The Aboriginal and Treaty Rights Framework Underlying the Fraser River Sockeye Salmon Fishery

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Introduction

1 This paper is intended to provide an overview of the aboriginal and treaty rights framework underlying the Fraser River sockeye salmon fishery. It is primarily based on a survey of cases determined by the Supreme Court of Canada (the "Court") the British Columbia Court of Appeal (the "BCCA") and the British Columbia Supreme Court (the "BCSC"). This paper is not intended to provide an exhaustive discussion of all cases that may be relevant to aboriginal and treaty rights related to the fishery.

2 Counsel for Participants will have the opportunity to express their comments on this paper at the Commission's hearings on "Perspectives on Aboriginal and Treaty Rights Underlying the Fraser River Sockeye Salmon Fishery" scheduled for October, 2010.

Constitutional Recognition and Affirmation of Aboriginal and Treaty Rights

3 The *Constitution Act, 1982*[1] recognizes and affirms the aboriginal and treaty rights of the aboriginal peoples of Canada,[2] by providing at s. 35(1) that:

> *The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*

4 Constitutional entrenchment of aboriginal and treaty rights affirmed and recognized that, as the first inhabitants of North America, the rights of the aboriginal peoples of Canada are to be accorded special legal and constitutional protection. Chief Justice Lamer explained this in the aboriginal fishing rights case *R. v. Van der Peet:*[3]

> *In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples <u>were already here</u>, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which*

[1] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[2] Section 35(2) of the *Constitution Act, 1981* defines the "aboriginal peoples of Canada" as including the Indian, Inuit and Métis peoples of Canada.
[3] *R v. Van der Peet,* [1996] 2 S.C.R. 507. (*"Van der Peet"*)

> *mandates their special legal, and now constitutional, status.*[4] [emphasis in the original]

5 The entrenchment of existing aboriginal and treaty rights gave constitutional status to rights that were previously vulnerable to unilateral extinguishment.[5] This entrenchment did not create new aboriginal rights, but rather, protected those rights already "existing" in 1982.[6] The effect of this protection is to "hold the Crown to a substantive promise" and to "[give] a measure of control over government conduct and a strong check on legislative power" by ensuring that the government is required to "bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1)."[7] Any law that is unjustifiably inconsistent with the Constitution is, to the extent of the inconsistency, of no force or effect.[8]

6 However, the recognition and affirmation of rights is only a starting point. In developing the law of aboriginal and treaty rights, courts must also take into account the fundamental objective that underscores such recognition and affirmation. This objective is the reconciliation of relationships among aboriginal and non-aboriginal peoples. As explained by Binnie J. in *Mikisew Cree First Nation v. Canada*,[9] the reconciliation of the claims, interests and ambitions of both groups rests at the heart of modern aboriginal and treaty rights law:

> *The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions*.[10]

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[4] *Van der Peet*, para 30.
[5] *R v. Marshall*, [1999] 3 S.C.R. 533, para 6. (*"Marshall II"*)
[6] *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, para 133. (*"Delgamuukw"*)
[7] *R v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] S.C.J. No. 49, para 65. (*"Sparrow"*)
[8] *Constitution Act, 1982*, s. 52.
[9] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69. (*"Mikisew Cree"*)
[10] *Mikisew Cree*, para 1.

Aboriginal Title to Marine Areas or Rivers

Introduction to Aboriginal Title

7 The Court has acknowledged that the rights of aboriginal peoples to their traditional lands has, for many years, been virtually ignored and that it was not until after a number of judicial decisions, notably *Calder et al. v. Attorney-General of British Columbia*[11] in 1973, that the government was prompted to reassess that position.[12] In *Calder*, the Court held that prior aboriginal occupation of North America could give rise to rights that were not merely personal or usufructory in nature:

> *[T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructory right". What they are asserting in this action is that they have a right to continue to live on their lands as their forefathers had lived and this right has never been lawfully extinguished*.[13]

8 Essentially, the Court in *Calder* recognized aboriginal title as a legal right, identified the source of that right as the prior possession of tribal territories by aboriginal societies, and that therefore the existence of the right did not depend on treaty, executive order or legislative enactment.[14] However, it would take the next two decades for the Court to articulate the nature of aboriginal title and to determine whether or not it continued to exist.

9 In 1984, aboriginal title was revisited in *Guerin v. Canada*,[15] wherein the Court affirmed the concept of aboriginal title as a "unique interest in land",[16] emphasized its *sui generis* nature and articulated the fiduciary obligations that aboriginal title instills upon the Crown:

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[11] *Calder et al. v. Attorney-General of British Columbia,* [1973] S.C.R. 313. ("*Calder"*)
[12] *Sparrow,* para 50.
[13] *Calder,* p. 328.
[14] *Calder*, p. 390; also see *Guerin* para 86.
[15] *Guerin v. Canada* [1984] 2 S.C.R. 335. ("*Guerin*")
[16] *Guerin*, para 96.

> *Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the* sui generis *interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians*.[17]

10 In *Guerin*, the Court held that the concept of aboriginal title could create a fiduciary relationship between aboriginal peoples and the Crown, stemming from the fact that the aboriginal interest in land was inalienable except upon surrender to the Crown.[18] Later, in *Wewaykum Indian Band v. Canada*,[19] the Court confirmed that "the fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples."[20]

11 As for the content of aboriginal title itself, however, the *sui generis* nature of the right made it difficult to describe, as acknowledged in 1988 by the Court in *Canadian Pacific Ltd. v. Paul:*[21] "Indian interest in land is truly *sui generis*. It is more than the right to enjoyment and occupancy although, as Dickson J. pointed out in *Guerin*, it is difficult to describe what more in traditional property law terminology."[22] In 1989, aboriginal title continued to be articulated with general terms such as "occupation and possession,"[23] as would remain the case until the Court's 1997 decision in *Delgamuukw v. British Columbia*.[24]

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[17] *Guerin,* para 97.
[18] *Guerin,* para 84.
[19] *Wewaykum Indian Band v. Canada*, 2002 SCC 79. (*"Wewaykum"*)
[20] *Wewaykum*, para 79.
[21] *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654. ("*Canadian Pacific"*)
[22] *Canadian Pacific*, p. 678.
[23] *Guerin,* para 86, citing *Calder*; See also *Roberts v. Canada*, [1989] 1 S.C.R. 322. ("*Roberts"*)
[24] *Delgamuukw*, see note 6.

12 In *Delgamuukw*, the Court confirmed that aboriginal title had not been extinguished by the creation of Crown land grants[25] and, where proven, continued as a burden on the Crown's underlying title.[26] In order to make out a claim for aboriginal title, an aboriginal group would be required to establish the following:[27]

i. The land claimed was used and occupied as traditional tribal territory, prior to the assertion of British sovereignty;[28]

ii. If present occupation is relied on as proof of occupation pre-sovereignty, then there must be a continuity between present and pre-sovereignty occupation; and

iii. At sovereignty, the occupation must have been exclusive, or perhaps jointly exclusive with one or more neighbouring First Nations in the case of joint title.[29]

13 A central and necessary criterion in any claim for aboriginal title is evidence of the aboriginal use and occupation of traditional territory prior to the assertion of Crown sovereignty.[30] This test is to be considered with reliance on "both the perspective of the common law and the aboriginal perspective, placing equal weight on each."[31] Use and occupation, therefore, will not be determined using European conceptualizations of those terms alone, and the aboriginal perspective is to be given equal deference.

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[25] *Delgamuukw,* paras 172-186.
[26] *Delgamuukw,* para 145. This confirmed an earlier finding by the Court that aboriginal rights to occupation and possession continued as a "burden on the radical or final title of the sovereign": *Roberts,* see note 23.
[27] *Delgamuukw*, para 143.
[28] In *Delgamuukw*, the parties did not dispute on appeal that British sovereignty was conclusively established in British Columbia by the Oregon Boundary Treaty of 1846: *Delgamuukw,* para 145. Note however that this date will vary between provinces or territories.
[29] The Court clarifies that the requirement of exclusive occupancy and the possibility of joint title could be reconciled by recognizing that joint title could arise from shared exclusivity: *Delgamuukw,* para 158.
[30] *Delgamuukw*, para 144.
[31] *Delgamuukw*, para 156.

14 Having set out the criteria necessary to support a claim for aboriginal title, the Court then began to articulate its content. In general terms, aboriginal title is a "right to the land itself"[32] and therefore is "more than the right to engage in specific activities which may be themselves aboriginal rights"[33] or even to engage in "site-specific activities."[34] Rather, the right in land is summarized by two propositions:[35]

i. That aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and

ii. That those protected uses must not be irreconcilable with the nature of the group's attachment to that land.

15 The first proposition, that aboriginal title includes the right to exclusive use and occupation of land for a variety of purposes, encompasses the right to choose to what ends a piece of land can be put. [36] This discretion is in contrast to aboriginal rights, such as the aboriginal right to fish for food, which would not contain within it the same discretionary component.[37] When one considers the multitude of modern uses to which land held under aboriginal title can be put, and that such use is not restricted to the aboriginal practices, customs or traditions that are integral to the distinctive culture of the aboriginal group, it follows that aboriginal title will have an "inescapable economic component."[38]

16 Also, the discretionary authority held by aboriginal title holders suggests that the fiduciary relationship between the Crown and aboriginal peoples may require the

[32] *Delgamuukw*, para 138.
[33] *Delgamuukw*, para 111.
[34] *Delgamuukw*, para 138.
[35] *Delgamuukw*, para 117.
[36] *Delgamuukw,* para 166, 168.
[37] *Delgamuukw,* para 168.
[38] *Delgamuukw*, para 166 and 169.

involvement of aboriginal peoples in decisions affecting their lands.[39] This will often take the form of consultation, the content of which will vary according to the severity of any contemplated infringement of aboriginal title. For lesser infringements, this may involve a good faith discussion of the contemplated decision with the intention of addressing the aboriginal group's concerns.[40] However, "[i]n most cases, it will be significantly deeper than mere consultation" and "[s]ome cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."[41] Several years later, the Court clarified that such consent "is appropriate only in cases of established rights, and then by no means in every case."[42]

17 The second proposition, that land held under aboriginal title must not be put to uses irreconcilable with the aboriginal group's attachment to that land, necessarily limits the right. The Court explains that "this inherent limit...flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple."[43] In basic terms, this "ultimate limit" means that the land cannot be put to uses that "destroy the ability of the land to sustain future generations of aboriginal peoples."[44]

18 Other limitations arising from the nature of aboriginal title itself include that lands held cannot be transferred, sold or surrendered to anyone other than the Crown (i.e. is inalienable to third parties),[45] and that title is held communally by aboriginal groups as opposed to personally by individual aboriginal persons, and therefore decisions in regards to the land must be made by the community as a whole.[46]

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[39] *Delgamuukw*, para 168.
[40] *Delgamuukw*, para 168.
[41] *Delgamuukw,* para 168.
[42] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511*,* para 48. (*"Haida"*)
[43] *Delgamuukw*, para 111.
[44] *Delgamuukw*, para 166.
[45] *Delgamuukw*, para 113.
[46] *Delgamuukw*, para 115.

19 The content of the fiduciary duty that stems from aboriginal title may also vary. For example, there will be no fiduciary duty where aboriginal title is claimed but not yet proven because, in such cases "[t]he aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title."[47]

20 Also, even if there is a fiduciary relationship, this does not ensure priority will always be given to aboriginal rights or title. As explained in *Delgamuukw*, "the fiduciary relationship between the Crown and aboriginal peoples demands that aboriginal interests be placed first. However, the fiduciary duty does not demand that aboriginal rights always be given priority."[48] Rather, "in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interests of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting."[49]

21 Aboriginal title, like other aboriginal rights, is not absolute. Aboriginal title may be infringed and in some cases such infringement may be justified. The onus of proving that aboriginal title has been infringed will fall upon the aboriginal group holding title. This will generally not be an onerous test. After that, the Crown will have the onus of justifying the infringement. The test to be applied here is largely based on the test for the infringement of an aboriginal right, articulated by the Court in *R. v. Sparrow*[50] and discussed in greater detail later in this paper. In brief, the justification test has two parts:[51]

[47] *Haida,* para 18.
[48] *Delgamuukw*, para 162.
[49] *Wewaykum*, para 96.
[50] *Sparrow*, see note 7.
[51] *Delgamuukw*, paras 161-164.

i. Is the infringement in furtherance of a valid legislative objective that is substantial and compelling?

ii. If there is a substantial and compelling legislative objective, has the honour of the Crown been upheld in light of the Crown's fiduciary obligation? In answering this, consider:

a. Does the process by which the Crown allocates the resource and the allocation of the resource reflect the prior interest of the holders of aboriginal title?
b. Has there been as little infringement as possible to effect the desired result?
c. In a situation of expropriation, has fair compensation been paid?
d. Has the aboriginal group been consulted in good faith?

Claims of Aboriginal Title to Marine Areas or Rivers

22 No Canadian court has yet to fully apply the concept of aboriginal title to marine areas or rivers. However, aboriginal title claims of this nature are emerging. Several First Nations, including the Ahousaht, Haida and Lax Kw'alaams First Nations have asserted aboriginal title over submerged lands or the foreshore, often in connection with claims of an aboriginal right to fish. However, aboriginal title to marine areas has only been pursued to trial in the recent *Ahousaht Indian Band v. Canada (Attorney General)*[52] decision at the BCSC. Garson J. summarized that title claim as follows:

> *The plaintiffs' claim to aboriginal title is a novel one that has not previously been considered by a Canadian court. In essence, they claim submerged lands bordered by the foreshore throughout the territory of each plaintiff and extending 100 nautical miles into the ocean; they do not claim the upland areas of their territories in this action.*[53]

[52] *Ahousaht Indian Band v. Canada (Attorney General)*, 2009 BCSC 1494. (*"Ahousaht"*) Currently under appeal to BCCA. Note that the Lax Kw'alaams First Nation's claim to aboriginal title was severed prior to trial: *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2006 BCSC 1463.
[53] *Ahousaht,* para 491.

23 However, in *Ahousaht*, the claim of aboriginal title to submerged lands and the foreshore was restricted to one economic component of that title – the fishery. Garson J. was not asked by the plaintiffs to define the scope or content of the title itself, except in so far as it related to any right to fish that may flow from it, if found. Because Garson J. ultimately determined that the plaintiffs held an aboriginal right to fish and to sell fish, she declined to make a finding of aboriginal title, stating:

> *Ultimately, it is not necessary for me to decide this issue since, in my view, the infringement and justification analyses as applied to title would not yield a different result than when applied to the plaintiffs' aboriginal rights in the circumstances of this case.*[54]

24 The limited pleadings in *Ahousaht*, therefore, did not require Garson J. to fully consider the issue of aboriginal title over submerged lands in marine areas or rivers. Without definitive jurisprudence on the matter, it remains unclear as to whether such title exists, and if so, whether or how the broader set of rights that typically attaches to aboriginal title might be applied or modified. Garson J. did, however, express doubt that a title claim to submerged lands is "legally tenable."[55]

25 Nevertheless, aboriginal title to submerged lands or the foreshore has the possibility of providing for a different set of rights than those that may be obtained through successful claims to an aboriginal right to fish. For example, aboriginal title carries the right to exclusive use and occupation of land for a variety of purposes, which need not be aspects of those aboriginal practices, customs or traditions that are integral to the title holder's distinctive aboriginal culture. This may arguably encompass alternative uses of marine resources that might not constitute aboriginal rights on their own.

26 Also, aboriginal title includes the right to choose to what ends a piece of land may be put, implying a degree of discretionary authority over decisions affecting the land or its resources. This discretionary authority was specifically contrasted as between aboriginal title and the aboriginal right to fish for food, with the Court in *Delgamuukw*

[54] *Ahousaht*, para 501
[55] *Ahousaht,* para 502.

clarifying that the latter would not contain the same discretionary component.[56] In some cases, the "full consent" of the aboriginal title holder may be required with respect to decisions affecting title lands "particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."[57]

27 In addition, aboriginal title carries an "inescapable economic component" which might speak to a right to fish for commercial purposes without proof that such practice was integral to the title holder's distinctive aboriginal culture, a burden that, as discussed later in this paper, has been challenging to meet.

28 However, the *sui generis* nature of aboriginal title makes it difficult to translate into property law terms. It is unknown whether aboriginal title to submerged lands in marine areas or rivers, if it exists, would translate into an ownership of the fishery. As noted by the Court in *R v. Nikal*,[58] "clearly the fishery ... can be severed from the ownership of the river bed."[59]

Interim considerations

29 At present, the lack of jurisprudence on aboriginal title to marine areas or rivers makes it impossible to discern whether such title exists, or whether or how the existence of such title would influence management of the fishery. A multitude of considerations, including but not limited to the impact on federal and provincial legislation, international obligations under the Pacific Salmon Treaty, federal management structures under the Department of Fisheries and Oceans and common law principles of access to marine and tidal areas, may apply.

30 In the interim, however, the assertion of aboriginal title to marine areas or rivers may be sufficient to place certain obligations of consultation and possibly reasonable

[56] *Delgamuukw*, para 168.
[57] *Delgamuukw*, para 168.
[58] *R v. Nikal*, [1996] 1 S.C.R. 1013. (*"Nikal"*)
[59] *Nikal*, para 80.

accommodation upon the Crown.[60] As explained in *Haida Nation v. British Columbia (Minister of Forests)*:[61]

> *The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests.... the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim.*[62]

31 Also, although it remains possible that a future finding of aboriginal title to marine areas or rivers may influence the nature of property rights in those areas, the existing case law is relatively clear in regards to the common property nature of the fishery. As stated simply by Major J. in *Comeau's Sea Foods Ltd v. Canada (Minister of Fisheries and Oceans)*:[63]

> *Canada's fisheries are a "common property resource", belonging to all the people of Canada.*[64]

32 The Federal Court of Appeal later clarified in *Larocque v. Canada (Minister of Fisheries and Oceans)*[65] that the fisheries "do not belong to the Minister" either.[66] Therefore, the fishery continues to be the common property of all Canadians.

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[60] Note that the scope and content of such consultation and reasonable accommodation will vary on the circumstances, including on the strength of the claimed title or rights, as discussed later in this paper.
[61] *Haida,* see note 42.
[62] *Haida*, para 27.
[63] *Comeau's Sea Foods v. Canada (Minister of Fisheries and Oceans),* [1997] 1 S.C.R. 12. (*"Comeau's Sea Foods"*)
[64] *Comeau's Sea Foods*, para 37.
[65] *Larocque v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237. (*"Larocque"*)
[66] *Larocque*, para 13.

Aboriginal Right to Fish

33 Where an aboriginal group has yet to prove, or is unable to prove, a claim of aboriginal title over its traditional territories, it may nevertheless be able to demonstrate that it holds an aboriginal right to engage in certain practices, customs or traditions in that area.[67] Aboriginal rights, of course, are also protected against unjustified infringement by virtue of s. 35(1) of the *Constitution Act, 1982.*

34 The Court first considered the recognition and affirmation of aboriginal rights in its 1990 decision, *R v. Sparrow.*[68] Although developed in a criminal context, the Court articulated for the first time its four-part analytical framework for s. 35(1):

i. Has the applicant demonstrated that he or she was acting pursuant to an aboriginal right;

ii. Was the right extinguished prior to enactment of s. 35(1);

iii. Has the right been infringed; and

iv. Was the infringement justified.

35 In brief, where an individual acting pursuant to an existing aboriginal right is charged with an offence pursuant to legislation that infringes that right, and where the government is unable to prove that such infringement is justified, then the charges cannot succeed.

The first step is to determine whether an aboriginal right exists.

[67] *R. v. Adams* [1996] 3 S.C.R. 101*,* para 26 ("*Adams"*). See also the companion case, *R v. Côté,* [1996] 3 S.C.R. 139 ("*Côté"*).
[68] *Sparrow*, see note 7.

Determining whether an aboriginal right to fish exists

36 Aboriginal rights are held by individual groups of aboriginal peoples and as such, will vary amongst different aboriginal groups. As explained by the Court, "aboriginal rights are highly fact specific" and "the rights recognized and affirmed by s. 35(1) are not rights held uniformly by all aboriginal peoples in Canada; the nature and existence of aboriginal rights vary in accordance with the variety of aboriginal cultures and traditions which exist in this country."[69]

37 Therefore, "[t]he fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right."[70] Aboriginal rights must be determined with specific reference to the aboriginal group claiming the right, and in particular to the perspectives held by that group. As the Court articulated in *Sparrow*, although it is impossible to give an easy definition of rights, "it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."[71]

38 With that in mind, the Court set out in *Van der Peet* the test for determining an aboriginal right protected by s. 35(1):

> *[I]n 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.*[72]

39 The first step in determining whether an aboriginal right exists is to identify the nature of the right being claimed.[73] This may, in the first instance, require a clear pleading by the claimant in regards to that right because, "[i]n the aboriginal law context, where the rights sought are different from those of all other Canadians, the principle that plaintiffs

[69] *R v. Gladstone*, [1996] 2 S.C.R. 723, para 65. (*"Gladstone"*)
[70] *Van der Peet*, para 69.
[71] *Sparrow*, at para 69.
[72] *Van der Peet,* para 46.
[73] *Van der Peet*, para 51. Note however, that in *Ahousaht*, Garson J. proposes to "modify the analysis slightly to reflect the nature of the present action" and reviews and makes findings of fact with respect to the existence of and nature of ancestral fishing practices before characterizing the nature of the aboriginal right claimed (*Ahousaht,* para 54).

must be clear about what they are seeking seems particularly important."[74] In addition, the court considering the claim will be asked to define the right in light of the purposes underlying s. 35(1). As explained in *Van der Peet*:

> *The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.*[75]

40 With that underlying purpose, the requirement that an aboriginal right be "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right" raises several issues. For example, the Court has considered each of the components of this test, including the meaning of:

i. "a practice, custom or tradition";

ii. "integral to";

iii. "distinctive culture"; and

iv. "group claiming the right".

41 The Court has also been asked to determine the relevant time period at which the test for determining an aboriginal right is to be applied. Each of these issues will be discussed in turn.

A practice, custom or tradition:

42 In *R v. Sappier; R v. Gray*,[76] the Court held that aboriginal rights are founded upon activities, such as practices, customs or traditions. Aboriginal rights are not founded upon property or the importance of a particular resource to an aboriginal people. In regards to aboriginal rights, the Court explained that:

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[74] *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2009 BCCA 593, para 61. Leave to appeal to SCC granted on June 10, 2010, [2010] S.C.C.A. No. 59. ("*Lax Kw'alaams"*)
[75] *Van der Peet*, para 31.
[76] *R v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54. ("*Sappier; Gray"*)

> *They are not generally founded upon the importance of a particular resource... because to do so would be to treat it as akin to a common law property right. In characterizing aboriginal rights as* sui generis*, this Court has rejected the application of traditional common law property concepts to such rights.*[77]

43 An aboriginal right to fish, for example, is a right to the practice, custom or tradition of fishing (verb) as opposed to the right to fish (noun). This interpretation is supported by the Court's finding that although an aboriginal right to fish may protect a traditional means of sustenance or a pre-contact practice that was relied upon for survival, "there is no such thing as an aboriginal right to sustenance" or a right to the fish themselves.[78]

Integral to:

44 In *Van der Peet*, the Court suggested that in order to be "integral", a practice, custom or tradition must be "a central and significant part of the society's distinctive culture."[79]

45 The precise nature of what is "integral" however, has not been easy for the Court to articulate. In *Mitchell v. M.N.R.,*[80] McLachlin C.J. explained that an aboriginal right "must have been 'integral to the distinctive culture' of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a 'defining feature' of the aboriginal society, such that the culture would be 'fundamentally altered' without it."[81]

46 Later, in *Sappier; Gray*, the Court backed away from this definition and acknowledged that McLachlin C.J's articulation of what was "integral" had unintentionally heightened the threshold for establishing an aboriginal right.[82] Rather, the Court clarified that the

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[77] *Sappier; Gray*, para 21.
[78] *Sappier; Gray*, para 37. See also *Ahousaht*, para 482 where Garson J. rejects the plaintiffs' right to fish to "sustain the community."
[79] *Van der Peet,* para 55.
[80] *Mitchell v. M.N.R.,* [2001] 1 S.C.R. 911. (*"Mitchell"*)
[81] *Mitchell*, para 12.
[82] *Sappier; Gray*, para 39-40.

pre-contact practice upon which an aboriginal right is based need not go to the "core" of a society's identity or be its single most important defining characteristic.[83]

47 What has been clear, however, is that in order for a practice, custom or tradition to be integral, it must be "independently significant", that is, it must not "exist simply as an incident to another practice, custom or tradition."[84] For example, in *R. v. N.T.C. Smokehouse Ltd.*,[85] the Court declined to find an aboriginal right to exchange fish for money or other goods where this exchange had been "few and far between" and occurred incident to potlatches or other ceremonies.[86] Even if the potlatches and ceremonies were to be recognized as aboriginal rights under s. 35(1), the incidental exchange of fish did not have the independent significance required to constitute an aboriginal right.[87]

Distinctive culture:

48 The next step in determining whether an aboriginal right exists is to assess whether the practice, custom or tradition is part of the aboriginal group's "distinctive culture". What constitutes an aboriginal group's "culture" is to be determined taking into account the perspective of the aboriginal peoples themselves[88] and the relationship of aboriginal peoples to the land.[89] This will be an inquiry into the "way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits."[90]

49 The qualifier "distinctive" is added to incorporate an element of "aboriginal specificity" but is not meant to reduce aboriginality to "racialized stereotypes of aboriginal

[83] *Sappier; Gray*, para 39-40.
[84] *Van der Peet,* para 70.
[85] *R v. N.T.C. Smokehouse Ltd.,* [1996] 2 S.C.R. 672. ("*NTC Smokehouse"*)
[86] *NTC Smokehouse,* para 26.
[87] *NTC Smokehouse,* para 26.
[88] *Van der Peet*, para 49.
[89] *Van der Peet*, para 74.
[90] *Sappier; Gray*, para 45.

peoples."[91] Also, distinctive does not mean "distinct" and more than one aboriginal group may hold the same aboriginal right.[92]

Group claiming the right:

50 Like aboriginal title, aboriginal rights are held communally by an aboriginal people rather than by an aboriginal person. As explained by the Court in *Sappier; Gray*, this is because s. 35(1) recognizes and affirms existing aboriginal and treaty rights in order to ensure the continued existence of aboriginal societies.[93] Therefore, the right to harvest a resource, as opposed to the right to make personal use of that resource once harvested, is not to be exercised by any member of an aboriginal community independently of the aboriginal society that the right is meant to preserve.[94]

Relevant time period:

51 In general, the test for whether an aboriginal right exists is to be applied with reference to the time period prior to contact with Europeans.[95] As explained by the Court in *Van der Peet*, this time period was identified because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the rights protected by s. 35(1).[96] The aboriginal group's practices, customs, traditions and distinctive culture are all generally to be considered with reference to this date. However, this is not to say that a "frozen rights" approach is to be taken. Rather, "[t]he evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights."[97]

52 When it comes to the Métis peoples, however, whose rights are equally recognized and affirmed by s. 35(1), the relevant time period cannot be pre-contact. Instead, the

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[91] *Sappier; Gray*, para 45.
[92] *Van der Peet*, para 71. See also *Sappier; Gray*, para 45.
[93] *Sappier; Gray*, para 26.
[94] *Sappier; Gray*, para 26.
[95] *Van der Peet,* para 60. Compare this to the relevant date in respect of a claim for aboriginal title, which as explained earlier in this paper, is the date on which the Crown asserted sovereignty over the land.
[96] *Van der Peet*, para 60.
[97] *Van der Peet*, para 64.

Court has clarified in *R v. Powley*,[98] that the relevant time period for the determination of Métis rights will be "post-contact but pre-control". This will be the "period after a particular Métis community arose and before it came under the effective control of European laws and customs."[99]

Right to fish for food, social or ceremonial purposes

53 In *Sparrow*, the Court recognized for the first time an aboriginal right to fish for food, social and ceremonial ("FSC") purposes, and it did so without the benefit of its test for determining the existence of an aboriginal right, which was not articulated until *Van der Peet* some six years later. Nevertheless, the Court acknowledged that:

> *[F]or the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished, for reasons connected to their cultural and physical survival.*[100]

54 Importantly, the Court held that not only did the Musqueam have a right to fish for FSC purposes, but that such right would be treated with priority, subject only to conservation. This concept of aboriginal priority to the fishery was not new and had been described by the Court even prior to the recognition and affirmation of aboriginal rights under the *Constitution Act, 1982.* In 1980, the concurring reasons of Dickson J. (as he then was) in *Jack et al v. The Queen*,[101] articulated the position taken by aboriginal defendants to a fishing violation and his agreement with that position, as follows:

> *They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.*
>
> *...*

[98] *R v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43 (*"Powley"*)
[99] *Powley,* para 37.
[100] *Sparrow*, para 40.
[101] *Jack et al v. The Queen*, [1980] 1 S.C.R. 294 ("*Jack et al"*)

> *I agree with the general tenor of this argument ... If there are to be limitations upon the taking of salmon here, then those limitations must not bear more heavily upon the Indian fishery than the other forms of the fishery. With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen, subject to the practical difficulties occasioned by international waters and the movement of the fish themselves. But any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery...just as such conservation measures override other taking of fish.*[102]

55 The Court in *Sparrow* adopted this prioritization of aboriginal FSC fishing rights, agreeing that "[t]he 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."[103] As guidance, the Court offered an operational description of this priority, suggesting that in years of low abundance it may be possible for all fish caught to go to aboriginal peoples holding the right, and that in any case the brunt of conservation measures would be borne by the commercial and recreational fisheries. It stated:

> *If, in a given year, conservation needs required a reduction in the number of fish caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of the conservation measures would be borne by the practices of sport fishing and commercial fishing.*[104]

56 However, the Court acknowledged that its guidance lay at a level of generality such that "the detailed allocation of maritime resources is a task that must be left to those having expertise in the area."[105] It would take the work of other courts and cases to sort out the details.

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[102] *Jack et al*, p. 313.
[103] *Sparrow*, para 78.
[104] *Sparrow*, para 78.
[105] *Sparrow*, para 78.

57 The priority element of the right to fish, being priority subject to conservation but in advance of other fishing groups, means that where the Department of Fisheries and Oceans has "pre-season knowledge of insufficient fish" to meet the aboriginal FSC fishing needs for the season, then priority must be given to aboriginal FSC fishing licences over commercial and recreational fisheries until the aboriginal FSC fishing needs have been met.[106]

58 In addition, where the Department acquires only in-season knowledge of insufficient fish to meet aboriginal FSC fishing needs, and this in-season information requires it to immediately impose valid conservation measures, the priority will still be met, if possible, by introducing restrictions in fishing times and fishing gear.[107]

59 The priority element, however, is not without limitations. For example, the Court also stated in *Sparrow* that the priority of allocations is "not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery."[108] Considering the practical difficulties occasioned by the movement of fish, the British Columbia Court of Appeal has held that the priority afforded by an aboriginal right to fish does not mean that FSC fisheries must precede or occur contemporaneously with non-aboriginal fisheries.[109] The BCCA explained that in regards to Fraser River sockeye:

> *The Fraser River sockeye encounter numerous fisheries, including aboriginal, recreational and commercial, as they migrate from the Pacific to their spawning grounds. If a non-aboriginal fishery could never precede any of the aboriginal fisheries, the result would be an exclusive food, social and ceremonial fishery, regardless of the need and abundance of stock. That cannot be the intended result of Sparrow...*[110]

60 It should be noted however, that the issue of temporal priority appears to remain the subject of legal dispute. The BCCA very recently granted leave to appeal on the issue,

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[106] *R v. Douglas*, 2008 BCSC 1098, para 61. (*"Douglas, 2008"*)
[107] *Douglas*, *2008*, para 61.
[108] *Sparow*, para 81.
[109] *R. v. Douglas et al*, 2007 BCCA 265, para 54. Leave to appeal to SCC refused, [2007] S.C.C.A. No. 352. (*"Douglas, 2007"*)
[110] *Douglas, 2007,* para 54.

with Neilson J.A. concluding that "the interests of justice require that leave be granted on the issue of whether the priority granted to the aboriginal FSC fishery includes priority in time."[111]

61 Additional elements of the right to fish for FSC purposes, other than priority, have also been developed. For example, in *R v. Nikal*,[112] the Court held that a proven aboriginal right to fish may include (i) the right to determine who within an aboriginal group will be the recipients of the fish for ultimate consumption; (ii) the right to select the purpose for which the fish will be used, i.e. food, social or ceremonial purposes; (iii) the right to fish for a particular species; and (iv) the right to choose the period of time to fish in the river.[113]

62 In *R v. Jack, John and John*,[114] the BCCA clarified that the right to fish for ceremonial purposes includes the right to fish for salmon in preparation for a wedding.[115] This case also held that whether or not "the right to a fishery in tidal waters is a public right to be shared by members of the public, including aboriginals ... [does] not displace the clear statement in *Sparrow* that the Indian Food Fish requirements must be given top priority after conservation."[116]

63 The right to fish for FSC purposes may also be limited to a specific area. This will be tied to a court's initial characterization of that right according to the test set out in *Van der Peet*. That is, if the practice, custom or tradition that constitutes an aboriginal right is defined as the practice of fishing within a particular area, the exercise of that right will also be limited to that area. As stated by the Court in *R. v. Adams*,[117] "[a] site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right

[111] *R. v. Quipp*, 2010 BCCA 389, para 38.
[112] *Nikal,* see note 58.
[113] *Nikal*, para 104.
[114] *R v. Jack, John and John* (1995), 16 B.C.L.R. (3d) 201 (B.C.C.A.). ("*Jack, John and John"*)
[115] *Jack, John and John*, para 64.
[116] *Jack, John and John,* para 67.
[117] *Adams*, see note 67.

exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question."[118]

Right to fish for commercial purposes

64 Like other aboriginal rights, the right to fish for commercial purposes must be demonstrated using the test set out in *Van der Peet*. Although the Court has emphasized the importance of flexibility and the ability to "draw necessary inferences about the existence and integrality of a practice when direct evidence is not available,"[119] it appears that a right to fish for commercial purposes has generally been difficult to prove.

65 For example, in *R. v. Van der Peet*, a member of the Sto:lo First Nation was convicted under s. 61(1) of the *Fisheries Act* with the offence of selling ten salmon caught under the authority of a food fish license. On appeal to the Court, the accused claimed what the Court characterized as "an aboriginal right to exchange fish for money or other goods."[120] This right to sell or trade was specifically distinguished as something less than an aboriginal right to sell fish commercially, and therefore evidence of pre-contact trade on a commercial scale need not be made out.[121] Nevertheless, although the Court determined that the exchange of fish took place prior to European contact, it held that this practice was not a central, significant or defining feature of the Sto:lo society and therefore did not constitute an aboriginal right.[122]

66 In *R. v. N.T.C. Smokehouse*, a fish processor was convicted under s. 61(1) of the *Fisheries Act* for purchasing fish caught under the authority of food fish licences held by the Sheshaht and Opetchesaht First Nations. Given that in order to convict the fish processor, the sale of fish by the Sheshaht and Opetchesaht peoples must have been illegal, the fish processor was entitled to raise as a defense an aboriginal right held by

[118] *Adams,* para 30. See also the companion case, *R v. Côté*.
[119] *Sappier; Gray*, para 33.
[120] *Van der Peet*, para 76.
[121] *Van der Peet*, para 78.
[122] *Van der Peet*, para 91.

the Sheshaht and Opetchesaht to have sold the fish.[123] In this case, the transaction was much larger than the ten fish sold in *Van der Peet*, being in excess of 119,000 pounds of salmon caught by 80 people. This was closer to the act of commerce or exchange on a large scale.[124] However, for the purpose of its analysis and because the *Fisheries Act* regulations prohibited "all sale or trade"[125] of FSC fish, the Court nevertheless characterized the right claimed as a right to "exchange fish for money or other goods,"[126] as it had in *Van der Peet*. The Court went on to find that pre-contact sales of fish were "few and far between" and therefore did not have the defining status and significance necessary to support an aboriginal right to exchange fish for money or other goods.[127] Also, the incidental exchange of fish at potlatches or ceremonial occasions did not have sufficient independent significance.[128]

67 Similarly, the BCCA did not find a Coast Tsimshian right to fish for commercial purposes in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*.[129] Specifically, the right claimed in that case was "an aboriginal right to harvest and sell on a commercial scale" all species of fish and fish products found within the Lax Kw'alaams' claimed territories."[130] The BCCA held that although prestige items such as eulachon grease may have been exchanged between kin at feasts and potlatches, "other fish, especially salmon, were so plentiful that although they were harvested in great quantity and eaten for subsistence, virtually no trade or exchange in them took place."[131] Accordingly the right to harvest and sell all species of fish on a commercial scale was not made out.

[123] *NTC Smokehouse*, para 15.
[124] *NTC Smokehouse*, para 18.
[125] *NTC Smokehouse*, para 19.
[126] *NTC Smokehouse*, para 21.
[127] *NTC Smokehouse*, para 26.
[128] *NTC Smokehouse,* para 26.
[129] *Lax Kw'alaams,* see note 74.
[130] *Lax Kw'alaams*, para 15.
[131] *Lax Kw'alaams*, para 2, 43.

68 However, there are at least two cases in which a right to fish for commercial purposes has been found. The first is *R v. Gladstone*,[132] in which the Court considered both whether the Heiltsuk Band has an aboriginal right to exchange herring spawn on kelp for money or other goods and also, whether the Heiltsuk Band has an aboriginal right to sell herring spawn on kelp to the commercial market.[133] The evidence in that case indicated that the exchange and trade in herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk.[134] Ultimately the Court held that the Heiltsuk held both an aboriginal right to exchange herring spawn on kelp for money or other goods and also to trade herring spawn on kelp on a commercial basis.[135]

69 In the second case, *Ahousaht Indian Band v. Canada (Attorney General)*,[136] Garson J. of the BCSC concluded that five aboriginal bands whose territories are located on the west coast of Vancouver Island hold an aboriginal right to "fish for any species of fish within the environs of their territories and to sell that fish."[137] This right to fish and to sell fish is broader than what is captured by the expression "exchange for money or other goods" [138] but is less than a right to "a modern industrial fishery or to unrestricted rights of commercial sale."[139] Also, the right would not be limited to any particular species[140] but its exercise would be limited to specified traditional fishing areas.[141]

70 As evident by the cases above, the right to fish for commercial purposes may take a variety of forms. This may range from the right to "exchange fish for money or other goods" to, at least, a right to fish "on a commercial basis." However, having confirmed that a right to fish for commercial purposes may exist, on whatever scale that may be, it is then necessary to assess how that right may affect the management of the fishery. For example, what form of priority will a commercial right to fish enjoy?

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[132] *Gladstone*, see note 69.
[133] *Gladstone*, para 24.
[134] *Gladstone*, para 27.
[135] *Gladstone,* para 26-27, 30.
[136] *Ahousaht,* see note 52.
[137] *Ahousaht*, para 489.
[138] *Ahousaht*, para 486.
[139] *Ahousaht*, para 487.
[140] *Ahousaht,* para 383.
[141] *Ahousaht*, para 394.

71 The Court discussed the issue of priority in a commercial context in *Gladstone,* in which it held that a more refined articulation of priority than that described in *Sparrow* would be required. Unlike FSC fishing rights, which are internally limited by the food, social and ceremonial needs of the aboriginal group holding the right, commercial rights, it said, have no internal limitation. Rather, the only limits are the "external constraints of the demand of the market and the availability of the resource."[142]

72 Therefore, the priority afforded in such cases could not require that commercial rights holders be granted an exclusive fishery after conservation. Rather, priority in this context requires that the government allocate the resource in a manner respectful of the fact that rights holders have priority over the exploitation of the fishery by other users:

> *Where the aboriginal right is one that has no internal limitation, then the doctrine of priority does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.*[143]

73 However, the Court also noted in *Gladstone* that the public's common law right of access to the fishery is not extinguished by virtue of a finding of an aboriginal right to fish for a commercial purpose. Rather, the Court clarified that:

> *[I]t was not contemplated by Sparrow that the recognition and affirmation of aboriginal rights should result in the common law right of public access in the fishery ceasing to exist with respect to all those fisheries in respect of which exist an aboriginal right to sell fish commercially. As a common law, not constitutional,*

[142] *Gladstone,* para 57.
[143] *Gladstone,* para 62.

> *right, the right of public access to the fishery must clearly be second in priority to aboriginal rights; however, the recognition of aboriginal rights should not be interpreted as extinguishing the right of public access to the fishery.*[144]

Extinguishment

74 Once an aboriginal group has established that a practice, custom or tradition integral to the distinctive culture of that group constitutes an aboriginal right, the next step in the analytical framework set out in *Sparrow* is to determine whether that right has been extinguished.

75 Section 35(1) recognizes and affirms "existing aboriginal and treaty rights", that is the rights in existence when the *Constitution Act, 1982* came into effect. Aboriginal rights need not have been formally recognized by French colonial or common law to have continued in an unextinguished manner following the arrival of Europeans.[145] However, s. 35(1) does not revive extinguished rights.[146]

76 The onus rests with the Crown to prove that an aboriginal right has been extinguished. This is a high burden, requiring "strict proof of the fact of extinguishment" and "evidence of a clear and plain intention on the part of the government to extinguish."[147]

77 That an aboriginal right has been controlled in great detail by regulations is not, on its own, enough to constitute a plain intention to extinguish that right. For example, in regards to the control of aboriginal fishing under the *Fisheries Act*, the Court in *Sparrow* held that neither detailed regulations nor discretionary permitting of aboriginal fisheries extinguished an underlying fishing right:

> *There is nothing in the Fisheries Act or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were*

[144] *Gladstone,* para 67.
[145] *Côté*, para 52.
[146] *Sparrow*, para 23.
[147] *R v. Badger*, [1996] 1 S.C.R. 771, para 41 ("*Badger"*) citing *Simon v. The Queen*, [1985] 2 S.C.R. 387, p. 406 ("*Simon"*) and *Calder,* p. 404

> *discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.*[148]

Infringement

78 In the next stage of analysis, the onus shifts to the rights claimant to establish a *prima facie* infringement of the aboriginal right. The purpose of this stage is to "ensure that only meritorious claims are considered" and the burden will not generally be difficult to meet.[149]

79 In Sparrow, the Court set out a test to determine whether fishing rights had been interfered with such as to constitute a *prima facie* infringement of s. 35(1).[150] This test involves three questions:

i. Was the limitation on the right unreasonable?

ii. Does the regulation impose undue hardship?

iii. Does the regulation deny to the holders of the right their preferred means of exercising that right?

Was the limitation on the right unreasonable?

80 An unreasonable limitation on the exercise of an aboriginal right will amount to *prima facie* infringement of that right. However, not all limitations will be unreasonable and this must be determined on a case-by-case basis. For example, in *Nikal*, the Court held that "the simple requirement of a license is not in itself unreasonable; rather it is necessary for the exercise of the right itself."[151]

[148] *Sparrow*, para 38.
[149] *R. v. Sampson*, (1995) 16 B.C.L.R. (3d) 226 (B.C.C.A.), para 43. ("*Sampson"*)
[150] *Sparrow*, para 70.
[151] *Nikal*, para 99. See also *Sampson*, para 54.

81 Similarly, in *R v. Badger*,[152] the Court held that, in some cases "reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food."[153] This reasonableness will still be applied on a case-by-case basis. Ten years later, the Court found that "[p]rotected methods of hunting cannot, without more, be wholly prohibited simply because in some circumstances they could be dangerous."[154] That is, a limitation based on safety concerns may not always be reasonable where alternative safety precautions will allow the right to be exercised in the face of some potential danger.

Does the regulation impose undue hardship?

82 Regulations may also infringe an aboriginal right if they cause undue hardship to the aboriginal group in exercising that right. Undue hardship can take a variety of forms but will generally involve a situation that "imposes something more than mere inconvenience."[155] For example, requiring "a license which is freely and readily available cannot be considered an undue hardship." [156] However, "[t]he situation might be different if, for example, the license could only be obtained at locations many kilometres away from the reserves and accessible only at great inconvenience or expense."[157]

83 Similarly, in *Sparrow*, the Court stated that "[i]f, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish" then a *prima facie* infringement would have been made out.[158]

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[152] *Badger*, see note 147.
[153] *Badger*, para 88-89. See also *Myran v. The Queen*, [1976] 2 S.C.R. 137, p. 142 where Dickson J. (as he then was) states for the Court that "there is no irreconcilable conflict or inconsistency in principle between the right to hunt for food... and the requirement... that such right be exercised in a manner so as not to endanger the lives of others." Note that the right to fish as set out in modern treaties is often limited by measures necessary for "public safety" in addition to conservation and public health. See for example the *Tsawwassen First Nation Final Agreement*, Fisheries, Chapter 9, s. 2.
[154] *R v. Morris*, 2006 SCC 59, para 39. ("*Morris"*)
[155] *Nikal*, para 100.
[156] *Nikal*, para 100.
[157] *Nikal*, para 100.
[158] *Sparrow*, para 70.

84 There may also be undue hardship where no explicit guidance is provided in respect of the exercise of discretion that may, as a result of the discretionary decision, lead to the infringement of an aboriginal right. For example, in *Adams,* the Minister's licensing powers "in the absence of some explicit guidance," were found to be an "unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications"[159] and, as such, imposed undue hardship on exercise of an aboriginal right.[160]

85 The imposition of a user fee or license fee may or may not cause undue hardship, depending on the facts. For example, in *R v. Côté*, the imposition of a modest "motor vehicle access fee" that applied to a portion of road leading to an area where an aboriginal right to fish was being exercised, did not constitute an undue hardship on that right because the financial burden was low and the revenues generated were directly applied to maintain access to the area.[161] In contrast, where as in *Ahousaht*, it is "impossible for the plaintiffs to pay the large amounts the market sets for licences" in a commercial fishery, such regulation may be found to impose an undue hardship on the right to fish and sell fish.[162]

86 It should also be noted that the enquiry of undue hardship is focused on the collective rights of the aboriginal group, and not whether an individual band member suffers undue hardship. In *R v. Sampson*, the BCCA held that although the prohibition against fishing in a particular area caused inconvenience to the appellants, the band to which they belonged obtained "an adequate number of salmon to satisfy their food fish requirements" and therefore there was no undue hardship to the group.[163]

[159] *Adams*, para 54.
[160] *Côté*, para 76.
[161] *Côté*, para 78-79.
[162] *Ahousaht*, para 788.
[163] *Sampson*, para 63-64.

Does the regulation deny to the holders of the right their preferred means of exercising that right?

87 Where the preferred means of exercising an aboriginal right are denied, an infringement of that right may be made out. However, this enquiry will also focus on the collective nature of the right and not on an individual's specific preference. For example, in *Sampson*, the BCCA held that "evidence of the appellants that they wished to exercise the aboriginal right to fish in Ladysmith Harbour, by means of a net, is not determinative of the issue."[164] Rather, that court looked to the band's preferred method of fishing instead.[165]

88 Generally, fishing closures,[166] restrictions on gear type,[167] or prohibitions against fishing in a traditional fishing territory[168] could all constitute an infringement on an aboriginal right to fish by denying the preferred means of exercising that right.

89 Restrictive licensing conditions may also deny a preferred means of exercising an aboriginal right to fish by placing restrictions on incidental rights, such as (i) the right to determine who within an aboriginal group will be the recipients of the fish for ultimate consumption; (ii) the right to select the purpose for which the fish will be used, i.e. food, social or ceremonial purposes; (iii) the right to fish for a particular species; and (iv) the right to choose the period of time to fish.[169]

90 Note that if a regulation or condition is found to infringe an aboriginal right, that regulation or condition will not be made valid simply by not being enforced. As explained in *Nikal,* "[t]he holder of a constitutional right need not rely upon the exercise of prosecutorial discretion and restraint for the protection of that right."[170]

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[164] *Sampson*, para 64.
[165] *Sampson*, para 69. On the facts, the appellants were restricted to trolling, which was not the band's preferred means of fishing and so the appellants were able to establish a *prima facie* infringement of their aboriginal right to fish, para 69-70.
[166] For example*,* as in *Douglas 2007*.
[167] For example, as in *Sparrow*.
[168] For example*,* as in *Jack, John and John*, para 54.
[169] *Nikal*, para 104.
[170] *Nikal*, para 108.

Justification

91 After it is shown that an aboriginal right exists and has been infringed, it will then fall upon the Crown to demonstrate that such infringement is justified. This analysis must be performed on a case-by-case basis, keeping in mind the context at play. As explained in *Sparrow*:

> *Given the generality of the text of the constitutional provision [s.35(1)], and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context in each case.*[171]

92 Section 35(1) does not form part of the *Canadian Charter of Rights and Freedoms*, and therefore will not be subject to the justificatory analysis developed under s. 1 of the *Constitution Act*, *1982.* However, this does not mean that any law, regulation or licensing condition affecting aboriginal rights will automatically be of no force or effect by virtue of s. 52 of the *Constitution Act, 1982.*

93 Rather, in *Sparrow,* the Court established a two-part test to determine whether an infringement is justified:[172]

i. Was the government acting pursuant to a valid legislative objective?

ii. Given the Crown's trust relationship and responsibility towards aboriginal peoples, does the legislation obtain the objective in a manner that upholds the honour of the Crown?

   a. Has the allocation of priorities after valid conservation measures given top priority to the aboriginal right?

   b. Has there been as little infringement as possible?

[171] *Sparrow*, para 66.
[172] *Sparrow*, para 71-83.

c. In a situation of expropriation, has fair compensation been made available?

d. Has the aboriginal group been consulted?

Each part of the justification test and its sub-parts will be considered in turn:

Was the government acting pursuant to a valid legislative objective?

94 In this first part of the justification test, a court must inquire into whether the objective of Parliament in authorizing a department to enact regulations, such as fishing regulations, is valid. The objective of the department in setting out the particular regulations will also be scrutinized.[173] The Court raised this as an important consideration because "government objectives that may be superficially neutral" may nevertheless "constitute *de facto* threats to the existence of aboriginal rights and interests."[174]

95 In general, a valid objective must be informed by the purposes underlying s. 35(1), which include the recognition of the prior occupation of North America by aboriginal peoples, and the reconciliation of this prior occupation with the assertion of Crown sovereignty.[175]

96 Objectives that fail this test may include those that are vague or imprecise. For example, in *Sparrow*, the Court held that the objective of the "public interest" was so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on a constitutional right.[176] In addition, objectives that the court considers to be less compelling or substantial may not qualify as valid. For example, in *Adams*, the Court held that "while sports fishing is an important economic activity in some parts of the country," the objective of enhancing a

[173] *Sparrow,* para 71.
[174] *Sparrow,* para 64.
[175] *Adams,* para 57. See also *Gladstone,* para 72.
[176] *Sparrow,* para 72. Note that it was on this point that the SCC fundamentally differed from the BCCA.

sports fishery that, on the facts, had no "meaningful economic dimension" could not justify the infringement of aboriginal rights.[177]

97 With respect to the justified infringement of both FSC and commercial fishing rights, the objective of conservation, however, will generally be considered valid.[178] This will be true even if the need for conservation measures may, in retrospect, be questioned. According to the BCSC, conservation concerns need not have been totally accurate in hindsight and "in the absence of *mala fides*, it is not the role of the courts to second-guess management decisions that fall within the range of what are objectively 'reasonable and necessary'."[179]

98 Other valid objectives may include those "purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial."[180] In other words, the list of possible valid objectives is not closed and will vary on the facts of each case.

99 In the context of a right to fish for commercial purposes, where the right itself has no internal limitation, other objectives may come into play. For example, in *Gladstone*, Lamer C.J.'s majority reasons added "the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups" as valid objectives in the interest of all Canadians and that may be necessary for the reconciliation of aboriginal societies with the rest of Canadian society.[181]

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[177] *Adams*, para 58. See also, *Delgamuukw*, para 161.
[178] *Sparrow*, para 71 and *Gladstone*, para 74.
[179] *Douglas 2008*, para 31.
[180] *Sparrow*, para 71.
[181] *Gladstone*, para 75. Note however that McLachlin J. (as she then was) articulated a rather strong dissent on this issue in the companion case *Van der Peet*. She wrote at para 306: "The extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-aboriginal fishers, by contrast, would negate the very aboriginal right to fish itself, on the ground that this is required for the reconciliation of aboriginal rights and other interests and the consequent good of the community as a whole. This is not limitation required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-aboriginals. It is limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*."

100 In *Ahousaht*, Garson J. appears to have extended the list of possibly valid objectives. In addition to objectives previously described, she adds: protection of endangered species, health and safety of the fishers and consumers, adherence to international treaties, facilitation of aboriginal participation in the fisheries, achievement of the full economic and social potential of fisheries resources, and safe and accessible waterways.[182]

Given the Crown's trust relationship and responsibility towards aboriginal peoples, does the legislation obtain the objective in a manner that upholds the honour of the Crown?

101 In order to assess whether legislation, regulations or a condition of license obtains the objective in a manner that upholds the honour of the Crown, several sub-parts may be considered:

a. *Has the allocation of priorities after valid conservation measures given top priority to the aboriginal right?*

102 In order to answer the question of whether the allocation of priorities after conservation gave top priority to the aboriginal right, one must first consider the meaning of "conservation". In *Nikal*,[183] the Court held that the management of a stock goes farther than preventing its elimination. Rather management imports a duty to maintain and increase reasonably the fishery resource.[184] In *R v. Douglas* (2008),[185] the BCSC applied this management duty to the definition of conservation, saying that "conservation is more than preservation of a stock and includes enhancement of that stock for the future benefit of all user groups."[186] However, a precise definition for "conservation" was not considered "possible or even desirable."[187]

[182] *Ahousaht*, para 881-883.
[183] *Nikal*, see note 58.
[184] *Nikal*, para 102.
[185] *Douglas, 2008,* see note 106.
[186] *Douglas, 2008*, para 29.
[187] *Douglas, 2008,* para 33.

103 With that in mind, this sub-part has generally been considered in respect of the priority afforded to the aboriginal right to fish for FSC purposes. In such cases, a court will determine whether the brunt of conservation measures has been borne by the sports and commercial fisheries and not by the aboriginal FSC fishery.[188] For example, when recreational and commercial fishers were allowed to harvest a limited number of fall Nanaimo River chinook in the Strait of Georgia, but aboriginal food fishers were completely prohibited from fishing that same run once it arrived at the Nanaimo River, the priorities set out in *Sparrow* had not been met.[189]

104 However, the priority of aboriginal fisheries in terminal areas does not mean that all commercial and sports fishing in approach or "interception" fisheries must be prohibited. Rather, as explained by the BCCA in *Sampson*:[190]

> *We do not suggest that the DFO should prohibit all commercial and sport fishing in the area of the interception fishery in Johnstone Strait. However, it is the responsibility of the DFO to implement a system which will conform to the priorities set forth in Sparrow. After conservation requirements have been met, the Indian food fish requirements must receive first priority.*[191]

105 In the context of an aboriginal right to fish for commercial purposes, the Court in *Gladstone* articulated a non-exhaustive list of factors that may be taken into account in determining whether the government can be said to have given priority to aboriginal rights holders. These factors include, *inter alia*, whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced license fees, for example), the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how important the fishery is to the economic and material well-being of the band in question, and the

[188] *Jack, John and John*, para 9, citing *Sparrow*, para 78.
[189] *R v. Little*, (1995) 16 B.C.L.R. (3d) 253 (B.C.C.A.) paras 11, 75 ("*Little"*) See also *Jack, John and John*, at para 65.
[190] *Sampson*, see note 149.
[191] *Sampson*, para 92.

criteria taken into account by the government in allocating commercial licenses amongst different users.[192]

106 The assessment of whether a constitutionally protected allocation priority has been respected may also be complicated by the need to balance priorities not only between aboriginal and non-aboriginal groups, but also between different aboriginal groups that may hold varying rights.[193]

b. Has there been as little infringement as possible?

107 The requirement that there be "as little infringement as possible" imports a degree of reasonableness and contextualization. As explained by the Court in *Nikal:*

> *[W]hen considering whether there has been as little infringement as possible, the infringement must be looked at in the context of the situation presented. So long as the infringement was one which in the context of the circumstances could reasonably be considered to be as minimal as possible, then it will meet the test. The mere fact that there could possibly be other solutions that might be considered to be a lesser infringement should not, in itself, be the basis for automatically finding that there cannot be a justification for the infringement.*[194]

108 Similarly, in the context of a right to fish for commercial purposes, it is the reasonableness of the government's decisions that must be considered, and not "whether the government took the least rights-impairing action possible."[195]

109 Generally, however, where the allocation of priorities does not accord with the constitutional analysis set out in *Sparrow*, it will not be found that there was as little infringement as possible.[196]

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[192] *Gladstone*, para 64.
[193] *Gladstone*, para 65.
[194] *Nikal*, para 110.
[195] *Gladstone*, para 63.
[196] *Little*, para 84.

c. In a situation of expropriation, has fair compensation been made available?

110 The case law has not demonstrated that compensation is typically awarded for an infringement of the aboriginal right to fish.

d. Has the aboriginal group been consulted?

111 As will be discussed later in this paper, a duty to consult will arise when the Crown has knowledge, real or constructive, of the potential existence of an aboriginal right or title and contemplates conduct that might adversely affect that right or title.[197] This part of the justification test requires the Crown to make every "reasonable effort" to inform and to consult an aboriginal group in advance of the infringement of their rights.[198]

112 In considering the justification test, it should also be noted that in *Sparrow* the Court clarified that its articulation of the test did not set out an exhaustive list of all the factors to be considered and new factors may arise for different cases.[199]

113 Also, although the issue of justification was raised in both *Gladstone* and *Ahousaht*, no justification analysis has actually been applied to a case in which an aboriginal right to fish for a commercial purpose was found. In *Gladstone,* the Court remitted the case to trial on the issue of justification – a trial which never occurred because the Crown entered a stay on the charges.

114 In *Ahousaht*, Garson J. of the BCSC similarly declined to apply the justification analysis, explaining that "not having taken into account the existence of the plaintiffs' aboriginal right to fish and to sell fish, Canada is not in a position to justify the infringements of that right."[200] Instead, Garson J. gave Canada and the plaintiffs two years to reconcile their various interests through consultation and negotiation after which they may apply for a determination on whether the *prima facie* infringement of

[197] *Haida*, para 35.
[198] *Nikal*, para 110.
[199] *Sparrow*, para 83.
[200] *Ahousaht*, para 869.

the plaintiffs' aboriginal rights was justified.[201] It remains to be seen then, what additional guidance will be gained when a court eventually applies the justification analysis in the context of a commercial right to fish.

Interim Considerations

115 As described earlier, the aboriginal right to fish, like other aboriginal rights, is held by an individual aboriginal group. The fact that one aboriginal group has a right to do a particular thing will not be, without something more, sufficient to demonstrate that any other aboriginal group holds the same right.[202] Although there have been a number of high profile aboriginal right to fish cases in British Columbia, the vast majority of right to fish claims asserted in respect of Fraser River sockeye have yet to be determined by the courts.

116 The Department of Fisheries and Oceans may therefore be required to apply tentatively the principles and tests set out in the cases discussed above, in discharging its management duties over Fraser River sockeye. In some cases, its knowledge of asserted claims of aboriginal rights, together with contemplated conduct that may adversely affect such rights, will give rise to a duty to consult and possibly, to accommodate.[203]

117 In the interim, however, the Minister of Fisheries and Oceans need not await judicial confirmation of rights before providing to aboriginal fishers those opportunities that they might otherwise seek in a rights context. For example, in *R v. Huovinen*,[204] the BCCA held that there was nothing to prevent the Minister from authorizing the sale of fish caught under aboriginal communal fishing licences, even in the absence of a proven aboriginal commercial fishing right.[205]

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[201] *Ahousaht*, para 909.
[202] *Van der Peet*, para 69. See also *Gladstone*, para 65.
[203] See the "Duty to Consult" chapter of this paper.
[204] *R. v. Huovinen*, 2000 BCCA 427. Leave to appeal to SCC refused, [2000] S.C.C.A. No. 478. (*"Huovinen"*)
[205] *Huovinen*, para 30.

118 Similarly, in *R. v. Kapp*,[206] the Court held that the Department of Fisheries and Ocean's pilot sales program, which provided certain exclusive commercial fishing opportunities to aboriginal fishers but not to other commercial or non-aboriginal fishers, did not violate the equality provision set out in the *Canadian Charter of Rights and Freedoms.*[207] On the facts, the program made a distinction based on race - one of the enumerated grounds in s. 15(1).[208] However, the objective of the pilot sales program was to ameliorate the disadvantaged position of the participating aboriginal peoples, and therefore the program was protected by operation of s. 15(2) of the *Charter*. [209]

119 However, in managing the fishery, the Department of Fisheries and Oceans is not required to treat unproven claims as if they are proven rights. As discussed later in this paper, some situations may give rise to a duty to consult with aboriginal peoples and to reasonably accommodate their concerns. However, this duty does not require agreement. A duty to consult, if found, will not amount to a right of veto over management decisions made.[210]

120 If an aboriginal group fails in establishing its claim to an aboriginal right, then, in respect of what was claimed, there will be no other right, fiduciary duty, or private law duty owed to that aboriginal group which could give rise to rights that are different from the rights of other Canadians.[211]

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[206] *R v. Kapp*, 2008 SCC 41. ("*Kapp"*)
[207] *Canadian Charter of Rights and Freedoms*, Part I, *The Constitution Act, 1982,* s.15.
[208] *Kapp,* para 29, 56.
[209] *Kapp*, para 61.
[210] *Haida,* para 48.
[211] *Lax Kw'alaams*, para 77.

Treaty Rights in the Fishery

121 Several historic and modern treaties negotiated between the Crown and First Nations refer to aboriginal access and participation in fisheries and therefore, such treaties must be considered as part of the legal framework underlying the management of Fraser River sockeye.

122 As explained by the Court in *R v. Sundown*,[212] "[t]reaties may appear to be no more than contracts. Yet they are far more. They are a solemn exchange of promises made by the Crown and various First Nations."[213] These promises serve to "reconcile pre-existing aboriginal sovereignty with assumed Crown sovereignty, and to define aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*."[214] Modern treaties are also negotiated to "create economic certainty over Crown land and resources and to improve the lives of First Nations."[215]

General Principles

123 Many of the principles that apply to aboriginal rights will also apply to treaty rights. For example, "both aboriginal and treaty rights possess a common *sui generis* nature"[216] and neither can be "interpreted as if they were common law rights."[217] In addition, both aboriginal and treaty rights will be subject to the constitutional analysis set out in *Sparrow* for rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982.*[218] Treaty rights, like aboriginal rights, will also be specific and may be exercised exclusively by members of the aboriginal group holding the right (i.e. the group that signed the treaty).[219]

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[212] *R v. Sundown*, [1999] 1 S.C.R. 393. ("*Sundown"*)
[213] *Sundown*, para 24.
[214] *Haida,* para 20.
[215] Web: Ministry of Aboriginal Relations and Reconciliation, "Treaties and other Negotiations", available at http://www.gov.bc.ca/arr/atreaty/default.html (accessed September 5, 2010).
[216] *Badger*, para 78.
[217] *Sundown,* para 35.
[218] *Little*, para 50.
[219] *Sundown,* para 25.

124 As written documents, however, treaties will also be subject to specific rules of interpretation. Four main principles are set out by the Court in *Badger*:

i. A treaty represents a solemn exchange of promises between the Crown and various aboriginal peoples. It is an agreement whose nature is sacred.[220]

ii. The honour of the Crown is always at stake in its dealings with aboriginal peoples. Interpretations of treaties that may have an impact on treaty rights must be approached in a manner that maintains the integrity of the Crown. It is assumed that the Crown intends to fulfil its promises and no appearance of "sharp dealing" will be sanctioned.[221]

iii. Any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the aboriginal group. A corollary to this principle is that any limitations which restrict the rights of an aboriginal group must be narrowly construed.[222]

iv. The onus of proving that a treaty right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.[223]

125 In addition, when interpreting treaties "a court must take into account the context in which the treaties were negotiated, concluded and committed to writing," keeping in mind that the written document "did not always record the full extent of the oral agreement."[224]

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[220] *Badger*, para 41, citing *R. v. Sioui*, [1990] 1 S.C.R. 1025, p. 1063 ("*Sioui*").
[221] *Badger*, para 41, citing *Sparrow*, para 58. See also *Little*, para 56, in which the Court held that a restrictive interpretation of the appellant's treaty rights would not accord with the *Sparrow* analysis of the meaning to be given to the words "recognized and affirmed" used in s. 35(1) of the *Constitution Act, 1982*.
[222] *Badger*, para 41, citing *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, p. 36.
[223] *Badger*, para 41, citing *Simon* p. 406 and *Calder,* p. 404.
[224] *Badger*, para 52.

126 However, treaty interpretation will not always favour the rights and interests of the aboriginal group. "'Generous' rules of interpretation should not to be confused with a vague sense of after-the-fact largesse."[225] Rather, treaty interpretation must be realistic, and must "reflect the intention[s] of both parties" not just that of the aboriginal group.[226]

Historic Treaties[227]

127 Compared to the rest of Canada, only a relatively small number of historic treaties were entered into in British Columbia. Those that were fall into two main categories: the Douglas Treaties, and Treaty No. 8.

128 The Douglas Treaties, signed between 1850 and 1854, are a set of 14 treaties entered into between various First Nations on southern Vancouver Island and Governor James Douglas.[228] These treaties provide that their First Nation signatories will have the right to carry on their "fisheries as formerly."

129 Treaty No. 8, signed in 1899, covers approximately 840,000 square kilometres of land in northern Alberta, north-western Saskatchewan, southern Northwest Territories and the north-eastern quarter of British Columbia. This treaty promised reserves and benefits to First Nation signatories, including the right to hunt, trap and fish throughout the surrendered lands except over "such tracts as may be required or taken up from time to time" by the Crown.[229]

130 Treaty No. 8 has been considered by the Court in a leading duty to consult case, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*,[230] which is discussed later in this paper. That case makes it clear that the Crown may hold a duty

[225] *Marshall I,* para 14.
[226] *Mikisew Cree*, para 28, citing *Sioui,* p. 1069.
[227] It is anticipated that historic treaties will be discussed in greater detail in a subsequent paper prepared by, or for, the Commission. This section offers an introduction only.
[228] The Douglas Treaties were first recognized as treaties in *R v. White and Bob,* (1964) 50 D.L.R. (2d) 613 (B.C.C.A.), aff'd (1965), 52 D.L.R. (2d) 481 (S.C.C.).
[229] *Mikisew Cree,* para 2, citing Report of Commissioners for Treaty No. 8 (1899), p. 12.
[230] *Mikisew Cree*, see note 9.

to consult with signatory First Nations where its contemplated conduct may adversely affect the rights contained within the treaty, including the right to fish in areas surrendered to the Crown. Although it is possible that other fishing rights may derive from this treaty, their determination will require additional judicial guidance.

131 The various Douglas Treaties have received greater judicial consideration, particularly regarding the "fisheries as formerly" provision they share. For example, in considering the Douglas Treaty at Nanaimo, 1854, the BCCA explained that this provision affords a source of protection against infringements of the fishing rights held by signatory bands.[231] In an earlier case, *Tsawout Indian Band v. Saanichton Marina Ltd.,*[232] the BCCA had applied this protection not only to the right to catch fish, but also to a right of access to the fishing area and of preventing the destruction of the fishing area itself. The Court stated that the treaty right protected the Tsawout Indian Band "against infringement of their right to carry on the fishery, as they have done for centuries, in the shelter of Saanichton Bay."[233]

132 The "fisheries as formerly" provision has also been considered by the BCSC in *R v. Ellsworth.*[234] The right was held to encompass "fishing, conservation and the use of the fish by Indian people for whatever purpose the fish were used by the signatories to the treaty" and that one of these purposes was obviously for food. However, the BCSC noted that the treaty itself did not preclude other uses of fish.

133 More recently, in *Snuneymuxw First Nation v. British Columbia,*[235] the BCSC held that the effect of the "fisheries as formerly" provision was "at the very least, to entitle the First Nation to priority over the fish stocks that exist."[236] Further it "places responsibilities on the Crown and vests the First Nation with powers to manage the fishery in such a manner as not to jeopardize the constitutionally protected rights of the

[231] *Little,* para 46.
[232] *Tsawout Indian Band v. Saanichton Marina Ltd.,* (1989), 36 B.C.L.R. (2d) 79 (B.C.C.A.). ("*Saanichton Marina"*)
[233] *Saanichton Marina,* para 34.
[234] *R v. Ellsworth*, [1992] 4 C.N.L.R. 89 (B.C.S.C.).
[235] *Snuneymuxw First Nation v. British Columbia*, 2004 BCSC 205. ("*Snuneymuxw"*)
[236] *Snuneymuxw*, para 20.

Douglas Treaty First Nations."[237] It is unclear from this decision, however, what the practical application of a Douglas Treaty First Nation's "powers to manage the fishery" will be.

134 Outside of British Columbia, historic treaties have also been considered for their effect on fisheries management. Most notable is the case *R v. Marshall,*[238] in which the Court addressed the "promise of access to 'necessaries' through trade in wildlife"[239] contained in the 1760-1761 treaties entered into with, among others, the Mi'kmaq Indian Band in Eastern Canada. The Court held that the treaty protected a right of trade for access to "necessaries", and that such "necessaries" should be construed in the modern context as equivalent to a "moderate livelihood." In turn, "moderate livelihood" would include such basics as "food, clothing and housing, supplemented by a few amenities, but not the accumulation of wealth."[240] In practical terms, this right to trade could be accommodated through catch limits that "could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards" but that could nevertheless be regulated and enforced without violation of the treaty right.[241]

Modern Treaties

135 In recent decades, the provincial and federal governments have renewed a process of treaty negotiation with First Nations in British Columbia. On May 11, 2000, the *Nisga'a First Nation Final Agreement* came into effect.[242] This treaty, however, was negotiated using a singular process. To create a more uniform structure for treaty negotiations, British Columbia, Canada and the First Nations Summit (a consortium of British Columbia First Nations), entered into the British Columbia Treaty Commission Agreement on September 21, 1992. This Agreement authorized the creation of the BC

[237] *Snuneymuxw,* para 20.
[238] *R v. Marshall*, [1999] 3 S.C.R. 456 ("*Marshall I"*); For another example, see *R. v. Jones* (1993), 14 O.R. (3d) 421 (Ont. Crt. Prov. Div.) in which it was held that the Saugeen Ojibway Nation had an aboriginal and treaty right to fish for commercial purposes.
[239] *Marshall I,* para 54.
[240] *Marshall I,* para 59, citing *Gladstone*, para 165.
[241] *Marshall I*, para 61.
[242] Web: Ministry of Aboriginal Relations and Reconciliation, available at http://www.gov.bc.ca/arr/firstnation/nisgaa/default.html (accessed September 5, 2010).

Treaty Commission, pursuant to the *Treaty Commission Act*,[243] to facilitate the negotiation of treaties among BC First Nations, Canada and British Columbia.

136 Currently, there are between 42[244] and 49[245] treaty tables operating in the BC treaty process. Each table includes one or more First Nations, such that approximately 116 First Nations are participating in negotiations.[246] However, there are approximately 198 First Nations in British Columbia[247] and as many as 143 of those are located along the migration routes of Fraser River sockeye.[248]

137 The modern treaty right to fish may include a percentage[249] allocation of a given species, for example Fraser River sockeye, to be caught for "domestic purposes" (defined as food, social and ceremonial purposes). This percentage allocation is translated into fish numbers by reference to the Canadian Total Allowable Catch for that species in a given year, and in some cases may be capped at a maximum number of fish.[250] Commercial fishing opportunities may be provided in a separate Harvest Agreement that accompanies, but does not form a part of, the treaty and is therefore not protected by s. 35 of the *Constitution Act, 1982*.

138 At the time of writing this paper, the only modern agreement in force involving Fraser River salmon stocks is the *Tsawwassen First Nation Final Agreement*. A final agreement involving the L'heidli T'enneh Indian Band, situated near Prince George, was signed after 14 years of negotiation. However, this agreement failed to pass the ratification stage when it was turned down by a vote of Lheidli T'enneh members on

[243] *Treaty Commission Act*, R.S.B.C. 1996, c. 461.
[244] Web: Ministry of Aboriginal Relations and Reconciliation, available at http://www.gov.bc.ca/arr/treaty/negotiating/participants.html (accessed September 5, 2010)
[245] Web: BC Treaty Commission, available at http://www.bctreaty.net/files/updates.php; See also Web: First Nations Summit, available at http://www.fns.bc.ca/treaty/t_facts.htm
[246] Web: Ministry of Aboriginal Relations and Reconciliation, available at http://www.gov.bc.ca/arr/treaty/faq.html
[247] Web: Ministry of Aboriginal Relations and Reconciliation, available at http://www.gov.bc.ca/arr/treaty/faq.html. Note however that the First Nations Summit lists the number of BC First Nations at 197: First Nations Summit, available at http://www.fns.bc.ca/treaty/t_facts.htm
[248] *Ahousaht,* para 886.
[249] Note that this percentage may be a static number or it may be a number that varies according to the size of the Canadian Total Allowable Catch; i.e. an abundance based formula.
[250] For an example allocation, see the *Tsawwassen First Nation Final Agreement,* Appendix J-2.

March 30, 2007.[251] A final agreement made with several First Nations situated on the west coast of Vancouver Island, the *Maa-Nulth Final Agreement*, has been signed and ratified and will become effective on April 1, 2011. In addition, the *Yale First Nation Final Agreement* was initialled by negotiators on February 5, 2010 and is entering the ratification stage. The Lheidli T'enneh, Maa-Nulth and Yale final agreements all involve Fraser River sockeye.

139 This paper does not offer an in-depth analysis of modern treaties. Nevertheless, it may be important to note that the Government of Canada has deferred fisheries discussions at all treaty tables involving salmon, pending the findings and recommendations to be made by the Commissioner following this Inquiry. This deferral, however, will not affect the final agreements being entered into with the Yale First Nation, Sliammon First Nation and In-SHUCK-ch Nation, which have reached late stage negotiations.[252]

Infringement

140 The Court has recognized that treaty rights are not absolute. The criteria used to assess infringement, as set out in *Sparrow*, are to "apply equally to the infringement of treaty rights."[253] However, regulations or conditions such as catch limits that "do no more than reasonably define" a treaty right in terms that are required for administrative purposes and for confirming an understanding of the right with the group holding it, will not be seen as infringing.[254]

141 In addition, treaties themselves may contain conditions that limit rights and the expression of such limits in regulations or licenses will not be an infringement. For example, in the *Tsawwassen First Nation Final Agreement*, the treaty fishing right is limited to "harvest for domestic purposes" (food, social and ceremonial purposes)

[251] Web: Ministry of Aboriginal Relations and Reconciliation, available at http://www.gov.bc.ca/arr/firstnation/lheidli/default.html
[252] Web: Ministerial Statement of Honourable Gail Shea, 2 March 2010, available at http://www.dfo-mpo.gc.ca/media/statement-declarations/2010/20100302-eng.htm
[253] *Badger,* para 74-54.
[254] *Marshall II,* para 37.

and also by measures not only required for conservation, but for public health and public safety.[255]

Justification

142 In some cases, the infringement of treaty rights will also be justifiable. The burden of justifying such infringement will fall upon the Crown.[256] However, "[t]reaty rights must not be lightly infringed. Clear evidence of justification would be required before that infringement could be accepted."[257]

143 In *Badger*, the Court extended to treaties the justificatory standard developed for aboriginal rights in *Sparrow,* as discussed earlier in this paper.[258] However, in doing so, a court must also consider the context of the treaty itself and be open to other justificatory factors that may arise on the facts of each case.[259]

144 For example, as with aboriginal fishing rights, infringements to treaty fishing rights may be justified not only on the basis of conservation concerns, but also for other "compelling and substantial public objectives."[260] This may include, without limitation, the objectives of public safety[261] and, as in a case regarding a treaty right to fish for a "moderate livelihood", the objectives of "economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups."[262]

[255] *Tsawwassen First Nation Final Agreement*, Fisheries, Chapter 9, s. 1 and s. 2. See also *Maa-Nulth First Nations Final Agreement,* Fisheries, Chapter 10, s. 10.1.1 and 10.1.2.
[256] *Marshall II*, para 41.
[257] *Sundown*, para 46.
[258] *Badger*, para 77 and 85.
[259] *Badger*, para 85.
[260] *Marshall II*, para 19.
[261] *Morris,* para 35.
[262] *Marshall II*, para 41.

Interim Considerations

145 With relatively few historic treaties and even fewer concluded modern treaties, it appears that, in many cases, fisheries management decisions will require consideration of proven or unproven aboriginal rights and title as opposed to negotiated treaty rights.

146 Also, although treaties may be an important source of information in assessing the rights held by aboriginal peoples, they nevertheless cannot be taken as comprehensive. As articulated by the Court in *Mikisew Cree*, "[t]reaty making is an important stage in the long process of reconciliation, but it is only a stage" and as such, a treaty is "not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it."[263]

Management of the Fishery

Aboriginal Management of the Fishery

147 The Court has recognized the "history of conservation-consciousness and interdependence with natural resources" held by aboriginal peoples.[264] This recognition, together with the existence of aboriginal and treaty rights in relation to the fishery, may give rise to a duty of consultation and reasonable accommodation regarding decisions that may adversely impact upon such rights. The content and scope of this duty will be discussed later in this paper. However, participation in consultative processes may be differentiated from the decision-making authority associated with aboriginal management.

148 A claim to aboriginal self-governance regarding the fishery has yet to reach the Court. Therefore, it remains uncertain whether or how such a right, if found, would impact the management of the fishery. This paper does not explore the complex issue of aboriginal self governance. It also does not provide a comprehensive review of the

[263] *Mikisew Cree,* para 54.
[264] *Sparrow*, para 82.

various means by which aboriginal peoples may or may not participate in fishery management decisions. Rather, it simply sets out some of the decision-making authority conferred upon aboriginal peoples through legislation or treaty.

149 For example, modern treaties may recognize the authority of a First Nation to enact certain laws in relation to the fishery that prevail to the extent of conflict with federal or provincial law. This exclusive law-making power may be limited in scope, however, covering subjects such as the designation of fishers and vessels authorized to fish under the First Nation's communal fishing right, or the distribution of catch amongst members of the First Nation.[265] The First Nation may also enact laws in respect of other matters, such as the documentation held by fishers and vessels designated by the First Nation to fish and the trade and barter of fish harvested under the communal fishing right.[266] However, such laws will be subordinate to federal or provincial laws to the extent of any conflict.

150 Note that a First Nation's management role in the fishery may also be set out in other ways under a treaty. A First Nation may be asked to propose an annual fishing plan that will then be presented to a Joint Fisheries Committee comprised of representatives from the First Nation, federal and provincial governments. The Joint Fisheries Committee may review the annual fishing plan and provide recommendations to the Minister of Fisheries and Oceans as to whether the fishing plan ought to be implemented.[267]

151 A band council operating under the *Indian Act*[268] may also have the authority to make band by-laws in respect of fishing on reserve lands. Section 81(1)(o) of the *Indian Act* provides that:

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[265] See for example, *Tsawwassen First Nation Final Agreement*, Fisheries, Chapter 9, s. 51. See also *Maa-Nulth First Nations Final Agreement*, Fisheries, Chapter 10, s. 10.1.39.
[266] See for example, *Tsawwassen First Nation Final Agreement*, Fisheries, Chapter 9, s. 53. See also *Maa-Nulth First Nations Final Agreement*, Fisheries, Chapter 10, s. 10.1.41.
[267] See for example, *Tsawwassen First Nation Final Agreement*, Fisheries, Chapter 9 (throughout), particularly ss. 68ff. See also *Maa-Nulth First Nations Final Agreement*, Fisheries, Chapter 10 (throughout).
[268] *Indian Act*, R.S. 1985, c. I-5.

> *The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely... the preservation, protection and management of fur-bearing animals, fish and other game on the reserve.*

152 In *R v. Jimmy,*[269] Hinkson J.A. for the BCCA held that a band by-law provision that was validly enacted pursuant to s. 81(1)(o) of the *Indian Act* could afford a complete defence to a charge under the *Fisheries Act*.[270] As explained later by the Court, Parliament's intention in enacting s. 81(1) as a whole and in particular paragraph (o) was to "provide a mechanism by which Band Councils could assume management over certain activities within the territorial limits of their constituencies."[271]

153 However, the band by-laws contemplated in s. 81(1)(o) of the *Indian Act* apply only to "management of ... fish...on the reserve." In *R v. Lewis*, the Court restricted what was considered to be "on the reserve" by finding that the common law *ad medium filum aquae* presumption did not apply to navigable waters.[272] That is, a reserve bordering a navigable river will not extend to the mid-point of that river, unless such area is expressly included in the reserve grant. Rather the reserve territory will end at the natural boundary, or high water mark of the river.[273] Similarly, in *Nikal*[274] the Court held that a reserve would not include in its territory any part of a navigable river which ran through its centre.

154 Considering the navigability of the domestic migratory path of Fraser sockeye, including the Fraser River, the *Lewis* and *Nikal* cases may assist in determining whether this fishery is subject to the *Fisheries Act* and its regulations or the by-laws of reserves which may adjoin this area.

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[269] *R v. Jimmy* (1987), 15 B.C.L.R. (2d) 145 (C.A.). ("*Jimmy"*)
[270] *Jimmy*, para 28. Decision referred to by the SCC in *R v. Lewis* [1996] 1 S.C.R. 921, para 2. ("*Lewis*")
[271] *Lewis*, para 80.
[272] *Lewis,* para 62.
[273] *Lewis,* para 45.
[274] *Nikal*, see note 58.

Canada's Obligation to Manage the Fishery

155 In contrast, the Court has been clear in expressing that a central authority is required to manage the salmon fishery and that this authority rests with the federal government. In *Nikal*, the Court stated:

> *If the salmon fishery is to survive, there must be some control exercised by a central authority. It is the federal government which will be required to manage the fishery and see to the improvement and the increase of the stock of that fishery.*[275]

156 Conservation, in particular, is a responsibility that the Court has stated is shouldered by the federal government alone and not by other participants to the fishery:

> *The paramount regulatory objective is the conservation of the resource. This responsibility is placed squarely on the Minister and not on the aboriginal or non-aboriginal users of the resource.*[276]

157 This may be so because the federal government holds a "duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest"[277] and therefore the rights or interests of all participants to the fishery are to be considered. At times, the government will not only be required to make decisions that will affect harvest allocations and fishery access between aboriginal peoples and non-aboriginal peoples, but also as between different groups of aboriginal peoples that may hold different rights in the fishery.[278]

158 Also, even where aboriginal rights in the fishery are found to exist and the government is required to ensure that its management plans take those rights seriously, it remains that "the constitutional entitlement embodied in s. 35(1) ... is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery."[279]

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[275] *Nikal*, para 102.
[276] *Marshall II,* para 40.
[277] *Comeau's Sea Foods*, para 37.
[278] *Gladstone,* para 65.
[279] *Sparrow*, para 81.

The Duty to Consult

The Duty to Consult and its Source

159 The "Crown's assertion of sovereignty over an aboriginal people and the *de facto* control of land and resources that were formerly in the control of that people" is the foundation for the Crown's duty of honourable conduct.[280] The honour of the Crown is always at stake in its dealings with aboriginal peoples[281] and it is this honour that may give rise to a duty to consult aboriginal peoples in a process of fair dealing and reconciliation.[282]

160 Because the duty to consult stems from the honour of the Crown, the "Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect aboriginal interests."[283] Although certain procedural aspects of consultation may be delegated by the Crown to third parties, it is not possible for the honour of the Crown to be delegated and therefore, the Crown retains its responsibility over consultation in such cases.[284] Third parties, such as businesses or non-governmental agencies, may also choose to consult with First Nations, but they will not be held to a constitutional duty to do so.

Whether a Duty to Consult Arises

161 The duty to consult does not exist for every decision or action taken by the Crown. Rather, the "duty arises when the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplates conduct that might adversely affect it."[285] That is, there are two elements that will give rise to a duty to consult:

i. That the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title; and

[280] *Haida,* para 32.
[281] *Haida*, para 16.
[282] *Haida*, para 32.
[283] *Haida,* para 53.
[284] *Haida,* para 53.
[285] *Haida*, para 35.

ii. The Crown contemplates conduct that might adversely affect that aboriginal right or title.

162 In regards to the first element, the Court has been clear that asserted but unproven claims of aboriginal rights or title may also give rise to a duty to consult pending the resolution of such claims.[286] As explained in *Haida*, limiting reconciliation to the "post-proof sphere" runs the risk that "[w]hen the distant goal of proof is finally reached, the aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable."[287]

163 There are two sub-components required in regards to the second element: "contemplated conduct" and "adverse effect".

164 In regards to "adverse effect", the BCCA has held that not all fishery management decisions will adversely affect the aboriginal right to fish and there may be a *de minimus* level of adverse effect before a duty to consult will arise. For example, in *Douglas, 2007*,[288] the BCCA held that the decision to allow marine recreational fishers to retain some 200 Early Stuart sockeye incidentally caught in a Chinook-directed fishery would have no appreciable effect on the aboriginal right to fish for food, social and ceremonial purposes, and therefore did not give rise to a duty to consult.[289]

165 In regards to "contemplated conduct", there may also be a *de minimus* level of decision that gives rise to the duty, or a differentiation between strategic decisions and individual fishery openings and closures. In *Douglas, 2007*, the BCCA also held that "having conducted appropriate consultations in developing and implementing its fishing strategy, DFO is not required to consult with each First Nation on all openings and closures throughout the salmon fishing season, where those actions were consistent with the overall strategy."[290]

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[286] *Haida,* para 27.
[287] *Haida,* para 33.
[288] *Douglas, 2007,* see note 109.
[289] *Douglas, 2007*, para 44.
[290] *Douglas, 2007*, para 42.

166 Also, according to the Alberta Court of Appeal, "contemplated conduct" giving rise to a duty to consult is unlikely to include the passage of legislation. Although not in the context of aboriginal rights, the Court has stated that "[l]ong-standing parliamentary tradition makes it clear that the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent."[291] In *R v. Lefthand,*[292] the Alberta Court of Appeal took this to mean that there can be no duty to consult prior to the passage of legislation, even where aboriginal rights may be affected, explaining that:

> *Enactments must stand or fall based on their compliance with the constitution, not based on the processes used to enact them. Once enactments are in place, consultation only becomes an issue if a prima facie breach of an aboriginal right is sought to be justified.*[293]

167 Further, "contemplated conduct" is unlikely to include emergency management actions that must be urgently taken by the Crown. According to the BCSC, the duty to consult in regards to fishery management decisions may not arise, or may cease, where immediate actions must be taken that do not allow time for meaningful consultation. For example, in *Douglas, 2008,* that court stated that:

> *The duty to consult is ongoing where accommodation of the aboriginal interests is a realistic possibility. However, where exigent circumstances require the imposition of conservation measures that must be shared by all fisheries, accommodation may not be possible and thus ongoing consultation becomes meaningless.*[294]

[291] *Authorson v. Canada (Attorney General)*, 2003 SCC 39, para 37.
[292] *R v. Lefthand*, 2007 ABCA 206. Leave to appeal to SCC refused, [2007] S.C.C.A. No. 468. ("*Lefthand"*)
[293] *Lefthand*, para 38.
[294] *Douglas, 2008,* para 53.

Scope and Content of the Duty to Consult

168 The Court has clearly articulated that when it comes to determining the scope and content of the duty to consult "every case must be approached individually"[295] and "it is impossible to provide a prospective checklist of the level of consultation required."[296] Similarly, the British Columbia Court of Appeal has agreed that the content of the duty to consult will "depend on the facts and circumstances of each particular case,"[297] and "no useful purpose would be served by attempting to define for general application the meaning of the word 'consulted.'"[298]

169 However, general principles will apply. The scope and content of consultation "must be consistent with the honour of the Crown"[299] and "the controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the aboriginal peoples with respect to the interests at stake."[300] As explained by the Court in *Haida*, this analysis gives rise to a spectrum of consultation that varies according to the strength of the claim to aboriginal rights or title and the severity of the potential adverse effect on that right or title:

> *[T]he scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.*[301]

170 Where the claim to aboriginal right or title is weak, the aboriginal right limited or the potential for infringement minor, "the only duty on the Crown may be to give notice, disclose information and discuss any issues raised in response to the notice."[302] Notice and information, it appears, is the minimum requirement in such cases as aboriginal

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[295] *Haida,* para 45.
[296] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* [2004] 3 S.C.R. 550, para 32. (*"Taku River"*)
[297] *Sampson,* para 100.
[298] *Sampson,* para 100.
[299] *Haida,* para 38.
[300] *Haida,* para 45.
[301] *Haida*, para 39.
[302] *Haida,* para 43.

peoples “would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.”[303]

171 In contrast, where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the aboriginal peoples and the risk of non-compensable damage is high, “deep consultation, aimed at finding a satisfactory interim solution, may be required.”[304] The precise requirements for the duty to consult will continue to vary with the circumstances and the Court does not offer an exhaustive or mandatory list. However, “the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that aboriginal concerns were considered and to reveal the impact they had on the decision.”[305]

172 In general, the Crown will be expected to take a proactive and comprehensive approach to consultations. For example, in regards to management of the fishery, the requirement for consultation “is not fulfilled by DFO merely waiting for a Band to raise the question of its Indian food fish requirements” but rather, DFO is expected to proactively engage aboriginal groups to inform them of conservation measures being taken.[306] In addition, the information that is provided should “cover all of the conservation measures which were implemented” including how such measures affect other users of the resource, and not just the aboriginal group being consulted.[307]

173 In order for consultation to be meaningful, it must also occur in a timely manner in advance of any interference of aboriginal rights. Consultation in advance “goes to the heart of the relationship”[308] between aboriginal and non-aboriginal people and is required in order for the aboriginal peoples being consulted to have an opportunity to express their concerns and interests, for the Crown to take those representations

[303] *Sparrow*, para 82.
[304] *Haida,* para 44.
[305] *Haida,* para 44.
[306] *Sampson*, para 109.
[307] *Jack, John and John,* para 77.
[308] *Mikisew Cree*, para 3.

seriously and, if possible, to address those concerns. As stated by the BCCA in *Halfway River:*

> *The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.*[309]

174 When it comes to management of the fishery, this timeliness requirement means that the Department of Fisheries and Oceans' duty to consult requires it to inform an aboriginal group of the conservation measures being implemented *before* they are implemented.[310]

175 However, although the Crown is required to "engage directly"[311] with aboriginal peoples, consultations need not occur with each aboriginal group individually. Individual consultations are "impractical and unnecessary for the DFO to satisfy its duty to consult."[312] This is especially so in the case of consultations regarding the Fraser River salmon fishery, where a large number of aboriginal groups may hold rights and interests and many issues will become the subject of consultations:

> *Given the nature of the Fraser River salmon fishery, the number of First Nations involved, and the lack of unanimity between them on important issues, DFO's emphasis on joint consultations was reasonable and appropriate*.[313]

[309] *Halfway River First Nation v. British Columbia*, 1999 BCCA 470, para 160. (*"Halfway River"*)
[310] *Jack, John and John*, para 79.
[311] *Mikisew Cree*, para 64.
[312] *Douglas, 2008*, para 53.
[313] *Douglas, 2007*, para 40. See also *Douglas, 2008*, para 53.

Effect of the duty to consult

176 The effect of good faith consultation may be to reveal a duty to accommodate.[314] As stated by the Court in *Haida:*

> *Where a strong prima facie case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.*[315]

177 Accommodation can take a variety of forms, including changing government plans or policies in order to address aboriginal concerns.[316] The key requirement to any consultative process is responsiveness and willingness on the part of the Crown to make changes based on information that emerges during the consultative process.[317] Simply put, "[c]onsultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the [aboriginal group] an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along."[318]

178 However, accommodation of the kind desired by an aboriginal group may not occur in every case. Accommodation does not amount to a "veto" over what can be done and "a balancing of interests, of give and take" will be required.[319] That is, meaningful consultation does not carry a duty to reach an agreement with the aboriginal peoples whose rights or title may be adversely affected.[320] Instead, compromise and a balancing of societal concerns may be necessary:

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[314] *Haida,* para 47.
[315] *Haida,* para 47.
[316] *Taku River*, para 25.
[317] *Taku River*, para 29.
[318] *Mikisew Cree*, para 54.
[319] *Haida,* para 48.
[320] *Haida,* para 10.

> *[A]ccommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process.*[321]

179 The Crown is "bound by its honour to balance societal and Aboriginal interests in making decisions that affect Aboriginal claims" and this may require the Crown to make decisions in the face of disagreement with aboriginal peoples as to the adequacy of its response to their concerns.[322]

180 For example, in regards to the management of the fishery, the BCCA has held that consultations between the Department of Fisheries and Oceans and an aboriginal group do not require agreement on all conservation measures, the consent of the aboriginal group is not required for any plan proposed by the Department, and the aboriginal group is not entitled to veto any conservation measures that the Department wishes to implement.[323]

181 Similarly, the BCSC has held that the consent of an aboriginal group is not required before the Department may impose closures on aboriginal fisheries, or effect in-season changes to the annual fishing plan that result in commercial and recreational fisheries having access to the fish before the aboriginal fishing needs have been met.[324]

Obligations of Aboriginal Peoples regarding Consultation

182 Although the duty to consult is held by the Crown, the Court has added that "there is some reciprocal onus on the [aboriginal group] to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution."[325]

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[321] *Taku River*, para 2.
[322] *Haida,* para 45. Compare this to the right of consent that may arise in regards to infringement on aboriginal title, where "some cases may require the full consent of an aboriginal nation": *Delgamuukw*, para 168.
[323] *Jack, John and John,* para 81.
[324] *Douglas, 2008,* para 56-57.
[325] *Mikisew Cree*, para 65.

As the Alberta Court of Appeal explains, the Crown will not be prevented from taking action if an aboriginal group refuses to participate in consultative processes:

> *The obligation to consult does not include an obligation to repeatedly request input from the aboriginal group, nor to inquire as to why no response has been received to the invitation to consult. Likewise, no aboriginal group can effectively stall the development of public policy by delaying the provision of input, or by refusing to participate.*[326]

183 Similarly, the BCCA has stated that the Crown's duty to consult "does not mean that the First Nation is absolved of any responsibility",[327] but rather, it holds a reciprocal duty and cannot frustrate the process by imposing unreasonable conditions:

> *There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions.*[328]

184 An example of "unreasonable conditions" may be an aboriginal group insisting as its only position that it is entitled to continue fishing until its fishing needs are met, regardless of the conservation concerns for the stock.[329] "This was not a reasonable position from which to engage in meaningful consultation."[330]

Example Case Law

185 Given the case by case analysis that must be applied to the duty to consult, it may be useful to consider briefly the facts presented in two of the leading duty-to-consult cases, one in which the duty to consult was met, and one in which it was not.

186 In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*,[331] a mining company sought permission from the BC government to re-open an old mine.

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[326] *Lefthand,* para 43.
[327] *Halfway River*, para 182.
[328] *Halfway River*, para 161.
[329] *Douglas,2008,* para 51.
[330] *Douglas, 2008,* para 51.
[331] *Taku River,* see note 296.

The Taku River Tlingit First Nation (the "TRTFN") objected to the company's plan to build a road through a portion of their traditional territory. This road would pass through an area "critical to the TRTFN's domestic economy"[332] and the TRTFN held *prima facie* aboriginal rights and title over the area.[333] On the facts, the Province had a duty to consult, but it met that duty. Specifically, the TRTFN was part of a project committee that fully participated in the environmental review process for the project; its views were put before the Minister, and the final project approval contained measures designed to address both the TRTFN's immediate and long term-concerns.[334] The Province consulted and made accommodations. However, it was not under a duty to reach an agreement with the TRTFN and its failure to do so did not breach its obligation to consult in good faith.[335]

187 In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),*[336] a different result was reached. The Mikisew Cree First Nation ("MCFN") is a signatory to Treaty 8, in which several First Nations surrendered some 840,000 square kilometres of land. In exchange for this surrender, the First Nations were promised reserves and benefits including the rights to hunt, trap and fish throughout the land surrendered except for "such tracts as may be required or taken up from time to time."[337] In 2000, without consultation, the federal government approved a winter road that was to run through the MCFN's reserve. The government later amended the road plan so that it would track along the boundary of the reserve rather than run through it. However, neither of these "unilateral" actions met the Crown's duty to consult, which would have required at least providing notice to the MCFN and to engage directly with them. This engagement ought to have included provision of information about the project, anticipating its adverse impact on the rights and interests of the MCFN and attempting to minimize those adverse impacts.[338] Had the consultation process gone ahead, it

[332] *Taku River*, para 31.
[333] *Taku River,* para 30.
[334] *Taku River*, para 22.
[335] *Taku River*, para 22.
[336] *Mikisew Cree*, see note 9.
[337] *Mikisew Cree*, para 2.
[338] *Mikisew Cree*, para 64.

would not have given the MCFN a veto over the alignment of the road.[339] However, they were at least entitled to be consulted about the decision so that their concerns would be heard and accommodations could be considered in good faith.[340]

Upcoming Developments

188 It should be noted that two cases regarding the duty to consult were recently heard by the Court. In the first, *David Beckman, in his capacity as Director, Agricultural Branch, Department of Energy, Mines and Resources, et al. v. Little Salmon/Carmacks First Nation, et al*,[341] heard on November 12, 2009, the Court was asked to consider whether there is a duty to consult and, where necessary, accommodate First Nations' concerns and interests in the context of a modern comprehensive land claims agreement.

189 In the second, *Rio Tinto Alcan Inc., et al. v. Carrier Sekani Tribal Council*,[342] heard May 21, 2010, the Court was asked to consider a range of consultation issues, including but not limited to whether BC Hydro had a duty to consult and, if necessary, accommodate, a First Nation in regards to another Crown actor's conduct, whether a tribunal such as the BC Utilities Commission possesses a "duty to decide" consultation questions and whether BC Hydro had a duty to consult and, if necessary, accommodate in respect of an Energy Purchase Agreement.

190 The Court reserved judgment on both of these cases and reasons were not available at the time of writing this paper. It is anticipated that the Court may render its reasons within the duration of this Inquiry.

[339] *Mikisew Cree,* para 66.
[340] *Mikisew Cree*, para 66.
[341] SCC Docket 32850.
[342] SCC Docket 33132.

Conclusion

191 As this paper has set out, aboriginal peoples have both proven and unproven claims to aboriginal rights and title, and to treaty rights, that affect the management of the Fraser River sockeye salmon fishery. In practical terms, uncertainties may remain as to exactly how such rights and titles ought to inform the detailed decision-making inherent to managing a complex fishery. However, the Crown, with its duty of honourable conduct in all its interactions with aboriginal peoples, will be required to consider those rights and titles in a process of good faith dealings and reconciliation. In some cases, the honour of the Crown will require consultation and possibly accommodation.

List of Authorities

Case Law

1.	*Ahousaht Indian Band v. Canada (Attorney General)*, 2009 BCSC 1494.
2.	*Authorson v. Canada (Attorney General)*, 2003 SCC 39.
3.	*Calder et al. v. Attorney-General of British Columbia,* [1973] S.C.R. 313.
4.	*Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654.
5.	*Comeau's Sea Foods v. Canada (Minister of Fisheries and Oceans),* [1997] 1 S.C.R. 12.
6.	*David Beckman, in his capacity as Director, Agricultural Branch, Department of Energy, Mines and Resources, et al. v. Little Salmon/Carmacks First Nation, et al*, judgment reserved, SCC Docket 32850.
7.	*Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.
8.	*Guerin v. Canada* [1984] 2 S.C.R. 335.
9.	*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.
10.	*Halfway River First Nation v. British Columbia*, 1999 BCCA 470.
11.	*Jack et al v. The Queen*, [1980] 1 S.C.R. 294.
12.	*Larocque v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237.
13.	*Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2006 BCSC 1463.
14.	*Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2009 BCCA 593.
15.	*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69.
16.	*Mitchell v. M.N.R.,* [2001] 1 S.C.R. 911.
17.	*Myran v. The Queen*, [1976] 2 S.C.R. 13.
18.	*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29.
19.	*R v. Adams* [1996] 3 S.C.R. 101.
20.	*R v. Badger*, [1996] 1 S.C.R. 771.
21.	*R v. Douglas et al*, 2007 BCCA 265. Leave to appeal to SCC refused, [2007] S.C.C.A. No. 352.

22.	*R v. Douglas*, 2008 BCSC 1098.
23.	*R v. Ellsworth*, [1992] 4 C.N.L.R. 89 (B.C.S.C.).
24.	*R v. Gladstone*, [1996] 2 S.C.R. 723.
25.	*R v. Huovinen*, 2000 BCCA 427. Leave to appeal to SCC refused, [2000] S.C.C.A. No. 478.
26.	*R v. Jack, John and John* (1995), 16 B.C.L.R. (3d) 201 (B.C.C.A.).
27.	*R v. Jimmy* (1987), 15 B.C.L.R. (2d) 145 (C.A.).
28.	*R v. Lefthand*, 2007 ABCA 206. Leave to appeal to SCC refused, [2007] S.C.C.A. No. 468.
29.	*R v. Lewis* [1996] 1 S.C.R. 921.
30.	*R v. Little*, (1995) 16 B.C.L.R. (3d) 253 (B.C.C.A.).
31.	*R v. Marshall*, [1999] 3 S.C.R. 456.
32.	*R v. Marshall*, [1999] 3 S.C.R. 533.
33.	*R v. Morris*, 2006 SCC 59.
34.	*R v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672.
35.	*R v. Nikal*, [1996] 1 S.C.R. 1013.
36.	*R v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43.
37.	*R v. Quipp*, 2010 BCCA 389.
38.	*R v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54.
39.	*R v. Sampson*, (1995) 16 B.C.L.R. (3d) 226 (B.C.C.A.).
40.	*R. v. Sioui*, [1990] 1 S.C.R. 1025.
41.	*R v. Sundown*, [1999] 1 S.C.R. 393.
42.	*R v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] S.C.J. No. 49.
43.	*R v. Van der Peet,* [1996] 2 S.C.R. 507.
44.	*R v. White and Bob,* (1964) 50 D.L.R. (2d) 613 (B.C.C.A.), aff'd (1965), 52 D.L.R. (2d) 481 (S.C.C.).
45.	*Rio Tinto Alcan Inc., et al. v. Carrier Sekani Tribal Council*, judgement reserved, SCC Docket 32850.

46.	*Roberts v. Canada*, [1989] 1 S.C.R. 322.
47.	*Simon v. The Queen*, [1985] 2 S.C.R. 387.
48.	*Snuneymuxw First Nation v. British Columbia*, 2004 BCSC 205.
49.	*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.
50.	*Tsawout Indian Band v. Saanichton Marina Ltd.*, (1989), 36 B.C.L.R. (2d) 79 (B.C.C.A.).
51.	*Wewaykum Indian Band v. Canada*, 2002 SCC 79.

Statues and Legislation

1.	*Canadian Charter of Rights and Freedoms*, Part I, *The Constitution Act, 1982,* s.15.
2.	*The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
3.	*Treaty Commission Act*, R.S.B.C. 1996, c. 461.

Websites

1.	BC Treaty Commission, available at http://www.bctreaty.net/files/updates.php;
2.	First Nations Summit, available at http://www.fns.bc.ca/treaty/t_facts.htm
3.	Ministerial Statement of Honourable Gail Shea, 2 March 2010, available at http://www.dfo-mpo.gc.ca/media/statement-declarations/2010/20100302-eng.htm
4.	Ministry of Aboriginal Relations and Reconciliation, "Treaties and other Negotiations", available at http://www.gov.bc.ca/arr/atreaty/default.html
5.	Ministry of Aboriginal Relations and Reconciliation, available at http://www.gov.bc.ca/arr/firstnation/nisgaa/default.html
6.	Ministry of Aboriginal Relations and Reconciliation, available at http://www.gov.bc.ca/arr/treaty/faq.html
7.	Ministry of Aboriginal Relations and Reconciliation, available at http://www.gov.bc.ca/arr/firstnation/lheidli/default.html

Treaties

1.	*Maa-Nulth First Nations Final Agreement,* Fisheries, Chapter 10.
2.	*Tsawwassen First Nation Final Agreement*, Fisheries, Chapter 9.

COMMISSION OF INQUIRY INTO THE DECLINE OF THE SOCKEYE SALMON IN THE FRASER RIVER

In the matter of Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a Commission to issue under Part 1 of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as Commissioner to conduct an inquiry into the decline of the sockeye Salmon in the Fraser River

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WRITTEN SUBMISSIONS OF THE GOVERNMENT OF CANADA IN RESPONSE TO THE POLICY AND PRACTICE REPORT ENTITLED "THE ABORIGINAL AND TREATY RIGHTS FRAMEWORK UNDERLYING THE FRASER RIVER SOCKEYE SALMON FISHERY," OCTOBER 1, 2010

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I. INTRODUCTION

1. Canada submits that an understanding of the Aboriginal and treaty rights framework that underlies the Fraser River sockeye fishery is critical to understanding the fishery and Canada's role and responsibilities in its management.

2. The Commissioner, in order to understand and make recommendations on, *inter alia*, the Department of Fisheries and Ocean's (DFO) fisheries policies and programs, management practices and procedures, and risk management, in accordance with his mandate, requires an understanding of the legal context in which Canada operates.

3. Canada has an obligation to manage the fisheries for all Canadians, and also in a manner consistent with the constitutional protection afforded to Aboriginal and treaty rights[1]. In managing the fisheries, consistent with the requirements of the Constitution and jurisprudence regarding those requirements, Canada seeks to avoid unjustifiably infringing Aboriginal and treaty rights. Where a claimed Aboriginal right may be adversely affected by Canada's proposed actions or decisions, Canada consults with the Aboriginal group claiming the right and, where appropriate, seeks to accommodate its interests.

4. While it is essential that the Commissioner be cognizant of the legal framework in forming his recommendations pursuant to his mandate, Canada submits that the Commissioner's role is to apply the law as it stands currently, not to pronounce upon or seek to direct the evolution of the Aboriginal or treaty rights framework[2]. The law of Aboriginal and treaty rights is particularly complex and dynamic; many of the subjects discussed in the Commission's paper, "*[t]he Aboriginal and Treaty Rights Framework Underlying the Fraser River Sockeye Salmon Fishery,*" dated October 1, 2010 (the "Paper"), are the subject of active litigation. Interpretations of the law, or opinions expressed about possible future directions of this legal framework, could prove prejudicial to Participants' legal positions in, or conduct of, litigation, or impact upon ongoing consultation and rights negotiation processes.

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[1] *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 at paragraph 37. (*"Comeau's Sea Foods"*); *R. v. Gladstone,* [1996] 2 S.C.R. 723 at paragraph 67 (*"Gladstone"*)

[2] "A commission of inquiry has no authority to decide legal rights or obligations; the fact-finding function of a commissioner has an intrinsic value quite apart from that of serving as the foundation for determining rights or obligations." Ratushny, Ed. *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009), page 162.

5. As a general comment, and subject to the comments made in these submissions, the Paper is mostly a fair and balanced effort to explain a complicated and often contentious area of the law. However, Canada submits that, in places, the Paper engages in unnecessary and sometimes unhelpful speculation on the future direction or evolution of the Aboriginal and treaty rights framework. Some examples of such speculation include (but are not limited to):

> [paragraph 25] ...aboriginal title to submerged lands or the foreshore has the possibility of providing for a different set of rights than those that may be obtained through successful claims to an aboriginal right to fish...This may arguably encompass alternative uses of marine resources that might not constitute aboriginal rights on their own.
>
> [paragraph 70] ...the right to fish for commercial purposes may take a variety of forms. This may range from the right to "exchange fish for money or other goods" to, at least, a right to fish "on a commercial basis".
>
> [paragraph 130] Although it is possible that other fishing rights may derive from this treaty [i.e. Treaty 8]... [emphasis added]

6. Aboriginal issues are often controversial and, in some cases, subject to ongoing litigation. It is inappropriate to speculate as to the future direction of the law in this area. The courts have been clear that important and complex questions of Aboriginal law should not be decided in the abstract, but rather that questions of Aboriginal and treaty rights must necessarily be considered in relation to specific fact situations and not according to hypothetical arguments or general principles[3]. Such issues and questions are best considered by courts in proceedings where the parties have the ability to present and test the evidence in an adversarial process.

7. Canada therefore submits that the Commissioner should, in preparing his report and recommendations, disregard those passages in the Paper that reflect opinion or speculation as to the possible evolution of the law. At a minimum, in considering the issues discussed in the Paper, the Commissioner should be aware that many of these issues are controversial, and he should refrain from endorsing any positions or opinions that are not based on jurisprudence that exists currently.

II. ABORIGINAL TITLE TO MARINE AREAS OR RIVERS

Aboriginal Title – Interest in Aboriginal Title and Reserve Lands

8. Paragraphs 9-11 of the Paper cite authorities describing the relationship of Aboriginal interests in Aboriginal title land and in reserve lands. The jurisprudence is clear that the incidents of

[3] *R. v. Marshall*, [1999] 3 S.C.R. 533, at paragraph 22; *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539 at paragraphs 13-19.

Aboriginal title, and the corresponding obligations of government, will be quite different from those relating to a reserve interest. The differences between Aboriginal title and reserve lands are discussed in *Osoyoos Indian Band v. Oliver*[4]. Specifically, the Supreme Court of Canada (SCC) clarified that:

> In sum, aboriginal interest in reserve land is entirely distinct and independent from aboriginal title. Furthermore, it does not fall into the same category of "aboriginal right", subject to the same legal principles, as aboriginal title and the other aboriginal rights referred to above; in other words, a bare interest in reserve land which is not also the object of aboriginal title, treaty rights or such other aboriginal rights cannot be considered to be an "aboriginal right" that is protected under s. 35 of the *Constitution Act, 1982*.[5]

9. The statements in paragraph 10 of the Paper relating to the nature of the Crown's fiduciary relationship with Aboriginal peoples refer primarily to Aboriginal interests in reserve lands. In particular, the passage quoted from *Wewaykum* at paragraph 10 ("the fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples") is clearly in relation to a reserve interest and not as to Aboriginal title. Indeed, the SCC in *Weywaykum* specifically notes that case is not about Aboriginal title[6].

Aboriginal Title – Date of the Assertion of Crown Sovereignty

10. At footnote 28, the Paper notes that the parties in *Delgamuukw* did not dispute that British sovereignty was "conclusively established" in British Columbia by the Oregon Boundary Treaty of 1846. However, it is important to note that Aboriginal title is determined as of the date of the assertion of Crown sovereignty[7]. The date for the assertion of Crown sovereignty in any given case is a question of fact, and such date may vary not only between provinces and territories of Canada, but also arguably within the Province of British Columbia.

Aboriginal Title – Proof of Occupation – *Bernard and Marshall*

11. The Paper sets out at paragraphs 12 the three elements of the test for proof of Aboriginal title, and noted at paragraph 13 that a central and necessary criterion in any claim for Aboriginal title is evidence of the Aboriginal use and occupation of the land in question. Since all three elements described at paragraph 12 are concerned with "occupation", the question of what actually

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[4] *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, paragraphs 41, 160-169 ("*Osoyoos*").
[5] *Osoyoos*, at paragraph 169.
[6] *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, at paragraph 3.
[7] *Delgamuukw*, at paragraphs 144-145.

constitutes "occupation" is central to determining whether the test has been met. Therefore the absence in the Paper of any reference to or discussion of the SCC decision in *Bernard and Marshall* is particularly significant[8]. This decision is, among other things, the leading authority on the question of what constitutes "occupation" sufficient to ground Aboriginal title, and it is therefore a decision of central relevance and importance to any question as to whether an Aboriginal group could establish Aboriginal title to submerged lands in marine areas or in rivers.

12. The SCC in *Bernard and Marshall* ruled that "occupation" means "physical occupation":

> This "may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources": *Delgamuukw*, *per* Lamer C.J., at para. 149.[9]

13. Further, the SCC ruled in each case that the respective trial judges were correct in requiring proof of regular and exclusive use of specific sites to establish Aboriginal title. The Court found that seasonal hunting and fishing rights exercised by pre-sovereignty Aboriginal groups will typically only translate to modern hunting or fishing rights, rather than to Aboriginal title. Hunting, fishing and other exploitation of natural resources will translate into Aboriginal title only if the activity was sufficiently regular and exclusive to the land in question to comport with title at common law[10]. The degree of regularity and exclusivity required to prove Aboriginal title was indicated to be very high. Referring to its decisions in *Van der Peet*, *Nikal*, *Adams* and *Côté*, the Court said:

> In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, the season over, they left, and the land could be traversed and used by anyone. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights.

This passage from *Bernard and Marshall* suggests that a claim to Aboriginal title cannot be maintained absent proof of regular and exclusive physical occupation.

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[8] *R. v. Marshall; R. v Bernard,* [2005] 2 S.C.R. 220 (*"Bernard and Marshall"*).
[9] *Bernard and Marshall,* at paragraph 56.
[10] *Bernard and Marshall,* at paragraph 58.

Aboriginal Title – Requirement of Exclusivity

14. Another element in the test for Aboriginal title from *Delgamuukw*, described at paragraph 12 of the Paper, is the requirement that, at the date of the assertion of sovereignty, occupation of the land claimed must be "exclusive":

> Finally, at sovereignty, occupation must have been exclusive. The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right. Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.[11]

15. Lamer C.J.C. observed that it could be possible to demonstrate exclusive occupation even if other Aboriginal groups were present or frequented the claimed lands. Under such circumstances, exclusivity would be demonstrated by an Aboriginal group's intention and capacity to retain exclusive control. An isolated act of trespass would not undermine a general finding of exclusivity if an Aboriginal group intended to and attempted to enforce their exclusive occupation of a particular site[12]. Lamer C.J.C. also noted that where Aboriginal groups can show that they occupied a particular site, but did not do so exclusively, it would still be possible to establish Aboriginal rights short of title[13].

16. In *Bernard and Marshall*, the Court reiterated these principles[14], and then provided clarification of the test for exclusivity in the following terms:

> [64] [...] The right to control the land and, if necessary, to exclude others from using it is basic to the notion of title at common law. In European-based systems, this right is assumed by dint of law. Determining whether it was present in a pre-sovereignty aboriginal society, however, can pose difficulties. Often, no right to exclude arises by convention or law. So one must look to evidence. But evidence may be hard to find. The area may have been sparsely populated, with the result that clashes and the need to exclude strangers seldom if ever occurred. Or the people may have been peaceful and have chosen to exercise their control by sharing rather than exclusion. It is therefore critical to view the question of exclusion from the aboriginal perspective. To insist on evidence of overt acts of exclusion in such circumstances may, depending on the circumstances, be unfair. The problem is compounded by the difficulty of producing evidence of what happened hundreds of years ago where no tradition of written history exists.
>
> [65] It follows that evidence of acts of exclusion is not required to establish aboriginal title. All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so. The fact that

[11] *Delgamuukw*, at paragraph 155.
[12] *Delgamuukw*, at paragraph 156.
[13] *Delgamuukw*, at paragraph 159.
[14] *Bernard and Marshall*, at paragraph 57.

> history, insofar as it can be ascertained, discloses no adverse claimants may support this inference. This is what is meant by the requirement of aboriginal title that the lands have been occupied in an exclusive manner.

17. In summary, in *Delgamuukw* and *Bernard and Marshall*, the SCC confirmed that Aboriginal groups claiming Aboriginal title would need to establish that at the date of the assertion of sovereignty, their ancestors had effective control of the claimed lands (including any submerged lands, marine areas and rivers). That is, that those ancestors exclusively and physically occupied the lands claimed, and had the intention and capacity to exclude others from those lands. Moreover, with respect to the need to prove effective control of their respective claim areas, *Bernard and Marshall* emphasized that this control must be over "definite tracts of land"[15]. Aboriginal title is site specific, and the whole territory over which Aboriginal title is claimed must have been used regularly, not just on irregular occasions.

Aboriginal Title – Submerged Lands and Test for Title

18. Paragraph 22 of the Paper states that "[n]o Canadian court has yet to fully apply the concept of Aboriginal title to marine areas or rivers." This comment actually overstates the current state of the law: to date no Canadian court has accepted to any extent the concept of Aboriginal title to marine areas or submerged land under rivers or lakes. Based on the foregoing discussion, Canada submits that it would be very difficult in most instances for an Aboriginal group to demonstrate the requisite degree of exclusive and physical occupation to submerged lands required to establish Aboriginal title at common law. This is particularly true for much of the Fraser River and its tributaries, which was and is traversed by many Aboriginal groups and other peoples for fishing and navigation[16]. It would be even more difficult to establish exclusive and physical occupation in marine areas, particularly in areas far from shore.

Aboriginal Title to Submerged Lands – Limitations of Common Law Title

19. Another reason why Aboriginal groups would face difficulties proving Aboriginal title to submerged lands arise from the finding in *Bernard and Marshall* that Aboriginal title is based in the

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[15] *Bernard and Marshall* at paragraph 70.

[16] In *Tzeachten First Nation v. the Attorney General of Canada*, 2008 FC 928, at paragraph. 40, the trial judge, in assessing certain Sto:lo First Nations' claims to aboriginal title that encompassed parts of the Fraser River and tributaries, noted that "... the fact that a portion of the territory claimed was underwater and used as a transportation and trading route makes the exclusive occupation of this particular portion all the more difficult to prove."

common law.[17] Title at common law may be subject to or influenced by other common law rights and principles (as noted in the Paper at paragraph 29). In particular, claims to Aboriginal title to submerged lands may be incompatible with the public rights of fishing or navigation.

20. In marine (tidal) areas, the Crown's title to the seabed includes all the land below the high water mark, with the effect that no common law property or fishing rights can exist in those waters other than the public rights of fishing and navigation[18]. The equivalence stressed in *Bernard and Marshall* between Aboriginal title and common law title suggests that, if common law title cannot exist below the high water mark, then Aboriginal title cannot exist there either.

21. In non-tidal waters, the solum of a river bed can be the subject to title at common law. Therefore it is conceivable that Aboriginal title could exist to such lands in some jurisdictions. In particular, it is conceivable that title could be held to submerged lands *ad medium filum aquae*, similarly to a riparian right, by an Aboriginal group who could establish Aboriginal title to the adjoining dry land. However, in British Columbia, common law title cannot exist a*d medium filum aquae* to navigable water bodies[19].

Aboriginal Title – Public Right of Navigation

22. Any claim to Aboriginal title to navigable waters is inconsistent with the common law public right of navigation, which is held in common by all Canadians and can only be taken away by statute. It is paramount over any right that the Crown or any person may possess in navigable waters, including the rights of the owner of the solum[20]. Aboriginal title, by its very definition including the right to the exclusive use and occupation of the lands, and including the right to exclude others, would be incompatible with a public right of navigation. Such a claim for Aboriginal title is fundamentally inconsistent with the essential part of the common law that protects the public's access to navigable waters and is therefore not cognizable to the common law.

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[17] *Bernard and Marshall,* at paragraphs 38, 51.
[18] *Halsbury's Law of England,* 4th Edition, 2004 Re-issue, vol. 49(2), at paragraph 56. In the Fraser River, DFO considers the Mission bridge as the boundary between tidal and non-tidal waters.
[19] *R. v. Lewis,* [1996] 1 S.C.R. 921 at paragraphs 56-65 (*"Lewis"*); *R. v. Nikal,* [1996] 1 S.C.R. 1013 at paragraphs 65-75 *("Nikal")*
[20] *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3 at paragraphs 53-59; Gerard V. LaForest, Q.C. and Associates, *Water Law in Canada: the Atlantic Provinces* (Ottawa: Information Canada, 1973), page 185. ("LaForest, *Water Law in Canada*").

23. In *Walpole Island First Nation v. Canada*, a case involving a claim of Aboriginal title to submerged lands in the Great Lakes, the Ontario Superior Court considered the issue of the relationship between the public right of navigation and Aboriginal title. While the Court did not grant the Crown's preliminary motion to strike portions of the Statement of Claim relating to Aboriginal title to the lakebed on the basis that is was not "plain and obvious", the motions judge did describe Canada's arguments as "powerful and persuasive"[21].

24. Whether a waterway, particularly a river or lake, is considered "navigable" is a question of fact and, therefore, claims must be individually assessed. A water body is considered "navigable" if canoes or boats can travel down it, or if timber and logs can float on the river or lake:

> In Quebec, Ontario, the Prairie Provinces, and British Columbia, the rule is that if waters are *de facto* navigable, the public right of navigation exists there, whether the waters are tidal or non-tidal...[22]

Even if only part of a river is, in fact, navigable, the whole will be held to be navigable at law[23]. Based on this definition, the rivers and lakes of the Fraser River watershed in which sockeye salmon swim and spawn are almost certainly considered to be "navigable" water bodies.

Aboriginal Title – Fisheries as a Common Property Resource and the Public Right to Fish

25. In marine (tidal) waters, the fisheries have been described in the courts as a "common property resource"[24]. Any claim for Aboriginal title to submerged lands would not only be incompatible with the concept of the fishery as a "common property resource", but also incompatible with the common law public right to fish. Since the time of the *Magna Carta*, the Crown has no power – except by statute – to grant an exclusive fishery in tidal waters to the owner of submerged lands or to anyone else[25].

26. In *Gladstone*, the SCC confirmed that Aboriginal rights exist within the context of the public right to fish:

> It should also be noted that the aboriginal rights recognized and affirmed by s. 35(1) exist within a legal context in which, since the time of the Magna Carta, there has been a common law right to fish in tidal waters that can only be abrogated by the enactment of competent legislation:

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[21] *Walpole Island First Nation v. Canada (Attorney General)*, [2004] 3 C.N.L.R. 351, at paragraph 16.
[22] LaForest, *Water Law in Canada*, page 178.
[23] LaForest, *Water Law in Canada*, p. 180: *Nikal* at paragraph 74.
[24] *Comeau's Sea Foods*, at paragraph 37.
[25] *A.G. (B.C.) v. A.G. (Canada)*, [1914] A.C. 153 at 170.

> . . . the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike.
>
> . . .
>
> [I]t has been unquestioned law that since Magna Charta *[sic]* no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation.
>
> (Attorney-General of British Columbia v. Attorney General of Canada, [1914] A.C. 153 (J.C.P.C.), at pp. 169-70, per Viscount Haldane.)

> While the elevation of common law aboriginal rights to constitutional status obviously has an impact on the public's common law rights to fish in tidal waters, it was surely not intended that, by the enactment of s. 35(1), those common law rights would be extinguished in cases where an aboriginal right to harvest fish commercially existed. As was contemplated by *Sparrow*, in the occasional years where conservation concerns drastically limit the availability of fish, satisfying aboriginal rights to fish for food, social and ceremonial purposes may involve, in that year, abrogating the common law right of public access to the fishery; however, it was not contemplated by *Sparrow* that the recognition and affirmation of aboriginal rights should result in the common law right of public access in the fishery ceasing to exist with respect to all those fisheries in respect of which exist an aboriginal right to sell fish commercially. As a common law, not constitutional, right, the right of public access to the fishery must clearly be second in priority to aboriginal rights; however, the recognition of aboriginal rights should not be interpreted as extinguishing the right of public access to the fishery.[26]

27. In summary, Aboriginal title to submerged lands, and in particular to lands under marine (tidal) waters or navigable rivers and lakes, is inconsistent with the common law rights of public navigation and the public right to fish, as well as with the common property nature of the fisheries. Because Aboriginal title encompasses the right to exclusive use and occupation of the area subject to title, Aboriginal title to marine areas and submerged lands under rivers and lakes is irreconcilable with the common law and not cognizable in law. The foregoing arguments were made to Justice Garson in *Ahousaht*, and, although she declined to decide upon the plaintiffs' Aboriginal title claim to submerged lands in the circumstances of that case, she nevertheless expressed "some doubt" that the claim was legally tenable[27].

28. Based on the difficulties an Aboriginal group would likely face in establishing a claim of Aboriginal title to submerged lands, Canada submits that the Paper likely goes too far in asserting that "[i]n the interim *[i.e. to the development of jurisprudence on aboriginal title to marine areas or rivers]*... the assertion of aboriginal title to marine areas or rivers may be sufficient to place certain obligations of consultation and possibly reasonable accommodation upon the Crown" (paragraph 30). As the Federal Court recently discussed in *Athabasca Regional Government v. Canada*[28]:

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[26] *Gladstone,* at paragraph 67.
[27] *Ahousaht Indian Band and Nation v. Canada (Attorney-General)*, 2009 BCSC 1494 (*"Ahousaht"*), at paragraph 502.
[28] *Athabasca Regional Government v. Canada (Attorney-General)*, 2010 FC 948, at paragraph 210.

[210] As the Respondents point out, the duty to consult may not be triggered at all where there is a relatively minimal adverse effect on claims to Aboriginal title or rights or treaty rights claims. In *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009 at page 34), Professor Dwight Newman summarizes when the duty to consult may be triggered:

> ****
> Government departments need not consult in circumstances where there are overriding doubts about the Aboriginal title or right or treaty right. They need not consult in circumstances where there is no plausible adverse effect on an Aboriginal claim. They need not consult if they are not involved in the kinds of action that trigger a duty to consult. However, it is not always easy for government officials to make those determinations with certainty, which may support the notion that to avoid the risk of not consulting in circumstances where consultation should have occurred, where there is any argument for doing so and it is practical to do so, at least notice to Aboriginal communities should be extended. It would be impractical to consult on every governmental decision, though, so there is a need for good judgment in applying this principle. [emphasis added]

29. Canada submits that the Crown may not have a duty to consult with Aboriginal groups based on legal arguments and positions that are theoretical and hypothetical in nature. In particular, the statement in paragraph 30 as to a possible duty to consult in connection with claims to Aboriginal title to marine areas and rivers is both speculative and subject to "overriding doubts".

III. ABORIGINAL RIGHTS

Aboriginal Rights – Site-Specific Nature of Aboriginal Fishing Rights

30. The Paper at paragraph 63 states that the right to fish for FSC purposes "may also be limited to specific area". In *Sappier*, the SCC noted that it has imposed a site-specific requirement on Aboriginal hunting and fishing rights in cases such as *Adams*, *Côté*, *Mitchell*, and *Powley*. The Court stated that the right "imports a necessary geographical element..."[29].

Aboriginal Rights – Right to Fish for Commercial Purposes

31. In paragraphs 68 and 69, the Paper states that *Ahousaht*, along with *Gladstone*, is a case where the court found a right to fish for "commercial purposes". In *Gladstone* the SCC confirmed that the Heiltsuk have an Aboriginal right to harvest and sell herring spawn on kelp "on a scale best characterized as commercial" (in addition to an Aboriginal right to sell spawn on kelp for money

[29] *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R 686, at paragraphs 50-51.

and other goods)[30]. The SCC referred to this right to sell "on a scale best characterized as commercial" as a right to sell on a "commercial basis"[31].

32. In *Ahousaht*, by contrast (and as described in the Paper at paragraph 69), Garson J. described the plaintiffs' right to harvest and sell fish as broader than a right to "exchange for money or other goods", but less than a right to "a modern industrial fishery or to unrestricted rights of commercial sale"[32]. While the right to fish and sell fish confirmed in *Ahousaht* is something more than "[t]he small-scale sale of fish outside the commercial market", Garson J. declined to characterize the plaintiffs' right as "commercial," to the extent that judicial authorities use that term to indicate sale "on a large industrial scale". Garson J. expressly declined to use this characterization, given that the plaintiffs' right "was not for the purpose of accumulating wealth". It is therefore inaccurate to state that the court in *Ahousaht* found a right to fish for "commercial purposes".

33. In addition to the cases cited involving Aboriginal claims to rights to harvest and sell fish, including rights to harvest and sell fish on a commercial basis, there are two trial decisions of the Provincial Court of British Columbia involving claims to harvest and sell Fraser River salmon on a commercial basis. In *R. v. Coutlee and McCaleb*[33], members of the Lower Nicola and Kamloops bands were charged with the unlawful sale of sockeye salmon. The defendants asserted an Aboriginal right to engage in commercial sales of salmon. The trial judge characterized the right claimed as a right to harvest and exchange salmon for money or other goods. After a trial of approximately 50 days, the trial judge concluded that the defendants had failed to establish that the Thompson and Shuswap Aboriginal people had traditionally exchanged salmon for money or other goods.

34. In *R. v. Billy* and Johnny[34], the two defendants, who are members of the Anahim Band and Tsilhqot'in First Nation, were charged with multiple counts of unlawfully harvesting and selling salmon. The defendants asserted in defence an Aboriginal right to harvest and sell fish for commercial purposes. In a trial lasting 48 days, the trial judge ultimately concluded that the defendants had failed to establish an Aboriginal right to commercially sell salmon.

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[30] *Gladstone,* at paragraph 26.
[31] *Gladstone*, at paragraph 30.
[32] *Ahousaht*, at paragraphs 486-487.
[33] *R. v. Coutlee and McCaleb*, B.C. Prov. Ct.., Kamloops Registry No. 58374-C, May 7, 2004, unreported.
[34] *R. v. Billy and Johnny*, 2006 BCPC 0048.

Aboriginal Rights – Justification of Infringements – Valid Legislative Objectives – Management of the Resource

35. In *Sparrow*, in considering the issue of justification of infringements, the SCC held that (in addition to those factors noted at paragraph 98 of the Paper) "[a]n objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource...would be valid" [emphasis added]. The SCC upheld the finding the B.C. Court of Appeal that regulations could be valid if reasonably justified for the proper management and conservation of the resource, noting that "[t]he justification of conservation and resource management, on the other hand, is surely uncontroversial"[35].

Aboriginal Rights – Justification of Infringements – Valid Legislative Objectives - Conservation Measures

36. As noted in paragraph 102 of the Paper, in *Nikal* and other cases, the courts have consistently upheld the principle that management of the fishery for conservation imports a duty to maintain and increase reasonably the resource[36]. In *R. v. Douglas*[37], the appellants asserted that the DFO's policy of optimal escapement targets to rebuild diminished fish stocks beyond minimal levels of catch for all user groups was not a valid legislative objective. The appellants argued for a narrower definition of escapement within the broader concept of sustainability, and submitted that DFO should adhere to prescribed escapement levels.

37. The trial judge disagreed, noting that:

> "...such a narrowing is not possible as it would restrict the contextual and fact-specific inquiry mandated by *Sparrow*, the standard of reasonableness required by [*Nikal*], and would impair the DFO's responsibility to manage the resource, which may require it to make adjustments to the fishing plan on very short notice, for the benefit of all user groups.[38]

The Court expressly endorsed the principle of managing the conservation of fisheries for all user groups as a valid legislative objective:

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[35] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1113 (*"Sparrow"*).
[36] *R. v. Nikal*, [1996] 1 S.C.R. 1013, at paragraph 102 (*"Nikal"*).
[37] *R. v. Douglas*, 2008 BCSC 1097. This is one of four 2008 BCSC appeal decisions released in relation to prosecutions of (primarily) Cheam band members charged with unlawful fishing activities in 1999. This decision is in respect of a charge of fishing in a closed time for late summer sockeye The other three decisions are *R. v. Douglas*, 2008 BCSC 1098 (mid-summer sockeye), *R. v. Aleck*, 2008 BCSC 1096 (Early Stuart sockeye) and *R. v. Tommy*, 2008 BCSC 1095 (Chinook salmon). *R. v. Tommy* is cited in the Paper as *"Douglas, 2008"*. None of these decisions should be confused with the earlier BCCA decision in *R. v. Douglas*, 2007 BCCA 265 *(Douglas, 2007)*.
[38] *Douglas*, 2008 BCSC 1097, at paragraphs 84-85.

> [86] The DFO's policy of risk aversion is an integral part of its management of the Fraser River fisheries. As noted previously, the DFO's mandate includes the complex and dynamic task of planning, coordinating and allocating the fisheries among a variety of user groups with often competing interests. It would be impossible in any given year, given the variety of in-season changes that occur, to follow mandated prescribed levels of escapement. Such a policy would, in my view, abrogate the government's obligation to reconcile aboriginal with non-aboriginal interests.
>
> [87] The Supreme Court of Canada has endorsed the notion of enhancement and sustainability of the resource in general terms, as a valid legislative objective. *Sparrow* described resource enhancement for all user groups as "uncontroversial"; *Nikal* observed that "management [of the resource] imports a duty to maintain and increase reasonably the resource". This responsibility was not qualified or limited to certain user groups. Ultimately, the DFO must make decisions regarding the allocation of the resource among the various competing user groups.[39]

38. The Court made similar rulings in *R. v. Aleck* (where the Court noted in particular that "the objectives of preservation and sustainability of the resource apply also amongst the 93 Fraser River First Nations")[40], in *R. v. Douglas* (mid-summer sockeye)[41], and in *R. v. Tommy*[42].

Aboriginal Rights – Justification – Allocation of Priorities

39. The British Columbia Court of Appeal decision in *Douglas, 2007* is the leading decision in British Columbia regarding issues of the priority of First Nations' Aboriginal rights to fish for food, social and ceremonial (FSC) purposes[43]. The Court emphasized that the consideration of issues of harvest priority requires a "contextual analysis", and concluded in that case that small incidental harvests of mixed stock interception recreational fisheries do not necessarily violate the priority enjoyed by First Nations' FSC fisheries. The Court noted that the correct standard to apply was "reasonableness" in the context of the specific circumstances, and that DFO "properly took account of all of the First Nations' interests.

> This is not to say that the priority required by *Sparrow* means that the food, social and ceremonial fisheries must always precede or occur contemporaneously with the non-aboriginal fisheries. As part of the contextual analysis into priority, it will sometimes be necessary to consider the practical difficulties occasioned by the movement of the fish themselves. The Fraser River sockeye encounter numerous fisheries, including aboriginal, recreational and commercial, as they migrate from the Pacific to their spawning grounds. If a non-aboriginal fishery could never precede any of the aboriginal fisheries, the result would be an exclusive food, social and ceremonial fishery, regardless of need and abundance of stock. That cannot be the intended result of *Sparrow*, where the Court stated that the objective of the priority requirement is to guarantee that fisheries conservation and

[39] *Douglas*, 2008 BCSC 1097, at paragraphs 86-87.
[40] *R. v. Aleck*, at paragraphs 36-46.
[41] *R. v. Douglas*, 2008 BCSC 1098, at paragraphs 28-35.
[42] *R. v. Tommy*, paragraphs 50-68. In particular, at paragraph 57, the trial judge found that the jurisprudence "establishes that sustainability is an integral part of the concept of conservation. Sustainability requires enhancement of the resource for the future benefit of both aboriginal and non-aboriginal Canadians."
[43] *Douglas, 2007*, see note 37. The Paper refers to aspects of the decision at paragraph 59.

management plans "treat aboriginal peoples in a way ensuring that their rights are taken seriously" (at 1119). DFO's actions in this case were consistent with that purpose.[44]

Aboriginal Rights – Justification – Minimal Infringement

40. In *R. v. Douglas* (mid-summer sockeye)[45], the appellants argued that DFO, in closing the mid-summer sockeye fishery when (with the benefit of hindsight) escapement goals were exceeded, failed to minimally infringe the appellants' Aboriginal rights to fish for FSC purposes. The Court stressed that the appellants' argument ignored the contextual basis upon which the closures were imposed, and that "[t]he management of migrating fish cannot be undertaken in hindsight. I am satisfied the closures were reasonable and necessary at the time the decision to impose them was made"[46].

41. The trial judge in *Douglas* also relied on the Alberta Court of Appeal decision in *R. v. Lefthand*[47] to explain that the analysis of minimal impairment must be considered in the context of the valid legislative objective:

> The analysis of whether the impairment of the aboriginal right is minimal cannot be conducted in isolation from the "valid legislative objective". The two must be balanced. What the inquiry seeks is the minimal infringement that will still leave room for some level of achievement of the objective.

Aboriginal Rights – Justification – Fair Compensation (in a Situation of Expropriation)

42. The Paper at paragraph 110 notes that the case law to date "has not demonstrated that compensation is typically awarded for an infringement of the Aboriginal right to fish". The trial judge in *R. v. Douglas* (mid-summer sockeye) firmly rejected the appellants' arguments that compensation should be paid where the infringement of the Aboriginal right to fish results in the Aboriginal group failing to meet its FSC needs:

> [59] Compensation for an infringement of an aboriginal right pre-supposes that the infringement amounts to an expropriation. Conservation measures to protect a resource do not, in my view, amount to an expropriation of an aboriginal right. The aboriginal right is not an absolute or exclusive right; it is subject to valid conservation measures that must be borne by all user groups. To find otherwise would be to ignore the descending order of priorities that was established in *Sparrow*.[48]

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[44] *Douglas, 2007*, at paragraph 54.
[45] *R. v. Douglas*, 2008 BCSC 1098.
[46] *Douglas*, 2008 BCSC 1098, at paragraphs 43 and 45.
[47] *R. v. Lefthand*, 2007 ABCA 206, leave to appeal to S.C.C. refused, 32250 (February 21, 2008).
[48] *R. v. Douglas*, 2008 BCSC 1098, at paragraph 59.

The courts have reached similar conclusions in *Douglas, 2007* (summary conviction appeal)[49] and in *R. v. Aleck*[50].

Aboriginal Rights – *R. v. Kapp* – No Finding of "Exclusive Fishery"

43. At paragraph 118, the Paper refers to the SCC holding that DFO's pilot sales program provided "exclusive" commercial fishing opportunities to Aboriginal fishers. To clarify, the B.C. Court of Appeal in *Kapp* considered the appellants' claim that the First Nations' pilot sales fishery was an "exclusive fishery", as that term is understood in the common law (and thus, in the appellants' submission, *ultra vires* the authority of the Minister under the *Fisheries Act*). Low J.A. for the Court rejected the appellants' argument that the pilot sales program created an "exclusive fishery" in law, but rather that the communal fishing licences issued to First Nations in the program were a method of allocation of resource and tool for managing the fishery; it was not a transfer of a property right over the fishery[51].

IV. TREATY RIGHTS

Modern Treaties – Principles of Interpretation

44. The principles of treaty rights and treaty interpretation described in the Paper at paragraphs 123 to 126 are derived from jurisprudence arising from the interpretation of historical treaties[52]. These principles, while general in nature, must, when applied to the modern treaty context, take into account the differences in how modern treaties are negotiated in comparison to historical treaties. In particular, modern treaties are complex legal agreements, negotiated over several years by sophisticated parties represented by experienced legal counsel. First Nations negotiating modern treaties arguably do not share the unique vulnerability of Aboriginal signatories to historical treaties.

45. In particular, in the case of modern treaty agreements, ambiguities or doubtful expressions in the wording of the treaty or document need not necessarily be resolved in favour of the Aboriginal

[49] *R. v. Douglas,* 2006 BCSC 284.
[50] *Aleck*, paragraphs 77-84.
[51] *R. v. Kapp*, 2006 BCCA 277, at paragraphs 52-66.
[52] While the Paper appropriately cites *R. v. Badger* for the principles of historical treaty interpretation, leading cases on the principles of historical treaty interpretation also include *R. v. Marshall*, 3 S.C.R. 456 and *R. v. Marshall*, 3 S.C.R. 533.

party. In the *Eastmain Band* case, which interpreted the provisions of the James Bay and Northern Quebec Agreement (JBNQA), the Federal Court of Appeal stated that the rule that doubtful expressions be construed in favour of the Aboriginal parties does not apply to the interpretation of modern treaties[53].

46. More recently, the SCC considered the differences in interpreting modern and historical treaties in *Quebec (Attorney General) v. Moses*[54]. Binnie J. for the majority noted that modern treaties are "meticulously negotiated by well-resourced parties," that the parties were represented by counsel in negotiations that produced a detailed, 450-page legal document, and that the importance and complexity of this text is a feature that distinguishes the JBNQA as a modern treaty from historic treaties. Because the JBNQA is so analogous to a contract, and because of the importance and complexity of the negotiated text, Binnie J. took the position that in interpreting the JBNQA, the Court should "pay close attention to its terms"[55].

47. Applying *Moses*, it is important to consider whether modern treaty agreements contain provisions that provide guidance on the rules of interpretation agreed to by the parties. For example, section 60 of the General Provisions Chapter of the *Tsawwassen First Nation Final Agreement* confirms the agreement of the parties that "[t]here will be no presumption that doubtful expressions, terms or provisions in this Agreement are to be resolved in favour of any particular Party"[56].

Historic Treaties – Douglas Treaties

48. The 14 treaties entered into by Governor James Douglas on Vancouver Island between 1850 and 1854 were with "tribes" or families of various named groups. For some of the Douglas Treaties, it is not clear from the tribal or family name which modern First Nations can claim historical treaty rights arising from the Douglas treaty.

49. The Paper at paragraph 133 refers to *Snuneymuxw First Nation v. British Columbia* for the proposition that the Douglas Treaty rights to carry on "fisheries as formerly" was "at the very least, to entitle the First Nation to priority over the fish stocks that exist," and that it "...vests the First

[53] *Eastmain Band v. JBNQA (Administrator)*, (Fed. CA), 99 D.L.R. (4th) 16 at 25.. See also *R. v. Howard*, [1994] 2 S.C.R. 299 at 306-7; *Cree School Board v. Canada (Attorney General)*, [2002] 1 C.N.L.R. 112 (Q.C.A.).
[54] [2010] 1 S.C.R. 557 ("*Moses*").
[55] *Moses*, at paragraph 7.
[56] *Tsawwassen First Nation Final Agreement*, General Provisions Chapter, s. 60, available at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/07039_05.

Nation with powers to manage the fishery"[57]. In this case the Snuneymuxw First Nation was seeking an interlocutory injunction to limit or prohibit the storage of log booms in the Nanaimo River Estuary pending trial. Canada submits that the comments made by the motions judge, Groberman J., were *obiter* to the issues before him. Moreover, he acknowledged that "the contours of the right to "carry on fisheries as formerly" have not been fully articulated by the courts." Moreover, the motions judge acknowledged that he "would be ill-advised to come to any definitive view of the rights incidental to the right to "carry on fisheries as formerly" on this interlocutory application".[58]

Modern Treaties – Full and Final Settlement

50. At paragraph 146, the Paper refers to treaties as "an important source of information in assessing rights held by aboriginal peoples", yet "they nevertheless cannot be taken as comprehensive". While in *Mikisew* Cree the SCC was likely not distinguishing between historical and modern treaties when confirming that "[t]reaty making is an important stage in the long process of reconciliation…", modern treaties are as a general rule intended to be comprehensive in setting out the rights of the treaty First Nation under s. 35 of the *Constitution Act, 1982*[59]. This is express, for example, in the *Tsawwassen First Nation Final Agreement*. Section 11 of the General Provision Chapter provides that "[t]his Agreement constitutes the full and final settlement in respect of the aboriginal rights, including aboriginal title, in Canada of Tsawwassen First Nation" [emphasis added]. Section 12 confirms that "[t]his Agreement exhaustively sets out the Section 35 Rights of Tsawwassen First Nation, their attributes, the geographic extent of those rights, and the limitations to those rights to which the Parties have agreed"[60]. All modern treaties contain similar provisions.

51. The extent to which the duty to consult arising from the honour of the Crown applies to modern treaty agreements, and the related issue of the comprehensiveness of a modern treaty, is the subject of the appeal to the SCC in *Little Salmon/Carmacks*, heard November 12, 2009, and under reserve (as noted at paragraph 188 of the Paper).

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[57] *Snuneymuxw First Nation v. British Columbia*, 2004 BCSC 205 (*"Snuneymuxw"*), at paragraph 20.
[58] *Snuneymuxw*, at paragraph 23.
[59] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[60] *Tsawwassen First Nation Final* Agreement, General Provisions Chapter, sections 11-12.

Modern Treaties – Governance Rights

52. As described at paragraph 149 of the Paper, modern treaties provide First Nations with rights to make laws, including laws in relation to the First Nations' fisheries. In some instances, those laws will prevail over federal or provincial law to the extent of any conflict. However, neither the Tsawwassen Final Agreement, nor other modern treaty agreements, provide First Nations with "exclusive" law-making power, if by this the Paper suggests that federal or provincial laws do not apply. Rather, the Tsawwassen Final Agreement expressly provides that federal and provincial laws apply to Tsawwassen lands and people, concurrently with Tsawwassen laws[61].

V. MANAGEMENT OF THE FISHERY

Canada's Obligation to Manage the Fishery

53. With respect to Canada's obligation to manage the fishery, *Nikal* provides a definitive rejection to the argument that an Aboriginal individual or group is free to follow his own or his group's discretion in exercising Aboriginal rights:

> This position cannot be correct. It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another... The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. [62]

Responsibility to Make Allocation Decisions amongst Aboriginal Groups

54. In *R. v. Michell*[63], the Provincial Court judge, relying on Gladstone, ruled that the Crown had failed in its responsibility to allocate fish amongst the 93 bands on the Fraser River, and ruled that DFO cannot transfer this responsibility to the Aboriginal groups.

> *R. v. Gladstone*, [1996] 109 C.C.C. (3d) 193 (S.C.C.) at page 221 established that the Crown must allocate fish between different aboriginal rights holders. That being the law, the Department failed by virtue of its abdication of that responsibility. The difficulty of the task does not justify an attempt to transfer the responsibility to the aboriginal groups. Unless it is beyond the realm of possibility to make the necessary allocations, the law requires that the Crown do so.

The *Michell* decision underscores the central role of DFO in managing the fisheries, including its responsibilities to make allocation decisions for and between First Nations.

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[61] General Provisions Chapter, section 19.
[62] *Nikal*, at paragraph 92.
[63] *R. v. Michell*, B.C. Prov. Ct., Lytton/Kamloops Registry No. 2958/66171-1-T, November 15, 2002, unreported.

VI. DUTY TO CONSULT

Reciprocal First Nation Obligations to Engage in Consultations

55. *Douglas, 2007*, is another example of a First Nation failing to meet its reciprocal obligation not to frustrate a consultation process by imposing unreasonable conditions. In that case, the defendants relied in their defence to the charges on the failure of DFO to consult with it on a recreational opening (that proved to have an insignificant impact on the First Nation's fishing opportunities). The trial judge concluded that it was unreasonable to fault DFO on failing to consult on this "minor matter" when the First Nation had systematically failed to respond to DFO's efforts to consult on major issues:

> [45] Finally, it is illogical to conclude that DFO failed to conduct adequate consultations with the Cheam because DFO did not approach them on a minor matter, when the trial judge found that the Cheam had failed to respond to repeated requests to meet, consult or respond on the major issues. Significantly, the Cheam failed to communicate their needs in concrete terms in response to DFO's request that they do so. The Cheam did not fulfil their reciprocal obligation to carry out their end of the consultation. To hold that members of a First Nation who deliberately frustrated all of the government's attempts to consult, and thereby failed in its own obligations should receive a remedy for an infringement of its aboriginal right because the government did not approach it on a minor issue goes far beyond what is required to justify DFO's conduct. The DFO's duty as described by the Supreme Court of Canada in *Sparrow* was to uphold the honour of the Crown and conform to the unique contemporary relationship between the Crown and aboriginal peoples. As the trial judge held, "the refusal by the Cheam to meet, to communicate, and to refuse to attend group discussions has direct implications on the assertion the consultation efforts of government are flawed" (at para. 73).[64]

See also *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management),* where the trial judge concluded that the First Nation had frustrated the process of consultation by taking intransigent positions and refusing to participate in consultation regarding any type of accommodation concerning the proposed hatchery[65].

Requirement of Consent as an Element of the Duty to Consult

56. In addition to the cases cited at paragraphs 180-181 of the paper, the reasons of the trial judge in *R. v. Aleck* are particularly relevant:

> The appellants maintain the Cheam's consent was required before any changes could be made to the annual fishing plan. The jurisprudence does not support them in this position. The inability of the parties to reach a consensus does not entitle the Cheam to exercise a right of veto. If that were the case, the resource would have long been dissipated before any conservation measures could have been imposed. A requirement for the DFO to secure the consent of 93 First Nations before it could impose closures in the midst of a crisis would have been an abrogation of its mandate, if not an impossibility. The management of a finite resource that is dynamic, variable and constantly changing does not typically offer the luxury of time for the purpose of competing interests to reach a consensus on

[64] *Douglas, 2007, at* paragraph 45.
[65] 2003 BCSC 1422, at paragraphs 103-108, 117-118.

urgent issues. Unlike land which can be controlled and protected during the consultation process, fish continue to migrate to their spawning grounds.[66]

VII. CONCLUSION

57. Paragraph 191 of the Paper states that "aboriginal peoples have both proven and unproven claims to Aboriginal rights and title…that affect the management of the Fraser River sockeye salmon fishery". In saying this it is important to recognize that no Aboriginal claimant has yet established a claim to Aboriginal title in the province[67].

Dated at the City of Vancouver, BC, this 19th day of October 2010.

Mitchell Taylor, Q.C.
Tim Timberg
Mark East
Counsel for the Participants the Government of Canada

[66] *Aleck,* at paragraph 73.
[67] This comment applies also to the statement at paragraph 145 of the Paper that "…fisheries management decisions will require consideration of proven or unproven aboriginal rights or title…" [emphasis added].

BRITISH COLUMBIA
The Best Place on Earth

October 19, 2010

Commission of Inquiry into
the Decline of Sockeye Salmon
in the Fraser River
2800 – PO Box 11530
650 W. Georgia Street
Vancouver BC V6B 4N7

Attention: Brian Wallace, Q.C., Senior Commission Counsel

Dear Mr. Wallace:

Re: Written Submission of the Province of British Columbia Regarding the October 1, 2010, Cohen Commission Paper Titled "The Aboriginal and Treaty Rights Framework Underlying the Fraser River Sockeye Salmon Fishery"

Please find enclosed the Province's written submission in regard to the above captioned matter.

Yours very truly,

Boris W. Tyzuk, Q.C.
Senior Legal Counsel
Legal Services Branch

BWT/gy
Enclosure

Cc: Clifton Prowse, Q.C.

Ministry of Attorney General

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COMMISSION OF INQUIRY INTO THE DECLINE OF SOCKEYE SALMON IN THE FRASER RIVER

In the matter of Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a commission do issue under Part I of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as Commissioner to conduct an inquiry into the decline of the sockeye salmon in the Fraser River

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WRITTEN SUBMISSION OF THE PROVINCE OF BRITISH COLUMBIA REGARDING THE OCTOBER 1, 2010, COHEN COMMISSION PAPER TITLED "THE ABORIGINAL AND TREATY RIGHTS FRAMEWORK UNDERLYING THE FRASER RIVER SOCKEYE SALMON FISHERY"

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Introduction

1. In general, the Paper is a quite good and relatively balanced exposition of the existing law; this however does not mean that the Province agrees with everything in the Paper. The Province does have concerns and will comment on some of those concerns. In addition, there are aspects of the Paper that are more speculative in nature and the Province takes issue with these as some are controversial or the subject of ongoing litigation.

2. The Terms of Reference for the Inquiry do not mention of aboriginal or treaty rights with respect to the Fraser River fishery. Thus the Inquiry is not one into aboriginal and treaty rights with respect to the Fraser River sockeye fishery nor is it an inquiry into aboriginal fishing. Given these facts, the Province is uncertain as to the practical implication of the law in regard to the mandate of the Inquiry. Given the Terms of Reference and the lack of mention of aboriginal or treaty rights, the Commissioner is not required to make any findings or pronouncements on the law or the application or interpretation of the law, be it in general, or to a particular situation.

Specific Comments - October 1, 2010 Cohen Commission Paper (the "Paper")

As mentioned above, the Paper is quite good and concise, given the nature of the topic, and well written in so far as it deals with the existing law. It presents a relatively balanced assessment of the existing law. However the Province does not agree with all aspects of Paper. There are a number of instances where the Paper is more speculative in nature and the Province takes issue with these provisions, as they are controversial and some are the focus of ongoing litigation.

Aboriginal Title to Marine Areas or Rivers (paragraphs 7 -32)

3. The Introduction to Aboriginal Title section (paragraphs 7-21) does not mention of the more recent Supreme Court of Canada decision in *Bernard and Marshall,*[1] which is, arguably, the most important aboriginal title decision from the Supreme Court of Canada since *Delgamuukw*[2]. In *Bernard and Marshall* the Court clarified what was required to satisfy the criterion of "exclusive occupation" as set out in *Delgamuukw*[3]. Specifically the Court confirmed that what was needed was actual and exclusive physical occupation of definite tracts of land:

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[1] *R. v. Marshall; R v. Bernard* [2005] 2 S.C.R. 220 ("*Bernard and Marshall*")
[2] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 ("*Delgamuukw*")
[3] *Delgamuukw* at para. 143

"Occupation" means "physical occupation". This may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources"; *Delgamuukw,* Per Lamer C.J. at para. 149.

"Exclusive" occupation flows from the definition of aboriginal title as "the right to *exclusive* use and occupation of land": *Delgamuukw*, per Lamer C.J., at para. 155 (emphasis in original). It is consistent with the concept of title to land at common law. Exclusive occupation means the "intention and capacity to retain exclusive control" and is not negated by occasional acts of trespass or the presence of other aboriginal groups with consent. (Delgamuukw, at para. 156, citing McNeil, at p. 204). Shared exclusivity may result in joint title [page 247} (para. 158). Non exclusive occupation may establish aboriginal rights "short of title" (para. 159).

It follows from the requirement of exclusive occupation that exploiting the land, rivers, or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However more typically seasonal hunting and fishing rights exercised in a particular area will translate to hunting or fishing right. This is plain from the Court's decisions in *Van der Peet, Nikal, Adams* and *Cote*. In those cases aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forbearers had come back to the same place to fish or harvest each year since time immemorial. However the season over, they left, and the land could be traversed and used by anyone. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights."[4]

4. In regard to paragraph 18 of the Paper, we would suggest that instead of "title is held communally by aboriginal groups..." , more precise wording from *Delgamuukw* be used " it is a collective right held by all of the members of an aboriginal nation..." [5] .

5. Claims to Aboriginal title to Marine Areas or Rivers (paragraphs 22-28) – The comments in paragraphs 25 and 30 are very speculative; they are also controversial and the underlying issue is the subject of ongoing litigation. There are no cases in Canada finding aboriginal title to marine areas or rivers, and there is judicial commentary questioning whether such a claim is "legally tenable" (Garson J. in *Ahousaht*).[6.]

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[4] *Bernard and Marshall* at paras. 56 -58

[5] *Delgamuukw* at para. 115

[6] *Ahousaht Indian Band v. Canada (Attorney General),* 2009 BCSC 1494. at para. 502

6. Since *Magna Carta*, the common law has refused to recognize a right to exclude others from marine, tidal to navigable areas. [7] Instead, under public rights of fishing and navigation every member of the public may use these areas to fish and navigate. These rights have been described as "paramount" because they may be asserted against the Crown or any other person and can only be abrogated or extinguished by statute.[8] Further in *Gladstone,* the Supreme Court of Canada considered whether s. 35(1) of the *Constitution Act, 1982* had extinguished the public right of fishing, and concluded that it did not have that effect.[9]

Aboriginal Right to Fish (paragraphs 33-120)

7. Right to fish for Commercial Purposes (paragraphs 64-73) - The use of the term "commercial purposes" may be overly broad or confusing. The Paper uses the term to cover both *Gladstone* and *Ahousaht*, yet they deal with very different fact patterns. In *Gladstone,* the court held that the Heiltsuk had an aboriginal right to trade herring spawn on kelp on a commercial basis. This is very different from *Ahousaht*, where, as is pointed out in paragraph 69 of the Paper, Garson J. distinguished " the right to fish and sell fish is broader than what is captured by the expression "exchange for money or other goods" but is less than a right to " a modern industrial fishery or unrestricted rights of commercial sale"." One further note, it is our understanding that Garson J's characterization of the right as having a commercial aspect is one of the issues under appeal.

8. This overly broad use of "commercial purposes" leads to the speculation set out in paragraph 70, which again, may be characterized as controversial.

9. With respect to paragraph 108 of the Paper, the Province submits that the focus of the quoted part of the judgement from *Gladstone* (para. 63) was more on the priority to be given to the right as opposed to the right to fish for commercial purposes. Specifically the Court stated the following:

> ".... Similarly, under *Sparrow's* priority doctrine, where the aboriginal right to be given priority is one without internal limitation, courts should assess the government's actions not to see whether the government has given exclusivity to the right (the least drastic means) but rather to determine whether the government has taken into account the existence and importance of such right." [10]

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[7] *AGBC v. AG(Canada)* ,(1913) [1914] 15 D.L.R. 308 at pp. 314-317 ("*AGBC*")
[8] *AGBC* pp. 314-317; *R. v. Gladstone* [1996] 2 S.C.R. 723 at para. 67 ("*Gladstone*")
[9] *Gladstone* at para. 67
[10] *Gladstone* at para. 63

Treaty Rights in the Fishery (paragraphs 121-146)

10. General Principles (paragraphs 123-126) - Paragraph 124 quotes *Badger*[11] and sets out certain principles of interpretation for treaties, however the most frequently cited summary of relevant interpretive principles is that of McLachlin J. (as she then was) in *Marshall* at para. 78. [12]

11. The principle in paragraph 124 iii. (the presumption of ambiguities being resolved in favour of the aboriginal group) does not, it is submitted, apply without reservation to modern treaties. Rather given the comprehensive nature of modern treaty negotiations, the presumption of ambiguity principle does not play much of a role in the interpretation of modern treaties. In *Moses,* the Supreme Court stated as follows:

> "The text of modern comprehensive treaties is meticulously negotiated by well-resourced parties. As my colleagues note, "all parties to the Agreement were represented by counsel, and the result of the negotiations was set out in detail in a 450-page legal document" (para. 118). The importance and complexity of the actual text is one of the features that distinguishes the historic treaties made with Aboriginal people from the modern comprehensive agreement or treaty, of which the James Bay Treaty was the pioneer. We should therefore pay close attention to its terms."[13]

12. In addition many modern treaties have specific provisions that deal with the issue of doubtful expressions. In the Nisga'a Final Agreement Ch. 2, General Provisions, paragraph 57 states:

> " There is no presumption that doubtful expressions, terms or provisions in this Agreement are to be resolved in favour of any particular Party."

There are similar provisions in both the Tsawwassen First Nation Final Agreement (Ch. 2, General Provisions paragraph 60) and the Maa-Nulth First Nations Final Agreement (Ch. 1, General Provisions 1.15.5).

13. The last sentence in paragraph 130 of the Paper, which refers to the possibility of other fishing rights deriving from Treaty 8, is another example of a speculative statement that should not receive any attention from the Commissioner.

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[11] *R v. Badger [1996] 1 S.C.R. 771at para. 41*

[12] *R v. Marshall* [1999] 3 S.C.R. 456

[13] *Quebec (Attorney General) v. Moses* SCC 17 [2010] 1 S.C.R. 557 ("*Moses*")

14. Paragraph 133 of the Paper refers to the *Snuneymuxw* decision. This decision arose from an interlocutory injunction application and Groberman J., as he then was, noted that he was not getting into an assessment of what the treaty right actually protects

> "In my view, the court would be ill-advised to come to any definitive view of the rights incidental to the right to "carry on fisheries as formerly" on this interlocutory application."[14]

Thus some of the statements in paragraph 133 are somewhat speculative in nature.

15. Paragraph 146 of the Paper states, in effect, that treaties cannot be taken as comprehensive. This is not an accurate statement as it relates to modern treaties in British Columbia. In the Nisga'a Final Agreement Ch. 2, General Provisions, paragraphs 22, 23, 24 and 25 read as follows:

> "FULL AND FINAL SETTLEMENT
>
> 22. This Agreement constitutes the full and final settlement in respect of the aboriginal rights, including aboriginal title, in Canada of the Nisga'a Nation.
>
> NISGA'A SECTION 35 RIGHTS
>
> 23. This Agreement exhaustively sets out the Nisga'a section 35 rights, the geographic extent of those rights and the limitations to those rights, to which the Parties have agreed, and those rights are:
>
> a. the aboriginal rights including aboriginal title, as modified by this Agreement, in Canada of the Nisga'a Nation, and its people in and to Nisga'a Lands and other lands and resources in Canada;
>
> b. the jurisdictions. Authorities, and rights of Nisga'a Government; and
>
> c. other Nisga'a section 35 rights.
>
> MODIFICATION
>
> 24. Notwithstanding the common law, as a result of this Agreement and the settlement legislation, the aboriginal rights, including the aboriginal title, of the Nisga'a Nation, as they existed anywhere in Canada before the effective date, including their attributes, and geographic extent, are modified, and continue as modified as set out in this Agreement.

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[14] *Snuneymuxw First Nation v. British Columbia*, 2004 BCSC 205

25. For greater certainty, the aboriginal title of the Nisga'a Nation anywhere that it existed in Canada before the effective date is modified and continues as the estates in fee simple to those areas identified in this Agreement as Nisga'a Lands or Nisga'a Fee Simple Lands."

16. Similar provisions exist in the Tsawwassen First Nation Final Agreement (Ch. 2, General Provisions paras. 11-15), and in the Maa-nulth First Nations Final Agreement (Ch.1, General Provisions 1.11.1 – 1.11.5).

Management of the Fishery (paragraphs 147-158)

17. While in paragraph 148 the Paper states that it does not explore the complex issue of aboriginal self governance, it is important to note that there is no Canadian decision that sets out a general right of self governance for a First Nation. In addition the courts have indicated that any particular aboriginal right of self governance would have to be proven as any other aboriginal right in accordance with the test set out in *Van der Peet.* [15]

18. In paragraph 149, the Paper refers to "exclusive law making power " in a modern treaty in the situation where a First Nation's law prevails to the extent of a conflict over a federal or provincial law. This characterization does not accurately reflect the governance model contained modern treaties in British Columbia. The governance model for modern treaties in British Columbia is the concurrent law model. There is no exclusive law making authority for a First Nation government. In the Nisga'a Final Agreement Ch 2, General Provisions, paragraph 13 states as follows:

> "13. Federal and provincial laws apply to the Nisga'a Nation, Nisga'a Villages, Nisga'a Institutions, Nisga'a Corporations, Nisga'a citizens, Nisga'a Lands and Nisga'a Fee Simple Lands, but:
>
> a. in the event of an inconsistency or conflict between this Agreement and any provisions of any federal or provincial law, this Agreement will prevail to the extent of the inconsistency or conflict; and
>
> b. in the event of an inconsistency or conflict between the settlement legislation and the provisions of any other federal or provincial law, the settlement will prevail to the extent of the inconsistency or conflict. "

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[15] *R. V. Pamajewon* [1996] 2 S.C.R. 821.

19. There are similar provisions in the Tsawwassen First Nation Final Agreement (Ch. 2 General Provisions paras. 19 – 28); and in the Maa-Nulth First Nations Final Agreement (Ch. 1 General Provisions 1.5.1 and 1.8.1 – 1.8.11).

20. Because of the concurrent law model in modern British Columbia treaties, there will be situations where both a federal or provincial law and a First Nation's law could apply to a particular situation. If there is a conflict or inconsistency between the two laws, the paramountcy provisions set out which law, either the federal or provincial law or the First Nation's law, will prevail to the extent of the conflict or inconsistency. This does not make the prevailing law exclusive; the jurisdiction of the non prevailing law is not vacated, rather in that particular situation the prevailing law will apply, but only to the extent of the inconsistency or conflict.

21. Paragraph 154 of the Paper states that *Nikal*[16]; and *Lewis*[17] "may assist in determining whether this fishery is subject to the Fisheries Act...". We submit that *Nikal* and *Lewis* are conclusive of the issue in determining that at least for the navigable parts of the Fraser River and its tributaries any Band bylaws of a reserve would not apply, and correspondingly the Fisheries Act and regulations continue to apply to the Fraser River Sockeye fishery.

Conclusion (paragraph 191)

22. Some of the statements in Paragraph 191 of the Paper require comment. The Province is not aware of any judicial decisions that have found aboriginal title in British Columbia or any aboriginal title decisions that affect the management of the Fraser River sockeye salmon fishery. Thus the reference to "proven aboriginal title" is not accurate. Also it is our view that uncertainties do remain as to how such rights could inform the detailed decision-making inherent in managing a complex fishery.

Practical Implications of the law within the context of the Inquiry's mandate.

23. There are no references to aboriginal or treaty rights in general, or specifically with respect to the Fraser River sockeye salmon fishery, in the Commissioner's Terms of Reference. Thus it is clear this is not an Inquiry about aboriginal or treaty rights either in general or specifically with respect to the Fraser River sockeye fishery. Given the mandate of the Inquiry, one which does not include any reference to aboriginal or treaty rights, the Province is uncertain if there are any practical implications of the law on this topic in regard to the Inquiry's mandate.

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[16] *R v. Nikal* [1996] 1 S.C.R. 1013 ("NIkal")
[17] *R v. Lewis* [1996] 1 S.C.R. 921("Lewis")

24. The Province submits that, given the mandate of the Inquiry, the Commissioner is not required to make any rulings with respect to the law concerning aboriginal or treaty rights. Further there are many unresolved and contentious issues, many of which are before the courts.

25. Also the law is clear that any aboriginal right is fact specific and First Nation specific[18] and the evidentiary process to be used in the Inquiry, as well as the timeframe, are not suited nor designed to deal at that fact specific level. In addition, issues of infringement, justification and consultation are all fact specific, and again the Inquiry is not the forum to make findings or pronouncements on those issues.

26. While there is some consensus on basic elements of the existing law, the law in the area is evolving and controversial. It should be left to the courts to continue their traditional role to determine these issues as they arise.

Conclusion

27. The Paper provides a helpful staring point to the existing law in regard to aboriginal and treaty rights underlying the Fraser River sockeye salmon fishery. The Province does not however agree with all of the contents of the Paper and has set out many of its concerns, including those surrounding the speculative nature of a number of provisions in the Paper, some of which are controversial or the subject of ongoing litigation.

28. The Inquiry's Terms of Reference do not mention aboriginal or treaty rights. Thus Province is uncertain if there are any practical implications of the within the context of the Inquiry's mandate. Further, given the lack of any reference to aboriginal or treaty rights in the Inquiry's mandate, the Commissioner is not required to make any finding of law in regard to aboriginal or treaty rights.

29. The Province will also be making oral submissions to supplement these written submissions.

Dated at Vancouver, British Columbia, October 19, 2010

D. Clifton Prowse Q.C

Boris W. Tyzuk Q.C.

[18] *Gladstone* para 65

COMMISSION OF INQUIRY INTO THE DECLINE OF SOCKEYE SALMON IN THE FRASER RIVER

In the matter of Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a Commission do issue under Part I of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as Commissioner to conduct an inquiry into the decline of sockeye salmon in the Fraser River

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COMMENTS OF THE B.C. WILDLIFE FEDERATION AND B.C. FEDERATION OF DRIFT FISHERS ON THE OCTOBER 1, 2010 REPORT TITLED "THE ABORIGINAL AND TREATY RIGHTS FRAMEWORK UNDERLYING THE FRASER RIVER SOCKEYE SALMON FISHERY"

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INTRODUCTION

1. We start by commending Commission Counsel on their Practice Report. They have produced a framework which, given the controversial nature of the issues involved, provides a reasonably objective summary of the jurisprudence as it stands today. In addition, and just as important, they have recognized the dynamic and evolving nature of the jurisprudence, as well as the inherent difficulty in translating that jurisprudence into fisheries policy and management practice.

2. This submission will be brief and preliminary; as we expect that the details of the law and, particularly, its application will be dealt with in the development of the evidence and the submissions on that evidence. It is divided into two parts: first, some comments on the subject matter of the Report and then some comments on that subject matter as dealt with in the Report itself.

GENERAL COMMENTS

Rights-Based Fishery

3. The fundamental point of fisheries law is that the resource is rights-based. Unlike the land and the land-based resources, the fishery, which is the subject matter of this inquiry, is not a Crown asset; it is the common property of all Canadians; the Crown is a steward or trustee of that resource for the public.

4. As pointed out in the Report, the relationship of the Crown to the resource has been expressed in terms of a legal obligation or duty to the public different from the general political obligation of providing "good government".

5. Ensuring the integrity of the public nature of the resource is the primary concern of this Participant. In that light, we commend to the Commission the *Railway Belt* case[1] which describes the origins of the public right of fishing and its nature as an ancient liberty recognized in *Magna Carta*.

6. As can be seen from the Reasons for Judgment, the right of fishing is as much a part of Canada's British heritage as it is of the aboriginal heritage of some aboriginal communities.

7. Reference is also made to the *Yarmirr* case[2] (which will be discussed below) in which the High Court of Australia identified the public right of fishing (together with that of

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[1] *British Columbia (Attorney General) v. Canada (Attorney General)* [1914] A.C. 153 (P.C.)

[2] *Commonwealth of Australia v. Yarmirr* [2001] H.C.A. 56 (H.C.A.) at paras. 60-61, 70

navigation) as a constraint on the Crown's capacity to recognize aboriginal title: so that any aboriginal title to submerged land must be consistent with those public rights.

8. This Participant stresses that the "public" to which the resource belongs includes individual aboriginal Canadians. Aboriginal individuals when fishing other than pursuant to an aboriginal right (i.e., recreationally or commercially) are exercising the same public right of fishery as their non-aboriginal countrymen.

9. This proposition seems obvious, but is usually overlooked in the public, political and even sometimes legal discourse about aboriginal rights.

10. To put it bluntly, there is no such thing as a "non-aboriginal fishery". Aboriginal fishing rights[3] are not substitutional, they are additional. The public right is not exclusionary, but inclusive. That inclusiveness is the central position of this Participant.

11. We ask therefore that the Commission be careful in the use of its terminology: that it distinguish where necessary not between "aboriginal" and "non-aboriginal" fisheries but between fishing pursuant to an aboriginal right and fishing pursuant to a public right; between the "aboriginal fishery" and the "public fishery"; and that it keep in mind that that "public" is inclusive of <u>all</u> aboriginal Canadians.

12. It is the recognition of the special and additional nature of aboriginal rights that drives the substance and the methodology for the determination, description and application of those rights laid down by the Supreme Court of Canada in the seminal cases, *Sparrow*, *Vanderpeet* and *Gladstone* and which this Commission should keep in mind throughout.

Law, Policy and Practice

13. In its conclusion, the Report states:

> *In practical terms, uncertainties may remain as to exactly how such rights and titles ought to inform the detailed decision-making inherent to managing a complex fishery.*

14. This Participant could not agree more. Indeed, it is suggested that much of the focus of this Commission should be on the question of how such uncertainties have been dealt with and how such dealings may be improved in the future.

15. In the opening remarks before this Commission, the point was made by many that scientific controversies and uncertainties, although important in themselves, were secondary to the issue as to how such controversies and uncertainties were managed by government. The point

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[3] Except where the context indicates otherwise, the term "aboriginal rights" includes treaty rights in these comments.

made here is that the same applies in controversies over aboriginal fishing rights: the function of this Commission is not to settle the law or even to apply it; but rather to review the way in which the jurisprudence informs (or doesn't inform) fisheries management and to provide guidance for that process.

16. We suggest therefore that the Commission be alive not simply to the controversies or uncertainties themselves (and they are many and serious), but also to the sources, and potential sources, of those uncertainties.

17. Clearly, some of those uncertainties are based in the jurisprudence itself. The courts have clearly stated that claims to aboriginal rights are fact-specific and consequently must be dealt with on a case-by-case basis. Further, such concepts as "priority" and "consultation and accommodation" are relative and contextual rather than absolute and categorical. Still further, the jurisprudence is dynamic and developing; the Report, like any survey of the jurisprudence, is a snapshot of a process.

18. Another source of uncertainty to which particular attention should be paid is the interface between law and policy; between the judicial and executive functions. Appellate decisions, even at the level of the Supreme Court of Canada, are focused primarily on correcting error and providing guidance to lower courts: they are not policy manuals. Government and, in particular, the DFO, however, must follow the law as laid down in those decisions. This is particularly the case where, as stated above, it is managing the exercise of rights of access by individuals to their own common property. This Commission should examine how DFO, its policies and practices, are informed by the law with a view to making recommendations for the improvement of that process.

19. A further potential source of uncertainty is, we suggest, the administrative level at which the law is to be interpreted and applied. Briefly put, this Commission should investigate where in the management process and by whom such difficult questions such as whether priority has been given, consultation occurred or food, social and ceremonial needs met are answered.

20. Notwithstanding the preliminary and general nature of both the Practice Report and this comment, there are two areas of concern about the application of the policy on aboriginal rights which are of concern to this Participant and should be raised at the outset. These are: dual systems of fisheries management and the lack of quantification (or transparency about quantification) respecting aboriginal fishing rights.

21. There is a tension in the management of the "aboriginal fisheries" between "integrated management" and segregated fisheries. It is the concern of this Participant that numerous management problems are caused or exacerbated by the existence of two management regimes: one for the public fishery and the other for the "aboriginal fishery". Without getting into detail, this Participant is concerned that these dual systems result in different standards and in particular different standards with respect to conservation (different escapement objectives and different rules for fishing), the reliability of data and enforcement. The existence of dual systems also runs counter to the notion of managing the fishery as an

organic whole. This latter problem, as discussed below, was the subject of comment by MacKenzie, J.A. in *R. v. Kapp*[4] who recognized the management problems caused by the "Balkanization" of the commercial fishery.

22. The second area of concern is that of the lack of quantification.

23. There is no apparent attempt to quantify the real "food, social and ceremonial' needs of the groups holding aboriginal food fishing rights; this results in apparent per-capita entitlements which are out of all proportion to reasonable domestic needs; this in turn leads to the inference that substantial quantities of "food fish" are in fact sold.

24. The lack of quantification also creates concern in the context of treaties and Harvest Agreements where it results in the lack of any indication as to the ultimate extent to which access is to be reallocated from the public to the treaty-based fishery.

Fundamentals

25. Our final general comment is on the Report as a whole; it is not so much a criticism (hopefully constructive) as the expression of a perspective. The comment is about the balance of the Report.

26. As indicated at the outset, the Report is reasonably balanced as between the perspectives of those with interests at stake. We submit with respect, however, that the same cannot be said for the balance between the central and the peripheral; the fundamental and the detail. It is a matter of emphasis but not unimportant.

27. The essence of the law is in the seminal cases decided in the 1990s and, in particular, in *Sparrow* and *Vanderpeet*, in which cases the Supreme Court of Canada consciously laid down the substantive principles and the methodology for the determination of claims to aboriginal fishing rights: their existence, nature and scope; their relationship to other rights and governmental power. This is the core of the law dealing with aboriginal rights of fishing. Cases involving aboriginal title, together with cases involving "consultation and accommodation" with respect to land and land-based resources, are at the periphery. It is appreciated that consideration of those matters is necessary for the sake of completeness; relating them to the fishery, however, must be recognized as speculative.

SPECIFIC COMMENTS

28. The following are comments on the Practice Report itself. The references are to the paragraph numbers in the Report.

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[4] *R. v. Kapp* (2006) B.C.C.A. 277 at paras. 114-115

29. Reference paragraph 6: The issue of the role of the judicial process in the broader process of "reconciliation" is a live one. In *Lax Kw'aalams* and *Ahousaht*, mentioned by Commission Counsel, together with *William*[5], the substantive issues around aboriginal rights and title are accompanied by procedural issues which give rise to this general question.

30. In *Lax Kw'aalams*[6], the Trial Judge took a strict view of the judicial function and refused to stray from the *lis* as it was presented in accordance with ordinary practice and procedure (she was upheld by the Court of Appeal). In *Ahousaht*, the Trial Judge did not follow this course and did not determine the *lis*; rather, she laid out general principles and facilitated a negotiated resolution of the issues in dispute. In *William*, the Trial Judge dismissed the plaintiff's claim for reasons similar to those given in *Lax Kw'aalams*, but went on to provide a non-binding opinion to facilitate negotiations.

31. As leave to appeal has been granted by the Supreme Court of Canada in *Lax Kw'aalams*, it is likely that in the context of that case the Court will provide more detailed guidance as to the relationship between the broad process of "reconciliation" and the adjudication of particular disputes.

32. Reference paragraph 12: It should be noted that in *Delgamuukw*, there was no decision by the Supreme Court of Canada on whether aboriginal title had been extinguished by the colonial enactments at issue in the lower courts and in *Calder*. The comments referred to in the Report are confined to the question of extinguishment after 1871 when British Columbia joined Confederation.

33. Reference paragraphs 22-32: In *Yarmirr*[7], the High Court of Australia described the public rights of fishery and navigation as constraints on the Crown's recognition of aboriginal title on the assertion of sovereignty. In short, the Crown, in the exercise of its prerogative power, could not recognize aboriginal title that was inconsistent with the public rights; consequently, any aboriginal title to submerged land (which was not found) would have to be consistent with the public rights of navigation and fishing.

34. Given the relationship between aboriginal rights and aboriginal title (in Canada, aboriginal rights are not incidents of aboriginal title; aboriginal title is a sub-set of aboriginal rights), the strict test for aboriginal title laid down by the Supreme Court of Canada[8], the developed law on aboriginal fishing rights ("fish" as a verb rather than a noun), together with the analysis of the High Court of Australia, it is unlikely that aboriginal title to submerged lands

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5 *Tsilhqot'in Nation v. British Columbia* (2007) B.C.S.C. 1700

6 *Lax Kw'aalams Indian Band v. Canada (Attorney General)* 2008 B.C.S.C. 447

7 *Yarmirr* supra at paras. 60-61, 70

8 *R. v. Marshall; R. v. Bernard* [2005] 2 S.C.R. 220, 2005 S.C.C. 43

(at least underlying navigable waters) will be found; and especially that such title would ground fishing rights different from those resulting from the application of the *Vanderpeet* test.

35. Reference paragraphs 42-43: In these paragraphs, the Report makes an important distinction between the right to perform an activity and the right to a resource, sustenance or livelihood. In doing so, however, it makes the common semantic error of conflating "activities" with "practices, customs or traditions". This distinction is at the heart of the *Vanderpeet* methodology which is designed to distinguish:

(a) Activities which are elements of practices, customs or traditions from those which are not; and

(b) Practices, customs or traditions which are integral to the distinctive culture from those which are not.

36. Conflating activities with practices, customs or traditions omits the first of these distinctions.

37. This important semantic point is demonstrated in *Lax Kw'aalams* where the Court of Appeal distinguished the activity of preparing food from the tradition of cooking turkey at Christmas.

38. Reference paragraph 96: As will be seen in the course of these hearings, British Columbia is one of the "parts of the country" where "sports fishing is an important economic activity" as recognized in *Adams*.

39. We believe that the evidence will show that are in the order of 500,000 individuals who participate in the recreational fishery in British Columbia; they fish in the order of eight million angler days each year. These anglers generate a total economic activity in the province of approximately $1.4 billion annually; they pay approximately $16 million in licence fees to the federal and provincial governments annually; they generate revenue to the federal and provincial governments in the order of $285 million annually; they generate in the order of $500 million per year to the British Columbia Gross Domestic Product and provide approximately 17,500 British Columbians with jobs.

40. Reference paragraph 118: It is notable that, of the three judges who commented on the policy underlying the Pilot Sales Fishery in issue in *Kapp*, all were critical of it. Kitchen Prov. Ct.J. found the impugned licence provisions not only unconstitutional but socially disruptive and hence unwise[9].

41. Brenner, C.J.S.C.B.C., although finding constitutionality, queried whether the program (then suspended) should be reinstituted. He stated:

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[9] *R. v. Kapp* (2003) B.C.P.C. 279

[117] In these Reasons I deal with whether the AFS and the PSP infringed s.15 Charter rights. In concluding that they do not, I would not want these Reasons to be interpreted as an endorsement by this Court of the wisdom of such a policy. I have found only that there is no Charter breach.

[118] That being the case and since the PSP was suspended the day after the trial judgment was released, the Minister will no doubt have to consider whether to reinstate the program.

[119] ...

[120] In many respects the pilot sales program has had an unfortunate history. It has generated much ill will between those who work in the two fisheries. It has also generated ill will amongst aboriginals who work in the commercial fishery and those who work in the PSP fishery. This stands in contrast to the positive acceptance of other AFS measures such as the licence buy-back program. ...

[121] In view of my conclusion that there has been no s.15 breach, the Minister, subject to further decisions of the higher court, is left with the absolute discretion ... to reinstitute the PSP. However, before doing so and perhaps in giving consideration to other methods or changes in the PSP that might be employed to accomplish the same objective, it would be this court's hope that the Minister would consider the history of the PSP and would further consider the extent to which it has enhanced or diminished the overall strategic objective of a reconciliation between aboriginals and non-aboriginals in our country.[10]

42. MacKenzie, J.A. also found constitutionality but went on to suggest that the program ought not to be expanded. He stated:

[115] In my view, there are sound reasons not to constitutionalize aboriginal commercial salmon fisheries. Sparrow pointed out that there are 91 separate bands along the Fraser with a claim to an aboriginal food fishery. If a commercial fishery is constitutionally recognized for some, it will be hard to deny it to others. Recognition of the right also would require defining its extent in terms of quantities of fish taken and there is no obvious limit to commercial catches as there is with the food fishery to the reasonable food, cultural and ceremonial requirements of particular bands. You would risk Balkanizing the commercial fishery and compounding the already formidable management challenges facing the DFO. It would fail to recognize the aboriginal component of the existing commercial fishery including the nearly

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10 *Regina v. Kapp and others* (2004) B.C.S.C. 958

> *half of the seine fleet that accounts for a large share of the commercial catch of Fraser sockeye in most years. It would threaten to undermine a greater aboriginal participation in the integrated commercial fishery which in many ways sets the fishery apart as an example for other sectors of the economy.*[11]

43. Reference paragraph 148: It should be noted that the *Nikal*[12] case was dealt with by the Court of Appeal as one of self-governance regarding the fishery. It was argued in the Supreme Court of Canada as a self-governance case. Consequently, the fact that the Supreme Court of Canada did not so characterize the issue, but rather simply applied *Vanderpeet* is significant in itself. In effect, the Court in *Nikal* did implicitly what it did explicitly in *Pamajewon*[13] explicitly: i.e., rejected the broader claim to governance in favour of a more specific claim within the paradigm of *Vanderpeet*.

DATED: October 19, 2010

RESPECTFULLY SUBMITTED

"J. Keith Lowes"
J. Keith Lowes

"Bradley M. Caldwell"
Bradley M. Caldwell

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11 *R. v. Kapp* (2006) B.C.C.A. 277

12 *R. v. Nikal* [1993] 5 W.W.R. 629 (B.C.C.A.)

13 *R. v. Pamajewon* [1996] 2 S.C.R. 821

COMMISSION OF INQUIRY INTO THE DECLINE OF SOCKEYE SALMON IN THE FRASER RIVER

In the matter of Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a Commission do issue under Part I of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as Commissioner to conduct an inquiry into the decline of sockeye salmon in the Fraser River

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SUBMISSIONS OF PARTICIPANT GROUP # 14 COMPRISING MAA-NULTH TREATY SOCIETY[1], MUSQUEAM INDIAN BAND AND TSAWWASSEN FIRST NATION IN RESPONSE TO THE COMMISSION'S PAPER ENTITLED "THE ABORIGINAL AND TREATY RIGHTS FRAMEWORK UNDERLYING THE FRASER RIVER SOCKEYE SALMON FISHERY" – OCTOBER 19, 2010

Part 1 – "The Practical Implications of the *Sparrow* Decision Within the Context of the Mandate of the Cohen Inquiry"

Part 2 – "The Practical Implications of the Tsawwassen First Nation Final Agreement Within the Context of the Mandate of the Cohen Inquiry"

Submitted by:
James I. Reynolds,
Counsel for the Musqueam Indian Band

Joseph Arvay Q.C.
Tina Dion,
Counsel for the Tsawwassen First Nation

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[1] The Maa-nulth Treaty Society is not making any written submissions in response to the Commission's Paper.

PART 1

"The Practical Implications of the *Sparrow* Decision within the Context of the Mandate of the Cohen Inquiry"

- Submissions of the Musqueam Indian Band[2]

Introduction & Summary

The Commission has requested submissions on its paper entitled "The Aboriginal and Treaty Rights Framework Underlying the Fraser River Sockeye Salmon Fishery" dated October 1, 2010. These Submissions are made on behalf of the Musqueam Indian Band in response to that request. They summarize the practical implications of the *Sparrow* decision that led to a negotiated settlement on an annual basis through Comprehensive Fisheries Agreements between the Band and the Department of Fisheries and Oceans ("DFO") and how those Agreements have failed to provide for any meaningful cooperative management by DFO and the Band of the sockeye salmon fishery in the Fraser River. They conclude by requesting the Commission to include as part of its recommendations for improving the future sustainability of the fishery that DFO enter into good faith negotiations on an agreement with Musqueam for meaningful cooperative management of the fishery. This would better implement the promise of the *Sparrow* decision and enable the traditional knowledge and practical fishing experience of Band members to be used to improve the sustainability of the fishery and so help to fulfill the mandate of the Commission.

[2] The Musqueam Indian Band is a member of a standing group with Maa-nulth Treaty Society and Tsawwassen First Nation who are not making any written submissions on this issue.

The *Sparrow* Case – Musqueam has an Aboriginal right to fish in the Fraser

In 1990, the Supreme Court of Canada in *Sparrow*[3] upheld the decision of the B.C. Court of Appeal that the Musqueam have an Aboriginal right to fish in the Fraser River for food and social and ceremonial purposes, leaving aside the question of commercial fishing because of the way the case had been presented in the courts below.[4] This right is protected by section 35(1) of the *Constitution Act 1982*.

The Court noted that the evidence "reveals that the Musqueam have lived in this area as an organized society long before the coming of the European settlers, and the taking of salmon was an integral part of their lives and remains so to this day."[5] In his address to welcome the Commission to Musqueam's Traditional Territory, Elder Larry Grant affirmed the relationship of salmon to the very survival of the Musqueam:

"our people greeted the strangers on those ships [of the Spanish and British explorers in the 1770s] and many of them brought fish forward, fish to give, fish to trade. It was a major, major part of our culture. … Our culture is dependent on fish. And for 9,000 years up until colonization, it sustained us, sustained our culture. And with the introduction of colonization and industrial fishery, it's been depleted in a short century. If the salmon disappears … a big portion of our culture disappears."[6]

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[3] [1990] 1 S.C.R. 1075; [1990] 3 C.N.L.R. 160.

[4] Musqueam asserts and fully reserves its Aboriginal right to sell fish.

[5] [1990] 3 C.N.L.R. 160 at 171.

[6] Hearing Transcript, June 15, 2010 at 1-2.

Negotiated Settlement – The Comprehensive Fisheries Agreements

In order to avoid disputes over the extent of the Aboriginal right to fish and based on the need to provide employment and economic opportunities, the Band has reluctantly agreed in most years subsequent to *Sparrow* to enter into Comprehensive Fisheries Agreements with the Department of Fisheries to regulate the exercise of the right to fish by the Band members.[7] These Agreements form part of the foundation of the DFO Aboriginal Fisheries Strategy that was started by DFO in 1992 as a direct result of the *Sparrow* decision.[8] Such negotiated agreements were encouraged by the Court in *Sparrow* with its statement that "Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place."[9] The Band has repeatedly shown that it is prepared to go to the highest level of court to protect its Aboriginal rights and title.[10] However, its preference is to enter into negotiated settlements such as the 2008 Reconciliation Agreement with the Province of British Columbia.[11] Such negotiated settlements have been encouraged by all levels of courts including by the famous statement of Chief Justice Lamar in *Delgamuukw:*

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[7] The Agreements expressly state that they are not intended to define or extinguish any Aboriginal rights and are not evidence of such rights.

[8] Ministry of Fisheries and Oceans, available at: http://www.dfo-mpo.gc.ca/fm-gp/aboriginal-autochtones/afs-srapa-eng.htm

[9] *Supra* note 3 at 178

[10] *Guerin v. The Queen*, [1984], 2 SCR 335 (Shaughnessy Golf Course); *Sparrow*, *supra* note 3; *Musqueam Indian Band v. Canada*, [2004] FC 351(Garden City lands); *Musqueam Indian Band v. City of Richmond*, [2004] 4 C.N.L.R. 228 (Bridgepoint Casino); *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management*, (2005), 251 D.L.R. (4th) 717 (UBC Golf Course); *Canada (Public Works and Government Services) v. Musqueam First Nation*, (2008),297 D.L.R. (4th) 349 (FCA) (Sinclair Centre and 401 Burrard St.).

[11] See http://www.gov.bc.ca/arr/firstnation/musqueam/down/musqueam_reconciliation_agreement.pdf; James I. Reynolds, "The Beauty of Compromise – The Musqueam Reconciliation Agreement" in Continuing Legal Education Society of British Columbia, *Aboriginal Law2008.*

> "Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve ... 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.' Let us face it, we are all here to stay."[12]

The Failure of the Aboriginal Fisheries Strategy to Achieve Cooperative Management

Unfortunately, the experience of the Musqueam in trying to implement the *Sparrow* decision through negotiated settlements as encouraged by the courts has not been successful in achieving the cooperative management of the resource by Musqueam with DFO as was the original intent. Instead, the negotiation and implementation of the Comprehensive Fisheries Agreements have been a source of frustration and confrontation. DFO's approach to "co-management" is based on instructions from DFO as opposed to collaboration, and is focused on a shared delivery of elements of DFO programs. This experience has failed to reflect the statement of the Supreme Court of Canada in *Sparrow* that:

> "The relationship between the Government and aboriginals is trust-like, rather than adversarial and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship." [13]

Instead, the policy framework has become mired in internal programming audits and reviews, and is more about budgets and politics than upholding the honour of the Crown

[12] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at paragraph 186.

[13] *Sparrow*, *supra* note 3 at 180.

and its fiduciary obligations with respect to proven Aboriginal rights.[14] This has resulted in budget reductions and a shift in the focus of operations to new government programs. Musqueam has seen its "co-management" budget reduced by nearly one hundred thousand dollars, and the allocations for salmon have also been reduced since the mid 1990s.

Musqueam has been disappointed by the failure of DFO to have meaningful consultations with it over the fishery. This has resulted in correspondence and meetings demanding that the *Sparrow* decision be respected. Musqueam has seen DFO permit other user groups to continue to fish despite conservation concerns and limits placed on Musqueam's ability to fish. There was no Comprehensive Fisheries Agreement signed in 2008 because DFO refused to negotiate regarding the changes requested by Musqueam.

At present, the Comprehensive Fisheries Agreements fail to have any meaningful form of cooperative management of the sockeye salmon fishery in the Fraser River or to give Musqueam any ability to have a meaningful say in sustainability of that fishery. Instead, they are a mechanism of program delivery to meet DFO operational objectives for data. The Agreements set up a weak system of a Planning Committee to react to decisions made by DFO on how the participation by Musqueam in the fishery will be managed by DFO and, if the Musqueam representatives disagree, to make written recommendations to

[14] *Sparrow*, *supra* note 3, at 181: "We find that the words 'recognition and affirmation' [in section 35(1) of the *Constitution Act 1982*] incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power." *Ibid* at 183-4: "[T]he honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified."

the Regional Director General that he is not obligated to accept, and will ultimately be too late to have any practical effect. Despite the case law on timely consultations, there is inadequate time for the Musqueam to effectively react and state their concerns to DFO.

There is no say by Musqueam in the management by DFO of the fishery by other user groups who dominate the harvest and so have the dominant impact on the sustainability of the fishery despite the scheme of priority to Musqueam fishing over fishing by other user groups.[15] The Integrated Harvest Planning Committee which develops the Integrated Fisheries Management Plan has no clearly defined First Nations representation process, and can best be described as ad-hoc. The Comprehensive Fisheries Agreement originally provided funding for enforcement by Musqueam Guardians. However, DFO has for all intents and purposes cancelled the Guardian program in the Pacific Region, so Musqueam Guardians more resemble observers or monitors.

Musqueam's traditional knowledge of the fishery, gained over thousands of years, is not taken seriously and preference is given to projections by DFO scientists that have proven to be wrong over many years. DFO does not fully comprehend its fiduciary obligations as part of the Crown with respect to Musqueam's proven Aboriginal rights and, instead, it purports to restrict the exercise of those rights and sidesteps its fiduciary responsibility based on questionable science and bureaucratic considerations and without adequate consultation with the Band.[16] Such consultation is a legal right.[17]

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[15] *Sparrow*, *supra* note 3 at 184-5.

[16] *Ibid* at 187.

It is not only Musqueam that has suffered as a result of the failure to include the Band in meaningful cooperative management of the fishery. Conservation has also been affected. Musqueam's traditional knowledge and fishing experience reflects "their history of conservation-consciousness and interdependence with natural resources" that was acknowledged by the Supreme Court of Canada in *Sparrow*.[18] It also reflects the traditional belief that rights come with obligations. Musqueam's history demonstrates, as noted by Elder Larry Grant, that:

> "... our culture is dependent on fish. And for the 9000 years up until colonization it sustained us, it sustained our culture. And with the introduction of colonization and industrial fisheries it's been depleted in a short century."[19]

It is time again that the traditional knowledge and conservation-consciousness of Musqueam be heard again in order to help to reverse the decline in the fishery. This can best be achieved through meaningful cooperative management of the fishery by DFO and Musqueam throughout the Band's traditional territory. The content of the cooperative management agreement should be a matter of good faith negotiations between DFO representing the Crown and Musqueam. Those negotiations should be informed by the experience of other First Nations including Tsawwassen First Nation under the Joint Fisheries Committee Process discussed in Part 2 of these Submissions.

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[17] *Ibid*: questions to be addressed within the analysis of justification for the restriction on an Aboriginal right to fish include "whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented."

[18] *Ibid.*

[19] *Supra*, note 6.

Recommendation for Cooperative Management by DFO and Musqueam Indian Band

Musqueam calls upon this Commission to make recommendations that will better implement the promise of *Sparrow* and *Delgammukw* of a cooperative relationship between the federal Government and the Band as well as the fiduciary obligations of the Crown with respect to Musqueam's proven Aboriginal right to fish.

Applied to the mandate of the Commission, this means that, as part of its recommendations for improving the future sustainability of the sockeye salmon fishery in the Fraser River, the Commission should recommend that DFO enter into good faith negotiations on an agreement with Musqueam for meaningful cooperative management of the Fraser River sockeye salmon fishery. This will better implement the promise of section 35 as interpreted in *Sparrow* to recognize and affirm Aboriginal rights. It will also enable the traditional knowledge and practical fishing experience of Band members to be used to improve the future sustainability of the sockeye salmon fishery in the Fraser River. The scope and content of the agreement will be dependent on a truly "negotiated settlement, with good faith and give and take on all sides, reinforced by the judgments of [the courts]".[20]

[20] *Supra* note 12.

PART 2

"The Practical Implications of the Tsawwassen First Nation Final Agreement within the Context of the Mandate of the Cohen Inquiry"

-Submissions of the Tsawwassen First Nation

The Tsawwassen First Nation Final Agreement ("Final Agreement") took effect on April 3, 2009. The Final Agreement, a treaty within the meaning of ss. 25 and 35 of the *Constitution Act, 1982*, creates certainty with respect to Tsawwassen First Nation's ("TFN") Aboriginal rights and title and recognizes the TFN's self-governing powers over its lands and Members. Within that framework, TFN has the constitutional authority to make laws in many areas of jurisdiction that were traditionally federal, provincial and municipal in nature. The Final Agreement is the first modern treaty negotiated under the British Columbia Treaty Commission process and the first urban Treaty in this province.

The Joint Fisheries Committee Process

The Final Agreement includes both procedural measures and substantive rights for the use, management and enhancement of the salmon fishery. It creates certainty around the TFN's Aboriginal right to fish for salmon in Tsawwassen traditional territory and established mechanisms for collaborative long-term management and enhancement of the salmon fishery. In order to facilitate the cooperative assessment, planning, and management of the fisheries with respect to the TFN's constitutional and commercial fishing rights, the Final Agreement established a Joint Fisheries Committee ("JFC") with

representatives from the TFN, and the provincial and federal governments. The *Tsawwassen Fisheries Operational Guidelines* ("TFOG")[21], created under the Final Agreement, further set out the operational principles, procedures and guidelines to assist the parties to implement the general agreement with respect to fisheries, including the functions and procedures of the JFC.

Our submissions are intended to provide this Commission with a deeper appreciation of the aims and structure of JFC in order to assist the Commissioner in considering other possibilities that now exist for the co-management of the Fraser River fishery as between First Nations and other governments. Our submissions are not intended to suggest that the JFC process is the alternative or only alternative to the current Comprehensive Fisheries Agreements that form part of the Department of Fisheries and Oceans ("DFO") Aboriginal Fisheries Strategy ("AFS"), or to argue that is a more appropriate process. We leave that submission to those First Nations who are under the non-treaty regime.

That said within the JFC model, there may be elements that are desirable for the future co-management of salmon stocks in the Fraser River by First Nations and other governments. These elements include a long term structured relationship that consists of representatives from the levels of government, which in our view, provides for a more reliable, long term system of co-management, including allocation and sustainability. These desirable elements could be replicated in agreements outside of treaties. In addition, the fisheries chapter of the Final Agreement also provides for clear rules around

[21] *Tsawwassen Fisheries Operational Guidelines, April 3, 2009.* Available at: http://www.tsawwassenfirstnation.com/treaty/TFN%20Fisheries_Operational_Guidelines_04.03.09.pdf

Dispute Resolution process that the parties have agreed to adhere to. The *TFN Fisheries Act*[22] also outlines the responsibilities of the TFN representative to the JFC.

The JFC is unique to the TFN[23] and while it is still a relatively new process, the relationship between TFN and the DFO has improved under the Treaty. Whether it will continue to improve in the future remains to be seen and we can only say we remain hopeful. The JFC process has improved the mode and quality of communication respecting fish management; TFN is now a key partner of the fishery within the Fraser River. First Nations in this Province seek a more substantive role in co-management of a resource that they have relied on for millennia. The elements of the JFC process may provide some foundation for that increased substantive role. These elements could be contained in non-treaty agreements.

The Final Agreement modified the mechanism for determining the TFN's access to the salmon fishery. Prior to 1992, the TFN made applications to the DFO for a maximum catch allocation. Between 1992 and 2009, the TFN were allocated fish under the AFS, which is applicable in areas where the DFO manages the fishery, but where land claims are not yet settled. Under the Final Agreement, TFN's constitutional rights to harvest fish and aquatic plants for food, social and ceremonial purposes, subject to conservation, public health and public safety, were recognized and affirmed, and an allocation mechanism was agreed upon by the parties.

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[22] See *Fisheries, Wildlife, Migratory Birds and Renewable Resources Act*, Statute of Tsawwassen First Nation, 2009; and *Fisheries Regulation, 2009*, Order 092-2009.

[23] The *Nisga'a Final Agreement*, May 11, 2000 also provides for a bilateral Joint Fisheries Management Committee pursuant to Chapter 8, clause 77. See: http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nsga/nis/nis-eng.asp#chp8

Allocations

As defined in the Final Agreement, the constitutionally-protected Tsawwassen Fishing Right ("TFR") includes "the right to harvest Fish and Aquatic Plants in the Tsawwassen Fishing Area." The TFR is held by the TFN, and the TFN and its Members have the right to trade and barter fish and aquatic plants harvested under the TFR among themselves or with other Aboriginal people of Canada.[24] The Tsawwassen Fishing Area is outlined in Appendix J-1 of the Final Agreement. The Tsawwassen Fishing Area includes a large portion of the Strait of Georgia and the lower Fraser River. The Final Agreement provides for the TFN's treaty allocations of salmon for food, social and ceremonial purposes. Appendix J-2 of the Final Agreement outlines the strict process for determining the allocation of sockeye salmon, and other salmon species, in a given year for the TFN. The allocation of salmon under the Final Agreement, in a given year, is a small percentage of the Canadian Total Allowable Catch for the Fraser River-bound sockeye salmon ("CTAC"), as determined by the DFO. For the last ten years, under the AFS and now under the Final Agreement, the TFN's allocation has been under one percent of the CTAC.

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[24] Under the self-government powers enumerated in the Final Agreement, the Tsawwassen Government has made laws and regulations with respect to the fisheries. A Tsawwassen law made with respect to the TFR prevails to the extent of a conflict with a Federal or Provincial law. These laws regulate, among other things: 1) designation and licensing of individuals and vessels to harvest fish under the TFR, 2) the trade and barter among aboriginal peoples of fish harvested under the TFR, 3) penalties for offences under the laws and regulations, 4) fisheries management and staffing responsibilities, and 5) the distribution of fish caught under the TFR to Tsawwassen Members.

Commercial Interests

With respect to the economic benefits of fishing, the TFN is just now beginning to see an economic return from commercial fishing activities. As stipulated in the *Harvest Agreement*, the intention of that agreement is to put the TFN commercial fishery on equal footing with other commercial fishers, while accommodating a First Nations communal interest in the fishery. As with other commercial fishers, the TFN wants its share of the benefits from the Fraser River fishery. However, unlike other commercial fishers, the TFN has the added mechanism and responsibility of working through the JFC to manage and enhance the fishery that will likely result in the long-term benefit to all users, not only the TFN. In many respects, commercial fishing rights have more value to TFN Members than the food, social and ceremonial rights that are guaranteed under the Final Agreement. A fish caught under a commercial license may be eaten or used for ceremonial or social purposes, but it may also be sold to raise money for other necessities.

It should be noted however that unlike non-treaty First Nations, the TFN is particularly disadvantaged when there are low numbers of fish, as the Final Agreement prohibits TFN Members from fishing under a general claim of an Aboriginal right to fish given that TFN Members' fishing rights are tied to the formula of allocation under the CTAC. The longer the decline, the more disadvantaged the TFN becomes. This is one of those compromises that the TFN has made and one that may not appeal to other First Nations. That said the TFN reserves the right to argue that in cases of a declining supply of

salmon, the Honour of the Crown necessitates giving fishing priority to the TFR, despite the fact that the Final Agreement ties the TFN's allocation into the CTAC.

In short, these agreements, including the commercial *Harvest Agreement*, provide for the TFN the much-needed tools to move out of a position of economic disadvantage and protect rights which have immense value for its Members and community.

JFC as a Tool to Meet Obligations of the Parties

The JFC was established to assist the treaty parties to meet the obligations of management and enhancement that are established in the Final Agreement, and to facilitate the protection of the various fishing rights that are protected by the treaty. The JFC is responsible for making recommendations to the parties with respect to fishery assessment, planning, management and enhancement.[25] Through the JFC, a TFN representative has a seat at the table with provincial, and federal officials (namely the DFO), responsible for management of the fishery, and is given a voice in decision-making with respect to fishery decisions that could affect the TFN's rights and interests. The JFC meets at least twice yearly, once to exchange the TFN annual Fishing Plan and once to conduct post season reviews. Some members of the JFC also meet as needed, particularly when a fish opening is being planned or considered.

A Joint Technical Committee is established as a subcommittee of the JFC under the TFOG with a mandate to support the operations of the JFC by, *inter alia*, compiling relevant data and information. It also makes recommendations to the JFC with respect to

[25] *Tsawwassen First Nation Final Agreement*, Fisheries, Chapter 9, Clause 68.

stock assessments, as well as analyzing data and information to support recommendations to the JFC concerning the management of fish, fish habitat and fish harvests in the Final Agreement.[26]

Catch Data Reporting

The overall goal of the catch monitoring and reporting program is to ensure that accurate information is gathered to aid all parties in the management of the fishery and the implementation of the Final Agreement. In essence, there are three components to this program, which are,

a. fishing effort (how many vessels are participating);

b. the related catch for each participant, and

c. some form of random and representative validation.[27]

Current JFC Process could be Expanded

The current AFS system is an acknowledgement of the legal requirement that Aboriginal Peoples are entitled to fish for food, social and ceremonial purposes, in priority over other users, subject only to conservation. This legal requirement has resulted in, in most cases, the DFO meeting with each First Nation operating under the Comprehensive Fisheries Agreement process to negotiate a yearly AFS agreement. The AFS process does not provide long term certainty with respect to Aboriginal rights, nor is there, in our view,

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26 *Supra*, note 21, at pages 68-69.

27 *Id.*, at page 70.

sufficient endurance to the AFS process. The preference for TFN was to achieve long term security over fisheries management, which it now has through the JFC process.

Given that the DFO already meets with individual First Nations under this scheme, in our submission, there is room in which the DFO may expand those discussions with a view of providing First Nations without a treaty with a more defined and substantive role in co-management and the long term sustainability of the resource. With a system of co-management that incorporates elements of the JFC, DFO may achieve its objective of reconciling the demands of First Nations for an enhanced role in management of the fishery, while at the same time, meeting its statutory obligation to manage the resource.

Harvest Agreement Process could Lead to a more Collaborative Fishery

Each year, the JFC makes recommendations to the Minister of the DFO respecting the operation and management provisions to be contained in the annual Harvest Agreement for the TFR. The TFN designates those individuals and vessels permitted under Tsawwassen Law to harvest fish (and aquatic plants), which information forms part of the recommendations to the Minister. The Harvest Agreement is not a treaty or a land claims agreement, and does not recognize or affirm Aboriginal or Treaty rights, within the meaning of ss. 25 or 35 of the *Constitution Act, 1982*. TFN monitors and reports on catch data and it also provides other biological data which is also submitted to the JFC, for consideration and inclusion when making recommendations to the Minister in support of the annual Harvest Agreement.

In our experience, the Harvest Agreement process is useful in establishing expectations for a particular season, and as a key co-management tool, it is more collaborative than the AFS process. The Harvest Agreement process also provides for increased efficiencies because TFN has to, in the recommendation planning stage, look at the vulnerable or threatened stocks when formulating its optimal fish openings. Replication of this model for non-treaty First Nations could provide them with more a substantive co-management role, while at the same time, as building longer term collaborative approaches to the sustainability of the fishery.

Importance of the Food Social and Ceremonial Fishery and Recommendations

As the Final Agreement specifies strict guidelines for determining the portion of allowable catch that is allocated to the TFN under the TFR, a determination by this Inquiry that results in the DFO modifying the manner of deciding the CTAC, or even the actual amount itself, will clearly impact the TFN constitutional right to fish for food, ceremonial and social purposes. It is important to the TFN that the rights enumerated in the Final Agreement are protected and respected in the proceeding of the Inquiry and any final determination or recommendations that the Commission makes. From the TFN's perspective, the terms that protect access to the fishery for food, cultural and social purposes, are among of the most valuable aspects of the Final Agreement.

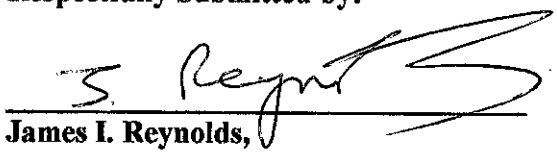
First Nation Participation in Stewardship and Enhancement and Recommendations

The formal structure for fishery management and enhancement that was created by the Final Agreement is unique among lower mainland First Nations. Fisheries stewardship

and enhancement is a further unique aspect that was negotiated by the TFN as a component of the Final Agreement. The treaty provides that the TFN has the ability and the resources dedicated to fisheries stewardship and enhancement programs.

In our submission, those First Nations who wish to participate more fully in stewardship and enhancement ought to be provided with the opportunity to do so. First Nations should not be excluded from these types of activities, particularly given their traditional knowledge of the resource, simply because they are not a treaty First Nation.

Respectfully Submitted by:



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Index of Authorities

1. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

2. *Guerin v. The Queen*, [1984], 2 SCR 335.

3. *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

4. *The Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

5. Department of Fisheries and Oceans, available at: http://www.dfo-mpo.gc.ca/fm-gp/aboriginal-autochtones/afs-srapa-eng.htm

6. *Tsawwassen Fisheries Operational Guidelines, April 3, 2009*. Available at: http://www.tsawwassenfirstnation.com/treaty/TFN%20Fisheries_Operational_Guidelines_04.03.0 9.pdf

7. *Fisheries, Wildlife, Migratory Birds and Renewable Resources Act*, Statute of Tsawwassen First Nation, 2009; and *Fisheries Regulation, 2009*, Order 092-2009.

8. *Tsawwassen First Nation Final Agreement*, Fisheries, Chapter 9, Clause 68.

COMMISSION OF INQUIRY INTO THE DECLINE OF SOCKEYE SALMON IN THE FRASER RIVER

In the matter of Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a commission do issue under Part I of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as Commissioner to conduct an inquiry into the decline of sockeye salmon in the Fraser River.

SUBMISSION OF THE WESTERN CENTRAL COAST SALISH FIRST NATIONS ON THE COMMISSION'S OCTOBER 1, 2010 PAPER ENTITLED "THE ABORIGINAL AND TREATY RIGHTS FRAMEWORK UNDERLYING THE FRASER RIVER SOCKEYE FISHERY"

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Introduction

1. This submission is made on behalf of the Western Central Coast Salish Standing Group in response to the Commission's invitation to comment on the paper dated October 1, 2010, entitled "The Aboriginal and Treaty Rights Framework Underlying The Fraser River Sockeye Fishery" (the "Aboriginal and Treaty Rights Paper").

Aboriginal Title, Exclusive Fisheries and Fisheries as a Common Property

2. The Aboriginal and Treaty Rights Paper gives a broad overview of the law concerning aboriginal title, aboriginal rights and treaty rights but in doing so reaches certain conclusions that are not clearly decided by the existing case law. These conclusions do not reflect the fact that many of the legal principles governing this area of law are still being developed and further fail to reflect that the aboriginal perspective has to be taken into account when developing the law in this area.

3. One area of concern to the Western Central Coast Salish First Nations is the emphasis placed on the difficulty of proving occupation of submerged lands and the application on the "common property" rule with respect to the fishery. The "common property" rule has generally been considered in the Canadian context in relation to Crown assertions of right with respect to the management of fisheries *vis a vis* non-aboriginal peoples. The question of the application of the common property rule has been little considered in the context of aboriginal title and aboriginal rights to fisheries.

4. It is important to note that the word "fishery" at common law had different meaning depending upon the context. In the broadest sense of the word, fishery refers to the harvesting of fish from the waters and is a description of an activity. A fishery is also a reference to a place where a fishery is regularly carried out. The common law long recognized the potential for exclusive fisheries even in the context of tidal waters. At common law the owner of the solum or bed of the river

was also vested with the fisheries over that soil, unless they were severed by some action. This distinction has been noted in Canadian cases. For example, in ***Re Provincial Fisheries****,* the Privy Council considered questions regarding the jurisdiction over the beds of lakes, rivers and public harbours within the Dominion. In deciding the questions before it could be resolved without addressing ownership of those beds as between the central and provincial governments, Lord Herschell noted a distinction between jurisdiction over fisheries as place and as practice:

> Their Lordships are of opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, "Sea-Coast and Inland Fisheries" in s. 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment.
>
> ***Attorney General of Canada v. Attorney General for Ontario et al* ("*Re Provincial Fisheries"),* 1898 A.C. 700 (PC)**

5. The distinction between fisheries as place and practice is clear under common law, for some cases have noted that "fisheries" includes areas that can be considered "fish habitats". This link to place is also confirmed by statute, as the ***Fisheries Act*** defines fishery to include "the area, locality, place or station" where fishing activities are conducted.

> ***Reference re British Columbia Fisheries,* (1913), 47 S.C.R. 493;**
> ***Attorney General of Canada v. Attorney General for Ontario et al* [1898] A.C. 700 (P.C.);**
> ***See also R v. Northwest Falling Contractors*, 1980 2 SCR 292 at p 301**

6. It has been long recognized in Canada that depending upon the local law, the terms of historic grants made by the Crown and the navigability of the river in question the bed of a river could be privately owned at common law and, thus, the fishery held privately. This has been the subject of litigation in New Brunswick in relation to the ownership of clearly valuable fisheries on the Miramichi River.

***Lord Fitzhardinge v. Purcell,* [1908] 2 Ch. 139, pp. 149, 159, 166-7; *Parish of Ludlow and Bliss v. Dean* [1996] N.B.J. No. 85 (NBCA); *Swazey v. King* [1997] N.B.J. No. 25 (NBCA).**

7. As set out in the Aboriginal and Treaty Rights Paper, the Crown's power to make exclusive grants of fisheries in tidal waters was limited by the ***Magna Carta*** and this limitation has been held to apply in Canada in relation to the grant of exclusive rights of fisheries by the Crown to non-aboriginal people. This limitation is often described as reflecting the principle that the fisheries in tidal waters are "common property" or a common public right. It should be noted, however, that there are two significant qualifications to this so-called public right of fisheries in so far as it applies on the Pacific Coast of Canada in 2010, as opposed to the coastal waters of England in 1215.

8. First, the application of the public right of fishing found in the ***Magna Carta*** flows from the adoption of English law in British Columbia which was expressly made applicable subject to local circumstances. This was stated by Justice Idington in the ***Reference re British Columbia Fisheries***:

> It is not suggested that from the first establishment of the colony of British Columbia down to the time when the United Colony entered the Canadian Union any enactment was passed by any lawmaking authority affecting the public rights of fishing in tidal waters in any way material to the present question. At the date of the Union the law governing these rights may be taken for our present purpose to have been the law of England "**so far as the same was not from local circumstances inapplicable**."
>
> > The soil of navigable tidal rivers, like the Shannon so far as the tide flows and reflows, is primâ facie in the Crown, and the right of fishery primâ facie in the public. But for Magna Carta, the Crown could, by its prerogative, exclude the public from such primâ facie right and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. And the great charter left untouched all fisheries which were made several, to the exclusion of the public, by Act of the Crown not later than the reign of Henry II.

> This statement of the law, contained in the opinion of the judges given by Mr. Justice Willes, in 1863, in response to a question put by the House of Lords in Malcomson Jr. O'Dea, 10 H.L. Cas. 593, at page 618, was expressly approved by the House, and is, of course, a final pronouncement as to the state of the law in England respecting public rights of fishing in tidal waters on the 19th November, 1858. I can think of no good reason why the rule enunciated in this passage should be supposed to be inapplicable to the circumstances of British Columbia, and I think it must be held to have been in force throughout British Columbia in 1871, when the provisions of the "British North America Act" became applicable to the province. That statute vested in the Dominion Parliament the exclusive authority to make laws relating to the "Sea Coast and Inland ,Fisheries," and in Attorney-General for the Dominion of Canada v. Attorney-General for Ontario, [1898] A.C. 700, at page 716, one consequence of this was held by the Privy Council to be that
>
> > all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only.
>
> It follows that question 2 in so far as it refers to a supposed exclusive right to be created by the province in tidal waters ought to be answered in the negative.
>
> ***Reference re British Columbia Fisheries,* (1913), 47 S.C.R. 493**

9. While Justice Idington did not identify any local circumstances that would render the public fisheries principle inapplicable, he was not considering the situation of an aboriginal or treaty right which may been granted prior to the reception of English law. In British Columbia, English law was received by virtue of the operation of the ***English Law Act*, 1858**. Any rights arising by virtue of aboriginal title would have vested as at the assertion of British Sovereignty (1846); by virtue of aboriginal rights, would have vested at the time of contact (likely 1792 or thereabouts); and, by virtue of the Douglas Treaties, would have vested at the time of the treaties being signed (1850-1851). Clearly, the existence of aboriginal societies engaged in the fisheries according to their own laws as at 1858 was a local circumstance that would have to be considered in determining whether or not the public right of fishing in tidal waters was not qualified.

10. The foregoing is consistent with the understanding of reception described in the ***Mabo*** decision, where the doctrine of settlement was described in detail. There, Brennan J. noted that British sovereignty caused English law to be applied automatically as the law of the colony; however, because English law was adjusted to local conditions upon reception, the local common law recognized the continuity of aboriginal title to lands and resources as defined by native custom. In other words, English law was received in Australia by virtue of sovereignty but it recognized customary laws of Aboriginal peoples so long as those laws were not repugnant to natural justice. The Canadian example of this is ***Connolly v. Woolrich,*** where a Canadian court recognized that aboriginal customary laws on marriage continued to apply notwithstanding the reception of English common law in Canada. Similarly, in ***Amodu Tijani***, the House of Lords held that the assertion of sovereignty, while causing the reception of English law, did not "disturb the rights of private owners".

> **J.E. Cote, "The Reception of English Law", 1977 15 Alta LR 29;**
> ***Connolly v. Woolrich*, (1867) 11 L.C. Jur. 197;**
> ***Amodu Tijani v. Secretary, Southern Nigeria,* (1921) 2 A.C. 399 (P.C.);**
> ***Mabo v. Queensland (No. 2)*, (1992) 175 CLR 1**

11. Second, the public right to fish as set out in the ***Magna Carta*** is itself limited to protect any pre-existing exclusive rights of fishing that may have existed. Thus where a pre-existing exclusive fishery existed, English law did not act to trump or defeat that fishery. This can be seen in the statement of the ***Magna Carta*** principle quoted above (and repeated here for emphasis):

> The soil of navigable tidal rivers, like the Shannon so far as the tide flows and reflows, is primâ facie in the Crown, and the right of fishery primâ facie in the public. But for Magna Charta, the Crown could, by its prerogative, exclude the public from such primâ facie right and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. **And the great charter left untouched all fisheries which were made several, to the exclusion of the public, by Act of the Crown not later than the reign of Henry II**. [emphasis added]

12. In the 1910 edition of ***Halsbury's Laws of England***, it was said that:

> In all waters within the territorial limits of the kingdom, subject to the flow and reflow of the tide, the public, being subjects of the realm, are entitled to fish, except where the King or some particular subject has gained a propriety exclusive of the public right, or Parliament has restricted the common law rights of the public. ...
>
> As the public right of fishery is dependent on the presumed ownership of the soil by the Crown, the area in which the right may be exercised is limited to the Crown's right to the soil. It extends, therefore, only to the high-water mark of ordinary tides, and as far up rivers as the tide in the ordinary and regular course of things flows and reflows.
>
> ***Halsbury's Laws of England*, 1910, vol. 14 at paras. 1269-1270**

13. This is borne out in the jurisprudence clearly. In 1908 Parker J. in Lord ***Fitzhardinge v. Purcell*** recognized that pre-existing rights in fisheries were not negated by the ***Magna Carta***, stating:

> It is also true that no such grant [by the Crown of part of the bed of the sea or the bed of a tidal navigable river], **since the Magna Charta**, operate to the detriment of the public right of fishing. But, subject to this, there seems no good reason to suppose that the Crown's ownership of the bed of the sea and the beds of tidal navigable rivers is not a beneficial ownership capable of being granted to a subject in the same way that the Crown's ownership of the foreshore is a beneficial ownership capable of being so granted. [emphasis added]
>
> ***Lord Fitzhardinge v. Purcell,* [1908] 2 Ch. 139, pp. 149, 159, 166-7**

14. In 1913, Viscount Haldane LC, speaking for the Privy Council in ***Attorney-General (British Columbia) v Attorney-General (Canada)***, similarly said:

> Since the decision of the House of Lords in *Malcomson v O'Dea*, it has been unquestioned law that since Magna Carta no new exclusive fishery could be created by Royal grant in tidal waters, and that ***no public right of fishing in such waters, then existing, can be taken away without competent legislation***. This is now

part of the law of England, and their Lordships entertain no doubt that it is part of the law of British Columbia. [emphasis added]

Re Provincial Fisheries, supra.

15. Professor Mark Walters describes how this was applied in the United Kingdom:

> The basic English common law rules regarding waters and fisheries were summarized by Matthew Hale, Lord Chief Justice of England, in his seventeenth century treatise, "De Jure Maris". According to those rules, land covered by water is the same as land not so covered: it is susceptible to private ownership but until granted by the Crown to a subject it constitutes part of the royal demesne. Fisheries are regarded as profits of the soil, and therefore the owner of lands covered by water has, as an incident of that ownership, a separalis piscaria or a "several" fishery -- an exclusive right to fish in those waters.
>
> …
>
> [B]y the mid-nineteenth century Blackstone's view of chapter 16 had prevailed: the House of Lords held that Magna Carta did indeed prevent Crown grants of several fisheries in tidal waters, and that to establish a lawful exclusive fishery in such waters one had to produce either a Crown grant "not later than the reign of Henry II" or **evidence of "long enjoyment" of the fishery from which it might be inferred that such a grant had been made. [emphasis added]**
>
> **Mark D. Walters, "Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada', (1998) 23 Queen's L.J. 301**

16. The geographical scope of pre-existing rights in the fisheries that were recognized upon the reception of English law in Canada is informed by a number of cases. In ***R v. Keyn***, as adopted in two reference cases, the British Parliament's ability to legislate over the ocean beyond the low-water mark was affirmed. In the ***Offshore Reference***, the Supreme Court of Canada confirmed that in the nineteenth century (and in particular at the dates when English law was received in British Columbia), the British had jurisdiction over and in respect

of the territorial sea off the coast of British Columbia. Further to the foregoing, English law would have recognized the then existing rights of aboriginal peoples in these areas. The situation is the same for inland waters, including the bays, inlets, sounds, and other waters out to and including offshore islands.

> ***R v. Keyn*, (1876) 2 Ex. D., 63;**
> ***Reference Re Offshore Mineral Rights*, [1967] S.C.R. 792, pp. 804-5, 807;**
> ***Direct United States Cable Company v. Anglo-American Telegraph Company*, (1877) 2 A.C. 394, pp. 419-421;**
> ***Reference Re: Ownership of the Bed of the Strait of Georgia,* [1984] 1 S.C.R. 388, pp. 396-7**

17. In New Zealand, the Maori Land Court took exactly this approach in upholding the grant of Maori fishing rights under the Treaty of Waitangi. In the ***Kauwaeranga case***, the New Zealand Maori Land Court held that exclusive fisheries in tidal waters were possible under received English Law and that, according to Hale's "De Jure Maris", such rights could arise by custom and usage or prescription. Then, addressing implicitly the ***Magna Carta*** restriction, Fenton C.J. stated:

> And accepting the principle that all properties, rights, privileges, or easements of this character [i.e., several fisheries] are held to be derived from the King, for prima facie they are all his, yet immemorial several use having been proved, the Courts will presume the grant. And, in our case the title is older, for the ownership was before the King, and the King confirmed and promised to maintain it.
>
> ***Kauwaeranga Judgment*, (1984) 14 V.U.W.L.R. 227**

18. It should be noted that these two approaches are entirely complementary and can really be viewed as two sides of the same coin. The drafters of the ***Magna Carta*** had no desire to dispossess anyone then holding such rights as they had been lawfully granted. Thus, the guarantee of a public right of fishing in tidal

waters was qualified to protect the existing rights of others. Similarly, in providing for the adoption of English Law into British Columbia, the Crown had no desire to displace rights that had been previously created and certainly did not intend to dispossess the aboriginal peoples of British Columbia merely by asserting the application of such law. This is equally consistent with s. 109 of the ***Constitution Act, 1867*** where the vesting of Crown land in the Provinces is made expressly subject to the trusts and interests of others, a provision which the Privy Council and the Supreme Court of Canada have said repeatedly protected the then existing rights of aboriginal peoples.

> ***St. Catherine's Milling & Lumber Co. v. The Queen*** **(1889), 14 App. Cas. 46 (P.C.);**
> ***Delgamuukw v. British Columbia*****, [1997] 3 S.C.R. 1010 at para. 175;**
> ***Haida Nation v. British Columbia (Minister of Forests)*****, at 2004 SCC 73, [2004] 3 S.C.R. 511 para 58-59.**

19. It should also be noted that in the modern treaty context there is no question that these treaties can create or affirm exclusive fisheries. The modern practice of treaty making involves the province and the federal government ratifying and giving effect to the modern treaty by means of legislation. The restrictions contained in the ***Magna Carta*** at most limit the **Crown**'s unilateral power to grant exclusive rights by means of the **Crown prerogative**. The ***Magna Carta***, consistent with the principle of parliamentary sovereignty, did nothing to limit the power of the Parliament or legislatures or the Crown acting with the authority of Parliament or legislatures to create such rights.

20. In summary, the Western Central Coast Salish Nations submit that the principles concerning the public right to fish derived from the ***Magna Carta*** have little application in the context of aboriginal and treaty rights, particularly where those rights pre-date the reception of English Law – which is the case for aboriginal title, aboriginal rights and the Douglas Treaties – or where the rights arise out of modern treaties that have been implemented by legislation.

The Application of the Law of Aboriginal Title

21. The decision in ***Ahousaht*** should not be over-emphasized given the fact that it was not particularly focused on the aboriginal title claim *per se* and the claim was also an extensive maritime claim (thus not necessarily leading to a focused analysis of usage of water features such as riverbeds, channels, bays, coves, foreshores, islands, and reefs). In considering a claim for aboriginal title in the context of fisheries and submerged lands, it is useful to remember that the Supreme Court of Canada has made it clear than the degree of occupation necessary to establish aboriginal title must be determined having regard to the nature of the land and the nature of the aboriginal use of the land. The approach to the proper definition of aboriginal title in the context of a particular land use was outlined in ***R v. Marshall, R v. Bernard***:

> 51 In summary, the court must examine the pre-sovereignty aboriginal practice and translate that practice into a modern right. The process begins by examining the nature and extent of the pre-sovereignty aboriginal practice in question. It goes on to seek a corresponding common law right. In this way, the process determines the nature and extent of the modern right and reconciles the aboriginal and European perspectives.
>
> 52 The second underlying concept — the range of aboriginal rights — flows from the process of reconciliation just described. Taking the aboriginal perspective into account does not mean that a particular right, like title to the land, is established. The question is what modern right best corresponds to the pre-sovereignty aboriginal practice, examined from the aboriginal perspective.
>
> 53 Different aboriginal practices correspond to different modern rights. This Court has rejected the view of a dominant right to title to the land, from which other rights, like the right to hunt or fish, flow: *R. v. Adams*, 1996 CanLII 169 (S.C.C.), [1996] 3 S.C.R. 101, at para. 26; *R. v. Côté*, 1996 CanLII 170 (S.C.C.), [1996] 3 S.C.R. 139, at paras. 35-39. It is more accurate to speak of a variety of independent aboriginal rights.
>
> 54 One of these rights is aboriginal title to land. It is established by aboriginal practices that indicate possession similar to that associated with title at common law. In matching common law

> property rules to aboriginal practice we must be sensitive to the context-specific nature of common law title, as well as the aboriginal perspective. The common law recognizes that possession sufficient to ground title is a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which the land is commonly enjoyed: *Powell v. McFarlane* (1977), 38 P. & C.R. 452 (Ch. D.), at p. 471. For example, where marshy land is virtually useless except for shooting, shooting over it may amount to adverse possession: *Red House Farms (Thorndon) Ltd. v. Catchpole*, [1977] E.G.D. 798 (Eng. C.A.). The common law also recognizes that a person with adequate possession for title may choose to use it intermittently or sporadically: *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680 (C.A.), *per* Wilson J.A. Finally, the common law recognizes that exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of land: *Delgamuukw*, at para. 158.
>
> ***R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220 at paras. 51-54**

22. Thus in the case of submerged lands one would not look toward types of occupation associated with dry lands such as defined hunting grounds, village sites or enclosed fields. Instead, one would look toward uses which are consistent with the use and occupation of submerged lands as understood both by the common law and aboriginal peoples. Thus, for example, the common law recognized that the ownership of adjacent lands in the case of rivers gave rise to ownership of the bed of rivers to the mid-stream (a rule limited by legislation in Canada in respect of navigable waters, but only in respect of fee simple ownership). Similarly, for aboriginal people, the most obvious way to use submerged lands was through the prosecution of fisheries, which could include the harvesting of shellfish at low tides, but could also include such activities or methods as the following: the harvesting of salmon through the use of spears on fishing rocks; the establishment of weirs in river mouths; the building of fish traps in harbours; or the use of reef nets or other forms of reef fisheries. In this way, aboriginal title to submerged waters becomes intimately connected to the fact that aboriginal people may have preferred places in which they carried out their aboriginal rights.

23. It should be noted that the linkage between the carrying out of fisheries in certain areas and aboriginal title is not mere legal sophistry. In ***Mikisew*** the Supreme Court of Canada considered the Crown's submission that treaty rights could not be infringed as long as they could be exercised somewhere, even if that "somewhere" was a long way from the traditional harvesting places of the Mikisew Cree. The Supreme Court of Canada rejected that submission, holding that it was important to the maintenance of their way of life that aboriginal people be able to harvest where they traditionally harvested. In the case of fisheries this is particularly important – for example, if a reef net fishery was prosecuted on a reef near a village it would be a fundamentally different form of harvesting to tell the aboriginal people to fish somewhere else away from the reef using a different technique. This type of displacement could occur either as a result of fisheries management or as a result of appropriation of the island or reef for other purposes but the result is the same in either case – by displacing the aboriginal from the preferred location, the aboriginal people have been cut off from their ability to carry out their traditional fishery. Thus, the fact that submerged land is used for the purpose of prosecuting a fishery would suggest that protection of the fishery requires protecting access to and use of the land which is a right most obviously equivalent to aboriginal title.

Mikisew Cree First Nation, **[2005] 3 S.C.R. 388 at paras. 47 and 48.**

24. There have been other cases in Canada and elsewhere in the world considering claims of aboriginal title to submerged lands and their linkages to fisheries. In ***Walpole Island First Nation v. Canada****,* the Ontario Superior Court of Justice dismissed 2 motions to strike the plaintiffs' action for a declaration that they hold aboriginal title to a lake bed. The court would not hold that it is plain and obvious that there is no aboriginal title to lake beds in Canada.

Walpole Island First Nation v. Canada **2004 CanLII 7793 (ON. SC)**

25. In New Zealand, title to submerged lands arose in the ***Ngati Apa*** case, where a claim was made to the foreshore and seabed. The Crown argued the court lacked jurisdiction because the foreshore and seabed could not be customary land, either as a matter of law or because any Maori rights had been extinguished. While ultimately not deciding whether the claimants had such a right, the Court of Appeal did decide that Maori customary rights to the foreshore and seabed could exist as a matter of law. Specifically, the court held: (1) that submerged lands could be Maori customary land if the rights could be proven in accordance with Maori practices and custom, and (2) that this would displace any presumption of Crown ownership arising at common law.

***Ngati Apa & Ors v. Ki Te Tau IHU Trust & Ors*, [2003] NZCA 117**

26. The Court also rejected an earlier ruling that Maori rights to the foreshore could not exist when that land bordered the sea (the rule that was rejected here is similar to the position in Canada that the presumption of fee simple ownership of the beds of rivers as a riparian right is not applicable). In reaching these conclusions, the Court of Appeal relied on the doctrine of continuity, in which the property rights of inhabitants over which the Crown asserts sovereignty continue to exist in their customary form absent a Crown taking (i.e., extinguishment or conversion) of the title.

***Ngati Apa & Ors v. Ki Te Tau IHU Trust & Ors*, [2003] NZCA 117 at paras. 29-31**

27. Also of note, the Court of Appeal in ***Ngati Apa*** rejected the distinction between dry land and land below the high tide mark, thus implying that indigenous title to the foreshore/seabed is not incompatible with Crown sovereignty. In doing so, the Court noted that interests in land below the low water mark were known under the laws of England where those interests had arisen by custom.

***Ngati Apa & Ors v. Ki Te Tau IHU Trust & Ors*, [2003] NZCA 117 at 51**

c.f. Te Runanganui o Te Ika Whenua Inc. v. A.G., [1994] 2 N.Z.L.R. 20 at 23-24 (C.A.)

28. In Australia, there are a couple of examples of native title to fisheries. In ***Northern Territory of Australia v Arnhem Land Aboriginal Land Trust***, a claim was made for the right to right to exclude others from tidal waters. In response, the state argued that the public right to fish disposed of the question. Similar to the ruling in ***Ngati Apa***, the court in ***Arnhem*** held that "Aboriginal land" should not be understood as confined, in intertidal zones, to only the land surface of that area. The court also rejected the argument that a public right to fish (as granted by statute) guaranteed a right of access to waters over which Aboriginal interests had been granted.

***Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust,* [2008] HCA 29**

29. Similarly, in ***Lardil Peoples v. Queensland***, the Australian Federal Court was faced with overlapping native title claims to land and waters by four groups. The court found that the plaintiffs had proved possession of certain native title rights to the water, and ordered that, to the extent that the land and waters defined in any group's title areas overlay any waters of the other three groups, the overlapping land and water area was to be adjusted to meet up along the centre of the area of the overlay.

***Lardil Peoples v. Queensland,* [2004] FCA 298**

30. It is therefore submitted that the Commission should be exceedingly cautious in making any overarching statements concerning the difficulty of proving aboriginal title to submerged lands and consequent exclusive aboriginal fisheries over those lands.

Treaty Rights

31. The Te'mexw Nations are particularly concerned about the sparseness of the analysis of the distinction between treaty rights and aboriginal rights in the Aboriginal and Treaty Rights Paper. This is particularly important to the Te'mexw Nations as they presently hold Douglas Treaty rights and are concerned that the Department of Fisheries and Oceans has inadequately addressed the unique nature of these rights in light of the trade that existed not only between aboriginal peoples before contact but between aboriginal peoples and non-aboriginal peoples after contact but before the Douglas Treaties were signed in 1850-1851.

32. The central exercise in defining treaty rights is to reconcile the parties' intentions at the time the treaty was made: "[i]n particular, [courts] must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration."

***R v. Sioui*, [1990] 1 S.C.R. 1025 at para. 17**

33. In ***R v. Sioui***, the SCC noted that two of the factors to be considered in assessing treaty rights are: (1) the reasons why the Crown made a commitment, and (2) the situation prevailing at the time the document was signed. That the date relevant to the determination of treaty rights is the signing of the treaty is clear from ***Sioui***, where the territorial scope of the treaty right was based on "the definition of the common intent of the parties which best reflects the actual intent of the Hurons and of Murray on September 5, 1760." In other words, ***Sioui*** is clear that contextual factors existing at the time of the treaty inform the interpretation of treaty rights.

***R v. Sioui*, supra at para. 120**

34. This approach is reflected in ***R v. Marshall***, where understandings and practices at the time of signing informed the scope of the treaty right. Specifically, in ***R v. Marshall*,** the right to trader for a moderate livelihood was based on the proposition that fishing for trade in 1760 was a traditional activity of the Mi'kmaq.

***R v. Marshall,* [1999] 3 S.C.R. 456**

35. In ***R v. Marshall***, McLachlin C.J. also resolved uncertainty in treaty interpretation principles by stating clearly that external evidence of the interactions between the Crown and aboriginal peoples is relevant to determining the nature and scope of the treaty right. Additionally, by framing the issue before the court in ***Marshall*** as whether the modern trading activity in question represents a logical evolution from the traditional trading activity at the time the treaty was made, McLachlin C.J. necessarily implied that treaty rights can arise through practices arising post-contact.

36. In ***R v. Marshall, R v. Bernard***, the SCC was again called upon to interpret the truckhouse clause at issue in Marshall:

> The truckhouse clause was a *trade* clause. It was concerned with what could be traded. As discussed in *Marshall 1*, the British wanted the Mi'kmaq to cease trading with the French, whom they had just defeated, and trade only with them. The Mi'kmaq were willing to do this, but sought assurances that the British would provide trading posts, or truckhouses, where they could trade. **The Mi'kmaq had been trading with Europeans for 250 years by this time, and relied on trading their products, like furs and fish, in exchange for European wares. The purpose of the truckhouse clause was to give the British the exclusive right to trade with the Mi'kmaq and the Mi'kmaq the assurance that they would be able to trade with the British as they had traded with the French in the past.** [Emphasis added]
>
> …
>
> The historic records and the wording of the truckhouse clause indicate that what was in the contemplation of the British and the Mi'kmaq in 1760 was continued trade in the products the Mi'kmaq had traditionally traded with Europeans. The clause affirmed that this trade would continue, but henceforth exclusively with the British.

***R v. Marshall, R v. Bernard*, [2005] 2 S.C.R. 220 at paras. 17 and 21**

37. While the court in ***Marshall, Bernard*** stated that the treaty right to trade was restricted to "traditionally traded products," "traditionally traded" was determined by reference to practices arising post-contact and in connection with Europeans. This is clear by the court's finding "the Mi'kmaq people have sustained themselves in part by harvesting and trading fish (including eels) since Europeans first visited the coasts of what is now Nova Scotia in the 16th century."

R v. Marshall, R v. Bernard**, supra at para. 117**

38. More recently, the SCC again noted in ***R v. Morris*** the importance at looking at the circumstances present at the time of treaty signing when assessing treaty rights:

> The language of the Treaty stating "we are at liberty to hunt over the unoccupied lands" exemplifies the lean and often vague vocabulary of historic treaty promises. McLachlin J., dissenting on other grounds, stated in *R. v. Marshall*, [1999] 3 S.C.R. 456 ("*Marshall No. 1*"), at para. 78, that "[t]he goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed". This means that the promises in the treaty must be placed in their historical, political, and cultural contexts to clarify the common intentions of the parties and the interests they intended to reconcile at the time.

R v. Morris, **[2006] 2 S.C.R. 915 at para. 18**

39. For the court in ***Morris***, this involved looking at the "economic and demographic realities" of the region at the time of the treaty.

40. The principle that courts can take into account trade with Europeans when assessing treaty rights is also supported by the clauses in treaties that signatories can hunt on "unoccupied" lands, for these clauses necessarily entail treaty rights that arise through the interaction of Aboriginal and non-Aboriginal peoples and create a right vesting in settlers to be protected from potentially

dangerous practices on their lands. Similarly, the holders of the Douglas Treaties, particularly in the vicinity of Fort Victoria and the coal mines at Nanaimo would place great importance on taking the post-contact but pre-treaty trade in fish between their people and Europeans (including the Hudson's Bay Company) in determining the content of the right to "fish as formerly".

***R. v. Morris*, supra at para. 34**

Incidental Rights and the Protection of Habitat

41. The Aboriginal and Treaty Rights Paper focuses its discussion on the harvesting right *per se*. For the purpose of this inquiry, it is important to note that aboriginal and treaty rights carry with them a variety of other rights which are "incidental" to the core harvesting right. These incidental rights reflect a number of factors but, in a broad sense, reflect the principles that the existence of these rights is about preserving a way of life and there is little point of that if the rights cannot be exercised because the resource cannot be accessed, the resource has been made extinct or the habitat upon which the resource relies has been destroyed or compromised. In this case, the Western Central Coastal Salish First Nations are deeply concerned that many of the issues concerning the overall decline of the sockeye salmon stocks flows from the loss of habitat in the spawning, rearing and ocean habitats of the sockeye salmon.

42. In ***Claxton v. Saanichton Marina*** the Court of Appeal held that the Douglas Treaty right to "fish as formerly" implied a right to access the fishing grounds and a right not to have the fishing grounds destroyed. Thus, the construction of a marina on top of an important eel grass bed impermissibly interfered with the treaty right and was enjoined. Similarly, in ***West Moberly*** the Supreme Court held that a treaty right to hunt implied an incidental right to have the habitat necessary to support the caribou species traditionally harvested by the people protected.

***Claxton v. Saanichton Marina,* [1989] 5 W.W.R. 82 (B.C.C.A);**

***West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* 2010 BCSC 359 at para. 62**

43. This principle has been considered in some depth in the United States in the context of the Stevens Treaties in Washington State. There a guarantee of a right to fish in common with the non-Indians of the State of Washington was held to provide the Indian Tribes with an entitlement to 50% of the fish to be harvested. In a subsequent decision it was held that this right to harvest fish necessarily mandated the protection of habitat which resulted in the de-commissioning of dams and restoration of salmon habitat on major salmon bearing rivers. As Justice Orrick pointed out in the second decision, failing to protect habitat in time would reduce the right to fish to the right to dip one's net in the water and come up empty.

***United States v. Washington*, 384 F. Supp. 312, 343 (W.D. Wash. 1974) Lexis 12291 ("Boldt Decision"), aff'd in *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 669 (1979), U.S. Lexis 43;**
***United States v. Washington*, 506 F. Supp. 187, 1980 U.S. Dist. Lexis 17152 (W.D. Wash. 1980) at 203.**

Division of Powers Issues

44. Any legislative and regulatory framework relating to Aboriginal and Treaty Rights must accord with the division of powers under the ***Constitution Act, 1867***. Aboriginal and Treaty Rights fall within the core of s. 91(24) and are accordingly within an area of exclusive federal jurisdiction. As a subset of Aboriginal Rights, Aboriginal Title also lies within exclusive federal jurisdiction. Accordingly, under the doctrine of interjurisdictional immunity, provincial legislation affecting aboriginal and treaty rights is constitutionally inapplicable to the extent that the legislation intrudes or touches upon core federal competence even if enacted under a valid head of legislative authority. The result is that the Province lacks constitutional authority to infringe Aboriginal Title, Aboriginal Rights or Treaty rights in respect of fisheries.

R v. Morris, **[2006] 2 S.C.R. 915, at para. 91**;
Delgamuukw v. British Columbia, **[1997] 3 S.C.R. 1010 at para. 178**.

45. It is clear from the Supreme Court of Canada's decision in ***R v. Morris*** that provincial laws that infringe upon treaty rights are constitutionally inapplicable due to the operation of the doctrine of interjurisdictional immunity. Accordingly, ***R v. Morris*** and ***Saanichton Marina*** suggest that any prima facie interference by the province with Douglas Treaty rights, including Douglas Treaty rights in respect of fisheries, engages interjurisdictional immunity such that British Columbia cannot infringe those rights.

R v. Morris, **[2006] 2 S.C.R. 915;**
Claxton v. Saanichton Marina, **[1989] 5 W.W.R. 82 (B.C.C.A)**

The Duty to Consult and Accommodate

46. The Western Central Coast Salish Nations are concerned that the Aboriginal and Treaty Rights Paper fails to fully comprehend and shed light upon the duty to consult and accommodate as a means of recognizing and protecting aboriginal and treaty rights. This is a matter of great concern to the Western Central Coast Salish Nations as this reflects one of the core concerns they have about the Department of Fisheries and Oceans' approach to consultation and accommodation. Aboriginal people see DFO's obligation in this manner: DFO should appreciate the existence, scope and nature of aboriginal and treaty rights and the impacts that proposed fisheries actions may have on them (consultation) and then accommodate these rights in the fisheries management regime (accommodation). Instead, DFO designs policies which it views as satisfying a generic communal right to harvest for FSC purposes and then works to require aboriginal people to accommodate their rights to those policies. This approach – aside from being constitutionally unsound – engenders resistance and hostility on the part of aboriginal peoples and prevents meaningful participation in fisheries management by many of these peoples.

47. In 1982 the Constitution of Canada was fundamentally altered to recognize and affirm the aboriginal and treaty rights of aboriginal peoples throughout Canada. This recognition and affirmation was both forward looking and backward looking. Section 35 of the ***Constitution Act, 1982*** protected future rights that would be created in modern land claims agreements. However, Section 35 also recognized and affirmed the existing aboriginal and treaty rights of aboriginal peoples.

48. Section 35 of the ***Constitution Act, 1982*** was needed because of a simple fact – Canadian society and the Canadian state persistently failed to respect the rights of aboriginal peoples as legal rights despite our apparent commitment to the rule of law. This history is long and grim: prior to ***R. v. White and Bob,*** treaty rights were denied legal status; prior to ***Calder*** it was argued that aboriginal title had been extinguished; prior to ***Sparrow,*** it was argued harvesting rights required Crown recognition before they could be enforced; prior to ***Delgamuukw,*** it was denied that aboriginal title could be a right to the land itself; prior to ***Haida,*** the duty to consult was denied in respect of aboriginal rights; and prior to ***Mikisew,*** it was denied that the duty to consult could extend to holders of treaty rights. As the Court said in ***Sparrow***:

> For many years, the rights of the Indians to their aboriginal lands -- certainly as legal rights -- were virtually ignored. … By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the Statement of the Government of Canada on Indian Policy (1969), although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land . . . are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community". In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument; see The Quebec Boundaries Extension Act, 1912, S.C. 1912, c. 45. It took a number of judicial decisions and notably the Calder case in this Court (1973) to prompt a reassessment of the position being taken by government.
>
> ***R. v. Sparrow***, [1990] 1 S.C.R. 1075 at 1103.

49. Thus, while the modern law of aboriginal rights is directed at the goal of the reconciliation of aboriginal and non-aboriginal society, the jurisprudence recognizes that reconciliation must take place in a historic context in which the rights and aspirations of aboriginal people were minimized or ignored. The possibility of future reconciliation through consultation, accommodation and modern treaty negotiations cannot be achieved with without recognizing this context. It is thus important to read the opening words of the ***Mikisew*** decision in their entirety:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. **The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies**. [emphasis added]
>
> ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage***) [2005] 3 S.C.R. 388, 2005 SCC 69 (CanLII) at para. 1.

50. The promise of Section 35 is both a promise of change and a promise of recognition of that which already exists. As the Supreme Court of Canada said in the ***Secession Reference***:

> Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the Constitution Act, 1982 included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise" of s. 35, as it was termed in R. v. Sparrow, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments.
>
> ***Reference re Secession of Quebec,*** [1998] 2 S.C.R. 217, 1998 CanLII 793 (S.C.C.) at para. 82

51. Thus, the whole purpose of the introduction of Section 35 and the modern development of aboriginal and treaty rights law is to encourage respect for these rights as legal rights and to encourage respect for these peoples as peoples who have a special and yet vulnerable place in our society. They are minorities who are subject to being potentially ignored and adversely affected by government action, particularly if that government action is not planned and carried out in a way that actually understands and respects these rights. As the Supreme Court of Canada put it in ***Gladstone*** in its discussion of how commercial aboriginal rights are to be given priority:

> Where the aboriginal right is one that has no internal limitation then the doctrine of priority does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. **This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery**.
>
> ***R. v. Gladstone*, [1996] 2 S.C.R. 723 at para. 62.**

52. It was in order to show the procedural aspect of aboriginal (and implicitly treaty) rights that the duty to consult was developed. But what must be borne in mind is that the purpose of imposing this procedural duty is to ensure that the "prior interest of aboriginal rights holders in the fishery" is reflected in resource allocation.

53. Following the recognition of aboriginal rights as existing rights and the requirement for consultation that came with these rights, the Crown adopted a strategy of deferring actual respect and consultation until after a court had

judicially recognized the right in question. Thus, if a First Nation could not show that a court had already recognized a right, the government essentially took the position that no constitutional obligations arose in respect of that right and, in particular, there was no duty to consult in the constitutional sense. Essentially, the rights were relegated to being treated as mere interests and the aboriginal people as another stakeholder. If aboriginal people wanted to achieve legal recognition of their rights, they had to persuade a court to issue a remedy on either a final or interlocutory basis.

54. This was the issue that gave rise to the ***Haida*** and ***Taku*** litigation and led to the following observation in ***Haida***:

> 6 This brings us to the issue before this Court. The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the forests in Block 6 of the land. But the Haida people also claim title to the land — title which they are in the process of trying to prove — and object to the harvesting of the forests on Block 6 as proposed in T.F.L. 39. In this situation, what duty if any does the government owe the Haida people? More concretely, is the government required to <u>consult</u> with them about decisions to harvest the forests and to <u>accommodate</u> their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?
>
> 7 The stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida's claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.
>
> 8 The government, in turn, argues that it has the right and responsibility to manage the forest resource for the good of all British Columbians, and that until the Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated.

> 9 The chambers judge found that the government has a moral, but not a legal, duty to negotiate with the Haida people: 2000 BCSC 1280 (CanLII), [2001] 2 C.N.L.R. 83, 2000 BCSC 1280. The British Columbia Court of Appeal reversed this decision, holding that both the government and Weyerhaeuser have a duty to consult with and accommodate the Haida people with respect to harvesting timber from Block 6: 2002 BCCA 147 (CanLII), (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147, with supplementary reasons 2002 BCCA 462 (CanLII), (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462.
>
> 10 I conclude that the government has a legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser.
>
> ***Haida Nation v. British Columbia (Minister of Forests)*** **[2004] S.C.R. 511, 2004 SCC 73 (CanLII) at paras. 6-10**

55. Chief Justice McLachlin further comments on the relative merits of the duty to consult and recourse to interlocutory injunctions as follows:

> Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507, at para. 31, and *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims

> litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.
>
> ***Haida*, supra at para. 14**

56. The Chief Justice then goes on to describe the underlying source of the duty to consult as follows:

> 25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. **The honour of the Crown requires that these rights be determined, recognized and respected**. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. **While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.**
>
> ***Haida*, supra at para. 25**

57. These passages and what follows show that, at its heart, the duty to consult is intimately connected to the Crown's duty – arising out of the honour of the Crown – to determine, recognize and respect aboriginal and treaty rights. We thus see the courts say things such as:

a. The duty to consult has to be more than just a chance to "blow off steam". That is, where the consultation process leads to the conclusion that something should be done then the Crown must act.

Mikisew, supra at para. 54

b. Thus the duty to consult has to be carried out in a framework where it is actually possible to affect decision making and decisions have not already been made. It implies that the Crown must be able to approach the subject with an open mind and adjust its course of action where warranted.

***Haida*, *supra* at paras. 39-51**

c. The duty to consult imposes a positive obligation to reasonably ensure that First Nations are provided with all necessary information in a timely way so they have an opportunity to express their interests and concerns and to ensure that their representations are seriously considered and wherever possible demonstrably integrated into the proposed plan of action.

***Halfway River v. B.C. (Ministry of Forests), 1999 BCCA 470* at para. 160**

d. This means the duty to consult has to start early in the Crown's decision making process and certainly before momentum toward a certain course of action has developed.

Squamish v. British Columbia (Sustainable Resource Development),* 2004 BCSC 1320 at para. 74*;
***Dene Tha' v. Canada (Minister of the Environment)*, 2006 FC 1354**

e. The consultation must be sensitive to issues reasonably raised in the context of the right. Thus, for example, if the right to harvest implies the maintenance of a species or habitat for a species, then the consultation must include this within its consideration.

***West Moberly*, supra; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 46**

f. The carrying out of the duty necessitates an assessment of the merits of the claimed rights, the strength of the claim and the risk of adverse effects at an early stage. Absent a proper assessment of the strength of claim in each particular case it is difficult to see how the mandate to have meaningful consultation could possibly be carried out.

***Haida, supra,* at paras. 39-51*; Wii'litswx v. British Columbia (Minister of Forests),* 2008 BCSC 1139 at para. 8**

g. The duty to consult cannot be reduced to "one size fits all" approach or "per capita" formulas that are not sensitive to the actual nature of the rights in question and the impact to be suffered by the First Nation.

***Huu-Ay-Aht v. B.C. (Minister of Forests),* 2005 BCSC 697**

58. To this end, it is important that the Commission carefully consider the distinction drawn by Supreme Court of Canada in ***Haida*** and ***Taku*** between the test for infringement (which deals with 'insignificant adverse effects') and the trigger for the procedural aspects of the duty to consult. Placing too large a focus on 'insignificant adverse effects', as is the temptation in the Aboriginal and Treaty Rights Paper, causes the heart of the duty to consult indentified above to be obscured. In ***Mikisew,*** the Court made it clear that the real flexibility in the duty to consult lies not it the trigger but in the determination of the depth of consultation required. This only makes sense, for without consultation at an early stage in the face of potential adverse effects, how can the Crown assess whether the effects are insignificant or not?

59. It should be noted that in an analogous situation to the Douglas Treaties, the United States courts have held that the terms of Stevens Treaties require including the aboriginal people of Washington State in a form of co-management of the fisheries resource. This is not inconsistent with the idea that the Government has a management role that must take into account the interests of

all while recognizing that the aboriginal interests and their special constitutional status give rise to different considerations.

> ***United States v. Washington*, 384 F. Supp. 312, 343 (W.D. Wash. 1974) Lexis 12291, aff'd in *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 669 (1979), U.S. Lexis 43**

60. Ultimately, consultation and accommodation are designed to serve a purpose – in the largest sense, to help effect a reconciliation of aboriginal and non-aboriginal society. The means by which consultation and accommodation achieve this end is by requiring the Crown to take aboriginal and treaty rights seriously in making decisions that may affect such rights. This mandates trying to understand the rights and giving them their appropriate place in the constitutional framework that has been articulated by the Supreme Court of Canada. It is only by doing this that aboriginal peoples will have some assurance that their pre-existing rights will be taken seriously as legal rights and not merely relegated to a political process of compromise and disregard. The effect of doing this over time will be to bring aboriginal people into the fisheries management regime with a sense that this is a regime which is actually working to better their situation rather than merely addressing existing, non-aboriginal vested interests.

COMMISSION OF INQUIRY INTO THE DECLINE OF SOCKEYE SALMON IN THE FRASER RIVER

In the matter of Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a commission do issue under Part I of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as Commissioner to conduct an inquiry into the decline of sockeye salmon in the Fraser River

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RESPONSE OF THE STÓ:LŌ TRIBAL COUNCIL AND CHEAM INDIAN BAND STANDING GROUP TO THE COHEN COMMISSION'S OCTOBER 1, 2010 POLICY AND PRACTICE REPORT, "THE ABORIGINAL AND TREATY RIGHTS FRAMEWORK UNDERLYING THE FRASER RIVER SOCKEYE SALMON FISHERY"

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1. This is the joint submission of the Stó:lō Tribal Council ("STC") and the Cheam Indian Band ("Cheam") on the October 1, 2010 policy and practice report issued by Commission Counsel, entitled "The Aboriginal and Treaty Rights Framework Underlying the Fraser River Sockeye Salmon Fishery" (the "Report"). While in general we regard the Report as providing a good overview of the current state of domestic case law pertaining to Aboriginal and treaty rights, we do have comments on the law and practical implications, as set out below.

A. Inherent Rights

2. It is important to understand the difference between the inherent rights of Indigenous Peoples and Aboriginal Title and Rights at common law. Aboriginal Title and Rights crystallize at the time of contact and are subject to limitation, as set out in the case law. Inherent Rights exist independent of recognition by any other legal system and are informed by indigenous laws. Indigenous Peoples had and continue to have their own legal systems, land tenure systems and management systems for water, natural resources and wildlife. The inherent rights and powers of Indigenous Peoples, including Indigenous legal systems, are inalienable. These rights cannot be transferred or taken away.

3. Indigenous Peoples and nations are the original peoples of their territories and waters. They govern and own their territories based on their deep-rooted connection to their territories and waters. In their own languages they often call themselves "the People" of the respective territories – their names tell them where they come from. In the case of the Stó:lō , their name means the People of the River; this is how deeply they are connected to the Fraser River. Indigenous Peoples and nations have established relationships with other Indigenous Peoples through trade and commerce, the issuance of declarations, and the creation of protocols.

4. Indigenous Peoples have sustainably managed sockeye salmon throughout the Fraser watershed since time immemorial. Indigenous knowledge is key to returning to sustainable management of the salmon.

5. Sockeye have always been part of Indigenous economies along the Fraser, perhaps particularly for the Stó:lō. The sockeye have always been at the centre of their economy and culture. Indigenous laws and knowledge ensure that salmon are taken and used in a manner that is economical and environmentally and culturally sustainable. Western economic models and management systems aiming at linear growth and profit maximization have led to the depletion of the salmon. These are different from indigenous economies, which are more circular and focus on the reproduction of the resource, the maintenance of stocks and the sustaining of communities.

6. The distinction between "food fishing" and "commercial fishing" is a colonial creation that is not reflected in Indigenous economies:[1]

> In the traditional social systems of the Indians in British Columbia there was no distinction between food fishing and commercial fishing. In the Indian economies that existed during the fur trade era (1780s to 1850s) there was no such distinction… This distinction has been imposed by the white governments… Indians throughout British Columbia have always caught, sold or traded their fish and from the Indian position, changes in technology and equipment or the development of non-Indian exploitation of the fishing resource could <u>not</u> alter the fundamental fact of Indian sovereignty, Aboriginal Rights and the unity of "food" and "commercial" fishing.

7. The creation of a test for "commercial" fishing that requires proof of an extensive pre-contact practice of trading in salmon and engaging in a Western-style economy is a contradiction, the intended result of which is the limitation of the Aboriginal right to fish and the consequent expansion of the industrial commercial fishery. The proper approach is to look at overall indigenous economies and recognize the Aboriginal right to have an economy and independent economic base built on salmon, as has been the case since time immemorial.

8. The Stó:lō have never extinguished or ceded their inherent rights and jurisdiction. They maintain the position that they have the right to fully participate in all management decisions regarding the sockeye salmon fishery as equal partners.

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[1] Ware, Reuben, *Five Issues – Five Battlegrounds*, Coqualeetza Education Training Centre (1983), p. 7.

9. It is important to note that Indigenous Peoples are rights-holders and not stakeholders; they cannot simply be approached through stakeholder engagement processes with an ability to offer input but no decision-making power. Rather, independent Indigenous decision-making processes have to be devised and Indigenous Peoples have to be equal decision-makers regarding management of the Fraser River Sockeye Salmon in their respective territories and waters.

10. The legal status of Indigenous Peoples and nations predates contact with Europeans. It precedes any assertion or assumption of sovereignty by states such as Britain or Canada based on colonial doctrines. Indigenous Peoples have territorial integrity and sovereignty but, unlike states, theirs is not based on colonialism. In the Canadian context, especially in British Columbia, the inherent power and rights of Indigenous Peoples have been disrespected and denied through deliberate colonial laws and policies of Canadian governments. The Supreme Court of Canada in the *Haida Nation* decision recognized the need to reconcile Aboriginal sovereignty with assumed Crown sovereignty.[2]

11. This has happened in some countries in Latin America where legal pluralism has been recognized in the constitution of the respective countries and constitutional enabling provisions allow for the co-existence of indigenous legal systems and Western legal systems on equal footing. One is not subsidiary to the other or subject to test and limitations imposed by one on the other. It allows for parallel legal orders. Within the scope of this Inquiry, this would mean a recommendation to enable the co-existence of Western and Indigenous management systems regarding the Fraser River Sockeye Salmon, where Indigenous Peoples are equal decision-makers.

B. International Standards

12. The political status of Indigenous Peoples is *equal* to all other peoples in the world. Indigenous peoples possess the inherent power to govern their nations and territories.

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[2] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 20.

International law has recognized that Indigenous Peoples have the collective right to self-determination. Indigenous Peoples and nations, have the right to self-determination, which means they can freely and independently determine their own political, legal, economic, social and cultural systems without external interference.

13. As set out in the Cohen Commission Policy and Practice Report on International Law Relevant to the Conservation and Management of the Fraser River Sockeye Salmon, customary international law and principles of international law constitute sources of international law.[3] Principles of international law often find expression in treaties and declarations. Whereas the Rio Declaration on the Environment gave expression to many international environmental law principles, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[4] gives expression to many international law principles with respect to Indigenous Peoples.

14. Of all human rights instruments, the UNDRIP took the longest to negotiate in UN history. It resulted, however, in consensus being built among the community of nations, reflective of the necessary *opinio juris*. In addition, the principles of the UNDRIP have started to be implemented in state practice and recognized by international bodies, tribunals and courts. After over 20 years of negotiation and with the vast majority of the members of the United Nations voting in favour of the UNDRIP, its principles now form part of international law and constitute minimum standards for the protection of indigenous rights to be implemented at the national level.

15. In situations where the necessary principles have not been set out or implemented in domestic law, the courts often look to international law. In regards to the scope of the Commission's mandate, these international principles can play an important role in proposing ways to ensure the sustainable management of the Fraser River sockeye. Some of those important elements and principles of international law are set out in the submissions that follow.

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[3] Cohen Commission (2010) Policy and Practice Report on International Law Relevant to the Conservation and Management of the Fraser River Sockeye Salmon, paras 7-13

[4] http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

16. The UNDRIP contains minimum standards and norms that can be the starting point for decolonizing the state-Indigenous Peoples relationship. The UNDRIP recognizes that Indigenous Peoples are subjects of international law and have the right to self determination. Article 3 of the UNDRIP sets out that Indigenous Peoples have the right to self-determination: "By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This article replicates the wording of Article 1 of the UN Covenant on Civil and Political Rights and the UN Covenant on Economic, Social and Cultural Rights, also known as the Decolonization Covenants, which are binding international law instruments to which Canada is a party. Canada is therefore bound to respect the right to self-determination; the UNDRIP Article 3 just confirms that this right also applies to Indigenous Peoples.

17. Article 25 of the UNDRIP specifically refers to water: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard." Article 26 states:

> 1. Indigenous Peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous Peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, and those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous Peoples concerned.

18. The UNDRIP affirms Indigenous territorial rights within a context of respect for the right to self-determination as peoples. The remedial and substantive standards and norms set out in the UNDRIP to recognize, protect and respect indigenous inherent land systems are strong and raise the bar relative to common law recognition of Aboriginal Title and Rights with respect to how decisions are made about Indigenous lands, territories and resources. The UNDRIP states that indigenous territories are for *Indigenous* use, development and control. States are legally and politically expected to recognize and, if needed, protect indigenous territories in accordance with indigenous "customs, traditions and land tenure systems.

19. Indigenous Peoples have the remedial rights to restitution of lands, territories and resources that have been dispossessed, confiscated, taken, occupied, used or damaged without their free, prior and informed consent (Art. 28). Indigenous Peoples have the right to conserve and protect the environment and productive capacity of their territories, lands and resources (Art. 30). Indigenous Peoples have the right to determine and develop priorities and strategies for the development or use of their territories or lands and other resources (Art. 32). States must obtain Indigenous consent before proposing any development project that can affect their lands, territories and resources as well as mitigate any adverse environmental, economic, social, cultural or spiritual impacts (Art. 32).

20. Finally, the UNDRIP contains a non-extinguishment standard to ensure that any implementation of indigenous rights under that instrument do not diminish or extinguish rights that Indigenous Peoples have now or in the future (Art. 45). The goal is to create harmonious and cooperative relations between states and Indigenous Peoples. These standards provide a pathway to address the question regarding jurisdiction and management of the fishery.

21. International customary law and general legal principles recognize the right of Indigenous Peoples to legal recognition of their varied and specific forms of modalities of their control, ownership, use and enjoyment of territories and property. After the UNDRIP was adopted by the UN General Assembly in 2007, the Supreme Court of Belize applied the UNDRIP standards on land, territories and resources and other regional principles to interpret and ultimately find that the respective Mayan People have a distinct land system, which the state of Belize had to respect, in addition to Mayan rights.[5]

22. Prior informed consent is referred to in different provisions throughout the UNDRIP. Article 19 stipulates that: "States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures

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[5] *Aurelio Cal and the Maya Villages of Santa Cruz and Conejo v. AG of Belize and Minister of Natural Resources and Environment* (2007) Claim Numbers 171 and 172 of 2007, ruling by Chief Justice of Belize, the Honourable Abdulai Conteh.

that may affect them." This provision applies to regulations of the salmon fishery and any management decisions to be made.

23. Article 32(2) stipulates that "states shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

24. According to the international standard contained in the UNDRIP, the free, prior informed consent of Indigenous Peoples is required for any land and resource developments in or that affect their territories. Indigenous Peoples must be provided with all the information to enable us to make a free and informed decision about land and resource development. The principle of free, prior informed consent recognizes Indigenous jurisdiction and is a much higher standard than consultation. On the other hand, in simple consultation processes, the final decision and jurisdiction remains with the government.

25. As a signatory to the Convention on Biological Diversity (CBD), Canada was a party to negotiations that enshrined the principle of free prior informed consent of Indigenous Peoples to development in or affecting their traditional territories. Canada, as a party to the CBD, must implement the CBD provisions and Conference of the Parties (COP) decisions through national legislation and policies. One of the instruments elaborated by the Article 8(j) Working Group and approved by the Conference of the Parties are the Akwé: Kon Guidelines[6] for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place or which are likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities and which enshrine a prior informed consent requirement.

26. Similarly, prior informed consent standards are enshrined in other multilateral environmental agreements and international human and indigenous rights instruments. There is a

jurisdictional-procedural element to prior informed consent and a substantive element that ensures that the rights of Indigenous Peoples are taken into account, which enables the full participation of Indigenous Peoples as equal decision makers. The principle of Indigenous prior informed consent has also been recognized in a number of other multi-lateral environmental agreements. It clearly forms part of international law and is a key principle that is binding on Canada and should be implemented in regard to all decisions regarding the management of the Fraser River Sockeye Salmon.

C. Government Policies

27. The Cohen Commission policy report aims to set out the Aboriginal and Treaty Rights framework, but it does not address government policy in regard to that framework. Current federal government policies do not recognize Aboriginal Title and Rights and fail to implement court decisions recognizing such rights. In a number of other countries and jurisdictions where Aboriginal Title and Rights have been judicially recognized, substantial legislative and policy reform has followed. The Canadian government has failed to meaningfully implement the Supreme Court of Canada decisions which recognize Aboriginal Title and Rights, including by failing to negotiate at the treaty tables from a position of recognition of such rights. Aboriginal Peoples who do not agree with the limitations in the federal policies and negotiating mandates, and therefore do not participate in such negotiations, often feel they have no alternative but to exercise their rights on the ground.

28. Current Canadian policies in regard to Indigenous rights do not recognize the inherent dimension to such rights. They do not meet the minimum standards set out in the UNDRIP, nor, indeed, section 35 of the Canadian Constitution. The policies right now focus on limiting and extinguishing Indigenous rights and need to be changed in order to ensure implementation of international standards and Canadian court decisions recognizing Aboriginal Title and Rights.

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[6] Found at: http://www.cbd.int/doc/publications/akwe-brochure-en.pdf.

29. Current federal and provincial treaty negotiating mandates do not allow for Aboriginal Title and Rights to water, rivers and the foreshore to be covered. No agreement negotiated under the BC treaty process to date recognizes rights to water, a river or the foreshore.

30. Fishing rights and allocations are dealt with in separate agreements that have to be renewed separately from comprehensive claims agreements. In addition, unless fishing allocations have been previously negotiated, the federal government currently refuses to negotiate fisheries agreements pending the recommendations of the Cohen Commission.

31. The policy and the very limited mandates of federal and provincial negotiators have stalled negotiations in the BC treaty process because the majority of treaty tables have rejected the current approach. They have formed a group known as the Common Table to oppose the narrow treaty negotiation policy and mandates. Similarly, Indigenous Peoples outside of the treaty process face the same limitations because there are no other processes available that are based on the recognition of Aboriginal Title.

Federal Fisheries Policies

32. Federal fisheries policies and legislation do not recognize or implement the Aboriginal Rights to fish, rather they aim at maintaining exclusive federal jurisdiction and discretion over fisheries matters. Aboriginal Peoples who do not take out or conform to licences issued by the DFO will be prosecuted and have to bring an Aboriginal Rights defence to avoid quasi-criminal sanctions. Under the *Fisheries Act*, the Minister has absolute discretion to issue licences. Section 7(1) stipulates that:

> Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licence for fisheries or fishing, wherever situated or carried on.

33. Aboriginal communal fishing licences state on their face that "the licence does not define an Aboriginal right to fish… The licence is issued under the authority of the *Fisheries Act* and Section 4 of the Aboriginal Communal Fishing Licences Regulations." Under the *Fisheries Act*, licences are issued at the discretion of the minister and do not enshrine a right.

34. The 1992 Aboriginal Fisheries Strategy ("AFS") sought cooperation by promising stable allocations of salmon, and the chance to sell fish legally under the experimental Pilot Sales program. The 1992 season was a fiasco, and Aboriginal Peoples went from regular weekly fishing times to tightly controlled limited openings. 1992 was also the first year a recreational fishery on sockeye salmon was opened. Recreational fishermen enjoyed more openings than Aboriginal fishermen and continue to do so to date.

35. In the following years, DFO was asking individual bands to sign on to another round of agreements, take the offered allocations, and go along with rigid license conditions.[7] For Aboriginal fishing communities, the alternative was bleak. If they rejected an agreement, then DFO would just impose an allocation, and the fishing would still be subject to a license but without a pilot sales component,[8] since from DFO's perspective, selling fish was still a privilege it could grant or refuse.

36. Aboriginal Peoples continue to have serious concerns regarding comprehensive fisheries agreements. They insist they do not need DFO's permission to pursue their livelihoods. DFO still refuses to recognize indigenous inherent jurisdiction over traditional fisheries. As one commentator has noted:

> The road the AFS did not take was the more difficult work of restoring to the tribal communities greater control over their fisheries, allowing them to decide for themselves how to restore the economic relationship they have always maintained with the resource in cooperation with neighbouring non-native fishers.[9]

37. Instead, DFO responded to *Sparrow* by tightening its control, and budgets for enforcement and monitoring of Aboriginal fisheries were expanded. And if Aboriginal Peoples asserted some power of their own, DFO quickly instituted enforcement actions.

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[7] For a list of ACFL conditions, see, e.g., Sheldon Evers and Fisheries and Oceans Canada, "Aboriginal Communal Fishing License for Cheam First Nation for Salmon LFA-09-CL213/CHEAM," May 6, 2009.

[8] Fisheries and Oceans Canada, "Policy for the Management of Aboriginal Fishing [Draft]," March 1993, 4.

[9] Terry Glavin, *Dead Reckoning: Confronting the Crisis in Pacific Fisheries*, David Suzuki Foundation Series (Mountaineers Books, 1997), 145.

38. Because of the consultation language in *Sparrow*, the new system required more contact between Indigenous communities and DFO staff. But it was not the kind of relationship the communities wanted. Consultation meant sitting in meetings where DFO informed you of decisions already made or took unilateral decisions after pro forma meetings.

39. The *Sparrow* decision set out priority resource allocation for Aboriginal fisheries, with the only superseding priority being "conservation". Rather than implementing the recognized Aboriginal rights, DFO has claimed exclusive jurisdiction over management and conservation to the exclusion of Aboriginal Peoples. To date DFO does not recognize Indigenous control and jurisdiction over conservation and management of fisheries in Indigenous territories. There is clearly a strong Indigenous dimension to conservation and indigenous knowledge continues to hold the key to sustainable management of the Fraser River sockeye.

40. Indigenous Peoples who do not sign agreements with DFO accepting their exclusive jurisdiction over fisheries management, and instead exercise their rights, are subject to ever-increasing enforcement actions and quasi-criminal prosecutions. In a recent decision dealing with fisheries charges from 2002, 2004 and 2005, the court ruled that the Crown did not provide an equal playing field even in the course of such prosecutions and all charges were stayed.[10]

41. The issue of the criminalization of Indigenous Peoples who exercise their Aboriginal and inherent rights has also been brought before a number of UN Committees, including the UN Committee on the Elimination of all Forms of Racial Discrimination (CERD), which called on Canada to change their policies from non-recognition to recognition of Aboriginal Rights.[11]

42. In a recent decision, *Ahousaht Indian Band v. Canada (Attorney General)*,[12] the BC Supreme Court returned to the issue of the Aboriginal Right to fish and sell fish and engaged in a

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[10] *R v. Quipp*, [2007] B.C.J. No. 60, para 82.
[11] CERD Concluding Observations on Canada (CERD/C/CAN/CO/18):
[12] 2009 BCSC 1494.

detailed analysis of the *Fisheries Act*, associated regulations and DFO policies. The court observed:[13]

> As a result of this legislative scheme and the broad discretion conferred on the Minister, most of the policies and management schemes that are at issue in this case have not been imposed through legislative instruments such as statutes or regulations. Rather, they have been imposed through discretionary decisions of the Minister relating to the issuance of licences and the conditions imposed on those licences.

The court further found at para 752 that:

> The *Fisheries Act*, on its face, imposes a complete prohibition against the activity that forms the basis of the plaintiffs' aboriginal rights. Pursuant to s. 7 of the Act, the Minister's discretion to issue licences in respect of that activity is absolute. Section 22 of the *Fishery (General) Regulations* confers on the Minister a broad discretion to impose licence conditions. While DFO policies certainly provide considerable guidance with respect to the exercise of the Minister's discretion, they do not, as Canada itself acknowledges, bind or confine the Minister in his or her exercise of that discretion.

43. After a detailed analysis of the multitude of government policies that affect Aboriginal fisheries, the court turned to the issue of infringement and held at para 758:

> Starting with the first question, I do conclude, as the plaintiffs submit, that the *Fisheries Act* and regulations impart to the Minister an unstructured discretion that risks infringing the plaintiffs' aboriginal rights. With respect to the second inquiry, DFO policies do not presently recognize aboriginal fishing rights outside the context of an FSC fishery. It obviously follows that the Minister's discretion to issue licences accommodating aboriginal fishing rights, other than for FSC purposes, is unstructured and unconstrained by legislation. I will return to the FSC fishery later. For now, I turn to the third inquiry, whether the regulatory regime meaningfully diminishes the exercise of the plaintiffs' aboriginal rights to fish and to sell fish.

44. The court ultimately concluded:

> [790] The plaintiffs assert in this lawsuit an aboriginal right to sell their fish commercially. Although Canada has many programs designed to enhance commercial fishing opportunities for aboriginal fishers, fundamentally Canada

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[13] Para 553

> does not recognize the right of those fishers to fish and to sell their fish commercially as an aboriginal right. Canada argues that the plaintiffs are the beneficiaries of these special programs that protect and enhance their participation in the commercial fishery. However, I am satisfied that these programs have been largely ineffective in assuring the plaintiffs' reasonable participation in accordance with their preferred means in the commercial fishery. Indeed, those programs have not succeeded in maintaining even a modest native commercial fishery.
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> [791] I conclude that the plaintiffs have proved that Canada's fisheries regulatory regime *prima facie* infringes their aboriginal rights to fish and to sell fish by their preferred means, both legislatively and operationally.

45. Applying this analysis to a number of Aboriginal Peoples in British Columbia who have maintained indigenous economies based on the sockeye salmon, an Aboriginal right to harvest fish and sell it, by their preferred means, should be recognized as a right and implemented by DFO. In the context of the Stó:lō people this would mean a community-based river fishery, including the use of small boats and other small-scale fishing techniques.

D. Aboriginal Law Is Constantly Developing

46. It is important to remember that Aboriginal law is in a state of development. While a number of principles have been established, more than perhaps any other area of law the state of the jurisprudence is unsettled and underdeveloped. New principles arise often, and it is plain that many more will need to be defined before reconciliation will be achieved, at least in the courts.

47. In this sense, Aboriginal law is constantly in flux. For instance, although the existence of Aboriginal title was recognized in 1973, in *Calder*,[14] it was not until 1997 in *Delgamuukw*[15] that is basic nature was defined. Similarly, while the Supreme Court of Canada recognized an Aboriginal right to fish in 1990 in *Sparrow*,[16] only in 1996, in *Van der Peet*,[17] did it set out a test for how Aboriginal rights are proven. Recently, in *Haida Nation* in 2004, the Court recognized

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[14] *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313.
[15] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.
[16] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
[17] *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

the Crown's broad duty to consult where government action could adversely affect an Aboriginal right, even if that right is not yet proven. In *Mikisew*,[18] that duty has been extended to a treaty context, where government must consult if exercising a right under the treaty that may adversely affect the First Nation's treaty right.

48. Broad issues that are yet to be litigated, and for which the jurisprudence remains entirely undeveloped, include the Aboriginal right to self-government, and title claims to the seabed and riverbed. Further, a slew of more specific issues remain unsettled, even if they have been previously litigated. For example, in *Douglas, 2007*,[19] the BC Court of Appeal held that fish, social and ceremonial fisheries do not need to precede commercial or recreational fisheries in order to meet the requirement of priority, but the Court of Appeal has recently decided to revisit that issue.[20]

49. Given the developing state of the law, the exact parameters legal relationship between the Crown and Aboriginal Peoples are often not jurisprudentially defined. Aboriginal Peoples have had to engage in a very long and expensive process of litigation with the Crown to force the Crown to have any recognition of and respect for Aboriginal title and rights. Moreover, it is plain and obvious that it has only been through litigation that the Crown has agreed to negotiate with Aboriginal Peoples in a substantive manner at all.

Aboriginal title and rights litigation, however, is a daunting process for First Nations. The legal issues and the evidence are generally exceedingly complex. For instance, the trial in *Delgamuukw* lasted 384 days. The trial decision was issued in 1991. The appeal to the SCC, which rendered its decision at the end of 1997, resulted in a new trial being ordered on the ground that the trial judge had improperly refused to admit oral history evidence. The trial in *Tsilhqot'in Nation v. British Columbia*[21] lasted 339 days over five years and resulted in the court opining that the Tsilhqot'in have Aboriginal title to approximately 2,000 square kilometres of land, but declining to grant a declaration to that effect. The trial in *Ahousaht* lasted 110 days.

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[18] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69.
[19] *R. v. Douglas et al*, 2007 BCCA 265.
[20] See *R. v. Quipp*, 2010 BCCA 389.

Other First Nations have had to take the Crown to court simply to secure advance costs in order to be able to litigate their claims at all.[22]

E. The Honour of the Crown and Consultation/Co-Management

50. As the Practice and Policy Report sets out, where the Crown infringes Aboriginal rights or title such infringement will only be justified if it is pursuant to a valid legislative objective and the legislation upholds the honour of the Crown.[23] The honour of the Crown is also engaged where the Crown's actions would adversely impact on *unproven* claims to Aboriginal title or rights. There too the Crown must act honourably, and the content of that duty will depend on the strength of the claim and the seriousness of the adverse impact.[24]

51. The Report suggests that: "[t]he fact that one aboriginal group has a right to do a particular thing will not be, without something more, sufficient to demonstrate that nay other aboriginal group holds the same right" (para 115), "the vast majority of right to fish claims asserted in respect of Fraser River sockeye have yet to be determined by the courts" (para 115), that DFO may be required to apply "tentatively" principles relating to the justification of infringements of Aboriginal rights (para 116), and, "in some cases", a duty to consult, "and possibly, to accommodate" may arise (para 116).

52. With respect, these statements do not reflect the full content of the honour of the Crown. While it may be that most of the claims to Fraser River sockeye are unproven, given what we know of Aboriginal history, it is simply obvious that First Nations along the coast and along rivers have Aboriginal rights to fish. Furthermore, it is perfectly clear that First Nations along the Fraser have rights to fish sockeye. No serious doubt can be entertained in this respect, and a

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[21] 2007 BCSC 1700.
[22] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71.
[23] See the Report at p. 34 and *ff*.
[24] See the Report at p. 55 and *ff*.

position to the contrary would not uphold the honour of the Crown. As the Court stated in *Haida Nation* at para 33:

> To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow*, *supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

53. It is plain that the honour of the Crown is profoundly implicated in the management of the sockeye fishery, at least in respect of every First Nation along the Fraser. The right to fish sockeye is of tremendous importance to such First Nations, going right to the heart of their distinctive cultures. At the very least, the honour of the Crown requires deep consultation and significant accommodation.

54. Indeed, the honour of the Crown truly requires that significant decisions in the management of the sockeye fishery be shared with First Nations in a process of co-management. Application of the prior informed consent requirement would implement both the substantive rights of Indigenous Peoples and truly equal decision-making processes. Aboriginal Peoples along the Fraser, including the Stó:lō, have compelling claims to Aboriginal title over their lands and the resources within them, as well as to self-government. That is, the Stó:lō and other First Nations have strong prima facie claims to jurisdiction over the resources situated in, or passing through, their traditional territories, including Fraser sockeye. Moreover, the Aboriginal right to fish itself is a group right, requiring coordination within that group of the exercise of the right, as well as relations with other fishing groups. For Aboriginal Peoples such as the Stó:lō, the *management* of sockeye cannot rationally be divorced from the *taking* of sockeye.

F. Funding and Consultation

55. Toward fulfilling its duty to consult and accommodate First Nations in respect of the management of Fraser sockeye – and *a fortiori* in respect of its duty of co-management with First

Nations – the Crown must provide adequate and stable funding to First Nations so that they can develop the capacity to meaningfully engage in such consultation and co-management.

56. Consider, for example, the duty to consult. The BC Court of Appeal has described that duty as follows:[25]

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

57. The management of Fraser sockeye raises technical issues that plainly require specialized education and experience. In this context, it is obvious that the duty to consult (let alone the duty to co-manage) cannot be fulfilled simply by providing "all necessary information". It is plain that a First Nation can only provide meaningful input in the complex area of fisheries management if it has a high degree of technical capacity. That means that a First Nation must be able to employ technical consultants to allow it to participate in consultations with the Crown, and especially to co-manage with the Crown.

58. The result is that, in order to fulfill its duty of honourable conduct, the Crown must provide adequate and stable funding to First Nations to allow them to develop the technical capacity to engage in meaningful consultation and co-management.

59. There is emerging recognition by the courts that adequate consultation will in some cases require the provision of funding to the First Nation. In *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, the First Nation sought funding for its engagement in consultation with the Province and Platinex. In a preliminary decision,[26] the court issued an interim declaratory order requiring the three parties to enter into a consultation protocol which would provide, among other things, for "compensation and funding. In a subsequent decision,[27] the court

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[25] *Halfway River First Nation v. British Columbia*, 1999 BCCA 470, para 160; quoted in the Report at para 173.
[26] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] O.J. No. 1841 (S.C.J.) at para 188.
[27] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] O.J. No. 2214 (S.C.J.) at para 27.

observed that "[t]he issue of funding is essential to a fair and balanced consultation process, to ensure a 'level playing field'."

60. In *Dene Tha' First Nation v. Canada (Minister of Environment)*,[28] the Federal Court concluded that the Crown failed to discharge its duty to consult the Dene Tha' First Nation in respect of the portion of the Mackenzie Gas Pipeline passing through its territory. The court noted that one of the Dene Tha's concerns was "the absence of funding to be able to engage in meaningful consultation."[29] The court ultimately decided that it would hold a "remedies hearing", at which one of the issues to be addressed was to be "the provision of technical assistance and funding to the Dene Tha' to carry out the consultation."[30]

61. Other decisions also support the broad principle that adequate consultation can require funding. In these cases, although the courts did not order the Crown to provide funding to First Nations, it noted the provision of funding as a factor in finding consultation efforts to be adequate.[31]

G. Conclusion

62. It is, of course, not the role of this Commission to resolve issues of Aboriginal Title and Rights. Rather, this Commission's mandate is to make recommendations for better and more sustainable management of Fraser sockeye. The participation of Aboriginal Peoples in the management of Fraser sockeye is critical. Aboriginal Peoples have long-term knowledge and the long-term interests that are essential to ensuring that management decisions are centred on sustainability.

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[28] [2006] F.C.J. No. 1677 (T.D.).
[29] Para 114.
[30] Para 134.
[31] See *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505, 2008 BCSC 1505 at para 243; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 at paras 71, 78, 138-139, 142, 179 and 229.

63. The critical point in the current context – the Aboriginal Rights framework underlying the fishery – is that the law continues to recognize and protect the deep connection between Aboriginal Peoples and fish, especially sockeye. Concurrently, the law continues to require more substantial engagement by government with Aboriginal Peoples in the management of the fishery.

64. It is appropriate that the management of the sockeye fisheries respect these trends in the law and recognize the connection between Aboriginal Peoples and sockeye, and seek to utilize Aboriginal Peoples' expertise by incorporating them more fully within the management structure. A system of true co-management is an important means by which both to respect Aboriginal Rights and better ensure the sustainability of the sockeye.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Tim Dickson

Nicole Schabus

Dated: October 19, 2010

Case Law	
1.	*Ahousaht Indian Band v. Canada (Attorney General)*, 2009 BCSC 1494.
2.	*Aurelio Cal and the Maya Villages of Santa Cruz and Conejo v. AG of Belize and Minister of Natural Resources and Environment* (2007) Claim Numbers 171 and 172 of 2007.
3.	*British Columbia (Minister of Forests) v. Okanagan Indian Band,* [2003] 3 S.C.R. 371, 2003 SCC 71.
4.	*Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313.
5.	*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.
6.	*Dene Tha' First Nation v. Canada (Minister of Environment,)* [2006] F.C.J.No.167 (T.D.).
7.	*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 20.
8.	*Halfway River First Nation v. British Columbia*, 1999 BCCA 470.
9.	*Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505.
10.	*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69.
11.	*Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] O.J. No. 1841 (S.C.J.).
12.	*Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] O.J. No. 2214 (S.C.J.).
13.	*R. v. Douglas et al*, 2007 BCCA 265.
14.	*R. v. Quipp*, [2007] B.C.J. No. 60.
15.	*R. v. Quipp*, 2010 BCCA 389.
16.	*R. v. Sparrow*, [1990] 1 S.C.R. 1075.
17.	*R. v. Van der Peet*, [1996] 2 S.C.R. 507.
18.	*Tsilhqot'in Nation v. British Columbia,* 2007 BCSC 1700 (Executive Summary Only).
19.	*Wii'litswx v. British Columbia (Minister of Forests),* 2008 BCSC 1139.
Other Authorities	
1.	Akwé: Kon Guidelines, found at: http://www.cbd.int/doc/publications/akwe-brochure-en.pdf
2.	United Nations Declaration on the Rights of Indigenous Peoples, found at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.
3.	Ware, Reuben, *Five Issues – Five Battlegrounds*, Coqualeetza Education Training Centre (1983) pp 7 – 8.

COMMISSION OF INQUIRY INTO THE DECLINE OF SOCKEYE SALMON IN THE FRASER RIVER

In the matter of Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a Commission do issue under Part I of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as Commissioner to conduct an inquiry into the decline of sockeye salmon in the Fraser River

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SUBMISSIONS OF THE FIRST NATIONS COALITION IN RESPONSE TO THE COMMISSION'S PAPER ENTITLED "THE ABORIGINAL AND TREATY RIGHTS FRAMEWORK UNDERLYING THE FRASER RIVER SOCKEYE SALMON FISHERY"

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1. In the view of the First Nations Coalition ("FNC"), the Commission's paper entitled *The Aboriginal and Treaty Rights Framework Underlying the Fraser River Sockeye Salmon Fishery* ("Commission's Framework Paper") provides a useful overview of the legal framework that underlies Aboriginal and Treaty rights and title as it relates to the Fraser River sockeye salmon fishery. The Commission's Framework Paper references the relevant and applicable case law from the Supreme Court of Canada, British Columbia Court of Appeal, and British Columbia Supreme Court that has addressed Aboriginal title, Aboriginal rights, Treaty rights, and the duty to consult and accommodate First Nations.

2. Given the thoroughness of the Commission's Framework Paper, these submissions focus primarily on the *practical implications* of that law as it relates to the sustainability and management of Fraser River sockeye. In particular, the FNC will focus these submissions on the practical implications arising from (i) the historical context for reconciliation; (ii) the Constitutional priority of the Aboriginal right to fish for food, social and ceremonial ("FSC") purposes, (iii) First Nations' meaningful participation in the management of the fishery, and (iv) the honour of the Crown and the Department of Fisheries and Oceans' ("DFO's") duty to consult and accommodate. The submissions open with a brief response to some of the issues of law discussed in the Commission's Framework Paper.

3. It is the FNC's expectation that the dialogue resulting from the Participants' submissions on the Commission's Framework Paper will focus not so much on the *state* or *content* of the law on Aboriginal and Treaty rights, including title, to the Fraser River sockeye salmon fishery, but rather on DFO's obligations related to *the implementation* of this law. The FNC submits that when developing recommendations to improve the future sustainability of the Fraser River sockeye salmon fishery, the Commissioner must also consider how such recommendations can assist DFO in meeting its legal obligations to First Nations.

A. Response to Issues of Law Raised in the Commission's Framework Paper

i. Aboriginal Title to Fresh and Marine Waters

4. The law regarding Aboriginal title to fresh and marine waters, including submerged lands, marine areas and rivers – like all aspects of Aboriginal law – will evolve over time. While the Commission correctly notes that "no Canadian court has yet to fully apply the concept of aboriginal title to marine

areas or rivers" (Commission's Framework Paper, para. 22) this should not suggest that it is either impossible or doubtful to successfully apply the law of Aboriginal title to include water areas.

5. First Nations, including those who are members of the FNC, have consistently and strongly asserted that the territories over which they exercise and hold Aboriginal title, include not only land, but also lakes, rivers, banks, fishing rocks, and the parts of the ocean, seabed, and foreshore that they have traditionally used and occupied and continue to rely on today. First Nations' use and occupation of their territories is interconnected with the resources of those territories. For the First Nations of the Fraser Watershed and the marine area along the migratory route of sockeye salmon, use and occupancy of fresh and marine waters will be directly related to the presence of fish and marine mammals in those territories. First Nations' connections to those vital resources for sustenance, economic, spiritual, social, ceremonial and other purposes, together with the practices of fishing, hunting, gathering, are all the foundations for and indicia of Aboriginal title. Traditional villages, and later reserves, are often located adjacent to or in strategic locations along the Fraser River, its tributaries, and key marine access points. The rivers, streams, lakes, and marine areas are a fundamental part of First Nations' territories over which they assert Aboriginal title and exercise stewardship responsibilities.

6. The Commission cannot and should not assume that Aboriginal title to marine areas and rivers does not exist or that it is "impossible to discern whether such title exists" (Commission's Framework Paper, para. 29). Given the Commissioner is not mandated within his terms of reference to make findings of Aboriginal rights or title to the Fraser Watershed, neither these submissions nor the evidence to be presented in this Inquiry will seek to establish a *prima facie* case of Aboriginal title to any particular areas. However, the FNC submits that judicial findings of Aboriginal title to marine and river areas and the salmon resources are a predictable evolution of the law of Aboriginal title, should First Nations not be able to achieve recognition of their rights outside of the courtroom.

7. In the meantime, these assertions of strong Aboriginal title interests require the Crown to proceed honourably when contemplating any actions or decisions that could affect such title. Without such caution or respect the Crown would again be reverting to a post-proof sphere and, as stated by the Court in *Sparrow* and again in *Haida*, would then be treating reconciliation as a "distant legalistic goal, devoid of the 'meaningful content' mandated by the 'solemn commitment' made by the Crown in recognizing and affirming aboriginal rights and title" (*Haida*, para. 33). The FNC urges the Commission not to fall into to the trap of post-proof thinking.

ii. Way of Life includes Fish and Fishing

8. At paragraphs 42 and 43 of the Commission's Framework Paper, the Commission, paraphrasing *Sappier; Gray*, states that Aboriginal rights are not founded upon the importance of a particular *resource* to an Aboriginal people, but are founded on the importance of *practices, customs or traditions*. The Commission's Paper then goes on to note that the Aboriginal right is a right to the *action/verb (fishing)*, not the *resource/noun (fish)*. The FNC submits that the more accurate inquiry, as stated by the Court in *Sappier; Gray*, is into the pre-contact way of life, and that in such an inquiry fishing cannot be untangled from fish.

9. In *Sappier; Gray*, the Court states that it is through looking at the practices, customs and traditions that the Court seeks to grasp and understand the importance of the particular resource to the particular Aboriginal people (*Sappier; Gray*, para. 22). Therefore the verb (fishing) and the noun (fish) are intricately connected. In a case dealing with an assertion of Aboriginal fishing rights, a First Nation may produce evidence about the importance of salmon to the community, and support this with evidence of how salmon were revered, harvested, used and celebrated. Although this evidence may not lead to a finding of an Aboriginal right to salmon as a property right, it would, in our submission, lead to the finding of an Aboriginal right to access and harvest salmon which, practically speaking, result in a right to salmon. The FNC submits that the difference between asserting that fish as a resource are important to a particular First Nation, and asserting that the First Nation is a fishing people is semantic, not real. As noted above, the right to fish must include the fish and the environment that supports such fish, or it is a rather hollow right.

iii. Aboriginal Right to Manage the Fishery

10. In the Commission's Framework Paper, Aboriginal management of the fishery is discussed within the context of assertions of Aboriginal self-governance (claims of which the Commission notes have yet to reach the Court (Commission's Framework Paper, para. 148)), modern treaties, and band by-laws in regards to fishing on reserve lands. From the FNC's perspective, the Aboriginal right to manage and to be involved in management decisions regarding the fishery arises from two sources of common law: (1) Aboriginal title, and (2) Aboriginal and Treaty rights, including self-governance.

11. Aboriginal title includes the right to exclusively use and occupy an area for a variety of purposes *and* the right to choose to what ends an area will be put (*Delgamuukw*, paras. 166-168). The right to

choose how land is used necessarily includes a management component. Given the nature of Aboriginal title, the FNC submits that recognition by the Crown of the existence, or potential existence, of Aboriginal title to a territory that includes a fishery requires the recognition of the right to manage the fishery in that territory.

12. The FNC also submits that implicit in s.35 Aboriginal rights to fish for sockeye salmon is the right to make management decisions, including such things as the fishing methods, openings, and stewardship measures in place. This issue is discussed in greater detail in section B(ii) below.

13. Courts have repeatedly indicated that the content of any Aboriginal right must be guided by the Aboriginal perspective of the right (*Delgamuukw*, paras. 81-82). The First Nations' perspective on the Aboriginal right to fish is integrated and holistic; it does not parse the right to harvest and use fish from the responsibility to manage fish in a sustainable manner. The FNC submits that the law on Aboriginal rights to fish should not be rendered meaningless by reducing an Aboriginal right to fish to something we now call a harvest right. Such a right, when viewed from the Aboriginal perspective, always includes the right and responsibility to manage the fishery for present and future generations, which, in modern times, can as a minimum be described as the right to be meaningfully and collaboratively involved in strategic and operational aspects of the management of the resource.

14. Treaty rights also provide recognition of First Nations' rights as managers of the fishery. The Douglas Treaties provide rights to its signatories, including the Snuneymuxw, Tsartlip and Tsawout First Nations who are members of the FNC, to their "fisheries as formerly". Courts have interpreted the "fisheries as formerly" provision in the Douglas Treaties as including, at the very least, a right of priority over existing fish stocks, and the power to manage the fishery in a manner that does not jeopardize the Constitutionally protected rights in the treaties (*Snuneymuxw First Nation v. British Columbia*). In *Tsawout Indian Band v. Saanichton Marina Ltd.*, citing *R. v. Fowler*, the British Columbia Court of Appeal noted that the meaning of the word "fishery" could include "the business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water". Clearly, the Douglas Treaty right to the "fisheries as formerly" engages a right to be involved in the "business" of harvesting fish and gives rise to a power to "manage the fishery".

15. The FNC submits that the implications arising from the legal interpretations of Aboriginal title, Aboriginal rights, and Treaty rights as they relate to fisheries lead to the inescapable conclusion that such

rights carry the legal foundation for First Nations to demonstrate their jurisdiction over fisheries, and in particular, participation in the management, stewardship and allocation of the resources.[1]

iv. Fisheries as a Common Property Resource

16. At various points in the Commission's Framework Paper, reference is made to the fishery being the "common property" of all Canadians (Commission's Framework Paper, paras. 31, 32) and to the "common law right of public access in the fishery" (Commission's Framework Paper, para. 73). The FNC suggests that within a paper aimed at describing the *Aboriginal and Treaty Rights* Framework underlying the Fraser River sockeye salmon fishery proper emphasis should be placed on the fact that Aboriginal and Treaty rights, including rights to fish, are rights protected by s.35 of the *Constitution Act*, and are rights that take priority over other potential common law rights.

17. The FNC also submits that the legal foundation on which the fishery has come to be assumed as being common property should be carefully considered. The FNC notes, first, that the importation of British common law did not supplant First Nations' laws and, second, that the common law concept of common property of the fishery has not been consistently applied by colonial governments or bureaucrats from the mid 1800s through to today.

18. Prior to the arrival of Europeans to what is now known as British Columbia, the First Nations who inhabited the area and fished the seas and rivers operated based on a complex system of laws and relationships governing the access, harvest and trade of fish, and the associated responsibilities of stewarding the land, waters and resources. As Douglas Harris explains in the introduction to *Landing Native Fisheries*, "from the beginnings of a European presence in what is now British Columbia, Native peoples clearly articulated their rights to land and to resources, none more strongly than the right to the fisheries".[2]

19. Although some will likely argue that the *Magna Carta* entrenched the idea of fisheries as a common property resource, the FNC submits that the notion of fisheries as a common property resource was not applied by early reserve commissioners considering First Nations uses of the fishery or by officials entering into the Douglas Treaties. Nor did this concept ever supplant First Nations' legal ordering, views and use of the resource.

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[1] *Delgamuukw* at paras. 111, and 158-159.

20. Reserve Commissioners who allotted most reserves along the lower Fraser River in the late nineteenth century, did so with explicit recognition of exclusive fisheries on non-tidal stretches of the Fraser River and some of its tributaries.[3] In 1906, the Royal Commission tentatively confirmed these exclusive fisheries that O'Reilly had allotted. The idea expressed by Justice Iacobucci in *R. v. Lewis*, that "it was never the intention of the Crown to provide the Bands with an exclusive fishery in waters adjacent to reserves" simply does not hold water. As Dickson J. had noted earlier in *R. v. Jack* "...lands were to be reserved for Indians for the purpose of permitting them to continue their river fishery at the customary stations."[4] As Harris and others have pointed out, reserving exclusive fisheries and the land associated with those fisheries appears to have been one of the principal concerns of the reserve commissioners, at least until 1882.[5]

21. The colonial government's willingness to recognize exclusive First Nations fisheries (a direct assault on the notion of fisheries as a common property resource) is also evidenced in the Douglas Treaties. Governor Douglas, writing to the Hudson Bay Company in the spring of 1850 described the entering into of the Douglas Treaties in Victoria as follows: "I informed the Natives that they would not be disturbed in the possession of their village sites and enclosed fields, which are of small extent, and that *they were a liberty to hunt over unoccupied lands, and to carry on their fisheries with the same freedom as when they were the sole occupants of the country*" [emphasis added].[6]

22. Given the above, the FNC submits that the notion of the common property nature of the fishery resource is not as straightforward as the Commission's Framework Paper and the cases cited therein suggests, and cautions the Commissioner to not get distracted by this legal argument.

B. Practical Implications of the Law

i. Historical Context for Reconciliation

23. At the time of European contact, Aboriginal peoples inhabiting the Fraser Watershed and the coastal marine waters of what is now British Columbia, had created lives deeply connected with the

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[2] Douglas C. Harris, *Landing Native Fisheries: Indian Reserves & Fishing Rights in British Columbia, 1849-1925* (Vancouver: UBC Press, 2008) at p. 14.
[3] Douglas C. Harris, *Landing Native Fisheries: Indian Reserves & Fishing Rights in British Columbia, 1849-1925* (Vancouver: UBC Press, 2008) at pp. 60-91.
[4] *R. v. Jack*, [1980] 1 S.C.R. 294.
[5] Douglas C. Harris, *Landing Native Fisheries: Indian Reserves & Fishing Rights in British Columbia, 1849-1925* (Vancouver: UBC Press, 2008) at pp. 60-91.

salmon. For example, Haida ethics as expressed in beliefs says that animals, including salmon, have a spirit and that at the head of each creek resides a supernatural being, a Creek Woman, who stewards the resources in that tributary. Before any salmon can be taken from the creeks or rivers, the permission of the Creek Woman must be obtained and respect must be paid through offerings.[7] The Interior Salish express their deepest respect for the transformers who transformed life along the Fraser River, including salmon. For example, the Secwepemc tell of Coyote, a transformer, who after developing a hankering for fish, and making numerous attempts to transform himself into something that could attract such fish, was tested by three medicine women for four days and nights, and then broke the dam and summoned salmon up river. Being extremely impressed with himself he then called a large meeting so all could see his huge drying rack and all the salmon he had. The salmon, however, jumped off the rack and returned to the river, and all that was left was the slime on the stick. Coyote, in inflating his ego and showing off his ability to catch salmon, had disrespected the salmon. The Secwepemc say that when we disrespect the salmon and their homes and are more concerned about showing off our catches, the salmon will leave us.[8]

24. Indigenous families, villages and Nations rest on an interconnectedness with all the resources of the lands and waters that have sustained them since time immemorial. These peoples' indigenous laws, customs, practices and traditions are intimately connected with their fisheries in a spiritual, material and ecological manner. Their communities thrived with these salmon colonies, and their responsibilities to the salmon beings are part and parcel of who they are. Their traditional fisheries and practices exude a sophistication with, and deep respect and reverence for the salmon populations of the Fraser River which, after thousands of years of use, were thriving when the colonists arrived.

25. In just over a century much of that has been fundamentally challenged to the brink of extinction. In support of a salmon canning industry being established in the 1870s, the Canadian government began severely restricting Aboriginal river fisheries, limiting them to fish for food, prohibiting the use of their most productive (and selective) gears, such as weirs and traps, and denying them a meaningful role in the management and expansion of the fishery resulting from industrialization. The development of the commercial/industrial marine fishery, which from an Aboriginal perspective has operated for decades without sufficient responsibility to conserve the salmon resource or without respect for Aboriginal

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[6] Douglas C. Harris, *Landing Native Fisheries: Indian Reserves & Fishing Rights in British Columbia, 1849-1925* (Vancouver: UBC Press, 2008) at p. 23.

[7] Russ Jones and Terri-Lynn Williams-Davidson, "Applying Haida Ethics in Today's Fishery" in Harold Coward, Rosemary Ommer, Tony J. Pitcher, eds. *Just Fish: Ethics and Canadian Marine Fisheries* (St. John's: Institute of Social and Economic Research, 2000), p. 100.

fisheries, has been part of the continued impoverishment of Aboriginal communities. It goes without saying that this history has resulted in a deep mistrust of colonial governments and the industrial fishing sector.

26. After years of colonization, Aboriginal peoples of British Columbia began turning to the Courts to seek recognition and protection of their rights, in the hopes that such recognition would respect and help re-build their foundational relationship with the fish, waters, and lands. The relatively recent Supreme Court of Canada decisions cited in the Commission's Framework Paper have begun to affirm a constitutional protection for the rights and responsibilities to the fishery that First Nations have always exercised.

27. In 1992, apparently in response to *Sparrow*, DFO developed the Aboriginal Fisheries Strategy ("AFS") – a policy that has modestly increased some First Nations' access to salmon, and has provided some opportunities for some First Nations to become involved in economic fisheries. However the AFS, largely developed without meaningful input from First Nations, has created much controversy – both within First Nations and with other fishing sectors who have opposed the existence of AFS and initiated legal challenges against these initiatives. All this to say the path towards reconciliation paved by the Court's decisions is not for the weak of heart.

28. The FNC submits that the practical challenges and implications of implementing DFO policies and programs like AFS, the Aboriginal Aquatic Resources and Ocean Management program ("AAROM"), the Pacific Integrated Commercial Fishery Initiative ("PICFI") and others, will need to be considered when this Commission considers the challenges associated with the management of the sockeye fishery. While the AFS and other programs can be described as necessary steps, it is not a mechanism for addressing the historic wrongs, not has it sufficiently transformed the status quo in a meaningful manner so as to build First Nations' confidence that DFO is committed to achieving reconciliation.

29. As noted in the Commission's Framework Paper, the Court has been clear that the "fundamental objective" of the modern law of Aboriginal and Treaty rights is the "reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions"[9] and the "reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown".[10] Implicit in the language

[8] Summary of Coyote story as told by Dr. Ron Ignace, Stsmel'cqen, September 21, 2010.
[9] *Mikisew*, para. 1.
[10] *Van der Peet*, para. 31.

of the Court in *Gladstone* is the requirement that the Crown and First Nations find workable accommodations in a modern context on all matters related to the access, use and management of fisheries resources.[11] The FNC submits that the Commissioner must keep the contextual history described in the preceding paragraphs and the goal of reconciliation embedded in s. 35 alive during the Inquiry and when contemplating the necessary recommendations. It will be useful for the Commissioner to acknowledge that while this area of constitutional law is still being articulated, there is sufficient judicial direction available to advance changes to the status quo that are necessary for reconciliation to be achieved.

ii. Aboriginal Perspectives on the Content of Aboriginal Title and Rights to the Fisheries

30. Another practical implication of the case law is that although the final outcomes of court cases are informed and constrained by their particular factual situations, the Supreme Court of Canada has confirmed on numerous occasions certain underlying principles to be applied when considering the rights protected by section 35 of the *Constitution Act*. The challenge becomes finding proper places outside the courts for working out the differing views on the application of these principles.

31. One of these principles is that the courts must be informed by the Aboriginal perspective on that right (*Delgamuukw*, para. 156; *Sparrow*, para. 69). First Nations of the Fraser Watershed and marine areas include in any description of their rights to the sockeye salmon fishery, and assert constitutional priority for, elements such as the:

(a) responsibility to protect, conserve and sustain the fishery for this and future generations, and therefore the responsibility to manage and preserve the salmon and the environment on which it relies;

(b) responsibility to other First Nations who access, depend upon, and are similarly related to the salmon;

(c) right to harvest salmon for all purposes within their own homelands, and in particular to harvest salmon to support thriving families, villages and Nations, including for FSC and economic purposes;

(d) right to harvest salmon using all the traditional methods known and passed down over the centuries, and the methods that evolve and are developed; and

[11] *Delgamuukw* quoting *Gladstone*, para. 161.

(e) right and responsibility to exercise and maintain proper relations to the salmon and its ecology, including the rivers, forests, and marine areas.

32. One implication of the youthfulness of s. 35 law related to the fishery, is that there remains gaps between what the courts have had the opportunity to determine is constitutionally protected by the common law under s. 35, and what remains "assertions". The FNC submits that the rights to the salmon fishery recognized in the case law to date are only a fraction of the rights asserted and exercised by First Nations.

33. That said, the abundance of historical evidence indicating First Nations' use of and reliance on salmon has often resulted in DFO admitting within specific litigation the existence of some type of s. 35 right to fish, and seeking to move straight to the justification test. Often the legal issue in many fishing cases is not whether the right exists, but rather whether DFO has met its legal obligations to ensure the constitutionally protected FSC priority and/or adequately consult and accommodate.

34. The FNC submits that the jurisprudence required for the recognition of a fulsome Aboriginal right to the fishery – which includes the rights and responsibilities described in paragraph 31 above – has been laid. By relying upon both the common law as established and First Nations' perspectives on Aboriginal title and rights, sufficient changes could be made in the management of the Fraser River sockeye salmon fishery that will not only pave the way for reconciliation but also substantively increase the likelihood of ensuring the sustainability of such fisheries. One of the Commissioner's challenges in this Inquiry will be to be diligent in finding solutions and reaching meaningful recommendations towards such ends.

iii. Constitutional Priority of Aboriginal Right to Fish for FSC Purposes

35. Since *Sparrow* First Nations along the migratory route of Fraser River sockeye salmon have relied on the constitutional protection of the right to access these fish for FSC purposes. The Court has confirmed that the right has a constitutional priority, second only to the needs of conservation. Since *Sparrow* there have been differing perspectives on what this priority means and whether DFO is meeting this priority.

36. The constitutional priority of s.35 fishing rights should not be equated to priority of access. The priority of the right must be given a fulsome interpretation. We note that in *Delgamuukw* the Court

adopted in a title context questions from *Gladstone* that are relevant in determining whether the Crown has show priority for Aboriginal fishing rights:

> . . . questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example), whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food versus commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users.[12]

37. The constitutional priority for s.35 FSC rights gives rise to at least two practical implications: first, what does conservation mean, and second, how can First Nations' FSC priority be protected in an fishery that historically denied that right and faces continued pressures from other users and industries, including the commercial and recreational sectors. In more recent years, and in particular years in which there is a scarcity of salmon, there have been significant practical difficulties in DFO's honouring of this legal priority.

38. The FNC submits that, to date, there is no shared understanding (among DFO, First Nations, users of the fisheries resource, and conservation groups) of what conservation of the fishery means. The FNC does not believe DFO is operating with conservation of the fishery as a true priority. From their perspective DFO has made decisions that have and continue to put their fisheries at risk. The level of risk tolerance inherent in DFO's management approach has often been unacceptable to First Nations whose own laws, practices and traditions require a precautionary approach that builds, rebuilds and sustains the fishery for this and future generations.

39. Another key practical implication for the implementation and realization of the constitutional priority for FSC fisheries arises from the movement of fish themselves and the uncertainties associated with estimating run sizes and setting escapement goals,[13] and the pressures exerted by the other sectors and in particular the marine based commercial and recreational sectors that access fish prior to their arrival in the river. For First Nations, the balancing exercise relied upon by DFO to continue to meet the

[12] *Delgamuukw* quoting *Gladstone*, para. 164.
[13] *Sparrow* at p.116; *Jack* at 313; *Douglas* (BCCA), para. 54.

needs of other sectors, has often not respected the constitutional priority for rights-based fisheries. Particularly during times of scarcity, priority and "balancing" are viewed by First Nations as mutually exclusive and inconsistent with the following words of the Court in *Sparrow*:

> If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the Constitutional nature of their fishing right.[14]

40. Commercial fishing in the ocean environment on mixed stocks before the fish have begun to make their way to their natal streams has resulted in the serious depletion of smaller stocks, which are precisely the stocks of which many upriver First Nations assert priority rights of access. In addition, DFO's opening of recreational fisheries, including catch and release which is viewed as dishonourable and disrespectful to many First Nations, without proper assessment of impacts and during times when First Nations' FSC fisheries are closed, creates significant conflict.

41. Given that the courts will apply a reasonableness standard when assessing infringements and scrutinizing government actions related to the priority,[15] there are many practical implications and challenges to managing the fishery in a manner that enforces this priority. Practically speaking there are strong differences of view as to what is reasonable. While the FNC recognizes that the successful implementation of the FSC priority is a challenge, we also submit that neither the complicated nature of the fishery, nor the pressures from various interests, are sufficient excuses for failing to honour this constitutionally held right.

42. To both address the constitutional priority for the FSC component of section 35 fishing rights for the in-river First Nations and reduce the risks posed by mixed stock fisheries, there are two strategies that have been proposed to DFO on many occasions and in many ways:

> One is to reduce the fishing effort on mixed stocks as much as possible by using "terminal fisheries" that target stocks separately at points where these is no mixing or little mixing with other stocks. A second strategy is to employ selective fishing techniques, using gear such as weirs and traps, fishwheels, beach and purse seines,

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[14] *Sparrow*.
[15] *Gladstone*, para. 63; *Douglas* (BCCA), paras. 48-51; *Nikal*.

> fykes, reefnets, dragnets, bagnets and dipnets. These allow for retention of fish from strong stocks and live release (with low mortality) of fish from weak stocks.[16]

Somewhat ironically, this is how First Nations have always managed the fishery.

43. The FNC is not satisfied that DFO is committed to these solutions, which we assert are both necessary for ensuring the sustainability of the Fraser River sockeye salmon runs and ensuring the FSC constitutional priority. Insufficient effort has been employed to date to transition an unsustainable marine mixed stock fishery into the more traditional and long standing practice of selective terminal fisheries.

44. This Inquiry will, among other things, need to explore the causes for such resistance to change and the challenges that must be overcome, and reach recommendations that assist DFO and First Nations, together with the commercial and recreational sectors, in ensuring that this transition can occur with more predictability and in the near future.

iv. Meaningful Participation in the Management of the Fishery

45. Given their inherent responsibilities to preserve and conserve salmon for this and future generations, First Nations have always managed their fisheries and assert that this is a fundamental component of their inherent right to self government. At the time of contact there were complex laws, customs and ethics governing how and when Aboriginal peoples accessed and harvested fish, what fishing methods and practices were employed and by whom, what steps would be necessary to ensure adequate access, how the fish were shared and traded, and whether and to what extent third parties could access fish. These are all indicia of managing the fishery. This right and responsibility to protect resources, particularly ones such as the fisheries which are integral to First Nations' culture and identity, remains intact despite government regulation.

46. Whether as part of the Aboriginal title or an Aboriginal right to the fishery, or as an exercise of the right to self government, First Nations assert the right to be meaningfully engaged and involved in all matters related to their fisheries, including the right to be directly involved in all decisions that could affect either their access to their fisheries and/or the future sustainability of the Fraser River sockeye.

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[16] Parzival Copes, "Aboriginal Fishing Rights and Salmon Management in British Columbia: Matching Historical Justice with the Public Interest" in E. Eric Knudsen, Cleveland R. Steward, Donald D, MacDonald, Jack E. Williams, Dudley W. Reiser, eds., *Sustainable Fisheries Management: Pacific Salmon* (New York: CRC Press - Lewis Publishers, 2000), p. 79.

Most importantly, for this Inquiry's mandate, this includes the right to be meaningfully involved in all decisions that have the potential to impact the fishery, including its habitat.

47. One of the practical implications associated with the management component of s. 35 fishing rights, is that in a modern context fisheries management has become a complex endeavour. According to Parzival Copes:

> An effective fisheries management agency should possess a competent administration, well-developed scientific capability, powerful regulatory capacity, and a correspondingly adequate budget. Most essentially, the management agency needs to have the legal power to structure, administer and enforce a system-wide management plan. Effective use of the salmon resource requires that the fishery for each river system be carefully regulated and coordinated by a management authority able to follow a consistent plan and enforce regulations on all participants, so they will not exceed catch allocations or otherwise subvert the plan. This authority also needs the power to apply inseason management (i.e. to impose fishery closures and other strictures at short notice in any part of the system, based on information on stock conditions)...[17]

48. DFO has been slow to substantively work with First Nations to develop transparent, inclusive processes that are adequately resourced and accountable. Some challenges to recognizing the right of First Nations' direct involvement in management decisions related to Fraser River sockeye include: the existence of many Aboriginal Nations throughout the marine and Fraser River Watershed organized in various ways and operating with distinct political authorities and mandates; and inadequate resourcing to Aboriginal organizations to ensure fulsome political representation and sufficient technical expertise. In addition to the lack of sufficient progress and funding, some programs such as AFS, pit First Nations against each other for dwindling government resources.

49. The FNC submits that the signals remain distant and unreliable as to whether DFO is committed to engaging in meaningful dialogue that would lead to transparent decision making processes and joint, collaborative, or co-management. Developing such processes is not only possible but of vital importance. Adequate human and financial resources dedicated to overcoming these obstacles is necessary, including:

[17] Parzival Copes, "Aboriginal Fishing Rights and Salmon Management in British Columbia: Matching Historical Justice with the Public Interest" in E. Eric Knudsen, Cleveland R. Steward, Donald D, MacDonald, Jack E. Williams, Dudley W. Reiser, eds., *Sustainable Fisheries Management: Pacific Salmon* (New York: CRC Press - Lewis Publishers, 2000), p.86.

- developing, resourcing, organizing, and refining the Tier 1 processes;[18]
- engaging a process that obtains the necessary mandates from First Nations;
- developing sufficient technical capacity, expertise, and support (from both a traditional knowledge and scientific perspective) to inform the work of those involved in Tier 1 processes; and
- encouraging and working with DFO to develop inclusive Tier 2[19] government-to-government processes that would address, among other things, the establishment of optimal selective and terminal fisheries.

50. As a corollary, the information on which management decisions are based must also transition to provide all those participating in the decision making structure with adequate information. Information-sharing protocols that ensure timely sharing of information related to upcoming strategic (e.g., Fraser Panel) and operational (e.g., openings and closings) decisions must be reached. Historically the funding for gathering of information (test fisheries, spawning escapement, catch and release information, etc.) reflected DFO's priorities associated with opening and closing the marine commercial fisheries. Different information will be needed as the focus shifts to ensuring sustainability. In addition, Aboriginal people carry much knowledge regarding the state of the fisheries, including its strength and vulnerabilities in season. This knowledge must be encouraged, rebuilt and given a place within the information base on which decisions are made.

51. While DFO appears to be becoming more disposed to funding the development of regional or community based organizations and agencies with unique responsibilities (for example, AAROM bodies and other collaborative working arrangements) there remains no comprehensive or transparent "co-management", "collaborative management" or "shared decision making" process. Instead, First Nations are left with piece-meal processes that are not guided by defined terms of reference and are left to wade through myriad and shifting processes without any clear indication that shared decision making will result. Through the BC Treaty Process, DFO and some First Nations have begun to sketch how delegation of management authority could be exercised by groups with constitutionally empowered authority (for example, Tsawwassen Final Agreement). However, many First Nations who assert management responsibilities related to the Fraser River sockeye are either not participating in the BC

[18] Tier 1 of the three-tier process involves discussions and organizational relationships among First Nations only.
[19] Tier 2 involves First Nations and the Federal government.

Treaty process or cannot see why they need to await the outcome of treaty negotiations to address the management of the Fraser River fishery.

52. This Inquiry will, among other things, need to explore the causes for resistance to change, the challenges that must be overcome, and reach recommendations that assist DFO and First Nations in ensuring that collaborative-management and shared decision making models are developed and transparently implemented. It is the FNC's submission that the failure of DFO to fully embrace the establishment of effective and transparent decision making structures for the management of Fraser River sockeye is a key area for this Inquiry, both as it relates to causes of decline and recommendations for rebuilding a sustainable fishery.

v. The Honour of the Crown and Duty to Consult and Accommodate

53. The practical implication of the (a) clear enunciation of the justification test pronounced in *Sparrow*, (b) the judicial clarifications that the honour of the Crown is always at stake in its dealings with First Nations, and (c) DFO's knowledge of the existence (both real and potential) of s. 35 Aboriginal fishing rights, is that DFO must meaningfully consult the rights holders prior to making decisions that have the potential to impact such rights, with the goal of addressing their concerns.

54. Over the last few decades the Federal Crown, and in particular DFO, has been clearly put on notice that in addition to the proven Douglas Treaty rights, First Nations assert strong *prima facie* claims for Aboriginal title and rights to the Fraser River Watershed and to sockeye. It is also clear that there are a myriad of DFO's decisions related to this fishery that affect and can infringe First Nations' exercise of their s. 35 fishing rights.

55. Given DFO's knowledge of such assertions, their willingness to offer AFS Agreements, and their tendency to admit the existence of a s. 35 FSC right, First Nations assert that consultation must occur at the deepest level of the *Haida* spectrum. It is the FNC's submission that if DFO takes a position contrary to that, they should advise and provide First Nations with an opportunity to share any further information necessary.

56. There are many practical implications associated with implementing the duty to consult and accommodate, including the following:

- Inadequate human and financial resourcing for both DFO and First Nations to adequately engage.

- Lack of meaningful engagement during in-season decision making processes. While in-season decisions are perhaps the most time sensitive decisions, they are also those most likely to result in direct infringements to s. 35 fishing rights. There has not been adequate effort by DFO to develop options for meaningful in-season consultation and involvement in decision making.

- Lack of reliable and timely information. Modern day management decisions involve complexities that require political, economic, scientific and traditional knowledge bases to properly inform decision makers. Funding and administrative decisions regarding what information will be gathered and how need to address First Nations' concerns and interests.

- There remain differing views of the scope of issues over which DFO must consult.[20]

- While consultation may not always result in providing First Nations with a veto, consultation must be meaningful, timely and with sufficient information to provide a real opportunity to engage. Many First Nations have observed that DFO has not only failed to satisfy this obligation, but also that DFO relies on the time sensitive nature of its decisions to substantively continue operating according to the status quo, without truly incorporating the guidance from *Haida* and *Taku* on this point.

- The FNC offers the observation that until DFO and First Nations develop effective Tier 1 and Tier 2 processes many legal obligations held by DFO and responsibilities held by First Nations will be frustrated.

57. It is useful to reflect on the similarity among the concerns and the solutions related to First Nations' involvement in the management of the fishery and DFO's failure to adequately consult and accommodate. The FNC is of the view that DFO's existing consultation mechanisms do not meet the *Haida* test. This Inquiry will, among other things, need to explore all of these challenges and reach recommendations that assist DFO and First Nations in taking the necessary steps to develop adequate decision making and consultative processes, including effective Tier 1 and Tier 2 processes for pre-, in-, and post-season decision making.

[20] For example, First Nations sought to be consulted and involved in relation to the Marine Stewardship Council's certification of Fraser River sockeye salmon, but were not properly or meaningfully engaged. In addition, First Nations seek meaningful consultation on the potential movement to defined shares. However, there is not always agreement from DFO that these, and other issues, are ones that require consultation with First Nations or accommodations of their rights and interests.

vi. Economic Rights to the Fishery

58. Finally the FNC wishes to comment on some of the practical implications resulting from the law on Aboriginal fishing rights for economic purposes. Among other things, pressure from the commercial sector has, we submit, made it difficult for DFO to embark on the steps towards reconciliation related to economic access. Instead many First Nations believe they must go to court to seek declarations of Aboriginal title or Aboriginal rights to fish for commercial purposes, and must meet the associated evidentiary tests before economic access will be provided in a meaningful way. Most First Nations do not have the financial resources to pursue such lawsuits.

59. The historical economic injustices that have resulted from Canada's assertion of sovereignty and the failure to reconcile such sovereignty with Aboriginal title, rights and Treaty rights to the fishery must be resolved through positive and institutional change. For many First Nations the outcome of the Boldt decision in Washington State (which was upheld by the US Supreme Court), where the Court found a treaty right for 19 Northwest tribes entitling them to catch 50% of the harvestable fish and which led to those tribes now enjoying full and equal roles in the management of and access to the fisheries, is both inspiring and challenging. Many of the Washington tribes whose rights have now been recognized are relatives of Fraser First Nations. At the time of contact many shared the same or similar laws, customs and traditions related to this fishery. It is difficult therefore to understand or accept the justice of something less in Canada.

60. While such claims to a greater portion of the fishery remain opposed by some, these type of changes are necessary for reconciliation to be achieved. Other stakeholders fear that this reallocation of the fisheries and the sharing of decision making authority will mean less fish for them collectively. There are, however, some who have strongly argued that more fish for Fraser First Nations, especially if implemented through terminal fisheries using selective gear (and live-release of weak stock fish), can, over time, lead to more sustainable fisheries for everyone in the longer term.

61. This Inquiry may, among other things, need to explore implications associated with economic access, including considering the necessary steps to re-imagine and then re-apportion fisheries, including commercial marine fisheries, so that they can operate in a more sustainable and respectful manner.

62. In closing, we wish to express gratitude to the Commission for taking up the FNC's recommendation that the evidentiary hearings of this Inquiry begin with an assessment of the law

regarding s. 35 fishing rights. The challenge of such an assessment is not in articulating the law but rather in assessing and understanding the practical implications of applying such law and considering that within the Terms of Reference of this Inquiry. In this submission we have begun to frame the practical implications which we see are particularly relevant to the work of this Commission. We look forward to reviewing the submissions of the other Participants on these issues and engaging in the necessary dialogue that will assist the Commissioner in meeting the goals of this Inquiry.

All of which is respectfully submitted this 19th day of October, 2010.

Brenda Gaertner

Leah Pence

List of Authorities

Cases

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511

Jack et al. v. The Queen, [1980] 1 S.C.R. 294

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69

R. v. Douglas et al., 2007 BCCA 265. Leave to appeal to SCC refused, [2007] S.C.C.A. No. 352

R. v. Jack, [1980] 1 S.C.R. 294

R. v. Lewis, [1996] 1 S.C.R. 921

R. v. Sappier; R. v. Gray, [2006] 2 S.C.R. 686, 2006 SCC 54

R. v. Sparrow, [1990] 1 S.C.R. 1075, [1990] S.C.J. No. 49

Snuneymuxw First Nation v. British Columbia, 2004 BCSC 205

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550

Tsawout Indian Band v. Saanichton Marina Ltd. (1989), 36 B.C.L.R. (2d) 79 (BCCA)

Articles and Books

Copes, Parzival. "Aboriginal Fishing Rights and Salmon Management in British Columbia: Matching Historical Justice with the Public Interest" in E. Eric Knudsen, Cleveland R. Steward, Donald D, MacDonald, Jack E. Williams, Dudley W. Reiser, eds., *Sustainable Fisheries Management: Pacific Salmon*. New York: CRC Press - Lewis Publishers, 2000,

Harris, Doug. "Indian Reserves, Aboriginal Fisheries, and the Public Right to Fish in BC, 1876-82" in John McLaren, A.R. Buck, Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies*. Vancouver: UBC Press, 2005.

Harris, Douglas C. *Landing Native Fisheries: Indian Reserves & Fishing Rights in British Columbia, 1849-1925*. Vancouver: UBC Press, 2008.

Jones, Russ and Terri-Lynn Williams-Davidson, "Applying Haida Ethics in Today's Fishery" in Harold Coward, Rosemary Ommer, Tony J. Pitcher, eds. *Just Fish: Ethics and Canadian Marine Fisheries*. St. John's: Institute of Social and Economic Research, 2000.

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October 22, 2010

VIA EMAIL: Brock.Martland@cohencommission.ca

The Cohen Commission
2800 - 650 West Georgia Street
Vancouver, BC V6B 4N7

Attention: Brock Martland, Associate Commission Counsel

Dear Brock:

Re: Policy and Practice Report: The Aboriginal and Treaty Rights Framework Underlying the Fraser River Salmon Fishery

We write to provide you with our comments on the above-referenced report (the "Report").

1. The Report provides an Overview

It is our view that the Report provides a useful and concise overview of the current state of the law on aboriginal and treaty rights as those rights relate to fisheries management. We are grateful to the Commission staff for their work on the difficult and complicated task of organizing and distilling this area of law.

The Report, of course, is an overview only. Some matters are not discussed in full. Accordingly we urge the Commission to inquire more deeply into the jurisprudence whenever an authoritative statement of the law on a particular subject is required.

2. Upcoming Developments

The Report identifies some upcoming developments but does not record that an appeal of the *Lax Kw'Alaams* decision is to be heard by the Supreme Court of Canada in February 2011 and an appeal of the *Ahousaht* decision is to be heard by the BC Court of Appeal in December 2010. We are of the view that these appeals will further develop the law on aboriginal fishing rights and may alter the scope and content of ongoing treaty negotiations.

3. The Fishery as Property

The Report cites the Supreme Court of Canada's decision in *Comeau's Sea Foods* for the proposition that Canada's fisheries are a "common property resource" belonging to all the people of Canada. The Report states, at paras. 31 and 32:

> ... the existing case law is relatively clear in regards to the common property nature of the fishery. As stated simply by Major J. in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*:
>
> > *Canada's fisheries are a "common property resource", belonging to all the people of Canada.*
>
> The Federal Court of Appeal later clarified in *Larocque v. Canada (Minister of Fisheries and Oceans)* that the fisheries "do not belong to the Minister" either. Therefore, the fishery continues to be the common property of all Canadians.
>
> [footnotes omitted]

We note that the Court in *Comeau's Sea Foods* did not elaborate on the meaning of "common property resource" and did not cite any authority for the proposition that the fishery is commonly held by all Canadians. The decision in that case turned on an interpretation of the authority of the Minister to issue licences under the provisions of the *Fisheries Act*. Hence, we submit that the Court's opinion on the character of the fishery as "common property" belonging to all Canadians is *obiter dicta*.

We submit that it is imprecise to speak about the fishery as "property" belonging to all the people of Canada. In fact, as a matter of law, free-swimming fish are themselves properly regarded as *ferae naturae*, i.e. wild animals title to which is acquired by capture. Moreover, in regard to fisheries, as discussed by the Judicial Committee of the Privy Council in *British Columbia* v. *Canada*, 1913 D.L.R. 308, at paras. 11 and 12:

> ... the general principle is that fisheries are in their nature mere profits of the soil over which the water flows and that title to the fishery arises from the right to the *solum*. A fishery may of course be severed from the *solum*, and it then becomes a *profit a prendre in alieno solo* and an incorporeal hereditament. ...

A *profit a prendre* is a non-possessory right to take produce from certain lands. It follows that there is no property right to fish – only a right to take fish – and the right to take fish is vested in the federal Crown by virtue of its title to the lands underneath the

sea and navigable rivers. This federal right is of course subject to the aboriginal rights enshrined by s. 35 of the *Constitution Act, 1982*

4. The Public Right to Fish has been Replaced by Statutory Rights

The notion of an unrestricted public right to fish in tidal waters and navigable rivers is an English legal principle of some antiquity. The Judicial Committee of the Privy Council discussed the public right to fish in some detail in *British Columbia* v. *Canada*, 1913 D.L.R. 308, at paras. 11 to 19. The Lord Chancellor, writing for a unanimous panel, noted that their Lordships agreed that: "... the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike." The Lord Chancellor went on, however, to find that the public right to fish can be regulated by statute. He wrote, at para. 15:

> "...it has been unquestioned law that since *Magna Charta* no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation. This is now part of the law of England, and their Lordships entertain no doubt that it is part of the law of British Columbia.
>
> [Emphasis added]

Later, at para. 19, the Lord Chancellor confirmed that section 91(12) of the *Constitution Act, 1867*, confers "an exclusive right on the Dominion to make restrictions or limitations by which public rights of fishing are controlled".

Similarly, in their classic treaties on the history and law of fisheries in England, Moore and Moore state that the public right to fish must be exercised "...in accordance with the law and the provisions of the statutes with respect to it." See: Moore and Moore (1903), *The History and Law of Fisheries*. London: Stevens and Haynes, at p. 96.

We submit that, today in Canada, as far as sockeye salmon are concerned, the public right to fish has been wholly replaced by the statutory rights defined by Parliament in the exercise of its legislative jurisdiction over fisheries. The federal government has in effect 'occupied the field' by enacting the various licensing schemes and other controls on fishing contained in the *Fisheries Act* and related statutes and regulations.

4. Statutory Rights and Powers are Subject to Aboriginal Rights

In contrast, aboriginal fishing rights are not derived from inherited English common law or from statute. They are *sui generis* and based on the fact that: "...when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries." See *Van der Peet*, at para. 30.

Aboriginal rights are also unique among fishing-related rights for being constitutionally entrenched. The entrenchment of aboriginal rights has two consequences for fisheries management.

First, aboriginal rights serve as a constraint on the exercise of legislative power. It follows that aboriginal rights also constrain the exercise of statutory authority by government officials, including those charged with managing the fishery. See *Sparrow*, at para. 65.

Second, notwithstanding any other interests or objectives save conservation, the Courts have clearly stated that the Crown is legally obliged to give priority to aboriginal fishing rights when making fisheries management decisions. See, for example, *Gladstone*, at para. 65.

The Courts have also recognized that the process of proving aboriginal rights can take a very long time. Hence, even where aboriginal rights are claimed but not yet proven, the honour of the Crown requires that the government consult First Nations about the potential impacts of statutory decisions and policies that may have an impact on those claimed rights. See *Haida*, at paras. 26-27.

5. The "Duty" to Manage Fisheries "in the Public Interest"

We submit that it is important to distinguish between the legal obligations of government and the policy choices made by government in the formulation of fisheries management policies.

The Report seems to present the view that the federal government is under a positive legal obligation ("a duty") to manage, conserve and develop the fishery "in the public interest". It supports this proposition by citing the dicta in *Comeau's Sea Foods*. The Report then concludes, without citing any authority, that the public interest requires that "the rights and interests of all participants" are to be considered in the making of fisheries management decisions. See the Report, at para. 157. We submit that there are three main problems with this view and conclusion.

First, as a matter of law, the federal government is not under a legal duty to manage the fishery. Rather it has a discretionary power to manage the fishery for certain purposes pursuant to section 43 of the *Fisheries Act*. That section provides: "The Governor in Council may make regulations for carrying out the purposes and provisions of this Act ...". The prescribed purposes include "...the proper management and control of the sea-coast and inland fisheries".

Second, nowhere does the *Fisheries Act* state that the federal government must manage the fishery "in the public interest". We submit that the government may be under a political obligation to act in the public interest when managing natural resources like fisheries, but whether and how it chooses to do so is a matter of policy, not law.

Third, in formulating fisheries management policies, the decision whether to consider and how much weight to give to the rights and interests of different participants in the fishery is, with one exception, purely a policy choice, not mandated by law. The exception is aboriginal rights.

We submit that the better view is that, as a matter of law, the government must ensure that aboriginal rights are satisfied, before turning to consider whether and how the interests of other participants should be addressed in the formulation of fisheries policies. We say that the priority given to aboriginal rights is a fair, just and lawful part of the process of reconciling the prior occupation and control of the lands and waters of Canada by Aboriginal Nations with the relatively recent Crown assertion of sovereignty.

We further submit that the same conclusion is reached when one approaches the difficult question of how to allocate fish as scarce natural resources from the point of view of "the public interest". Surely the Rule of Law and the fulfilment of the terms of the Constitution will always be of the highest interest to the public. It follows that, because the protection of aboriginal rights is a constitutional requirement that constrains the exercise of legislative power, those aboriginal rights must be given priority over other interests in the formulation of fisheries management policies that are aimed at promoting the public interest.

5. Aboriginal Issues beyond Rights and Title

As the Commission is aware, aboriginal issues relevant to this Inquiry include, but are not limited to, the question of s. 35 rights. In particular, proper fisheries management is today inextricably linked to historical realities. Our clients were allotted small Indian Reserves on the understanding that they would earn their living from the Sea. Justice demands that the interrelationship between reserve size and fishing for a livelihood be considered in relation to the proper allocation of the Fraser River Sockeye resource.

We note that the Commission intends to produce a research paper entitled "A History of the Regulation of the Aboriginal Fraser River Sockeye Fishery to 1982". We anticipate that this paper will document the linkage between the small size of the reserves allotted to coastal and Fraser River Aboriginal Nations and continued access to the Fraser River Sockeye fishery. We will provide detailed comment and historical documentation relating to that issue at the appropriate time.

We hope that the Commission finds these comments useful.

Yours truly,

DONOVAN & COMPANY

James Hickling

JH/JH

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COHEN COMMISSION

HEILTSUK TRIBAL COUNCIL'S ORAL PRESENTATION FOR OCTOBER 26-27, 2010: PERSPECTIVES ON THE ABORIGINAL AND TREATY RIGHTS FRAMEWORK UNDERLYING THE FRASER RIVER SOCKEYE SALMON FISHERY

Counsel for Heiltsuk Tribal Council: Ming Song and Lisa C. Fong

A. Overview

1. The question posed by the Commission is: what are the practical implications of the law of aboriginal rights and treaty rights in this Commission?

2. The simple answer is that the recommendations of this Commission must recognize and honour First Nations' aboriginal rights and treaty rights. This answer is complicated by aboriginal rights exercised and asserted by First Nations being broader than those rights legally recognized to date. Many aboriginal rights currently before courts or tribunals remain to be legally recognized, and First Nations exercise many more aboriginal rights not currently part of any process of formal recognition. Nonetheless, Heiltsuk's aboriginal rights have never been ceded, surrendered or extinguished, and such rights include their inherent right to self-government, or to manage their fisheries.

3. In Heiltsuk's view, implicit in the success of this Commission is its recognizing existing aboriginal rights, and its acknowledging valid claims to yet-unproven aboriginal rights. Recommendations by this Commission, at either operational or leadership levels, must recognize these rights and respect these claims. Otherwise, the mandate of the Commission in making meaningful recommendations will be unduly limited.

4. In the context of the inquiry, where the Commission's mandate expressly includes addressing DFO policy, this means the Commission is able to evaluate the extent to which government practices have failed to give proper effect to aboriginal rights, in favour of other interests. This means the Commission must formulate recommendations about allocation which properly reflect aboriginal rights to priority.

5. On a broader policy and leadership level, the Commission may make recommendations about stewardship which are consistent with, and which recognize the benefits of co-management by First Nations claiming and exercising a right and a duty to steward resources within their traditional territories. Such recommenda-

tions would be consistent with the Commission's overall aim of "encouraging broad cooperation among stakeholders," and developing recommendations about sustainability.

6. The Province, in its written submission, has urged limits to what this Commission should find and recommend. The Province says this inquiry is not about aboriginal or treaty rights, or aboriginal fishing. The Commission is not required to make any findings of law, or apply or interpret law in general or in particular.

7. Heiltsuk disagrees. The Province's position is too narrow. It is no answer to merely say that the words "aboriginal rights" and "treaty rights" were not written into the terms of reference of this Commission. The terms of reference provide for recommendations to improve future sustainability. These recommendations will necessarily address priority and allocation. This Commission simply cannot investigate and make recommendations about sustainability without the Commission considering and providing for the priority of First Nations. The aboriginal right to fish and the priority recognized by the Supreme Court of Canada is an inherent component of any plan for sustainability.

8. Canada's position is that it recognizes the Commission must be cognizant of the legal framework. It says however the Commission is to only apply the law as it currently stands, and not to pronounce upon or seek to direct the evolution of aboriginal rights or treaty rights frameworks.

9. Heiltsuk disagrees. Canada's position is too limiting. The nature of the Commission here is broader than Canada implies. This Commission is uniquely-situated. It is specifically designed to provide leadership. It is specifically mandated to not only find the facts necessary to draw inferences as to the cause of the decline of Sockeye Salmon, but most importantly, to make recommendations that are future-looking, and that provide leadership in formulating changes that favour sustainability.

10. In its submission, Canada quotes a passage from Ratushny on *The Conduct of Public Inquiries* to assert that a Commission has no authority to decide legal rights or obligations. That author goes on, however, to address the unique opportunity to address laws and relationship in making recommendations, to avoid past problems in the future:

> But it would be a sterile exercise merely to record these conclusions since **they provide a unique opportunity to go one step further. That is to make recommendations** to avoid similar problems occurring in future. The commission must be educated throughout the inquiry process in order to draw lessons from the events. **The recommendations can relate to laws**, administrative processes, **relationships**, and organizational struc-

tures **and can inform future public and political discussion and debate**. (emphasis added)

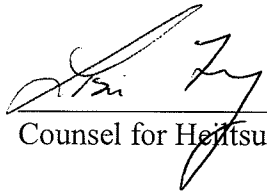
Ratushny, ed. *The Conduct of Public Inquiries* (Toronto: Irwin law, 2009) at 162-163.

11. The Commission may comment on the existing law of aboriginal rights, and may anticipate its development when fashioning recommendations for sustainability. The fact that First Nations self-government has not yet been judicially determined to be an aboriginal right does not prevent this Commission from commenting on that possibility, and does not foreclose the Commission from recommending, for example, co-management of marine resources by First Nations. Every First Nation here may say something different about methods of stewardship, but every First Nation here will say its traditional knowledge, and right and duty of stewardship, is part of the solution to sustainability of Sockeye Salmon.

12. This Commission is uniquely situated. The subject matter of its inquiry and recommendations is complex and multi-faceted; it includes the environment, the business of aquaculture, the extensive policy and practices of the provincial and federal fisheries, aboriginal rights and treaties, and the public's interest in sustainable salmon fishing. The tools available to this Commission are powerful. As demonstrated the Commission conducts its own research, commissions its own expert reports, conducts interviews of witnesses, and has the right to speak to a range of persons including scientists, environmentalists, members of the public, First Nations, and governments, and will hold extensive evidential hearings. As a result, the Commission will be uniquely situated to make comprehensive findings of fact, and provide leadership by fashioning forward-looking recommendations that address systemic problems.

13. Heiltsuk submit the Commission's recommendations should address both operational and policy issues; they should affirm and be consistent with aboriginal rights; and they should encourage broader cooperation by governments with First Nations, consistent with their aboriginal rights, consistent with their rights of self-government, and consistent with their right to manage fisheries within their traditional territorial waters.

Date: October 27, 2010



Counsel for Heiltsuk Tribal Council

HEILTSUK TRIBAL COUNCIL SUBMISSIONS
IN RESPONSE TO
THE ABORIGINAL AND TREATY RIGHTS FRAMEWORK UNDERLYING THE FRASER RIVER SOCKEY SALMON FISHERY, OCTOBER 1, 2010
("Framework")

The Heiltsuk

1. The Heiltsuk ancestral homeland comprises a defining portion of what is now known as the Central Coast of British Columbia. It extends from the southern tip of Calvert Island north to Klekane Inlet across from Butedale, inland from the head of Dean Channel and Inlet to the offshore area west of Goose Island, Aristazabal Island, Calvert Island and the intervening inlets, channels, islands and waterways.

2. The Heiltsuk have lived within and upon their homeland since time immemorial and assert aboriginal right and title to their lands including the right to fish and steward marine resources. Heiltsuk have never surrendered or ceded these rights.

3. The sockeye salmon migration path passes directly through Heiltsuk's traditional territory, specifically, in or about Goose Island, Purple Bluff and Spider Island.

4. These sockeye salmon are migrating to and from the Fraser River.

5. As a result, sockeye salmon fishing is an integral and defining constant of Heiltsuk life. It provides resources and habitat for many of the species that Heiltsuk rely upon for their food, social, ceremonial and economic needs as evidenced in archaeological studies and oral traditions.

Introduction

6. The Heiltsuk thank the Commission Counsel for drafting a Framework on Aboriginal and treaty rights underlying the Fraser River sockeye salmon fishery.

7. The Heiltsuk also thank the Commission for the opportunity to respond to and supplement the Framework.

8. The Framework is helpful as a starting point. It provides a comprehensive summary of the jurisprudence on aboriginal fishing rights.

9. Heiltsuk's submissions intend to assist the Commission by providing a more thorough and substantive analysis of the Sparrow[1] and Gladstone[2] decisions in the hopes of clarifying three issues as it relates to the aboriginal right to fish:

   a. Priority and allocation;
   b. Commercial fishing; and
   c. Canada's obligation to manage the fishery

Priority and Allocation

10. The Supreme Court of Canada decisions in *Sparrow* and *Gladstone* provide a clear and comprehensive guide to Canada in prioritizing and allocating Canada's fishery.

11. According to these decisions, government must demonstrate that its actions are consistent with the government's fiduciary duty towards aboriginal peoples. This means that the correct order of priority in the fisheries is as follows:

[1] R. v. Sparrow, [1990] 1 SCR 1075, [1990] S.C.J. No. 49
[2] R. v. Gladstone, [1996] 2 S.C.R. 723

a. conservation;

b. Indian fishing;

c. Non-Indian commercial fishing; or

d. Non-Indian sports fishing[3]

12. In other words, any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing and that even a conservation plan "would be scrutinized to assess priorities".[4]

13. The significance of giving the aboriginal right to fish for food top priority was aptly described by the Court as:

"If in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.[5]

14. The Court in *Sparrow* also referred to *R. v Denny*[6] decision in which Clarke CJNS, for a unanimous court, held that "Section 35(1) of the *Constitution Act, 1982,* provided the appellants with the right to a top priority allocation of any surplus of the fisheries resources which might exist after the needs of conservation had been taken into account" and "to afford user groups such as sports fishermen (anglers) a priority to fish over legitimate food needs of the appellants and their families is simply not appropriate action on the part of the Federal government. It is inconsistent with the fact that the appellants have for

[3] Gladstone, para 54, citing Jack v. The Queen, [1980] 1 S.C.R. 294 at p. 313
[4] Sparrow, para 78
[5] Sparrow, para 78
[6] (1990), 9W.C.B. (2d) 438, unreported, March 5, 1990

many years, and continue to possess an aboriginal right to fish for food. The appellants have, to employ the words of their counsel, 'a right to share in the available resource'. This constitutional entitlement is second only to conservation measures that may be undertaken by federal legislation".[7]

15. At page 23, paragraph 59 of the Framework suggests that the priority element has limitations as supported by the Douglas 2007 BCCA decision and relies on the decision in *Sparrow*.

16. To be clear, it was not the intention of *Sparrow* that the notion of priority as articulated in that case would mean that where an aboriginal right is recognized and affirmed that right would become an exclusive one. The only circumstance contemplated by *Sparrow* was where the aboriginal right was internally limited.[8]

17. In other words, such allocation has been recognized to have its inherent limits and Canada's fishery would not remain exclusive to aboriginal rights holders. Once the aboriginal group has satisfied its needs for food, social and ceremonial purposes, other users could participate in the fishery. [9]

18. In a situation where the aboriginal right is internally limited, so that it is clear when the right has been satisfied and other users can be allowed to participate in the fishery, the notion of priority, as articulated in *Sparrow* makes sense. In that situation, it is understandable that in an exceptional year, when conservation concerns are severe, it will be possible for aboriginal rights holders to be alone allowed to participate in the fishery, while in more ordinary years other users will be allowed to participate in the fishery after the aboriginal rights to fish for food, social and ceremonial purposes have been met.[10]

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[7] Sparrow, para 79
[8] Gladstone, para 60
[9] Gladstone, para 57
[10] Gladstone, para 58

19. At page 23, paragraph 59 of the Framework refers to *Sparrow* in the context of priority of allocations as "not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery". To clarify, the Court went on to further state, and which was not set out in the Framework submissions that, "The object [of setting out allocation priorities in favour of aboriginal peoples] is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously".[11]

20. At page 22, paragraph 56 of the Framework refers to *Sparrow* regarding the detailed allocation of maritime resources is a task that must be left to those having expertise in the area and suggests that "It would take the work of other courts and cases to sort out the details."

21. The full quote in *Sparrow* suggests it is not necessary for subsequent courts or cases to set out the details. Rather, "While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established". (emphasis added)

Commercial Fishing

22. *Gladstone* is one of only two cases which recognize an aboriginal right to fish for commercial purposes.

23. In *Gladstone*, the court recognized that the basic insight of Sparrow – that aboriginal rights holders have priority in the fishery – is a valid and important one; however, the articulation in that case of what priority means, and its suggestion that it can mean exclusivity under certain limited circumstances, must be refined to take into account the varying circumstances which arise when the

[11] Sparrow, para 81

aboriginal right in question has no internal limitations..[12] In other words, Indian fishing other than for food, social and ceremonial purposes.

24. In the context of the aboriginal right to fish for commercial purposes, the doctrine of priority does not require that, after conservation goals have been met, the government is required to allocate the commercial fishery on an exclusive basis to those holders of the aboriginal right.[13]

25. Rather, the Court suggests that the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users.[14]

26. Such a right is both procedural and substantive. What this means is that at the stage of justification of an infringement, the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.[15]

27. The Court in *Gladstone* went on to characterize the content of the commercial priority as something less than exclusivity but which nonetheless gives priority to the aboriginal right. This characterization must remain vague to take into account "consideration of the government's actions in specific cases".[16]

28. In the context of resource allocation within the context of commercial fishing, the notion of exclusivity of priority was rejected. [17]

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[12] Gladstone, para 61
[13] Gladstone, para 62
[14] Gladstone, para 62
[15] Gladstone, para 62
[16] Gladstone, para 63
[17] Gladstone, para 68

29. However, elevating common law aboriginal rights to constitutional status impacts on the public's common law rights to fish in tidal water but does not extinguish them. However, where conservation concerns drastically limit the availability of fish, satisfying food, social and ceremonial purposes may require the abrogation of the common law right of public access to the fishery. In other words, although the right of public access in the fishery is not extinguished, such right must clearly be second in priority to aboriginal rights.[18]

30. Although the Court in Gladstone acknowledged that no blanket requirement is imposed under the priority doctrine, it did provide some guidance to assist in scrutinizing governmental action.[19]

31. At page 38, paragraph 105 of the Framework identifies 4 of the 7 relevant questions the Court identified as relevant to determining whether the government has granted priority to aboriginal rights holders:

a. whether the government has accommodated the exercise of the aboriginal right to participate in the fisher (through reduced licence fees, for example);

b. the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population;

c. how important the fishery is to the economic and material well-being of the band in question; and

d. the criteria taken into account by the government in, for example, allocating commercial licences amongst different users.

[18] Gladstone, para 67
[19] Gladstone, para 64

The other three relevant questions set out in *Gladstone* are:

a. the questions enumerated in *Sparrow* relating to consultation and compensation.

   At paragraph 82 of *Sparrow*, the Court stated that within the analysis of justification, further questions to be addressed include, in a situation of expropriation, fair compensation is available; and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

b. whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders; and

c. how the government has accommodated different aboriginal rights in a particular fishery (food versus commercial rights, for example).

32. The guidance provided by the Court in both *Gladstone* and *Sparrow* is not exhaustive of the list of factors that may be taken into account in determining whether the government can be said to have given priority to aboriginal rights holders; they only give some indication of what such an inquiry should look like.[20] Suffice it to say that recognition and affirmation of an aboriginal right to fish requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.[21]

[20] Gladstone, para 64
[21] Sparrow, para 83

Canada's Obligation To Manage The Fishery

33. Based on the foregoing, there is no question that conservation must come first. And the courts have pointed out, management and conservation of resources is indeed an important and valid legislative objective.[22]

34. In determining how Canada is obliged to manage the fishery after conservation purposes have been met it is submitted that the justification test for infringing upon an aboriginal right to fish as set out in Sparrow must first be satisfied. It is only after the government has satisfied the requirements of reasonably limiting an aboriginal right to fish, can the correct order of priority in the fisheries as set out in paragraph 11 of these submissions take place.

35. The test for justification requires that a legislative objective must be attained in such a way as to uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and aboriginal peoples.[23]

36. The justification test as articulated by *Sparrow* may be summarized as follows:

37. The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right.[24]

38. If a *prima facie* interference is found, the analysis moves to the issue of justification. This step involves two steps. First, is there a valid legislative objective? If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue: the honour of the Crown in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginal people must be the first consideration in

[22] Sparrow, para 80
[23] Sparrow, at page 4
[24] Sparrow, at page 5

determining whether the legislation or action in question can be justified. There must be a link between the question of justification and the allocation of priorities in the fishery.[25]

39. In Sparrow, the Court acknowledged that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of section 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups.[26]

40. As with paragraph 59 on page 23, at page 54, paragraph 158 of the Framework, it states, that "the constitutional entitlement embodied in s. 35(1)…is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery."

41. To assist the Commission, the full quote taken at paragraph 81 of *Sparrow* is: "The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously."

42. During this inquiry, the Commission will consider the policies and practices of the Department of Fisheries and Oceans (the "Department") with respect to the sockeye salmon fishery in the Fraser River – including the Department's scientific advice, its fisheries policies and programs, its risk management strategies, its allocation of Departmental resources and its fisheries management practices and

[25] Sparrow, page 6
[26] Sparrow, para 81

procedures, including monitoring, counting of stocks, forecasting and enforcement.[27]

43. In the end, recommendations will be made for improving the future sustainability of the sockeye salmon fishery in the Fraser River including, as required, any changes to the policies, practices and procedures of the Department in relation to the management of the Fraser River sockeye salmon fishery.[28]

44. From a practical perspective, it is submitted any and all effective methods towards sustainability, which would include conservation and proper stewardship of the fishery, must consider a higher level of assistance, expertise, co-management and/or collaborative management from First Nations than what presently exists.

45. Heiltsuk looks forward to sharing its thoughts and vision with the Commission on the concepts of co-management and/or collaborative management for a successful future of the fishery to be ultimately utilized and enjoyed by all Canadians.

[27] Cohen Commission, Terms of Reference
[28] Cohen Commission, Terms of Reference

Conclusion

46. As the Court stated in *Sparrow,* "Guidelines are necessary to resolve the allocation problems that arise regarding the fisheries. Any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing".[29]

47. In light of the approach set out in these submissions, we look forward to the commencement of the Commission hearings.

October 19, 2010

All of which is respectfully submitted:

W. Ming Song, Counsel for Heiltsuk Tribal Council

Lisa Fong, Counsel for Heiltsuk Tribal Council

[29] Sparrow, at page 6

COMMISSION OF INQUIRY INTO THE DECLINE
OF SOCKEYE SALMON IN THE FRASER RIVER

In the matter of Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a Commission do issue under Part I of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as Commissioner to conduct an inquiry in the decline of sockeye salmon in the Fraser River

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RESPONSE TO THE COHEN COMMISSION PAPER: *THE ABORIGINAL AND TREATY RIGHTS FRAMEWORK UNDERLYING THE FRASER RIVER SOCKEYE SALMON FISHERY*

SUBMISSION BY THE PARTICIPANTS THE
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AND THE
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I. INTRODUCTION

1. The Cohen Commission paper, *The Aboriginal and Treaty Rights Framework Underlying the Fraser River Sockeye Salmon Fishery,* does not give sufficient regard to the rights of the public in the management of the Fraser River salmon fishery. Further elaboration is needed to place the public right in its proper historical and legal context. As Cory J. held for the Court in *R. v. Nikal*, [1996] 1 S.C.R. 1013 at p. 53 in explaining why aboriginal rights are not absolute:

> It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others.

II. THE PUBLIC RIGHT TO FISH

A. The Origin and Content of the Right in British Columbia

2. Unlike forests, minerals or government revenues, the fishery is not owned by the Crown. The people own the fishery and have a right to fish. Binnie J., in *British Columbia v. Canadian Forest Products*, [2004] SCC 38, held for the court that public ownership of the resource and the public right of fishery has "deep roots in the common law" which can be traced back to the Roman Emperor Justinian who granted statutory recognition to that given to humankind in common by the law of nature: the air, running water and the sea.

3. Viscount Haldane in the *Railway Belt Reference*[1] also held that the right has existed since time immemorial:

> The legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean, if, indeed, it did not in fact first take rise in them. The right into which this practice has crystallized resembles in some respects the right to navigate the seas or the right to use a navigable river to as a highway, and its origin is not more obscure than that of these rights of navigation.

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[1] *A.G for British Columbia v. A.G. Canada*, [1914] A.C. 153 at p. 169

4. British Kings often disregarded the public right until *Magna Carta* prohibited the King from usurping the right.[2] As Viscount Haldane further held in the *Railway Belt Reference* at p. 170:

> If this were the true interpretation of the words of Magna Charta it would indicate that the general right of the public to fish in the sea and in tidal waters had been established at an earlier date than *Magna Charta*, so that it was only necessary at that date to guard the subject from the temporary infractions of that right by the Crown in the rivers as well tidal as non-tidal which were covered by the writ *de defensione ripariae*. But this is a matter of historical and antiquarian interest only. Since the decision of the House of Lords in *Malcolmson v. O'Dea*, 10 H.L.C. 593, it has been unquestioned law that since Magna Charta no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation. This is now part of the law of England, and their Lordships entertain no doubt that it is part of the law of British Columbia. (emphasis added)[3]

5. In British Columbia, the public right to fish played a key role in the colonization of the province. Following the loss of Oregon to the United States in the *Oregon Treaty* of 1846, the British government tried to guarantee BC's future by ensuring that residents enjoyed all the rights of a British subject in the United Kingdom. It saw the protection of the rights of citizenship as more important than could be afforded by the Royal Navy, yet the right to fish was almost lost during these pre-confederation discussions.

6. In 1848, the Colonial Office included the fishery in the proposed grant of Vancouver Island to the Hudson's Bay Company (HBC). The Prime Minister, the Lord Chancellor and other senior advisors to the Queen who formed the *Committee of Her Majesty's Privy Council for Trade and Plantations* then advised Queen Victoria:

> It is essential, in order to ensure the more effectual colonization of Vancouver's Island, that certain amendments should be made to some of the conditions inserted in the said draft grant... That the grant of fishing of all sorts of fish in the seas, bays, inlets and rivers within or surrounding the said island be omitted from the said draft grant. [4]

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[2] *The Law Magazine, Quarterly Review of Jurisprudence*, Vol. XXVIII, London, (1842) p. 324 - for example, all the grants of the fishery in the time of King Richard I were later annulled.

[3] This passage was cited, in part, by a unanimous Supreme Court of Canada in *R. v. Gladstone*, [1996] 2 S.C.R. 723 at para. 67 in its reaffirmation of the continuing effect of the public right to fish.

[4] Accounts and Papers, Thirty Volumes (6.)Colonies...Session 1 February –1 August 1849, p. 19

7. Queen Victoria followed the advice of her Ministers and struck the fishery from the grant, so this first constitutional document for British Columbia was rewritten to protect the public right to fish. The Province was established on a firm foundation of "rights and liberties"[5] to the approval of the British Parliament. Said the Earl of Lincoln:

> Considerable alterations have been made in that charter since the debate of last year.... By the draft of the charter as then proposed, the whole of the fisheries in the neighbourhood of Vancouver's Island would have been exclusively confined to the company. It was perfectly monstrous that the Colonial Office should for a moment have entertained such a demand.... Why it was a wonder that they did not call upon the Government to exclude the colonists from the very air they breathed. This provision has now been altered, and the fisheries are left as free as the air."[6]

8. The Queen also approved the establishment of criminal and civil courts to further fulfill the goal of creating a loyal citizenry and strong framework of rights and laws as a bulwark against American expansionism.

9. Their claim defeated, the HBC turned loss into victory by enticing prospective settlers to British Columbia with an advertisement stating:

> The right of fishing proposed to be given to the Hudson's Bay Company...having been relinquished, every freeholder shall enjoy the right of fishing all sorts of fish in the seas, bays, and inlets...[7]

10. Protected by the Sovereign and Parliament, the public right to fish was reaffirmed as a binding compact between British Columbians and the Crown. The right ensured broad public access to the fishery and that aboriginal fishing rights were *not* extinguished by grant to the HBC.

11. In 2010, the public right ensures that more than 300,000[8] sport fishermen fish for recreational purposes almost anywhere in BC's coastal waters. Thousands more families

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[5] Accounts and Papers, Thirty Volumes (6.)Colonies...Session 1 February –1 August 1849, p. 20
[6] Hansard's Parliamentary Debates, Vol. CVI, June 19, 1849, p. 578
[7] Accounts and Papers, Thirty Volumes (6.)Colonies...Session 1 February –1 August 1849, p. 21
[8] Pacific Region Stats, Annual Comparison of Sales Entered into the Tidal Waters Sportfishing (TWS) Database to August 25, 2010, Fisheries and Oceans Canada

earn livelihoods in the commercial fishing industry.[9] The public right also ensures that Canadians, including those of other aboriginal ancestries, will have a place in the fishery even if one aboriginal group proves an aboriginal commercial right.[10]

12. That the Sovereign and the most senior officials in the British government would take an interest in the BC fishery is not surprising given their historical recognition that a public fishery encouraged settlement. This belief is well-illustrated through instructions to British Colonial governors prior to 1776[11]:

> ...you are to take care that the beaches and stages be left to public use...
> *Protection of the Newfoundland Fishery (Order 955)*
>
> You shall strictly enjoin both the present and future garrison of Placentia and all his Majesty's officers and soldiers and other persons whatsoever belonging there, not to interrupt the fishermen in the curing of their fish, not to take up for themselves any beaches, stages, or cook-rooms upon any pretense whatsoever upon pain of his Majesty's highest displeasure.
> *Placentia Garrison Not to Interfere with Fishery (Order 956)*
>
> ...you are to use your best endeavours that the fishery on the coast of Nova Scotia be protected and encouraged... for any of his Majesty's subjects...
> *Protection of Nova Scotia Fisheries (Order 957)*

13. Cory J., for a unanimous court, reviewed the Crown's pre and post-confederation fishery policies in *R. v. Nikal*, [1996] 1 S.C.R. 1013 starting at pp. 22:

> This pre-Confederation policy is also set out in the 1866 opinion of James Cockburn, Solicitor General of the Province of Canada. He stated:
>
> > . . . I should say that without an Act of Parliament ratifying such reservation, no exclusive right could thereby be gained by the Indians, as the Crown could not by any Treaty or act of its own (previous to the recent Statute) grant an exclusive privilege in favour of individuals over public rights, such as this, in respect of which the Crown only holds as trustee for the general public. (p. 25) (emphasis added)

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[9] *Commercial Fisheries, Licences, Fishers Information, 1985-2004* , Fisheries and Oceans Canada, shows that more than 8,000 personal commercial fishing licences are issued annually.
[10] *R. v. Gladstone*, [1996] 2 S.C.R. 723 Lamer C.J. at para. 68; *R. v. Marshall*, [1999] 3 S.C.R. 533 at para. 41
[11] *Royal Instructions to British Colonial Governors* 1670-1776, Vol. II at pp. 689-692

14. Neither is the public right a Canadian anomaly. In *A.G. Canada v. A.G. Quebec* [1921] 1 A.C. 413 at p. 423 the Judicial Committee cited the French *Code de la Marine* of 1681 which declared that all the subjects of the King of France had the right of fishing.

15. In Australia, the High Court in *Commonwealth v Yarmirr* [2001] HCA 56 at para. 60 held that the public right to fish is a limit on the powers of the sovereign:

> The acquisition of sovereignty can also be understood, from the point of view of municipal law, as a claim made in exercise of the prerogative. The prerogative rights of the Crown in relation to the territorial sea were limited, however, in some important respects. The most relevant of those limitations were the public rights of fishing in the sea and in tidal waters and the public right of navigation. So far as the high seas beyond tidal waters are concerned, both rights might be seen as owing their origin to custom since time immemorial. The public right to fish in tidal waters might be seen as having been preserved by the Magna Carta of John. Whatever may be the origins of those rights, no party or intervener disputed their existence and no party or intervener submitted that the sovereign rights asserted in 1824 did not acknowledge the continuation of those rights. (footnotes omitted)

16. In *R. v. Kapp* 2003 BCPC 0279, at para. 8, Kitchen P.C.J cited *Lewis v. State* which explains the American courts view of the right:

> The common right, which one individual of the whole community is entitled to enjoy as much as another, cannot be made by law the exclusive privilege of the people of a certain class or section upon terms and conditions that do not apply to the whole people alike. This right which one individual has in common with every other individual in the community to take and use fish and game, *ferae naturae,* is one that has existed from the remotest times, and, although at one time in England after the Norman Conquest the right to take fish and game was claimed as a royal prerogative to the exclusion of the people, it was restored to them by the Barons at Runnymede in 1215, and was declared in the great charter which they wrested from King John. 'The rights,' says Green, 'which the barons claimed for themselves they claimed for the nation at large.' These rights... have come down to us from the laws of England and may be regarded as a common heritage of the English-speaking people.

17. In 1913, Idington J. of the Supreme Court of Canada considered a BC fishery without a public right in the *Railway Belt Reference*[12]:

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[12] Re *British Columbia Fisheries* [1913] 11 D.L.R. 255 at p. 497

> If the contention of the province were to prevail it might result in one man or corporation acquiring the monopoly for all time over a food supply of fish which the rest of the people of Canada, as well as British Columbia, have a right to enjoy...This power of granting exclusive licenses to fish in the waters of British Columbia so touches the welfare of the whole people of Canada, not only in relation to their food, but also in the widest areas of national life, in so many and diverse ways, that a book be might be written thereon. I think the people who may be affected by its operation must be declared virtual masters, through their Parliament, of the situation.

B. The Right has Not Been Extinguished

18. As quoted by Lord Haldane in the *BC Fisheries Reference*:

> In the case of a river that flows and re-flows, and is an arm of the sea, there *prima facie* it is common to all: and if anyone appropriate a privilege to himself the proof lieth on his side...[13] (emphasis added)

19. It is not for BC fishermen to prove the right of the public; it is for Minister to prove the surrender of the public right to fish through an express act of Parliament.[14]

20. The *Foyle and Carlingford Fisheries (Northern Ireland) Order 2007* shows the type of express language needed to abrogate the public right to fish:

> 52A.(2) An aquaculture licence may be granted notwithstanding any public right to fish in the area, which on the granting of the licence, becomes the licensed area. (emphasis added)

21. Canada has not passed any such legislation. In 1993, in *R. v. N.T.C. Smokehouse Ltd.* (B.C.C.A.) [1993] B.C.J. No. 1400, the Court dismissed claims to an aboriginal right to fish salmon commercially on southwest Vancouver Island partially on the basis of the public right.[15] Hutcheon J. held at para. 108:

> We start with these propositions:
> (a) the Somass river is tidal;
> (b) at common law the general public has the right to fish in tidal waters;
> (c) Federal legislation would be required to take away the public right to fish in tidal waters; and
> (d) no such Federal legislation exists although fishing is severely regulated.

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[13] *Lord Fitzwalters Case* 86 E.R. 737 [1674]; *Stephens v. Snell* [Ch. 1939] All E.R. 622

[14] As will be shown below, however, such legislation would transfer ownership of the resource to the Provinces because in the absence of the public right the fishery becomes property held by the Provinces.

[15] The SCC dismissed a further appeal: *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672

22. Hutcheon J's conclusion that regulation does not extinguish a right was the basis of the BC Court of Appeal and Supreme Court of Canada decisions in *Sparrow*:

> [R]egulation of the exercise of a right presupposes the existence of the right.
> *R. v. Sparrow*, [1987] 2 WWR. 577, at 597 (BCCA)

> These permits were simply a manner of controlling the fisheries, not defining underlying rights.
> *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099

23. Neither is the public right extinguished by aboriginal rights. In 1996, in *R. v. Gladstone*, [1996] 2 S.C.R. 723 Lamer C.J. held at para. 67 that the public right of fishery could *limit* the scope of aboriginal rights, especially commercial rights:

> While the elevation of common law aboriginal rights to constitutional status obviously has an impact on the public's common law rights to fish in tidal waters, it was surely not intended that, by the enactment of s. 35(1), those common law rights would be extinguished in cases where an aboriginal right to harvest fish commercially existed.[16]

24. As Lamer C. J. further held at para. 64, even in the event of an aboriginal commercial aboriginal right it is not necessary to terminate the public right because a simple *reduction in licence fees* may be satisfy a proven right.

25. In a series of failed attacks on the public right, the Minister introduced several bills in Parliament during the mid-1990s and in 2007. The bills did not pass Parliament, so s. 60 of the existing *Fisheries Act* still authorizes fishermen use of vacant public property for uses "accessory to public rights of fishery."

C. The Public Right Limits the Authority of the Minister

26. The existence and effect of the public right to fish in Canada is long settled law. A number of limitations on the authority of the Minister arise from the right some of which were addressed in a series of Supreme Court of Canada and Privy Council references that settled federal/provincial disputes over the fishery.

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[16] See also *R. v. Marshall* [1999] 3 S.C.R. 533 at para. 41.

27. In the *Railway Belt Reference*[17] the Supreme Court of Canada was asked:

> Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise the exclusive right to fish in any or what part or parts of the waters within the railway belt - (a) as to such waters as are tidal, and (b) as to such waters as, although not tidal, are in fact navigable?

28. By asking the broad question of an "exclusive right" to fish "by way of lease, licence, or otherwise" the Governor-General-in-Council recognized that by 1913 there were other means to exclude the public beyond an "exclusive fishery" stemming from title to the solum. The "otherwise" in the question anticipated that new ways, such as the impugned scheme, would be attempted to exclude the public. Idington J. held:

> After having given that possibly arguable right of the province the best consideration I can, it seems to me that it must be taken to be the will of Parliament that, until it has otherwise declared, the common law giving such rights as the public now possess is the regulation to be observed, and that is inconsistent with the grant of an exclusive license. (p. 2)

29. On appeal to the Privy Council, Viscount Haldane did not analyze each type of exclusive right to determine whether it accorded with a public right, rather he looked for exceptions to the public right. Quoting Lord Hale, he held that an exception was:

> where separate and exclusive rights of fishing in tidal waters have been recognized as the property of the owner of the soil...but no such case could exist in any part of British Columbia, inasmuch as no rights there existing could possibly date from before Magna Charta...In the tidal waters, whether on the foreshore or in creeks, estuaries, and tidal rivers, the public have the right to fish, and by reason of the provisions of Magna Charta no restriction can be put upon that right of the public by an exercise of the prerogative in the form of a grant *or otherwise.* "[18] (emphasis added)

30. The law on this question has been settled for centuries, so government and private parties generally adhered o the law. As a result, there are only a small number of cases dealing with the right. In *Meisner v. Fanning* (1842), 3 N.S.R. 97 the plaintiff charged the defendant with trespass for fishing in the tidal waters of Deep Cove, Nova Scotia.

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[17] *Re British Columbia Fisheries* 11 D.L.R. 255 [1913] at p. 494
[18] *A.G. British Columbia v. A.G. Canada*, [1914] A.C. 153 at pp. 170-171

The case turned on whether the Plaintiff acquired the fishery by Crown grant or prescription. The Court held at pp. 99-100:

> We are called upon to say whether the grant in question conveyed to the Messrs. *Cochran* the waters of Deep Cove, being a navigable arm of the sea. There is no pretence for saying that the crown could make any such grant. It might as well grant the air around the cove. These waters, fluctuating and in a constant state of change, are not the subject of a grant... the crown could not grant a general fishery – a grant to support that must be as old as the reign of Henry II, and therefore beyond the time of legal memory, for, by Magna Charta, and the second and third charters of Henry III, the King is expressly precluded from making fresh grants... (emphasis added)

31. In *Rose v. Belyea* (1867), N.B.R. 109, Ritchie C.J., as he then was, upheld a jury award of $40 for $2 in damage done to a fisherman's net by a land owner who claimed an exclusive tidal fishery. Ritchie C.J. held that the trial judge was correct in holding:

> Since *Magna Charta* the Crown cannot grant the exclusive right of fishing in a public navigable river to a private individual. The claim set up by the defendant, of the exclusive right to fish in front of his own land, entirely failed

32. In 1904, in *Capital City Canning*, Duff J. of the B.C. Supreme Court, as he then was, struck down a claim for exclusive fishing rights based on a shoreline lease to a fish processor because the public right is a burden on the title of the Crown.[19]

33. In 1907, in *Donnelly v. Vroom* 42 N.S.R. 327, the Court unanimously dismissed an appeal for damages by a landholder who claimed that he owned the clams between the high and low water mark. The claim was dismissed because the fishermen enjoyed a common law right of fishing and the adjacent landholder held no title to the fishery.

34. In 2003, in *Beauliea v. Province of New Brunswick* 2003 NBCA 92, Robertson J.A. held for the Court that "a person wishing to acquire Crown lands had neither a moral nor legal claim to the fishing rights to contiguous waters" and upheld a dismissal of a claim to the fishing rights in a river flowing through land owned by the plaintiff.

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[19] *Capital City Canning and Packing Co. v. Anglo-British Columbia Packing Co.* [1905] 11 B.C.R. 333

35. In *Larocque v. Canada (Minister of Fisheries and Oceans)* 2006 FCA 237, the Court voided the Minister's subversion of the public right to finance his department:

> It is accepted, as the Supreme Court of Canada put it in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, that "Canada's fisheries are a 'common property resource', belonging to all the people of Canada" and that "it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest" (at pages 25 and 26). They do not belong to the Minister, any more than does their sale price. Also, when the Minister decided to pay a contracting party with the proceeds of sale of the snow crab, he was paying with assets that did not belong to him. (para. 37) (emphasis added)

36. In 2009, Hinkson J. of the BC Supreme Court in *Morton v. British Columbia (Agriculture and Lands)* 2009 BCSC 136 concluded that net cages for fish farms restrict the public right of fishery (para. 133) and rejected at para. 159 the proposition that fish farms could be private fisheries because the fishery is a public fishery, not amenable to transfer to private interests in the absence of competent federal legislation.

37. In *Aucoin v. HMG (Minister of Fisheries and Oceans)* 2001 FCT 800, Rouleau J. voided the Minister's use of his licensing and fish allocation authority to fund unemployed shoreworkers. At para. 43 he stated:

> Though the Minister has absolute discretion, it is specified that he may issue licences for fisheries or fishing, not for the purpose of assisting in setting up an unemployment benefit scheme and collecting additional levies. The Minister's conduct in this regards is not supported by any authority nor is it justified for any statutory purpose. The *Fisheries Act* is to protect and regulate fisheries and this was undoubtedly beyond the scope of the Minister's discretion.

III. JURISDICTIONAL LIMITS ON THE AUTHORITY OF THE MINISTER

A. Federal Jurisdiction is Limited to Management

38. The jurisdiction of Parliament under s. 91(12) of the *Constitution Act* 1867 is to manage sea-coast and inland fisheries. Parliament has no proprietary right in the fishery. In *A.G. Canada v. A.G. Quebec* [1921] A.C. 413 at p. 420, Viscount Haldane held:

> If, however, the legislature purports to confer on others proprietary rights which it did not itself possess, that would be beyond its power.

39. In *The Queen v. Robertson* (1882), 6 S.C.R. 52, the Minister purported to grant an exclusive right to fish by leasing a non-tidal section of the Miramichi River to a private party for fly-fishing (the impugned fishery in this matter occurs in tidal and non-tidal waters) . Ritchie C.J. held at para. 114 that the lease was an unconstitutional attempt to treat fish as property. The federal power was limited to:

> ...subjects affecting the fisheries generally tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large.

40. This ruling was reinforced in subsequent judgments. In the *Provincial Fisheries Reference* Strong C. J. held[20]: "...Neither the Provinces ... nor the Dominion can, without legislative authority, grant exclusive rights of fishing in tidal waters..." and in regard to the federal power over licences, he said:

> Such licences must, however, be purely personal licences conferring qualification, and any legislation going beyond this and assuming to confer exclusive rights of fishing is unconstitutional and void.

41. In the *Railway Belt Reference*, the Privy Council reaffirmed that the purpose of s. 91(12) is to regulate fishing rights that are "rights of the public in general and in no way special to the inhabitants of the Province"[21] or, as in this application, are in no way special to one race of the inhabitants of a Province. Examples of invalid restrictions were given in terms that would include separate commercial fisheries for aboriginal interests *e.g.* "by the grant of exclusive or partially exclusive rights to individuals or classes of individuals" - the fishery is "a right open equally to all the public."[22]

42. In *Quebec Fisheries (Re)* [1921] 1 A.C. 413 Lord Haldane further held that the necessity of reading down of the power in s. 4 (now s. 7) of the *Fisheries Act* to exclude

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[20] *Re Jurisdiction over Provincial Fisheries* (1895), 26 S.C.R. 444, at pp. 533.
[21] *Attorney General for British Columbia v. Attorney General for Canada,* [1914] A.C. 153, at p. 170
[22] *Ibid.*, p.. 172 - 175 (emphasis added).

any power to confer exclusive rights to fish in property belonging not to the Dominion was now "settled law."[23] This is a *constitutional* limitation on Parliament. Referring to the pre-confederation powers of the Province of Canada pre-1867, Lord Haldane held:

> No doubt ... those powers might have been so exercised as to destroy the public right in a certain place. But if so exercised they would be fulfilling a double function; the disposal of property and the exercise of the power of regulation. The former of these functions has now fallen to the Province, but the latter to the Dominion; and accordingly the power which existed under s. 3 of the Act of 1865 no longer exists in its entirety.[24] (emphasis added)

43. This case conclusively determined that the power transferred to the Dominion of Canada by s. 91(12) is insufficient to allow Parliament to authorize by lease or licence an exclusive fishery in the tidal waters of British Columbia:

> [constitutional] restrictions in the interest of the public on the granting of exclusive rights of fishing in tidal waters still exist....[25]

44. Viscount Haldane further held at p. 420:

> ...All that Lord Hershell could say in delivering their Lordship's opinion was that if the Dominion were to purport to confer on others proprietary rights which it did not itself possess, that would be beyond its power. In other words, the capacity conferred by s. 91 extended to regulation . . .

45. In *R. v. Nikal*, [1996] 1 S.C.R. 1013, Cory J. writing for a unanimous Court summarized the law on this point at p. 51:

> The Crown in all of its manifestations was consistently clear in its statements that no exclusive fishery should be granted to Indian bands in British Columbia. This is consistent with the fact that the Crown had no power to grant an exclusive fishery, and that after Confederation this would involve the grant of provincial property.[26] (emphasis added)

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[23] *A.G. Canada v. A.G. Quebec* [1921] 1 A.C. 413 at p. 427.
[24] *Ibid.*, at p. 431.
[25] *Ibid.*, at p. 432.
[26] See pp. 25 to 82 in *Nikal* for a review of the historical fishing policies of the Crown

46. In *Ward v. Canada (A.G.),* [2002] 1 S.C.R. 569 at para. 43, McLachlin C.J. reaffirmed the general principle that the federal fisheries power must be construed to respect the Provinces' power over property and civil rights:

> Measures that in pith and substance go to the maintenance and preservation of fisheries fall under federal power. By contrast, measures that in pith and substance relate to trade and industry within the province have been held to be outside the federal fisheries power and within the provincial power over property and civil rights.

47. The appropriation of a portion of the public commercial fishery to create a commercial fishery restricted to a private party is *ultra vires* Parliament because its *de facto* effect is proprietary. It is long settled law that grants of even "partially exclusive rights to individuals or classes of individuals" are beyond the scope of s. 91(12).[27]

48. The Minister has a duty to maintain and protect the right. As La Forest stated in *Water Law in Canada*:

> The Crown as *parens patriae* is a trustee for the public of the public right to fishing. Accordingly, where a person so interferes with the public right of fishing so as to constitute a nuisance, an indictment or an action may be brought against him at the suit of the Attorney-General.[28]

IV. EXPROPRIATION OF ABORIGINAL FISHING RIGHTS

49. It is trite law that the Minister may infringe upon an aboriginal right to fish providing the infringement is justified, but the fact that the Federal Crown may expropriate an aboriginal right to fish is often overlooked even though in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Court held at p. 46:

> We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with

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[27] *Attorney General for British Columbia v. Attorney General for Canada,* [1914] A.C. 153 at p. 175.
[28] La Forest G.V., *Water Law in Canada: The Atlantic Provinces*, 1973 at p. 197

> that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously ...
>
> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. (emphasis added)

50. In waters where there has been a history of lawlessness and abuse of an aboriginal right to fish for food which continues to have serious negative impacts on the conservation of the fishery, expropriation of any aboriginal right should not be ruled out. Expropriation and permanent closure of the fishery may be the only proper and effective means to protect the fishery resource and the interests of other Canadians in the fishery.

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23. *Fisheries Act* R. S. c. F-14, s. 60

24. *Foyle and Carlingford Fisheries (Northern Ireland)* Order 2007

III. TEXT

25. La Forest G.V., *Water Law in Canada: The Atlantic Provinces*, 197

26. *The Law Magazine, Quarterly Review of Jurisprudence*, Vol. XXVIII, London, (1842)