The Scope of Section 35 Fishery Rights: A Legal Overview and Analysis

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INTRODUCTION

Canadian courts, since the entrenchment of section 35[3] in the *Constitution Act, 1982*, have moved towards acknowledging the comprehensive nature of Aboriginal people's traditional relationship with fisheries. This recognition lies not solely within the landmark fisheries cases – including *Sparrow*[4], the commercial fisheries trilogy[5], and *Marshall*[6] - but importantly within Aboriginal title cases, and cases regarding the Crown's fiduciary obligations, including *Delgamuukw*[7], *Haida Nation*[8], and *Taku River Tlingit*[9].

Through a review of the spectrum of Aboriginal rights, including title and site-specific rights, as they relate to fisheries, the full range of First Nations fisheries rights in current Canadian common law can be identified. The legal acknowledgement and accommodation by the Crown of First Nations' fisheries rights must be comprehensive, including recognition of First Nations jurisdiction, stewardship role, access to and use of fisheries resources. First Nations must participate in management and decision-making and must be able to share in benefits derived from resource use. Through such recognition and accommodation, the central

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[3] Section 35(1) states "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
[4] *Regina v. Sparrow*, [1990] 1 S.C.R. 1075.
[5] *R. v. Van der Peet,* [1996] 2 S.C.R. 507; *R. v. NTC Smokehouse,* [1996] 2 S.C.R. 672; *R. v. Gladstone,* [1996] 2 S.C.R. 723.
[6] *R. v. Marshall,* [1999] 3 S.C.R. 456.
[7] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010
[8] *Haida Nation v. British Columbia (Minister of Forests)*, [2002] B.C.J. No. 378 (*Haida #1*); *Haida Nation v. British Columbia (Minister of Forests)*, [2002] B.C.J. No. 1882 (*Haida #2*).
[9] *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, [2002] B.C.J. No. 155 (C.A.).

place of fisheries in the culture and traditions of First Nations can preserved and maintained. First Nations fisheries are not dependant on recognition by the Crown, but practical recognition will make it easier for First Nations to preserve and maintain their ability to exercise such rights.

THE SPECTRUM OF SECTION 35 RIGHTS

In *Delgamuukw* the Court identified a spectrum of section 35 rights.[10] At one end of the spectrum is Aboriginal title, which is a right to the land itself and the resources of such land. At the other end of the spectrum are Aboriginal rights where no title is claimed or proven. In between these two poles are site specific rights, which are rights to engage in certain activities at particular places, but where no title is claimed. Each of these types of rights have implications for First Nations fisheries.

ABORIGINAL TITLE AND FISHERIES

The primary source of and legal foundation for First Nations jurisdiction and management over fisheries – including stewardship responsibilities, watershed management, allocation and use of the resource – lies within Aboriginal title and the inherent right of self-government.

(a) The Legal Framework of Aboriginal Title

In *Delgamuukw* the Supreme Court of Canada articulated that Aboriginal title is a unique proprietary interest, which may only be infringed by the Crown with justification.

[10] Para. 138.

Aboriginal title is a legal property interest.[11] It is a constitutional certainty that Aboriginal title is a right to the land itself – a collective title held by all members of a First Nation.[12] Aboriginal title is a "burden on the Crown's underlying title"[13] and, therefore, there is a need for reconciliation of the prior occupation of the land by Aboriginal peoples with the assertion of Crown sovereignty.

Aboriginal title requires that there was exclusive occupation by a First Nation of a particular area of land[14] prior to the assertion of Crown sovereignty.[15] Aboriginal title could not be extinguished prior to 1982 absent an expression of clear and plain intent by the federal Crown. After 1982, it seems clear that Aboriginal title could not be extinguished without the consent of the relevant First Nation.

The Court has held that Aboriginal title, like all section 35 rights, is subject to justified infringement by the Crown. In adapting the test from *Sparrow* the Court confirmed that infringement can only be justified where:

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[11] The Court describes the nature of Aboriginal title in the following terms at para 112-113:

> ...[Aboriginal title] is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.
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> The idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title. One dimension is its inalienability. Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties. This Court has taken pains to clarify that aboriginal title is only "personal" in this sense, and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests....

[12] Para. 111,115.

[13] Para. 145.

[14] There has been some ambiguity concerning what is required under *Delgamuukw* to establish exclusive occupation. Proof of occupation is shown by drawing together both the Aboriginal perspective and the common law, but it is unclear what is included in the Aboriginal perspective. The Courts have also stated that if present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation. There is some judicial resistance to strict standards of actual use and occupation. For example, in *R. v. Bernard*, [2003] N.B.J. No. 320 the trial judge found as a fact that the Mi'kmaq did not have exclusive occupation of the cutting area at the time of the assertion of crown sovereignty as there was no evidence of regular use of the cutting area for hunting and fishing. In rejecting this finding, Daigle J.A. found that to require hard evidence of actual use and give no weight to Mi'kmaq subsistence land use patterns, is to apply too strict a standard.

[15] In the case of British Columbia the relevant date is 1846.

- there is a compelling and substantial legislative objective; and
- the infringement is consistent with the fiduciary relationship between the Crown and Aboriginal peoples.

(b) Principles of Aboriginal Title and Fisheries

There are a number of principles emanating from the case law on Aboriginal title which have significant implications for First Nations and fisheries. Collectively, these principles provide the legal foundation for First Nations to demonstrate their jurisdiction over fisheries, and in particular, participation in management, stewardship and allocation of the resources.

1. Right to Exclusive Use and Occupation

In defining Aboriginal title, the Supreme Court of Canada in *Delgamuukw* enunciated the principle that Aboriginal title gives rise to the right to use and occupy[16] the land[17] for a variety of activities. As the Court stated:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title.[18]

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[16] In *Delgamuukw* the Court confirmed the possibility of joint title, shared territory, and shared jurisdiction at para 158-159:

> I would suggest that the requirement of exclusive occupancy and the possibility of joint title could be reconciled by recognizing that joint title could arise from shared exclusivity. The meaning of shared exclusivity is well-known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's.
>
> ... [I]n addition to shared title, it will be possible to have shared, non-exclusive, site-specific rights. In my opinion, this accords with the general principle that the common law should develop to recognize aboriginal rights (and title, when necessary) as they were recognized by either *de facto* practice or by the aboriginal system of governance. It also allows sufficient flexibility to deal with this highly complex and rapidly evolving area of the law.

[17] In this legal context, "land" includes the lands and resources including water, of a Territory.

The only limitation the Court identified with regard to the rights of use and occupation of Aboriginal title land was that the uses should not destroy or be irreconcilable with the traditional foundations for attachment to that land.[19]

The implications of the principle of exclusive use and occupation include:

- Aboriginal title land traditionally used for fishing could not be used by Aboriginal people in a manner which destroyed that fishery. Based on the same principle, the Crown cannot manage the land and resources in a manner which destroys the Aboriginal attachment to the land that is the basis for Aboriginal title. For example, the Crown does not have the authority to knowingly destroy a fish stock or the necessary habitat required to support a fishery that is the source of a long-standing First Nation fishery.

- The right to choose the uses to which land can be put confirms Aboriginal jurisdiction over the level of access and use of the resource, management schemes and decision-making, as well providing for application of First Nation stewardship principles and responsibilities. The underlying Aboriginal title must be involved in the decisions regarding who is allocating what resources and for what purposes within their Territories.

2. Aboriginal Priority, Consultation and Accommodation

In *Sparrow* and *Gladstone* the Court articulated the principle of priority of Aboriginal interests – namely, that the "fiduciary relationship between the Crown and aboriginal peoples demands that aboriginal interests be placed first".[20] However, this priority "does not demand that aboriginal rights always be given priority."[21] Different contexts may result where the fiduciary duty is expressed in other ways.[22]

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[18] Para. 111.

[19] The Court states at para 111:

> However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit…flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple.

[20] *Delgamuukw,* para. 162.

[21] *Delgamuukw,* para. 162. It remains unclear exactly how the degree of scrutiny of the infringing governmental action will change as a result of the Aboriginal right in issue. For example, arising out of *Gladstone,* the priority the Crown owes to Aboriginal interests under its fiduciary duty will vary depending upon the nature of the Aboriginal right in question. In *Gladstone* the Court found that if the Aboriginal right has no natural limitation (a commercial

In the context of Aboriginal title, the Court in *Delgamuukw* stated that "what is required is that the government demonstrate 'both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest' of the holders of aboriginal title in the land".[23] In other words, the Department of Fisheries and Oceans ("DFO") must ensure that First Nations are consulted in decision-making about the allocation of the resource, and that the actual allocation of the resource accommodates the priority of Aboriginal peoples. This requires that First Nations be consulted on the full range of allocations of the fisheries resources, beyond just issues of allocations for primary food, social and ceremonial purposes.

The content of the duty of consultation and accommodation remains dynamic. What must it look like? How must it be implemented in a fisheries context? Based on court decisions thus far on the Crown's duty to consult with and accommodate First Nations, it can be said that consultation and accommodation includes:

- negotiating in good faith with the intention of substantially addressing the aspects of title and rights - not merely interests - which First Nation's want accommodated;
- addressing the full spectrum of Aboriginal title and rights;
- exchanging all necessary information in a timely way so that there is an adequate opportunity to express interests and concerns;
- First Nations must not frustrate the process by refusing to meet or participate by imposing unreasonable conditions; and
- consultation with First Nations requires a distinct process from public consultation.

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fishery was an example given) then the standard of scrutiny is whether the government has allocated a resource in a manner "respectful" of that priority.

[22] Factors relevant to this include the scope of the infringement, the degree of consultation which has been undertaken, and the availability of compensation in situations of expropriation.

[23] *Delgamuukw* quoting from *Gladstone,* para. 167.

Recent decisions of the British Columbia Court of Appeal in *Haida Nation* and *Taku River Tlingit*, both of which are under appeal to the Supreme Court of Canada[24], have offered further details on the duties of consultation and accommodation including:

- the Crown has the obligation to consult with those First Nations that assert Aboriginal title and rights, even in the absence of a court decision regarding existence of the scope of those rights;
- every obligation of consultation carries with it an obligation to seek reasonable accommodation of the interests of Aboriginal people – including cultural and economic interests;
- while the obligation to consult is primarily a Crown obligation, there are specific circumstances where it may be the obligation of another party, such as in the *Haida* case where a licensee company, based on "knowing receipt", was found to have consultation and accommodation obligations;
- there is a legally enforceable duty on both the Crown and third parties to consult with First Nations in good faith and to endeavour to seek workable accommodations between the Aboriginal interest on the one hand, and the short- and long-term objectives of the Crown and third party interests, in accordance with the public interest on the other;
- the duty to consult and accommodate continues through the term of the licence - each time the Crown deals with a licence (for example, renewal, transfer or replacement) the obligation to consult and accommodate is triggered;
- an infringement may lie in establishing legislative and administrative schemes which grant exclusive rights to use a resource (for example, exclusive commercial harvesting licences), and then renewing or transferring those rights; and
- the scope of consultation and the strength of the obligation to seek an accommodation is proportional to the strength (evidence) of the claim of Aboriginal title and rights.

3. Aboriginal Title has an Inescapable Economic Component

A third principle enunciated by the Court is that Aboriginal title has an inescapable economic component. The Court states that:

[24] Oral argument in both cases took place in March 2004.

> …aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put.[25]

First Nations have a legal right to access and use the land and resources within their Territory. Therefore First Nations are entitled to share in the benefits from the fisheries regardless of whether First Nations or others are engaged in harvesting the resource. Sharing in the benefits of fisheries resource use will contribute to the First Nation's economic base and, therefore, the sustainability of the community, including the development of the First Nation's governance structures and programs (for example health and housing).

This opportunity for rebuilding sustainable communities is enhanced by the requirements of compensation for past, present, and future infringements as a result of the economic benefits taken from the Aboriginal title land. Compensation is always relevant to justification. As was stated in *Delgamuukw* "fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated."[26]

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[25] Para. 169.

[26] Para. 169. In terms of how fair compensation may be arrived at, there was not explicit direction in *Delgamuukw*. However, the Court did state that "circumstances subsequent to sovereignty" may be relevant to compensation, such as "where native bands have been dispossessed of traditional lands after sovereignty" (para. 145) and that "fair compensation…is not equated with the price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown" (para. 203, per La Forest J.). Robert Mainville has suggested six legal principles for determining compensation:

i. compensation is to be determined in accordance with a methodology that takes into account the principles of fiduciary law;
ii. relevant factors in determining compensation include the impacts on the affected Aboriginal community and the benefits derived by the Crown and third parties from the infringement;
iii. compensation is to be determined in accordance with the federal common law and will thus be governed by rules that apply uniformly throughout Canada;
iv. compensation is generally the responsibility of the Crown but may, in appropriate circumstances, be assumed by third parties;
v. compensation may be provided through structured compensation schemes or through a global monetary award;
vi. compensation is normally to be awarded for the benefit of the affected Aboriginal community as a whole.

4. Reconciliation of Aboriginal Prior Occupation and the Assertion of Crown Sovereignty and Crown Title.

A final principle is the emphasis that the Court's have placed on the reconciliation of Aboriginal prior occupation and the assertion of Crown sovereignty. In *Gladstone* and *Van Der Peet,* the Court stated that the purpose of the recognition and affirmation of Aboriginal rights in section 35 is twofold: "the recognition of the prior occupation of North America by aboriginal peoples or . . . the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown."[27] At the stage of justification, the Court in *Delgamuukw* stressed that reconciliation is the primary consideration. While this emphasis on reconciliation in *Gladstone* was a foundation for a narrowing of the expansive approach to fisheries rights articulated in *Sparrow,* implicit within such language is the requirement that First Nations and the Crown find workable accommodations in a modern context on all issues related to the access, use and management of fisheries resources. It is only when this is done that the goal of reconciliation may be achieved.

In this regard, in *Delgamuukw*, the Court adopted for the title context the questions from *Gladstone* which are relevant in determining whether the Crown has shown priority for Aboriginal rights:

> . . . questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example), whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food *versus* commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria

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Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach"* Saskatoon: Purich Publishing, 2002, ppp. 104 – 127.

[27] *Delgamuukw* quoting from *Gladstone*, para 161.

taken into account by the government in, for example, allocating commercial licences amongst different users.[28]

5. Aboriginal Title to the Seabed

Aboriginal title to the river or seabed is a developing area of the law. In Canada there has been no judicial determination on the subject. However, a number of court proceedings have been initiated—including by the Haida, Tsimshian, and Nuu-chah-nulth First Nations—whereby First Nations seek to demonstrate that their Aboriginal title extends to the sea.[29] Court decisions in these cases will likely have significant impacts on issues such as aquaculture and oil and gas development.

In other jurisdictions, claims concerning Aboriginal title and rights in the seabed have received a mixed response:

- In the United States, cases touching on Aboriginal rights and title to the seabed and ocean spaces have applied the doctrine of federal paramountcy to reject Aboriginal claims.[30]

- The High Court of Australia[31] recognized native non-exclusive cultural and subsistence rights, including free access to the sea and seabed within the claim area for specific purposes. The Court rejected a claim to native ownership, rights to control resources, rights to control access, and to trade within the territorial sea.

- In New Zealand, the Court of Appeal recently ruled that the Maori Land Court's jurisdiction could extend to the foreshore and seabed—laying the foundation for a possible declaration of the foreshore and seabed as Maori customary land, as defined by the legislation in New Zealand.[32] The result of this has been an on-

[28] *Delgamuukw* quoting *Gladstone*, para. 164.
[29] The Haida claim Aboriginal title and rights to the lands, and inland, and offshore waters of Haida Gwaii. It includes a claim for a declaration quashing Crown licenses, permits, leases, and tenures. The Tsimshian claim more specifically focuses on rights and title to fisheries resource harvesting sites, including the mouth of the Skeena River, a key commercial fishing area for salmon. The Nuu-chah-nulth First Nations claim Aboriginal title and rights to a portion of the land and offshore waters on the west coast of Vancouver Island, and includes rights to harvest and sell for commercial purposes all species of fish, as well as Aboriginal title to the fishing territory.
[30] *Inupiat Community of the Arctic Slope v. United States,* 548 F. Supp. 182 (D. Alaska, 1982); *Native Village of Eyak v. Trawler Diane Marie, Inc.,* 154 F (3d) 1090 (9th Cir. 1998); cert. denied; *Native Village of Eyak v. Daley* 527 U.S. 1003 (1999).
[31] *The Commonwealth v. Yarmirr,* [2001] H.C.A. 56.
[32] *Ngati Apa and others v. Attorney-General*, [2003] 3 N.Z.L.R. 643 *[Marlborough Sounds]*

> going political and legal struggle as the Government seeks to balance the rights and interests of all New Zealanders.[33]

The legal framework of *Delgamuukw* provides a basis for demonstrating Aboriginal title in the seabed. However, given the lack of judicial consideration of this matter in Canada, there are issues and questions which may complicate the picture, including:

- Will the courts apply *Delgamuukw* as it is currently understood, or will they deviate from the framework in some manner? Will the courts find legal significance in the differences between title to land as distinct from title to water or the seabed?

- The legal determination of Aboriginal title and rights to the seabed may require careful delineation of the rights which are in issue and being claimed. For example, will a court view some of the rights claims in relation to the seabed as rooted in a claim to title, or non-land based rights in which the test from the *Sparrow* line of cases might be used. A related issue is how the courts might correlate Aboriginal title and rights with the varying jurisdiction and interest of the Crown in the seabed of the territorial sea, exclusive economic zone, and the continental shelf.

- It is unclear how the courts will approach the interaction of Aboriginal title—and in particular the fact that Aboriginal title includes exclusive use —with the right of innocent passage at international law, and common law rights of public fishing and navigation.[34]

- It is unclear how the courts will deal with concerns about Canada's sovereignty and its international obligations, especially as assertions of Aboriginal rights and title move beyond the territorial sea and into the exclusive economic zone and the continental shelf.

(c) Summary

Aboriginal title includes First Nations' jurisdiction over a range of fisheries issues, including the management, use and allocation of fisheries resources. How such jurisdiction will

[33] An overview of the debate sparked by the decision in *Marlborough Sounds* and a critique of the government's response can be found in the Waitangi Tribunal's "Report on the Crown's Foreshore and Seabed Policy" at www.waitangi-tribunal.govt.nz

[34] This uncertainty can be seen in the decision of the High Court of Australia in *The Commonwealth v. Yarmirr*, [2001] H.C.A. 56.

be exercised will depend upon the reconciliation and accommodation that is achieved. This requires honourable good-faith dealings between the Crown and First Nations, and will be informed by a number of factors – including future legal decisions, the community development and vision of First Nations, and the Crown's fulfilment of its fiduciary obligations. A legal foundation exists for First Nations to pursue management and conservation schemes in consultation with the Crown and, if necessary, in the courts. Such a scheme would: reflect indigenous values and practices; seek reparation and mitigation for past and on-going impacts; and provide for First Nations' and Crown participation in determining appropriate levels of resource use and managing both the resource and the people using the resource. As holders of the underlying Aboriginal title, First Nations must be involved in the management, allocation and oversight of fisheries activities within their Territories.

ABORIGINAL RIGHTS AND FISHERIES

There is an important distinction between Aboriginal title, as distinct from other Aboriginal rights. Namely, when a non-title right is being claimed it exists at a specific, as opposed to general level.

(a) Legal Framework of Aboriginal Fishing Rights

In the 1990's the Supreme Court of Canada made a number of significant decisions which shaped the content of the Aboriginal right to fish. As a result of the Court's interpretation of section 35, these decisions undermined traditional Crown arguments. The Crown can no longer i) demand strict proof of rights through the Courts before the Crown will recognize Aboriginal fishing rights; ii) hold that the rights must be recognized and defined through a treaty

process; or iii) assert that the fact of regulation extinguished Aboriginal rights.[35] Aboriginal fishing rights are protected under section 35 of the *Constitution* and are subject to infringement by the Crown only where such infringement can be justified.

Beginning in *Sparrow* the Court laid out a basic approach to Aboriginal fishing rights. The starting point is determining when an Aboriginal fishing right exists. On this question, the Court in *Sparrow* took a relatively broad approach. As opposed to defining Aboriginal rights in relation to the ways they have been regulated by governments in the past, the Court viewed section 35 rights in dynamic terms. An existing Aboriginal right is an "unextinguished" right which can evolve flexibly over time. As such, these rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour".[36] This includes fishing with modern methods, and participating in modern forms of governance and stewardship of the fisheries resources.

There are a number of steps the Court will use in determining the existence of a right:

- First, the Court will characterize the claim made by an Aboriginal person, to determine what kind of fishing right is in issue. Such an analysis is highly fact specific.

- Second, the Court will ask whether the right in issue is an integral part of the distinctive culture of the First Nation in question. In other words, the First Nation or Aboriginal person must be able to show that the fishing practice, tradition, or custom was one of the things that truly made the society what it was. In evaluating whether or not a particular practice is integral the Court will look at the time period prior to contact between aboriginal and European societies.[37]

- Third, a Court will look to see if the right being claimed may have been extinguished. The burden to prove extinguishment is high – requiring a clear and

[35] In *Sparrow* the Court rejected arguments that regulation could constitute extinguishment.
[36] *Sparrow,* quoting Professor Brian Slattery, para. 27.
[37] As opposed to the time prior to the assertion of Crown sovereignty as is the case with Aboriginal title. This limitation to the time prior to contact—which was fully articulated by Lamer, C.J. in the commercial rights trilogy, is a restrictive limitation on the ability to establish fishing rights. This is especially so in the commercial rights context. This is discussed more fully in section on "Right to fish for economic purposes".

> plain intent by the Crown. Past government regulation does not in itself constitute extinguishment.[38]

If an Aboriginal right is found to exist, the focus then shifts to whether infringement has occurred and, if so, whether such infringement is justified. As in the Aboriginal title context, justification of an infringement rests upon the existence of a compelling and substantial government objective and whether there has been consultation and accommodation consistent with the fiduciary duty owed by the Crown. In *Sparrow,* conservation of the resource was found to be a compelling and substantial government objective which sits first in priority over Aboriginal interests. In *Gladstone* the Chief Justice Lamer went further and suggested that Aboriginal rights may be cut back in order to fulfil the section 35 purpose of reconciliation and social harmony.[39] This approach to justification has been the subject of some dissent.[40]

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[38] The extent of explicit past government acknowledgement of the right, consideration of the conflict between the right and any proposed government action, and a government resolve to abrogate the right remains unclear. In dissent in *Van der Peet*, McLachlin J. argued that the "clear and plain" test for extinguishment by legislation or regulation requires that (i) the legislation acknowledge the Aboriginal right, (ii) the government considered the conflict between the Aboriginal right and the legislation or regulation; and (iii) the government resolved the conflict by abrogating the right.

[39] Lamer, C.J. states at para. 73:

> Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are a part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, <u>equally</u> a necessary part of that reconciliation….[emphasis in original]

He also states at para. 75:

> [A]fter conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this [justification] standard.

[40] In *Van der Peet* McLachlin J. criticized the idea that Aboriginal rights could be cut back on the need for reconciliation and social harmony on the basis that it runs counter to the authorities, is indeterminate, ultimately more political than legal, and that it is unnecessary. McLachlin J. notes at para. 306:

> The extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-aboriginal fishers, by contrast, would negate the very aboriginal right to fish itself, on the ground that this is required for the reconciliation of aboriginal rights and other interests and the consequent good of the community as a whole. This is not limitation required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-aboriginals. It is limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*.

(b) Recognized Components of Fishing Rights

1. Right to Fish for Food, Social, and Ceremonial Purposes

In *Sparrow*, the Aboriginal right to fish for food, social, and ceremonial purposes was confirmed where it can be established as integral to the distinctive culture of the Aboriginal people claiming the right. By looking at anthropological and historical evidence, the Court determined that, for the Musqueam, "the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions."[41] As a result, where the right can be established, First Nations can fish for individual and community purposes.

Regarding issues of infringement and justification, the Court found that conservation is a legitimate government objective which can infringe upon the right to fish for food, social, and ceremonial purposes. After conservation, however, the priority of the Aboriginal right was affirmed, ahead of the interests of non-Aboriginal commercial and recreational fishing.

2. Right to Fish for Economic Purposes

Another right pursued through the Courts is the right to fish for economic, or commercial, purposes. This right was discussed in the trilogy of *Van Der Peet, NTC Smokehouse,* and *Gladstone*. While the Court recognized the right, it took a narrower approach to defining its scope. This included establishing the time prior to contact as the relevant period to examine for existence of a commercial right to fish – a high bar for a First Nation to meet to establish a commercial fishing right. The difficulty in meeting this evidentiary standard is seen in the commercial rights trilogy itself. Only in *Gladstone* did the Court find the existence of a commercial fishing right.

In terms of characterizing the right at issue in the trilogy, the Court drew a distinction between fishing for a money sale or trade as distinct from fishing for sale on the commercial market. In *Van der Peet,* the Court found the sale of 10 salmon for fifty dollars to be for the purposes of a money sale. In *NTC Smokehouse* the act of selling in excess of 119,000 pounds of salmon by 80 people suggested that the right in issue was for commercial purposes. In both, cases, however, the Court ruled that the right in question was not an integral part of the distinctive culture of the First Nations prior to contact. In the circumstances of a money sale, the Court looked for prior to contact evidence of a regularized trading system which rendered the trade in fish as something more than merely incidental. In the context of the commercial sale in *NTC Smokehouse,* the Court denied that the sales were integral to the First Nation's distinctive culture because they were "few and far between"[42], and that exchanges of fish at ceremonies were only incidental to ceremonies themselves. As such, in both *Van der Peet* and *NTC Smokehouse,* the evidence before the Court did not meet that test. It is important to note that when the evidence was led before the trial judge in both these cases, the specific evidentiary requirements to meet the test had not yet been enunciated by the Court.

In *Gladstone* the Court reached a different result. At issue was the commercial exploitation of herring spawn on kelp. The Court found that the evidence led at trial established that, prior to contact, the Heiltsuk engaged in extensive trade of herring spawn on kelp with other native groups along the coast. The facts supported a finding that both the exchange of herring spawn for money sale and trade, as well as for commercial purposes, were integral to the distinctive culture of the Heiltsuk.

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[41] Para. 40.
[42] Para. 35.

As a result of finding the existence of a commercial fishing right the Court went on to consider the issues of infringement and justification. An infringement was found to have occurred because, while pre-contact there had been no limit on the exploitation of herring spawn by the Heiltsuk, there were now limitations as a result of the DFO fisheries regulations. The Court then adjusted the standard of justification because the right to fish for commercial purposes was at stake. The Court reasoned that the right to fish for food, social, and ceremonial purposes has an inherent limit – at some point an individual or group will have caught enough fish to satisfy food, social and ceremonial needs. According to the Court, the right to fish for economic purposes has no such inherent limit.[43] If First Nations had priority for that purpose, the Court found it would logically result in an exclusive right over the resource. The Court found, therefore, that the Crown must show that in allocating a resource it has took into account the existence of Aboriginal rights and allocated the resource respectful of that.

The *Marshall*[44] decision, which involved treaty rights, points to a broader approach to commercial fishing rights.[45] In *Marshall,* the Court took a relatively expansive view of treaty interpretation, identifying the overriding concern as the upholding of the honour and integrity of the Crown.[46] This requires a contextual approach to treaty interpretation, which moves beyond just the written word and considers the evidence from the negotiations and understandings of the parties. The Court found that legally enforceable rights may arise out of a course of conduct which implicitly recognizes Aboriginal peoples right to conduct themselves in a particular way, and where that conduct was promoted by the Crown in its own self interest.

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[43] Para. 57. This interpretation is premised on a non-holistic relationship to resources, where the spiritual, ceremonial, social and respectful relationship to the fishery is separated from the commercial aspect.
[44] Because of public outcry, the *Marshall* decision had to be supplemented by additional reasons found in [1999] S.C.R. 533. In these supplementary reasons the Court clarified that even where Aboriginal or treaty rights exist, the Crown retains a power to regulate.
[45] The *Marshall* decision was based on the interpretation of the specific wording of the Mi'kmaq Treaties of 1760-61. It is uncertain if, or how, the Courts might distinguish the decision based on the wording the treaty.

Based on these principles, the Court confirmed a collective treaty right to fish for eels in "a small-scale commercial activity to help subsidize or support"[47] one's family. This treaty right permits the Mi'kmaq community to work for a "moderate livelihood"[48] – which at a minimum includes "food, clothing and housing, supplemented by a few amenities" but does not include the "accumulation of wealth".[49] While the full scope of "moderate livelihood" remains to be determined, the articulation of a treaty right to fish for this economic purpose, illustrates the Court's movement from the more limited finding of Aboriginal rights for an economic purpose (in a non-title situation) in the commercial fishing trilogy.

3. Protection and Management of Fisheries and Aboriginal Priority

While no Supreme Court of Canada decisions specifically address the scope of the Aboriginal right to manage the fisheries resource, it is important to note specifically how courts have utilized the Aboriginal priority borne out of the earlier decisions related to fishing rights, to consider specific management and conservation issues.

In *Saanichton Marina*[50] the Tsawout First Nation opposed the construction of a marina because it would interfere with fishery rights confirmed in the Douglas Treaty. The Tsawout First Nation had specifically argued that the marina would interfere with a unique fish habitat. The British Columbia Court of Appeal provided an expansive interpretation of the fishery right under the Treaty. The Court ruled that the treaty right to "carry on their fisheries as formerly" included both the right to catch fish and the place where the right can be exercised; that the Treaty terms protect the Band "against infringement of their right to carry on the fishery, as they

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[46] We note that a Treaty right presumes a resolution of an Aboriginal title right.
[47] Para. 8.
[48] Para. 59.
[49] Para. 59.

have done for centuries"[51]; and that the right to carry on the fishery includes "other rights incidental to the right granted by the treaty" including the right to travel to and from the fishery[52]. The proposed marina, the Court concluded, would interfere with the fishery rights by limiting access, causing the loss of parts of the fishery habitat to dredging and by disrupting other parts of the fishery. The development of the marina on a small part of the Bay would have an harmful effect on Aboriginal fishery rights.

The Aboriginal right to management is also discussed in a 1996 trilogy of decisions by the British Columbia Court of Appeal.[53] In *Jack, John, and John,* Joseph Jack had an Aboriginal right to fish for food, social and ceremonial purposes. DFO shut down the terminal fishing area where the First Nation traditionally fished because of a purported conservation concern, while allowing commercial and sports fishing to continue in the approaches to the terminal area. DFO justified the shut down on the basis of conservation. The Court ruled that DFO's management of the fishery did not meet the constitutional priority established in *Sparrow*. DFO had failed to consult with the First Nation concerning the conservation measures they were taking and the effect of such measures on their communities. Essentially, the Court required that DFO ensure that First Nations are involved within the management decisions of the resource.[54]

First Nations must be consulted and their Aboriginal title in their fishery, and/or their Aboriginal rights, must be accommodated in decisions regarding fishing plans. This includes

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[50] *Claxton v. Saanichton Marina Ltd.*, [1989] B.C.J. No. 563.
[51] Page 8.
[52] Page 9.
[53] *Regina v. Jack, John, and John,* (1995) 16 B.C.L.R. (3d) 201*; Regina v. Sampson and Elliott,* (1995) 16 B.C.L.R. (3d) 226*;* and *Regina v. Little,* (1995) 16 B.C.L.R. (3d) 253.
[54] The Court states at para. 77:

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

making decisions aimed at ensuring that, on a run by run basis, sufficient returns are made not only to meet the necessary escapement but also to meet the fishing requirements of the Aboriginal people. These decisions essentially require that DFO consult with and accommodate First Nations regarding on marine and in-river management decisions which will affect the health, stability and sustainability of First Nation fisheries. It is not sufficient for DFO to simply substitute access to other fishing runs or other fish, without the required prior consultation with the First Nation.

(c) Summary: Aboriginal Rights and Fisheries

The Courts have interpreted section 35 Aboriginal rights and Crown obligations sufficiently to lay the foundation for Aboriginal participation in the management, allocation and protection of the fishery resources.

SITE SPECIFIC RIGHTS

In *Delgamuukw,* the Court also recognized the existence of site-specific Aboriginal rights – a right to engage in certain activities at particular places, where title is not claimed, or cannot be established.[55] While the occupation and use of the land may not be sufficient to support a claim of title, if the practice or activity is tied to a specific place, a right may exist nonetheless to engage in a particular activity. Similarly, where an Aboriginal group asserting title (or a number of groups asserting joint title) cannot meet the requirement of exclusive occupation, if there is evidence of non-exclusive occupation, a site-specific right may be established. To date, there are no court cases which provide guidance on the specific scope and nature of these rights.

In *Sampson* the Court similarly clarified at para. 92 the responsibility of DFO "to implement a system which will

CONCLUSION

The spectrum of section 35 rights already confirmed by the Supreme Court of Canada establishes a firm foundation for First Nations to establish their title and rights to the fisheries within their Territories. Relying upon the clarifications the Courts have already provided regarding the scope of Aboriginal fishing rights, the Aboriginal title and right of fishing includes:

- Jurisdiction over the fisheries resources, including a management and stewardship role, which in a modern context practically includes: establishment of fishing plans; participation in allocation decisions; and participation in other decisions affecting the strength and sustainability of the fishery's resources and their return to their Territories. This jurisdiction is exercised in the context of the principles of Aboriginal priority, the right to determine how the land and resources will be used, and the need for reconciliation and accommodation.

- The right to fish for food, social and ceremonial purposes within their traditional territory (or at locations traditionally fished prior to contact).

- The right to fish for economic purposes. As a result of the decision in *Gladstone* the commercial right may have to be established on a case by case basis. However, where Aboriginal title is established, this may not be the case.

- The right to fish for the species of fish historically relied upon, within the context of reconciling priorities, including that of conservation.

- The right to protect the fishery from damage, such as habitat destruction and pollution.

These rights are held collectively by the First Nation and can be exercised according to Aboriginal laws and customs. This includes issues such as who fishes at which locations, the purpose for which the fish will be used, the distribution of fish or other benefits from the fishery, and the implementation of rules/methods for conservation.

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conform to the priorities set forth in *Sparrow*".
[55] Para. 138.

While on-going litigation on Aboriginal title and rights and the Crown's fiduciary relationship with Aboriginal peoples, will likely continue to clarify the nature and extent of section 35 fisheries rights, the courts have on numerous occasions called on both the Crown and First Nation to engage in good-faith negotiations which resolve these issues within our modern complexities.[56] First Nations clearly have the legal foundation for direct participation in the stewardship and management of these vital resources. In addition, as title holders, First Nations have the right to enjoy economic benefit from the allocation and use of the resources. These legal principles to date provide sufficient foundation for the reconciliation of modern issues regarding fisheries management and allocation. Simply put, it is the Crown's lack of willingness to change the *status quo*, and engage in meaningful consultation which addresses and substantially accommodates Aboriginal title and rights, and the related interests, which prevents the required changes to achieve the overall goal of reconciliation.

[56] For example, *Sparrow,* para. 24, 40; *Delgamuukw,* para. 50.