

Indigenous Peoples' Tenure Rights in Fisheries: A Canadian Case Study

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Abstract

This paper describes recent developments in recognition of aboriginal rights to fish in Canada, in particular, how First Nations have utilized the Canadian constitution and domestic law to achieve greater access to fisheries resources. Canada's constitution recognizes and affirms "existing aboriginal and treaty rights of aboriginal peoples..." The nature and scope of aboriginal fishing rights in Canada are evolving through the negotiation of modern treaties and through litigation. The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal and non-aboriginal peoples to their respective claims, interests and ambitions. In 1990, the Supreme Court of Canada found that a First Nation group on Canada's Pacific coast has an aboriginal right to fish for food, social and ceremonial purposes and that this right takes priority (after conservation) over other harvesters. The Government of Canada responded to this court decision by extending the aboriginal priority to fish for food, social and ceremonial purposes to all First Nations across Canada. In 2009, Canada's courts found that five First Nations on the Pacific coast hold aboriginal rights to fish within their territories, and to sell that fish. As a result, the five First Nations had their aboriginal fishing rights recognized, increased their access to fish for economic purposes and gained the flexibility of having small-scale local fisheries as an alternative to participating in the general commercial fishery. A second phase of the trial concluded in 2018. It provided a further interpretation of the rights with respect to a number of issues including fisheries management responsibilities, the appropriate level of fish allocation for some species and the priority of the First Nations' fishery relative to other harvesters.

1. INTRODUCTION

1.1 Description of the fishery

This paper provides an overview of a multi-species fishery off Canada's Pacific coast, where fishing is conducted by indigenous groups (First Nations). These groups carry court-recognized commercial fishing rights. Pre-contact, First Nations had a long history of fishing and exchanging fish with others in this area. Fish were an integral part of their distinctive economies and culture. Post-contact, when the modern fishery developed during the late 1800s, First Nations maintained a prominent role, using smaller, older vessels in local waters close to canneries. However, during the 1920s and 1930s, First Nations fishermen began to be displaced by the trend toward larger, costlier fishing vessels. This displacement continued during the mid-twentieth century with the consolidation of the salmon canning industry into fewer, larger operations.

First Nations' participation in the commercial fishery declined even further when the federal government began to introduce limited entry licensing in the late 1960s and subsequently through government-funded fleet reduction programs. Specifically, many First Nation vessel owners did not

meet the initial landings qualifications required to obtain a limited entry licence. They were therefore no longer eligible to participate in the commercial fishery. Additionally, some individuals who did qualify for limited entry licences subsequently sold them in government-funded licence retirement programs – these programs were designed to improve the sustainability and financial viability of commercial fisheries.

The decline in First Nations' participation in commercial fisheries resulted in serious economic and social distress in their communities, many of which had limited alternative employment opportunities. This situation prompted the federal government to adopt a series of measures, since the 1990s, to increase the participation of First Nations in commercial fisheries. One ongoing measure involves the federal government acquiring commercial fisheries access through a voluntary relinquishment process, where commercial vessel owners and licence holders are offered the opportunity to permanently relinquish licences and/or quota in exchange for a payment. The equivalent commercial fishing access is then re-issued to First Nations communities.

Some First Nations have disagreed with the government's approach to providing commercial fisheries access in the manner described above. In particular, First Nations maintain that the approach does not recognize an aboriginal right to fish: commercial communal fishing licences and quotas are usually issued to First Nations authorizing participation in the general commercial fishery, as opposed to in a separate aboriginal rights-based fishery. This means that commercial fishing under a communal commercial fishing licence is generally subject to the same terms and conditions as other commercial licences, except there is no associated licence fee.

In the early 2000s, a number of First Nations on the Pacific coast were dissatisfied with their access to commercial fisheries and decided to seek a judicial determination of their aboriginal fishing rights.¹ These First Nations sought a greater level of commercial fisheries access and the ability to use numerous small boats in their local area to conduct a multi-species fishery, rather than participating in the general commercial fishery with a limited number of larger boats that are generally licenced as a single species fishery. Following a lengthy trial, a 2009 court decision found that five First Nations collectively known as T'aaq-wiihahak (meaning fishing with permission of the hereditary chiefs) each have an aboriginal right to fish and sell fish within their territories up to 9 miles offshore.² This ruling was based on evidence that the First Nations' ancestors had traded fisheries resources at a significant scale and that this trade was a practice integral to their society.

¹ Eleven of the 14 Nuu-chah-nulth Nations started the action in 2003. During pre-trial procedures, the claims of three of those Nations were severed to be tried in a later phase due to conflicting claims with the other eight. Three more plaintiffs discontinued their claims during the trial in order to sign the Maa'nulth Treaty. In the end, five of the 14 Nuu-chah-nulth Nations – the Ahousaht, Ehattesaht, Hesquiaht, Mowachaht/Muchalaht and Tla-o-qui-aht – completed the case.

² Each of the five First Nations self-identified as an autonomous nation and the judgement concluded that each group is the rights holder for its own First Nation.

The T'aaq-wiihak First Nations' fishing rights are protected under Canada's constitution.³ The 2009 judgment did not provide a precise definition of the T'aaq-wiihak First Nations' fishing rights – the rights were described as something less than an unrestricted commercial right on an industrial scale, but something more than exchanging fish for money or other goods. The Court nevertheless characterized the First Nations' preferred means of fishing rights as community-based, multi-species, localized fisheries involving wide community participation, using small low-cost boats. In the absence of a precise definition of the right, the Court directed the T'aaq-wiihak First Nations and the federal government to consult and negotiate the manner in which the aboriginal right to fish and sell fish can be accommodated and exercised without jeopardizing Canada's legislative objectives and societal interests in regulating the fishery.

After six years of negotiations, there was still no agreement between the T'aaq-wiihak First Nations and the government on allocations of fish and management of the fishery. Progress was hindered because the parties had divergent views about the nature and scale of the right. This impasse resulted in a second phase of the trial, which concluded in 2018. The 2018 judgment provided a further interpretation of the nature and scope of the rights, including fisheries management responsibilities, the appropriate level of fish allocation for some species, and the priority of the T'aaq-wiihak First Nations' fishery relative to other harvesters.

As a result of the court decisions described above, the T'aaq-wiihak First Nations had their aboriginal fishing rights recognized, increased their access to fish for commercial purposes and gained the flexibility to have small-scale local fisheries as an alternative to participating in the general commercial fishery. The rest of this paper focuses on a commercial salmon fishery that was initiated in 2012, as a result of the Court's recognition of the five T'aaq-wiihak First Nations' aboriginal fishing rights. The fishery continues to evolve through negotiations and ongoing litigation. The government refers to it as a "demonstration fishery," meaning alternative fisheries management features are being tested in an attempt to accommodate the T'aaq-wiihak First Nations' fishing rights, without jeopardizing Canada's legislative objectives and societal interests in regulating the fishery.

The T'aaq-wiihak First Nations do not consider the fishery to be an appropriate reflection of their aboriginal rights, as they continue to seek changes to the fisheries management regime imposed by the government. However, as an interim step, the T'aaq-wiihak First Nations have accepted aspects of the government's demonstration fishery, offered "in order to create opportunities, however, limited, for their fishers, while continuing with negotiations for true rights-based fisheries."⁴ The T'aaq-wiihak First Nations' salmon fishery operates separately from the general commercial fishery. The fishing area includes coastal inlets and near-shore coastal waters, extending nine nautical miles seaward. Figure 1 illustrates the T'aaq-wiihak First Nations' fishing territories. The main target species in this fishery is Chinook salmon (*Oncorhynchus tshawytscha*), though smaller quantities of other salmon (e.g., coho and sockeye) and

³ Section 35(1) Canada's Constitution Act, recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples in Canada; however, it does not specify the nature or content of the rights that are protected.

⁴ T'aaq-wiihak Fishery Indicators, 2015. Page 3.

groundfish (e.g., halibut, lingcod and rockfish) are harvested too. All of the species harvested in the fishery are fully exploited and are subject to annual stock assessments.



Figure 1. Map identifying the location of the fishery.

Source: Fisheries and Oceans Canada, Pacific Region.

The fishing season covers the period of February to September; however, fishing is permitted only during authorized openings. Openings are scheduled to occur when there is an abundance of the species, and the by-catch of lesser abundant species can be minimized. In 2016, most of the total salmon harvest occurred in the first four openings (one in May, one in July and two in August). In 2017, most of the harvest occurred during three openings (13 February to 15 March, 19 April to 13 May and 24 July to 30 July).

After the 2009 decision, the T'aaq-wiihak reached an agreement that they would conduct their fishery using two main types of vessels – (i) commercial troll vessels ranging from 34 to 46 feet in length and (ii) 'mosquito' vessels ranging from 14 to 28 feet in length.⁵ Both the troll and mosquito vessels fish with hook and line gear, but the troll vessels have significantly greater catching capacity. The troll vessels typically have internal fish holds with ice, allowing fishers to engage in multi-day fishing trips (usually two to four days). By contrast, the mosquito vessels are mostly small, open, aluminium skiffs or covered fibreglass hull cruisers. They use coolers on the deck of the vessels to store fish. Mosquito vessels generally engage in day-fishing trips due to storage limitation of their coolers.

The relative catching and storage capacity of the two vessel types is reflected in the distribution of landings. Since this fishery was established, in 2012, troll vessels have accounted for a minority of the total number of vessels but have landed a majority of the total catch (e.g. between 2014 and 2017, troll vessels accounted for 76 percent to 88 percent of the total Chinook landings). All of the fish sold from vessels participating in the fishery must be landed at a designated landing site and validated through a dockside-monitoring program. There are four designated landing sites located in the fishing area (Zeballos, Gold River, and two docks in Tofino). The distance between the most northern landing site (Zeballos) and the most southern (Tofino) is about 160 kilometres. No major conflicts have occurred on the fishing grounds. However, a number of concerns have been raised by those who participate in the T'aaq-wiihak First Nations fishery and by those potentially affected by it. For example, the T'aaq-wiihak First Nations have opposed some of the government restrictions imposed on their fishery. T'aaq-wiihak fishers also expressed frustration when trolling next to recreational fishers, which are not restricted to the same opening and area restrictions or fishery monitoring requirements. In addition, T'aaq-wiihak fishers expressed frustration that the general commercial fishery did not have the same area restrictions and had the potential to catch more salmon.

Participants in the general commercial fishery have expressed concerns about the impact of the T'aaq-wiihak First Nations fishery. They have also sought confirmation from the government that the allocations provided to the T'aaq-wiihak First Nations' fishery are fully mitigated (i.e. will not reduce the average catch per licence in the general commercial fishery). To prevent an escalation of tensions, considerable effort is dedicated to resolving issues through negotiations between the T'aaq-wiihak and the government, and through fisheries advisory meetings that include representatives of all harvest sectors.

⁵ 2017 Salmon Demonstration Fisheries Post Season Review, January 2018. Page 14.

1.2 Economic contribution and social implications of the fishing activity

The fishery is important economically and culturally to the T'aaq-wiihak First Nations. Before European settlement, fish were central to their local economies and inspired many of their ceremonies, culture, and art. During the court proceedings that resulted in the recognition of the T'aaq-wiihak First Nations' aboriginal right to fish and sell fish, there was evidence presented that the First Nations' ancestors had traded fisheries resources at a significant scale and that this trade was a practice integral to their society. This illustrates the historic importance of the fishery to the T'aaq-wiihak First Nations. In their efforts to increase access to the fishery and to have the Courts recognize their aboriginal right to fish for commercial purposes, the T'aaq-wiihak First Nations placed importance on the effort to "reinvigorate their coastal communities" through "participation in the commercial fishery" and through "restoring this fishing culture and economy." These statements illustrate the overall importance of the fishery to the T'aaq-wiihak First Nations.

Since it was established in 2012, the T'aaq-wiihak First Nations fishery has been an important source of income and employment in their communities. From 2012 and 2017, there were 96 to 229 designated T'aaq-wiihak fishers, of which 42 to 89 were active in a given year. All of the participants come from the five territories shown in Figure 1. The total population of the five T'aaq-wiihak First Nations is just over 5 000, although not all members live on the reserves (e.g. in 2014 about 1,750 members lived on the reserves). Mosquito vessels usually fish 5 to 11 hours per day and catch between zero and 10 Chinook during that period. In 2017, 19 percent of the mosquito fleet fishing trips resulted in zero Chinook salmon being caught. The troll vessels fish 10 to 14 hours per day and catch about 200 Chinook salmon daily when fishing conditions are good.

In 2016, the estimated landed value of fishery was USD 727 000. Fish is landed in the local area at one of four designated landing sites. A small quantity of the salmon is sold locally in Tofino to the public, local restaurants and a retail fish store while the majority is sold to domestic buyers who transport the fish to an urban centre (Vancouver). Here, most are sold in fresh or frozen product form, either domestically or as an export to the U.S.

2. MANAGEMENT OF THE FISHERY AND RIGHTS-BASED APPROACH

2.1 Management of the fishery

The T'aaq-wiihak First Nations commercial fishery operates within a broad fisheries management regime that includes an international collaboration - between Canada and the U.S., and between a number of other Canadian fisheries. The Canada-U.S. Pacific Salmon Treaty contains harvest-sharing provisions between the two countries. The purpose of these provisions is to achieve conservation and harvest-sharing objectives by limiting the interception of salmon that migrate between the two countries. Canada's catch limit for Chinook salmon on the west coast of Vancouver Island is established based on the harvest provisions of the treaty and a model that predicts Chinook salmon abundance. Canada plans its domestic fisheries to comply with the catch limits contained in the Pacific salmon treaty. Canada's allowable harvest is allocated to a number of domestic fisheries - First Nations food, social and ceremonial fisheries, the T'aaq-wiihak First Nations commercial aboriginal rights-based fishery, recreational fisheries and the general commercial fishery.

Canada's Department of Fisheries and Oceans has the overall authority for managing all of the salmon fisheries described above. The T'aaq-wiihak First Nations commercial fishery is licensed under the Aboriginal Communal Fishing Licences Regulations. Under this regime, the Minister of Fisheries and Oceans issues a licence to an aboriginal organization (in this case, one licence is issued to the five First Nations collectively), setting out conditions of the fishery. The licence generally describes the authorized elements of a fishery (open area, retention species, gear permitted, etc.). The T'aaq-wiihak First Nations are responsible for authorizing participation in their fishery. Each fisher is required to register annually to participate in the fishery, and vessels engaged in the fishery are required to be registered on an annual basis. The T'aaq-wiihak First Nations also have a Requirements and Responsibilities (R&R) Agreement between their fishers and the individual First Nations. The R&R Agreement specifies conditions that fishers must adhere to when participating in the fishery (or face registration being revoked based on non-compliance with the conditions).

The T'aaq-wiihak First Nations have an established limit on the number of Chinook salmon that a vessel can sell per trip or, in some instances, for an entire multi-day fishery opening. The vessel catch limit was introduced to control the total catch and thereby avoid exceeding the total allocation authorized for the fishery. Further, the T'aaq-wiihak First Nations have assumed a prominent role in the delivery of the dockside-monitoring and catch-reporting systems. With Canada's Department of Fisheries and Oceans, they have dedicated considerable effort to developing fishing plans that provide the appropriate fishing opportunity commensurate with their Aboriginal rights. A "Main Table" was established in 2010 as the primary venue for consultations and negotiations involving the T'aaq-wiihak First Nations and the government. Main Table meetings have addressed a broad range of topics from designing and funding the consultation and negotiation process, to fisheries access arrangements. A Joint Working Group was established in 2010 to share relevant fisheries management, stock assessment, and licensing information, as well as to review, analyze, and present recommendations for the Main Table. The Joint Working Group is not a negotiation forum and does not make decisions on whether proposals may be implemented. In addition, an Enforcement Sub-Committee was established to support the Main Table.

Beyond the bilateral consultations and negotiations described above, Canada's Department of Fisheries and Oceans has ongoing advisory processes, including the Integrated Salmon Harvest Planning Committee. This is comprised of First Nations and commercial and recreational harvesters, supporting environmental interests. The advisory committee provides formal advice and makes recommendations; on operational decisions related to salmon harvesting in British Columbia, and on the watersheds that contribute to these fisheries. First Nations participation is intended to co-ordinate the fishing plans of First Nations and other users of the resource.

2.2 Brief history of the former rights-based approaches used in the fishery

Before having their aboriginal rights to fish for commercial purposes recognized by the courts, the T'aaq-wiihak First Nations participated in two fisheries: the general commercial fishery, and the food, social and ceremonial (FSC) fishery. The general commercial fishery has been managed with input controls, including

limited entry since 1969. Other features of the general commercial fishery include single gear licensing (seine, gillnet and troll), area licensing, and restricted fishing times.

By the late 1990s, the T'aaq-wiihak First Nations found that the general commercial fishery was managed in such a way that few community members could participate and those that were able to required commercial fishing vessels and gear to compete for a share of the harvest. Further, they found that increasingly, they did not have the mosquito boats to conduct their own FSC fishery. This made it impractical to achieve their objectives of having, on the first hand, a mosquito fleet comprised of many small-scale vessels, and on the second hand, broad community participation to conduct both commercial and FSC fishery. This was a major factor prompting the T'aaq-wiihak First Nations to seek legal recognition of their fishing rights in 2003.

2.3 Rights-based approach: allocation and characteristics

The T'aaq-wiihak fishery is based on the legal recognition of their aboriginal rights to fish (2009), and a second court decision (2018) that provides additional interpretation regarding the nature and scope of the right. The 2009 court decision established that each of the five T'aaq-wiihak First Nations have an aboriginal right to fish and sell fish within their court-defined fishing territories. In practice, the five First Nations have collectively chosen to receive a single allocation and the members of each of the five First Nations are able to fish in the entire court-defined area (i.e., the members of one First Nation are not confined to their particular area).

Since 2012, the government has used the following mechanism to allocate a specific quantity of Chinook salmon to the T'aaq-wiihak. First, the government has identified a number of commercial fishing licences to the T'aaq-wiihak First Nations that can be operated as part of the general commercial fishery or converted into an allocation that can be used in a separate T'aaq-wiihak fishery. The allocation is based on the average catch-per-licence in the general commercial fishery. For example, in 2017, the T'aaq-wiihak First Nations opted to use 14 licences in their own fishery. These 14 licences represented an 11.9 percent share of the ocean commercial troll fishery on the west coast of Vancouver Island (14 of 118 commercial licences), resulting in a pre-season allocation of 6,688 Chinook salmon assigned to the T'aaq-wiihak First Nations fishery.

The 2018 judgment did not change the right, but the Court did provide a further interpretation of the aboriginal fishing rights. The 2018 judgment stated:

“despite the lack of parameters in the [2009] declaration, ... the declared right to fish for any species and to sell that fish is to be interpreted as a small-scale, artisanal, local, multi-species fishery, to be conducted in a nine-mile strip from shore, using small, low-cost boats with limited technology and restricted catching power, and aimed at wide community participation.”
(Paragraph 441)

The 2018 judgment also included some “basic interpretive principles as to the extent of the right” including:

- the right is restricted to a nine nautical mile area defined by the Court;
- the right provides for a community-based localized fishery with wide community participation;
- the right enables the T’aaq-wiihak First Nations to fish using their preferred means, that is, small, low-cost boats with restricted catching power, with wide community participation;
- the right is multi-species; therefore it is the totality of the fishery that is relevant, not one particular allocation of a species; and,
- the right is not exclusive and does not provide a guaranteed level of income, prosperity, or economic viability. (Paragraph 414)

The 2018 judgment provided specific guidance on the nature and scope of the right with respect to several issues that the T’aaq-wiihak First Nations and the government were not able to agree upon.

Fisheries Management Authorities and Responsibilities

The T’aaq-wiihak First Nations’ rights are to fish and to sell fish; they do not include aboriginal rights to manage the fishery. In Canada, the federal government has legislative authority under s. 91(12) of the Constitution Act of 1867 to manage all fisheries. This authority includes the T’aaq-wiihak First Nations Aboriginal rights-based fisheries. However, the government does collaborate with the T’aaq-wiihak First Nations and with other First Nations, with respect to fisheries management issues.

Level of Allocations

The 2009 court decision did not specify how much fish should be allocated to accommodate the commercial fishing rights of T’aaq-wiihak First Nations. During the period of 2010 to 2016, there was a significant increase in the T’aaq-wiihak First Nations’ access to a range of fisheries. The 2018 judgment stated that, in some instances, those levels of access are sufficient to satisfy the right. For example, with respect to access to the prawn fishery, the 2018 judgment stated that the present allocations “are appropriate accommodations of the right and are not an infringement of the plaintiffs’ right to trade in prawn into the commercial marketplace.” (Paragraph 1722) For some other species, the 2018 judgment was inconclusive with respect to whether or not the current allocations are appropriate to accommodate the right.

Allocation Priority

Canada’s approach to allocating Chinook and Coho salmon among domestic fisheries has been based on an allocation policy that was established in 1999.⁶ Under this policy, First Nations FSC fisheries are the first harvest priority after conservation needs. The policy specifies that the recreational fishery is the next harvest priority for Chinook and Coho salmon, followed by the commercial fishery. The 2018 court

⁶ Fisheries and Oceans Canada, An Allocation Policy for Pacific Salmon. 1999.

decision struck down the allocation policy that applies to Chinook and Coho salmon, as it does not properly recognize the aboriginal rights of the T'aaq-wiihak First Nations commercial fishery (i.e. the recreational fishery should not be afforded a higher priority than an aboriginal rights-based fishery). Specifically, the 2018 judgment states:

“... the fact that the declared aboriginal right is to fish and sell fish into the commercial marketplace does not lessen the priority to be accorded to the aboriginal right -- it does not allow Canada to start out on the allocation process by treating the plaintiffs' fishery as simply another commercial fishery. To accord priority to the recreational fishery over the plaintiffs' aboriginal commercial fishery is not justified.” (Paragraph 925)

The Court's 2018 interpretation of the T'aaq-wiihak First Nations' aboriginal fishing rights will help inform ongoing negotiations as the fishery continues to evolve. Further, the Court may provide an additional interpretation of the rights in the future, given that the 2018 court decision has been appealed by the T'aaq-wiihak First Nations and some aspects of the rights are yet to be clearly defined in court decisions to date.

3. CONTRIBUTION OF THE RIGHTS-BASED APPROACH TO ACHIEVING SUSTAINABILITY

3.1 Sustainable use of the resources

The T'aaq-wiihak First Nations' fishery continues to be managed by the government and subject to restrictions designed to achieve conservation and sustainable fisheries objectives. Many of the fisheries management features that apply to the general commercial fishery also apply to the T'aaq-wiihak First Nations' fishery (e.g., a total catch limit, gear restrictions, closed conservation areas, etc.). Accordingly, there has not been an observed change in the sustainable use of fishery resources resulting from the establishment of the T'aaq-wiihak First Nations' fishery in 2012.

Two factors may have an impact on resource sustainability in the future. First, the T'aaq-wiihak First Nations are now more actively engaged in fisheries management activities compared to their previous involvement in the general commercial fishery. This role includes determining who participates in the T'aaq-wiihak First Nations fishery, communicating with fishers to ensure that the rules of the fishery are understood and operating a dockside catch monitoring program. An R&R agreement between the fishers and the individual First Nations specifies conditions that fishers must adhere to when participating in the fishery, with penalties for non-compliance. The enhanced fishery management roles of scientists, managers and dockside monitors employed are expected to make a positive contribution to future resource sustainability.

Second, a number of fisheries management features related to resource sustainability remain unresolved in negotiations between T'aaq-wiihak First Nations and the government. For example, the government has applied restrictions to vessels over 25 feet participating in the T'aaq-wiihak fishery that is similar to

those applied in the general commercial fishery (e.g. gear restrictions to limit the incidental harvest of coho salmon and catch reporting standards). The T'aaq-wiihak First Nations oppose these restrictions, noting that the recreational fishery is not subject to the same restrictions. Reaching a common understanding of the outstanding fishing restrictions would contribute to future resource sustainability.

3.2 Economic viability of the fishery

Under the previous rights-based approach, it was not practical for the smaller vessels (mosquito fleet) to participate in the commercial fishery. Under the newly established aboriginal-rights-based fishery, the T'aaq-wiihak First Nations are constrained by an overall allocation of fish, but there is no limit on the number of vessels under 25 feet that can participate in the fishery. The T'aaq-wiihak fishery continues to evolve, and its economic viability is closely tied to both the level of fish allocated to the fishery by the government and the approach the First Nations take to managing access to the fishery. A brief discussion of each of these factors follows.

3.2.1 Allocation of Fish to the T'aaq-wiihak Fishery

The level of fish allocations to the T'aaq-wiihak fishery is a contentious issue in negotiations between the T'aaq-wiihak First Nations and the government. Specifically, the T'aaq-wiihak First Nations are seeking significantly higher allocations of Chinook salmon - currently the main target species - and a wide range of other fish that are included in their fishing rights. The government has not supported the allocations proposed by the T'aaq-wiihak First Nations, and the two sides remain far apart on this issue. For example, since 2012, the T'aaq-wiihak First Nations proposed allocations of Chinook salmon that have been between three and six times higher than the allocation provided by the government. The T'aaq-wiihak First Nations have identified allocations of fish as the primary factor affecting the economic viability of their fishery. In their post-season review of the 2017 fishery, the T'aaq-wiihak stated that the number of fishers registering and participating in the fishery likely demonstrates the recognition by fishers that the current allocations “are not viable or able to provide a reliable source of income.”⁷

3.2.2 Number of Vessels Participating in the T'aaq-wiihak Fishery

Unlike the general commercial fishery, there is presently no limit on the number of vessels that participate in the T'aaq-wiihak fishery. The T'aaq-wiihak First Nations are responsible for designating eligible individuals and vessels and have been encouraging community members to participate in the fishery. In recent years, there has been a gradual increase in the number of troll vessels in the T'aaq-wiihak fishery. This is illustrated in the following statement:

“In 2017, six new trollers joined the fleet bringing the total to 34 registered trollers this year. Four of these trollers were purchased by younger fishers, showing that fishing knowledge and skills are

⁷ 2017 Salmon Demonstration Fisheries Post Season Review, January 2018. p.12.

being passed down to younger generations and these younger fishers are showing the desire to participate in the fishing industry despite the low allocations currently provided ...”⁸

The number of vessels participating in the fishery is an important factor affecting economic viability. That is, at a given level of allocation, as the number of vessels participating in the fishery increases, the average catch-per-vessel decreases. This means the decisions made by the T’aaq-wiihak First Nations on the number of vessels that participate in the fishery influence its economic viability.

3.2.3 Composition of the T’aaq-wiihak Fishing Fleet

The two vessel types presently participating in the T’aaq-wiihak fishery (mosquito and troll) are quite distinct with respect to vessel size (mosquito vessels are 14 to 28 feet in length and troll vessels are 34 to 46 feet), fishing capacity and fishing costs. The relative fishing capacity of the two vessel types is reflected in the catch rates in Table 1.

⁸ Ibid., p.32.

Table 1. Catch Rates and Fishing Effort by Vessel Type.

Vessel Type	Average Chinook Catch per Day	Average Days per Trip	Average Hours Fishing per Day
Mosquito Vessel	8	1	9
Commercial Type Troll Vessel	214	2 to 3	12

Source: T'aaq-wiihak Fishery Indicators, 2015, p.7.

In 2016, 73 vessels participated in the fishery. This included 42 mosquito vessels (58 percent) and 31 troll vessels (42 percent). The estimated landed value of all species caught in the fishery that year was USD 713 000, with troll vessels accounting for 75 percent of the total landed value. With respect to the main target species, Chinook salmon, the troll vessels accounted for about 90 percent of the landed value.⁹ The relative fishing costs of mosquito and troll vessels are shown in Table 2.

Table 2. Fishing Costs by Vessel Type.

Costs (USD)	Mosquito Fleet (day-trips)	Trollers (multi-day trips)
Average fuel costs per trip	113	656
Range of fuel costs per trip	40-150	500-900
Average vessel maintenance costs	1 006	4 134

Source: T'aaq-wiihak Fishery Indicators, 2015, p.9.

As noted above in connection with the total number of vessels participating in the fishery, decisions the T'aaq-wiihak First Nations make concerning access to the fishery (e.g., vessel trip or fishery opening limits) would be expected to affect the composition of the fishing fleet (mosquito and troll) and the economic viability of the fishery. If the distribution of catch between mosquito vessels and troll vessels is not controlled, the mosquito fleet may find it increasingly difficult to maintain its share of the total catch. The 2018 court decision cautioned that the focus of the right-based fishery is on small, low-cost boats and wide community participation. For example, the court decision stated:

“How the use of trollers will be handled to ensure that wide community participation can be maintained for the mosquito fleet will necessitate appropriate management and monitoring of the right-based fishery, but the answer is not a continued increase in allocations to compensate for all the fish being caught by a large and growing fleet of small trollers.” (Paragraph 455)

⁹ 2016 Salmon Demonstration Fisheries Post Season Review, p.27.

3.3 Social equality

All members of the T'aaq-wiihak First Nations are eligible to participate in the fishery. To date, only a small proportion of the population has opted to do so. A number of barriers to fishing were identified by individuals who registered but did not fish in 2015, including the following:

“Not worth fishing due to the low DFO¹⁰ allocation (not economical); T'aaq-wiihak openings were too short/poorly timed/ poor weather/ not enough notice; Fisher lives outside of territory – too far away from T'aaq-wiihak fishing area for fishing to be economical for quantity of fish available or duration of fishery; Fishing vessel is not adequate for ocean fisheries (e.g., too small to travel offshore); and, Fisher does not have a vessel/cannot afford one.”¹¹

In 2015, 24 percent of participating T'aaq-wiihak fishers did not own a boat but were able to participate in the fishery by borrowing or leasing a boat (and gear) from another T'aaq-wiihak fishery (generally family).¹²

While women are eligible to participate, men primarily conduct the fishing. In 2015, there were 229 individuals registered to fish, including 35 women. However, only two women *actually* participated in the fishery that year. The fishery has contributed to community sustainability by enabling fishing knowledge to be passed down within families. During the 2015 fishery, it was reported: “26 out of 28 T'aaq-wiihak mid-sized troll vessel operators were able to pass down fishing knowledge and skills to younger fishers by having them on-board as deckhands.”¹³

4. MAIN CHALLENGES AND WAY FORWARD

4.1 Challenges for the fishery

Since the T'aaq-wiihak First Nations fishery was initiated in 2012, several challenges have emerged, including the following. First, the lack of a clear description of the T'aaq-wiihak First Nations' fishing rights from the Courts has resulted in various different interpretations and expectations regarding the actions required to accommodate the rights. For example, during extensive negotiations involving the T'aaq-wiihak First Nations and the government, the two parties were unable to agree on many of the fundamental issues associated with accommodating the rights, such as quantity of fish, type of fishing vessels, the priority of the fishery relative to other harvesters, and fisheries management responsibilities. This is an ongoing challenge since the most recent court decision (2018) left some key issues unresolved, and the 2018 Court decision has been appealed by the T'aaq-wiihak First Nations.

¹⁰ DFO refers to Canada's Department of Fisheries and Oceans.

¹¹ T'aaq-wiihak Fishery Indicators, 2015, p.11.

¹² T'aaq-wiihak Fishery Indicators, 2015, p.14.

¹³ T'aaq-wiihak Fishery Indicators, 2015, p.14.

Second, negotiations involving the T'aaq-wiihak First Nations and government officials have taken place in the context of ongoing litigation. The adversarial nature of litigation has had a negative impact on the working relationship. This is reflected in the T'aaq-wiihak First Nations 2017 post-season report, which stated that the adversarial trial -that had occurred over the whole of the previous 2016 season "sat heavily with the Nations leadership, their fishers and their staff."¹⁴

The third challenge stems from having to manage both mosquito and troll vessels in a common fishery. This presents a number of difficulties in ensuring the focus of the rights-based fishery on small, low-cost boats and also on wide community participation. For example, there appears to be a trade-off emerging between the First Nations' objective of broad community participation in the fishery and the gradual increase in the number of troll vessels which account for the vast majority of the total harvest in the T'aaq-wiihak fishery. Some fisheries management features such as fishery monitoring and catch reporting are subject to cost-sharing in commercial fisheries. However, if the same provisions were applied to all vessels in the T'aaq-wiihak fishery, it would likely be unaffordable for the smaller mosquito vessels, further constraining broad community participation. At the same time, fisheries management features that are appropriate for small vessels may not provide sufficient fisheries management control for larger vessels.

4.2 Improving fishery sustainability in the future

Perhaps the greatest single factor that could improve the fishery's sustainability would be to gain greater clarity regarding the nature and scope of the T'aaq-wiihak First Nations' fishing rights. In particular, a clear definition of the rights would help the First Nations and the government develop a common understanding of the actions required to accommodate the rights, and it would provide a more solid foundation for future negotiations. With this being said, the court process is exceedingly slow, and the litigation that interpreted the fishing rights in 2018 is now being appealed by the T'aaq-wiihak First Nations – it is expected to go on for many more years. In the meantime, several immediate actions have the potential to improve the current situation.

First, the Canadian government should respond to the 2018 Court judgment concerning the allocation priority of the T'aaq-wiihak fishery. It should update its domestic salmon allocation policy to ensure the aboriginal rights are appropriately accommodated. Second, the government should continue to advance proposals to expand the T'aaq-wiihak fishery (additional species and allocations) in a manner consistent with the First Nations' commercial fishing rights (i.e., for small, low-cost vessels.). Third, the T'aaq-wiihak should consider how they would like their fisheries access to develop in the future, in particular with respect to the relative priority of mosquito vessels versus troll vessels, recognizing that the focus of the fishing rights is on small, low-cost boats and wide-community participation. In doing so, the T'aaq-wiihak First Nations could learn from the experience of other commercial fisheries in Canada and worldwide. This will help inform decisions that will affect the economic viability and social equitability of their fishery.

¹⁴ 2017 Salmon Demonstration Fisheries Post Season Review, January 2018, p.36.

Fourth, it would be beneficial for the Canadian government and the T'aaq-wiihak to further explore options for fisheries access beyond the strict interpretation of the court-defined fishing rights, particularly with respect to the use of larger, high-technology vessels. In 2014, the government proposed a 'hybrid approach' that would allow larger T'aaq-wiihak vessels to participate in the general commercial fishery, but this proposal was rejected. Future negotiations could explore approaches such as establishing a maximum share of the allowable harvest that can be taken by the larger vessels, and establishing fishery monitoring and catch reporting requirements based on vessel catching capacity. Requirements could be informed by testing different approaches for mosquito vessels and vessels with the same catching capacity as those participating in the general commercial fishery. Finally, recognizing that litigation is slow and costly, the T'aaq-wiihak First Nations and the government should continue to negotiate in the spirit of reconciliation.