A Different Current: Alternative Theoretical Propositions to Guide Aboriginal Fisheries Policy-Making in British Columbia

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Abstract

Liberal individualism and group-differentiated rights are not incompatible with one another, as has often been suggested in Canadian political discourse. In order to make self-defining choices, and to be the autonomous free-choosing individuals that are central to liberal theory, individuals require a range of options from which to choose and a means of differentiating between those options. An individual’s culture provides him or her with both of these necessary elements of autonomous free choice. But while Canadians share a common culture by virtue of their membership in a Canadian moral community, there is no single Canadian identity. Some Canadians, such as aboriginal peoples, are Canadian through being members of minority national groups which have distinct cultures of their own. In order to ensure that liberal equality is extended to all citizens of Canada, the complexity of Canadian identities must be reflected in government policy-making. In this thesis, I develop a set of theoretical propositions about group-differentiated rights in Canada, and apply them to aboriginal fisheries policy-making in British Columbia. I propose a policy that reflects those theoretical propositions and compare it with the federal government’s Aboriginal Fisheries Strategy (AFS).

Fishing rights are the only aboriginal rights to have run the full gamut from being traditional aboriginal practices, to being defined as aboriginal rights by the Supreme Court of Canada, to being recognized through government policy. The aboriginal fisheries policy that I propose in this thesis would be more extensive than was the AFS. The proposed policy would maintain the AFS’ structure of individual fisheries agreements negotiated between aboriginal nations and the Department of Fisheries and Oceans. But the proposed policy would also include provisions for significant aboriginal management of their local fisheries, as well as for aboriginal involvement in the development of a province-wide fisheries management regime.
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Introduction

As in many other liberal democracies, a conflict exists in Canada between the focus on the individual that is central to liberalism, and the existence of minority groups that assert claims to group-differentiated rights. In Canada, this conflict has been particularly apparent in the politics of aboriginal rights. Aboriginal and treaty rights are protected by section 35 of the Constitution Act 1982; however these rights are not defined in the constitution. The task of defining aboriginal rights has been left to the legislators and to the courts. To date, fishing rights are the most important aboriginal rights to have run the full gamut from being traditional aboriginal practices, to being defined as communally-held aboriginal rights by the courts, to having the Canadian government implement a policy, the Aboriginal Fisheries Strategy (AFS), that recognizes those rights. The discourse that pits liberal individualism against group-differentiated rights has become terminally circular. But I believe that the focus on this conflict is misplaced. By shifting the focus from rights to identity, I will develop a set of theoretical propositions on the place of group-differentiated rights in Canada that maintain the focus on the individual that is central to the liberal theory that underpins Canadian society. I believe that these theoretical propositions could guide aboriginal fisheries policy-making in Canada. In this thesis, I will compare an aboriginal fisheries policy based on these theoretical propositions with the Aboriginal Fisheries Strategy that the federal government implemented in 1992.

Most liberal democratic states, Canada being a prime example, contain very complex and heterogeneous societies. While members of these societies share many commonalities, they also differ in many respects. The complex nature of individual and group identities within liberal democratic societies is inconsistent with the traditional liberal notion that all citizens of those states should be treated in exactly the same way and endowed with exactly the same set of rights and
immunities. In fact, a willingness on the part of the state to entertain the notion of group-differentiated rights for some minority groups is a necessary precondition for a liberal democratic society that wishes to ensure similar degrees of autonomy for all of its citizens.

In order to break free of the circular discussion in which individual rights are pitted against group rights, it is necessary to move the discussion beyond the concept of rights. Avigail Eisenberg writes that the group versus individual rights dichotomy "misrepresents the nature of conflicts between individuals and groups by conflating identity-related claims with other types of claims."¹ She suggests that rather than continue a discourse of "competing and incommensurable values," it would be far more productive to seek "a means of understanding how various devices, including individual and group rights, may be employed in an attempt to preserve distinctive identities."²

In the first chapter of this thesis, I will develop a set of theoretical propositions on group-differentiated rights that are based on a complex understanding of individual and group identities in Canada. In chapter 2, I will propose an aboriginal fisheries policy, based on those theoretical propositions, that could be implemented in British Columbia. Although fisheries fall within the jurisdiction of the federal government, fisheries policies must be targeted at specific areas of the country. The fisheries policy that I will develop in chapter two will be specifically for British Columbia. In chapter three, I will review the major Supreme Court of Canada decisions on aboriginal fishing rights in order to paint a picture of the legal doctrine of aboriginal rights as it currently exists in Canada. I will also determine the legality of the aboriginal fisheries policy that I will propose in chapter two. In the final chapter, I will compare that policy with the federal government’s Aboriginal Fisheries Strategy.

² Ibid. p.20.
Chapter 1: Theoretical Propositions About Group Differentiated Rights in Canada

Unfortunately for liberal theorists, the populations of most modern liberal democratic states are anything but homogeneous. The challenge of reconciling the demands of minority groups with the traditional liberal focus on the universality of individual rights has, therefore, proved to be a bit of a puzzle for many liberals. Some believe that such a reconciliation is impossible within a liberal paradigm. Of course, liberalism is not a single unified theory. There is a wide spectrum of theorists who could all be called liberal, but who most certainly would disagree vehemently with each other on many issues. But there are nonetheless several features that are common to all of the liberal theories. The most prevalent of these is the focus on the rational, autonomous individual as the basic unit of society. Drawing on the work of Will Kymlicka and Charles Taylor, I will devote this first chapter to the development of a set of theoretical propositions about group-differentiated rights in Canada that maintains the traditional liberal focus on the individual.

The Politics of Equal Dignity vs. The Politics of Difference

Liberal societies place a very high value on individual autonomy because the successes and accomplishments of an individual can have spill-over effects that benefit other members of their society, and possibly even the society as a whole. So the liberal society has an interest in seeing each of its members achieve their maximum potential. But the society also has the ability to limit an individual's capacity to reach his or her maximum potential because the society controls the degree to which rights are protected and the environment in which they may be exercised. What results is a circular relationship in which the growth and development of the society is partially dependent on the individual's ability to reach his or her own maximum potential, and the individual's capacity to do so is, at least partially dependent on the society. Liberal societies have traditionally functioned on the assumption that the atmosphere most conducive to individuals reaching their maximum
potential is one characterized by extensive individual rights.

Charles Taylor disputes this assumption. The root of the disagreement lies in how the potential of an individual is defined. For Taylor, the maximum potential of an individual is closely tied to the individual's identity. "Who am I?" he asks. Taylor argues that "what is peculiar to a human subject is the ability to ask and answer questions about what really matters, what is of the highest value, what is truly significant, what is most moving, most beautiful, and so on." He argues that "outside the horizon provided by some master value or some allegiance or some community membership, [he] would be crucially crippled, would become unable to ask and answer these questions effectively, and would thus be unable to function as a fully human subject." Taylor defines identity as "the background against which our tastes and desires and opinions and aspirations make sense." He argues that human beings are naturally dialogical. So while individuals do define their own identities for themselves, the recognition that they receive through the relationships which they form in life also plays an important role in the formation of their identities.

Taylor notes that in hierarchical societies recognition was built into the social structure. An individual's place in society was the basis for the recognition of his or her honor. The collapse of hierarchical societies led individuals to seek a new basis for securing recognition. One such basis for recognition is what Taylor refers to as "equal dignity." The politics of equal dignity has been embraced by many liberal theorists who argue that all individuals in a liberal democracy should be entitled to the same rights and immunities on the basis of having equal dignity. But as Taylor argues, the politics of equal dignity contains within it a fatal flaw. It "negates identity by forcing people into a homogeneous mold that is untrue to them." The disabling effects of this negation of identity are compounded by the fact that generally, "the supposedly neutral set of difference-blind

principles of the politics of equal dignity is in fact a reflection of one hegemonic culture." Taylor argues that the politics of equal dignity is, in fact, not equal at all as "only the minority or suppressed cultures are being forced to take alien form." Far from representing a "fair and difference-blind society," the politics of equal dignity is in fact "not only inhuman (because suppressing identities) but also in a subtle and unconscious way, itself highly discriminatory."

Anne Phillips has also written a scathing indictment of the politics of equal dignity. She argues that the problem with this model of democracy is that it treats us as "abstract individuals or citizens, regardless of our sex, race or class." She suggests that, once forced into this abstract mold, "we are allowed to voice, but are not encouraged to press, our own specific concerns. Fairness is then conceived as a matter of putting oneself in the other person's shoes." This model of fairness places no serious hardship on those in "comfortable positions of power." But "the same injunction can be totally disabling for those less fortunately placed." Phillips argues that "when an oppressed group is called upon to put its own partial needs aside, it is being asked to legitimate its own oppression."

The politics of equal dignity rest on two principles: individual rights and universality. For those who subscribe to the politics of equal dignity, the whole notion of group-differentiated rights is very troublesome. As Taylor argues, "a political society's espousing certain collective goals threatens to run against both of these basic provisions...First, the collective goals may require restrictions on the behavior of individuals that may violate their rights... second... it will always be the case that not all those living as citizens under a certain jurisdiction will belong to the national group thus favored." Taylor argues for an alternative to the politics of equal dignity as a means of securing recognition for individuals. He calls the alternative the politics of difference.

Taylor argues that all humans share a potential “for forming and defining [their] own identity, as an individual and as a culture.” He suggests that in lieu of recognizing an identical set of individual rights and immunities for every citizen, as is central to the politics of equal dignity, liberal societies should adopt the politics of difference which includes a recognition of the unique identity of every individual, “their distinctness from everyone else.” Taylor argues that the politics of difference rejects the assimilation of distinct identities into a dominant or majority identity. This assimilation is inextricably linked to the politics of equal dignity, and in Taylor’s opinion, is “the cardinal sin against the idea of authenticity.”

**Kymlicka’s Liberal Theory of Group-Differentiated Rights**

Will Kymlicka presents one means by which an individual can maximize his or her potential to define and formulate his or her own identity. *Multicultural Citizenship* is Kymlicka’s attempt to dispel the commonly held belief that group-differentiated rights are incompatible with liberalism. He argues that this belief is not reflective of true liberalism, but of a misunderstanding of minority rights that has entered into the popular discourse since the Second World War. Kymlicka proposes an understanding of the basic tenets of liberalism that is not only compatible with some forms of group-differentiated rights, but in fact in many instances requires them.

He argues that one of the fundamental values of liberalism is individual autonomy, specifically individual choice. But because individuals are incapable of autonomous free-choice in a moral vacuum, Kymlicka argues that they require a “context of choice.” There are two important aspects of an individual’s process of choice. The first is the range of options from which he or she makes that choice. Kymlicka argues that “the range of options is determined by our culture.” The second aspect of the individual’s process of choice is the factors which lead the individual to make that particular choice. In Kymlicka’s argument “[t]he process by which options and choices become significant for us are

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linguistic and historical processes." He argues that in order to make self-defining choices, individuals must be allowed "to intelligently decide for [themselves] what is valuable in life," a decision that always involves "selecting what [they] believe to be most valuable from the various options available, selecting from a context of choice which presents [them] with different ways of life."

The argument that choices are made clear to individuals through history and language fits with a concept developed by Taylor that he calls a horizon of significance. A horizon of significance is a "background of intelligibility" against which individual decisions are made and can be understood. Taylor argues that individuals have several horizons of significance which, together, form this background of intelligibility. The more expanded are the horizons of significance of an individual, the greater will be the scope of the individual's process of choice. Likewise, if an individual has a very collapsed set of horizons of significance, then he or she will make decisions that are very limited in scope.

There are many different sources of horizons of significance, possibly the most significant though, is culture. So not only does an individual's culture present him or her with a context of choice, as Kymlicka argues, but it also forms a horizon of significance against which the individual's choices take on meaning. As Betty Bastien writes of Aboriginal people, "one's sense of tribal identity allows for a perception of reality; and a strong sense of tribal identity brings alive, with vitality and inspiration, the expectations, desires, and purpose of life for Indian people."

There are numerous sources of culture in liberal democratic states. For members of minority groups, their own group's culture is one of the most important. One of the most valuable contributions that Multicultural

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*Citizenship* makes to the understanding of the politics of difference is the delineation that Kymlicka draws between “cultural diversity [that] arises from the incorporation of previously self-governing, territorially concentrated cultures into a larger state... [and] cultural diversity [that] arises from individual and familial immigration.” Kymlicka refers to the minority groups in the first case as “national minorities” or “cultures,” and in the second case as “ethnic groups.”

Unfortunately, Kymlicka’s treatment of the two categories is somewhat problematic. Obiora Chinedu Okafor has argued that “very often in his book... the central challenge Kymlicka faces is himself. As a self-confessed liberal, he is constrained at every turn to reconcile his support for minority rights with the often rigid doctrinaire individualism of mainstream liberal minority rights theory.” The problems for Kymlicka’s theory arise both from the fact that, although he denies that his categories of groups are exhaustive, he ignores all other categories of group affiliation, and also from his unstated assumption that all individuals fit into his categories of groups. Kymlicka’s theory can thus be seen as a theory of universal differences, and therein lies the contradiction. He acknowledges difference, but only in a way that can be applied universally. The result is a theory of group rights that is based on a complex understanding of identity, but that is artificially limited by Kymlicka’s need to make his theory more palatable to liberals who subscribe to the politics of equal dignity.

The contradiction in Kymlicka’s theory is obfuscated by his failure to differentiate between nations and cultures. He defines the term culture “as synonymous with a nation or a people.” But although the definitions of nation and culture are hardly generally agreed upon, one should know intuitively that there is a difference between the two. By conflating the terms culture and nation, Kymlicka avoids certain questions with which his theory seems unable to deal. According to him, “the Quebecois form a

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separate culture [or nation] within Canada."¹⁵ Newfoundlanders do not. But if one accepts Kymlicka’s argument that “individuals are members of societal cultures [emphasis added]”¹⁶, then one is left to ask what are Newfoundlanders? According to Kymlicka’s theory, because Newfoundlanders do not fit his definition of an ethnic group, they must belong to a national group. But seeing as they do not form their own nation, they must belong to an entity called the majority cultural group, or as he calls it in a later book, the majority linguistic community.¹⁷

Kymlicka’s theory of group rights is predicated on the existence of a majority culture. One of his principle arguments is that “minority cultures in multination states may need protection from the economic or political decisions of the majority culture.”¹⁸ But if Kymlicka is advocating protecting cultures because they provide “contexts of choice,” integral elements in the identity of individuals, then it would seem unrealistic for him to assume that all those individuals who do not fit neatly into his categories of national groups and ethnic groups can necessarily be lumped together into an entity called the majority nation or linguistic community, and that this entity will form the primary constituent element in those individuals’ conception of their own identity. The fact that Newfoundlanders do not constitute either an ethnic group or a minority nation of their own does not in any way render illegitimate the fact that many of them identify strongly the province of Newfoundland, or justify lumping all Newfoundlanders into an entity called the Canadian majority nation. It should be clear that while Newfoundlanders are without a doubt Canadians, they do also have their own unique culture. The example of Newfoundlanders suggests that group identities in Canada can not be simplified quite to the extent that Kymlicka would like to see them.

**Defining a Nation**

There is an enormous body of literature devoted to the differences

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¹⁶ Ibid. p.125.
between nations and states, and to defining a nation. So while Kymlicka's definition of an ethnic group is sufficient on its own, the body of literature on nations can add much to his definition of a national minority. The definition of a nation must be flexible enough to capture the significance that nations have for the self-identification of their members. As Taylor argues, national membership significantly affects an individual member's ability to act as a fully human subject. But the definition of a nation must also be structured enough so as to make nations discernible from other types of societal groups to an outsider.

David Miller acknowledges the complexity of national identity, writing that "nations are not things that exist in the world independently of the beliefs people have about them, in the way that, say, volcanoes and elephants do." Miller argues that the difference lies in the fact that "once we know the criteria for something's being one, it becomes a fairly simple matter of observation to decide whether a given object is an elephant or a volcano." Identifying nations is an altogether different type of exercise. "It is not merely that the criteria are more complex; it is also that people's own beliefs about their nationhood enter into the definition."

The *Concise Oxford Dictionary* defines a nation as "a community of people of mainly common descent, history, etc., forming a State or inhabiting a territory." But while all of the elements of this definition do reappear often in various works on nations and nationalism, the dictionary definition is too clinical by itself to capture effectively the essence of a nation. It does, however, set some of the basic parameters for such a definition. Nations are communities of people. They are not simply groupings of people. Members of nations share common histories and other commonalities. Nations occupy or are associated with certain territories. They are not widely dispersed. There is, however, a lot more to nations than simply histories, communities, and territories. Nations provide primary poles of identification for their members.

In his famous essay "Qu'est-ce qu'une nation?" , Ernest Renan attempts to develop a conceptualization of a nation that captures the

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psychological and emotional bonds that nations can engender in their members. Renan argues that neither race, nor language, nor religion, nor common interests, nor even geography can provide a sufficient understanding of a nation.

L'homme est tout dans la formation de cette chose sacrée qu'on appelle un peuple. Rien de matériel n'y suffit. Une nation est un principe spirituel, resultant des complications profondes de l'histoire, une famille spirituelle, non un groupe déterminé par la configuration du sol...
Une nation est une ame... L'homme n'est esclave ni de sa race, ni de sa langue, ni de sa religion, ni du cours des fleuves, ni de la direction des chaînes de montagnes. Une grande aggregation d'hommes, saine d'esprit et chaude de cœur, crée une conscience morale qui s'appelle une nation. Tant que cette conscience morale prouve sa force par les sacrifices qu'exige l'abdication de l'individu au profit d'une communauté, elle est légitime, elle a le droit d'exister.²¹

(Man is everything in the formation of this sacred thing that we call a people. No material objects are enough. A nation is a spiritual principle, resulting from profound historical complications, a spiritual family, not a group determined by the geography of the land... A nation is a spirit... Man is not a slave to his race, his language, his religion, the course of the rivers, or the placement of the mountain ranges. A large aggregation of men, sound of mind and warm of heart, create a moral conscience known as a nation. When this moral conscience proves its strength by the sacrifices that individuals make for the benefit of the community, it is legitimate. It has the right to exist.)²²

Renan’s definition of a nation as a soul and a spiritual principle is simply too ethereal to function as the sole definition of the nation. What can be

²² Translation by author.
gleaned from his essay though, is a sense of the emotional ties that bind members of nations to one another.

A far more concrete conception of the nation than was presented by Renan is posited by Anthony D. Smith, who argues for a definition of the nation that has seven elements:

1. Cultural differentiate (i.e., the "similarity-dissimilarity" pattern, members are alike in the respects in which they differ from non-members)
2. Territorial contiguity with free mobility throughout
3. A relatively large scale (and population)
4. External political relations of conflict and alliance with similar groups
5. Considerable group sentiment and loyalty
6. Direct membership with equal citizenship rights
7. Vertical economic integration around a common system of labour.

While Smith does acknowledge the more emotionally-based characteristics of the nation, such as the issue of group loyalty, he is much more concerned with criteria that would allow for the empirical classification of nations. It should also be clear that Smith is not writing specifically about minority national groups. In Smith's theory, there is very little difference between a nation and a nation-state. In fact, according to him, all that is required for a nation to become a nation-state is "de facto territorial sovereignty." Smith's category of "ethnie," which are groups that exhibit all of the elements listed above except numbers 6 and 7, is perhaps more appropriate for describing minority nations. It is not at all clear that a group must have equal citizenship rights and a common system of labour in order to qualify as a nation. In fact, insisting on such requirements would virtually preclude all groups other than nation-states from qualifying as nations.

David Miller's definition of a nation is very similar to Kymlicka's. Kymlicka defines a nation as "an intergenerational community, more or less institutionally complete, occupying a given territory or homeland,

24 Ibid. p.189.
sharing a distinct language and history.”

He also writes that a national culture “provides its members with meaningful ways of life across the full range of human activities, including social, educational, recreational, and economic life, encompassing both public and private spheres.”

For Miller, a nation is “a community (1) constituted by shared belief and mutual commitment, (2) extended in history, (3) active in character, (4) connected to a particular territory, and (5) marked off from other communities by its distinct public culture.”

On a continuum of definitions of the nation which encompasses on the one end, purely psychologically and emotionally-based definitions, and on the other end, strictly empirically testable definitions, Kymlicka and Miller’s definitions of the nation would fall in between those of Renan and Smith.

A final definition of the nation is supplied by Avishai Margalit and Joseph Raz, who suggest a six-part definition:

1. The group has a common character and a common culture that encompasses many, varied and important aspects of life, a culture that defines or marks a variety of forms or styles of life, types of activities, occupations pursuits, and relationships...

2. The correlative of the first feature is that people growing up among members of the group will acquire the group culture, will be marked by its character... They need not be indelibly marked. People may migrate to other environments, shed their previous culture, and acquire a new one. It is a painful and slow process, success in which is rarely complete...

3. Membership in the group is, in part, a matter of mutual recognition. Typically, one belongs to such groups if, among other conditions, one is recognized by other members of the group as belonging to it...

4. ...These are groups, members of which are aware of their membership and typically regard it as an important clue in understanding who they are, in interpreting their actions and

25 Kymlicka, Multicultural Citizenship, p.18.
26 Ibid. p.76.
27 Miller, On Nationality. p.27.
reactions, in understanding their tastes and their manner.

5. Membership is a matter of belonging, not of achievement...

6. ... They are anonymous groups where mutual recognition is secured by the possession of general characteristics... 

Each of the six definitions of the nation, those of Renan, Smith, Kymlicka, Miller, and Margalit and Raz, identifies important aspects of the nation. But none of them sufficiently meets both criteria that I established for an adequate definition of a nation, namely, capturing the significance that nations have for the self-definition of their members, while at the same time making nations discernible from other societal groups to an outsider. My definition of the nation incorporates elements from each of the six definitions. It has three components: elements of the nation that contribute to the individual identity of its members, elements of the nation that allow for external recognition, and characteristics of membership in nations.

Nations provide their members with a context of choice, or in the words of Taylor, horizons of significance, that allow those individuals to make self-defining choices; however, the question of who defines the nation is also very significant. The nation contributes to the self-definition of its members, but they in turn contribute to the definition of the nation. Walker Connor argues that “an ethnic group may be readily discerned by an anthropologist or other outside observer, but until the members are themselves aware of the group’s uniqueness, it is merely an ethnic group and not a nation.” The important implication of this observation is that while “an ethnic group may, therefore, be other-defined, the nation must be self-defined.”

Individuals can contribute to the self-definition of their nation in both the public and the private sphere. As David Miller’s asserts, nations


are active in character. As Ernest Renan writes, "l'existence d'une nation est... un plebiscite de tous les jours" (A nation is an every day plebiscite).\textsuperscript{30} What is meant here is that members of a nation actively participate in social, political, economic, leisure, or other types of activities, public in nature, that contribute to the distinctive character of their nation.

They also participate in the self-definition of their nation in the private sphere. One feature of nations that seems to have been overlooked by many theorists is the role that families play, both as a source of horizons of significance for the members of the nation, and as a forum in which the individual can contribute to the development of the nation's distinctive identity. It is through family relationships that many important features of the nation, such as its language, history, and values can be passed on to successive generations. Inevitably, these features of the nation will evolve as those passing them on give their own individual interpretations of them. The family can, therefore, be thought of as an important crucible for the development of the nation's identity.

Family ties are also an important part of the second component of my definition of the nation: the elements of the nation that allow non-members to differentiate the nation from other societal groups. Nations are intergenerational groups. They are extended in history, and concentrated in specific territories. The fact that nations are concentrated in specific territories contributes to their developing distinctive cultures and languages, important elements of the nation in terms of its external recognition. A national culture must be pervasive. It must affect most aspects of the lives of the national members. National cultures must also serve the double role of marking members of the nation off from non-members as well as providing a source of the horizons of significance discussed earlier. It is thus key, that a national culture be such that those raised in the nation will acquire it.

But nations are not face-to-face communities. While they can be very community-based, a community is not a nation. National members do

\textsuperscript{30} Renan, "Qu'est-ce qu'une nation?" p.41.

\textsuperscript{31} Translation by author.
not all know each other, but they should be able to recognize other members of their nation by the cultural, linguistic, and other such national traits that they share. This restriction on the size of the nation suggests that, as the concept is defined here, very few societal groups will qualify as nations. A nation must be large enough that it is not a face-to-face community, but small enough that it can develop a shared language, culture, history, territory, etc.

The final component of the definition of the nation that I am proposing is the criteria for membership in the national group. National members are either born or adopted into the nation. In the case of adoptions, an individual's desire to join a nation is not sufficient for him or her to gain membership therein. National membership is a matter of mutual recognition. Feeling a part of a nation is only half of the equation of membership. The other members of the nation must recognize an individual's membership in the group as well. It is also important to point out, as Margalit and Raz do, that membership is not a matter of achievement. Membership in the nation is an issue of belonging.

So to recapitulate my definition, a nation is a self-defined societal group, active in character, which provides its members with a context of choice and horizons of significance without which, its members would be seriously limited in their ability to act as fully human subjects. A nation is an intergenerational community, extended in history, associated with a particular territory, exhibiting a distinctive language and a distinctive culture that affects most of the aspects of the national members lives. This national culture is acquired by those who are raised in the nation. Membership in a nation is not a matter of achievement, but a matter of mutual recognition.

Deep Diversity

Once the terms nation and culture have been untangled, it becomes clear that many Canadian citizens do not belong to a national or ethnic group. So Kymlicka's delineation between the two is very important. But for it to be useful, one must allow for the possibility that not all citizens fit neatly into one of the two categories of groups. English-speaking, non-
aboriginal Canadians clearly have their own cultures. And one could
definitely make the case for there being a majority culture, not nation,
that they dominate. But according to the definition that I have proposed,
there is no English-speaking, non-aboriginal Canadian nation. Their
dominant position in the majority Canadian culture derives from the fact
that English-speaking, non-aboriginal Canadians are the majority group
in, what Samuel LaSelva calls, the moral community in Canada. This
moral community includes all of those who Kymlicka would compress
under the umbrella of his majority linguistic community. But it also
includes Canada's minority national and ethnic groups as well.

According to LaSelva, the foundations of Canadian federalism
"provide an understanding of how Canadians, who have different ways of
life, can also live a common life together." At one level, aboriginal and
non-aboriginal Canadians are fundamentally different from each other.
Aboriginal peoples have histories, languages, and cultures that non-
aboriginal Canadians do not share. Aboriginal peoples are nations. But
aboriginal and non-aboriginal Canadians do live a life in common with one
another as members of the the moral community that exists in Canada.
In Canada, our moral community is one of the major crucibles for the
development of a Canadian culture and a Canadian identity that set
Canadians apart from citizens of other countries. But Canada is certainly
not a single nation. It would be extremely difficult to argue that British
Columbians, Quebecers, and citizens of Nunavut are all members of the
same nation given that the three groups have different histories, speak
different languages, and have different cultures. But at the same time, the
three groups do share commonalities by virtue of belonging to this moral
community.

An individual who is at the same time a citizen of a liberal
democratic state and a member of a minority national group within that
state will identify differently with the state than will another citizen of the

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33 Ibid. p.171.
same state. The national member might identify primarily with his or her national group, but at the same time, feel a strong attachment to the moral community of the state. The identity of a citizen who did not belong to either an ethnic or a minority national group would be more directly linked with his or her citizenship in the state. The essence of the argument here is that different people belong to their countries, their communities, their ethnic groups, and their nations in different ways. Charles Taylor refers to this phenomenon as deep diversity.

Writing in the context of Canada, Taylor argues that if we are to have an inclusive society, we must “allow for second-level or deep diversity, in which a plurality of ways of belonging would also be acknowledged and accepted.” 34 But many Canadians have difficulty accepting other ways of being Canadian, paradoxically because they are unsure of their own identity as Canadians. 35 This insecurity about their identity has led many non-aboriginal Canadians to fabricate a group identity for themselves, arguing either for the existence of a majority, English-speaking Canadian nation, or for the existence of a single Canadian nationality. But both of these positions deny the complexities of Canadian group and individual identities. Non-aboriginal, English-speaking Canadians do have a group identity by virtue of their membership in a Canadian moral community. But this group identity is not homogeneous. For members of minority nations, it is only through being a member of their nation that they are Canadian. The complex nature of minority national identities can be very difficult to understand for Canadians whose membership in the moral community of Canada does not pass through another identity first. And often, people fear what they do not understand. But the only way to put those fears to rest is for non-aboriginal, English-speaking Canadians to make a genuine attempt to understand the perspectives that members of minority nations have on their identity as Canadians. This understanding must include a recognition of deep diversity.

Group-Differentiated Rights

In order to allow for deep diversity, a liberal democratic state must abandon the politics of equal dignity, the notion that all citizens of liberal democratic states should be endowed with identical sets of individual rights and immunities. It must be open to recognizing group-differentiated rights for some minority groups. The starting point for the recognition of such rights is Kymlicka’s distinction between ethnic and national groups, bearing in mind that his requirement that every citizen belong to one of the two types of groups has been dropped. Kymlicka argues that there are three different types of group-differentiated rights: self-government rights, polyethnic rights, and special representation rights. Polyethnic rights and special representation rights are appropriate for ethnic groups, whereas self-government rights are only appropriate for national groups.

Special representation and polyethnic rights, while often highly contentious, are nonetheless relatively straightforward concepts. Special representation rights are “a response to some systematic disadvantage or barrier in the political process which makes it impossible for the group’s views or interests to be effectively represented.” An example of a special representation right could be a guarantee to a specific ethnic group of a certain number of seats in a provincial legislature. Polyethnic rights are “intended to help ethnic groups and religious minorities express their particularity and pride without hampering their success in the economic and political institutions of the dominant society.” An example of a polyethnic right would be the legal recognition of a particular group’s religious holiday.

Self-government rights are far more complex than either of the first two types of group-differentiated rights. Self-government rights entail “some form of political autonomy or territorial jurisdiction, so as to ensure the full and free development of [the nation] and the best interest of [its] people.” Using self-government as synonymous with self-determination, Margalit and Raz write that “the value of national self-

36 Kymlicka, Multicultural Citizenship, p.32.
37 Ibid. p.31.
38 Ibid. p.27.
determination is the value of entrusting the general political power over a group and its members to the group." It is the value of allowing groups to determine "the character of their social and economic environment, their fortunes, the course of their development, and the fortunes of their members by their own actions."³⁹ David Miller agrees. He argues that "where a nation is autonomous, it is able to implement a scheme of social justice; it can protect and foster its own culture; and its members are to a greater or lesser extent able collectively to determine its common destiny."⁴⁰ Margalit and Raz equate the term self-determination with self-government. Miller uses the term autonomous to mean self-governing. Clearly the definition of national self-government is nearly as complex as that of the definition of the nation itself. But I will simply posit that self-government is not a single group-differentiated right. Varying degrees of self-government are possible.

If one is to remain within a liberal paradigm, group-differentiated rights, be they powers of self-government, polyethnic rights, or special representation rights can only be justified in terms of the importance that the minority groups in question have for the the self-conception of their members, and for the ability of those member to act as fully human subjects. The fact that can not be ignored is that members of minority groups within liberal democratic states are not only members of their respective national or ethnic groups, they are citizens of their state as well. Their minority group membership provides them with one context of choice, but their membership in the state's moral community provides them with another. If one accepts the logic of deep diversity, then it would be highly problematic to argue that all ethnic groups should be entitled to the same polyethnic and special representation rights, and that all minority national groups should be entitled to the same powers of self-government because to do so would be to ignore the differences in group membership between groups, and to potentially trivialize the context of choice provided to the members of the minority groups by their

³⁹ Margalit and Raz, "National Self-Determination." p.80.
⁴⁰ Miller, On Nationality. p.98.
Rights are only meaningful insofar as others agree to recognize those rights. If an individual asserts a right which nobody else is willing to recognize, then that right is relatively meaningless. Most discussions of rights include questioning the source of rights. Such discussions tend to end with participants defending iron-clad positions in which rights are either bestowed by God, or in which people have rights by virtue of being human. So rather than focusing on which rights minority groups have, it is a much more useful approach to discuss the rights that minority groups should have. The logic of deep diversity suggests that group-differentiated rights become necessary when the individuals in an ethnic or national group feel that their state identity and their group identity are in competition with one another, that an expression of the one can only be achieved to the detriment of the other. The objective of a liberal in recognizing group-differentiated rights should be to protect the vitality of the minority group, while at the same time protecting the access of the group's members to the context of choice provided them by Canada's moral community.

Theoretical Propositions For Canada

It is time that Canadians move beyond debating the conflict between liberal individualism and minority group rights. The theoretical propositions that I have developed in this chapter suggest that the recognition of some group-differentiated rights is necessary to ensure that all Canadian citizens enjoy similar levels of autonomy, a cornerstone of liberal theory. According to the definition that I have proposed, the vast majority of aboriginal peoples in Canada are nations. If we as non-aboriginal Canadians, value the full and free participation of aboriginal peoples in Canadian society, and as liberals we must, then it is imperative that we acknowledge the complex nature of their membership in Canada's moral community. This acknowledgement, and the recognition of group-differentiated rights that would flow from it, does not require a paradigm shift in the theoretical orientation of Canadians. The theoretical propositions that I have developed here are liberal propositions. So as LaSelva has argued, the failure of non-aboriginal Canadians to recognize
rights of self-determination for aboriginal peoples in Canada "would be strong evidence of the inability of Canadians to understand the principles of Confederation and the foundations" of Canada.11

Beginning with the basic liberal values of universality and the primacy of the autonomous, free-choosing individual, I have argued that all people share a universal potential to define and formulate their own identity, and that only through this process can they reach their full potential as autonomous, free-choosing individuals. In defining his or her own identity, the individual is required to make choices, including choosing a conception of the good life. Because individuals can not make these choices in a moral vacuum, they require a context of choice, which is provided to them through, among other things, culture. An individual who is denied access to his or her context of choice is incapable of being the autonomous, free-choosing individual that is the basic unit of the liberal democratic state. Given the value that liberals place on universality, such a denial of the conditions necessary for the individual's free and full participation in his or her society could only be seen as a severe form of oppression. It is, therefore, in the interest of the liberal society to protect the cultures of its citizens. But seeing as different individuals belong to different types of societal groups and different cultures, and that different individuals attribute different levels of importance to their citizenship in the larger state when defining their own identity, the liberal democratic society should adopt the principle of deep diversity. The fundamental right of both national and ethnic groups in liberal democratic states should then be understood as the right to recognition. These groups have the right to be recognized for the value that they bring to their individual members and to the society as a whole. This is not to say that all such groups have equal value, that they all contribute equally to the horizons of significance of their members, or that they are all deserving of the same group-differentiated rights. But if the state does not even recognize the existence of the group, then the rest of the liberal society will never be able to comprehend the importance

of the group to the identity of its members.

In the next chapter, I will apply the theoretical propositions that I have developed here to aboriginal fishing rights. I will propose an aboriginal fisheries policy for British Columbia that would have as its objective, to protect the contribution that fisheries make to aboriginal cultures and societies, and by extension, to the contexts of choice that are necessary for the full and free participation of aboriginal peoples in Canadian society.
Chapter 2: An Alternative Aboriginal Fisheries Policy

The theoretical propositions that I developed in chapter one could form the basis for a guide to aboriginal fisheries policy-making in British Columbia. A policy based on those theoretical propositions would focus on the recognition of aboriginal rights to fish, and would have as its objective, to protect the contributions that fisheries make to aboriginal cultures, and by extension, to the contexts of choice of aboriginal peoples in the province. The achievement of this objective would require that the policy incorporate the views of the aboriginal peoples affected on the importance of fisheries to their respective societies and cultures. So central to this policy is a significant transfer of management authority to aboriginal peoples so that they can ensure that fisheries continue to play the central role that they have traditionally played in aboriginal cultures.

In Canada, the policies regulating fisheries are formulated by the Department of Fisheries and Oceans (DFO). In British Columbia, the provincial government can influence decisions regarding the management of the Pacific fisheries, but it has no jurisdiction in the area. Fisheries are differentiated from one another by species, by their location, and by the gear used. Traditionally, aboriginal peoples in British Columbia have fished for salmon more than for any other species. Aboriginal salmon fisheries are terminal fisheries, that is to say, they are conducted in the coastal rivers, bays, and inland waters when the salmon are heading upstream to spawn. The type of gear used in aboriginal salmon fisheries varies from place to place.

Definitions would be very important in a policy guided by the theoretical propositions that I outlined in the first chapter. I would argue that, according to the definition that I proposed in chapter one, the vast majority of aboriginal peoples in British Columbia are nations. These are self-defined societal groups, active in character, which provide their members with a context of choice and horizons of significance without which, the members of those nations would be seriously limited in their ability to act as fully human subjects. National groups are
intergenerational communities, extended in history, associated with a particular territory, exhibiting distinctive languages and distinctive cultures that affect most of the aspects of their members' lives. The national culture is acquired by those who are raised in the nation. Membership in a nation is not a matter of achievement, but a matter of mutual recognition. One of the cornerstones of this definition of a "nation" is that nations must be self-defined. The national identity must be defined by those for whom it represents a central pillar of their individual identity. So an aboriginal fisheries policy that was based on the theoretical propositions that I developed in chapter one would have to define aboriginal peoples as they define themselves.

Because aboriginal peoples are separate nations, the aboriginal fisheries policy would have to be sensitive to the fact that fisheries might have different importances to different nations. There are, however, several generalizations that can be made about the importance of fisheries to aboriginal peoples in British Columbia. Aboriginal peoples have always seen salmon as a "lifeblood." Salmon were seen as currency, and as a tie to the Earth itself. Without the salmon, aboriginal societies would be fundamentally changed.¹ The authors of the Royal Commission on Aboriginal Peoples write that the relationship between aboriginal peoples and their lands and resources is "both spiritual and material, not only one of livelihood, but of community and indeed of the continuity of their cultures and societies."² In order to recognize the importance that fisheries have for aboriginal peoples, and at the same time, be sensitive to differences in that importance between nations, the aboriginal fisheries policy would have to include the flexibility to allow individualized fisheries plans for each aboriginal nation.

This flexibility in the policy would allow for a recognition of differences amongst the traditional fisheries management techniques and strategies of different aboriginal peoples. But as with the importance of fisheries to aboriginal peoples, it is possible to make some

generalizations about traditional aboriginal fisheries management. Traditionally amongst aboriginal peoples in British Columbia, "reciprocal use and other ancient rites and customs governed access to fish, and people made no distinction between harvesting for subsistence and harvesting for exchange or other purposes." This approach to fisheries management is inconsistent with DFO’s approach, in which the distinction between recreational, commercial, and subsistence fisheries plays a central part. But these conflicting management strategies are not necessarily irreconcilable. There are precedents for aboriginal fisheries policies in which the allocations for subsistence and commercial fisheries are undifferentiated. In Washington State, tribal fisheries are allocated 50% of the Total Allowable Catch (TAC). The circumstances that led to the 50% allocation are specific to Washington State, but the State’s aboriginal fisheries policies could serve as a model for British Columbia.

In 1974, the 20 treaty Indian tribes in Washington State affected by Judge Boldt’s decision in United States v. Washington to allocate 50% of the TAC to Tribal fisheries formed the Northwest Indian Fisheries Commission (NWIFC) as a body for making fisheries policy, and also as a mouthpiece to speak on their behalf with regards to fisheries management. Together, the NWIFC and the Washington Department of Fish and Wildlife (WDFW) established a series of agreements on fisheries management. Under the agreements, each member tribe is responsible for regulating and managing the fisheries within the territory determined to be its usual and accustomed fishing ground. Those fisheries include the six species of salmon (chum, sockeye, pink, coho, chinook, and steelhead), as well as halibut, herring, and shellfish. Each tribe has a

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4 The tribal fisheries in Washington State were developed in response to Judge Boldt’s decision in the 1974 court case United States v. Washington. At issue in the case was the interpretation of an 1855 treaty signed between the United States Government and several of the tribal groups in the Pacific Northwest. Judge Boldt interpreted the section of the treaty reserving to the tribal groups in question a right of taking fish, at all usual and accustomed grounds... in common with all citizens of the Territory to mean that tribal fishermen were guaranteed a 50% share of the annual allowable catch of anadromous fish.

fisheries manager who is in charge of its fisheries management staff, and who has jurisdiction over harvest management, habitat protection, enhancement, and enforcement. The WDFW manages all of the fisheries in the State that are not managed by the NWIFC members. The treaty tribes also sit on the Pacific Fishery Management Council (PFMC), which manages the fisheries between the three mile near coastal waters and the two hundred mile limit of American jurisdiction. The near coastal fisheries management strategies adopted by the WDFW and by the NWIFC members must be consistent with those adopted by the PFMC.

As a part of an aboriginal fisheries policy guided by the theoretical propositions that I developed in chapter one, DFO could implement a fisheries management regime in British Columbia similar to the Washington State model. In fact, DFO has already begun to transfer some fisheries management authority to aboriginal peoples. The Nisga’a Final Agreement provides for an annual allocation of Nass River fish to the Nisga’a. Under the Agreement, the Nisga’a Lisims government will have the authority to manage the fisheries within the parameters established in the treaty and in a separate Harvest Agreement that will be negotiated between DFO and the Nisga’a. Under the Agreement, Nisga’a fishers will be allowed to sell their catch should they so choose.

But fisheries can not be managed through a system of unconnected, local management regimes. Such a system would be unworkable, and unable to protect the long-term sustainability of the resource. Fisheries must be managed at the provincial level. So in order for DFO to break with the “long-standing ethos in resource management that perpetuates distinctions between [aboriginal] users and [non-aboriginal] managers,” the Department would have to include aboriginal peoples in fisheries management at the provincial level.

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6 In the United States, fisheries management is divided between the federal and state governments. The state governments have jurisdiction over fisheries within the three mile near coastal waters, and the federal government manages those that take place between three and two hundred miles off of the coast.

7 Comprehensive Tribal Fisheries Management on the internet at http://www.nwifc.wa.gov/nwifc.htm

8 Nisga’a Final Agreement: Canada, British Columbia, Nisga’a Nation. Chapter 8.

9 “Restructuring the Relationship (Part 2).” p.651.
Increased aboriginal management of the fisheries at both the local and the provincial levels is necessary if aboriginal fishing rights are to be the self-government rights that I discussed in chapter one. The authors of the Royal Commission on Aboriginal Peoples write that many Aboriginal people emphasized the integrated nature of the spiritual, familial, economic and political spheres. While some Canadians tend to see government as remote, divorced from the people and everyday life, Aboriginal people generally view government in a more holistic way, as inseparable from the totality of communal practices that make up a way of life.10

Dianne Newell argues that for aboriginal nations, fisheries management is linked to issues such as “economic self-sufficiency, pride in heritage, and social goals.”11 The political, cultural, spiritual, familial, and economic lives of aboriginal peoples are at the heart of the contexts of choice that aboriginal cultures provide to their members. If, as is argued in the Royal Commission on Aboriginal Peoples, “the recognition, accommodation and implementation of Aboriginal rights to and jurisdiction over lands and resources is absolutely critical to their goals of self-sufficiency and self-reliance,”12 then an aboriginal fisheries policy guided by the theoretical propositions that I developed in chapter one would have to grant substantial management powers to the aboriginal peoples in the province.

The limitations of my theoretical propositions as a guide to policymaking stem from the fact that a context of choice is an extremely abstract concept. There is nothing complicated about the argument that an individual can only make free and informed choices when he or she has a range of options to choose from and a means of differentiating between them. But identifying the elements of the context of choice that provide the individual with those options and the means to differentiate between them is a very difficult endeavor. In fact, it would be virtually impossible

12 "Restructuring the Relationship (Part 2)." p.447.
to itemize every element that contributed to an individual's context of choice. But for the theoretical propositions to be useful in guiding policy-making, it is not necessary to list every element in an individual's context of choice. Because the objective of a policy guided by those propositions must be the protection of an individual's context of choice, it is only necessary to identify elements that are under threat.

Fishing rights are a case in point. There can be no doubting the fact that fisheries play a very central role in the economic, political, spiritual, and cultural lives of aboriginal peoples in British Columbia. Clearly, fisheries are integral to the contexts of choice of aboriginal peoples in the province. So even without being able to itemize the elements in their contexts of choice, it is legitimate to claim that the denial to aboriginal peoples of the right to fish in their preferred traditional ways would represent a clear threat to the context of choice that aboriginal cultures provide to their members.

Because contexts of choice are such abstract concepts, the success of any policy guided by the theoretical propositions that I developed in chapter one would be very difficult to judge. The effects of either a weakening or a strengthening of a context of choice will be felt over several generations, and may take different forms from generation to generation. For example, the aboriginal children who attended the British Columbia residential schools were separated from their families, punished for speaking their own languages, and forcibly educated in an education system that was foreign to them. Essentially, the residential school system was designed to deny to aboriginal children access to their context of choice. But the effects of the residential schools have been felt by members of the next generations of aboriginal peoples as well, even though they never attended the schools. Many have never even been taught to speak their own languages. Likewise, the effects of an aboriginal fisheries policy guided by the theoretical propositions on group-differentiated rights would be felt over several generations and would be impossible to measure empirically.

In order to measure the success of a policy guided by the theoretical
propositions that I developed in chapter one, it would be necessary to measure the cultural health of aboriginal nations. Most government policies are reviewed periodically in order that government officials determine whether or not the policies are meeting established targets. But it would be very difficult to set cultural health targets that could be measured accurately. While often used to illustrate some of the problems in aboriginal communities, indicators such as health statistics, employment rates, education rates, and suicide rates do not give the full measure of a culture's health. According to my theoretical propositions, the only true measure of a minority nation's cultural health would be the degree to which the national members' context of choice allowed them to participate fully and freely in Canadian society. As with the elements of a context of choice, it would be very difficult to itemize the requirements for full and free participation. But a government policy need not have short-term performance targets in order to be worthwhile. In order for the federal government to be able to act in the best interests of its citizenry, the government must be able to develop policies with long-term goals. And if these goals are worthwhile, and the policy demonstrates a clear strategy for achieving them, the absence of short-term performance targets does not necessarily point to a flaw in the policy.

The aboriginal fisheries policy that I am proposing would establish a fisheries management regime that would allow for aboriginal peoples to assume significant management authority over their local fisheries, while at the same time maintaining a province wide management strategy. The most effective way to accomplish these two objectives would be to adopt a similar management model to that developed in Washington State. The authority to manage local fisheries would be transferred to aboriginal peoples, as they defined themselves, so as to ensure that the particular ways in which fisheries contributed to their society were maintained. The aboriginal nation would be allocated a portion of the provincial Total Allowable Catch (TAC) that it could manage as it saw fit. The allocations for subsistence, recreational, and commercial fisheries would not be separated, but the nation would have the authority to divide its allocation
amongst the various players in the fisheries.

The allocations to aboriginal peoples would be determined by a fisheries management regime at the provincial level that would coordinate the fisheries and assure their long term sustainability. In order to avoid the aboriginal user, non-aboriginal manager model that the authors of the Royal Commission on Aboriginal Peoples alluded to, aboriginal peoples would have to be included in fisheries management at the provincial level as well. One possibility would be for aboriginal peoples to form a pan-British Columbian fisheries authority, similar to the NWIFC in Washington State, and for that body to be represented in fisheries management decisions at the provincial level. But that is only one possibility. Under an aboriginal fisheries policy guided by the theoretical propositions that I developed in chapter one, the decision of how to organize themselves would be left up to the aboriginal peoples in the province.

I believe that this aboriginal fisheries policy, based on the theoretical propositions that I developed in chapter one, could contribute in a meaningful way to aboriginal peoples in British Columbia becoming full and free participants in Canadian society. By allowing individual aboriginal nations significant fisheries management authority within a provincial management regime in which they would also participate, the policy would recognize the complex identities of aboriginal peoples. It would allow them significant autonomy in an area of jurisdiction that is central to their cultures and societies, while at the same time recognizing that aboriginal peoples are Canadian and must function within the framework of Canada. The policy would also implement a fisheries management regime that could coordinate the fisheries in the province and ensure their long-term sustainability. The implementation of this policy would require that DFO modify its approach to fisheries management, but not in any way that has not been tried elsewhere or that would threaten the effective management of fisheries in British Columbia.

In the next chapter, I will shift the focus to the Supreme Court of Canada decisions on aboriginal fishing rights. These decisions represent
the theoretical framework within which DFO developed the Aboriginal Fisheries Strategy. My objective is to determine the legality of the aboriginal fisheries policy that I have proposed in this chapter.
Chapter 3: Major Supreme Court of Canada Decisions on Aboriginal Fishing Rights

Since the enactment of the Constitution Act 1982, aboriginal and treaty rights have been constitutionally protected in Canada. But the task of defining aboriginal rights has been left mostly to the courts. Much of the definition of aboriginal rights has been developed in the context of aboriginal fishing rights. In 1990, the Supreme Court began the process of interpreting the constitutional protection of aboriginal rights in the case of R. v. Sparrow. In 1996, the Court released three more aboriginal fishing decisions: Van der Peet, Gladstone, and Smokehouse. These four decisions, along with the Court's 1998 Delgamuukw decision, constitute the primary elements in the judicial doctrine of aboriginal rights that exists in Canada today. But due to several inconsistencies in the decisions, many questions remain as to the extent and nature of the protected aboriginal rights. In this chapter, I will discuss the four major aboriginal fishing decisions in order to determine the legality of the aboriginal fisheries policy that I proposed in chapter two.

The Constitutional Protection of Aboriginal Rights

The Constitution Act 1982 has had far reaching consequences for aboriginal peoples in Canada. Section 35 of the Act reads as follows:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indians, Inuit and Metis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be

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so acquired.

(4) Notwithstanding any other provisions of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.  

But while treaty rights are easily defined as the rights that are enumerated in treaties or land claims agreements signed between an aboriginal people and the Crown, aboriginal rights are far more difficult to define.

The major aboriginal rights cases have involved an aboriginal person or group being arrested for engaging in an activity that violated statute law, and claiming to be in the exercise of an aboriginal right. Typically, the aboriginal person or group has claimed that because they were exercising a Section 35 right, the law that they are accused of having violated is of no force or effect by virtue of s. 52(1) of the Constitution Act 1982 which reads as follows:

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

(2) The constitution of Canada includes

(a) the Canada Act 1982, including this Act;

(b) the Acts and orders referred to in the schedule; and

(c) any amendment to any Act or order referred to in paragraph (a) or (b).  

R. v. Sparrow  

The first Section 35 defense was presented in R v. Sparrow. In 1984,
Ronald Sparrow, a member of the Musqueam First Nation, was charged under the *Fisheries Act* for fishing with a longer drift net than was allowed by his band's food fishing license. It is important to note that the section of the lower Fraser River on which Mr. Sparrow was fishing was "not part of a reserve, nor did any treaty apply." In his defense, Sparrow argued that he was exercising an existing aboriginal right to fish that was protected by section 35 of the *Constitution Act 1982*. Because it was constitutionally protected, Sparrow argued that his right was immune to regulation by the Department of Fisheries and Oceans (DFO). Sparrow was convicted at trial, and his case was appealed all the way to the Supreme Court of Canada.

In a unanimous decision delivered by Chief Justice Dickson and Justice La Forest, the Supreme Court dismissed both Mr. Sparrow's appeal and the Crown's cross-appeal, and sent the case back for a new trial. But in its decision, the Court established a set of guidelines for the interpretation of section 35 rights. Of particular note are the Court's interpretation of the phrases "existing aboriginal and treaty rights" and "recognized and affirmed," the test of extinguishment adopted by the Justices for aboriginal rights, an order of priority of access to scarce resources where a section 35 aboriginal or treaty right is in effect, and a requirement that the aboriginal perspective be incorporated into any future judgments on aboriginal rights.

According to the Court, aboriginal rights are *sui generis* in nature, meaning that they are unique, and "need not conform to traditional common law rights." Aboriginal rights arise from the fact that, since long before the arrival of Europeans in what is now Canada, aboriginal peoples have lived in organized societies, membership in which has entitled them to certain rights. Although the *Sparrow* decision does not include an in depth analysis of the definition of aboriginal rights, the Justices do hint at a definition. Dickson and La Forest write that "the evidence reveals

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that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day."  The requirement that an aboriginal right be an integral practice to an aboriginal culture, and that it have continuity with a practice that pre-dates the arrival of European settlers, later became the Court's standard test for aboriginal rights.

The Court's discussion of the word "existing" in the phrase "existing aboriginal and treaty rights" is one of the most significant aspects of the Sparrow decision. In order to be protected by section 35, a right can not have been extinguished prior to 1982. The Court ruled that "extinguished rights are not revived by the Constitution act 1982," a relatively obvious conclusion given the wording of section 35. The Court also ruled that the aboriginal and treaty rights protected by section 35 are not limited to those that were defined and regulated in 1982. Dickson and La Forest write that "the notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations." The Court concludes that the word "existing" should be interpreted to mean "unextinguished rather than exercisable at a certain time in history." Dickson and La Forest write that "the phrase existing aboriginal rights must be interpreted flexibly so as to permit their evolution over time... those rights are affirmed in a contemporary form rather than in their primeval simplicity and vigour," and that "an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate frozen rights must be rejected."

On the question of extinguishment, the Court ruled that laws of general application are not sufficient to extinguish aboriginal rights. The Crown had argued that any exercise of an aboriginal right that conflicted with a law of general application, in this case the Fisheries Act, was

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11 Ibid. p.219.

12 Ibid. p.219.

13 Ibid. p.219.

14 Ibid. p.220.
automatically extinguished. The Court rejected this argument and ruled that “the Sovereign’s intention must be clear and plain if it is to extinguish an aboriginal right.” The United States Supreme Court has adopted a similar test of extinguishment. In Dion, Justice Marshall writes that “what is essential is that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty.”

The next section of Sparrow focuses on Dickson and La Forest’s interpretation of the phrase “recognized and affirmed.” They write that “the nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.” They also write that “it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.”

The final section of the Sparrow decision is devoted to infringements of Section 35 and possible justifications for those infringements. In order to show that an aboriginal right has been interfered with to the point of constituting an infringement of s.35(1), the individual or group making the claim against the Crown must show that the limitation on their ability to exercise their right is unreasonable, that it imposes undue hardship, and that it denies to them their preferred means of exercising that right. To justify an infringement of Section 35 the Crown must show that its legislation was enacted in furtherance of a “valid legislative objective,” and that it upholds the honour of the Crown.

With respect to aboriginal fishing rights, the Court ruled that

15 Sparrow (reprinted in Kulchyski). p.223.
17 Sparrow (reprinted in Kulchyski). p.228.
18 Tennant, Chris. “Justification and Cultural Authority.” p.375.
20 In Guerin v. R. [Guerin v. R., [1984] 2 S.C.R. 335 (hereafter Guerin)] the Court found that the honour of the Crown includes a fiduciary responsibility vis-à-vis aboriginal peoples and a requirement that the relationship between the two be trust-like, not adversarial.
management and conservation of the resource does constitute a valid legislative objective, and thus a legitimate basis for infringements of s. 35(1). But Dickson and La Forest also write that “the constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing.” Commercial and recreational fishing interests must bear the brunt of conservation measures.

At first glance, the Sparrow decision would seem to open the door for the Court to define a vast catalogue of constitutionally protected aboriginal rights in Canada. But some commentators, such as W.I.C. Binnie, doubt that the Court will do so any time soon. Binnie writes that “the Sparrow decision is in the grand tradition of Supreme Court of Canada cases that have raised ambiguity about the content of aboriginal rights to a high art form.” He argues that having ruled that Section 35 rights were not extinguished by government regulation, and that governments will in future have very little authority to regulate those rights except within narrow limits, “the courts will now be reluctant to read into section 35 a sufficient catalogue of protected activities to provide Aboriginal peoples with the expected constitutional solution to the problems that beset many Native communities.” The Supreme Court’s 1996 decision in the case of R. v. Van der Peet would seem to support Binnie’s prediction.

**An Aboriginal Right to Fish Commercially?**

While the ramifications of the Sparrow decision were certainly far reaching, the only section 35 right that was actually defined in the decision was the Musqueam right to fish for food, social, and ceremonial purposes. Having explicitly limited their decision to this particular aspect of aboriginal fishing, it was inevitable that the Court would have to revisit the issue of aboriginal fishing rights. On August 21, 1996, the Supreme Court handed down decisions in the cases of R. v. Van der Peet, R. v. Gladstone, and N.T.C. Smokehouse L.T.D. v. The Queen. All three cases

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dealt with aboriginal rights to fish commercially.

*Smokehouse* was the N.T.C Smokehouse Ltd. company's appeal of its conviction for having purchased fish from members of the local First Nations on the west coast of Vancouver Island and then re-sold them on the commercial market. Because the fish had been caught under the authority of Indian food fishing licenses, the company was convicted of violating s. 4(5) and s. 27(5) of the *British Columbia Fishery (General) Regulations.* After losing its appeal, the company appealed its case to the Supreme Court of Canada.

In *Gladstone,* Donald and William Gladstone, members of the Heiltsuk First Nation, were charged with attempting to sell herring spawn on kelp in the Vancouver area. Because they did not have the proper licenses, the accused were convicted under s. 61(1) of the *Fisheries Act* for having contravened s. 20(3) of the *Pacific Herring Fishery regulation.* The Gladstones also lost their appeal before their case made its way to the Supreme Court of Canada.

In *Van der Peet,* Dorothy Marie Van der Peet, a member of the Sto:lo First Nation, was charged with selling ten salmon for five dollars apiece. The salmon had been caught under the authority of an Indian food fishing license, and so Van der Peet was convicted of having violated s. 27(5) of the *British Columbia Fishery (General) Regulations.* She won the right to a new trial when a summary appeal judge found in her favour; however, the B.C. Court of Appeal reinstated Van der Peet's conviction. Her case was appealed to the Supreme Court of Canada.

In each of the three cases, *Smokehouse, Gladstone,* and *Van der Peet,* the accused argued that they were exercising existing aboriginal rights that were protected by s. 35(1) of the *Constitution Act 1982,* and that by virtue of s. 52(1), the regulations that they had contravened were of no force or effect. Because the three cases were so similar, the Court released the three judgments together. The written decision in *Van der Peet* establishes the principles for the interpretation of s. 35(1).

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24 *Smokehouse.* p.672-3.
25 *Gladstone.* p.724.
many of the reasons for judgment given in the Gladstone and Smokehouse decisions merely refer back to Van der Peet, the latter is considered to be the most significant of the three decisions.

Of course, the Supreme Court was not starting with a blank slate when it set out in Van der Peet to establish the principles for interpreting s. 35(1). Much of that work had already been done in Sparrow. In Sparrow, the Court had dissected the language of s. 35(1), and in so doing, had set many of the parameters for the interpretation of the constitutional protection afforded to aboriginal and treaty rights. But the issue of defining aboriginal rights was not before the Court until Van der Peet.

R. v. Van der Peet

Unlike Sparrow, Van der Peet was not a unanimous decision. Chief Justice Lamer wrote the majority decision with Justices La Forest, Sopinka, Gonthier, Cory, Iacobucci, and Major concurring. Justices McLachlin and L'Heureux-Dube each wrote separate dissenting opinions. In his decision, Lamer identifies the source of aboriginal rights and establishes a test for defining them. This test proved to be the primary cause for the split in the Court as both McLachlin and L'Heureux-Dube argue against its adoption; however, the two dissenting Justices were unable to agree on an alternate test.

Writing for the majority, Lamer argues that aboriginal rights exist because of the prior occupation of North America by aboriginal peoples. He writes that “what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.” In arriving at this conclusion, Lamer refers to jurisprudence on both aboriginal rights and aboriginal title from Canada, Australia, and the United States. In the case of Worcester v. Georgia, Chief Justice Marshall of the United States Supreme Court wrote that

the Indian nations had always been considered as distinct, independent political communities,

27 Van der Peet. p.539.
retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed.”

Lamer writes of this passage that “Marshall C.J.’s essential insight that the claims of the Cherokee must be analyzed in light of their pre-existing occupation and use of the land...is as relevant for the identification of the interests s. 35(1) was intended to protect as it was for the adjudication of Worcester’s claim.”

Lamer proceeds to develop a test for the identification of the aboriginal rights that s. 35(1) was intended to protect. He writes that “in order to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.” Lamer calls this test the “integral to a distinctive culture” test. He argues that the first step in applying the test is to accurately characterize the practice, custom, or tradition that is being claimed as an aboriginal right, a process that will necessarily involve taking into account the aboriginal perspective. The next part of the test involves the determination of whether or not the practice, tradition, or custom is integral to the lives of the aboriginal group claiming it as an aboriginal right. Lamer writes that “in order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question.” It must be “one of the things that truly made the society what it was.” Lamer uses the past tense in this sentence because of his further requirement that “the practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to

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30 Van der Peet. p.545.
31 Ibid. p.549.
32 Ibid. p.563.
33 Ibid. p.553.
contact" with Europeans. Lamer is adamant about the fact that aboriginal rights must trace their origins to pre-contact practices, customs, or traditions. In fact, he goes as far as to rule that "where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right."

In applying the "integral to a distinctive culture" test to the case of Ms. Van der Peet, Lamer argues that the appellant was not claiming a right to sell fish commercially, but rather "an aboriginal right to exchange fish for money or for other goods." Lamer concludes that amongst the Sto:lo, "no regularized trade in salmon took place in aboriginal times. Such trade as took place was either for ceremonial purposes or opportunistic exchange taking place on a casual basis," and was "incidental only." He rules that Ms. Van der Peet failed to demonstrate that she was exercising an existing aboriginal right in selling the ten fish, and so her appeal should be dismissed.

Justices L'Heureux-Dube and McLachlin both dissented from the majority decision in Van der Peet, arguing separately that Ms. Van der Peet's appeal should in fact have been allowed. The crux of L'Heureux-Dube's objection to Lamer's written decision is her belief that the Chief Justice was in error when he ruled that s. 35(1) protects a "catalogue of individualized practices, customs and traditions." Instead, L'Heureux-Dube argues that s. 35(1) protects the "distinctive culture of which aboriginal activities are manifestations." She writes that in lieu of the Chief Justice's definition, aboriginal rights should be defined as "the practices, customs and traditions... that are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people." These should be the practices, customs and traditions that provide the aboriginal group in question with "a way and

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34 Van der Peet. p.554.
36 Ibid. p.563.
37 Ibid. p.567.
38 Ibid. p.593.
39 Ibid. p.594.
means of living in an organized society.\textsuperscript{40} L'Heureux-Dube's view of the rights protected by section 35 differs from Lamer's in that it puts the emphasis on "the significance of these activities to natives rather than on the activities themselves."\textsuperscript{41}

Justice McLachlin dissented from the majority decision, but she was also uncomfortable with L'Heureux-Dube's assessment of the potential scope of Section 35. McLachlin argues that aboriginal rights must be distinguished from the exercise of those rights. She writes that "rights are generally cast in broad, general terms. They remain constant over the centuries. The exercise of rights, on the other hand, may take many forms and vary from place to place and from time to time."\textsuperscript{42} The danger in confusing the two, according to McLachlin, is that if one treats a modern practice as the right itself, one may not be able to find a continuity with a pre-contact practice as is required by Lamer's "integral to a distinctive culture" test. McLachlin argues that if one makes the distinction that she is suggesting, "the question then becomes whether the modern practice at issue may be characterized as an exercise of the right" that is being claimed.\textsuperscript{43}

McLachlin also argues that the Court need not always attempt to formulate original definitions of aboriginal rights. She argues that while aboriginal rights were not constitutionally protected prior to 1982, some were still generally observed through legislation, regulation, or mere convention prior to the enactment of the Constitution Act 1982. McLachlin writes that the Court ought to ask whether the activity in question "may be seen as the exercise of a right which has either been recognized or which so resembles a recognized right that it should, by extension of the law, be so recognized."\textsuperscript{44}

A final, but very significant point on which both McLachlin and L'Heureux-Dube dissented from the Chief Justice's ruling was the

\textsuperscript{40} Van der Peet. p.595.
\textsuperscript{41} Ibid. p.593.
\textsuperscript{42} Ibid. p.631.
\textsuperscript{43} Ibid. p.631-2.
\textsuperscript{44} Ibid. p.633.
appropriateness of imposing the date of first contact as the timeframe for identifying aboriginal rights. Lamer writes for the majority of the Court that in order for an aboriginal activity to qualify as an aboriginal right, it must have been integral to that aboriginal society “prior to contact with the Europeans.” L’Heureux-Dube argues that to impose a cut-off date is to adopt precisely the frozen rights approach that the Court rejected in Sparrow. Consequently, she argues that the Chief Justice’s approach should be rejected in favour of a formula that would recognize aboriginal rights as being the practices that have been integral to the aboriginal society in question for “a substantial and continuous period of time.” McLachlin agrees that the Chief Justice’s approach is flawed for its imposition of an arbitrary cut-off date on the definition of aboriginal rights, but she also critiques L’Heureux-Dube’s proposal for being too vague to be of use in defining those rights. McLachlin argues that aboriginal activities should qualify as aboriginal rights where they are “rooted in the historical laws or customs of the people,” and where “there is continuity between the historic practice and the right asserted.”

Smokehouse and Gladstone

The Smokehouse decision is essentially a reiteration of the views that the Justices expressed in Van der Peet. The two decisions are virtually identical. The conviction of the N.T.C. Smokehouse L.T.D. company was upheld by the Court. Again, Lamer wrote the majority decision, and again, McLachlin and L’Heureux-Dube wrote dissenting opinions. Writing for the majority, and applying the “integral to a distinctive culture” test, Lamer dismisses “the appellant’s claim that, prior to contact, the exchange of fish for money or other goods was an integral part of the distinctive cultures of the native bands involved.” As in Van der Peet, Lamer finds that “the exchange of fish incidental to social and ceremonial occasions was not, itself, a sufficiently central, significant or defining feature of these societies to be recognized as an aboriginal

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45 Van der Peet. p.548.
46 Ibid. p.601.
47 Ibid. p.635.
right under s.35(1) of the Constitution Act, 1982.”  

In her dissenting opinion, L'Heureux-Dube again challenges Lamer's "integral to a distinctive culture" test for its tendency towards the "frozen rights" approach. She reiterates her view that "the definition of aboriginal rights should refer to the notion of integral part of distinctive aboriginal culture," and should "permit the evolution of aboriginal rights over time." L'Heureux-Dube argues that "case law on treaty and aboriginal rights relating to trade supports the making of a distinction between the sale, trade and barter of fish for, on the one hand, livelihood, support and sustenance purposes and for, on the other, purely commercial purposes." This distinction suggests that aboriginal rights should be viewed in terms of a continuum. L'Heureux-Dube argues that the trial judge's failure to take the notion of a continuum into account in passing judgment represented a significant error on his part, and that in fact, the case was made for the existence of the aboriginal right to sell, trade or barter fish for livelihood, support and sustenance purposes.

In her dissenting opinion, McLachlin concurs with L'Heureux-Dube's assertion that aboriginal rights should be construed as evolving over time and that the case was made by the appellant for the existence of the aboriginal right in question. McLachlin argues that the aboriginal right was infringed upon, so she proceeds to apply the test for justifying an infringement upon a s.35(1) right that was established in Sparrow. McLachlin concludes that the infringement of the aboriginal right to sell fish for sustenance was not justified because "the Crown did not establish that the denial of the aboriginal right to sell fish for sustenance was required for conservation purposes or for other purposes related to the continued and responsible exploitation of the resource." Moreover, argues McLachlin, "the total denial conflicted with the fiduciary duty of the Crown to permit the exercise of a constitutionally guaranteed aboriginal right."  

The last of the three decisions on commercial aboriginal fishing

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48 Smokehouse, p.674.
49 Ibid. p.675.
50 Ibid. p.677-8
rights is *Gladstone*. This decision stands in stark contrast to the first two because the Court ruled that the Heiltsuk do have an aboriginal right to trade herring spawn on kelp on a commercial basis. The decision was again a majority decision. This time, Chief Justice Lamer wrote the decision on behalf of Justices Sopinka, Gonthier, Cory, Iacobucci, and Major. Justices L'Heureux-Dube and McLachlin wrote concurring opinions. Only Justice La Forest dissented.

In applying the "integral to a distinctive culture" test, Lamer found that the trade of herring spawn on kelp on a commercial basis had been an integral aspect of Heiltsuk culture prior to contact, and that it continued to be so to this day. In her concurring opinion, McLachlin writes that "evidence of an established trading network was clear in this case. The Heiltsuk derived their sustenance from trade derived from herring spawn on kelp; they relied on trade to supply them with the necessaries of life, principally other food products."\(^{51}\)

In his dissenting opinion, La Forest argues that the Heiltsuk had a limited aboriginal right to trade herring spawn on kelp. He writes that "these activities had special significance to the Heiltsuk in that the Heiltsuk engaged in such trading activities on the basis that they valued sharing resources with other bands who did not have access to that resource."\(^{52}\) La Forest argues that any trade in herring spawn on kelp that does not fit this pattern of sharing the resource with those who do not have access to it can not be deemed to be the exercise of an aboriginal right. Such trade would lack the required significance to Heiltsuk culture.

The discussion of whether or not the Heiltsuk's trade in herring spawn on kelp constituted a section 35 aboriginal right is followed by the application of the tests developed in *Sparrow* for extinguishment and the justification of infringements of s. 35(1) rights. The majority of the Court found that the aboriginal right had not been extinguished, and that government licensing did infringe upon it; however, the Justices felt that there was not enough evidence before the Court for a determination to be made on the justification of the infringement. La Forest dissented from

\(^{51}\) *Gladstone*. p.726.  
\(^{52}\) Ibid. p.726.
the majority, arguing that the aboriginal right had been extinguished prior to 1982. He writes that "the Crown specifically chose to translate aboriginal practices into statutory rights and expressly decided to limit the scope of these rights. Aboriginal rights relating to practices that were specifically excluded were thereby extinguished."

Inconsistencies in the Court's Decisions

The Supreme Court's decisions in Sparrow, Van der Peet, Smokehouse, and Gladstone have set parameters for the interpretation of Section 35 of the Constitution Act 1982. But there are several inconsistencies in the Court's decisions. The five major areas of inconsistency are: the rationale behind the constitutional protection of aboriginal rights, the Court's supposed rejection of the "frozen rights" approach, the question of whether aboriginal rights are inherent or contingent rights, the relationship between aboriginal rights to a resource and commercial interests in that resource, and the Court's adoption of the aboriginal perspective in its definitions of aboriginal rights.

Chief Justice Lamer's decisions give inconsistent rationales for the Section 35 protection of aboriginal rights. In Van der Peet, Lamer writes that the "substantive rights which fall within this provision must be defined in light of this purpose:... the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. [emphasis added]"54 Nine pages later, the Chief Justice writes that any test for aboriginal rights must "fulfill the purpose underlying s. 35(1) - i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies. [emphasis added]"55 Six pages later, the Chief Justice returns to his earlier assertion that the purpose underlying s. 35(1) is the reconciliation of the "pre-existing aboriginal societies with the assertion of Crown sovereignty over Canada. [emphasis added]"56 In Gladstone, Lamer writes that "aboriginal rights are a necessary

53 Gladstone, p.728.
54 Van der Peet. p.539.
55 Ibid. p.548.
56 Ibid. p.554.
part of the reconciliation of aboriginal societies with the broader political community of which they are a part. [emphasis added]\(^57\) This third rationale for the protection of aboriginal rights is reiterated by the Chief Justice on the following page, where he writes that aboriginal rights are protected as part of the "reconciliation of aboriginal societies with the rest of Canadian society. [emphasis added]\(^58\)

The differences between "the sovereignty of the Crown," "the arrival of Europeans," and "the rest of Canadian society" are not merely matters of semantics. Lamer has enumerated three very distinct, and very different rationales for the Section 35 protection of aboriginal rights. But the Chief Justice has never wavered in his assertion that in order to qualify as an aboriginal right, an aboriginal practice, custom, or tradition must have continuity with a practice, custom, or tradition "that existed prior to contact."\(^59\) The "prior to contact" requirement would be logical if it were well established that the purpose underlying the protection of aboriginal rights was the reconciliation of the pre-existing aboriginal societies with the arrival of the European settlers. But if the rationale underlying s. 35(1) is the reconciliation of pre-existing aboriginal societies with the assertion of Crown sovereignty, then presumably, the date of sovereignty should be the timeframe for defining aboriginal rights.

The Chief Justice attempts to clarify his position in a passage of the Van der Peet decision.

It is to the pre-contact period that the courts must look in identifying aboriginal rights. The fact that the doctrine of aboriginal rights functions to reconcile the existence of pre-existing aboriginal societies with the sovereignty of the Crown does not alter this position. Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact

\(^{57}\) Gladstone, p.730.
\(^{58}\) Ibid, p.731.
\(^{59}\) Van der Peet, p.554.
that they existed prior to the arrival of Europeans in North America. As such, the relevant time period is the period prior to the arrival of the Europeans, not the period prior to the assertion of sovereignty by the Crown.60

It would seem from this passage that the inconsistency in Lamer's decisions is due in part to some clumsy sentence construction on his part. In the preceding passage, the Chief Justice writes that "it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with." In this sentence, "pre-existing" can only mean in existence prior to the assertion of Crown sovereignty. But it would seem from the rest of the passage, that the Chief Justice is really arguing that the rationale behind s. 35(1) is the reconciliation of aboriginal societies that existed prior to contact with Europeans, with the assertion of sovereignty by the Crown. His argument in Gladstone, that the purpose of s. 35(1) is the reconciliation of aboriginal societies with the rest of Canadian society is a different matter all together. But even after it has been clarified, the Chief Justice's argument in Van der Peet, remains confusing.

The wording of section 35 seems to contradict the Chief Justice's choice of the date of contact as the timeframe for identifying aboriginal rights. Section 35(2) states that aboriginal people are defined in the Constitution as including the "Indians, Inuit and Metis peoples of Canada."61 Hon. Mr. Justice Lambert writes that "the inclusion of the Metis people in the coverage of s. 35(2) indicated that the relevant time for examining rights to see whether they are aboriginal cannot be the time of contact because there were no Metis at the time of contact and must therefore be the time of sovereignty."62 In her dissenting opinion in Van der Peet, L'Heureux-Dube writes that "obviously, there were no Metis prior to contact with Europeans as the Metis are the result of intermarriage

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60 Van der Peet. p.555.
61 Archer, Keith, et. al. supra note 6.
between natives and Europeans... As a result, according to the text of the Constitution of Canada, it must be possible for aboriginal rights to arise after British sovereignty. [emphasis added]"63

Neither Lambert, nor L'Heureux-Dube acknowledge the possibility that s. 35(1) simply does not protect any aboriginal rights for Metis peoples. This possibility would be consistent with the Chief Justice's imposition of a cut-off date at contact. But Lamer does not appear to be making this argument either. In defense of his position, the Chief Justice writes that “the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Metis are defined.”64

Lamer's adoption of the moment of contact as the relevant timeframe for identifying aboriginal rights forces the him to adopt a static view of aboriginal cultures. Lamer writes in Van der Peet that s. 35(1) should be interpreted in such a way as to identify the “practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans. [emphasis added]”65 On the next page, the Chief Justice re-phrases this assertion slightly and writes that “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. [emphasis added]”66 Because he has stipulated that contact is the appropriate timeframe for identifying aboriginal rights, Lamer must treat the phrases “central to the aboriginal societies that existed prior to contact,” and “distinctive culture of the aboriginal group claiming the right” as being synonymous with one another. But in so doing, the Chief Justice implicitly argues that it is only the customs, traditions, and practices that existed prior to contact that make the cultures of the aboriginal groups that exist today distinctive.

L'Heureux-Dube challenges the Chief justice's position in her dissenting opinion in Van der Peet. She writes that “holding that what is

63 Van der Peet. p.598.
64 Ibid. p.558.
65 Ibid. p.548.
66 Ibid. p.549.
common to both aboriginal and non-aboriginal culture must necessarily be non-aboriginal and thus not aboriginal for the purposes of s. 35(1) is, to say the least, an overly majoritarian approach.” This approach, argues L’Heureux-Dube “literally amounts to defining aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away.” L’Heureux-Dube suggests that the approach adopted by the Chief Justice “implies that aboriginal culture was crystallized in some sort of aboriginal time prior to the arrival of Europeans.”

Chief Justice Lamer is correct to suggest that the pre-contact practices, traditions, and customs are relevant to the distinctiveness of aboriginal cultures today. But he is wrong in suggesting that the pre-contact practices represent the full extent of the distinctiveness of modern aboriginal cultures. The flaw in the Chief Justice’s argument would seem to stem from his understanding of modernity. Charles Taylor has argued that we should think of modernity in the plural rather than in the singular. There are, therefore, countless modernities, not just one.

The Chief Justice argues that “activities which become central or significant because of the influence of European culture cannot be said to be aboriginal rights.” The assumption underlying this argument is that any adoption of European customs, traditions, or practices would necessarily make aboriginal peoples less aboriginal, and more European. This assumption stems from, what Taylor calls, the understanding of modernity in the singular. The only logical conclusion of this view of modernity is that eventually, because people are now exposed to cultures from all over the world, we will all become exactly the same. All cultural differences will disappear.

The assumption of a single modernity denies the fact that different cultures start from different places. Is it logical to suggest that two people

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67 Van der Peet. p.592.
68 Ibid. p.596.
69 I heard Charles Taylor make these arguments at a lecture that he gave at Green College at the University of British Columbia in the Spring of 1999.
70 Van der Peet. p.570.
will wind up in exactly the same place if they each take a single stride of the same length? It is if the two people start from exactly the same place and both take the stride in the same direction. But under any other circumstances, the assertion that the two people will end up in the same place is simply erroneous. The same can be said of cultures. The cultures of the aboriginal peoples who lived here and those of the European settlers who arrived later were very different at the time of first contact. So on what basis can the Chief Justice argue that any aboriginal activity that arose as a result of the contact between aboriginal and European cultures can not be integral to a distinctive aboriginal culture? He can only do so by adopting the single modernity theory, and by arguing that aboriginal cultures existed in original pristine states prior to the arrival of Europeans. Any mixing of the different cultures would then represent an erosion of the genuine aboriginal cultures. The problem with this approach is that it is completely at odds with the Supreme Court’s dictate in Sparrow that aboriginal rights “must be interpreted flexibly so as to permit their evolution over time.”

Another inconsistency in the Supreme Court’s doctrine of aboriginal rights lies in the Court’s wavering between aboriginal rights as inherent rights, and as contingent rights. These two competing theories of aboriginal rights are detailed by Michael Asch and Patrick Macklem. The contingent rights approach recognizes “aboriginal rights contingent upon formal recognition by legislative or executive authority or explicit constitutional amendment.” The inherent rights approach views “aboriginal rights as existing independently of the legal creation of Canada and not requiring explicit legislative or executive recognition for their existence.”

In Van der Peet, Lamer argues that aboriginal rights “arise from the fact that aboriginal people are aboriginal.” He seems to endorse the inherent rights approach. But Asch and Macklem argue that the Supreme

73 Van der Peet. p.534.
Court took two important steps away from the inherent rights approach and towards the contingent rights approach in the *Sparrow* decision. Firstly the Court "unquestioningly accepted that the British Crown, and thereafter Canada, obtained territorial sovereignty over the land mass that is now Canada by the mere fact of European settlement." According to Asch and Macklem, this acceptance of Crown sovereignty essentially negates any chance that aboriginal sovereignty will be defined as a s. 35(1) right. Secondly, the Court ruled that rights which were regulated prior to 1982 remain existing rights; however, those rights that were expressly extinguished by the federal government prior to 1982 are not deemed to be existing. Asch and Macklem argue that "state action, in other words, defines the parameters of s. 35(1) rights, which is a central tenet of the contingent theory of aboriginal rights." As far as Asch and Macklem are concerned, the Court's unquestioning acceptance of Crown sovereignty is the more serious of these two steps away from the inherent rights approach. They cite Brian Slattery in enumerating the four legal principles upon which states have traditionally relied to justify their sovereignty over new territories. These four principles are: "(1) conquest or the military subjugation of a territory... (2) cession or formal transfer of a territory from one independent political unit to another; (3) annexation... and (4) the settlement or acquisition of territory that was previously unoccupied or is not recognized as belonging to another political entity." Asch and Macklem argue that the Court in *Sparrow* relied on settlement as a justification for Crown sovereignty. But given that the territory was inhabited, the justification is very difficult to sustain. They suggest that the assumption underlying the use of the settlement thesis as a justification for Crown sovereignty over Canada was that "in contrast to the settlers, the original inhabitants were either too primitive to possess sovereignty or, at the least, possessed it in such a rudimentary form that its existence did not deserve to be respected by the more advanced settler.

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75 Ibid. p.508.
76 Ibid. p.511.
In other words, the acceptance of Crown sovereignty stems from the Court's belief in the superiority of European culture.

In his article “Discarding the Rose-Coloured Glasses: A Commentary on Asch and Macklem,” Thomas Issak strongly critiques the opinions expressed by Asch and Macklem. Issak agrees that the settlement thesis was in all likelihood originally rooted in a belief in the superiority of European nations. But he argues that the thesis adopted by the Supreme Court is one which “supports Canadian sovereignty as a matter of political and legal reality and not one which necessarily relegates aboriginal people to a substandard social status.” Issak further argues that Section 52 of the Constitution Act 1982 leaves the Supreme Court no discretion in determining the supremacy of the Canadian Constitution.

The process of recognizing aboriginal rights must include a recognition of the reality that is modern day Canada. But questioning the basis for the Court’s acceptance of Crown sovereignty, as Asch and Macklem do, has merit. The circumstances under which the British Crown, and thereafter the Canadian government, came to have jurisdiction over the aboriginal peoples of Canada is certainly relevant to a discussion of aboriginal rights. But I think that if Asch and Macklem were to take into account the directive in Sparrow that the aboriginal perspective be incorporated into the definition of s. 35(1) rights, they would find that their focus on aboriginal sovereignty is perhaps misplaced.

In his address to the British Columbia Legislature following the signing of the Nisga’a Final Agreement, Chief Joseph Gosnell said that the success of the treaty was the fact that “the Nisga’a people will join Canada and British Columbia as free citizens - full and equal participants in the social, political, and economic life of this province, of this country.” The majority of aboriginal people in Canada share Chief

79 Ibid. p.709.
Gosnell’s aspirations for the future. Although there are undoubtedly some aboriginal peoples who desire sovereignty, it is my belief that the vast majority wish to become full and equal participants in Canadian society.

One of the factors that has impeded many aboriginal peoples in British Columbia in becoming full and free participants in Canadian society is the fact that, while they never lost wars, sold their land, gave it away, or signed treaties, the Crown has assumed sovereignty over their lands and over them. None of the four legal principles enumerated by Brian Slattery as justifications for states assuming sovereignty over new territories applies to British Columbia. But Crown sovereignty is a political reality in Canada, and whatever the objections to it, Crown sovereignty is not about to be lifted in the foreseeable future. So while aboriginal sovereignty is probably untenable, Asch and Macklem’s argument does establish the basis for a strong claim to aboriginal self-government within Canada.

The fourth area of inconsistency in the Court’s decisions relates to the requirement in Sparrow that the aboriginal perspective be considered in the definition of aboriginal rights. It would appear that the aboriginal perspective has at times, been completely ignored by the Court. In Sparrow, the Court separated aboriginal fishing into two broad categories: fishing for food, social and ceremonial purposes, and fishing for commercial purposes. Rosanne Kyle argues that in making this distinction between the two types of fishing, “the Court was viewing the right as it had been defined by regulation and not as it had been traditionally exercised by aboriginal fishers prior to regulation.” Kyle writes that “by characterizing the right in this manner, the Court ignored its own rule of interpretation that the aboriginal perspective was to be considered, and that the rights not be viewed as constitutionalized in their regulated form.”  

Another example of the Court’s ignoring the aboriginal perspective is evidenced by Lamer’s statement in Van der Peet that

Hudson’s Bay Company, while certainly of significance to the Sto:lo society of the time, was found by the trial judge to be qualitatively different from that which was typical of the Sto:lo culture prior to contact. As such, it does not provide an evidentiary basis for holding that the exchange of salmon was an integral part of Sto:lo culture.82

Again, it would seem that the Court ignored its own ruling in Sparrow. As Chris Tennant writes “the Court never relinquishes its role as a social critic of aboriginal society.”83

A final area of inconsistency relates to the Court’s treatment of the relationship between the exercise of an aboriginal right to a resource and the exercise of a commercial, or other interest in the resource. In her dissenting opinion in Van der Peet, McLachlin writes that

The Chief Justice’s proposal comes down to this. In certain circumstances, aboriginals may be required to share their fishing rights with non-aboriginals in order to effect a reconciliation of aboriginal and non-aboriginal interests. In other words, the Crown may convey a portion of an aboriginal fishing right to others, not by treaty or with the consent of the aboriginal people, but by its own unilateral act... How, without amending the Constitution can the Crown cut down an aboriginal right?... The rights themselves can be diminished only through treaty and constitutional amendment. To reallocate the benefit of the right from aboriginals to non-aboriginals, would be to diminish the substance of the right that s. 35(1) of the Constitution Act 1982 guarantees to the aboriginal people. This no court can do.84

The Chief Justice’s proposal sets a very dangerous precedent. Not only does it seem to be unconstitutional, but, as Rosanne Kyle writes, “it effectively neutralizes the entrenchment of Aboriginal rights in the Constitution by elevating other interests in Canada to the same level as

82 Van der Peet. p.570.
83 Tennant, Chris. “Justification and Cultural Authority.” p.386.
84 Van der Peet. p.667.
constitutional Aboriginal rights." In order for aboriginal rights to be at all meaningful, they must, as the Court ruled in *Sparrow*, be afforded a higher priority than is afforded to interests that have no constitutional protection.

**Conclusion**

Nothing in the Supreme Court's doctrine of aboriginal rights precludes any aspect of the aboriginal fisheries policy that I proposed in chapter two. The Court has defined aboriginal rights as those practices, customs, and traditions that are integral to distinctive aboriginal cultures. For most aboriginal peoples in British Columbia, fisheries clearly meet this requirement. The Court has ruled in favour of an aboriginal right to fish for food, social, and ceremonial purposes. And while the Justices ruled against the existence of an aboriginal right to fish for commercial purposes in both *Van der Peet* and *Smokehouse*, the *Gladstone* decision demonstrates that the recognition of such rights by the Court is possible.

At the time of writing this thesis, Justice McLachlin has recently become the first woman to be appointed to the position of Chief Justice of the Supreme Court. Her replacement of Lamer as the Chief Justice may have far reaching implications for aboriginal rights in Canada. Under Chief Justice Lamer, several inconsistencies appeared in the Court's doctrine of aboriginal rights. The Court wavered in its depiction of the rationale underlying Section 35, in its rejection of the "frozen rights" approach, in applying the contingent and inherent theories of aboriginal rights, and in adopting the aboriginal perspective. At times, the Court also granted to commercial and recreational fishing interests a de facto constitutional status. Justice McLachlin dissented from the majority decision in *Van der Peet*, the decision in which most of these inconsistencies emerged because her view of aboriginal rights is noticeably different from Lamer's.

The Supreme Court is bound by the precedents that it sets. It is extremely rare that the Court will reverse one of its earlier decisions.87

86 *Supra*, note 21.
87 Chief Justice McLachlin stated this during a Vancouver Institute lecture that she gave at the University of British Columbia on March 11, 2000.
But resolving the inconsistencies in the Court's doctrine of aboriginal rights will not require the Justices to reverse earlier rulings. They will simply have to settle on one of the approaches to defining and protecting aboriginal rights that have been included in their previous decisions. With the change in Chief Justice, it is possible that McLachlin's approach to aboriginal rights cases will be adopted by the rest of the Court. Should the Court adopt her approach, sovereignty, not contact, would become the relevant timeframe for identifying aboriginal rights. Given Chief Justice McLachlin's opinion that the Court should distinguish between the exercise of a right and the right itself, aboriginal practices that arose as the result of European influences would not necessarily be precluded from qualifying as aboriginal rights as they were under Chief Justice Lamer. This change could have a noticeable impact on the Court's treatment of cases dealing with aboriginal rights to fish for commercial purposes. It is worth noting that McLachlin argued to allow the appeals in both *Smokehouse* and *Van der Peet*.

Chief Justice McLachlin's preferred definition of aboriginal rights as those elements, integral to aboriginal cultures, that originated in traditional aboriginal laws and customs and that have continuity with historical practices, would also suggest that should the Court adopt her approach, it would focus on the protection of aboriginal cultures, and not merely on the protection of the practices, customs, and traditions that are expressions of those cultures. The focus on aboriginal laws would empower the Court to define aboriginal rights as self-government rights as opposed to the approach that it has taken for fishing rights of defining aboriginal rights as areas where the federal government's authority to legislate is limited. McLachlin's definition of aboriginal rights would also avoid the pit-falls of the "frozen rights" approach, and embrace the Court's earlier ruling from *Sparrow* that aboriginal rights be seen as evolving. In order to fully implement McLachlin's approach to defining aboriginal rights, the Court would have to seriously consider the aboriginal perspective on the rights being claimed.

The doctrine of aboriginal rights that the Court would develop
should it adopt Chief Justice McLachlin's approach to defining and protecting aboriginal rights would be more consistent with the theoretical propositions that I developed in chapter one than is the doctrine of aboriginal rights that the Court has produced under the leadership of Chief Justice Lamer. McLachlin's approach to protecting aboriginal rights emphasizes the protection of aboriginal cultures and traditional laws to a much greater extent than does Lamer's. This emphasis would suggest that McLachlin's doctrine of aboriginal rights would support the adoption of an aboriginal fisheries policy similar to the one that I proposed in chapter two. While there is nothing in the Court's current doctrine of aboriginal rights that precludes the adoption of the fisheries management regime that the policy would create, which is in effect a form of self-government, McLachlin's doctrine of aboriginal rights would, in all likelihood, mandate its adoption.

In the next chapter, I will compare the federal government's Aboriginal Fisheries Strategy (AFS), the fisheries policy that the Department of Fisheries and Oceans developed in the context of the Supreme Court's current doctrine of aboriginal fishing rights, with the aboriginal fisheries policy that I proposed in chapter two.
Chapter 4: The Aboriginal Fisheries Strategy

In 1992, the federal Department of Fisheries and Oceans (DFO) implemented its Aboriginal Fisheries Strategy (AFS), a seven-year program designed to put the requirements of the Sparrow decision into practice. The AFS consisted of a series of agreements between DFO and individual aboriginal communities on fisheries management. The majority of these agreements established Sparrow-related allocations for food, social, and ceremonial (FSC) fisheries, but three Pilot Sales agreements were also negotiated as a part of the program. As well, Cabinet approved a training and guardianship program, programming for habitat restoration, and a grant to the Nisga'a for in-river assessment as a package with the other components of the AFS. In this chapter, I will assess the degree to which the AFS met the federal government's legal obligations to aboriginal peoples, as well as the congruency between the AFS and the aboriginal fisheries policy that I proposed in chapter two.

No single factor was responsible for precipitating the AFS. The Supreme Court's Sparrow decision certainly forced the hand of DFO, but Sparrow was only one factor. Prior to the Sparrow decision, DFO had followed a policy of issuing Indian Food Fishing Permits to individuals. By ruling that aboriginal rights are held communally, the Court effectively rendered such permits illegal. So DFO was left with very little choice but to develop a new regulatory system for the aboriginal fisheries that would reflect the communal aspect of aboriginal fishing rights.

In the aftermath of Sparrow, the Department sought legal opinions on its obligations from the Department of Justice. According to Paul Kariya, who was responsible for the initial implementation of the AFS in


2 Paul Kariya was the Director of Native Affairs for the Department of Fisheries and Oceans in 1992 and 1993. He became the Director of Aboriginal Fisheries for the Pacific Region in 1993, and held that position through 1994. He is now the Chief Executive Officer of Fisheries Renewal B.C.
B.C, the legal opinions interpreted the decision more narrowly than did the lawyers for some aboriginal groups. While the Court had declared Musqueam FSC fishing to be an aboriginal right, the legal opinions suggested that the right was still quite undefined and was not at all quantified. But rather than allowing the undefined and unquantified nature of aboriginal fishing rights to stagnate the policy-making process, DFO officials chose to give a quantifiable identity to the right in order that they be able to develop effective fisheries management models.³

The federal government also had several reasons for wanting to foster an open and trusting relationship with aboriginal peoples. Firstly, the Sparrow decision was seen as the beginning of a trend. As one official stated, there was "a general feeling that under Brian Dickson, Indians were winning in the Supreme Court. And they were going to continue to win."⁴ Secondly, the government was extremely anxious to avoid a repetition of the sort of violence that had erupted between Mohawk warriors and the Quebec provincial police force at Oka in 1990. Finally, the government was preparing to negotiate treaties with aboriginal peoples in British Columbia. And in 1991, the governments of Canada and British Columbia, along with the First Nations Summit, did agree to a process for the negotiation of treaties.

A final catalyst in the development of the AFS was the fact that aboriginal fisheries in British Columbia had become difficult to manage. In some areas, aboriginal people were disregarding the Indian Food Fishing Permit system all together. Equally troubling was the increasing sale of salmon not caught under a communal license. By the early 1990s, the sale of fish had become "almost uncontrollable in certain parts of the province."⁵ There was a feeling amongst DFO officials that if control of the sale of fish were lost all together, the whole fabric of fish management would fall apart because DFO would lose credibility with all of the major players in the fisheries. All of these factors culminated in the 1992 launch

³ Kariya, interview.
⁴ Kariya, interview (Brian Dickson was the Chief Justice of the Supreme Court who wrote the Sparrow decision).
⁵ Kariya, interview.
of the Aboriginal Fisheries Strategy.

The AFS was a seven-year program, but it was extended after the seven years elapsed. There was a built in review of the policy that occurred mid-way through the seven years and gave Cabinet the option to discontinue funding for the AFS. But the policy was designed to last the full seven years. The AFS was conceived as a long term policy in order that it endure at least one election, that it last longer than one cycle of salmon, a sockeye cycle being four years, and that the policy demonstrate that DFO's "commitment to aboriginals was sincere." In 1992, the British Columbia component of the AFS consisted of more than eighty agreements valued at $14 million. Some of the agreements were multi-year agreements, others were single-year agreements that were renewed year-to-year.

The majority of the AFS agreements were concerned with managing the FSC fisheries. The Sparrow decision required that these fisheries be granted priority of access ahead of commercial and recreational fisheries, and that FSC fisheries be limited only for valid reasons of conservation. A typical FSC Agreement set the quantity of fish to be caught, established the management responsibilities of the aboriginal group and of DFO, set limitations on the disposition of fish (such as precluding the sale, barter, or trade of the fish), established the rules for licensing, and listed the types of gear that could be used.

The second major component of the AFS was the negotiation of three Pilot Sales agreements, one on the lower Fraser River, one on the west coast of Vancouver Island, and one on the Skeena River. 5% of the provincial Total Allowable Catch (TAC) was allocated to these commercial fisheries. The catch by aboriginal fishers in the AFS Pilot Sales was counted separately from the catch by aboriginal fishers who participated in the regular commercial fisheries. In the 1990s, aboriginal people comprised about 20% of the total participants in the commercial salmon fishery. They accounted for approximately 28% of the commercial catch in

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6 Kariya, interview.
7 Department of Fisheries and Oceans, "Statement by John C. Crosbie Minister of Fisheries and Oceans," December 7, 1992.
pieces or 23% of the total landed value of salmon annually. So in reality, B.C. aboriginal commercial fishers took substantially more than the 5% of the TAC of salmon that was allocated to Pilot Sales under the AFS; however, the only areas of overlap between the AFS Pilot Sales and the commercial fisheries were at the mouth of the Fraser River with the Tsawwassen and Musqueam First Nations.

Pilot Sales was one of the most contentious elements to be included in the AFS. While the Sparrow decision left DFO with very little choice but to negotiate the FSC Agreements, the Court did not establish an aboriginal right to fish commercially. The inclusion of the Pilot Sales agreements in the AFS was motivated by several factors. Firstly, there was the government of Canada’s desire to make a genuine attempt at addressing the concerns of aboriginal peoples in B.C. The aboriginal peoples in the three areas that were selected for Pilot Sales Agreements had been the most vocal in demanding commercial fishing rights. The Van der Peet, Smokehouse, and Sparrow cases originated in these three areas. Secondly, more black market salmon were coming from the three areas in question than from any other areas of the province. Pilot Sales was seen, in part, as a step towards gaining control of the black market sale of salmon in the province.

But there were other reasons for choosing those three particular areas for Pilot Sales. On the lower Fraser, aboriginal people were already catching large quantities of fish under the Indian Food Fishing Permits. DFO officials felt that the increase that a Pilot Sales program would bring about in the aboriginal catch on the lower Fraser would not be significant. On the west coast of Vancouver Island, DFO officials saw the Nuu Chah’ Nulth Tribal Council as a progressive group that had expressed interest in developing co-management regimes with DFO. The creation of a Pilot Sales program was intended to be a show of goodwill that would facilitate a good working relationship between DFO and the Nuu Chah’ Nulth. On

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8 Salmon and Aboriginal Fishing on the Lower Fraser on the internet at http://web20.mindlink.net/stolo/salmon.htm#econ
9 Kariya, interview.
10 Ibid.
the Skeena, the Tsimshian and Gitksan had a long history in the marine fisheries. A commercial fishery was piloted on the Skeena in advance of the treaty negotiations that were to come. There was also a hope on the part of DFO officials that if Pilot Sales was successful on the Skeena, commercial fishing groups would accept similar aboriginal commercial fisheries in other parts of the province.\textsuperscript{11}

DFO took several steps to minimize the displacement and disruption that the new Pilot Sales programs would create in the existing commercial fisheries. While the allocations to the lower Fraser and Vancouver Island Pilot Sales came out of the TAC, the fisheries in the Skeena Pilot Sales were all ESSR fisheries (Excess Salmon to Spawning Requirements). ESSR fisheries are not counted against the TAC that is established at the beginning of the season. They are a part of the in-season management that DFO fish mangers do every year. If, for example, there is a weak run of coho coming back to the river co-mingled with a sockeye run, the sockeye openings may be curtailed in order to protect the coho. The side effect of scaling back the fisheries is the possibility of too many sockeye spawning. So DFO fish mangers will open fisheries in the river to allow the sockeye that are excess to the spawning requirements for that particular run to be caught. The further up-river that the fisheries take place, the easier it is to fish selectively and to target specific runs.

The Pilot Sales Agreements on the Skeena stipulated that openings would be limited in the event of there not being any excess fish, but some critics of the Pilot Sales agreements accused DFO of purposely managing to create an ESSR surplus.\textsuperscript{12}

DFO also embarked on a program of buying commercial licenses that were put up for sale voluntarily by commercial fishers and transferring them to aboriginal groups. The theory was to find the capacity necessary for the Pilot Sales without expropriating commercial licenses. In the first year of the program, DFO spent more than $6 million on the voluntary

\textsuperscript{11} Kariya, interview.
\textsuperscript{12} Ibid.
license retirement program. But there were some serious flaws with the program and it failed to reach its desired objective. The major problem was that too little money was devoted to buying back licenses. Also, much of the money that was available was spent retiring, what Paul Kariya calls "junk boats." The Department retired boats with very little catch capacity, and so did not really take any capacity out of the fisheries.

The license retirement program elicited criticism from opponents of the AFS, but it was only one of several aspects of the policy that drew their ire. One of the most vocal opponents of the AFS, and indeed of aboriginal and treaty rights generally, throughout the 1990s in British Columbia was Melvin H. Smith. In 1995, Smith published *Our Home Or Native Land?: What Governments' Aboriginal Policy is Doing to Canada*, in which he expresses his belief that the Canadian government has capitulated to the aboriginal leadership. One very prominent chapter in the book details Smith's critique of the AFS. This chapter includes many of the views commonly expressed by other opponents of the AFS such as the B.C. Fisheries Survival Coalition.

One of the most common criticisms of the AFS is that it creates race-based fisheries. Smith writes that "the Fraser River, the largest salmon producing river in the world, became the site for an experiment with a racially-segregated commercial fishery." Very often, this argument is buttressed with a reference to South Africa. Smith quotes Gordon Gibson as saying that "South Africa has taken definitive steps to shutting down its massive, evil and failed system of apartheid. Now maybe we in Canada should stop expanding our own smaller, but equally failed apartheid system relative to natives. We still assign political rights on the basis of race where it affects Indians."

The assertion that the AFS created race-based fisheries may be

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14 Kariya, interview.
17 Smith, Melvin H. *Our Home or Native Land?* p.250.
useful for inciting anger and fostering mistrust of aboriginal peoples, but it is a factual error. Very simply, the AFS does not create race-based fisheries. It is true that aboriginal people have a different skin colour than do non-aboriginal Canadians, but this difference played no part in the development of the AFS. Aboriginal fishing rights derive from the simple fact that aboriginal peoples are aboriginal. The difference in skin colour is purely incidental. If aboriginal people in Canada had white skin, as the Sami of Norway do, their entitlement to fishing rights would not be affected in any way.

And yet the race argument did galvanize a sector of the population, particularly in the commercial fishing industry, in opposition to the AFS. One particular issue that seemed to infuriate this sector was the issue of “double-dipping.” The AFS did not preclude aboriginal holders of regular commercial fishing licenses from fishing in AFS Pilot Sales fisheries as well. So it was possible for an aboriginal fisher to fish one day during a Pilot Sales opening, and then to go out the very next day, in the same boat, to fish during a commercial opening. This situation was seen to be unfair by many of the opponents of the AFS.

While access to the commercial fisheries in British Columbia is a privilege that is open to anybody, aboriginal FSC fishing is a right, protected by the Canadian Constitution. So it was inevitable that “double-dipping” would become a source of conflict. But if the government were to start putting restrictions on who could or could not hold a commercial license in B.C., the door would be opened to inconsistencies that would be potentially far more serious than the limited cases of aboriginal fishers participating in both commercial and Pilot Sales fisheries. For DFO to recognize the fact that aboriginal fishing is a distinct right, it had to establish distinct times for aboriginal fisheries. It was within the purview of individual aboriginal communities to resolve the issue of “double-dipping.”\footnote{Kariya, interview.} But when they chose not to limit the opportunities for aboriginal fishers to participate in both fisheries, there was nothing that DFO could do without either limiting access to the commercial fisheries or
ignoring the distinct constitutional nature of aboriginal fishing rights.

Another criticism that has been leveled at the AFS is that it caused the incidents of “missing fish” that occurred in the summers of 1992 and 1993. Melvin Smith suggests that it was no coincidence that the AFS was implemented in the same year as salmon began to “disappear” in the Fraser River. He cites statistics from the Pacific Salmon Commission that suggest that as many as 713,000 salmon went “missing” in the summer of 1992.\textsuperscript{19} A DFO News Release dated August 21, 1992, confirms that 172,000 Gates Creek sockeye passed the fish enumeration echo sounder at Mission, but only 16,500 of them were counted passing through the Seton Dam by the 17th of August, 1992. And only 5,600 of the 166,000 Fennell Creek sockeye that were counted at Mission that year were counted again at a weir on Fennell Creek.\textsuperscript{20} In the Fall, the government hired Dr. Peter Pearse and Dr. Peter Larkin to investigate the “missing fish.” The Pearce Report concluded that 482,000 sockeye salmon that were estimated to be in the Fraser River in 1992 never made it to their spawning grounds.\textsuperscript{21}

Smith implies that “wide-spread native poaching and 24 hour per day unregulated fishing with no DFO enforcement presence” were to blame for the “missing fish.”\textsuperscript{22} But this conclusion is at odds with the findings of the Pearce Report. Dr. Pearce and Dr. Larkin conclude that

We cannot say who took these fish or how they were disposed of or where they went. Nor can we say whether they were caught illegally. We can only say with confidence that considerably more fish were taken than estimated, and many were sold illegally, insofar as official sales slips were not issued for them.\textsuperscript{23}

While native poaching was almost certainly a factor that led to the fish

\textsuperscript{19} Smith, Melvin H. \textit{Our Home or Native Land?} p.208.
\textsuperscript{22} Smith, Melvin H. \textit{Our Home or Native Land?} p.208.
\textsuperscript{23} Fraser River Salmon Investigation, “Intensive Fishing Caused Losses of Fraser Sockeye.”
going "missing," the data does not support the conclusion that Smith implies in his book. In addition to native poaching, non-native poaching, weather and climatic conditions, and warm water factors that had not been encountered before on the Pacific coast played a part in the "missing fish" saga. Another factor that should be considered in attempting to explain the "missing fish" is the fact that DFO's fisheries information is continually improving. It is very possible that fish have gone "missing" at other times in the past, but that because of poorer fisheries information, DFO officials failed to notice.24

One of the improvements to DFO's information gathering was its implementation of one of the most ambitious catch monitor systems attempted anywhere in the world as a part of the AFS. The catch monitor system was designed to count and record every single fish caught in the AFS fisheries. In the Pilot Sales fisheries, all fish had to be landed at a designated landing site where they were counted and recorded by a monitor. The fish were then loaded into totes, and the fisher was issued a landing slip. If there were no cash buyers at the landing site, a transport permit was issued in order that DFO be able to track the totes. And while the catch monitor system did breakdown in the first year of the AFS for want of proper landing sites, the system did work much better in the following years. It is now considered by some to be a system that could be very useful as a means of controlling by-catch in the regular commercial fisheries.25

But the inclusion of the catch monitor system in the AFS did nothing to appease the commercial and recreational fishing groups that opposed the policy. To express their anger at the AFS, groups such as the B.C. Fisheries Survival Coalition conducted a seemingly endless series of protest fisheries. Roxanna Laviolette,26 who served as an Aboriginal Fisheries Officer (AFO), observed several of these protest fisheries. She describes scenes in which commercial fishers in large fishing boats

24 Kariya, interview.
26 Roxanna Laviolette is a Gitksan woman who served as an Aboriginal Fisheries Officer from 1993-1998. She currently sits on the Board of Directors of Fisheries Renewal B.C.
careened through groups of aboriginal fishing boats, often times threatening to swamp the much smaller aboriginal boats, and putting the lives of aboriginal fishers at risk.\textsuperscript{27}

One of the flaws in the AFS was the limited enforcement powers that it granted to Aboriginal Fisheries Officers. The theory behind having AFOs was to put aboriginal people in a better position to manage the fish resource. Many aboriginal people believed that Aboriginal Fisheries Officers would be better able to understand the aboriginal perspective on the resource than would non-aboriginal DFO officers. But there was no established standard of qualifications for AFOs, nor was there a standard uniform for the officers. Because they were not easily recognized, AFOs had trouble gaining the respect of the fishers they were sent to monitor. Compounding the problem was the fact that AFOs had very little in the way of enforcement powers. An AFO could confiscate the designation card of an offending fisher. Without the designation card, the fisher was not permitted to fish. But the AFOs did not have any power beyond confiscation of designation cards. An AFO could not detain a suspect without a DFO Officer being present.\textsuperscript{28} So AFOs did not have any authority to intervene in the protest fisheries conducted by opponents of the AFS.

Interestingly, opponents of the AFS, such as Melvin Smith, also argue that the enforcement provisions in the AFS were flawed. Smith writes that “enforcement must be in the hands of officers trained by, employed by, supervised by, and responsible to, DFO. It is unrealistic to expect those who use the resource for personal gain - whatever colour their skin - to police it in the public interest.”\textsuperscript{29} Now some might argue that those who derive their livelihood from the fisheries are precisely the people who should police the industry because they have the most to lose if the resource is mismanaged or if it is depleted by over-fishing. But Smith is right to suggest that those who police the fisheries should have the training, authority, and enforcement powers necessary to be effective.

\textsuperscript{27} Laviolette, interview.
\textsuperscript{28} Ibid.
\textsuperscript{29} Smith, Melvin H. \textit{Our Home or Native Land}? p.216.
in their jobs, and must also be interested in safeguarding the resource from over-fishing and poaching. It seems clear that AFOs could have been far more effective had they had greater authority and enforcement powers. As for Smith's belief that aboriginals should not have been policing the AFS fisheries at all, the argument rests on an assumption that fishers, "whatever the colour of their skin," are somehow dishonest and unconcerned with the long term sustainability of the fisheries. Given that the public interest includes the interests of fishers, Smith's concern must be dismissed as baseless until his assumption that fishers are dishonest can be further substantiated.

In addition to the very well publicized critiques of the AFS, there were some problems that arose without garnering much public attention. One such problem was a reluctance on the part of some aboriginal fishers to recognize the communal aspect of their fishing rights. The *Sparrow* decision was very explicit about the *sui generis* nature of aboriginal rights. They are communally-held, and can not be considered as ordinary common law rights. But problems arose in some aboriginal communities when elders and those who could not actively fish began complaining to DFO that they did not have any fish to eat. In some cases, the small group that had controlled the black market sale of fish prior to the implementation of the AFS, had simply moved into the AFS fisheries and taken control there. The worst cases occurred on the lower Fraser, but similar incidents occurred in other parts of the province as well.31

While these problems were certainly serious, and not to be dismissed, they did not highlight any particular problem with the AFS. These matters were internal to the aboriginal communities concerned, and given the communal nature of aboriginal fishing rights, had to be left up to those communities to resolve. The development of communal agreements was a part of the government's effort to change the relationship that the rest of Canadian society has with aboriginal peoples.32 If DFO had been expected to resolve a dispute as internal to an

30 Kariya, interview.
31 Laviolette, interview.
32 Kariya, interview.
aboriginal community as the distribution of fish amongst the members of that community, a mockery would have been made of the government’s commitment to a new relationship with aboriginal peoples.

A final critique of the AFS, one that Melvin Smith has expressed particularly vehemently, is that the government simply went too far in recognizing aboriginal fishing rights. Most opponents of the AFS will concede that the _Sparrow_ decision required the government to recognize the aboriginal right to fish for food, social, and ceremonial purposes, but they argue that DFO could have fulfilled the government’s obligations under the law without implementing the Pilot Sales agreements. Smith writes of the _Sparrow_ decision that

> though narrow in its legal import, this decision became a convenient excuse for eager bureaucrats and compliant politicians alike to argue that they were no longer able to regulate the native food fishery.\(^{33}\)

He argues that DFO statements claiming that the AFS was “consistent with the principles set out by the Supreme Court of Canada in the _Sparrow_ decision,” and that the AFS was “a strategy designed to implement the 1990 Supreme Court of Canada decision in _Sparrow_” were part of a deliberate “misinformation campaign.”\(^{34}\) Smith argues that, “though supposedly governed by the rule of law and the Canadian Constitution,” DFO failed to cancel the Pilot Sales after the B.C. Court of Appeal rejected Ms. Van der Peet’s appeal of her conviction. Smith does acknowledge that, at the time that he wrote his book, the Supreme Court had already agreed to hear Van der Peet’s appeal.\(^{35}\) But the legality of the AFS is certainly worth considering.

In 1992, when the AFS was first implemented, the Supreme Court had not yet heard the _Van der Peet, Smokehouse_, and _Gladstone_ appeals. So at the time that the policy was designed, the federal government’s legal obligations derived mostly from _Sparrow_. Because aboriginal fishing for

\(^{33}\) Smith, Melvin H. *Our Home or Native Land?*_ p.203.

\(^{34}\) Ibid. p.218.

\(^{35}\) Ibid. p.220.
food, social, and ceremonial (FSC) purposes was found to be an aboriginal right, the Court ruled that "any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing." Commercial and recreational fishers must bear the brunt of conservation measures. The AFS seems to have reflected both of these principles.

The question of priority of access was also dealt with as a part of DFO's in-season management. Cases arose in which, for example, an aboriginal fishery that was going to result in the taking of 100,000 pieces was scheduled for the day after a commercial opening that was going to see 800,000 pieces taken. When such cases were brought to light by the aboriginal communities that were affected, DFO officials would attempt to reschedule the fisheries so that the aboriginal fishers had the first chance to fish. Such decisions were very unpopular with the commercial groups, but they were forced to accept them.

The Sparrow decision also requires the government to allow aboriginal groups to exercise their rights in their preferred traditional way. Although the Supreme Court distinguished between aboriginal FSC and aboriginal commercial fishing, aboriginal peoples have not traditionally made this distinction. So whatever the motivation behind the inclusion of Pilot Sales in the AFS, a response to Melvin Smith's charge that the government acted unlawfully is that the inclusion of Pilot Sales in the AFS represented an acknowledgement of the traditional aboriginal perspective on the fisheries. The acknowledgement of this perspective was a step towards compliance with the Supreme Court's requirement that aboriginal peoples be allowed to exercise their rights in their preferred way.

It is unclear whether or not the inclusion of the AFO program in the AFS marked an acknowledgment of the Court's dictate that aboriginal people be able to exercise their rights in their preferred way. From one point of view, it could be said that having the AFS fisheries policed by

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37 Kariya, interview.
AFOs, as opposed to non-aboriginal DFO officers, was a genuine attempt on the part of DFO officials to ensure that the aboriginal perspective was incorporated into the monitoring of the AFS fisheries. But given the minimal enforcement powers that were granted to AFOs, this view is somewhat difficult to sustain. On the other hand, many aboriginal people would argue that because aboriginal fisheries were traditionally self-regulating systems, it was unnecessary for DFO to appoint specific individuals to police the fishers. In many First Nations, the entire community was traditionally involved in monitoring the fisheries. For example, the Gitksan used devices such as shame feasts to discourage wasting or over-fishing.\(^38\)

The aboriginal perspective was unquestionably considered by DFO officials when they defined the communities with whom AFS agreements would be negotiated. The definition of “First Nation” was intentionally left ambiguous in the AFS in order to allow DFO to negotiate AFS agreements with individual bands in some areas, and with entire tribal councils in others.\(^39\) A genuine attempt was made to define the aboriginal communities involved in the AFS in the way that they defined themselves.

The Van der Peet, Gladstone, and Smokehouse decisions did not impose any further obligations on DFO. The Court differentiated between an aboriginal right to fish for commercial purposes and an aboriginal right to exchange fish for money or other goods, but it did not preclude the possibility of either type of right existing. The Court did rule against Van der Peet and Smokehouse, finding against the existence of a Section 35 aboriginal right to exchange fish for money or other goods amongst the Sto:lo and the Nuu Chah’ Nulth. So it would not have been unconstitutional for DFO to discontinue the Pilot Sales on the lower Fraser and on the west coast of Vancouver Island. But nothing in the Supreme Court decisions required, or even suggested that DFO cancel the Pilot Sales either.

The premise underlying Melvin Smith’s argument that DFO disregarded the constitution when it failed to cancel the Pilot Sales

\(^{38}\) Laviolette, interview.

\(^{39}\) Kariya, interview.
seems to be that the government is required to do all that the Court orders it to, but must not make any policy decisions that extend beyond the Court's rulings. In essence, Smith seems to be arguing that government policy on aboriginal fisheries should be dictated by the Supreme Court and not by the federal parliament. But the Canadian Constitution does not support this view. According to the Constitution Act 1867, "the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated;" These classes of subjects include "12. Sea Coast and Inland Fisheries," and "24. Indians and Lands reserved for Indians." So while some might oppose the Pilot Sales, the government did not violate the rule of law or act unconstitutionally by including them in the AFS. The AFS was consistent with Canadian law on aboriginal fishing rights.

The AFS is also quite consistent with the aboriginal fisheries policy that I proposed in chapter two. Both policies emphasize individualized agreements for each aboriginal nation. But the policy that I proposed in chapter two is more extensive than was the AFS, and includes provisions for aboriginal management of the fisheries that were not included in the AFS. The difference in scope between the two policies is due to them having different objectives. The protection of the contexts of choice of aboriginal peoples that is the objective of the policy that I proposed in chapter two is of a completely different magnitude than were the objectives of the AFS.

But despite having different objectives than would the policy that I proposed in chapter two, the AFS included two components that were not explicitly ordered by the Supreme Court, but that are included in the policy that I am proposing. The inclusion of the Pilot Sales in the AFS was a step towards allowing aboriginal peoples to exercise their rights in their preferred traditional ways. And while the policy that I proposed in chapter two would not differentiate between the allocations to subsistence and commercial fisheries as the AFS did, the inclusion of a commercial

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The fisheries component in the AFS was certainly consistent with the type of aboriginal fisheries policy that I am proposing.

The other significant point on which the AFS is consistent with the aboriginal fisheries policy that I am proposing is its flexible definition of aboriginal nations. The AFS left the definition of First Nation up to the individual nations involved in the program. In some cases, AFS agreements were negotiated with individual bands, in other cases, with entire tribal councils. Allowing aboriginal peoples to define themselves was a vital step towards the recognition of the complexity of group and individual identities in Canada that is central to the theoretical propositions upon which the policy that I am proposing is based. Clearly, the architects of the AFS were cognizant of the fact that different aboriginal peoples defined themselves in different ways, and that dealing with them as they defined themselves was an important step towards developing an equal and trusting relationship.

The AFS and the aboriginal fisheries policy that I proposed in chapter two are similar enough, that the proposed policy would likely face many of the same critiques as did the AFS. Almost certainly, it would be suggested by some that the aboriginal fisheries policy that I am proposing would create race-based fisheries, and that it would exceed the government's legal obligations to aboriginal peoples. As when they were leveled at the AFS, the responses to these two critiques would be very straightforward. With regards to the first critique, aboriginal fishing rights are based on the aboriginality of aboriginal peoples and are in no way related to the colour of their skin. With regards to the second, the Canadian Constitution gives the federal government the exclusive authority to pass legislation regarding fisheries. The government is not required to limit its legislation to implementing decisions of the Supreme Court.

But because of the significant role that it includes for aboriginal peoples in fisheries management, the policy that I am proposing would likely not face certain other critiques that were leveled at the AFS. It is highly unlikely that "double-dipping" would be a contentious issue under
the policy that I am proposing. Allocations for aboriginal subsistence and commercial fisheries would be undifferentiated across the whole province, as they are in Washington State, so most aboriginal commercial fishers would have access to commercial fisheries managed by their own nation. "Double-dipping" could easily be eliminated as a part of the province-wide management regime that DFO would develop in conjunction with the aboriginal peoples. Any aboriginal person who wanted to fish commercially, but who belonged to a nation that would not have its own fishery, such as an interior people, could participate in the commercial fishery in the same way that a non-aboriginal person who did not belong to an aboriginal nation with its own fishery could.

It is also unlikely that the policy that I proposed in chapter two would be blamed for incidents of "missing fish" similar to those that occurred in the summers of 1992 and 1993. Traditionally, entire aboriginal communities monitored their fisheries. If aboriginal nations had authority over fisheries monitoring, it is likely that they would be very effective at reducing poaching. It would be very difficult for poachers to go undetected if the entire community was involved in monitoring the fisheries. Also, the inclusion of aboriginal peoples in fisheries management at the provincial level would provide a further incentive for them to have effective monitoring in their fisheries. The effectiveness of aboriginal peoples at controlling poaching would affect their credibility in the provincial level management of the fisheries.

The Aboriginal Fisheries Strategy fulfilled the federal government's legal obligations to aboriginal peoples. And while the AFS was not as extensive as the aboriginal fisheries policy that I proposed in chapter two, the two policies are similar; however, the exclusion of aboriginal peoples from fisheries management decisions under the AFS marks a significant difference between the two policies. The aspect of the AFS that is most consistent with the policy that I proposed in chapter two is its flexible definition of an aboriginal nation. The theoretical propositions that I developed in chapter one suggest that aboriginal peoples can only become full and free participants in Canada's liberal society if non-aboriginal
Canadians accept the fact that Canadian citizenship holds a different place in the identities of aboriginal peoples than it does in their own. Negotiating AFS agreements with aboriginal peoples as they defined themselves was a sure step towards recognizing the complexity of their identities as Canadians.
Conclusion

On the Pacific coast of North America, "a river without salmon is a body without a soul. From the Sacramento to the Yukon, every waterway pulled by gravity to the Pacific has, at one time, been full of the silver flash of life." Salmon have traditionally played a very central role in most of the aboriginal cultures in British Columbia. It is through these cultures that aboriginal peoples develop the horizons of significance and the contexts of choice that allow them to make meaningful self-defining choices, and to participate fully and freely in Canadian society. Quite simply, fisheries are part of a way of life that contributes to defining who aboriginal peoples are.

The theoretical propositions that I developed in chapter one are based on a complex understanding of group and individual identities in Canada, and are consistent with the Supreme Court’s focus on the distinctiveness of aboriginal cultures. Due to the inconsistencies in the Court’s doctrine of aboriginal rights, questions remain about the nature and extent of the aboriginal rights protected by Section 35. But with Chief Justice McLachlin now at the head of the Court, it seems likely that those inconsistencies will be resolved in such a way as to move the Court’s doctrine of aboriginal rights closer to the theoretical propositions that I developed in chapter one. Nevertheless, those propositions are consistent with the liberalism that underpins Canadian society.

An aboriginal fisheries policy based on the theoretical propositions that I developed in chapter one would include many of the elements that the Canadian government included in the AFS, but it would be more extensive than was the AFS because different objectives underlie the two policies. As I discussed in chapter four, the AFS was developed as a response to three major factors: the Sparrow decision, the need of DFO officials to develop an effective management regime for the aboriginal fisheries, and the federal government’s desire to foster an open and trusting relationship with aboriginal peoples as a means to avoiding a

repeat of the type of violent confrontation that occurred at Oka in 1990 and in recognition of the Supreme Court’s developing pattern of ruling in favour of aboriginal rights. The objective of an aboriginal fisheries policy based on the theoretical propositions that I developed in chapter one would be to protect the contribution that fisheries make to aboriginal cultures and societies, and by extension, to the contexts of choice that are necessary for aboriginal peoples to participate fully and freely in Canadian society. Given Canada’s liberal democratic tradition, Canadians should support the government in any attempt to ensure that the promise of liberal equality is extended to every citizen.
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