

**ABORIGINAL USE AND MANAGEMENT
OF FISHERIES IN BRITISH COLUMBIA**

by

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ABSTRACT

Both the use of and jurisdiction over fisheries resources is an important issue for many First Nations in British Columbia. Historically, fish played an important spiritual, social and economic role in numerous Aboriginal societies. These societies had various methods of managing the resource and, although they had the technological capacity to over-exploit the fisheries, they were able to maintain sustainable levels of fish. Following contact with European settlers, Aboriginal fishers were initially able to continue their traditional methods of fishing as well as expand their use of the fisheries through trade with non-Aboriginals. However, with the opening of the canneries on the coast the fisheries grew in economic importance to non-Aboriginal fishers and management of the resource was gradually but systematically taken over by the state, with various ideologies being used to justify the take-over. Aboriginal fishers lost not only their control over management of the resource, but also their ability to use it as extensively as they once had. Over the years, Aboriginal participation in both the food and commercial fisheries has declined although various government-sponsored programs have been initiated to attempt, with only partial success, to remedy this problem. In the meantime, the Department of Fisheries and Oceans has been battling other problems in the commercial fisheries, including over-capitalization of the fleet and depletion of fish stocks. Management of salmon in particular, because it is an anadromous species which

travels through several different jurisdictions, has become extremely complex. It is in this context that much litigation over Aboriginal fishing has been launched. Only a few of the issues have been clarified by the judgments which have resulted and certain myths and ideologies have surfaced repeatedly in many of the decisions. It is likely that the recent decisions of the Supreme Court of Canada on Aboriginal commercial and management rights will result in increased complexity and political controversy. However, problems of fisheries management, including the accommodation of Aboriginal interests, is not unique to British Columbia or even Canada. Similar problems have been experienced elsewhere in the world and various types of co-management regimes have been established in various jurisdictions in an attempt to deal with some of these issues and to recognize a greater role for Aboriginal fishers and communities in fisheries management. It is not clear whether, and to what extent, co-management will be adopted in British Columbia, or what the role of Aboriginal fishers might be in such a regime. Even if co-management is established, it is highly probable that the state's underlying regulatory regime will remain intact. However, co-management may result in increased Aboriginal participation in both the use and management of the resource.

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CHAPTER ONE

INTRODUCTION

Aboriginal fishing has recently been in the spotlight in British Columbia and has been the subject of much negotiation and litigation in the province. To many Aboriginal peoples¹, the fish are not only a potential means to achieve economic independence, they historically have been, and continue to be, a critical component of their culture, spirituality and identity. Following contact with non-Aboriginal settlers, First Nations ultimately lost control over management of the resource and were increasingly prevented from utilizing it, even in those areas where the Aboriginal right to fish was ostensibly protected by treaties. Since then, the fisheries resource has become an important and lucrative industry for many non-Aboriginals, and some Aboriginals, in British Columbia.

In the context of threatened fish stocks, the issues involving management of the resource, including allocation among user groups, has become increasingly contentious. Resource depletion has exacerbated management

¹I use the terms "Aboriginal" and "First Nations" synonymously throughout this thesis. However, since the former term in particular encompasses Metis, non-status Indians (that is, those who do not fall within the legal definition set out in the *Indian Act*, R.S.C. 1985, c. I-5) and Inuit, and the focus of my thesis is on "Indian" fishing specifically, I use these terms restrictively to refer only to the latter unless otherwise stated.

problems and heightened conflict among the user groups. It has also called into question the effectiveness of the current management regime.

The purpose of this thesis is to delineate how salmon fishing in particular has been managed in British Columbia and the effect these management schemes have had on Aboriginal peoples.² The way in which Aboriginal fishing rights have been defined by government and the courts is also reviewed.

It should be noted at the outset that Aboriginal rights to fish in Canada are derived from treaties or from Aboriginal rights. As well, in the prairie provinces, the Natural Resources Transfer Agreements between Canada and Manitoba, Saskatchewan and Alberta support fishing rights.³ Since 1982, existing Aboriginal and Treaty rights have been constitutionally protected in s. 35(1) of the *Constitution Act, 1982*⁴. In British Columbia, Aboriginal fishing is generally

²Although there are many species of fish on the Pacific coast and within the interior of British Columbia, salmon have played the most important role in Aboriginal cultures. As well, because salmon are anadromous, management of them presents problems which are probably the most complex of any fish species. It is for these reasons that the focus will be on salmon. However, many of the issues and problems raised are also present in other fisheries and in other parts of the country. For instance, similar fact situations and issues arise with respect to the Ojibway in Ontario and Manitoba and First Nations in the Yukon. See various essays in K. Abel and J. Friesen, eds., *Aboriginal Resource Use in Canada: Historical and Legal Aspects* (Winnipeg: University of Manitoba Press, 1991).

³The Agreements contain the following clause: "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access." See, for example, *The Natural Resources Act of Manitoba*, RSM 1954, c. 180.

⁴Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. Section 35(1) provides as follows: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

presented as an Aboriginal right, since there are very few treaties in the Province.⁵

One of the most contentious issues within fisheries management generally and Aboriginal fishing policies particularly is how the fish are to be allocated among the various user groups. Allocation considerations are often the basis for management decisions and programs and even where allocation is not an express consideration in management policy, management decisions invariably affect how the resource is allocated among user groups. The interplay between management and allocation can be seen in the dramatic decline in Aboriginal participation in commercial fishing over the last century. In the late 1800s, the majority of fishers were Aboriginal. It has been estimated that by 1951, only one-third of the province's fishers were Aboriginal. Between 1964 and 1977, the number of fishing vessels owned or operated by Aboriginals decreased by an average of 3.8 percent per annum. By 1979, Aboriginal participation in the salmon fishing industry was down to 8.8 percent of the total salmon fleet. Although Aboriginal ownership of licensed salmon vessels increased between 1985 and 1991 to about 18 to 19 percent of the total, the total number of Aboriginal fishers is still much lower than it was 100 years ago.⁶

⁵Fourteen First Nations on Vancouver Island entered into treaties between 1850 and 1854. As well, a portion of northeastern British Columbia is included in Treaty 8, which initially covered northern Alberta but was ultimately extended into part of British Columbia. In *R. v. Cooper* (1969), 1 D.L.R. (3d) 113 (B.C.S.C.), the Court held that the fishing provisions in the Vancouver Island treaties were subordinate to the *Fisheries Act*.

⁶M.D. James, *Historic and Present Native Participation in Pacific Coast Commercial Fisheries* (Ottawa: Ministry of Supply and Services, 1984) at pp. iii-iv and D. Newell, *Tangled Webs of History: Indians and*

Given this trend, Aboriginal fishers are understandably concerned about allocation issues and particular attention is paid to them in this thesis.

However, the ability to catch fish, however those fish may be allocated, is obviously predicated on the existence of fish to catch. Accordingly, management decisions involve much more than merely deciding who can catch fish. Which party is permitted to make those management decisions has become another critical issue in the fisheries debate. The right to manage the resource is seen by many Aboriginal peoples as a fundamental issue which is linked to their demands for recognition of self-government; without the right to manage the resource, they believe they will have no control over the ultimate fate of the fish and, consequently, their own futures. Many Aboriginal fishers, among others, have come to question the efficacy of the federal Department of Fisheries and Ocean management to date and dire predictions have been made that west coast salmon will soon be close to extinction. Conversely, one of the concerns expressed by some resource managers, non-Aboriginal fishers and others is that if jurisdiction over the resource is decentralized and Aboriginal management powers recognized, effective management schemes cannot be ensured and the already depleted fish stocks will be even further over-fished. Central control over the resource is seen as a prerequisite for survival of the fish. In an attempt to analyze these various propositions, the results of

traditional Aboriginal and non-Aboriginal management systems is reviewed. Alternative approaches--including some which are being initiated to some extent in British Columbia--are also reviewed and some case studies from other parts of the world presented.

At this stage, it may be helpful to note that there are essentially five alternative ways of regulating the fisheries: firstly, by licensing boats or fishers; secondly, by regulating the times and methods of fishing; thirdly, by allocating fishing rights to particular areas; fourthly, by allocating quota to individual fishers; or, fifthly, by using a combination of the above. These regulatory frameworks reflect two basic, and sometimes conflicting, underlying management models: increased government regulation and semi-privatization of the resource. In the British Columbia salmon fisheries, the Department of Fisheries and Oceans has used both licensing and regulation of times and methods of fishing. In the review of alternative management systems in Chapter Four, co-management is considered as an alternative model of fisheries management. The same five alternative regulatory frameworks are used in these co-management systems, but they differ in the way in which regulations are decided upon and enforced.

During the course of the analysis, some of the underlying ideologies will be identified and challenged. How these ideologies affect management

decisions and the way the fisheries resource is perceived is addressed, as well as how these ideologies appear to affect the potential for change.

It will no doubt become apparent in this thesis that the issues surrounding Aboriginal fishing are extremely complex. Not only are the factors relating to management of fishers and the fish themselves difficult to understand and, often, misunderstood or completely unknown, the legal history of "Aboriginal rights", as they are now referred to in the Canadian Constitution, is complex and often difficult to rationalize. We are in the midst of a judicial shift from a positivist framework, in which only those matters declared by legislation to be "rights" are recognized, to a rights-based framework in which rights are seen to exist independently of any legislative enactment and must somehow be defined and respected in the context of modern society. Although the courts are giving some important rulings on Aboriginal fishing rights, it cannot be expected that they will fully define substantive rights or management systems.

It is because legal sources do not appear to provide complete answers, and certainly not solutions, to the complexity of the problems that historical and contemporary social, economic and political issues are also addressed in this thesis. These other factors do not provide answers or solutions either, but they assist in understanding current legal realities and ideologies and the prospect for change. As it has been stated, "law must be understood not as an

independent organism but an integral part of the social system.”⁷ It is for this reason that this thesis is not a mere recitation of the formal law surrounding Aboriginal fishing, but rather an attempt to place that law in a social, economic and political context.

It should be noted that First Nations’ goals with respect to fishing are community and individual specific. There is no comprehensive agreement among or, often, within First Nations with respect to how they would like the fish to be allocated or what type of management powers, if any, they would like their community to have. Many Aboriginal fishers participate in the commercial fishery in marine areas and would oppose any reductions in the commercial marine fleet if required to ensure an increased Aboriginal share of the fish in the rivers; others would prefer to have fishing restricted to rivers but support the concept of a commercial fishery; still others oppose any type of commercial fishing and would prefer fishing to be restricted to food, social and ceremonial purposes. There is a natural divergence of interests between the offshore commercial fishery, which includes some Aboriginal fishers, and the river-based food fishery. Some Aboriginal commercial fishers feel threatened by the concept of an Aboriginal rights fishery. The diversity of opinion among Aboriginal peoples on these issues adds to the complexity of management problems and to the difficulty of defining Aboriginal fishing rights. So too does the fact that in the context of litigation, the discourse is not about the goals of Aboriginal peoples at

⁷M. Shapiro, “Political Jurisprudence” (1964) 52 Ken. L. J. 294 at p. 294.

all, but rather about historical rights which originate in the past: for instance, whether First Nations had commercial fisheries at contact. There is, therefore, a discordance between the legal arguments which are made which focus on the past, and future-oriented ideas of goals.

As I am a non-Aboriginal who has no background in the fishing industry, I acknowledge that my analysis is biased to the extent that I am an outsider looking in at these problems. As someone who has been raised and educated within a Western liberal-democratic tradition, it is often difficult for me to view the issues from another perspective. I attempt to do so as best I can. However, it must also be recognized that Aboriginal people are currently required to fight their legal battles within the liberal-democratic tradition and the existing legal system: rightly or wrongly, "struggles over allocation of resources today must be waged on non-indigenous terms and using the discourse and legalities of the more powerful parties"⁸ Thus, it is important to consider whether the discourse and legalities of the Canadian system can truly accommodate the notion of an Aboriginal right to fish commercially and to manage the resource. One of the potential problems which is addressed is whether Aboriginal rights, as a type of collective right, can fit within the liberal tradition of individual rights.

⁸A. Hamilton, "The Unity of Hunting-Gathering Societies: Reflections on Economic Forms and Resource Management" in N.M. Williams and E.S. Huhn, *Resource Managers: North American and Australian Hunter-Gatherers* (Melbourne: Globe Press, 1982) 229 at p. 242.

My approach in this thesis is to attempt, firstly, to provide in Chapter Two a chronological account of the history of fisheries management in British Columbia, beginning with traditional Aboriginal management systems and then reviewing the evolution of the non-Aboriginal regulatory framework up to the present time. Chapter Three then examines the jurisprudence dealing with Aboriginal fishing issues. The focus is on cases decided subsequent to the entrenchment of Aboriginal and Treaty rights in the Constitution, but a brief and very general history of the caselaw prior to that time is given as well. In both Chapters Two and Three an attempt is made to analyze the apparent ideologies used to justify the legislation and the judicial decisions.

Chapter Four presents some alternative management regimes, and includes case studies of management systems in the Western Arctic, Washington State and New Zealand. These alternative systems are analyzed and their applicability to the situation in British Columbia considered. Current trends in British Columbia are also reviewed in this chapter, including those reflected in the fishing provisions in the recent Nisga'a Agreement in Principle.

Chapter Five concludes the thesis with a general summary of the goals of First Nations and governments, the problems inherent in fisheries management, and alternative approaches. Also contained in the final chapter is a discussion of liberal democratic theory and group rights in the context of recognition of

Aboriginal fishing rights. This issue is discussed in relation to the legislative and jurisprudential history of fishing laws in British Columbia, as well as to the alternative management systems discussed in Chapter Four.

CHAPTER TWO

MANAGEMENT OF THE RESOURCE

A. Traditional Aboriginal Systems of Management

One of the common myths about Aboriginal traditional communities is that they had no conceptions of boundaries, territories or possessions. This ideology was used by colonizers to rationalize claims by the Crown: if something was common to all, it belonged to no one and could therefore be claimed.⁹ It was also commonly believed that the use of lands and resources was shared equitably. However, anthropologists have found that not all groups practiced egalitarian sharing of food and access to resources. It was only when risk was great (i.e. resources were scarce or conditions were stressful) that sharing predominated. Sharing was a risk-minimizing behaviour, but not an essential attribute of hunter-gatherers; it was circumstantial, not cultural.¹⁰

On the Northwest Coast of North America, food and resources were frequently owned by kinship groups or individuals. Resources tended to be privately owned rather than shared equally, although reciprocal access to

⁹*Ibid* at p. 238.

¹⁰R.A. Gould, "To Have and Have Not: The Ecology of Sharing Among Hunter-Gatherers" in Williams and Huhn, eds., *ibid*, 69 at pp. 71 to 88.

resources did take place in accordance with specific obligations. The resources which were most frequently restricted to private ownership were those which were predictable and abundant and geographically restricted to limited areas.¹¹

Of particular note for the purposes of this thesis is the fact that in all of the communities studied on the Northwest Coast, salmon was the single most important food resource. Salmon fishing sites were usually owned by kin groups, communities or individuals.¹² Most fishing took place inland on rivers where fish were more concentrated, and harpoons and traps were the most often used methods of catching fish.¹³ Preserved salmon was not only the principal food source for those societies located on the coast or on salmon rivers, but it was also used for inter-group trade. Trade has been described as being essential to their economies, with salmon being the paramount item of trade, forming almost a type of legal tender.¹⁴

¹¹A. Richardson, "The Control of Productive Resources on the Northwest Coast of North America" in Williams and Huhn, eds., *ibid* 93 at pp. 93-95. Richardson goes on to delineate the specific arrangements in various First Nation communities along the coast. Variations in the type of ownership resources were noted. Food shortages and seasonal variation increased as one went northward and he concluded through his research that as this occurred, the tendency to have a type of private ownership of resources decreased. See pp. 105 to 108. It should be noted that the term "private ownership" is used loosely here; the Aboriginal concept of ownership differed from the Euro-Canadian concept and involved a complex set of social duties, privileges and mutualities.

¹²For instance, among the central coast Salish, ownership of fishing sites was vested in kin groups, although weirs and traps tended to be owned by villages or larger village clusters; among the southern coast Salish, multi-kin groups held ownership rights. See *ibid* at pp. 97 to 99. See also Newell, *supra*, note 6 at pp. 40-42.

¹³Newell, *supra*, note 6 at p. 14 and p. 28.

¹⁴*Ibid* at pp. 29-31.

Anthropologists have also concluded that hunter-gatherer societies, including those in what is now British Columbia, actively managed their resources through strategic ecological and economic courses of action, social control and political maneuver, or through the use of symbols and ritual.¹⁵ The type of management which existed depended upon the location of the First Nation within North America. Broad generalizations cannot be made about these systems given the diversity among First Nation groups; however, some similarities were noted by the researchers. In all the groups along the Northwest Coast, individual male heads of kin groups managed the resource.¹⁶ Management responsibilities tended to be separate from ownership privileges and for each group, traditional laws governed the use and application of fishing technology.¹⁷ Systems of resource management were found to be part of the traditional culture and ideology.¹⁸ Regardless of the differences in management systems, the anthropologists conducting the studies concluded that hunter-gatherers "faced many of the same problems of organized human access to scarce resources and they achieved workable solutions which were, in comparison with our own, both resilient and just."¹⁹ The methods used by Aboriginal peoples on the Northwest Coast were such that all fish could have been prevented from reaching the spawning grounds. However, the presence of

¹⁵N.M. Williams and E.S. Huhn, "Introduction" in Williams and Huhn, eds., *supra*, note 8, 1 at p. 1.

¹⁶Richardson, *supra*, note 11 at p. 101.

¹⁷Newell, *supra*, note 6 at p. 42.

¹⁸This type of management regime was found in other First Nation communities across North America as well. For instance, among the Koyukon of Alaska, a well-developed conservation ethic and strict prohibition against over-use and waste was found. Similar situations were found among the Cree, Naskapi and Ojibway. See R.K. Nelson, "A Conservation Ethic and Environment: The Koyukon of Alaska" in Williams and Huhn, eds., *supra*, note 8, 211 at pp. 211-212.

large stocks of fish noted by European settlers is evidence that Aboriginal peoples managed the resource and maintained their fish-based societies and economies.²⁰

Although one of the popular images of Aboriginals in the fishery has been a negative one wherein Aboriginal peoples are seen as being untrustworthy to manage the resource and prone to destructive tendencies²¹, there has recently emerged among some groups a "romanticized image of the hunter-gatherer as conservationist" due to hunter-gatherers' traditionally strong connection to the natural world.²² There may be much truth to the notion that Aboriginal peoples traditionally managed their resources effectively, but it does not follow that Aboriginal peoples were intrinsically conservationists. They traditionally exploited their resources extensively²³ and, thus, their regulation of the resource is probably better explained as having evolved from their demography, organization, ideologies, religion, territorial organization and ecological

¹⁹Williams and Huhn, *supra*, note 15 at p. 15.

²⁰Newell, *supra*, note 6 at p. 28.

²¹This negative ideological representation of Aboriginal fishers will be reviewed in further detail in subsequent sections of this chapter.

²²Hamilton, *supra*, note 8 at p. 240. She suggests that this stereotype first emerged in the mid 1970s.

²³Newell actually expressly rejects the theory that British Columbia's Aboriginal peoples were "perfect conservationists". She estimates that the amount caught traditionally by Aboriginal peoples was at least comparable to that which was caught by the pioneer commercial (or, as she prefers to call it, industrial) fishery. See *supra*, note 6 at p. 45. In the 1879 Annual Report of Inspector of Fisheries for B.C. it is estimated that 17.5 million salmon were taken by Aboriginal fishers, more than ten times what was taken in the commercial fishery at the time. See M.P. Shepherd and A.W. Argue, *The Commercial Harvest of Salmon in British Columbia, 1820-1877* (Ottawa: Supply & Services Canada, 1989) at p. 2. Although the authors suggest that this figure may have been somewhat over-estimated, there was a significant harvesting of fish by Aboriginal peoples both before and after contact with Europeans. M.D. James estimates that the value of Aboriginal food fish in 1900 was approximately three million dollars, which was roughly equivalent to the total value of the commercial catch at the time. See *supra*, note 6 at p. 2.

variables.²⁴ As one anthropologist has posited, the cause of the emergence of a limiting ideology in North American society is probably the same as for traditional Aboriginal communities: an increase in technological capacity to overexploit the resource, observation of damage attributable to over-exploitation and improvements in understandings of ecological processes.²⁵ In other words, Aboriginal management systems probably resulted in large part from lessons learned from previous over-exploitation, much as is the case in non-Aboriginal management systems. One critical difference may be the extent to which the lesson has been learned in the respective societies. Whatever the reasons, the traditional Aboriginal management system appears to have "assured everyone adequate stocks of fish over the long term. The same cannot be said for the state-regulated industrial fishery that replaced it in the late nineteenth century."²⁶ It is to this latter system that we will now turn.

B. The Non-Aboriginal Regulatory Framework and Its Effect on Aboriginal Fishers

Fisheries resources in Canada are managed within a complex jurisdictional framework. Although there are provincial and international aspects

²⁴Hamilton, *supra*, note 8 at p. 240.

²⁵Nelson, *supra*, note 18 at p. 225. Similar theories are put forward by various other authors, including R.B. Rettig, F. Berkes and E. Pinkerton in "The Future of Fisheries Co-Management: A Multi-Disciplinary Approach" in E. Pinkerton, ed., *Co-operative Management of Local Fisheries* (Vancouver: University of British Columbia Press, 1989) 273 at p. 280.

²⁶Newell, *supra*, note 6 at p. 45.

to salmon management, the focus of this thesis will be on federal legislation, policies and initiatives.

The federal government has jurisdiction over sea coast and inland fisheries under section 91(12) of the *Constitution Act, 1867*. Separate regulations are passed for each province, setting out the time, place and conditions under which commercial, sports and Aboriginal fisheries may be conducted. Each province has its own separate regulations which, in some cases and for some species of fish, are actually enforced by the provincial government although they are still passed by the federal government. In British Columbia, the federal government administers the regulations in relation to salt-water and anadromous species, with the provincial government administering fresh water species regulations. With respect to salmon in British Columbia, the federal Department of Fisheries and Oceans Field Services Branch regulates the catch taken in commercial, sport and native fisheries, while the Habitat Management Branch attempts to control the discharge of pollutants and damage to fish habitat. The Department of Indian Affairs has also been involved in fisheries issues, through the administration of various programs and loans to assist Aboriginal commercial fishers.

In British Columbia, a separate provincial fisheries bureaucracy was established in 1901. The Marine Resources Branch of the provincial Ministry of

Environment regulates fish processing plants and development of the mariculture industry and can grant proprietary interests such as licences where the province owns river beds. It also represents provincial interests in promoting and regulating the fishing industry. In addition, the provincial Fish and Wildlife Branch regulates non-anadromous fresh water fisheries. The province has jurisdiction over the sale of fish within its boundaries, but Canada has jurisdiction over the export of fish outside British Columbia.

First Nations also have limited by-law making powers in respect of fish on their reserve, pursuant to the *Indian Act*.²⁷ Section 81(1)(o) of the *Indian Act* provides that First Nation Band Councils can pass by-laws with respect to the preservation, protection and management of fish on their reserve. It has been held that these by-laws, if valid, supersede regulations under the *Fisheries Act* to the extent of any inconsistency.²⁸ However, this section only applies to fish in waters which are actually part of the reserve. Generally, reserves in British Columbia do not include the lakes, rivers or foreshores.

Salmon management in Canada also has an international dimension. Canada and the United States established the Pacific Salmon Fisheries Commission in 1937 in relation to management of the Fraser River sockeye and pink salmon fisheries. They also entered into the Pacific Salmon Treaty in 1985,

²⁷R.S.C. 1985, c. I-5.

²⁸*R. v. Jimmy* (1987), 15 B.C.L.R. 145 (B.C.C.A.).

although subsequently the agreement collapsed due to a failure to agree upon how the commercial catch was to be divided between the two countries. Considerable effort was spent in 1996 attempting to re-negotiate a treaty.²⁹

Within this constitutional framework, Canada's Pacific Coast commercial fisheries have been described as among the most regulated in the world.³⁰ The justification for the regulatory framework has been conservation.³¹ The basic premise upon which the regulatory scheme is built is that fish are public or common property, not private property. Thus, according to conventional euro-centric wisdom, preservation of the resource requires government intervention; otherwise, a tragedy of the commons will result.³² With respect to Aboriginal fishing, the basic ideology which appears to underlie state management of the fisheries, at least historically, was that Aboriginal peoples are incapable of managing the resource adequately and will invariably cause the ultimate destruction of the resource if left to their own devices. Central state management authority was presented as being necessary to preserve the fish.

²⁹For a more detailed break-down of federal and provincial jurisdictions over the fisheries and related industries, as well as international aspects, see A.H.J. Dorsey, *Bargaining in the Governance of Pacific Coastal Rescues: Research and Reform* (Vancouver: Westwater Research Centre, 1986) at pp. 47-48 and p. 63 and Newell, *supra*, note 6 at pp. 10-21.

³⁰Newell, *supra*, note 6 at p. 6. No authority is given by Newell on this point.

³¹*Ibid.* The question which will be addressed later in this chapter is conservation for whom and at whose expense.

³²*Ibid.* The "tragedy of the commons" concept was discussed by G. Hardin in "The Tragedy of the Commons" (1968) 162 *Science* 1243 wherein he referred to what he believed was the inevitable consequence when individuals are allowed to make unlimited use of public lands, such as grazing cattle in an open pasture. The tragedy is that: "each man is locked into a system that compels him to increase his herd without limit--in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all." See p. 1244. The effect of the portrayal of the fisheries as common property is discussed in subsequent sections of this chapter.

This ideology may not be as relevant today, but it does appear to be the foundation for the current regulatory system. It arose at a time in the late 1800s when non-Aboriginal fishers were beginning to take over the fishery, no longer needing Aboriginal assistance in the industry. The "demonization", as Newell refers to it, of Aboriginal fishers becomes an incidental, racist justification for extending non-Aboriginal control of the fisheries. In the words of Newell:

The state and its administrative agencies and courts, backed by private industry and non-Indian fishers, characterized Pacific Coast Indian fishing traditions as destructive and demonized Indian food fishers as predators. The historical record of fishery regulations for British Columbia reflects this thinking.³³

These ideologies can be seen in the historical evolution of the regulations and will be reviewed in more detail in the final section of this chapter. In the meantime, the following is a brief history of salmon regulation in British Columbia.

Commercial fishing in the province began in 1870 and was legally restricted to tidal areas.³⁴ The first salmon-canning factory was opened in 1871 and the first regulations went into effect in 1878, initially applying only to salmon. Beginning in 1888, licences were required to fish in British Columbia and

³³*Supra*, note 6, at p. 4.

³⁴The historical review of fisheries regulations in British Columbia which follows is largely taken from Newell's text, *supra*, note 6 as well as from The Commission on Pacific Fisheries Policy, *Turning the Tide: A New Policy for Canada's Pacific Fisheries* (Ottawa: Supply & Services Canada, 1982) [Commissioner: P.H. Pearse].

subsequent regulations governed the type of gear which could be used, then the times fishing could occur and finally the locations where it could take place.

Initially, the Fisheries Department ("the Department") did not interfere with traditional Aboriginal fishing since Aboriginals still out-numbered non-Aboriginals in the province three-to-one and their cooperation was needed to establish the fishing industry. Newell describes Aboriginal people as the "labour backbone of the salmon canning industry during its chaotic rise in the late-nineteenth century...."³⁵, with many working seasonally for the canneries, abandoning their villages to do so.

In addition to increasing participation by Aboriginals in the cannery operations, Aboriginal communities continued to rely on fish as an important food staple, as well as for social and ceremonial purposes. As had been the case for centuries, traditional fishing practices continued to be concentrated in the rivers. Aboriginal fisheries influenced both the size and the location of reserves in British Columbia; reserves in coastal and inland river areas tended to be quite small based on the assumption that the people would have continued access to the fisheries to sustain themselves. As the canneries expanded, traditional Aboriginal fishing practices were in a "politically vulnerable middle ground" between commercial fishing and the spawning grounds.³⁶ Since most

³⁵*Supra*, note 6, at pp. 53-54.

³⁶*Ibid* at p. 14.

Aboriginal fishing took place in the rivers, conflicts soon arose between commercial fishers and Aboriginals: commercial fishers did not want Aboriginals to take fish from the rivers because often by that time there were not enough fish left after commercial harvesting to ensure sufficient escapement for spawning purposes.

Disputes between Aboriginal and non-Aboriginal fishers began in the late 1880s when Aboriginal fishers expressed concerns that the spread of canneries made it difficult to carry on traditional fisheries. A Commission was established and Aboriginal fishers asked for an extension of reserves and a reservation of a number of fishing stations and tracts for hunting. There was little response. Aboriginal fishing was addressed for the first time in regulations in 1888 wherein "Indian fishing" was defined in terms of a subsistence activity only. Sale of fish by Aboriginals was prohibited at that time, a prohibition which remains to this day.³⁷ Until that time, Aboriginal communities did not distinguish between fishing for food, social and ceremonial purposes, and fishing for trade purposes. Thus, the regulation "separated harvesting and personal consumption of fish from economic, social or cultural purposes [and] separated production of resources from management of them, officially transferring all management of this crucial food and commercial resource from Indians to the state."³⁸ As Newell

³⁷Order in Council, 26 November 1888, Canada Gazette, vol. XXII, 956. The only exceptions to that statement are the agreements under the Pilot Sales Arrangement ("PSA") which have been reached with some First Nations under the Aboriginal Fishing Strategy ("AFS"). The PSA and AFS will be discussed in more detail later in the chapter.

³⁸Newell, *supra*, note 6, at p. 62.

goes on to say, this policy created the still pervasive stereotype of Indians as simple subsistence people in comparison to the commerce-minded Europeans, although in reality they had traded extensively in fish products both before and after contact with Europeans.

Between 1889 and 1914, the Department's policies were based on a biological-conservation theory of "maximum sustained yield". Beginning in 1889, the Department limited the number of licences.³⁹ Phenomenal runs had attracted a number of independent, mostly white, fishers and the cannery operators wanted to keep out competition. Most of the licences went to the cannery operators. However, political problems resulted because the white fishers resented "any denial of access to what was, at least within British tradition, a common-access resource."⁴⁰ Cannery operators expanded their operations in an attempt to obtain more licences and, thus, licence limitation did not guarantee sufficient escapement. As a result of these problems, licence limitations were removed in 1892 with regulations focusing instead on the type of gear, and areas of and time periods for fishing.⁴¹

It was also during this era that complaints began about Aboriginal fishing weirs and dams on the rivers. As a result, new regulations were passed in 1894 which prohibited Aboriginal spearing, trapping, or penning of fish on spawning

³⁹Order in Council, 14 March 1890, Canada Gazette, vol. XXIII, 1903.

⁴⁰Newell, *supra*, note 6 at p. 70.

⁴¹Order in Council, 3 March 1894, Canada Gazette, vol. XXVII, 1579.

grounds or on any grounds set aside for the propagation of fish; only dip nets, which had never been widely used by Aboriginal fishers, were permitted in non-tidal waters.⁴² At the same time, Aboriginal fishers complained about the construction of a mill which blocked their fisheries and canoe access to their village and about commercial seine fishing and log drives on spawning grounds in Cowichan Bay. The British Columbia Chiefs complained to Ottawa in 1906, stating that their people were having difficulty obtaining enough fish for their own needs and could no longer make livings from the fisheries. Meanwhile, cannery operators were asking for a larger share of the fish. Government officials decided Aboriginal fishing barricades were the most important issue with respect to conservation of the fish even though "fish ... had survived such mass-fishing devices for thousands of years."⁴³ Thus, traps and weirs were confiscated and fisheries guardians hired to enforce the regulations. As Newell states with respect to the Babine First Nation fishers on the Skeena River:

The Skeena River salmon needed to be conserved. But only a portion of the runs had to reach the spawning grounds. There was a surplus to be fished, so who would get it--the Indians or the cannery operators? For officials and canners the choice was clear. The Babine were using the fish for food and for exchange. But they fished principally at the end of the salmon's return journey to the spawning grounds. The industrial salmon fishery, being restricted to tidal areas, was first in line in the harvesting chain. For being last in line, the Indian riverine fisheries would pay heavily.⁴⁴

⁴²Order in Council, 3 March 1894, S.C., 1894.

⁴³Newell, *supra*, note 6 at p. 90.

⁴⁴*Ibid* at p. 91. Newspaper articles at the time contained headlines such as "Indians wiping out Sockeyes". The ideology of Aboriginal fishing as destructive was widespread, with Aboriginal fishers being portrayed as chronic over-fishers who were destroying "one of the greatest sources of the people's wealth." See pp. 91-92.

Industrial expansion in the province also led to other problems for Aboriginal fishers. In 1913, railway construction resulted in blockages on the Fraser River near Hell's Gate. Spawning grounds were ruined and Aboriginal fishing in the canyon and the waters above it was devastated, with famines ensuing. The government responded by prohibiting all food fishing in the Fraser River.

Beginning in 1917, new regulations required Indian food fishing permits which were subject to the same restrictions as commercial fishing, such as area and gear prohibitions and closed times.⁴⁵ Government officials cited the large number of salmon caught in the Indian fishery and the inherent difficulty in regulating that fishery as justification for limiting Indians from taking salmon anywhere or by any means except under commercial salmon licence and in waters open for commercial fishing.⁴⁶ It also became an offence not only to sell food fish, but also to buy it from Aboriginals. Newell calls the government's prohibition of Aboriginal sale of fish a "fundamental hypocrisy" given that non-Aboriginal cannery operators were permitted to sell all of their fish, including outside the country.⁴⁷ The rhetoric of conservation was used to justify restrictions of Aboriginal fishing and sale of fish, but the only thing truly being protected were the interests of the cannery operators.

⁴⁵Order in Council, 11 September 1917, S.C., 1918.

⁴⁶Newell, *supra*, note 6 at p. 96.

⁴⁷*Ibid* at p. 97.

From the 1920s through the inter-war years, Aboriginal fishers received very few of the commercial licences. In 1927, Aboriginal fishers requested recognition of their exclusive right to fish commercially in certain defined areas. The federal director of fisheries opposed such a "privilege", stating that the fishery was public and he could not, therefore, grant anyone exclusive rights.⁴⁸ The common property notion appears to have been relied upon extensively whenever Aboriginal claims to the fishery were put forward.

In 1931, the Native Brotherhood of British Columbia was formed by leading Tsimshian chiefs, all of whom were commercial fishers, to address Aboriginal grievances with respect to schooling, as well as hunting, fishing, trapping and timber harvesting rights on off-reserve traditional territories. The organization expanded to include additional villages, and by 1936 was well established on the north and central coasts among the Gitksan, Heiltsuk, Nuxalk and Haisla. Following the federal government's decision to impose income tax on Aboriginal commercial fishers in the early 1940s, commercial fishing concerns came to the forefront for the Brotherhood, which by that time had expanded to include communities on the south coast. The Brotherhood never expanded beyond the coast but, ultimately, it became an Aboriginal commercial fisher's union, acting as bargaining agent for Aboriginal commercial fishers. By the 1960s, the organization was the longest-lived Aboriginal organization in

⁴⁸Despite his position, the Director did finally acknowledge that the Department had leased whole inlets to canneries and large, non-Aboriginal fishing interests, with no corresponding privileges being granted to Aboriginal fisheries. Of course, this fact made no difference to his position. See *ibid* at p. 114.

Canada and it continues to play an important role with respect to Aboriginal commercial fishing.⁴⁹ It currently represents about 1,500 Aboriginal involved in the fishing industry.⁵⁰

The Department's approach to management in the 1950s has been described as being focused on maximization of economic yield as opposed to biological yield. However, the underlying management system appears to have remained the same as it had been since the turn of the century. This regulatory approach resulted in an increase in capital investment and an increase in mobility and catching power of the fleet. The Department responded to the increase in efficiency by decreasing fishing times. Closures began in 1956 which resulted in even heavier capital investment because fishers wanted to catch as many fish as they could in the few days of openings. Meanwhile, destruction of habitat continued inland, with hydro-electric dams, logging operations, saw mills, pulp and paper plants, other industries and municipalities all contributing to pollution of and blockages in the rivers.

Throughout this period, some Aboriginals continued to be involved in the commercial fishery. However, by 1951, only one-third of British Columbia's commercial fishers were Aboriginal and almost all licences were directly held by

⁴⁹P. Tennant, *Aboriginal Peoples and Politics* (Vancouver: University of British Columbia Press, 1990) at pp. 116-120.

⁵⁰S. Gilbey, "The Aboriginal Right to a Commercial Fishery" (1995) 4 *Dalhousie J. of Legal Studies* 231 at p. 238.

non-Aboriginals. Lack of capital made it difficult for Aboriginals to participate in the industry. Some were able to procure loans from canneries, but the canneries were increasingly shutting down in more remote areas and centralizing in the Vancouver and Prince Rupert areas. Between the mid-1940s and the mid-1960s, the number of Aboriginal fishers dropped by 33 percent.⁵¹

Aboriginal fishers also experienced increasing difficulties participating in their food fisheries. In the 1960s, about one-half of all Aboriginal food fish was caught in the Fraser River system. In 1967, the Department closed fishing in parts of the Fraser River for a three-week period on the basis that it was required to protect the early sockeye run at Stuart Lake. Twenty-four hour patrols, arrests and confiscations of Aboriginal nets resulted, with conservation being used as the rationale. Meanwhile, however, commercial fishing on the Fraser estuary continued. Aboriginals began pressuring government for legislative recognition of their right to fish the Fraser. A similar three-week closure took place in 1968, although one 24-hour opening for food fishing was permitted in that period. Newell heralds what happened on the Fraser River in those years as a "revival of the aboriginal rights issue in British Columbia and elsewhere in Canada."⁵²

⁵¹This figure was cited by the Native Brotherhood in the 1960s when it lobbied government to provide financial assistance to Aboriginal fishers. Newell, *supra*, note 6 at p. 142.

⁵²*Ibid* at p. 147.

In the 1960 Sinclair Report, the Pacific fisheries were presented as a prime example of the tragedy of the commons problem. No mention of Aboriginal fishing was made in the report except indirectly through a suggestion that everyone should be treated equally in the fisheries. The government responded to the report with the Davis Plan, or "Salmon Vessel Licence Control Plan", in 1968. The goal of the plan was to improve the fisheries' economic performance, increase incomes by restricting the numbers of licensed salmon vessels, and decreasing over-capitalization and excess labour usage in the industry.

When the Davis Plan licensing program was reviewed in the late 1970s and early 1980s, it was determined that the cost of fishing had soared without any comparable increase in returns; the number of boats had decreased, but mostly in the small vessel fleet only; total capital investment had quadrupled between 1969 and 1980 yet the size of the catch had remained constant; and no real response had been made to the threats of industry and sport fishing on management. The Salmon Enhancement Program was initiated in 1977 in an attempt to bolster stocks, but it was geared more to development of hatcheries than to habitat rehabilitation. Studies showed that Aboriginal fishers were the hardest hit by the new licensing scheme, with increased competition and capitalization pushing them out of the industry. The welfare rolls expanded as the number of licensed Aboriginal fishers decreased.

Attempts were made to boost Aboriginal participation in the commercial fisheries through grants, loans and special, lower cost, licences.⁵³ Only a handful of Aboriginal fishers benefitted from these programs, with the total number of Aboriginal fishers still less than 50 percent of what it had been 20 years previously. As well, much of the increase in incomes was enjoyed not by those living on reserves, but rather by those living in the Vancouver area. The programs tended to help those few who had been doing well previously and, thus, caused greater polarization in incomes.⁵⁴ In 1986 the Native Brotherhood also attempted to bolster Aboriginal participation in the fishing industry by creating the Native Fishing Association which provided low-interest financing and training programs for Aboriginal fishers.

⁵³Indian Fishermen's Assistance Programs ("IFAP") were in place between 1968 and 1973 and between 1974 and 1978 with direct grants and government-backed loans being made available to increase the size, quality and safety of the Aboriginal fishing fleet. An emergency assistance program was also initiated between 1980 and 1982. It was administered by the Department of Indian Affairs, the Native Brotherhood and 13 bands of the Nuu-Chah-Nulth Tribal Council. The rationale behind these programs was not recognition of an Aboriginal right to fish, but rather an attempt to relieve the economic hardship of Aboriginal peoples. In 1971, special "Indian only" licences were made available at a lower annual cost. The Indian Fisheries Development Board was also established in 1971 and provided financing for Aboriginals to buy boats and gear. It did not, however, provide assistance with respect to the requisite down payments. See *ibid* at pp. 158 to 166.

⁵⁴As Newell states, "Because the assistance programs had the same inherent biases as the Davis Plan itself, they ultimately worked against the interests of Indian fish-based communities and favoured the highly successful vessel owners and processing conglomerates." See *ibid* at p. 162. In his report, P. Pearse also critiqued these programs and concluded that they were not successful in getting large numbers of Aboriginal fishers into the industry. He also noted that the grants and loans contributed to an overcapitalization problem in the fishing fleet. See The Commission, *supra*, note 34 at p. 155. This report will be reviewed in greater detail below. It should be noted at this point that although increases in incomes may have been enjoyed by only a handful of Aboriginal fishers, average gross incomes of Aboriginal fishers did increase during this period from 61 percent of the average fleet income in 1967 to 109 percent in 1973, with an average of 84 percent between 1975 and 1979. See James, *supra*, note 6 at p.14.

During this period, various Aboriginal communities conducted "fish-ins" on parts of the Fraser River, openly breaching fishing regulations in protest. Several charges were laid and Aboriginal resistance intensified in response. In 1977, the Department launched its "Operation Roundup" to enforce provisions against illegal taking and selling of fish by Aboriginals. Although a number of charges were laid, no convictions resulted. At a meeting in 1978, the President of the Union of BC Indian Chiefs called the Department of Fisheries "Enemy No. 1".⁵⁵ Illegal sale of fish continued. In 1986, the Department raided a Gitksan fish camp. One hundred Gitksan formed a human barricade around the site and pelted enforcement officers with marshmallows. Many charges were laid but, as was the case with most other charges laid throughout this period, none resulted in convictions. On May 25, 1984, Ron Sparrow was charged with fishing with a net that was longer than what was specified in the regulations.⁵⁶ The Supreme Court of Canada ultimately held that the Aboriginal right to fish for food, social and ceremonial purposes was protected by section 35 of the Constitution Act and could only be overridden if there was a valid legislative objective, such as conservation of the resource.

Following the *Sparrow* decision, the Department announced that the prior right of Aboriginals to fish for food would be honoured. It should be noted that the Department's stated policy for some time had actually been that reasonable

⁵⁵Newell, *supra*, note 6 at p. 173.

⁵⁶*R. v. Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.). The *Sparrow* decision will be reviewed in greater detail in subsequent chapters.

Aboriginal food fish requirements were to rank second in priority to conservation. This was noted by the Court of Appeal in its decision in *Sparrow* and appears to have been a factor in that Court's decision to recognize a constitutionally protected priority right.⁵⁷ The policy was apparently first espoused by Department Minister Davis in the 1970s.

In 1991, the Aboriginal Fisheries Co-operative Management Program was launched and in 1992, the seven-year Aboriginal Fishing Strategy ("AFS") was announced, which included pilot projects for the sale of fish by Aboriginal fishers in some communities.⁵⁸ The program was designed to protect Aboriginal food fishing and to give Aboriginal communities a greater role in fisheries management. Part of the program included buying back commercial licences from non-Aboriginal fishers on a voluntary basis. These allocations were then used to increase the Aboriginal share of commercial fish. Also part of the AFS was a fishery guardian training program to train Aboriginal peoples to participate in fisheries monitoring, stock management, fishery enhancement and assessment, habitat protection and enforcement. Under the AFS, the federal government negotiates individual fishing agreements with individual bands, tribal

⁵⁷*R. v. Sparrow* (1987), 36 D.L.R. (4th) 246 (B.C.C.A.) at pp.255 and 277.

⁵⁸Some 80 agreements, involving 57 First Nations or Tribal Councils were entered into under the AFS in 1992. Agreements under the Pilot Sale Arrangement (PSA) for the commercial sale of salmon were signed with the Lower Fraser Aboriginal Fisheries Commission representing the Sto:lo, Musqueam and Tsawwassen First Nations; the Tsu-ma-uss Fisheries on the west coast of Vancouver Island representing two Nuu-Chah-Nulth First Nations; and the Tsimshian Tribal Council, the Gitksan and Wet'suwet'en Watershed Authorities, and the Nat'oot'en First Nations on the Skeena River. For a more detailed description of the program, see Gardner Pinfold Consulting Economists Limited, *An Evaluation of the Pilot Sale Arrangement of Aboriginal Fisheries Strategy* (1994) [unpublished].

councils and other Aboriginal groups. The agreements cover issues such as habitat protection, habitat enhancement training, fishing regulations, regulation enforcement training and economic development. Fish plans are developed by the band and the Department. The AFS is designed to be in place only until 1999, at which time it is intended that Interim Measures Agreements under the B.C. Treaty Commission process will be in place.

In June 1993, the new Aboriginal Communal Fishing Licences Regulations were adopted. These regulations provided for communal fishing licences to be issued to bands, as opposed to individuals directly.⁵⁹ The bands can then administer who can fish in their food fisheries. Aboriginal fishers can also hold regular commercial salmon fishing licences in marine areas at a reduced fee.

In 1996, the Minister of Fisheries and Oceans announced a plan to reduce British Columbia's commercial salmon fishing vessels by 50 percent. The decision was a controversial one and many fishers, as well as the British Columbia government, called for a more effective federal strategy to deal with the economic concerns of commercial fishers as well as the depleted fish runs.⁶⁰

⁵⁹SOR/93-332, amended SOR/94-390.

⁶⁰L. Pynn and S. Simpson, "Fishers Cry Foul Over Licence Cuts" The Vancouver Sun (30 March 1996) A1, A6. Among those calling for a federal strategy to restore depleted runs was Premier Glen Clark. His comment is interesting given that the provincial government has a great deal of control over the condition of the runs through its jurisdiction over industry in the province. Since habitat destruction is one of the causes of the depleted runs, and much of the destruction is caused by industry, federal strategy alone will probably not solve the problem. Provincial action is required as well.

Despite the opposition, the plan went into effect on May 24, 1996, although it was subsequently announced that the plan will be reviewed.⁶¹ The Department also initially prohibited commercial sockeye and chinook salmon fishing on the south coast and Vancouver Island for the 1996 season because of the predicted low level of stocks returning to spawn. However, the estimated run size of sockeye was subsequently upgraded and some fishing was permitted.⁶²

It can be seen that state control of the fisheries has essentially been a combination of increased regulation of where and how fishing is to take place on the one hand, and attempts to limit entry into the industry through the use of licensing regimes on the other. These two management approaches are the traditional methods used to attempt to solve the "tragedy of the commons".⁶³ What follows is a review of how well those approaches have worked in practice.

C. The Non-Aboriginal Management Regime in Review: How Well Has It Worked?

One of the most recent comprehensive reviews of fishing policy in British Columbia was conducted by the Commission on Pacific Fisheries Policy which

⁶¹M. Crawley and J. Hunter, "Salmon deal gives B.C. a bigger say" *The Vancouver Sun* (16 July 1996) A1, A5.

⁶²B. Bouw, "Fraser sockeye fishery to open as run upgraded" *The Vancouver Sun* (6 August 1996) B1 and P. McMartin, "Fraser sockeye estimates rise again, allowing more fishing" *The Vancouver Sun* (13 August 1996) B1.

⁶³B.J. McCay and J.M. Acheson, eds., *The Question of the Commons. The Culture and Ecology of Communal Resources* (Tucson: The University of Arizona Press, 1987) at pp. xiii-xiv.

was established in 1981 to review fishing on the Pacific coast and to make recommendations to improve fisheries management. The 1982 report of Commissioner Peter Pearse was the first such report to really address the Aboriginal fishing issue. He concluded that government policy was deficient due to "uncertain objectives, weak and outdated legislation, bad organization, contradictory programs and confusion."⁶⁴ With respect to management of salmon, he identified difficulties with the use of pre-season management plans.⁶⁵ The Department prepares these pre-season plans each year in an attempt to meet tentative harvesting and spawning objectives. Pearse concluded that there was an "alarming lack of documentation on how management decisions are made; what information is used; how it is interpreted and the results obtained."⁶⁶ Instead, he concluded, decisions were often based on personal knowledge and intuition.

Pearse also concluded that the central economic problem of the fisheries was overcapacity of the fleet, a problem he linked to the way in which the fisheries were traditionally organized: because the fisheries were open to large

⁶⁴The Commission, *supra*, note 34. He goes on to recommend two policy objectives: firstly, to ensure the resource and its habitat is protected and, where advantageous, enhanced; and secondly to maximize the benefits of the resource by ensuring that the resource is allocated to those who can make the most valuable use of them. Within the goal of economic development, he identified two supplementary goals: improvement of fishers' incomes and development of economic opportunities for coastal communities and Indian people. See pp. 4-5.

⁶⁵*Ibid* at p. 40. These problems are: (i) lack of knowledge as to the number of fish which will enter the fishery because the number cannot be accurately assessed until the fish are in the fishery or on the spawning grounds; (ii) inability to predict when the stock will enter a fishery; (iii) lack of knowledge of how many vessels will participate in the fishery; and, (iv) weak information upon which to base escapement targets so that they become essentially guesses.

⁶⁶*Ibid* at p. 42.

numbers of fishers, harvesting was based on the "rule of capture". That is, because the fish were not assigned through property rights, users had to compete with others for a share. In such a scenario, temporary profits are thought to stimulate fishers to expand their fishing capacity which, in turn, decreases net returns and threatens the stocks⁶⁷; in other words, the classic tragedy of the commons problem. He concluded that reforms usually required benefitting one group over another and, as a result, government tended to be reluctant to make those reforms, which resulted in a "profound inertia."⁶⁸

Pearse determined that the commercial sector took approximately 93 percent of the total salmon harvested in the province and the Aboriginal fishery took approximately 2 percent of the total.⁶⁹ He noted that serious economic problems were caused by the decrease in Aboriginal participation in the fisheries. In his words, coastal Indians have:

stronger motivation, greater skill and more experience to support their participation in commercial fishing than they do in most other fields the commercial fisheries afford a highly promising means of involving coastal Indians in constructive economic activity. Moreover, it is an activity in which many of them claim an historic right to participate. The

⁶⁷*Ibid* at pp. 75-76.

⁶⁸*Ibid* at p. 6. This statement may be generally true when reforms are not in the interest of the commercial fishing industry. However, given the history of regulation of fishing in the province, it is not so clear that the government has been reluctant--at least historically--to introduce reforms which benefitted commercial interests over those of other groups. Indeed, quite the opposite appears to have occurred. Perhaps, therefore, the reason for any inertia which may currently exist is more accurately attributed to the fact that there appear to be no alternatives available which will not negatively affect commercial interests in some way.

⁶⁹*Ibid* at p. 10.

fisheries, then, must be regarded as an obvious base for policies aimed at Indian social and economic development.⁷⁰

Pearse also referred to Aboriginal food fishing and pointed out that the distinction drawn by many non-Aboriginals between commercial and recreational fishing was not appropriate in the Aboriginal context, given that traditionally fish played an important role not only as food, but also in trade, social and cultural activities. He concluded that "Indian fisheries policy cries out for reform."⁷¹ He suggested that Aboriginal fishing rights should be clarified and strengthened, Aboriginals permitted to participate in fisheries management, and Aboriginals given opportunities to take better economic advantage of their rights to fish.

Pearse was involved in a further study of the fisheries a decade later. The 1992 fishing season was rife with problems and controversy. An estimated 482,000 fewer sockeye returned to the spawning beds than had been expected. The year marked the first time in over a century that Aboriginals were permitted to sell fish on the lower Fraser River as a result of the Pilot Sales Arrangement. The situation provoked near riots and "rekindled controversy over commercialization of the river fishery."⁷² Pearse and his colleague in the

⁷⁰*Ibid* at p. 156.

⁷¹*Ibid* at p. 181. Pearse pointed to a number of problems, including Aboriginal discontent over the prohibition of sale, feelings of being left out in management decisions, and resulting enforcement problems due to bad relations between Aboriginal groups and the Department of Fisheries and Oceans.

⁷²Newell, *supra*, note 6 at p. 178.

investigation, P. Larkin, reviewed the situation in the fall of 1992 in an attempt to determine the cause of the dramatic shortfall in numbers of fish.⁷³

Pearse noted that since the 1960s there had been a healthy growth in returns of sockeye in the 1992 cycle year because of regulations, fishways and enhancement works.⁷⁴ However, the numbers expected for 1992 did not end up in the spawning grounds. Pearse and Larkin concluded that the fish had been in trouble long before they reached the Fraser River. By the time they had reached the Juan de Fuca and Johnstone Straits, the estimated stock size was only half of what had been expected. Part of the reason for this shortfall was considered to be the failure of the Pacific Salmon Commission to agree on a division of the marine commercial catch between the United States and Canada, thus resulting in a fish war. As well, they concluded that the PSA had created an "entirely new environment for the Indian fishery and the Department's managers."⁷⁵ Pearse spent much time in his report reviewing the PSA and its effect on the numbers of fish which ultimately reached their spawning grounds in 1992. He concluded that the Aboriginal catch had exceeded estimates, but he placed most of the blame on the Department for hastily reaching agreements with the various First Nations involved in the PSA while fishing was essentially already underway,

⁷³P.H. Pearse, *Managing Salmon in the Fraser. Report to the Minister of Fisheries and Oceans on the Fraser River Salmon Investigation* (Vancouver: Department of Fisheries and Oceans, 1992).

⁷⁴Sockeye salmon are on a four-year cycle. The 1992 cycle year historically produces the smallest runs of the four cycles on the Fraser. However, in 1992 record numbers were expected because of the stock rebuilding program. See *ibid* at pp. 4-6.

⁷⁵*Ibid* at p. 8.

failing to disseminate adequate information or communicate clear policy objectives, and failing to adequately ensure catches were controlled to meet escapement targets. Pearse concluded that the pilot sale projects signaled a major shift in policy and "threatened deeply entrenched interests. Change is often tentative, upsetting and fraught with mistakes."⁷⁶

In Pearse's opinion, what happened in 1992 was not a disaster because, although escapement targets were not met, the second highest number of fish for that run in several decades reached the spawning beds.⁷⁷ The circumstances in 1993 have been reported to have improved although monitoring and enforcement costs were high.⁷⁸

In 1994, similar controversies resulted when more than a million sockeye expected to return to spawning areas in the Fraser never arrived. The Fraser River Sockeye Public Review Board was established in response. The Board concluded that over-reliance on quality of historic in-season estimates and an optimistic attitude with respect to the expected run size resulted in risky management decisions being made by the Department in 1994. As well, confusion relating to the AFS continued, resulting in a lack of effective enforcement. It stressed the need for better communication within the

⁷⁶*Ibid* at p. 30.

⁷⁷*Ibid* at p. 29.

⁷⁸Gardner Pinfold, *supra*, note 58 at p. vi. Some \$3.3 million was spent with \$2.8 being spent in the lower Fraser where enforcement problems were the greatest.

Department and between the Department and First Nations, as well as with the commercial and sport fishing sectors. It concluded that First Nations should be involved in the management of fish and given a greater opportunity for input into the decision-making process.⁷⁹

The David Suzuki Foundation released a report in 1995 wherein Dr. Carl Walters reviewed management of the Pacific fisheries. He concluded that the current management system is working to some extent, with the largest sockeye salmon catch since 1913 being caught in 1993. The steady increase in catches over recent years was attributed to stock rebuilding and protecting natural stocks, as opposed to salmonid enhancement projects.⁸⁰ However, he also concluded that the current fishery was not sustainable in ecological or economic terms. He described the management system as producing:

an institutional quagmire, with grossly overcapitalised and bitterly competitive fishing fleets, an allocation system among fishermen that is dominated more by threat of civil disobedience than by reasoned analysis of where rights and privileges ought to lie, and a publicly costly and burdensome apparatus for both biological management and economic support of fishermen.⁸¹

With respect to the recent changes made under the AFS, an initial review of the Pilot Sales Arrangement was undertaken which indicated that employment

⁷⁹Fraser River Sockeye Public Review Board (Canada), *Fraser River Sockeye, 1994: Problems and Discrepancies. Report of the Fraser River Sockeye Public Review Board* (Ottawa: Public Works and Government Services Canada, 1995).

⁸⁰C. Walters, *Fish on the Line. The Future of Pacific Fisheries. A Report to the David Suzuki Foundation Fisheries Project, Phase I* (Vancouver: The David Suzuki Foundation, 1995) at p. 3.

⁸¹*Ibid* at pp. 4-5.

levels among the First Nations involved in the program have doubled and the increased economic opportunities have resulted in an increase in self-esteem in communities involved. The quality of the fish caught has been somewhat lower than ocean-caught fish due to location and timing but Aboriginal fishers have not experienced difficulty in selling their catches. As well, it was found that the PSA has led to improvements in fishery management through greater control of effort and availability of more reliable catch data. However, high monitoring and enforcement costs have been incurred in the program.⁸²

To date, no comprehensive review of the co-management aspects of the Aboriginal Fishing Strategy has been completed by the Department.⁸³ However, the B.C. Aboriginal Fisheries Commission presented a review of the AFS to the Department in 1996.⁸⁴ The Commission concluded that the Department had not implemented Aboriginal priority to fish over the commercial and recreational fisheries, although positive steps had been taken to enhance the involvement of Aboriginal people in fishery management activities. It found that many First Nations considered the AFS to "be one of the most effective and innovative programs to have guided the federal department of Fisheries and Oceans for many years."⁸⁵ In the four communities in which the PSA was operating,

⁸²See Gardner Pinfold, *supra*, note 58 at pp. 53-54.

⁸³I have been advised, however, that the Department is currently in the process of drafting a report reviewing the AFS. It is expected to be released some time in 1996.

⁸⁴The BC Aboriginal Fisheries Commission, *First Nations Review of the Aboriginal Fisheries Strategy* (1996) [unpublished].

⁸⁵*Ibid* at p. 3.

unemployment, which averaged around 70 percent normally, was virtually eliminated during the two-month pilot sales fisheries. As well, the Department was reported to have benefitted from improved catch data, better and less expensive monitoring and enforcement, and community involvement in fisheries management.

However, the Commission did cite various problems with the program. For instance, it found that resource conservation, stock assessment, and habitat and fish production were underfunded. Training in fishery management activities was also found to be insufficient. It recommended that the AFS and PSA be expanded to all First Nations, with agreements being negotiated at the community level so that differences among communities can be recognized and incorporated into policies, and local and regional concerns can be balanced with national ones. Of particular importance was the need to involve communities on the upper Fraser River in the PSA so that all First Nations on the Fraser are given equal opportunities; otherwise, it stated, these communities will "continue to be at odds with one another."⁸⁶ A majority of First Nations contributing to the Commission's report believed that the only way to protect Aboriginal involvement in the fishery is to create communal commercial licences instead of merely attempting to integrate Aboriginal fishing with the commercial fisheries. The Commission identified the key elements of an effective Aboriginal Fisheries Policy as including access to fisheries; integration into fishery management,

⁸⁶*Ibid* at p. 7.

training and employment opportunities; habitat and environmental monitoring; transparent access to information; and economic development.

There are clearly problems with the current management system and the role which Aboriginal fishers play within it. Not only do stocks appear to be declining, but the status of Aboriginal fishing rights remains unclear and increasingly controversial. In an attempt to better understand these problems, the underlying ideologies of the current system will be reviewed and considered.

D. Ideologies and Myths in Fisheries Regulations

The regulatory system which has been designed for the fisheries is, presumably, designed to reflect normative principles of governance. The liberal democratic ideology holds that all individuals have certain inalienable rights which cannot be violated by legislatures or courts. As well, there is an underlying belief in fair treatment of all individuals and groups and a belief that the preferences and priorities of all individuals affected will have equal merit in governmental decisions.⁸⁷ G.B. Doern describes the basic premises behind the Canadian regulatory scheme as follows:

The basic concept of liberalism and pluralism saw Canadian political life as being characterized by a high degree of individual freedom and market activity within a system of

⁸⁷Dorcey, *supra*, note 29 at pp. 73-74.

democratically elected government. It also portrayed a benevolent competition among interest groups, with the state as independent referee removing the excesses of the market place.⁸⁸

The ideology of liberalism and, in particular, that of equality, emerges in government policies and public reaction to Aboriginal fishing issues. However, it appears that the use of this ideology is often used to mask reality: governmental decisions with respect to the fisheries have often been made without the true input of Aboriginal groups and without giving equal weight to Aboriginals' preferences and priorities, and with an assumption that the fisheries are common property and that, hence, there are no property rights with which to deal. Governments may promote the image of themselves as merely mediators,⁸⁹ but that is rarely--if ever--the case. As Sally Weaver states in relation to Aboriginal issues generally:

Policy-making is not a pragmatic exercise devoid of principles and beliefs, but a process in which values that will guide government actions are selected and rationalized. Indian policy in Canada is made by individuals who hold strong feelings about whether or not native groups should be treated differently from other Canadians.⁹⁰

⁸⁸G.B. Doern, "Introduction: The Regulatory Process in Canada" in G.B. Doern, ed., *The Regulatory Process in Canada* (Toronto: The MacMillan Company of Canada, 1978) 1 at pp. 3-4. Interestingly, Doern also refers to the myth that private enterprise opposes state regulation. Instead, he states, many actively seek such regulation. See p. 5. Although this premise will not be reviewed here in the fisheries context, it appears plausible that commercial interests would be in favour of government regulation of fishing, particularly when that regulation results in the participation of other user groups in the industry being marginalized.

⁸⁹D. Newell, *supra*, note 6 at p. 5. Newell's description essentially mirrors the "government as referee" image described by G.B. Doern in note 84 above.

⁹⁰S. Weaver, "Federal Difficulties with Aboriginal Rights Demands" in M. Boldt and J.A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 139 at pp. 141-142.

It has also been pointed out that regulatory authorities in particular tend to have a great deal of discretion to decide which values will be maximized, how open the process will be, who will be contacted and when.⁹¹

We can see the use of liberal notions of equality in legislation and government policy. The *Fisheries Act* and its regulations historically characterized Aboriginal fishers as an interest group whose needs should be addressed on the same legal basis as other users. The claims to traditional rights must compete with the interests of other users, but "[a]lways, Indians were expected to cooperate with the established industrial processing sector, usually in the name of conservation."⁹² The Davis Plan was "predicated on the assumption that all groups of users had the same claim on the fish."⁹³ However, as discussed earlier in this chapter, the effect of the Plan was anything but equal, with even larger discrepancies among and within user groups resulting.

When the Department introduced the AFS, it described it as being designed to meet the challenge to "protect and conserve fish resources while ensuring fair and equitable treatment for all stakeholders."⁹⁴ It described the AFS as forming the basis for a "new 'social contract' among government, Aboriginal people and non-Native fishing groups [aimed at] increas[ing]

⁹¹Doern, *supra*, note 88 at pp. 19-20.

⁹²Newell, *supra*, note 6 at p. 212.

⁹³*Ibid* at p. 208.

⁹⁴Department of Fisheries and Oceans, News Release B-HQ-92-25, "Aboriginal Fisheries Strategy. The Content" (June 1992).

economic opportunities in Canadian fisheries for Aboriginal people while achieving predictability, stability and enhanced profitability for all participants."⁹⁵

It is not only government which uses liberal notions of fairness and equality; they are also used by interest groups. When the AFS and PSA were introduced in the early 1990s, they engendered wide protest from the processors. The Fishermen's Direct Action Committee threatened to boycott fish plants which accepted the Aboriginal catch. Non-Aboriginal commercial fishing groups complained that the Department was favouring Aboriginal peoples and that the latter were being given special access to the resource and that allowing Aboriginals to sell fish caught for traditional purposes "distorts the market by creating unfair competition."⁹⁶ Thus, non-Aboriginal groups use liberal notions of equality to support their opposition to programs designed to increase Aboriginal participation in the fisheries despite the historical evidence that past regulations have not resulted in equality of opportunity for Aboriginal fishers. The same type of discourse is being used by those defending as well as those opposing such programs.

As well, conservation is usually touted by the government as the rationale for regulation of the fishery. However, the actual strategies for management

⁹⁵Department of Fisheries and Oceans, News Release B-HQ-92-24, "Aboriginal Fisheries Strategy. The Program" (June 1992).

⁹⁶J. Allain and J. Frechette, *The Aboriginal Fisheries and the Sparrow Decision* (Ottawa: Supply and Services Canada, 1994) at p. 19.

involve political, social and economic decisions and "the choices are often not about conservation *per se*."⁹⁷ Over the years in British Columbia, different varieties and species of fish, regions, gear, processing methods, and labour organizations have become associated with different racial and ethnic groups. Thus, regulations which favour one type of fish, or location, or gear type benefit some groups at the expense of others.

The effect of the Department's use of conservation as the rationale behind its fishing policies can be seen in its response to the Pearse report. It claimed that although it recognized that Aboriginals had priority to the fish once conservation was met, it could not ensure appropriate escapement levels were met unless it curtailed Aboriginal fisheries because they were at the end of the harvesting chain. In other words, the Department portrayed conservation and Aboriginal fishing as diametrically opposed concepts: the two cannot co-exist. The location of Aboriginal traditional fisheries has become a major impediment to effective recognition of Aboriginal rights to fish. It is really only when the fish are in the rivers that their true numbers can be tallied and the effect of ocean fishing on stock levels truly assessed. Often, it is determined that the numbers are at such levels that Aboriginal fishing cannot be permitted without risking having insufficient numbers of fish reach the spawning grounds. As a result, although Aboriginal fishers are given priority in theory, in reality, they are usually the group which must bear the cost of conservation. The party which ultimately

⁹⁷Newell, *supra*, note 6 at p. 7.

enjoys the benefits of such conservation efforts are the commercial fishers who will get the first opportunity to capture the fish.

Of course, instead of prohibiting Aboriginal fishing, the Department could still achieve its conservation goals by significantly curtailing marine commercial fishing. However, it has historically chosen not to. There are many valid social, economic and political reasons why it has chosen not to, but it is important to recognize that choices are made and often those choices have nothing to do with conservation. Indeed, one could argue that conservation objectives could be best achieved if all ocean fishing was prohibited and only fishing in the rivers was permitted, where numbers can be accurately counted and runs effectively targeted.⁹⁸

Aboriginal management was also historically not permitted on the grounds of conservation requirements and is only beginning to be acknowledged to some extent through the AFS co-management plans. Often, local management was discounted on the basis that the Aboriginal communities did not have the scientific expertise of the Department and, therefore, could not adequately conserve the fish and "[i]t is often difficult for government to believe that there

⁹⁸Not everyone agrees with that proposition. For instance, it is Walter's opinion that restricting fishing to rivers only would be "ecologically disastrous" because the Department is not capable of adequately administering the larger number of fisheries which would result, problems of interception of non-targets species would actually increase, and crucial information from offshore fishing required for in season adaptive regulation would be lost. See *supra*, note 80 at p. 43. It is beyond the scope of this thesis to attempt to analyze the benefits of marine versus in-river fishing.

may be viable management methods other than a particular hierarchical form of standardized procedures and use of expertise."⁹⁹ However, as discussed above, Pearse concluded that managers within the Department, for all their scientific knowledge, often end up using their experience and intuition in making decisions. This is not to suggest that science does not have anything to offer to fisheries management; however, it is important to acknowledge that science is not all that is used. As well, science is "contaminated with value judgments"¹⁰⁰; scientists are not completely objective, nor can they be expected to be. As a result, assumptions underlying information brought into the process should be challenged.¹⁰¹ Given that Aboriginals fished in the waters for thousands of years, their experience and intuition is equally, and probably more valuable, than those of the Department's managers and their voices should not be excluded on the basis that they allegedly lack a scientific basis and therefore cannot achieve conservation objectives.¹⁰² Of course, it cannot be assumed that traditional Aboriginal experience and knowledge has not been affected by years of marginalization and exclusion from fisheries management. However, it can also not be assumed that Department employees do indeed have tremendous

⁹⁹E. Pinkerton, "Introduction: Attaining Better Fisheries Management Through Co-Management--Prospects, Problems, and Propositions" in Pinkerton, ed., *supra*, note 25, 3 at p. 17.

¹⁰⁰Dorcey, *supra*, note 29 at p. 97.

¹⁰¹*Ibid* at p. 109. Although Dorcey made this suggestion in the context of bargaining, it is equally applicable to the process of management decision-making as well.

¹⁰²In addition to their traditional knowledge, many First Nations have been attempting to increase their technical and scientific knowledge base by hiring fisheries biologists and other scientists. This trend is understandable given that it is often a "war of knowledge" in fisheries management, with the Department claiming to have more scientific knowledge than others and, therefore, more credentials to manage the resource. The increased scientific knowledge of Aboriginal communities can also assist them in their management strategies.

expertise. Many employees are young and move on to other fields or departments. Thus, the experience of many of the Department's so-called experts amounts to only a few years. This situation may worsen with the current downsizing of the Department which is taking place. It may be that expertise is thin in all parts of the fisheries management system, Aboriginal and non-Aboriginal alike.

As well, the Department has always presented the fisheries as a resource which requires central management. As a result, a macro-economics perspective is inherent in the regulatory approach which prejudices the many Aboriginal fishery-based economies which are locally and regionally based.¹⁰³ The BC Aboriginal Fisheries Commission identified the need to balance local and regional needs with national ones in its report to the Department. It is not clear that this is currently being done.

Conservation concerns are also used by the interests groups which oppose increased Aboriginal participation in the fisheries. For instance, the United Fishermen and Allied Workers' Union opposed the AFS and PSA programs, claiming that the Aboriginal fishers would not abide by the quota, would continue black market sales and ultimately destroy the resource and the industry.¹⁰⁴ The stereotype of "Indian as destroyer of natural resources"

¹⁰³Newell, *supra*, note 6 at p. 214.

¹⁰⁴*Ibid* at p. 178.

surfaced yet again. This stereotype was unfortunately reinforced by the events of the 1992 fishing season.

The regulatory system and underlying ideologies have clearly had effects on the resource. As was discussed above, one of the major problems with current fishing strategy is that when most of the fish are caught in the ocean, it is impossible to truly assess the impact of fishing on stocks until they reach the rivers and often it is too late at that point to correct for any significant over-fishing. As well, it is impossible to separate weak and strong stocks when they are in the ocean. As a result, oftentimes weak stocks are overfished and even completely depleted in the mad rush to get as many fish as possible.¹⁰⁵ The fact that this problem could arguably be avoided if only in-river fishing was allowed indicates that preservation of the fish is clearly only one goal of the regulatory process. Despite claims of the Department to the contrary, the policies and regulations appear to be aimed more at regulating the industry itself, rather than protecting the fish.¹⁰⁶ The government appears also to perceive itself as having an obligation to individuals and communities which currently live off the present commercial fishery. Any dramatic shifts in policy are perceived to threaten the

¹⁰⁵These problems are referred to in more detail by J.A. Crutchfield, "The Fishery: Economic Maximization" in D.V. Ellis, ed., *Pacific Salmon Management for People* (Victoria: University of Victoria, 1977) at pp. 9-11.

¹⁰⁶Newell, *supra*, note 6 at p. 210.

economic base of some isolated coastal communities.¹⁰⁷ As Peter Pearse described it:

Working with insufficient knowledge of stock sizes and population dynamics, under heavy pressure from competing groups of fishermen, and with inadequate control over fishing activity, management has in many respects been reduced to a series of desperate attempts to meet the demands of vocal user groups, without visibly destroying the resource.¹⁰⁸

Another ideology which is used in the fisheries debate is that fish are common property and cannot, therefore, be assigned to one group. However, it is not at all clear that it is accurate to conceive of fish as common property. As Patricia Marchak argues, the result of designating fish as common property appears to have been to bury issues rather than to illuminate them.¹⁰⁹ She suggests that fish are better characterized as state or Crown property since there are no true rights of non-exclusion as is the case with common property.¹¹⁰

¹⁰⁷This reaction occurred in relation to the recent "Mifflin Plan". See, for instance, Pynn and Simpson, *supra*, note 60.

¹⁰⁸The Commission, *supra*, note 34 at p. 37.

¹⁰⁹"Uncommon Property," in P. Marchak, N. Guppy and J. McMullan, eds., *Uncommon Property. The Fishing and Fish-Processing Industries in British Columbia* (Toronto: Methuen, 1987) 3 at p. 3.

¹¹⁰It is not clear that complete rights of non-exclusion are a true requirement of common property. In their article, J.C. Juergensmeyer and J.B. Wadley review the historical evolution of the concept of common property and point out that common lands were not necessarily shared equally. In its earliest usage, the concept did mean that certain land was set aside for communal rather than private individual ownership and everyone was equally entitled to use and enjoy it. However, rights of common were distinct and consisted of privileges of use granted by the use and enjoyment of undivided common land under the customs of the neighbourhood or from use and enjoyment granted by lords to tenants. The rights of common idea was ultimately incorporated into the notion of common lands and resulted in the possibility that some members of a given village could be legitimately excluded from the use and enjoyment of the lands. In other words, just because it was common lands did not mean that everyone enjoyed complete rights of common to use that land. See "The Common Lands Concept: A 'Commons' Solution to A Common Environmental Problem" (1974) 14 Nat'l Res. J. 361. In any event, it could be argued that the lack of rights of non-exclusion in the fisheries has resulted from government regulation of the fisheries in an attempt to avoid a tragedy of the commons. In other words, the lack of rights of non-exclusion could be seen as a result of the common property nature of the resource, rather than as evidence

The state restricts and allocates access rights to fish and retains extensive management authority which affects users in diverse ways. Under her analysis, the tragedy is not of the commons, but rather of mismanaged state property since she views overfishing as the result of how management is carried out, and not due to the "assumed evils of common property."¹¹¹

Nonetheless, the ideology of common property can play a role in motivating fishers to accept state management to avoid a tragedy of the commons. However, because fishers profess to believe in this ideology, "when the state abruptly assumes rights of ownership, as in attempting to reallocate the resource, fishers mount opposition. Since the ideology has been publicly stated so frequently, it takes on a life of its own and begins to have legal implications."¹¹² Because the resource has been presented as common property, fishers who are licensed in the system claim a right to use it to their own advantage, and they guard that perceived right jealously. This is indeed what appears to be happening in response to increased recognition of Aboriginal rights to fish and was particularly evident in response to the introduction of the AFS and PSA.¹¹³ It can also be seen in the recent response to the Department's attempt to reduce fleet size through a licence buy-back program. It is likely that

that it is not common property. No definitive conclusions will be made in this thesis with respect to this issue. However, it should be noted that it is certainly not clear that they are indeed common property.

¹¹¹Marchak, *supra*, note 109 at p. 10.

¹¹²*Ibid* at p. 29.

¹¹³This response has also been seen more recently in response to the fisheries provisions in the Nisga'a Agreement in Principle, which will be reviewed in Chapter Four.

the resistance stems not as a consequence of the portrayal of fish as common property, but rather from the fact that these regulatory changes threaten vested interests in the industry. However, those who feel threatened often use common property ideology to oppose the changes. Thus, the notion of fish as common property becomes, along with the ideology of equality, a way to justify opposition to an Aboriginal fishery.

It has also been argued that the assumptions underlying notions of common property result in an under-estimation of the ability of people to cooperate and a failure to recognize the social nature of property institutions and that property rights are embedded in historically specific social contexts. It also reduces environmental problems to property rights instead of linking them to socio-economic systems and tends to polarize local communities and governments.¹¹⁴ Polarization is certainly evident not only between First Nations and non-Aboriginal commercial and recreational fishers, but among and within First Nations as well, particularly along the Fraser River where some First Nations are involved in the PSA and others are not. However, it is not clear that it is the conceptualization of the fish as common property which is the cause of this polarization. The conflicts are probably better characterized as being over wealth, rather than about defending a common property concept of the fish.

¹¹⁴These points are taken from McCay and Acheson, "Human Ecology of the Commons" in McCay and Acheson, eds., *supra*, note 63, 1 at pp. 7-11.

Common property ideology is used to attempt to protect that wealth in certain circumstances, but does not appear to be the cause of the conflict.

What should also be recalled is that Aboriginal fishers did not appear to have open access problems before contact because custom delineated access rights, allocation and distribution of benefits; instead of being a commons, the fisheries were regulated by "territorial use rights in fisheries".¹¹⁵ Since the fisheries were not treated as common property, no tragedy of the commons appears to have resulted. It is, therefore, clearly inappropriate to conceive of the fisheries as being characterized only in terms of common property. As E. Pinkerton and M. Weinstein found in their review of several fisheries from around the world, the tragedy of the commons model does not represent a universal truth.¹¹⁶ Viewing the resource in only that light also precludes the recognition and utilization of alternative management systems beyond increased government regulation or privatization. Some of these alternative approaches will be reviewed and analyzed in Chapter Four. However, before these approaches are considered, the jurisprudence relating to Aboriginal fishing will be summarized and discussed.

¹¹⁵Rettig, *et. al.*, *supra*, note 25 at p. 276.

¹¹⁶E. Pinkerton and M. Weinstein, *Fisheries That Work. Sustainability Through Community-Based Management. A Report to the David Suzuki Foundation* (Vancouver: The David Suzuki Foundation, 1995) at p. 177.

CHAPTER THREE

SCALES OF JUSTICE: THE CASE LAW

Both the law and the discourse dealing with Aboriginal fishing rights have been profoundly affected by the entrenchment of Aboriginal and Treaty rights in the Constitution and the 1990 decision of the Supreme Court of Canada in *R. v. Sparrow*.¹¹⁷ Indeed, it has been suggested that as a result of the constitutional amendments, "the pre-1982 framework for hunting and fishing rights is gone."¹¹⁸ As a result, only a brief summary of a few pre-*Constitution Act, 1982* decisions will be presented, with the focus of this chapter being on the *Sparrow* decision and subsequent caselaw.

A. Pre-Constitution Act, 1982

There are a myriad of cases in Canada dealing with both Aboriginal hunting and fishing issues, dating back to Confederation. As was noted in the introductory chapter, Aboriginal fishing rights in Canada have historically been

¹¹⁷*Supra*, note 56.

¹¹⁸D. Sanders, "Pre-Existing Rights: The Aboriginal Peoples of Canada" in G.A. Beaudoin and E. Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3rd ed. (Toronto: Carswell, 1996), 17-1 at p. 17-27.

interpreted as stemming from various sources, including treaties and Aboriginal rights. In some parts of Canada, the Royal Proclamation of 1763 has also been found to affect Aboriginal hunting and fishing rights.¹¹⁹ In the prairie provinces, the Natural Resources Agreements provided for food fishing rights. Thus, four different regimes relating to Aboriginal fishing and hunting rights in Canada were recognized by the judiciary: areas covered by the Royal Proclamation of 1763, the provinces subject to the Natural Resources Agreements, regions covered by treaties, and non-treaty areas. Many of the cases involved treaty rights and, as a result, the decisions often dealt with issues which were largely irrelevant in most of British Columbia. However, some important premises were established in these cases which, although currently of limited application due to the entrenchment of Aboriginal rights in the Constitution, help shed some light on the historical evolution of Aboriginal fishing rights jurisprudence.

The starting point for a great deal of Canadian Aboriginal law during much of this century was the case of *St. Catherine's Milling and Lumber Co. v. The Queen*.¹²⁰ In that case, the Privy Council dealt with Aboriginal title. Aboriginal peoples were found to have some rights in their lands as a result of the provisions of the Royal Proclamation of 1763; the Proclamation was interpreted

¹¹⁹There is some uncertainty as to whether the Royal Proclamation of 1763 applies to British Columbia. In *Calder v. British Columbia (A.G.)* (1973), 34 D.L.R. (3d) 145 (S.C.C.), the court was split 3-3 on this issue. However, as we shall see below, given the findings in the *Calder* case, this issue is essentially moot.

¹²⁰(1889), 14 A.C. 46 (J.C.P.C.).

as a grant, under which the state gave rights to Indians.¹²¹ However, these rights were described as "personal and usufructuary, dependent upon the goodwill of the Sovereign". They were not seen as constituting full fee simple title.

Aboriginal hunting and fishing rights were considered by the Privy Council in 1903 in *Ontario Mining Co. v. Seybold*.¹²² In that case, the Privy Council considered the Robinson Treaty which contained provisions guaranteeing Aboriginals the right to continue to hunt and fish throughout their surrendered territory. The Court held that the Province of Ontario held title to land subject to the burden of the Aboriginal usufructuary title. Upon extinguishment of that title, the province acquired full beneficial interest subject only to such privileges of hunting and fishing as were reserved in the treaty. Although hunting and fishing rights were not directly at issue in the case, this ruling suggested that hunting and fishing rights were severable interests capable of surviving as a "non-territorial incident of an otherwise extinguished aboriginal title."¹²³ It was, however, later determined that these rights were enforceable in limited circumstances only.

¹²¹Sanders, *supra*, note 118 at pp. 17-3 to 17-4. Sanders describes this characterization of Aboriginal rights as an example of legal positivism.

¹²²[1903] A.C. 73 (J.C.P.C.).

¹²³P. G. McHugh, "Maori Fishing Rights and the North American Indian" (1985) 6 Otago L. Rev. 62 at p. 68.

In a line of cases beginning with the ridiculed *R. v. Sikyea*¹²⁴, the Supreme Court of Canada ruled that where there was a conflict between general federal legislation and treaty rights to fish, hunt or trap, the legislation prevailed regardless of whether there was a treaty or whether the activity took place on a reserve.¹²⁵ The courts subsequently specifically held that the federal *Fisheries Act* applied to Aboriginals and overrode treaty fishing provisions.¹²⁶

In 1973, the Supreme Court of Canada decided an important case in relation to the nature of Aboriginal rights generally. In *Calder*¹²⁷, the Court adjudicated upon the Nisga'a land claim. The Court split evenly on the issue of extinguishment of Nisga'a Aboriginal title. However, Judson J. recognized

¹²⁴[1964] S.C.R. 642. This case dealt with the question of whether the *Migratory Birds Convention Act*, R.S.C. 1970, c. M-12, a federal statute, had taken away the treaty protected hunting rights of an Aboriginal in the Northwest Territories. Although the Supreme Court ultimately agreed with the decision of the court below that the Act was inconsistent with the Aboriginal right to hunt for migratory birds and, as a result, the right had been abrogated, it spent most of its time considering whether the duck in question was a wild duck or a tame one. D. Sanders points out that the Supreme Court of Canada's decision in this case was the object of the satire *Regina v. Ojibway* which dealt with the question of whether a horse covered with feathers was a small bird. See D. Sanders, "Indian Hunting and Fishing Rights" (1972-73) 38 Sask. L. Rev. 45 at pp. 45-46.

¹²⁵See also *R. v. George*, [1966] S.C.R. 267 and *Daniels v. White*, [1968] S.C.R. 517, both of which also dealt with the *Migratory Birds Convention Act*. It should be noted that provincial game laws can be superseded by a treaty by virtue of s. 88 of the *Indian Act* which provides that "Subject to the terms of any treaty ... all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province". See *R. v. White and Bob* (1964), 52 W.W.R. 193 (B.C.C.A.), aff'd [1965] S.C.R. vi. It has been held that s.88 applies only to provincial legislation, and not federal. Thus, federal legislation of general application could affect treaty rights. See *R. v. George*. Fisheries are within federal jurisdiction, but the Department has delegated some its powers to provincial ministries. In British Columbia, for instance, administration of the regulatory regime for freshwater fish species has been delegated to the province. However, the regulations are still enacted on the authority of a federal statute and are, therefore, federally-derived legislation. See *R. v. Derricksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.). Thus, s. 88 has little bearing on Aboriginal fishing. As well, the provision has little effect in British Columbia in any event given that there are few treaties in the province and s. 88 refers only to treaty rights, not Aboriginal rights. Because s. 88 refers only to treaty rights, Aboriginals in non-treaty areas historically had less protection from provincial legislation than those with treaties.

¹²⁶*R. v. Derricksan*, *supra*, note 125, *R. v. Francis* (1970), 10 D.L.R. (3d) 189 (N.B.C.A.) and *R. v. Cooper*, *supra*, note 5.

¹²⁷*Supra*, note 119.

Aboriginal title as something which could exist independently of the Royal Proclamation and which was grounded in Aboriginal organization and occupation. He did not, however, rule that this historic organization and occupation meant that Aboriginals had legal rights to their lands.

Nonetheless, the judgment signaled the beginning of a movement away from viewing Aboriginal rights from a positivist framework, wherein such rights are only seen to exist where so declared by legislation, to a rights-based framework in which rights are seen to exist independent of any legislative declaration. Under the rights-based analysis, it is irrelevant whether the Royal Proclamation of 1763 applies to British Columbia since Aboriginal rights can exist without being explicitly proclaimed by the state. Subsequently, the Court in *Guerin v. The Queen*¹²⁸ found that Aboriginal title to traditional lands was based on pre-existing occupation and control, thus continuing the trend away from positivism. As D. Sanders states, the *Calder* case significantly altered the framework for arguing aboriginal rights in Canada.¹²⁹

As was noted earlier, s. 35 of the *Constitution Act, 1982* has also changed that framework dramatically and it is to cases decided under that section that we will now turn.

¹²⁸[1984] 2 S.C.R. 335.

¹²⁹Sanders, *supra*, note 118.

B. Sparrow and Its Wake

(1) The Sparrow Decision

It was in the midst of the shift to a rights-based framework that the *Constitution Act, 1982* was enacted. The Act contains three sections which deal with Aboriginal peoples, the most significant of which is section 35. Section 35(1) provides that: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."¹³⁰

The Supreme Court of Canada's first interpretation of section 35(1), which happened to be in the context of Aboriginal fishing rights, occurred in *R. v. Sparrow*.¹³¹ In that case, the Court considered only the Aboriginal right to fish for food, social and ceremonial purposes.¹³² However, since the case dealt with the appropriate interpretation to be given to s. 35 in the context of fishing rights, it obviously sheds considerable light on the approach which should be taken by the

¹³⁰Schedule B of *The Canada Act 1982* (U.K.), 1982, c. 11. The other two provisions are s. 25, which protects Aboriginal rights from the equality provisions of the Charter of Rights and Freedoms, and s. 37, which calls for four First Ministers' Conferences on Aboriginal constitutional issues.

¹³¹*Supra*, note 56.

¹³²Although requested by appellant counsel to deal with the commercial aspect of the right, the Court declined. See *Sparrow*, *ibid* at pp. 402 to 403. In his article, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 *Queen's L.J.* 217 at pp. 243 to 244, W.I.C. Binnie refers to the fact that the only reason charges were laid against Mr. Sparrow was because fisheries officers had learned that the First Nation had been selling fish. Charges had actually been laid in relation to the sale of fish, but they were dismissed because the seizure of the fish was found to be unlawful. Thus, although the Supreme Court of Canada did not address the issue of commercial fishing, it appears that the First Nation's commercial activity was actually one of the central motivating factors for laying the charges in the case.

courts in determining whether other Aboriginal fishing rights—including commercial and management rights—are constitutionally protected.

Mr. Sparrow was a member of the Musqueam Indian Band. In 1984, he was charged under the *Fisheries Act* with the offence of fishing with a net longer than that which was permitted by the terms of his Band's food fishing licence. He admitted the facts alleged to constitute the offence, but defended the charges on the grounds that he had been exercising an Aboriginal right to fish and that the net restriction contained in the Band licence was contrary to s. 35(1).

The Provincial Court Judge convicted Mr. Sparrow of the offence. He held that he was bound by the British Columbia Court of Appeal's decision in *Calder* that a person could not claim an Aboriginal right unless it was supported by a treaty, proclamation, contract or other document. This reliance on the Court of Appeal judgment had been argued by the provincial government in the years since the split Supreme Court of Canada decision in *Calder*. An appeal to the County Court was dismissed on similar grounds. The British Columbia Court of Appeal found that the courts below had erred in law in deciding they were bound by the Court of Appeal's decision in *Calder* since the Supreme Court of Canada had rendered a different opinion on that point in its decision in the *Calder* case. The Court of Appeal also found that an Aboriginal right was not extinguished through mere regulation, although government did have the power to regulate Aboriginal fishing under s. 35(1), provided such regulation was reasonable for the proper management and

conservation of the resource. The Court defined the right in question as a right to fish for food and associated traditional activities in priority to the interests of other user groups. The Court found that the trial judge's findings of fact were insufficient to lead to conviction. Both Mr. Sparrow and the Crown appealed the Court of Appeal's decision.¹³³

The Supreme Court of Canada delivered a unanimous, and somewhat convoluted, decision in the case. It ultimately found that there were insufficient factual findings to support a conviction of Mr. Sparrow and sent the case back for a retrial so that the issues it identified in its decision could be considered. Chief Justice Dickson and Justice La Forest, who delivered the decision for the Court, spent much time in the decision delineating the meaning of s. 35(1). They expressly rejected a "frozen rights" approach to the interpretation of Aboriginal rights and stated that the rights were not to be interpreted in relation to how they had been regulated in the past. The Court held that the phrase "existing aboriginal rights" was to be interpreted flexibly to permit the evolution of rights over time. The Court also

¹³³Mr. Sparrow appealed on the ground that the Court erred in holding that s. 35(1) only protected Aboriginal food fishing and permitted restrictive regulation of the right whenever reasonably justified for proper management and conservation of the resource, and in failing to find the net length restriction inconsistent with s. 35(1). The Crown cross-appealed on the ground that the Court erred in holding that the Aboriginal right had not been extinguished prior to April 17, 1982 and, in the alternative, that it erred in concluding that the right included the right to take fish for ceremonial purposes and societal needs and that the band had priority over all other users of the resource. It also argued that Mr. Sparrow had failed to establish a *prima facie* case that the restriction on net length unreasonably interfered with his right. There were a number of intervenors in the appeal to the Supreme Court: the National Indian Brotherhood Assembly of First Nations intervened in support of Mr. Sparrow, and the Attorney-Generals of British Columbia, Ontario, Quebec, Saskatchewan, Alberta and Newfoundland, the British Columbia Wildlife Federation, the Fishery Council of British Columbia, and the United Fishermen and Allied Workers Union supported the Crown.

held that a right is not extinguished merely because it has been controlled in great detail by regulation. The state's intention to extinguish an Aboriginal right must be clear and plain. The Court found nothing in the *Fisheries Act* or the regulations to demonstrate a clear and plain intention to extinguish the Aboriginal right to fish for food.¹³⁴

However, although the Court found that regulations do not necessarily extinguish an Aboriginal right, it held that Aboriginal rights are not absolute and the federal government continues to have power to legislate in relation to Aboriginal peoples. In support of that finding, the Court stated that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to ... [the] lands vested in the Crown."¹³⁵ Thus, federal power to legislate continues, although it is tempered by the requirement that government justify any regulation that infringes upon or denies an Aboriginal right. In other words, the federal power, and possibly provincial powers, must be reconciled with the fiduciary duty to recognize and affirm Aboriginal and treaty rights.¹³⁶

The Court then set out the test for determining whether a proper reconciliation has taken place. The first question to be asked under the *Sparrow*

¹³⁴*Supra*, note 56 at pp. 396-397 and pp. 400-401.

¹³⁵*Ibid* at p. 404.

¹³⁶*Ibid* at pp. 408-410. In the words of the Court: "While ... [s. 35] does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise." See p. 410.

test is whether the legislation interferes with an existing Aboriginal right. To determine if, and what type of, Aboriginal rights exist, the characteristics of the rights are to be considered. The Court pointed out that Aboriginal fishing rights are not traditional property rights, but rather collective rights in keeping with the culture and existence of the group. It cautioned that courts must be sensitive to the Aboriginal perspective on the meaning of the right. To determine whether an infringement has occurred, the Court set out three questions: firstly, is the limitation unreasonable; secondly, does it impose undue hardship; and, lastly, does it deny to the holders of the right their preferred means of exercising the right.¹³⁷

If an infringement has occurred, the onus then shifts to the Crown to prove that it was justified. The justification standard requires that there be a valid legislative objective which must be more meaningful and less vague than "the public interest". Conservation and resource management were considered valid objectives.

The next requirement in justifying the infringement is that there be a link between the objective and the extent of infringement of the Aboriginal right. In the fisheries context, the Court recognized that the recognition and affirmation of Aboriginal rights may give rise to conflict with other users, but required that there be a link between the management objective and the allocation of priorities in the fishery. The Court expressly stated that the constitutional nature of the Musqueam

¹³⁷*Ibid* at p. 411.

food fishing rights means that Aboriginals must be given priority in any allocation of fishing rights after conservation objectives are met, even if the result is that only Aboriginals are allowed to fish.¹³⁸

The Court also identified further questions to be addressed within the justification analysis, depending on the circumstances of the case, including whether there was as little infringement as possible, whether fair compensation was paid, and whether the Aboriginal people in question were consulted about the regulations.¹³⁹

The decision in *Sparrow* can certainly be described as a milestone in the Aboriginal fishing rights battle. With its requirement for sensitivity to the Aboriginal perspective and express rejection of a frozen rights approach, it establishes the framework for a much broader recognition of Aboriginal rights. Indeed, the decision was the impetus for a change in the policy of the Department of Fisheries and Ocean ("the Department") and its establishment of the Aboriginal Fisheries Strategy ("AFS"). However, at times the Court appears to have had some difficulty following its own directions to consider the Aboriginal perspective and to refrain from viewing the rights as constitutionalized in their regulated form. As well, some of the findings in the decision continue to reflect many of the same basic premises and ideological representations which have been the basis for the fisheries regulatory regime.

¹³⁸*Ibid* at pp. 413-414.

¹³⁹*Ibid* at pp. 416-417.

For instance, by separating the fishing right into two distinct parts—food, social and ceremonial on the one hand, and commercial on the other—the Court was viewing the right as it was defined by regulation and not as it was traditionally exercised by Aboriginal fishers prior to regulation. The Court's excuse for viewing the right in this way was that the commercial issue was not dealt with in the court below. However, it is interesting to note that the Court spent some time discussing the conflict between Aboriginal and non-Aboriginal commercial fishers, even mentioning the presence of the intervenors representing commercial fishing interests. It is quite plausible that the real reason the Court declined to deal with the commercial issue was to avoid that conflict as much as possible. Although the Court noted that government regulation in and of itself could not delineate the right as one involving food fishing only, and perhaps thereby attempted to pave the way for a future decision favouring commercial rights, it still confined its reasons to food fishing. Thus, it effectively ignored its own principles of interpretation. Its decision in this regard can be seen as an example of the difficulty courts often have in truly considering the Aboriginal perspective, particularly when so doing means non-Aboriginal commercial interests could be seriously threatened. When there are too many overlapping and conflicting interests, the courts will often be reluctant to define rights too broadly.¹⁴⁰

¹⁴⁰W.I.C. Binnie makes this observation in "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" *supra*, note 132 at p. 225.

This difficulty can be seen as an example of the tendency of courts to protect what Menno Boldt calls "the national interest".¹⁴¹ That is, whenever recognition of an Aboriginal right is perceived as threatening the interests of the rest of Canada, courts will refuse to recognize it. Boldt states: "It would seem the Canadian people, their governments, and the judiciary have reached an ideological concord to deny the historical rights and claims of Indians because it would cost too much to honour them."¹⁴² Although the Supreme Court did not explicitly deny that the Aboriginal right to fish included a commercial element, it certainly did not appear to want to come to that conclusion. Undoubtedly, the cost, as well as the controversy, of recognizing a broader Aboriginal fishing right was a factor in its decision to avoid the issue entirely. As well, the Court may have had some concerns about management of the highly regulated and competitive commercial fishery that they sensed did not exist for the food fishery.

Another reason for the Court's refusal to deal with the commercial issue is perhaps that it had a view of Aboriginals as traditional or poor or both, but not as modern players who could get into commercial fishing in a big way. As well, the fact that this was Chief Justice Dickson's last Aboriginal rights case might have led him to ignore the facts of illegal sale which had been set out in the courts below, and thereby the commercial aspects of the case, and focus exclusively on the subsistence issue to ensure unanimity of the Court.

¹⁴¹*Surviving as Indians. The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993).

¹⁴²*Ibid* at p. 17.

On the ideological front, the Court does appear to have recognized some of the prevailing myths in fisheries management and Aboriginal rights discourse. By holding that Aboriginal rights in s. 35(1) are to be interpreted flexibly to permit their evolution over time, the Court expressly rejected the ideological representation of Aboriginal culture as static. This ideology, which holds that Aboriginals are no longer "real Indians" if they adopt practices of the dominant society, has been explicitly and implicitly used by other courts to find against the existence of an Aboriginal right.¹⁴³ The Supreme Court's express rejection of that ideology is definitely a step forward.

As well, although the Court did not question that government is the proper party to determine appropriate conservation goals, it pointed out the need to consider who those conservation measures are designed to protect. The Court found that although conservation of resources is a valid legislative objective, there must be a link between the question of justification and the allocation of priorities in the fishery, with Aboriginal fishers being given priority once conservation objectives are met. Conservation concerns in and of themselves will not justify an infringement of the Aboriginal right to fish.

However, not surprisingly, the Court did not completely step outside the prevalent ideological framework. Although it recognized the need to consider in

¹⁴³See M. Kline, "The Colour of Law: Ideological Representations of First Nations in Legal Discourse" (1994) 3 Social and Legal Studies 453 at pp. 463-465.

whose benefit conservation goals are aimed, it did not question that it is only government which can delineate and achieve those goals. Of course, the issue of Aboriginal management of the resource was not directly before the Court and it was probably not even argued in the case. However, in recognizing the government's continuing right to legislate in relation to Aboriginal fishing the Court does not appear to have considered the possibility that, from the Aboriginal perspective, management of the fish is arguably as integral to their culture as being permitted to catch fish. It could be argued that to the extent that regulations do not recognize and respect Aboriginal management, they are an infringement of an Aboriginal right. The Court does not appear even to have turned its collective mind to this issue, except perhaps to casually note 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."¹⁴⁴ This blind acceptance of Canadian sovereignty over Aboriginals is certainly not surprising—after all, the Court is part of the establishment and one of its implicit jobs is to protect that sovereignty. As well, this decision was released after the Oka incident, with its focus on sovereignty. However, it does indicate the difficulty courts will have in truly taking on an Aboriginal perspective, particularly when that perspective is antithetical to that of the dominant society.¹⁴⁵ It has also been suggested that this blind acceptance of Canadian sovereignty indicates that the Court is not yet taking a completely inherent rights-based

¹⁴⁴*Supra*, note 56 at p. 404.

¹⁴⁵As C. Tennant points out, it may not be possible for judges to truly ever understand Aboriginal culture in anything other than the dominant society's terms. He suggests that even assuming that knowing difference is possible is a tool of cultural hegemony. See "Justification and Cultural Authority in s. 35(1) of the Constitution Act, 1982: *Regina v. Sparrow*" (1991) 14 Dalhousie L. J. 372 at p. 384.

approach to Aboriginal rights. Instead, it is still using at least a partial positivist or contingent rights-based framework because in order to accept without question Canadian sovereignty over Aboriginals, one must believe that if Canada decided not to respect Aboriginal sovereignty, it does not exist.¹⁴⁶

Despite the limitations of some of the findings in *Sparrow*, it is clearly an important case and one to which lower courts should pay strict heed in adjudicating upon Aboriginal rights issues. We will now review how some of these lower courts, and the British Columbia Court of Appeal in particular, have applied *Sparrow* in the Aboriginal fishing context.

(2) Application of Sparrow

Lower courts have been just as reluctant to threaten non-Aboriginal commercial interests in the fisheries industry as the Supreme Court apparently was in *Sparrow*. As well, despite the ruling in *Sparrow*, there have been very few cases

¹⁴⁶See M. Asch and P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta L. Rev. 498. Their points are critiqued by T. Isaac in "Discarding the Rose-Coloured Glasses: A Commentary on Asch and Macklem" (1992) Alta L. Rev. 708. Isaac concludes that their article "lacks a sense of the political and legal reality of Canada. Paramount to this reality is Canadian sovereignty. Absolute sovereignty in the forms of an inherent aboriginal right of self-government or aboriginal sovereignty is politically unfeasible and legally unsupported." See p. 712. Although it is not clear to this writer that recognition of Aboriginal sovereignty is legally unsupported, it certainly does not appear to be politically feasible to expect courts to deny the validity of Canadian sovereignty and, hence, their own authority.

in which an Aboriginal right to fish commercially has been recognized.¹⁴⁷ Where the courts have recognized such a right, the right has been defined in extremely narrow, and often nonsensical, terms. For instance, in the *R. v. Jones* decision¹⁴⁸, the Court found that the Saugeen Ojibway had a commercial right to fish. However, it must be noted that the Crown conceded that there was "an aboriginal right of some sort to fish commercially".¹⁴⁹ In addition, in describing the right, Fairgrieve J. referred to it as a commercial activity directed at "sustenance".¹⁵⁰ In support of such a definition, he referred to the dissenting opinion of Wilson J. in *R. v. Horseman*¹⁵¹ wherein she distinguished between use of a resource for sustenance and pure commercial profit. A similar distinction was made more recently by some members of the Supreme Court in *R. v. Van der Peet*¹⁵², *R. v. Gladstone*¹⁵³ and *N.T.C. Smokehouse Ltd. v. The Queen*¹⁵⁴, as will be discussed in Part (3) below. Thus, even when a commercial right has been found by either the Supreme Court or a lower court, the term "commercial" has been defined much differently than it is for non-Aboriginals. The rationale behind this distinction may very well be the courts' reluctance to make

¹⁴⁷There has, however, been some caselaw giving a broader interpretation to treaty fishing rights. For instance, in *Saanichton Marina Ltd. v. Claxton* (1989), 36 B.C.L.R. (2d) 79, the British Columbia Court of Appeal was dealing with the fishing provisions in one of the treaties on Vancouver Island. The Court found that although the right to fish granted by the Treaty did not amount to a proprietary interest in the seabed or a contractual right to the fishing grounds, the Treaty did protect their right to fish. The Court found that the right to fish encompassed other rights which are incidental to the Treaty right. The construction of a marina was found to interfere with that right. As a result, the Treaty fishers were successful in blocking the construction of the marina. Although this was not a case about commercial rights to fish or jurisdiction over the fisheries, it could nonetheless have important implications in the fisheries context to the extent that it recognizes incidental rights.

¹⁴⁸(1993), 14 O.R.(3d) 421 (Ont. Ct. (Prov. Div.)).

¹⁴⁹*Ibid*, at pp. 430-431.

¹⁵⁰*Ibid*, at p. 437.

¹⁵¹[1990] 1 S.C.R. 695 at p. 919.

¹⁵²[1996] S.C.J. No. 77 (QL).

¹⁵³[1996] S.C.J. No. 79 (QL).

¹⁵⁴[1996] S.C.J. No. 78 (QL).

findings which will negatively affect other interests to a significant extent. As well, it is another example of courts' inability to perceive Aboriginals in anything but stereotypical traditional terms; that is, that they were concerned only with survival and not involved in commercially-profitable enterprises.

It has been argued that the Supreme Court of Canada has effectively foreclosed the possibility of lower courts recognizing an Aboriginal commercial right to fish by defining fishing rights in terms of priorities.¹⁵⁵ If courts are truly motivated by a concern to protect the "national interest" (i.e. non-Aboriginal capitalists), as Boldt suggests, the requirement that Aboriginal rights to the fisheries are to be given priority may very well result in courts refusing to find that such a right exists. Although food fishing is somewhat self-limiting in that there are only so many fish a community can consume, commercial fishing has no such self-limitations apart from the built-in limitations of the potential commercial market. Thus, the consequences to non-Aboriginal commercial fishers is so potentially devastating that courts may predictably find against the right.

At least in the case of the British Columbia Court of Appeal, this is indeed what appears to have occurred. The Court found against the existence of an Aboriginal commercial right to fish in *R. v. Van der Peet*¹⁵⁶, *R. v. Gladstone*¹⁵⁷ and *R.*

¹⁵⁵See Binnie, *supra*, note 132 at p. 236.

¹⁵⁶(1993), 80 B.C.L.R.(2d) 75, aff'd [1996] S.C.J. No. 77 (QL).

¹⁵⁷(1993), 80 B.C.L.R.(2d) 133, rev'd [1996] S.C.J. No. 79 (QL).

v. *N.T.C. Smokehouse*.¹⁵⁸ As will be discussed in Part (3) below, the Supreme Court of Canada affirmed the Court of Appeal's decisions in both *Van der Peet* and *N.T.C. Smokehouse*, using some of the same rationales and apparent underlying concerns.

In these cases, it appears that one of the motivating factors for the judges' refusal to recognize an Aboriginal right to fish commercially might have been the effect such a right would have on non-Aboriginal commercial fishers, or what Boldt would call the "national interest". For instance, in *Van der Peet*, Justice Macfarlane stated:

this case is not about the casual disposal of surplus food fish. In essence, it is about an asserted Indian right to sell fish allocated for food purposes on a commercial basis. The result would be to give Indian fishers a preference or priority over other Canadians who seek a livelihood from commercial fishing.¹⁵⁹

We can also see much of the old ideology coming to the fore in these decisions. For instance, In *Van der Peet*, Macfarlane J.A., speaking for the majority, stated that not all Aboriginal practices in existence at the time sovereignty was asserted by Europeans are Aboriginal rights. The practices must be integral to the First Nation's distinctive culture. He went on to state that a modernized form of the practice can still be an Aboriginal right, but something which became prevalent merely because of European contact is not an Aboriginal right. In addition, he held

¹⁵⁸(1993), 80 B.C.L.R.(2d) 158, aff'd [1996] S.C.J. No. 78 (QL).

¹⁵⁹*Van der Peet*, *supra*, note 156 at p. 85.

that practices which are not unique to Aboriginal societies, but are common to both Aboriginal and European societies, are not to be given the status of Aboriginal rights. Since the Sto:lo traded most extensively in fish as a result of the opening of a Hudson's Bay post, Macfarlane J.A. found that the sale or barter of fish could not be considered integral to the Sto:lo's distinctive culture and, therefore, there was no Aboriginal right to sell fish.¹⁶⁰ These comments reflect the ideology of static "Indianness", which holds that Aboriginal culture cannot change or adapt and still be Aboriginal in nature.

The majority uses the same ideology of static culture to deny a commercial right to sell herring spawn on kelp in *Gladstone*. Although there was evidence that the members of the Heiltsuk First Nation had traded in literally tons of herring spawn on kelp pre-contact, the majority found that the historical quality and character of that activity was different from the sale of the spawn to Japanese buyers and, therefore, there was no Aboriginal right to fish commercially.¹⁶¹

In addition, the ideology of equality was used by the Court to deny the Aboriginal commercial right and to attempt to keep Aboriginal rights as traditional. For instance, in *Van der Peet*, after holding that Mrs. Van der Peet did not have an Aboriginal right to sell her fish, Macfarlane J.A. stated,

¹⁶⁰*Ibid* at pp. 84-86.

¹⁶¹*Gladstone, supra*, note 157 at p. 145

that is not to say persons of aboriginal ancestry are precluded from taking part, with other Canadians, in the commercial fishery. But they must be subject to the same rules as other Canadians who seek a livelihood from that resource.¹⁶²

Wallace J.A. made similar statements in *Van der Peet*. He stated as follows:

If s. 35 had, as its purpose, the recasting of the nature and scope of aboriginal rights to reflect the aboriginal community's objective of satisfying its economic needs, one result would be the creation of an aboriginal priority in the commercial fishery along the coasts and rivers of British Columbia (subject to conservation objectives). The effect of this priority would be that other interest groups wishing to participate in the fish harvest for any purpose - be it food, sports or commercial - could do so only after the aboriginal commercial catch (as determined by their economic needs) was satisfied. Of course, the nature of a commercial fishery, with its inherent objective of satisfying a practically inexhaustible demand for salmon, would make the aboriginal commercial priority limitless.¹⁶³

We also see in that statement the reluctance of Wallace J.A. to find a commercial right because of the consequences to other interests, particularly because of the far-reaching effect of the priority characterization of the right which was made by the Supreme Court of Canada in *Sparrow*. He, too, went on to refer to equality arguments and stated that:

¹⁶²*Van der Peet*, *supra*, note 156 at p. 89.

¹⁶³*Ibid* at p. 95

every resident of British Columbia, native and non-native, has the right to fish in British Columbian waters and dispose of their catch commercially. This right, however, is limited and controlled by a variety of regulations....¹⁶⁴

Another underlying ideology which is reflected in the above-noted comment is the common property notion. Although it is not true that every resident of British Columbia does indeed have the right to fish commercially, given the legal, financial and other hurdles to entering the industry¹⁶⁵, Wallace J.A. nonetheless fell back on common property notions to deny any special rights for Aboriginals.

The majority of the Court in these cases was not prepared to find that the right even existed, thus negating the necessity of determining whether an infringement of the right was justified. Even where the right was found to exist, the justification issue was dealt with summarily, with conservation automatically justifying any and all infringements. No inquiry was undertaken into the issue of who the conservation objectives were designed to serve. In *Gladstone*, for instance, Hutcheon J.A. found that the regulations infringed an Aboriginal right to sell herring spawn on kelp but that these regulations were justified by conservation and management concerns.¹⁶⁶ However, as Lambert J.A. pointed out in his dissent, convincing evidence was presented at trial to suggest that there were no

¹⁶⁴*Ibid* at p. 98. By stating that everyone has a right to fish, Wallace J.A. is effectively elevating the "national interest" to the same level as the aboriginal right. By doing so, he "dismisses the purpose of section 35 in recognizing the uniqueness of aboriginal rights...." See A. Bowker, "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995) U.T. Fac. L. Rev 1 at p. 24.

¹⁶⁵Section 4 of the *British Columbia Fishery (General Regulations)* prohibits fishing unless a licence is obtained. SOR/84-248

¹⁶⁶*Gladstone*, *supra*, note 157 at p. 141.

conservation concerns with respect to herring spawn on kelp because the adult herring are not killed in the harvesting process.¹⁶⁷ Conservation objectives were considered to legitimize regulation in *N.T.C. Smokehouse* as well.¹⁶⁸

Not only did the Court fall back on various ideological justifications for its decisions in these cases, it also did not follow the Supreme Court's direction in *Sparrow* to consider the Aboriginal perspective in defining the Aboriginal right in question. It is arguable that if in, for instance, the *Van der Peet* case the Court had truly been sensitive to the Aboriginal perspective, it would have taken a different view of the trial judge's finding that the members of the First Nation had traded in fish in an opportunistic way prior to contact. Given that fact, it is arguable that the Sto:lo therefore have a right to trade fish "opportunistically". One of the biggest opportunities to come to the Sto:lo people was obviously the arrival of Europeans who wanted their fish and it would seem to follow from the *Sparrow* approach that trade would therefore be protected as an Aboriginal right.¹⁶⁹

As well, the *Sparrow* analysis explicitly permits a right to be exercised in a contemporary form. The sale of fish could clearly be characterized as a modern form of trade. However, the majority of the Court of Appeal chose instead to interpret the Supreme Court as saying that the method by which the right was exercised could be modern, such as the use of modernized equipment, and not the

¹⁶⁷*Ibid* at pp. 153-154

¹⁶⁸See Hutcheon J.A.'s comments in *N.T.C. Smokehouse*, *supra*, note 158 at pp 183-184.

¹⁶⁹Bowker, *supra*, note 164 at p. 22.

actual form of the right.¹⁷⁰ There is nothing in the *Sparrow* decision itself which suggests that this limited interpretation is to be taken.

The Court also seemed to start with the premise that selling fish is illegal and that the Aboriginals must establish there is an exception to the regulation. However, "*Sparrow* requires a court to strip away the layers of non-Aboriginal regulations and view the right in its original form."¹⁷¹ This relates again to the need to be sensitive to the Aboriginal perspective. The Aboriginal perspective, and the rights-based approach toward which courts have been moving recently, require the Court to recognize that the source of Aboriginal rights is Aboriginal people and their culture, not the state.¹⁷² Regulations under this perspective are, therefore, irrelevant.

Macfarlane J.A., for instance, referred in *Van der Peet* to the issue as being whether the Sto:lo have the right to dispose of excess fish allocated for food, ceremonial and social purposes. By so characterizing the issue, he is starting with the right as defined by the regulation and not the right as it may independently exist. It is only in the regulation that the Sto:lo use of fish for food, ceremonial and social purposes is separated from other uses of the fish. The actual right may be much broader than what the regulation attempts to regulate. It is this type of "frozen rights" approach which the Supreme Court of Canada expressly rejected in *Sparrow*.

¹⁷⁰See for example Wallace J.A.'s comments in *Van der Peet*, *supra*, note 156 at pp. 99-100

¹⁷¹Bowker, *supra*, note 164 at p. 20

¹⁷²*Ibid* at p. 40.

Similar ideological approaches arose in the British Columbia Court of Appeal cases dealing with Aboriginal fisheries management issues. The Court dealt with these issues in *N.T.C. Smokehouse*¹⁷³, as well as in *R. v. Lewis*¹⁷⁴ and *R. v. Nikal*¹⁷⁵. In all three cases, the majority held that the First Nations had no right to pass by-laws in relation to extra-territorial fisheries in which their members had rights to fish for food, social and ceremonial purposes. The Supreme Court upheld the decision in relation to the by-law issue in both *Lewis* and *Nikal*, but overturned the decision in *Nikal* for other reasons which will be discussed in Section (3) below.

The Court's refusal to recognize a right to govern the resource may stem partly from the Court's inability to recognize the legitimacy of Aboriginal self-government and possibly even their inability to view the Aboriginal right to fish as a truly collective right as opposed to an individual right, although these issues are never raised explicitly by the Court. It is of note that the Court of Appeal in *Sparrow* explicitly rejected any notion of co-management, confirming exclusive federal regulatory power. However, if the right is truly a right of First Nations as opposed to a right of individual members of a particular First Nation, it would seem that the ability to regulate the use of the resource for the benefit of the group as a whole must be integral to the right to use the resource.¹⁷⁶ Otherwise, individual members of the group could exercise their right in ways inconsistent with the right of others,

¹⁷³*Supra*, note 158.

¹⁷⁴(1993), 80 B.C.L.R.(2d) 224, *aff'd* [1996] S.C.J. No. 46 (QL).

¹⁷⁵(1993), 80 B.C.L.R.(2d) 245, *aff'd in part, rev'd in part* [1996] S.C.J. No. 47 (QL).

¹⁷⁶This argument is made by R. Kapashesit and M. Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1991) 36 McGill L.J. 925 at pp. 955-960 and by Bowker, *supra*, note 164 at p. 19.

including the group as a whole. If fishing is seen to be integral to the group's distinctive culture, the right to govern how, when, where and by whom fishing is to be exercised would also seem to be integral. That approach would be consistent with viewing the right as a collective right.¹⁷⁷

However, it is not clear that this line of argument was used by the appellants in *Lewis* in particular. It appears that no argument was led suggesting that management of fish is part of the Aboriginal right to fish. Instead, arguments were limited to the correct statutory interpretation of s. 81(1)(o) of the *Indian Act* and the proper delineation of reserve boundaries.

Nonetheless, some of the same concerns about the practical effect of recognizing an Aboriginal right as were found in the commercial cases were raised by the Court in these cases. For instance, in *Lewis*, Wallace J.A. seemed to be influenced by his concern that if the river is considered part of the reserve, the First Nation's right to fish would become an exclusive right and, therefore, contrary to the interests of non-Aboriginals.¹⁷⁸ Again, this line of reasoning appears to relate to a concern over preserving other interests in the industry.

In *Nikal*, we also see the equality arguments being used again. Macfarlane J.A. emphasized that all riparian owners and occupiers have the same rights with

¹⁷⁷The issue of collective versus individual rights in the context of liberal theory will be dealt with in greater detail in the concluding chapter of this thesis.

¹⁷⁸*Supra*, note 174 at p. 239

respect to fishing in non-tidal, non-navigable rivers and that, therefore, no special rights of governance should attach to the Aboriginal right to fish.¹⁷⁹ Once again, equality seems to be perceived as necessary to ensure all competitors in the commercial market are on a level playing field, even though historically Aboriginal fishers were not given that luxury.

More recently, the Court of Appeal again had to consider the *Sparrow* test in the context of Aboriginal food fishing rights. In *R. v. Jack*,¹⁸⁰ *R. v. Sampson*¹⁸¹ and *R. v. Little*¹⁸², the Court was dealing with the issue of whether certain conservation measures instituted by the Department interfered with Aboriginal and Treaty rights to food fish. Following the test in *Sparrow*, the Court stated that Aboriginal food fishing must be given priority after conservation objectives are met. The Court spent considerable time on the consultation issue in these cases, concluding that the consultations which took place between the Bands and the Department did not meet the *Sparrow* criteria since they did not cover all of the conservation measures which were implemented and which affected the availability of food fish. In *Jack*, the Court stated that:

there was a duty on the DFO to ensure that the Indian Band was provided with full information on the conservation measures and their effect on the Indians and other user groups. The DFO had a duty to fully inform itself of the fishing practices of the aboriginal group and their views of the conservation measures.¹⁸³

¹⁷⁹*Supra*, note 175 at p. 263

¹⁸⁰[1995] B.C.J. No. 2632 (QL), 16 B.C.L.R. (3d) 201.

¹⁸¹[1995] B.C.J. No. 2634 (QL), 16 B.C.L.R. (3d) 226.

¹⁸²[1995] B.C.J. No. 2633 (QL), 16 B.C.L.R. (3d) 253.

¹⁸³*Supra*, note 180 at pp. 53-54 (cited to QL).

However, the Court found that it was not necessary for the Department to reach agreement with the Bands on all conservation measures, as that would effectively give First Nations a veto power over any conservation measures the Department wished to initiate. Again, not surprisingly, the Court was not prepared to consider whether management of the fisheries is something which is also part of the Aboriginal right to fish. However, by requiring that there be complete disclosure of conservation plans to First Nations by the Department, the decisions recognize that Aboriginal fishers have a voice in fisheries management, although that voice does not necessarily have to be heeded.

The Court was also prepared to go beyond merely accepting at face value that conservation was a valid objective. Instead, it stated that *Sparrow* required that the way in which the objective was to be attained must also be analyzed. In other words, who the conservation measures benefitted, through the allocation of priorities, is an important issue to be considered. Top priority must be given to Aboriginal food fishing.¹⁸⁴

As well, the Court also attempted to consider the Aboriginal perspective to some extent by refusing to merely consider the nature of an Aboriginal right to fish in the context of individuals. It stated that the collective right of the First Nation must be considered when determining whether undue hardship was suffered as a result

¹⁸⁴See, for instance, *Little, supra*, note 182 at pp. 54-69 (cited to QL).

of the regulations in question.¹⁸⁵ Whether the Court's acceptance of the collective nature of the right would go so far as to accept the right of First Nations to have a role in fisheries management is not clear since it was not argued in these cases. However, the Court had no difficulty viewing the fishing right as a collective one.

These cases certainly reflect much more judicial sensitivity to the Aboriginal perspective than the commercial fishing cases. The Court appears to be prepared to take the *Sparrow* test seriously and to require strict adherence to it. However, the cases are limited in their application: they do not recognize anything other than a food fishing right and do not even consider Aboriginal management rights. The Court may very well have made the decisions it did precisely because it was dealing only with food fishing and, hence, the ramifications of its decisions would be somewhat limited. However, the cases make it clear that conservation objectives cannot be accepted blindly and that meaningful consultation must take place with First Nations. It may well be that these findings will ultimately be the basis for an increased role for First Nations in fisheries management, and perhaps even in commercial fishing.

¹⁸⁵See *Sampson, supra*, note 181 at pp. 40-45 (cited to QL).

(3) The Supreme Court in the Post-Sparrow Era

The Supreme Court has now had an opportunity to revisit the *Sparrow* decision in the context of both Aboriginal commercial fishing and fisheries management. Its decisions in *Van der Peet*, *Gladstone*, *N.T.C. Smokehouse*, *Lewis* and *Nikal* reveal that, as has been the case with many lower courts, the Supreme Court appears to be reluctant to apply the *Sparrow* principles in such a way as to fully recognize commercial and self-regulatory elements to the Aboriginal fishing right. Indeed, at times it completely departs from the spirit of *Sparrow* to avoid such recognition.

In *Van der Peet*¹⁸⁶, Lamer C.J., for the majority, characterized the issue in the case as whether s. 35(1) recognizes and affirms the right of the Sto:lo to sell fish. In answering that question, he stated that Aboriginal rights must be interpreted in a way which reflects the purposes underlying s. 35(1) and the interests the provision is intended to protect.

Lamer C.J. made reference in his decision to the limitations of the philosophical precepts of "liberal enlightenment", which hold that rights are general and universal, when applied to Aboriginal rights. He stated that Aboriginal rights are different from other Charter rights because they are rights which only Aboriginal peoples hold due to the fact that they are Aboriginal. He did not suggest that

¹⁸⁶*Supra*, note 152.

Aboriginal rights do not fit within a liberal framework because they are collective rights; rather, he pointed to the distinction between Aboriginal rights and other Charter rights in an attempt to define Aboriginal rights. However, it appears that he was concerned about granting special rights to one group in society and, accordingly, attempted to narrow the definition of Aboriginal rights. He stated that the Court cannot "ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society."¹⁸⁷ Thus, unlike the Supreme Court in *Sparrow* which demanded that s. 35(1) be given a "generous, liberal interpretation"¹⁸⁸, Lamer C.J. appears to limit its application. It may be that this stems from his difficulty in fitting Aboriginal rights within the liberal framework, with its focus on the individual and equality, or it may relate to other reasons such as concern over the effects of interpreting Aboriginal rights broadly. Whatever the reason, in his view, if special rights are to be granted, it will only be in specific circumstances.

Lamer C.J. held that Aboriginal rights should be defined through a purposive approach to s. 35(1) to ensure that "that which is found to fall within the provision is related to the provision's intended focus: aboriginal people and their rights in relation to Canadian society as a whole."¹⁸⁹ He found that the reason Aboriginal rights are recognized and affirmed in s. 35(1) is to reconcile the pre-existence of

¹⁸⁷*Ibid* at pp. 58-59.

¹⁸⁸*Supra*, note 56 at p. 407. Lamer C.J. later points to this requirement although he apparently does not pay any real attention to it. See *supra*, note 152 at p. 61.

¹⁸⁹*Supra*, note 152 at p. 60.

Aboriginal societies with Crown sovereignty. Aboriginal rights, therefore, must be defined so that this reconciliation is achieved. It appears that, as was the case with the majority in the British Columbia Court of Appeal, Lamer C.J. was concerned about the effect on other interests in Canada if Aboriginal rights are recognized and, as a result, he attempted to temper those rights somewhat by requiring that they be defined with other interests of Canadian society in mind. It is also clear, and not surprising, that he did not question the underlying basis for Canadian sovereignty.

As well, it appears that he misapplied *Sparrow* to the extent that he required the issue of reconciliation to be taken into account at the stage when Aboriginal rights are being defined, rather than at the justification stage. In *Sparrow*, the Court spoke only of reconciliation in the context of justifying regulations which infringe Aboriginal rights.¹⁹⁰ Lamer C.J. also reinterpreted the requirement in *Sparrow* that the Aboriginal perspective be taken into account in assessing a claim for Aboriginal rights. He stated that, "Courts adjudicating aboriginal rights claims must ... be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada."¹⁹¹ He required that equal weight be given to the Aboriginal perspective and the perspective of the common law. It is true that Aboriginal rights, as they are currently recognized, do exist within the broader Canadian legal system. However, it is not clear why that fact must be taken into account when Aboriginal rights are being defined, rather than at the

¹⁹⁰*Supra*, note 56 at p. 409.

¹⁹¹*Supra*, note 152 at p. 88.

justification stage, as was done in *Sparrow*. Again, it appears that Lamer C.J. departed from the spirit of *Sparrow* and was more concerned about effects on Canadian society than attempting to adopt the Aboriginal perspective.

Lamer C.J. formulated a test in *Van der Peet* for identifying Aboriginal rights which are protected by s. 35(1). He stated that since one of the purposes of s. 35(1) is to recognize pre-existing Aboriginal societies, Aboriginal rights must be linked to the practices, traditions and customs central to Aboriginal societies prior to contact with Europeans. In support of this requirement, Lamer C.J. referred to the Supreme Court's reference in *Sparrow* to the fact that the salmon fishery was "an integral part of [the Musqueam's] distinctive culture".¹⁹² The Supreme Court never stated that to be an Aboriginal right, the activity must be an integral part of the First Nation's distinctive culture; it merely used those words in the context of describing the importance of fishing to the Musqueam in that case. However, Lamer C.J. found that the Court in *Sparrow* suggested that it is the test for defining Aboriginal rights and he therefore used it as such.

The first stage in Lamer's test is to properly characterize what is being claimed. He stated that the nature of the claim must be delineated in terms of the particular practice, tradition or custom under which it is claimed. The court must also consider other factors, including the nature of the action which the applicant is

¹⁹²*Ibid* at p. 84.

claiming was done pursuant to an Aboriginal right, and the nature of the governmental action being challenged.¹⁹³

The next step is to determine whether what is being claimed as an Aboriginal right was an integral part of the First Nation's distinctive culture. The claimant at this stage must demonstrate that the practice, tradition or custom being relied upon was a "central and significant part of the society's distinctive culture."¹⁹⁴ Only those aspects of the culture which made it distinctive will translate to Aboriginal rights since, in Lamer's words, "To reconcile aboriginal societies with Crown sovereignty it is necessary to identify the distinctive features of those societies; it is precisely those distinctive features which need to be acknowledged and reconciled with the sovereignty of the Crown."¹⁹⁵ He stated that the question which must be considered is whether without the practice, tradition or custom, the culture would be fundamentally altered. If not, what is being claimed is not an Aboriginal right. The practice, custom or tradition cannot exist as an incident to another practice, custom or tradition; incidental practices will not qualify as Aboriginal rights.

The relevant timeframe for determining whether a particular practice is integral to a particular First Nation under Lamer's test is the period prior to contact between Aboriginal and non-Aboriginal societies. Lamer C.J. stated that this is the relevant time period because the basis for entrenching Aboriginal rights in the

¹⁹³*Ibid* at pp. 90-91.

¹⁹⁴*Ibid* at pp. 92.

¹⁹⁵*Ibid* at p. 94.

Constitution was the fact that distinctive Aboriginal societies lived on the land prior to the arrival of Europeans and, therefore, it is to the pre-contact period that the courts must look in defining Aboriginal rights. He acknowledged that it will often be next to impossible to produce conclusive evidence from pre-contact times about the practices, customs and traditions of the society in question. As a result, he stated that all that is required is to demonstrate that the activity had its origins pre-contact; in other words, that there is continuity between present practices, which are integral to the First Nation's distinctive culture, and those which existed before contact.¹⁹⁶

Lamer C.J. found that the practice of exchanging fish for money or other goods was not an integral part of the distinctive culture of the Sto:lo prior to contact with the Europeans. Trade in salmon was found to have taken place, but it was described as being either for ceremonial purposes or opportunistic exchanges. As a result, Mrs. Van der Peet had no Aboriginal right to sell her fish and the appeal was dismissed.

Lamer C.J. applied the test he formulated in *Van der Peet* in *N.T.C. Smokehouse*¹⁹⁷ and found that the trial judge's findings of fact did not support a claim that, prior to contact, the exchange of fish for money or other goods was an integral part of the distinctive cultures of the Sheshaht or the Opetchesaht. Although fish were traded or exchanged on some occasions, including at potlatches and other

¹⁹⁶*Ibid* at pp. 96-98.

¹⁹⁷*Supra*, note 154.

ceremonial events, Lamer C.J. found that they were incidental events only and lacked the independent significance to constitute an Aboriginal right. The appeal was therefore dismissed.

The test for proving Aboriginal rights which is presented by Lamer C.J. establishes a very high threshold for Aboriginal claimants to meet. It will often be difficult to prove that an activity had its origins in pre-contact Aboriginal society, even though Lamer suggested that the rules of evidence should be relaxed somewhat to take into account this problem.¹⁹⁸ It is also artificial to attempt to separate out parts of a culture. Cultural elements are inter-related and it will be difficult to determine which elements are incidental only and can be removed without altering the underlying culture. It is also not clear why it is only the distinctive aspects of Aboriginal culture which are to be protected by s. 35(1). If s. 35(1) is truly designed to recognize the existence of Aboriginal peoples prior to contact, it is arguable that all aspects of Aboriginal culture, including incidental practices, should be protected with the *Sparrow* test being used to justify any necessary infringements.

Lamer C.J. also failed to adopt even a partial Aboriginal perspective in his analysis. In requiring that the appellants prove that the sale of fish, as opposed to the extensive use of fish generally, was an integral part of the First Nation's

¹⁹⁸*Supra*, note 152 at p. 102. It is noteworthy, however, that Lamer C.J. nonetheless unquestioningly accepts the trial judge's findings of fact in his judgments in both *Van der Peet* and *N.T.C. Smokehouse* without any apparent consideration of whether the evidentiary standards being applied by the trial judge were too high in the circumstances. See *ibid* at pp. 112-116 and *N.T.C. Smokehouse*, *supra*, note 154 at pp. 35-37.

distinctive culture, he did what the Supreme Court in *Sparrow* expressly stated should not be done. That is, he viewed fishing rights in their regulated form. He separated fishing into food fishing and fishing for trade or sale. This separation resulted from government regulation, not Aboriginal tradition. As was noted in the context of the Court of Appeal's decisions, First Nations used fish opportunistically and as a way in which to sustain themselves. If trade opportunities arose, the fish were used accordingly. If a truly Aboriginal perspective was being considered at all, the artificial separation of fishing into food fishing and fishing for trade or sale would not be used.

As well, it appears that Lamer C.J. confused the historical basis for the recognition and affirmation of Aboriginal rights in s. 35(1) with the content and definition of those rights. Aboriginal rights may be protected because Aboriginal societies existed in North America prior to the arrival of Europeans. However, that does not mean that Aboriginal culture was frozen at the moment of contact and cannot legitimately change without losing its distinctiveness. Culture is dynamic, not static. The Court in *Sparrow* expressly recognized that fact and rejected a "frozen rights" approach. Lamer C.J. appears to ignore that rejection completely, at least in relation to formulating a test for defining Aboriginal rights. Lamer C.J. suggested that he was actually avoiding a frozen rights analysis through the use of the concept of continuity. He stated that practices, customs and traditions can evolve into modern forms, provided there is continuity with pre-contact practices, customs and

traditions.¹⁹⁹ However, like the Court of Appeal, he nonetheless used at least a partial frozen rights analysis. An activity which arose as a result of contact with Europeans will not pass Lamer's test, as he expressly stated.²⁰⁰ Thus, he breathes new life into the ideological notion of "static Indianness": Under Lamer's analysis, Aboriginals are no longer true Aboriginals if they adopt practices of the dominant society.

In their dissents, both L'Heureux-Dube and McLachlin J.J. each take a different approach to the issue of Aboriginal fishing rights. L'Heureux-Dube expressly recognized in her dissent in *Van der Peet* and *N.T.C. Smokehouse* that Aboriginal rights derive from the historic occupation and use of ancestral lands and do not depend on any legislative enactment. She thereby acknowledged the inherent rights approach to Aboriginal rights. She also noted that Aboriginal practices, traditions and customs have changed and evolved over the years, including after the arrival of Europeans. She expressly stated that the notion of Aboriginal rights must be open to fluctuation, change and evolution over time.²⁰¹

As well, she referred to the requirements in *Sparrow* that s. 35(1) be given a generous, large and liberal interpretation, that uncertainties be resolved in favour of the Aboriginal peoples, and that the court be sensitive to the Aboriginal perspective on the meaning of the rights at stake. She held that Aboriginal rights should be

¹⁹⁹*Van der Peet*, *supra*, note 152 at pp. 98-99.

²⁰⁰*Ibid* at p. 107.

²⁰¹*Ibid* at pp. 135-136.

defined in relation to the significance of various activities to First Nations, rather than to the activities themselves. The rights which are to be protected relate to the activities which are "sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people."²⁰² She rejected the frozen rights approach and held that a "dynamic rights" approach should instead be followed so that Aboriginal practices, traditions and customs can change and evolve within the broader society. All that is required is that the practice be an integral part of the distinctive culture and social organization for a substantial continuous period of time.²⁰³ In both *Van der Peet* and *N.T.C. Smokehouse*, she found sufficient evidence of trade in salmon for livelihood, support and sustenance purposes for a substantial period of time, rooted in the First Nation's distinctive culture.

McLachlin J. also expressly rejected the frozen rights approach of the majority. She characterized the right at issue as the right to continue to use the resource in the traditional way to provide for traditional needs in their modern form. She perceived trade as being one mode by which the more fundamental right of drawing sustenance from the resource is exercised. However, she limited the right to that which is required to provide the Aboriginal people in question with reasonable substitutes for what they traditionally obtained from the resource; in most cases, that would amount to what is necessary to provide basic housing, transportation, clothing and amenities.²⁰⁴ She found in both *Van der Peet* and *N.T.C. Smokehouse* that

²⁰²*Ibid* at p. 165.

²⁰³*Ibid* at pp. 174-176.

²⁰⁴*Ibid* at pp. 260-262.

there was an Aboriginal right to sell fish in the manner in which it was sold, that the right had not been extinguished, that it had been infringed, and that the Crown had not proven that the infringement was justified.

Although both L'Heureux-Dube's and McLachlin's judgments appear to be more in line with the Supreme Court's analysis of Aboriginal rights in *Sparrow*, even they had difficulty conceiving of an Aboriginal right to engage in modern commercial fisheries. L'Heureux-Dube distinguished, as did the majority of the Court in these cases as well as the courts in *R. v. Jones* and *R. v. Horseman*²⁰⁵, between the sale, trade or barter of fish for livelihood, support and sustenance purposes on the one hand, and the sale, trade and barter of fish for purely commercial purposes on the other hand. In *Van der Peet*, she stated that an Aboriginal activity can form an integral part of the distinctive culture of a First Nation if it is done for certain purposes, such as to gain a livelihood, but not if it is done for other purposes, such as purely commercial purposes.²⁰⁶ She stated that:

commercial use of the fish would seem to be intrinsically incompatible with the pre-contact or pre-sovereignty culture of the Sto:lo which commanded that the utilization of the salmon, including its sale, trade and barter, be restricted to providing livelihood, support and sustenance, and did not entail obtaining purely commercial profit.²⁰⁷

²⁰⁵*Supra*, notes 148 and 151 respectively. These cases were discussed in Part (2) above.

²⁰⁶*Supra*, note 152 at pp. 181-191.

²⁰⁷*Ibid* at p. 217.

As a result, she effectively drew a distinction for Aboriginal fishers that does not exist for non-Aboriginal fishers. Commercial non-Aboriginal fishers catch and sell fish to earn a livelihood for themselves and their families, yet they are not described as being involved in a sustenance activity only; they are described as being involved in a commercial undertaking. It is interesting to note that the term "sustenance" is defined as the means of providing the necessities of life. Thus, by using this characterization of the right, L'Heureux-Dube found that Aboriginal "commercial" fishers are entitled to obtain no more than the necessities of life through their fishing endeavours. No such limitation exists for non-Aboriginal fishers involved in the commercial industry.

Although McLachlin J. disagreed with making a distinction between fishing for sustenance purposes and commercial fishing, she too stated that a large operation geared to producing profits in excess of what the Aboriginal people had historically taken might not be constitutionally protected. Instead, she interpreted the Aboriginal right to fish commercially as incorporating only that which was required to emulate traditional Aboriginal society.²⁰⁸ In her words:

the aboriginal right to fish for commerce is limited to supplying what the aboriginal people traditionally took from the fishery. Since these were not generally societies which valued excess or accumulated wealth, the measure will seldom, on the facts, be found to exceed the basics of food, clothing and housing, supplemented by a few amenities.²⁰⁹

²⁰⁸*Ibid* at pp. 229-230.

²⁰⁹*Ibid* at p. 287.

L'Heureux-Dube's and McLachlin's reluctance to perceive the Aboriginal right as including the ability to run a commercial profit-making enterprise may stem from an underlying conception of Aboriginals as being traditionally involved in sustenance economies only; they are not perceived as modern players in the commercial fisheries. This, again, reflects a "static Indian" ideology with Aboriginals being viewed in traditional terms only. It is also a way to rationalize Aboriginal "commercial" fishing rights with other Canadian interests in the context of *Sparrow's* priority requirement by interpreting those rights in the least threatening way vis-a-vis other fishing interests. As a result, their findings are not that surprising.

Despite the difficulties inherent in establishing that an Aboriginal right exists under the test formulated by the majority in *Van der Peet*, the Court did find an Aboriginal right to sell fish using that test in *Gladstone*.²¹⁰ In that case, the Court found that the trade of herring spawn on kelp for money or other goods was a central, significant and defining feature of the pre-contact culture of the Heiltsuk people and that it was on a scale best characterized as commercial. Following the *Sparrow* requirement of evidence of a clear and plain intention to extinguish an Aboriginal right, the Court found that the right of the Heiltsuk, although regulated, had never been extinguished.

The Court then went on to consider the other parts of the *Sparrow* test dealing with infringement and justification. The Court found that since prior to the

²¹⁰*Supra*, note 153.

arrival of Europeans the Heiltsuk could harvest herring spawn on kelp to any extent they desired, the regulations infringed the Aboriginal right by limiting the amount that could be legally harvested for commercial purposes.

When dealing with the justification issue, the Court noted that there was a fundamental difference between the facts of the case and those in *Sparrow*. In *Sparrow*, the Court was dealing with internally limited food fishing rights. However, in *Gladstone*, the commercial sale of herring spawn on kelp had no such internal limitation; the only restraints were the external demands of the market and the availability of the fish. The Court remarked that the consequence of this distinction meant that the priority requirement in *Sparrow* is unsuited to a commercial situation:

in the circumstance where the aboriginal right has no internal limitation, the notion of priority, as articulated in *Sparrow*, would mean that where an aboriginal right is recognized and affirmed that right would become an exclusive one. Because the right to sell herring spawn on kelp to the commercial market can never be said to be satisfied while the resource is still available and the market is not sated, to give priority to that right in the manner suggested in *Sparrow* would be to give the right-holder exclusivity over any person not having an aboriginal right to participate in the herring spawn on kelp fishery....such a result was not the intention of *Sparrow*.²¹¹

Thus, instead of being required to grant a priority to Aboriginal commercial fishers, all that government need do is demonstrate that in allocating the resource it took into account and respected the existence of Aboriginal rights; both the process

²¹¹*Ibid* at pp. 82-83.

of allocation and the actual allocation must reflect the prior interest of Aboriginal right holders. How this requirement is to be carried out by government in practice is not clear in the decision and, as the Court noted, will be case-specific. The Court did, however, set out a number of factors which must be considered, including whether there was sufficient consultation and compensation—as required by *Sparrow*—and whether the government accommodated Aboriginal participation in the industry, the extent of Aboriginal participation in the industry, and the criteria used by government to allocate commercial licences among users.²¹²

In rejecting a priority characterization of the right that would result in exclusivity, the Court fell back on one of the common ideological representations which has been used in other cases: the notion that fish are common property. Although it is not clear that fish are indeed common property, the Court nonetheless used this ideology as a rationale to limit the scope of the Aboriginal right, stating that “the recognition of aboriginal rights should not be interpreted as extinguishing the right of public access to the fishery.”²¹³

The reassessment and rejection of the priority requirement in *Sparrow* in the commercial context is not surprising and, indeed, was predictable given the consequences of recognizing a complete priority right of Aboriginals to fish commercially. Total recognition of a priority right would effectively displace all other

²¹²*Ibid* at pp. 85-90.

²¹³*Ibid* at p. 93.

commercial fishing interests and it is, therefore, extremely unlikely that any court would make that finding. Courts continue to be reluctant to completely threaten non-Aboriginal commercial fishers. Nonetheless, by modifying the priority requirement the Court was at least able to recognize a commercial right, however unclear its parameters might be. If it had been unable to make those modifications, it is likely that it would not have recognized the right at all.

The Court's concern over the interests of broader society is also reflected in its discussion of what will constitute a valid government objective. The Court made it clear that objectives relating to non-Aboriginal interests in the fisheries may be valid. It stated that:

Because ... distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are a part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.²¹⁴

The Court went on to state, although as *obiter dicta* since it decided to send the justification issue back for a new trial, that objectives such as the pursuit of

²¹⁴*Ibid* at pp. 98-99.

economic and regional fairness and the recognition of the historical reliance upon and participation in the fishery by non-Aboriginal groups could satisfy the requisite standard for a valid objective since these matters are in the interest of all Canadians.²¹⁵ This is an explicit example of the Court being concerned about protecting non-Aboriginal interests in the industry.

La Forest's dissent in the *Gladstone* case largely reflects a frozen rights approach. He found that bartering and trading in fish was integral to the Heiltsuk First Nation because of the historical context in which it occurred and, without that context, it is no longer part of their distinctive culture. In other words, because the Heiltsuk no longer live as they did pre-contact, any bartering or trading of fish that now takes place can no longer be characterized as part of their culture. He noted:

when the Heiltsuk trade herring spawn on kelp in large quantities to Japanese clients, they do so for the unique ... purpose of satisfying their own financial interests and clearly not in pursuance of the values rooted in their cultural distinctiveness we are light years away from the ancient practice of sharing resources with fellow bands in furtherance of spiritual ideals.²¹⁶

These comments seem to reflect the stereotypical view that Aboriginal people were historically unconcerned about improving their situation in life. As was noted in Chapter Two, this was not the case, with discrepancies in wealth and status being the rule rather than the exception among individual members of a First Nation.

²¹⁵*Ibid* at p. 100.

²¹⁶*Ibid* at pp. 118-119.

Thus, one of the values which may have been rooted in their cultural distinctiveness, which La Forest failed to recognize, was concern over economic status, just as it is today.

It is not yet clear what the effect of these Supreme Court decisions will be in the commercial fishing industry in British Columbia. There are some, particularly those in the Fisheries Survival Coalition, who view the decisions as support for abolition of the AFS and the complete abolition of any "special rights" for Aboriginal commercial fishers.²¹⁷ It is not clear that the decisions do indeed require the Department to abandon the AFS since the Court did not state that allotting Aboriginal fishers a share of the fish is unconstitutional. As well, the AFS is based at least partly on the Supreme Court's requirement in *Sparrow* that Aboriginal fishers be given priority with respect to fishing for food, social and ceremonial purposes. The recent cases do not alter this requirement and the AFS, with the exception of the few First Nations which have been permitted to sell fish under the Pilot Sales Arrangement ("PSA"), is designed more to deal with the management of food fishing than commercial fishing. Although it may be arguable now that there is no constitutional requirement that all First Nations be given the right to sell fish under the PSA, those First Nations which can establish that the trade or barter of fish was an integral part of their cultures before contact will have a constitutionally protected right to sell their fish, subject to justified infringement. This will be a difficult issue for

²¹⁷ See, for instance, M. Crawley, "Court limits aboriginal fishing rights" *The Vancouver Sun* (22 August 1996) A1 and A2.

the Department to determine for each First Nation and, as a result, it may decide, for ease of administration, to merely continue a form of the PSA, perhaps involving even more First Nations. The Department has contended that its position on the AFS and PSA has always been based on a policy decision, rather than a view that Aboriginals have a right to fish commercially.²¹⁸ As a result, it may well decide to continue to follow that policy although it will no doubt be more difficult politically to do so in the context of the current caselaw.

It is also not clear what the effect of the decisions will be on the treaty process. Some have predicted that there will now be more reluctance to grant commercial rights to Aboriginals in the treaties.²¹⁹ The province was reluctant enough in negotiating the Nisga'a Agreement in Principle to agree to commercial fishing provisions, an issue which will be discussed in Chapter Four. It is likely that the political environment which has been engendered by the Supreme Court's decisions will result in the province being even more hesitant. However, First Nations will also probably continue to be insistent that commercial rights be included in the treaties. Uncertainty has resulted from the decisions to the extent that commercial rights must be determined on a case-by-case basis, with the particular historical circumstances of each First Nation being considered in detail. Thus, in the absence of a court finding, it will be difficult to delineate in some cases what rights a particular First Nation has. As a result, if commercial rights are not addressed in the

²¹⁸*Ibid* at p. A2.

²¹⁹See, for example, the comments of J. Borrows in *ibid* at p. A2.

treaties, it can be predicted that the negotiation process will most often fail, with litigation the ultimate result.

Thus, what becomes apparent from the Supreme Court's decisions in the commercial fishing cases is that the Department will have a difficult time administering Aboriginal fishing in the commercial context. Although the Court predictably rejected any notion of Aboriginal exclusivity in the commercial fisheries, it did not reject outright the commercial aspect of the Aboriginal fishing right. Instead, it established a framework for defining Aboriginal fishing rights on a case-by-case basis. Thus, the Department will either have to follow some type of blanket policy or attempt to determine whether a First Nation can establish that the trade or barter of fish was an integral part of its distinctive culture pre-contact. Given the number of First Nations in the province, the latter approach seems unlikely. As well, it is not yet clear what will constitute a valid infringement of that right. Given the complexities and uncertainties which have resulted from the decisions, more litigation in this area can definitely be anticipated. In addition, because the Court expressly stated that it was formulating the test for defining all Aboriginal rights, the cases will be used not just in the fishing context but in all Aboriginal, and probably Treaty, rights cases.²²⁰

²²⁰The Supreme Court has indeed already applied the test in *Van der Peet* to a non-fishing context. In *R. v. Pamajewon* [1996] S.C.J. No. 20 (QL), the Court used the test to determine whether the First Nations in question had Aboriginal rights to participate in and regulate gambling activities on reserve lands. It found that the First Nations did not have such rights because the evidence did not demonstrate that gambling, or the regulation of gambling, was an integral part of the distinctive cultures of the First Nations at the time of contact.

It is also interesting to consider the effect of the Supreme Court's decisions in *Lewis*²²¹ and *Nikal*.²²² In those cases, by-laws had been passed by the Band Councils under s. 81(1)(o) of the *Indian Act* which permits a Council to make by-laws for the "preservation, protection and management of fish ... on the reserve." The Court of Appeal found in both cases that the fisheries in question were not part of the reserves and that, therefore, s. 81(1)(o) did not apply and the by-laws were ineffective and could not constitute a defence under the *Fisheries Act*.²²³ In *Nikal*, the Court of Appeal also found that requiring Aboriginal fishers to obtain a licence was not contrary to s. 35(1). The Supreme Court of Canada upheld the Court of Appeal's decision in *Lewis*, but overturned its decision with respect to the licence issue in *Nikal*.

As was noted in Part (2) above, argument in *Lewis* was restricted to issues relating to whether the fisheries and/or river in question were part of the reserve so that s. 81(1)(o) of the *Indian Act* would apply. The appellant apparently did not argue that the Aboriginal right to fish includes the incidental right to manage the fish through by-laws and that, therefore, the by-laws were valid. Thus, the issues were narrowed considerably and did not address inherent self-government rights or even Aboriginal rights generally. Instead, the focus was on statutory interpretation of the *Indian Act* and analysis of historical documentation in respect of the location of

²²¹[1996] S.C.J. No. 46 (QL), 1 S.C.R. 921.

²²²[1996] S.C.J. No. 47 (QL), 1 S.C.R. 1013.

²²³As was discussed in Chapter Two, if valid by-laws are passed in relation to fisheries on the reserve, they take precedence over any inconsistent *Fisheries Act* provisions.

reserve boundaries and whether the fisheries were intended to be part of the reserve. The Court was apparently not asked to step outside a positivist framework on this issue and consider inherent rights. As a result, the findings of both the Court of Appeal and the Supreme Court on that issue are not that astonishing.

In *Nikal*, however, an argument was also made that the licensing regulations infringed an Aboriginal right to self-regulation. The Supreme Court agreed with the Court of Appeal's decision that, as in *Lewis*, the fishery was not part of the reserve and that therefore s. 81(1)(o) of the *Indian Act* did not apply and the by-law was of no force or effect. However, it overturned the lower Court's finding that the licensing regulations did not infringe the Aboriginal right in this case.

The Supreme Court found that licensing Aboriginal fishers was not, in and of itself, an infringement of Aboriginal rights. However, Cory J., for the majority of the Court, held that in the circumstances of the case the conditions attached to the licence in question did infringe Aboriginal rights and since the Crown had adduced no evidence justifying those conditions, the licence was invalidated and the Defendant was acquitted of the charges.

In holding that the requirement for a fishing licence is not in and of itself unconstitutional, Cory J. stated:

It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or groups rights are necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact.²²⁴

By framing the issue in this way, Cory J. appears to assume that others have rights in the fisheries, in addition to Aboriginal fishers. This may well be another example of the acceptance of the ideology of fish as common property. However, as has already been pointed out, it is not at all clear that fish are indeed common property. The fact that it is not completely open for anyone to engage in commercial fishing suggests that fish are not common property. It is certainly not clear that everyone has a right to fish.

Predictably, the Court also used the conservation issue to validate the licensing regulations, stating that the Aboriginal right to fish must be balanced against the need to conserve the fishery stock. The Court concluded that conservation concerns require that the government be permitted to enact a licensing scheme. Cory J. stated that "The very right to fish would in time become meaningless if the government could not enact a licensing scheme which could form the essential foundation of a conservation program."²²⁵ It appears that the Court has assumed that without a government conservation program, all the fish would be doomed. What this assumption fails to acknowledge is that conservation objectives

²²⁴*Nikal, supra*, note 222 at p. 88 (cited to QL).

²²⁵*Ibid* at p. 90.

could be met in other ways, including through a co-management system. Government licensing is certainly not the only way to manage fish. However, the Supreme Court does not appear to be even conscious of the alternative of Aboriginal management or co-management. Cory J. made this clear in the following statement: "If the salmon fishery is to survive, there must be some control exercised by a central authority. It is the federal government which will be required to manage the fishery and see to the improvement and the increase of the stock of that fishery."²²⁶ This was essentially the same holding as the British Columbia Court of Appeal in *Sparrow*, although it was not expressly stated by the Supreme Court in that case. As a result, this ruling by the Supreme Court in the *Nikal* and *Lewis* cases makes express something which was implied in its decision in *Sparrow* and is a non-express rejection of co-management.

Cory J. went on to state that licensing is also required as a type of "passport" to identify individuals as Aboriginals and, hence, as having constitutionally protected fishing rights. The difference, of course, between a passport and a fishing licence is that the former does not have conditions of citizenship attached to it, whereas a fishing licence does contain terms and conditions. The Court implicitly acknowledged that distinction by finding that conditions on a fishing licence could constitute infringements of s. 35(1).

²²⁶*Ibid* at p. 94.

The Court found that the requirement of a licence is not unreasonable, does not impose undue hardship and does not affect Aboriginals' preferred means of exercising their fishing rights. However, it found that several mandatory conditions printed on the face of the licence were clear infringements of Aboriginal fishing rights, including the restriction of fishing for food only (as opposed to food, social and ceremonial purposes) and of fishing for the fisher and his family only. It also found that other terms of the licence could constitute an infringement depending on the circumstances, including prescribing in which waters fishing could take place, the type of gear that could be used and the time and days fishing could take place. Since the Crown did not adduce any evidence to meet its onus of proving these conditions were justified, and the conditions were found to be inseverable from the licence itself, the licence was found to be invalid.

It is this latter finding of the Court which may ultimately have one of the greatest effects on Aboriginal fishers. Whenever a licence contains any of the conditions noted by Cory J., it is a *prima facie* infringement of Aboriginal fishing rights and the licence is, therefore, invalid unless the conditions are justified. This will certainly provide a defence to any Aboriginal fisher who decides to fish without a licence. Of course, in subsequent cases the Crown may adduce sufficient evidence to meet its onus under the justification test. The Crown may also decide that attaching certain conditions cannot easily be justified and merely refrain from adding them to the licence. It may be that ultimately what will occur is that the licensing of

Aboriginal fishers will serve only as a method of identification of those who are exercising Aboriginal rights and nothing more. Of course, other stipulations relating to how fishing rights are exercised will, no doubt, be contained in other regulatory provisions. However, it is also possible that at some point the government will formulate some other type of management scheme, such as permitting some of those stipulations to be promulgated and enforced by First Nations. Some of these possible alternative management regimes will be addressed in the following chapter, as will the likelihood that they will be adopted in British Columbia.

CHAPTER FOUR

ALTERNATIVE MANAGEMENT SYSTEMS

A. Some Problems with Formulating Alternatives

All food-collecting societies throughout the world have been affected by the expansion of colonialism. Colonialism either changed the forms of their societies completely, or affected their economic systems which in turn profoundly altered their resource base. States have transformed both the pattern of resource use as well as the political and social relations of Aboriginal peoples and taken the management of resources away from indigenous institutions.²²⁷ This certainly appears to be the case with respect to fishing in British Columbia.

However, managing the fisheries, particularly when it involves anadromous fish like salmon, is complex from a biological, economic, political and social perspective. The major challenges involved in managing coastal resources have been identified as follows: demands for use of coastal resources have diversified and expanded and, as a result, conflicts between

²²⁷Hamilton, *supra*, note 8 at pp. 237-242.

different interests have increased in frequency and severity; evolving socio-economic and institutional systems with respect to coastal resource sectors have added to the complexity of the biophysical systems which makes resolving conflicts more difficult; and boom and bust cycles and a poor understanding of what drives the biophysical and socio-economic structures have lead to great uncertainties.²²⁸ J.H. Mundie has characterized the problems more succinctly: "The problem of Pacific salmon management is twofold: the maintenance of a natural resource, and its allocation to people with diverse claims. The setting is the contemporary world of urban and industrial growth, unemployment and inflation."²²⁹

Not only are there conflicts within sectors (such as Aboriginal versus commercial versus sports fishers), there are also conflicts among sectors (for instance, resource development versus fishing). These conflicts stem from cognitive differences in understandings of the problem, and from differences in ideas about the ends to be achieved and about who should pay and who should benefit, as well as differences in personalities and circumstances of the parties.²³⁰ Added to the complexity is the inter-jurisdictional aspect of fishing: although the federal government has jurisdiction over the salmon fisheries,

²²⁸Dorcey, *supra*, note 29 at p. 3. The existence of uncertainty as one of the most limiting factors in fish management has been identified by many other writers as well, including C.J. Walters in "Management under Uncertainty" in Ellis, *supra*, note 105, 261 and R. Hilborn and R.M. Petrman, "Changing Management Objectives" in Ellis, *ibid*, 68.

²²⁹"Concluding Remarks: The Problem In Its Setting" in Ellis, *supra*, note 105, 299 at p. 299.

²³⁰Marchak, *supra*, note 109 at pp. 39-40.

provincial decisions in areas of its jurisdiction often affect fish and fish habitat. The fish are also affected by what occurs in the United States and the price of fish is dependent on the world market. There are also divergent interests within First Nation communities, between tribal units, between Aboriginal fishers and shoreworkers, and between coastal communities and up-river communities, and different ideological commitments to change within these groups.²³¹ These are important factors to keep in mind when alternatives are being considered. Resolution of the increasing complexity has been described as the biggest challenge to those involved in governance of coastal resources.²³²

Given the difficulties inherent in attempting to manage a marine fishery, Pearse suggested in his Commission report that a terminal fishery appeared to hold much promise; not only would management be easier and more discriminate, but the economy of fishing could be improved by removing the need for a large fleet, and production could be increased by confining the catch to mature fish. However, he pointed to problems with deterioration of the fish as they approach the spawning grounds, which would result in a decrease in product value.²³³ Given that it is the market which drives the entire fishing

²³¹E. Pinkerton, "Indians in the Fishing Industry" in E. Pinkerton, ed., *supra*, note 25, 249 at p. 250.

²³²Marchak, *supra*, note 109 at p. 39.

²³³The Commission, *supra*, note 34 at p. 44. This is probably no small concern given that what drives the entire system is arguably the market. If Canadian fish are not up to world standards, Canadian fishers might be unable to maintain their market share and economic and social costs will be incurred. In 1994, the economic value of British Columbia's commercial salmon fishery was estimated at one billion dollars annually. See Allain and Frechette, *supra*, note 96 at p. 1.

process, this is a factor which in and of itself could foreclose the possibility of an in-river fishery only.

Another factor which must be addressed when considering this alternative is that once a program or system is in place, those with interests in it will inevitably protest its removal. G.B. Doern identifies a common attitude in regulatory regimes: regulators tend to become obsessed with sunk costs and abhor abandoning an existing capital investment. As well, there is a tendency to stress continuity of service and thus protect regulated firms from as much uncertainty as possible.²³⁴ In the Pacific fisheries, marine fishers have invested large sums of money in vessels and fishing equipment, most of which would not be utilized in a riverine fishery. In addition, there are large corporate entities with vested interests in the fisheries as they are currently regulated. It can be predicted that fishers would strongly oppose any change from an ocean-based fishery to a river-based one without significant compensation for their lost investment. Since corporations have a great deal of influence on government, it is unlikely that the regulatory scheme would be altered to such an extent that corporate interests are threatened greatly.

As well, depending on the type of reform to the management structure, there might be some social displacement with fishers being forced to move from coastal areas to inland fishing areas, thus creating potentially large social and

²³⁴Doern, *supra*, note 88 at p. 10.

economic costs in some regions. These political, social and economic repercussions make a radical change in fisheries policy unlikely, even if such a change is required to save the resource.²³⁵ The reforms which are more likely to take place are in relation to some restricted management activities, with only minimal changes being made to the ways in which fish are caught and by whom they are both caught and managed.

In particular, it is extremely unlikely that the recognition of increased Aboriginal participation in the catching, sale and management of salmon will result in a significant abdication of fisheries management by the state. Given the complexity of the salmon fisheries, its inter-jurisdictional character and the divergence of interests among the various groups, including within Aboriginal communities, it is unlikely that any one group would be permitted to have exclusive jurisdiction over the resource. Perhaps, however, a role for First Nations in some management activities will be recognized, and a co-management regime developed.²³⁶ It is this alternative which will be the focus of the remainder of the chapter.

²³⁵As C.J. Walters states, "Vested interest and personal commitment do not provide a very good seed bed for rational thinking and decision making." See *supra*, note 228 at p. 264.

²³⁶Co-management may not be the best alternative with respect to non-anadromous fish. It is possible that some type of separate management regime could be put in place for some isolated species of fish. However, since all fish swim, it is likely that inter-jurisdictional issues will arise when attempting to manage them and, as a result, co-management may virtually always be the only practical alternative.

B. Is Co-Management the Solution?

Co-management has been accredited with altering relationships among actors in the fishery: "by instituting shared decision-making among these actors, co-management systems set up a game in which the pay-offs are greater for co-operation than for opposition and/or competition"²³⁷ In other words, the parties have to work together if the resource is to be saved for everyone's benefit. The new relationships which are created can generate communication and trust. For instance, if fishers become responsible for stock rehabilitation, they should no longer be perceived by government as predators interested in short-term gains only.²³⁸ The logistics of harvesting may not have to be a government concern as long as overall conservation goals are met. E. Pinkerton states:

Co-management can allow a balance to be struck between the needs of local groups for self-determination and the needs of government to have some assurance the resource is being well managed, and that it can step in should there be strong evidence of over-exploitation.²³⁹

There is arguably an even greater incentive for Aboriginal fishers to be effective regulators since increased control over the fishery may be a means to reinforce

²³⁷E. Pinkerton, "Introduction: Attaining Better Fisheries Management Through Co-Management--Prospects, Problems and Propositions" in Pinkerton, ed., *supra*, note 25, 3 at pp. 4-5.

²³⁸*Ibid* at pp. 8-9.

²³⁹*Ibid* at p. 14.

traditional concepts and practices and "[i]f being very competent self-regulators is a way of also saving one's culture, the fishery will benefit as well."²⁴⁰

Despite the potential benefits, the prospects for a co-management regime are anything but clear. It has been observed that bureaucracies have a tendency to perpetuate themselves indefinitely and it is doubtful that the Department of Fisheries and Oceans ("the Department") will easily allow the devolution of much of its authority.²⁴¹ However, it is interesting to note that the Department has already begun to move toward some sharing of its responsibilities. For instance, it recently announced an agreement with British Columbia in which it was acknowledged that the province could possibly assume an enhanced role in fisheries management. A review of federal and provincial management responsibilities is to be completed by February 1997.²⁴² Thus, it may well be that a trend toward co-management has indeed already begun.

Nonetheless, one of the biggest challenges in formulating a co-management scheme is with respect to allocating the resource among user groups. Although it has been suggested that co-management can allow allocation decisions to be made by the users themselves, in the current climate it seems highly unlikely that the groups will be able to work together to devise an

²⁴⁰*Ibid* at p. 17. See also Rettig *et al.*, *supra*, note 25 at p. 281 and McCay and Acheson, *supra*, note 114 at p. 24.

²⁴¹Pinkerton, *supra*, note 237 at p. 24.

²⁴²See Crawley and Hunter, *supra*, note 61.

effective and acceptable division of the resource.²⁴³ It is not even clear that the parties can establish working relationships to co-manage even the less controversial aspects of fishing, as "[t]he stakeholders who are to become co-managers approach the central questions of fisheries management with perspectives struck from radically different cultural and educational backgrounds."²⁴⁴ As well, as was discussed in earlier chapters, the ideologies of equality, conservation and common property have all led to the development of certain types of perceptions and relationships among the parties which will not be easily broken down. The Department will undoubtedly have to remain a critical player unless the groups can develop a relationship which will permit them to work together, particularly on the more political and socially divisive issues.

Having said all that, variations of Aboriginal co-management regimes have been established in some jurisdictions around the world. As well, there are currently some trends in British Columbia, albeit only minor ones, toward a sharing of management responsibilities with First Nations over fisheries. It is to these trends and extra-jurisdictional models that we now turn.

²⁴³Pinkerton acknowledges that difficulty, citing the non-Aboriginal fishers' particularly individualistic ideology as a further barrier to such a co-management structure. *Supra*, note 237 at p. 20.

²⁴⁴N. Dale, "Getting to Co-Management: Social Learning in the Redesign of Fisheries Management" in Pinkerton, ed., *supra*, note 25, 49 at p. 49. This is not to suggest that it is impossible, however, as Dale goes on to point out in the Washington State context. He reviews how a frame-shift occurred in organizational attitudes in Washington following the controversial "Boldt decisions" when the parties began to meet and attempt to work together in a co-management regime. The Washington model is an interesting one which will be discussed later in this chapter.

(1) Co-Management in British Columbia

To date, the only type of co-management being offered to Aboriginal fishers in British Columbia is really that of greater participation in and integration into existing state systems. Given the problems discussed above, this is no great surprise and it is unlikely that any other type of participation, such as allowing them to establish their own management systems separate and apart from the Department's regulatory scheme, will be permitted. However, it is important to recognize that most, if not all, of the co-management activities which are taking place continue to be modeled around liberal ideology.

(i) The Aboriginal Fisheries Strategy ("AFS")

The AFS, as described in Chapter Two, is an example of how the dominant system of fisheries governance continues to be used even in a co-management system. Although the AFS is designed to attempt to share the governance of resource management to some extent with First Nations, it effectively does so by further incorporating Aboriginal fishers into the dominant system of fisheries management. For instance, one of the programs under the AFS is to train Aboriginals as fish guardians or enforcement officers. Through this training program, the Department is indigenizing front-line service delivery

workers but the same management structure is in place. In other words, traditional Aboriginal enforcement techniques are not being relied upon; instead, Aboriginals are being trained to enforce the laws the way the dominant society enforces them. This type of approach is an example of the creation of what has been described as "hybrids of the imposed system of social control which appropriate indigenous personnel to enhance legitimacy."²⁴⁵

Not only does the AFS not result in much recognition of an alternative management model, it currently does not even fully integrate Aboriginal management into the existing system. First Nations are permitted to exercise very limited management functions only. One of the criticisms of the AFS program by the B.C. Aboriginal Fisheries Commission was that it did not provide a substantial enough role for First Nations in management of the fisheries. Thus, although the program has been described as a type of co-management arrangement²⁴⁶, it is such only to a limited extent. State ideologies continue to dominate and if Aboriginal fishers wish to participate in management, they must essentially play by the rules of those ideologies.

Merely permitting Aboriginal people to enforce the state's laws or to perhaps have some type of advisory capacity with respect to those laws is not true co-management. If they are to be true participants in management,

²⁴⁵P. Havemann, "The Indigenization of Social Control in Canada" in B.W. Morse and G.R. Woodman, eds., *Indigenous Law and the State* (Providence, R.I.: Foris Publications, 1988) 71 at p. 91.

²⁴⁶See, for example, the description of the program in Gardner Pinfold, *supra*, note 58 at p. 48.

Aboriginal fishers have to be permitted to incorporate traditional fishing practices, where they still exist, into regulations. This does not appear to be happening to any great extent under the AFS. However, even if this were permitted, there is a risk that many of the traditional practices would not be translated accurately into state regulations: it has been suggested that whenever customary law is incorporated into state law, it invariably entails the distortion of the customary law.²⁴⁷ Thus, it may be extremely difficult, if not impossible, to devise a workable co-management system which truly acknowledges a completely different legal system and ideology.

Despite its limitations, the AFS is a movement toward some type of co-management with Aboriginal fishers, although as was discussed in Chapter Three, it may be that as a result of the Supreme Court of Canada's decision in *Van der Peet* the AFS will be abandoned by the Department. In any event, however, a more specific example of an attempt to incorporate traditional management practices into the regulatory framework can be found with the Gitksan and Wet'suwet'en. As will be seen in the next section, they have succeeded in doing so to some extent within the framework of the AFS.

²⁴⁷See B.W. Morse and G.R. Woodman, "Introductory Essay: The State's Options" in Morse and Woodman, *supra*, note 245, 5 at p. 15.

(ii) The Gitksan and Wet'suwet'en

Fishing among the Gitksan and Wet'suwet'en on the Skeena River has continued to be regulated to some extent by laws and customs which are deeply imbedded in their cultural traditions.²⁴⁸ Fishing and processing is a co-operative social endeavour in their cultures and the fishing grounds are treated as the property of kinship groups.²⁴⁹ Although the House Chiefs have traditionally had essentially the same powers as state fishery managers, the rules are based on a shared philosophy and the values of an entire society and, as a result, they are self-enforcing and involve minimal conflict. Most of the conflicts which do exist are those which centre around questions of state versus traditional authority for management and commercial sale of fish.²⁵⁰

The Gitksan and Wet'suwet'en Tribal Council proposed that the traditional system be used as a basis for local economic development, with rights to harvest and obligations to share benefits to be structured along traditional lines. Negotiations to reach a management agreement between the Department and the Tribal Council began in 1979. Although a few interim agreements were

²⁴⁸M. Morrell, "The Struggle to Integrate Traditional Indian Systems and State Management in the Salmon Fisheries of the Skeena River, British Columbia" in Pinkerton, ed., *supra*, note 25, 231 at p. 232. See also E. Pinkerton, "Indians in the Fishing Industry" in P. Marchak, et. al., *supra*, note 109, 249 at pp. 253-254.

²⁴⁹Among the Gitksan, the Houses own the fishing grounds with the House Chief having ultimate authority and responsibility for those grounds. Among the Wet'suwet'en, ownership of fishing grounds vest with the Clan (a group of several Houses) but final authority remains with one individual. See Morrell, *supra*, note 248 at p. 233.

²⁵⁰*Ibid* at pp. 234-235.

reached, negotiations ultimately broke down because of the Department's refusal to recognize the management authority of the Chiefs. The Department's goal in the process appeared to be merely to obtain Aboriginal agreement to the annual fishing plans to reduce tension. The Tribal Council's position was that the Department wanted to reduce the Aboriginal role in management to one of consultation only.²⁵¹ The type of co-management being contemplated by the respective parties diverged dramatically and, as a result, ultimate agreement seemed unlikely.

However, some conciliation has more recently been reached with the Department. In the 1980s, the First Nations conducted extensive biological studies of their fisheries and conducted training in the science of fisheries management and in the operation of their traditional systems. When the AFS was introduced in 1982, the Gitksan and Wet'suwet'en entered into agreements with the Department and were permitted to sell fish under the Pilot Sales Arrangement ("PSA"). In the case of the Gitksan, there were 10 Houses conducting commercial fisheries by 1994.

The Gitksan and Wet'suwet'en Watershed Authorities ("GWWA") was formed in 1991 by the House Chiefs to co-ordinate fishing activities and to carry out their obligations under the AFS agreements. The GWWA is the interface between the Chiefs and the Department. Weekly meetings are held in-season

²⁵¹ *Ibid* at pp. 246-247.

between representatives of the GWWA and the Department to review harvest data. This committee also decides when closures are necessary. Some members of the GWWA have also been trained as fishery guardians under the AFS. In 1994, GWWA management activities included joint stock assessment; data collection; monitoring of habitat conditions; joint enforcement of harvest regulations; and resource use co-ordination. Thus, the GWWA formalizes some of the traditional Chiefly harvest management activities. It has also been suggested that as a result of the initiatives under the AFS, Department officials are now "seen as colleagues who are helping get a job done."²⁵² Although it is unclear whether the Department will agree to provisions in the AFS agreements permitting traditional management and harvesting practices which do not conform to its management philosophy, the model appears to be one of the most successful co-management regimes in British Columbia to date.

In addition, aspects of co-management in the Skeena watershed are expanding to encompass all users of the resource. In 1991 the Gitksan joined with the Tsimshian and interior Babine Lake Nat'oot'en First Nations to form the Skeena Fisheries Commission ("SFC") to coordinate agreements with the Department in relation to the AFS. The SFC continues to coordinate AFS agreements among its members. In 1992, the Skeena Watershed Committee ("SWC") was formed, of which the Gitksan is also a member. This organization also includes commercial and sports fishers as members. The SWC performs

²⁵²Pinkerton and Weinstein, *supra*, note 116 at p. 67.

several informal management functions, including advising the federal and provincial governments on stock assessment research programs; working with governments in joint harvest planning; formulating harvest monitoring programs; co-ordinating research; and sponsoring and co-ordinating any initiatives in the watershed related to fish.²⁵³ However, achieving consensus in the SWC has been problematic, with the United Fishermen and Allied Workers' Union pulling out of the process in 1995, protesting that commercial fishers were not being allocated enough sockeye.²⁵⁴

Thus, it appears that a form of co-management is working to some degree in the Skeena watershed, with not only Aboriginal fishers, but other users of the resource also participating in management functions. However, as is the case with other AFS programs, the state management system, along with its underlying premises and ideologies, is still predominant. Although Aboriginal users clearly have a greater voice in management decisions now than they did under previous systems, and some traditional management techniques are being utilized, the ultimate decision maker is still the state and at least some conformity to the state regulatory system is required. That this is the case is not surprising, given what has been discussed in earlier portions of this chapter. As was noted, it is extremely unlikely that a more radical shift in management will take place.

²⁵³For a more comprehensive review of the SWC, see Pinkerton and Weinstein, *ibid* at pp. 55-62.

²⁵⁴E. Alden, "How fisheries flourish" *The Vancouver Sun* (27 July 1996) A19.

(iii) The Nisga'a Agreement-in-Principle

An even more recent example of an attempt to move toward some type of co-management arrangement can be found in the Nisga'a Agreement in Principle, which was entered into on February 15, 1996. Agreement on the fishing provisions was not easily reached among the negotiators, with the province being reluctant to agree to a constitutionally entrenched fishing quota because it was perceived to be unsaleable to the public in that it was race-based. The fishing issue stalled negotiations and almost prevented an agreement from being reached.²⁵⁵ When an agreement was finally reached and its details released, news articles at the time indicated that it was the fishing provisions which sparked the most controversy and debate among members of the public generally, and within the fishing community specifically. The provisions were criticized as being a sell-out to First Nations peoples and creating an unfair race-based fishery. Litigation was initiated in April 1996 opposing any special Aboriginal fishery.

It should be noted that the Agreement in Principle does not constitute a treaty. The British Columbia Treaty Commission process provides that an Agreement in Principle will contain the major points of agreement among the

²⁵⁵News stories at the beginning of 1996 indicated that along with the fishing issue, two other problems remained in the negotiations: the Nisga'a opposed any wording "extinguishing" Nisga'a Aboriginal title and rights and British Columbia sought an end to Nisga'a tax exemptions. See D. Sanders, "The Nisga'a Agreement" (13 April 1996) [unpublished] at p. 2.

parties only and is not a final agreement. The next step is to negotiate the Final Agreement or Treaty, which is to embody the principles and agreements reached in the Agreement in Principle. Thus, although the negotiation of the Nisga'a Agreement in Principle is indeed an important milestone, the treaty itself may still be many years away.

Under the Agreement in Principle, the Nisga'a will be entitled to a treaty allocation of approximately 18 percent of the harvest of fish entering the Nass River system for domestic and commercial use.²⁵⁶ In addition, the agreement provides that they will receive an allocation of sockeye and pink salmon for commercial use under a harvesting agreement entered into outside the treaty.²⁵⁷ All entitlements are to be held communally. In total, the Nisga'a will be able to harvest approximately 26 percent of the total allowable catch on the Nass River, when runs permit. The Department will retain the right to determine minimum escapement levels and where runs are less than or equal to the minimum escapement level, no harvests of the fish will be permitted.

Although the Nisga'a will be permitted to sell their fish, they will be subject to measures necessary for conservation and to legislation enacted for the

²⁵⁶See Canada, British Columbia, Nisga'a Tribal Council, *Nisga'a Treaty Negotiations Agreement in Principle* (15 February 1996) [unpublished] and Canada, British Columbia and Nisga'a Tribal Council, *Nisga'a Treaty Negotiations Agreement in Principle in Brief* (15 February 1996) [unpublished].

²⁵⁷The Agreement in Principle expressly states that the harvesting agreement will not create treaty rights within the meaning of s. 35 of the *Constitution Act, 1982*. It also provides that the harvest allocation is to be given the same priority as commercial and recreational allocations in the Department's fisheries management decisions. See pp. 36-37 of the Agreement.

purposes of public health and safety. As well, fish caught pursuant to the harvest allocations, as opposed to treaty allocations, are to be sold only pursuant to the terms of the harvest agreements. No sales will be permitted of any fish, however allocated, where there are no directed harvests in Canadian commercial or recreational fisheries of Nass Area stocks of that species.

Generally, the treaty is not to alter laws of general application with respect to proprietary interests in fish or marine plants. The Department will retain overall responsibility for conservation and management of the salmon fisheries and fish habitat, with the Nisga'a managing its own harvest. The Nisga'a will be permitted to regulate how the harvest is to be allocated among Nisga'a citizens and non-Nisga'a citizens fishing in their waters; licensing requirements; designation and documentation of Nisga'a harvesters; disposition of harvested fish; and designation of vessels used for conducting harvests.

A joint management committee will be formed to share information and plans, arrange for collection and exchange of data, provide advice on escapement goals and make recommendations to the Department and the Nisga'a government with respect to conservation needs and other issues. The committee will be composed of two members appointed by each of the Nisga'a Central Government, Canada and British Columbia.

The Nisga'a must prepare an annual fishing plan and ensure fish are harvested in compliance with the plan. It must include the location, timing, method of harvest and applicable gear restrictions; fishery monitoring plans; fishery enforcement plans; stock assessment and enhancement plans; and the terms and conditions for the sale of fish. The plan must be forwarded to the joint management committee which will have the power to make adjustments necessary to integrate the Nisga'a fisheries with other resource conservation and harvesting plans. The committee will then recommend the plan to the Minister of Fisheries and Oceans who has the ultimate authority to accept or vary the plan.

The Nisga'a will also receive \$11.5 million for the purchase of vessels and licences for participation in the coastal commercial fishing industry. In addition, a trust will be established to promote conservation and protection of Nass fish species. Canada will also be required to consult with the Nisga'a Central Government in relation to international negotiations which may significantly affect fisheries resources referred to in the Final Agreement.

The fisheries provisions in the Nisga'a Agreement in Principle, if they ultimately become part of a treaty, will undoubtedly increase the Nisga'a share of Nass salmon. The provisions will also permit the Nisga'a to have a greater control over how their fish are managed. However, the agreement clearly does

not envisage a comprehensive co-management regime. Instead, the Nisga'a are permitted to decide how the fish are to be divided among themselves and to ensure the fisheries are managed according to the Department's overall management plan. Although they are also permitted to establish their own harvesting plans and to determine enforcement mechanisms, these plans must ultimately be approved by the Department. It may be that the Department will permit traditional harvesting and management practices to be incorporated into the plans. However, it seems unlikely under this type of framework that much deviation from the non-Aboriginal management scheme will be permitted. It is more likely that what will result is a Nisga'a regulatory framework which mirrors the Department's regulatory schemes.

Although the provisions of the Agreement in Principle are limited, it is a step toward co-management of the fisheries. To a limited extent the Nisga'a will be recognized as "owners" of a particular portion of Nass River fish.²⁵⁸ Thus, there appears to be a slight shift from the traditional focus on fish as a common property resource. However, it is important to recognize that the basic management system, with the Department retaining essentially all of the management decision-making power, is not significantly altered by these provisions.

²⁵⁸G. Holman argues that the Agreement in Principle does indeed privatize a portion of the Nass salmon runs. See "Fishing industry has a chance to swim rather than sink" *The Globe and Mail* (27 February 1996) A13.

As well, the degree of controversy which the Agreement in Principle engendered indicates that there appears to be an unwillingness in British Columbia to move toward a co-management fisheries regime. The public, and certainly those within the fisheries industry who criticized the agreement, continually point to the common property nature of the resource as support for the notion that priority cannot be given to any particular group to harvest it, regardless of any historical or constitutional right the group might have. As well, there has been much criticism of the provisions as being racially based. Equality arguments are used to suggest that it is contrary to natural justice, and perhaps even the Constitution, to permit one group in society to have a special harvesting allocation. It is interesting that there is so much focus on the race issue in the discourse, given that the fisheries in British Columbia have been "racially based" for over 100 years, to the extent that the Aboriginal food fishery has been recognized in the regulations since 1888 and was confirmed by the Supreme Court of Canada.

The concerns of conservation also continue to dominate the fisheries debate, and attempts have been made in the agreement to ensure that the state's conservation objectives are met and that Nisga'a harvesting plans are consistent with harvests in the rest of the province. The basic ideologies which have permeated the Aboriginal fishing issue since the turn of the century continue to dominate current debates and trends in the industry.

2. Co-Management Outside British Columbia

There have been some attempts in other jurisdictions to formulate a workable co-management scheme incorporating Aboriginal fisheries. Three examples of such attempts can be found in Canada's western Arctic, Washington state and New Zealand. The following is a brief summary and analysis of the systems in place in these three jurisdictions. Although the scope of this thesis is not such so as to permit a complete analysis of these three management systems and their potential application in British Columbia, the following hopefully at least provides sufficient information to illustrate the variations in the type of co-management regimes possible, as well as their strengths and limitations.

(i) The Western Arctic

In June 1984, the Government of Canada and the Inuvialuit entered into the Inuvialuit Final Agreement ("the IFA") in the western Arctic. The agreement covers a large area in the western Arctic, including the northernmost reaches of the Yukon Territory and the northwestern corner of the Northwest Territories. The IFA provided that the Inuvialuit would relinquish their land claims in return for specific rights, including title to approximately 91,000 square kilometres of

land, \$45 million, and rights to participate in resource development, renewable resource harvesting, and management of renewable and non-renewable resources. The Inuvialuit and Canada now share in resource management, with five joint management groups having been created under the IFA. Several local committees, with solely Inuvialuit membership, were also established. These organizations advise, inform and make representations to the joint management councils and attempt to promote Inuvialuit involvement in resource management.

One of the joint management groups is the Fisheries Joint Management Committee ("the FJMC") which was established in 1986 to give advice to the Inuvialuit and the Department on fishery management within the Inuvialuit Settlement Region. The establishment of the FJMC was intended to ensure recognition of Inuvialuit knowledge and experience as essential elements in resource management. There are five members on the FJMC, two of whom are appointed by the Inuvialuit Game Council, which was established under the IFA as a wholly Inuvialuit management structure, two by the Government of Canada and the fifth by the other four members. The FJMC is responsible for assisting Canada and the Inuvialuit in administering rights and obligations related to fisheries under the IFA; to assist the Department in managing the fisheries and marine mammals in the ISR; and to advise the Minister of Fisheries and Oceans on all matters relating to the Inuvialuit and ISR fisheries. Included in these responsibilities is the determination of current harvest levels, regulation of

access to fisheries and allocation of subsistence quotas among communities. It also makes recommendations to the Department with respect to appropriate quotas and regulatory amendments.²⁵⁹ The FJMC has been described as having "substantial powers with respect to formulation of legislation and regulations."²⁶⁰

The IFA gives the Inuvialuit priority in the harvest of marine mammals and fish for subsistence purposes in the Settlement Region. "Subsistence purposes" is defined to include trade, barter and sale to other Inuvialuit. As well, Inuvialuit fishers can be issued non-transferable commercial licences to harvest a total weight of fish equal to the largest annual commercial harvest of that species taken by Inuvialuit over the preceding three years. Additional commercial licences are to be issued to Inuvialuit on the same basis as they are to non-Inuvialuit fishers.²⁶¹

Since the Final Agreement recognizes preferential or exclusive harvesting rights of Inuvialuit in some areas, as well as control of access to the resource, participation in management, relevance of traditional knowledge, and modern scientific approaches to conservation, it has been said to contain "all the

²⁵⁹For a review of the FJMC's most recent initiatives, see Fisheries Joint Management Committee, *Annual Report 1992/1993, 1993/1994 and 1994/1995* [unpublished]. It is noteworthy that amendments to fisheries regulations have been undertaken to coordinate the regulatory scheme with the provisions in the IFA.

²⁶⁰N.C. Doubleday, "Co-Management Provisions of the Inuvialuit Final Agreement" in Pinkerton, *supra*, note 25, 209 at p. 216.

²⁶¹Canada, *The Western Arctic Claim. A Guide To The Inuvialuit Final Agreement* (Ottawa: Ministry of Indian Affairs and Northern Development, 1984) at p. 8.

required ingredients for a co-management regime."²⁶² It does not, however, result in a complete devolution of authority by the Department in respect of Aboriginal fishing rights. Although the Final Agreement does provide for wholly Inuvialuit committees, their role is limited to enforcing regulations and providing necessary data. Management powers are given only to the FJMC, a joint committee, with final decisions still being made by the Minister. As N. Doubleday explains, the "weight within the joint management bodies will be on the side of regulation acceptable to government, rather than deregulation of Native harvesting rights."²⁶³ However, she also suggests that regulations recommended by the FJMC can be expected to be generally more favourable to Inuvialuit fishers than regulations passed without its input. As well, as discussed earlier in this thesis, given the current ideologies and trends in the Canadian fisheries industry and regulatory regime, it is highly unlikely that the Department will devolve all power in favour of an Aboriginal management system. Thus, although the co-management scheme encompassed within the Final Agreement may still be biased in favour of state ideology and control, with only some incorporation of Aboriginal customary law, it nonetheless may be the best model of co-management currently available in Canada given the realities of our system.

²⁶²*Ibid* at p. 221.

²⁶³*Ibid* at p. 221.

Having said that, it must be acknowledged that there are obviously significant differences between the political, social, economic and geographic situations in the western Arctic and much of British Columbia, and traditional Aboriginal systems of management may well be much more intact in the former than in many areas of the latter.²⁶⁴ These differences may greatly affect the type of co-management system which is most likely to succeed in each area and it is premature to recommend the adoption of the Inuvialuit model in other parts of Canada without further consideration of the context in which it has arisen.²⁶⁵ However, it is significant that the co-management system in the western Arctic appears to be giving Aboriginal fishers a much greater voice in fisheries management than in many other areas of the country.

(ii) State of Washington

The history of Aboriginal rights to fish commercially in Washington State is replete with conflict. As is the case in British Columbia, the Aboriginal people of what is now Washington state historically depended on fish for food. Fish also played a central role in their religion, myths and rituals.²⁶⁶ The importance of the

²⁶⁴It is interesting to note, however, that some studies have shown that much of the traditional culture of the Inuit people has been lost, particularly in the western Arctic and Labrador. See, for example, J. Chartrand, "Survival and Adaptation of the Inuit Ethnic Identity: The Importance of Inuktitut" in B. A. Cox, ed., *Native People, Native Lands. Canadian Indians, Inuit and Metis* (Ottawa: Carleton University Press, 1987) 241 at p. 251.

²⁶⁵Unfortunately, the scope of this thesis is not such to permit such an interesting analysis to take place.

²⁶⁶M.R. Anderson, "Law and the Protection of Cultural Communities: The Case of Native American Fishing Rights" (1987) 9 Law & Pol'y 125 at p. 126.

fishery to these people was recognized by Governor Stevens when he negotiated treaties with them in the 1860s. The treaties specifically provide for protection of the Aboriginal right to continue fishing.²⁶⁷

There are many parallels in the history of fisheries regulations in British Columbia and Washington. The Washington State Department of Fisheries was formed to prevent over-fishing after salmon began gaining value as a commodity and increasing numbers of non-Aboriginals began participating in the industry. The Department tended to prefer marine fishing over river fishing as the former was easier to control and more people fished in marine areas. As was the case north of the border, this effectively resulted in the favouring of one culturally-defined mode of fishing over another, as the Aboriginal fishermen tended to fish in rivers while non-Aboriginal fishermen tended to fish in marine areas. Over time, regulations effectively became restrictions on Aboriginal treaty rights and the Aboriginal fishermen's capacity to fish declined significantly.²⁶⁸ As well, the development of timber and mining industries and the construction of hydro-electric dams adversely affected the fish stocks.²⁶⁹ The result of all these factors has been scarcity of the resource.

²⁶⁷The Stevens Treaties provided a guarantee that the aboriginal peoples' "right of taking fish, at all usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the Territory." See *ibid*, at p. 126.

²⁶⁸*Ibid* at p. 127.

²⁶⁹P.C. Monson, "United States v. Washington (Phase II): The Indian Fishing Conflict Moves Upstream" (1981-82) 12 Environ. L. 469 at p. 471. R. Bruun argues that the Department of Fisheries chose to enact conservation regulations to decrease competition for the resource instead of going after industry, which was the true cause of habitat degradation and the consequent depletion of the resource. Since treaty fishermen were less numerous and less politically influential than non-treaty fishermen, she argues, it was easier to cut the former out of the competition through regulation than the latter. The State often rationalized these regulations on the basis that

Aboriginal peoples began asserting their right in the fisheries by participating in "fish-ins" (fishing in contravention of state regulations) beginning in the 1950s. In the 1960s, these "fish-ins" resulted in arrests of several Aboriginal peoples and confiscations of gear.²⁷⁰ This activity resulted from the general reluctance on the part of both the state Fisheries and Game Departments and the federal government to recognize the treaty right to fish. Sport and non-Aboriginal commercial fishing interests were also opposed to recognition of such rights.²⁷¹

It is in these circumstances that the United States federal government commenced an action on behalf of several tribes.²⁷² The action which resulted was divided into two parts, which together came to be known as the "Boldt decisions".²⁷³ The tribes were essentially asserting that their treaties gave them a right to a specific allocation of the fisheries resource. The resulting judgment of District Judge Boldt in "Phase I" has been described as "the most controversial court decision in Washington State history."²⁷⁴

the treaty fishermen were guilty of mismanagement of the fisheries. However, she points out that during the pre-trials in the Boldt cases, the state was unable to provide even one example of conduct of the treaty fishermen which was detrimental to the fish. See R. Bruun, "The Boldt Decision. Legal Victory, Political Defeat" (1982) 4 Law & Policy Q. 271 at pp. 282-283.

²⁷⁰For a description of these activities, see S. Bentley, "Indians' Right to Fish: The Background, Impact, and Legacy of *United States v. Washington*" (1992) 17 Amer. Ind. L. Rev. 1 at pp. 2-3.

²⁷¹Bruun, *supra*, note 269 at pp. 271-273.

²⁷²This was a somewhat unusual situation. The federal government brought the action in exercise of its trust or guardianship role toward the tribes. However, it appears that it only brought the action after years of tribal requests and only when violence over the fishing issue became imminent. See F.G. Cohen, *Treaties on Trial. The Continuing Controversy over Northwest Indian Fishing Rights* (Seattle: University of Washington Press, 1986) at p. 182.

²⁷³*United States v. Washington*, 384 F.Supp. 312 (W. D. Wash 1974), affirmed 520 F.2d 676 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976) and *United States v. Washington*, 506 F.Supp. 187 (W. D. Wash 1980), affirmed in part 759 F.2d 1352 (9th Cir. 1982), cert. denied 106 S. Ct. 407 (1985), hereinafter referred to as the "Boldt decisions" or "Phase I" and "Phase II" respectively.

²⁷⁴Bruun, *supra*, note 269 at p. 271.

In his decision, Judge Boldt referred to the evidence which highlighted the importance of fish to the treaty fishermen historically and found in the circumstances that the term "in common with" in the treaties means sharing equally the opportunity to take fish. In other words, both treaty and non-treaty fishermen were to have the opportunity to take up to 50 percent of the harvestable number of fish taken at the usual and accustomed fishing grounds and stations.²⁷⁵

With respect to the state's power to regulate, Judge Boldt held that only those regulations which were reasonable and necessary to prevent demonstrable harm to the actual conservation of fish could affect treaty rights to fish.²⁷⁶ He stated that if alternative means of achieving the conservation objectives were available, the state could not restrict treaty right fishing, even if the only alternative was restriction of fishing by non-treaty fishermen.²⁷⁷ In addition, to be valid, any state regulation affecting treaty rights to fish could not discriminate against the treaty tribe's right to fish and must meet appropriate standards of substantive and procedural due process.²⁷⁸

Judge Boldt also recognized the right of the tribes to regulate off-reservation fishing by their members. However, he limited the right to circumstances where the

²⁷⁵ *United States v. Washington* (1974), *supra*, note 273 at p. 343.

²⁷⁶ *Ibid* at p. 342. Judge Boldt went on to define "reasonable" as a specifically identified conservation measure appropriate to its purpose, and "necessary" as essential to conservation.

²⁷⁷ *Ibid* at p. 342.

²⁷⁸ *Ibid* at p. 402. He also stated that to meet the appropriate standards, the regulations must receive full, fair and public consideration and determination.

tribe had established that they met certain qualifications and conditions to the satisfaction of either the Departments of Fisheries and Game or the court.²⁷⁹ He recognized the possibility of co-jurisdiction in off-reservation fishing by both the tribes and the state in certain circumstances.²⁸⁰ He also stated that the division of fishing rights as between tribes was to be left to the tribes themselves to determine.

Judge Boldt granted an injunction requiring the state to implement interim regulations which recognized the treaty fishermen's right to take fish as guaranteed in the treaties and which ensured an equitable apportionment of the state's fish harvest between treaty and non-treaty fishermen. The Court retained jurisdiction over the case and hired experts to assist in establishing appropriate allocations.²⁸¹

The second phase of the decision dealt with the issues of, firstly, whether hatchery-bred fish were to be included in the treaty fishermen's allocation and, secondly, whether the tribes had the right to have the fishery resource and habitat protected from adverse environmental activity.²⁸² District Judge Orrick, who took over jurisdiction of the case from Judge Boldt upon the latter's retirement, held that

²⁷⁹*Ibid* at p. 340. These qualifications were that the tribe have competent and responsible leadership; well organized tribal government reasonably competent to apply tribal off reservation fishing regulations; Indian personnel trained to enforce the fishing regulations; well qualified experts in fishery science and management; an officially approved tribal membership roll; and provision for tribal membership certification. In addition, the tribe had to provide for full and complete tribal fishing regulations; permit monitoring of off reservation aboriginal fishing by the Fisheries and Game Departments; and provide fish catch reports of both on and off reservation fishing to Fisheries and Game. See pp. 340-341.

²⁸⁰*Ibid* at p. 403. Judge Boldt stated that the jurisdiction of each party to regulate was unimpaired by the exercise of another's regulatory jurisdiction.

²⁸¹*Ibid* at p. 408 and p. 413.

²⁸²*United States v. Washington* (1980), *supra*, note 273.

hatchery fish were included in the treaty allocation and that the treaty right included an implied environmental right. His decision with respect to the hatchery fish issue was affirmed by the Court of Appeals, Ninth Circuit, but his decision on the environmental protection issue was reversed.²⁸³

Problems began almost immediately after the Phase I decision was released. When the Washington State Department of Fisheries proposed regulations in an effort to comply with Judge Boldt's ruling, a number of private citizens challenged the proposed regulations in the State Supreme Court.²⁸⁴ The State Supreme Court held that the District Court could not order a state Fisheries Department to pass regulations with respect to anything other than that which was related to conservation of the resource. The Supreme Court also rejected Judge Boldt's interpretation of the treaties, and held that recognizing special rights for Aboriginal peoples violated the Equal Protection Clause of the Fourteenth Amendment.²⁸⁵ The Supreme Court enjoined the Fisheries Department from enforcing regulations to implement Judge Boldt's decision. The result was a conflict between state and

²⁸³*United States v. Washington* (1982), *supra*, note 273. This was actually the second decision of the Ninth Circuit in this case. A judgment had earlier been rendered by a panel of three judges of the Ninth Circuit (694 F.2d 1374), but the decision was subsequently vacated (704 F.2d 1141) and the case was reconsidered by the court *en banc*. This latter decision was the final, and binding, decision of the court.

²⁸⁴P.F. James, "United States v. Washington: Implied Treaty Rights to Continue Fishing" (1982) 18 *Williamette L. Rev.* 659 at p. 661. Some of the cases which resulted include *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson*, 89 Wash. 2d 276 (1977); *Purse Seine Vessel Owners Association v. Moos*, 88 Wash. 2d 799 (1977); *Puget Sound Gillnetters Association v. Moos*, 88 Wash. 2d 677 (1977).

²⁸⁵The position of the State Supreme Court is summarized in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 61 L. Ed. 2d 823 (1979) at p. 837. R. Bruun noted that groups opposed to the recognition of treaty rights to fish have attempted to use "the rhetoric of rights" (i.e. equal rights) in support of their arguments. She suggests that the fact that "rights" arguments can be used by both sides in the dispute is a serious limitation on the rights model. She is of the opinion that the issue is one of resources, not rights. *Supra*, note 269 at pp. 280 and 285. As was noted in Chapter Three, these "equal rights" arguments are also made in Canadian courts.

federal court judgments. In addition, several non-treaty commercial fishermen continued to fish in defiance of the Boldt decision and the proposed regulations. Confrontation and violence between treaty and non-treaty fishermen resulted, including threats and shootings, and there were petitions to remove Judge Boldt from office.²⁸⁶ Judge Boldt ultimately took over management of the fisheries and established the Fisheries Advisory Board to ensure enforcement of his judgment. The board was made up of one tribal representative and one state representative.

As a result of these conflicts, the United States Supreme Court agreed to hear the Boldt case along with two other cases, the *Washington State Commercial Passenger Fishing Vessel Association* and *Puget Sound Gillnetters Association* cases.²⁸⁷ In its decision, the Supreme Court found that the tribes had reserved the right to take a share of each run that passes through the tribal fishing areas. The Court stated that since both Aborigines and non-Aborigines are entitled to take a fair share of the available fish, the 50 percent allocation to the treaty fishermen was to be interpreted as a maximum allocation, not a minimum allocation as Judge Boldt had suggested. The actual allocation was to be based on what was required to give the treaty fishermen a "moderate living"; the allocation could be decreased if moderate livings could be obtained through a lesser allocation.²⁸⁸

²⁸⁶The campaign to impeach Judge Boldt was commenced by a group known as "Interstate Congress for Equal Rights and Responsibilities". See Bruun, *ibid* at pp. 285-287.

²⁸⁷*Washington v. Washington State Commercial Passenger Fishing Vessel Association*, *supra*, note 285.

²⁸⁸*Ibid* at pp. 841 and 845. The Court also reversed Judge Boldt's finding that fish caught on reserve or for food and ceremonial purposes were not to be included in the calculation of the treaty fishermen's allocation. See pp. 846-847.

The Court also held that the District Court had jurisdiction to directly supervise the fisheries if state law continued to bar the enforcement of the decision. The Court dismissed the argument that the Equality Protection Clause of the Fourteenth Amendment was breached by holding that treaty fishermen had the right to a 50 percent allocation, stating that the allocation was based not on race, but on membership in a treaty nation.²⁸⁹

As a result of the Boldt decisions, by 1992, Washington Aboriginals' share of the fish had increased from less than two percent to approximately 50 percent of the total harvest.²⁹⁰ An increase in material well-being and self-confidence in reserve communities has been shown. New tribal-owned businesses emerged and employment opportunities on reserves increased. A new image of self and of community has emerged in many of the tribes.²⁹¹

Of particular note for our purposes is the fact that Aboriginal peoples obtained a voice in resource management as a result of the decisions.²⁹² After the Boldt decisions, the tribes took steps to increase their capacity to manage their fisheries through the hiring of biologists and enforcement officers. Nineteen tribes also formed the Northwest Indian Fisheries Commission ("the Commission") to assist in developing programs to protect and co-ordinate treaty fishing rights; to

²⁸⁹*Ibid* at pp. 841-842 and 852.

²⁹⁰Bentley, *supra*, note 270 at p. 19.

²⁹¹Anderson, *supra*, note 266 at pp. 135-136.

²⁹²Cohen, *supra*, note 272 at pp. xxiv-xxvi.

provide technical advice and co-ordination; and to develop good will through public information and education. The Commission represents the tribes in meetings with management agencies, including the International Pacific Salmon Fisheries Commission. It also serves as a liaison between the tribes, Congress and the federal executive branch. The federal government transferred \$700,000 to the United States Fish and Wildlife Service to work with the Commission to implement the Boldt decisions.

As well, the federal government, and Oregon and Washington states negotiated a comprehensive five-year management plan in 1977. The major goals of the plan were to preserve and enhance the fisheries, allocate the resource fairly and allow Aboriginal involvement in management. The Technical Advisory Committee ("TAC") was also formed to develop and analyze data and to make recommendations for fisheries policy. Also in 1977, the tribes formed an inter-tribal body to co-ordinate fisheries management policies and provide tribal decision-makers with technical information. Despite these co-operative efforts, fish stocks continued to decline, apparently due to droughts in 1975 and 1976 and the building of a dam. Concerns were also raised that Aboriginals did not have enough say in decision-making, with their input being limited to responses to other parties' initiatives.²⁹³ By 1982, many of the tribes had declared the five-year plan a failure due to the continuing decline in stocks, failure to devise appropriate ocean

²⁹³*Ibid* at pp. 122-126.

regulations, and continuing litigation. Two tribes formally withdrew from the plan and there was still no comprehensive plan for Columbia River salmon and steelhead.²⁹⁴

However, by 1983, the tribes were catching more fish and participating in the development of regional management plans. Some tribes began levying a fish tax which could be used to finance the purchase of fishing boats, management programs and other initiatives. There was also a resurgence in tribal government. All tribes affected by the Boldt decisions now have their own management programs, or participate in co-operative management. There has been an emphasis in tribal management on restoration of weak runs through habitat rehabilitation and augmentation of natural runs. As well, some inter-tribal co-operatives have been formed which operate joint ventures with respect to data collection, fisheries patrols and environmental monitoring.²⁹⁵

There is some evidence to suggest that as a result of Boldt I's requirement of an equal division of the harvestable fish, there has been an improvement in data collection and management of the resource.²⁹⁶ Tribal management systems have played an important role in providing detailed information on local conditions, which would otherwise be difficult for more centralized agencies to obtain. There has been an increase in communication between the tribes and the Department of Fisheries

²⁹⁴*Ibid* at p. 135.

²⁹⁵*Ibid* at pp. 155-165.

²⁹⁶Bruun, *supra*, note 269 at pp. 291-292.

as well.²⁹⁷ In 1986 the tribes and the Department of Fisheries engaged in a comprehensive watershed planning process for the state. Tribal representatives have also been involved in the Pacific Fisheries Management Council, a federal commission involved with the regulation of Oregon, California and Washington coastal waters.²⁹⁸ By the mid-1980s, a trend of joint problem solving had evolved in Washington.²⁹⁹

There are some who criticize the Boldt decisions as merely shifting conflict from tribe versus state to intra and inter-tribal. The nature of tribal fishing changed radically after the Boldt decisions. The size of the treaty fishing fleet increased from 800 in 1975 to 2,163 in 1982, and the number of marine fishermen increased from 20 to 30 pre-Boldt to 1,106 by 1982.³⁰⁰ It has been argued that the Boldt decision did not protect traditional fishing practices, but instead merely provided an opportunity for an enlarged Aboriginal marine fishery. It has even been suggested that the decision effectively forced Aboriginal fishermen to adopt non-traditional methods of fishing in order to compete.³⁰¹ These trends have apparently resulted in

²⁹⁷ Cohen, *supra*, note 272 at p. 170.

²⁹⁸ F.G. Cohen, "Treaty Indian Tribes and Washington State: The Evolution of Tribal Involvement in Fisheries Management in the U.S. Pacific Northwest" in Pinkerton, *supra*, note 25, 37 at pp.44-45.

²⁹⁹ Dale, *supra*, note 244 at p. 62.

³⁰⁰ Anderson, *supra*, note 266 at p. 136. Before Boldt I, there were fewer than 30 Aboriginal-owned power-reel marine gillnets; by 1982 there were 448. Pre-1974 there was one Aboriginal-owned purse-seiner; by 1982, there were 38.

³⁰¹ Bentley, *supra*, note 270 at p. 24. She argues that the court failed to recognize that traditionally, Aboriginal peoples fished for anadromous fish only at fixed fishing sites on rivers; only non-anadromous fish were fished in marine areas. The fixed fishing sites were essentially owned by various families within a tribe, and income was redistributed throughout the tribe. The families' proprietary interests in the fishing sites resulted in them being "careful stewards". The court's interpretation of the right to fish as being an opportunity to fish eliminated the notion of private ownership of the fishing sites. She argues that, as a result, treaty fishermen are now forced to compete within the dominant "common property" system because if they don't, there is no guarantee that there will be sufficient fish stocks at their traditional fishing sites. Even the exercise of their regulatory power is

some tensions within tribes between traditional fishermen and marine fishermen, in part from jealousies and resentment stemming from the huge discrepancies in incomes between the two.³⁰² There is also a perception that it is the wealthy marine fishermen who control tribal government and, hence, tribal fishing regulations. Concerns have also been voiced by various tribes in some areas that they are barred from harvesting salmon which pass through fishing sites of other tribes because the latter, which tend to have superior harvesting capabilities, take the entire Aboriginal allocation.³⁰³ Some tribes have actually commenced litigation and/or mediation in relation to this issue.³⁰⁴

However, it is important to recall one of the myths which was debunked in Chapter Two; that is, that Aboriginals on the Northwest coast shared lands and resources equitably. Contrary to popular myth, Aboriginal groups on the coast were not egalitarian in the way in which food and resources were shared. Property concepts with respect to ownership rights of specific fishing sites were well developed in western Washington Aboriginal cultures.³⁰⁵ Traditionally there were

dependent upon them being able to fit within the dominant systems of management. Thus, the Court is seen as "simply recreating the relationships of the dominant society." She argues that the better approach would have been to eliminate all marine fishing of anadromous fish since marine areas can only be "commons" and not private property, and give legal force to the traditional aboriginal property-based approach to the anadromous fisheries resource. See pp. 20-29. Similar arguments are made by Bruun, *supra*, note 269 at pp.291-294. Similar issues were discussed in earlier portions of this thesis.

³⁰² Anderson, *supra*, note 266 at p. 137. Anderson suggests that the average income for a river fisherman was about \$5,000, while the average income for a marine fisherman was over \$200,000.

³⁰³ Bentley, *supra*, note 270 at p. 13. For example, the Lummi fleet has grown significantly since pre-Boldt: from 43 vessels to over 330 vessels in 1985 (see p. 15).

³⁰⁴ For example, the Tulalip, Skokomish, Port Gamble Klallam, Lower Elwa Klallam and Jamestown Klallam Tribes have all commenced either litigation or mediation. *Ibid* at pp. 14-15.

³⁰⁵ Cohen, *supra*, note 272 at p. 22.

large discrepancies in prosperity among individuals and among families. Aristocracies based on wealth were found in many traditional communities on the Northwest coast. The population was often divided into three classes: nobles, commoners and slaves, with the rights to all economic and ceremonial property being held by the nobles.³⁰⁶ The only distinction between the traditional divisions of wealth and that of today may be that wealth is now measured in dollars; however, that does not mean that wealth or status today is necessarily non-traditional. It is far too simplistic to merely assume that the increased prosperity of individuals in First Nations communities is assimilative and culture-destroying. As well, it is also inappropriate to view Aboriginal culture as being static and fossilized in one period of time. Culture is ever-evolving and can adapt to at least some degree of change without being destroyed. Thus, although Aboriginal participation in the commercial marine fishery may be somewhat assimilative, it is not necessarily indicative of a complete destruction of the culture.

As can be seen from the Boldt decisions and their consequences, resolving Aboriginal fishing rights issues in Washington has been no easy task. Indeed, it may very well prove to be impossible to ever completely resolve the issues, particularly given the traditional cultural importance of the resource to Aboriginal peoples, the economic value of the resource to all users, and the increasing scarcity

³⁰⁶See J.H. Steward, "Determinism in Primitive Society?" in B. Cox, ed., *Cultural Ecology: Readings on the Canadian Indians and Eskimos* (Toronto: The MacMillan Company of Canada Limited, 1970) 205. For descriptions of social hierarchies in particular tribes, see R. Ruddell, "Chiefs and Commoners: Nature's Balance and the Good Life Among the Nootka" in Cox, *ibid*, 254 and D. Weinberg, "Models of Southern Kwakiutl Social Organization" in Cox, *ibid*, 227.

of the resource. It is of note that despite the advances made, many non-Aboriginal commercial fishers in Washington do not support co-management.³⁰⁷

As well, there has been no radical reorganization of the patterns of fisheries management in Washington, with the focus continuing to be on ocean as opposed to riverine fishing and the tribes being required to conform to the standards of the non-Aboriginal regulatory regime. Treaty fishers must operate within the dominant common property regime instead of their traditional private rights system. They are only permitted to pass their own regulations if the regulations comply with standards set by the Departments of Fisheries and Game. Thus, although their right to manage their own fisheries may appear to be quite extensive, it is subject to their ability to adopt dominant society's forms and structures and liberal values. As well, the role of Aboriginals in management continues to be limited to some extent in that their role is only advisory in many areas.

However, the Boldt decisions did result in some recognition of the role which the Aboriginal communities can play in managing the resource. Despite its weaknesses, a form of co-management appears to be working in Washington. As in the case of British Columbia, a radical reorganization of the existing pattern of management will probably never be seriously considered. As a result, the only real alternative becomes somehow increasing the participation of Aboriginal fishers in the existing system. The Boldt decisions appears to have done that. Certainly,

³⁰⁷Dale, *supra*, note 244 at p. 66.

Aboriginal fishers have a much greater role in fisheries management in Washington than they do in British Columbia.

Whether the Washington model can be adopted in Canada is an important issue to consider. The Boldt cases were decided in very specific factual circumstances: the Aboriginal peoples in Washington State had treaties which expressly reserved to them the right to fish in common. There are very few treaties in British Columbia and those which do exist are distinct from the Washington State treaties. Thus, the basis for finding an Aboriginal right to an equal share in the fisheries resource in British Columbia has to be based on an entirely different argument. Given the Supreme Court of Canada's recent decisions it has become apparent that there will not be a judicial determination similar to the one in the Boldt decisions.

As well, another important aspect of the Boldt decisions was the extent of involvement and jurisdiction of the District Court Judges; the judges assumed far-reaching powers with respect to administering their decisions. Indeed, Judge Boldt went so far as to actually administer the Department of Fisheries for a period of time. Although this type of jurisdictional control by judges is not common in the United States, there is precedent for it in the school desegregation cases. However, to this writer's knowledge, no Canadian court has ever attempted to assume such authority. Although it is questionable whether judges are the most appropriate parties to be

administering their decisions in complex cases such as these, without the judges' extensive involvement in the Boldt cases it is unclear to what extent their decisions would have been implemented. Thus, although elements of the Washington model may very well be ones which should be emulated in British Columbia, how that can be accomplished is anything but clear.

(iii) New Zealand

The history of Aboriginal fishing in New Zealand has also been rife with controversy. The most recent attempt to resolve the controversy in that country culminated in the passage of *The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*. This legislation embodies the so-called "Sealord deal" between Maori fishers and the state, a deal which has been hailed as a historic settlement.³⁰⁸

Historically, as in the case of many First Nations in North America, fish were used by the Maori for both subsistence and as an important part of their economy. The tribes also exercised control over their fisheries in the inshore seas extending from their territories.³⁰⁹ Recognition of Maori fishing rights stems

³⁰⁸See J. Munro, "The Treaty of Waitangi and the Sealord Deal" (1994) 24 Vic. U. of Well. L. Rev. 389 and R.T. Price, *Assessing Modern Treaty Settlements: New Zealand's 1992 Treaty of Waitangi (Fisheries Claims) Settlement and Its Aftermath* (1996) [publishing pending].

³⁰⁹Munro, *supra*, note 308 at p. 392.

from the Treaty of Waitangi of 1840 which guarantees Maori exclusive and undisturbed possession of their fisheries.³¹⁰ The Treaty has been interpreted to provide that traditional structures for tribal control are to be maintained, and that the Maori are to be given adequate resources. Article 1 of the Treaty has also been interpreted to mean that although the Crown has the right to govern and administer laws, including the right to make laws of general application for conservation, its right to govern in the public interest is limited by its Treaty obligations. Thus, the state's right to regulate a resource does not in itself permit it to regulate Maori in the same way as other resource users since the Maori have Treaty rights to certain resources while non-Maori have only privileges.

Despite the Treaty provisions, Maori fishing rights have been consistently ignored in New Zealand's fishing regulations and fishing claims have been made continually by the Maori for the last 150 years.³¹¹ The state has regulated fishing since 1866. The various regulations have not recognized the Maori right to participate in fisheries management and have not adequately protected their right to fish. In addition, no attempts were made to incorporate Maori into the commercial fishing industry, with none of the loans or incentives being offered by the state going to the tribes. As a result of these factors as well as others,

³¹⁰ A.M. Waetford, "Treaty of Waitangi (Fisheries Claims) Settlement Act 1992" [1993] Auckland U. L. Rev. 402 at p. 402.

³¹¹ P.G. McHugh, "Sealords and sharks: The Maori Fisheries Agreement (1992)" [1992] N.Z.L.R. 354 at p. 354.

including loss of access to traditional fishing grounds and depletion of stocks due to overfishing and pollution, the Maori were unable to sustain their use and control of the fisheries and any Maori commercial fishing industries which were established ultimately went into decline. The commercial fishing which did take place by Maori tended to be small scale operations which were vulnerable to industry changes.³¹²

As a result, Maori fishing rights were the subject of much litigation. Although section 77(2) of the *Fisheries Act* 1980 provided that nothing in the Act could affect Maori fishing rights, the courts had ruled in early decisions that the phrase referred only to rights conferred by statute, and not the Treaty. However, in *Te Weehi v. Regional Fisheries Officer*³¹³, the Court held that the Defendant could not be convicted under the *Fisheries Act* for taking undersized fish because he was exercising a customary Maori fishing right under the exception in the Act. This decision has been described as "turning the tide" toward recognition of Maori fishing rights in New Zealand.³¹⁴

The Waitangi Tribunal, which was established as an independent body in 1975 to assist in the resolution of disputes under the Treaty through the making of recommendations to government, has also been involved in the Maori fishing disputes. It ruled that tribes have an exclusive right to the fisheries surrounding

³¹²Munro, *supra*, note 308 at pp. 398-400.

³¹³[1986] 1 N.Z.L.R. 680 (H.C.).

³¹⁴Waetford, *supra*, note 310 at p. 403.

their territories to a distance of 12 miles. It also found that the Maori have a right to a reasonable share of the fisheries off their territories beyond the 12 mile limit. The state was also required to respect as far as possible the traditional role of the Maori in regulating the fisheries.³¹⁵

It was in this context that in the mid-1980s, the New Zealand government attempted to implement a new fisheries management regime in response to concerns over the depletion of the fish stocks and over-capitalization in the fishing fleet. The government introduced private ownership of commercial fisheries quotas during this period in an attempt to solve the problems. Under the Quota Management System, the Minister of Fisheries sets total allowable catches for a species in the quota management area and from that subtracts an allowance for Maori traditional, recreational and other non-commercial uses of the fisheries to determine the total allowable commercial catch. The total allowable catch is then divided into individual transferable quotas which constitutes a permanent property right to catch and sell a fixed number of fish.³¹⁶

The new regulatory scheme resulted in a 50 percent reduction in the numbers of fishers, although the catch was reduced by about only 5 percent. It had a particularly devastating effect on small commercial fishing operations,

³¹⁵Munro, *supra*, note 308 at pp. 392-393.

³¹⁶For a more extensive description of the regulatory process, see *ibid* at p. 400.

including many run by Maori.³¹⁷ Several Maori tribes became concerned about the effect of the new regulations on their Treaty rights to fish. The regulations were in conflict with the Treaty provisions in that they gave full, exclusive and undisturbed possession of the fisheries to non-Maori and not to Maori, even though the latter's right to such possession was guaranteed in the Treaty. As well, the regulations recognized only a minimal role for Maori in fisheries management.³¹⁸ As a result, the Maori sought redress through the Waitangi Tribunal and the courts.

The Tribunal concluded in its final report that the new regulatory regime was in breach of Treaty principles and called for the Maori and the state to negotiate. The courts subsequently made a similar finding. An action had been brought by the Muriwhenua and Ngai Tahu tribes to clarify their fishing rights under the *Fisheries Act*. The Court held that there was an arguable case that the Maori had commercial fishing treaty rights. Since the *Fisheries Act* expressly stated that nothing in the Act could affect Maori fishing rights, the Court found that the quota management system was contrary to the Act in that it affected Maori fishing rights. The Court declared that the Minister was not to take any further action with respect to the quota management system.³¹⁹

³¹⁷It is estimated that nearly 300 fishers, most of them believed to be Maori, lost their licences in Northland alone between 1984 and 1985. See *ibid* at p. 400.

³¹⁸*Ibid* at p. 401.

³¹⁹Price, *supra*, note 308 at pp. 31-32 and Munro, *supra*, note 308 at pp. 402-403.

As a result of these decisions, the government was compelled to negotiate and by late 1987 negotiations between the Maori and the state were underway. Negotiations stalled for a period of time, with no agreement having been reached by the deadline of June 1988. However, an interim agreement was reached in 1989, although it had essentially been imposed by the government. The agreement provided that 10 percent of the quota for each species would be given to the Maori over four years and that \$10 million would be provided to assist the Maori in the fishing industry. The Maori Fisheries Commission was established to deal with these assets and to facilitate the entry of Maori into the fishing industry. The interim agreement indicated that the government was willing to recognize that the Maori had a Treaty entitlement to a portion of the commercial fisheries.

Negotiations to reach a final agreement continued. Some conflict arose among the Maori with respect to the approach of the Maori Fisheries Commission and its method of allocating the commercial fishing quota. Despite these problems, a tentative agreement was reached in August 1992. The agreement provided that the Maori would get a 50 percent stake in New Zealand's biggest fishing company, Sealord, which would result in their obtaining half of Sealord's 26 percent quota. With the 10 percent quota which had been obtained under the interim agreement, the Maori were to receive a total of 23 percent of the country's total commercial fishing quota. The Waitangi

Fisheries Commission was also established under the agreement to replace the Maori Fisheries Commission. It holds the Maori fishing assets and is responsible for allocating the quota among the tribes.

The deal also recognizes a somewhat expanded role for Maori in fisheries management, with a requirement that Maori be represented on various fisheries statutory advisory bodies, such as the Fishing Industry Board and the Fisheries Management Committee. The Waitangi Fisheries Commission must also be consulted by the Crown whenever it is statutorily required to consult with the Fishing Industry Board, such as when the total allowable commercial catch is being determined or a closure is being considered.³²⁰ Thus, the agreement does establish a type of co-management arrangement in the commercial fishing industry in that Maori must now be consulted and can have some input into management decisions. The Minister of Fisheries must also consult with Maori and develop policies to help recognize the use and management practices of the Maori with respect to non-commercial fishing.

Traditional fishing rights are also addressed in the legislation. Firstly, general regulations are to be passed to recognize the right of tribes to regulate members fishing for defined customary, non-commercial uses in their territories. Regulations must also be promulgated to enable tribes to pass by-laws regulating customary fishing in specific sites which are of special significance for

³²⁰Munro, *supra*, note 308 at p. 412.

fishing or for cultural or spiritual reasons. These by-laws can regulate fishing in certain sites, but must be consistent with overall sustainability requirements of the state's regulatory regime and apply to all individuals equally. The by-laws must also be approved by the Minister of Fisheries.³²¹ These provisions contemplate a much more comprehensive co-management arrangement with Maori being permitted to actually regulate the resource within certain parameters, but in limited customary fishing areas only.

The deal engendered much controversy. The agreement involves all Maori tribes and is to be a full and final settlement of all Maori commercial fisheries claims under the Treaty of Waitangi and completely discharges the Crown's obligation to the Maori in respect of commercial fishing. Neither the courts nor the Waitangi have jurisdiction to consider Maori commercial fishing rights. Some Maori questioned the mandate of some of its representatives to sign the agreement on their behalf and viewed the agreement as a sell-out contrary to the terms of the Treaty.³²² They challenged the agreement in court, the Waitangi Tribunal and later the United Nations Human Rights Committee, but were unsuccessful. Later, there was a dispute with respect to the selection of candidates to be appointed to the Commission. Despite these disputes, legislation in relation to the agreement was ultimately introduced in December

³²¹*Ibid* at pp. 412-414.

³²²Somewhere between nine and 13 tribal groupings out of a total of 40 opposed the deal. See Price, *supra*, note 308 at p. 50. Also, see Waetford, *supra*, note 310 at p. 406.

1992. However, none of the Maori members of the House of Representatives supported its enactment.³²³

Although the legislation has been passed, the controversies are not yet over. Disputes have arisen over the appropriate way for the Commission to allocate the quota among the tribes. Heavily populated areas favour an allocation based on population, while less populated areas with longer coastlines favour one based on a coastline formula. Litigation was commenced by some tribes on this issue. Given the immense value of the quota, it is not surprising that these disputes have arisen. Attempts are being made to reach a compromise on this issue, and it appears that a workable solution will be found, with the opposing groups having begun to reach a consensus by mid-1995.³²⁴ However, one of the issues still outstanding is how assets will be shared with urban Maori. Even if an agreement can be reached, the Minister will ultimately be required to approve any recommendations made by the Commission on the allocation issue.

Although the Sealord deal does recognize a role for Maori in respect of fisheries management, it is not an extensive one. Under the deal, the Quota Management System will apply equally to Maori and non-Maori, despite the fact that the former's fishing rights are to have special status pursuant to the Treaty.

³²³Waetford, *supra*, note 310 at p. 402. It may be that there is a party split explaining this; the Maori members were probably all Labour Party.

³²⁴See Price's analysis at *supra*, note 308 at pp. 56-59 and pp. 66-67.

As well, those management rights which the Maori have are limited; for the most part, they are advisory only. Although they are to be given additional management powers with respect to their customary fishing practices, they are limited to a few specific sites, relate for the most part to non-commercial fishing only, and are subject to the state's approval. As well, any by-laws passed must apply to everyone equally, even though Maori have been given greater rights than others in the fisheries by the Treaty.

Since the deal is premised on the acceptance of the Quota Management System, the fisheries continue to be regulated from the perspective of the state, with little real input from or substantive role for Maori. Indeed, the agreement "effectively opens the way for government and the fishing industry to progressively develop the QMS without the continual threat of Maori commercial fishing claims."³²⁵ In the words of J. Munro, the system is:

solely the Crown's vision of an appropriate solution to management and conservation needs; there was no commitment to finding a bicultural approach. Under the Sealord deal, Maori have bought into the Crown's vision The Sealord deal demonstrates, therefore, an inability to accept pluralism, or treating one section of the community differently from another. The Crown has perpetuated the simplistic notion of "one nation under one law".³²⁶

Thus, the Sealord deal in New Zealand is a limited form of co-management only. It does not really change the underlying management

³²⁵Waetford, *supra*, note 310 at p. 407.

³²⁶Munro, *supra*, note 308 at pp. 422-423.

structure of fisheries regulation, but rather incorporates Maori fishers into the existing system. Even more so than is the case in Washington, it requires Aboriginal fishers to conform to the dominant society's model almost completely. Maori participation in the fishing industry will continue to be dictated by the state.³²⁷ Since it is a relatively new arrangement with many of the details yet to be worked out, it remains to be seen how well it works in practice and the extent to which Maori participation in the fishing industry will increase as a result of its provisions.

C. Some Conclusions about Co-Management

It is apparent that none of the co-management regimes presented in this chapter are radical departures from the states' dominant regulatory schemes. At best, they are accommodations of Aboriginal interests into existing frameworks with the degree of accommodation varying among the various systems. The co-management system in the Western Arctic, for instance, recognizes Inuvialuit knowledge and experience in fisheries management, and permits some exclusive Inuvialuit harvesting rights, control of access to the resource and participation in management. Conversely, the New Zealand scenario is a much more limited co-management arrangement with any remotely substantial Maori regulatory powers being restricted to traditional food fisheries. In the latter case,

³²⁷Waetford, *supra*, note 310 at p. 406.

the main purpose of the new system is to deal Maori into the existing commercial fisheries regime, not to recognize Maori self-regulation rights.

Even in those jurisdictions where a greater role for Aboriginals is being sought, the dominant society's underlying system remains essentially intact. Washington state has one of the most comprehensive forms of co-management regimes which was reviewed in this chapter. However, even there, there is no recognition of an alternative Aboriginal perspective on fisheries management. Although the tribes can pass fishing regulations, the regulations must meet the standards of non-Aboriginal society. As well, the focus is still on marine fisheries, as opposed to riverine fisheries. Similarly in the western Arctic, Inuvialuit management is merely incorporated to some extent into the Department's regulatory regime with final decisions still being made by the state; there is, again, no acknowledgement of an independent self-regulatory right.

That this is the case is not surprising in light of what has been discussed in this thesis. Recognizing more than one independent regulatory system would add yet another layer of complexity to the already complicated task of managing the fisheries. As well, the diversity of interests in the fisheries make formulating a workable co-management regime difficult. Some coordination of management systems must be undertaken and it is not remarkable that the state's framework is the dominant one. There are also too many vested interests in the industry in

all of the jurisdictions studied to make complete devolution of authority by the state likely.

It seems unlikely that any of the models presented could be adopted in their entirety in British Columbia. The Inuvialuit experience can provide valuable insights into how a co-management system can work successfully, but differences in political, social, demographic and geographic circumstances must be considered. It is possible that the Inuvialuit model works in the western Arctic at least partly because the Inuvialuit comprise the majority population in that area. As well, it may well be that traditional knowledge and management systems have survived there better than in many communities in British Columbia.

Similarly, the situation in Washington is distinct. In Washington, the co-management regime was founded on a court decision which acknowledged an Aboriginal treaty right to 50 percent of the commercial catch, or at the very least enough fish to earn a moderate livelihood. Canadian courts have not made similar findings, with the Supreme Court in *Van der Peet* expressly rejecting the "moderate livelihood" approach which had been espoused by Lambert J. in his dissent at the Court of Appeal. The explicit allocation of a portion of the fish to Aboriginals in Washington provides a much stronger basis for increased participation of First Nations in fisheries management in the state. Without that

basis in British Columbia it is not clear how management of the Aboriginal fisheries will be handled.

Although the New Zealand situation is not a good example of a co-management regime, given the limited role the Maori have in management, the quota management system which was undertaken there may be a model which could assist in making fairer allocations in British Columbia fisheries. If specific quotas for salmon were set in the province, a certain percentage of the quota could be allocated to Aboriginal fishers. However, management of salmon is complex and involves both pre-season and in-season predictions. The system requires flexibility to respond to changing circumstances, often at the eleventh hour. It seems unlikely that quotas could be established ahead of time to ensure adequate escapement. Thus, the use of a quota management system in the salmon fisheries seems impractical.

Thus, it is unlikely that any of the models presented will be completely adopted in British Columbia, even if co-management regimes are established. Even those co-management frameworks which have started to be adopted in British Columbia, such as the Gitksan and Wet'suwet'en example, cannot necessarily be adopted in other parts of the province. On the Fraser River, for example, there are substantially more First Nations and fishers with varying interests in the fisheries than on the Skeena River. Formulating a workable co-

management regime for the Fraser, therefore, will be a much more complex and challenging endeavour.

It is not clear that co-management will indeed be the way of the future for fisheries management in British Columbia. However, there are currently some trends which suggest that the adoption of some form of co-management is at least possible. The recent movement in some areas of the province to co-operative management systems, the current downsizing of the Department, and the complexity and uncertainty which has resulted from the Supreme Court's recent decisions all point to the likelihood that some changes will be made to the current regulatory framework. What those changes will be remains to be determined.

CHAPTER FIVE

CONCLUSION

It is clear that fisheries management, particularly in relation to anadromous fish, is extremely complex. Fisheries science appears to be anything but precise, with decisions often being made by fisheries managers based on experience and intuition. Often, decisions have to be reconsidered and remade in response to changing circumstances. As well, social, economic and political issues are involved in fisheries management decisions, and government is often reluctant to pursue alternatives which will seriously threaten vested interests. There appears to be very little common ground among the various user groups, with divergence of opinion on various issues being found both among and within the groups. Added to the complexity is the international dimension to the fisheries and the influence of the world market.

We have seen that the current regulatory system in British Columbia has evolved slowly over the last century. Until the early 1870's, when the first cannery was opened, the fisheries were essentially left in the hands of the Aboriginal fishers. The settlers at the time were content with the arrangement because Aboriginals had superior methods of preserving fish and could provide the settlers with fish. First Nations depended on the fish for both food and trade,

both before and after contact. Fisheries management was part of their culture, with traditional laws governing the use of fishing technology. Although their technology was such that they could have completely destroyed whole salmon runs, their traditional laws prevented them from doing that. They were effective managers of the resource.

However, when the first cannery was opened in 1871, all that began to change. The settlers no longer had to depend on the Aboriginals for fish. Non-Aboriginals began to enter the commercial fishery in greater numbers as they discovered that there was limited agricultural land available in the province. This occurred during a time when the Aboriginal communities were suffering from the epidemics, so little resistance could be mounted. For a period Aboriginals were needed to staff the canneries, but over time the canneries shut down, leaving whole villages of unemployed Aboriginal fishers and cannery workers in their wake. At the same time, management of the fisheries was slowly being taken over by the state. Aboriginal fishing was suddenly defined to include food fishing only and commercial sale of fish by Aboriginals was prohibited. Throughout this period, the ideologies of conservation and Aboriginals as destroyer of fish were used to justify the state's actions.

Throughout the 20th century, Aboriginal participation in the commercial fisheries declined. Food fishing also decreased. Aboriginal fishers were never

completely restricted from the fisheries since this measure was not seen as necessary and, indeed, would have been counterproductive in that it would have expanded the Aboriginal welfare rolls. After the Davis licensing program was initiated in 1968, the number of Aboriginal fishers declined even more drastically. The loan programs which were developed stemmed the decline somewhat, but only in limited circumstances. Meanwhile, the regulatory system was failing. The licensing regime resulted in over-capacity and over-capitalization in the fleet. Salmon stocks were being depleted and the fisheries were not sustainable.

It was in this environment that Aboriginals began to oppose the regulatory system in large numbers. Various demonstrations and protests were staged and fish were sold contrary to regulation. Many charges were laid against Aboriginal fishers for various infractions. Around the same period, the Canadian Constitution was amended and Aboriginal and Treaty rights were given constitutional protection in s. 35. The first time the Supreme Court of Canada had to deal with s. 35 was in the context of Aboriginal fishing. Its decision in *Sparrow* set the groundwork for greater recognition of Aboriginal fishing rights and the Department was forced to develop the Aboriginal Fisheries Strategy ("AFS") in response. As well, around this same time, the Minister of Fisheries and Oceans, John Crosbie, announced that fishing rights would be part of Treaty settlements in British Columbia. Indeed, the agreements reached under the AFS

have been considered by some to be interim agreements pending final resolution of fishing issues in the treaty process.

Courts in cases since the *Sparrow* decision have been reluctant to expand on the principles which were established in that case, including the Supreme Court of Canada in *Van der Peet*, *N.T.C. Smokehouse*, *Lewis and Nikal*. However, given the uncertainty which has been engendered by those decisions, the jurisprudence may nonetheless be the impetus for the Department to continue to change its policies in relation to Aboriginal fishing and, perhaps ultimately, to formulate a new regulatory system which better accommodates First Nations.

In all of the regulations and jurisprudence to date, the same basic underlying ideologies are often used repeatedly. Liberal notions of equality are used to justify denial of any "special rights" for Aboriginals in the fisheries. The concept of fish as common property is also used at times to defend the current regulatory regime and to prevent Aboriginals from getting any kind of priority in the fisheries, at least with respect to commercial fishing. Conservation concerns are presented as requiring exclusive government regulation. Although the courts are beginning to question for whose benefit the conservation goals are designed, they are not questioning by whom those goals are best achieved. Both government and the courts assume that conservation objectives can only

be established and achieved by the Department. There has been little acknowledgement that First Nations can have a direct role to play with respect to conservation. There also appears to be a real reluctance by government and the courts to adversely affect those who are already established in the industry. Thus, although there has been some recognition of Aboriginal fishing rights, it is not yet, and may indeed never be, full acknowledgement.

It is sometimes suggested that legislatures and courts have difficulty acknowledging Aboriginal rights because recognition of collective rights and cultural uniqueness is contradictory to liberal democratic principles.³²⁸ Liberal democratic ideology is very much focused on the individual, and liberal democracies purport to place a great deal of value on equality, individualism and freedom from discrimination. As has already been stated, the ideology of equality has been used, and continues to be used, in the British Columbia fisheries context to justify both the regulatory regime and the jurisprudence. However, there has not been an overt denial of Aboriginal fishing rights on the basis that they are collective rights and therefore unrecognizable in a liberal state. Indeed, the courts have explicitly identified the rights as collective while at the same time affirming them. In *Sampson*, for instance, the British Columbia Court of Appeal noted that when determining whether an Aboriginal right has been infringed, the court must consider the effect on the collective right of the First Nation as a whole and not just on the individual

³²⁸W. Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995) at p. 34 and Kapashesit and Klippenstein, *supra*, note 176 at pp. 937-939 and S. Weaver, "Federal Difficulties with Aboriginal Rights Demands" in Boldt and Long, *supra*, note 90 at pp 141-142.

defendants.³²⁹ The Supreme Court of Canada also acknowledged the collective nature of Aboriginal rights in *Sparrow*.³³⁰ In those cases where Aboriginal fishing rights have been denied, such as in *Van der Peet* and *N.T.C., Smokehouse*, the collective nature of Aboriginal rights has not been used as a rationale for the denial.

Of course, it cannot be concluded that because the collective nature of Aboriginal rights is not being cited expressly by governments and courts to justify denying those rights, it is not nonetheless one of the fundamental barriers to complete recognition. It may well be that the liberal democratic focus on the individual precludes the dominant society from being completely sensitive to the collective nature of Aboriginal rights. However, it has also been argued that it is a fallacy to suggest that collective rights are inconsistent with liberal democratic principles. For instance, Will Kymlicka argues that cultural differences are actually accommodated in liberal democracies through protection of civil and individual rights.³³¹ He takes issue with the terminology "collective rights" in the context of group-differentiated citizenship, and suggests that it is more appropriate to speak in terms of the right to internal restrictions and external protections.³³² He argues that external protection rights are completely consistent with liberal democratic

³²⁹*Supra*, note 181 at pp. 40-45.

³³⁰*Supra*, note 56 at p. 411.

³³¹Kymlicka, *supra*, note 328 at p. 26.

³³²That is, the ability to protect the group from internal dissent and the right to protect the group from external decisions. *Ibid* at pp. 34-35. It should be noted that Kymlicka distinguishes between self-government rights and polyethnic rights. He characterizes Aboriginal groups as "national minorities" and therefore having self-government rights. In contrast, he argues that individuals who immigrate to Canada are not entitled to self-government rights, but merely the right to have the freedom to exercise aspects of their cultures within the larger framework of Canadian society.

principles. Although internal restrictions can be contrary to liberal principles when the group limits the rights of individuals to question authority, he suggests that even in those circumstances, liberals do not need to force their principles on the groups through coercion. Instead, attempts should be made through negotiation and lobbying efforts to influence the group to change its internal rules.³³³

Kymlicka argues that the recognition of minority rights is consistent with liberal principles because individual freedom is tied to membership in one's national group and group-specific rights can promote equality between the majority and the minority. He suggests that freedom is intimately linked with, and dependent on, culture and attempting to suppress cultural identity and self-government claims may "simply aggravate the level of alienation and division."³³⁴ He points to the fact that liberalism requires that individuals have the ability to choose among differing conceptions of "the good" and he argues that group differentiated rights which protect minority cultures support that principle. Thus, he concludes that the recognition of self-government rights (i.e. the power to govern with respect to internal restriction and external protection) is consistent with liberal democratic principles.³³⁵

³³³*Ibid* at p. 37 and pp. 167-168. Of course, by influencing the group to change its internal rules, an attempt is still being made to liberalize the group. The point is, however, that there is no requirement that the group be liberalized for its self-government rights to be recognized.

³³⁴*Ibid* at pp. 73 to 75.

³³⁵*Ibid* at pp. 69, 84 and 106.

Similarly, Randy Kapashesit and Murray Klippenstein argue that liberal theory does not provide any rationale for the refusal to recognize Aboriginal collective rights. They point out that section 35 of the Constitution Act refers to "peoples" and since the term is not used elsewhere in the Constitution, it must denote a special meaning; that is, a group right.³³⁶

Thus, it is at least arguable that liberal theory can completely accommodate collective rights. If Aboriginal fishing rights are not being fully recognized, it may be for reasons other than their collective nature. One of those reasons may be the desire to protect what Menno Boldt described as the "national interest", which was discussed in Chapter Three.³³⁷ Boldt's position is that it is the "national interest" and not liberal democratic concepts which influences how decision-makers interpret Aboriginal rights. Of course, it could be argued that the "national interest" is merely a manifestation of capitalist ideology and that, therefore, it is still underlying ideology which is influencing governments and courts. The point which is brought home, however, is that governments and courts are not necessarily refusing to recognize collective rights because the individual rights model inhibits recognition of collective rights. Instead, the motivation appears to be their desire to ensure that the dominant group continues to reap the benefits of capitalism. The issue is one relating to protection of wealth.

³³⁶*Supra*, note 176 at p. 952.

³³⁷Boldt, *supra*, note 141 at p. 12. Boldt notes that the "national interest" paradigm creates the illusion that it constitutes a national homogeneity of interests, but it is actually derived at behind closed doors by politicians, bureaucrats and corporations, without any reference to the "national good" as defined by the Canadian people (see p. 67).

Kymlicka's theory that Aboriginal group rights are consistent with liberal ideology may be completely valid. However, under Boldt's "national interest" theory, the point becomes moot since those rights will only be permitted to the extent that they do not conflict with the larger society's interests. The potential for this conflict is arguably perceived most strongly in the context of resources where the interests of wealth are most stark. Canadian courts have identified this conflict through their explicit concern about the effect of far-reaching interpretations of Aboriginal fishing rights on non-Aboriginal fishing interests.³³⁸

That is not to say that liberal ideology does not play a role. On the contrary, as we have seen, governments, courts and interest groups often use liberal principles, most often notions of equality, as a rationale to avoid recognizing Aboriginal rights. And, as we saw in Chapter Four, these principles have also been used in other liberal democratic states, such as Washington, to oppose recognition of Aboriginal fishing rights. These liberal notions may provide a convenient excuse to avoid adversely affecting non-Aboriginal interests in the fisheries. As Boldt states:

Canada commits its injustice under the guise of a venerated democratic principle—'one person, one vote', 'rule by majority'. This 'principle' makes it possible for the Canadian government to disregard the rights and will of a colonized people (Indians) for self-determination.³³⁹

³³⁸See, for instance, both the Court of Appeal and Supreme Court of Canada decisions in *Van der Peet*, *supra*, notes 156 and 152.

³³⁹*Supra*, note 141 at p. 9.

We have seen that to date, governments and courts in Canada have been reluctant to give broad interpretations to Aboriginal fishing rights. Although some progress may be gained through decisions like those of the Supreme Court in *Sparrow*, *Gladstone* and *Nikal*, the principles which have been established are limited in their application and continue to reflect a concern over protecting the interests of dominant society. As well, the Supreme Court appears to be developing a much broader range of objectives which will meet the justification test in *Sparrow*, such as economic and regional fairness. When one considers the potential effect on non-Aboriginal commercial fishers if the Aboriginal right to fish is broadly construed, these interpretations are not surprising.

Given the history of legislative and judicial treatment of the issues, it is difficult to be overly optimistic that First Nations will be permitted to use the fisheries as they see fit, including commercially, and to govern the resource according to their own management systems. It appears that in the fisheries context the "national interest" will always prevail. Although some judges couch their findings in terms of equality and individual rights, there is a strong argument to be made that their true motivation is to avoid negatively affecting the wealth of those who are established in the industry, many of whom are large corporate interests. Boldt's following comments may indeed be apt in the fisheries context:

Anyone who imagines that Canadian politicians and courts will legitimate the Indians' version of aboriginal rights is guilty of 'vulgar optimism'. All of the laws ever passed by Parliament were designed to

serve Canadian interests, not Indian interests. This accumulated legal structure serves as an edifice of judicial bias contrary to Indian interests, and stands as a bastion to protect Canadian interests, not Indian interests. When all the laws are set up to advance Canadian interests, then the decisions of judges, who unquestioningly follow these laws, will be biased against Indian interests whenever these come into conflict with Canadian interests, even when judges are not racially prejudiced....The prospects are better for finding the Holy Grail in one's lunch pail than that the Indians will obtain ... a judicial decision from the Supreme Court of Canada [discrediting legal structures and precedents and legitimizing the Indian version of aboriginal rights]."³⁴⁰

Boldt suggests that the only way Aboriginal peoples will be able to survive as Aboriginal peoples is if there is a "paradigmatic shift in Canadian policy making from the imperatives of the 'national interest' to a coequal emphasis on Indian interests."³⁴¹ He acknowledges that this can only happen if more than a century of political, legal and constitutional precedents are set aside, as well as the greed of larger society. Given the magnitude of the task, it seems unlikely that this will ever occur or, indeed, that governments and courts will actually want it to occur.

However, what must be acknowledged is that the courts do appear to be attempting to manage conflict resulting from a sense of injustice. As a result, we see the Supreme Court of Canada in *Van der Peet* and *Gladstone* talking about a national goal of reconciliation, which requires some recognition of Aboriginal rights. As a result, there has been somewhat of a paradigmatic shift, although one of a more pragmatic, political and limited character than Boldt discusses.

³⁴⁰*Ibid* at p. 31

³⁴¹*Ibid*, at p. 116

Is there any prospect for a broader interpretation of Aboriginal fishing rights? It seems that the only way Aboriginal peoples' rights in the fisheries will ever be fully acknowledged and respected is if they can somehow be accommodated within the broader Canadian interest. That requirement will, of necessity, force the First Nations to compromise their positions and goals significantly. Effectively, they will have to present and define their aspirations in a manner which minimizes the effect of those aspirations on the broader community. The Supreme Court appears to have attempted to reinterpret fishing rights in that way in its decisions in *Van der Peet* and *N.T.C. Smokehouse*. As could be predicted, the potential effect of a priority characterization on other interests in the industry in the commercial context was perceived by the Court as being too great. It is likely that it will always be perceived in that manner, both by the courts and government.

Exactly how First Nations can present their rights in a way which is non-threatening, or at least minimally threatening, to other interests is obviously the critical question. Arguably, any definition of such rights will threaten non-Aboriginal interests at least to some extent. However, as we saw from the examples in Chapter Four of fisheries management schemes in other jurisdictions, there are potential ways to accommodate Aboriginal interests in the existing framework. That these alternative systems achieve only an accommodation of Aboriginal interests, with the basic regulatory framework of the dominant society remaining essentially intact, is a fact which must be recognized. To some extent this is no doubt a reflection of the

state's continuing concern over protecting national interests. However, what must also be acknowledged is that the reality and complexity of fisheries management is such, particularly in the case of anadromous species, that it is not practical to have several completely independent and self-contained management regimes in place. Some co-ordination of management objectives and strategies is required and it is not surprising that the dominant society's system is the one which is invariably chosen to provide the framework.

To this writer's knowledge, there have been no radical shifts in fisheries management anywhere in the world to permit Aboriginal systems to completely dominate or co-exist on an equal basis with non-Aboriginal regimes. It seems highly improbable that such a radical shift will occur here in Canada, particularly in relation to salmon management. However, although there is not yet a complete co-management approach in the British Columbia fisheries regulatory regime as in some other jurisdictions, we saw in Chapter Four examples of some movements recently toward a more co-operative management system. Given the recent cut-backs in the Department's budget and its corresponding downsizing³⁴², it is quite plausible that some degree of decentralization and devolution of authority will take place. To some extent, this has already started to take place, with the Department announcing that it is prepared to consider giving the British Columbia government

³⁴²The Department announced in the summer of 1996 that it will be cutting its annual Pacific Region budget by \$34 million in 1997. As part of the cuts, 236 full-time jobs will be eliminated. See L. Pynn, "Feds cut fisheries budget by \$34 million" *The Vancouver Sun* (24 July 1996) A1, A7.

an "enhanced role" in fisheries management.³⁴³ As well, the recent Supreme Court of Canada decisions will make it increasingly difficult for the Department to manage Aboriginal fishing, both from a political and practical perspective. Despite the Supreme Court's implied rejection of co-management in *Lewis* and *Nikal*, it may be that ultimately some form of co-management system will be established in British Columbia fisheries in an attempt to deal with the controversy and uncertainty. It seems unlikely, however, that the transition will occur rapidly.

It is clear that the co-management alternative which has been presented in this thesis is no panacea. As has already been noted, the co-management systems which have been established do not radically alter management regimes or permit complete Aboriginal autonomy in the fisheries. They are at best a compromise, with First Nations usually being required to make the largest sacrifices in terms of many of their economic self-sufficiency and self-government goals. As well, in those jurisdictions in which a form of co-management has been instituted in the fisheries, conflicts continue to brew. To some extent, these controversies may be a function of the novelty of the systems in place and many of them may be resolved in ensuing years. However, given the ever-increasing complexity of fisheries management, it is probable that some conflict will always persist. The hope is that in the face of this conflict, co-management systems will result in better management while at the same time an increase in Aboriginal participation in the fisheries industry. As Pinkerton states, "co-management systems set up a game in which the pay-offs are greater for

³⁴³Crawley and Hunter, *supra*, note 61.

co-operation than for opposition and/or competition, a game in which the actors can learn to optimize their mutual good and plan co-operatively with long-term horizons."³⁴⁴ It seems doubtful that this state of grace envisioned by Pinkerton will ever be reached in British Columbia fisheries. However, perhaps ultimately, a system can be established which recognizes both the rights of Aboriginal peoples and the legitimate role they can play within fisheries management. And, hopefully, by that time, there will still be fish in the sea to manage.

³⁴⁴*Supra*, note 237 at p. 5.

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