognizes and affirms Indigenous constitutional orders as separate yet equal constitutional orders within the Canadian Constitution."[8] However, the Canadian judiciary has not followed this interpretation, opting instead to limit the possibility that Indigenous sovereignty is relevant in the consideration of section 35(1).

In *Sparrow*, the SCC confirmed the presumed supremacy of Crown sovereignty by stating that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title to such lands vested in the Crown."[9] However, as Macklem observes, "the legitimacy of Canadian sovereignty over Aboriginal peoples and Aboriginal territory is far from self-evident."[10] Ladner argues:

> The fact is that Indigenous people never ceded their rights and responsibilities (collective sovereignty) under their own constitutional order; nor did they consent to be ruled by the Crown or its operatives (such as Parliament). These claims…are legal conventions that were created by colonial authorities to

[7] N Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall LJ 95 at 100.
[8] Ladner, *supra* note 4 at 295.
[9] *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*] at 1103.
[10] Macklem, *Indigenous Difference*, *supra* note 6 at 74.

> legitimate European expansion and its territorial claims vis-à-vis other would-be colonizers.[11]

Borrows explains that unilateral Crown sovereignty is a legal construct intended to dispossess Indigenous peoples:

> Sovereignty's incantation is like magic.... This mere assertion is said to displace previous Indigenous titles by making them subject to, and a burden on, another's higher legal claims. Contemporary Canadian jurisprudence has been susceptible to this artifice.... [A]s in past centuries, sovereignty heralds the diminishment of another's possessions.[12]

Turpel suggests that "The acceptance without critical examination…of the underlying sovereignty of the Crown over Aboriginal peoples situates the [*Sparrow*] decision of Supreme Court of Canada squarely within the colonial tradition."[13] Moreover, Christie observes that "contemporary jurisprudence not only borrows from colonial justifications developed and maintained during Canada's overtly colonial period, but actually sanctions, affirms and strengthens this colonial conceptual framework."[14] According to Ladner, "The courts have…decided to ignore Indigenous perspectives and to perpetuate colonialism and its hierarchy of knowledge, histories and peoples."[15] The judicial assumption of the supremacy of Crown sovereignty has been followed in all Aboriginal rights jurisprudence since *Sparrow*. The judiciary's ongoing belief in the supremacy of Crown sovereignty allows the Crown to continue to exert its jurisdiction to the detriment of Indigenous peoples, territories, resources, and rights.

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[11] Ladner, *supra* note 4 at 290.
[12] John Borrows "Sovereignty's Alchemy: An Analysis of *Delgamuukw* v. *British Columbia*" (1999) 37 Osgoode Hall L J 537 at 562.
[13] Mary Ellen Turpel, "Home/Land" (1991-92) 10 Can J Fam L 17 at 20.
[14] Gordon Christie, "A Colonial Reading of Recent Jurisprudence: *Sparrow, Delgamuukw and Haida Nation*" (2005) 23 Windsor YB Access Just 17 at 21.
[15] Ladner, *supra* note 4 at 285.

5.3 Constitutional Supremacy

In *Sparrow*, the SCC also circumvented the notion of constitutional supremacy with respect to Aboriginal rights. Section 52(1) of the *Constitution* provides that:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Despite this provision, the SCC held that because section 91(24) of the *Constitution Act, 1867* grants the federal government authority to legislate with respect to "Indians and lands reserved for Indians," Aboriginal rights under section 35 are not absolute. McNeil rebuts this reasoning. He contends that section 35(1) "can be interpreted as barring Parliament from *infringing* Aboriginal rights, while leaving intact Parliament's jurisdiction to enact legislation *protecting* or *enhancing* Aboriginal rights."[16] Although the SCC could have interpreted sections 91(24) and 35(1) in a way that enhanced Aboriginal rights, the SCC inferred that these sections permit the federal Crown to interfere with Aboriginal rights. In *Sparrow*, the SCC held that the constitutional supremacy provision:

> does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of section 52…. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).[17]

The SCC's use of section 91(24) to dilute section 35(1) was informed by the colonial belief in Indigenous inferiority. Section 91(24) epitomizes the colonial presumption that the Crown can unilaterally exercise authority over Indigenous peoples and lands. The SCC relied on the federal Crown's authority under section 91(24) to find that section 35(1) does not provide absolute

[16] Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's Law Journal 95 [McNeil, "Envisioning Constitutional Space"] at 111 [emphasis in the original].
[17] *Sparrow*, *supra* note 9 at 1109. An extensive critique of *Sparrow's* infringement test is detailed in chapter 4.

protection for Aboriginal rights.[18] As McNeil acknowledges, "the standard denial of the inherent right of the Aboriginal peoples to govern themselves…appears to have been the Supreme Court's starting point for assessing the effect of s. 35(1)."[19]

As Roach observes, section 52 provides the ultimate remedy for a breach of section 35.[20] If the SCC applied section 52 to Aboriginal rights, then any law or regulation that interfered with existing Aboriginal rights would be of no force or effect to the extent of the inconsistency; there would be substantial consequences for breaching Aboriginal rights. However, no court has used section 52 in relation to Aboriginal rights. The legal consequences for breaching Aboriginal rights are minimal at best, and are often non-existent. This leaves Aboriginal peoples with little power to protect their lands and resources via the Canadian legal system.[21] A stricter application of constitutional supremacy is required to effectively recognize and affirm Aboriginal rights.

5.4 Reconciliation

Rather than giving full effect to section 35, the SCC in *Sparrow* suggested that the federal Crown must reconcile its duties under section 35 with its section 91(24) authority over Indians and lands reserved for Indians.[22] Post-*Sparrow*, the concept has been reconfigured into a reconciliation of pre-existing Aboriginal societies with Crown sovereignty. Murphy observes

[18] *Ibid*. This, of course, makes no sense with respect to Inuit and Metis who are defined as "Aboriginal" under section 35(2) of the *Constitution*, but are not "Indians".
[19] McNeil, "Envisaging Constitutional Space", *supra* note 16 at 113.
[20] Kent Roach, "Remedies for Violations of Aboriginal Rights" (1991-1992) 21 Man LJ 498 at 499.
[21] Aboriginal peoples have used other methods of protecting their rights, such as media campaigns, and economic strategies (e.g. educating shareholders about the negative impacts companies are having on Aboriginal rights), but such methods are beyond the scope of this thesis. For a detailed analysis of Nuxalk resistance strategies, see: Lauren Penny, *Empowerment Strategies for Native Groups Facing Resource Crises: A case-study of the Nuxalk Nation, Bella Coola, British Columbia*, MA Thesis, Concordia University 2004) [unpublished].
[22] *Sparrow*, *supra* note 9 at 1109.

that "The SCC has located reconciliation at the heart of its jurisprudence on Aboriginal rights."[23] Even so, as Vermette points out, "There is nothing in the wording of section 35(1) demanding the Court reconcile any competing claims."[24] Instead, "The judicial principle of reconciliation has been created out of thin air by the Supreme Court of Canada."[25] Walters acknowledges that "despite having used the language of reconciliation for more than a decade, Canadian judges have never been very explicit about what they think reconciliation means in the context of Aboriginal and non-Aboriginal relations."[26] According to Goldenberg, because no "court has specified the precise meaning and content of the reconciliation principle, it remains a rather vague and largely unexamined concept despite its fundamental importance to the purpose and nature of Aboriginal rights under the Constitution."[27]

The Canadian legal system's approach to reconciliation has repercussions for the legitimacy of Canadian sovereignty. As Macklem explains, "the legitimacy of Canadian sovereignty rests on its capacity to co-exist with Aboriginal sovereignty."[28] He contends that Canadian sovereignty is illegitimate to the extent that it relies on colonial ideologies of Indigenous inferiority:

> Given its inherent ethnocentrism, the proposition of Aboriginal inferiority cannot stand as a valid reason for excluding Aboriginal nations from the distribution of sovereignty on the continent. Both the original exclusion of Aboriginal nations from the community of nations entitled to assert sovereignty over North America

[23] Michael Murphy, "Civilization, Self-Determination, and Reconciliation" in Annis M Timpson, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada*, (Vancouver: University of British Columbia Press, 2009) 251 [Murphy, "Reconciliation"] at 251.
[24] D'Arcy Vermette, "Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples" 29 Windsor YB Access Just 55 at 63.
[25] *Ibid* at 71.
[26] Mark Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in W Kymlicka & B Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) 165 at 183.
[27] André Goldenberg, "'Salmon for Peanut Butter': Equality, Reconciliation and the Rejection of Aboriginal Commercial Rights" (2004) 3 Indigenous LJ 61 at 82-83.
[28] Macklem, *Indigenous Difference*, *supra* note 6 at 123.

> and the continuing refusal to recognize the inherent sovereignty of Aboriginal people offend formal equality.[29]

Therefore, "to the extent it fails to recognize Aboriginal forms of sovereignty, the present distribution of sovereignty in North America is unjust."[30]

The subject of reconciliation, or the matter that is being reconciled (such as Indigenous and Crown sovereignties, Aboriginal and Canadian societies, historical and current facts, or any combination of those matters), will influence the outcome of the reconciliatory process. There are five options for reconciliation with respect to Aboriginal rights.

The first option, the inherent sovereignty model, would accept that Indigenous sovereignty and Crown sovereignty are distinct and operate separately from one another. My perception is that Indigenous sovereignty exists independently from Canadian sovereignty, and need not be reconciled with Crown sovereignty. The inherent sovereignty model would not be conducive to reconciliation on its own, but it could be useful in conjunction with the second model of reconciliation.

To provide context for the second model, I perceive a difference between "Indigenous sovereignty" and "Aboriginal sovereignty". I use the term "Indigenous sovereignty" to signify pre-colonial Indigenous sovereignty that exists independently from the Canadian legal system, and the term "Aboriginal sovereignty" to signify Indigenous sovereignty that has been incorporated into the Canadian legal system via treaty or under section 35(1) of the *Constitution*.

The second option, labelled the equal sovereignty model, would incorporate Indigenous sovereignty into the Canadian legal system, thus converting it into Aboriginal sovereignty:

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[29] *Ibid* at 121.
[30] *Ibid* at 7.

> Within this framework, the recognition of indigenous rights…would…be linked to…the prior status and authority of those societies as independent and self-governing political communities. From this perspective, courts would recognize indigenous peoples as the bearers of a form of parallel jurisdictional authority that would operate in co-ordination with the sovereignty of the Crown. The underlying source of indigenous rights and entitlements would thus be located in the status of indigenous peoples as free and self-determining peoples – a status equal in principle to that of non-indigenous communities.[31]

Under this model, Aboriginal and Canadian sovereignties would be considered as separate but equal.

The equal sovereignty model assumes that the *Constitution* protects existing Aboriginal sovereignty. As Barsh and Henderson explain:

> [W]hat section 35(1) entrenched was the *lex loci* of Aboriginal nations, to the extent that their own laws had not clearly been extinguished prior to 1982…. Moreover, under section 52 of the *Constitution Act, 1982*, this…rule has become part of 'the supreme law of Canada' and overrides any ordinary legislation inconsistent with it.[32]

Ladner suggests that:

> Section 35…contains within it the inherent right to self-government…, a right that is recognized in but not created by the Canadian Constitution.[33]
>
> ….
>
> Indigenous peoples have the ability to engage their governments in the range of jurisdictions that are explicit within their own constitutional orders…and recognized and affirmed in section 35(1) of Canada's *Constitution Act, 1982.*[34]

Macklem conveys that the equal sovereignty model incorporates respect for Indigenous sovereignty into the Canadian *Constitution*:

> Interests associated with Aboriginal sovereignty merit constitutional protection because a just distribution of sovereignty requires both constitutionally

[31] Michael Murphy, "Prisons Of Culture: Judicial Constructions Of Indigenous Rights In Australia, Canada, And New Zealand" (2009) 87:2Can Bar Rev 357 [Murphy, "Prisons of Culture"] at 380.
[32] Russell Barsh & James Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1996-1997) 42 McGill L J 993 at 1008.
[33] Ladner, *supra* note 4 at 291.
[34] *Ibid* at 297.

> recognizing the fact that Aboriginal peoples were sovereign prior to European contact and vesting greater law-making authority in Aboriginal communities.[35]

However, as the Royal Commission on Aboriginal Peoples acknowledged:

> Section 35 does not warrant a claim to unlimited governmental powers or to complete sovereignty, such as independent states are commonly thought to possess. As with the federal and provincial governments, Aboriginal governments operate within a sphere of sovereignty defined by the constitution.[36]

Accordingly, Macklem proposes that:

> Despite settlement and the establishment of the Canadian state, Aboriginal law ought to continue to govern Aboriginal people and their lands and, in certain circumstances, ought to be treated as paramount in the event of a conflict with an inconsistent federal or provincial law.[37]

Moreover, Crown sovereignty could be exercised in a way that would complement Indigenous sovereignty to enhance the protection of Aboriginal rights. Existing Aboriginal sovereignty, combined with constitutional protections provided by sections 35 and 52 could lead to this result.

The third option is a merged model, where two sovereigns each adapt to fit within a new sovereign entity that incorporates both sovereigns. Binnie J. explains the merged sovereignty model in his concurring decision in *Mitchell* v. *MNR*:

> "Merged sovereignty" asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners…. [I]n 1982 when the s. 35(1) reconciliation process was established...all aspects of our sovereignty became firmly located within our borders…. [A]boriginal and non-aboriginal Canadians *together* form a sovereignty with a measure of common purpose and united effort.[38]

The merged model may involve the development of new decision-making entities (such as co-management boards) to engage Aboriginal and Crown representatives in mutually agreed upon decision-making processes.

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[35] Macklem, *Indigenous Difference*, *supra* note 6 at 287.
[36] *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 241.
[37] Macklem, *Indigenous Difference*, *supra* note 6 at 180.
[38] *Mitchell v MNR* 2001 SCC 33 [*Mitchell*] at para 129.

The fourth option is a lesser version of the merged model and entails the fusion of each sovereign's legal order into a new intersocietal law. In *Van der Peet*, McLachlin articulates the goal of section 35 as the "reconciliation of the different legal cultures of [A]boriginal and non-[A]boriginal peoples."[39] Lamer characterizes the law of Aboriginal rights as "neither English or [A]boriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities."[40] Borrows suggests that intersocietal law should increase Aboriginal influence in decision-making processes:

> Aboriginal law is a source to which the courts look to determine answers to questions before them. The idea is to reconcile Indigenous and non-Indigenous legal traditions…. [A] morally and politically defensible conception of Aboriginal rights will incorporate both legal perspectives…. Aboriginal law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of land. It is more than evidence: it is actually law. And so, there should be some way to bring to the decision-making process those laws that arise from the standards of the Indigenous people before the court.[41]

The intersocietal model would incorporate Indigenous legal traditions into the development, application, and interpretation of Canadian law.

Under the fifth model of reconciliation, a superior sovereign unilaterally subsumes an inferior sovereign. The inferior's sovereignty is either never acknowledged or is extinguished, but certain practices are permitted to continue as long as those practices do not interfere with the superior's sovereignty. This assimilationist model of reconciliation has become the standard in Canadian courts.[42]

The assimilationist model of reconciliation was born in *Van der Peet*, when Lamer C.J. interpreted section 35(1) as providing "the constitutional framework through which the fact that

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[39] *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*] at para 310.
[40] *Ibid* at para 42.
[41] John Borrows, "Creating an Indigenous Legal Community" (2005) 50 McGill LJ 153 at 173.
[42] Vermette, *supra* note 24 at 67.

[A]boriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown."[43] This model of reconciliation is one-sided: "all Aboriginal rights must be 'reconciled' with the imported [colonial] legal system,"[44] and not vice versa. Macklem explains that the root of this inequity has racist origins:

> European assertions of territorial sovereignty in North America were premised on the assumption that Aboriginal nations were not sovereign nations at the time of European contact, an assumption in turn founded on the belief that Aboriginal peoples were inferior to European peoples.[45]

Based on this racist assumption, Lamer invents the objective of reconciling *Aboriginal societies* with Crown *sovereignty*.[46] By framing of the purpose of section 35 as the reconciliation of *Aboriginal societies* and Crown *sovereignty*, the SCC subverts *Indigenous sovereignty*. Although *Indigenous sovereignty* continues to exist, the Canadian legal system undermines *Indigenous sovereignty* by reducing the concept to *Aboriginal societies* thus creating an unbalanced comparison from which to seek reconciliation. Rather than reconciling *Indigenous sovereignty* with Canadian *sovereignty*, the Canadian legal system sets out to reconcile *Aboriginal societies* with Canadian *sovereignty*. This one-sided equation favours Canadian sovereignty. It does not promote reconciliation, but rather, facilitates assimilation: Aboriginal *societies* are expected to reconcile to the Crown's *sovereignty*, and there is little expectation that the Crown will concede any of its power to safeguard Aboriginal rights.

[43] *Van der Peet*, *supra* note 39 at para 31.
[44] Barsh & Henderson, *supra* note 32 at 1004.
[45] Macklem, *Indigenous Difference*, *supra* note 6 at 6.
[46] *Van der Peet*, *supra* note 39 at para. 31.

According to Ladner, "The court has…framed reconciliation in a manner that… disregards Indigenous constitutional orders…and subjects Indigenous nations and their 'sovereign' constitutional orders to the sovereignty of the Crown."[47] Similarly, Walters observes:

> it is hard to escape the impression that the Court has concluded that Aboriginal peoples must be reconciled with the fact of Crown sovereignty, or, in other words, with the fact of their place within the Canadian state.… The Court's formulation of reconciliation is therefore best described as… an asymmetrical or one-sided form.[48]

Macklem explains the problem with this approach: "characterizing Aboriginal nations as 'previously self-governing' groups that have been 'incorporated' into a larger state presupposes the legitimacy of the assertion of state sovereignty that purported to accomplish such an incorporation."[49] Murphy traces the assimilationist model of reconciliation to colonial ideologies:

> Reconciliation in the new civilizationist paradigm is predicated on the acceptance that the colonization of the Americas was historically inexorable and, ultimately, justifiable as a means of spreading the scientific, technological, and material benefits of modernity.[50]

The assimilationist model has reduced "reconciliation to a mere balancing of interests"[51] which, as Chapter 4 has shown, has been detrimental to Aboriginal rights. Goldenberg describes that:

> A restrictive view of reconciliation…entails the widening of permissible legislative objectives that would justify the infringement…of existing Aboriginal rights under the Sparrow test…, many of which have more to do with satisfying non-Aboriginal and commercial interests than with promoting the protection of Aboriginal rights.[52]

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[47] Ladner, *supra* note 4 at 283.
[48] Walters, "Reconciliation", *supra* note 26 at 179.
[49] Macklem, *Indigenous Difference*, *supra* note 6 at 73.
[50] Murphy, "Reconciliation", *supra* note 23 at 252.
[51] Walters, "Reconciliation", *supra* note 276at 182.
[52] Goldenberg, *supra* note 27 at 82-3.

In *Van der Peet*, Lamer used reconciliation "primarily to justify unilateral infringement of Aboriginal rights for the benefit of other Canadians."[53] The application of this model of reconciliation to section 35 "has gravely eroded the constitutional status of Aboriginal rights."[54]

Although my preference is for the inherent sovereignty model, I appreciate that it is not conducive to reconciliation. Of the five models, I believe that the equal sovereignty model would be the best for achieving reconciliation. This model would give effect to existing Indigenous sovereignty by recognizing and affirming it under section 35 (thus converting certain aspects of Indigenous sovereignty into Aboriginal sovereignty for reconciliation purposes), and would combine with the constitutional supremacy provided by section 52 to result in actual repercussions for Crown sovereignty (i.e. conflicting legislation would get struck down for being inconsistent with Aboriginal sovereignty). Felix Hoehn highlights key benefits of the equal sovereignty model:

> A paradigm grounded in the principle of the equality of peoples will indeed force a reconstruction of Aboriginal law that will change some of the field's most elementary generalizations – it will cause many existing doctrines to be re-examined or discarded.[55]
>
> …
>
> Once the continuing sovereignty of Aboriginal peoples is recognized it becomes necessary to secure the consent of Aboriginal peoples, in treaties, to just terms for sharing sovereignty in a federal Canada…. Indeed the focus of discussion under the equality paradigm will naturally shift from defining the "rights" of Aboriginal peoples versus the Crown's exclusive sovereignty to ways sovereignty, and hence jurisdiction, should be shared between the Crown and Aboriginal nations.[56]

Certainly, previous chapters have shown that a paradigm shift is needed.

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[53]Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2 Indigenous LJ 1 at 17.
[54] Lisa Dufraimont, "From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada" (2000) 58 UT Fac L Rev 1 at 13.
[55] Felix Hoehn, *The Emerging Equality Paradigm in Aboriginal Law* (LLM Thesis, University of Saskatchewan, 2011) [unpublished] at 92.
[56] *Ibid* at 93.

Hoehn suggests that:

> An Aboriginal nation, especially one that has not yet entered into a treaty with the Crown, has a solid legal and constitutional foundation for asserting its continuing sovereignty, as well as concomitant rights to territory and jurisdiction. It can also claim that Crown sovereignty is not legitimate…until a treaty reconciles the sovereignty of the Aboriginal nation with Canadian sovereignty.[57]

The Nuxalk Nation, having not yet entered into a treaty with the Crown, is in a prime position to assert its continuing sovereignty, and is doing so through its eulachon protection and restoration initiatives. Applying the equal sovereignty model to the Nuxalk eulachon crisis will demonstrate how the recognition and affirmation of Aboriginal sovereignty would provide a stronger foundation from which to seek reconciliation than is currently being offered by the Canadian legal system.

A major issue for the Nuxalk Nation in attempting to restore the eulachon fishery has been the fragmentation of the Canadian legal system in four ways. First, the Canadian state is fragmented in that the constitutional division of powers divides jurisdictional authority between the federal and provincial governments. Second, Canadian laws divide federal and provincial powers even further into legislation and regulations that guide governmental decision-makers within their respective spheres of authority. Third, governmental decision-making is also fragmented. Decisions are often made in isolation, incrementally, and without proper consideration of the future, downstream, or cumulative effects of each decision. Fourth, fragmentation affects the interpretation of Aboriginal rights, which are considered separately from underlying Indigenous legal orders, on a nation-by-nation, case-by-case, site-specific, and (sometimes) species-by-species basis. The end result of these four types of fragmentation within the Canadian legal system is a severe erosion of Aboriginal rights. In the Nuxalk case,

[57] *Ibid* at 86-7.

fragmentation has led to the diminishment of Nuxalk sovereignty, the extirpation of the eulachon, and the lack of meaningful recourse under the Canadian legal system.

In contrast to the fragmented Canadian legal system, Indigenous legal orders are based on a more holistic worldview. Leroy Little Bear explains that "In Aboriginal philosophy…[a]ll things are animate, imbued with spirit, and in constant motion…. [I]nterrelationships between all entities are of paramount importance…. [O]ne has to look at the whole to begin to see patterns."[58] Similarly, Kapashesit and Klippenstein's observe that Indigenous belief systems:

> share a number of features…includ[ing] a lack of division between humans and the rest of the environment, a spiritual relationship with nature, concern about sustainability, attention to reciprocity and balance, and the idiom of respect and duty (rather than rights).[59]

The equal sovereignty model would incorporate Indigenous legal orders from all affected Indigenous nations into decision-making. Each of their legal orders would factor into the decisions that could affect their respective territory and rights. The sum of their laws would provide a strong foundation for ethical decision-making, resulting in a holistic approach that would promote sustainability.

In relation to the Nuxalk eulachon crisis, the equal sovereignty model would acknowledge and respect Nuxalk laws that are currently being applied to protect and restore eulachon within Nuxalk territory. Although Nuxalk sovereignty would only apply within Nuxalk territory, Crown sovereignty (which is more expansive than Nuxalk sovereignty) could compliment Nuxalk sovereignty to support Nuxalk protection and restoration efforts. These efforts would also be bolstered by Nuxalk alliances with neighbouring Indigenous nations, who,

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[58] Leroy Little Bear, "Jagged Worldviews Colliding" in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 77 at 77-78.

[59] Randy Kapashesit & Murray Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1990-1991) 36 McGill LJ 925 at 929.

in making decisions affecting their own territories and rights, would be mindful of how their decisions could impact Nuxalk interests. A more holistic approach by the Canadian legal system and Indigenous legal orders would also consider and mitigate long term, downstream, and cumulative effects, which would greatly assist in alleviating the Nuxalk eulachon crisis.

Another key issue (related to fragmentation) in the Nuxalk eulachon crisis is that the courts consider Aboriginal practice rights in isolation from the broader rights of Indigenous sovereignty and legal orders. The de-contextualization of practice rights makes it easier for the Canadian legal system to dismiss them. In the Nuxalk case, the practice rights to fish and trade eulachon are rendered meaningless without the jurisdictional rights to protect and restore the species. The practice rights, considered without the jurisdictional context, would be *de facto* extinguished at this point in time, because there are too few eulachon to harvest. However, the equal sovereignty model would acknowledge that Nuxalk jurisdiction has not been extinguished, so all eulachon-related rights continue to exist, and deserve recognition and affirmation by the Canadian legal system. Effective protection of these rights requires the Canadian legal system to acknowledge Nuxalk sovereignty, and incorporate Nuxalk laws into decisions that affect eulachon.

Under the equal sovereignty model, consultation would mean something entirely different than it does now. Consultation would not be a mere process, but would actually require Indigenous consent. The government would no longer have the ultimate authority in consultations. Instead, the Crown and Aboriginal nations would have to reach mutual agreement in decision-making that could affect Aboriginal territories and rights. The equal sovereignty model would respect the sovereignty of all Indigenous nations. Indigenous laws guiding alliances among neighbouring nations would strengthen Aboriginal influence in consultations.

Indigenous laws, requiring a more holistic approach to consultation, would mean that all affected Aboriginal nations would be consulted, and their collective concerns would be dealt with. Indigenous laws would also inform conflict resolution models that would be collaboratively developed and mutually agreed upon by all affected parties, including the Crown. Indigenous laws would factor into the consultations, resulting in more respectful dialogues, and in more sustainable outcomes. Alliances among Indigenous nations, and relationships between Indigenous nations and the Crown, would be improved.

These factors would lead to an improvement in the implementation of *SARA*. If Indigenous laws influenced the *SARA* listing process, then more holistic approach would apply. Consultation would not be done incrementally or nation-by-nation basis. A holistic approach would require a full consideration of the past, present, and future of the state of the eulachon to devise strategies to recover the eulachon. Indigenous laws from all affected nations would inform this discussion, and would likely lead to the protection of eulachon through the *SARA* listing process. Indigenous laws would guide the development of recovery strategies and action plans, as well as the identification and protection of critical eulachon habitat.

The equal sovereignty model would also ensure that Indigenous legal orders would inform the remedies for Crown breaches of Aboriginal rights, fiduciary duties, and solemn obligations. The incorporation of Indigenous laws regarding rectification would make the remedies more meaningful and effective for Aboriginal peoples. As Murphy acknowledges, "if the courts are to succeed…in reconciling the rights and interests of indigenous and non-

indigenous peoples, the parties to their decisions must be convinced that a measure of justice has been served."[60]

Chapter 3 revealed that the Nuxalk eulachon crisis has roots that lie deeper than the current extirpation. The problem began with the imposition of colonial laws to the detriment of Nuxalk legal order. The subversion of Nuxalk authority has dislodged the Nuxalk Nation's relationships with its territory and everything contained within it. The Nuxalkmc have never surrendered their sovereignty, and continue to assert it. However, the Crown's assertion of sovereignty with respect to Nuxalk territory, resources, and rights, has practical implications for the effectiveness of Nuxalk sovereignty. Therefore, any meaningful remedy, from a Nuxalk perspective, would require the Crown to recognize and respect Nuxalk sovereignty, and to take positive action in support of Nuxalk efforts to protect and restore eulachon.

Under the equal sovereignty model, Indigenous laws would also inform the Canadian legal system's approach to reconciliation. As Murphy suggests:

> Although there is no grand, unified First Nation perspective on reconciliation, there is widespread agreement that it encompasses a forward-looking relationship among equals who will seek to establish bonds of trust and mutual respect by working to rectify the injustices of the past and who are committed to governing the terms of their existence in a spirit of reciprocity and mutual consent.[61]

Incorporating Indigenous understandings of reconciliation into reconciliatory processes would result in a more honourable approach to reconciliation than is presently occurring within the Canadian legal system.

As part of reconciliation, the Nuxalk legal order would likely require an acknowledgement of past wrongs, a commitment to restoring Nuxalk people, territory, and resources to their pre-contact conditions, and a promise for improved conduct in the future. A

[60] Murphy, "Prisons of Culture", *supra* note 31 at 389.
[61] Murphy, "Reconciliation", *supra* note 23 at 251.

general apology from the federal Crown for unilaterally asserting sovereignty to the detriment of Nuxalk sovereignty would be required. The Department of Indian Affairs (DIA) would be required to apologize for confining the Nuxalk people to Indian reserves, and for breaching its promises to ensure sufficient fisheries for the Nuxalkmc to sustain livelihoods on the miniscule reserves that the DIA allotted to them. The DFO would be required to acknowledge its numerous errors that led to the downfall of the steelhead, coho, and eulachon. Both departments would be required to acknowledge and respect existing Nuxalk sovereignty going forward.

How to transform the direction of the Canadian legal system's approach to reconciliation remains an unresolved question. For Aboriginal peoples, the two primary methods for effecting change within the Canadian legal system are litigation and negotiation.[62]

The likelihood of reconciling Indigenous and Crown sovereignties through litigation is minimal. Asch and Macklem observe that in *Sparrow*, the "Court severely curtailed the possibility that s. 35(1) includes an [A]boriginal right to sovereignty and rendered fragile s. 35(1)'s embrace of a constitutional right to self-government."[63] Despite this, the SCC "has openly considered the possibility (without coming to a formal decision) that self-government is a constitutionally protected Aboriginal right."[64] In *Mitchell*, the SCC declined to apply the doctrine of "sovereign incompatibility" in a claim of an Aboriginal right to transport goods across the Canada-United States border. Under the doctrine of sovereign incompatibility, "[A]boriginal interests and customary laws were presumed to survive the [Crown's] assertion of

[62] Aboriginal peoples also influence legislative processes, but this is often achieved through negotiations because Aboriginal peoples are underrepresented in the provincial legislatures and federal parliament, thus reducing their ability to directly effect change through democratic processes.
[63] Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. *v. Sparrow*" (1991) 29 Alta L Rev 498 at 516.
[64] Murphy, "Prisons of Culture", *supra* note 31 at 383.

sovereignty…unless they were incompatible with the Crown's assertion of sovereignty."[65] Binnie J., in his concurring judgement, stated that "First Nations were not wholly subordinated to non-[A]boriginal sovereignty but over time became *merger partners*."[66] In *Campbell* v. *British Columbia*,[67] the BC Supreme Court found that "although the right of [A]boriginal people to govern themselves was diminished, it was not extinguished."[68] However, as explained in Chapter 4, precedent reveals that it is unlikely a Canadian court would accept claims of Indigenous sovereignty. The SCC determined that Aboriginal claims of self-government[69] and jurisdiction[70] were too broad, and re-characterized these claims to fit within the Canadian legal system's paradigm. Ladner understands that court recognition of Indigenous sovereignty is improbable because:

> it is the very institutions that see themselves as the defenders of the Crown's sovereignty that are being asked to denounce this sovereignty and recognize the sovereignty of Indigenous peoples within both Indigenous and Canadian constitutional structures.[71]

Accordingly, is unlikely that litigation would lead to the reconciliation of Indigenous and Crown sovereignties.

For Indigenous peoples who have not surrendered jurisdiction over their territories and citizens, it would be ironic to bring an Indigenous sovereignty claim within the Canadian legal system. Having not conceded to Canadian jurisdiction, it would seem incongruous for Indigenous peoples to approach the Canadian judiciary to acknowledge Indigenous sovereignty. Walkem observes that "[u]sing litigation to forward Indigenous Peoples' aspirations requires

[65] *Mitchell*, *supra* note 38 at para 10.
[66] *Ibid* at para 129 [emphasis in the original]. Because the SCC found that the claimant did not provide sufficient facts regarding north-south trade, the SCC held that it was not necessary to decide the "sovereign incompatibility" issue. Because the issue was not formally decided, Binnie's comments are not binding.
[67] *Campbell v British Columbia*, [1999] 3 CNLR 1.
[68] *Ibid* at para 179. This is a lower court decision, so it has low precedential value.
[69] *R v Pamajewon*, [1996] 2 SCR 821.
[70] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.
[71] Ladner, *supra* note 4 at 296.

some degree of recognition of the legitimacy of colonial power, as courts are instruments of colonial society and reflect colonial rules and aspirations."[72] Moreover, the Canadian legal system is often at the root of the problems that Indigenous peoples are seeking to redress. According to Ladner:

> the ineffectiveness of the judiciary in its dealings with Indigenous nations is the result of the courts' colonial mentality and their position as defenders of the interests of the colonial state and the colonial paradigm. Their…test for Aboriginal rights (including the underlying idea that Aboriginal rights must be compatible with Canadian sovereignty) and their understanding of… infringement…obfuscate and deny Aboriginal peoples the right and the opportunity to exercise sovereignty, engage in a nation-to-nation relationship, and govern within their territory (i.e. manage their resources) in accordance with their own constitutional order.[73]

The case law reviewed in Chapter 4 reveals the inadequacies of the Canadian common law with respect to Aboriginal rights. It is improbable that meaningful reconciliation could be achieved using precedents that are based on racist ideologies of Indigenous inferiority.

The Royal Commission on Aboriginal Peoples indicated that the courts are not the appropriate venue for pursuing reconciliation. Walters summarizes the concern:

> [T]he incremental manner in which judges in the common law tradition advance the law, the deference they extend to governments and legislatures, and the respect they show for established legal precedent, might prevent them from articulating the innovative constitutional transformations that reconciliation requires.[74]

Although the Royal Commission on Aboriginal Peoples was released in 1996, the same problems with the common law still exist. With respect to the deference the courts extend to governments and legislatures, Jonathan Rudin acknowledges the reality that "the strength of any particular Court decision depends on the extent to which it is accepted by the legislature. In the area of

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[72] Ardith Walkem, "Constructing the Constitutional Box: The Supreme Court's Section 35(1) Reasoning" in Ardith Walkem & Halie Bruce eds, *Box of Treasures or Empty Box?: Twenty Years of Section 35* (Penticton, BC: Theytus Books, 2003) 196 at 199.
[73] Ladner, *supra* note 5 at 285.
[74] Walters, "Reconciliation", *supra* note 23 at 265.

Aboriginal rights, the Court cannot provide much support in the face of significant political opposition to the expansion of such rights."[75] This is unfortunate, because, as Vermette acknowledges:

> Indigenous peoples in Canada continue to be among the most disadvantaged and disempowered segments of society, faced with a difficult struggle to assert and protect their rights in the face of fickle, frequently unsympathetic, and unfailingly powerful majorities.[76]

The extent to which Aboriginal rights are recognized and affirmed by Canadian courts depends on the political will of Canadian society. The more supportive Canadian society is of Aboriginal claims, the more likely a court will find in favour of the Aboriginal claimants. Therefore, a societal shift towards acknowledging Indigenous sovereignty is needed as a basis for reconciliation.

Walters suggests that "the Court now seems to view one of its primary roles to be encouraging reconciliation through negotiation."[77] In *Haida*, McLachlin C.J. acknowledged that "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty."[78] This observation seemed promising because "for the first time, the Court…recognized that it is 'Aboriginal sovereignty', not just distinctive [A]boriginal societies or [A]boriginal occupation, that must be reconciled with Crown sovereignty."[79] However, the Aboriginal sovereignty concept has not yet resulted in any significant changes in the judiciary's interpretation of Aboriginal rights post-*Haida*. The courts continue to treat Aboriginal sovereignty as being inferior to Crown sovereignty.

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[75] Jonathan Rudin, "One Step Forward, Two Steps Back: the Politican and Institutional Dynamics Behind the Supreme Court of Canada's Decisions in *R. v. Sparrow*, *R. v. Van der Peet* and *Delgamuukw v. British Columbia*" (1998) 13 JL & Soc Pol'y 67 at 68.
[76] Vermette, *supra* note 25 at 380.
[77] Walters, "Reconciliation", *supra* note 26 at 185.
[78] *Haida*, *supra* note 3 at para 20.
[79] Mark Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's LJ 470 at 514.

The legitimacy of any reconciliation process depends on the theories that guide it. If negotiations are based on an assumption of Crown superiority, then Indigenous peoples will have minimal power to influence the outcome. Moreover, reconciliation based on notions of Indigenous inferiority would only serve to perpetuate racism. True reconciliation cannot be achieved through such imbalanced negotiations.

Chapter 4 revealed that the Nuxalk Nation is unlikely to find effective remedies to alleviate the eulachon crisis through litigation or negotiation under the Canadian legal system. The colonial presumption of Indigenous inferiority is entrenched in the Canadian legal system; Indigenous peoples are unable to effectively protect their rights under this regime.

Whether in the court room or at the negotiation table, the Canadian legal system needs to better reflect the existence of Indigenous sovereignty. Reconciliation must begin from a place of equality. Indigenous sovereignty must be given equal respect in relation to Crown sovereignty. If section 35 is meant to play an intermediary role between Indigenous and Canadian sovereignties, then reconciliation on both sides is required; Indigenous peoples must not be expected to assimilate within Canadian sovereignty. The Canadian legal system has the capacity to effectively protect Aboriginal rights, but is failing to do so using the assimilationist model of reconciliation.

Although my recommendations may be perceived as overly optimistic and not practical, I am not alone in my beliefs. Other legal academics have also recommended that Indigenous sovereignty must be given equal respect to Crown sovereignty, and have suggested that anything less is a violation of fundamental equality rights.[80] In my view, it is important to push the

[80] Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stan L Rev 1311 at 1366.

boundaries of the Canadian legal imagination[81] in order to force a shift from the current oppressive colonial regime toward a decolonized legal system that embraces the existence and legitimacy of Indigenous sovereignty, and correspondingly improves the legitimacy of Canadian sovereignty.

5.5 Conclusion

To return to the Nuxalk eulachon crisis, the current point of conflict between Nuxalk and Canadian sovereignties is primarily in relation to the Nuxalk Nation's efforts to protect and restore eulachon. The Nuxalk Nation is asserting sovereignty in their efforts to protect and restore eulachon. However, Nuxalk sovereignty is only exercisable within Nuxalk territory, and trawl fisheries that are occurring outside of Nuxalk territory (beyond Nuxalk jurisdiction) have serious implications for the eulachon. Nuxalk efforts are pointless if the eulachon they are trying to save are being destroyed outside of Nuxalk territory, and the Crown is doing nothing to stop the destruction. Section 35 requires the Crown to recognize and affirm Aboriginal rights. In the Nuxalk eulachon case, this arguably requires the Crown to manage trawl fisheries in a way that ensures Nuxalk eulachon rights are not extinguished. The Nuxalkmc continue to urge the DFO to stop the Pacific Coast trawl fisheries, and to list eulachon as "endangered" under the *SARA*. However, the Nuxalkmc need leverage to pressure the Crown to support their efforts. To effectively protect Nuxalk eulachon-related rights, the Canadian legal system needs to recognize and affirm Nuxalk sovereignty which articulates Nuxalkmc responsibilities to protect the integrity of their territory and resources. As a result of the Canadian legal system's failure to recognize and affirm the broader Nuxalk jurisdictional rights that lay the foundation for the practices of fishing and trading eulachon, their practice rights have been severely diminished,

[81] Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill LJ 382.

resulting in *de facto* extinguishment at the present time. The eulachon crisis has galvanized the Nuxalkmc to assert their sovereignty. One would hope that this catastrophe might also prompt the Canadian legal system to change, so that no other Indigenous nation suffers the same tragedy that the imposition of colonial laws has inflicted upon the Nuxalkmc. A shift to the equal sovereignty model of reconciliation would provide more effective protection of Aboriginal rights than the Canadian legal system currently offers.

The crisis can be boiled down to a simple but powerful metaphor. The eulachon symbolize everything that the Nuxalkmc have lost since contact with Europeans: sovereignty, jurisdiction, territory, governance, people, and resources. The eulachon will only return when Canada puts its relations with Indigenous nations on an equal foundation based on the mutual recognition of sovereignty.

While the SCC has clearly established that *de facto* extinguishment of Aboriginal rights is not legally valid, its acceptance of sweeping Canadian interests as valid objectives to justify the infringement of Aboriginal rights may lead to this result. As Canadian resource development makes ever-expanding demands on lands and resources, Aboriginal rights become increasingly under threat. Escalating environmental degradation raises the likelihood of *de facto* extinguishment of Aboriginal rights via the extirpation of species central to the exercise of such rights. Therefore, it is likely that Aboriginal peoples will increasingly seek to address this problem. If Aboriginal rights are to have any substance under Canadian law, courts and governments must acknowledge the existence of these rights on a broader scale. True reconciliation requires the recognition and affirmation of Indigenous sovereignty by the Canadian legal system.

Way. (That is all I have to say.)

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