Fishing Around the Law: The Pacific Salmon Management System as a "Structural Infringement" of Aboriginal Rights

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In its present form, the Pacific salmon management system, as a whole, infringes Aboriginal fishing rights, and must be fundamentally revised. Traditional Aboriginal fishing rights are to be protected under the Constitution, but they involve both harvesting and management of the resource. At present, ecologically unsustainable harvesting practices and centralized state management conflict with the objective of ensuring the sustainability of the resource, and the system as a whole conflicts irreconcilably with Aboriginal fishing rights. Alternative management models exist which can resolve the structural conflict that exists both within the industrial fishing system, and between it and Aboriginal rights. Such alternatives can also provide ecological and socio-economic benefits to all fishing-dependent communities. This paper examines why, by ignoring traditional management rights, the present system is unconstitutional, and how a confluence exists for Aboriginal and non-Aboriginal interests in constitutionally sound and ecologically sustainable community-based fisheries.

Dans sa forme actuelle, le système d'exploitation du saumon du Pacifique enfreint les droits de pêche des Autochtones et doit être révisé de manière fondamentale. Les droits de pêche autochtones traditionnels doivent être protégés par la Constitution, mais ceux-ci comprennent à la fois la récolte et la gestion de la ressource. Actuellement, des pratiques de récolte non-justifiables d'un point de vue écologique et une gestion étatique centralisée sont en conflit avec l'objectif d'assurer le renouvellement de la ressource, et le système dans son ensemble est en conflit irréconciliable avec les droits de pêche autochtones. Il existe des modèles d'exploitation alternatifs qui peuvent non seulement remédier au conflit structurel présent dans le système de pêche industriel, mais également au conflit entre ee système et les droits de pêche autochtones. De telles alternatives peuvent également fournir des bénéfices écologiques et socio-économiques à toutes les communautés qui dépendent de la pêche. Le présent article examine pourquoi le système actuel, en ignorant les droits traditionnels d'exploitation, est inconstitutionnel, tout en démontrant l'existence d'une confiuence entre l'intérêt des Autochtones et celui des non-autochtones à instituer un système de pêche constitutionnel et écologiquement viable.

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Introduction

As the 1990s drew to a close, Canadians were witness to a dramatic reassertion of Aboriginal fishing rights. One of the most enduring images is of lobster traps being set, and smashed, on the Atlantic coast—a conflict between Mi'kmaq and non-Aboriginal fishers triggered by the Supreme Court of Canada decision *R.* v. *Marshall*[1] on September 17, 1999. In the same month on the west coast, a federal member of Parliament who had been convicted for fishing illegally in a protest against Aboriginal fishers exercising their salmon fishing rights lost his fight when the regulations cast in doubt by his case were upheld.[2] On both coasts, the character and scope of aboriginal fishing rights are long-standing issues.

In British Columbia over the past 120 years, legendary Pacific salmon fisheries have been transformed from traditionally managed Aboriginal fisheries to state-managed commercial, sport, and Aboriginal "food" fisheries. Today, the complexity of interests and problems associated with the fishery makes frequent news, but many of the issues currently debated have been canvassed repeatedly over the course of the century. Overcapitalization, habitat destruction, concentration of ownership, competition between Aboriginal fishers and non-Aboriginal fishers, and stock depletion have attended industrial fishing since the canning industry first emerged in the last decades of the 19th century.

The Supreme Court of Canada's recognition, since the patriation of Canada's constitution in 1982, of the existence of long standing legal rights for Aboriginal peoples is, however, relatively new. To date, these rights have been applied in a case-specific fashion. When considered in light of a full understanding of traditional practices, however, the existence of these rights points to a larger concern with the structure of the federal fisheries management system. The change in the legal landscape coincides with a growing awareness outside the legal community of the potential for alternative, community-based approaches to fisheries production and management.

In this light, this paper concludes that the Department of Fisheries and Ocean's ("DFO") management system constitutes, *as a whole*, a "structural infringement" of Aboriginal fishing rights. By defining the right to fish uniquely as a right to harvest, excluding fisheries management from the current conception, stocks have been depleted and Aboriginal self-regulation initiatives precluded. As a result, it is DFO's duty to revise the Pacific salmon management system so that it accords with constitutionally protected rights. Such a revision need not be conflictual. Rather, in undertaking it, DFO would begin a process of transformation toward social, economic, and biological sustainability that would benefit a wide range of social interests. Mounting tensions on both coasts demonstrate the pressing need for new strategies of this kind.

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[1] [1999] S.C.J. No. 55, online: QL (SCJ).

[2] See: *R.* v. *John Martin Cummins* (26 January 1998), Surrey 9347-01 (B.C. Prov. Ct.); *R.* v. *Houvinen et al.* (23 September 1999), New Westminster X052002-X052005 (B.C.S.C.).

I. The Legal Foundation

The legal basis for Aboriginal rights to harvest fisheries resources is now well established. Under section 35 of the *Constitution Act, 1982*,[3] Aboriginal plaintiffs have won the right to priority food fisheries,[4] the right to special consideration in some commercial fisheries,[5] and the right to exercise their rights by preferred means.[6] To date, however, fishing rights have been construed narrowly to mean the right to *harvest*, a right that is seen as separate and distinct from *management* of the resource.

This narrow construction of what "fishing" means is consistent with the Western approach to economic exploitation of natural resources: exploitation and management are generally conceived as separate activities. Resource users, mostly private actors, are expected to apply their legal rights to compete and prosper and, in so doing, to behave according to market pressures. Responsibility for preventing *overuse* lies with public institutions and regulatory agencies. This division of responsibilities is deeply ingrained in Canadian cultural and institutional thinking, but it is far from a natural division. Moreover, it is inconsistent with traditional Aboriginal approaches to resources where use and management of salmon fisheries are integrated and inextricably linked.

This historic reality implies that in addition to the Aboriginal right in Canadian law to harvest fish which have been allocated for that purpose by the state, a legal basis also exists for an Aboriginal right to manage fisheries which were traditionally exploited by Aboriginal people. In other words, the right to manage the resource exists as part of the already recognized right to fish. Failure to act on this more complete right reflects a failure to give the "right to fish" its full meaning.

This paper:

- elaborates the legal argument for including an Aboriginal right to both harvest and manage Pacific salmon fisheries ("right to stewardship") within the scope of Aboriginal rights as defined in *R.* v. *Van der Peet*;[7]
- demonstrates how that right is structurally infringed by the federal approach to salmon management in British Columbia;
- explains why this infringement is not justified based on the principles set out in *Sparrow*, *Van der Peet* and *Delgamuukw* v. *British Columbia*;[8] and

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[3] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[4] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.].

[5] *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 [hereinafter *Gladstone* cited to S.C.R.].

[6] *Sparrow, supra* note 4 at 1112.

[7] [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [hereinafter *Van der Peet* cited to S.C.R.].

[8] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [hereinafter *Delgamuukw* cited to S.C.R.].

- demonstrates how future state management of the resource can only be justified by incorporating, in an integrated fashion, both community-based management and the practice of "clean production".

II. The Legal Analysis of Aboriginal Rights

Recent judicial decisions clearly establish that Aboriginal stewardship of the salmon resource falls within the scope of Aboriginal rights under section 35 of the *Constitution Act, 1982.*

The Supreme Court of Canada set out the framework for Aboriginal rights analysis in *Van der Peet.* Lamer C.J.C. defined an Aboriginal right as follows: "[T]o 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."[9] Aboriginal rights attach to activities which, before contact, were

> ... of central significance to the aboriginal society ... [The claimant] must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive—that it was one of the things that truly *made the society what it was.*[10]

The Supreme Court further asserted that, as in other constitutional cases, section 35 should be interpreted in light of its purpose. This purpose, said the Court, was to acknowledge and reconcile with European settlement and the Canadian state the fact that Aboriginal people lived on the land in distinctive societies. Moreover, the Crown's fiduciary relationship towards Aboriginal people means a generous and liberal interpretation should be given in favour of Aboriginal people, with ambiguities to be resolved in their favour.[11] This context is important when considering whether the legal tests for establishing an Aboriginal right have been satisfied.

A. Defining the Aboriginal Right

The first step in establishing an Aboriginal right is to characterize the nature of the right claimed. The right to stewardship is the right to participate in and regulate salmon fishing activities for those stocks which the claiming First Nation traditionally harvested and managed.

In British Columbia, the Court of Appeal has explicitly affirmed that section 35 encompasses the right to "self-regulation". In *Casimel* v. *I.C.B.C.*, the British Columbia Court of Appeal considered the relationship between the customary adoption law of the Stellaquo Band and provincial law. In recognizing the validity of the adoption, Lambert J.A. concluded (for the unanimous court):

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[9] *Van der Peet, supra* note 7 at 549.
[10] *Ibid.* at 553 [emphasis in original].
[11] *Ibid.* at 537.

> I think that the conclusion which should be drawn from the decision of [this] court in *Delgamuukw v. British Columbia* is that none of the five judges decided that aboriginal rights of social self-regulation had been extinguished by any form of blanket extinguishment and that particular rights must be examined in each case to determine the scope and content of the specific right in the aboriginal society, and the relationship between that right with the scope and content and the workings of the general law in British Columbia.
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> Of course, if the aboriginal right had not been extinguished before 1982, it is now recognized, affirmed and guaranteed by s. 35 of the *Constitution Act, 1982,* not in its regulated form but in its full vigour, subject to the prima facie infringement and justification tests leading to a decision about ultimate justification, all as set out in *R. v. Sparrow.*[12]

The Supreme Court of Canada has not yet affirmed broad-based claims to self-government. In the leading case on self-government, *R.* v. *Pamajewon,*[13] the court did not decide whether self-government is protected under section 35, concluding that whether section 35 encompasses self-government or not, the evidence in that particular case did not support the claim. The case involved high stakes gambling on a reserve under the authority of a band council by-law. The band, arguing that it had an inherent right to self-government, had refused a gambling license offered by the Ontario Lottery Corporation. The Ojibwa appellants claimed a broad right to manage the use of their reserve lands, and evidence of pre-European traditions of public games and sporting events was presented. The Supreme Court found the impugned statute, the activity the band regulated (which the appellants engaged in), and the evidence on which they relied all related directly to gambling. The court characterized the right claimed much more narrowly as a right to participate in and regulate gambling on reserve lands, and on that basis concluded the evidence was insufficient to demonstrate either that gambling of the kind at issue was an integral part of the culture, or that gambling on the reserve was ever the subject of Aboriginal regulation.

Pamajewon does, however, provide insights into the type of self-government (or "self-regulation") claims that would be likely to carry weight with the court. While the broadly based claim to a general right of self-government asserted by the appellant was not upheld, an approach affirmed in *Delgamuukw,*[14] the court in *Pamajewon* did contemplate a right to self-regulation of a particular activity. On the facts of the case, the court found the evidence only supported "informal gambling activities taking place on a small scale" before contact, and not "large scale activities, subject to community regulation,"[15] implying that it is the latter which is necessary to assert a right to self-regulation. It would appear that traditional fisheries fall within this latter category.

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[12] *Casimel* v. *I.C.B.C.* (1993), 82 B.C.L.R. (2d) 387 at 394-95, 18 C.C.L.I. (2d) 161 (C.A.).

[13] [1996] 2 S.C.R. 821, 107 C.C.C. (3d) 275, (*sub. nom. R.* v. *Jones*) 138 D.L.R. (4th) 204 [hereinafter *Pamajewon* cited to D.L.R.].

[14] *Delgamuukw, supra* note 8 at 1114.

[15] *Pamajewon, supra* note 13 at 214.

Furthermore, the Court evaluated the self-government claim at issue in *Pamajewon* using the *Van der Peet* framework, stating that self-government will be evaluated using the same legal principles as other Aboriginal rights claims.[16] The Court in *Van der Peet* indicated a willingness to recognize traditional Aboriginal governing structures as a means of understanding and founding a section 35 right:

> Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of the aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society.[17]

The Court in *Delgamuukw* affirmed this position, recognizing that traditional laws could be a source of Aboriginal title: "Relevant laws might include, but are not limited to, a land tenure system or laws governing land use."[18] If traditional Aboriginal law can be a foundation for Aboriginal title, traditional Aboriginal laws also provide a valid foundation for other Aboriginal rights which involve control over resources, including fishing rights.

1. *Sui Generis* Rights

The Supreme Court has defined Aboriginal rights as *sui generis*, that is, they are unique and must be defined according to Aboriginal custom and practice—including traditional Aboriginal law. The content of an Aboriginal right must be developed from the perspective of the claiming Aboriginal group. In *Sparrow*, the Supreme Court stated: "While it is impossible to give an easy definition of fishing rights, it is possible, indeed crucial, to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake."[19]

Exploring cultural differences is therefore part of exploring the meaning of an Aboriginal right. For example, Claudia Notzke has said that the term "resource management" implies "apartness" from nature and superiority over other living things which is inconsistent with the world view of many Aboriginal cultures.[20] In contrast, the interdependence of people and nature, and the principle that people live subject to the constraints of the natural world, are more common themes among Aboriginal cultures. These kinds of cultural differences are of central significance when it comes to defining what it means "to fish", the relationship between harvest and management and, ultimately, the content of Aboriginal fishing rights.

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[16] *Ibid.* at 212.

[17] *Van der Peet, supra* note 7 at 562.

[18] *Delgamuukw, supra* note 8 at 1100.

[19] *Sparrow, supra* note 4 at 1112.

[20] C. Notzke, *Aboriginal Peoples and Natural Resources in Canada* (North York: Captus Press, 1994) at 1-2.

2. Cultural Significance

What it means to take the "Aboriginal perspective" remains unclear in the case law. Borrows and Rotman argue that giving due consideration to the Aboriginal perspective means changing the way courts evaluate the content of Aboriginal rights:

> ... adhering to the Aboriginal perspective of the meaning of the rights at stake similarly dictates that they ought not be defined by reference to the community's historic practices. The definition of Aboriginal rights by reference to specific historic practices misinterprets the Supreme Court's rejection of frozen rights theory. Clearly, if Aboriginal rights exist to secure physical and cultural survival, they cannot be ascertained exclusively by reference to pre-contact "Aboriginality." There are far more relevant aspects to the determination ... Aboriginal rights have two primary components, a theoretical and a material element. The theoretical element is a constant, and concerns the underlying purpose for the right in question—namely the contemporary cultural and physical survival of Aboriginal societies. Meanwhile, the material element of the right involves its practice, which is fact and site-specific.[21]

Borrows and Rotman would make the significance of an activity for cultural survival the critical test for whether a practice amounts to an Aboriginal right,[22] as a way of avoiding applications of section 35 which fail to recognize the cultural significance of a narrowly defined practice.

Judicial recognition of the cultural significance argument can be found. In her separate concurring judgment in *Pamajewon*, Madame Justice L'Heureux-Dubé interprets the question of whether an activity is integral to the distinctive culture to include whether the activity is "connected enough to the self-identity and self-preservation of the appellants' Aboriginal societies to deserve the protection of s. 35(1)."[23] This approach ensures that the purpose of section 35 is reflected in its application, reflecting the constitutional principle of purposive interpretation.

Justice Lambert took a similar approach in dissent in the British Columbia Court of Appeal decision in *R.* v. *Van der Peet*, suggesting the description of rights should

> ... relate the custom to the significance of the custom in the lives of the aboriginal people in question. If the fishing for salmon was what defined the culture of the society and made possible the cycle of the lives of its members, then it would be possible to describe the aboriginal right as a right to live from the salmon resource and continue to make salmou a focus of the sustainment of the lives of the people.[24]

In the Supreme Court decision on the case, Madame Justice McLachlin, also in dissent, argued explicitly against overly narrow definitions of rights:

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[21] J. Borrows & L. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 Alta. L. Rev. 9 at 39.

[22] *Ibid.* at 40.

[23] *Pamajewon, supra* note 13 at 217.

[24] *R.* v. *Van der Peet* (1993), 80 B.C.L.R. (2d) 75 at 112, 83 C.C.C. (3d) 289 (C.A.).

> It is necessary to distinguish at the outset between an aboriginal right and the exercise of an aboriginal right. Rights are generally cast in broad, general terms. They remain constant over the centuries. The exercise of rights, on the other hand, may take many forms and vary from place to place and from time to time.
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> If a specific modern practice is treated as the right at issue, the analysis may be foreclosed before it begins. This is because the modern practice by which the more fundamental right is exercised may not find a counterpart in the aboriginal culture of two or three centuries ago.[25]

Similarly, Anna Zalewski suggests that *Van der Peet* sets up a situation whereby rights are defined as practices, and then the practice defined so narrowly that it loses the cultural meaning that makes section 35 protection necessary.[26]

While the critiques of the *Van der Peet* analysis in the academic literature and in the dissenting judgments suggest analytic frameworks more favourable to an Aboriginal rights argument such as the one forwarded here, outright rejection of the *Van der Peet* approach is not necessary for the present analysis. Even though the approach in *Van der Peet* focuses narrowly on a practice and, by implication, possibly excludes broad, political rights such as self-determination,[27] the depiction of a fishing right as including management is based on the integration of management into the traditional fishing practices. As such, recognition of a free-standing right to self-government is not necessary.

What is needed, however, is a willingness to reconsider the content of fishing rights in light of a full exploration of archival, ethnographic, and oral historical evidence from the "Aboriginal perspective". Furthermore, in considering the scope of an Aboriginal right to stewardship over salmon, it is critical to remember this recognition of traditional law as a valid basis for a right. As noted previously, the Supreme Court in *Delgamuukw* stated that traditional law can be a source of an Aboriginal title, which is a particular type of Aboriginal right.

B. Aboriginal Fisheries Before Contact

The consensus among anthropologists, historians and Aboriginal commentators is that complex systems of fisheries use and management existed before contact.[28] For

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[25] *Van der Peet, supra* note 7 at 631.

[26] A. Zalewski, "From *Sparrow* to *Van der Peet*: The Evolution of a Definition of Aboriginal Rights" (1997) 55 U.T. Fac. L. Rev. 435.

[27] M. Asch, "From *Calder* to *Van der Peet*: Aboriginal Rights and Canadian Law, 1973-1996" in P. Havemann, ed., *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Melbourne: Oxford University Press, 1999) 428.

[28] See generally Notzke, *supra* note 19; K. Carlson, ed., *You Are Asked to Witness: The Stó:lō in Canada's Pacific Coast History* (Chilliwack: Stó:lō Heritage Trust, 1996); D. Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993); M. Kew, "Salmon Availability, Technology and Cultural Adaptation in the Fraser River

litigation purposes, detailed evidence about the characteristics of the particular traditional stewardship system asserted and its continuity to present times would be necessary.[29] A more general overview is presented here, however, both to describe the conceptual basis for the right and to highlight how common characteristics of traditional stewardship differ from contemporary state management.

1. Population and Consumption

Traditional management systems evolved to deal with regional, seasonal and inter-annual variations in abundance while ensuring that a high level of resource utilization could be maintained. Northwest coast peoples lived (pre-epidemic) at a level and population density that was high in comparison to other non-agricultural societies around the world.[30] While Aboriginal harvest rates are estimated not to have been enough to depress abundance, Aboriginal harvests did impact the resource. Michael Kew concludes that Aboriginal fishing practices actually amplified the resource: "[S]izes of salmon runs in 1800 were what they were not in spite of humans or independent of humans but because of humans and how they fished and interacted with the fish. ... The overwhelming evidence of the resilience of salmon to predation requires the conclusion that Indian fishing increased the abundance ..."[31]

Watershed" in B. Hayden, ed., *A Complex Culture of the British Columbia Plateau: Traditional Stl'atl'imx Resource Use* (Vancouver: University of British Columbica Press, 1992); E. Pinkerton, "Indians in the Fishing Industry" in P. Marchak, N. Guppy & J. McMullan, eds., *Uncommon Property: The Fishing and Fish-Processing Industries in British Columbia* (Toronto: Methuen, 1987) 249 [hereinafter "Indians in the Fishing Industry"]; F. Cassidy & N. Dale, *After Native Claims? The Implication of Comprehensive Claims Settlements for Natural Resources in B.C.* (Lantzville, B.C.: Oolichan Books, 1988); W. Suttles, "Affinal Ties, Subsistence and Prestige Among the Coast Salish" (1960) 62 Am. Anthrop. 296; N. Easton, *The Underwater Archaeology of Straits Salish Reef-Netting* (M.A. Thesis, University of Victoria 1985) [unpublished].

[29] Continuity to present day may be in modern form, and the Supreme Court has recognized that activities which are Aboriginal rights may have been interrupted for periods of time. See *Van der Peet*, *supra* note 7 at 556-57.

[30] Newell, *supra* note 28 at 29.

[31] *Supra* note 28 at 207-08. Kew's analysis reflects the principle of population biology that extremely high abundance can depress recruitment levels. In other words, if mortality is density dependent (*e.g.* high abundance causes spawning bed overcrowding, increased intraspecific competition, increased predation, etc.), then harvesting the "surplus" can cause an increase in production. While density-independent mortality plays a complex role in salmonid recruitment, Larkin concluded, "Regardless of the exact form of the relationship [between spawner number and resulting stock], it seems reasonable to suggest that, for many major stocks of salmon, recruitment is maximum at some intermediate stock size..." See P. Larkin, "Pacific Salmon" in J. Gulland, ed., *Fish Population Dynamics* (London: John Wiley & Sons, 1988) 152 at 166. It should be noted also that Hewes has suggested that the high abundances in the *late* 1800s were in part a result of post-contact Aboriginal population declines and reduced Aboriginal fishing pressure: G. Hewes, "Indian Fisheries Productivity in Pre-Contact Times in the Pacific Salmon Area" (1973) 7 Northwest Anthrop. Notes 133.

If Aboriginal harvest rates were low (estimated at less than 15%[32]), consumption was high. Prior to European arrival, consumption in British Columbia can be roughly estimated at between 60 and 106 million kilograms per year.[33] In comparison, the average annual commercial catch of all five species of salmon in British Columbia between 1983 and 1997 was approximately 70 million kilograms (see Appendix).[34] In light of the current controversy over the survival of some species and many stocks of Pacific salmon, the fact that total consumption pre-contact was comparable to or higher than contemporary commercial catches is particularly noteworthy.

Given high natural variation in returns and the intensity of exploitation, Aboriginal societies had the potential to depress stocks. Weirs were sometimes built bank to bank, completely blocking migrants for as long as the weir was closed. Local product specialization was common,[35] such that the pressure on a marine resource in a particular area would have been increased by trade beyond levels required to satisfy a local group. Similarly, potlatching created pressure to generate wealth as a means of asserting, gaining and maintaining social status.[36]

In sum, Aboriginal fisheries included technologies and social pressures that, if not culturally regulated, had the potential to cause over-exploitation. Instead, despite incidents of glut and scarcity, Aboriginal fisheries maintained high levels of exploitation over many centuries, but without long-term negative effects on the resource.

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[32] Kew, *supra* note 28 at 180.

[33] It was estimated the average Aboriginal catch pre-contact to be 88 million kg per year (see Carlson, *supra* note 28 at 141). This estimate is based on a consumption rate of 220 kg per capita per year and an estimated pre-epidemic Aboriginal population in the B.C. area of 400,000 (see Hewes, *supra* note 31). Hewes calculated an average per capita consumption rate of 220 kg per capita per year for the Northwest Coast region, and 200 kg per capita per year for the Northern Interior and Columbia-Fraser Plateau regions. These are conservative estimates—Carrothers has estimated 265 kg per capita per year in the B.C. area (W.A. Carrothers, *The British Columbia Fisheries*, Political Economy Series 10 (Toronto: University of Toronto Press, 1941)). For comparison, the Hudson's Bay Company accorded 4 kg per day (1460 kg per year) for each boat brigade crewman during the fur trade era (see Newell, *supra* note 27 at 30). Taking the range of 200 to 265 kg per capita per year, and a population range of 300,000 to 400,000 for the B.C. area (see P. Tennant, *Aboriginal Peoples and Politics* (Vancouver: University of British Columbia Press, 1990) at 3), the pre-contact catch can be estimated at between 60 and 106 million kg per year.

[34] Online: B.C. Salmon Marketing Council Database <http://www.bcsalmon.ca/database/map/tab2ca.htm> (last modified: 18 August 1998).

[35] Newell, *supra* note 28 at 31.

[36] Potlaching involves elaborate feasting, gift-giving and performances. Potlatches traditionally demonstrated and legitimized political rank authority, and provided for redistribution of wealth. V. Garfield summarizes the significance of potlatches among the Tsimshian in the following way:

> the potlach permeated every aspect of Tsimshian native life. It was the fonndation of the eeonomic system, the stimulus for accumulation of goods and one of the sources through which wealth might be acquired. Through the custom of distribution of wealth a complex system of exchange was built up ("Tsimshian Clan and Society" (1939) 9:3 U. Neb. Pub. in Anthrop. 167 at 216).

2. Communal Property Regimes

In general, Aboriginal systems were not based on open access, private or state ownership, but rather communal ownership accompanied by local group responsibility for management.[37] Access was limited through kin or other group ownership of sites and technologies. Newell describes substantial variation in the nature of ownership between Aboriginal groups, ranging from "... the rather loose system of the Salish to strict individual ownership among the Nootka and tight kinship-village control among the main Kwakiutl and Tsimshian peoples. Some groups, such as the Haisla, apparently had systems that displayed a little of each type."[38] The degree of exclusivity of ownership thus varied among Aboriginal groups.

Degrees of exclusivity also varied within Aboriginal groups with respect to different aspects of the resource. For example, individuals might own and control access to equipment, individual families might own and control access to dip-net and drying stations, and extended lineages might own and control access to fishing weirs and traps or entire streams. These hierarchies of exclusivity appear to have reflected the level of control necessary to match exploitation with ecosystem characteristics. For example, Gitksan and Nisga'a tribal territories were divided into resource areas on a watershed basis and owned by lineage heads. Access was more finely controlled through ownership of fishing sites, smoke houses and/or processing locations. While the Nass River was accessible for non-house members who fished for immediate use, owner groups effectively controlled exploitation by requiring permission to process fish caught in volume.[39] Similar tiers of control existed on the Cowichan River, where anyone could gaff at weirs built communally, but traps and platforms belonged to specific families.[40] Among the Straits Salish, reef nets, which could harvest up to 6,000 salmon a day,[41] were owned individually and reef netting locations were effectively held in trust for a larger kin group, while non-intensive technologies like gaffing were accessible to all without constraint.[42]

Stewardship obligations accompanied formal individual and group rights to territories and technologies necessary to access the resource. Among the Nisga'a, heredi-

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[37] Four categories of property rights are defined. "Open access" refers to the absence of well-defined property rights, where the resource is free and open to everyone. "Private property" means that the right to exclude others and regulate use of a resource is vested in an individual or group of individuals, such as a corporation, and is usually enforced by the state. Under "state property", rights to resources are vested in government. Under "communal property", rights to a resource are held by an identifiable community of interdependent users who exclude outsiders and regulate use by members of the community. See D. Feeny *et. al*, "The Tragedy of the Commons Twenty-Two Years Later" (1990) 18:1 Human Ecology 1 at 4-5.

[38] *Supra* note 28 at 40-41.

[39] E. Pinkerton & M. Weinstein, *Fisheries That Work.: Sustainability Through Community-Based Management* (Vancouver: David Suzuki Foundation, 1995) at 16.

[40] Newell, *supra* note 28 at 41.

[41] Easton, *supra* note 28 at 40.

[42] D. Boxberger, *To Fish in Common* (Lincoln: University of Nebraska Press, 1989) at 13.

tary leaders were trained from childhood in coordinating resource management and information gathering. Stories passed on by inheritance taught principles about the interactions between people and the environment, revealed important information about locations and events, and served as proof of ownership of lands and resources.[43] In this way, important ecological and cultural knowledge was embedded in local communities, information was guaranteed to be passed to future generations, and responsibilities were instilled in the recipient of the knowledge.

3. Leadership Responsibilities

Many Aboriginal leaders were responsible for the timing of the opening of the salmon season through the First Salmon Ceremony. Prior to the first fish ceremony, the ritual leader would watch and pray at the fishing grounds, erecting posts with owl, hawk, red-wing or eagle feathers. Berringer has documented that for a period at the start of spring runs, consumption was strictly forbidden. Upon catching the first fish of the season, an act performed by a community member designated by the ritual leader, the fish was prepared by the ritual leader in a special manner and then shared amongst community members. The First Salmon Ceremony had management dimensions as well. Swezey and Heizer conclude:

> In allowing the salmon to run freely during the initial period of ritual restriction (the duration and timing of which was controlled by the formulist, and generally appears to have lasted from several days to two weeks), riverine tribes maintained a productive inventory of spawning salmon each spring, which ensured successful reproduction and the return of king [chinook] salmon runs in following years. Intensive salmon fishing after the period of ritual restriction, by large numbers of individuals initiating this subsistence effort at the same time, probably benefited the production of salmon by preventing overcrowding at the spawning beds.[44]

Group leaders were also responsible for ensuring adequate harvest and redistribution of the catch among community members. Accountability and redistribution were both assured through the potlatch. While chiefs had to show wealth at potlatches, wealth was demonstrated by its redistribution, not its accumulation. Paul Tennant concludes that as a result, "coastal peoples came as close as human societies ever have to resolving the perennial political problem of misuse of power for personal gain."[45] Among the Kwakiutl,

> [t]he chief held responsibility for his people and resources. The chief and his namima could lose their place in Kwakiutl society if they could not demonstrate through gifting that the abundant fisheries and other resources were being

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[43] J. Corsiglia & G. Snively, "Knowing Home: Nisga'a Traditional Knowledge and Wisdom Improve Environmental Decision-Making" (1997) 23:3 Alternatives 22 at 25.

[44] S. Swezey & R. Heizer, "Ritual Regulation of Anadramous Fish Resources in Native California" in B. Grunda, ed., *The Fishing Culture of the World: Studies in Ethnology, Cultural Ecology and Folklore* (Budapest, Akademiai Kiado, 1984) 967 at 985.

[45] Tennant, *supra* note 33 at 7-8.

> stewarded well enough to provide the goods needed to conduct a proper potlatch.[46]

Ownership of fishing sites could also be gained or lost at potlatches.[47]

Similarly, achieving high status within the Stó:lō required thorough knowledge of one's history, including which fishing sites a family owned and special information about resources. High status also ensured access to and ownership of family assets.[48] Stó:lō political leaders, or *siyá:m* (which also means "extended family leader"),

> ... accumulated wealth ... through the ownership, regulation and control of productive resource sites such as fishing rocks.... The more respected a leader became, the more gifts they would receive. Each gift was wealth, and the greater the leader's wealth, the higher their status.[49]

These leaders kept their status and enforced rules and rights through the respect others had for them. They also worked to build community consensus when resource conflicts arose. If discredited, the extended family stopped deferring to the opinion of the *siyá:m*.[50] Thus, under the potlatch system, the pressures to accumulate wealth were directly balanced by collective monitoring and accountability systems.

Traditional rights and responsibilities respecting fishing have been acknowledged as an important dimension of Aboriginal fishing rights. For example, in *R.* v. *Joseph Andrew Jack, Arnold John and Martin John*,[51] Mr. Jack had been charged under the *Fisheries Act* for fishing in a restricted area that was within his hereditary fishing territory. In finding that Mr. Jack had a right to fish in that particular location, the British Columbia Court of Appeal cited the following evidence:

> Mr. Jack, as head of a family group, possesses a hereditary compendium of rights, assets and responsibilities known as his "hahuuhli". His aboriginal right to fish included the right to invite kinsmen to assist him in fishing. ... To fail to provide sufficient salmon from his own hahuuhli would be a source of considerable embarrassment and loss of prestige for a person of Mr. Jack's chiefly rank.[52]

The court thus recognized the significance of traditional social structures related to stewarding and providing fish, and relied on these elements of the traditional management system to find that Mr. Jack's Aboriginal right was site-specific.

In summary, communal property regimes limited access and ensured the harvester group was responsible for management. Redistribution systems and mechanisms for

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[46] Pinkerton and Weinstein, *supra* note 39 at 16.

[47] Newell, *supra* note 28 at 42.

[48] Carlson, *supra* note 28 at 89.

[49] *Ibid.* at 91.

[50] *Ibid.* at 92-93.

[51] (1995), 16 B.C.L.R. (3d) 201, 131 D.L.R. (4th) 165 (C.A.) [hereinafter *Jerry Jack* cited to B.C.L.R.].

[52] *Ibid.* at 208.

accountability if leaders were not good stewards of the resource created incentives for community rather than individual wealth.

4. Adaptation to Ecosystem Limits

Given restricted mobility and the existence of exclusive communal property regimes, Aboriginal fishers relied on local production and had to adapt to local environmental conditions: "A coincidence of appropriate ecological and cultural elements would define a fishery site, and the interaction of all these factors would provide a range of harvesting strategies to be used."[53] This functioning within ecosystem limits had implications for social ordering:

> Their choice of fishing sites and harvesting and processing technologies typically took advantage of micro-environmental conditions and diversified marine resources. Variations in supply and differential distribution helped to link families in a web of production, co-use of sites, and exchanges of goods.[54]

Aboriginal technologies evolved to address physical accessibility constraints. In addition, these technologies were highly selective, readily monitored and controlled access by group members. Fishing practices were monitored and limited in time and space to ensure adequate spawning.[55] For example, fishers working a weir knew, based on traditional knowledge and observation, when a run started and ended, could ensure the weir was opened to allow the passage of fish to spawning grounds, and could fish run-selectively and, in small tributaries, stock-selectively, as needed. Thus, fishing technologies were directly tied to management through designs which allowed for continuous monitoring of, and adaptation to, the health of the resource by harvesters.

Ocean fishing methods provided less finely tuned control, but nevertheless tended to be at least species-selective. For example, the widespread practice of trolling with baited hooks only resulted in the capture of coho and chinook, leaving the other species of salmon for in-river exploitation. Similarly, Straits Salish reef nets tended to take pinks and sockeye.[56] Trawling with conical nets was another technology used in salt and fresh water by numerous coastal peoples, including the Haida, Tsimshian, Haisla, Nuxalk, Nuu-chah-nulth, Makah, and Coast Salish, as well as coastal nations further south.[57]

Traditional technologies tended to be labour-intensive. Individuals in a labour-intensive fishery are constrained by the inefficiency of searching out low catch per unit effort ("CPUE") catches. In times of scarcity, CPUE is low, prompting a temporary switch to other resources with higher CPUE until the population of the weaker resource recovers. In their study of the Kwakiutl, Weinstein and Morrell concluded:

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[53] Newell, *supra* note 28 at 32.
[54] *Ibid.* at 28.
[55] Carlson, *supra* note 28 at 142.
[56] Kew, *supra* note 28 at 191 and 198.
[57] *Ibid.* at 205.

> The need for a high CPUE, the ability to switch from scarce resources to more abundant ones, along with the awareness of the status of animal populations that constant monitoring of CPUE provides are the main elements in the conservation formula as practiced in aboriginal resource management.[58]

Thus, the technologies and monitoring strategies used in traditional Aboriginal fisheries were structurally geared to avoid over-exploitation, as scarcity triggered a decrease, rather than an increase, in fishing intensity.

5. Social Regulation

Specific rules aimed at protecting ecosystem integrity and habitat also existed. For example, the Nisga'a returned salmon remains to the river to maintain the natural "scent trail" and to encourage salmon to return.[59] Among the Nuxalk it was an offence to throw refuse in a stream during the salmon run.[60] Stewart also speculates that a taboo against floating freshly split cedar planks and new canoes down river during salmon runs was aimed at protecting salmon from cedar extractives which are toxic to fish and other forms of life.[61]

Spiritual and moral teachings further instilled a world view in which humans are part of and dependent on the natural world and created strong social pressures against destructive practices. For example, salmon stewardship figures prominently in this Stó:lō creation story told by Ernie Crey:

> Our history tells us that at the beginning of the world, salmon was given to the Stó:lō by Xă:ls, the creator and great Transformer. He taught us how to survive by maintaining a good relationship with salmon. He taught us how to fish for salmon, how to cook it, and how to look after it.[62]

In summary, a wide range of ethnographic and historical evidence demonstrates that traditional Aboriginal stewardship embodied an integrated approach to fisheries resources, where the manner, amount, and allocation of harvest were all regulated within the local community, in a geographically specific manner, and with reliance on the traditional ecological knowledge passed from generation to generation. Harvesters and managers were rooted within a community-based economy which was dependent on local ecosystem integrity. In-river ("terminal") technologies facilitated monitoring of the health of the resource, and provided direct means for reducing harvest pressure during periods of scarcity. Ocean-based fishing of mixed stocks and species tended to be at least species selective. Social institutions, particularly redistribution by chiefs and potlatching, also eased pressure on resources in times of scarcity.

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[58] M. Weinstein & M. Morrell, *Need is Not a Number: Report of the Kwakiutl Marine Food Fisheries Reconnaissance Survey* (Campbell River: Kwakiutl Territorial Fisheries Commission, 1994) at 24.

[59] Corsiglia and Snively, *supra* note 43 at 24.

[60] H. Stewart, *Indian Fishing: Early Methods on the Northwest Coast* (Vancouver: J.J. Douglas Ltd., 1977) at 174.

[61] *Ibid.*

[62] Carlson, *supra* note 28 at 140.

C. Van der Peet *Criteria*

Meeting the Supreme Court definition of what constitutes an Aboriginal right requires more than characterizing the nature, before contact, of an activity which is claimed as a right. Following *Van der Peet*, to fall within the scope of section 35, the activity must:

- be integral to the distinctive culture asserting the right;
- persist today in traditional or modern form; and,
- the right must not have been explicitly extinguished by the Crown.

1. "Integral"

Here the claimant must establish the activity was "one of the things which made the culture of the society distinctive—that it was one of the things that truly *made the society what it was*."[63] It seems difficult to overestimate the significance of fisheries stewardship to pre-contact Aboriginal cultures living in the watersheds of the North Pacific. As has been described, fisheries stewardship was integrated into the social order. Notzke concludes that "... marine resources in general, and the salmon in particular, constituted not only people's economic staple, but also provided the very essence of their social fabric and basis for their territorial organization."[64] Newell concurs: "Northwest Coast social and economic organization developed around salmon fishing. Such organization was an essential ingredient of what were in effect Aboriginal systems of salmon management."[65] The Native Brotherhood of British Columbia testified to the Pearse Commission in 1981 in perhaps more explicit terms: "Without fish, we have no culture and with no culture we are not a people. To us, the marine resources of British Columbia are part of our struggle to survive and grow."[66] This cultural significance is also reflected in Aboriginal creation stories.

The claimed activity must also be more than "incidental" to another, more culturally significant, activity—it must "be itself of integral significance to the Aboriginal society."[67] Stewardship is clearly more than incidental to harvest, given the clear evidence both of the significance of stewardship to Aboriginal cultures, and of the integration of fish production with fish management.

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[63] *Van der Peet, supra* note 7 at 553.

[64] Notzke, *supra* note 20 at 33-34.

[65] *Supra* note 28 at 40.

[66] Commission on Pacific Fisheries Policy, Final Report, *Turning the Tide: A New Policy for Canada's Pacific Fisheries* (Vancouver: Commission on Pacific Fisheries Policy, 1982) at 174 (Commissioner: P. Pearse).

[67] *Van der Peet, supra* note 7 at 560.

2. "Distinctive"

Following *Van der Peet*, an Aboriginal right must reflect the distinctive culture of the group claiming the right, but the practice need not be unique to the group. Proving the stewardship right in court would necessarily involve presenting evidence about the distinctive culture of the claiming nation, given that Aboriginal stewardship systems are collective, largely define the attributes of a particular culture and vary substantially among Aboriginal groups.

3. "Continuity"

Some continuity between pre-contact activities and modern times must be established. The activity may, however, have been interrupted and resumed, and may take a modern form.[68] In recognition of the difficulty of producing evidence from pre-contact times, conclusive proof about the pre-contact period is not required. In *Delgamuukw*, Chief Justice Lamer stated: "What would suffice instead was evidence of post-contact practices, which was 'directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact.'"[69] The Chief Justice went on to state, drawing on *R.* v. *Côté*,[70] that "to impose the requirement of continuity too strictly" would undermine the purpose of s. 35(1) and perpetuate historical injustices.[71]

The principle of continuity is the means by which the court seeks to allow for the evolution of rights and practices over time, avoiding a "frozen rights" approach. Rights in the modern context are not to be characterized as identical to pre-contact practices. Doing so would create problems for establishing continuity, and would constrain the definition of rights so that they have little use in furthering the objectives of section 35(1). Evidence of continuity, then, can be found in modern practices and approaches to the fishery that reflect traditional management, and in the persistent assertion by Aboriginal people of their right to control resources upon which they have traditionally relied.

As a final note, the principle also may have implications for the limits placed on Aboriginal rights. In the context of the right of Aboriginal title, Chief Justice Lamer stated in *Delgamuukw* that the principle of continuity extended to both past and future, implying that the right of title does not extend to uses of the land that are irreconcilable with the continued exercise of the right in the future.[72] Whether this aspect of "continuity" applies to rights other than title remains to be determined.

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[68] *Ibid.* at 555-57.

[69] *Delgamuukw*, *supra* note 8 at 1102, affirming and citing *Van der Peet*, *supra* note 7 at 555.

[70] [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385 [hereinafter *Côté* cited to S.C.R.].

[71] *Delgamuukw*, *supra* note 8 at 1103.

[72] *Ibid.* at 1089.

a. Historical Claims

From the early days of state management, Aboriginal people asserted the right to control their own fisheries free from government interference. In 1888, the Nisga'a claimed 50% of the licence fees collected by the Department of Fisheries for the Nass River in recognition of Nisga'a jurisdiction, reasoning that the Department could keep the other 50% as a collecting fee.[73] Before the Duff Commission in 1922, the Tsimshian claimed exclusive rights to salmon creeks controlled by their ancestors, and decried having to get a licence to fish for food.[74]

More recently, the Gitksan, Wet'suwet'en and Nuu-chah-nulth have all explicitly asserted the right to manage as well as harvest.[75] In the Gitksan-Wet'suwet'en case, the traditional economy has continued to be regulated by the hereditary Chiefs under their traditional legal system.[76] The Gitksan-Wet'suwet'en Tribal Council ("GWTC") has tried a variety of strategies to gain recognition of its stewardship practices and rights, including fishing bylaws under the Indian Act.

b. Modern Forms

Continuity of traditional practices is also expressed in current co-management initiatives. Many First Nations have been involved in co-management initiatives with DFO, including the Nisga'a, Nuu-chah-nulth, Nanaimo and, through the Lower Fraser Fishing Authority, the Musqueam, Tsawassen and Stó:lō. The Gitksan have developed a particularly successful and extensive co-management arrangement.

As documented in *Fisheries That Work*,[77] more than fifty actively fishing Gitksan house (extended family) chiefs have the right and responsibility to manage access of house members to fishing sites and, under traditional law, the right and obligation to protect fish habitat. A chief's management is validated or censured at the feast hall. While fishing sites have moved away from tributaries to sites on the main stem of the Skeena River due to overfishing of the small tributary stocks in coastal mixed stock fisheries and enhancement of major runs, the system of regulating access to the these sites has remained.

The Gitksan undertake extensive catch surveys and maintain a database relied on by both the Gitksan and the Department of Fisheries and Oceans. They have been exploring selective harvest methods to improve the status of small stocks since the early 1980s, leading to an Aboriginal Fisheries Strategy (AFS) agreement in 1992 experimenting with the most effective traditional, selective technologies. During the fishing

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[73] D. Harris, *The Legal Capture of British Columbia's Fisheries: A Study of Law and Colonialism* (LL.M. thesis, University of British Columbia 1998) at 56-57 [unpublished].

[74] Newell, supra note 28 at 117.

[75] Notzke, *supra* note 20 at 301 and 33.

[76] Gitksan-Wet'suwet'en Tribal Council, *Brief to House of Commons Standing Committee on Fisheries and Forestry* (1985) at 4.

[77] Pinkerton and Weinstein, *supra* note 39 at 63-70.

season, Gitksan representatives regularly confer with DFO officials to discuss the current harvest data, and Gitksan fisheries guardians participate in enforcement, facilitating monitoring and social control in the form of peer pressure. Illegal commercial sales have been reduced; all commercial sales follow a standardized procedure and are sold through a single corporation run by a board of chiefs.

Thus, the Gitksan are involved in joint stock assessment with DFO and MELP, data collection, monitoring of the condition of habitat, joint enforcement with DFO and resource use co-ordination in consultation with house chiefs. These management activities formalize and extend traditional harvest management duties of chiefs.

Not all First Nations have been as successful in asserting their rights and maintaining their traditional culture. For some, the exercise of fishing rights may be limited to fishing a few days a year under a DFO food fish licence. Many Aboriginal people do, however, persist with traditional ways in various modern forms. The Pearse Report of 1992 recognized continued adherence to traditional tenure regimes among nations of the lower Fraser.[78] Similarly, Pinkerton has documented some of the many ways Aboriginal traditions have continued, including the following:

> [A] system of informal territorial property rights remains in some areas. Fishers who have traditionally fished an area, or who have kinship-based claims over the resources in an area may as a group exercise informal social control to regulate the access of other fishers to the area. Second, the ownership of vessels has to some extent replaced the titular ownership of fishing sites, and vessel ownership carries with it similar obligations for those Indians who choose to be part of the local status system. Vessels are used as a common resource in many ways by community members, despite the formal definition of private ownership. For example, vessel owners transport other community members to food-gathering sites, on food-fishing expeditions, to feasts, and large community gatherings. Vessel owners may hire deckhands from the community, even if they do not require them, and distribute fish gathered with food-fishing permits to the entire community. ... On one reserve, a chief and seine boat owner was said to spend $30,000 a year in maintaining his chiefly obligations.[79]

Finally, many Aboriginal people continue to subscribe to traditional moral and spiritual beliefs. Stó:lō fisher Ernie Crey put it this way: "the right to harvest salmon has always carried with it moral and spiritual imperatives of stewardship and conservation, whether the salmon was harvested for social, ceremonial or economic reasons."[80] Similarly, traditional ecological knowledge continues to be passed on by the Nisga'a, who teach members of the community to be respectful and careful observers.[81]

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[78] Canada, *Managing Salmon in the Fraser: Report to the Minister of Fisheries and Oceans on the Fraser River Salmon Investigation* by P.H. Pearse (British Columbia: H. MacDonald Printing, 1992) at 17 [hereinafter *Pearse Report*].

[79] "Indians in the Fishing Industry", *supra* note 28 at 259.

[80] Carlson, *supra* note 28 at 142.

[81] Corsiglia and Snively, *supra* note 43 at 25.

4. "Unextinguished"

As British Columbia is for the most part not subject to treaties, except in the areas covered by the Douglas Treaties of 1850-1854,[82] Treaty 8 of 1899[83] and, if it is ratified, the new Nisga'a treaty,[84] Aboriginal rights remain unextinguished and protected by section 35 unless they have been explicitly extinguished.[85] Only the federal government has the authority to extinguish an Aboriginal right,[86] and an instrument relied upon for this purpose must reflect "clear and plain" intent to extinguish the right.[87]

In *R.* v. *Côté*, the Supreme Court applied the test, concluding that the failure by colonial governments to recognize legally a particular Aboriginal practice, custom, or tradition—and on the facts in *Côté*, tacit toleration—cannot be equated with a "clear and plain" intention to extinguish the practice.[88] In *Delgamuukw*, the court added that a law of general application cannot, by definition, meet the test.[89]

Similarly, the existence of a regulatory regime, such as the *Fisheries Act*, does not extinguish an underlying Aboriginal right without clear and plain intent. In *Sparrow*, the Supreme Court considered the *Fisheries Act* and decided it was not a complete code which unavoidably implies that fishing rights have been extinguished:

> 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 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.[90]

Whether the conclusions in *Sparrow* about the *Fisheries Act* are directly applicable to a self-government right is perhaps not entirely clear, as *Sparrow* dealt with narrowly defined harvest rights. In the harvest context, the Court drew a distinction between regulation and extinguishment: "At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the

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[82] Online: <http://www.tbc.gov.bc.ca/aaf/history/douglas.htm> (last modified: 20 November 1996). See also Tennant, *supra* note 33 at 17-38. Documents negotiated between James Douglas and several Aboriginal nations of Vancouver Island in the 1850s have been recognized as treaties by Canadian courts, see *R.* v. *White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), which was affirmed by the Supreme Court in *R.* v. *White and Bob* (1965), 52 D.L.R. (2d) 481.

[83] Online: <http://www.inac.gc.ca/treatdoc/treat8> (last modified: 19 November 1999).

[84] Online: <http://www.tbc.gov.bc.ca/aaf/treaty/nisgaa/docs/nisga-agreement.html> (last modified: September 1998).

[85] *Sparrow*, *supra* note 4 at 1091.

[86] *Delgamuukw*, *supra* note 8 at 1022.

[87] *Calder* v. *British Columbia (A.G.)*, [1973] S.C.R. 313 at 404.

[88] *Côté*, *supra* note 70 at 175.

[89] *Delgamuukw*, *supra* note 8 at 1022.

[90] *Sparrow*, *supra* note 4 at 1099.

regulations does not mean that the right is thereby extinguished.'"[91] With respect to self-governance, however, it is necessary to consider whether regulation by the state may be taken to imply extinguishment of an underlying Aboriginal self-government right.

In the Court of Appeal decision in *Pamajewon*, Osborne, J.A. held that *Sparrow* was authority for the principle that the assertion of sovereignty by the Crown extinguished a general right of self-government for Aboriginal peoples.[92] The Supreme Court decision did not affirm this finding, instead dismissing the appeal for lack of evidence to support the claim made. As noted previously, the Supreme Court was clearly willing to consider the possibility of narrower claims for "self-regulation" of a particular activity.

In looking for guidance on how to evaluate the effect of state regulation on a fishing claim defined to include both self-regulation and harvest, the applicable test for evaluating extinguishment remains the "clear and plain" test. As fisheries regulations in British Columbia have been incremental and inconsistent, have generally ignored traditional management and, in recent years, have allowed co-management initiatives, the Crown has at no point clearly and plainly extinguished Aboriginal fisheries management rights.

In summary, Aboriginal stewardship is an activity which falls within the scope of section 35 as defined in *Van der Peet*. The next stage in the analysis is to assess whether the right has been infringed by government action.

III. Infringements of Aboriginal Fishing Rights

The primary responsibility for managing Pacific salmon lies with the Department of Fisheries and Oceans (DFO) under the *Fisheries Act*. In brief overview, DFO estimates returns, required escapement, and desired total allowable catch ("TAC"). By limiting the timing and duration of openings and number of licenses, DFO attempts to control effort so that both TAC and catch of individual stocks do not exceed the desired level. The TAC is allocated among user groups, which include Aboriginal, commercial and sport fishers. DFO consults with major representatives of the fish processing sector through the Fisheries Council of British Columbia, with commercial fishers organizations (organized mainly by gear type), sport fishery representatives, the United Fishermen and Allied Workers Union, and First Nations through the Aboriginal Fisheries Strategy ("AFS"). While the major processors have had perhaps the most influence on DFO policy through the Fisheries Council of British Columbia and the former Commercial Fishing Industry Council, through which coastwide allocation

[91] *Ibid.* at 1097.

[92] *R.* v. *Pamajewon* (1994), 21 O.R. (3d) 385 at 400-02, 120 D.L.R. (4th) 475 (C.A.), aff'd see *supra* note 13.

was negotiated in the past, these forums provided no representation to communities and regions.

A focal point of consultations and management attention is thus the allocation of harvests. Allocation between Canada and the United States is handled through the Pacific Salmon Commission, an increasingly complicated process dealing with international allocation of Fraser River sockeye and pink, as well as chinook, coho and chum taken in recreational and troll fisheries. Canada's share is then divided among interest groups, each fighting to protect its share. Carl Walters concludes:

> Tight percentage allocations of available catch are seen by negotiating interest groups as a way of protecting their interest in the face of aggressive pressure for higher allocations by other groups that they see as potentially more powerful. Troll allocations have grown as trollers have learned to take sockeye offshore before the fish are available to other groups. Seine allocations have grown in response to aggressive lobbying by this highly capitalised, economically powerful group. Native allocations have grown in response to legal commitments.[93]

Managing these competing claims effectively within the existing framework has become a Herculean task.

The AFS was announced by DFO in 1992 in response to the new recognition of First Nation rights in *Sparrow*.[94] The AFS includes co-management initiatives, where Aboriginal groups have, for example, management responsibilities over aspects of food fisheries and some enhancement projects. Agreements for consultation and allocation, subject to conservation limitations, of fisheries resources for food, social and ceremonial purposes are also part of the AFS. The British Columbia Fisheries Commission, made up of representatives from commercial and sports fishing interests, advises the Minister of Fisheries and Oceans on the implementation of the AFS. In limited cases, DFO has developed Pilot Sales Agreements to permit the sale of fish caught under Aboriginal food fishing licences under the AFS. For example, for the 1998 season, DFO's management plan for the North Coast involved consulting with First Nations organizations to determine their food, social and ceremonial allocation needs while not jeopardizing coho conservation objectives, and issuing communal licences to the organizations. DFO also decided Pilot Sales Agreement fishing would be subject to the coho conservation restrictions imposed on the rest of the commercial fleet.[95]

Existing co-management regimes vary substantially in their comprehensiveness. As previously discussed, the Gitksan have negotiated fairly extensive involvement in

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[93] C. Walters, *Fish on the Line: The Future of Pacific Fisheries* (Vancouver: David Suzuki Foundation, 1995) at 20.

[94] *Pearse Report*, *supra* note 76 at 13-14.

[95] Canada, Fisheries and Oceans Canada, *Salmon Net Management Plans: Areas A, C and North Coast* (Ottawa: Communications Group, 1999), online: Fisheries and Oceans Canada <http://www.pac.dfo-mpo.gc.ca/ops/fm/mplans/mplans.htm> (last modified: 24 August 1999).

the management of the salmon fishery in their territory.[96] Other co-management efforts are more limited, involving the sharing of particular functions, for example, hiring Aboriginal guardians to do enforcement work, or Aboriginal management of a hatchery, without more comprehensive co-management of regional issues. No co-management agreement to date involves complete self-regulation, nor do these initiatives substantially change what remains the dominant strategy of DFO for management of the fishery. While elements of the fishery are becoming more community-based, the dominant strategy remains centralized state management of an increasingly industrial, corporate-owned fleet, where use and management are functionally separate.

A. Historical Perspective

As the traditional Aboriginal fishery has been described, it was community-based, involved communal property rights, used selective gear, involved some ocean-based fishing and was substantially carried out at terminal fishing sites. In the early days of European colonization, this regime stayed largely intact. During the first half of the 19th century, the Hudson's Bay Company relied on the Aboriginal fishery for its food supply. Traditional exchange systems extended to include trade with Europeans.[97] Colonists did not become heavily involved in the industry until the 1870s, but with them came regulation. At first, British Columbia's recommendation to the federal government was to encourage, rather than regulate, the industry.[98] With fish very abundant and the colonial commercial fishery as of yet insignificant, there was no reason to interfere with or restrict Aboriginal catch. On the contrary, the economy of the day relied on large and effective Aboriginal fisheries.

Soon, however, conflict developed as the wealth of the resource was discovered by colonists and the canning industry got underway. The transformation to a regulated industrial fishery was remarkably fast over the next forty years. Control began with blanket directives borrowed from regulations in place in the East. Regulations soon followed which explicitly targeted the Aboriginal fishery.

The first permanent canneries appeared in the Fraser River area in the early 1870s, with government Fisheries officers keeping records as of 1873. By 1875, canners were complaining about the impacts of gold mining in stream beds and Aboriginal fishing on the runs, and by 1877, the Fisheries Act was in force in British Columbia.[99] The number of canneries expanded from nine in 1880 to sixty-four in 1900, with canners increasingly competing for the same stocks and fishing sites as Aboriginal

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[96] Pinkerton and Weinstein, *supra* note 39 at 63-70.

[97] "Indians in the Fishing Industry", *supra* note 28 at 251.

[98] Harris, *supra* note 73 at 12.

[99] *Ibid.* at 24-25.

fishers.[100] Over the same period, regulation of every aspect of the industrial salmon fishery developed.

In 1878, the first regulations specific to British Columbia banned nets in non-tidal and fresh waters, prohibited the obstruction of rivers by more than one-third of their width and closed the fishery on weekends.[101] Aboriginal weir fishing, probably the most productive of Aboriginal technologies, was thus banned at an early stage, and with the ban a major legal blow was dealt to terminal fishing. The prohibition on net fishing in fresh tidal water included the lower Fraser, and would have shut down the canneries if strictly enforced. Fisheries Inspector A.C. Anderson chose to enforce the regulations as he deemed appropriate in British Columbia, with the result that there was "very little enforcement of any kind" in the early years.[102]

In 1879, the Department of Fisheries was given the power to grant licences and leases for salmon fishing. Licences were at first freely available to anyone. The British Columbia Board of Trade soon produced a report urging licence limitation to protect stocks and limit competition.[103] It had not taken long for conservation to become an issue. In 1878, the provincial legislature had passed a resolution "requesting the Dominion government take 'immediate steps' to stop the 'highly pernicious practice now pursued by Indians, in annually taking and using for food the spawn' of salmon and herring."[104] The need for conservation was to be used repeatedly as a justification for curtailing traditional fisheries while industrial fisheries expanded.

B. Transformation of the Production System

Traditional gears used in terminal fisheries were targeted early. A wave of weir and trap destruction began in the 1890s in the Cowichan area. In 1912, dams and traps were destroyed at the two most productive rivers draining into Quatsino Sound. In 1904, the Babine weirs were targeted; in 1906, Clayoquot Sound; and, in 1911, Stuart Lake weirs and drag seining at Lac la Hache.[105] Throughout this process, the Fisheries Department encouraged the switch from traditional fixed trap and weir technologies to mobile, industrial gear. For example, gillnets were supplied by Fisheries as part of the compensation agreement reached with the Babine for taking down their weirs,[106] despite gillnetting being illegal in freshwater under the *Fisheries Act*. Similarly, after a

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[100] "Indians in the Fishing Industry", *supra* note 28 at 251. Note also that over the history of the canning industry, First Nations have started and run their own canneries in some instances, though dominance in cannery ownership has consistently been non-Aboriginal.

[101] *Salmon Fishery Regulations for the Province of British Columbia*, C. Gaz. 1878.I.1258.

[102] Harris, *supra* note 73 at 35.

[103] *Ibid.* at 37.

[104] *Ibid.* at 40.

[105] Newell, *supra* note 28 at 90.

[106] *Ibid.* at 93; see also Harris, *supra* note 73, and B. Souther, *Aboriginal Rights and Public Policy: Historical Overview and an Analysis of the Aboriginal Fisheries Strategy*. (M.A. Thesis, Simon Fraser University 1993) on the history of the Babine barricades.

protracted battle, the Cowichan permanently took down their weirs on the Cowichan River in the mid-1930s, and the Fisheries Department supplied them with gillnets: "Increasingly, Fisheries used its power to issue or withhold net permits to influence the Cowichan use of their weirs".[107] A critical incidental effect of this change was the erosion of traditional management controls over access to the resource when the technology changed from a fixed weir to mobile gillnet.

C. Discriminatory Licensing

Licences were required as of 1888. The Department of Fisheries' stated purpose was not only to protect and improve fisheries, but also "to define and defend the respective fishing places used by fishers where 'confusion and intrusion might otherwise occur.'"[108]

These regulations also created the Aboriginal food fishery: "Indians shall, at all times, have liberty to fish for the purpose of providing food for themselves but not for sale, barter or traffic, by any means other than with drift nets or spearing."[109] Production by Aboriginal fishers was thus capped. Harris concludes:

> Fisheries isolated a portion of Native fishing, the food fishery, allowing it to remain under Native control for a few more years. It was an artificial distinction with no historic or traditional roots; Native people had caught fish for food, but also for trade and sale. ... [C]onfining the Native fishery to a food fishery was a means of reallocating the resource to the canneries.[110]

After the turn of the century, constraints on the food fishery grew. With Japanese labour replacing Aboriginal labour, canners were no longer dependent on the Aboriginal fishery for supply. Traditional fishing was now seen only as a threat to spawning requirements, marginal and dispensable. After the Hell's Gate slide, food fishing was severely curtailed up-river of the blockage, while the commercial fleet continued to fish in the lower part of the Fraser.[111] New regulations in 1917 required food fishers to abide by the same gear, area, close times, and season restrictions as industrial fishers, and made it an offence to buy fish caught under an Indian food fish licence. These regulations are essentially unchanged today.[112] In 1920, food fishing was prohibited at the principal Fraser River sites, while the industrial fishery remained open in the Fraser River estuary. When fish-processing rebounded after 1922, the food fishing restrictions in place on the Fraser were extended around the province.[113] By 1937, food

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[107] Harris, *supra* note 73 at 122.

[108] Newell, *supra* note 28 at 50.

[109] *Fishery Regulations for the Province of British Columbia*, C. Gaz. 1888.II.956.

[110] *Supra* note 73 at 18.

[111] Newell, *supra* note 28 at 95-96. In 1913-1914, railway construction on the Fraser River canyon caused massive slides severely damaging salmon runs in the Fraser.

[112] *Ibid.* at 96.

[113] *Ibid.* at 117.

fish licences were only being issued to those without other means of support.[114] In the eyes of the state, the Aboriginal fishery had been reduced to a cheap alternative to welfare. The real fishing was happening in the commercial sector.

Licensing in the commercial sector reflected the same trend toward allocating the resource away from the traditional Aboriginal fishery to the industrial fishery. In 1890, licences were limited in number for the first time in the Fraser district in order to restrict competition from newcomers to the canning industry, as well as from the growing number of independent Euro-Canadian fishers in the fresh/frozen business. Most of the 500 licences were issued to canners.[115] The ensuing conflict prompted the creation of the Wilmot Commission. Canners wanted security in their access to the resource from year to year, whereas British immigrants felt fisheries were a common access resource. The result of this early experiment in licence limitation was a boom in cannery construction to get access to additional licences. The number of canneries increased 50% from 1888-91 and tripled over the next decade despite insecure markets. Licence limitation thus caused a spiral in demand. The program was abandoned in favour of unlimited licensing for all British subjects, and canneries had to report who fished for them.[116]

Of the more than 3,000 Aboriginal fishers on the Fraser in 1892, only forty had independent licences and could thus freely negotiate a price for their catch. Of the 1,174 boats on the Fraser the following year, 909 were cannery owned. The issue of inequality in licensing was raised before the Wilmot Commission:

> [T]he federal fisheries inspector, by his own admission, routinely rejected applications for independent licences from Indians who lived outside the Fraser valley. Through a witness who was an Indian agent, Indian fishers requested that 100 independent licences be set aside for them. When Wilmot commissioners asked Marshall English about the wisdom of this, his answer suggests that cannery operators objected to the economic independence that Indians might gain under such a scheme. The commission's report was silent on the granting or reserving of independent fishing licences for Indians.[117]

According to Geoff Meggs, it was a federal policy in 1912 to grant unattached licences to Euro-Canadian fishermen coastwide.[118]

Drag seine licensing provides a particularly graphic example of how licences restricted access to the resource for some, and concentrated access in the hands of licen-

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[114] Harris, *supra* note 73 at 128.

[115] Newell, *supra* note 28 at 69-70.

[116] *Ibid.* at 70.

[117] *Ibid.* at 77.

[118] G. Meggs, *Salmon: The Decline of the British Columbia Fishery* (Vancouver: Douglas & MacIntyre, 1991) at 89.

sees.[119] Drag seine licences granted exclusive, long-term rights to a particular near-shore area:

> These leases amounted to fishing monopolies that encouraged prospecting for good seining grounds. Industrial drag-seining grounds were established quickly at the mouth of the Nimpkish River (near Alert Bay), and on salmon rivers flowing into Smith Inlet and Clayoquot Sound, for example. One person received seining licences for over 320 km of the coast. Another got one for Smith Inlet in 1884, and it was not canceled until 1919, after resentful First World War veterans attacked and destroyed the nets. Such monopolies were officially issued only to cannery owners.[120]

Meggs asserts that canners used these licences to "extort" money from seine fishers, and that one canner "held the seine lease for the entire east coast of Vancouver Island from Deep Bay to Comox...."[121] Whole inlets were leased to canneries and non-Aboriginal interests over several decades, with no reciprocal rights for Aboriginal fishers.[122]

D. Restricted Access to Traditional Sites

In addition to licensing and food fish restrictions affecting access to the resource, land-based fishing sites were in some cases sold, or taken over by non-Aboriginal users. For example, the province granted land to Stoney Point Reserve in 1878, but sold a parcel of the land to build a cannery in 1881.[123] Conservation arguments were used to restrict access to traditional fishing sites. Fishing near spawning areas and hatcheries was forbidden in 1894. This regulatory tool was later used strategically in some cases to curtail Aboriginal fishing in areas where fishing rights had already been recognized. For example, in 1905 a hatchery built in Kennedy Lake precluded fishing in an area for which the Nuu-chah-nulth had just had rights recognized in 1889. Similarly, while promises of allowing commercial sales were made to the Babine as part of the resolution of the 1904-06 weir dispute, the promises were followed up with "improvements" and construction of a hatchery on tributaries to Babine Lake which restricted the ability of the Babine to exercise the concessions they had won.[124]

Given these kinds of restrictions on traditional means of accessing the resource, the pressure would have been strong to move into the industrial fleet, if not with one's own licence, as labour on another's boat. The production system had shifted to an industrial model.

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[119] Drag seining involves throwing a net which is weighted at the bottom and which has floats on the upper edge from a boat and then pulling the net to shore.

[120] Newell, *supra* note 28 at 51.

[121] Meggs, *supra* note 118 at 86.

[122] Newell, *supra* note 28 at 114.

[123] *Ibid.* at 60.

[124] Souther, *supra* note 106 at 10.

E. The Industrial Fishery and Regulatory Regime

The new rules on gear, licensing, weekend closures and sale of food fish all required external enforcement, as none were supported by built-in incentives to comply. The Department of Fisheries started hiring officers to patrol weirs on Vancouver Island as early as 1885.[125] All enforcement officers were political appointees, at least through the turn of the century.[126] At first, Inspector Anderson enforced against Aboriginal fishers only when using non-Aboriginal technologies or selling to canneries, as the traditional fisheries were recognized as a critical food source.[127] As the canning industry developed, traditional fisheries were selectively targeted to facilitate cannery growth.

The Babine weirs provide a good example. In 1904, there were eleven cannery operators in the Skeena region.

> [Cannery operator] Alex Noble claimed that more than half a million dollars had been invested on the Skeena, that the industry paid three thousand workers a similar amount annually, and that the thirteen Skeena canneries required 1,600,000 fish. To protect that capital investment, the cannery owners demanded that the Government enforce the law and remove the barricades [weirs].[128]

The Babine Aboriginal fishery was highly productive, catching 750,000 salmon in 1904. Only the Babine were targeted, not neighbouring Stuart and Fraser Lakes peoples, because the Babine was the spawning area for Skeena cannery stocks. When the Babine asked the local fisheries officer about this inconsistency, he felt "compelled to stifle the truth."[129] The final resolution involved new sockeye gillnets for the Babine in lieu of their weir. That this was contrary to *Fisheries Act* regulations banning gillnets in freshwater did not seem to matter. As Barb Souther has documented, "the Indians claimed the barricade prohibition was a 'death blow to them in order to favour the Cannerymen,' but they complied. The Department, however, did not live up to its promise of supplying nets, and later unilaterally rescinded the agreement allowing the sale of fish."[130]

In the Babine case, state agencies selectively used the law to remove a fishery from Aboriginal control. If the regulations banning traditional gears ostensibly had conservation motivations, their implementation reveals a different story.

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[125] Harris, *supra* note 73 at 54.
[126] *Ibid.* at 149.
[127] *Ibid.* at 49.
[128] *Ibid.* at 177.
[129] *Ibid.* at 163.
[130] Souther, *supra* note 106 at 10.

F. Capital Investment and Centralization

After World War II, technological innovations increased the range, mobility, efficiency, and composition of the fishing fleet, accelerating plant centralization and closures. Fishfinding gear, powered gear, navigational gear, and refrigeration technologies meant that fishers did not need to be close to processors and could stay at sea longer, with more net sets per day. Purse seiners expanded but gillnetting remained predominant, with processors owning the bulk of the gillnet fleet. The government responded by attempting to control effort: "The Fisheries Department responded to the increased efficiency of the gillnetters and seiners by reducing fishing times and fishing effort in the net fishery, not by discouraging or limiting capital investment...."[131]

Costs, however, went up:

> Centralization and diversification in processing required larger and more mobile, hence very expensive, boats .... The heavy investment in vessels and equipment together with dwindling supplies of salmon drove up the price of the fish. Yield per boat steadily declined, more than offsetting the technological advances and resulting increase in each vessel's productivity and profitability.
>
> ...[I]n the 1950s, investment per person in the primary fishing operation in British Columbia doubled over that of the 1930s."[132]

Owners invested in multigear capacity, moving from one gear-type opening to another, leading Newell to conclude that "[t]he historic relationship between method of capture, places of capture, and final disposition of catch was thus weakened."[133] Cannery construction and expansion in 1960s was centred in Prince Rupert and Vancouver. Between the mid-1940s and mid-1960s, a 33% drop occurred in the number of Aboriginal fishers.[134]

1. Davis Plan

In 1968, DFO instituted a policy of eliminating smaller boats in the fleet as part of "fleet rationalization" under the Davis Plan. Under the plan, Category A licences were issued to boats with catches over 10,000 pound landings in 1967 or 1968, a buyback program was initiated and vessel inspections were begun. Category B licences were issued to boats which had landings of less than 10,000 pounds and were to be phased out over ten years. Licences could be purchased and combined on a higher capacity vessel, and it was possible to licence new seine boats on a "ton for ton" basis by retiring older gillnet boats. It was thought that "economically optimal" gear and area

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[131] Newell, *supra* note 28 at 124-25.
[132] *Ibid.* at 123-25.
[133] *Ibid.* at 126.
[134] *Ibid.* at 142.

regulations would maximize mobility and improve quality of catch by shifting away from rivers to ocean harvesting.[135]

During the 1970s, both prices and costs soared. In addition to the Davis Plan, licence limitations, price increases and government incentives to invest (including the Indian Fisherman's Assistance Program, boat construction subsidies, tax credits and write off allowances, and changes in the *Fishermen's Improvement Loan Act*) spurred capital investment in boats and gear. "Total capital investment quadrupled between 1969 and 1980, yet the size of the catch remained about the same."[136] Over the same period, the number of seine vessels increased 10% while the overall number of vessels (seine, gillnet and troll) decreased by 30%.[137] Combination seiners, able to fish both salmon and roe herring, increased from 83 to 216 vessels.[138] Between 1973 and 1976 alone, the ratio of mobile to stationary (fishing only two or three areas) seiners increased from 5:1 to 12:1.[139] It was thus the seine sector that responded most strongly to the market and regulatory changes of the 1970s, with increased investment and larger shares of the total catch relative to other gear types.[140]

Many of the boats eliminated from the fleet in ensuing years were owned or rented by Aboriginal fishers. Newell suggests the Davis Plan particularly benefited processors, who were the largest owners of rental gillnetters and who retired these boats to licence newer seiners of equivalent tonnage.[141] Between 1969 and 1971, the number of gillnet boats rented to Aboriginal fishers fell by more than 50%.[142] The closure of several Central Coast canneries contributed to the decline in rental gillnet opportunities for Aboriginal fishers. According to Pinkerton, the Indian Fishermen's Assistance Program, which ran from 1967 to 1979, "resulted in the retirement of vessels whose skippers could not afford to upgrade them to pass inspection and the recirculation of their licences into larger newer vessels, especially in the seine sector."[143]

Increased investment in seining also led to political pressure to open areas to fishing, overstressing small stocks. Pinkerton concludes:

> Department officials ... report that large processing companies, which owned at least a quarter of the seine fleet in addition to their joint-venture interests in other seiners, could often use political pressure to allow fishing on stocks against the better judgment of conservative fisheries biologists who recom-

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[135] *Ibid.* at 150.
[136] *Ibid.* at 153.
[137] Commission on Pacific Fisheries Policy, *supra* note 66 at 99.
[138] *Ibid.* at 100.
[139] E. Pinkerton, "Intercepting the State: Dramatic Processes in the Assertion of Local Comanagement Rights" in B.J. McCay & J. Acheson, eds., *The Question of the Commons: The Culture and Ecology of Communal Resources* (Tuscon: University of Arizona Press, 1987) 344 at 348 [hereinafter "Intercepting the State"].
[140] *Ibid.* at 349-50.
[141] *Supra* note 28 at 151-52.
[142] "Indians in the Fishing Industry", *supra* note 28 at 258.
[143] *Ibid.*

> mended closures of fishing areas... . Although the erosion of stocks was not new in the 1970s, and government efforts to constrain effort had suffered previous breakdowns in the 1940s and 1950s, it is important to note that the decline worseued in the 1970s, and that by the 1980s fishermen were able to link it clearly to government programs.[144]

Increased fleet mobility also made traditional Aboriginal fishing areas, even the most isolated, vulnerable to fishing pressure from non-Aboriginal fishers. According to Chief Harry Assu of Cape Mudge, non-Aboriginal seiners invaded the local grounds, destroying the indigenous industry and forcing out of business some Aboriginal fishers whose ancestors had fished there for thousands of years.[145]

2. Mifflin Plan

The cycle of capital intensification and attrition of small boats is presently repeating itself under the Mifflin Plan.[146] Like previous plans, its elements target economic objectives, or "fleet rationalization": inefficient boats are being removed from the fleet through buyback. With the aim of better controlling fishing effort, area licensing and single gear licensing were introduced. Remaining licence holders could buy the licences of others, however, and "stack" them on a single boat.

Because the remaining fleet has the capacity to catch the available fish, the Mifflin Plan is expected to have little effect on total catch.[147] This plan has, however, led to a shift from a rural to an urban ownership of licences and a disproportionate loss of jobs outside the Lower Mainland as well as in Aboriginal communities. Of the 7,800 jobs lost in the first year of implementation, 69% were outside the Lower Mainland.[148] Haida Gwaii, the Central Coast, northern Vancouver Island and west coast of Vancouver Island were the worst hit. Aboriginal communities suffered disproportionate job losses as a percentage of community employment. Ahousat lost 46% of the jobs in the community, Kyuquot lost 35%, Kitkatla 14% and Bella Bella 11%. The Aboriginal fleet as a whole was reduced by 23% from 1995-96 through buyback and stacking compared with 27% for the fleet as a whole.[149]

In addition, the Mifflin Plan has produced an increase in the capital intensity of the remaining boats in the fleet. While 9% of the seine fleet was retired, more than 20% of the small boat fleet was retired. Seiners were also most likely to stack li-

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[144] "Intercepting the State", *supra* note 139 at 351.

[145] Newell, *supra* note 28 at 161.

[146] The Mifflin Plan, also known as the Pacific Salmon Revitalizatiou Strategy, was a DFO initiative announced in 1996.

[147] B.C. Job Protection Commission, *Fishing for Answers: Coastal Communities and the BC Salmon Fishery* (Final Report) by G. Gislason, E. Lam & M. Mohan (Vancouver: ARA Consulting Group, 1996) at S-7.

[148] *Ibid.* at 16-1, S-7.

[149] *Ibid.* at 16-3.

cences—13% of seine licences were stacked, compared with 10% of gillnet licences and 4% of troll licences.[150]

Processing company ownership of seine licences was consistent between 1995 and 1996.[151] Like the Davis Plan, the Mifflin Plan appears to have acted as a subsidy to processors to get their inefficient boats out of the fleet, while retaining their catching power through licence stacking. At the same time, small-scale fishers were forced out. By 1998, Michael Harris of the Ottawa Sun concluded, "A full 30% of those who took advantage of Ottawa's licence buy-back offer were fishermen who typically caught 150 fish a day on hook-and-line. The big boys, whose seiners can take 20,000 fish in a single set of their nets, hung in."[152]

In sum, over the last 120 years, the Pacific salmon fishery has been transformed from a community-based, communally owned, selective, terminal and ocean-based Aboriginal fishery characterized by the integration of management and use, to a highly concentrated, non-selective ocean-based industrial fishery. Comparable levels of production were achieved under traditional Aboriginal and contemporary industrial systems, but the systems are fundamentally different.[153] While the Aboriginal fishery integrated use and management, the modern industrial system separates these activities and is characterized by private control, increasing capital investment, decreasing labour intensity and reliance on non-selective technologies. State enforcement in this fishery has been highly politicized, uncertain in its effects, conflictual and, with the escalating conservation crisis, ultimately unsuccessful.

IV. Structural Infringement of Aboriginal Fishing Rights

There are many ways in which this transformation in fisheries production and management has infringed the rights of Aboriginal people.

Overall, Aboriginal "fishing" practice traditionally involved both harvest and management, inextricably entwined. The industrial system presumes that the two are separate activities. The definition of what it means to have a right "to fish" is, in the industrial model, assumed to mean the right to "take fish", a meaning that eviscerates the traditional stewardship practice. If a fish on the dinner table, no matter how it got there, is the only protection of fishing rights that section 35 accords, it is a partial and inadequate protection.

In the modern constitutional framework, the culturally specific (*i.e.* Western) definition of what it means to fish has been perhaps the most significant obstacle to the exercise of the existing full Aboriginal right. This is especially so when the *sui generis* nature of the right is properly applied to define its content. Historically, it was

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[150] *Ibid.* at 14-3.
[151] *Ibid.* at 14-4, 17-2.
[152] M. Harris, "A City Fishing for Answers" *Ottawa Sun* (19 November 1998) 14.
[153] See Appendix.

this narrow conceptual approach that permitted the development of the current scale of industrial fishery, a process that has led directly both to the progressive erosion of Aboriginal fishing activities and the current decline in the stocks. Today, this translates into an escalating erosion in the ability of Aboriginal fishers to utilize their few remaining opportunities.

As Douglas Harris has demonstrated, in the early days of state regulation, colonial rhetoric about the absence of pre-existing Aboriginal law was necessary to justify the imposition of colonial law.[154] In the process of allocating the resource away from Aboriginal communities to support the canneries, existing Aboriginal management and harvest regimes were consistently ignored. Colonial laws aimed at asserting control over the resource came very early. The person who managed and controlled allocation clearly mattered a great deal.

The definition of fishing as harvest, and not stewardship, remains as significant a tool today as ever for denying to First Nations access to the resource. Peter Usher asserts that control over resource management is a form of social control:

> A strong case can be made that fish and wildlife management, and the economic objectives associated with it, have been used as a means of social control and engineering of Aboriginal people, with no less disruptive effect than Indian administration itself.[155]

Restrictions including bans on traditional gear, prohibitions on potlatch, closures and other limits on access to fisheries, and above all, a consistent policy of promoting an industrial fleet incompatible with traditional management have combined to undermine Aboriginal cultures. To now affirm a right to harvest fish (under *Sparrow*) without structurally changing the way fisheries are managed in British Columbia fails to resolve the historical and continuing infringement.

In this context, the infringement of Aboriginal fishing rights must be understood as *systemic*. That is, separating the production of fish products from the management of fisheries constitutes, as a whole system, a "structural infringement" of Aboriginal rights. This occurs in two broad ways.

First, unlike traditional fisheries, the present system is fundamentally geared away from a production process which integrates preventive management controls directly into its technology and practices. Contrary to the demonstrated high levels of productivity attained over many centuries by the practices of traditional stewardship, the governmentally mandated separation has, in a few decades, created conditions which have allowed a drastic depletion of salmon stocks, thus eroding not only the management, but also the harvest component of Aboriginal fishing rights. This is a structural infringement because, as discussed below, *it is an inevitable consequence of the separation of use from management.* As such, it cannot be addressed without changing the

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[154] *Supra* note 73.

[155] P. Usher, "Some Implications of the *Sparrow* Judgement for Resource Conservation and Management" (1991) 18:2 Alternatives 20 at 20-21.

structure of the production system and regulatory regime. This can be achieved only by moving toward an integrated approach that embeds conservation management objectives directly within the process of production, a system often called "clean production".

Second, the nature of the present regime, characterized by centralized state management and separate users, precludes the development of modern, locally driven, and culturally meaningful "self-regulation" initiatives by First Nations. This infringement of the stewardship component of the fishing right is structural because its source also lies in the fundamental separation between the production system and the regulatory regime, so that modern Aboriginal stewardship cannot be accommodated without changing this core structure. This situation can only be redressed by shifting toward meaningful community management in a manner reminiscent of traditional practices.

These two broad infringements, and their potential remedies, are discussed in greater detail below.

A. The Harvest Component

Conservation problems are inherent in the present system. While DFO has formally adopted a "risk averse" policy, the present production system is structurally oriented toward over-exploitation, and the effects are manifest. The *Strait of Georgia Fisheries Sustainability Review* found that four out of the five salmon species, namely coho, pink, sockeye and chinook, do not meet criteria for sustainability.[156] Insufficient escapement to support food fisheries for Aboriginal communities has been occurring at least since 1975.[157] A 1996 assessment of 5,487 anadromous salmon stocks (a little more than half of the identified stocks in British Columbia) found that, in the last century, 142 have been extirpated, 624 are at "high risk", 230 are "of special concern", and 78 are at "moderate risk" with 43% of stocks remaining unclassified because of unreliable data.[158] British Columbia coho stocks have been so weakened that a full moratorium was imposed in 1998.

It should be noted that serious concerns exist with a range of species, including rockfish, cod, a variety of shellfish and increasingly with herring, particularly resident populations. Like salmon, herring have great cultural significance to Aboriginal peoples, and, in addition, play a key role in the ecosystem's food web for many species, including salmon.

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[156] D. Levy, L. Young & L. Dwernychuk, eds., *Strait of Georgia Sustainability Review* (West Vancouver: Hatfield Consultants, 1996) at 211.

[157] Union of B.C. Indian Chiefs Food Fish Committee, "Food Fish Documentation" as cited in W. McKay, "The Native Food Fisheries and the Potential Impacts of Oil Spills Near or En Route to Kitimat, Port Angeles and Cherry Point" in Canada, *Environment Canada Regional Program Report 78-21* (Ottawa: Communication Group, 1978) at 21.

[158] T.L. Slaney *et al.*, "Status of Anadromous Salmon and Trout in British Columbia and Yukon" (1996) 21:10 Fisheries 20.

1. Non-Selectivity and Mixed-Stock Fishing

Unlike traditional Aboriginal fisheries, the present regime relies on non-selective technologies fishing mixed stocks. As has been recognized within the scientific community, small and/or weakened stocks and substocks are presently overfished as by-catch on openings for large stocks. Slaney *et al.* concluded that "...the mixed stock nature of many coastal fisheries—as well as steady increases in both the effort and effectiveness of commercial, sport and Aboriginal fishers—continue to threaten many of British Columbia's weaker stocks."[159]

Because there are so many separate stocks in British Columbia, managing openings to protect small stocks is untenable when they are mixed:

> [T]he management focus has been biased toward the enhancement and harvest of major commercial stock aggregates rather than toward conservation to avoid extinction of the myriad small, local populations playing a lesser role in the commercial fishery.
>
> Not surprisingly, considerable evidence can be assembled to characterize the outcome of these efforts as either great successes or dismal failures. On the success side, managers can point to the biologically healthy state of most of our stocks and the maintenance of many sustainable fisheries on the coast. On the failure side, managers must acknowledge that dozens, possibly hundreds, of local populatious of salmon have been extinguished in the last century, and that steelhead trout populations are threatened with severe depletion, if not biological extinction, through incidental catch in commercial salmon fisheries in British Columbia.[160]

In the late 1980s, DFO predicted 35% of South Coast salmon stocks would be lost by 2030 if harvest patterns continued. Many stocks were already extirpated when that estimate was made.[161]

Non-selective, mixed-stock fishing inherently tends toward the loss of genetic and geographic diversity, that is, towards increasing reliance on just a few major stocks. As genetic and geographic diversity protects against biophysical variations, including human-induced changes like global warming, these losses of small stocks may have

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[159] *Ibid.* at 29-30.

[160] K.D. Hyatt, "Stewardship for Biomass or Biodiversity: A Perennial Issue for Salmon Management in Canada's Pacific Region" (1996) 21:10 Fisheries 4 at 4-5.

[161] Canada, Department of Fisheries and Oceans, *Pacific Region Salmon Stock Management Plan I: Inner South Coast Fraser River* (Vancouver: Department of Fisheries and Oceans, 1988) at 204 as cited in E. Pinkerton, "Local Fisheries Co-management: A Review of International Experiences and their Implications for Salmon Management in British Columbia" (1994) 51 Can. J. Fish. & Aqua. Sci. 2363 at 2364. Riddell, in Pinkerton, calculated that one third of the Strait of Georgia salmon stocks known since the 1950s to have been extirpated or decreased to such low levels they were no longer consistently monitored.

far-reaching regional consequences. These losses also set the stage for economic problems, as reliance on fewer stocks creates larger fluctuations in supply.[162]

a. Case Example

The problem of mixed stock management was addressed by the British Columbia Court of Appeal in *Jerry Jack*. In that case, an expert witness for the Crown asserted: "because of commingling the DFO was unable to take action directed exclusively at the chinook ... they could be dealt with only when they were in their natal rivers or very close to those rivers when they were mature and ready to spawn."[163] The Court did not, however, conclude that this justified imposing harsher conservation measures on terminal-based Aboriginal fishers than on sport and commercial fishing located further from spawning areas.

On the contrary, the Court concluded that Mr. Jack had an Aboriginal right to fish *within his hereditary area*:

> The trial judge found that the closure of sub-area 25-16 prevented Mr. Jack from fishing for any salmon in his traditional area and that it was important for the appellant to fish within his own hereditary area. If the appellant had to seek permission of another person to fish elsewhere, he would be embarrassed and would lose stature. There was evidence to support this finding.[164]

Imposing conservation restrictions on Mr. Jack in his hereditary area, while sport and commercial fishers continued to fish on mixed stocks further from the spawning areas, was a violation of his Aboriginal right. The court found that this violated the principle of priority allocation, where the order of priority in allocation in descending order is conservation, Aboriginal fishing, sport fishing, and commercial fishing:

> In our opinion, the DFO failed to give priority to Mr. Jack's aboriginal right when it prohibited any fishing for chinook at the mouth of the Leiner River but at the same time allowed sport fishers a daily limit of two chinook per person in the entrances to Esperanza and Nootka Inlets.[165]

The Court rejected the argument that "any further general conservation measures which would have significantly benefited the Leiner and Tahsis Rivers stocks would have had a drastic adverse effect on the off-shore fisheries."[166] As other management

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[162] E. Pinkerton, "Models for Community-Based Management of BC Salmon Fisheries" in P. Gallaugher, ed., *British Columbia Salmon: a Fishery in Transition* (Vancouver: Pacific Fisheries Think Tank, 1997) 58 at 59 [hereinafter "Models"].

[163] *Jerry Jack*, *supra* note 51 at 211.

[164] *Ibid.* at 216.

[165] *Ibid.* at 219. *Sparrow* affirmed the order of priority for allocation that Dickson J. (as he then was), outlined in his separate concurring judgment in *Jack et al.* v. *The Queen* (1979), [1980] 1 S.C.R. 294 at 313, 100 D.L.R. (3d) 193 [hereinafter *Jack et al.* cited to S.C.R.]. The first priority is conservation, followed by Aboriginal food fishing, and then commercial fishing.

[166] *Jerry Jack*, *supra* note 51 at 219.

alternatives were available to DFO, the restrictions on Mr. Jack were "unreasonable,"[167] and a violation of his Aboriginal rights.

A key insight from this very important case is that because Aboriginal rights can exist in a particular terminal fishing location, a management approach which allows excess harvesting of mixed stocks and compensates by imposing conservation restrictions in terminal areas will inevitably cause infringements of Aboriginal rights.

b. *Recent Proposals to Shift Commercial Fishing to the Mouths of British Columbia's Major Rivers*

Open-ocean technologies necessarily focus on mixed stocks that have not yet separated by end destination, and cannot be visually separated at capture. Thus, non-selective, high volume technologies targeting mixed stocks and species have the potential to be very damaging to weakened species and stocks. Not all technologies are equally risky, however.

Over the last century, the industrial fleet has increasingly relied on non-selective gear types (especially seine and gillnets) that are utilized primarily to meet economic criteria set by the large processors, whose "rights" now determine production methods. Smaller scale ocean-based fishers using less ecologically risky technologies, such as trollers, have been increasingly marginalized. Hook and line fishers of today are, however, more closely akin to traditional Aboriginal ocean fishers than industrial seiners, and are an important part of Aboriginal and non-Aboriginal communities on British Columbia's coast.

In recognition of the threat the industrial fleet currently poses to stock and species diversity, DFO recently proposed to address the problem of mixed stock fishing by shifting the commercial allocation to the mouths of British Columbia's major rivers and offering buy-backs to those who would be prejudiced by the changes, for example, trollers on the west coast of Vancouver Island. This proposal presents a serious threat to Aboriginal and non-Aboriginal outport communities, and prompted the Nuu-chah-nulth Tribal Commission to write the following to Fisheries Minister David Anderson: "With one stroke of the pen, you are on the verge of wiping out a way of life for people that have lived with the salmon for thousands of years."[168]

The problems encountered over the past several decades relating to industrial fishing on mixed stocks run deeper than the DFO proposal to move the industrial fleet to river mouths (*i.e.* more terminal areas) would suggest. Aboriginal rights certainly exist in particular species and stocks, as *Jerry Jack* indicates, and this fact demands management approaches that can protect stock and species diversity. Aboriginal rights also exist to ocean-based fishing, as demonstrated, for example, by long traditions of

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[167] *Ibid.* at 225.

[168] Letter to the Fisheries Minister (2 November 1998) in *Salmon: A Human Crisis* (Ucluelet, B.C.: Regional Aquatic Management Society, undated).

hook and line fishing on the west coast of Vancouver Island. As the Nuu-chah-nulth statement indicates, protecting Aboriginal rights involves protecting a way of life, a way of life that, it is argued here, is inconsistent with a highly centralized industry and management system.

2. Scientific Stock Assessments

Under the present system, DFO must try to time openings so that the fleet does not fish right through the peak return of a major stock, but rather allows enough escapement to pass through. If openings are mis-timed, stocks may be seriously imperiled. Similarly, if returns for a stock are overestimated stocks can easily be seriously over-harvested given the capacity of the fleet. The Fraser River Sockeye Public Review Board found that errors in stock assessment in 1994 resulted in a total harvest rate for sockeye of 80%,[169] and that one more twelve hour opening on Fraser-bound sockeye in Johnstone Strait could have virtually eliminated the late run of Adams River sockeye.[170]

The current management approach relies on precise stock assessment and control over fishing effort. Both are unreliable. The uncertainty inherent in biological production, mortality, stock assessments, and human behavior have led some scientific commentators to conclude that pervasive uncertainty is here to stay.[171] Given this reality, reliance on a narrow range of information inputs creates serious problems. Reliance on scientific stock assessment to the exclusion of local and traditional knowledge is an institutional weakness of the current management approach. Information supply for stock assessments is further weakened by the prohibitive cost of putting DFO officials in the field to monitor stock by stock, leading instead to a reliance on industry reporting and on ocean surveys of narrow parameters.

3. The Failure to Manage for Ecosystem Integrity

Single-species management, as opposed to management at the ecosystem scale, is a serious flaw in the present model. The practice of fisheries management lags behind scientific understanding of this issue, and is contrary to traditional Aboriginal approaches. As defined by R.E. Grumbine, "[e]cosystem management integrates scientific knowledge of ecological relationships within a complex sociopolitical and values framework toward the general goal of protecting native [biologically indigenous] eco-

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[169] Canada, "Fraser River Sockeye 1994: Problems & Discrepancies" in *Report of The Fraser River Sockeye Public Review Board 1995* (Ottawa: Canada Communications Group, 1995) (Chairman: J.A. Fraser) at 39 [hereinafter *Fraser Report*].

[170] *Ibid.* at 34.

[171] D. Ludwig, R. Hilborn & C. Walters, "Uncertainty, Resource Exploitation, and Conservation: Lessons from History" (1993) 260 Science 17; J.A. Wilson *et al.*, "Chaos, Complexity and Community Management of Fisheries" (1994) 18:4 Mar. Policy 291.

system integrity over the long term."[172] Ecosystem management's key contribution is that resource management must be geared to fit human use within ecosystem limits as opposed to being geared to maximize production of goods and services.[173] From a biological perspective, the ecosystem approach to management is the "only way" to conserve ecological processes and habitats.[174] In this light, the current centralized, single species management model is institutionally maladapted as it leads to the underestimation of risk and thus over-exploitation.

4. Enforcement Problems

Separating use from management creates the necessity for intensive enforcement at high cost. The high cost means enforcement is susceptible to budget restraints. After the 1994 evidence of 1.3 million fewer sockeye spawners than expected, the *Fraser Report* concluded "because of reductions in DFO enforcement staff, there are simply not enough officers in place to estimate the magnitude of the illegal catch".[175] Yet even if monitoring by DFO were tight, the production system inherently creates a tendency toward over-exploitation.

The incentives to "beat the system" which attend the separation of use and management also introduce major errors in stock assessment. For example, the *Pearse Report* of 1992 which examined why 500,000 sockeye "went missing" found serious problems in catch estimates, including the failure to adequately account for evasive behaviour by fishers: "...no provision was made in the catch estimates for extra, unauthorized nets used at night, or for nets set before openings and pulled after closures."[176] The conclusion reached by the *Fraser Report* of 1995 was that co-management with First Nations can help address catch estimate problems and should be pursued by DFO.[177] Similarly, in his analysis of the Atlantic cod collapse, A.T. Charles concluded that difficulties in calculating and enforcing quota management created anti-conservation incentives which introduced biases of enough significance to warrant serious rethinking of the approach.[178]

5. Vulnerability to Private Interests

A pressure to over-invest is also inherent in the current management model where the incentives lie in investing heavily in gear and boats that can take quick advantage of very short openings. This system lacks the balancing institutions that would create

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[172] R.E. Grumbine, "What Is Ecosystem Management?" (1994) 8 Conserv. Bio. 27 at 31.

[173] *Ibid.*

[174] J. Franklin, "Preserving Biodiversity: Species, Ecosystems or Landscapes?" (1993) 3 Ecological Applications 202 at 202.

[175] *Fraser Report, supra* note 169 at 21.

[176] *Supra* note 78 at 26.

[177] *Fraser Report, supra* note 169 at 22.

[178] A.T. Charles, "The Atlantic Canadian Groundfishery: Roots of a Collapse" (1995) 18 Dal. L.J. 65 at 79-80.

incentives to invest at scales appropriate to ecosystem functions, while also ensuring that the benefits of investments in sustainability will accrue to the investing fisher. Historic and contemporary efforts to "rationalize" the fishery have done little to slow the problem of over-investment. On the contrary, the consolidation of ownership is increasing, while sustainability-driven institutional reforms are postponed.

Examples of management decisions which reflect compromise on conservation objectives due to capital pressures are numerous and varied. Walters has documented how increasingly complex and rigid allocations make it virtually impossible for DFO to respond to fluctuations in salmon abundance.[179] Increasing privatization through innovations like Individual Transferable Quotas ("ITQs"), which British Columbia uses to manage halibut and black cod, would also constrain decision-making. ITQs create a right to a quota in an individual, who may sell or fish the quota. Charles notes that because ITQs create a property right in a quota, they render difficult any changes to TAC mid-season, as could be made when more information about stock status becomes available. ITQs are therefore poor tools for dealing with uncertainty.[180]

The increasing allotment of the resource to private interests creates strong pressures against the development of new management arrangements under which Aboriginal stewardship rights could be exercised. These problems are exacerbated by the "revolving door", in which individuals working for DFO go on to work for the major processing companies and vice versa.[181] Pinkerton concluded in her analysis of the implementation of co-management after the Boldt[182] decision: "Barriers to negotiating and implementing co-management agreements are greater in proportion to the power of other parties affected and the extent to which they have captured a government agency."[183]

B. Structural Incompatibility

Stable, community-based participation by Aboriginal fishers is necessary to retain the cultural significance of the activity. Any system that is designed in a way which discourages this participation structurally infringes Aboriginal fishing rights. This is true whether the erosion of Aboriginal participation occurs through stock depletions caused by inappropriate management, or through reallocation of the fishery away from Aboriginal fishers to private interests. Such reallocation can occur subtly through decades of management that favours corporate ownership and the industrial exploitation of mixed stocks, as discussed above, or through direct privatization of

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[179] Walters, *supra* note 93 at 19.

[180] *Supra* note 178 at 76.

[181] Personal communication from David Ellis.

[182] *United States* v. *Washington*, Phase I, 384 F. Supp. 312 (W.D. Wash. 1974), 506 F. Supp. 187 (W.D. Wash. 1980), vacated, 759 F.2d 1353 (9th Cir. 1985), wherein Washington tribes won broad fishing rights, including management rights related to allocation and habitat protection.

[183] E.W. Pinkerton, "Translating Legal Rights into Management Practices: Overcoming Barriers to the Exercise of Co-Management" (1992) 51 Human Org. 330 at 339.

rights to the fish *per se*, for example through Individual Transferable Quotas. The concentration of ownership in Vancouver and Prince Rupert and the erosion of local participation and stewardship are products of the management regime and production system it encourages.

Focusing specifically on Aboriginal stewardship, meaningful "self-regulation" (to use the Supreme Court's term in *Pamajewon*) of salmon fisheries by First Nations is incompatible with the fundamental character of the present production/management system. The degree of reform in production techniques and the amount of control needed at the local level to achieve successful community regulation, reminiscent of traditional fisheries management systems but expressed in modern form, can only be achieved through structural changes in the fishery. Without this, local Aboriginal groups remain the recipients of an allocation in competition with other harvesters for a resource that is dwindling as a direct consequence of the existing system.

Without significant changes to both the production and management systems, over-exploitation and its associated consequences will continue. The failure to address this systemic problem constitutes an on-going structural infringement of the Aboriginal right to fish.

V. Infringements of Aboriginal Fishing Rights and the Law

Under Canadian constitutional law, infringements of constitutional rights may in some circumstances be "justified" and therefore legal. *Sparrow* sets out a two step justification test for Aboriginal rights infringements. The burden of proving justification lies with the Crown. Under the first step, to be justified, the infringement of an Aboriginal right must be done for a substantial and compelling purpose. Under the second step, the government must show that the infringements do not violate the Crown's fiduciary duty toward Aboriginal peoples.

A. A "Substantial and Compelling" Objective

Sparrow recognized "preserving s. 35(1) rights by conserving and managing a natural resource" as a substantial and compelling legislative objective.[184] In the *Van der Peet* trilogy, the Supreme Court found that reconciliation with non-Aboriginal people and economic and regional fairness were also valid purposes.[185] It may at first appear that DFO's objectives fall within these broad parameters. However, this requirement is not satisfied.

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[184] *Sparrow*, *supra* note 4 at 1113.

[185] It should be noted that Aboriginal food and ceremonial fishing rights enjoy greater protection than the commercial rights. While reconciliation and economic and regional fairness are valid legislative objectives when it comes to commercial rights, these are not valid objectives with respect to food and ceremonial fishing rights (*Gladstone*, *supra* note 5).

Based on the history of the commercial fishery set out above, the primary objective of the management system is demonstrably not conserving and managing natural resources, reconciliation, or economic and regional fairness. Rather, the facilitation of non-Aboriginal, and to a lesser extent Aboriginal, industrial exploitation of the resource has been the underlying objective. Conservation has played a very subsidiary role, and regional outports have become casualties rather than beneficiaries of the development of the industry. While in *Sparrow*, "conserving and managing natural resources" were framed as a means of preserving section 35 rights by ensuring the sustainability of the resource, a more accurate characterization of the objectives of the DFO recognizes its history of encouraging non-Aboriginal interests and Aboriginal fishing only to the extent it conforms to the industrial approach. As industrial fishing "individualizes" access rights, communal rights have been eroded.[186]

While the AFS attempts in some ways to recognize the communal nature of Aboriginal fishing rights and may be intended by DFO to have the objective of "reconciliation", its effects have hardly been conciliatory. In her review of the AFS, Souther has found that non-Aboriginal commercial fishers unanimously disapproved of the AFS.[187] The overt transfer of allocation from non-Aboriginal to Aboriginal fishers created substantial ill-feeling.[188]

In sum, the present management system lacks a compelling social objective. It cannot be said to have as its primary objective conservation, reconciliation, or economic and regional fairness, the objectives suggested so far by the Supreme Court to be valid. Rather, the objective of industrializing the fishery to the exclusion of traditional harvesting and management, and crucially, to the exclusion of outlying fisheries-dependent communities (both Aboriginal and non-Aboriginal) is best interpreted as a policy decision favouring major processing companies. The favouring of one economic actor over others cannot be the kind of social objective the Supreme Court has contemplated as a compelling basis for infringement of a constitutional right.

B. The Crown's Fiduciary Duty

The second step in the *Sparrow* justification test is that the Crown's fiduciary duty must be satisfied. In *Guerin* v. *The Queen*, the court stated that like negligence, the categories of fiduciary duty "should not be considered closed."[189] As the Supreme Court explained in *Delgamuukw*, fiduciary obligations vary with the nature of the Aboriginal right at stake and the factual and legal context of each case, in some cases requiring priority allocation of fish, in others requiring considerations such as minimum infringement, compensation for expropriation, and meaningful consultation.[190]

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[186] Personal communication with Pinkerton.
[187] Souther, *supra* note 106 at 81.
[188] *Ibid.* at 81-82.
[189] *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335 at 384, 13 D.L.R. (4th) 321.
[190] *Delgamuukw*, *supra* note 8 at 1108-1110.

Thus in *Sparrow* and *Gladstone*, the fiduciary duty identified in each differed based on the distinction the Court perceived between a food fishery and a commercial fishery. In *Sparrow*, the fiduciary duty amounted to priority allocation, whereas in *Gladstone* the government had a fiduciary obligation to ensure that both the process of allocation and the quantum allocated to the Aboriginal commercial fishery reflected the prior interest of Aboriginal rights holders.

As previously discussed, the British Columbia Court of Appeal decision in *Jerry Jack* indicates that, even when fishing is considered narrowly as a right to harvest, the Crown's fiduciary obligation to prioritize Aboriginal fishing means that managing for conservation by restricting terminal fishing while sport and commercial fishing on mixed stocks proceeds will lead to violations of Aboriginal rights.

The honour of the Crown extends farther than this, however. In previous cases the nature of the right was characterized in terms of access to harvest. In contrast, the nature of the right, fully understood, is fundamentally broader as it entails a comprehensive right to steward fish (*i.e.* to "manage" as well as to produce) by traditional practice expressed in modern form. As the form of fiduciary duty varies with the nature of the Aboriginal right, the fiduciary obligation with respect to stewardship must be different than the fiduciary obligation with respect to harvest. Where the latter was linked in *Sparrow* to allocation, the former is best discussed in terms of a management/production process as a whole—beyond minor modifications to, for example, current consultation processes, or isolated co-management agreements.[191] Therefore, the scope of analysis at this stage must extend to the structure of the management system as a whole, with the burden of justification lying on the Crown.

The obligation of the government must extend to not harming the sustainability of fisheries resources on which Aboriginal cultures rely. With established Aboriginal fishing rights, even to harvest alone, any act of the government that puts those resources in jeopardy violates the spirit of section 35. Furthermore, the government's fiduciary obligations require the court to ask at the justification stage "whether there has been as little infringement as possible in order to effect the desired result."[192] As we argue below, this question must be answered in the negative, as the management system itself structurally infringes Aboriginal fishing rights.

To the extent the justification test for section 35 is comparable to the *Oakes* test[193] for justification of Charter infringements, an objective which is substantial and compelling in the abstract should not justify an infringement of a fundamental right where the harm caused by the infringement far outweighs the benefits. In *Dagenais* v. *Canadian Broadcasting Corporation*, the Supreme Court concluded that "there must be a

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[191] *Sparrow* set out an Aboriginal right to part of the annual allocation, and, as a consequence of the Crown's fiduciary duty, affirmed the order of priority for allocation set out in *Jack et al.*, *supra* note 165 at 313.

[192] *Sparrow*, *supra* note 4 at 1119.

[193] *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, *and there must be a proportionality between the deleterious and the salutary effects of the measures.*"[194]

The honour of the Crown requires this proportionality in the context of section 35. However, from the perspective of conservation, reconciliation, or economic and regional fairness, the current management approach inevitably does more harm than good.

VI. The Minimal Infringement Principle

To be justified under the minimal infringement principle, the burden lies on the Crown to show that:

- the current management model is necessary to satisfy a substantial and compelling objective; and,
- no other system which infringes Aboriginal fishing rights to a lesser degree is viable.

For example, in the *Jerry Jack* case, the Crown's conservation objective was considered compelling, but the means chosen by DFO were not minimally infringing. The British Columbia Court of Appeal supported the trial judge's finding that "the allocation of fish stocks to interception fishery groups at the same time as the closure of Mr. Jack's right to fish at the mouth of the Leiner River, was unreasonable"[195] given that alternative management interventions to achieve conservation results were available. The Court also supported the trial judge's finding that the allocations

> were unilaterally imposed by the DFO and that the Indians were expected to abide by any corresponding regulations and orders. [The trial judge] held that such conduct did not reflect the trust-like relationship with which the Crown was required to deal with the aboriginal peoples. He therefore found that there had not been as little infringement as possible in order to affect [*sic*] the desired conservation result."[196]

The Crown cannot, then, make unilateral decisions with respect to managing a fishery in which Aboriginal rights persist. What is further argued here is that the Aboriginal right cannot be accommodated simply through consultation with Aboriginal groups and minor modifications in allocation, but rather requires structural change to the management of the fishery as a whole.

The honour of the Crown is not upheld when, despite growing awareness of both the unsustainability of the current fishery and the inherent flaws in the present management system, government actions are oriented to *extend* the same basic principles and strategies even further. Overall, the present crisis demands a very different direc-

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[194] [1994] 3 S.C.R. 835 at 889, 120 D.L.R. (4th) 12 [emphasis in original].

[195] *Jerry Jack*, *supra* note 51 at 223-24.

[196] *Ibid.* at 224.

tion than was followed in the period when the Aboriginal right was progressively undermined. Today, the honour of the Crown can only be upheld where government moves towards a community-based and clean production-oriented fishery. The key is to *merge management into production* so as to *integrate conservation and risk prevention into the production system.* This is the nature of the traditional right; only this can now facilitate the requisite Aboriginal "self-regulation".

As noted above, this approach would infringe Aboriginal stewardship rights far less than the present system, while achieving economic and conservation objectives in a manner that would reconcile the interests of non-Aboriginal and Aboriginal communities.

A. Community-Based Approach

Calls for a community-based approach to fisheries management have been coming for some time from First Nations' attempts to forward self-government, as well as from social scientists and fisheries biologists.[197] Recently, for example, on the west coast of Vancouver Island, a broad spectrum of stakeholders in the fishery have joined together to develop a regional board structure which aims to ensure broad-based community input into management decisions. The Regional Aquatic Management Society ("RAMS")[198] represents an unprecedented consensus among Aboriginal and non-Aboriginal groups on the need for community-based institutions that can work toward community and ecological sustainability, while ensuring Aboriginal interests are fully respected.

These proposals challenge the workability of the existing system, where management constraints are imposed externally on production processes that, by virtue of their primary foundation in concerns for economic productivity and corporate profitability, inherently resist such constraints. Instead, a community-based approach seeks to embed management into the process of fishing and, in doing so, to create a new integrated form of production *and* management.

On the management side, a community-based management model (examples of which are well-established in other jurisdictions) allow for a diversity of institutional structures as is locally appropriate. Local autonomy can be accommodated within a hierarchical, nested governance framework, where higher levels of government serve

[197] Pinkerton has repeatedly forwarded this position; see also Walters, *supra* note 93; "Models", *supra* note 162.

[198] RAMS members include: Nuu-chah-nulth Tribal Council, local First Nations, regional districts, municipal governments, West Coast Area G Trollers Association, Port Alberni Sport Fishing Committee, Pacific Coast Processors, West Coast Sustainability Association, Alberni Environment Coalition, Economic Development Commission, Community Futures, and the Coastal Communities Network. Other groups also participate through subcommittees.

functions appropriate to a larger regional scale, which might include providing technical advice and serving as a watchdog.[199]

Management concerns become "embedded" in the production process only when "external" environmental and social costs are demonstrably reduced through the very nature of production technology and process *designs*. This "clean production" approach to fishing resolves many of the biological sustainability problems which plague the dominant management model. In a fisheries context, "clean production" is more achievable within a community-based setting. For example, community-based management is better suited to stock specific management embedded in an ecosystem management framework, for ground-truthing (verification of field evidence) and local co-ordination of overlapping resource uses, for the development of stock-specific monitoring, and for the application of selective fishing techniques which also reduce incidental fish mortalities (through, for example, "passive" fishing techniques such as weir systems at "terminal" points in fish migrations).

In community-based systems, local and traditional knowledge is harnessed more effectively to provide a wider range of inputs into stock assessment and other policy functions. Community-based regimes also allow harvesters to turn their energies to improving instead of beating the system, such that compliance is enhanced and problems with poor estimation of effort, which have confounded stock assessors under the present system, are ameliorated. Pinkerton and Weinstein conclude:

> Stewardship is the essence of community-based management. Management systems based on stewardship focus as much on the DUTY of fishing communities to manage the resources for future generations as they focus on the RIGHT of the communities to manage. ... When communities become stewards, a large percentage of the community residents as well as fishermen enforce the system as fundamental to the values of the society, or at least of the local community.[200]

From the perspective of respect for the Aboriginal right, a community-based policy directly counters the centralization policies of the past century. Increased community control could improve "economic and regional fairness" by slowing the consolidation of ownership of access to the resource if not to the resource itself. Pinkerton also argues that community-based management models can address the cost spiral:

> [M]aking allocation decisions at a level closer to the fishermen has the potential to at least reduce, if not entirely eliminate, competitive over-investment, and dissipation of profits. Fishermen having the opportunity to plan harvesting and allocation collectively can achieve a sense of greater control and more rational, predictable aecess to the resource. This increased ability to plan and control

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[199] E. Ostrom, "Designing Complexity to Govern Complexity" in S. Hanna & M. Munasinghe, eds., *Property Rights and the Environment: Social and Ecological Issues* (Washington, D.C.: The International Bank for Reconstruction and Development/The World Bank, 1995) 33.

[200] *Supra* note 39 at 182.

> automatically allows fishermen to seek ways to reduce competition which is disadvantageous to all and to seek ways to ecouomize.[201]

In sum, community-based fisheries are a viable alternative to the present system. Successful community-based fisheries management regimes have been documented from cultures around the world.[202] Communal property regimes have been shown to provide institutional arrangements for controlling costs, restricting access, enhancing monitoring and otherwise regulating use to successfully address the excludability and subtractability problems which characterize Garret Hardin's famous "tragedy of the commons".[203] In their survey of community-based fisheries management regimes, Pinkerton and Weinstein conclude: "Our cases demonstrate that neither the predator/prey model nor the tragedy of the commons model predicts how people behave when communities exert management rights, either formally or informally. Communities can make rules which they can and do make their members obey."[204]

B. Clean Production in the Fisheries Context

While there are many different techniques that, unlike the present system, might satisfy the minimal infringement principle and the requirements of the Aboriginal right of stewardship, some very concrete guidelines are evident.

The starting point for a reformed system must be *selective fisheries under coastal community management*. The community would remain overseen by government, would involve a range of interests (including any interests in upstream habitat), and would be ideally suited to co-operative institutions with non-Aboriginal community residents.

On the production side, the technology, as a clean production technology, would involve a combination of terminal fisheries capable of precise stock selectivity, and hook and line fishing based in coastal outports. To the extent that a more "active" production technology is used (*i.e.* involving boats chasing fish offshore), the onus is very strong to embed management conservation objectives within the very nature of the technology being used. On the one hand, this onus would inherently favour the use of small-scale, selective fishing gears; on the other hand, it would impose a very heavy burden of justification on the continued use of non-selective and/or wasteful techniques.

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[201] E. Pinkerton, "Introduction: Attaining Better Fisheries Management through Co-Management—Prospects, Problems and Propositions" in E. Pinkerton, ed., *Co-operative Management of Local Fisheries* (Vancouver: University of British Columbia Press, 1989) 3 at 22.

[202] Pinkerton and Weinstein, *supra* note 39; F. Berkes, P. George & R.J. Preston, "Co-management: The Evolution in Theory and Practice of Joint Administration of Living Resources" (1991) 18:2 Alternatives 12. See also International Association for the Study of Common Property, online: <www.indiana.edu/~iascp/library.html> (last modified: 6 January 2000).

[203] Feeny *et al.*, *supra* note 37; G. Hardin, "The Tragedy of the Commons" (1968) 162 Science 1243.

[204] *Supra* note 39 at 15.

In considering these technological changes, it is to be remembered that the Aboriginal fishing right was traditionally exercised in a way that generated a comparable level of production, but without the costs to the sustainability of the resource that has been generated by the non-Aboriginal system that replaced it.

Community-based terminal and precautionary ocean-based fishing would be linked together via a regional management body, such as the Regional Aquatic Board proposed by RAMS, which would have built-in conservation restraints. Regional institutions would then be tied together through inter-regional institutions capable of linking upstream, downstream and ocean-based interests and sources of information.

A strength of the RAMS model, which is currently under development, is that a conservation trust has been conceived that will be incorporated into the institutional structure. It should be noted that the RAMS concept of a conservation trust is consistent with the doctrine against equitable waste that the Supreme Court enunciated in *Delgamuukw* with respect to Aboriginal title. The court gave the following example: "...if a group claims a special bond with the land because of its ceremonial and cultural significance, it may not use the land in such a way as to destroy that relationship."[205] Given that fishing rights, like title, are communal and involve control over resources, by analogy the concept that resources to which an Aboriginal right attaches must be sustained for continued use by future generations applies equally well to fishing rights.

Conclusion

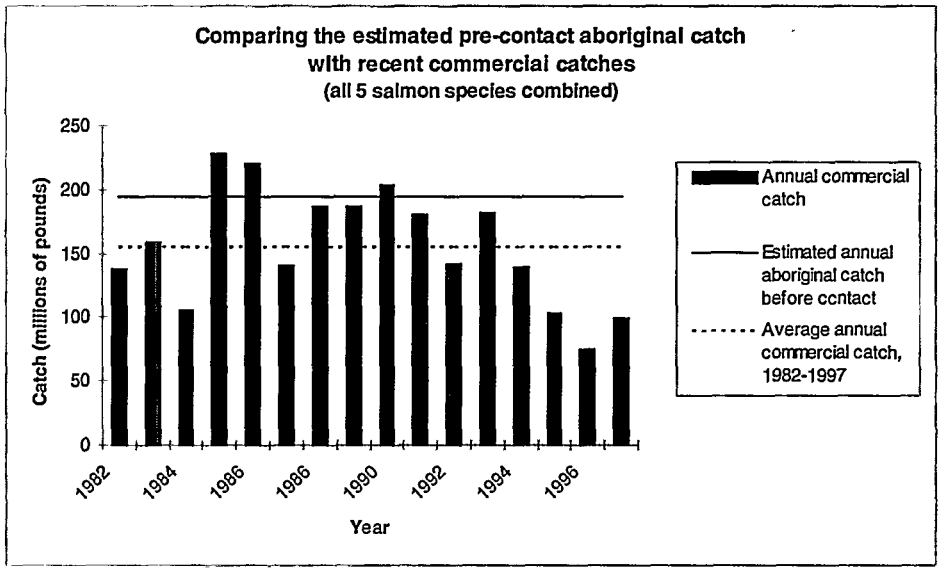
The infringements of Aboriginal fishing rights outlined in section 3.0 are unnecessary to achieve either conservation, reconciliation, or economic and regional fairness. Rather, they reflect a special interest objective that is accorded neither constitutional protection nor has any substantial and compelling merit. A viable alternative model that impairs Aboriginal fishing rights to a lesser degree does exist and is sustainable: community-based management according to clean production principles. This provides clear evidence that the Crown's fiduciary duty toward Aboriginal peoples has been breached. To address direct threats to stocks, a production system based on clean production is required, combined with a management system suited to this imperative. Such an approach would also accommodate the modern expression of Aboriginal self-government, or "self-regulation" of the salmon resource.

Precautionary community-based management is the only management approach consistent with the Aboriginal right and the conservation imperative. Far from being in conflict with the *Van der Peet* objectives, recognition of the right could further them, consistent with growing contemporary challenges to the productionist/managerialist model. It is time to put to bed the rhetoric of conflict between conservation and production, and between the interests of Aboriginal and non-Aboriginal

[205] *Delgamuukw*, *supra* note 8 at 1089.

fisheries. Since the 1880s these conflicts have obscured the more fundamental issues regarding the structure of the production system and management regime. A unity of interests exists, and it is found in a constitutionally sound, ecologically sustainable, community-based solution that alone will uphold the honour of the Crown.

Appendix


Comparing the estimated pre-contact aboriginal catch
with recent commercial catches
(all 5 salmon species combined)
Catch (millions of pounds)
250
200
150
100
50
0
1982
1984
1986
1988
1990
1992
1994
1996
Year
Annual commercial catch
Estimated annual aboriginal catch before contact
Average annual commercial catch, 1982-1997