

Food Fish, Commercial Fish, and Fish to Support a Moderate Livelihood: Characterizing Aboriginal and Treaty Rights to Canadian Fisheries

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Abstract

The Aboriginal peoples of Canada stand in a different legal relationship to the fisheries than non-Aboriginal Canadians. They do so by virtue of a long history with the fisheries that precedes non-Aboriginal settlement in North America, and because of the constitutional entrenchment of Aboriginal and treaty rights in Canadian law. This article describes the characterizations of Aboriginal and treaty rights to fish in Canadian law and discusses what it means for rights characterized in terms of food fishing, commercial fishing, and fishing to support a moderate livelihood, to receive constitutional protection. The article then problematizes these characterizations and suggests that the simplest and broadest characterization, that is, of a right to fish without restriction as to purpose or use of fish, best coincides with the goals of effective management and fair distribution.

Key words: Fisheries, Indigenous people, Aboriginal and treaty rights, Canada.

1. Introduction

Canada's fishing communities confront challenge from many quarters. Changing ocean conditions, land uses that compromise fish habitat, and ineffective regula-

tion of the world's enormous capacity to harvest fish have combined to diminish wild fish stocks dramatically. There are many fewer fish to catch than there were a generation ago, let alone a century ago. In addition, fluctuations in fish prices and input costs are unpredictable and uncontrollable; fishers are buffeted from all sides with economic uncertainty. To compound this uncertainty, Canada's fishers work in a context of partially and incompletely defined Aboriginal rights. The result is an overriding sense of vulnerability about rights of access to fish and the future of long-established ways of life. Aboriginal and non-Aboriginal fishers share the uncertainty, but they stand in a different legal relationship to the fisheries. That difference flows from the fact that Aboriginal peoples fished and managed their fisheries before others arrived, a fact reflected in the constitutional entrenchment of Aboriginal and treaty rights in Canadian law. As a result, although many Aboriginal fishers participate in the fisheries on the same terms as non-Aboriginal Canadians, they also enjoy the fact or possibility that certain of their fisheries are protected as constitutional rights.

This article describes then critiques the characterizations of Aboriginal peoples' fishing rights in Canadian law. In particular, we focus on the rights to fish for food, to fish commercially, and to fish to support a moderate livelihood, and on what it means for rights, characterized in these terms, to receive constitutional protection. This framing of fishing rights has emerged largely over the last twenty years from the judicial interpretation of the constitutional entrenchment of Aboriginal and treaty rights. When Aboriginal peoples approach the courts for recognition of their rights to fish, they must now work within, or against, this framework. Either way, the characterization of fishing rights in terms of food, commercial, or moderate-livelihood fishing, structures much of what is possible within Canadian law. This is true not only in the courts, but also in treaty negotiations, and we discuss the fisheries provisions in a series of modern treaties in relation to the court-defined rights.

Aboriginal and treaty rights share the status of constitutional rights, but Aboriginal peoples also access the fisheries under a diverse set of agreements with federal and provincial governments that do not enjoy constitutional status. Although a detailed description of these agreements is beyond the scope of this article, we sketch their contents and consider how these agreements stand apart from, but are influenced by, the judicial articulation of constitutional rights. In

so doing, we draw upon examples from across the country, but give particular attention to the Pacific fisheries.

Finally, we consider the characterization of rights to food fisheries, to commercial fisheries, and to fisheries in support of a moderate livelihood in light of their capacity to promote effective management and a just allocation of the fisheries. The effective management of the fisheries will, of course, depend upon much more than the characterization of Aboriginal or treaty rights to fish, and the elusive goal of a just allocation is probably better described as an aspiration rather than an achievable objective. However, the particular characterization of fishing rights may either assist or impede these goals. We argue that to characterize Aboriginal and treaty fishing rights in terms of food fisheries or fisheries to support a moderate livelihood is problematic, and that the simplest and broadest characterization, that is, of a right to fish without restriction as to purpose or use of fish, best coincides with the goals of effective management and fair distribution.

2. Constitutional Rights to the Fisheries

In 1982, Canada amended its constitution to include a Charter of Rights and Freedoms and a separate provision, section 35(1), for Aboriginal and treaty rights: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”¹ This slight text is followed in paragraph two with a description of the Aboriginal peoples of Canada as including “Indians, Inuit, and Métis.” “Indians,” now more commonly and properly First Nations, are the indigenous people of most of Canada’s land area and oceans.² The Inuit are the original human inhabitants of Canada’s north. The Métis, concentrated in the Prairie provinces and western Ontario, but present elsewhere, are distinct peoples of European and indigenous descent.³

Beyond these few words in the constitution, the legal meaning of the constitutional recognition and affirmation of Aboriginal and treaty rights was left to the courts, and many important interpretive principles have emerged from the conflict

1. *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

2. Although First Nations is the preferred term, “Indian” remains a relevant legal category in Canada. The federal government governs First Nations through the *Indian Act*, R.S.C. 1985, c. I-5, which defines Indian and Indian Band status.

3. See *R. v. Powley*, 2003 SCC 43 at para. 10 [Powley].

over fisheries.⁴ This is the result, on the one hand, of the importance of the fisheries to Aboriginal cultures and economies across much of the country and, on the other, of a Canadian management regime that, since its inception, reallocated fish to non-Aboriginal interests.⁵ Aboriginal peoples have turned to the courts and to the constitutional recognition of their rights in an effort to secure access to their fisheries. In doing so, Aboriginal fishing rights cases have influenced not only the management of the fisheries, but also the general understanding of Aboriginal and treaty rights in Canada.

According to the courts, Aboriginal rights (including Aboriginal title) emerge from the prior use and occupation of the lands and waters of what is now Canada.⁶ Treaty rights, on the other hand, arise from the many formal agreements between European colonial powers or Canada and Aboriginal peoples. Some of these agreements are several centuries old; others are the product of a modern treaty process that continues to unfold in some regions of the country, particularly in the north and in British Columbia, Canada's western-most province.⁷ The texts of the modern treaties are the product of protracted negotiations and of careful legal drafting. The historic agreements are set out in relatively few, broad terms. Canadian courts have established a number of principles to guide the interpretation of these terms, and there is considerable overlap between the definition of the rights that arise from the historic treaties and those based in the prior use and occupation of traditional territories. We deal first with Aboriginal rights and historic treaty rights to fish, and we use the characterizations of fishing rights that the courts have deemed worthy of constitutional status – rights to food fisheries, to commercial fisheries, and to fisheries to support a moderate

4. The list of cases is potentially long, but certainly includes *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*], *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*], *R. v. Gladstone*, [1996] 2 S.C.R. 723 [*Gladstone*], and *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall*].

5. Under the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, s. 91(12), fisheries are a federal responsibility in Canada (although jurisdiction over freshwater fisheries has largely devolved to the provinces), and as a result most of the conflict involves Aboriginal peoples and the federal government. There is a growing regional literature on the history of this conflict. For British Columbia see Newell 1993, Harris 2001, and Harris 2008a; for Manitoba see Tough 1996; for Ontario see Thoms 2004 and Blair 2008; for Atlantic Canada see Coates 2000 and Wicken 2002; for the north see Bankes 2003.

6. *Van der Peet*, op.cit. para. 30; *Calder v. British Columbia*, [1973] S.C.R. 313 [*Calder*].

7. *Constitution Act, 1982*, op.cit. s. 35(3).

livelihood – to organize our analysis.⁸ We then turn to the fisheries provisions in the modern treaties. The rights that emerge from these diverse sources share the status of constitutional rights.

2.1 Food Fisheries

R. v. Sparrow (1990) marked the first sustained attempt by the Supreme Court of Canada (SCC) to interpret the constitutional entrenchment of Aboriginal and treaty rights. The case arose as a result of the Crown's prosecution of Aboriginal fishers from the Musqueam First Nation for offences under the *Fisheries Act* and their assertion, in defense, of an Aboriginal right to fish. The SCC held that, so far as the fisheries were concerned, the constitutional entrenchment of Aboriginal rights meant that a Musqueam "food, social and ceremonial fishery" had priority, after conservation, over other fisheries. The SCC did not define the scope of this fishery, but it noted that the case arose as a result of an alleged breach of a food fishing license and therefore that the case was not about the nature or extent of an Aboriginal right to a commercial fishery.⁹ The government could infringe this right to a food, social and ceremonial fishery – regulations that were legitimately required to conserve fish stocks might be a justifiable infringement – but the onus lay with government to justify any infringement. The standard was high. Beyond conservation, the court suggested that a regulation imposed to prevent harm might meet the standard, but also that the "public interest" was too general and vague an objective to justify infringing a constitutionally-protected right. Moreover, any infringement had to be consistent with the Crown's special trust relationship with Aboriginal peoples. A regulation imposed in the name of conservation, for instance, could not place limits on the Aboriginal fisheries in order to conserve the fisheries for others. Thus, conservation was the first priority in managing the fishery, then the "Indian" food fisheries, and only then the sport and commercial fisheries.¹⁰

Sparrow defined the rights of the Musqueam, but the priority of the Aboriginal fisheries extended to all those able to establish an Aboriginal right to fish for food.

8. This order is a function of the way the rights have developed in the Supreme Court of Canada.

9. *Sparrow*, op.cit. pp. 1083, 1011. Although the right to a "food, social, and ceremonial" fishery appears to be broader than a right to a food fishery, the SCC uses the two categories interchangeably.

10. *Ibid.* p. 1116.

In most instances, this has not been difficult, and while the quantity of food fish may be debated, the priority of the food fishery is not. Moreover, the SCC has since extended the principles articulated in *Sparrow* to Métis subsistence harvesting rights, understood as rights to harvest wildlife, including fish, for food.¹¹ However, beyond constructing or re-constructing the categories of food fishing and subsistence harvesting, and announcing their priority, the courts have left it to the parties and, more generally, to Aboriginal peoples and the federal department of Fisheries and Oceans Canada (Fisheries Canada) or its provincial counterparts to determine the scope and extent of these constitutional rights. That process largely unfolds within the Federal government's Aboriginal Fisheries Strategy, discussed in part 3 below.

2.2 Commercial Fisheries

In 1996, the SCC confronted the issue of Aboriginal rights to commercial fisheries in three cases known as the *Van der Peet* trilogy.¹² In these cases the SCC determined that in order to secure an Aboriginal right to a commercial fishery, a First Nation must establish that, prior to the group's contact with Europeans, it had prosecuted a commercial fishery and that commercial fishing was "integral to the distinctive culture of the aboriginal group claiming the right."¹³ This was a substantially different and more difficult standard to meet than for the food fisheries, and until very recently, the Aboriginal defendants in *R. v. Gladstone* (1996), a case involving the Heiltsuk Nation on Canada's Pacific coast, were the only people to succeed in establishing an Aboriginal right to a commercial fishery, and then only for the herring spawn-on-kelp fishery.¹⁴ Moreover, in recognizing the possibility of an Aboriginal right to a commercial fishery, the SCC expanded the grounds on which the government might justifiably infringe that right. Conservation remained a legitimate goal, but the government's "pursuit of economic and regional

11. *Powley*, op.cit. paras. 41, 48.

12. *Van der Peet*, op.cit.; *Gladstone*, op.cit.; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672.

13. *Van der Peet*, op.cit., para 46. In *Powley*, op.cit. para. 37, the SCC modified this test for the Métis. In order to establish an Aboriginal right, the Métis claimant must establish that the practice in question was an integral part of a distinctive culture prior to the time at which the Métis community in question "came under the effective control of European laws and customs."

14. *Gladstone*, op.cit. See Harris 2000 on *Gladstone*, and Johnston 2005 on the SCC's departure from *Sparrow* in the *Van der Peet* trilogy.

fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups” might also justify infringing the constitutional right.¹⁵ In short, the right to a commercial fishery, should it be established under the framework set out in *Van der Peet*, might be broad in the first instance, but then, following *Gladstone*, constrained by the government to further other economic and social policies.

Two recent attempts to establish Aboriginal rights to commercial fisheries have produced opposing results. Both attempts involved extensive archaeological, anthropological, historical, and oral evidence introduced to the courts in an attempt to prove that commercial fishing was, following *Van der Peet*, integral to the distinctive culture of the First Nations claiming the right. In 2008, the British Columbia Supreme Court ruled that the Lax Kw’alaams of the province’s northern coast “had existed primarily within a subsistence economy until the arrival of the fur traders” and therefore had not established a right to a commercial fishery, a result upheld on appeal.¹⁶ Conversely, in the *Ahousaht* case, nine member Nations of the Nuuchah-nulth Tribal Group on the west coast of Vancouver Island have successfully established “a right to fish and to sell fish.”¹⁷ The right, wrote Justice Garson, “is not an unlimited right to fish on an industrial scale, but it does encompass a right to sell fish in the commercial marketplace.”¹⁸ The court left the parameters for the exercise of this right somewhat vague pending further evidence, under the test set out in *Gladstone*, of the government’s objectives in infringing the right, but nonetheless the court recognized an Aboriginal right to a commercial fishery.

2.3 Fisheries to Support a Moderate Livelihood

There are relatively few judicial interpretations of the fisheries clauses in historic treaties. In 1989, the British Columbia Court of Appeal ruled that the right “to our fisheries as formerly” in the Douglas treaties on Vancouver Island included the right of the Tsawout First Nation to protect a traditional fishing ground from the building of a marina, but a fuller interpretation of this treaty right remains to be

15. Ibid. para. 75.

16. *Lax Kw’alaams Indian Band v. Canada*, 2008 BCSC 447, para. 495; appeal dismissed 2009 BCCA 593.

17. *Ahousaht Indian Band and Nation v. Canada*, 2009 BCSC 1494, para. 487.

18. Ibid. para 489.

seen.¹⁹ Elsewhere in the country, two decisions regarding historic treaty rights to fish in the Great Lakes and on the Atlantic coast have significantly re-orientated those fisheries. Both decisions extend the treaty right beyond a food fishery to include a right to fish for commercial purposes. However, the right is limited to fishing for “sustenance” or to support “a moderate livelihood.”

Conflict over fisheries on the Great Lakes between Aboriginal peoples and the state emerged with the rise of non-Aboriginal commercial and sport fisheries in the 1830s and 1840s.²⁰ One protracted dispute involves the Saugeen fisheries around the Bruce Peninsula on Lake Huron.²¹ In *R. v. Jones*, a 1993 case involving charges against Saugeen fishers for exceeding the limit on a communal commercial fishing license, the Ontario Provincial Court ruled that the Chippewas of Nawash, part of the Saugeen Ojibway First Nation, had a treaty right lodged in the Bond Head Treaty of 1836 and an Aboriginal right “to fish for sustenance purposes in their traditional fishing grounds.”²² Following the approach set out in *Sparrow*, the court held that the effect of “the defendants’ aboriginal and treaty rights to fish for commercial purposes is that the Saugeen Ojibway Nation has priority over other user groups in the allocation of surplus fishery resources, once the needs of conservation have been met.”²³ The right to sustenance, therefore, included commercial as well as food fishing, although the commercial right was “directed ‘to a subsistence use of the resource as opposed to a commercially profitable enterprise.’”²⁴ However, the court did not elaborate on the extent of the commercial fishing right for sustenance or subsistence beyond ruling that the allocation at the time when the charges were laid was inadequate.

This ruling and the ensuing Saugeen fisheries provoked a backlash from the non-Aboriginal fishing community. A provincial inquiry noted the escalating violence on the Bruce Peninsula, including boat burnings and assaults, and the inexplicable refusal of the provincial government to negotiate a resolution.²⁵ It was only in 2000, seven years after the decision in *Jones*, that the Saugeen Ojibway and the provincial government concluded a five-year management agreement for

19. *Saanichton Marina Ltd. v. Claxton*, [1989] 5 W.W.R. 82.

20. See Lytwyn 1990, Thoms 1999.

21. See Lytwyn 1992, Blair 1997.

22. *R. v. Jones* (1993), 14 O.R. (3d) 421.

23. *Ibid.* p. 448.

24. *Ibid.* p. 441.

25. Ipperwash Inquiry 2007 pp. 117–19.

the commercial fisheries around the Bruce Peninsula. That agreement, the terms of which are confidential, includes provisions for commercial fishing boundaries and seasons, data collection and sharing, and joint committees to recommend acceptable harvest levels. It was renewed in 2005.²⁶

The single most important treaty fishing rights case is *R. v. Marshall* (1999), a case involving the interpretation of an eighteenth-century treaty between the British and the Mi'kmaq on the Atlantic coast. The treaty text stipulated that the Mi'kmaq would only trade at British trading posts. It did not mention fishing, but the SCC, after reviewing an extensive historical record and expert historical testimony, ruled that, in the context of a series of peace and friendship treaties, the Mi'kmaq had treaty rights to trade fish for "necessaries." Justice Binnie, writing for the majority, concluded "the treaty rights are limited to securing 'necessaries' (which I construe in the modern context, as equivalent to a moderate livelihood), and do not extend to an open-ended accumulation of wealth."²⁷ Elsewhere he characterized the treaty as securing "the right of the Mi'kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed 'necessaries'."²⁸ The right to fish for sustenance or to support a moderate livelihood, therefore, was broader than the "Indian" food fishery, but it was not as broad as the right to an open-ended commercial fishery that the court had described in *Gladstone*. Nonetheless, the right to a limited commercial fishery was a constitutionally-protected treaty right and therefore "enjoy[ed] special treaty *protection* against interference with its exercise."²⁹

Two months after releasing its decision in *Marshall*, the SCC issued a second set of reasons when it denied an application from the commercial fishing fleet for a rehearing of the case.³⁰ In *Marshall II* the court emphasized the federal government's power to regulate the Mi'kmaq treaty right.³¹ The government could infringe the treaty right not only to achieve conservation goals but also to further the objectives set out in *Gladstone*: the pursuit of regional and economic fairness and the recog-

26. Ontario Ministry of Natural Resources 2005.

27. *Marshall*, op.cit. para. 7.

28. Ibid. para. 4.

29. Ibid. para. 47 (emphasis in original).

30. *R. v. Marshall*, [1999] 3 S.C.R. 533 [*Marshall II*].

31. Ibid. para. 24.

dition of non-Aboriginal participation in the fisheries.³² In reiterating the federal government's capacity to regulate the fishery and infringe treaty rights, the SCC imported to the treaty rights context the objectives that might justify infringing an Aboriginal right to a commercial fishery. As a result, the treaty right, which the SCC found was limited to trade for sustenance or to support a moderate livelihood, was also subject to the capacity of the government to infringe that right for a broad range of social policy objectives.³³

The *Marshall* decision, and the fact that Mi'kmaq fishers immediately began to fish for lobster during a closed season in exercise of their treaty right, provoked an outcry among non-Aboriginal fishers.³⁴ They called on Fisheries Canada to stop the fishing and when the department refused to intervene they destroyed Mi'kmaq fish traps and other property.³⁵ Fisheries Canada eventually did intervene, prompting a much-publicized confrontation between one Mi'kmaq community and federal authorities. However, by March 2001, Fisheries Canada concluded interim agreements with most First Nations affected by the *Marshall* decision.³⁶ Under a program known as the Marshall Response Initiative, these agreements were later replaced with longer-term agreements in which, between 2000 and 2007, Fisheries Canada spent almost \$600 million to provide eligible First Nations with communal commercial licenses (acquired from commercial fishers under a voluntary retirement program), fishing vessels, and training.³⁷

2.4 Modern Treaty Fisheries

In the late 1960s, the Nisga'a First Nation turned to the courts for a declaration that Nisgaia Aboriginal title had not been extinguished. The resulting case, *Calder v. British Columbia*, was the legal catalyst that revived treaty-making in Canada.

32. Ibid. para. 41.

33. Goldenberg 2004 pp. 93–94, notes that a right to fish to support a moderate livelihood is an internally-limited right along the lines of a food fishing right. It is not an open-ended commercial fishing right, such as the one in *Gladstone* that caused the SCC to re-visit the test for justifying infringements. Therefore, the government objectives outlined in *Sparrow* that might justify infringing an Aboriginal right (conservation, the prevention of harm) are the more appropriate.

34. Coates 2000 pp. 127–168.

35. Johansen 2004 pp. 5–6.

36. Ibid. pp. 9–10.

37. Fisheries and Oceans Canada, "Summative Evaluation of the Marshall Response Initiative" and "First Nation Participation in Commercial Fisheries Following the Marshall Decision."

Although the SCC dismissed the Nisga'a claim, the reasons for judgment prompted the government of Canada to establish a comprehensive land claims policy and to open treaty negotiations with a number of Aboriginal groups across the country, including the Nisga'a.³⁸ Spurred by the pressures of an enormous hydro-electric development in northern Quebec, the Inuit of Nunavik and the James Bay Cree First Nation concluded an agreement in 1975. Another Inuit group, the Inuvialuit, reached a land claims settlement in the Western arctic in 1984, to be followed by the largest land claim agreement in Canadian history with the Inuit of Nunavut in 1993. That agreement carved a vast new territory – Nunavut – out of the existing Northwest Territories. Two other comprehensive land claim agreements with the Gwich'in in 1992 and with the Sahtu Dene and Métis in 1993, cover large portions of the Yukon and Northwest Territories respectively. Finally, in British Columbia the Nisga'a, after decades of negotiation, concluded an agreement in 1999. Two other comprehensive land claim agreements have followed, with the Tsawwassen (near the city of Vancouver) in 2006 and the Maa-nulth (on the west coast of Vancouver Island) in 2009, and negotiations continue elsewhere in the province.

These treaties vary enormously in form and substance. We do not attempt to review the detail of the fish and wildlife provisions, let alone the treaties as a whole. However, a number of notable differences have emerged in the characterization of fishing rights. The rights are most constrained in the recent Tsawwassen and Maa-nulth treaties. Both treaties identify a particular allocation of fish, described as a percentage of the total allowable catch of various named species, that may be harvested “for Domestic Purposes.”³⁹ This is defined along *Sparrow* lines to mean for “food, social or ceremonial purposes.”⁴⁰ Fish harvested under the agreements may not be sold,⁴¹ but may be traded or bartered within the community or with the other Canadian Aboriginal people,⁴² although presumably only for food, social or ceremonial purposes. Beyond the limited treaty rights, each treaty is accompanied by a side agreement, labeled a “harvest agreement,” which includes various mechanisms for enhancing Tsawwassen and Maa-nulth participation in the commercial fisheries. These harvest agreements, discussed more fully below, are referred to in

38. *Calder*, op.cit. See Foster 2007.

39. Tsawwassen First Nation Final Agreement, 8 December 2006, Chapter 9, s. 1 [Tsawwassen FA]; Maa-nulth First Nations Final Agreement, 9 December 2006, art. 10.1.1 [Maa-nulth FA].

40. Tsawwassen FA, Chapter 1; Maa-nulth FA, art. 29.1.1.

41. Tsawwassen FA, Chapter 9, s. 19; Maa-nulth FA, art. 10.1.9.

42. Tsawwassen FA, Chapter 9, s. 4; Maa-nulth FA, art. 10.1.4.

the treaties but are excluded from them and do not enjoy constitutional status. The treaty right, and therefore the right with constitutional protection, is to a fishery for food, social or ceremonial purposes.

However, in a provision that demonstrates the link between the results of litigation and the structure of modern treaty rights, the Maa-nulth treaty provides that if, in the final determination of the *Ahousaht* case, the other Nuu-chah-nulth tribes establish Aboriginal rights to commercial fisheries, then the Maa-nulth treaty and the harvest agreement (concluded with the five Nuu-chah-nulth tribes that are not a party to the litigation) will be amended to include those commercial fishing rights under the treaty.⁴³ On the basis of the trial decision in *Ahousaht* that the tribes had an Aboriginal right “to sell fish in the commercial marketplace,” it appears that, pending the outcome of subsequent appeals, the Maa-nulth treaty tribes may yet have treaty rights to commercial fisheries.

The earlier Nisga’a treaty also provides an allocation embedded in the treaty and a larger allocation set out in a harvest agreement. Within the treaty, Nisga’a citizens have a right to harvest defined quantities of Nass River salmon; there is no requirement that the fish be harvested for “Domestic Purposes.” Nisga’a who sell treaty fish will be subject to license fees and other charges levied against other commercial harvesters, but they are entitled to sell treaty-caught fish.⁴⁴ This unencumbered treaty entitlement, which only applies to Nass River salmon, differs significantly from the Tsawwassen and Maa-nulth agreements, but as with those agreements, the treaty allocation is relatively small. The bulk of the allocation, and most of the opportunity to participate in the commercial fisheries, rests in the provisions of the accompanying harvest agreement. The treaty contemplates subsequent agreements regarding treaty entitlements for other species of fish and aquatic plants and those agreements may contain provisions for commercial fisheries, but until then the harvesting of all non-salmon species is for “domestic purposes” only.⁴⁵

The agreements in the northern territories include fishing rights within general wildlife harvesting provisions. The Gwich’in (1992) and Sahtu (1993) agreements recognize extensive rights “to harvest all species of wildlife within the settlement

43. Maa-nulth FA, art. 10.2.3; Maa-nulth Harvest Agreement, 9 December 2006, s. 90 [Maa-nulth HA].

44. Nisga’a Final Agreement, 4 May 1999, Chapter 8, s. 8.

45. Ibid. Chapter 8, ss. 52–67.

area at all seasons of the year”.⁴⁶ These harvesting rights include “the right to trade among themselves and with other aboriginal persons, for personal consumption, edible products of wildlife harvested by [the signatories].”⁴⁷ “Personal consumption” is not defined, but it is described later in the agreement to include “nutritional, clothing and cultural needs and fish for their dogs,”⁴⁸ and it appears to perform approximately the same role as the “domestic purposes” limit in the British Columbia treaties. Commercial activity is expressly excluded; trading “is intended to maintain traditional sharing among individuals and communities,” not commercial harvest.⁴⁹ If it is thought necessary to set a total allowable harvest for any species for conservation purposes, then the treaty sets out a formula for establishing a Gwich’in or Sahtu “Needs Level” harvest based on past harvests and personal needs. As in *Sparrow*, this “Needs Level” harvest is to have first priority.⁵⁰

The Nunavut Agreement also establishes a distinction between those wildlife stocks that are subject to a total allowable harvest limit and those that are not, but in both instances the treaty right is considerably more extensive than in any other land claims agreement.⁵¹ In fact, it is the only modern agreement in which a right to a commercial harvest is embedded fully within the treaty. The treaty provides that, where a total allowable harvest limit for a stock or population of wildlife has not been set, the Nunavut Inuit have an unlimited right to harvest that wildlife stock for whatever purpose.⁵² Where a total allowable harvest limit has been set, Nunavut Inuit have priority to a “basic needs level,” which is based primarily on prior harvest levels rather than a “domestic purposes” characterization.⁵³ Finally, the treaty confirms that “an Inuk shall have the right to dispose freely to any person

46. Gwich’in Comprehensive Land Claims Agreement, 22 April 1992, s. 12.4.1 [Gwich’in CLCA]; Sahtu Dene and Metis Comprehensive Land Claims Agreement, 6 September 1993, s. 13.4.1 [Sahtu CLCA].

47. Gwich’in CLCA, op.cit., s. 12.4.16; Sahtu CLCA, op.cit. s. 13.4.16.

48. Gwich’in CLCA, op.cit. s. 12.5.5(b); Sahtu CLCA, op.cit. s. 13.5.5(b). These provisions describe in greater detail the approach adopted in the Inuvialuit Final Agreement, 5 June 1984 [Inuvialuit FA], which recognized the Inuvialuit “preferential right to harvest all species of wildlife ... for subsistence usage” (s. 12.(24)(a)) and the right to trade or barter with other Inuvialuit (s. 12.(31)) and the beneficiaries of adjacent land claims (s. 12.(34)).

49. Gwich’in CLCA, op.cit. s. 12.4.16(d); Sahtu CLCA, op.cit. s. 13.4.16(d).

50. Gwich’in CLCA, op.cit. s. 12.5.3; Sahtu CLCA, op.cit. s. 13.5.3.

51. For a fuller analysis see Bankes 2003 pp. 173–75.

52. Nunavut Land Claims Agreement, 25 May 1993, s. 5.6.1–5.6.2.

53. Ibid. ss. 5.6.19–5.6.30.

any wildlife lawfully harvested,” including “the right to sell, barter, exchange and give, either inside or outside the Nunavut Settlement Area.”⁵⁴ In effect, the treaty provides constitutional protection for an expansive right to fish.

This sampling of fisheries provisions in the modern treaties reveals something of the diversity of fishing rights accorded constitutional protection. Where First Nations are concerned, the emerging pattern is to limit constitutional protection to fisheries for domestic consumption and to specify the priority of those fisheries in the manner set out in *Sparrow*. Commercial fisheries may be the subject of long-term agreements, but not of constitutional status. Here it seems the impact of *Van der Peet* and the difficult standard it sets for establishing Aboriginal rights to commercial fisheries loom large. With *Van der Peet* at their back, the governments of Canada and British Columbia have, with the important exception of the Nisga’a treaty, refused to embed rights to commercial fisheries in the British Columbia treaties.⁵⁵ The Maa-nulth may yet have treaty rights to commercial fisheries, but they await the outcome of litigation to discover if this will be so. At present only the Inuit of Nunavut have secured a full treaty right for commercial fisheries.

3. Non-constitutional Rights to the Fisheries

Aboriginal peoples participate in the fisheries under the constitutional umbrella of Aboriginal and treaty rights, but also under the same legal framework as non-Aboriginal fishers.⁵⁶ In addition, they participate by virtue of diverse agreements that are specific to Aboriginal peoples, but do not enjoy constitutional protection. Here we discuss the “harvest agreements” associated with several recent treaties, and the “comprehensive fisheries agreements” that establish fishing rights under the auspices of the Aboriginal Fisheries Strategy (AFS). The character of these agreements is certainly influenced by the definition and scope of Aboriginal and treaty rights, and many involve fisheries to which Aboriginal people claim con-

54. Ibid s. 5.7.30.

55. Goldenberg 2004 pp. 91–103, notes the legal as well as the social and political “anxiety” over recognizing commercial rights.

56. James 2003 found that Aboriginal fishers in BC held or operated 27 percent of the commercial fishing licenses and took 14 percent of the commercial harvest, by landed value. These figures include the Nisga’a treaty licenses, but they form a small proportion of the total.

stitutional status but which Canadian governments and courts have declined to recognize or have yet to determine.

The most secure of the fisheries that do not enjoy constitutional protection are lodged in “harvest agreements.” These agreements between Canada, British Columbia, and several First Nations (the Nisga’a, the Tsawwassen, and the Maa-nulth First Nations) have their origin in the modern treaty process in British Columbia and accompany, but are expressly excluded from, the treaties.⁵⁷ The harvest agreements allocate either a percentage of the total allowable catch of particular species or additional fishing licenses to the signatories. The allocation of licenses or quota within the communities is left to the First Nations themselves. Commercial fishing conducted under these agreements is subject to the terms and conditions that apply to the rest of the commercial fisheries. However, unlike other commercial licenses which Fisheries Canada issues annually at its discretion, the harvest agreements are renewable 25-year agreements that the government may revoke only with appropriate compensation. In this respect, the harvest agreements appear to provide substantially greater security of tenure, although in practice the distinction may be less than it appears; Fisheries Canada has always re-issued annual commercial licenses.⁵⁸

Although separate from the treaties, harvest agreements are tied to the modern treaty process and are relatively few in number. Without a treaty or harvest agreement, most Aboriginal peoples fish under the auspices of the Aboriginal Fisheries Strategy. Established by Fisheries Canada in 1992 as a response to *Sparrow*, the government’s stated goal was “to establish a social contract among the government, aboriginal people and non-aboriginal fishing groups.”⁵⁹ As the AFS has evolved, Fisheries Canada negotiates annual “comprehensive fisheries agreements” with Aboriginal groups, thereby providing them with some combination of communal fishing licenses, management responsibility, and funding. The licenses authorize “food, social and ceremonial” fisheries, commercial fisheries, or both.⁶⁰ In recent years these communal licenses have accounted for an increasingly large proportion of the catch. In British Columbia’s salmon fishery, for example, the “food, social

57. Nisga’a Nation Harvest Agreement, 11 May 2000; Tsawwassen First Nation Harvest Agreement, 8 December 2006; Maa-nulth HA, *op.cit.*

58. See *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, at para. 24.

59. Allain 1993 p. 13.

60. Fisheries Canada issues the licenses under the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332.

and ceremonial” fishery now accounts for approximately 9 percent of harvested fish.⁶¹ This reflects the gradual effort of Fisheries Canada, since 1994, to shift a portion of the fisheries to First Nations by acquiring licenses from non-Aboriginal fishers and re-issuing them through the AFS as communal licenses.⁶² It also reflects fewer fish, a declining catch, and the constitutional obligation to ensure that there is a sufficient Aboriginal food fishery before opening other fisheries.⁶³ All comprehensive agreements stipulate that commercial fishing under communal licenses is subject to the same terms and conditions as other commercial licenses.

The requirement for conformity in the commercial fishery emerged from conflict over an AFS pilot sales program that enabled a small group of First Nations in British Columbia to harvest fish for food or sale. The most controversial provision allowed these fishers to put their nets in the water 24 hours before the rest of the commercial fleet. In a fishery where openings are measured in hours, many in the commercial fleet condemned this advanced access and staged a symbolic protest fishery during the opening. Fisheries Canada placed charges against members of the commercial fleet, who in turn claimed that the pilot sales program violated the equality guarantees in the constitution. The SCC, in the case known as *R. v. Kapp*, eventually upheld the convictions and dismissed the claim on the grounds that the program was a justifiable attempt to ameliorate a historic disadvantage.⁶⁴ However, Fisheries Canada stopped giving priority to the pilot sales fisheries; commercial openings are differentiated by gear type, but extend to all commercial fishers.

61. Data on salmon landings from 1953 to 2007 in Irvine 2008 indicate that the “Aboriginal subsistence fishery” accounted for approximately 4 percent of all salmon landings since 1953, but had increased to 9 percent in the decade from 1998–2007. McRae 2004 p. 10 estimated that from 1994–2003, 12 percent of the Fraser River sockeye salmon, Canada’s largest and most productive wild salmon fishery, went to the “food, social and ceremonial” fishery. However, James 2003 p. 1 suggests that: “In most capture fisheries, commercial fishing accounts for well over 95 percent of the fish caught.”

62. In 1994, Fisheries Canada created the Allocation Transfer Program (ATP) under the AFS. Operating on a budget of approximately \$ 6 million per year for the Pacific Region, the program has issued over 250 licenses to Aboriginal groups since its inception: Fisheries and Oceans Canada, Pacific Region Integrated Fisheries Management Plan p. 100; Fisheries and Oceans Canada, ATP website http://www.pac.dfo-mpo.gc.ca/tapd/atp_e.htm [visited 22 October 2009].

63. Irvine 2008 describes a significant decline in sockeye landings since the mid 1990s.

64. *R. v. Kapp*, 2008 SCC 41.

4. Problematizing the Characterizations of Fishing Rights

The line between fisheries that operate within and without the framework of constitutional rights is not always evident. The fishing rights embedded within the treaties clearly enjoy constitutional protection; those in the harvest agreements do not. Beyond this, there is a general constitutional right to a “food, social and ceremonial” fishery, but the communal licenses issued under the Aboriginal Fisheries Strategy do not have constitutional status. They are broadly consistent with the constitutional priority, but are not formal expressions of it. Indeed, each AFS agreement includes a provision stipulating that the agreement does not define or extinguish any Aboriginal or treaty right. Similarly, the Heiltsuk (who established an Aboriginal right to a commercial fishery in *Gladstone*), the Saugeen (who established a treaty and Aboriginal right to fish commercially for subsistence use in *Jones*), and the Mi’kmaq (who established a treaty right to fish to support a moderate livelihood in *Marshall*) negotiate yearly or multi-year commercial fishing agreements. Again, these fisheries operate within the frame of recognized constitutional rights, but the agreements themselves are not constitutional documents like the treaties. If there are few bright lines to demarcate constitutional rights in the fisheries, what then are the principles that guide the allocation of fishing rights, and how are those principles defined and limited by the characterizations of those rights?

The first and the clearest principle is that the Aboriginal “food, social and ceremonial” fishery, or some variant that is limited to fishing for domestic purposes, has priority over other fisheries and is subject chiefly to conservation concerns.⁶⁵ This, to borrow one commentator’s phrasing, is the promise of *Sparrow*.⁶⁶ Canada’s recognition of this constitutional right has come primarily in the form of annual catch allocations under its AFS, but also in the modern treaties which include the right to catch a stipulated quantity of fish for food. However, the characterization of this right is problematic, a function of its history and of the difficulties it presents to effective fisheries management.

65. In *Sparrow*, op.cit., the SCC noted that in addition to conservation, other objectives such as the prevention of harm might justify infringing an Aboriginal right. This has been an issue so far in hunting rights cases (see *R. v. Morris*, 2006 SCC 59), but not fishing rights cases.

66. Bowker 1995.

First, the characterization is a legal construct and should not be understood to provide an accurate description of the Aboriginal fisheries at some point in the past. Fish were crucially important as food in many Aboriginal societies in North America, but also facilitated the accumulation of wealth. As a legal construct, the food fishery emerged in nineteenth century fisheries legislation as a way of setting aside a small proportion of the fisheries for Aboriginal peoples while opening the vast majority of the resource to other interests. In British Columbia, the category of Indian food fishing performed the same function in the fisheries as did the Indian reserve on land: the reserve and the food fishery were the legal categories through which the state consigned the Aboriginal presence on the land and in the fisheries to the margins.⁶⁷ As a result, the characterization of the right in terms of food fishing is part of a colonial history of dispossession. If it is to remain a part of contemporary fisheries law and policy, it is vital that it not perpetuate this history.

Second, with respect to the modern management of the fisheries, an allocation of fish for a particular purpose is a significant complicating factor. A food fishery requires the regulation not just of the act of fishing, but also of the uses of the fish caught. Regulating the fisheries themselves is a difficult enough task without also regulating how the fish are used. This second layer of regulation is difficult, intrusive, and the source of considerable antagonism between Aboriginal peoples and the federal government.⁶⁸ Conversely, a lack of enforcement implies a failure of the rule of law and creates resentment within the commercial and sports fisheries and, in some instances, within the larger Aboriginal community. Moreover, so far as conservation is concerned, it makes no difference whether the fish are caught for food or for sale. In 2003, in the aftermath of the trial decision in *Kapp* which led to the cancellation of the pilot sales program, Chief Doug Kelly of the Soowahlie First Nation on the lower Fraser River in British Columbia, put it this way: "Once a fish is caught, who cares whether we eat it or sell it? The fish is gone. It's not going to spawn. It doesn't matter whether it's my food or your food."⁶⁹ The priority should be to an allocation of fish, irrespective of the uses to which the fish are put.

Beyond the priority of the Aboriginal food fisheries, it is difficult to discern stable principles to guide the allocation of fishing rights. We do know that consti-

67. Harris 2008a pp. 4, 106–26.

68. For a sample of the discontent from different regions of British Columbia, see Howard 1998 p. A3, Lindsay 2000 p. A4, Eustace 2003 p. 1.

69. Mickleburg 2003 p. A4, cited in Goldenberg 2004 pp. 102–103.

tutional protection for commercial fisheries and fisheries to support a moderate livelihood is possible, but the courts have indicated that constitutional status for these fisheries does not confer the same priority as that enjoyed by the food fisheries. Instead, the standard for establishing constitutional status is higher, the priority that results is weaker, and the capacity of the government to justifiably infringe the right is notably greater than for food fisheries.

As with the food fisheries, the right to commercial fisheries appears to be constructed around the use to which fish are put. In effect, however, there is no restriction on use: the fish may be sold or used for any other purpose, including food. The characterization of the right, therefore, is relatively straight-forward. It is a simpler and more effective means of allocating the fishery. The problem lies in the fact that the courts have made it so difficult for Aboriginal peoples to establish constitutional commercial fishing rights that they have been of little consequence. This is the legacy of the SCC's much-criticized decision in *Van der Peet*.⁷⁰ Only the Heiltsuk in *Gladstone*, and very recently several Nuuchah-nulth tribes in *Ahousaht*, have established such a right, but even then the capacity of the government to infringe the right creates the potential to remove most of what might be gained from the constitutional status. This is not to suggest that there are not difficult choices to be made in the allocation of the fisheries, but rather that the most useful characterization of fishing rights – a simple allocation of fish to be used for whatever purpose – is unlikely to enjoy constitutional protection.

In its interpretation of historic treaties, the SCC has indicated that First Nations may have constitutionally-protected treaty rights to fisheries that support a “moderate livelihood.”⁷¹ To the extent that this categorization blurs the distinction between a food and commercial fishery, it is a helpful development. Moreover, Davis and Jentoft argue that “the distinction between livelihood and wealth accumulation fishing” and the priority accorded livelihood fishing make possible a fisheries management regime that prioritizes “attaining and maintaining ecosystem integrity for the purpose of sustaining fisheries livelihoods and coastal communities.”⁷² They see the moderate livelihood standard as a means to “empower small-scale coastal fishers.”⁷³ We agree with this goal, but are not convinced

70. Barsh 1997, Borrows 1997, Johnston 2005.

71. *Marshall*, op.cit.

72. Davis and Jentoft 2001 p. 236.

73. *Ibid.*

that characterizing the right in terms of a moderate livelihood furthers effective fisheries management. The right to fish to support a moderate livelihood shares the problem of the food fisheries in that it allocates fish for a particular use and therefore requires monitoring of the uses of fish, not just their catching. The potential uses of fish are broader, but the scope is even less well-defined than food fishing. What is a “moderate livelihood”? Justice Binnie in *Marshall* described it as including “such basics as ‘food, clothing and housing, supplemented by a few amenities’, but not the accumulation of wealth.”⁷⁴ This is not a particularly useful clarification for those attempting to translate a right to a “moderate livelihood” into a specific number of fishing licenses or a percentage of the total allowable catch. To whom does the right extend? To all fishers in the community at a particular point in time? To all members of the community? Moreover, even if an adequate definition were possible, in most cases a moderate livelihood depends on so much more than an allocation of fish that it is unhelpful as a standard for allocating fish.⁷⁵ If the goal is to determine a fair and just allocation, then a division of the fisheries based on indeterminate characterizations of the use of fish is probably not helpful.

In interpreting the historic treaties the courts must determine the meanings of general provisions negotiated when abundance was presumed. In a context of abundance, treaty rights that secured access might be sufficient. Today, the courts are being asked to interpret treaty provisions and Aboriginal rights in the context of increasing and, in some cases, acute scarcity. Stipulating that the rights extend only so far as to support a moderate livelihood is one way of placing a limit on fishing rights in this dramatically-changed context. Assuming that limits beyond those imposed for conservation purposes are appropriate, should the courts be more specific in defining an allocation to First Nations? In the United States, in the case of *U.S. v. Washington* (involving the interpretation of a mid-nineteenth-century treaty in Washington state), Justice Boldt determined that treaties securing a right to fish “in common with all citizens of the Territory” entitled the treaty tribes to 50 percent of the commercial fishery.⁷⁶ Conflict between Aboriginal and

74. *Marshall*, op.cit. para. 59.

75. In *Ahousaht*, op.cit. para. 482, the plaintiffs claimed, among other things, a right to fish commercially “to sustain the community.” This is a communal variation on the right to subsistence or to a moderate livelihood, and one that Justice Garson ruled was not a viable characterization because it was “contrary to the evidence” and “a purpose-driven characterization.”

76. *U.S. v. Washington*, 384 F. Supp. 312 (1974).

non-Aboriginal fishers ensued, but there could be little doubt about the extent of the allocation.⁷⁷

Perhaps setting the broad parameters of a right, rather than defining specific allocations, is an appropriate role for courts. Certainly the judicial determinations of a right to fish for sustenance purposes in *Jones* and to support a moderate livelihood in *Marshall* were catalysts that led to significant increases in Aboriginal peoples' participation in the fisheries on Lake Huron and along the Atlantic coast. In those cases, the judicial articulation of the right receded into the background once the parties negotiated fisheries agreements that stipulated numbers of licenses and percentages of total allowable catch. However, the judicial determinations provide the foundation for the rights: the parties will be thrown back on the language of "moderate livelihood" or "sustenance" should the agreements falter. In those circumstances, the courts' characterization of the right will facilitate a long-standing resolution only if it is sufficiently defined to provide the parties with clear guidance. We are skeptical that the right to fish to support a moderate livelihood satisfies this criterion.

5. Conclusion

If the process of reconciling Aboriginal peoples' prior settlement of territory with the emergence of Canada is going to involve some sharing of the fisheries, then there will need to be a balancing of the interests of those who came before with those who came later. The courts have said repeatedly that the best place for this balancing is in negotiated agreements. However, when negotiations falter, courts are called upon to intervene, and when they do they determine the rights of the parties but also the framework of rights in which the more general balancing of interests occurs. Within the jurisprudential frame of Aboriginal and treaty rights, the balancing occurs either in the characterization of the right, or in the capacity of governments to infringe the right, or both. Rights to a food fishery and to a fishery that supports a moderate livelihood are characterizations of the right to fish

77. At least not until the U.S. Supreme Court, in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), determined that the tribes had a right to an allocation of up to 50 percent of the fishery to support a moderate livelihood. This is the source of the moderate livelihood limit in Canada. See Harris 2008b. On the aftermath of the Boldt decision, see Cohen 1986.

that limit its scope. So too, a jurisprudence that permits governments to infringe Aboriginal and treaty rights to further other economic and social policies or to accommodate a history of non-Aboriginal fishing also limits the right. A balancing of interests, therefore, might occur in the characterization of the right or in the expression of its limits. Where should it occur?

We have set out strong reservations of the characterizations that currently limit Aboriginal fishing rights in Canadian law. The food fishery is a legal construct laden with a particular colonial history of dispossession; it is also a characterization that complicates fisheries management enormously by requiring not only the regulation of fishing but also the use of fish. The right to fish to support a moderate livelihood carries some intuitive appeal, but defies a satisfying definition; it is not a stable characterization on which to found Aboriginal or treaty rights. As a result, the food fishery and the fishery in support of a moderate livelihood are characterizations of the fishing right that should be employed cautiously, if at all. Our preference is for the simplest of characterizations, that is, of a right to fish without qualification as to the purpose or use of fish. The right would include fishing for food, fishing to support a moderate livelihood, and commercial fishing, but would not be defined or limited in those terms. Any qualification of the right would be imposed not in its characterization, but in its limit. This would entail moving the balancing of interests to a second stage of analysis, a stage currently occupied in Canadian law by a test that affords government an opportunity to justify an infringement of the right. The parameters of this test still need refinement. At present the scope for justifiably infringing constitutional rights is unconscionably broad. But this is where the balancing of interests should occur. To recognize a broad right to fish, and then to lodge the balancing of interests in a realm that requires strong government justification for any limit on that right, we believe, provides the clearest route to a just allocation of the fisheries. It avoids problematic and tortuous characterizations of the right that replicate colonial patterns and hinder effective fisheries management; it corresponds with a history in which Aboriginal peoples used and managed the fisheries broadly, unencumbered by the characterizations of a colonial state; and it acknowledges other interests that may, at times, justify limiting Aboriginal rights to fish, but places the onus on governments to establish when this might be so.

Aboriginal and non-Aboriginal peoples in Canada stand in a different legal relationship to the fisheries. Of this much we are certain. Beyond this, the just allocation of the Canadian fisheries remains an important work in progress.

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Вылов рыбы для пропитания, промысловый вылов и лов для поддержания экономики семьи: характеристики прав коренных народов и договорных прав по рыболовству в Канаде

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Резюме

Коренные народы Канады находятся в ином правоотношении к рыболовству, чем другие ее жители. Это отношение основано на пользовании рыбными угодьями с незапамятных времен, которое предшествует истории создания некоренных поселений в Северной Америке, а также на защите прав коренных народов в конституции и в канадском договорном праве. В статье описываются характеристики прав коренных народов и договорного права на ловлю рыбы в канадском законодательстве. В частности, это описание права на вылов рыбы на нужды питания, право на промысловый и коммерческий лов, и на поддержание экономики семьи, а также что означает для этих прав конституционная поддержка. В статье поднимается вопрос по этим характеристикам и выносится предположение о том, что самая простая и самая широкая характеристика, при которой можно заниматься рыболовством без ограничения относительно цели вылова или использования рыбы, лучше всего совпадает с целью эффективного управления и справедливого распределения.

Ключевые слова: Рыболовство, Акт о коренных народах, права коренных народов и договорное право, Канада