NATIVE FISHING RIGHTS AND ENVIRONMENTAL PROTECTION IN NORTH AMERICA AND NEW ZEALAND: A COMPARATIVE ANALYSIS OF PROFITS A PRENDRE AND HABITAT SERVITUDES

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Indigenous people throughout the world share a common desire to maintain traditional subsistence economies and lifestyles. Coastal natives are especially concerned with the perpetuation of fishing cultures, particularly where the fishery retains sufficient remunerative value to enable them to attain economic self-sufficiency essential to self-government. Unfortunately, economically valuable fishery resources are also the most likely to be the subject of intense competition from non-indigenous populations possessing the economic resources and harvest technologies to both effectively preempt native fisheries and frequently overharvest the resource itself.

Native natural resource claims are often conceived in only terms of land rights, which is regrettable because non-fee interests such as fishing rights are often central to native cultures and involve a fraction of the cost of land claims. Nevertheless their classification as non-fee interests — technically, they are profits *a prendre* — hardly makes native fishing rights insignificant.

On the contrary, this article shows that these fishing profits include not only access rights to the resource (easements), but also an insulation from governmental regulations, except regulations necessary to preserve the resource. In addition, they can include a right to a specific share of the harvest and, in all probability, a right of environmental protection against activities that damage fish or fish habitat. It is this latter right — a negative servitude to restrain a variety of developmental activities — which gives native fishing rights an environmental dimension. This environmental dimension is also the means by which non-native fishermen may come to see the value of, if not readily embrace, governmental recognition of native rights to fish.

This article begins, in part I, by examining the native fishing rights situation in the U.S. Pacific Northwest, where those rights have received the most judicial attention. There are peculiar aspects to the U.S. situation, especially the fact that these fishing rights were recognized by judicially enforceable treaties, but the principles established in the Pacific Northwest cases are effectively being applied in British Columbia and New Zealand. In the latter jurisdictions, analyzed in parts II and III, native rights have been ratified by constitutional and statutory provisions, respectively. Judicial recognition of the right in British Columbia and New Zealand to take fish is of much

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more recent origin, and its ultimate contours much less certain. However, the evidence so far indicates that the fishing right includes within it an environmental right of considerable dimension.

The value of any comparative legal analysis is limited by the constitutional, political, and institutional idiosyncrasies of individual countries studied. It is true that the constitutional and political structures of the three nations studied here are quite different, and their responses to the native fishing rights issue are distinctive. For example, in the U.S. federal court interpretation of enforceable, century-old treaty promises has been crucial. In Canada, courts are interpreting a relatively recent constitutional guarantee. In New Zealand, on the other hand, legislative provisions, including the establishment of an advisory tribunal, have prompted the courts to reconsider the meaning of a 150-year old treaty. Nevertheless, underlying the disparate treaty, constitutional, and statutory provisions is a similar legal tradition: the English common law. This article concludes that the similarity of results in the three countries' articulation of the nature of native fishing rights is due in large measure to the fact that they share the same common law roots.

I THE U.S. PACIFIC NORTHWEST

The Pacific salmon runs of the North American West coast have been the subject of disputes throughout this century.[1] Several reasons account for this. First, the Pacific salmon, which spawn in virtually every river from the Sacramento in California to the Yukon in Alaska, are of immense economic and cultural value. Second, their predictable return to natal streams makes harvesting relatively easy, especially with nets. Third, their vast migrations — most species travel thousands of ocean miles — and their environmental sensitivity complicate resource management.

In the United States management is further complicated by federal-state tensions. Wildlife regulation in America has always been a matter the federal government left largely to the states. However, in the 19th century the federal government negotiated a number of treaties with Pacific Northwest Indian tribes that reserved to the tribes the "right to take fish" at their usual and accustomed fishing grounds "in common with" white settlers.[2] These bargained-for rights to harvest salmon imposed an inevitable federal dimension upon state-dominated management systems. However, imposition has hardly been an easy one; in fact, the evolution of the Indian "right to take fish" has been one of the federal courts imposing limitations on state regulation of salmon fishing.[3]

The treaty right to take fish has always been recognized as having a commercial component to it. The Indians were commercial fishers at treaty time, trading salmon with other Indian groups for food, raw materials and manufactured goods not available locally, and selling large quantities of salmon

[1] See generally American Friends Serv. Comm., *Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup, and Nisqually Indians* (1970); F. Cohen, *Treaties on Trial: The Continuing Controversy over Northwest Indian Fishing Rights* (1986).

[2] See, e.g., Treaty with the Umatilla Tribe, June 9, 1855, 12 Stat. 945; Landau, "Empty Victories: Indian Treaty Fishing Rights in the Pacific Northwest" 10 Envtl. L. 412 (1980).

[3] See Landau, supra note 2.

to white settlers.[4] The tribes clearly understood the treaties as securing to them the right to continue to fish as they had previously.[5] In the years immediately following the signing of the treaties, there were few conflicts over treaty fishing rights. The resource was abundant and the non-Indian fishery was insignificant.[6] However, in the latter part of the 19th century, technological developments, such as the tin can and refrigerated railroad car, transformed salmon into a valuable export commodity.[7] Consequently, non-Indian commercial fishers began to employ new harvesting methods, such as fish wheels and gasoline-powered ocean trollers, to effectively preempt the Indian fishery (and overharvest the resource as well).[8] The resulting conflicts first pitted Indian against non-Indian fishers, but they soon also involved the issue of whether and under which circumstances the states could regulate the Indian right to fish.

1. *An Access Right*

The judicial foundation of the treaty "right to take fish" was laid some 85 years ago, in *United States v. Winans*.[9] In that case the United States Supreme Court held that the Stevens Treaties of the 1850s guaranteed to the signatory tribes — who were "not much less dependent upon fishing than the air they breathed"[10]—a right to cross a fee title holder's property in order to access their usual and accustomed fishing grounds, even though his homestead title from the federal government said nothing about a native right. Despite the fact that the state of Washington granted the landowner a license to operate a number of fish wheels (which similarly failed to mention the Indian right to fish) Justice McKenna identified the right to take fish as imposing a prior servitude on the title of the burdened property owner.[11] Recognition of this right was not inequitable, since the Indian fishing right satisfied all the elements of a property interest the common law recognized as an equitable servitude.[12] The *Winans* case thus established the fishing right as a property right that burdened both the title of federal land grantees and state regulatory activities, even though the state was not a party to the treaty.

Soon after *Winans*, the Supreme Court applied its principles to land not expressly ceded by the signatory tribes to the United States but nevertheless

[4] R. Ruby & J. Brown, *The Chinook Indians: Traders of the Lower Columbia* 21–22 (1976); Brief for Respondent Indian Tribes at 13, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (Nos. 77–983, 78–119 and 78–139).

[5] See *U.S. v. Washington*, 384 F. Supp. 312, 355–57 (W.D. Wash. 1974).

[6] Tribal Brief, supra note 4, at 26.

[7] See Wilkinson & Conner, "The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource" 32 U.Kan.L.Rev. 17, 30 (1983).

[8] Ibid. at 31–33.

[9] 198 U.S. 371 (1905).

[10] Ibid. at 381.

[11] Ibid.

[12] Equitable servitudes "run" with the land (that is, they burden and benefit nonparties to the original agreement) if: (1) the parties intend it to bind remote successors; (2) there is notice (actual, record or inquiry) to the burdened party; (3) the burden "touches and concerns" the land (i.e., is economically valuable). See generally R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property* paras. 8.24–8.28 (1984); see also Meyers, *United States v. Washington (Phase II) Revisited: Establishing An Environmental Servitude Protecting Treaty Fishing Rights*, 67 Or. L.Rev. 771, 783-793 (1988) (characterizing the treaty fishing right as a profit a prendre). There is little doubt that the treaty negotiators intended the fishing servitude to benefit succeeding generations or that the servitude is economically valuable. And in *Winans* the court determined that there was actual notice of the tribal right; 198 U.S. at 372.

habitually used by them as fishing grounds. The Court held that the fishing rights burdened the land in question because signatory tribes would have understood the treaty as reserving those customary locations.[13] Construing Indian treaties as the tribes would have understood is one of the canons of treaty construction by which the U.S. courts interpret Indian treaties.[14] In addition, the courts construe the treaties liberally in favour of the interests of the tribes and resolve ambiguities in their favour. These canons stem from judicial recognition of the unequal bargaining position of the parties to the treaties.[15]

Over the years, the U.S. Supreme Court expanded the treaty right to take fish from a mere access right to a right to be free from state-imposed licence fees, on the rationale that the treaty fishing right was a "reserved" right, one that preexisted the state itself.[16] But over two decades ago, in 1968, the Court determined that the state of Washington could regulate the treaty right to fish for conservation purposes,[17] despite protests that the state's conservation purposes included conservation of fish for non-Indian fishers as well as preservation of the resource itself.[18] Just five years later, however, the Court was forced to reconsider the implications of its earlier decision and ruled that a ban on net fishing, even though facially non-discriminatory, violated the treaty because it worked exclusively against the Indian fishery.[19] To overcome the state's propensity to impose the conservation burden on the Indian fishery, the Court required the state to allocate the Indian fishery a fair share of the resource.[20]

2. *A Harvest Share*

That fair share had already been ordered by a district court judge in Oregon, who also established some principles of enduring significance. In *Sohappy v. Smith*,[21] Judge Belloni ruled that (1) state regulation must be the least restrictive regulation consistent with preservation of the resource, (2) the Indian fishers must be treated separately from the remainder of the fishery, and (3) the treaty Indians were entitled to certain procedural protections, including notice and an opportunity to be heard and participate meaningfully in the formulation of fishing regulations.[22]

Some five years later, another district court quantified the Indians' "fair

[13] *Seufort Bros v. U.S.*, 249 U.S. 194 (1918).

[14] See generally F. Cohen, *Handbook on Federal Indian Law* (1982 ed.) at 221–225.

[15] Federal negotiators appointed friendly Indians as "chiefs" with whom to bargain. In addition, the treaty negotiations were conducted in Chinook jargon, a language many of the Indians did not understand and which possessed a very limited vocabulary. Moreover, the treaties were written in English and in legal terms unfamiliar to the Indians. See Wilkinson & Volkman, "Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows Upon the Earth' — How Long A Time Is That?" 63 Calif.L.Rev. 601, 610–611 (1975); Coggins & Modrcin, "Native American Indians and Federal Wildlife Law" 31 Stan.L.Rev. 375, 386 (1979) (analogizing treaty interpretation to interpretation of adhesion contracts).

[16] *Tulee v. Washington*, 315 U.S. 681 (1942).

[17] *Puyallup Tribe v. Washington Dep't of Game*, 391 U.S. 392 (1968) (*Puyallup I*) (conservation regulations must meet appropriate standards and not discriminate against the treaty right).

[18] See Johnson, "State Regulation Versus Indian Off-Reservation Fishing: A Supreme Court Error" 47 Wash.L.Rev. 207 (1972).

[19] *Puyallup Tribe v. Washington Dep't of Game*, 414 U.S. 44 (1973) (*Puyallup II*).

[20] Ibid. at 48 (instructing the state to "fairly apportion" the fishery).

[21] 302 F. Supp. 899 (D. Or. 1969), aff'd 529 F.2d 570 (9th Cir. 1976).

[22] See *Sohappy v. Smith*, No. 68-409 (D. Or. Oct. 10, 1969) (unpublished judgment).

share". In *United States v. Washington (Phase I)*, Judge Boldt determined that the treaty Indians were entitled to half of the harvestable fish to pass their fishing grounds.[23] This right, an acknowledged commercial right, was largely confirmed by the U.S. Supreme Court in 1979.[24] In affirming the 50/50 allocation, the Supreme Court ruled that the state could not use its regulatory powers to "crowd out" the Indian fishery.[25] According to the Court, the Indians were entitled to more than a right to dip their nets into the water and come up empty, since the central purpose of their treaties was to ensure the tribes a "livelihood — that is to say, a moderate living".[26] The 50/50 split was assumed to supply the tribes with the moderate living that the Court called for, although a lesser amount could be judicially approved if a tribe dwindled to a small number or abandoned its fishery.[27]

The *Phase I* litigation also confirmed the Indian tribes' status as regulators of access to the resource of their own members. The tribes thus can set their seasons free of state interference and enforce tribal laws at their off-reservation fishing grounds to control their fisheries.[28]

After the Supreme Court handed down its *Phase I* opinion, the tribes pressed their rights further. In *Phase II* of the case they sought judicial confirmation of a share of the hatchery fish governmentally-produced, as well as a right to enjoin activities damaging the habitat upon which the fish depended. The courts had little difficulty in determining that the Indians had rights to hatchery fish, which effectively compensated for the natural fish lost as a result of the states' authorization of numerous activities damaging the fishery and its habitat.[29]

3. *An Environmental Right*

The courts have had more difficulty with the alleged habitat protection right, however. The tribes asked only for a negative right; that is, a right to restrain damaging activities — not a right to demand the state to take affirmative action. But they insisted that the right burdened not only the state but also the federal government and third parties. District Court Judge Orrick agreed with these allegations, interpreting the Supreme Court's *Phase I* opinion to recognize that the treaty guaranteed the tribes a meaningful opportunity to take fish.[30] He therefore concluded that implied within the treaty right was a right to restrict the state, as well as the federal government and third parties, from undertaking activities that damage the fish runs.[31]

According to the formula devised by Judge Orrick, where the allocation of fishing rights remained at 50/50 under the Supreme Courts' equal sharing

[23] 384 F. Supp. 312 (W.D. Wash. 1974).

[24] *Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). The court did, however, overrule Judge Boldt's separate treatment of Indian ceremonial and subsistence fishing and on-reservation harvests. According to the Supreme Court, the Indians' 50% share includes all harvests for both commercial and noncommercial purposes, both on-reservation and off. Ibid. at 688.

[25] Ibid. at 684.

[26] Ibid. at 686.

[27] Ibid. at 687.

[28] See *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974).

[29] *U.S. v. Washington (Phase II)*, 506 F. Supp. 187, 197-99 (W.D. Wash. 1980); aff'd 759 F. 2d 1353, 1360 (9th Cir. 1982).

[30] *Phase II*, 506 F. Supp. at 202-204.

[31] Ibid. at 208.

principle,[32] there was a presumption that the Court's "moderate living" principle had not been fulfilled.[33] Given this presumption, according to the district court, if the tribes could show that a proposed activity would produce fishery habitat degradation, the burden shifted to the state to show that the tribes' moderate living needs would not be impaired.[34] After a good deal of confusion,[35] the Ninth Circuit Court of Appeal finally determined that fixing the scope of these rights in a proceeding not based on any concrete facts was impermissible.[36]

Nevertheless, there should be little doubt that an environmental right accompanies the treaty right to take fish, as every judge who has considered the issue on its merits has concluded that such a right exists.[37] In fact, in specific factual contexts the treaty right has enjoined the construction of dams,[38] altered dam operations,[39] limited irrigation withdrawals,[40] and blocked construction of a marina.[41] Thus, the environmental right is powerful enough to protect waterflows upon which the fish are dependent and appears to give the tribes a virtual veto over developmental activities damaging the fishery resource, especially projects that block access to fishing grounds.[42] At a minimum, the right should be construed to require administrators to (1) ensure that the tribes participate fully in their decision-making processes, (2) adopt the least burdensome alternative on fishery resources, (3) include all feasible mitigating measures in their proposals, and (4) convince a court that the

[32] See supra notes 25-27 and accompanying text.

[33] *Phase II*, 506 F. Supp. at 208.

[34] Ibid.

[35] A Ninth Circuit panel first overturned Judge Orrick's decision on the environmental issue, 694 F.2d 1374 (9th Cir. 1982) (environmental right only requires the state to take "reasonable steps" commensurate with its ability and resources to protect fish habitat). This decision was subsequently vacated by the Ninth Circuit *en banc* in an unpublished opinion, on the ground that there was no jurisdiction to review the district court's rulings on motions for partial summary judgment under para.54(b) of the Federal Rules of Civil Procedure (28 U.S.C. para.1292(b)). This decision was in turn vacated by the decision cited infra note 36.

[36] 759 F.2d 1353, 1357 (9th Cir. 1985) (interests of the public not served by declaratory judgments which announce legal rules "imprecise in definition and uncertain in dimension").

[37] See Blumm, "Why Study Pacific Salmon Law?" 22 Idaho L.Rev. 629, 637 n.54 (asserting that all appellate judges who have considered whether there is an environmental right on the merits have concluded that there is, although they have not agreed on its scope).

[38] *Confederated Tribes of the Umatilla v. Alexander*, 440 F. Supp. 553 (D. Or. 1977) (congressionally authorized dam cannot abrogate treaty rights without express congressional intention to abrogate).

[39] *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032 (9th Cir. 1985) (requiring dam releases to preserve salmon redds); *Conferated Tribes of the Umatilla v. Callaway*, No. 72-211 (D. Or. Aug.17, 1973) (Columbia River hydroelectric operations cannot "impair or destroy" treaty fishing rights).

[40] *U.S. v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (treaty right dates from "time immemorial" and includes water flows necessary to support fishing as necessary to support the livelihood of tribal members).

[41] *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1507 (W.D. Wash. 1988) (enjoining a dredge and fill permit that would have blocked access to tribal usual and accustomed fishing grounds, ruling that "the treaty fishing right cannot be impaired or limited without an act of Congress").

[42] Ibid. at 1516 (amount of damage to treaty fishing right not to be balanced against project benefits, not "a factor to weigh in reaching its decision").

project will not adversely affect treaty property rights.[43]

The scope of this environmental right is considerable, not only because of the immense migratory range of the salmon runs but also because it is not limited to tribal land reservations. The treaty right attaches to all "usual and accustomed" fishing grounds. These have been judicially determined to exist at numerous locations throughout the Northwest, including not only rivers and streams but also bays and ocean waters.[44]

The right to a share of the harvest springs from the treaty language promising the tribes a right to fish "in common" with others. The environmental right, however, does not appear to necessarily depend upon express treaty language, since it has been implied in the existence of Indian reservations — in a manner similar to the reserved water rights doctrine.[45] Thus, tribes without treaties have secured sufficient water flows to protect on-reservation fisheries.[46] This implied right is limited to the boundaries of the reservation and does not entitle the tribe to a harvest share. Nevertheless, it can affect off-reservation activities that have on-reservation effects.[47]

4. *A Negotiating Tool*

Judicial recognition of the treaty fishing right has enabled the Pacific Northwest tribes to become a significant force in water resources management issues on the state, national and international levels. In 1980, the tribes formed a key part of a coalition that convinced Congress to pass the Northwest Power Act,[48] a statute calling for a program to restore Columbia River Basin fish runs depleted by dam construction and operations.[49] The statute recognized the tribes as resource managers on an equal basis with the states,[50] and the fish restoration program authorized by the Act gave the tribes unprecedented authority to control water flows on the Columbia River to benefit salmon runs.[51]

In 1985, the tribes were instrumental in helping to negotiate the U.S.-Canada Pacific Salmon Treaty which will significantly restructure ocean

[43] See *U.S. v. Washington (Phase II)*, 694 F.2d at 1389, 1391 (panel decision) (concurring opinion of Judge Reinhardt). Judge Reinhardt's criteria also included compensation to the tribes for any losses sustained. However, it is clear that administrators lack the authority to terminate treaty property rights; Congress must authorize such takings. *Muckleshoot*, 698 F.Supp. at 1512.

[44] See, e.g., *U.S. v. Washington (Phase I)*, 459 F. Supp. 1020, 1058–1060 (marine and fresh water usual and accustomed fishing grounds of the Tulalip tribe).

[45] See e.g. Ranquist, "The Winters Doctrine and How it Grew: Federal Reservation of Rights to Use Water" 1975 B.Y.U. L.Rev. 639; Pelcyger, "The Winters Doctrine and the Greening of the Reservations" 4 J. Contemp. L. 19 (1977).

[46] See, e.g., *Colville Tribe v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) (tribes entitled to sufficient water to allow establishment of a wild trout fishery); *U.S. v. Anderson*, 6 Am. Ind. L. Rep. F-129 (E.D. Wash.), aff'd in part, rev'd in part on other grounds, 736 F.2d 1358 (9th Cir. 1984).

[47] See, e.g. *Colville Tribe v. Walton*, 752 F.2d 397 (9th Cir. 1985) (holding that the reservation fishing right has a priority date of the date of the establishment of the reservation, meaning that water rights junior to that date would be curtailed in times of shortage).

[48] 16 U.S.C. para.839.

[49] See Blumm & Johnson, "Promising A Process For Parity: The Pacific Northwest Electric Power Planning and Conservation Act and Anadromous Fish Protection" 11 Envtl. L. 497.

[50] See 16 U.S.C. para.839b(h).

[51] See Blumm, "Implementing the Parity Promise: An Evaluation of the Columbia Basin Fish and Wildlife Program" 14 Envtl.L. 277, 293–96 (1984) (discussing the "Water Budget").

harvest practices, in large measure to uphold the Indian right to take fish.[52] The U.S. legislation implementing the Pacific Salmon Treaty considers the tribes on an equal basis with the states and gives them direct representation on the institutions established to implement the Treaty.[53]

In 1987, the state of Washington revised its timber management regulations to supply greater protection for fish habitat.[54] The impetus for doing so was a desire to avoid litigation based on the implied environmental right that the tribes were likely to bring.

Finally, in late 1988, U.S. District Court Judge Marsh approved a settlement agreement establishing a long-term comprehensive plan for managing the anadromous fish runs on the Columbia River. The plan, a response to the *Sohappy* litigation,[55] establishes a framework for allocating Indian and non-Indian harvests and developing basin management plans to rebuild the fish runs.[56] The plan also secures a fishery management role for the tribes, a role first recognized by the courts.[57]

Thus, judicial recognition of the environmental component of the treaty right to fish was rapidly given legislative and even international sanction. Moreover, because of the "cotenancy" nature of the right, the beneficiaries of the environmental component included non-native commercial and sport fishers, who, ironically, were the most vocal opponents of the right during the 1970s. The pattern of judicial recognition prompting action on the part of more representative branches of government, coupled with the non-excludable nature of the environmental benefits,[58] has served to democratize the treaty right to fish. This pattern is being repeated in both Canada and New Zealand.

5. *Comparing the Treaty Right With An Aboriginal Right*

The treaty right is in a sense a "recognized" aboriginal right; however, its content is determined by evidence of the same customary practices needed to establish an aboriginal right.[59] However, the express treaty recognition means that the treaty fishing right is a durable one: its implied easements

[52] Treaty with Canada Concerning Pacific Salmon and Memorandum of Understanding, Jan. 28, 1985; see Jensen, "The Pacific Salmon Treaty: An Historical and Legal Overview" 16 Envtl.L. 363 (1986); Yanagida, "The Pacific Salmon Treaty" 81 Am.J. of Intl.L. 557 (1987); Twitchell, "The Struggle to Move from 'Fish Wars' to Cooperative Fishery Management" 20 Ocean Dev. & Intl. L. 409 (1989).

[53] 16 U.S.C. paras.3631, 3632(a), (f)-(g); see Yanagida, supra note 52, at 583.

[54] Wash. Admin. Code para.222-30 (1987).

[55] See supra notes 21-22 and accompanying text. For background on the development of the plan, see Harrison, "The Evolution of a New Comprehensive Plan for Managing Columbia River Anadromous Fish" 16 Envtl.L. 705 (1986).

[56] See *U.S. v. Oregon*, 699 F. Supp. 1456 (D. Or. 1988); see also "Oregon, Washington Tribes Sign Fish Pact" The Oregonian, Mar. 11, 1988 at 42.

[57] See Settler, supra note 28.

[58] The beneficiaries of the treaty fishing environmental right include not only non-native fishers, but, hunters, recreationalists, and drinkers of municipal water.

[59] Aboriginal title is a legal right to lands or resources good against all third parties but existing at the mere sufferance of the federal government. See W. Canby, *American Indian Law In a Nutshell* 13 (2nd ed. 1988); Blumm & Malbon, *Aboriginal Title, the Common Law, and Federalism: A Different Perspective 27, 33-35 in The Emergence of Australian Law* (Ellinghaus, Bradbrook & Duggan, eds. 1989); see also infra notes 176-180 and accompanying text. Compare, e.g., F. Cohen, supra note 14, at 492 (discussing the elements of proof of an aborinal title claim) with *Phase I*, 384 F. Supp. at 350-353, 359-382 (treaty dependent, including its commercial nature, on pre-treaty activities).

and negative servitudes survive homestead patents and statehood.[60] They may be extinguished only by clear, unambiguous federal statutory language.[61] Even then, payment of just compensation is constitutionally required.[62]

The compensation requirement, along with the right to a specified harvest share, distinguishes the treaty fishing right from an aboriginal fishing right. In the U.S. extinguishment of the latter does not require payment of compensation,[63] nor does it insulate the right from state regulation.[64]

The U.S. treaty fishing right has evolved over a century of judicial interpretation into a significant economic and environmental right. While the precise contours of the latter have yet to be sketched, its outlines may provide a useful benchmark for other jurisdictions, such as Canada and New Zealand, where similar rights are evolving.

II BRITISH COLUMBIA

Pacific Northwest natives inhabiting British Columbia were just as dependent on salmon runs as the Indians of the U.S. Pacific Northwest.[65] The Fraser River runs, now the largest on the Pacific Coast, were particularly prized. But unlike their neighbors across the border, most British Columbia tribes never signed treaties, largely due to a lack of funds to purchase Indian lands and a fair amount of provincial recalcitrance.[66] However, the federal government did set aside numerous Indian land reserves, and in the process "appropriated" fishing rights for natives, often at locations off the reserves.[67] Thus, in British Columbia native fishing rights might be based on treaty, land reserves, appropriation, or aboriginal title.

Another feature of the native fishing right in British Columbia that distinguishes it from the U.S. right is that, in Canada, regulation of fishing is a largely federal matter,[68] although implementation is in fact accomplished by provincial regulations. Thus, the federalism tensions so evident in the U.S., if not absent in British Columbia, are at least below the surface.

[60] See, e.g., *Winans*, supra notes 9–12 and accompanying text.

[61] F. Cohen, supra note 14, at 493.

[62] Ibid. at 485 (citing *Mitchel v. U.S.*, 348 U.S. 271 (1955).

[63] *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 271 (1955).

[64] See F. Cohen, supra note 14, at 443 (citing *State v. Newell*, 84 Me. 465, 24 A. 943 (1892) and *State v. Moses*, 70 Wash. 282, 442 P.2d 775 (1967)).

[65] See, e.g., H. Brady, *Maps and Dreams, Indians and The British Columbia Frontier* (1981); W. Duff, *Indian History of British Columbia* (1964).

[66] The tragic story of Indian policy in British Columbia is set forth in some detail in P. Cumming & N. Mickenberg, *Native Rights in Canada* (2d ed. 1972), ch. 17. A number of small land conveyances, which the Canadian Supreme Court interpreted to be treaties in *Regina v. White and Bob*, 52 D.L.R. (2d) 481 (1964) were signed between tribes on Vancouver Island and Governor James Douglas in the 1850s for lands surrounding Fort Vancouver. In addition, a few tribes in northwestern British Columbia were included in Treaty No. 8, negotiated in 1899. But the vast bulk of the province has neither been the subject of a treaty nor a Natural Resource Agreement such as those in effect in the three prairie provinces. See ibid. at 211 n.23.

[67] See R. Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* 113 n.111 (1988) (noting that appropriations of fishing rights were made "in every part of the province").

[68] Fisheries Act, R.S.C. c.F-14 (1970). On the other hand, regulation of hunting, largely a provincial matter, resembles the U.S. situation. See infra notes 82–83.

1. *Aboriginal Title in British Columbia*

The foundation of Indian law in Canada was the Royal Proclamation of 1763 which (1) established the Crown's responsibility for protecting Indian tribes, (2) reserved hunting grounds for them, and (3) prohibited private purchases of their lands.[69] The Proclamation was judicially recognized as the source of Indian title a hundred years ago,[70] but its application to British Columbia was never clear.[71] Throughout the 20th century, British Columbia tribes maintained that, absent a treaty of other agreement ceding their lands and fisheries, they retained title.[72] Not until the 1960s, however, did the courts begin to consider whether Indian title persisted in the province, and their initial answers were negative — either because the 1763 Proclamation was the sole source of Indian title and inapplicable to British Columbia, or because Indian title was extinguished by colonial land ordinances prior to British Columbia's joining the Dominion in 1871.[73]

In 1973, however, in the landmark *Calder* case, the Canadian Supreme Court indicated that aboriginal title was not dependent on the Royal Proclamation.[74] But the Court split on the issue of whether aboriginal title had been extinguished: three justices ruling that the colonial land ordinances worked an implied extinguishment, three others requiring legislation showing a "clear and plain" indication to extinguish Indian title, a standard which general land ordinances did not meet.[75] While *Calder* made a judicial declaration of aboriginal title possible in British Columbia, the case clearly did not resolve the issue. Some provincial courts employed *Calder* to declare expansive aboriginal rights, but, with one exception, these results have not survived appeal.[76] Nonetheless, they have prompted negotiations leading to

[69] R.S.C. 1970 App. 11 No. 1, at 123–29. See generally Clinton, "The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal — State Conflict Over the Management of Indian Affairs", 69 B.U.L. Rev. 329 (1989).

[70] *St. Catherine's Milling and Lumber Co. v. The Queen*, 14 A.C. 46 (1888) (J.C.P.C.).

[71] See P. Cumming & N. Mickenberg, supra note 66, at 30 n.31 (citing a number of cases holding that the Proclamation did not apply to the Canadian Far North or West, because those lands were not subject to British sovereignty in 1763).

[72] See ibid. at 188-191. Indian title clearly includes the right to hunt and fish. *R. v. Issac*, N.S.R. (2d) 460, 498 (N.S.S.C.A.D.), 9 A.P.R. 460, 498 (1975); *Attorney General for Ontario v. Bear Island Foundation*, 1 C.N.R.L. 1, 38–39 (Ont. S.C. 1985) (so long as no damage or prejudice to other property rights).

[73] For example, the trial court in *Calder v. Attorney General*, 71 W.W.R. 81, 8 D.L.R. (3d) 59 (1969), ruled that Indian title was extinguished by colonial land legislation, while the British Columbia Court of Appeal held that Indian rights in British Columbia must be grounded on treaty, proclamation, or contract, 74 W.W.R. 481, 13 D.L.R. (3d) 64 (1970).

[74] *Calder v. Attorney General*, 34 D.L.R. (3d) 145, 152–153, 156 S.C.R. 313, 322–323, 328 (1973) (Judson J.) (proclamation not exclusive source of Indian title), 200–201, S.C.R. at 390–392 (Hall J.) (aboriginal title not dependent on treaty, executive order or legislative enactment).

[75] Ibid. at 158–60, S.C.R. at 330–334. These ordinances generally declared Crown fee ownership of all unreserved and unoccupied lands and minerals. For Justice Hall and his colleagues, Crown fee ownership was not inconsistent with Indian title — which is not fee title, since it is inalienable except to the Crown. See ibid. at 173–74, S.C.R. 352–353.

[76] See *Re Paulette* 42 D.L.R. (3d) 1974), rev'd, 630 D.L.R. (3d) 1 (1976), aff'd 72 D.L.R. (3d) (1977) (on the ground that a caveat cannot be filed against unpatented Crown land); *Kanatewat v. James Bay Development Corp.*, 1974 R.P. 38 (C.S.), rev'd 1975 C.A. 166 (Q.C.A.) (any aboriginal rights that might survive are too vague to justify an injunction). The case that survived was not appealed, *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, 107 D.L.R. (3d) 513 (1980) (recognizing Inuit aboriginal title in Northwest Territories and finding no extinguishment because of lack of clear and plain legislative intention to extinguish). For a discussion of these cases, see Bartlett, "Aboriginal Land Claims at Common Law" 15 West. Aust. L.Rev. 293 (1983).

comprehensive land and resource settlements in particular areas, especially in the North.[77]

Until the *Sparrow* case,[78] British Columbia courts interpreted *Calder* narrowly,[79] leaving the issue of native common law rights unsettled. However, the tide began to turn in the mid-1980s. In 1985, the British Columbia Court of Appeal upheld an injunction halting logging pending a trial on an aboriginal land claim in the *Meares Island* case.[80] Moreover, the Canadian Supreme Court gave a ringing endorsement to native land rights in *Guerin v. The Queen*, where the Court imposed a judicially enforceable fiduciary obligation on the Crown properly to manage certain lands for the benefit of the Indians.[81]

2. *Fisheries Act Regulation*

Because fishery regulation in Canada is primarily a federal matter, it does not involve the complexities of provincial hunting regulation including section 88 of the Indian Act.[82] Moreover, since Canadian courts have consistently upheld Fisheries Act regulation of treaty rights,[83] it seems unsurprising that aboriginal fishing rights are also subject to federal regulation.[84] Overlooked until recently was a provision of the Indian Act authorizing tribal regulation to displace Fisheries Act regulation for the management of fish and game on Indian reserves.[85]

Prior to the enactment of the Constitution Act of 1982, any limitation on federal Fisheries Act regulation of aboriginal rights appeared unlikely.

[77] See infra notes 155–58 and accompanying text.

[78] See infra notes 101–13 and accompanying text.

[79] For example, the trial judge in *Sparrow v. The Queen*, interpreted *Calder* to mean that aboriginal rights had to be based on treaty, proclamation, or contract. The county appellate court interpreted *Calder* to mean that "aboriginal rights no longer exist" in British Columbia. See *Sparrow v. The Queen*, 2 W.W.R. 577, 592-593 (1987).

[80] *MacMillan Bloedel Ltd v. Mullin*, 3 W.W.R. 557, 61 B.C.L.R. 145 (1985).

[81] 2 S.C.R. 335 (1984). Although the reasoning in Querin could be limited to recognized reservation lands after surrender to the Crown, the court did trace the roots of the fiduciary obligation to aboriginal title. Ibid. at 376.

[82] Section 88 of the Indian Act, R.S.C. 1970 S.I-6, makes provincial laws of general application applicable to Indians, provided they do not infringe treaty or federal statutory rights. Regulation under the British Columbia Wildlife Act has been frequently upheld by the Canadian Supreme Court. *Kruger and Manuel v. The Queen*, 1 S.C.R. 104 (1978) (Wildlife Act regulates only time, manner, and place of hunting; it does not take hunting rights); *Dick v. The Queen*, 2 S.C.R. 309 (1985) (Wildlife Act is a law of general application under para.88); *Jack and Charlie v. The Queen*, 2 S.C.R. 332 (1985) (Wildlife Act is not an impermissible interference with Indian's freedom of religion).

[83] *Regina v. Cooper*, 1 D.L.R. (3d) 113 (B.C.S.C. 1969) (upholding convictions of 3 treaty Indians for violating federal Fisheries Act regulations). The Canadian Supreme Court has upheld the termination of hunting rights under the federal Migratory Birds Convention Act, R.S.C. 1970 ch. M-12. *Regina v. Sikyea*, 1964 S.C.R. 642; *Regina v. George*, 1966 S.C.R. 267 (treaties do not prevail over federal legislation); *Daniels v. The Queen*, 2 D.L.R. (3d) 1 (1969) (natural resource agreements do not prevail over federal legislation).

[84] *Regina v. Derrikson*, 71 D.L.R. (3d) 159 (1976); *Jack v. The Queen*, 1 S.C.R. 294 (1980) (Terms of Union, under which British Columbia joined the Confederation, promising "a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion after the Union" do not preclude subsequent Fisheries Act regulation).

[85] Section 81(1) of the Indian Act, R.S.C. 1970 s.1-6, authorizes tribal by-laws for "the preservation, protection, and management of fur-bearing animals, fish and other game on the reserve". Under section 82, these by-laws are subject to disapproval by the Minister of Indian Affairs.

In the related hunting rights area, the Canadian Supreme Court persistently upheld termination of treaty rights under the federal Migratory Birds Convention Act.[86] Thus, species conservation clearly prevailed over native rights, even treaty rights, where the regulation was federal. The result is consistent with the language in many of the treaties of western Canada which expressly subject native hunting and fishing rights to regulation by the "Government of the country".[87] However, there was some judicial indication that regulation must treat native subsistence rights distinctly from sport and commercial hunters, at least where native rights were treaty rights[88] or protected under the prairie provinces' Natural Resources Agreements.[89]

In the latter two situations it was at least arguable that both federal and provincial regulation should be aimed at conservation of game for Indian needs, and any restriction on subsistence taking limited to those necessary to accomplish this purpose.[90] No similar regulatory limits seemed applicable to aboriginal rights, as the Canadian Supreme Court frequently sustained application of both federal fishery regulations and provincial game regulations without requiring a showing that the regulations were designed to conserve fish or game for Indian needs, or that the native taking itself was a threat to the species.[91] In British Columbia the effect was judicial ratification of increasingly stringent regulation of the Indian fishery, occasioned in large measure by the growth of non-Indian commercial and sport fisheries.[92]

In response, British Columbia tribes sought exemption from Fisheries Act regulation under the Indian Act, and the courts have affirmed displacement of Fisheries Act regulations.[93] However, Indian Act displacement is limited to on-reserve fishing, requires the acquiescence of the Minister of Indian Affairs,[94] and might not be applicable to rivers bordering reserves.[95] Nevertheless, use of the Indian Act in this manner may enable British Columbia tribes to achieve a co-management role similar to that possible for U.S. tribes.[96]

[86] See cases cited supra note 83.

[87] See, e.g., Treaty No.8, cited in P. Cumming & N. Mickenberg, supra note 66, at 221. The prairie provinces' Natural Resource Agreements contain similar language, see ibid. at 211.

[88] *Regina v. Sikyea*, 43 D.L.R. (2d) 150, 153 (1964), 46 W.W.R. 65, 68 (N.W.T.C.A.), aff'd, S.C.R. 642 (1964) (permissible regulations were those designed to assure a supply of game for Indian needs).

[89] *Prince and Myron v. The Queen*, 1964 S.C.R. 81, 84 (1964) (distinguishing between subsistence hunting and sport and commercial hunting, exempting the former from general game laws). See also *Rex v. Wesley*, 4 D.L.R. 774 (Alta. App. Div. 1932).

[90] See Lysyk, "Indian Hunting Rights: Constitutional Consideration and the Role of Indian Treaties in British Columbia" 2 U.B.C. L.Rev. 401, 414 (1964–66).

[91] See cases cited supra notes 82 (sustaining provincial game regulations) and 84 (sustaining federal Fisheries Act regulations).

[92] See *Jack v. The Queen*, 1 S.C.R. 294, 310 (1980) (Dickson J.).

[93] *R. v. Jimmy*, 3 C.N.L.R. 77 (B.C.C.A. 1987); *R. v. Baker*, 4 C.N.L.R. 73 (B.C. Co. Ct. 1983). See also *R. v. Burnaby*, 2 C.N.L.R. 125 (N.B.Q.B. 1987); *R. v. Sacobie and Polchies*, 3 C.N.L.R. 92 (N.B.Q.B. 1987).

[94] See supra note 85 and accompanying text.

[95] *Attorney General of British Columbia v. Wale*, 2 C.N.L.R. 36 (B.C.C.A. 1987) (affirming a preliminary injunction pending trial on this issue). But see the dissenting opinion of Judge Seaton, ibid. at 44 (citing *Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78 (1918)), where the Annette Island Reserve was held to include surrounding waters); and *Jack v. The Queen*, 1 S.C.R. 294 (1980), where Justice Dickson noted the difficulty of separating reserves from traditional fisheries and ruling that the purpose of the reserves was often to permit the Indians to continue to fish at their customary stations).

[96] See *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974) (upholding tribal regulation at off-reservation customary fishing stations).

3. *The Constitution Act of 1982 and the Sparrow Decision*

The 1982 Constitution Act, which patriated the Canadian Constitution,[97] included section 35(1) recognizing and affirming "existing aboriginal and treaty rights".[98] What is meant by "existing" rights is open to question — in particular, it is not clear whether this saves all restrictions imposed on aboriginal and treaty rights as of 1982.[99] Section 37 established a constitutional conference to, among other things, settle questions such as this, but no progress has been made and the issue seems destined to be resolved judicially.[100]

The first case to apply section 35(1) to the federal Fisheries Act was *Sparrow v. The Queen*.[101] In *Sparrow*, a unanimous British Columbia Court of Appeal reversed the conviction of a Musqueam Band member who was fishing off-reservation on the Fraser River with a drift net longer than permitted under Fisheries Act regulations. In so doing, the court not only recognized aboriginal fishing rights but limited the federal power to regulate the Indian fishery for the first time.

The Court of Appeal first reversed the lower courts' interpretation of *Calder*, ruling that aboriginal title in British Columbia may arise at common law.[102] It was unnecessary for the court to confront the issue of whether aboriginal fishing rights had been extinguished because the Fisheries Act regulations always recognized a native right to fish for food and authorized separate licenses for it.[103] The court dismissed the federal government's suggestion that because the right was subject to regulation, it did not constitute an "existing" aboriginal right, ruling that the regulations confirm the existence of this right, rather than extinguish it.[104]

[97] See generally Hodge, "Patriation of the Canadian Constitution: Comparative Federalism in a New Context" 60 Wash. L.Rev. 585 (1985).

[98] Constitution Act para.35(1) (1982).

[99] Compare McNeill, "The Constitutional Rights of Aboriginal Peoples of Canada" 4 Sup. Ct. L.Rev. 255 (1982) (arguing that para.35(1) should be construed to restrict all regulation of aboriginal and treaty rights not lawfully extinguished in 1982), with P. Hogg, *Canada Act 1982, Annotated*, at 82–83 (1982) (endorsing as "plausible" a freezing of native rights in their condition as of 1982).

[100] See, e.g., *Regina v.Arcand*, 4 C.N.L.R. 91 (A.P.C. 1988) (Migratory Birds Convention Act was a continuing breach on treaty hunting rights, not an extinguishment of those rights and thus the right is "existing" and is affirmed by section 35(1); *Regina v. Sundown*, 4 C.N.L.R. 116 (S.C.Q.B. 1988) (section 35(1) must be read subject to the Natural Resources Transfer Agreement and has no effect on the application of provinical game laws); *Regina v. Googoo*, 2 C.N.L.R. 137 (N.S.P.C. 1987) (section 35(1) did not revive treaty rights that had previously been prohibited by provincial fishing regulations); see generally, Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act" 1982, Part II, Section 35: "The Substantive Guarantee", 22 U.B.C.L. Rev. 207, 215–220 (1988).

[101] 2 W.W.R. 577 (B.C.C.A. 1987). See Postscript, infra notes 277–280 and accompanying text.

[102] Ibid. at 592–595 (reversing B.C.W.L.D. 599 (1986)),If affirmed by the Canadian Supreme Court, this result would have considerable effect on the numerous pending aboriginal land claims in the province, although the court was careful to emphasize that aboriginal claims are fact-specific. Ibid. at 595 (relying on Dickson J. in *Kruger and Manuel v. The Queen*, I.S.C.R. 104, 108–109 (1978)). For a summary of one aboriginal land claim, see "The Address of the Gitksan and Wet'suwet'en Hereditary Chiefs to Chief Justice McEachern of the Supreme Court of British Columbia" 1 C.N.L.R. 17 (1988).

[103] 2 W.W.R. at 596–597.

[104] Ibid. at 597:

> If the Indians did not have a special right in respect of the fishery, there would have been no reason to mention them in the regulations. The regulations themselves, which have consistently recognized the Indian right to fish, are strong evidence that the right does exist. It is equally clear that such right has not been extinguished, either expressly (as Hall J. would require) or by implication (as Judson J. held).

As to the regulatory limits imposed by section 35(1) the Court of Appeal construed the provision "in a liberal and remedial way" expressly endorsing the U.S. view that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in their favor,[105] a rule that now seems settled Canadian jurisprudence.[106] However, the court rejected as inconsistent with existing circumstances the Indians' argument that their fishing should be exempt from federal regulation.[107] Also rejected was the contention that the federal government be required to prove by clear and convincing evidence any restriction on the Indian fishery as reasonably necessary for conservation.[108] Instead, the court ruled that the government must treat the Indians separately, giving "priority" to Indian food fishing over the commercial and sport fisheries,[109] but reserving the right to impose "reasonable regulations to ensure proper management and conservation of the resource".[110]

Although the court seemed to think its ruling would simply constitutionally entrench existing government policy,[111] it is doubtful that government policy actually preferred the inland Indian fishery over the competing ocean commercial and sport salmon fisheries.[112] Thus, the ruling could produce larger changes than the court assumed. Moreover, the rule of liberal construction led the court to expand the scope of the Indian food fishery beyond the band's reasonable subsistence needs to include other societal needs, such as ceremonial use "and a broader use of fish then mere day-to-day domestic consumption".[113]

The *Sparrow* case, now on appeal to the Canadian Supreme Court (see Postscript), could prompt an entire restructuring of salmon fishery regulation in British Columbia. However, its precise contours will not emerge for some time, as the decision left unresolved even the question of whether the net length restriction at issue was a reasonable conservation measure.[114] Also unresolved is how the priority owed the Indian fishery is to be fulfilled. The American experience suggests that if this does not include some quantification of the right, the authority to promulgate "reasonable regulations to ensure the proper management and conservation of the resource" may prove to be so vague a standard as to legitimize measures designed to "conserve" fish for the commercial and sport fishing.[115] Similarly, the court's asserted

[105] Ibid. at 599 (citing Justice Dickson's opinion in *Nowegijick v. The Queen*, 1 S.C.R. 29, 36 (1983), which in turn relied on *Jones v. Meehan*, 175 U.S. 1 (1899) (Indian treaties "must . . . be construed, not according to the technical meaning of [their] words . . . but in the sense in which they would naturally be understood by the Indians").

[106] *Simon v. The Queen*, 2 S.C.R. 387, 402 (1985); see R. Bartlett, supra note 67, at 31 (noting that rule of liberal construction constitutes a "significant departure from conventional principles of interpretation and is founded on the unique historical relationship between the Crown and the Indians").

[107] 2 W.W.R. at 603.

[108] Ibid. at 598, 607. The court interpreted this to be the U.S. rule. Ibid. at 604–605.

[109] The court cited the cases noted in supra note 89.

[110] 2 W.W.R. at 607–608.

[111] Ibid. at 608, 585 (citing a fishery manager's letter).

[112] See P. Pearse, *Turning the Tide: A New Policy for Canada's Pacific Fisheries* 177 (1982) (Indian food fishery has priority second only to conservation, but no priority over ocean fisheries; and because of its inland location, the burden of conservation is often imposed on the Indian fishery).

[113] 2 W.W.R. at 608.

[114] The court remanded the issue for a new trial on whether the length restriction was a necessary conservation measure. Ibid. at 609.

[115] See Johnson, supra note 18.

distinction between the fishing right and the time, place and manner of exercising the right is one that failed to impose meaningful restrictions on state regulators in the U.S., necessitating frequent resort to the courts.[116] The *Sparrow* court's directive to accord priority to the Indian fishery may in fact avoid these difficulties, but some quantification of the scope of the right seems necessary.

A final issue concerns the apparent exclusion of a commercial dimension from the scope of the right. The U.S. treaty rights include a commercial dimension because the tribes were commercial fishers at the time the treaties were signed. If the Musqueam Band were commercial fishers like many other tribes in British Columbia,[117] their aboriginal right should also include a commercial dimension.[118] Alternatively, if Fisheries Act regulation extinguished this aspect of the Indian right prior to 1982, perhaps compensation is due. A recent Manitoba decision expressly adopting the *Sparrow* court's reasoning arguably supports the commercial nature of the right, holding that the Migratory Birds Convention Act can regulate but no longer extinguish treaty hunting rights.[119] It may be that Indian food fish licenses can similarly regulate but no longer exclude commercial fishing based on aboriginal rights. The commercial fishery issue has been squarely raised by the Gitksan Bands in their attempt to secure management authority for the Skeena river System.[120] An answer must await trial on the issue.

4. *An Emerging Environmental Right*

The outline of an environmental right began to emerge even before the Coury of Appeal's decision in *Sparrow*. On August 15, 1985, in *Pasco v. Canadian National Railway Co.*, a British Columbia trial court issued an interim injunction against the railroad's twin tracking construction program in response to a suit brought by the Oregon Jack Creek Band alleging interference with their fishing rights.[121] While the band alleged interference with aboriginal rights, it also claimed the construction programme would interfere with its proprietary rights in the Thompson River (arising from its riparian rights accompanying its beneficial ownership of a land reserve adjoining the river and from the appropriation of specific traditional fishing grounds for the band under the British Columbia Terms of Union). It was these alleged proprietary rights, rather than the aboriginal title claim, that led Judge McDonald to issue an interim injunction so that a trial could be held on the issue of whether these rights existed and, if so, whether the double tracking constituted a trespass.[122] The injunction was affirmed by the Court of Appeal, and the Canadian Supreme Court dismissed a subsequent

[116] See Comment, "Sohappy v. Smith: Eight Years of Litigation Over Indian Fishing Rights" 56 Or. L.Rev. 680 (1977) (referring to a "commuter run" to the courthouse).

[117] See *Jack v. The Queen*, 1 S.C.R. 294, 306-311 (1980) (citing testimony of noted anthropologist Barbara Lane); *Attorney General of British Columbia v. Wale*, 2 C.N.L.R. 36, 39 (B.C.C.A. 1987) (citing a fish management report prepared for the Gitksan-Wet'suwet'en Tribal Council).

[118] This is the U.S. rule, see supra note 24.

[119] *Regina v. Flett*, 3 C.N.L.R. 70 (M.P.C. 1987), overturning twenty years of Canadian precedent, including the cases cited in supra note 83, on the basis that under the new Constitution, Parliament is no longer supreme, and courts must protect constitutionally entrenched rights from statutory restrictions. Ibid. at 75.

[120] *Attorney General of British Columbia v. Wale*, 2 C.N.L.R. 36 (B.C.C.A. 1987) (affirming a preliminary injunction preventing the bands' exclusive commercial fishing, established under para.81 of the Indian Act (see supra note 85) pending trial.

[121] 1 C.N.L.R. 35 (B.C.S.C. 1986).

[122] Ibid. at 43.

appeal.[123]

The *Sparrow* case should cause Judge McDonald to reconsider his doubts about the viability of the band's claim based on aboriginal title. If aboriginal title can be proved, it is no less capable of maintaining a trespass than other proprietary rights.[124] U.S. courts have long considered aboriginal title "as sacred as the fee", differing from a fee interest only in its inalienability and compensation rules.[125] The Canadian Supreme Court in *Guerin v. The Queen* seemed to agree that the right was similar to fee title.[126]

Affirmation that the native right to fish may restrain habitat-damaging activities came in the recent *Claxton v. Saanichton Marina case.*[127] There, a British Columbia trial court issued an injunction halting construction of a marina in waters on which a Vancouver Island Indian band held a treaty right to "carry out their fisheries as formerly". Employing the rule of liberal construction, the court specifically rejected suggestions that this promise secured to the band only a right to fish along with others, and that its fishing right could be diminished to the extent the marina occupied some of its traditional fishing grounds. Judge Meredith declared that the "right of the Band is to insist that the whole of the Bay continue to be used as a fishery".[128] Although *Claxton* involved a treaty right unusual in British Columbia, one prominent authority believes it will be the first of many upholding native rights to use water for fishing, as well as hunting and trapping rights.[129] This prediction seems sound, at least in the case of treaty rights, since the Canadian Supreme Court has already declared that a treaty hunting right constitutes "a positive source of protection against infringement on hunting rights".[130]

5. *Treaty Rights vs. Aboriginal Rights*

The British Columbia situation is complicated by the fact that native fishing rights may be grounded on treaty, land reserve, fishing ground "appropriation" or aboriginal claim.[131] It is possible that the validity and scope of the right might vary depending on its origin. But although some differences seem plausible, especially regarding the circumstances under which aboriginal claims may be extinguished[132] and the possible tribal management authority over on-reservation fisheries,[133] in most respects the origin of the native fishing right should not affect its existence or nature.

[123] Ibid. at 34.

[124] For a conclusion contrary to Judge McDonald's, see *U.U.K.W. v. The Queen in Right of British Columbia*, 5 B.C.L.R. (2d) (B.C.S.C. 1986). See also *U.S. v. Alsea Band of Tillamooks*, 329 U.S. 40 (1946) (aboriginal title confers the rights of complete ownership against all but the sovereign).

[125] *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 235 (1985); *Mitchel v. U.S.*, 34 U.S. (9 Pet.) 711, 746 (1835).

[126] 2 S.C.R. 335, 382 (1984) (Indian title differs from fee simple title only in its general inalienability and the fiduciary obligation imposed on the crown when lands are surrendered). Because it has never adopted the no compensation rule articulated in *Tee-Hit-Ton v. U.S.*, 348 U.S. 272, 279 (1955), Canada may afford greater protection to aboriginal rights — quite apart from the constitutional protection supplied by para.35(1).

[127] 4 C.N.L.R. 48 (B.C.S.C. 1987).

[128] Ibid. at 60.

[129] R. Bartlett, supra note 67, at 57.

[130] *Simon v. The Queen*, 2 S.C.R. 387, 401-402 (1985).

[131] See supra notes 66-67 and accompanying text.

[132] See infra notes 139 and accompanying text.

[133] See supra note 85 and infra note 147 and accompanying text.

In the U.S., the courts have discounted most distinctions by which native title is held, the chief difference being the no-compensation rule for extinguishment of aboriginal title.[134] Even that distinction may not apply in Canada,[135] and section 35(1) now makes extinguishment of "existing" aboriginal rights without consent constitutionally impermissible. *Claxton* interpreted a treaty-based right,[136] and the result there parallels the U.S. experience by not only finding a right of environmental protection implied in the treaty but also construing the right to survive a subsequent conveyance of the lands in fee.[137] This durability surely applies to "recognized" native rights — by treaty, reserve, or fishing appropriation.[138] Whether aboriginal title survives fee grants from the Crown to third parties may be open to question.[139] In the case of fishing rights, however, it will be much more difficult to demonstrate that fee ownership of submerged lands is sufficiently inconsistent with native fishing to constitute the "clear and plain" intention necessary to extinguish aboriginal title.[140]

The issue of partial extinguishment will certainly arise in claims for commercial fisheries. *Sparrow* did not directly confront the issue, although the court recognized a native right in excess of the recognized by the tribe's food fish license.[141] The commercial fishery question is squarely at issue in the *Wale* case.[142] However, U.S. precedent,[143] the dissenting opinion of Judge Seaton in *Wale*,[144] and the implications flowing from *Regina v. Flett*[145] all suggest that native fishing rights may include a commercial dimension. But it seems quite clear from *Sparrow* that, even if they do, the native rights will be subject to conservation regulations.[146] However, under the Indian Act, conservation regulations governing fisheries on reserves may be tribal regulations.[147]

Fisheries on reserves may present a particularly troublesome issue because of their arguably exclusive nature. While certainly tribes ought to be able to regulate access to the fisheries on reserves,[148] in the case of a migratory resource like salmon, exclusivity cannot mean unlimited harvests, for that would undermine the principle of the paramount importance of conserva-

[134] See generally F. Cohen, supra note 14, at 471–499; see supra notes 62–63 and accompanying text.

[135] See supra note 130; see also Elliot, "Aboriginal Title" in *Aboriginal Peoples and the Law* 117 (B. Morse ed. 1985) (general common law presumption in favour of compensation; but not applied in the case of regulatory limitations, citing *Kruger and Manuel v. The Queen*, 75 D.L.R. (3d) 434, 437 (1977) (Dickson J.)).

[136] See supra notes 124-26 and accompanying text.

[137] See *U.S. v. Washington (Phase II)*, supra notes 29–36; Winans, supra notes 9–12.

[138] See F. Cohen, supra note 14, at 444–446.

[139] See Bartlett, supra note 76, at 341 (concluding that aboriginal title does not survive fee patents pursuant to statutory authorization).

[140] See, e.g., *Calder v. Attorney General* 34 D.L.R. (3d) 145, 216 (1973) (need specific legislation providing that "Indian title to public lands in the Colony is hereby extinguished"); *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* 107 D.L.R. (3d) 513, 551 (1980) (need legislation expressing a "clear and plain intention to extinguish").

[141] See supra note 113 and accompanying text.

[142] See supra note 120 and accompanying text.

[143] See supra notes 4–6 and accompanying text.

[144] 2 W.W.R. at 333 (1987).

[145] See supra note 119 and accompanying text.

[146] See supra note 110 and accompanying text.

[147] See supra note 85 and accompanying text.

[148] See Settler, supra note 28.

tion.[149] In the U.S., the Supreme Court refused to distinguish between on-reservation and off-reservation fisheries in determining that the treaties' "in common with" language implied a 50% share of the resource.[150]

Absent similar language in the British Columbia treaties or reserves, the equal sharing principle may not be appropriate. But if the right includes a commercial dimension, some sort of allocation will be necessary to properly manage the resource. If it can be estimated, the fairest way to establish such an allocation may be to base it on per capita consumption at the time of colonial settlement, irrespective of whether the right was grounded on treaty, reserve, or aboriginal claim. In the case of the Musqueam Band, evidence in the *Sparrow* case suggested that such a result would require nearly doubling the band's 1982 harvest.[151] That, in fact, may not be an impractical goal in light of the emerging environmental protection component of the right and restoration initiatives promised by the Pacific Salmon Treaty.[152] In the U.S., it is public policy to double the size of the Columbia Basin salmon runs, largely (although not exclusively) for the benefit of the inland Indian fishery.[153] Perhaps judicial declaration that the scope of the native fishing right is a function of per capita pre-colonial harvest would induce a similar restoration program for salmon runs in British Columbia.

6. *The Aboriginal Right as a Negotiating Tool*

As in the case of the U.S. Indians,[154] judicial recognition of Canadian native rights can prompt negotiations that produce settlements recognizing both native land and resource rights and environmental rights to protect the habitat upon which the resources depend. Until a series of agreements signed in mid-1988, there were two prominent examples: The Inuvialuit (COPE)[155] Agreement covering the Western Arctic and the James Bay Agreement.

The James Bay Agreement, prompted by the trial court decision in the *Kanatewat* case,[156] supplies the Cree and Inuit with a guaranteed allocation of wildlife, environmental protection provisions, native regulatory authority over wildlife management, and even a guaranteed income security program for native hunters, trappers and fishers.[157] The COPE Agreement commits

[149] See supra notes 108–110 and accompanying text.

[150] See supra note 24.

[151] The 58,000 pounds harvested in 1982 meant a per capita harvest of just under 400 pounds. The Pearce Report, supra note 112, at 174, estimated pre-colonial consumption at around 700 pounds per capita.

[152] Treaty between the U.S. and Canada concerning Pacific Salmon (entered into force Mar. 18, 1985), discussed in Jensen, Yanagida, and Twitchell, supra note 52.

[153] The goal of Columbia River Basin Fish and Wildlife Program, adopted under the Northwest Power Act, 16 U.S.C. para.839, is to double salmon runs in the Basin in 20 years. See generally Blumm, "Reexamining the Parity Promise: More Challenges than Successes to the Implementation of the Columbia Basin Fish and Wildlife Program" 16 Envtl. L. 461 (1986).

[154] See supra notes 48-58 and accompanying text.

[155] The agreement, entitled "the Western Arctic Claim: Inuvialuit Final Agreement" was negotiated by the Committee for Original Peoples' Entitlement, hence the acronym of "COPE".

[156] See supra note 76.

[157] See Feit, "Negotiating Recognition of Aboriginal Rights: History, Strategies and Reactions to the James Bay and Northern Quebec Agreement" in *Aborigines, Land, and Land Rights* 416 (N. Peterson & M. Langton eds. 1983); see also Feit, "The Income Security Program for Cree Hunters, in Quebec, Canada" in ibid. at 439.

the federal government not only to substantial recognition of fee title for the natives, but also to dedicate a 5,000-square-mile area of the northern Yukon as a National Wilderness Park in which the Inuvialuit people retain hunting, fishing, and trapping rights.[158] The Agreement also provides the Inuvialuit with a system of preferential and exclusive harvesting rights and promises protection of "critical" wildlife in an integrated wildlife and land management program, involving the Inuvialuit "in all structures, functions, and decisions pertaining to wildlife management . . .".[159]

In the 1988 settlements, the Canadian government agreed (1) to pay the Cree $11.2 million to settle a longstanding dispute over an alleged breach of the James Bay accord; (2) to cede title to Indians in the Yukon Territory nearly 16,000 square miles and $194 million; and (3) to convey some 70,000 square miles in the McKenzie River Valley in the Northwest Territories and $400 million to Dene and Metis tribes.[160] If a proposed transfer of 200,000 square miles and $520 million in the eastern Arctic is approved, the natives will have full or partial control of nearly 7% of the land mass in Canada.[161] While these agreements indicate that natives may be able to bargain for significant environmental protection for subsistence resources, it is clear that judicial declaration of the existence of their rights is a prerequisite to effective bargaining. Without the impetus supplied by such a declaration, governments are unlikely to be interested in negotiating agreements that recognize native rights to resources or supply environmental protection for them. The evolution of native fishing rights in New Zealand mirrors the North American pattern of judicial decisions prompting legislative and executive recognition.

III New Zealand

Like the natives of British Columbia and the U.S. Pacific Northwest, the Maori peoples of New Zealand historically were heavily dependent on fishing for both their subsistence and their economy.[162] The English version of the 1840 Treaty of Waitangi included a clause which purported to guarantee the natives "full, exclusive, and undisturbed possession" of their lands, fisheries,

[158] The Agreement dedicates some 37,000 square miles in fee simple to the Inuvialuit people, see Cumming, *Canada's North and Native Rights in Aboriginal Peoples and the Law* 727 (B. Morse ed. 1985).

[159] Ibid. at 729 (citing pt. 14 of the COPE Agreement).

[160] See Witt, "Canada Strives to Mend Fences with Country's Native Peoples" Sunday Oregonian, Sept. 18, 1988 at A7.

[161] Ibid.

[162] See, e.g., the 1870 *Kauwaeranga* judgment of the Native Land Court, reprinted at V.U.W.L.R. 227, 240 (1984) (access to tidelands for fishing)

> afforded at all times, and with little labour and preparation, a large and constant supply of almost the only animal food which [the Maori] could obtain, was of the highest value to them; indeed of very much greater value and importance to their existence than any equal portion of land on *terra firma*.

See also Waitangi Tribunal, "Muriwhenua Fishing Report" (WAI:22) 31–76 [hereinafter Muriwhenua Report] (available from Government Print, Wellington, New Zealand) (detailed account of Maori dependence on fishing during the period prior to 1840, concluding that in 1840 Maori had a "bounteous" commercial fishery "which seemed to be under no immediate threat and they could afford to allow the few local settlers in their midst access to that fishery . . ." (at 62)).

forests, and other properties.[163] Although this promise proved to be judicially unenforceable, the Maori have succeeded in securing legislation recognizing their land claims to a much greater extent than the North American Indians.[164] This may be due to their comparatively greater numbers, their representation in Parliament, New Zealand's unitary governmental structure (without states or provinces), or the fact that prior to colonization, some Maori tribes had established agrarian societies, the validity of which Europeans were more ready to accept.[165] But while New Zealand established a system for recognizing Maori title to land, until very recently no accommodation was made for Maori fishing rights. Judicial decisions in 1986 and 1987 dramatically altered this state of affairs, however[166] it now appears that the Maori possess substantial, if as yet uncharted, rights to harvest fish, as well as restrain activities harmful to their fisheries.

1. *The Treaty of Waitangi*

On February 6, 1840, 52 Maori chiefs, mostly from the North Island, signed the Treaty of Waitangi.[167] The preamble to the treaty indicates its purpose was "to protect the just rights and property" of the Maori, secure peace and good order for them in the face of rapid emigration of Europeans and "avert the consequences that might result from an absence of Law".[168] Unlike the North American treaties, however, Waitangi transferred no native land. In fact, while in Article I of the English version of the treaty the Maori chiefs purported to cede sovereignty to the Crown, Article II was designed to protect, not take, Maori proprietary rights. Article II assured the Maori "the full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties so long as it is their wish and desire to retain the same in their possession . . .".[169] The chiefs also granted the

[163] There are two versions of the treaty: an English text and a Maori text, and they are not literal translations of each other. The English version of the treaty, reprinted at 11 V.U.W.L.R. 40 (1981), was signed by thirty-nine Maori chiefs, while over 500 signed the Maori version. Sutton, "The Treaty of Waitangi Today" 11 V.U.W.L.R. 17, 21 (1981). The Maori text neither mentioned "exclusive rights" nor fisheries. But it did promise the Maori "full chieftainship (or full authority) over the lands and all things highly important to them. See Muriwhenua Report, supra note 162, at 173–174. For a careful comparison of the Maori and English texts, see ibid. at 173-195; see also C. Orange, The Treaty of Waitangi (1987).

[164] See *Tamihanee Korokai v. Solicitor-General* (1913) 32 N.Z.L.R. 321, 355 ("From the earliest period of our history the rights of natives have been conserved by numerous legislative enactments . . . culminating in the Native Land Act of 1909").

[165] See Sanders, "New Zealand and Australia — A Different View" 6:4 Am. Ind. J. 27 (1980). Since the Maori Representation Act of 1867, the Maori have had four seats in Parliament. Ibid. at 29.

[166] See infra notes 223–240, 249–255, 262–267 and accompanying text.

[167] Copies of the treaty were later delivered to Maori tribes throughout the country and it was ultimately signed by 512 Maori chiefs.

[168] Treaty of Waitangi, supra note 163, art. II. The Maori version of the treaty (supra note 163) spoke of reserving their *"tino rangatiratanga"* their full chiefship or kingdom. See infra note 171.

[169] The quoted language is from the English version of the treaty. On the differences between the English and Maori versions of the text, see supra note 163. In essence, Article I of the treaty granted to the Crown sovereignty (English version) or governance (Maori version), while Article II reserved to the Maori "exclusive possession" (English version) or "full chieftainship" (Maori version). The translations seem to have emphasized the English version of Article I ("sovereignty") and the Maori version of Article II ("full chieftainship"). Arguably, the Maori would have done better had the emphasis been on Article I of the Maori version (granting "governance" to the Crown) and Article II of the English version (securing to the Maori "exclusive possession" of lands, forests, and fisheries).

Crown the exclusive right of purchasing Maori land, and in Article III the Maori were declared British citizens and promised royal protection.

The Treaty of Waitangi has been controversial, considered by some to be a legally binding international agreement, by others to be a sham.[170] The Maori have always felt that the treaty promised them more than mere possession of their lands and resources; they believed it gave them management authority (rangatiratanga) as well.[171] However, while the Pakeha (whites) frequently acknowledge the moral obligations imposed by the treaty,[172] the courts viewed the treaty as a legal nullity on the theory that the Maori's lack of political organization made them incompetent to act as a sovereign body under international law.[173] The reasoning was that the treaty did not constitute a cession of sovereignty — New Zealand was not a "ceded" colony, but a "settled" one. This convenient legal fiction meant that English common law, under which all land titles had to come through Crown grant, would govern New Zealand from the assertion of sovereignty.[174] Moreover, the courts also ruled that the treaty was not self-executing in any event; in order for its promises to be judicially enforceable, they had to be enacted by Parliament.[175] By itself, then, the treaty amounted to a statement of moral or political principle, not an independent source of legal rights.

2. *Common Law Native Title*

If the Waitangi Treaty gave the Maori no enforceable rights, the common law could still protect their prior possession under the doctrine of discovery, first enunciated by U.S. Chief Justice John Marshall[176] and subsequently applied by Chapman J. in *R. v. Symonds*.[177] Discovery gave title to the discoverer as against other European nations but did not oust native possessory rights, although it did give the "sole right of acquiring the soil from the natives".[178] Thus, according to *Symonds*, the common law recognized Maori possession and gave to the government the preemptive right to extinguish

[170] See Haughey, "The Treaty of Waitangi — Its Legal Status" [1984] N.Z.L.J. 392.

[171] See, e.g., Muriwhenua Report, supra note 162, at 181 (*"te tino rangatiratanga"* means "exclusive control . . . for the benefit of the tribe including those living and those yet to be born"; there are three major elements of this concept: (1) authority to control the tribal resource base; (2) recognition of the spiritual source of the resource (such as fisheries); and (3) authority over both persons and property).

[172] See, e.g., *Mueller v. The Taupiri Coal Mines Ltd.* (1902) 20 N.Z.L.R. at 123; *Baldick v. Jackson* (1910) 27 N.Z.L.R. at 533; *Tamihance Korokai v. Solicitor-General* (1912) 32 N.Z.L.R. 321, 343; *Re Bed of Wanganui River* [1962] N.Z.L.R. 600, 632; see also New Zealand Law Comm'n, *The Treaty of Waitangi and Maori Fisheries*, 34 (Draft, 1988) (citing assurances of Lord Stanley in 1844).

[173] See, e.g., *Wi Parata v. Bishop of Wellington* (1877) 3 Jur. (N.S.) 72, 78; see generally Molloy, "The Non-Treaty of Waitangi" [1971] N.Z.L.J. 193.

[174] *Veale v. Brown* (1868) 1 N.Z.C.A. 152. On the distinction between "settled" and "ceded" colonies, see K. Roberts-Wray, *Commonwealth and Colonial Law* 542–43 (1966) (arguing against rigid distinction between the two concepts); *Cooper v. Stuart* (1899) 14 A.C. 286, 291 (noting that the extent to which English law applies in a colony "must necessarily vary with the circumstances"; in "settled" colonies English law prevails "in so far as it is reasonably applicable to the circumstances of the colony . . .").

[175] *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board* [1941] N.Z.L.R. 590, [1941] A.C. 308.

[176] *Johnson v. M'Intosh* 21 U.S. (8 Wheat.) 543 (1823).

[177] (1847) N.Z.P.C.C. 387 (N.Z.S.C.).

[178] *Johnson*, supra note 176, at 573. See generally Cohen, "Original Indian Title" 32 Minn. L.Rev. 28 (1947).

native title.[179] In effect, the unenforceable principles of the Treaty of Waitangi were simply recognition of property rules enforceable at common law.[180] The *Symonds* result was reinforced by the Court of Appeal in 1872 in *Re Lundon and Whitaker Claims Act, 1871*.[181]

However, after 1872 the New Zealand courts lost their way. Perhaps confused by the distinction between the Crown's ultimate title and the Maori right of possession, or by the fact that the Treaty of Waitangi (but not the common law) conferred no enforceable rights, the courts ruled that there was no judicial authority to declare aboriginal title in New Zealand. In *Wi Parata v. The Bishop of Wellington*,[182] Prendergast C.J., misconstruing both *Symonds* and the American authorities, concluded that while the government "must acquit itself, as best it can, of its obligation to respect native proprietary rights" it was "the sole arbiter of its own justice".[183] This began a long line of cases ruling that the only land title recognizable in court was one grounded on a patent from the Crown,[184] led to a celebrated conflict with the Privy Council over recognition of native title,[185] and finally induced Sir John Salmond to draft the Native Land Act of 1909 aimed at settling the issue.[186] The 1909 Act recodified Maori land legislation, which since 1862 authorized Maori Land Courts to transform customary title into Crown-recognized fee title.[187] The 1909 statute was more than a merely recodification, however, as it enabled the Crown to extinguish aboriginal title by proclamation, rather than by legislation, and expressly made Maori customary title unenforceable against the Crown.[188] After 1909, it seemed settled that any Maori rights

[179] *Symonds*, supra note 177, at 390 (native title "cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers").

[180] Ibid. ("the Treaty of Waitangi . . . does not assert either in doctrine or in practice anything new and unsettled"). Paul McHugh notes that recognition of native title was consistent with the rule presuming continuity of local property rights, a principle preserved uncommon law rules after the Roman and Norman conquests. McHugh, "Aboriginal Title in New Zealand Courts" (1984). 2 Cant. L.Rev. 235, 241.

[181] (1872) 2 N.Z.C.A. 41, 49 ("the Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of native proprietary rights").

[182] (1877) 3 N.Z. Jur. (N.S.) S.C. 72.

[183] Ibid. at 78. The court also ruled that the Treaty of Waitangi did not affect the legal status of native possession, since its attempt to cede sovereignty was a "simple nullity" as there was no "body politic . . . capable of making cession of sovereignty". Ibid. The harsh result in *Wi Parata*, including judicial references to the Maori as "savages" and "primitive barbarians" may be explainable by the fact that, unlike *Symonds*, the Crown was not a party to the litigation.

[184] See, e.g., *Hohepa Wi Neera v. The Bishop of Wellington* (1902) 21 N.Z.L.R. 655 (C.A.)

[185] See *Nireaka Tamaki v. Baker* (1902) N.Z.P.C.C. 371 (overruling (1894) 12 N.Z.L.R. 483); *Wallis v. Solicitor General* [1903] A.C. 173; Hookey, "Milirrpun and the Maoris: the Significance of the Maori Land Cases Outside New Zealand" (1973) 3 Otago L.Rev. 63.

[186] See generally McHugh, supra note 180, at 245–250.

[187] In 1862, a year after Britain relinguished control over native affairs, the Maori Land Court was established to ascertain customary Maori landowners, transform customary title into fee title and authorize the sale of land by Maori to Pakeha. See Haughey, "Maori Claims to Lakes, River, Birds and the Foreshore" 2 N.Z.L.R. 29 (1966). The result was the rapid sale of Maori land. See Sanders, supra note 165, at 28; K. Sinclair, *A History of New Zealand* (3d ed. 1980) 146-147 ("The land laws, which Parliament passed by the score, became a legal jungle in which the Maori lost themselves and were preyed upon by its natural denizens, the land speculators or their agents and shyster lawyers").

[188] See McHugh, supra note 180, at 250 (discussing para.84 of the Native Land Act of 1909, now para.155 of the Maori Affairs Act of 1953).

depended on statutory recognition.[189]

3. *Maori Fishing Rights: The Traditional View*

The New Zealand judiciary's twin rules that (1) the Treaty of Waitangi conferred no enforceable rights, and (2) all title had to be Crown-derived, did not serve to dispossess the Maori from their lands, since legislation recognizing Maori land rights was enacted — arguably beginning in 1841.[190] Fishing rights, however, were another matter. Legislative recognition, while not necessarily absent, was considerably more ambiguous.

Section 8 of the 1877 Fish Protection Act, the first general regulation of fisheries,[191] expressly disclaimed any intent to affect fishing rights secured to aboriginal natives by the Treaty of Waitangi. This provision was deleted without explanation in 1894, but another disclaimer was enacted in Section 14 of the Fisheries Amendment Act of 1903 which, while omitting any reference to the treaty, provided: "nothing in . . . this Act shall affect any existing Maori fishing rights".[192] The same language was reenacted as Section 77(2) of the Fisheries Act of 1908.[193] In 1983, section 77(2) was recodified as section 88(2), with the word "existing" deleted.[194] While these provisions certainly did not extinguish Maori rights, the nature of the rights they preserved was unclear. The 1877 legislation might have been interpreted to implement the treaty's promise of exclusive fisheries, but the "existing" provision was deleted before it ever came before a court. The 1908 statute was interpreted merely to save existing rights, not grant new ones.[195]

The first judicial interpretation of Maori fishing rights antedated any of the statutes, however. In the *Kauwaeranga* judgment of 1870 Chief Judge Fenton of the Maori Land Court affirmed exclusive Maori rights to fish on tidelands on the Waihau River. Unlike later decisions, *Kauwaeranga* assumed the Treaty of Waitangi — as complemented by land ordinances beginning in 1841 — effectively confirmed native fishing rights. Although the judgment refused to vest absolute title to the foreshore in the natives, it construed the fishery promise in the treaty to guarantee an easement sufficient

[189] See *Tamihana Korokai v. The Solicitor General* (1912) 32 N.Z.L.R. 321. But cf. *Manu Kapua v. Para Haimonu* (1913) N.Z.P.C.C. 413, [1913] A.C. 761, where the Privy Council, without relying on any statute, stated that prior to Crown grant land was vested in the Crown "subject to the burden of native customary title to occupancy".

[190] The Land Claims Ordinance of 1841 seemed to recognize native title, stipulating that "unappropriated lands, subject to rightful and necessary occupation and use by the aboriginal inhabitants, are and remain Crown or domain lands". The Royal Charter of 1840 also impliedly recognized Maori title by providing that nothing in it was to affect the rights of aboriginal natives to occupy and enjoy lands in their possession. Arguably, this included the entire country. S.52 of the 1852 New Zealand Act gave the General Assembly authority to regulate the sale of waste lands, defined as lands where native land was extinguished by Crown presumption. And certainly the Native Land Court Acts, beginning in 1862 (supra note 187), assumed the existing Maori title.

[191] Regulation of oyster fisheries began with the Oyster Fisheries Act of 1866 (see infra notes 206 and 246). A year later the Salmon and Trout Act of 1867 was enacted.

[192] Fisheries Amendment Act of 1903 para.14; see generally Muriwhenua Report, supra note 162, at 96.

[193] Fisheries Act of 1908 para.77(2); see *Keepa v. Inspector of Fisheries* [1965] N.Z.L.R. 322, 329 (history of Fisheries Act legislation).

[194] Fisheries Act 1983 para.88(2).

[195] *Waipapakura v. Hempton* (1914) 33 N.Z.L.R. 1065, 1070; *Inspector of Fisheries v. Ihaia Weepu* [1956] N.Z.L.R. 920, 922; *Keepa v. Inspector of Fisheries* [1965] N.Z.L.R. 322, 324.

to enable the claimants to carry out their customary fishing practices.[196] Unfortunately, *Kauwaeranga* was unaccountably omitted from a compilation of Maori Land Court decisions,[197] undermining its value for subsequent cases.[198] Although the Treaty of Waitangi received another favorable interpretation in 1911 in *Baldick v. Jackson*,[199] where Stout C.J. held inapplicable to the circumstances of New Zealand a statute that would have conflicted with Maori whaling guaranteed by the treaty, the same judge would soon rule that any Maori fishing rights had to be statutorily derived.

Passage of the 1909 Maori Affairs Act, which authorized the Maori Land Courts to issue freehold orders for land but did not mention waters or fisheries, was construed in *Waipapakura v. Hampton* to contain no legislative recognition of Maori fisheries.[200] Moreover, the decision invoked the *Wi Parata* rule that the treaty gave no enforceable rights.[201] Further, Stout C.J. concluded that under the common law "there cannot be fisheries reserved for individuals in tidal waters or in the sea near the coast",[202] apparently forgetting his Baldick decision only three years before.[203] Maori fishing was subject therefore to Fisheries Act regulation, despite the disclaimer in section 77(2), a result affirmed in 1956 and again in 1965.[204]

Other decisions interpreted the effect of the freehold orders issued by the Maori Land Courts to effectively terminate native fishing rights. Claims to the title of navigable riverbeds and tidelands were rejected on the basis of common law presumptions and statutory interpretation.[205] Thus, issuance of a freehold order to land bordering a river or the sea worked to deny fishing rights in adjacent areas.[206] The Maori lost these rights without express legislation terminating them and without compensation. They lost them by implication through judicially created rules concerning statutory interpretation and the courts' assumption that English customary law (common law) dominated over Maori customary law. In this manner Maori fishing rights were declared nonexistent by the courts; although not expressly confiscated, they simply vanished by operation of law.

[196] Thus, the result was remarkably similar to that reached by the U.S. Supreme Court in *Winans*, supra note 9, some thirty-five years later.

[197] See the note by Frame, 14 V.U.W.L.R. 227 (1984).

[198] Fortunately, the decision is now reprinted at 14 V.U.W.L.R. 229–245 (1984).

[199] 30 N.Z.L.R. 343 (1911).

[200] 33 N.Z.L.R. 1065 (1914).

[201] See supra note 183 and accompanying text.

[202] *Waipapakura*, supra note 195, at 1071.

[203] See supra note 199 and accompanying text.

[204] See *Weepu*, supra note 195; *Keepa*, supra note 195. For a discussion of these cases, and *Waipapakara*, supra note 195, see Muriwhenua Report, supra note 162, at 97–99.

[205] *Re Bed of the Wanganui River* [1962] N.Z.L.R. 600 (C.A.) (common law presumption against including navigable riverbed in title to adjoining land); *Re the Ninety Mile Beach* [1963] N.Z.L.R. 461 (C.A.) (presumption that the boundary of freehold orders is the high water mark, noting the potential conflict with para.150 of the Harbours Act, requiring grants of tidelands to be by special legislation).

[206] Although there was no procedure by which Maori could obtain recognition of customary fishing rights, there were a few provisions by which specific fishing grounds near Maori villages could be reserved for non-commercial purposes. However, although the Waitangi Tribunal discovered some oysteries reserved for Maori and found a number of reservations of fisheries by Maori Land Court order (see supra note 187), it could uncover no fishing grounds reserved for Maori by the Marine Department under authority existing from 1900 until 1962. See Muriwhenua Report, supra note 162, at 99–103.

4. *Dawn of a New Era: The Waitangi Tribunal*

The revival of Maori rights must be traced to the Treaty of Waitangi Act of 1975. Dissatisfied with measures such as the Maori Affairs Amendment Act — which was designed to "normalize" Maori land tenure and permit the sale of fragmentary, uneconomic land interests — the Maori became an effective political force in the early 1970s.[207] The principal result was the 1975 Act, which authorized a Waitangi Tribunal to investigate Maori claims that legislative or executive actions or inactions were inconsistent with the "principles" of the treaty and to publicly report its findings.[208] In effect, the tribunal sits as a sort of permanent commission of inquiry.[209] Although it may issue only recommendations and until recently lacked power to investigate past (as opposed to proposed) actions, the tribunal has had a profound impact on the evolution of Maori rights. The tribunal's reports have raised the level of public consciousness of Maori claims, and its recommendations in fact have been in large measure adopted. Moreover, increased Parliamentary sensitivity has produced a plethora of legislative provisions recognizing and affirming the treaty's principles and protecting Maori rights.[210] One such provision in the State-Owned Enterprises Act led to the Court of Appeal's landmark decision in the 1987 *Maori Council* case, discussed below.[211]

The importance of fishing claims is evident from a brief perusal of the tribunal's docket. Its first four inquiries centered around the alleged prejudicial effect of fishing regulations or activities that could adversely affect fishing, such as construction of an electric power plant on Manukau Harbour near Auckland, and two instances of sewage discharges.[212] Its 1983 Te Atiawa report on a proposed synthetic petroleum plant revealed a broad view of its jurisdiction and function,[213] and a 1985 amendment gave it a retrospective mandate, enabling the tribunal to consider any statutes and acts of the Crown that might be inconsistent with the treaty since its signing in 1840.[214] Although the tribunal has no ability to enforce its recommendations, it effectively has induced both legislative action and judicial decisions aimed at fulfilling the treaty's basic premise of assuring the Maori people a fundamental role in the country's economic and political life.[215]

[207] See Sanders, supra note 165, at 30.

[208] Treaty of Waitangi Act 1975, para.6.

[209] See Durie, "The Waitangi Tribunal: Its Relationship with the Judicial System" [1986] N.Z.L.J. 235.

[210] See Palmer, "Planning and Maori Rights in 1987: A Concise Assessment" (unpublished paper discussing (1) Town and Country Planning Act 1977, para.3(1)(g), interpreted in *Royal Forest Bill Protection Society Inc. v. W.A. Habgood Ltd* (1976) 12 N.Z.T.P.A. 76 ("ancestral land" not limited to land remaining in Maori ownership); (2) Fisheries Act, para.88(2), which although not explicitly referencing the treaty removed the word "existing" (see supra notes 193–94 and accompanying text); (3) State Owned Enterprises Act, para.9 (1986), discussed infra notes 220–23 and accompanying text; (4) Environment Act 1986, preamble and para.5(e) ("full and balanced account" of the treaty principles in the management of natural resources under forty-one statutes); and (5) Conservation Act 1987 para.4 (Act to be "interpreted and administered as to give effect" to the treaty's principles in carrying out twenty-two statutes)).

[211] See infra notes 219–240 and accompanying text.

[212] See Sutton, supra note 163, at 34–40.

[213] See Williams, "Te Taha Maori Recognized: A Comment on the Waitangi Tribunal Report" [1983] N.Z. Recent Law 378.

[214] Treaty of Waitangi Amendment (1985).

[215] See Durie, supra note 209, at 236.

5. *The New Era in Operation: The Maori Council Case*

The Waitangi Tribunal's most notable contribution to date concerns the role it played in influencing the drafting and judicial interpretation of the State-Owned Enterprises (S.O.E.) Act of 1986, the centerpiece of New Zealand's program to reorganize its public sector. The S.O.E. Act "corporates" certain government departments and functions, creating nine new companies, called "state enterprises" and authorizes transfers of Crown assets, including land, to them.[216] Because of the immense scale of the land transfers the Act would authorize,[217] the Waitangi Tribunal worried that once the land ceased to be Crown land, the tribunal's ability to recommend the return of land to the Maori would be frustrated. Consequently, it submitted an interim report in December 1986, requesting the bill be amended to protect its ability to make recommendations of land restoration.[218] Parliament responded by including two provisions in the Act, sections 9 and 27, to protect Maori interests. The Court of Appeal was asked to interpret the meaning of these provisions in *New Zealand Maori Council v. Attorney General.*[219]

Section 27 of the Act establishes an elaborate procedure concerning both pending and future Waitangi Tribunal claims, while section 9 is a general stipulation that "nothing in this act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".[220] The problem was that the section 27 procedures did not address lands for which a Maori claim was filed after passage of the Act that had been conveyed by a state enterprise to a private party.[221] This was no small matter, since of the 88 claims pending before the tribunal in April 1987, 32 had been filed after passage of the S.O.E. Act.[222] Consequently, the Maori Council filed suit, claiming that despite this oversight, the general proscription in section 9 forbade any land transfers that might prejudice Maori land claims.

On one level, the Court of Appeal's June 29, 1987 decision was one of simple statutory interpretation. The Court ruled that section 9, in fact, supplied protection to land transfers, and that the section 27 procedures were not "a complete code".[223] As a result, it ordered the Crown to adopt a system to ensure the protection of Maori claims prior to any land transfers, suggesting the possibility of conditional transfers to third parties and an opportunity for Maori comment on transfers.[224] Because the case concerned provisions in the S.O.E. Act, it clearly does not reverse the longstanding rule that the

[216] See Palmer, supra note 210, at 4.

[217] Around 4 million hectares of Crown land (over 25% of the entire country) are to be transferred to Landcorp and Forestcorp alone. See *New Zealand Maori Council v. Attorney General* [1987] 1 N.Z.L.R. 641.

[218] Waitangi Tribunal, Claim No. A23, Interim Report, Te Hapau (Dec. 8, 1986).

[219] [1987] 1 N.Z.L.R. 641.

[220] State-Owned Enterprises Act 1986 paras.9, 27.

[221] See Boast, "New Zealand Maori Council v. Attorney General: The Case of the Century?" [1987] N.Z.L.J. 240–41.

[222] See judgment of Cooke, P. in *Maori Council* at p.657. The chief impetus for filing claims was the 1985 amendment to the Waitangi Tribunal Act (supra note 214 and accompanying text), which gave the tribunal retrospective jurisdiction; 55 of the 88 pending claims were filed after passage of the 1985 legislation. Ibid.

[223] See judgments of Cooke P. at 658; Richardson, J. at 679–680; Somers J. at 696; Casey J. at 701; Bisson J. at 716–717.

[224] Judgment of Cooke P. at 665.

Treaty of Waitangi is unenforceable absent domestic legislation implementing it.[225]

The case can hardly be limited to one of simple statutory construction, however. Suggested as being the "case of the century" by one commentator[226] and termed "perhaps as important for the future of our country as any that has come before a New Zealand Court" by the President of the Court of Appeal,[227] the case will produce considerable restructuring of Maori-Pakeha legal relationships, assuming that Parliament continues to enact provisions like section 9.[228]

The opinions in the case[229] go far toward giving meaningful content to the "principles" of the Treaty of Waitangi. The Court ruled that the treaty's overriding principle is that of a partnership; the parties stand in a fiduciary-like relationship with each other.[230] Accepting earlier pronouncements of the Waitangi Tribunal as authoritative, Cooke P. stated that the mutual duty imposed by the treaty principles is to act reasonably toward each other, in the "utmost good faith".[231] Importantly, the partnership requires the Crown not merely to refrain from undertaking prejudicial actions but "extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable".[232]

The *Maori Council* case also points the way the continuing partnership will evolve in the future. First, the Waitangi Tribunal interpretations were accepted as authoritative, entitled to "much weight" although not binding on the courts.[233] Second, the court endorsed the notion that the treaty principles should be interpreted liberally and as an aid to ambiguous legislation:[234]

> [The treaty] should be interpreted widely and effectively and as a living instrument taking into account of the subsequent developments of international human rights norms; and . . . the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty.

[225] See ibid. at 655, 667 (relying on *Hoani Te Heuheu*, supra note 175) ("Two crucial steps were taken by this Parliament in enacting the Treaty of Waitangi Act and in insisting on the principles of the Treaty in the State-Owned Enterprises Act. If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity").

[226] Boast, supra note 221.

[227] Judgment of Cooke P. at 651.

[228] Some statutory provisions go even further in recognizing the treaty principles than para.9. For example, para.7 of the Conservation Act 1987, supra note 210, clearly imposes an affirmative obligation to "give effect to" the treaty principles, not merely forbidding actions inconsistent with the principles.

[229] Although the decision was an unanimous one, five separate judgments were delivered. The formal orders and effect of the decision are set forth by Cooke P. at 666–668.

[230] Judgments of Cooke P. at 664; Somers J. at 693.

[231] Judgment of Cooke P. at 664.

[232] Ibid. at 664.

[233] Ibid. at 661.

[234] Ibid. at 655–656. This echoed the sentiments of the Waitangi Tribunal in the Motunui case (WAI: 6, Mar. 17, 1983):

> the Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilize a status quo, but to provide a direction for future growth and development . . .. We consider then that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles.

Liberal use of the treaty as an interpretive aid recently led one court to require consideration of Maori spiritual values in water rights decision making, despite the lack of mention of Maori concerns or treaty principles in the Water and Soil Conservation Act.[235] Third, the court signaled its intent to play an active role in overseeing "a reasonably effective and workable safeguard machinery" to protect Maori claims in land transfers under the S.O.E. Act, by requiring the Crown to devise a system, submit it to the Maori Council for comment, and lodge a draft with the Court of Appeal for its review.[236] This sort of ongoing judicial supervision of Crown policymaking is quite unusual and may prove to be among the most enduring legacies of the case.[237]

In December 1987, the government reached a settlement with the Maori Council plaintiffs which included (1) establishment of a Maori Land Information Office to assemble records of utility to Maori claims; (2) expanded membership, staff, and support for Waitangi Tribunal; (3) legal aid for Maori claimants; (4) a standing Cabinet Committee to facilitate settlement of Maori grievances and implement Waitangi Tribunal recommendations; (5) a promise to limit transfers of water rights to state enterprises to a maximum of 35 years; and (6) introduction of a bill aimed at establishing the systematic safeguards for which the Court of Appeal called.[238] The bill gives the Waitangi Tribunal the power to make binding recommendations for the return to Maori ownership any land transferred to a state enterprise, requires the tribunal to consider land claims as if the land had not been transferred, and precludes state enterprises or their successors from being heard by the tribunal regarding their interest in transferred land.[239]

The Court of Appeal had no occasion to address the issue of fishing rights in the *Maori Council* case, and it expressly left open the question of whether Maori customary title enjoys common law protection.[240] However, fishing rights claims have been recently addressed by the Waitangi Tribunal, lower courts, and a joint government-Maori working group commissioned to report on how Maori fishing rights may be effectuated.

6. *Maori Fishing Rights in the Wake of the Maori Council Case*

Even before the Court of Appeal's decision in *Maori Council*, the Waitangi Tribunal and the lower courts were employing statutory interpretation to vindicate Maori fishing rights. In a series of reports the tribunal found the following activities to violate the treaty's principles: (1) existing pollution from the Waitara sewage outfall that was damaging valuable fishing sites, as well as proposed new discharges and a new outfall to accommodate petrochemical industries;[241] (2) the proposed Kaituna River sewage pipeline which

[235] *Huakina Development Trust v. Waikato Valley Authority* (1987) 12 N.Z.P.T.A. 129 (reversing longstanding Water Board practice).

[236] Ibid. at 39–40.

[237] Boast, supra note 221, at 244–245.

[238] See Letter of Deputy Prime Minister Geoffrey Palmer to Maori Council Chairman Sir Graham Latimer (Dec. 9, 1987).

[239] Treaty of Waitangi (State Enterprise Bill).

[240] Judgment of Cooke P. at 655. Nor did the court have to rule on which text of the treaty (supra notes 163, 168–169) should govern in the case of discrepancies between the two; ibid. at 663. The Waitangi Tribunal has hinted that the Maori text should control. Waitangi Tribunal, Manukau Claim (WAI: 8, July 19, 1985) at 88.

[241] Motunui Claim, supra note 234.

would have degraded Maori fishing grounds;[242] and (3) the Manukau Harbour plan which neither gave sufficient weight to Maori culture and fishing interests nor was detailed enough to ensure improvements in harbour water quality.[243] None of the proposals the tribunal found inconsistent with the treaty principles has proceeded, and many of its suggested remedial measures have been adopted.[244] In the wake of the *Maori Council* case, the tribunal's conclusions in these claims are now entitled to much judicial weight.[245]

In the Manukau Claim, the tribunal indicated that the lack of ownership of lands below high water was not the chief impediment to recognition of Maori fishing rights, suggesting that such rights were legislatively recognized in the past and the Fisheries Act supplied sufficient authority to do so now.[246] Legislative recognition could serve to correct the judicial misapprehension that fishing rights cannot exist apart from ownership of the underlying land,[247] but legislative action should not be a prerequisite for common law recognition of Maori customary fishing rights. In a number of articles Paul McHugh has forcefully demonstrated that Maori fishing rights were recognizable at common law, are unconnected to land ownership, have never been legislatively extinguished, and indeed have received affirmative legislative recognition.[248] This view was adopted by Williamson J. in *Tom Te Weehi v. Regional Fisheries Officer*,[249] a High Court case antedating the Maori Council decision.

In *Te Weehi*, a Maori was prosecuted for harvesting undersized shellfish off Motunui Beach in violation of Fisheries Act regulations. The harvesting was in accordance with local Maori custom, which allowed subsistence fishing but not commercial harvesting and imposed conservation measures. Relying on *Symonds, Lundon, and Kauwaeranga*,[250] Williamson J. concluded that English common law recognized that "the local laws and property rights of [indigenous] peoples in ceded or settled colonies were not set aside by the establishment of British sovereignty".[251] He also determined that (1) customary fishing title was legislatively recognized by the 1877 Fish Protection Act and its successors,[252] (2) fishing rights could exist independent from land

[242] Waitangi Tribunal, Kaituna Claim (WAI: 4, Nov. 30, 1984).

[243] Manukau Claim, supra note 240.

[244] See Aboriginal Law Center, Aboriginal Law Bulletin No. 28 (Oct. 1987) at 6–7.

[245] See supra note 233 and accompanying text.

[246] See Manukau Claim, supra note 240, at 104–105. Section 8 of the 1877 Fish Protection Act seemed to recognize the Treaty of Waitangi as a source of native fishing rights. See text preceding note 193. In addition, the Oyster Fisheries Act 1866 (supra notes 191 and 206) imposed closed seasons for oyster harvesting and prohibited taking of oysters below low tides without a license, allowing harvesting on tidelands until 1874 "out of consideration for aboriginal natives". See Muriwhenua Report, supra note 162, at 81. Under para.7 of the Fishing (Amateurs Fishing) Regulations 1983, special fishing rights may be given to particular communities.

[247] Weepu, supra note 195; *Re Bed of the Wanganui River*, supra note 205.

[248] See, e.g., McH McHugh, "Aboriginal Servitudes and the Land Transfer Act 1952" V.U.W.L.R. 213 (1986); see also McHugh, "Maori Fishing Rights and the North American Indian" (1986) 6 Otago L.R. 621.

[249] [1986] 1 N.Z.L.R. 680 (LEXIS, N.Z. Library, Cases file). See Brookfield, "Maori Fishing Rights and the Fisheries Act 1983: Te Weehi's Case" [1987] N.Z. Recent Law 63.

[250] See supra notes 177–81, 196–98 and accompanying text.

[251] *Te Weehi*, supra note 249.

[252] Ibid. (citing *Nireaka Tamaki v. Baker* [1900] N.Z.P.C.C.A. 371 and *Tamihara Korokai v. Solicitor-General* (1912) 32 N.Z.L.R. 321.

ownership,[253] and (3) they persist until extinguished by "clear and plain" legislation.[254] By classifying fishing as "non-territorial" in character, as advocated by McHugh,[255] Williamson J. was able to see that there was no inconsistency between recognizing Maori customary fishing rights and Crown ownership of tidelands, since the fishing right is merely a servitude — a profit a prendre — that burdens the Crown's fee. If upheld by the Court of Appeal, this recognition would give common law protection to Maori fishers who could prove customary use and would exempt them from Fisheries Act regulations and quotas.

Although Williamson J. emphasized the non-commercial nature of the shellfish harvest at issue in *Te Weehi*, Maori fishing rights almost certainly include a commercial dimension. The report of the Waitangi Tribunal on the Muriwhenua Claim concluded that the tribe not only made "full and extensive" fishing use of the seas out to at least 12 miles (and "occasional" use beyond), and that they regulated and controlled harvests (they "exercised dominion" over the seas), but that their entire economy and social network was built upon sea harvests.[256] The tribunal found that (1) the Maori were commercial fishers; (2) the treaty committed the Crown to actively protect those fisheries and envisioned that the Maori would profit from white settlement; and (3) the treaty right includes a right to develop and adapt to new technologies, new species, and even new fishing areas (such as the offshore).[257] Determining that the seas were owned by Muriwhenua in the same way that land was, and that the Maori tribe permitted non-Maori harvesting for domestic purposes, the tribunal concluded:[258]

> The essential principle was that despite the projected settlement, Maori would not be relieved of their important properties without an agreement, and for their protection, there was a duty on the Crown to ensure that they retained sufficient [property] for their subsistence and well-being . . .
>
> In terms of the Treaty, it is not that the Crown had a right to licence a traditional [Maori] user. In protecting the Maori interest, its duty was rather to acquire or negotiate for any major public use that might impinge on it. In the circumstances of Muriwhenua, where the whole sea was used, and having regard to its solemn undertakings, the Crown ought not to have permitted a commercial user at all, without negotiating for some greater right of public entry. *It was not therefore that the Crown had merely to consult*, in the case of Muriwhenua; *the Crown had rather to negotiate for a right.*

[253] Ibid. (citing *Attorney-General v. Emerson* [1891] A.C. 649, 654). A subsequent case confirms the notion that Maori rights are not dependent on current land ownership, extending the Maori protection provision in the Town and Country Planning Act 1977 to land not now owned by Maori. *Royal Forest and Bird Protection Society v. Habgood* (1987) N.Z.T.P.A. 76.

[254] Ibid. (citing *Calder*, supra note 74; *Guerin*, supra note 81; and *Lipon Apache Tribe v. U.S.* 180 Ct. Cl. 487, 492 (1967)).

[255] See supra note 248.

[256] Waitangi Tribunal, "Muriwhenua Fisheries Claim" Chairman's Comments at Sept. 30, 1987 Chambers Meeting, para.5 at 1-2.
See also Muriwhenua Report, supra note 162, at 217-240.

[257] Muriwhenua Report, supra note 162, at 234-238. "An opinion that Maori cannot have it both ways, the advantages of new technologies as well as privileges in traditional fishing, does not come from the Treaty, for that is precisely what Maori bargained for". Ibid. at 238. See also ibid. at 234 (citing *Simon*, supra note 106, for recognition of the right to develop); C. Wilkinson, *American Indians, Time, and the Law* 68-75 (1987) (on the right to develop).

[258] Muriwhenua Report, supra note 162, at 216-217 (emphasis added).

As a result, the tribunal determined that a "quota management system"[259] the fulcrum of a revolutionary system governing fishery harvests but which failed to take into account Maori commercial fishing, was in "fundamental conflict" with the treaty's principles and terms.[260]

Due to the judicial deference owed the Waitangi Tribunal's conclusions,[261] the quota system as it affected squid and jack mackerel harvesting by the Muriwhenua tribe was enjoined on the same day the tribunal's interim report was filed.[262] A month later *Ngai Tahu Maori Trust Board v. Attorney General*[263] restrained any further implementation of the new management regime throughout the country, essentially agreeing with the Waitangi Tribunal that (1) in 1840 the Maori had "a highly developed and controlled fishery over the whole coast of New Zealand" (2) this fishery contained a commercial component, (3) there was no evidence that the Maori gave away or waived their fishing rights since 1840, and (4) these rights not only were not legislatively extinguished but were legislatively protected by section 88(2) of the Fisheries Act.[264] In *Ngai Tahu*, Greig J. adopted the rule employed by Williamson J. in Te Weehi that extinguishment of native common law fishing right requires express legislative directive.[265] He also suggested that the protection contained in section 88(2) implied legislative recognition of those rights, subject to "proof of their existence, their scope and their extent".[266] By assuming that Maori fishing was merely of a ceremonial and recreational nature, and thus outside the quota management system, the government breached the native rights recognized by the Fisheries Act.[267]

7. *Negotiating Maori Fishing Rights*

In the wake of the *Ngai Tahu* decision, the New Zealand government initiated negotiations with the Maori Council and individual tribes in an effort to avoid further litigation. The result was the establishment in December 1987 of a joint working group composed of both Crown and Maori members to recommend a settlement of Maori fishing claims,

[259] Under the quota management system authorized by para.10 of the Fisheries Amendment 1986, the Minister of Agriculture and Fisheries may declare commercial harvesting of specified species subject to its provisions. The system is then implemented by a two-step process: (1) the Minister establishes a total allowable catch for each species, and (2) individual transferable quotas (I.T.Q.'s) are issued to individual fishermen, based on historical catch. The I.T.Q. system is essentially a property rights solution to fishery regulation, since once the initial allocation of quotas is made, the theory is that the market will determine who will fish, the government's role being limited to setting the total allowable catch (which necessarily must include a run size estimate and an estimate of how many fish must escape for conservation purposes). See Sandrey, "Maori and Pakeha: Land and Fisheries" Agribusiness and Economic Research Unit, Discussion Paper No. 109 (Lincoln College) at 26–7; see also Muriwhenua Report, supra note 162, at 140–154.

[260] Ibid. at xx, 239. The tribunal emphasized that the quota system, as applied, created the conflict, and it suggested that Maori interests could be accomodated within the system. Ibid.

[261] See supra note 233 and accompanying text.

[262] *New Zealand Maori Council v. Attorney General*, High Court of New Zealand, Wellington Registry, C.P. 553/87 (Sept. 30, 1987), reprinted in Muriwhenua Report, supra note 162, at 303.

[263] High Court of New Zealand, Wellington Registry, C.P. 559/87 (Nov. 2, 1987) (slip op.), reprinted in Muriwhenua Report, supra note 162, at 307.

[264] Ibid. at 6–8.

[265] Ibid. at 7 ("there needs to be some express enactment to take away the rights; they cannot be taken away by a side wind or by some indirect implication").

[266] Ibid. at 8.

[267] Ibid. at 9, 11, 14.

On June 30, 1988, the joint working group submitted its recommendations. Perhaps not surprisingly, the Crown and the Maori members were badly divided on the substance of the settlement and submitted two separate reports. The Crown members proposed a reversion of the quota management system: all individual quotas to be held by a corporation in which Maori would own 25% of the stock (although Maori would appoint three of the seven corporation directors). Other Maori benefits, such as job training and allowance for small-scale or part-time fishers were also included, estimated at 4% of the resource. This 29% total was derived from allocating to Maori all the inshore (within twelve miles) fisheries and 12–1/2% of the high seas fisheries (based on the Maori percentage of population in 1986).[268]

The Maori members rejected the Crown proposal. They criticized the Crown's emphasis on monetary payment without a guarantee of access to the fisheries, its locking Maori into a minority position in the corporation, and its reliance on 1986 population statistics to allocate rights to the offshore fishery. Although they asserted that the Maori are legally entitled to 100% of the fisheries, the Maori working group members proposed that Maori would offer 50% to the Crown in return for recognition of equality of Maori ownership and management and control. The Maori proposal suggested that a modified transferable quota system in which 50% of individual quota was allocated to Maori was an acceptable alternative.[269]

As of this writing, no final settlement had been reached.

8. *The Environmental Right*

No New Zealand court has addressed the issue of whether Maori fishing rights include a right of environmental protection, but the Court of Appeal's deference to the findings of the Waitangi Tribunal in *Maori Council* leaves little doubt that there is such a right. The tribunal has indicated that the principles of the Treaty of Waitangi would be violated by developments such as power plants and sewage outfalls, harbour plans that do not account for Maori interests, and existing facilities polluting Maori fishing grounds.[270] Given its retrospective jurisdiction and its expanded powers and resources,[271] the tribunal will clearly be presented with a number of opportunities to articulate the scope of the right. While it may be aided by the opinions of Judges Orrick and Reinhardt,[272] the Waitangi Tribunal almost certainly will be forced to formulate a definition of the environmental right before the U.S. and Canadian courts finally resolve the issue.

The flexibility both the tribunal and the Court of Appeal have found inherent in the treaty principles[273] should help in articulating the environmental right, just as it will in enunciating the scope of the harvest right. The tribunal has already indicated that the treaty's capability to adapt to new circumstances means that the treaty partners need not "regard all Maori fishing grounds as inviolate".[274] Thus, the treaty principles will not foreclose all development,

[268] Report of the Crown Members of the Joint Working Group on Fisheries to Maori and Crown (June 30, 1988).

[269] Report of the Maori Members of the Joint Working Group on Fisheries to Maori and Crown (June 30, 1988).

[270] See supra notes 212–213, 241–243 and accompanying text.

[271] See supra notes 214, 238–239 and accompanying text.

[272] See supra notes 30–34.

[273] See supra note 234 and accompanying text.

[274] Waitangi Tribunal, Motunui Claim, supra note 234.

nor will they eliminate all non-Maori fishing. The overriding treaty principle, as the Court of Appeal indicated in the *Maori Council* case, is one of partnership[275] — in both use and control of the resources subject to its terms. It seems evident that this precept has moved New Zealand, which long denied their existence, into the forefront of the international movement to protect and restore native fishing rights.

IV Conclusion

The native right to harvest fish has evolved distinctly in each of the three jurisdictions analyzed in this article. In the U.S., Stevens treaty promises, enforced by federal courts under the U.S. Constitution, produced a long line of court victories, although only within the last decade have the tribes actually secured a significant percentage of the harvest. The initial resistance of non-Indian fishers to accept the treaty right has diminished as the environmental protection implicit within the right promises to benefit both Indian and non-Indian fishers. Moreover, recognition of the tribes as resource managers as well as harvesters, while complicating management, has also induced better decision making by requiring better data and more publicly accountable decisions. The treaty right even fostered an international agreement to better manage harvests and national legislation designed to double run sizes. There is little question that the beneficiaries of the treaty right to fish are not limited to the signatory Indian tribes.

In British Columbia, the native right to fish has evolved more slowly. But Canadian Supreme Court decisions like *Calder* and *Guerin* and the 1982 Constitution Act's recognition of existing aboriginal and treaty rights signal a new era. The *Sparrow* decision, now on appeal to the Canadian Supreme Court, is likely to indicate the direction that era may take. Although the British Columbia Court of Appeal in *Sparrow* appeared to deny a commercial component to the fishing right, other judicial decisions are remarkably consistent with U.S. precedent in affirming the environmental dimension of such a right. No court decision has recognized the Indian tribes as legitimate resource managers, however. But recent comprehensive land claims settlements in the Canadian North offer hope that that aspect of the right can be defined by bilateral negotiations rather than protracted litigation.

In New Zealand, the pace of recent events has been fairly stunning. Court decisions, advisory tribunal opinions, and legislative provisions have combined, within a couple of years, to produce the prospect of a substantial commercial Maori fishery in a nation that denied significant Maori fishing rights for over a century. True, negotiations have yet to produce agreement on the precise scope of the Maori right. Nevertheless, if the recent opinions of the Waitangi Tribunal are not dismissed, it is reasonable to expect a Maori fishing right that includes a commercial component, management authority, and environmental protection. Clearly, the chief force behind the rapid evolution of the Maori right has been the Waitangi Tribunal, whose reports have received deference from both the courts and Parliament.

Despite peculiarities among the jurisdictions, such as the Waitangi Tribunal, the Canadian Constitution Act, and the Stevens Treaties, the essential similarity of the native fishing right in all three nations should not be overlooked.

[275] See supra note 230 and accompanying text.

All these nations now recognize, however belatedly, the common law nature of the right. That is, the right springs from native use and custom from time immemorial, not from governmental creation. Constitutional, statutory, and treaty recognition of the right may help to interpret the nature of the right or clarify its scope, but they did not create it. The fishing right predated governmental recognition, and the common law — which all three nations inherited from England — was fully capable of protecting native customary practices as property rights. It was, in fact, the common law's recognition of native property rights which induced governmental action, not vice versa.

The common law role in the articulation of native rights reveals a good deal about the role of courts in educating and inducing action on the part of more representative bodies of government. It also links the three former British colonies in the legal tradition they share and may help to encourage international cooperation on similar common problems. Perhaps even more important, recognition of the common law underpinnings of native rights may help other former British colonies which have denied their existence, notably Australia,[276] to see that they are fundamentally out of step with the common law tradition.

V POSTSCRIPT

On May 31, 1990, a unanimous Canadian Supreme Court handed down its long-awaited decision in *Sparrow v. The Queen*.[277] Although the Court remanded to the trial court the issue of whether the regulation limiting the length of drift net fishing was inconsistent with section 35(1) of the Constitution Act (recognizing and affirming "existing" aboriginal and treaty rights[278]), it did establish a new framework for answering such questions and also clarified important issues, such as the meaning of "existing" rights and the means by which pre-1982 rights may have been extinguished.

The Court ruled that (1) the term "existing" rights did not revive rights extinguished prior to 1982 and also allows the government to regulate the right to permit its flexible evolution over time; (2) the Musqueam Band's proof of use showed sufficient continuity to establish their possession of an existing aboriginal right; (3) the standard for legislation effectively extinguishing pre-1982 aboriginal rights is "clear and plain intention to extinguish," due to the government's fiduciary duties to the natives and the judicial rules of liberal construction in their favour; (4) the scope of the Musqueam Band's aboriginal right to fish was assumed to be limited subsistence, ceremonial, and social purposes because the issue of the

[276] See *Milirrpum v. Nabalco Pty Ltd*, 17 F.L.R. 141 (1971), discussed in Keon-Cohen, "Native Justice in Australia, Canada and the U.S.A.: A Comparative Analysis" 7 Monash L.Rev. 250 (1981); see also Blumm & Malbon, supra note 59 (arguing that Australian courts have misinterpreted the common law rule of "discovery").

[277] 3 C.N.L.R. (1990). The lower court decision is discussed supra notes 101–16 and accompanying text.

[278] See supra notes 97–100 and accompanying text.

commercial nature of the right was not argued in the lower courts,[279] and (5) to determine whether a government regulation offends the constitutional guarantee necessitates a case-by-case analysis which requires the possessors to the right to first meet a *prima facie* test of showing interference with the right — which then shifts the burden of proof to the government to justify that interference. In order to satisfy the *prima facie* test, the Court suggested that the natives must show that the regulation is unreasonable, imposes undue hardship, or denies them their preferred means of exercising their right. The government then must justify regulation of the right not only by demonstrating a valid legislative objective (such as conserving and managing the fishery, although something more than a declaration of serving the "public interest" is required), but also by showing that the aboriginal right was given priority over other harvesters, after satisfying conservation requirements. This priority, the Court concluded, was justified because

> the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-a-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.[280]

[279] Note, however, that the Court ruled historical governmental policy without clear intention can neither extinguish nor delineate the scope or content of aboriginal rights. In the words of the Court:

> The nature of government regulations cannot be dterminative of the content and scope of an existing aboriginal right. Government policy *can* however regulate the exercises of that right, but such regulations must be in keeping with s. 11 35(1) (slip op. p.18) (emphasis in original).

[280] Sparrow, supra note 277, slip op. p.30.