Constitutional Conflicts and Aboriginal Rights:

Hunting, Fishing and Gathering Rights in Canada, New Zealand and the United States

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Abstract

Judicial resolution of non-aboriginal conflicts was crucial to the vindication of indigenous rights within the new state as the determination of the nature and quality of aboriginal legal interests and entitlements involved fundamental questions of land ownership, secure legal title for settler alienation, as well as governmental priority and competence. If not for these disputes, court decisions and common law doctrine solicitous of indigenous interests based on the idea of indigenous occupancy, use and possession of their territory, and the creation of law based on colonial and imperial policy -- which incorporated notions of indigenous sovereignty and supported pluralist legal relations -- would have been discarded by the courts due to the underlying dynamism and logic of colonialism.

Using a recent judicial decision by the highest court in each jurisdiction as a window to discuss the various approaches courts have taken to usufructuary rights, this thesis discusses the major components of the legal doctrine of hunting, fishing and gathering rights in Canada, New Zealand and the United States. It argues that the judicial protection of these aboriginal or treaty rights have been profoundly affected by non-aboriginal disputes over the constitution and the nature of national polity. At the same time the analysis suggests that values "external" to the law are not the sole determinant of judicial outcomes over time. Rather in certain instances the legal doctrine and decisions implicate values inherent to the legal system, such as a conceptual commitment to a logical internal structure, a respect for precedent and previous governmental policy as well as the principle that courts are disinterested dispensers of neutral justice. These internal values comingle with deep-seated commitments held by individual decision-makers and the judiciary more generally, regarding the constitutional structure of the state and the role of the judiciary.

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Chapter One Aboriginal Rights, Colonialism and Conflict

> "The Canadian Constitution involves a unique combination of four major features: parliamentary democracy, federalism, individual and group rights, and aboriginal rights." Patrick Macklem *et al.*, *Canadian Constitutional Law*, 2nd ed. (Toronto: Emond Montgomery Publications Limited, 1997) at 4.

> " The main legal principle that has dominated the relationship between Maori and the New Zealand state is neither the common law doctrine of aboriginal title nor the Treaty of Waitangi but, in fact, the principle of parliamentary sovereignty." Richard Boast, "Maori and the Law, 1840-2000" in Peter Spiller, Jeremy Finn and Richard Boast, *A New Zealand Legal History*, 2nd ed. (Wellington: Brookers, 2001) 123 at 184.

> "The federal-tribal relationship is premised upon broad but not unlimited federal constitutional power over Indian Affairs, often described as 'plenary.' The relationship is also distinguished by special trust obligations requiring the United States to adhere strictly to fiduciary standards in its dealings with Indians. The inherent tension between broad federal authority and special federal trust obligations has produced a unique body of law." Felix S. Cohen, *Handbook of Federal Indian Law*, 1982 ed. (Charlottesville, Va.: The Michie Company, 1982) at 207.

I. Aboriginal Rights and Constitutional Conflict

Aboriginal rights are bound up in the foundation and development of constitutional law in Canada, New Zealand and the United States. Aboriginal law implicates constitutional law because it concerns the relationship of indigenous entities and individuals to public authority, either through specific textual references in constitutional documents, statutes, common law legal doctrine or rights-based constitutional jurisprudence. The recognition, incorporation or disregard of these entities and individuals involves fundamental constitutional values such as: parliamentary sovereignty, federalism, separation of powers, rule of law and voting rights; the political and/or judicial determination of scope of constitutional authority; and constitutional innovation concerning the authority of governmental institutions, individual rights and equality. Moreover, any act of foundation and the consequent myths that accompany that foundation need an explanation of what was there before if they are to have any cogency. In order to legitimize colonial and imperial rule, as well as to justify the changes wrought by colonization upon the original inhabitants of a territory, settler societies established a foundational and "juridical" history premised upon rule of law as well as benign

and humanist impulses toward aboriginal peoples -- despite episodes of violence.[1] The post-settlement appropriation and incorporation of aboriginal governments and possessions is reflected in law insofar as indigenous peoples are mentioned in constitutional texts and/or are subject to unique jurisdictional and statutory rules.

As England began the process of incorporating aboriginal societies into the colonial project, their prior existence in the colonized territories meant that they enjoyed a certain status within British constitutional law relating to the creation of colonies and the reception of English law. [2] The incorporation of these legal rules into the domestic legal system and constitutional structure of the state was often due to the physical inability of settler governments to extend their jurisdiction and the potential threat non-recognition of aboriginal interests might pose. Over time however, the continued aboriginal control of land and recognition of other aboriginal interests such as inherent governmental capacity -- which was implicit in much of this law and policy -- was contrary to the underlying dynamism and logic of colonialism as well as the "constitution of power" [3] within settler societies. The continued legal use of and access to land provided a mechanism for aboriginal societies to affect the development of settler societies and distribute power within the colonial political economy; a potentiality which settler societies almost unanimously wished to avoid. At the same time the concomitant recognition of tribal entities as "rights holders" and alternative sources of governmental authority within the state was increasingly at odds with evolving notions of Eurocentric unitary national sovereignty in the 19th century. As such, the colonial state for the most part sought to eliminate the recognition and legal efficacy of aboriginal interests based

[1] Juridical history is where a court produces a history and relates the facts it contains through a body of rules to arrive at a legal judgment. Andrew Sharp, "Recent Juridical and Constitutional Histories of Maori" in Andrew Sharp and Paul McHugh, eds., *Histories Power and Loss: Uses of the Past – A New Zealand Commentary* (Wellington: Bridget Williams Books, 2001) 31.
[2] Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727. See also *Campbell v. Hall*, [1558-1774] All E.R. Rep. 252.
[3] James W. Hurst, *Law and Economic Growth the Legal History of the Lumber Industry in Wisconsin 1836-1915* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1964).

on earlier imperial policy and law.

Colonial judiciaries, following this dynamic consensus and having a broad scope of discretion which the establishment of a new polity in different territorial and social circumstances afforded, similarly depreciated aboriginal rights despite solicitous precedent and statutory protections. Indeed, values "external" to the legal system and legal reasoning have been particularly salient in the colonization process and extension of colonial authority over aboriginal peoples. Discussing the judicial efficacy of treaty and aboriginal rights arguments put forward in the face of executive actions disregarding earlier agreements or previous law Williams writes:

> Modern legal scholars tend to be squeamish about such a transparent moulding of legal doctrine to suit the convenience of colonial capitalism, and no doubt the colonial judiciary in the late nineteenth century did 'misunderstand', deliberately or otherwise, the doctrine of aboriginal title. Yet…colonial judges in many parts of the Empire were adept at reaching decisions convenient for colonial Governments which were at the expense of indigenous peoples' rights.[4]

Yet this drive to reduce and subsume aboriginal interests within the common matrix of the colonial state, usually obfuscated by solicitous language and protestations of goodwill, was not straightforward. Often the vindication or non-recognition of aboriginal sovereignty, governmental capacity and possessory interests had profound implications for non-aboriginal legal actors. In such circumstances one or another group or government would champion aboriginal possessory interests before the courts in an effort to substantiate a purported legal right to support their preferred vision of economic development or constitutionalism. Particularly crucial to the development of the law in each of these states were disputes between national or federal governments and states or provinces. As each of these levels of government held constitutionally assigned capacities which were either exclusively or

[4] David V. Williams, "Te Tiriti o Waitangi – Unique Relationship between Crown and Tangata Whenua?" in I.H. Kawharu, ed., *Waitangi Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 64 at 87.

concurrently shared with the other level disputes involving various aboriginal interests, particularly land and jurisdiction, assumed a constitutional importance. While aboriginal groups were usually not direct parties to these disputes, their judicial resolution nevertheless had major consequences for aboriginal possessory and usufructuary interests. Moreover, the judiciary did not always completely adopt the logic of colonialism when faced with these conflicts. Besides the "external" considerations mentioned above, the decisions implicated values inherent to the legal system, such as a conceptual commitment to a logical internal structure, a respect for precedent and previous governmental policy and the principle that courts are disinterested dispensers of neutral justice. These internal values comingled with deep-seated commitments held by individual decision-makers and the judiciary as a whole, regarding the constitutional structure of the state and the role of the judiciary -- a salient feature in aboriginal disputes because they often involved foundational history and fundamental jurisdictional questions.

Using an individual case from each national jurisdiction as a window to evaluate the law of each state, this thesis seeks to compare how judicial decision-making within the context of constitutional conflicts (or lack of conflict) in Canada, New Zealand and the United States has affected the historic recognition and efficacy of hunting, fishing and gathering rights as part of the larger bundle of aboriginal rights. It argues that the historic recognition of these rights in the United States occurred as part of the larger Federal-State conflict regarding which level of government had primacy in the American Federation, a legal position which necessarily subsumed the "legal" recognition of aboriginal rights, even though the objective sought by the Federal government had little to do with protecting aboriginal interests. Conversely, it also argues that the narrowly circumscribed judicial protection and recognition of aboriginal rights in pre-1982 Canada was one result of the Federal-Provincial jurisdictional battles in the 19th and early 20th centuries. Finally, it argues

that in New Zealand where these constitutional debates and judicial decisions did not implicate aboriginal interests or where a fundamental consensus existed over the content and scope of constitutional authority, the logic of colonialism and the liberal state led to an almost complete defeasance of legally subsisting aboriginal interests. Courts in this instance have had limited input in determining the content and scope of aboriginal rights.

This approach to aboriginal rights jurisprudence suggests that this law owes much of its continued efficacy to historical constitutional conflicts, judicial conceptions of those conflicts and the place of the judiciary within the constitutional framework which in turn entrenched a particular vision of aboriginal rights. It neither presumes that the development of aboriginal law is completely reflective of the dominance of settler communities nor does it accept that legal doctrine and the law can be analyzed separately from historical context. Rather it agrees with the observation that few, if any, legal propositions are initially uncontroverted in history.[5] Furthermore, the fact that these rights are tied to larger constitutional issues suggests that the continued evolution of this law within each state, premised either on some liberal conception community-rights or on international human rights norms, must evolve in concert with the overall constitutionalism and constitutional structure of the state.

II. Law and the Survival of Hunting Fishing and Gathering Rights

A. Usufructuary Rights

The genesis of this story lies in the English settlement of the American Atlantic seaboard, the military defeat of France in North America and Captain James Cook's South Pacific voyages. These events occurred during the time when, as stated by Cornell:

[5] Hamar Foster, "Aboriginal Peoples and the Law: Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases" (1992) 21 Man. L. J. 343.

> Europe spun a web about the world, and in the process the world was remade. During those and subsequent years, various peoples, nations and ideas would struggle within the grasp of that web. Some would flourish, some would disappear; but few would entirely escape the ever-expanding network of connections that made this world so very new.[6]

The expansion of English economic and political power led -- through purchase, conquest and chicanery -- to the extension of political power and legal jurisdiction by the British, Anglo-settlers and the Americans into what are now Canada, New Zealand and the United States. The extension of jurisdiction and the claims of legal authority that necessarily preceded that extension brought indigenous peoples living in these areas within the ambit of Western law; instigating a process whereby their pre-existence and occupation of colonized lands was incorporated and re-articulated within the imperial, colonial and national legal system.

Law was crucial to the colonialist enterprise. Indeed, from the European perspective, colonialism *was* a legal enterprise. "The archives of Western colonialism...," Robert A. Williams writes, "...reveal a profusion of laws that were drafted, enacted, obeyed, ignored, or defied in pursuit of Europe's will to empire."[7] Law "gave the Anglophone a way of seeing aboriginal peoples both as organized groups and as individuals" and was a key mechanism by which the colonialists dealt with the occupants of newly settled territories.[8] It was one of the means by which the settlers structured their relationships with indigenous peoples and established the basic legal instruments by which governmental authority and colonial property rights were established. As the colonial state established jurisdictional hegemony the

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[6] Stephen Cornell, *The Return of the Native: American Indian Political Resurgence* (Oxford: Oxford University Press, 1988) at 11.
[7]Robert A. Williams, Jr., *The American Indian in Western Legal Thought* (New York: Oxford University Press, 1990) at 6.
[8] Paul G. McHugh, *Aboriginal Societies and the Common Law A History of Sovereignty, Status and Self-Determination* (Auckland: Oxford University Press, 2004) at 4.

law was used to control, pacify, amalgamate and govern indigenous populations.[9]

The extension of law created new cultural and legal boundaries between the colonizer and the aboriginal communities and it outlined the basis of a relationship between the aboriginal groups and the colonizers under the law of the colonizing power. This relationship has been complex and has varied across time and place but in all cases aboriginals were not simply passive victims. Rather they were active participants in their own history. As stated by Lauren Benton "[c]onquered and colonized groups sought…to respond to the imposition of law in ways that included accommodation, advocacy within the system, subtle delegitimation, and outright rebellion."[10] Law, and the ideology of rights and state power embedded within it, provided a way by which colonized groups could resist some of the more egregious demands of the settlers as well as enabling the colonial state to ameliorate, if it so chose, some of the more brutal aspects of settlement.[11]

It is from this interaction that indigenous peoples retain, albeit in truncated form, usufructuary hunting, fishing, and gathering rights in a manner that would otherwise be prohibited by the applicable law of the state. These rights are either reserved by or derived from a treaty, common law aboriginal title, common law aboriginal rights, or are based on the recognition of customary hunting, fishing and gathering practices under statute. Depending on the legal system and the type of use, these rights have been called "common law aboriginal rights," "usufructuary rights," "off-reservation rights," "reserved rights," "un-extinguished rights," "inherent rights," "non-territorial aboriginal title" and "customary rights." They have been analogized to "*profits à prendre*," "access rights" or easements by

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[9] John L. Comaroff, "Colonialism, Culture, and the Law: A Foreword" (2001) 26 Law & Soc. Inquiry 305.
[10] Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History 1400-1900* (Cambridge: Cambridge University Press, 2002) at 2-3.
[11] Sally Merry, "Law and Colonialism" (1991) 25 Law & Soc'y Rev. 889 at 891.

the courts.[12] The rights are non-territorial in the sense that they do not derive from, and are independent of, any present-day ownership interest in the land but rather arise from historical occupation and use of particular lands and waters. They can include not only the right to use resources for personal sustenance or religious purposes but also may provide some insulation from governmental regulation, a right to a specific share of the harvested resource, and a right to preserve the resource from activities that might damage continued use.[13] Occasionally the use rights can include commercial exploitation.

B. The Nature of Usufructuary Rights Disputes

Disputes between aboriginal peoples and states over the definition, allocation and use of natural resources are often the core of the indigenous-state relationship and have rarely been settled simply and amicably. These difficulties are compounded by the fact that as the character of natural resource usage and the state-aboriginal relationship changes there is often a need to re-visit the areas of disagreement.

The disputes energize many politically potent interest groups and implicate fundamental social values. Hunting and fishing are important industries in each of the countries. Employment in many areas where the rights are asserted is specifically geared to tourism or extractive industries, which are then perceived to be threatened should the claims be allowed. Lumbering, ranching and extractive industries are concerned about what effects

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[12] "The right to profits, denominated profit a prendre, consists of a right to take part of the soil or product of the land of another,in which there is a supposable value, or the right of taking soil, gravel, minerals, and the like from the land of another. Similarly, the right to hunt and fish on another's land is properly characterized as a profit a prendre. The underlying principle is that it carries the right of entry and the right to remove and take from the land the designated product of profit, and gives a right enforceable against others." *Corpus Juris Secundum*, vol. 28A, *s.v.* "Easements" at §9.
Black's Law Dictionary defines a usufruct as: "A right to use another's property for a time without diminishing or damaging it, although the property might naturally deteriorate over time." *Black's Law Dictionary*, 7th ed. (St. Paul, Minn.: West Group, 1999).
See also L. F. E. Goldie, "Note: Title and Use (And Usufruct) -- An Ancient Distinction Too Oft Forgot" (1985) 79 Am. J. Int'l L. 689 at 690-695; Gary D. Meyers, "Native Title Rights in Natural Resources: A Comparative Perspective of Common Law Jurisprudence" (2002) 19 Environmental and Planning Law Journal 245.
[13] Michael C. Blumm, "Native Fishing Rights and Environmental Protection in North America and New Zealand: A Comparative Analysis of Profits à Prendre and Habitat Servitudes" (1989/90) 8 Wis. Int'l L.J. 1at 2.

potential aboriginal uses (or an aboriginal veto over their use) would have on their activities. Environmentalists doubt the ability of governments and aboriginal groups to manage the resource effectively. At the same time, other non-aboriginal groups complain that recognition of additional use rights is discriminatory, racist and/or violates their equal rights. Private landowners complain about the erosion of private property rights. States and provinces complain about the extension of national and judicial power into areas historically subject to their control, or about the inability of aboriginal groups to regulate their own activities, leading to aboriginal over-exploitation and restricting non-aboriginals use. Local governments likewise resent the intrusion by courts and other levels of government into their jurisdiction and local area. All levels of government complain about the security, ancillary enforcement and management costs which arise during the disputes or once the indigenous use rights have been recognized.

A further complication is that the nature of the resources and interests make it difficult for the parties to compromise. At a basic level access to natural resources is about aboriginal poverty but usually indigenous struggles to gain resources and territory are intertwined with claims for sovereignty, autonomy, cultural recognition and the redress of historical grievances; objectives that are not necessarily related to a particular resource use for subsistence, religious or economic purposes. Often indigenous groups are unwilling to separate self-government claims from claims of interest in property because they do not think of hunting, fishing and gathering in terms of simple natural resource usage. In addition, the issues often involve disputes within and among the indigenous groups themselves concerning the appropriateness of various groups' use of resources in a particular area. At the same time, the resources in question are often perceived as being too limited to support the assumed increase in aboriginal exploitation that might occur should their use rights be recognized. There is a sense, particularly among hunting, fishing and tourism groups, that aboriginal

resource use will derogate from non-aboriginal (primarily sporting) use. Where the parties believe that another's use can only be occasioned by a concomitant reduction in their own use, the perceived stakes are very high.

Aboriginal hunting, fishing and gathering also involve issues that are central to the foundation and development of social, legal and constitutional structures. Often, the process of delimiting the various rights forces policy and jurisprudential innovation (depending on one's point of view), and political divisiveness, which can undermine aboriginal relations with non-aboriginal socio-political groups, classes or institutions within the state.[14] Courts and policy-makers have had to balance their commitment to equal rights and access to common areas for all citizens with historical and legal precedents which explicitly recognize that indigenous groups have rights not accorded other citizens. They also must consider national constitutional limitations due to federal structures and/or the separation of power restraints as well as the legal rights and political interests of sub-national units of government. The exertion of judicial power in these disputes often creates political opposition towards the judiciary and can undermine its more general role as guarantor of due process and rule of law. These difficulties are exacerbated because the disputes involve thorny issues of law and history that suffer from inherent indeterminacy. The historical and legal issues can involve foundational myths of a particular society and implicate fundamental assumptions about the nature of individuals and the polity whose resolution turns on and affects "a set of ideas about what happens, what can be known and what [is] done" in a society -- issues that cannot be easily and clearly abstracted into an analytical framework

[14] James S. Frideres, *Aboriginal Peoples in Canada, Contemporary Conflicts*, 5th ed. (Scarborough, Ont.: Prentice Hall Allyn and Bacon Canada, 1998) at 2-20.

internal to the law.[15]

III. Constitutional Law and the State

A. Foundation and Conflict

The foundation of new societies and states in North America and Australasia was a chaotic affair. Before the fully effective extension of state authority and jurisdiction across the territory various informal and customary legal orders, both settler and aboriginal, interacted with one another and with colonial and state legal orders and authority.[16] Yet even after the extension of full jurisdiction, each state's constitutional structure remained unsettled. Prior to the middle of the 19th century, the colonial states, as institutional states, were neither unitary entities claiming a monopoly on legal authority; nor did they make a singular claim for legitimation and allegiance upon their inhabitants.[17] As noted by Cooper and Stoler:

> Colonial Regimes were neither monolithic nor omnipotent. Closer investigation reveals competing agendas about using power, competing strategies for maintaining control, and doubts about the legitimacy of the venture.[18]

While the United States was not a colonial state in an international law sense, the description above similarly applies to the American state. By the second term of the Washington administration, various states argued that the Federal government possessed neither the sovereignty nor the ability to enforce its laws within the states without sub-national agreement. This political and institutional dispute over the primary locus of authority and legitimacy within American federation was settled by the American Civil War but it was a primary argument or sub-text in many judicial disputes.

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[15] J.G.A. Pocock *Politics, Language and Time Essays on Political Thought and History* (London: Methuen & Co. Ltd, 1972) at 233.
[16] Peter Karsten, *Between Law and Custom "High" and "Low Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia, and New Zealand 1600 – 1900* (Cambridge: Cambridge University Press, 2002).
[17] Benton, *supra* note 10 at 259.
[18] Frederick Cooper and Ann Laura Stoler "Between Metropole and Colony: Rethinking a Research Agenda" in Frederick Cooper and Ann Laura Stoler, eds., *Tensions of Empire: Colonial Cultures in a Bourgeois World* (Berkeley, Cal: University of California Press, 1997) 1 at 6.

Benton calls the historical comparative and interpretive study of these processes and conflicts the study of "jurisdictional politics." For Benton, jurisdictional politics means "conflicts over the preservation, creation, nature, and the extent of different legal forums and authorities."[19] It arose out of a colonial milieu where the informal law of the Anglo-settlers, the law of indigenous societies, rules governing the interaction of these groups, and the coalescing colonial and national state intersected. The disputes not only involved fundamental imperial, national and settler political and economic interests but also were about fundamental political and legal philosophies regarding the nature and extent of the developing national state. Judges as members of the colonial and national elites took part in these debates and maintained intellectual commitments to one or another perspective. Their intellectual and political commitments can be discerned in case law given the wide interpretive latitude the judiciary in fact had through its application of the common law rules and interpretation of statutes in the colonial context.

Law was utilized in the colonial and newly emergent national states as a means of legitimizing certain groups, institutional practices and constitutional arrangements. However it was not simply an instrument for certain political and economic interests but was also a reflection and embodiment of an idea of how the community should be organized and exist in time. The law was both discursive, *i.e.* it was the object of continual struggles over definitions and markers of cultural difference, and structural, in that it shaped and constrained political and economic interactions.[20] It was a political, intellectual and cultural exercise. Law, from this perspective "contributes to a definition of a style of social existence."[21] For example, the introduction of representative institutions in the settler colonies patterned on the

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[19] Benton, *supra* note10 at 10.
[20] *Ibid.* at 253.
[21] Robert Vipond, *Liberty and Community Canadian Federalism and the Failure of the Constitution* (Albany, N.Y.: State University of New York Press, 1991) at 9-11; Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 173.

Westminster model contained a "constitutional logic" that affected the development of local autonomy because British precedents and practices could be relied upon to reconfigure and legitimize the political landscape. Those elites that had collaborated with imperial authorities could no longer depend on imperial support and were vulnerable to nationalistic claims by their opponents.[22] Colonial opponents, while often adept at playing on national or local sentiment, nevertheless employed language and pursued objectives that were consonant with British or liberal political and legal concepts. While the immediate aim in the dispute may have been the advancement of certain economic and class interests, the dispute process generated a set of propositions about the legal relationship among the Anglo-settlers, the colonial or national state and imperial Britain that in turn constituted the range of alternative political and social arrangements which could be, to use Geertz's term "real" to the participants in the process.[23]

Law was an intellectual exercise in that the "range" of political and social arrangements that constitute a society only became "legal" through a self-conscious decisional process. In the early settlement period prior to the full extension of state jurisdiction, this decisional process was based on customary law and group consensus which was later incorporated into the common law by colonial and national courts.[24] That this process might have masked underlying elite or class dominance is beyond the scope of this thesis; it suffices to say that the judiciary needs to justify its decisions if it is to maintain authority and legitimacy. Simpson notes:

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[22] Peter Burroughs, "Colonial Self-Government" in C.C. Eldridge, ed., *British Imperialism in the Nineteenth Century* (London: MacMillan Publishers Ltd., 1984) 40.
[23] For Geertz, law is "not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but part of a distinctive manner of imagining the real." Geertz, *supra* note 21 at 173.
[24] For example, customary mining law and forums of miners to resolve various disputes were common in frontier gold fields. Karsten, *supra* note 16 at 38-75.

> Insofar as the ideal of rationality is pursued by judges…the best that can be done in real life is to act by reasons which appear to be good or compelling when the decision is taken, and again what counts as a good or compelling reason will be determined by the cultural context, in part specifically legal, in part not.[25]

Moreover, the nature of the law and the decisional process must at the very least maintain an appearance of impartiality if the process of state consolidation under a liberal legal order is to proceed. "If a law is evidentially partial and unjust," E.P. Thompson states:

> [T]hen it will mask nothing, legitimise nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just.[26]

After American independence in 1776 and when the Canadian and New Zealand settlers gained self-rule in the period between 1840 and 1870, an emphasis on economic improvement was also accompanied by a self-conscious articulation of the institutional structures and a political theory that justified and legitimated state activity. With a diminished or absent imperial link, the new state was required to modify or create new institutional and social power structures. It required either the establishment a new social basis of power or tying the existing bases of socially or institutionally-based power to the new state. The process was in no sense linear and the particular premises and issues remained contested. Nevertheless, over time a basic agreement as to the underlying premises of the new state and legal system became evident. These premises included the notion of state sovereignty, liberal political structures and economic development and the positivist idea that the national state was a "set of administrative, policing, and military organizations headed, and more or less coordinated by, an executive authority."[27]

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[25] A.W.B. Simpson, "Legal Iconoclasts and Legal Ideals" (1990) 58 U. Cin. L. Rev. 819 at 843.
[26] E.P. Thompson, *Whigs and Hunters: the Origin of the Black Act* (London: Allen Lane, 1975) at 263.
[27] Theda Skocpol, *States and Social Revolutions: A Comparative Study of France, Russia and China* (Cambridge: Cambridge University Press, 1979) at 28-9.

B. Consolidation of State Power, Constitutional Conflict and Aboriginal Law

While a legally plural environment continued to exist both ahead of the frontier and elsewhere, the question for policy-makers and jurists, unlike the earlier settlement period, was not to legitimize state law or determine what law applied (customary, imperial, indigenous etc.) but rather to determine the "content" of the state law that applied to the particular situation. In the environment of the emerging national state "[t]he political and symbolic importance of defining the legal status of indigenous subjects"[28] was often an important issue -- their existence antecedent to self-government implicated the received constitutional legacy from Britain and the developing constitutional and institutional arrangements within the new state. Moreover they needed to be incorporated into the self-conscious efforts to ground the basis of the new states' power and authority as part of a continuous process of cultural and political definition. Thus aboriginal issues involved the location, content and scope of imperial, colonial settler authority, national authority, state or provincial authority, as well as more metaphysical disputes concerning international sovereignty, sovereignty within the British imperial system and state sovereignty within the liberal democratic paradigm.[29]

Three sets of conflicts shaped this process. The first was between the settlers and the indigenous peoples themselves. As mentioned above, in New Zealand and North America the story of the interaction between aboriginal peoples and the colonists is not simply one of dispossession and exploitation. Many indigenous tribes sought to maximize the opportunities

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[28] Benton, *supra* note 10 at 253.

[29] There are two major streams of liberalism, an American-based rights liberalism and another type other type of liberalism, identified more with commonwealth states, which understands liberty, not as an exclusionary zone of private right but combination of private right and accountable self-government. that inform the development of the state and civil society in the states under consideration here. These approaches to liberalism are not exclusionary and are present, to a more or less extent in all the jurisdictions. Robert C. Vipond, "Lament For a Notion: The Eclipse of Reform Liberalism" in Joseph F. Fletcher, ed., *Ideas in Action: Essays on Politics and Law in Honour of Peter Russell* (Toronto: University of Toronto Press, 1999) 24 at 25-6. In spite of the emphasis in liberal theory on rights and property, the theory has generally not included indigenous groups and indigenous individuals as having a "liberty" interest. See also Uday S. Mehta, "Liberal Strategies of Exclusion" in Cooper and Stoler, *supra* note 18 at 59.

European trade and economic goods brought to them while minimizing their adverse impacts. As they realized the differing attitudes the settlers had toward land and property and the how European diseases and alcoholism impacted tribal life, many tribes sought to separate themselves, either through migration or agreement, from settler contact and colonial law to preserve their own law, customary practices and territory. Sometimes they resorted to the colonial and national courts and colonial and imperial law to protect their interests. The British and American settlers, on the other hand, generally sought to impose colonial and national authority where it supported their economic and political objectives.

The second conflict involved sub-national local and regional governments and the central government. In the United States these issues involved the extent and scope of federal-state relations and state authority as a sovereign entity within the federal system. In the British colonies, these disputes did not just concern issues of federalism, though the federal structure was the preferred institutional arrangement to consolidate independent minded, culturally diverse colonies into political units which would be viable enough to minimize imperial economic and military support. They also involved the relationship between the imperial government and sub-national state and provincial governments. After the establishment of the national state through the imperial consolidation of separate colonies, the sub-national governments, as formerly self-governing colonies, often sought to retain their institutional and colonial independence *vis-à-vis* the national government.

The third level of conflict involved the power and scope of imperial authority versus the power of the colonial government controlled by the Anglo-settlers under the grant of responsible government. As the imperial constitutional power, the British Privy Council was the highest tribunal in each colony and the Imperial government reserved the right to disallow colonial legislation that was considered contrary to imperial interests or repugnant to English

law. This power was used sparingly, particularly in those colonies that were granted legislative assemblies or responsible government.[30] Nevertheless the *laissez-faire* attitude toward colonial legislation taken by the Colonial Office often did not extend to aboriginal affairs. The imperial authorities initially reserved control over aboriginal affairs and often pursued independent policies with regard to the aboriginals after the grant of responsible government. The Colonial Office believed that the settlers' interests were often incompatible with the interests of aboriginal inhabitants. Moreover, settler predations could spark military conflict that would entail imperial costs.

Orderly settlement and lower costs were not the only motivation for retaining imperial control. The humanitarian idea that Britain owed a civilizing mission to colonized peoples was also considered important.[31] Indigenous people often looked to the Crown over the heads of local governments to protect their interests. For example, the Mi'kmaq in Nova Scotia repeatedly petitioned Crown representatives and Queen Victoria about the failure of colonial governments to provide relief as promised in various treaties, agreements and representations with imperial and colonial officials.[32] The manner in which colonial responsible governments were able to secure control over indigenous affairs in their territory and the scope of control the settler governments ultimately assumed over the indigenous peoples was in no small part dependant on how the debate was framed.[33]

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[30] D.B. Swinfen, *Imperial Control of Colonial Legislation 1813 – 1865 A Study of British Policy towards Colonial Legislative Powers* (Oxford: Clarendon Press, 1970) 32.
[31] See U.K., H.C., "Report of House of Commons Committee on Aborigines in British Settlements (June 26, 1837)," reprinted in Kenneth N. Bell and W.P. Morrell, eds., *Select Documents on British Colonial Policy 1830 – 1860* (Oxford: Clarendon Press, 1928) at 546.
[32] L.F.S. Upton, *Micmacs and Colonists Indian-White Relations in the Maritimes, 1713 – 1867* (Vancouver: University of British Colonial Press, 1979) at 133-41.
[33] After the American Revolution, British colonial policy in the remaining empire was premised on the idea that the American colonies had been granted too much legislative authority. See C.P. Lucas, ed., *Lord Durham's Report on the Affairs of British North America* (Oxford: Clarendon Press, 1912) vol. 2 at 279-80. Earlier British constitutional theory could not accommodate colonial self-rule with imperial parliamentary sovereignty. Responsible government was granted to a united Canada in 1846. Over the next few years it was granted to all colonies where English settlers were significant populations. C.A. Bodelsen, *Studies in Mid-Victorian*

Most importantly, indigenous issues were implicated in the development of the colonial and national state because aboriginals initially controlled, and still maintained control or had a colour of interest in territory throughout the 19th century, or simply had a presence that was perceived by the settlers to be a hindrance to development. Indigenous groups generally did not accept the settlers' liberal notions of property and economic development. The fear that indigenous interests would intrude upon or preclude settlers' property rights or create an indigenous veto on the economic development of the country was evident in cases where a court refused to recognize or protect aboriginal interests. For example, the Canadian Supreme Court in the seminal case *St. Catherine's Milling Co.* was concerned lest the aboriginals have a veto on development decisions. As stated by Justice Tashereau:

> The necessary deduction from such a doctrine [that the general policy of respect for the claims of the [I]ndians is a recognition or grant of legal title by the Crown] would be, that all progress of civilization and development in this country is and always has been at the mercy of the Indian race. Some writers cited by the appellants, influenced by sentimental and philanthropic considerations, do not hesitate to go as far. But legal and constitutional principles are in direct antagonism with their theories. The Indians must in the future, everyone concedes it, be treated with the same consideration for their just claims and demands that they received in the past, but as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from political control. [34]

In the New Zealand 1871 *Kauwaeranga* Case, Chief Judge Fenton of the Native Land Court likewise noted:

> I cannot contemplate without uneasiness the evil consequences which night ensue from judicially declaring that the soil of the foreshore of the colony will be vested absolutely in the natives, if they can prove certain acts of ownership, especially when I consider how readily they may prove such, and how impossible it is to

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Imperialism (London: Nordisk Forlag, 1924) at 13-22. See also Peter Burroughs, "Colonial Self-Government" in Eldridge, *supra* note 22 at 39.

[34]. *St. Catherine's Milling and Lumber Company v. The Queen*, [1887] 13 S.C.R. 577 at 649.

> contradict them if they only agree amongst themselves. And I am not without precedent in allowing my mind to be influenced by such considerations.[35]

Yet the issue of status for indigenous peoples, as individuals and collective entities, was also important because it related, on one hand, to composition of who would and who would not be a participant and potentially dominant decision-maker within the liberal polity, and on the other hand, the extent and scope of that polity across the national territory. Behind this issue lay political, economic and class, cultural and racial issues which in turn made the debate of significant symbolic as well as practical importance.[36] For example, the issue of whether, and to what extent, the right to vote should be extended to those with or without real property or assets of some sort was far from settled in the first half of the 19th century; and proposals to extend the right to vote to indigenous individuals highlighted disputes within the larger society.[37]The existence of collective indigenous entities which controlled territory and claimed jurisdiction over its members was an alternative governmental and legal framework to the settler state which included the potential for aboriginal entities to by-pass local and colonial governments. For example, the long-standing dispute between the Upper Canadian government and the Six Nations concerning a land grant along the Grand River revolved around whether Upper Canada and later Canada would recognize the tribes' status as a sovereign ally during the American War of Independence or as a dependant government subject to Crown authority. If the courts concluded that the tribe had been an independent ally of the Crown rather than a dependant government, the tribes would not be subject to Upper Canada law and could sell or lease their land to whomever they chose without Crown

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[35] "*Kauwaeranga* Judgment" (1984) 14 V.U.W.L.R. 227 at 244.
[36] See for example American Chief Justice Taney's discussion contrasting African-Americans and Indians in *Dred Scott v. Sandford*, 60 U.S. 393 at 403-4 (1856).
[37] Patricia Grimshaw, Robert Reynolds and Shurlee Swain, "The Paradox of 'Ultra-Democratic Government: Indigenous Civil Rights in Nineteenth Century New Zealand, Canada and Australia" in Diane Kirkby and Catherine Coleborne, eds., *Law, History, Colonialism*: *The Reach of Empire* (Manchester: Manchester University Press, 2001) 78.

approval.[38] Where jurisdictional and sovereign authority was reposed in imperial authorities, the existence of parallel and (to a certain extent) competing sources of authority within the territory could be finessed. However, as settler population increased and they came into contact with aboriginal peoples and aboriginal law, the lack of jurisdiction on the frontier over land and tribes came to be seen as an obstacle to economic development and the nation-building process.[39] In this process, where national and sub-national governments sought to maximize their jurisdiction, and settler governments sought to maximize their self rule *vis-à-vis* the imperial authorities, there was little room (either physically, legally or philosophically) for alterative arrangements which the settlers might perceive as a challenge to colonial or national authority. Thus in New Zealand, for example, which had been established on a more tolerant vision of inter-racial relations under the Treaty of Waitangi, dominant settler groups consistently used methods of local control and law to frustrate the incorporation of Maori collective entities into the colonial polity and fought interpretations of the Treaty which understood it as reserving to Maori pre-existing rights of sovereignty, governance and land.

C. Colonialism and the Drive for Natural Resources

When Canada, New Zealand and the United States were articulating their fundamental legal and policy frameworks, as well as establishing their historical myths and legal traditions, two primary interrelated processes impacted indigenous law and policy: colonialism and the overwhelming drive of imperial authorities and the settlers to wrest control of the natural

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[38] Sidney L. Harring, *Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: Osgoode Society for Canadian Legal History by University of Toronto Press 1998) at 35-81; Darlene Johnson, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 U.T.Fac.L.Rev. 1.

[39] John C. Weaver, "Economic Improvement and the Social Construction of Property Rights" in John McLaren, A.R. Buck & Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 79.

resources away from the indigenous population.[40] These processes had two overlapping but distinct historical phases. The first phase involved the period prior to the establishment of responsible government in Australasia and British North America and the period of time prior to the British-American War of 1812 in the United States. During the first phase, depending upon the local circumstances the imperial and American governments and the local colonial administrations generally recognized indigenous interests (at least in policy articulation and directly to the aboriginals when interacting with them) and sought to prevent the invasion of those interests by the settlers.[41] Sometimes, the attempt to acknowledge aboriginal interests was based on recognition of their ownership of their lands and/or their natural rights as human beings. More often the solicitude of tribal interests was a tactic used to appropriate indigenous resources by the ethno-centric settlers and by imperial authorities where indigenous relative military strength was a viable threat or where it was deemed more expedient in terms of cost and violence to extend the frontier. During this period, imperial authority generally reserved all matters relating to indigenous inhabitants. Imperial interests in Canada and Australia which informed New Zealand policy as well as its policy in the 13 American colonies before 1776[42] established a framework that served as the basis for later law and policy. While always intent upon maximizing the economic and political gains from possession of the colony, British policy was sometimes motivated by humanitarian sentiments and was intended to protect indigenous peoples from the local colonists. Other times the policy was directed toward avoiding war and minimizing the military outlays for

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[40] Imperialism can be understood either as link to a specific form of capitalist production, the formal annexation of territory or a mixture of territorial, political and social terms. Bernard Semmel, *The Liberal Ideal and the Demons of Empire Theories of Imperialism from Adam Smith to Lenin* (Baltimore: The Johns Hopkins University Press, 1993) at 1-16. In all the states under consideration imperial control consisted of territorial annexation of land and resources and settlement by people of European stock.

[41] The British Government never accepted the idea that aborigines in the Australian colonies had any legal interest in the lands. However provisions were inserted in Crown leases so that aboriginals would not be denied subsistence activities. See Henry Reynolds, *The Law of the Land*, 3rd ed. (Camberwell, Vic.: Penguin Books, 2003).

[42] Robert N. Clinton, "The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-States Conflict Over the Management of Indian Affairs" (1989) 69 B.U.L. Rev. 329.

colonial defence. Crucially for the rights under discussion here was the British use of the treaty as a method of cession in all the colonies. The consequent negotiations and the interaction in the treaty process incorporated international law concepts into the relationship while retaining the legal concept of reserved rights within indigenous jurisprudence. While attitudes of cultural superiority by the British, Anglo-settlers and the Americans meant that treaties were generally made to be broken, the result has been that assertions by indigenous groups for sovereignty or autonomy are based on notions of mutual respect and customary or recognized practices grounded in international law.[43]

The second phase commenced when the colonies became self-governing and the government extended political control and legal enforcement across the territory. In the United States this period began after the War of 1812 when the British withdrew from American territory. Lacking countervailing British power to resist American encroachment, the tribes were unable to prevent the extension of federal and state jurisdiction into their lands. Local settler customary law and the aboriginal presence and power, such as it existed, were effectively disregarded in the favour of resource exploitation by local settlers based on liberal notions of political and economic development.[44] The more fluid political and social environment over which the colonial state was consolidating became more orderly and less amenable to penetration and accommodation to alternative legal norms. For the settlers, the imperial or national government's efforts to protect indigenous peoples had often been seen as misguided idealism or simply as intrusive and dangerous meddling into matters of local concern. Conciliatory acts and legal protections, if any had existed, were discarded, ignored or re-articulated as necessary, to be later subsumed under the legal tradition and Western legal doctrine of the consolidating national state.

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[43] Williams, *supra* note 7 at 124-37.
[44] Karsten, *supra*.note 16.

From the time when European settlers first engaged in social, economic and political interaction with indigenous groups until indigenous natural resource interests had been reduced to such a level that they offered no obvious opportunities for economic exploitation, the British, American and Anglo-settlers wanted the resources controlled by aboriginal groups. From the British and American imperial perspective, the use of these natural resources would enhance national wealth and power in a dangerous and increasingly competitive world. From the perspective of the settlers and frontiersmen, indigenous peoples use of natural resources was not consistent with European-based ideas of economic development and progress. The appropriation and use of natural resources was therefore a natural right.[45] In New Zealand, Tate suggests that *Wi Parata v. Bishop of Wellington*[46] and all subsequent case law and legislation incorporating the decision, was premised upon a clear difference of opinion between the New Zealand settlers and the Privy Council over the legal status of native title. The difference between the imperial authorities and the settlers that affected the resolution of various legal disputes regarding aboriginal title was grounded on the overwhelming desire of the Anglo-settlers to have stable and secure land title for settlement.[47] Kahn suggests in the United States that "perhaps the central contrast between Indians and Europeans at the moment they first encountered each other in New England had to do with what they saw as resources and how they thought those resources should be utilized".[48] The Canadian Royal Commission on Aboriginal Peoples noted that:

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[45] John C. Weaver, *The Great Land Rush and the Making of the Modern World, 1650-1900* (Montreal: McGill-Queens University Press, 2003).
[46] *Wi Parata v. Bishop of Wellington*, (1877) 3 N.Z. Jur. (NS) 72 (N.Z.C.A).
[47] John William Tate, "The Privy Council and Native Title: A Requiem for *Wi Parata*" (2004) 12 Waikato L. Rev. 101.
[48] Benjamin A. Kahn, "The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand: In Contrast to the American Indian Experience" (1999) 35 Stan. J. Int'l L. 49 at 50-1.

> The principle of reciprocity upon which Crown-aboriginal relations had been founded originally was to be discarded by the Crown in its drive to acquire aboriginal territory and absorb aboriginal peoples into the Canadian populace.[49]

The stated policy, at least since *The Royal Proclamation of 1763* and in the United States since the *Non-Intercourse Act of 1791*, had been to obtain access to indigenous natural resources by cession to imperial and national authorities. Title could also be obtained by conquest. Where imperial and national policy was not favourable to opening more land or moved too slowly, the Anglo-settlers and frontiersmen used whatever means they could -- legislative, legal, military, simple disregard and self-help -- and petitioned every level of government, from imperial London and Washington to the local town constable, to gain access to the aboriginal land and natural resources. Where legal means were not available, either because the settlers were ahead of the frontier or current law or policy afforded them no legal right, they resorted to self-help; they squatted, entered into unenforceable or questionable agreements with the local aboriginals and waited for the law to either protect indigenous interests or legitimize their claimed ownership. Regardless of the method of dispossession used, there was almost always a legal justification for an indigenous loss of rights; however an echo of the previous indigenous possession remained within the law of each state.

The legitimation of aboriginal dispossession was the essential element of colonialism as it affected these states. While not a monolithic concept, colonialism occurs when one state or a group of people within a state establish political, legal and cultural domination over a territory and its people through the application of legal rules and cultural norms based on inequality and a division of population into "civilized" and "savage."[50] Colonialism as an

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[49]Canada, *Report of the Royal Commission on Aboriginal Peoples Treaty-Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Royal Commission on Aboriginal Peoples, 1995) at 29.
[50] J.M. Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (New York: Guilford Press, 1993) at 21-26, 23. See also Nicholas Thomas, *Colonialism's Culture: Anthropology, Travel and Government* (Cambridge: Polity Press, 1994).

idea arose from the notion that European-derived people were undergoing a progressive evolution in which they would ultimately transform the world. It reached what Blaut calls its "classical form" in European and American global political, economic and technological dominance in the 19th century. In Britain, colonialism and imperial expansion was associated with a confidence that British progress was in some sense in harmony with progressive forces in the universe.[51]

The process varied across time, cultures, geography, the type of economic activity pursued by the Europeans and the form of political control exercised by the colonizing powers. However, in all instances British and American colonialism was underwritten by optimism and a sense of mission to bring "the benefits of civilization to the backward parts of the world".[52] As the century progressed, colonialism was increasingly supported by ideas of racial superiority and that the assignation of basic cultural and personality traits based on race became so pervasive that at the beginning of the 20th century such opinions were considered "common sense" by the colonizers[53]

The fusing of political power and cultural categories within the colonialist paradigm allowed the Americans and Anglo-settlers to justify continuing economic development and concomitant marginalization and/or destruction of other peoples within the consolidating state. Within this consolidating institutional structure and exploitative natural resource-based economy, the question of whether the "savage" was irredeemable and destined for extinction or capable of learning and assimilating European institutions and culture depended upon

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[51] Ronald Hyam, *Britain's Imperial Century 1815-1914 A Study of Empire and Expansion* (London: B.T. Batsford, 1976) at 49. See also the statement by the *Select Committee on Aborigines (British Settlements)* in Bell, *supra* note 31at 546.
[52] C.C. Eldridge, "Sinews of Empire: Changing Perspectives" in Eldridge, *supra* note 22 at 183.
[53]James W. St. G. Walker, *"Race," Rights and the Law in the Supreme Court of Canada, Historical Case Studies* (The Osgoode Society for Canadian Legal History and Wilfred Laurier Press, 1997) at 12-50.

one's point of view.[54] However, the "right to rule," based on purportedly superior political, legal, economic, commercial, religious, educational and technological factors, was not questioned.[55]

D. Colonialism, Emergent Sovereignty and Usufructuary Rights

The most evident result of the colonial drive for natural resources and economic development is found in each state's idea of sovereignty and how this drive related to aboriginal sovereignty claims and rights as part of more particular claims to hunt, fish, and gather. The similarity of rules and legal doctrine regarding aboriginal rights and aboriginal title is underscored by similar legal principles regarding the sovereignty of the national state. Sovereignty is a contentious concept both as it relates to indigenous/state relations and within the national and international polity.[56] It exists at the intersection between a physical reality of dominion and control over a defined territory and a legal concept that exists as a matter of law within the international system.

The state-centric notion of sovereignty is particularly important in hunting, fishing and gathering cases. First, it places a political constraint upon aboriginal groups who seek legal redress. Politically courts cannot render decisions that are ineffective because they are overwhelmingly opposed by the mainstream society. "[D]emocratic politics can severely limit the extent to which Aboriginal peoples can enjoy rights recognized by the Judiciary."[57] Aboriginal assertions for rights have often been opposed in the name of an unproblematized

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[54] For attitudes that suggested that assimilation would work because of the natural capacities and rights of Indians see D.S. Otis, *The Dawes Act and the Allotment of Indian Lands* (Norman, Okla.: University of Oklahoma Press, 1973) and M.P.K. Sorrenson, "Maori and Pakeha," in Geoffrey W. Rice, ed., *The Oxford History of New Zealand*, 2nd ed. (Auckland: Oxford University Press, 1992) 141.

[55] Hyam, *supra* note 51 at 52-69; Reginald Horsman, "Race and Manifest Destiny" in Richard Delgado and Jean Stefancic, eds., *Critical White Studies Looking Behind the Mirror* (Philadelphia: Temple University Press 1997) 139 at 142-3.

[56] David Strang, "Contested Sovereignty: the Social Construction of Colonial Imperialism" in Thomas J. Biersteker and Cynthia Weber, eds., *State Sovereignty as a Social Construct* (Cambridge: Cambridge University Press, 1996) 22.

[57] *Ibid.* at 252.

"national interest" which legitimizes various legal positions and categories that often exclude indigenous peoples. Aboriginal opposition to various resource uses or indigenous insistence that they possess hunting, fishing and gathering rights are often characterized as "vested," "illegitimate" or contrary to the national interest by proponents of the resource use.[58] Legal doctrines such as the "Act of State" doctrine in the commonwealth states and the "Plenary Power" doctrine in the United States have been devised and used by courts to justify the dispossession of indigenous peoples under the guise of national interest. These formulations of national interest and power tend to dominate the political and legal fields such that more nuanced intermediate pluralist conceptions of the national polity are unable to gain traction within political and legal systems.

Second, it establishes a legal framework for aboriginal rights, both for aboriginal possessory interests and for aboriginal governmental and social entities, that is composed of essentially non-protective rules.[59] These non-protective rules do not only relate to differential treatment accorded to indigenous peoples under the legal system and in particular disputes due to race, culture and poverty. The differential treatment is also related to the idea that indigenous peoples and the *sui generis* nature of aboriginal law are only contingently integrated into the legal order of the liberal democratic sovereign state. Provided certain constitutional, statutory and procedural requirements are implemented, the national state, in its capacity as sovereign, has the absolute authority and power to recognize or extinguish any and all indigenous property rights *as well as* indigenous legal existence. This complete internal sovereignty is a necessary component of the idea of sovereignty as it has developed over the colonial period. As American Chief Justice Marshall noted:

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[58] Richard Howitt, John Connell & Philip Hirsch, "Resources, Nations and Indigenous Peoples," in Richard Howitt, John Connell & Philip Hirsch, eds., *Resources, Nations and Indigenous Peoples* (Melbourne: Oxford University Press, 1996) 5 at 14-15.
[59] See Steve Russell, "Jurisprudence of Colonialism" in Anne Waters, ed., *American Indian Thought* (Malden, Mass.: Blackwell Publishing Ltd., 2004) 217.

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction....[60]

The ultimately unprotected status of many aboriginal rights means that the old philosophical argument of divided versus undivided sovereignty or Parliamentary supremacy has little relevance in an analysis of the interaction between indigenous and national sovereignty. Despite indigenous sovereignty existing as an alternative or complementary legal order, it is not yet conceived of as constitutive, in any real or legal sense of the national state sovereignty. The notion of national sovereignty in liberal settler societies is necessarily protective of the natural rights of its individual citizens as opposed to collectivist aboriginal legal orders.

Third, the state-centric notion of sovereignty prevents the courts from examining competing claims of sovereignty put forward or argued as a legal or historical justification for an indigenous right where it threatens the constitutional or legal structure (particularly of property relations) of the state. In addition, as the locus of sovereignty is in the elected branches (*i.e.* the executive and legislative branches) the courts become acutely sensitive to separation of power issues and the "politicization" of the judicial process which these claims can entail. As Chief Justice Marshall wrote:

> Indian inhabitants are to be considered merely as occupants...However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be it adopted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of Justice.[61]

Competing or alternative conceptions of indigenous sovereignty, self-determination and use-rights must be compatible with dominant notions of the state's political and legal sovereignty.

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[60] *Schooner Exchange v. McFaddon & Others*, 11 U.S. (7 Cranch) 116 at 136 (1812).
[61] *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 at 591-2 (1823).

The courts' jurisprudence must by necessity be sensitive to the dominant society. In their treatment of sovereignty, each country's judiciaries have always held back from questioning the issue of sovereignty or questioning the legitimacy of pervasive settler power. "This" according to Russell, "[t]his is the hard residue of imperialism in this evolving jurisprudence."[62]

IV. Organization of Chapters

This thesis compares the judicial constructions and the legal law of aboriginal hunting, fishing and gathering rights from the perspective of constitutional and institutional conflicts. The analysis outlines the major parameters of judicial decision-making on hunting, fishing and gathering rights and suggests that historical and present-day case law has been profoundly informed by historical disputes which had little to do with aboriginal rights. Individual legal decisions are used as springboards to a more general comparative discussion of the effects constitutional or institutional conflict have on aboriginal rights. The analysis therefore is not meant to be an exhaustive study of the black letter rules relating to hunting, fishing and gathering rights.

Chapter One discusses the underlying dynamic that informed the colonial project and the manner in which hunting, fishing and gathering rights are formulated and judicially protected. It hypothesises that the political, economic and cultural logic behind colonialism sought to eliminate aboriginal possessory interests and any legally protected uses. To the extent the rights are judicially protected is because some aboriginal possessory interests were bound up in various constitutional disputes and the courts ruled in favour of those parties whose constitutional interests included some legal protection for aboriginal interests. Chapter Two discusses the comparative case law method used in this thesis. Chapters Three and Four

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[62]Peter H. Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61 Sask.L.Rev. 247 at 275.

discuss hunting, fishing and gathering rights in the United States and Canada and argue that the present judicial understanding of the source, content and scope of these rights as well as judicial enforcement of aboriginal claims in this area was influenced by federal/state and federal/provincial conflicts. Chapter Five discusses these rights in New Zealand. It argues that New Zealand did not experience the types of conflict found in Canada and the United States. It is hypothesized that the reason New Zealand saw little judicial decision-making in this area was because the logic of colonialism and the relative consensus of the nationalist project privileged unitary notions of national rights despite the attempt to integrate Maori with the Treaty of Waitangi. The chapter concludes that New Zealand courts have nevertheless incorporated some aspects of the Treaty of Waitangi and common law aboriginal rights despite legislative attempts to eliminate the historic rights and interests. Chapter Six will contain an assessment of how the law of hunting, fishing and gathering rights has been affected by constitutional disputes in the three states. It argues that a further extension of aboriginal rights in Canada, the United States and New Zealand would require additional constitutional innovation. Moreover, it emphasizes that these constitutional innovations and judicial approaches to aboriginal rights reflect underlying fundamental differences in how the polity and constitutional nature of the state is understood by judicial decision-makers.

Chapter Two Judicial Decisions and Comparing Jurisdictions

This thesis analyzes judicial decision-making about hunting, fishing and gathering rights with three themes in mind. First, the construction of this jurisprudence was dependant upon internal developments within the law and legal doctrine as well as the external historical context. Second, an historic context which has profoundly affected how and why the law developed involved constitutional disputes among various levels of government or political elites about their respective power and jurisdiction. The disputes not only concerned the relative power and authority of the various actors but also involved philosophical debates about the source and nature of sovereignty, federalism, and liberal democracy. The status of indigenous peoples and the scope of their rights under the common law and treaties that were recognized and incorporated into the state legal systems were bound up in the process. But for these constitutional disputes, the logic of colonialism and the "great land rush" which accompanied the settlement of the United States, Canada and New Zealand could have been expected to preclude the legal enforcement of pre-existing aboriginal possessory interests as envisioned by the doctrine of common law aboriginal rights. Since Native American interests were successfully championed by federal authority in the United States these disputes entrenched legal protections for Native Americans. Similar federal efforts in Canada to advance federal authority by advocating aboriginal interests were turned aside by the courts. The result was that aboriginal interests and rights could not be protected by treaty and were given only minimal common law protection. Until the *Constitution Act, 1982* the courts had little impact delineating the source, content and scope of aboriginal rights. In New Zealand, these types of disputes did not occur, therefore little of the common law doctrine of aboriginal rights has been recognized by the courts and the Treaty of Waitangi has not provided a legal basis for Maori claims. Third, aboriginal law, legal doctrine and the legal

tradition of each state as well as the political constellations and institutional structure of the state that developed out of these disputes delimit the scope of judicial reasoning today.

I. The Cases

Because the law and legal doctrine of hunting, fishing and gathering rights is so intertwined with history and context, this thesis briefly explores the history and reasoning of a recent illustrative decision by the highest court within each jurisdiction to examine the source, content and scope of hunting, fishing and gathering rights. An examination of the reasoning used as well as the particular and general historic context opens a window to reveal common and divergent legal reasoning across the judiciaries while elucidating underlying political and legal assumptions in the legal traditions and constitutional systems of each state.

A. Canada: *R. v Marshall*

The 1999 case *R. v. Marshall* is part of the ongoing Mi'kmaq efforts to assert hunting, fishing and gathering rights in the Atlantic Provinces. [1] In *Marshall I* the Supreme Court of Canada considered whether a member of the Mi'kmaq Tribe had treaty rights to catch and sell eels without complying with federal and provincial regulations. The defendant claimed that his fishing with a net prohibited by provincial regulation and the unlicensed sale of eels were protected by a 1760 treaty between the Mi'kmaq and the British. The Crown argued that the treaty had either been extinguished or did not provide for the unregulated fishing and sale of eels. The Court ruled that Marshall had a treaty right to take and trade eels in order to sustain a "moderate livelihood."[2] It held that Under the *Constitution Act, 1982* any infringement or regulation needed to be specifically justified and tailored to interfere as little possible with the aboriginal right.

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[1] *R. v Marshall,* [1999] 3 S.C.R. 456 [*Marshall I*].
[2] *Ibid.* at 502.

B. New Zealand: *Te Runanga o Muriwhenua Inc. v. Attorney-General* and *Te Runanga o Wharekauri Rekohu Inc v. Attorney-General*

Te Runanga o Muriwhenua v. Attorney-General and *Te Runanga o Wharekauri Rekohu Inc v. Attorney-General* concerned Maori fishing rights.[3] Various fisheries acts in New Zealand had contained provisions protecting Maori Fishing Rights. The *Fisheries Act 1983*, s. 88(2) provided that "Nothing in this Act shall affect any Maori fishing rights." The New Zealand government introduced a quota management system for its commercial fisheries in 1986. The new Act allowed the minister to set commercial quotas "after allowing for Maori, traditional, recreational and other non-commercial interests in the fishery." The Muriwhenua iwi, which had asserted a treaty claim for fishing rights in front of the Waitangi Tribunal filed suit arguing that the Crown's new fisheries regime breached its obligations under common law and the Treaty of Waitangi. The iwi sought an interim declaration preventing the Minister from issuing additional quota. The High Court ruled in favour of the plaintiffs. As an interim solution the Crown then enacted the *Maori Fisheries Act 1989* which transferred quota and money to the newly created Maori Fisheries Commission. Additional Maori plaintiffs filed suit against the Crown. In *Muriwhenua* the Court of Appeal consolidated the cases and upheld the High Court's interim declarations concerning the Maori interest in the fisheries. In this essentially procedural decision, President Cooke strongly suggested that Maori fishing rights, as a separate part of native title, had not been extinguished.

In 1992 the Government and some Maori representatives agreed to a global fisheries settlement, which the Government implemented in the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*. The settlement repealed s. 88(2) of the *Fisheries Act 1983* but it provided money for Maori and Maori-owned entities to purchase additional quota. *Te Runanga o Wharekauri Rekohu Inc v. Attorney-General* arose due to dissatisfaction about the

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[3] *Te Runanga o Muriwhenua Inc. v. Attorney-General*, [1990] 2 N.Z.L.R. 641 (N.Z.C.A.) [*Muriwhenua*]; *Te Runanga o Wharekauri Rekohu Inc. v. Attoney-General*, [1993] 2 N.Z.L.R. 301 (N.Z.C.A.)[*Sealords*].

settlement among some Maori groups. In the decision President Cooke found that in spite of its defects the fishing settlement was "thoroughly consistent" with the solicitous approach to Maori aboriginal rights recognized by the *Muriwhenua* Court, other New Zealand case law and commonwealth case law. Under the circumstances, the willingness of the Crown and Maori representatives to arrive quickly at a mutually beneficial arrangement that would effectuate the evolving Maori interest in the commercial fishery was an opportunity. Failure to take advantage of this opportunity Cooke, P. held "might well have been inconsistent with the constructive performance of the duty of a party in a position akin to a partnership."[4] As time was of the essence and the New Zealand legislature had the requisite constitutional authority to enact the settlement, the Court dismissed the complaint.

C. United States: *Minnesota v. Mille Lacs Band of Chippewa Indians*

The Lake Superior Chippewa's fight for off-reservation hunting, fishing and gathering rights under the Treaty of 1837 in Wisconsin and Minnesota was the issue in *Minnesota v. Mille Lacs Band of Chippewa Indians.*[5] Article 5 of the1837 Treaty between the Chippewa and the United States provided: "The privilege of hunting, fishing, and gathering of wild rice…in the territory ceded, is g[ua]rantied to the Indians during the pleasure of the President of the United States." In 1850 President Taylor issued an Executive Order revoking the article and ordered the Chippewa out of the treaty territory. The Chippewa refused to move. The United States subsequently established reservations in Minnesota and Wisconsin but both states enforced their natural resource law throughout the ceded territory.[6] Minnesota argued that Chippewa rights under the treaty had been extinguished either by the 1850 Executive Order,

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[4] *Sealords, supra* note 3 at 307.
[5] *Minnesota v. Mille Laces Band of Chippewa Indians,* 526 U.S. 172 (1999)[*Mille Lacs*].
[6] The right to hunt, fish and gather under the 1837 Treaty in the Wisconsin portion of the ceded territory was upheld by the Seventh Circuit Court of Appeal in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983). The State of Wisconsin chose not to be party to *Mille Lacs*. The plaintiff Chippewa tribes in *Voigt* intervened in *Mille Lacs* as an adverse determination of their rights in the Minnesota territory could have affected their Wisconsin rights.

by later treaties with the Chippewa, or upon Minnesota's admission to statehood. The United States Supreme Court held that the 1850 Executive Order was invalid and that Minnesota statehood and the later treaties did not extinguish Chippewa treaty rights. The Chippewa could hunt, fish and gather in the ceded territory subject to the state's authority to "impose reasonable and necessary non-discriminatory regulations…in the interest of conservation."[7]

II. Case Law and Context

A. Legal Archaeology and Thick Description

The focus of comparison and the basis for the generalisations in this thesis is reported case law. According to Simpson:

> Cases need to be treated as what they are, fragments of antiquity, and we need, like archaeologists, gently to free these fragments from the overburden of legal dogmatics, and try, by relating them to other evidence…to make sense of them as events in history and incidents in the evolution of the law.[8]

An approach that emphasizes the uniqueness and historicity of individual cases has been called "legal archaeology" by Simpson and others.[9] It is a way of approaching legal history that "focuses on a specific case and reconstructs its historical and social context…from clues embedded in the opinion, the trial transcript and other contemporaneous documents."[10] It is not an attempt to explain social phenomena by "weaving them into grand textures of cause and effect" but an approach to law which looks for interaction of "orientating notions," "legal sensibilities" and institutional constraints within the scope of a single case.[11]

The approach has a long pedigree and has been a vital part of legal scholarship. Scholars have used it to reveal political strategies and power relations hidden beneath the

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[7] *Mille Lacs, supra* note 5 at 205.
[8] A.W.B. Simpson, *Leading Cases in the Common Law* (London: Clarendon Press, 1995) at 12.
[9] *Ibid*. at 12; Debora L. Threedy, "A Fish Story: Alaska Packers' Association v. Domenico" (2000) 2000 Utah L. Rev. 185.
[10] Debora L. Threedy, "Symposium: Subversive Legacies: Learning From History/Constructing the Future: Unearthing Subversion with Legal Archaeology" (2003) 13 Tex. J. Women & L. 133 at 135.
[11] Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 215-34.

ostensible neutrality of the law and to elucidate ways in which social groups have been marginalized.[12] The method assumes that there is much to be learned about cases and legal systems, particularly regarding the generation and application of decisional rules that never appears in the written decision. The knowledge gained can shed additional light on the law, on legal and political institutions, and on society. It can lend support to anecdotal evidence and criticisms that there are systemic weaknesses in the legal system such as inequality of legal resources, bias of fact finders, and the inability of legal remedies to address the grievances of the parties or the issue in a dispute.

Legal archaeology is useful in evaluating how contingency, personalities and interpretive or cultural predilections affect law. Walker has shown how cultural paradigms provide important insights to explain individual case outcomes and legal history.[13] He analyzes four cases decided by the Supreme Court of Canada to show how cultural factors influenced its decisions.[14] He argues that at the time each case was heard the Canadian legal system, like Canadian society generally, understood racial categories and the conduct of people of different races in a way that would be considered "racist" today. He found that the courts used considerable creativity in the decisional process despite the doctrine of *stare decisis* or their formal ascription to a non-activist methodology. The result was that the litigants, who would have been vindicated under the Canadian legal paradigm prevailing today, lost.[15] The Supreme Court of Canada echoing the dominant "legal sensibility" that legitimated the racial and ethnic stereotyping, could not construe the facts and the plaintiff's rights-based legal arguments as implicating legally enforceable grievances.

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[12] E.P. Thompson, *Whigs and Hunters: the Origin of the Black Act* (London: Allen Lane, 1975).
[13] James W.St.G.Walker, *Race Rights and the Law in the Supreme Court of Canada Historical Case Studies* (Toronto: Osgood Society for Canadian Legal History and Wilfred Laurier University Press, 1997).
[14] *Quong Wing v. The King* [1914] 39 S.C.R. 440; *Christie v. York Corporation* [1940] S.C.R. 139; *Noble and Wolf v. Alley* [1951] S.C.R. 64; *Narine-Singh v. Attorney General of Canada* [1955] S.C.R. 395.
[15] *Noble and Wolf* was a victory for the Jewish plaintiffs but the victory not on the public policy issue.

Walker applies the theoretical framework of Geertz. For Geertz, law is "not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but part of a distinctive manner of imagining the real."[16] Law is "local knowledge" and this local knowledge subsumes a multitude of assumptions and explanations which are considered "common sense" in society. Legal decisions are not simple or mechanistic but are infused with a "legal sensibility" which delineates the "notion of what constitute[s] a relevant question, a legitimate analogy, an acceptable argument, as well as an appropriate range of answers."[17] Legal sensibility rather than positivist rational analysis or subservience to precedent and the common law is the primary determinant of legal decision-making.

As a method of comparison, Geertz's approach suggests that local culture and local law transcends any positivist universalizing tendencies that legal analysis may have. Historic and contemporary legal analysis, whether internal or comparative, is situationally specific observation -- of individuals, social practices or whatever within the context that is important to the observer -- from which legal knowledge and judicial decisions are constructed to decide the case at hand. Laid over the specific context are the generalized norms and practices which permeate the legal culture.

B. Comparing Cases through Context and Legal Doctrine

It is difficult to disagree with the notion that law and individual cases should be understood within the context of the culture, as well as the practitioners' psychological and ideological predilections within history. The problem with such an approach is that concepts such as "culture" or "sensibility" are not bounded in an analytical sense; and it is difficult to identify what particular aspects of a culture impact the legal system or determine what aspects of the

[16] Geertz, *supra* note 11 at 173.
[17] Walker, *supra* note 13 at 313, f n. 65.

legal system are representative of the larger culture. The approach also tends to over-emphasize and privilege the interpretive aspects of describing and constructing legal facts as they relate to various cultural norms, such as racial sensibility or social standing, over the construction of legal facts based on contending legal and normative paradigms, such as freedom of contract and individual rights; while ignoring the autonomous processes of positive doctrinal systematization found within the law itself.[18] These difficulties are magnified in a comparative context.

An over-emphasis on single case studies and the interpretive aspects of the law may therefore mischaracterize the institutional, cognitive and logical aspects of the law that are also part of legal analysis. The description of the law is no doubt influenced by the norms, perceptions, convictions, and concepts of practitioners but there is usually some agreement (if only from legal precedent) about the existence and meaning of legal rules within a legal doctrine as well as the process by which the facts are transformed into legal "facts" and concepts. The construction of legal facts and legal sensibility is not independent of these legal processes and structure. Rather, it is embedded within it because it is the context of the law and legal doctrine that provides a conceptual framework within which the interpretive and descriptive process in carried on.[19] "Rules and functions operate," Bell argues, "as part of a tradition of legal ways of doing things which has various complex relationships to the kind of society in which it operates and the functions it accords to law."[20] Within this tradition, norms, principles, rules, legal concepts as a product of positive law and historical elaboration of positive law, are as important as general "cultural sensibilities" when actual events are

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[18] David Nelken, "Comparative Sociology of Law" in Reza Banakar and Max Travers, eds., *An Introduction to Law and Social Theory* (Oxford: Hart Publishing, 2002) 329 at 337.
[19] Mark Van Hoecke and Francois Ost, "Legal Doctrine in Crises: Towards a European Legal Science" (1998) 18 L.S. 197.
[20] John Bell, "Comparative Law and Legal Theory," in Werner Krawietz, Neil MacCormick & Georg Henrik von Wright, eds., *Prescriptive Formality and Normative Rationality in Modern Legal System* (Berlin: Dunker & Humblot, 1994) 19 at 24.

transmogrified into legally significant facts that are in turn subsumed within the larger legal system.

Within the common law legal system the analysis, generalization, manipulation and application of rules within their internal legal context are essential theoretical activities. A search for commonality and structure within a particular historical moment upon which to apply generalizable and public rules is related to the theoretical activity of transforming particular context-driven disputes into general rules and conceptual structures of legal analysis; general rules and conceptual structures that are essentially stripped of their context. The rules become "in a generalized state, a part of the context in which future cases will arise and be decided."[21] The reasoning process may move outward from the facts but at some point a fact is matched against a corresponding rule or legal doctrine. This process can establish an intellectual terrain and jurisprudential logic which may purposefully incorporate and direct social life or, conversely, may establish a pattern of legal precedents "set more by inertia and undirected" but which nevertheless affects social life.[22] In effect, while law is related to a host of cultural, socio-economic and political factors it operates in a manner that does not always directly mirror the cultural, economic, and political forces within a society. As noted by Thompson:

> First, analysis of the eighteenth century (and perhaps other centuries) calls in question the validity of separating of the law as a whole and placing it in some typological superstructure. The law when considered as an institution (the courts, with their class theatre and class procedures) or as personnel (the judges, the lawyers, the Justices of the Peace) may very easily be assimilated to those of the ruling class. But all that is entailed in "the law" is not subsumed in these institutions. The law may also be seen as ideology or as a particular rules and sanctions which stand in a definite and active relationship (often a field of conflict) to social norms; and finally, it may be seen simply in terms of its own

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[21] Patricia D. White, "Symposium: Afterward and Response: What Digging Does and Does Not Do" (2000) 2000 Utah L. Review 301 at 303.
[22] James Willard Hurst, *Law and Economic Growth The Legal History of the Lumber Industry in Wisconsin 1836-1915* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1964) at 5.

> logic, rules and procedures – that is, simply as law. And it is not possible to conceive of any complex society without law.[23]

In the context of comparing hunting, fishing and gathering rights how does one integrate the use of individual cases and the natural specificity which accompanies such a methodological choice with those elements of law that are distinctly legal, *i.e*. legal rules and the methodology and jurisprudence of the courts, while exploring the interaction of these distinctive elements and legal "things" within the wider society in which they are embedded?[24] First, the dispute must be looked at as "configuration" rather than an isolated example of a particular historical moment. The seeming fact-specific inquiries and decisional turns in these disputes mask significant essentialist and categorical thinking by the judiciary. Second, the analysis must not focus too much on a particular constellation of present day and historical fact or on *mentalités* etc. but should utilize the concept of "legal doctrine." Legal doctrine as utilized by practitioners incorporates both interpretive and positive elements in the description and systematisation of the state of law over time. In aboriginal and treaty disputes, the doctrine includes a constellation of assumptions regarding: the description and classification of present day and historical evidence, the interpretive methodologies that are used by the courts, a theory of legal sources (inherent tribal law, the common law and statute law), and assumptions concerning the state's constitutional structure and legal system.

1. Cases as Configurations

Traditional comparative law analysis assumes that cultural and interpretive uniqueness is relatively unimportant. Societies face analogous problems and the law functions in similar

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[23] Thompson, *supra* note 12 at 260.
[24] Robert W. Gordon, "Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography" (1975) 10 Law & Soc'y Rev. 9 at 44-55.

ways based on similar principles to solve these problems.[25] Watson, for example, in his examination of the transfer and dissemination of legal rules across states has argued that legal change has little or nothing to do with change in the larger society. Contrary to what he describes as the "mirror" theory of law and legal change, (*i.e*. that nothing in the law is autonomous and every aspect is moulded by the economy, polity and society,) similarities among the law of different systems may be the result of borrowing. This "transplant of one legal idea or institution in a jurisdiction from another" is neither the result of similar socio-economic or political influences on the different legal systems nor is it the result of social interaction and influence across the state legal systems.[26] The upshot is that rules can and should be studied in a comparative context without undue concern for other factors unique to the society and culture.

On the other hand, comparative law analysis can assume that the law-society relationship is so unique and culture-bound that the analyst can understand legal rules and doctrine only if she "immerses" herself within the culture and legal tradition. Legal rules embedded within different legal systems are incommensurable. There is no common core of legal concepts across legal systems.[27] The process of comparison is an exercise premised on the idea that the comparative task should expose (and accept) "irreducible incomparables."[28]

> The immersion approach in comparative legal analysis suggests the importance of trying to understand foreign legal cultures in an untranslated form; i.e., through the prisms that shape perceptions in the target legal culture. This implies both an expansion and alteration of the comparatist's prisms. The immersion approach ideally involves an expansion of perceptual prisms rather than an exchange. In other words, the original legal culture should be viewed in untranslated form, but

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[25] On the functionalist method in comparative law see Richard Hyland, "Comparative Law" in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory* (Cambridge, Mass.: Blackwell Publishers, 1996) 184 at 188.

[26] Alan Watson, *Legal Transplants: An Approach to Comparative Law,* 2nd ed. (Athens, Ga.: University of Georgia Press, 1993) at 96. For an examination of Watson's logic see William Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants" (1995) 43 Am. J. Comp. L. 489.

[27] Rudolf B. Schlesinger *et al.*, eds., *Comparative Law,* 6th ed. (New York: Foundation Press, 1998) at 42.

[28] Vivian Curran, "Cultural Immersion, Difference and Categories in US Comparative Law" (1998) Am.J.Comp.L. 43 at 57-8.

> comparatists need to retain their stance as outsiders even as they acquire insight into the insiders' view. Otherwise, they will fail to perceive with sufficient acuity those fundamental, powerful aspects of target legal cultures which are so entrenched as to be unarticulated and even unconscious.[29]

However, this approach seemingly leads to a comparative nihilism because it posits that law is so bound up in the larger culture and language that comparative understanding and comparative methodology is limited if not impossible.

Contrary to these functional and cultural approaches, this thesis suggests that the comparative analysis should proceed in the sense that it looks at the specific dispute and the legal doctrine and law of each state, (each "case" so to speak) in their entirety or "as a whole," *i.e*. in a configurative sense.[30] "To make meaningful comparisons of cases as wholes, the investigator must examine each case directly and compare each case with other relevant cases."[31] By analysing the similarities and differences in configurations, *i.e.* as combinations of characteristics, evidence based on interrelationships among various elements within the entire configuration can be pieced together in a manner sensitive to chronology. Similar or different outcomes can be explained in a manner that offers opportunities for limited historical generalizations.[32] The configurations situate the decision within the larger social and political context. The process assumes that particular legal disputes and a range of case law in their entirety must make sense in history and are embedded, either positively or negatively, within the legal doctrine or the legal tradition today -- even if the decision offends our present-day sense of justice or the particular historical facts suggest "a haphazard muddle of indifference, vanity, incompetence, cruelty, ruling-class hypocrisy, and professional self-

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[29] *Ibid.* at 57-8.
[30] It is important to note here the use of the term "case" does not refer to a "legal case" but a unit of analysis. The unit of analysis in this thesis is not an individual case as evidenced by a judicial decision but the contemporary law and legal doctrine of hunting, fishing and gathering law in the particular state as revealed by an examination of a series of written opinions, statute and regulations.
[31] Charles C. Ragin, *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies* (Berkeley: University of California Press, 1987) at 16.
[32] *Ibid.* at 35.

deception."[33] In effect, the thesis will investigate the particular facts and law of an individual legal dispute as representative of each case in an effort to generalize *within* the case and legal system of the particular state and then *across* the states.

2. Rule-Based Comparison, Institutions and Legal Doctrine

A comparison based on an *a priori* assumption that law is so rooted within its cultural and ideological context such that meaning and the construction of legal reality is entirely ideographic, necessarily involves an investigation into the conscious and unconscious experiences of those practicing the law.[34] Within this "construed reality," the analyst is necessarily precluded from comparing legal rules "as rules" or legal doctrines as part of a rule-based comparison.[35] Such an approach is unwarranted in the disputes and jurisdictions under consideration here. First, the idea that rule-based comparisons are either exclusively premised on analytically distinct categories or on interpretive approaches is overstated, particularly when comparing English language common law legal systems. Indeed, the rise of law as a positivist autonomous system separated from the political and social system is a historical and *cultural* fact. Law as analytically distinct and separated from forces and influences found in the larger society is a part of the Western "mythology of the idea of the separation of powers and the rule of law" which underpins democratic governance.[36]

Second, the idea and conception of law as positive and autonomous may be the result

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[33] Robert W. Gordon, "1997 Survey of Books Relating to the Law: Simpson's Leading Cases" (1997) 95 Mich. L. Rev. 2044 at 2053.
[34] William Ewald, "Comparative Jurisprudence (I): What Was It Like To Try A Rat?" (1995) 143 U. Pa. L. Rev. 1889.
[35] "The law derives from historical experience. So do the forms that the law embraces. Legal practices are not simple acts of accumulation and acquisition that would have taken place over the years or centuries. It would be absurdly reductionist to see legal practices as the mere formulation of rules. What accretion of elements one sees is supported by impressive ideological formations. The law, in its many manifestations, is an incorporative cultural form. Just as culture is a source of identity, *legal practices* are a source of identity. They encode experiences. To my mind, legal practices are very much a reflection of a given culture and of a given legal *mentalité* (in the sense of the interiorized culture)." Pierre Legrand, "Review Article: Comparative Legal Studies and Commitment to Theory" (1995) 58 Mod. L. Rev. 262 at 265-6.
[36] Alan Hunt, "The Problematisation of Law in Classical Social Theory" in Reza Banakar and Max Travers, *supra* note 18 at 17.

of particular strategies of social group interaction in an ever-evolving balance of forces and power which nevertheless is rooted in relatively stable institutional and constitutional arrangements. These institutional and structural constraints are positive, analytically autonomous and influence interpretive activity.[37] Historically the institutional and structural constraints have operated within the state system by structuring the way political and judicial disputes are decided and implemented. They also create the contextual environments that over time provide interpretative models and policy options to decision-makers, interest groups, and litigants.[38] Moreover because it is within these structures that political and legal disputes are articulated and managed, the notion of a conceptually distinct and impartially managed legal system is reinforced through the resolution of disputes.[39]

An analysis of rules and legal doctrine therefore implicates cultural and interpretative aspects of the law and invites an investigation into institutional constraints that operate on the legal system to explain both similarity and difference. For example, Summers' and Atiyah's analysis of the legal systems of America and the United Kingdom found significant differences in the application of various procedural and substantive rules. It found that the manner in which the issue is framed and resolved reveals the underlying differences between the legal systems and the tensions and limitations that exist within each state's constitutional and institutional structure. It also revealed the differing historical approaches or "vision of

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[37] Mark Lichbach, "Social Theory and Comparative Politics" in Mark Lichbach and Alan Zuckerman, eds., *Comparative Politics* (Cambridge: Cambridge University Press, 1997) 239; Peter T. Manicus, *A History and Philosophy of the Social Sciences* (Oxford: Basil Blackwell, 1987).

[38] An institution both generates the context and affects outcomes and the context of decisions, political and legal, in the future. Kathleen Thelen & Sven Steinmo, "Institutionalism in Comparative Politics" in Sven Steinmo, Kathleen Thelen & Frank Longstreth, eds., *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge: Cambridge University Press, 1992) 1 at 10-11. An institution's legal and policy paradigms are self-reinforcing and privilege various historical outcomes based on the timing and sequence of certain events. Paul Pierson and Theda Skocpol, "Historical Institutionalism in Contemporary Political Science" in Ira Katznelson and Helen V. Milner, eds., *Political Science: State of the Discipline* (New York: W.W. Norton & Company, 2002) 693 at 698-706.

[39] For a discussion of how the pluralist theory of law differs from functionalism see David Nelken, "Comparativists and Transferability" in Pierre Legrand and Roderick Munday, eds., *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003) 437 at 446-52.

law" that prevails in each state and the tensions in that vision.[40] These differences are not merely legal or jurisprudential, but are also representative of a "complex set of features defining and expressing a legal culture."[41]

Third, the similarities regarding the indigenous hunting, fishing and gathering, the interdependence among the states' legal systems based on their shared British legal legacy and common law judicial practice suggest that a cultural/interpretative approach would privilege difference to the extent of obscuring commonalities. There is no question that the determination of indigenous issues involves a high level of specificity. The particular aspects of the historic occupation and use of lands and water and the unique characteristics of the indigenous interaction with the settlers are important components of indigenous litigation. Within this fact specific inquiry, generalization is often difficult. As the Privy Council noted in *Amodu Tijani* "[a]bstract principles fashioned a priori are of but little assistance, and are as often as not misleading."[42]

However, the concatenation of historic events and the salience and ubiquity of context should not obscure that fact that the states under consideration share many of the same historical antecedents. Courts in each jurisdiction share similar premises and essentializing assumptions about the nature of indigenous life and settler-indigenous relations. They have similar legal traditions and their aboriginal law has functioned in historically similar ways. For example, the law has been an important tool used to impose settler authority and secure resources for the dominant society in the face of indigenous occupancy of desired territory. Policies have been either directly copied or have been used as templates across jurisdictions. This interdependence and the similar policy objectives of the settler governments, as well as

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[40] Patrick S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions* (Oxford: Clarendon Press, 1987) at 4-5.
[41] Bell, *supra* note 20 at 19.
[42] *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 AC 399 at 404 (P.C.) [*Amodu Tijani*].

similar facts of indigenous existence and government within claimed territories, has led to similar definitions of the legal problems and issues.[43] American Indian law traces its origins to British imperial practice before the revolution. Within the British Empire and the settler colonies, British influences or legal approaches borrowed among the colonies were taken for granted. Law and policy was imposed upon the colonies by the Imperial Crown and Parliament. After *The Royal Proclamation of 1763*, the constitutional responsibility for treating with indigenous peoples was the right of the imperial sovereign. Later, the British Empire sought to have a standard policy for all colonized peoples. It frequently reserved these policy areas for imperial control after the grant of responsible government. Borrowing law, particularly statutes, by local governors and settler legislatures was often cheaper and more expedient than generating completely new law and policies. The routine rotation of colonial administrators among the colonies also resulted in the enactment of similar or identical laws. For example, the Vancouver Island treaties were modelled on similar land acquisition practices in New Zealand.[44] Colonial and national case law in each jurisdiction frequently noted decisions and cited precedents from other common law jurisdictions, including American Supreme Court cases.[45] The link is particularly significant in Canada and New Zealand where the Privy Council addressed the indigenous issues either as the highest domestic court of the colony or in an imperial context. Decisions such as *Amodu Tijani*, have had a significant impact on indigenous law across the Anglo-settler jurisdictions.[46] The internationalization of human rights discourse is the most recent global influence on

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[43] Mark Van Hoecke, "Deep Level Comparative Law" in Mark Van Hoecke, ed., *Epistemology and Methodology of Comparative Law* (Oxford: Hart Publishing, 2004) 165 at 174-85.
[44] Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBCPress, 2002) at 17- 43.
[45] Canadian aboriginal law was, and continues to be, been greatly influenced by the 19th century Marshall decisions. Christopher D. Jenkins, "John Marshall's Aboriginal Rights Theory and its Treatment in Canadian Jurisprudence" (2001) 35 U.B.C.L.Rev. 1.
[46] *Amodu Tijani* concerned the issue of whether a Nigerian chief could claim full compensation as absolute owner under the Land Ordinance of 1903. In the decision Lord Haldane noted that the conditions of each country need to be analyzed but finds that "native title" as a right in land survived the assertion of British sovereignty and that it is cognizable in colonial courts. *Amodu Tijani, supra* note 42 at 402-3.

indigenous domestic law in each jurisdiction.[47]

3. Legal Doctrine and the Systematization of Law

Thus a legal decision is in one sense unique and in another sense representative of larger social, political and legal trends. Each judicial opinion is unique in that it is contingent upon a set of linked historic events, processes and practices as well as individual predilections and choice that exist in a particular time and place. These events, processes, practices and individual choices function both as a cause and an effect upon the decisions. Aboriginal law and jurisprudence is both the outcome and the agency for such factors. But the singular aspects of the decision are mitigated by the operation and use of law and legal doctrine in analyzing, arguing and deciding a particular case within a constitutional and institutional context. This process and the result of describing and systematizing facts, rules and principles and mapping out their correspondence to each other is then used by practitioners in subsequent disputes with little consideration for the context of the previous dispute. The result is further permutations of the doctrine.

A legal doctrine is a set of beliefs about a particular area of the law or factual situation which are logically related and internally coherent. It provides a mechanism or a rule of thumb for deciding legal disputes. Legal doctrines subsume what Samuel has called the "structure of law."

> This structure is not, however a structure of rules. It is the structures that one uses to make sense of the world in which law applies. It is a matter of structuring the facts.[48]

A legal doctrine aims to describe the law and incorporate the facts of the dispute into legally cognizable facts. It also means identifying valid sources, organizing them to establish a

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[47] Catherine J. Iorns Magallanes, "International Human Rights and their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada and New Zealand" in Paul Havemann, ed., *Indigenous Peoples Rights in Australia, Canada, and New Zealand* (Auckland: Oxford University Press, 1999) 235.
[48] Geoffrey Samuel, "Comparative Law and Jurisprudence" (1998) 47 I.C.L.Q. 817 at 827.

hierarchy of authoritativeness, as well as delimiting the process of describing the law as it relates to a certain set of facts. In short, it refers to the result and the process of systematizing a particular area of the law into a conceptual framework. Systematizing means the integration of all these sources and rules into one conceptual framework through interpretation and theory building.[49] This framework is in turn applied in order to describe and process unique factual situations into authoritative law which is both conceived of and applied by practitioners as a coherent ahistoric whole.

The concept of legal doctrine is analogous to Kuhn's idea of a scientific paradigm in that legal doctrines are used to incorporate "facts" into the structure of the legal system and legal tradition through both rational and irrational processes.[50] It determines the kind of arguments and argumentative approaches that are considered acceptable within the legal reasoning process and legal structure.[51] It accommodates the idea that legal facts and rules are always socially and historically situated and legally constructed.[52] That is, the process by which we describe and define a particular fact in the real world and in the legal system in particular, is always one of interpretation. As an interpretive activity, cultural and sociological constructs, or "legal sensibilities" or a "legal vision" are always implicated in legal analysis. The analyst must first describe the facts of the particular judicial dispute. She must then describe, chose and determine the applicable rules or legal doctrine and controlling precedent which control the described facts or preferred outcome.

Yet this legal "construction" which involves a description of facts and rules and controlling precedent is only part of the process. In order to compare law or facilitate legal

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[49] Van Hoecke, *supra* note 43.
[50] Thomas S. Kuhn, *The Structure of Scientific Revolutions* 2d ed., (Chicago: University of Chicago Press, 1970).
[51] Mark Van Hoecke and Francois Ost, "Legal Doctrine in Crises: Towards a European Legal Science" (1998) 18 L.S. 197 at 198-9.
[52] Van Hoecke, *supra* note 43 at 167-72.

analysis, the law must be organized into a conceptual structure or model. There is an internal structure to the law that displays symmetries and patterns that have been imposed upon it by practitioners or that is the result of conscious legislative and regulatory activity. The systematization of the rules within a theoretically coherent and meaningful system is the other aspect of legal doctrine.[53] The systematization involves a consideration of the internal organization of the legal system and an incorporation of the rules in a coherent, principled manner. It involves more than the idea that a legal system or legal doctrine should be consistent with the application of its own rules. It organizes historic rules (whether statutory, customary or case law) and principles into a coherent, authoritative, ahistoric decisional framework that is applied to a dispute. This systematization is not external to the law but is internal in that it "deals with law on its own terms, [and] its sources are predominately those thrown up by the legal process…."[54] Legal doctrine must not only organize legal rules but also explain in a satisfactory manner a decisional outcome based on a particular set of facts. It is a crucial part of Simpson's "good or compelling" reasons for a judicial decision.[55]

Within this interpretive and conceptual framework, the explanatory process is inherently comparative.[56] The comparisons go back in time to discuss precedent and the circumstances within which those decisions took place. They range across jurisdictions (either within the federal system or across national states) and across contemporary decisions based upon similar factual situations. As Samuels notes this "[s]ystemic comparison involves the structure and organization of a particular legal area."[57] The process is based upon legal

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[53] Mark Van Hoecke and Mark Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law" (1998) 47 I.C.L.Q. 495.
[54] David Ibbetson, "What is Legal History?" in Anthony Lewis and Michael Lobban, eds., *Law and History Current Legal Issues* (Oxford: Oxford University Press, 2004) vol. 6 at 33 at 34.
[55] Simpson, "Legal Iconoclasts and Legal Ideals" (1990) 58 U. Cin. L. Rev. 819.
[56] See John Merryman, "Comparative Law and Scientific Explanation" in John Merryman, *The Loneliness of the Comparative Lawyer and other Essays in Foreign and Comparative Law* (The Hague, the Netherlands: Kluwer Law International, 1999) 479.
[57] Samuel, *supra* note 48 at 825.

principles and normative values internal to the law itself.

To be sure, the description, conceptualization and perhaps most importantly, authoritativeness, of a particular legal doctrine are all dependant upon various political, social, institutional and pragmatic factors that are outside of the legal system and legal reasoning. The legal community, for example, must be able to ascertain or predict with reasonable certainty how a court would rule in a case where the doctrine was applicable. The legal grounding of much of British, American and colonial relations with aboriginal peoples was due to military weakness (as well as humanitarian and moral considerations) *vis-à-vis* the tribes and has been particularly susceptible to judicial dispensation once the colonial authority had acquired enough power to ignore the treaties and contracts that it had used to justify its earlier occupation. Values "external" to the legal system and legal reasoning have been particularly salient in the colonization process and extension of British authority over indigenous peoples. Nevertheless, an important normative component of the rule of law and judicial decision-making is that the application of the law should be facially neutral and the use of doctrinal paradigms to organize and justify judicial decisions doctrinal facts is an important public component in legal decision-making.[58] Facts and rules need to be interpreted and described in a plausible manner. The systematization of rules within a doctrine must be: logical (deductively and inductively), be in accord with present needs, not do great violence to precedent, or not patently contradict historical fact.[59] In the area of aboriginal law -- where the legal process was often used for blatantly immoral purposes or as an instrument of unadulterated power -- the law as set forth in judicial decisions, for good and for bad, is

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[58] E.P. Thompson coming at the issue from a different perspective notes: "If a law is evidentially partial and unjust, then it will mask nothing, legitimise nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just." Thompson, *supra* note 12 at 263.

[59] Whether or not judicial outputs are more the result of idiosyncratic personal interpretations of judges or the contingencies of the trial process, or whether judicial decision-making is the result of institutional process and imperatives is not addressed in this thesis.

nevertheless incorporated within legal doctrine such that further innovations in favour of aboriginal interests can lead to apposite tortured reasoning. Often the “bad” law that purportedly came out of these judicial decisions nevertheless is construed as authoritative and efficacious as a matter of law. As law it must be considered by the courts when implicated as precedent unless overruled.

Chapter Three The United States

I. Introduction

American courts have held that off-reservation hunting, fishing, and gathering rights are dependant either upon the tribe possessing the underlying aboriginal title to a territory or the result of federal treaty or statutory guarantees relating to a particular territory.[1] Once the treaty right to a territory is recognized, or occupancy and use is recognized as "Indian Title" in judicial proceedings or by treaty, usufructuary rights are included within the panoply of uses to which the territory can be put or which can be reserved by treaty.[2] The rights are so bound up and such an intrinsic part of the "larger rights possessed by the Indians" resulting form tribal occupation and possession" that the Supreme Court in the seminal case *United States v. Winans* compared their importance as equivalent to "the atmosphere they [the Indians] breathed."[3]

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians then the atmosphere they breathed."

As such, they have been explicitly or impliedly included in numerous treaties, statutes, executive orders or agreements with tribes that are later approved by statute.

Because the tribes, the federal government and the states have an overlapping sovereignty within the American federation, the jurisprudential approach to off-reservation usufructuary rights has been subsumed within the larger issues of Indian land title, treaty

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[1] This chapter concerns Native American hunting, fishing, and gathering activities that occur outside of the reservation or Indian Country as defined in 18 U.S.C.A §1151 (West 2000) which provides: "Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

[2] *State v. Coffee*, 97 Idaho 905 at 908 (Idaho Sup. Ct. 1976).

[3] *United States v. Winans*, 198 U.S. 371 at 381 (1905) [*Winans*].

rights and federalism. [4] Together these areas have undergone numerous changes throughout American history but five central doctrinal elements have been maintained since the first U.S. Supreme Court decision involving Indian land *Fletcher v. Peck* was decided.[5] First, the tribes are independent entities that possess inherent sovereignty.

> The powers of Indian tribes are, in general, "inherent powers of a limited sovereignty which has never been extinguished." Before the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.[6]

This sovereignty, while subject to complete extinguishment and regulation by Congress, nevertheless remains an independent source of authority over tribal members and land. It can also provide a basis for the replacement of state regulation with tribal regulation of off-reservation usufructuary activities. Second, the federal government has plenary and exclusive authority over Indian tribes.[7] "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes."[8] Third, the power to regulate Indian tribes is completely federal and states are excluded from extending their jurisdiction and regulation to Indian tribes and land unless specifically authorized by Congress. As Justice O'Connor writing for the majority put it in *Mille Lacs v. Minnesota*:

> Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making.[9]

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[4] I will use the terms "Indian(s)" or "Native American(s)" interchangeably in this chapter. When discussing the national and state law concerning Indians I will use the term Indian Law. Due to the unique legal and historical situations in Alaska and Hawaii, I will not be considering hunting, fishing, and gathering issues in those states.
[5] *Fletcher v. Peck,* 10 U.S. (6 Cranch.) 87 (1810)[*Fletcher*].
[6] *United States v. Wheeler*, 435 U.S. 313 at 322-3 (1978).
[7] The major sources of federal authority over the tribes are the commerce clause, the treaty power, the property clause and the trust relationship that the federal government owes the tribes due to their dependant status. Nell Jessup Newton, "Federal Power over Indians: Its Sources, Scope and Limitations" (1984) 132 U. Pa.L.Rev. 195.
[8] *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 at 764 (1985).
[9] *Minnesota v. Mille Lacs Band of Chippewa Indians*, (1999) 526 U.S. 172 at 204 [*Mille Lacs*].

Fourth, the anomalous position of tribes arising from their prior occupation, possession and defence of territory in North America coupled with the inapplicability of Anglo-American legal and constitutional categories to their existence, has given rise to federal fiduciary and trust obligations towards the tribes and tribal property. These obligations interpose federal authority between the tribes and the states and provide a legally enforceable standard on federal action.[10] Finally, the states continue to have the authority to regulate off-reservation usufructuary activities for conservation and safety purposes provided the regulations do not discriminate against tribal harvesters.[11]

Despite treaty assurances and purportedly clear legal authority based on cases such as *Worcester v. Georgia* and *United States v. Winans*, the legal recognition of aboriginal and treaty rights outside of the reservation boundaries has been a relatively a recent phenomenon. There have been contentious political and doctrinal disputes involving the extent to which the rights continue to exist and the extent the state can regulate the rights in specific circumstances. The historic inability of tribal members to exercise their usufructuary rights outside the reservation has been in part due to the vigorous extension of state jurisdiction based on the public trust and Equal Footing doctrines as well as state conservation efforts to protect wildlife resources for non-Indian exploitation. State efforts have often been given currency by federal indifference towards its fiduciary and treaty obligations or the federal government's implementation of destructive assimilative policies such as the 1887 Dawes Act.

This chapter will examine the American doctrine of hunting, fishing, and gathering through the lens of the Chippewa's successful fight to exercise the usufructuary rights in Minnesota, Michigan and Wisconsin under the 1837 and 1842 treaties. In the United States

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[10] *United States v. Kagama*, 118 U.S. 375(1886) [*Kagama*]; *United States v. Mitchell*, 463 U.S. 206 (1983) [*Mitchell*].
[11] See William C. Canby, Jr., *American Indian Law in a Nutshell* (St. Paul, Minn.: West Group, 1998) at 1-3.

the doctrine seeks to balance the assertion of national, state and tribal sovereignty within a federal system where constitutional authority over Indian affairs is vested in the federal government. This nexus has lent itself to creative judicial decision-making. The courts have sought to describe and systematize specific historical facts and contexts into more general constitutional assumptions and rules in an area where there has been little textual support -- either in the constitution, in legislation or in treaties -- for the rights. After an initial discussion of the history of American-Chippewa relations and state law regulating Indian hunting, fishing and gathering, I will examine the 1999 Supreme Court decision *Minnesota v. Mille Lacs Band of Chippewa Indians*.[12] Justice O'Connor, writing for the *Mille Lacs* majority held that that the Chippewa continue to enjoy off-reservation hunting, fishing and gathering rights in territory ceded in the 19th century. The state government could only use its authority over natural resources and individual tribal members outside of reservation to "impose reasonable and necessary non-discriminatory regulations…in the interest of conservation."[13] Part IV of the chapter will then discuss the major elements of the American doctrine of hunting, fishing and gathering rights. After this discussion, I will argue that the

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[12] The procedural history of the *Mille Lacs* case is complex. After Mille Lacs Band initially sued the state in 1990, nine Minnesota counties, six landowners and the United States intervened. The District Court bifurcated the case and ruled on various cross-motions for summary judgment. This decision is found at 853 F. Supp. 1118 (D. Minn. 1994) and is commonly called *Mille Lacs I.* After an aborted settlement with the State of Minnesota the Trial Court held that the usufructuary rights under the 1837 Treaty continue to exist is found at 861 F. Supp. 784 (D. Minn. 1994). It is commonly called *Mille Lacs II*. After the *Mille Lacs II* decision the Wisconsin Chippewa intervened and the state moved for summary judgment arguing that the Wisconsin bands claims were barred by previous litigation before the Court of Claims and the Indian Claims Commission, as well as the arguing the 1842 Treaty extinguished their 1837 rights. The District Court denied all of Minnesota's and other defendant's arguments. This decision is called *Mille Lacs III* and is found at 3-94-1226 (D. Minn). The next event in the litigation concerned the intervention of the Fond du Lac band. In 1992 Fond du Lac band brought a separate claim against Minnesota claiming rights under the 1837 and 1854 Treaties. In March 1996, the District Court held that the Fond du Lac Band retains rights to hunt, fish, and gather under both the 1837 and 1854 Treaties. The *Mille Lacs* Trial Court then consolidated the portion of the Fond du Lac case dealing with the 1837 treaty. The Bands and the State had stipulated to Conservation Code and Management Plan under which tribal hunting, fishing and gathering would be regulated. The remaining issues were submitted on cross summary judgment motions where the court rejected making a further allocation of resources affected by the regulations and excluded certain privately held lands where the treaty right may be exercised. This decision is called *Mille Lacs IV* and it is found at 952 F. Supp. 1362 (D. Minn. 1997). The entire case (Phase I & II) was then appealed to the 8th Circuit Court of Appeals which affirmed the District Court. This decision is found at 124 F.3d 904 (8th Cir. 1997).

[13] *Mille Lacs*, *supra* note 9at 297.

present contours of the doctrine are the result of institutional conflicts between the federal government and the states that has had the effect of creating a federal guarantee for residual tribal sovereignty while at the same time reinforcing federal dominance in the American federation.

II. The American-Chippewa Relationship in Minnesota and Wisconsin

A. American Indian Policy and the Chippewa Treaties

After the War of Independence, American Indian policy built on British and colonial precedent. While often honoured only in the breach, the policy presumed that Indian land cessions would be obtained by purchase and that inter-tribal relations were not subject to colonial jurisdiction without consent of the tribe. Prior to 1754, when the British appointed North American imperial superintendents to manage political relations between the British and the Indians, the colonial governments had primary responsibility for Indian affairs. They negotiated their own treaties, developed policies and rules concerning land acquisition and extended their jurisdiction over particular tribes and Indians based on their relationship to the colonial government.[14] *The Proclamation of 1763* sought to centralize colonial-Indian relations in the imperial Crown. It established land purchasing procedures, required licenses and bonds for Indian traders and sought to establish a boundary between settled areas and tribal lands. Nevertheless, the responsibility for interpreting and enforcing legal rules (from whatever source) continued to be the responsibility of local officials such that in practice

[14] Alden T. Vaughan, *New England Frontier; Puritans and Indians, 1620-1625* (Boston, Mass.: Little, Brown, 1965); Yasi Kawashima, "Jurisdiction of the Colonial Courts over the Indians in Massachusetts 1689-1763" (1969) 42 New England Quarterly 532; Mark D. Walters, "Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal and Customary Laws and Government in British North America" (1995) 33 Osgoode Hall L.J. 785.

there remained considerable variation among the colonies concerning the scope of Indian rights recognized. [15]

The 1781 Articles of Confederation reflected a mixture of both the centralizing impulse found in late pre-revolution imperial policy and the earlier colony-specific approach.[16] Overlaying the jurisdictional bifurcation was the early attitude of the successful revolutionaries that Indian tribes were "conquered" peoples who had no rights but those granted them by the newly independent states or national government. Early Confederation Congressional committee reports emphasized that the "right of soil" and territorial sovereignty belonged to the United States and the tribes could "remain only on her sufferance."[17] The result was that the states and United States used high-handed tactics to secure uncompensated land cessions. After some initial successes securing treaties in this way it became apparent that the approach was unworkable in practice. The state and national governments lacked the military power to enforce their claimed rights or secure ceded territory. The tribes resented the American claims to their territory and with British support waged successful military action. At the same time, there was considerable disagreement between national and state officials concerning the scope of state power over Indian affairs.[18]

As the 1780s progressed there was a growing consensus that the unilateral approach towards the tribes was neither effective nor just and that the federal government should be

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[15] Francis Prucha, *American Indian Policy in the Formative Years* (Lincoln, Neb.: University of Nebraska Press, 1971) at 13-20.

[16] Robert N. Clinton, "Symposium Rules of the Game: Sovereignty and The Native American Nation: The Dormant Indian Commerce Clause" (1995) 27 Conn. L. Rev. 1055. Article IX reflecting the tension between national authority and the extent of state control over Indians gives Congress "the sole and exclusive rights and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."

[17] Reginald Horsman, "United States Indian Policies, 1776-1815" in Douglas H. Ubelaker, ed. *Handbook of North American Indians*: *History of Indian-White Relations*,vol. 4 (Washington, D.C.: Smithsonian Institution, 1988) 29.

[18] Jones notes that these initial American efforts approached Indian affairs as "a domestic problem." As the efforts to maintain peace, secure American territory from other European powers and obtain land for settlement along the frontier failed American officials were "forced to consider relations *with* the Indians, rather than a unilateral policy *for* the Indians." Dorothy V. Jones, *License for Empire Colonialism by Treaty in Early America* (Chicago: The University of Chicago Press, 1982) at 147-8.

given primary authority over Indian tribes. In 1787 the Northwest Ordinance established a new approach to dealing with tribes and avoiding the excesses of American frontiersman and state policies. This renewed commitment to treaty making, the recognition of the Native Americans peaceable right to the possession of their lands, and the purchase of land, coupled with a uniform national strategy to coordinate Indian affairs was fully implemented by the new Washington Administration established under the 1789 Constitution. The policy sought to maintain peace, acquire land and regulate trade, in a way that recognized that the United States had "only limited sovereignty" over Indian Territory and that "the limitations were set by the rights of the Indians inhabiting the land." [19] It presumed that the preferred instruments that should be used in the relationship were diplomatic intercourse and treaties. Land would be obtained by purchase and state and federal jurisdiction over the tribes was not assumed. As the tribes were in fact politically independent and could solicit support from Great Britain and Spain, the policy was expedient but was also recognition that the possessory rights asserted by the tribes had a legal basis within the American legal system.[20] The policy also provided for the "civilization" and assimilation of the tribes, an aspect that was increasingly emphasized in later administrations.[21] The policy was codified in the Trade and Intercourse Acts of 1790, 1793, 1796, and 1799.

The policy had no immediate impact on the Chippewa living in what are now Michigan, Minnesota, and Wisconsin as American authority was virtually non-existent.[22]

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[19] *Ibid.* at 147. At page 161 Jones points out that federal Indian policy was partly a product of local political struggles over land because each state laid down conditions for it to give up their claims to western Indian lands to the national government.

[20] *Ibid* at 157-86. The recognition of aboriginal title and the right to hunt on ceded lands was first spelled out specifically in the Treaty of Greenville (1795) where the United States relinquished its jurisdictional and land title claims over previously ceded Indian land north of the Ohio River and south of the Great Lakes. Treaty of Greenville, Aug. 3, 1795, online: The Avalon Project at the Yale Law School <http://www.yale.edu/lawweb/avalon/greenvil.htm.>.

[21] Prucha, *supra* note 15 at 213-24.

[22] The Chippewa or Ojibwa (plural Ojibweg) are a northern Algonquin people who historically occupied an area from the eastern end of Lake Ontario to Lake Winnepeg in Manitoba and the Turtle Mountains in North Dakota.

They continued their hunting, fishing, and gathering lifestyle. The British remained in the area and Chippewa and other bands traded with Canadian traders. The Chippewa frequently clashed with the Sioux as they continued their westward movement across Wisconsin and Minnesota in search of additional territory to harvest game for the fur trade.[23] At the start of the War of 1812, the United States had only two advanced outposts in the area: Fort Mackinac, located on the strait between Lake Michigan and Lake Huron, and Fort Dearborn at Chicago. After the war ended, the British agreed to quit their posts in the area and the United States extended its presence by establishing a military fort at the confluence of the Minnesota and Mississippi Rivers (1819), an Indian Agency at Sault Ste. Marie in Michigan Territory (1822) and opening trading houses in Green Bay (1815) and Prairie du Chien (1815).[24]

During the mid-1820s the Americans intensified their efforts to secure Chippewa allegiance and delineate the respective tribal territories; a project necessary in order to begin the extinguishing Indian title.[25] In 1825, the United States entered into a treaty at Prairie du Chien which called for "a firm and perpetual peace between the Sioux and the Chippewas"; established boundaries for the various tribes and recognized Indian title in these newly

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The Chippewa who are party to the treaties in Minnesota and Wisconsin are called the Lake Superior Chippewa and Mississippi Chippewa, located in the Mississippi watershed of Minnesota. All Wisconsin Chippewa are Lake Superior Chippewa. Both the Mississippi and Lake Superior Bands were identified separately in the 1842 and 1854 Treaties while the 1837 Treaty was signed with the Chippewa "nation." Prior to 1842 the terms had no political meaning either to the United States or the Chippewa. The Mille Band has been classified by the United States as part of the Mississippi Chippewa but it refused to sign several treaties (not relevant to this chapter), which led to poor relations between it and other Mississippi Bands. Throughout this chapter I will use the term "Chippewa" the common anglicized term for Oljwibeg or the more precise Lake Superior Chippewa or Mississippi Chippewa as these are the terms used by the American courts. Robert E. Ritzenthaler, "Southwestern Chippewa", Bruce Trigger, ed., *Handbook of North American Indians: Northeast*, vol. 15 (Washington, D.C.: Smithsonian Institution) 743; Great Lakes Indian Fish and Game Commission, *A Guide to Understanding Ojibwe Treaty Rights (*Odanah, Wis.: GLIFWIC, 2005).

[23] Ritzenthaler, *supra* note 22 at 743-4.

[24] For a discussion of establishment and demise of government owned trading houses see Prucha, *supra* note 15 at 84-93.

[25] As for the political allegiance of the Chippewa see Henry R. Schoolcraft, "Travelers Among the Aborigines: The Chippewa Indians" (1828) 27 North American Review 89 at 100.

delineated territories.[26] As some Chippewa bands were not in attendance at Prairie du Chien, another treaty approving the 1825 Treaty was signed at Fond du Lac in 1826. A further treaty in 1827 finished the process of delineating Chippewa territory from neighbouring tribes to the south and west.

While the expansion of American jurisdiction into the region continued, with the election of Andrew Jackson in 1828 federal policy underwent a shift. The new Administration viewed the treaty making process and federal obligations that resulted from them as an "absurdity" and an "anachronism."[27] The Administration believed that it was "farcical to treat with the Indian tribes as though they were sovereign and independent nations…"[28] The tribes, Jackson wrote "have only a possessory right to the soil, for the purpose of hunting and not the right of domain…."[29] As such they were subject to American national sovereignty and state jurisdiction by way of treaty, or if necessary, without their consent. Rather than treat with the tribes to mediate Native American-settler relations, the Administration believed that Indian and settler co-existence was fundamentally incompatible. It advocated the complete removal of the tribes in the eastern United States west of the Mississippi River. A policy enacted by The *Removal Act of 1830*.

The removal policy was not altogether new. It was premised on continued use of treaties to extinguish the tribes' interest in territory to facilitate settlement of the frontier. "Civilization" and assimilation remained policy objectives. In order to placate critics Jackson also proposed that removal would be voluntary and the tribes would be compensated for relinquishing their lands. Nevertheless, Jackson's position that non-removed tribes would be

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[26] *Ibid*.
[27] Ronald N. Satz, *American Indian Policy in the Jacksonian Era* (Lincoln, Neb.: University of Nebraska Press, 1975) at 10.
[28] Prucha, *supra* note 15 at 233.
[29] *Ibid.* at 234.

subject to state law and his refusal to prevent the extension of state authority over territory guaranteed by treaty made emigration to the west hardly "voluntary." The tribes that choose to remain would be subject to state and territorial law: a local law that state officials, federal officials and Native Americans understood to be destructive of tribal political organization and lifestyle. By the end of the 1840s many of the eastern tribes had removed west.

Even though it was not uncommon for the United States to negotiate treaties that included hunting, fishing and gathering rights prior to 1837, the removal policy was an important backdrop to the negotiations leading to the treaties of 1837, 1842 and 1854.[30] By the mid-1830s, large portions of Wisconsin had been opened up for settlement by removal treaties.[31] However, the Chippewa territory was not considered suitable for agricultural settlement and was instead sought for its mining and timber potential. The 1837 treaty discussions with the Chippewa bands were primarily concerned with the nature, price and method of payment for the cession and the reservation of hunting, fishing and gathering rights. It was presumed that they would continue to inhabit the area.[32]

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[30] Of the 12 treaties negotiated by the United States in 1837 four contain removal clauses. Three of these treaties concerned tribes or land in Wisconsin and Minnesota. One included land in present-day Iowa and Missouri. The 1837 Treaty with the Sioux concluded in Washington on September 29, 1837 where the Sioux ceded all their remaining territory east of The Mississippi River has also been called a removal treaty even though removal is not mentioned in the treaty text. See James A. Clifton, "Wisconsin Death March: Explaining the Extremes in Old Northwest Indian Removal" (1987) 75 Transactions of the Wisconsin Academy of Sciences, Arts and Letters 1 at 2-3.

[31] Alice E. Smith, *The History of Wisconsin: From Exploration to Statehood*, vol. 1 (Madison, Wis.: State Historical Society of Wisconsin, 1973) at 122-48.

[32] See statement by Aish-ke-bo-gi-ko-zhe (Flat Mouth) on 8th day (Friday, July 28th) of the treaty gathering In Carl A. Zapffe, *Minnesota's Chippewa Treaty of 1837* (Brainerd, Minn.: Historic Heartland Association, Inc. (hereafter 1837 Treaty Journal) at 23. The United States, no doubt for tactical advantage in negotiations and cultural ignorance considered the Chippewa to be "One nation" with whom they could treat. Ronald N. Satz, *Chippewa Treaty Rights: The Reserved Rights of Wisconsin's Chippewa Indians in Historical Perspective* (Madison, Wis.: Wisconsin Academy of Sciences, Arts and Letters, 1991) at 37. Nevertheless the term of "tribe" or "nation" was not an accurate description of Chippewa political organization and land was not "common property" of the "nation." Though the Chippewa shared a common culture and language they had no centralized political structure. Separate villages and bands were autonomous, independent units. Schoolcraft, *supra* note 25 at 100.The concept of majority rule applied by the American negotiators allowed them to outmaneuver the Wisconsin bands and secure the assent of the majority of Chippewa "nation" in 1837 and 1842 by having the Minnesota bands participate and agree to a cession in Wisconsin.

The result was that the 1837 Treaty, which ceded territory in the northern third of Wisconsin and a slice of Minnesota, did not have a removal provision. Instead of removal, it was premised on the continued Chippewa habitation of the ceded territory and guarantees usufructuary rights at the President's "pleasure." Article 5 of the 1837 Treaty provided:

> The privilege of hunting, fishing, and gathering of wild rice…in the territory ceded, is guarantied [*sic*] to the Indians during the pleasure of the President of the United States." [33]

The apparent provisional or temporary nature of the rights imported into the treaty language by the phrase "the pleasure of the President" was not discussed. However, even if it was discussed it is unlikely that the legal import of the phrase would have survived the translation process.[34] Representatives of 12 Chippewa bands, including the Mille Lacs Band, executed the Treaty on July 29, 1837.

After 1837, as the removal policy became more widely understood, Chippewa leaders became increasingly concerned about their continued occupation in the ceded territory. When the United States again assembled the bands in 1842 in La Point, Wisconsin to purchase the area north of the 1837 cession, removal was an important concern. The bands insisted that they be provided reservations in the 1837 territory and the lakeshore area being sought by negotiator Robert Stuart. However, Stuart's instructions insisted that the Chippewa must agree to remove from the ceded territory and resettle on "national" lands west of the Mississippi when required to do so.[35] In order to achieve this objective Stuart stated that removal would be far in the future and in any event the Americans did not wish to settle the

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[33] U.S., Wisconsin Legislative Reference Bureau *Chippewa Off-Reservation Treaty Rights: Origins and Issues Research Bulletin* (91-1) (1991) at 19.

[34] An eyewitness reported that in the 1837 discussions "it appeared as though neither the Governor or Indians understood the interpretation properly at the time, it having to pass from Indian into French and then into English before the Governor got the meaning…." Another eyewitness observed that government interpreter Peter Quinn was "a thick-mouth, stammering Irishman" who was unable "speak intelligently" in either English or Ojibwa." Quoted in Satz, *supra* note 32 at 26; see also *Mille Lacs II*, *supra* note 12 at 794- 7.

[35] La Point subagent Alfred Bunson stated that "'the Indians did not act free & voluntary, but felt themselves pressed into the measure' by Stuart who according to 'several reputable witness,' had told them [that] 'it was no difference whether they signed or not' because 'the government would take the land.'" *Ibid*. at 38 [footnotes omitted].

land as the United States simply wished to purchase the area for mining. Asked when they may be required to remove from the area, Stuart, like 1837 American negotiator Henry Dodge, stated that the Chippewa would not be asked to leave the area for a long time.

> When the suspicious chiefs demanded to know the exact length of time, Stuart responded – depending on the individual reporting the event – "as long as we behaved well &are peaceable with our grandfather {in Washington} & his white children", "not probably {sic} during …{your}lifetime," "we and our children after us might be permitted to live on our land fifty years or even a hundred if we live on friendly terms with the Whites, "that they were never to be disturbed if they behaved themselves.[36]

It followed that because of the assurances given by Stuart, the Chippewa would continue to hunt, fish, and gather as usual.[37] After describing the territory subject to the cession treaty Stuart told the assembled chiefs:

> You understand these boundaries now don't you? You are to have the privilege of living on your lands to hunt and fish, till your great Father requires you to remove, you understand he does not want the land now, it is only the minerals he wants. It will be better for you to have the same laws over you than to have the laws of the States. The laws of the United States are to remain over you as at present. I am very glad that some of your chiefs are so wise as to ask and desire it to be so.[38]

Both the premise of continued occupancy and use as well as the suspicion of government policy reflected in Article II of the 1842 Treaty which states:

> The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force,

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[36] *Ibid.* [footnotes omitted, brackets in original].
[37] While he supported removal, in a 1843 letter to Indian Commissioner Thomas H. Crawford, Stuart nevertheless observed that immediate removal "would not be in conformity with the spirit of the treaty" *Ibid.* at 39.
[38] Wheeler to Greene, Journal of the 1842 Treaty quoted in Charles E. Cleland "Preliminary Report of the Enthnohistorical Basis of the Hunting, Fishing, and Gathering Rights of the Mille Lacs Chippewa" in James M. McClurken *et al., Fishing in the Lakes, Wild Rice. And Game in Abundance Testimony on Behalf of Mille Lacs Ojibwe Hunting and Fishing Rights* (East Lansing, Mich.: Michigan State University Press, 2002) 1 at 38. (check)

> in respect to their trade and intercourse with the whites, until otherwise ordered by Congress.[39]

This forceful language ("The Indians stipulate *for*") indicates that the continued long term access and use of the territory was necessary to secure Chippewa assent despite the removal provisions in the treaty.[40]

After the 1842 Treaty was signed,[41] the Chippewa and settlers in Wisconsin and Minnesota continued to enjoy good relations when and where they interacted.[42] The overwhelmingly male settlers sought out Indian women and entered into familial relationships with band members. Chippewa worked in the logging camps and mines and the bands supplied surplus food and services to the mining and lumber industries. Divergent conceptions of property as well as alcohol led to the most problems but the total amount of settler-Chippewa difficulties were small.[43] The Lake Superior Chippewa however remained fearful of removal and aborted the proposed cession of the remaining Chippewa territory along the north shore of Lake Superior until they had a treaty guaranteed right to remain in 1837 and 1842 ceded territory. In the autumn of 1848 a contingent of Chippewa, including leaders of 16 Lake Superior Bands, travelled to Washington where they presented a petition to Congress asking for the establishment of a "permanent home" in the ceded territory.[44]

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[39]Article VI of the Treaty provides that "the Indians residing on the mineral district shall be subject to removal therefrom at the pleasure of the President of the United States." Treaty with the Chippewa 1842, Oct. 4, 1842 in Charles J. Kappler, ed., *Indian Affairs: Laws And Treaties*, vol. 2 (Washington: Government Printing Office, 1904) at 542-45 online: HeinOnline < http://www.heinonline.org.>.

[40] Chief Martin of Lac Court Orielles stated after the treaty was executed: "When I touched the pen it was on consideration that my relations were provided for, and that we should remain on the land, as long as we are peaceable. We have no objection to the white man's working mines, & the timber and making farms, but we reserve the birch bar & cedar, for canoes, the rice and the sugar tree and the priviledge [sic] of hunting without being disturbed by the whites." *Mille Lacs II*, *supra* note 12 at 799.

[41] Three representatives of the Mille Lacs Band signed the 1842 Treaty even though the Band did not inhabit any of the 1842 ceded territory.

[42] At the time of the 1837 and 1842 cessions there were about 1000 or less non-Indians living in or near the ceded territory. During the 1850s there a sharp increase in the non-Indian population living in the ceded territories. Cleland, *supra* note 38 at 47.

[43] Minnesota Territorial Governor Alexander Ramsay acknowledged divergent property concepts were often the problem that caused Indian predations. *Ibid.* at 48.

[44] Satz, *supra* note 32 at 51.

Despite the good relationship with the settler community the Indian Department was determined to remove the Wisconsin Chippewa.[45] At the urging of the Commissioner of Indian Affairs and the Secretary of the Interior, the President Taylor issued the Executive Order on February 6, 1850 revoking the rights set forth in the 1837 and 1842 Treaties and ordering the Chippewa out of the ceded territory.

> The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the fifth article of the treaty made with them on the 29th of July 1837 "of hunting, fishing and gathering the wild rice upon the lands, the rivers and the lakes included in the territory ceded" by the treaty to the United States, and the rights granted to the Chippewa Indians of the Mississippi and Lake Superior by the second article of the treaty with them of October 4th, 1842, of hunting on the territory which they ceded by that treaty, with the other usual privileges of occupancy until required to remove by the President of the United States, are hereby revoked and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.[46]

The Wisconsin Chippewa refused to move west. Band leaders stated that the Executive Order was not authorized by the 1837 or 1842 treaties and that it violated the representations made by Stuart in 1842. They also asserted that their agreement with the United States was that they would not be removed unless they "misbehaved."[47]

In an attempt to implement the 1850 Order, the Administration moved annuity payment location from La Point to Sandy Lake, Minnesota: a location approximately 200 to 500 miles west by canoe from the band signatories' home territories. To force the Chippewa to remain in Minnesota, the timing of the payment was moved from early summer to mid-October. Because of the distance, however the bands did not proceed en masse to Sandy

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[45] The reasons provided for the administrative decision made by Indian Commissioner Medill included settlement pressure, settler safety, the avariciousness of Wisconsin traders, the protection of Indians from liquor and the ability to better deliver instruction and improvement to a concentrated population. More likely it was the result of Minnesota officials seeking economic and patronage opportunities provided by treaty annuities. Satz, *supra* note 32 at 51-9. Bruce M. White, "The Regional Context and the Removal Order of 1850" in McClurken, *supra* note 38, 141 at 160-71.

[46] *Lac Courte Oreilles Band Of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 at 346 (7th Cir. 1983) [*LCO I]*.

[47] Anthony G. Gulig, In Whose Interest?: Government-Indian Relations in Northern Saskatchewan and Wisconsin 1900-1940 (Ph.D. Dissertation, Political Science, Univ. of Saskatchewan, 1997) [unpublished] at 40-1.

Lake. Rather a considerably smaller group of Chippewa, composed mostly of men, made the journey. The trip resulted in considerable suffering and loss of life -- an event that made the surviving Chippewa even more determined to avoid removal.[48] Partly in response to the disaster of the previous year, the Acting Commissioner of Indian Affairs wrote in August of 1851 to the Secretary of Interior recommending that the removal be abandoned. Within two years, the policy was officially abandoned and a new policy, which emphasized the concentration of tribal populations on reservations within their home territory was implemented.

The new federal policy was reflected in the Treaty of 1854, which ceded remaining Chippewa territory on the north shore of Lake Superior and established reservations for the Lake Superior Chippewa in Wisconsin. In these negotiations, the American negotiators found it necessary to agree to the Lake Superior Chippewa's demands for permanent reservations to secure the mineral wealth in the entire Lake Superior region. From the perspective of the federal government, the treaty was not a complete success since the Mississippi Chippewa refused to sell their land on any terms because of problems with earlier payments and because the attempted removal had generated ill will.[49] The Article 11 of the 1854 treaty in part stated:

> [T]he Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded [i.e. the north shore of Lake Superior below the Canadian border] shall have the right to hunt and fish therein, until otherwise ordered by the President.[50]

According to submissions provided to the *Mille Lacs II* Court, in the negotiations concerning the establishment of their reservations Indian Agent Henry Gilbert assured the bands that the

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[48] Federal officials did not make adequate arrangements for food and shelter and the treaty payments were late. Clifton, *supra* note 30 at 25.
[49] White, *supra* note 45 at 277.
[50] Treaty with the Chippewa 1854, September 30, 1854 in Kappler, *supra* note 39 at 648-52.

reservations "were not to confine us all together to live upon them – that we should have the privilege of going out of it whenever we had mind for hunting purposes."[51] All the Wisconsin bands signed the 1854 Treaty; the Mille Lacs Band was not represented at the negotiations despite having an interest in the 1837 ceded territory.

In 1855 the United States again approached the Mississippi Chippewa bands "respecting their claims to lands in Minnesota."[52] Several months later the Chippewa of the Mississippi surrendered a huge area of northern Minnesota. Article I of the 1855 Treaty in part states:

> The Mississippi, Pillager, and Lake Winnibigoshish bands of Chippewa Indians hereby cede, sell, and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota, and included within the following boundaries….And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere.[53]

Like the Treaty of 1854, the 1855 Treaty was a clear reversal of the removal policy. It established reservations for Mille Lacs and the other Mississippi bands in locations where the bands were currently residing. The Mille Lacs representatives said little at the treaty discussions. The 1855 Treaty did not mention hunting, fishing and rights at all, and there is no evidence that the 1837 treaty rights were discussed. The *Mille Lacs II* Court found that this failure to mention the 1837 rights shows that the United States "did not intend to extinguish the hunting, fishing and gathering privilege under the 1837 Treaty."[54] In addition, the Chippewa language equivalent of the English phrase "relinquish and transfer to the United States the lands" when translated would not have conveyed the idea that the land

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[51] *Mille Lacs II, supra* note 12 at 815.
[52] *Ibid*. at 812.
[53] Treaty with the Chippewa 1855, February 22, 1855 in Kappler, *supra* note 39, 685 at 685-6.
[54] *Mille Lacs II, supra* note 12 at 815.

transfer would extinguish hunting, fishing and gathering rights.[55]

Despite being confined to reservations, the Wisconsin and Minnesota Chippewa bands continued to roam and hunt, fish and gather throughout the ceded territory until the end of the 19th Century.[56] The Mille Lacs Band may have actually intensified its harvesting after the 1855 treaty to meet the needs of lumbermen cutting around Mille Lacs Lake.[57] This activity was based on necessity as the bands could not rely solely on agricultural and annuity payments. While the bands were provided with agricultural implements and encouraged to farm, American officials recognized they also depended on the natural resource harvest for their subsistence and they were provided supplies to support these activities. In addition, annuities payments were distributed so as not to interfere with the harvest. Those Chippewa who were able to secure positions in the logging and mining industries did reduce their reliance on the harvest but when these industries waned, they increased their hunting and fishing.

As the century closed however, both states sought to enforce their game laws on Indians.[58] "The increased population and tourism industries regarded Indian hunting and fishing, despite its history of coexistence with healthy wildlife populations and balanced natural resource use, as contributing to the continued decline of wildlife stocks."[59] By the third decade of the 20th century, Wisconsin and Minnesota completely regulated wildlife and natural resource harvesting outside of the reservations. This extension of state authority was opposed by the bands; individual members continued to hunt and fish for subsistence despite the law. In Wisconsin, given the precipitous decline of the logging industry in the north part

[55] *Ibid.*
[56] Charles F. Wilkinson, "To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa" (1991) Wis. L. Rev. 375.
[57] James M. McClurken, "The 1837 Treaty of St. Peters Preserving the Rights of the Mille Lacs Ojibwa to Hunt, Fish, and Gather: The Effect of Treaties and Agreements since 1855" in McClurken, *supra* note 38, 329 at 340.
[58] Gulig, *supra* note 47 at 102-7.
[59] Thomas Lund, "Nineteenth Century Wildlife Law: A Case Study of Elite Influence" (2001) 33 Ariz. St. L.J. 935 at 969-76.

of the state, reliance on hunting and fishing actually increased between 1900 and 1920.[60] The Federal government did not oppose state regulation. For example, in 1926 Commissioner of Indian Affairs Burke, responding to a letter written by three Chippewa inquiring about their hunting and fishing rights under the 1837 Treaty wrote that the 1837 treaty had been modified by the 1855 Treaty: "if the land you were hunting is within any of the land ceded by said Indians, it would be necessary for you to comply with state law in view of the modified provisions of the treaty."[61] In 1938, President Roosevelt wrote the Bad River Band of Lake Superior Chippewa that the 1837 and 1842 hunting, fishing and gathering privileges had been revoked by the 1850 executive order.

B. State Jurisdiction over and Regulation of Indian Hunting, Fishing and Gathering in Wisconsin and Minnesota

In federal law, the right of Indians to hunt in Indian country was enacted as early as 1834. The states, however have contested federal power to regulate the Indian hunting, fishing and gathering as an invasion of their sovereign rights.[62] They have argued that state regulation of wildlife harvesting is permissible to the extent that it promotes a valid police power objective and that federal authority to interfere with this power is limited. Historically, the basis for the exercise of state authority derived from the states' title to land, subject to the Indian right of occupancy and the unique relationship wild animals had with sovereign authority. The argument for state title to Indian lands, notwithstanding federal treaties reserving territory to the Indians, was based on *Fletcher v. Peck* and *Johnson v. M'Intosh*.[63] In *Fletcher*, the U.S. Supreme Court was presented with an argument that the Georgia legislature could not convey

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[60] Gulig, *supra* note 47 at 114-9.
[61] *Mille Lacs II*, *supra* note 12 at 821.
[62] *The Intercourse Act of 1834 Act of June 30, 1834* (c. 161, § 8, 4 Stat. 730), included a provision: "Every person, other than an Indian, who, within the limits of any tribe with whom the United States has existing treaties, hunts, or traps, or takes and destroys any peltries or game, except for subsistence in the Indian country, shall forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and all peltries so taken; and shall be liable in addition to a penalty of five hundred dollars." Section R.S. § 2137, repealed Pub.L. 86-634, 74 Stat. 469.
[63] *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) [*M'Intosh*].

land over which Indian title had not been extinguished by the federal government. Justice Marshall speaking for the court disagreed. He noted that:

> [T]he nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.[64]

In *M'Intosh*, Marshall extended this reasoning, finding that the Discovery doctrine gave title to the discovering power subject to the Indian right of occupancy. While Marshall claimed this title for the national government as pre-eminent sovereign, the claim of "title" to Indian lands that flowed from the case was also used as the basis of a state-centered jurisprudence that justified the extension of state jurisdiction to Indian territory and reservations based on state sovereignty.[65] Justice Catrone of the Tennessee Supreme Court outlined this position in *State v. Foreman*.

> That the right to subdue and govern infidel savages found in countries newly-discovered by christians pertained to the first christian discoverer. By this rule the Indians found on this continent, the Cherokees inclusive, were allowed no political rights, save at the discretion of the European power that colonized the country….The treaty-making power, as exercised with Indian tribes, cannot deprive a state of a part of the jurisdiction it once possessed. The power is not over, but under, the Constitution, and, like others, restrained by the instrument giving it existence. It cannot, in times of peace, cede away to a people independent of the state a part of its territory and sovereignty.[66]

The right to regulate wildlife was conceived as a blending of proprietary power and sovereign power, *i.e.* "an ownership based on the government's status as sovereign."[67] Thus as an

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[64] *Fletcher*, *supra* note 5 at 142-3.
[65] A line of state court decisions commencing prior to *Worcester v. Georgia* 31 U.S. (6 Pet.) 515 (1832) [*Worcester*] (where Marshall weakened the proprietary language use in the earlier case in his discussion of the Crown's pre-emptive right to purchase land from the tribes) established a competing line of legal authority to justify the exertion of state jurisdiction over the tribes and reservations. See *Caldwell v. The State*, 1 Stew. & P. 327; 1832 Ala. (Lexis) 13 (Ala. Sup. Ct. 1832) which was prior to *Worcester* and post-*Worecester* case *The State v. Foreman*, 16 Tenn. 256 (Tenn. Sup. Ct. 1835) which relied on *M'Intosh*. See also *The State v. Doxtater*, 47 Wis. 278 (Wis. Sup. Ct. 1879) [*Doxtater*]. For a discussion of these cases see Sidney L. Harring, *Crow Dog's Case American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge: Cambridge University Press, 1994) at 34-53.
[66] *The State v. Foreman*, *supra* note 65 at para. 42.
[67] Dale D. Goble, "Three Cases/Four tales: Commons, Capture The Public Trust and Property in Land" (2005) 35 Environmental Law 807 at 849. See also *Geer v. Connecticut*, (1896) 161 U.S. 519; *Ward v. Race Horse*, 163 U.S. 504 (1896) [*Race Horse*]. "The wild animals within its borders are, so far as capable of ownership, owned

attribute of state sovereignty, the states beginning in the 19th century extended their jurisdiction in order to regulate Indian hunting, fishing and gathering activity across their entire territory.[68]

Under the Equal Footing doctrine this fundamental sovereignty belongs to states when they are created by federal statute. The doctrine posits that all states are admitted to the federal union with the same attributes of sovereignty (*i.e.*, on an equal footing) as the original 13 States.[69] Constitutionally valid federal actions within the territory prior to statehood may not survive after the state is admitted to the Union, where the on-going restriction touches some fundamental aspect of state sovereignty. For example, in *Ward v. Race Horse*, the Supreme Court held that the Bannock Indians' treaty rights to hunt and gather outside of their reservation were irreconcilable with Wyoming's natural resource regulation, which the Court considered to be "an essential attribute of its governmental existence." It held that the rights were necessarily extinguished by Wyoming statehood and unless Indian rights were specifically mentioned in the legislation creating the state, the newly created state's police power was not pre-empted by federal law.

The Equal Footing doctrine established the necessity of an explicit federal guarantee of usufructuary rights in the act admitting a territory into statehood. Where such an explicit federal reservation was lacking, the courts found that a state had jurisdiction over hunting, fishing and gathering outside of the reservation and within the borders of a state

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by the State in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the State may regulate and control the taking, subsequent use and property rights that may be acquired therein." *Lacoste v. Department of Conservation*, 263 U.S. 545 at 549 (1923).

[68] These assertions of jurisdiction occurred even where tribal members were exempted from state wildlife laws because of their continued reliance on hunting, fishing and gathering for food. The state of Wisconsin, for example exempted Indian from many game and fish regulations in the mid-19th century. They could use certain types of nets and hunt or trap a wider variety of animals than non-indian hunters. However they could only do so if they were "uncivilized" and the activity needed to occur within the reservation. Brian Vandervest, "The Wisconsin State Legal System and Indian Affairs in the Nineteenth Century: A Lost Chapter in Wisconsin's Legal History" (2003) 87 Marq. L. Rev. 357 at 381.

[69] *Race Horse, supra* note 67 at 516.

notwithstanding treaty guarantees. "Unless the jurisdiction of the state over the territory occupied by the Indians within its boundaries is prohibited by the act admitting the state into the Union," asserted the Wisconsin Supreme Court in 1879:

> [O]r by some existing treaty with the Indians occupying such territory at the time of its admission, there does not seem to be any authority in congress to pass laws for the government or control of such Indians, or to prohibit the states from passing such laws, except the provision of the constitution which authorizes congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.[70]

State assertions of jurisdiction over tribal harvesting have also been premised on the Public Trust doctrine. The Public Trust doctrine presumes that state ownership and regulation of wildlife *for the benefit of all the state citizens* is a fundamental aspect of state sovereignty.[71] As the Minnesota Supreme Court noted in *State v. Rodman*:

> We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor, but in its sovereign capacity, as the representative, and for the benefit, of all its people in common. The preservation of such animals as are adapted to consumption as food, or to any other useful purpose, is a matter of public interest; and it is within the police power of the state, as the representative of the people in their united sovereignty, to enact such laws as will best preserve such game, and secure its beneficial use in the future to the citizens, and to that end it may adopt any reasonable regulations, not only as to time and manner in which such game may be taken and killed, but also imposing limitations upon the right of property in such game after it has been reduced to possession.[72]

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[70] *Doxtater*, *supra* note 65 at 291-2.

[71] Because of the necessarily incidental relationship between the ownership and regulation of wildlife and state sovereignty wildlife regulation was considered beyond the reach of federal power under the 1789 constitution in the 19th and early 20th centuries. Michael C. Blumm and Lucus Ritchie, "The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife" (2005) 35 Environmental Review 673; Christina Wood, "The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperilled Wildlife Populations" (2000) 37 Idaho L. Rev. 1 at 62.The Public Trust doctrine as a source of authority to regulate wildlife differs from the police power in that it provides an affirmative duty on the state to protect wildlife for the benefit of future generations. The state must protect the corpus of the wildlife trust within their boundaries. The state's general police power for the health, safety and welfare has no similar obligation.

[72] *State v. Rodman*, 58 Minn. 393 at 400 (Minn. Sup. Ct. 1894).

Today, the proprietary aspect of the state's interest in wildlife has been repudiated by the U.S. Supreme Court, but the regulation of natural resources use based on the state's interest as a public trustee continues to be considered an important aspect of state sovereignty.

The states justified their extension of jurisdiction over tribal hunting, fishing and gathering under the Equal Footing or Public Trust doctrines. Where these doctrines were not considered applicable, treaties that mentioned various usufructuary rights were simply ignored or considered extinguished by state officials. These assertions of state power were legitimated by state judiciaries and accepted by federal officials. In the late 19th and early 20th centuries, the federal government pursued an aggressive assimilative policy that sought to break up collectively held tribal lands and eliminate tribal entities as a source of governmental and cultural allegiance for tribal Indians. These policies, the most significant of which was the General Allotment Act of 1887, reversed previous policy that sought to remove tribal governments from mainstream society through the creation of reservations. They were pursued in the hope that individual Native Americans would abandon their tribal identity and adopt "the habits of civilized life". [73] They were premised on the political and judicial determination that congressional power over Indians was supreme and "plenary." Where Congress clearly asserted its authority in contravention of previous federal treaty and statutory guarantees relating to tribal rights, the actions were beyond the scope of judicial review in spite of the earlier treaties or the federal government's fiduciary obligations to the tribes.[74] In this way, the continuing residual nature of tribal sovereignty and treaty guarantees over tribal and ceded land discussed in such federal case law was often ignored or

[73] D.S. Otis, *The Dawes Act and the Allotment of Indian Lands* (Norman, Okla.: University of Oklahoma Press, 1973) at 7.

[74] The "Plenary Power doctrine" posited that the power of Congress of Indians "has always been deemed a political one, not subject to be controlled by the judicial department of the government" in *Lone Wolf v. Hitchcock* 187 U.S. 553 at 566 (1903), was never fully accepted by the U.S. Supreme Court even at the time it was articulated. Today while Congressional authority is broad, Congressional acts that affect Indians are subject to judicial review and ordinary constitutional protections may be invoked where an action is not rationally tied to congressional trust obligations. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977); see also Newton, *supra* note 7 at 228-36.

distinguished.

1. Chippewa Hunting, Fishing and Gathering in Wisconsin

Wisconsin became a state in 1848. Despite the 1837 and 1842 treaties and its inability to regulate Chippewa activity on the ground, Wisconsin assumed that its law covered the entire territory of the state and included the tribes. While some consideration was initially given to Indian activities, the state criminalized various hunting, fishing and gathering activities.[75] Outside of the established reservations federal officials took little interest in the Chippewa.[76] In 1879 the Wisconsin Supreme Court in *State v. Doxtater* declared that:

> Unless the jurisdiction of the state over the territory occupied by the Indians within its boundaries is prohibited by the act admitting the state into the Union, or by some existing treaty with the Indians occupying such territory at the time of its admission, there does not seem to be any authority in congress to pass laws for the government or control of such Indians, or to prohibit the states from passing such laws, except the provision of the constitution which authorizes congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.[77]

The *Doxtater* Court reasoned that since the United States had the power to assert its criminal laws over all reservation and non-reservation Indians, Wisconsin had inherited this power when it gained admission to the Union in 1848.

Doxtater, despite being contradictory to both federal case law, and after 1884 to federal statute, provided the legal basis for Wisconsin to extend its jurisdiction over all reservation and non-reservation activities. In 1901 the extension of state jurisdiction for hunting, fishing and gathering in the entire ceded territory, including Indian reservations,

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[75] Between 1850 and 1859 state laws allowed Indians to hunt at any time. Between 1868 and 1896 Wisconsin applied its hunting and fishing laws to Indian activities outside of the reservation boundaries but did not enforce its law on the reservation. By 1900, backed by the reasoning in *Doxtater*, the state was attempting to enforce its law also on the reservations. Gulig, *supra* note 47 at 77.

[76] While some federal officials responsible for Indian Affairs in the ceded territory acknowledged that the Chippewa had usufructuary rights to hunt and fish in the territory statements by other officials in the late 19th and early 20th century suggested that the federal government considered the Chippewa right to be extinguished. *Mille Lacs*, *supra* note 9 at 182-3.

[77] *Doxtater*, *supra* note 65 at 291-2.

suffered a legal setback. *In re Blackbird* concerned a member of the Bad River Band of Chippewa who was arrested by a state warden for netting on a small stream within the Bad River Indian Reservation. He was duly convicted under Wisconsin law. Blackbird applied for a writ of habeas corpus from the federal court for his conviction.[78] The Court released Blackbird noting that:

> It will be thus seen that ample provision has been made by congress and by the departments for policing these reservations. It is quite evident that congress has made all the provision it deemed necessary for the proper government and control of the Indians. No doubt, if necessary, congress would provide for the punishment of lesser crimes committed by the Indians….Congress might even provide fish and game laws to restrict the Indians in their natural and immemorial rights of fishing and hunting. But it has not seen fit to do so. It would be intolerable if the state, under these circumstances, should have the power to step in, and extend its civil and criminal codes and police power over these people.[79]

Blackbird re-established the proposition that state law, specifically state fish and game laws, did not extend to the reservation. Nevertheless, outside of the reservation the State continued to apply its law and disregard any off-reservation treaty rights mentioned in the 1837 and 1842 treaties. In *State v. Morrin*, the Wisconsin Supreme Court ruled that any rights reserved by treaty outside of the reservation boundaries were abrogated by the U.S. Congress when it admitted Wisconsin into the Union because Congress had not reserved usufructuary treaty rights in the enabling legislation.[80]

The Chippewa consistently insisted on the continued existence of their treaty rights. In 1972 The Wisconsin Supreme Court re-visited the issue of off-reservation treaty fishing in *State v. Gurnoe*.[81] The *Gurnoe* defendants were members of the Red Cliff and Bad River Bands of Chippewa who were charged with violating various state fishing statutes on Lake Superior. They argued that the 1854 treaty, which set aside lands "for the use of the

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[78] *In re Blackbird*, 109 F. Supp. 139 (W.D. Wis. 1901).
[79] *Ibid.* at 144.
[80] *State v. Morrin*, 136 Wis. 552 (Wis. Sup. Ct. 1908).
[81] *State v. Gurnoe*, 53 Wis.2d 390 (Wis. Sup.Ct. 1972).

Chippewa" was also a grant of fishing rights on Lake Superior for those bands who had reservations along the shore.[82] They claimed these treaty rights were not confined to waters within the reservation boundaries but extended into Lake Superior. The Court, overruling a 1933 decision regarding the same 1854 treaty agreed.

> Whether the right to fish in Lake Superior is denominated "off-reservation rights" or interpreted to be inherent rights under the treaty, the result is the same -- the Chippewa are entitled to the right to fish Lake Superior.[83]

After *Gurnoe*, several lawsuits were initiated which directly or indirectly implicated the status of the hunting, fishing and gathering rights in the 1837, 1842 and 1854 treaties as well as the effect of the 1850 Removal Order. [84] The Chippewa were initially unsuccessful in these suits. In the consolidated case *United States v. Bouchard* the U.S. District Court held that while the 1850 Removal Order was unlawful (*i.e.*, the removal was undertaken even though the Chippewa had not misbehaved), the 1854 treaty extinguished any off-reservation treaty rights. The establishment of the reservation in the treaty noted the Court "strongly implies the parties' intention that the 1854 treaty would extinguish the general Indian claim of a right to occupy, and hunt, fish and otherwise obtain food on the earlier ceded lands."[85]

However, the portion of *Bouchard* that related to whether the Chippewa treaty rights had been extinguished despite the invalid Removal Order of 1850 was overruled on appeal. The Seventh Circuit Court of Appeals in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians et al v. Voigt [LCO I]*[86] agreed with the District Court concerning the

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[82] *Ibid.* at 399-400.
[83] *Ibid.* at 409.
[84] *United States v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978).
[85] *Ibid.* at 1361.
[86] *LCO* involved the U.S. Circuit Court for the Western District of Wisconsin and numerous appeals to the Seventh Circuit Court of Appeals. It was a consolidated case for declaratory judgment that the Lac Courte Orielles Band of Lake Superior Chippewa retained treaty-reserved hunting, fishing, trapping and gathering rights in the public lands of the northern third of Wisconsin. The first decision by Doyle J. was reported as *United States v. Bouchard*, 464 F. Supp. 1316 (W.D.Wis. 1978) where the Court ruled against the tribe. The 7th Circuit Court of Appeals reversed this decision. The appeal decision reversing and remanding the case for trial

unlawfulness of the 1850 Removal Order, but held that the treaty rights of 1837 and 1842 involving the use of land for "traditional subsistence activities of hunting, fishing and gathering" could not be extinguished by implication.[87]

> [A] termination of treaty-recognized rights by subsequent legislation must be by *explicit* statement or must be *clear* from the surrounding circumstances or legislative history.[88]

Thus establishment of reservations by the 1854 treaty did not abrogate the earlier treaty rights because it did not expressly refer "to the termination of the usufructuary rights." Alternatively the "circumstances and legislative history surrounding the treaty" did not make it clear that Congress intended to abrogate the earlier treaty provisions.[89] The Court concluded that "treaty recognized usufructuary rights pursuant to the Treaties of 1837 and 1842….remain in force."[90] It remanded the case to determine the content of the reserved rights and the permissible scope of state regulation over the exercise of the rights.

In the remanded 1987 *LCO III* decision,[91] the District Court found that the Chippewa harvested a variety of products including rice, meat and parts of various trees throughout the ceded territory. Moreover, the Chippewa did not simply engage in subsistence hunting,

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is found at 700 F.2d 341 (7th Cir. 1983). It is commonly referred to as *LCO I*. The subsequent District Court and Appellate decisions are likewise referred to by roman numerals. They are found at 760 F.2d 177 (7th Cir. 1985)[*LCO II*](district Court using a particular date prior to which changes in land ownership from public to private in order to determine which excluded that land from exercise of usufructuary right is inappropriate); 653 F. Supp. 1420 (W.D. Wis. 1987)[*LCO III*](court enumerates species used in ceded territory which may be harvested by methods used at time of treaty and modern methods for commercial and subsistence purpose in order to provide Chippewa with a modest living); 668 F. Supp. 1233 (W.D. Wis. 1987) [*LCO IV*](state regulation of usufructuary right must be least restrictive alternative in the interest of conservation); 686 F. Supp. 226 (W.D. Wis. 1988)[*LCO V*](Chippewa could not reach modest living needs from available harvest in ceded territory); 707 F. Supp. 1034 (W.D. Wis. 1989)[*LCO VI*](Chippewa may regulate their own harvest provided they enact and implement conservation certain measures); 740 F. Supp. 1400 (W.D. Wis. 1990)[*LCO VII*](harvestable resources in ceded territory allocated equally between Chippewa and Wisconsin); 749 F. Supp. 913 (W.D. Wis. 1990)[*LCO VIII*](Eleventh amendment of U.S Constitution prevents recovery of monetary damages against state for violation of treaty rights); 758 F. Supp. 1262 (W.D. Wis. 1991)[*LCO IX*](treaty right does not extend to commercial timber harvesting); Final Judgment in case is found at 775 F. Supp. 321 (W.D. Wis. 1991)[*LCO X*].

[87] *LCO I*, *supra* note 46 at 352.

[88] *Ibid.* at 354 [emphasis in original].

[89] *Ibid.* at 362.

[90] The Court limited the exercise of the right to those portions of the ceded territory that were not privately owned. *Ibid*. at 365.

[91] The trial on remand from the Court of Appeal is called *LCO III*, *supra* note 86.

fishing and gathering, but harvested resources in a commercial manner.[92] As such, the products taken under the usufructuary right "may be traded and sold today to non-Indians, employing modern methods of distribution and sale."[93] Justice Doyle however, limited commercial activity in the market by finding that "the Chippewa were not motivated by the hopes of profits and the accumulation of material goods."[94]

2. Indian Hunting, Fishing and Gathering in Minnesota

The history of Minnesota's extension of jurisdiction over hunting, fishing and gathering activities differs from Wisconsin. While both states refused to allow Indian hunting, fishing and gathering activities outside of the reservation, Minnesota courts have always accepted the proposition that the state could not extend its jurisdiction to Indian acts committed on reservation land.

When Minnesota became a state in 1858 a large portion of territory remained under un-extinguished Indian title. The population grew rapidly in the cities and in the south, but the north and the territory ceded by the Chippewa remained relatively unpopulated.[95] However, Indian- settler relations grew increasingly tense. This tension was the result of the continued failure of the government to honour its treaty obligations, poor oversight of and misappropriation of monies by federal officials charged with disbursing these to the bands, settler encroachment, misappropriation and usury by traders, cultural clashes, and the increasing impoverishment of the tribes due to territory loss and the shortcomings of the

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[92] *Ibid.* at 1428.
[93] *Ibid.* at 1465.
[94] The Court further went on to state: "The Chippewa developed an economic strategy that incorporated both their traditional economy and the market economy in such a way that they were able, on the one hand, to transact business with non-Indians who were participating in the Euro-American market economy and, on the other, to transact social and political relations with one another in the traditional manner." *Ibid.* at 1429.
[95] "By the standard often used to define settlement – 2 whites per square mile – the 1837 treaty area in Minnesota was not actually settled until 1870." White, *supra* note 45 at 154.

annuities based economy.[96]

The dissatisfaction erupted in the American-Dakota war in 1862, which caused considerable loss of life. While few Chippewa bands actually engaged in violence in the war, the Indian loss gave rise to additional efforts to remove the bands from their home territories and terminate the reservations established by the 1855 Treaty. The climate of fear among settlers coupled with logging, mining and railroad interests, who sought to eliminate the Indian presence to facilitate their economic exploitation of the area, led to calls for the Chippewa to be concentrated in one reservation. The subsequent treaties signed in 1863, 1864 and 1867 between the Chippewa and the United States sought to remove the bands into one large reservation, extinguish all other claims and treaty rights, and extend the laws of the United States and the state of Minnesota to the entire area.[97] Chippewa opposition slowed removal efforts, as did the failure of the United States to finish certain pre-settlement work on the new reservation obligated by the treaty. Throughout the 1870s and1880s, most Chippewa remained on their 1855 reservations despite the removal treaties.

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[96] Anton Steven Treuer, *The Assassination of Hole In The Day* (Ph.D. Dissertation, Univ. of Minnesota, 1997) [unpublished] at 144-68.

[97] The Treaty of 1863, while calling for a cession of the Mille Lacs reservation nevertheless excluded Mille Lacs from the proposed reservation at Leech Lake. Article 1 of the treaty reads: "The reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake, as described in the second clause of the second article of the treaty with the Chippewas of the 22d February, 1855, are hereby ceded to the United States…." However, in Art. 12 the Mille Lacs Band is excluded from proposed removal. It states that "owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites." Treaty with the Chippewa of the Mississippi and The Pillager and Lake Winnibigoshish Bands, 1863, March 11, 1863 in Kappler, *supra* note 39, 839 at 841-2. The Treaty of 1864 repeated Art. 12 and indirectly strengthened Mille Lacs' claim to its 1855 reservation showing that the American negotiators recognized the continued use of natural resources in the Chippewa lifestyle. However by 1865 federal agents made their first efforts to remove the Mille Lacs Band. These efforts were resisted. The 1867 Treaty, which ceded part of the earlier Leech Lake reservation and created a new reservation at White Earth to be used for agriculture was understood by the Mille Lacs Band to in no way have altered their right to stay at Mille Lacs. It also extended the laws of Minnesota to the proposed White Earth reservation. Article 8 of the Treaty with The Chippewa Of The Mississippi, 1867, March 19, 1867 states: "For the purpose of protecting and encouraging the Indians, parties to this treaty, in their efforts to become self-sustaining by means of agriculture, and the adoption of the habits of civilized life, it is hereby agreed that, in case of the commission by any of the said Indians of crimes against life or property, the person charged with such crimes may be arrested, upon the demand of the agent, by the sheriff of the county of Minnesota in which said reservation may be located, and when so arrested may be tried, and if convicted, punished in the same manner as if he were not a member of an Indian tribe." Kappler, *supra* note 39, 974 at 976.

The 1889 *Nelson Act*, which was part of a renewed federal effort to civilize and assimilate the tribes, encouraged the removal process and accelerated the extension of state jurisdiction in Indian country. The Act provided for a "[C]omplete cession and relinquishment ... of all ... title and interest in and to all the [Chippewa] reservations" except White Earth and Red Lake. It directed that all the Chippewa were to be removed to, and allotted lands in, the White Earth reservation, and those on the Red Lake reservation were to be allotted lands. However, s. 6 allowed individual Indians to take an allotment in their 1855 reservations -- the remainder of which would be opened up for settlement -- thus enabling them to avoid moving.[98] The relinquishment and cession process was to be implemented upon approval by the requisite number of band members belonging to the respective reservations. Despite Indian misgivings, federal and state pressure and the opportunity to secure an allotment within the bands' home reservation under s. 6, succeeded in securing agreement. The result was that much of the territory in the remaining Minnesota reservations was conveyed to non-Indians.

The diminution of the Minnesota reservations through allotment and the curtailment or destruction of the Chippewa's and other tribes' privileges in post-Dakota war treaties provided the framework within which Minnesota asserted its jurisdiction over Indian hunting, fishing and gathering. The willingness to assert jurisdiction over its entire area and to curtail Chippewa hunting, fishing and gathering was evident early in the territory's history. In the autumn of 1849, Alexander Ramsey, Governor of the Minnesota Territory, complained that the Chippewas' exercise of their 1837 rights had "demoralizing effects" on the settlers in the

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[98] Sec. 1 of "*An act for the relief and civilization of the Chippewa Indians in the State of Minnesota*" 25 Stat. 642. See also Otis, *supra* note 73. Because an individual Indian could take an allotment in his home reservation under s. 6 of the Act, the bands who had been subject to removal efforts by the federal and state government saw the procurement of allotments within the 1855 reservations as a means to staying in their home territories. However, the provisions allowing for non-Indian settlement of the remaining territory significantly eroded the land base of the tribes.

area and argued for their removal from ceded lands.[99] Ironically, at the time of Ramsey's complaint there was no law that restricted hunting and fishing on public or private lands provided the land was not enclosed or farmed. In 1858, the first year of statehood, Minnesota introduced various statutes relating to hunting seasons for deer, elk, and game birds and extending Minnesota law to Indians leaving their reservation.[100]

The position that Minnesota could and should regulate Indian hunting, fishing and gathering gained strength in the decades after statehood. During 1889 *Nelson Act* negotiations with the Mille Lacs Band, American negotiator, Henry Rice (who also negotiated the 1863 Treaty with the Chippewa) was asked about the band's the right to hunt deer. Rice stated:

> In regard to hunting deer, that is a matter for the legislature of the State to determine. You can hunt deer in any way, wherever you find them during the season set apart for hunting; and wherever the white man may hunt, your young men will have the same right to do so.[101]

In 1898, a Minnesota Congressman complained to the Commissioner of Indian Affairs about local Indians hunting off their reservations in violation of game laws. The Commissioner replied that he had instructed the federal Indian agents in the state to educate the Indians about Minnesota's game laws.

The Minnesota Supreme Court set forth the basic parameters of state jurisdiction over Indians in the 1890s. Unlike the Wisconsin courts, the Supreme Court of Minnesota in *Minnesota v. Campbell* held that Minnesota law does not apply to Indians who committed criminal acts within the reservation because it would interfere with federal guardianship of

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[99] *Mille Lacs II*, *supra* note 12 at 802. White, *supra* note 45 at 162.
[100] *Ibid.* at 820-1citing 1858 Minn. Laws 40, Ch. XIX; 1858 Minn. Laws 103 (setting hunting seasons for deer, elk, and several game birds); 1858 Minn. Laws 103, Ch. XLIV (extending Minnesota laws to Indians leaving their reservations and requiring passes to do so); 1858 Minn. Laws 105, Ch. XLV (illegalizing the use of various fishing technologies) 1858 Minn. Laws 105, Ch. XLV (illegalizing the use of various fishing technologies).
[101] Quoted in McClurken, *supra* note 57 at 397.

the Indians.[102] The *Campbell* rule was applied to wild game in *Selkirk v. Stephens.* Selkirk was a White Earth Reservation member who was transporting game birds harvested by reservation Indians within the reservation. The Court, observing that "tribal Indians…are not subject to the criminal laws of the state" without a treaty explored the question of "the legal status of game found off the reservation and in the hands of the carrier for shipment out of the state, which was killed on the reservation by Indians." [103]

The Court noted the effect of the 1864 treaty, which established the White Earth reservation, and the earlier 1855 Treaty. These treaties, rather than reserving separate enclaves beyond the reach of state law, were understood by the court to extend Minnesota's jurisdiction in the created reservations.

> The legal effect of the treaty of February 22, 1855, was that the lands now embraced within the limits of White Earth reservation became public lands of the United States, and that every right of the Indians therein became absolutely extinguished. The laws of the then territory of Minnesota became operative over the whole territorial limits of the present reservation. When the territory of Minnesota became a state in 1858, the jurisdiction of the state was just as complete and absolute over the lands now included in the reservation in question as it was over any other part of the state, except as to the sale of spirituous liquors to the Indians. The state has never ceded or relinquished any part of this jurisdiction.[104]

This jurisdiction extends to all parts of the reservation and includes jurisdiction over wild animals that are owned "in trust for the whole people of the state."[105] What prevents the state from enforcing its game laws on the reservation is the "personal relations" that tribal Indians have with the federal government. These Indians "are its [the federal government's] wards, and under its guardianship and control, and the state may not interfere with or impair the efficacy of such guardianship." Even though the state game laws are operative across the

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[102] *State of Minnesota v. Mary Campbell*, 53 Minn. 354 at 337 (Minn. Sup.Ct. 1893)
[103] *Julia Selkirk v. P.O. Stevens and Others*, 72 Minn. 335 (Minn. Sup. Ct. 1898).
[104] *Ibid*. at 338.
[105] *Ibid*.

state, the "remedies for enforcing them are imperfect" because Minnesota cannot punish an Indian "for violating such laws on the reservation."[106]

One year after *Selkirk*, the Court in *State v. Clooney* characterized the Indian right as a "license" to hunt and fish that was premised on the continued existence of the state-tribal governmental relationship. This traditional relationship between the tribal government and the state was in part based on state acquiescence of tribal resource use on the reservation in spite of contrary state regulation.[107] The license reflected sound policy as the Indian "is less vicious, more contented, and more easily controlled when he is allowed to follow his traditional habits."[108]

The rule of *Campbell* and *Selkirk* -- premised on the idea that the post-1854 treaties "absolutely extinguished" Indian rights within the territory while an individual "tribal" Indian had personal immunity from state law based of the federal trust relationship -- outlined an expansive view of state authority to regulate Indian harvesting. Federal officials also subscribed to this view.[109] In the patchwork reservations created by the *Nelson Act*, which necessarily reduced the tribal land base, the consequent state authority was extensive. While the Minnesota Supreme Court in *State v. Cloud* and *State v. Jackson* extended the immunity to harvesting activities taking place on allotment owned or used by tribal members,[110] the

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[106] *Ibid*. at 339.
[107] "[W]e think such tradition and acquiescence, as between the state government and the tribal government, may have sufficient effect to give the tribe a license to hunt and fish within the boundaries of the reservation, as this peculiar right is practically indispensable to the maintaining of the tribal relation. By the course of things for more than 30 years, it must be inferred that the United States government assumed that the Indians had a right to hunt and fish on the reservation, and the state government has acquiesced in that assumption….After 30 years of the mutual recognition, by both the federal and state governments, of the right of these Indians to do something so essential to their tribal relations, we are of the opinion that the courts should follow this mutual recognition, and hold that, while the title to all the wild game is in the state, the Indians have a license to hunt on the reservation in their usual and traditional manner, in order to procure food for themselves." *State v. Al Cooney*, 77 Minn. 518 at 519, 520 (Minn. Sup. Ct. 1899).
[108] *Ibid*. at 519.
[109] *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 at 1004 (D. Minn. 1971).
[110] *State v. John Cloud*, 179 Minn. 180 (Minn. Sup. Ct., 1930); *State v. Robert Jackson*, 218 Minn. 429 (Minn. Sup. Ct. 1944). An allotment or a trust patent under the *Nelson Act* was non-alienable for a total of 25 years after it was granted to the tribal member. For 25 years after an allotment within a reservation was conferred to a tribal

court also held that state game laws applied to a tribal member who trapped muskrat on his fee simple allotted land located within the boundaries of the reservation.[111] Of course, allotted land within the reservation owned by a non-Indian was also subject to state regulation and closed to Indian harvesting.

The restriction of Indian hunting, fishing and gathering to tribal and allotted land within the reservation resurfaced in 1971. In *Leech Lake Band of Chippewa Indians v. Herbst* the Leech Lake Chippewa argued that the *Nelson Act* had not disestablished their reservation and they retained treaty guaranteed aboriginal rights to hunt and fish within the exterior boundaries of the reservation.[112] Noting that its decision would apply to all Chippewa reservations, the Federal District Court agreed. It stated the Chippewa: "have the right to hunt and fish and gather wild rice on public lands and public waters of the Leech Lake Reservation free of Minnesota game and fish laws." However, the state retained jurisdiction to regulate non-Indian harvesters. Later the Minnesota Supreme Court in *Minnesota v. Clark* ruled on whether the Chippewa could hunt and fish on land *not* owned by, or for the band or an individual Indian, but which nevertheless lay within the reservation.[113] Minnesota again argued that the *Nelson Act* disestablished the reservation. The Minnesota Supreme Court disagreed. It held that despite the allotment process, both Indian and non-Indian land with the reservation remained "Indian Country" and that "the state is without jurisdiction to regulate…[Indian] hunting and fishing activities within the…reservation."[114]

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member the land could not be sold, encumbered or taxed. Due to changes in policy or the failure of individual Indians to effectuate the fee-simple transfer some of this land was never conveyed in fee simple to the Indian allottee. The land remains allotted to an individual by a trust patent and is considered Indian land as it is held in trust by the United States.

[111] *State v. Joe Bush, Sr.*, 195 Minn. 413 (Minn. Sup. Ct. 1935).

[112] *Leech Lake Band of Chippewa Indians v. Herbst*, *supra* note 109 at 1006.

[113] *State of Minnesota v. Bernard Clark, Jack Fulstrom*, 282 N.W. 2d 902 (Minn. Sup. Ct. 1979). The Court specifically did not address the question of whether the tribal members had a right of access to hunt, fish and gather under property law rules.

[114] *Ibid.* at 909.

The gradual weakening of state authority over hunting and fishing on the allotted reservations, however, did not affect Minnesota's continued enforcement of its hunting, fishing and gathering regulations outside of the reservations. Out of necessity, the Chippewa continued to harvest natural resources outside of the reservations, but the law in Minnesota through most of the 19th and 20th centuries was that the state had the authority to enforce its laws in a non-discriminatory fashion against Indians *off* the reservation, in the absence of specific federal law to the contrary. Moreover, even when the off-reservation activity originated within reservation boundaries, Minnesota took the position that state law applied to the off-reservation activity arising from a legal reservation activity.[115] The treaties guaranteeing off-reservation usufructuary rights were considered inapplicable, despite Chippewa protestations about their continued efficacy. The putative extinguishment worked by the later treaties removed all off- reservation privileges under the 1837 and 1854 treaties.

III. Minnesota v. Mille Lacs Band of Chippewa Indians

A. The *Mille Lacs* Decision in the District Court

The successful litigation in Wisconsin regarding hunting, fishing and gathering rights under 1837 and 1842 treaties was a positive precedent for the Mille Lacs Band in Minnesota.[116] However, because the history of the Mille Lacs and the Wisconsin bands diverged after 1837, the *LCO* success in Wisconsin did not assure a similar success in Minnesota. On the one hand, the force of the Executive Order of 1850, which sought to revoke the usufructuary rights and remove the Chippewa, was lessened because Mille Lacs was not party to the 1842 Treaty with its removal provisions. In order for the rights to be extinguished under the Executive Order, the court in Minnesota would need to find that the portion of the order

[115] *Bailey v. State*, 409 N.W.2d 33 (Minn. Ct. App. 1987).
[116] The area covered by the 1837 and 1842 Treaties in Wisconsin is located in the 7th Federal Circuit. The Minnesota ceded territory is in the 8th Federal Circuit. Thus the 1983 Court of Appeal decisions in *LCO I* in which the Court found that the 1837 and 1842 Rights had not been extinguished had no effect of the 1837 treaty rights in Minnesota.

which revoked the usufructuary rights could be severed from the removal portion of the order. Given that the *LCO* Court had found the order "unlawful" and that it did not manifest the explicit intent necessary to extinguish treaty rights, it was likely that a Minnesota court would rule similarly.

On the other hand, the band necessarily needed to argue that the Treaty of 1855, to which the *LCO* bands were not parties, did not extinguish their usufructuary rights under the 1837 Treaty. In that treaty the Mille Lacs Band, along with other Minnesota Chippewa bands, ceded "all their right, title, and interest in, and to, the lands now owned and claimed by them" in the territory of Minnesota.[117] Certainly the *LCO* precedent, in which the 7th Circuit Court of Appeals held that the failure to mention hunting, fishing and gathering in the 1854 Treaty did not indicate the explicit intention to extinguish the rights, was persuasive. However, the language of the 1854 Wisconsin treaty, *i.e.* "[t]he Chippewas of Lake Superior hereby cede to the United States all the lands heretofore owned by them in common with the Chippewas of the Mississippi" was weaker than the1855 Treaty language. Legal precedent regarding this language was not encouraging. In a 1979 case concerning the 1863 Chippewa Treaty, *United States v. Minnesota*, the Federal District Court by Justice Devitt stated that the language "all right, title, and interest" was "precisely suited" for the purpose of eliminating Indian title and conveying to the government all the Band's interest in the ceded lands. [118] As hunting and fishing are parasitic on underlying title, the rights would similarly be extinguished in the absence of language expressly reserving them. In *Oregon Department of Fish & Wildlife v. Klamath Indian Tribe* the United States Supreme Court found that similar language extinguished hunting and fishing rights in a ceded portion of the Klamath Reservation.[119]

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[117] The 1855 Treaty ceded lands to the north and northwest of the 1837 ceded Territory.
[118] *United States v. Minnesota*, 466 F. Supp. 1382 at 1384. (D. Minn), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161, *cert. denied*, 449 U.S. 905 (1980).
[119] *Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985) [*Klamath*].

In 1990, the Mille Lacs Band filed suit against the Minnesota Department of Natural Resources to prevent it from enforcing hunting and fishing regulations against tribal members in twelve counties.[120] The band objected to the application of the regulations to band members and complained that traditional harvesting methods had been outlawed. The United States intervened on behalf of the band while nine counties and some private landowners intervened on the side of Minnesota. The District Court bifurcated the proceedings. In Phase I, the Court would determine whether the 1837 rights continued to exist and if they did, would determine the extent of these rights. If the rights were found to be un-extinguished, Phase II would address resource allocation issues and the validity of state regulatory measures.

In an effort to avoid litigation Minnesota entered into negotiations with the band but the resulting compromise was rejected by the Minnesota legislature. The subsequent Phase I decision by the District Court held that Mille Lacs retained the usufructuary rights set forth in Article 5 in the 1837 Treaty because they had not been extinguished by the 1850 Executive Order, the 1855 Treaty or Minnesota's admission to statehood. Minnesota could regulate the rights for health and safety provided the regulations met strict standards. The Court held that the treaty privilege allowed the Chippewa use of a broad range of resources found in the lakes and forests of the ceded territory for personal and commercial purposes; and that the Chippewa harvest was not limited to 1837 harvesting technologies.

> In 1837 the Chippewa used all of their surrounding natural resources to survive. They understood the phrase "hunting, fishing and gathering the wild rice" used in the 1837 treaty to mean "living off the land." They understood that the government wanted to harvest the pine timber, and they gave up any right to harvest that resource, but they did not understand the treaty to impose any other limits on the types of resources that they could harvest. They also did not

[120] The territory consisted of an area south and southeast of the Mille Lacs Reservation. See Catherine M. Ovsak, "Reaffirming the Guarantee: Indian Treaty Rights to Hunt and Fish Off-Reservation in Minnesota", Case Comment (1994) Wm. Mitchell L. Rev. 1177 at fn. 179.

> understand that there were any restrictions on the time, place, or manner of the exercise of the privilege….The evidence showed that the parties intended to permit continued use of the privilege for commercial purposes. In 1837 the Chippewa were engaged in the sale of harvested resources in the fur trade and to settlers and lumbermen….The privilege granted in 1837 was not limited to use of any particular techniques, methods, devices, or gear. The Chippewa incorporated rifles and other Euro-American technology into their hunting, fishing, and gathering before the 1837 treaty and continued to use new technology after the treaty. [121]

It rejected arguments that the President Taylor's 1850 Executive Order extinguished the rights or that the 1855 Treaty, where the Chippewa ceded "all their right, title, and interest in, and to, the lands now owned and claimed by them" to the United States extinguished the rights. The 1850 Order was unlawful because it sought to remove the Chippewa without their consent.[122] The language of the 1837 Treaty "did not give the President unfettered discretion to revoke the guaranteed usufructuary rights" because the President's discretion "was restricted so long as the Indians behaved well and peacefully…."[123] As for the language of the 1855 Treaty, the Court found that neither the Chippewa nor the United States intended to extinguish hunting, fishing and gathering rights.[124] "The Chippewa did not intend to give up their 1837 treaty privilege [to hunt, fish, and gather] and they did not understand the 1855 treaty to have that effect."[125]

After the Phase I decision and prior to Phase II, the Band, along with the intervener Wisconsin Chippewa Bands, agreed to a Conservation Code and Management Plan to regulate hunting, fishing and gathering in the 1837 ceded territory. [126] Those issues on which no agreement could be reached; such as the determination of harvestable surplus, whether the fish populations of lakes bisected by the treaty area boundaries were completely subject to the

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[121] *Mille Lacs II*, *supra* note 12 at 838.
[122] *Ibid.* at 824. The Court also held that the 1850 Removal Order was suspended by subsequent executive and congressional action and that it never applied to the Mille Lacs Band. *Ibid.* at 810-11.
[123] *Ibid*. at 827.
[124] *Ibid*. at 830-5.
[125] *Ibid*. at 818.
[126] After Phase I In March 1995, the Wisconsin Bands, who exercised usufructuary rights under the 1837 Treaty in Wisconsin by virtue of the *LCO* litigation intervened.

treaty right, whether the right might be exercised on private lands and the extent to which the moderate living doctrine applied to the exercise of the treaty right were all decided by the Court, mainly in favour of the bands position.[127] The 8th Circuit Court of Appeals affirmed the District Court in all respects.

B. The Supreme Court of the United States

Given the issues in *Mille Lacs* and the extensive record that had developed in both Wisconsin and Minnesota over the 1837, 1842, 1854 and 1855 Chippewa Treaties it was somewhat surprising that the Supreme Court granted *certiorari*. Chippewa usufructuary harvests in Wisconsin had been carried on for a decade without harm to the resource. After the rancour of litigation, the state and tribal governments, both in Wisconsin and Minnesota had reached substantive agreement on a broad range of regulatory issues. At the same time, there was a perception among the Indian law bar that the Supreme Court was not amenable to tribal claims against the state or federal governments. As one observer of the Court put it in 1998:

> Increasingly, the Court has shunned the difficult and detailed analysis that the issues demand and the tribes deserve. Instead, it has begun taking principles that were previously developed in context, and disengaging them from that context, generally to the serious disadvantage of the Indian tribes. It treats contextualized holdings as if they were nothing more than a thin film that can be lifted from the facts that created them and wrapped around quite different factual contexts without harm. In the process, the Court is creating an oversimplified Indian law at the expense of substantial misrepresentation of its own precedents in the area. [128]

However, it was clear that the issue of the explicitness necessary to extinguish treaty rights, the severability of the 1850 Executive Order, and Minnesota's equal footing argument were of some salience in federal law.

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[127] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 952 F. Supp. 1362 (D.Minn. 1997).
[128] Judith V. Royster, "Decontextualizing Federal Indian Law: The Supreme Court's 1997-98 Term" (1999) 34 Tulsa L.J. 329.

1. *Majority Opinion by Justice O'Connor*[129]

After a recitation of the facts, procedural history and lower court decisions Justice O'Connor, writing for the majority divided her opinion into three different sections. First, she discussed whether the President Taylor's 1850 Executive Order terminated Chippewa hunting, fishing and gathering rights and the severability of the removal portion of the order from the part revoking the usufructuary rights. Second, she discussed whether the 1855 Treaty extinguished the usufructuary privileges. Finally Justice O'Connor again focused the Court's attention on the Equal Footing doctrine and abrogation of Indian treaty rights upon statehood.

a) The 1850 Executive Order

Justice O'Connor began her discussion of the 1850 Executive Order by noting the power to terminate the usufructuary rights and order the removal of the Chippewa "must stem from an act of Congress or from the Constitution itself."[130] The legal basis of President Taylor's Order could either be the Removal Act of 1830 or the Treaty of 1837.[131] The 1830 *Indian Removal Act* was premised on the idea that the various tribes would agree to remove and neither forbid nor authorized the 1850 Executive Order. In the alternative, the intervening landowner's had argued that the 1837 Treaty authorized the removal order; an argument that O'Connor quickly dismissed. She noted that the treaty never mentions removal and "[t]he silence in the Treaty, in fact, is consistent with the United States' objectives in negotiating

[129] The *Mille Lacs* decision was 5-4 in favour of the Chippewa. The dissents of Chief Justice Rehnquist and Justice Thomas will not be discussed in this thesis.
[130] *Mille Lacs*, *supra* note 9 at 188-9
[131] Unlike the *LCO* litigation, the Mile Lacs Band was not party to the 1842 Treaty which had a removal clause. The *LCO I* Court held that the 1850 Executive Order was invalid because the Treaties of 1837 and 1842 authorized termination of the Chippewas' right to exercise their usufructuary privileges on ceded land *only* if the Indians misbehaved by harassing white settlers. The Court concluded that "there exists no genuine issue of material fact" about the good behavior of the Chippewa prior to the Order. *LCO I*, *supra* note 46 at 361.

it."[132] These objectives were not removal but the purchase of Chippewa land "for the pine woods located on it…."[133]

After concluding that there is no legal authority of the President's Removal Order, the opinion then considered the question of whether the extinguishment portion of the order could be separated from the unlawful removal portion. Minnesota had argued that the 1837 privileges were revoked notwithstanding the unlawfulness of the President's Order concerning removal. This was because the revocation was authorized in the 1837 Treaty itself where the hunting, fishing and gathering privileges were only guaranteed "during the pleasure of the President."

The issue of whether an executive order could be severed into valid and invalid parts was one of first impression. The Court, without discussion, simply applied the test used when considering the severability of statutes. This standard requires a factual inquiry into the legislative intent behind the statute.

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.[134]

Thus in order for the 1837 rights to be revoked by the 1850 Order, the Court would need to find that President Taylor would have revoked usufructuary privileges even if he could not have issued the removal order.

Rather than finding that the revocation of the usufructuary rights was a separate policy with independent or complementary policy objectives, the Court found that "President Taylor intended the 1850 order to stand or fall as a whole."[135] Removal of the Chippewa from

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[132] *Mille Lacs*, *supra* note 9 at 190.
[133] *Ibid.*
[134] *Ibid.* at 191.
[135] *Ibid.*

the ceded territory was the "predominant purpose"[136] behind the policy that led to the issuance of the order, and the revocation of the privileges is integral to the implementation of the removal policy. "The Order tells the Indians to 'go,' and it also tells them not to return to the ceded lands to hunt and fish."[137] O'Connor noted further that the officials charged with implementing the order similarly concerned themselves only with removal. Finally, the Court found that a revocation of the rights as distinct from revocation and removal as a "whole" policy would necessitate a finding that the independent exercise of the rights was a problem to American officials. Noting that the only evidence supporting a separate and independent reason for revocation was Governor Ramsey's single statement about the "demoralizing" effects of Chippewa hunting mentioned above, O'Connor pointed out that there is simply not evidence that the "[t]reaty privileges themselves – as opposed to the presence of the Indian – caused any problems necessitating the revocation of those privileges."[138] The history leading to the 1850 Order was not concerned with "revoking Indian Treaty rights; the Indians had to be removed."[139]

b) The 1855 Treaty

Minnesota also argued that the 1855 treaty, under which the Chippewa relinquished and conveyed "any and all right, title and interest, of whatever nature" in their territory extinguished the usufructuary privileges.

O'Connor structured her argument of the 1855 treaty by considering the silence of the treaty journal and text concerning the abrogation of usufructuary rights, the historic context of the treaty, and the application of traditional canons of construction applied by the court in favour of Native American treaty rights. She noted that the entire 1855 Treaty is "devoid of

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[136] *Ibid.*
[137] *Ibid.* at 192.
[138] *Ibid.*
[139] *Ibid.* at 193.

any language expressing mentioning – much less abrogating – usufructuary rights."[140] The authorizing legislation and treaty journal also do not mention usufructuary rights. For the majority, the failure to mention the rights, when contemporaneous treaties signed with other tribes expressly revoked usufructuary privileges, suggested that the intent of the parties was to preserve the rights.

Nevertheless, on its face the treaty language conveying all right, title and interest does create an impression that it might have been intended to abrogate the rights; despite the presumption that an intent to relinquish and abrogate the rights should not be given any special meaning by the court when the American drafter could have been more clear. O'Connor observed that in order to determine whether an extinguishment was intended, the Court must "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'"[141] Reviewing the historical context is indispensable because "we interpret Indian treaties to give effect to the terms as the Indian themselves would have understood them."[142]

For the majority, an examination of the historic context revealed that the treaty was primarily designed to transfer Chippewa land to the United States and it was not intended to terminate the privileges. At the very least, the historical record refuted Minnesota's "assertion that the 1855 Treaty unambiguously abrogated the 1837 hunting, fishing and gathering privileges."[143] The Chippewa chiefs present at the negotiations stated they understood that

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[140] *Ibid.* at 195.
[141] *Ibid.* at 196.
[142] *Ibid*. citing *Washington v. Washington State Commercial Passenger Fishing Vessel Assn*., 443 U.S. 658 (1979) [*Fishing Vessel*] and *Winans.*
[143] *Ibid.* at 200.

purchasing land was Commissioner Manypenny's objective.[144] Moreover, the legislation authorizing the negotiations was silent about the termination of usufructuary rights -- a silence which the Court found "was likely not accidental" as the Chairman of the Committee on Indian Affairs stated that the treaties negotiated under the Act would reserve to the Chippewa "those rights secured by former treaties."[145] This silence carries over into the Treaty Journal and the memorandum from Commissioner Manypenny that accompanied the treaty when it was submitted to the Senate. The memorandum also suggested that the words used in the treaty were not designed to extinguish the rights.

Finally, O'Connor distinguished *Oregon Dept. of Fish and Wildlife v. Klamath Tribe* in which the Court found that similar language used in a 1901 agreement extinguished usufructuary rights. *Klamath* concerned a reservation established by treaty in 1864 which provided for the "exclusive right of taking fish in streams and lakes, included in said reservation, and other gathering…within its limits." A surveying error excluded a portion of the reservation lands for which the United States and the Klamath entered into an agreement in 1901. In the agreement, the tribe agreed to "cede, surrender, grant, convey…all their claim, right, title and interest in and to" the land. The tribe later sought to have its usufructuary rights recognized on the land ceded by the 1901 agreement. After a close evaluation of the factual differences between the disputes, O'Connor concluded that *Klamath* does not control the *Mille Lacs* dispute -- the Chippewa's usufructuary rights existed independently of land ownership and were not tied to a reservation. Moreover, Minnesota's emphasis on the similar language found in the 1855 and 1901 agreements "reveals a fundamental misunderstanding of

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[144] "Indeed all of the participants in the negotiations, including the Indians, understood that the purpose of the negotiations was to transfer Indian land to the United States. The Chief of the Pillager Band of Chippewa stated: "It appears to me that I understand what you want, and your views from the few words I have heard you speak. You want land." (1855 Treaty Journal) (statement of Flat Mouth). Commissioner Manypenny confirmed that the chief correctly understood the purpose of the negotiations: 'He appears to understand the object of the interview. His people had more land than they wanted or could use, and stood in need of money; and I have more money than I need, but want more land.'" *Ibid.*at 197 [footnotes omitted].

[145] *Ibid.*

the basic principles of treaty construction." Relying on the bare language of a treaty text as the sole means of determining the content of a treaty agreement omits situationally derived and historically embedded understandings that flesh out the denotations of the words and phrases.

> Rather, to reach our conclusion about the meaning of that language, we examined the historical record and considered the context of the treaty negotiations to discern what the parties intended by their choice of words. This review of the history and the negotiations of the agreements is central to the interpretation of treaties.[146]

The history, purpose and negotiations of the 1855 Treaty led the majority to conclude that Mille Lacs Band did not relinquish its 1837 rights.

c) The Equal Footing Doctrine

As discussed above the Equal Footing doctrine was used as a basis for extending state jurisdiction over Indian hunting, fishing and gathering after a territory had been admitted as a state. Minnesota argued that the rights established in the 1837 Treaty were irreconcilable with its sovereignty in the absence of an express reservation of the rights in its Enabling Act. To support the argument that statehood impliedly abrogated the 1837 treaty rights when Congress admitted Minnesota as a state in 1858, Minnesota cited its Enabling Act which provides that it be "admitted into the Union on an equal footing with the original States in all respects whatever"[147] and the Supreme Court's 1896 decision *Ward v. Race Horse.*

Because neither the circumstances nor language of the Minnesota Enabling Act makes any mention of Chippewa treaty rights -- which the Court noted cannot be abrogated without clearly expressed intent and clear evidence that Congress actually considered the conflict between its intended action and Indian treaty rights and decided to resolve the conflict by

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[146] *Ibid.* at 202.
[147] *Congressional Act for the Admission to Minnesota Into The Union*, § 1, 11 Stat. 285 (1858).

abrogating the treaty -- Minnesota's argument rested on the cogency of *Race Horse*. However, for Justice O'Connor *Race Horse* "rested on a false premise."[148] The *Race Horse* Court had held that treaty rights which reserved the right to hunt on unoccupied lands of the United States terminated when Wyoming became a state because they "conflicted irreconcilably with state regulation of national resources."[149] The right to manage natural resources was an essential attribute of the state's governmental existence and thus the treaty rights could not survive admission to statehood. Moreover the rights created by the treaty were "temporary and precarious" and clearly were not established with the intent that they survive statehood. O'Connor wrote however that cases subsequent to *Race Horse* have held that usufructuary treaty rights were not irreconcilable with the state sovereignty over natural resources. Instead they can co-exist with state and federal management. This co-management does not provide the tribes with the absolute freedom to harvest resources but recognizes that the state can impose reasonable, necessary, and non-discriminatory regulations on the treaty right. Under the circumstances, there is no need for Congress to explicitly preserve the treaty rights in a statehood act. As for the classification of treaty rights into "temporary and precarious" as opposed to rights "of such a nature as to imply their perpetuity" O'Connor held that this distinction cannot provide a useful guide to what treaty rights were intended by Congress to survive statehood.[150] In conclusion, O'Connor dispenses with the Equal Footing doctrine in treaty rights cases.

> [W]e note that there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood. Treaty rights are not impliedly terminated upon statehood.[151]

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[148] *Mille Lacs*, *supra* note 9 at 204.
[149] *Ibid.*
[150] *Ibid.* at 206.
[151] *Ibid*. at 207 [emphasis in original].

IV. The American Doctrine of Hunting, Fishing and Gathering

The *Mille Lac* dispute is the latest example of the Supreme Court grappling with off-reservation hunting, fishing and gathering. While the principles governing activities within the reservation are relatively clear, the principles and the application of those principles in specific historical contexts involving aboriginal and treaty rights outside of the reservation are complex and less certain. The starting point of the analysis is certainly well settled; the rights are reserved either explicitly or implicitly by treaty, statutory agreements or executive orders establishing reservations.[152] The rights reserved by sovereign tribes have "a significant geographical component" which for the most part is limited to the reservation. Despite this authority, federal jurisdiction is paramount within the reservation. State jurisdiction is paramount where an activity takes place off the reservation absent some federal treaty or federal statute to the contrary.[153] However, as off-reservation rights necessarily involves the weighing of conflicting federal, state and tribal interests and considering complex and difficult historical issues, the application of *Mescalero Apache* standard mentioned above has been difficult and controversial.

First, it is often bitterly disputed what were the historical circumstances surrounding the existence, content or extinguishment of aboriginal or treaty rights. Typically, the disputes involve a degree of factual specificity which requires the court to resolve difficult questions of historical fact and historiography.

Second, the evidentiary problems are often compounded by the difficulty in determining the legal import of treaty language or a federal statute(s) in light of the particular circumstances of the rights claim. Through the use of protective interpretive approaches, the

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[152] Executive orders may establish off-reservation hunting, fishing and gathering rights both prior to and after statehood. However, after statehood there will be not implied rights found and the rights must be set forth explicitly in the Order. *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996).

[153] *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 at 335, n. 18 (1983) [*Mescalero Apache*].

courts have generally eschewed both the plain language approach to treaty texts and the application of traditional rules of statutory construction. It has been necessary to consider the particular text *in pari materia* with other legislative enactments in light of the general historical relationship between the Indians and the federal government as well as the particular relationship between the federal government and the tribe claiming usufructuary rights.

Third, even where the content, scope and extent of the federal action is clear, off-reservation usufructuary privileges involve the balancing of federal and state authority; an analysis which necessarily involves fundamental questions about the nature of the federal system. The rights provide the tribal member with immunity and/or pre-empt state regulation, but the state's interest as sovereign owner and trustee for wildlife has deep roots within American jurisprudence.[154] As Justice Douglas pointed out when discussing the rights of the Puyallup Tribe under the 1854 Treaty of Medicine Creek:

> The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.[155]

Indeed, despite the principle that the tribes on the reservations have the right to make their own laws and be governed by themselves, state regulatory interests in certain instances can extend state jurisdiction to regulate the activities of tribal member even within the reservation.[156] Moreover, the state has a compelling interest in seeing that its powers are not divested to non-representative groups (from the state-federalist perspective) since the continued vitality of the federal system is dependant upon the idea of efficacious elected local

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[154] *Baldwin v. Fish and Game Commission of Montana,* 436 U.S. 371 (1978), Burger C.J. in his concurrence at page 392 states that the state ownership doctrine "manifests the State's special interest in regulating and preserving wildlife. Whether we describe this interest as proprietary or otherwise is not significant [footnotes omitted]."

[155] *Department of Game of Washington v. Puyallup Tribe*, 414 U.S. 44 at 49(1973) [*Puyallup II*].

[156] *Nevada v. Hicks*, 533 U.S. 353 (2001) [*Hicks*].

governments.[157] Thus while the courts have narrowly defined the states' ability to regulate off-reservation activity for hunting and fishing, they have continued to hold that the state has legitimate interests in the area. They continue to apply structural considerations and the Equal Footing doctrine to federal actions which may affect the state authority.[158] As the 7th Circuit Court of Appeals noted in *Wisconsin v. Baker*:

> There are other concerns besides facilitating communication between the United States and the Indians that may come into play when a court is asked to resolve a dispute regarding the interpretation of an Indian treaty. Preserving the power of state governments to promote public welfare is one such concern, and it is a weightier one than is the concern for facilitating communication between the United States and the Indians. Thus when, as in the case before us, interpreting a treaty as the Indians understood it would have the effect of divesting a state of some of its sovereign power over non-Indians, we will not adopt a rule that requires us to interpret the treaty as the Indians understood it.[159]

Related to the issue of state interest is the uncertainty about the extent to which a tribe can co-manage the off-reservation treaty resources.

A. The Source of the Hunting, Fishing and Gathering Rights

1. Historic Occupation and Use

American law sources hunting, fishing and gathering rights in the historic use, occupation and possession of territory by tribal entities who exercised jurisdiction over the area.[160] In *M'Intosh* Chief Justice Marshall noted that the legal relationship governing American-Native

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[157] *Massachusetts v. New York*, 271 U.S. 65 (1926); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837)(grants of franchises or privileges from state are strictly construed in favour of public as they tend to impair State's power to exercise ordinary governmental functions).

[158] *Hicks*, *supra* note 156; *South Dakota v. Gregg Bourland*, 508 U.S. 679 (1993); *Montana v. United States*, 450 U.S. 544 (1981).

[159] *Wisconsin v. Baker*, 698 F.2d 1323 at 1333 (7th Cir. 1983) (Indian tribe may not exclusively regulate fishing on lakes located within or bordering the reservation absent explicit federal treaty as state assumed ownership of lakebed upon statehood.).

[160] I am using the term "possession" the same way that it is used by Professor McNeil in his book *Common Law Aboriginal Title*. Prof. Mc Neil suggests that possession is a legal concept or a conclusion of law which arises from a sufficiently close physical relationship between a person and a parcel of land due to a actual presence or control over it coupled with an intention to hold the territory for the person's own purposes. Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 6-14. Absent an explicit Congressional or Executive determination that a certain territory is possessed by a particular tribe or a treaty description, the determination of possession by the tribe of a particular territory is a question of fact based on the intention of the parties and all the surrounding circumstances. *United States* v. *Santa Fe Pacific R. Co*., 314 U.S. 339 at 345 (1941) [*Santa Fe Railroad*].

American interaction was premised on the idea that the tribes were "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion…."[161] According to Marshall and later Court decisions, the rule is derived from the earlier British practice and the Discovery doctrine.[162] Possession and use are not determined according to the criteria found in British and American common law. Rather they are determined relative to the cultural and economic practices of the particular tribe.

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.[163]

The rights included in Indian title are "as sacred and as securely safeguarded as is fee simple absolute title."[164] It is "good against all but the sovereign" and can be terminated only by "sovereign act" of the federal government.[165] While occupancy, use, and possession are often claimed by tribes to have existed from "time immemorial" there is no requirement in American law that Indian title predate European discovery or assertion of sovereignty. It simply must only be continuous and exclusive unless there was a forced removal.[166]

The Discovery doctrine has been challenged because it seemingly provided for the dispossession tribal territory and the destruction of their political and cultural existence. It has been faulted for establishing the legal basis for the extension of state jurisdiction over the tribes and the plenary power doctrine. The American version of the doctrine excluded the

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[161] *M'Intosh*, *supra* note 63 at 574.
[162] "One uniform rule seems to have prevailed in the British provinces in America by which Indian lands were held and sold, from their first settlement, as appears by their laws -- that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots." *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 at 745 (1835).
[163] *Ibid.* at 746.
[164] *United States v. Shoshone Tribe*, 304 U.S. 111 at 117 (1938).
[165] *Oneida Nation of New York State v. Oneida County, New York*, 414 U.S. 661 at 667 (1974) [*Oneida County*].
[166] *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935 (Ct. Cl. 1974).

idea that international law rules (which were presumed to respect property rights upon the transfer of sovereignty or conquest) could govern the relationship between the tribes and the colonial state. Instead it established that the relationship was to be governed by rules determined by the discovering power. However, unlike in other territories where the doctrine has been applied, American courts have incorporated legal rules which view tribal interests as legally cognizable under American law. In the seminal Indian cases *M'Intosh*, *Cherokee Nation* and *Worcester* it was established that the tribes have a residual sovereignty and legal interest in their territory subject to the national government's overarching sovereignty to extinguish title by purchase or conquest.

This pre-existing sovereignty and the recognition of legal possession have established a framework of inter-governmental relations where Indian-American relations operate across different spheres of authority and sovereignty. The relationship remains, in many important aspects, a political one, even though the plenary power of the federal government can extinguish tribal legal existence and title. The continuing residual inherent sovereignty of the tribes provides them with an exclusive source of authority to manage certain aspects of the collective existence and precludes challenges from non-Indians based on due process and equal protection constitutional provisions that have arisen in off-reservation disputes.[167]

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[167] "In the context of Indian fishing rights, the Supreme Court long ago rejected contentions that Indians obtained no greater rights by virtue of a treaty than non-Indian citizens: "This (*i.e.* that the Indians acquired no rights but those they would have without a treaty) is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more. And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules.' . . . How the treaty in question was understood may be gathered from the circumstances [footnotes omitted]."*Winans*, *supra* note 3. See also *United States v. Washington*, 384 F. Supp. 312 (1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) wherein the Court stated: "In treating treaty Indian fishermen no differently from other citizens of the state, the state has rendered the treaty guarantees nugatory."*United State of America v. Michigan*, 471 F. Supp. 192 at 250 (W.D. Mich., 1979).

2. Federal Power

It is not necessary for there to be a treaty or a federal statute in order for Indian occupation and use of territory to be recognized by the courts.

> Nor is it true…that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action...The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive.[168]

Yet because the Discovery doctrine incorporated Native American occupancy and use rights into municipal law and subsequent federal treaties or legislation occupied the entire field of American-Indian relations, Indian use and occupancy are also federal rights. The 1789 Constitution, federal Non-Intercourse Acts, and early Supreme Court decisions transformed these "common law rights" as understood by the doctrine of aboriginal title into federally protected rights.[169] As noted by the 6th Circuit Court of Appeals regarding Chippewa fishing rights in Lake Huron:

> The treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty, including the aboriginal rights to engage in gill net fishing, continue to the present day as federally created and federally protected rights. The protection of those rights is the solemn obligation of the federal government, and no principle of federalism requires the federal government to defer to the states in connection with the protection of those rights.[170]

Federally guaranteed tribal rights are different from other federally guaranteed rights. While the original source of the tribal rights precedes the establishment of the American state, (similar to the natural rights of the individual), the federal guarantees, premised on a political relationship between inherent sovereigns, are more analogous to the federal-state

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[168] *Santa Fe Railraod*, *supra* note 160 at 347.

[169] "The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State….But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." *Oneida County*, *supra* note 165 at 670.

[170] *United State of America v. Michigan*, 653 F.2d 277 at 278 (6th Cir. 1981).

structural relationship established by the constitution. This ongoing political relationship inserts Indian rights and tribal existence into the state- federal relationship. The 7th Circuit Court of Appeals exhibits the federal nature of the relationship in *Wisconsin v. Environmental Protection Agency*.

> Although the general model of sovereignty suggests that different sovereign states normally occupy different geographic territories, the existence of federations and confederations shows that overlapping sovereignty is also a common feature of modern political organization. In this case, we confront one of the more complex kinds of overlapping sovereignty that exists in the United States today: that between the States and Indian tribes.[171]

The federal nature of the tribal rights is demonstrated by and provides for the establishment of reservations and various usufructuary rights, by treaty, statutory agreement or executive order in territory that can be far removed from a particular tribe's historic territory; a situation which commonly occurred, particularly during the removal period. These removed tribes continue to have various rights associated with their use and occupation of their historic territories in their new territories. On the one hand, the continued use rights are a demonstration of federal constitutional authority. On the other hand, the establishment of the rights is predicated on the continuing political relationship the federal government maintains with the tribes -- otherwise state authority and constitutional provisions such as the equal protection clause would prevent the federal action.

B. General Principles of Interpretation

1. Reserved Rights Doctrine

The Reserved Rights doctrine informs all legal interpretations of treaty texts or federal statutory agreements.[172] The doctrine is an interpretive rule based on the status of the tribes as

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[171] *Wisconsin v. Environmental Protection Agency*, 266 F.3d 741 (7th Cir. 2001) [footnotes omitted].
[172] "The conceptual framework, then, for interpreting the treaty is that the grant or cession in the treaty is not made from the United States to the Indians. Rather, the Indians were the grantors of a vast area they owned

sovereign entities and possessors of territory and rights prior to the assertion of American sovereignty. "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory" and they continue hold their natural rights to sovereign authority in areas where it has not been relinquished.[173] In the oft-cited quotation in *United States v. Winans* the Supreme Court stated:

> The treaty was not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein.[174]

Under the doctrine, all members of the signatory tribes retain whatever rights they possessed which are not conveyed or relinquished.[175] The rights reserved include all rights associated with the residual sovereignty of the tribes which is consistent with their dependant status, such as laws pertaining to local government over tribal members and rights to hunt, fish and gather as well as access rights to territory to carry out these activities.

The effect of the Reserved Rights doctrine can be overstated. While it is presumes that the tribe intends to reserve inherent sovereignty to govern their own members, in the absence of contrary language in the treaty, the courts assume that the United States was negotiating for the unimpeded settlement and economic exploitation of the area. The scope of rights obtained by the United States is not limited by the uses it historically intended in the

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aboriginally and the United States was the grantee." *United State of America v. Michigan*, *supra* note 167 at 254.

[173] *United States v. Mazurie*, 419 U.S. 544 at 557 (1975).

[174] *Winans*, *supra* note 3 at 381.

[175] "And this, it is further contended, the Indians knew (that the lands were arid), and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?" *Winters v. United States*, 207 U.S. 564 at 576 (1908) [*Winters*]; See also *United States v. Wheeler*, *supra* note 6.

area (*e.g*. agriculture, mining, cutting timber) but by the assumption that the treaty was a textual reference extending non-Indian jurisdiction into an area over which it had asserted a pre-existing claim of *imperium*. In contrast, the courts require specific intent, explicitly set forth in the document of by treaty participants, or implicitly from all the surrounding circumstances, for tribes to reserve various uses. Moreover, these reserved uses have generally been understood by the courts to be "traditional", thus limiting their range.

Nevertheless, the Reserved Rights doctrine is an important aspect of American Indian jurisprudence and especially important in hunting, fishing and gathering disputes since continued access to natural resources for food was usually a primary concern of tribes when they ceded territory. First, where hunting, fishing and gathering rights are explicitly or implicitly reserved, any subsequent action purporting to extinguish the rights is narrowly construed. This narrow construction is consistent with the fiduciary relationship the grantor tribe continues to have with the United States. Second, activities that are not covered by the express terms, by implication, or by subsequent federal statute, remain within the governmental competence and use of the tribe. Included in this is tribal regulation of off-reservation activities. Third, the rights reserved by the treaty are not "frozen" in time. The tribe, like any non-Indian user, can utilize modern harvesting methods and engage in modern commercial activities involving harvested natural resources. This is consistent with the idea of the continuing sovereignty of the tribe.

2. Fiduciary Obligations and the Protective Canons of Statutory and Treaty Construction

A related interpretive principle is the idea that the federal government has fiduciary obligations towards the tribes. The trust responsibility is a judicially created legal doctrine derived from Justice Marshall's opinion in *Cherokee Nation* which incorporated earlier British and American policy into law. The obligations arise from the ongoing political

relationship the United States maintains with the Native Americans. This relationship has reduced the once independent tribes, who were in some respects a "dependent and distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies" to a state of dependency.[176]

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic….[177]

The trust responsibility is also a source of federal authority over the tribes and provides a standard for judicial evaluation of Congressional and Executive action.[178] However, perhaps reflecting the plenary power of the federal government to deal with Indians as it sees fit, the obligations required by the court under the general trust relationship are essentially procedural. Unless the United States assumes or has control or supervision over tribal monies or properties, no substantive fiduciary standards are required. [179]

For the most part, the trust responsibility impacts the area of hunting, fishing and gathering activities as an interpretive principle when applied by the court to determine the

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[176] *M'Intosh, supra* note 63 at 597.
[177] *Board of County Commissioners v. Seber*, 318 U.S. 705 at 715 (1943).
[178] "These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." *Kagama*, *supra* note 10 at 383-4. "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward Indians, such legislative judgments will not be disturbed." *Morton v. Mancari*, 417 U.S. 535 at 555 (1974). In *Felix S. Cohen's Handbook of Federal Indian Law*, 1982 ed. (Charlottesville, Va.: The Michie Company, 1982) [*Cohen's Indian Law*] at page 221 the authors argue that the *Mancari* statement "seems to impose substantive limitations." "Where Congress is exercising its authority over Indians rather than some other distinctive power, the trust obligation apparently requires that its statutes be based on a determination that the Indians will be protected. Otherwise, such statutes would not be rationally related to the trustee obligation."
[179] Although "the undisputed existence of a general trust relationship between the United States and the Indian people" can 'reinforce' the conclusion that the relevant statute or regulation imposes fiduciary duties, that relationship alone is insufficient to support jurisdiction under the Indian Tucker Act. Instead, the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *United States v. Navajo Nation*, 537 U.S. 488 at 506 (2003) [footnotes omitted]; see also *Mitchell*, *supra* note 10.

existence, content and extent of a claimed right as well as evaluating the character of the negotiating parties.[180] The principle requires the court to assume that the relationship between the tribe and the United States is one between two governmental entities with asymmetrical but nevertheless equally subsisting sovereignties. "Accordingly, it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties."[181] This political relationship is ongoing; and historic representations made by the Americans as evidenced by the treaty texts, statutory and executive agreements understood in light of the historic context are thus legally efficacious. Moreover, the court is to assume that the federal negotiators operated in good faith and did not engage in any subterfuge or legal legerdemain. Finally, there is the assumption that the United States intends to keep its agreements. Thus where an action is contrary to a representation by the United States (or adverse to tribal interests) the court will interpret the action so as to preserve the tribal rights unless Congress has explicitly stated its intent and it is evident to the court that it considered the adverse consequences to the tribal interests, which it chose to reconcile with those opposing interests by curtailing or abrogating the tribal rights.

The examination of legislative intent based on the judiciary's understanding of the federal government's fiduciary obligations has had three major effects in hunting, fishing and gathering cases. First, it has provided extensive room for the judiciary to develop an Indian jurisprudence as a co-equal branch of the government. This jurisprudence has generally been protective of federal and tribal interests to the detriment of state interests. Second, it has prevented the creation of general rules relating to hunting, fishing and gathering rights in favour of a particularized historical analysis. Third, it has allowed the courts to soften some of the more egregious adverse impacts that certain federal policies have had on Native

[180] The principle also requires that the United States bring suit to preserve a treaty guaranteed right.
[181] *Fishing Vessel*, *supra* note 142 at 675.

Americans.

The fiduciary nature of the relationship is most apparent in the "traditional canons of construction" which that have been developed to interpret treaties, agreements incorporated into statute and executive agreements. The Supreme Court has generally approached hunting, fishing, and gathering rights as an outcome of specific set of historical circumstances which led to the treaty or agreement. In appraising the particular constellation of historical events, the Court has recognized that the text should be construed in light of the protective relationship the federal government has toward the tribes and their status as less powerful partners or unwilling participants to the agreement.[182] Resolving disputes about the extent and content of a particular text in favour of the tribes forces the United States to express itself more clearly and plainly when it drafts an Indian treaty, thereby ensuring that the agreements are voluntary because the Indian would have necessarily understood and agreed to the explicit terms of the agreement. [183] This voluntary aspect of American-Indian relations is central for the recognition and integration of tribal governments and rights into the American federation.

The first protective principle articulated by the Court holds that a treaty should be understood as the tribal signatories would have understood it to determine the extent of rights that are reserved by the agreement. The Court in *Jones v. Meehan* set forth some of the reasons for this rule.

> In construing any treaty between the United States and an Indian tribe, it must always…be borne in mind that the negotiations for the treaty are conducted, on

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[182] "[The] canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit…."*Montana. v. Blackfeet Tribe of Indians*, 471 U.S. 759 at 766 (1985); *Choatte v. Trapp*, 224 U.S. 665 (1912).
[183] *United State of America v. Michigan*, *supra* note 167 at 249-61.

> the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.[184]

This principle necessarily makes an analysis factually specific and incorporates tribal legal and cultural concepts into law; since understandings of the tribal participants are imbricated with their cultural and legal concepts which are then subsumed in text.[185] For example, the Court found in *Menominee Tribe of Indians v. United States* that the 1854 treaty language which provided for the Menominee reservation lands "to be held as Indian lands are held" included the right to fish and hunt. The Court observed that the record showed that the lands chosen as a reservation in the 1854 Wolf River Treaty were "selected precisely because they had an abundance of game."[186] It would "seem unlikely," continues Justice Douglas for the Court:

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[184] *Jones v. Meehan*, 175 U.S. 1 at 10-11 (1899).

[185] For example, the Court in *Fishing Vessel* states: "It is true that the words "in common with" may be read either as nothing more than a guarantee that individual Indians would have the same right as individual non-Indians or as securing an interest in the fish runs themselves. If we were to construe these words by reference to 19th-century property concepts, we might accept the former interpretation, although even "learned lawyers" of the day would probably have offered differing interpretations of the three words. But we think greater importance should be given to the Indians' likely understanding of the other words in the treaties and especially the reference to the "right of *taking* fish" -- a right that had no special meaning at common law but that must have had obvious significance to the tribes relinquishing a portion of their pre-existing rights to the United States in return for this promise. This language is particularly meaningful in the context of anadromous fisheries -- which were not the focus of the common law -- because of the relative predictability of the "harvest." In this context, it makes sense to say that a party has a right to "take" -- rather than merely the "opportunity" to try to catch -- some of the large quantities of fish that will almost certainly be available at a given place at a given time." *Fishing Vessel*, *supra* note 142 at 677-8 [emphasis in original]; *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 at 357 (1945).

[186] *Menominee Tribe of Indians v. United States*, 391 U.S. 404 at 405 (1968).

> [T]hat the Menominees would have knowingly relinquished their special fishing and hunting rights which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not extend.[187]

Nevertheless, this specificity as to historical and tribal circumstance is overlain by a general presumption in hunting, fishing and gathering cases. In these situations, it is presumed that without explicit language, the tribes generally would have understood treaties and agreements to allow them to hunt, fish, and gather within the reservation without hindrance. In addition, where a tribe initially secured hunting, fishing and gathering rights outside of a reservation, it presumes that the tribe would be unlikely to relinquish it unless it was provided some consideration -- as Justice O'Connor notes in *Mille Lacs* when she considers whether the Chippewa had relinquished their 1837 hunting and fishing rights in the 1855 Treaty.

> The journal records no discussion of the 1837 Treaty, of hunting, fishing, and gathering rights, or of the abrogation of those rights. This silence suggests that the Chippewa did not understand the proposed Treaty to abrogate their usufructuary rights as guaranteed by other treaties. It is difficult to believe that in 1855, the Chippewa would have agreed to relinquish the usufructuary rights they had fought to preserve in 1837 without at least a passing word about the relinquishment. [188]

The second principle is that doubtful expressions or textual ambiguities in treaty and statutes are to be resolved in favour of the tribal parties. [189]

> By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.[190]

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[187] *Ibid.* at 405, fn 2 quoting Wisconsin Supreme Court in *State* v. *Sanapaw*, 21 Wis. 2d 377 at 383 (Wis.Sup. Ct. 1963) [footnotes omitted].
[188] *Mille Lacs*, *supra* note 9 at 198.
[189] The congressional intent must be clear, to overcome "the general rule that '[doubtful] expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'"*McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 at 174 (1973).
[190] *Winters*, *supra* note 175 at 574-7.

Put another way, this canon of construction prescribes that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice.[191] The ambiguity may be in the agreement itself, or in various statutory expressions and/or ratifications of the agreement passed by Congress.[192] Ambiguity may be found either in the text as it is presently analysed or may be evident when the language is considered in light of a historical reconstruction of the negotiation context. "[L]anguage that seems clear on its face to twentieth century readers…[may] have conveyed a different, ambiguous meaning to a person reading the same words in the early to mid-nineteenth century."[193] As such these "instruments [treaties and statutory agreements]...cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."[194] The historic context involving the ongoing relationship with the particular tribe and the context of negotiations is also important. Indeed, in treaty disputes such a review may be more determinative than the plain language of the text. As Justice O'Connor notes in *Mille Lacs*:

> [T]o reach our conclusion about the meaning of that language, we examined the historical record and considered the context of the treaty negotiations to discern what the parties intended by their choice of words. This review of the history and the negotiations of the agreements is central to the interpretation of treaties.[195]

The historical context, however, may not take the content of the agreement or statute beyond what the meaning of the words can bear. Even though ambiguities are resolved to the benefit of the Indians, courts cannot ignore plain language when the historical context and a fair appraisal of the understandings of the parties cannot support a claimed tribal right.[196]

Third, the rules require that treaties and agreements should be construed liberally in

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[191] *Worcester*, *supra* note 65.
[192] *Antoine v. Washington*, 420 U.S. 194 (1975) [*Antoine*].
[193] *Menominee Indian Tribe of Wisconsin v. Thompson*, 943 F. Supp. 999 at 1007 (W.D. Wis. 1996).
[194] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 at 206 (1978).
[195] *Mille Lacs*, *supra* note 9 at 202.
[196] *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498(1986); *DeCoteau* v. *District County Court*, 420 U.S. 425 at 447 (1975); *Choctaw Nation v. United States*, 318 U.S. 423 (1943).

favour of the Indians.[197]

> The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years….[198]

The liberal construction rule is applied in two ways. On the one hand, where there is a textual reference to particular reserved rights, the court should expand the content and extent of the claimed rights to include implicit activities which would have naturally been associated with the textual reference. For example, the Supreme Court in a series of cases concerning the contentious dispute over an anadromous fish in the Pacific Northwest has held that the treaty language reserving the "right of taking fish, at all usual and accustomed grounds and stations…" included the right to fish without a license, an access right to cross private lands to fish and a guaranteed allocation of fish.[199] On the other hand, the rule applies where a treaty or an agreement is silent concerning a particular issue. For example, the *Mille Lacs I* Court held that the usufructuary rights reserved by the 1837 Treaty were neither a *profit á prendre* nor a license. The rights were not an interest in land so they were not extinguished by the subsequent 1855 treaty or the issuance of a fee simple patent; despite the Chippewa's understanding that land would be taken up for settlement which would eventually prevent certain uses.[200] In many instances, textual silence relates to the purported extinguishment or abrogation of treaty rights. In such cases, the Court has required that a treaty rights may not be extinguished by implication; there must be either an explicit statement that a treaty right has been extinguished or "clear evidence that Congress actually considered the conflict

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[197] *Tulee v. Washington*, 315 U.S. 681 at 684-85 (1942) [*Tulee*].
[198] *Antoine*, *supra* note 192 at 212, Douglas J. concurrence [footnotes omitted].
[199] *Fishing Vessel*, *supra* note 142.
[200] *Mille Lacs I*, *supra* note 12 at 834-5. Note that the *Winans* Court seemed to conceptualize the usufructuary access right as an interest in land. *Winans*, *supra* note 3 at 381.

between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[201]

The Court has limited the reach of the liberal construction rule to a certain extent. Even with the strong presumption of liberality in construing a treaty or agreement, the court cannot rewrite the treaty by ignoring a reasonable interpretation that is consistent with tribal understandings and the federal government's general trust obligation. The Court states in *United States v. Choctow Nation*:

> It is said in the present case that the interpretation of the treaty in accordance with the views of the United States would put the Government in the attitude of having acquired lands from the Indians at a price far below their real value. Even if this were true it would not authorize the court in determining the legal rights of the parties to proceed otherwise than according to the established principles of interpretation, and out of a supposed wrong to one party evolve a construction not consistent with the clear import of the words of the treaty. But if the words used in the treaty of 1866, reasonably interpreted, import beyond question to the United States free from any trust, then the court cannot amend the treaty or refuse to carry out the intent of the parties, as gathered from the words used, merely because one party to it held the relation of an inferior and was politically dependent upon the other, or because in the judgment of the court the Indians may have been overreached.[202]

Nevertheless, such an exception provides more of a justification for governmental action rather than an analytical standard. The other way in which the reach of a treaty or agreement is restricted involves an offsetting presumption in favour of some other interest. In *Montana v. The United States*, the Crow Tribe, relying on its inherent authority over reservation lands and its purported ownership of the bed of the Big Horn River based on two treaties, sought to prohibit all hunting and fishing by non-members on non-Indian property within reservation boundaries. The ability of the tribe to regulate non-members was dependant upon its ownership of the riverbed. The treaty outlined the territory of the reservation but was silent as

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[201] *South Dakota* v. *Bourland*, 508 U.S. 679 at 693 (1993) [footnotes omitted]; *United States v. Dion*, 476 U.S. 734 at 738 (1986).
[202] *United States v. Choctaw Nation*, 179 U.S. 494 at 535 (1900).

to the ownership of the riverbed. The Court, by Justice Stewart ruled that an opposite presumption provides title to Montana in spite of the admonition to liberally construe treaties and interpret them consistently with tribal understandings.

> But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance unless the intention was definitely declared or otherwise made very plain….[203]

3. Specific Interpretive Assumptions in Hunting, Fishing and Gathering Rights cases

In hunting, fishing and gathering rights cases, the courts have applied additional interpretive principles and assumptions. First, where there are aboriginal and treaty rights, the courts assume that the rights will be subject to some governmental regulation. Second, that without a treaty which designates new territory, all hunting, fishing and gathering activity is restricted to a particular area of land over which the tribe held aboriginal title or to the area over which it exercised historic usage which could be characterized as an aboriginal right. Third, that the area where the rights are exercised can be reduced by subsequent federal activity such as issuing patents or land or flooding lands for irrigation and flood control purposes. Fourth, the reserved natural resources are not exclusively for Indian harvest. Finally, the courts assume that the content of the reserved usage is in some sense related to historic traditional activities.

C. Territory Where Rights Are Exercised

The territory over which off-reservation rights can be exercised is dependant upon the territorial extent of a tribes' original Indian title or on the areas described by treaty or legislation. It does not include the territory, whether privately owned, allotted or tribal that is located within "Indian Country" as defined by 18 U.S.C.A 1151. The territory reserved by treaty or legislation may be either territory over which the tribe held original Indian title that was subsequently ceded to the United States, or land that has been set aside out of the public

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[203] *Montana v. United States*, 450 U.S. 544 at 552 (1981) [footnotes omitted].

domain by the federal government. The diminishment of the extent of territory over which usufructuary rights may be exercised is separate from the extinguishment of the rights.

1. Aboriginal Title

Off-reservation hunting, fishing and gathering rights may be exercised over those areas where a tribe holds un-extinguished aboriginal title. Aboriginal title is the territory that a tribe historically occupied, used, and possessed. It is not defined with reference to common law concepts of property ownership, but according to the usages and practices to which the territory was put by the Native Americans. These include use and occupation in an "accustomed Indian manner for fishing, hunting, berrying, maintaining permanent or seasonal villages and other structures, [and] burying the dead."[204] The historic uses remain important in determining the content of rights reserved.[205] Whether the particular tribe holds aboriginal title is a question of fact where the court makes a determination that the tribe claiming such title exclusively occupied the territory at issue.[206]

There has been little litigation concerning the hunting, fishing and gathering rights on territory over which the tribe holds aboriginal title as most Indian title in the United States has been extinguished.[207] Extinguishment of aboriginal title also extinguishes hunting, fishing and gathering rights based on that title.[208] However, the issue of what territory was occupied and used for off-reservation resource harvesting can be important where fishing rights have been impliedly reserved by treaty. Unless the treaty or reservation included language specifically reserving the area where fishing rights can be exercised, the extent and content of the reserved rights depends upon a finding of aboriginal use and possession over the fishing

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[204] *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 at 275, fn. 4 (1955).
[205] *LCO III*, *supra* note 86 at 1430; *Mille Lacs II*, *supra* note 12 at 839.
[206] *Santa Fe Railroad*, *supra* note 160 at 345.
[207] There have been significant aboriginal title claims asserted by tribes in the eastern United States for land that had been ceded without approval of the federal government. In the western United States aboriginal title claims are not often found outside of the framework provided by the Indian Claims Commission Act. Canby, *supra* note 11 at 348-57. See also *State v. Coffee*, 97 Idaho 905 (Idaho Sup. Ct. 1976).
[208] *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996).

areas.[209]

2. Ceded Territory or Territory Set Aside for Tribes for Tribal Use Outside of Reservation Boundaries

Aboriginal title creates a legally enforceable property right against anyone but Congress.[210] The federal government can extinguish aboriginal title either by purchase or simply by taking the territory -- an action that the Court has stated will not be "lightly implied."[211] Coupled with the power to extinguish aboriginal title is the power to determine which tribes holds aboriginal title and the extent of the territory over which the tribe holds aboriginal title.[212] The boundary lines drawn by the respective parties in the process of negotiating treaties are the areas where off-reservation hunting, fishing and gathering rights are exercised today. These boundaries may or may not be identical to the original territory the tribe possessed prior to the agreement.[213]

The delineation and cession of territory in which aboriginal title is held by the signatory tribe by way of a treaty transforms the reserved aboriginal rights and Indian title reserved into constitutionally protected rights; at the same time the signatory tribe's collective existence and inherent residual sovereignty within the American federal system are entrenched. As Justice Marshall noted in *Worcester*: "The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them."[214] The aboriginal rights are not limited to the reservation but can extend throughout the ceded territory where

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[209] *People v. Le Blanc*, 399 Mich. 31 (Mich. Sup. Ct. 1976); *State v. Gurnoe*, 53 Wis. 2d 390 (Wis. Sup. Ct. 1972); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).
[210] *Beecher v. Wetherby*, 95 U.S. 517 at 525 (1877).
[211] *People v. LeBlanc*, 248 N.W. 2d 199 at 206 (Mich. Sup. Ct. 1976).
[212] "The corollary of the power of the United States to extinguish the Indian's aboriginal title is the power of the United States to determine which Indian tribes rightfully held aboriginal title. *Cramer v United States*, 261 U.S. 219 at 227 (1923).
[213] *State v. Buchanan*, 941 P.2d 683 (Wash. App. Div. 1997)
[214] *Worcester, supra* note 65 at 556.

they have been explicitly or impliedly reserved.[215] The result is that unlike possession based on aboriginal title, the territories and use rights reserved by treaty or statutory agreement may not be taken or encumbered without payment of compensation and interest.[216] Moreover the rights can only be extinguished by a clear and plain Congressional statement or action. They also "encumber" the land regardless of whether or not a subsequent federal transfer to the state or a private individual includes a mention of them in the instrument of transfer. The tribes have the corresponding ability to bring suit to protect their resource use from state regulation as well as the competency to regulate off-reservation resource use. [217]

The rights reserved however are subject to extinguishment or diminishment by subsequent federal action. First, territorial diminishment can occur because tribal members may have no access to particular parcels of land to exercise the reserved right. The lack of access can arise from the bifurcation of usufructuary rights: the right to "take" game and fish ("owned" or held by the state in trust for the public) and a right of access to land to exercise the right. For example, the 1837 Treaty with the Chippewa does not include a right of access for the exercise of the reserved usufructuary rights. The starting point for determining the extent of the access in such a circumstance is the law regarding the right of access to public and private lands at the time the treaty was signed and the historic understanding of the

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[215] *Antoine*, *supra* note 192; *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876)(rejecting the argument that Minnesota's sovereignty is infringed by enforcement of a treaty provision making federal law prohibiting the sale or introduction of liquor applicable to lands ceded in the treaty).

[216] Indian title cannot be encumbered or taken by third parties but has no constitutional protection against federal seizure or extinguishment. The Court of Claims has statutory authority to determine claims based on Indian title. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 at 275, fn. 4 (1955); *Oneida County*, *supra* note 165.

[217] Tribes may bring suit against the states for the prospective injunctive relief against violations of their federal treaty rights but the 11th Amendment, prevents the state from being sued in federal court for money damages relating to its interference with hunting, fishing and gathering rights. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253 (8th Cir. 1995). If money damages are to be awarded the United States must join a suit for monetary damages due to state interference with hunting, fishing and gathering rights. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 749 F. Supp. 913 (W.D. Wis. 1990).

parties.[218] Where a right of access is not reserved, the use right is limited to those lands to which a tribal member would otherwise have access to as a member of the general public, *i.e.* "public lands."[219] Yet the right itself is not extinguished on territory which the tribal member cannot access (such as school lands) or by the issuance of a federal patent to a private party. "In this sense privately owned lands [to which tribal members have no access] do not include public lands formerly in private ownership or private lands open to public hunting, fishing and gathering."[220]

Second, the territory can be diminished by settlement or restricted to certain territory by the treaty terms. In such a circumstance, the treaty language anticipates a gradual reduction in the territory to which the usufructuary right attaches as it is "occupied" or used by non-Indians, *i.e.* settled and developed. The extent of the diminishment does not necessarily depend on the issuance of a federal patent, (although in specific circumstances this could be determinative) but is rather the result of various state, federal and private entities or individuals "occupying" the land in a legal sense. This occupation extinguishes the underlying aboriginal rights reserved by the treaty. For example, in *Idaho v. Cutler* two members of the Shoshone-Bannock Tribe killed two elk outside of their reservation. Issued a citation by the State of Idaho, they claimed they possessed off-reservation rights to hunt

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[218] "An understanding of the general historical circumstances in 1837 indicates that a similar right was conveyed by the United States in the 1837 treaty. In the nineteenth century the public was allowed to hunt, fish, and gather on all lands not developed, enclosed or posted. An abundant amount of land was open for these purposes, and the drafters of the 1837 treaty would not have focused on whether the Chippewa would have access to land to hunt, fish, and gather. The 1837 treaty does not mention access or entry. It seems unlikely that the United States would have given the Chippewa an implied right of access to the 1837 ceded territory because such right could have eventually prevented certain uses of the ceded territory." *Mille Lacs II*, *supra* note 12 at 834.

[219] In the mid 19th century a federal question concerning land would be resolved in a manner consistent with Justice Story's *Commentaries on the Conflict of Laws*. Thomas Lund, "The 1837 and 1855 Chippewa Treaties in the Context of Early American Wildlife Laws," in McClurken, *supra* note 38 at 490.

[220] *Ibid.* at 836 quoting *LCO III* at 1432. While the reservation of right to harvest off-reservation does not impliedly provide access rights, in those treaties where a right of access is reserved, such as in the Pacific Northwest treaties, the access right reserved in the treaty is a servitude upon the land which allows tribal members access to their customary fishing grounds *as well as* a right to harvest a fair share of fish. The signatory tribes may have access to land within the described boundaries to harvest resources and they may remove the resource once harvested for their own use. Jonathan Gaunt and Paul Morgan, *Gale on Easements*, 16th ed. (London: Sweet & Maxwell, 1977) at 75-7.

under Article 4 of the 1868 Fort Bridger Treaty which stated that the tribes had "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."[221] The land on which the elk were taken was open range land managed as a wildlife area. The Court found that the state managed wildlife area was "occupied" for purposes of the treaty because "the signatory Indians' understanding would not necessarily require actual physical presence or use to change land from an "unoccupied" to an occupied status."[222] It found that Idaho had maintained fencing and other indicia of occupancy such as "signs, buildings, machinery, water projects, cattle guards, roads and campgrounds."[223] Thus even though the state allowed hunting on the land, which was open rangeland apart from settlements, the off-reservation rights were extinguished.[224]

Third, the territory over which the rights may be exercised may be diminished through the extinguishment of the right by a subsequent federal statute inconsistent with their continued existence. In *United States v. Peterson*, the district court held that the establishment of Glacier National Park by Congress abrogated whatever hunting right the Blackfeet Tribe retained in the ceded lands within the boundaries of the park.[225] The Court held that the Blackfeet retained hunting rights in 1896 Agreement, ceding some of their reservation lands which eventually became part of the national park. However, the statute creating the park revoked their right to hunt in the park even though tribal members continued to have the right

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[221] *Idaho v. Cutler*, 708 P.2d 853 at 855 (Idaho Sup. Ct.1985).
[222] *Ibid.* at 857.
[223] *Ibid.* at 859.
[224] The dissent in *Cutler* argued that the majority decision was contrary to precedent and the canons of treaty construction. They concluded "that both parties to the 1868 Fort Bridger Treaty understood "unoccupied" to mean those areas where hunting would not interfere with the white settlers." *Ibid.* at 863. Moreover, they noted that the indicia of occupancy found to be determinative by the majority, i.e. fencing, government signs, forest service stations, campgrounds, flood control and water conservation projects also existed on national forest land. See also *Mille Lacs II*, *supra* note 12 at 834 and *LCO III*, *supra* note 86 at 1432.
[225] *United States v. Peterson*, 121 F. Supp. 2d 1309 (D.C Mont. 2000).

of entry.[226]

D. Who May Exercise Hunting, Fishing and Gathering Rights

In American law there is no single definition of what constitutes the ethnological and political terms "Indian" or "Indian tribe."[227] Nevertheless, as the agreements which provide for off-reservation to hunt, fish, and gather are essentially contracts between two sovereign nations, only members of the signatory tribes (as legal-political entities) may exercise the rights.[228] Congress may further sub-divide the political legal entity of the tribe into smaller bands for purposes of negotiation and agreement, but these smaller units, while ethnologically part of a larger tribe, are considered separate "tribes" for the purpose of holding the particular treaty rights.[229] The rights are heritable but may not be transferred or alienated. A tribe itself must continue to exist and be recognized as existing by the federal government in order for the rights to continue.[230] A non-treaty tribe that later affiliates with a treaty tribe may share its treaty rights if the tribes merge or consolidate in a manner sufficient to combine their tribal or political structures.[231] However, unless the agreement provides for an expansion of the scope of the rights, such a merger establishes no independent rights.[232]

The courts have consistently held that one aspect of the retained inherent sovereignty

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[226] *United States v. Hicks*, 587 F.Supp. 1162 (W.D.Wash. 1984) (Olympic National park lands are not "open and unclaimed" to which reserve off-reservation hunting privilege set forth in Treaty of Olympia attaches).
[227] *Cohen's Indian Law*, *supra* note 178 at §3-17.
[228] *Fishing Vessel*, *supra* note 142 at 675.
[229] As pointed out in footnote 32, in order to achieve a negotiating advantage the United States would often argue that the tribe was a single political unit because of the separate bands shared ethnology and language when in fact the individual bands were politically divided.
[230] The issue of "recognition" however does not mean that the Executive branch must accept and specifically recognize that the tribe exists before the tribe can hold any legal rights. Many statutes provide services and legal protection to "Indians" or "any…tribe of Indians" which import ethnological, racial or social criteria into a determination of what is a tribe for particular purposes. For example, In *Joint Tribal Council of the Passamaquoddy Tribe v. Maine*, 528 F.2d 370 (1st Cir. 1975) the Court of Appeals stated that the Passamaquoddy were entitled to federal protection under the Indian Nonintercourse Act.
[231] *United States v. Suquamish Indian Tribe*, 901 F.2d 772 at 776 (9th Cir. 1990).
[232] *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (9th Cir. 1981).

held by a tribe is the power to determine its own membership.[233] Included in this authority is the power to provide for ethnically non-Indian individuals to share in the citizenship rights and common property of the tribe. At the same time, Congress may supersede a tribal determination of who is a tribal member in a particular instance. Given the strong state interest in regulating natural resources, it is unlikely that an individual with no Indian blood but who has been acknowledged as a tribal member would be afforded immunity from state law.[234] Such tribal authority to create immunity from state law for individuals would be inconsistent with the tribes' status within the American federation;[235] and it would be not be necessary to protect tribal government or control the internal relations of the tribe.[236]

E. Determining the Content and the Scope of Hunting, Fishing and Gathering Rights

As discussed above, original Indian title encompasses the totality of uses to which a territory can be put. This full beneficial interest in the territory has been characterized at various times by the Supreme Court as rights of "complete ownership"[237] or "as sacred and securely safeguarded as is fee simple absolute title." [238] It provides the possessing tribe the "full use

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[233] "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 at 72 (1978). Tribal membership requirements vary widely across the United States but generally most tribes define membership within their constitution and have implemented a tribal role. *Cohen's Indian Law, supra* note 178 at 21-3.

[234] *The United States v. Rogers*, 45 U.S. 567 (1846) (White man adopted by Indian tribe subject to federal jurisdiction and law) The authors of *Cohen's Indian Law* note that: "Recognizing the diversity included in the definition of Indian, there is nevertheless some practical value for legal purposes in a definition of Indian as a person meeting two qualifications: (a) that some of the individual's ancestors lived in what is now the United states before its discovery by Europeans, and (b) that the individual is recognized as an Indian by his or her tribe or community." *Cohen's Indian Law*, *supra* note 178 at 19-20.

[235] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

[236] *Hicks, supra* note 156; *Montana v. United States*, 450 U.S. 544 at 552 (1981).

[237] *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 at 46 (1946). The full sentence by Chief Justice Vison reads: "As against any but the sovereign, original Indian title was accorded the protection of complete ownership; but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will."

[238] *United States v. Shoshone Tribe*, *supra* note 164 at 117.

and enjoyment of the surface and mineral estate, and the fruits of the land, such as timber resources."[239]

The totality of hunting, fishing and gathering rights which can accompany a usufructuary reservation are similarly broad. While the modern day exercise of the rights must be related to historic uses at the time of the treaty, the intensity of particular resource harvesting and the methods used do evolve. The *Mille Lacs II* Court noted:

> In 1837 the Chippewa used all of their surrounding natural resources to survive. They understood the phrase "hunting, fishing and gathering the wild rice" used in the 1837 treaty to mean "living off the land." They understood that the government wanted to harvest the pine timber, and they gave up any right to harvest that resource, but they did not understand the treaty to impose any other limits on the types of resources that they could harvest. They also did not understand that there were any restrictions on the time, place, or manner of the exercise of the privilege.....The evidence showed that the parties intended to permit continued use of the privilege for commercial purposes.....The privilege granted in 1837 was not limited to use of any particular techniques, methods, devices, or gear. The Chippewa incorporated rifles and other Euro-American technology into their hunting, fishing, and gathering before the 1837 treaty and continued to use new technology after the treaty. Neither the treaty journal nor the language in the treaty indicates that the Band should be confined to techniques, methods, devices, and gear existing in 1837.[240]

Moreover, unless limited by the agreement, the right is not limited to the harvesting of particular species.[241]

In determining the content and scope of a treaty or agreement, the court may not incorporate into its analysis considerations concerning the impact the exercise of the reserved rights may have on third parties. The court is:

> [N]ot at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice.[242]

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[239] *Cohen's Indian Law*, *supra* note 178 at 491.
[240] *Mille Lacs II*, *supra* note 12 at 838 [footnotes omitted]. The *LCO III* Court also held that the 1837 reserved rights provided for a wide scale and differentiated natural resource harvesting. *LCO III*, *supra* note 86 at 1430.
[241] *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998).
[242] *United States v. Choctaw Nation*, 179 U.S. 494 at 533 (1900).

While the content and scope of the reserved rights can be broad where they are reserved by treaty or agreement, the reserved content and scope depends on the three general considerations: 1) the wording of the particular instrument which reserved the rights; 2) the cultural, social and economic practices of the tribe at the time the treaty was signed; and 3) the understanding and intent of the parties as determined by a judicial evaluation of the historical context and the context of the treaty negotiation process in light of the protective canons of construction.

The text of the treaty or agreement remains the starting point for an analysis concerning the reservation and scope of off-reservation hunting, fishing and gathering rights. This approach is not as narrow as it appears at first glance because as mentioned above the text is not solely determinative of the content of the agreement even where it is textually unambiguous. The courts must "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."[243] Paradoxically, while the textual basis of the reserved rights need not be on the face of the document, the courts have nevertheless required that there be a textual basis for the rights reserved.[244] Moreover, the entire panoply of rights reserved by an agreement cannot arise by implication unless an access right to hunt, fishing and gather, either directly or by implication, is reserved. For example, the *Mille Lacs I* Court held where an access right is not granted to the Chippewa, the rights to hunt, fish, and gather are limited to the area to which the tribal members would have access. Thus, the language used limits the content or scope of the judicial exegesis because the reserved rights "should be construed in accordance with the tenor of the treaty"

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[243] *Choctaw Nation v. United States*, *supra* note 196 at 431-2.
[244] *Klamath*, *supra* note 119; *Menominee Tribe v. United States*, 391 U.S. 404 (1968). The explicit reservation is consistent with the presumption articulated in *M'Intosh* that the Native American interest is a burden upon the underlying American title. In any conveyance of Indian title, it is assumed that the underlying intent of the United States and the Native American understanding was the conveyance of all possession and use the territory. As Justice Holmes noted in another context, "Whatever consideration may have been shown to the North American Indians, the dominant purpose of the whites in America was to occupy the land." *Carino v. The Insular Government of the Philippine Islands*, 212 U.S. 449 at 458 (1909).

or the agreement.[245]

Where there is a textual basis for the reserved rights, the text must be read with the awareness that non-Indian American draftsmen wrote the language memorializing the agreement. Language is strictly construed against the drafter and any diminishment of tribal rights in favour of the United States must be explicit. Thus while the text provides only one part of the agreement from the Native American point of view, the text is the most probative evidence of Congressional intent from the perspective of the United States. Indian understandings and intentions memorialized in the agreement must purport with the language used, but the understanding and intentions of American negotiators regarding the extinguishment of rights previously reserved in other treaties or agreements, must be on the face of the document.

Since the protective canons of treaty and statutory construction emphasize tribal understandings, the court will consider the actual practices of the signatory tribe to determine the tribal understandings of content and scope of the agreement. In these situations the court will examine the tribe's historic cultural, social, and economic practices for evidence of what the tribal negotiators were intending to reserve. Where the tribe engaged in the claimed activities or where the activity played a highly significant role in the lives of the claimant tribe, the activity will be reserved in the absence of limiting textual language.[246] If the tribe did not engage in the claimed activities at the time of the treaty, it is presumed that the activity was not reserved. As the *LCO IX* Court stated when discussing the existence of a reserved right to harvest timber commercially under the 1837 Treaty:

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[245] *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 at 353 (1945).
[246] *Kimball v. Callahan*, 493 F.2d 564 at 566 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1974).

> In order for the right to exist in the first instance, it must be shown that the Indians were in fact using the resource, i.e., that they exercised this right, subsumed within their larger, aboriginal right to their land and water.[247]

Thus the predicate for a finding that the tribe has reserved various usufructuary rights is a proffering of historical, anthropological, and archaeological evidence which documents that at the time the treaty was signed, the signatory tribes engaged in the claimed activities; or alternatively engaged in historic activities which are retrospectively related to present day activities.[248]

The determination of the right is also related to tribal understandings of the agreement as determined by the court in light of the protective canons.[249] A judicial determination of these understandings is derived from an investigation of the practices of the signatory tribes as well as the historic context "including the history of the treaty, the negotiations, and the practical construction adopted by the parties."[250] Unless the negotiation occurred after a war, the tribes, as owners of unencumbered aboriginal title or rights reserved under a prior treaty or agreement, would not be expected to enter into an agreement without some offsetting consideration. As noted by the *Winans* Court, where the text suggests a reserved right, a judicial or political determination that the Indians acquired no rights under the agreement would certainly be "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more."[251] Thus, where the negotiating context exhibited a concern for the continued used of the ceded territory, particularly as it relates to subsistence hunting, fishing and gathering activities, the content and scope of the

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[247] *LCO IX*, *supra* note 86 at 1270.
[248] *Ibid.* However, it should be noted that the right is not restricted to specific species or specific methods unless there is limiting language in the agreement. Consistent with their aboriginal title, a tribe had an absolute right to harvest any species desired. The fact that some species were not taken before treaty time because they were inaccessible or the Native Americans chose not to take them, does not mean that the Indians right to harvest the natural resources was similarly limited. *United States v. Washington*, *supra* note 241 at 644.
[249] "A treaty must…be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Fishing Vessel*, *supra* note 142 at 676.
[250] *Mille Lacs*, *supra* note 9 at 196.
[251] *Winans*, *supra* note 3 at 380.

rights will be extended to those activities.[252]

F. Regulation and Limitations of the Right

1. Cultural Limitations, Traditional Uses and the Moderate Living Doctrine

The process of determining Indian understandings of an agreement from an historic review of the cultural, social and economic practices at the time of the treaty can circumscribe the claimed rights because the courts have limited the rights reserved to those activities which are found to be "traditional." In determining the parties' understanding of the agreement, the courts have constructed a version of tribal intentions within the negotiating process that equates tribal intent and tribal understanding with a judicial understanding of tribal culture at the time the treaty was signed. These court-constructed indigenous understandings are relatively unsophisticated and are seemingly immutable in content, place, and time while being shared across all Indian cultures. Apparently, tribes only negotiate to reserve specific traditional cultural practices and cannot reserve even reasonably anticipated prospective uses. Where the issue is commercial exploitation, be it hunting, fishing or logging, this legally constructed intent and understandings of all tribal negotiators are deemed to be the same regardless of the historic context or the terms of the agreement -- the tribes only wish to hunt, fish and gather like they have always done.

The *LCO IX* Court sought to determine whether Article 5 of the 1837 Treaty reserved commercial logging rights. The Court began its inquiry into the nature and scope of the rights included within the treaty text by examining what "practices and customs" of the Indians were at the time the treaty was negotiated.[253]

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[252] *Mille Lac II*, *supra* note 12 at 814.
[253] *LCO IX*, *supra* note 86 at 1270.

> Ascertaining what the Chippewa were actually doing at the time of the treaties is a prerequisite to determining what they would have understood they were reserving.[254]

An evaluation of the practices of the Chippewa at the time led to a conclusion that logging was not within the circle of activities in which the Chippewa engaged when they entered into the agreement because:

> This is not what the Chippewa harvesters were interested in exploiting at treaty time. They were seeking particular trees for their unique characteristics, for example, the gum of the balsam or the roots of the jack pine. They did not harvest trees for use as logs or for saw boards.[255]

The Chippewa could not, therefore, have intended to retain the commercial logging rights on the ceded territory.

> Logging large areas of trees would have had no purpose for the Chippewa: their mobile hunting and gathering life-style gave them no reason to build log homes or barns or to clear the land. To the contrary, they depended heavily on retaining many different species of trees and other forms of plant life from which they derived many specialized products and which served as habitat for the animals they hunted.[256]

The judicial construct does not entirely comprehend historic Native American "traditional" activities and "traditional" trade in a historically inaccurate manner.[257] The case law suggests that the concept of "traditional" refers to the type of cultural practices and economic activity commonly thought to historically exist. It includes market based trading and commercial activities, provided such activities do not lead to the amassing of wealth. However, the underlying natural resource may not be "destroyed" or radically transformed through the use or harvest. The construct also means that tribes could not have reserved a wide range of usufructuary uses, or new uses that which might arise because of increased

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[254] *Ibid.*
[255] *Ibid.*
[256] *Ibid.* at 1271.
[257] Richard White and William Cronon, "Ecological Change and Indian-White Relations" in Wilcomb Washburn, ed., *The Handbook of North American Indians, History of Indian-White Relations*, vol. 4 (Washington, D.C.: Smithsonian Institution, 1982) 417.

knowledge or new markets. In a sense, the tribe only reserves the specific use (including the specific object of that use such as subsistence) as it relates to a specific natural resource, and not the natural resource itself.

Another aspect of the court-defined traditional assumption is found in the determination that usufructuary rights are normally subject to an internal cultural limitation and that maintaining this cultural limitation was the intention of tribal negotiators when the rights were reserved. Usufructuary resource use is limited to what the Supreme Court has called a "moderate living" standard.[258] Regarding the amount of fish allocated under the 1855 Stevens Treaty Justice Stevens wrote:

> [T]he central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood -- that is to say, a moderate living.[259]

This culturally circumscribed level of exploitation limits resource exploitation to subsistence levels and effectively precludes any resource exploitation for commercial purposes beyond the level needed to generate enough income to provide for necessary products that could otherwise not be obtained from the territory.[260]

The issue of off-reservation usufructuary rights for uses other than subsistence purposes does not seem to have appeared prior to the second half of the 20th century. Indians hunted, fished, and gathered for food. The courts did not distinguish between subsistence uses and commercial harvesting, probably assuming that such hunting, fishing, and gathering

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[258] *LCO VII*, *supra* note 86 at 1415.
[259] *Fishing Vessel*, *supra* note 142 at 686.
[260] Doyle, J. in *LCO III* reflects the moderate living standard as it relates to the Treaty of 1837."The Chippewa relied on hunting and gathering for their subsistence. They harvested resources for their own immediate, personal use and for use as trade goods in commerce. The Chippewa traded goods for items which contributed to their subsistence. Neither in harvesting resources for commercial purposes nor in harvesting resources for their own use did the Chippewa strive for more than a moderate, satisfactory living. They were indifferent to acquiring wealth beyond their immediate needs." *LCO III*, *supra* note 86 at 1424.

activities would be for subsistence purposes only.[261] Where the rights had not been extinguished, the state could restrict the use rights, provided it did so in manner that did not discriminate against the tribes or effectively prevent the exercise of the rights and was for a legitimate state purpose. The non-discriminatory and conservation element was evident in the 1942 case *Tulee v. Washington* where the U.S. Supreme Court noted:

> [W]hile the treaty [of 1855 with the Yakimas and other Indians] leaves the state the power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses…a fee of the kind in question here.[262]

The issue only became manifest where the courts had allocated the tribes a certain percentage of the harvest and the resource was not sufficient to meet Indian and non-Indian demand.[263] The confrontation between Washington and the tribal signatories to various treaties signed in the Oregon territory in 1854 and 1855 became the focal point of this off-reservation jurisprudence. In *Fishing Vessel* the tribes had argued that they could take as many fish from the anadromous fish runs as they chose. The Court did not agree. It held that such an interpretation undermined the shared understandings that were basic to the treaty negotiation process.

> Nontreaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of anadromous fish in the case area. Nor may treaty fishermen rely on their exclusive right of access to the reservations to destroy the rights of other "citizens of the Territory." Both sides have a right, secured by treaty, to take a fair share of the available fish. That, we think, is what the parties

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[261] *Sohappy v. Smith*, 302 F. Supp. 899 at 905 (D. Or. 1969) (Ffshing "still provides an important part of [tribal] subsistence and livelihood"); *United States v. Washington*, 384 F. Supp. 312 at 340 (W.D. Wash. 1974) (noting that the right to fish "is the single most highly cherished interest and concern of the present members of plaintiff tribes") and at 357-8 (noting present subsistence, cultural and economic role of fishing to tribes).
[262] *Tulee*, *supra* note 197 at 684 (1942). As to the permissible scope of state regulation see also *Puyallup Tribe of Indians v. Washington*, 391 U.S. 392 (1968) [*Puyallup I*] and *Puyallup II*, *supra* note 155.
[263] *Puyallup II*, *Ibid.* (Treaty of Medicine Creek protects commercial net fishing by Indians); *United States of America v. State of Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979)(Treaty of 1836 reserves the right to fish in area of the Great Lakes ceded to United States without state regulation).

> to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens. [264]

The sharing of the fishery led the Court to approve the District Court's decision to allocate the fishery 50/50 between Indian and non-Indian users. However, this equal split was a "maximum but not a minimum allocation."[265] Following the reasoning of the lower court, Justice Stevens noted that the central principle which governs treaty disputes over natural resources is that the treaty "secures so much as, but no more than, is necessary to provide the Indians with a livelihood -- that is to say, a moderate living."[266] This measure enables the allocation given to the Indians to be adjusted downward. If, for example the tribe abandons the activity or "dwindles to just a few members" a large allotment, though allowed by the treaty, would not be required. Thus the doctrine allows for the reduction in a treaty guaranteed allocation should the tribes needs be satisfied by a lesser amount of harvest.

The Court did not elaborate upon what precisely constitutes a "moderate livelihood" and the concept remains tied to issues of allocation. The *LCO V* Court took the position that the standard could be quantified. It found that even if the Chippewa harvested all the available treaty resources from the ceded territory they would not achieve a "moderate" standard of income.[267] The District Court in *United States v. Washington* however, found that the term is "not a term of art used by economists" and refused to apply an income standard to the doctrine stating it was a flawed "single-indicator analysis."[268] Rather it noted that the tribes "lag significantly behind other residents of the State of Washington in their overall standard of living."[269] It refused to apply the doctrine to reduce the tribe's share of harvestable fish. This approach is different again from that taken by the *Mille Lacs IV* Court.

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[264] *Fishing Vessel*, *supra* note 142 at 684-5.
[265] *Ibid.* at 686.
[266] *Ibid.* at 687.
[267] *LCO V*, *supra* note 86.
[268] *United States v. Washington*, 873 F. Supp. 1422 at 1146 (W.D. Wash. 1994).
[269] *Ibid.*

The *Mille Lacs IV* Court approached this issue with the purposes of the treaty and the intent of the parties in mind.

> [I]f an allocation of a resource must be made, such allocation should be quantified to fulfill the purposes of the treaty, while at the same time recognizing the rights of non-Indian harvesters to a resource. Thus, the threshold issue is not whether the Bands have achieved a moderate standard of living, but what was the purpose and intent of the treaty, and what amount of resources are needed to fulfill such purpose and intent. Where it is determined that the resource cannot meet both the needs of the Indians and the Bands, an allocation should be made.[270]

Despite this uncertain application, the doctrine has developed into a somewhat reasonable (and not necessarily "unhistorical," due to its being based on aboriginal oral tradition and archaeological evidence) method by which the intent and purposes of the treaty and the allocation of scarce resources can be achieved. As noted by Wood, the doctrine seemingly effectuates a central purpose of many treaties, which was to assure a "viable separatism," between the Indians and non-Indian society.[271] Nevertheless, it remains a limiting and elusive concept perched uneasily on historical exegesis, modern resource constraints and political expediency in U.S. case law. It originated as a limiting factor in order to reduce the tribal take of anadromous fish in the American Pacific Northwest and can be used to circumvent treaty guaranteed resource use. It explicitly limits tribal resource harvesting to a historically static non-economic standard and implicitly incorporates this economic standard into a cultural paradigm which ties the idea of moderate living standard to Indian traditions against over-exploitation and over-harvest of resources.

2. State Jurisdiction over Natural Resource Use and Exercise of Right

Rather than being presumptively pre-empted by federal power (as the courts have held regarding activities within the reservation) the state has limited regulatory authority over

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[270] *Mille Lacs IV*, 952 F. Supp. 1362 at 1393 (Minn. 1997).
[271] Mary Christina Wood, "The Tribal Property Right To Wildlife Capital (Part II): Asserting A Sovereign Servitude To Protect Habitat Of Imperiled Species" (2001) 25 Vt. L. Rev. 355 at 413.

federally guaranteed rights exercised outside of the reservation. State regulatory authority is either exercised directly on tribal harvesters or indirectly through management plans to which the state is a party or an observer. Provided state regulation does not discriminate, federal authority only provides immunity from state law insofar as the off-reservation activities are coincident with otherwise valid state regulation.

The state's continued ability to regulate in the off-reservation context is the result of a different pre-emption approach used in Indian cases, coupled with the historic connection between wildlife management and state sovereignty. Pre-emption analysis in Indian cases has rested on three factors not important in non-Indian pre-emption cases: the context of federal policy and fiduciary considerations (relatively ambiguous factors which the Court has been reluctant to apply in non-Native American cases), the impact the state regulation has on the residual sovereignty of the tribes, and an explicit acknowledgement that the state has varying degrees of regulatory interest based on the type of activity and whether an activity occurs on or off the reservation.[272] In the weighing of the particular federal, state and tribal interests, the broad construction of federal authority in Indian affairs is somewhat counterbalanced by more broadly construed notion of state authority than would otherwise be found in the more precise statutory construction approaches used elsewhere in pre-emption analysis.[273]

The general acknowledgement of a state interest in Indian pre-emption analysis makes the judicial recognition of state regulatory authority less dependant upon the content and scope of the particular agreement reserving the rights. As the Court noted in *Puyallup I*:

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[272] *Hicks*, *supra* note 156.
[273] *Mescalero Apache*, *supra* note 153 at 333-4. Laurence Tribe, *American Constitutional Law*, 3rd ed. (New York: Foundation Press, 2000) vol. 1 at 1173-9.

> The measure of the legal propriety of [regulations that are to be measured by the conservation necessity standard] is…distinct from the federal constitutional standard concerning the scope of the police power of a State.[274]

To be sure, state regulatory authority is curtailed by the objectives of the treaty participants (*e.g.* to maintain the ability to live off the ceded territory in exchange for the cession) and the precise content of the standards is dependant upon the specific environmental, territorial, and regulatory context. Nevertheless the emphasis is *not* whether the state has a *right* to regulate granted it by the historic agreement. Absent strong historic evidence or textual support supporting complete pre-emption, the right of the state to regulate and the general extent of state regulation is recognized and understood to apply in all present day circumstances -- an assumption grounded in state sovereignty and the idea that American negotiators would not have intended to concede the tribal parties exclusive privileges of occupancy in land that was ultimately to be settled or exploited by non-Indians.[275]

Despite the general presumption that the state does have some regulatory authority, the limitations on that authority are significant. First, the substance of state regulation can only relate to health, safety, and conservation issues. Where the use rights have been extended to include privately-held lands, this regulatory authority may not be invoked to limit the time, place, and manner of the treaty rights in order to ameliorate an inequitable impact a treaty use may have on a third party.[276] Second, the effect or manner of the state regulations must neither discriminate against Native Americans exercising their off-reservation rights nor favour non-Indian harvesters.[277] A general fee levied equally against Indians and non-Indians which is a charge against an Indian exercising treaty or agreement guaranteed wildlife harvesting is a *per se* discriminatory state regulation, regardless of whether members of the

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[274] *Puyallup I*, *supra* note 262 at 402 at fn. 14.
[275] *People v. LeBlanc*, 248 N.W. 2d 199 (Mich. Sup. Ct. 1976).
[276] *United States v. Choctaw Nation*, 179 U.S. 494 at 532-3(1900).
[277] *LCO II*, *supra* note 46 at 1237.

public must pay the same fee. Finally, the state generally may not impose its own regulations where a tribe has shown that its tribal regulations are adequate to protect the state health, safety, and conservation objectives.[278] As the Reserved Rights doctrine presumes that the tribe has reserved regulatory authority over its own members, the displacement of state authority has been relatively uncontroversial. However, the administrative capacity of the particular tribe to enforce its regulations as well as the competence of tribal wildlife regulatory authorities to establish appropriate harvest levels has been hotly disputed.

The legal standards used to evaluate state regulation are relatively clear. The state can regulate in the interest of conservation as long as "the regulation meets the appropriate standard and does not discriminate against the Indians."[279]In order for the standard to be "appropriate," the state has the burden of showing that a regulation is necessary and reasonable, and its application to the off-reservation harvest is necessary in order for it to reach its reasonable conservation objectives. In this context, a "necessary and reasonable" regulation is "necessary" when required for the perpetuation of a species, including a reasonable margin of safety against extinction of game within a certain territory, and is "reasonable" if it is appropriate to its conservation purpose.[280] Under this "conservation necessity test" equal regulatory treatment (*e.g.* restricting all gill nets in the fishery) of Indians and non-Indians is generally not permissible because equal treatment will

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[278] *Mille Lacs II*, *supra* note 12 at 839.
[279] *Puyallup I*, *supra* note 262 at 398. Thus the standard set forth in *Tulee v. State of Washington* which emphasizes "equal treatment in the time and manner is presumably no longer the applicable standard because the Court will scrutinize the impact on Indians as it relates to the guaranteed harvest right. In *Tulee* the Court stated: "[T]he treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, [but] it forecloses the state from charging the Indians a fee of the kind in question here." *Tulee*, *supra* note 197 at 684. The analysis presupposes that the federal right has priority over all other uses because disportionate impact on Indians is not only measured against Non-Indian users but also against absolute use rights reserved in the treaty or agreement.
[280] *Puyallup II*, *supra* note 155 at 49;. See also *Baldwin v. Fish & Game Commission*, *supra* note 154 at 391; *Antoine*, *supra* note 192 at 206-7; *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *LCO II*, *supra* note 86 at 1235-6.

disproportionately burden the smaller off-reservation Indian harvest.[281]

The regulation of public health and safety relating to the usufructuary harvest likewise may be done only if the regulations do not discriminate against the Indians and are "reasonably necessary to prevent or ameliorate a substantial risk to the public health or safety."[282] In order to determinate whether the standards are "reasonable and necessary", the state regulation must meet a three part test. First, the state must show it needs to regulate a particular resource because there is a public health or safety need involving the resource. "This requires a showing by the state that a substantial detriment or hazard to public health or safety exists or is imminent."[283] Second, the state must demonstrate that the proposed regulation is necessary to prevent or improve a public health or safety hazard.[284] Third, in order for the proposed regulation to be applied off-reservation rights, the state must show that it is necessary to effectuate the particular health or safety interest.[285] Finally, "the State must show that its regulation is the least restrictive alternative available to accomplish its health and safety purposes."[286]

G. Extinguishment

1. Aboriginal Title

It is in the extinguishment of aboriginal title that the colonialist impetus behind indigenous law is most evident. Despite the moral and legal obligation to protect Indian lands, natural resources and tribal governments, the relatively low legal threshold by which aboriginal title may be extinguished is perhaps the most egregious example of the use of law to advance the

[281] *Fishing Vessel*, *supra* note 142 at 682; *Mille Lacs v. Minnesota*, 124 F.3d 904 at 924, fn. 43 (8th Cir. 1997).
[282] *LCO IV*, *supra* note 86 at 1241-2.
[283] *Mille Lacs IV*, *supra* note 12 at 1369 (citing *LCO IV* at 1239).
[284] *Ibid.*
[285] *Ibid.*
[286] *Ibid.*

interests of the European settlers and undermine the continued existence of the tribes.[287] As hunting, fishing, and gathering rights are parasitic on possession of the underlying aboriginal title, extinguishment terminates corresponding use and occupancy rights, including fishing rights, unless those rights are reserved in a treaty, statute or executive order.[288] Extinguishment may be accomplished either directly or by various Congressional actions implying an intention to extinguish aboriginal title.[289] The United States Congress can "extinguish aboriginal title at any time and by any means." Extinguishment may be explicit or implicit but must involve in some sense an exercise of governmental authority adverse to the tribal right of occupancy.[290] The possessing tribe has no right of compensation for the taking of the aboriginal title.[291] The manner, method, and time of such extinguishment raise political, non-justiciable, issues.[292]

2. Treaty rights or Statutory Agreements

As the *LCO I* Court observed "aboriginal rights of use enjoy a different legal status than a treaty-recognized rights of use" because of the standard necessary to extinguish treaty rights. These rights may only be relinquished by the Indians in a clear and unambiguous manner. At the same time, Congress retains the broad right and ultimately the unilateral power, to abrogate Indian treaties and extinguish Indian rights. However, the courts have held that rights reserved by treaty or statutory agreement may only be extinguished by an unambiguous or clear and plain Congressional action evidencing an intention to extinguish the reserved

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[287] For a general discussion of treaty abrogation see Charles F. Wilkinson and John M. Volkman, "Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows upon the Earth.' How Long a Time is That?" (1975) 63 Cal. L. Rev. 601.

[288] *Western Shoshone National Council v. Molini*, 951 F.2d 200 at 202-03 (9th Cir. 1999), *cert. denied*, 506 U.S. 822 (1992).

[289] "Only Congress can abrogate an Indian treaty right by expressing that intention clearly and plainly." *United States v. Dion*, 476 U.S. 734 at 738(1986). The Constitution does not provide the President with the power to remove Indian tribes or to abrogate rights guaranteed under treaties as Congress has plenary authority over Indian affairs. *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965). Whatever authority the executive branch has over Indian affairs is provided either explicitly or implicitly from congressional authorization. *Mille Lacs*, *supra* note 9 at 188-9.

[290] *Beecher v. Wetherby*, 95 U.S. 517 (1877).

[291] *LCO I*, *supra* note 46 at 351.

[292] ."The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. As stated by Chief Justice Marshall in *M'Intosh,* 'the exclusive right of the United States to extinguish Indian title has never been doubted.' And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts [footnotes omitted]." *Santa Fe Railroad*, *supra* note 160 at 347.

rights.[293] Without this explicit statutory language, the courts have been extremely reluctant to find congressional abrogation of treaty rights;[294] because such explicit acknowledgement of intent is considered to be "clear evidence" that Congress "actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[295] Should the right be relinquished by a signatory tribe by way of a superseding treaty or agreement, the courts similarly require express language to that effect in the document.[296]

The clear and plain standard is not a *per se* rule which invalidates any Congressional action unless it explicitly abrogates or extinguishes reserved rights. The particular evidence of what constitutes "clear and plain" intent varies on the wording used, the historical circumstances, the legislative history and policy objectives and the conduct of the parties.[297] The *Dion* Court outlined some of the circumstances where sufficient intent can be found to extinguish reserved rights. It noted that the Court found sufficient intention where Congress had made an "express declaration" of its intent to abrogate treaty rights or where a statute's "legislative history" and "surrounding circumstances" as well as "the face of the Act" indicated sufficient intention.[298] Nevertheless where express language is absent, the court will construe the particular circumstances surrounding the purported extinguishment in light of the protective canons of interpretation. Where ambiguity or uncertainty exists in the legislation, either because of contemporaneous actions or statements of federal officials towards the affected or similarly situated tribes, or where the historic context suggests different tribal understandings regarding the purported action which are inconsistent with the claimed extinguishment, it is unlikely that the courts will find the right extinguished.

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[293] *Mille Lacs, supra* note 9 at 199. The standard similarly applies to rights reserved in statutory agreements or executive orders. *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Antoine, supra* note 192.
[294] *Fishing Vessel, supra* note 142 at 690.
[295] *United States v. Dion*, 476 U.S. 734 at 740 (1986).
[296] *Mille Lacs, supra* note 9 at 195-6.
[297] Wilkinson and Volkman, *supra* note 287 at 623-34.
[298] *United States v. Dion, supra* note 295 at 739-40.

The leading case regarding the extinguishment of hunting, fishing and gathering rights under a treaty is *Menominee Tribe of Indians v. United States*.[299] In *Menominee* the tribe argued that the *Menominee Termination Act of 1954* which provided for the termination of federal supervision over the property and members of the tribe did not extinguish their hunting, fishing and gathering rights within their former reservation established by the 1854 Treaty.[300] The Court held that the hunting, fishing, and gathering rights within the reservation had not been extinguished. Justice Douglas writing for the Court observed that the 1954 Termination Act was enacted only two months after a statute (Public Law 280) which granted Wisconsin jurisdiction "over offenses committed by or against Indians" on the reservation.[301] This bill, he observed "came out of the same committees" in the Senate and House as the Termination Act.[302] Douglas noted that Public Law 280 stated:

> Nothing in this section…shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute *with respect to hunting, trapping, or fishing* or the control, licensing, or regulation thereof.[303]

Reading the two statutes together, Douglas held that while the Termination Act ended the relationship that the Menominee had with the federal government, Public Law 280 specifically contemplated continued hunting, fishing and gathering by the Menominee. From this perspective the Termination Act cannot be seen as a "backhanded way of abrogating the hunting and fishing rights of these Indians." "While the power to abrogate those rights

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[299] *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).
[300] The *Menominee Termination Act* was enacted pursuant to the *1954 Termination Act*. The 1954 Act established a mechanism to "to provide for orderly termination of Federal supervision over the property and members" of a tribe. Under its provisions, the tribe was to formulate a plan for future control of tribal property and service functions theretofore conducted by the United States. Once approved the tribe's relationship with the federal government would be severed and its property and members would become subject to the law of the state within which their reservation was located. Local governance structures in the state would be extended into the former reservation. *Ibid*. at 408-11.
[301] *Ibid*. at 410.
[302] *Ibid*.
[303] *Ibid.* at 410-11[emphasis in original].

exists," wrote Douglas, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."[304]

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The relatively clear standard established by the *Menominee* Court was extended in *Mille Lacs*, which rejected the use of the Equal Footing doctrine to extinguish treaty rights. Beside finding that Congress had not exhibited the requisite clear and express intention to revoke the rights guaranteed under the 1837 and 1842 treaties, the *Mille Lacs* Court eliminated the possibility that usufructuary rights could be revoked by implication under the Equal Footing doctrine. The Equal Footing doctrine as understood in *Ward v. Race Horse* held that treaty rights (or treaty "privileges") which are "temporary and precarious" will be necessarily extinguished upon statehood.[305] The bare reservation of Indian rights and the concomitant limitation of state regulatory authority are, without explicit mention in the statehood act, simply inconsistent with state sovereignty. More permanent treaty rights, that is, those rights that are "perpetual" on the face of the treaty, survive statehood and can only be extinguished by an explicit act of Congress.[306] As mentioned above, Justice O'Connor noted that the distinction between "temporary and precarious" treaty rights and those rights which are "of such a nature as to imply their perpetuity" was simply too broad because "any right created by operation of federal law could be described as "temporary and precarious," as Congress could "eliminate the right whenever it wished."[307]

V. Federal Supremacy, State Sovereignty and American Indian Law

Hunting, fishing, and gathering rights in the United States show the theoretical and practical complexity of allocating rights and authority among overlapping national, state, and tribal

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[304] *Ibid.* at 413[footnotes omitted].
[305] *Race Horse*, *supra* note 67.
[306] "[W]e note that there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood. Treaty rights are not impliedly terminated upon statehood [emphasis in original]." *Mille Lacs*, *supra* note 9 at 207.
[307] *Ibid*. at 206-7.

sovereignties. Uniquely among the English settler states, American law continues to be premised on a notion of an efficacious tribal sovereignty. This sovereignty pre-dates the American state, but is subsumed within the American federation. At the same time, the law also exhibits a clear federal dominance -- the national government has both the right and the power to override state and tribal authority and sovereignty in its exercise of its constitutional authority over Indians.

This jurisprudence, while perhaps guided by moral and ethical concerns, nevertheless is informed by the federal-state conflict that arose prior to the American civil war. The period was characterized by intense philosophical and legal arguments concerning the nature of the American federation. The Marshall Court in particular became an important, if not primary proponent of a national view of sovereignty. Early American Indian jurisprudence, which was built upon principles of international law, British imperial policy and the various policies (peaceful, aggressive, assimilative) that the nascent United States used in dealing with the tribes was an area in which this debate developed. The nationalist-minded Marshall Court essentially formulated an Indian law which emphasized federal authority and left little room for the states to exercise jurisdiction over the tribes. At the same time, the international aspect of Indian law was used by the Court to depreciate the conception of state sovereignty advocated by the proponents of state rights. The concomitant federal dominance of the pre-confederation international tribes was a further justification for a national conception of sovereignty and federal authority.

From a legal perspective, these developments were not necessarily adverse to Native American interests. Their continued governmental existence, property rights and law were guaranteed by the federal government and were legally enforceable. The treaty process set forth the mechanism by which the tribes as governmental entities were incorporated into the American federation was established. However because these legal developments were the result of state-federal conflict, the underlying policy of the colonial project had little to do

with Indian rights, interests, or continued existence. Indeed, the history of American policy towards the tribes has been generally hostile towards them as governmental entities holding distinct political and legal rights.[308] The affirmation of federal dominance inherent within the Court's tribal jurisprudence necessarily established the basis for the extension of federal authority under the plenary power doctrine and the conceptual basis for the political question doctrine which precluded judicial vindication and enforcement of Native American rights.

A. The Problem of Sovereignty in the Antebellum United States

The fundamental issue underlying the American federation lay in locating the penultimate political authority or sovereignty as delegates of the American people. The controversy surrounding sovereignty revolved around those who advocated that the authority resided in Congress and the federal government (the Theory of National Supremacy) and those who located it in the states (the Compact Theory). Both theories accepted Locke's idea that individuals voluntarily unite together in political bodies to promote mutual safety and advantage, and that by doing so they establish a governmental authority to which every citizen subjects themselves. They both assumed that the people were the only true "sovereign" entity who in turn delegated their authority to the governmental entity.

> The government...of the state, is that portion, only of the sovereignty, which is by the constitution entrusted to the public functionaries: these are the agents and servants of the people."[309]

The difference between the two schools of thought was whether the primary political society in the American federation was co-extensive with the state polities, or was national in scope. This issue resolved itself into differing perspectives on the nature of actions that led to the ratification of the1789 U.S. Constitution.

The Theory of National Supremacy looked to the language of the Preamble of the

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[308] William Bradford, "With a Very Great Blame on Our Hearts: Reparations, Reconciliation, and an American Indian Plea for Peace with Justice" (2002/03) 27 Am. Indian L. Rev. 1.
[309] Sir William Blackstone, *Blackstone's Commentaries* ed. by St. George Tucker (New York: Augustus M. Kelley Publishers, 1969) vol. 1 at 7, Note B.

1789 Constitution.[310] It was premised on the Lockean idea that the federal government was an act of the entire people of the United States who created civil and political society to protect themselves from the vicissitudes of the state of nature. It was not a creation of the States themselves.[311] In *McCulloch* the Chief Justice Marshall stated this position forcefully. "The government," the Court declared, "proceeds directly from the people:"

> It is established in the name of the people...in order to form a more perfect union, establish justice, ensure domestic tranquility, and ensure the blessings of liberty to themselves and their prosperity.[312]

The fact that the national government had enumerated powers related only to its capacity to do certain tasks, but did not diminish its overall pre-eminence in the federal system. From this perspective, the states were not co-equal sovereigns independent of the Federal government. They acted as complementary, but necessarily inferior, governments. As stated by Marshall in *Gibbons v. Ogden*:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is necessary to interfere, for the purpose of executing some of the general powers of government.[313]

From this formulation, it followed that a state could not exclude federal authority nor could it prevent the federal government from pursuing federal objectives within its territory. Like the state government, the federal government acted directly on the individual. It did not act through the instrumentalities of the state. The federal government had both the authority and duty to promulgate, execute and enforce its laws throughout the nation.[314]

The second assumption the Court held was that the federal government was the

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[310]The Preamble to the Constitution of the United States reads: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

[311] For a discussion of the Lockean precepts to John Marshall's jurisprudence see Robert Kenneth Faulkner, *The Jurisprudence of John Marshall* (Princeton, N.J.: Princeton University Press, 1968).

[312] *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 at 403-404 (1819)[*McCulloch*].

[313] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 at 195 (1824) [*Gibbons*].

[314] *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

successor in interest to the British Crown and, as such, it possessed international sovereignty, which was not held by the states.[315] This authority was formally transferred by the treaty ending the Revolutionary War. As the Court observed in *M'Intosh*:

> By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but also the "propriety and territorial rights of the United States....By this treaty, the powers of government, and the right to the soil, which had previously been in Great Britain, passed definitively to these States.[316]

Nonetheless, in spite of the positive transfer of authority and proprietary rights by Great Britain in the treaty in 1783, the Court's claim was not the equivalent to the proposition that the only 1789 constitution conferred supremacy in international affairs upon the national government. Rather, the Court posited that the individual states never had international standing under positive or customary international law at any time. Justice Story enunciates this position in his *Commentaries on the Constitution of the United States*:

> From the moment of the declaration of independence, if not for most purposes at an antecedent period, the united colonies must be considered as being a nation de facto, having a general government over it created, and acting by the general consent of the people of all the colonies. The powers of that government were not, and indeed could not be well defined. But its exclusive sovereignty, in many cases, was firmly established; and its controlling power over the states was in most, if not all national measures, universally admitted.[317]

Thus, the international aspect of the Federal government was accompanied by the accoutrements of international sovereignty that was denied the states. This international sovereignty, springing from the initial collective steps of the individual colonies to resist British sovereignty, was not related to the mechanism whereby the states had later transferred authority to the national government in the 1781 Articles of Confederation.

The Court supported its position that the national government had international

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[315] See Frances Howell Rudko, *John Marshall and International Law: Statesman and Chief Justice* (New York: Greenwood Press, 1991).
[316] *M'Intosh, supra* note 63 at 584.
[317] Joseph Story, *Commentaries on the Constitution of the United States*, vol. 1 (New York: Da Capo Press, 1970) at 203, section 215. Marshall wrote Story regarding his *Commentaries* stating: "It is a subject [the constitution] on which we concur exactly. Our opinions on it are, I believe, identical." From Albert J. Beveridge, *The Life of John Marshall*, vol. 4 (Boston, Mass: Houghton Mifflin Company, 1919) at 569-70.

sovereignty to which the states could never be competent by observing that other international states had only recognized the national government (either the Continental Congress or the Confederation Congress) prior to the 1789 Constitution. This sovereignty was supported by the 1789 Treaty Power, which presumed international recognition by other sovereign states, the exclusive federal right to wage offensive and defensive war, and the incompetence of any authority above the federal government when it was exercising its enumerated powers.

It is not surprising that there were vehement opponents of this view. These opponents generally subscribed to the idea that the federal government resulted from a compact between the states "as states" and was not the creation of the American people in their sovereign capacity. The supporters of the Compact Theory argued that all the national governments of the United States (the Continental Congresses, the Confederation Congress and the 1789 Federal government) were the creation of independent and sovereign states and the national government exercised no authority over the states or the people that the States did not themselves possess prior to its creation. The 1789 constitution, in particular, in no way diminished the underlying sovereignty and authority of each state. The federal government had neither domestic nor international pre-eminence but had a derivative sovereignty. From this perspective the United States was simply a confederated republic similar to the Swiss confederation described by Vattel.

> In short, several sovereign and independent states may unite themselves together by perpetual confederacy, without each ceasing to be a perfect state. They will form together a federal republic: deliberations in common will offer no violence to the sovereignty of each member, though they may, in certain respects put some constraints on the exercise of it, in virtue of voluntary engagements. A person

> does not cease to be free and independent, when he is obliged to fulfil the engagements into which he willingly entered.[318]

The Compact Theory squarely posited that the states, as states, were the original Lockean civil society. From the moment of the 1776 Declaration of Independence, they were *de facto* and *de jure* independent sovereign states in the domestic and international spheres. They had behaved as such at the Continental Congresses.[319] The states then entered into the Articles of Confederation and the 1789 constitution in order to manage certain affairs common to them all. The powers of the 1789 national government were specifically enumerated powers, which acquired a sovereign quality in the area of international relations -- but in no way did the exercise of its national powers diminish the sovereignty of the individual states. The individual states and the federal government were co-equal sovereigns under the 1789 constitution;[320] each state could judge the content of federal statutes and judge the constitutionality of particular federal acts, notwithstanding the national judiciary or other national political branches.

In the decades following President Washington's tenure, the Compact Theory gained more adherents.[321] As partisan fervour rose between the Federalist Party and the nascent Democratic party of Thomas Jefferson, the Democrats emphasized the idea of state assent to the Union and the principle of undiminished state sovereignty to argue for a more limited

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[318] Emmerich de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* translated from the French (Dublin, Ireland: Luke White, 1792) at 18, section 10, online: Galegroup Eighteenth Century Collections Online <http://galenet.galegroup.com.ezproxy.auckland.ac.nz/servlet/ECCO>

[319] Claude H. Van Tyne, "Sovereignty in the American Revolution: An Historical Study" (1907) 12 American Historical Review 529.

[320] See Jefferson to Samuel H. Smith, August 2, 1823 in which the former president referred to the national and state governments as "two coordinate governments, each sovereign and independent in its department....The one may be strictly called the Domestic branch of government which is sectional but sovereign, the other the foreign branch of government equally sovereign on its own side of the line...." found in Jean Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt and Company,1996) at 664, fn. 111.

[321] During the debate regarding the ratification of the 1789 Constitution, the constitutional convention had recognized that legislative ratification of the Articles of Confederation undermined the authority of the national government. For example James Madison stated in 1788 that "among the defects of the confederation, that in Many of the States, it had received no higher sanction than a mere legislative ratification." Federalist 43 (Madison), Alexander Hamilton, James Madison & John Jay, *The Federalist Papers* (Toronto, Ont.: Bantam Books, 1982) at 224.

notion of federal authority.[322] Less than a decade after ratification of the 1789 Constitution, Jefferson declared that the powers of the federal government were the result of a "compact to which the states are parties." This compact was one where "each state acceded [to it] as a state" and one in which each state "is an integral party."[323] Later, in *McCulloch v. Maryland*, the counsel for Maryland explicitly put forth this argument against national authority.[324] The position was advanced by Georgia in the Cherokee cases (1829-1834), and the state of South Carolina in the 1832 tariff dispute. In these disputes, both states insisted that the national government had no authority to enforce federal legislation and insisted that each individual state retained an absolute right to judge for itself the constitutionality of various laws.[325]

B. Federal versus State Sovereignty and the Marshall Trilogy

The impact of the foundational American Indian cases *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia* and *Worcester v. Georgia* has been much disputed. Robert A. Williams argues that these early opinions of Chief Justice Marshall were representative of, or reinforced, racial stereotypes that justified the savagery and injustices inflicted upon the tribes by the colonial project and the ascendancy of American white civilization.[326] Lindsay Robertson has recently argued that the *Johnson v. M'Intosh* opinion was crafted by Marshall to address several contemporary political problems between Virginia and Kentucky concerning land grants to revolutionary war veterans. As the scope of the Marshall's opinion went beyond the legal issues in the case (which according to Robertson concerned the effect of *The Royal Proclamation of 1763* on pre-revolutionary war Indian land purchases), so that Marshall could ground sovereign title under the Discovery doctrine, the case was used as precedent to

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[322] Stanley Elkins and Eric McKitrick, *The Age of Federalism* (New York: Oxford University Press, 1993) at 719-26.
[323] Story, *supra* note 317 at 329 at section 361.
[324] *McCulloch*, *supra* note 312 at 363-9.
[325] Beveridge, *supra* note 317 at 555-73.
[326] Robert A. Williams, Jr., *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis, Minn.: University of Minnesota Press, 2005).

extend state jurisdiction over the tribes in a manner which ignored both inherent tribal rights to autonomy and federal constructional prerogatives.[327]

Yet the early Indian cases, despite the use of racist language, images of Indian savagery and Marshall's immediate political objectives, fundamentally espoused a notion of federal supremacy over the states and tribes. Placed in the context of the federal-state dispute, the Court's notion of national supremacy necessarily enhanced tribal sovereignty when it grounded national and international sovereignty in the federal government. The Court accepted that there were legally enforceable Indian property rights and that tribes were self-governing entities within the American legal system. Moreover, as part of the effort to demonstrate that the national government was supreme within the American federation, the Court compared and contrasted tribes with the states -- emphasizing the historical reality of the sovereign and independent tribes as opposed to the dependant colonial non-sovereign status of the states.

But this conception of national power, and its demonstration that federal authority both trumped and subsumed the pre-existing sovereign tribes, also established that Indian rights were ultimately subject to federal power; and their rights and possessions could be disregarded without their consent or legal intervention by the courts. This justification for

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[327]Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005). See for example *Caldwell v. The State*, 1 Stew. & P. 327 (Ala. Sup. Ct. 1832) at 470-2 where Taylor J. of the Supreme Court of Alabama wrote: "After a patient and laborious investigation, I can find nothing, either in ancient charters; the conduct of any European power, or the opinion of any respectable writer of older date than 1825, which tends in the remotest degree to countenance the opinion that the Indian tribes have ever been considered as distinct and independent communities. In the language of Chief Justice Marshall, in the case of *Johnson* vs. *McIntosh*, "discovery gave an exclusive right to extinguish the Indian title of occupancy either by purchase or conquest; and gave them" (the discoverers) "also, a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise." "The circumstances of the people" did not "allow them to exercise" jurisdiction over many of the tribes within the limits of the colonies at an early day." Those tribes lived beyond their reach or control, and wandered over immense forests which the people of the colonies never had penetrated, and within and beyond which, they had no intercourse. But so fast as these forests disappeared before their extending settlements, and those once distant tribes were brought within reach of the laws, and in contact with the settlements of their civilized and more powerful neighbors; so far, in fine, "as the circumstances of the people would allow them to exercise" jurisdiction and sovereignty over their persons and their country; thus fast they were brought under the influence of those laws, and compelled to yield to that jurisdiction and sovereignty."

empire over the Indians fully surfaced only after the triumph of the nationalist conception of sovereignty in the American Civil War with the abandonment of treaty-making by Congress and articulation of the plenary power doctrine in *United States v. Kagama* and *Lone Wolf v. Hitchcock.*[328] In this sense, American Indian law is reinforces the sovereign and institutional prerogatives of the national state and the socio-economic dominance of the American settlers. Nevertheless, the contest over which level of government is supreme within the federal structure carved out a legal doctrine and set of legal principles that are modestly solicitous of Indian rights. Despite legislative policies directed towards assimilation and the judicial re-interpretations that have significantly narrowed the scope of tribal sovereignty, these principles continue to inform Indian jurisprudence.

1. Johnson v. M'Intosh

Johnson v. M'Intosh was an ejectment action brought by individuals who claimed title to land purchased from the United Illinois and Wabash Land Companies which in turn claimed to hold title based on a purchase from Indians in present day Indiana and Illinois.[329] The issue was whether valid title could be obtained from a tribe by a private purchaser. The Court found that the tribe could not convey good title because all title in the United States was grounded in the federal government's exclusive pre-emptive right to extinguish Indian title. Chief Justice Marshall writing for a unanimous court regarded this pre-emptive right as a corollary of a version of the international law Discovery doctrine that equated "discovery" by European nations with exclusive title of the discovered land. Marshall recognized how "extravagant the pretension of converting the discovery of an inhabited country into conquest may appear", but nevertheless held the title did not depend upon European occupation or conquest for its validity.[330] This "conquest by discovery" thesis wedded sovereign radical title and the extinguishment of Indian title, aspects of sovereignty arguably incidental to state

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[328] *Kagama*, *supra* note 10; *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).
[329] Eric Kades, "History and Interpretation of the Great Case of Johnson v. M'Intosh" (2001) 19 L.H.R. 67.
[330] *M'Intosh*, *supra* note 63 at 591.

sovereignty under the Compact Theory, with international participation and recognition, characteristics possessed only by the federal government as successor in interest to the British Crown.

Modifying and elaborating on an earlier ruling regarding Indian land in *Fletcher v. Peck*,[331] the Court returned to the concept that *all* title in America ultimately resided in the sovereign and that this title to land was the direct result of the sovereign participating in the international system.

> While the different nations of Europe respected the rights of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant soil, while in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.[332]

The Discovery doctrine, as understood by Marshall, allowed the European states to claim "[a]n absolute dominion" over lands not yet occupied by them -- not by virtue of any conquest of, or cession by, the Indian natives, but as a right acquired by discovery. As such Indian title was not "a right to property and dominion, but a mere right of occupancy."[333] This national title was exclusive and the tribes could dispose of property only according to the rules of the discoverer state. "An absolute title to lands cannot exist, at the same time, in different persons, or in different governments."[334] As the federal government was successor-

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[331] In *Fletcher v. Peck* the Court considered the question of whether the "vacant lands within the United States became joint property, or belonged to the separate states". Marshall, C.J. writing for the Court noted that at one time this issue "threatened to shake the American confederacy to its foundation" held that all title to all lands conquered or occupied during the War of Independence went to "the people of the several states." Chief Justice Marshall noted that "[A]ll the right and Royal prerogative devolved upon all the people of the several states, to be exercised in such manner as they should prescribe, and by such governments as they should erect. The right of dispose of the lands belonging to a state naturally devolved upon the legislative body; who were to enact such laws as should authorize the sale and conveyance of them. *Fletcher*, *supra* note 5 at 121.
[332] *M'Intosh*, *supra* note 63 at 574.
[333] "As infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign and independent nations." Story, *supra* note 317 at 135 at §152.
[334] *Ibid.* at 587.

in-interest to the British Crown and held sole pre-emptive rights to extinguish Indian title, a private purchaser of Indian lands held no title.[335]

M'Intosh provided an opportunity for the Court to acknowledge the pre-existing sovereignty of the states arising from the 1776 Declaration of Independence because Virginia, which held title to the land prior to transferring it the federal government, had rejected the land claim prior to the creation of the federal government in 1789. If the state and federal governments were co-benefactors of the British Crown's sovereign rights under the Discovery doctrine, or if Virginia was a sovereign state under international law prior to 1789 and thus successor-in-interest of the British Crown, or if national sovereignty was in some sense dependant on Virginia acceding to the 1879 constitution "as a state," land title to the area would have definitively passed to Virginia (as an international state) and subsequently to the national government when Virginia ceded the land to the Confederation Congress in 1784. In such circumstances the 1779 rejection of the claim by Virginia legislature would conclusively end the matter.

Marshall however, argues that Virginian sovereignty and independence from the onset of the Revolutionary War did not have the quality necessary for Virginia to assume international rights and obligations. First, he equivocated on the point that the 1783 international treaty ending the War of Independence was an acknowledgement of state, as opposed to national sovereignty:

> By this treaty [that ended the War of Independence], the powers of government, and the right to soil, passed definitively to these States. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than which we before possessed, or to which Great Brian was entitled. It has never been doubted,

[335] Moreover, the extinguishment of Indian title by the federal government did not provide fee simple title to a previous purchaser of land from the Indians; the federal government could convey land over which it had extinguished Indian title regardless of the previous purchase.

> *that either the United States, or the several states*, had clear title to all the lands within the boundary lines described in the treaty....[336]

If the Court had understood Virginia as possessing both internal sovereignty and external sovereignty after 1783, it would have been unnecessary to contrapose the "United States or the several states"; particularly where Marshall in the earlier *Fletcher* case rejected the argument that the territory conquered by American revolutionary forces during the war was the property of the United States. [337] Second, Marshall questioned Virginia's power (as opposed to right) to rescind the title obtained by the original *M'Intosh* purchasers, a rather curious observation given Virginia's assertion of sovereignty over the area unless one assumes that Virginia held only a subsidiary authority under the British Crown and American national government. In response to petitions to recognize the transaction, Virginia had passed legislation in 1779 declaring Virginia's exclusive right to purchase Indian land and annulling any previous purchases by private parties. This 1779 legislation could have been construed by the Court as voiding the purchase. However, Marshall did not hold the 1779 act dispositive as an exhibition of Virginia's sovereign state legislative power; rather he found it to be an additional example of the practice that colonial governments had historically claimed exclusive rights to purchase land from the Indians.

> Without ascribing to this act the power of annulling vested rights, or admitting it to countervail the testimony furnished by the marginal note opposite to the title of the law, forbidding purchases from the Indians, in the revisals of the Virginia statutes, stating that law to be repealed, it may safely be considered as an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained, that the exclusive right to purchase from the Indians resided in the government.[338]

Instead, the Court reached back toward the idea that only one international sovereign can be the source of all title. It grounded that title on the right of self-preservation and conquest, legal rights only within the provenance of an international sovereign. In doing so, it excluded the states as a locus of complete sovereignty.

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[336] *M'Intosh*, *supra* note 63 at 584-85 [emphasis added].
[337] *Fletcher*, *supra* note 5 at 142.
[338] *M'intosh*, *supra* note 63 at 585.

Marshall's nationalist perspective lies in his finding that Indian sovereignty was immediately diminished by European discovery (as an extension of state sanctioned or affirmed exploration) and that tribes or individual Indians had no natural right to the lands they occupied. That the Discovery doctrine necessarily diminishes Indian title or that the "[c]onquest gives title which the Courts of the conqueror cannot deny" was not new.[339] However, by articulating the "conquest by discovery" thesis, the *M'Intosh* Court forcefully asserted that the tribes had no international rights nor natural or positive rights save what the European conquerors granted them or what they maintained for themselves by force. This was contrary to recognized international practice but the Court noted: "The law which regulates, and ought to regulate in general, the relations between the conqueror and the conquered, was incapable of application to a people under such circumstances."[340] Thus even if tribes wished to recognize and sell individual property, thereby enabling them to "improve and cultivate the land," and "[to] exercise their natural law right to property," they could not. Likewise, a grant of individual property could not "separate the Indian from his nation, nor give a title which our Courts could distinguish from the title of his tribe...." unless the sale was recognized in a treaty. The Court, emphasizing the *legal* effects of the Discovery doctrine, characterized the tribes as dependant nations regardless of their actual dependence or independence in fact. [341]

Without a natural right to their lands or sovereignty, the tribes would need to claim various rights under positive international law as sovereign, independent people or derive whatever rights they had from the municipal law of the sovereign. The Discovery doctrine

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[339] *Ibid*. at 588. See also Felix S. Cohen, "Indian Title: The Rights of American Natives In Lands They Have Occupied Since Time Immemorial" (1975) 75 Colum. L. Rev. 655 at 658; L.C. Green, "Claims to Territory in Colonial America" in L.C. Green and Olive P. Dickason, *The Law of Nations and the New World* (Edmonton, Alta.: The University of Alberta Press, 1989) 1.
[340] *Ibid*. at 596.
[341] *Ibid.* at 597.

presumptively eliminated any rights under international law but Marshall nevertheless understood the doctrine as incorporating legal rights to occupancy into the municipal legal system based on their formerly independent and sovereign status.

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[342]

These rights were necessarily incorporated into federal law because it was the sole successor-in-interest to the British Crown and held radical title to all lands over which Indian title had not been extinguished.

The national character of the Indian rights, based on the international status of the federal government and the former status of the tribes, is reinforced by actual relations with the Indians. According to the Court, the peculiar relationship between the British/Americans and the Indians was similar to, but differed in many respects, from, the political relations among foreign nations. Practices similar to international intercourse, such as diplomatic exchanges and treating with tribes were carried out because the tribes were "yet too powerful and brave not to be dreaded as formidable enemies."[343] The reasons for this were not principled but practical. The Indians were "fierce savages" who could not be "safely governed as a distinct people" until the "conquest is complete."[344]

Where assertions of *imperium* and *dominium* are: 1) simultaneously legally efficacious; 2) pretensions to be realized only through cession, acquiesce or conquest of the tribes; or 3) the result of actual conquest, the relationship between the tribes and the federal

[342] *Ibid.* at 574.
[343] *Ibid.* at 596.
[344] *Ibid.* at 587-8.

government does not accommodate in the courts view the sub-national character of state sovereignty. Instead, Marshall's Discovery doctrine ultimately resolves itself into an issue of the United States' right of self-preservation and right of conquest based on a positive and paramount claim of sovereignty.

> We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword.[345]

The states are incompetent in this regard. Discovery and the claim of absolute *dominium* are an assertion of power "now possessed by the government of the United States, to grant lands, [and it] resided, while we were colonies, in the crown or its grantees."[346] The predations of the tribes threatened the security of the crown and its grantees. Self-preservation was a natural right of the sovereign. The United States had both the right and duty to defend itself as a sovereign entity. As Pufendorf pointed out "The general rule for the conduct of supreme sovereigns is: Let the safety of the people be the supreme law....For sovereignty is conferred upon them with the intention that through it there may be secured the end for which states are established."[347]

This natural right of the federal government to defend its citizens and the corresponding denial of any natural right of the tribes is mirrored by the Court's denial of a state's natural right of sovereignty under Lockean principles. The Court refused to find natural or positive rights in the Lockean claim to state sovereignty -- a presumption which

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[345] *Ibid.* at 588.
[346] Ibid. at 587.
[347] Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo*, trans. by C.H. Oldfather and W.A. Oldfather in James Brown Scott, ed., *The Classics of International Law* (Oxford: Clarendon Press, 1934) vol. 2 at 1118-9.

underlay the Compact Theory. It would not speculate "whether agriculturalist, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits."[348] Rather the title of lands and ultimate dominion was acquired and maintained by force. This is not to say that the Court did not ascribe to a Lockean view of political society. Instead, the society it focused on was decidedly national. Marshall noted this when he acknowledged the incongruity between natural law and the position advanced by the Court.

> As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in a particular case, and given us as the rule of our decision.[349]

The national character of Locke's political society is further elaborated by the Court when it asserts that "Conquest gives title that the Courts of the conqueror cannot deny…."[350] The Court is national; the conquest is national. The right of conquest - and conquest by force of law under the Discovery doctrine - is held only by the absolute sovereign under international law.

This is evident by the different characterizations of Indian lands given by the Court in *M'Intosh* and the earlier *Fletcher* case. Marshall, writing for the *Fletcher* majority, described the Indian lands subject to the dispute as "vacant"; a characterization seemingly disputed by Justice Johnson in dissent who found that the tribes in the disputed area "retain a limited sovereignty, and the absolute proprietorship of their soil."[351] Since the land was vacant, the

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[348] *M'Intosh*, *supra* note 63 at 587.
[349] *Ibid.* at 572.
[350] *Ibid.* at 588.
[351] *Fletcher*, *supra* note 5 at 102. At p. 103 Justice Johnson concludes: "What, then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more

Crown would have assumed sovereignty and title and the issues of who held sovereignty or radical title and of the nature of Indian title would have disappeared. The only question for the Court was whether the Georgia legislature could convey the land. The Indian land and the assertion of sovereignty by the Crown under the legal pretext of discovery was characterized quite differently by the *M'Intosh* Court. Discovery occurs and possession is taken prior to actual occupation under the authority of an existing imperial government. Thus the colonies were an extension of the sovereign authority of the Crown and the territory "discovered" was already part of the nation that discovered it.[352] Yet the territory over which sovereignty was asserted in *M'Intosh* was not deemed *terra nullius* or vacant. It was occupied by tribes, who the Court admitted, were "rightful occupants of the soil" and whom were "in fact independent."[353] Marshall describes them as "fierce savages," whose occupation was war and who "were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence."[354] Given this characterization, from an international law perspective, the conquest of such peoples, either by force or by law, would be an affirmation of sovereignty. Where force is necessary it is the prerogative of the national government. For the right to use force, according to Vattel "or to make war, is given to Nations only for their defense and for the maintenance of their rights...."[355] This right to wage just war is the sole prerogative of sovereigns and "[w]ar in a just cause is therefore, according to the natural law...a natural mode of acquiring title."[356]

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than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits." This right could not be conveyed by Georgia legislature.

[352] See also M.F. Lindley, *The Acquisition and Government in Backward Territory* (New York: Longmans, Green and Co. Ltd., 1926) at 114-6.

[353] *M'Intosh*, *supra* note 63 at 574, 586.

[354] *Ibid.* at 590.

[355] E. De Vattel, "Le Droit des Gens, ou Principes de la Loi Naturelle, appliques a la Conduite et aux Affairs des Nations et des Souverains" trans. by George D. Gregory in James Brown Scott, ed., *The Classics of International Law* (New York: Oceana Publications, Inc. 1964) vol. 3 at 243.

[356] *Ibid.* at 307.

2. Cherokee Nation v. Georgia

The exclusive power of extinguishing Indian title allowed for the federal government to enter into treaties or go to war to clear the land for settlement. This power descended from Great Britain and was established by the Court in *M'Intosh* as a natural right to self-preservation and just war. Yet the rights under natural and international law (and established by British practice) that would have usually been accorded a conquered people were not available to the tribes. After *M'Intosh*, the legal nature of Indian tribes and how these entities would enter into the American legal system became increasingly important as the tribes sought to use the courts to defend themselves in the face of increased settlement and declining military power.

One means of securing rights "within" the American legal system was by treaty. Yet the notion that treaties would be used to incorporate the tribes into the American federal system brought a new set of issues. A treaty under the Supremacy Clause of the 1789 Constitution led to an assertion of federal authority in areas that may be reserved for the states. This had been a longstanding objection to the constitution and the extension of federal power faced increased political opposition from the states.[357] There also remained the issue of how the pre-existing sovereignty and independence of the tribes would be incorporated into the federal system. The Compact Theory and the National Supremacy Theory both assumed that the sovereignty of the people of the United States was singular and unitary; the sovereign people delegated various powers to their chosen units of government. Recognition of Native American sovereignty and independence within the internal boundaries of the United States, but outside of the categories established by American political theory, the constitution and international law, threatened the underlying assumption of complete internal sovereignty of the American people and the external sovereignty of the United States. As Justice Johnson

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[357]"And the senate has moreover, various and great executive powers, viz., in concurrence with the president-general, they form treaties with foreign nations, that may control and abrogate the constitutions and laws of the several states. Indeed, there is no power, privilege or liberty of the state governments, or of the people, but what may be affected by virtue of this power." in Ralph Ketcham, ed., *The Anti-Federalist Papers and the Constitutional Convention Debates* (New York: New American Library, 1986) at 251.

noted in his concurrence in *Cherokee Nation*:

> We had then just emerged ourselves from a situation having much stronger claims than the indians for admission into the family of nations; and yet we were not admitted, until we had declared ourselves no longer provinces, but states, and showed some earnestness and capacity in asserting our claim to be enfranchised. Can it be supposed, that when using those terms ["foreign" and "state" as found in the constitution], we meant to include any others than those who were admitted into the community of nations, of whom, most notoriously, the Indians were no part?[358]

For the Court that espoused the pre-eminent version of the federal government, the recognition of Indian sovereignty and independence within the borders of the United States brought additional problems. If Native American sovereignty (if only a residue of pre-existing sovereignty and independence prior to conquest and discovery) was accorded recognition by the courts, it would add force to the argument that each states' pre-existing internal and external sovereignty was in some sense a check on federal sovereignty. As Justice Johnson pointed out above, the states had "much stronger claims...for admission to the family of nations...."

The Court resolved these issues in *Cherokee Nation v. Georgia. Cherokee Nation* concerned the right of the Cherokee tribe, pursuant to a treaty with the federal government, to enforce its treaty rights directly in federal court. The Cherokee commenced an original action for an injunction in the U.S. Supreme Court to prevent Georgia from extending its jurisdiction over a reservation established by a federal treaty. The laws of Georgia, the Cherokee alleged, "go directly to annihilate the Cherokee as a political society and to seize...the lands of the nation which have been assured them by the United States Government, in solemn treaties repeatedly made and still in force."[359]

The Court began its analysis by admitting that the Cherokee were a "distinct and

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[358] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 at 26 (1831) [*Cherokee Nation*].
[359] *Ibid.* at 14.

independent society."

> So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of judges, been completely successful. They have been uniformly treated as a state, from the settlement of our country.[360]

Yet, for the majority of the judges, the existence of an independent Cherokee nation was not enough. For the purposes of Article III of the Constitution, the Court concluded that Indian tribes were not *foreign states* and the Court therefore did not have jurisdiction.[361] Building on the distinction between sovereignty and independence he delineated in *M'Intosh*, Marshall commented, that foreign nations were generally "nations not owing a common allegiance" to each other. However, "Indian territory is admitted to compose a part of the United States:"

> In all the Cherokee dealings with the United States they are considered within the jurisdictional limits of the United States. Moreover, they acknowledge themselves, in their treaties, to be under the protection of the United States, [and] they admit that the United States shall have the sole and exclusive right of regulating trade with them and managing their affairs as they think proper....[362]

Rather than deeming the Cherokee to be an independent foreign state, the majority held that the Cherokee and other tribes were "domestic dependant nations [that] are in a state of pupilage; [and] their relation to the United States resembles that of a ward to his guardian."[363]

Given that the *M'Intosh* Court emphasized that conquest and war were the currency of American-Indian relations the use of the ward-guardian relationship is curious. Analogies between the ward-guardian relationship and aboriginal people had been drawn for some time,

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[360] *Ibid.*at 15. Of the five Justices who participated in the case three (Marshall,, Thompson,, Story) recognized the Cherokee as a state. Marshall did not find them to be a foreign state for purposes of Article III. Justices Johnson and Baldwin did not recognize the Cherokee as a state.
[361] Article III, §2 of the U.S. Constitution states, in part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made...and between a State, or Citizens thereof, and foreign States, Citizens, or Subjects."
[362] *Cherokee Nation*, *supra* note 358 at 15.
[363] *Ibid.* at 17.

and it was ascribed to in other colonial jurisdictions, but it was not widely accepted.[364] Nevertheless, its use in the treaty context suggests an incorporation of the tribes into the American legal system under the authority and protection of the federal government -- for in a ward-guardian relationship, the ward tribe has no rights save those asserted or recognized by the federal government.

It is also curious that even from its nationalistic perspective, the Court found that Indian "nations" were competent to make a treaty or contract, without recognizing the corresponding right to enforce the contract in federal court. For the Court, Indian relations remained essentially issues of war and peace, or federal domination. In international law as understood by the Discovery doctrine, the Indian tribes were conquered people who had, despite the Court's rhetoric, ceased to be a state.[365] Prior to their elimination as independent states however, the "habits and usages" of Indian relations were essentially a government-to-government policy matter which did not include a consideration of the respective rights by the federal courts. The Court noted:

> At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or redress of wrong, had perhaps never

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[364] Francisci deVitoria stated that there may be instances where "It might, therefore, be maintained that in their own interests [the indians] the sovereigns of Spain might undertake the administration of their country...so long as this was clearly for their benefit." He doubted however that the idea would not be abused. Francisco de Vitoria, "De Indis et De Ivre Belli Relectiones," trans. by John Pawley Bate in James Brown Scott, ed., *The Classics of International Law* (Washington, D.C.: Carnegie Institution of Washington, 1917) at 161. It is said that Edmund Burke first formulated the duties of a colonial power in terms of trusteeship in a speech in the House of Commons on Fox's India Bill of 1783. "All political power which is set over men...ought to be some way or other exercised ultimately for their benefit. If this is true with regard to every species of political dominion, and every description of commercial privilege, none of which can be original self-derived rights, or grants for the mere private benefit of the holders, then such rights or privileges, or whatever else you ch[oo]se to call them, are all, in the strictest sense, a trust; and it is of the very essence of every trust to be rendered accountable; and even totally to cease, when it substantially varies from the purposes for which alone it could have a lawful existence." Lindley, *supra* note 342 at 330.

[365] "But a people, that has passed under the domination of another, can no longer form a state, and in direct manner make use of the law of nations. Such were the people and kingdoms which the Romans rendered subject to their empire; the most, even of those whom they had honored with the name of friends and allies, no longer formed states. Within themselves they were governed by their own laws and magistrates; but without, they were in every thing obliged to follow the orders of Rome; they dared not of themselves make either war or an alliance, and could not treat with nations." Emmerich de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (Dublin, Ireland: Luke White, 1792) at 18.

> entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution....[366]

Thus, the *Cherokee Nation* Court's refusal of jurisdiction merely emphasized the international status that the tribes once held contrasted with their now conquered status. The residual nature of the relationship precluded both the Court and the states from interfering with the policy of the federal government political branches.

It has been argued that the decision in *Cherokee Nation* avoided a political crisis between the Court and federal government, on the one hand, and the Jackson Administration and the states on the other.[367] However, in avoiding a political crisis the Court reasserted federal authority in three ways. First, Marshall limited the reach of the Eleventh amendment to its terms in the case.[368] Georgia, claiming sovereign immunity, had refused to answer or accept the jurisdiction of the Court in the case. Marshall cited Article III, §2 of the constitution and stated that "the party defendant [Georgia] may unquestionably be sued in this court." In so holding, Marshall indicated that the Eleventh amendment did not grant Georgia or any state a general defence of sovereign immunity. He asserted federal jurisdiction over states in those areas beyond the terms of the amendment, a broad interpretation in an era of increasingly strident assertions of state authority.

Second, Marshall set the groundwork for the federal pre-emption of all state authority over tribes under the Indian Commerce Clause. The Cherokee argued that the commerce clause intended "to give the whole power of managing" Indian affairs to the federal government, thus "removing those doubts in which the management of Indian affairs" that

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[366] *Cherokee Nation*, *supra* note 358 at 17.
[367] See Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality" (1969) 21 Stan. L. Rev. 500 at 514-6.
[368] The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State."

had prevailed under the Articles of Confederation.[369] Marshall agreed to the constitutional grant of authority to the federal government, even though his reasoning did not confer jurisdiction.

> Had the Indian tribes been foreign nations, in the view of the convention, *this exclusive authority of regulating intercourse with them* might have been, and, most probably, would have been, specifically given, in language indicating that idea, not in language contradistinguishing them from foreign nation.[370]

This broad grant of legislative power, excluding or precluding state jurisdiction, recapitulated *McCulloch* while going beyond the justification for the dormant commerce clause outlined in *Gibbons v. Ogden.*[371]

Third, the Court avoided a political crisis by reasserting the position that certain disputes concerning external sovereignty and international law, such as recognition of foreign states, when a state of war exists, or how to dispose of confiscated property during hostilities, are questions of "policy" rather than of "law", while continuing to reserve these issues for the federal government.[372] The judiciary had the duty "to decide upon individual rights, according to those principles which political departments of the nation have established." It did not have jurisdiction to decide those great issues involving a sovereign in its external relations.[373] From this perspective, the federal government retained absolute internal and external sovereignty. The issue of whether Indian treaties were enforceable obligations either depended upon the federal political departments, or in other circumstances upon the courts. The authority, including the authority to pre-empt and override state jurisdiction, remained in

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[369] *Cherokee Nation, supra* note 358 at 18.
[370] *Ibid.* [emphasis added].
[371] *Gibbons, supra* note 313.
[372] *Brown v. United States*, 12 U.S. (8 Cranch) 110 at 128-9 (1814). See also *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 at 135 (1812).
[373] *Foster and Elam v. Neilson*, 27 U.S. (2 Pet.) 415 at 433 (1829).

the federal government as a whole.[374] The sovereign always retained the authority to disregard a treaty and face whatever internal or international disapprobation that might arise.

3. Worcester v. Georgia

It is ironic that the Court cited the "former" sovereignty of the tribes to justify continued and permanent domination of them by the federal government in *Cherokee Nation*. In *Worcester v. Georgia*, the Court extended this notion and asserted the pre-existing and pre-eminent sovereignty of the national government by virtue of its international relations with the tribes. At the same time it denied the pre-existing sovereignty of the states and their incapacity to act in the international sphere.

M'Intosh, *Chereokee Nation*, and the earlier *Fletcher* decision were used by states to extend their jurisdiction to tribes and Indian country.[375] They argued that the effect of the Discovery doctrine as outlined in *M'Intosh*, and the idea that the Indian title was not incompatible with state possession of the land in *Fletcher*, precluded the tribes from exercising full sovereignty over their territory and their members while providing them with a only a permissive occupancy of their lands. This occupancy could not interfere with the advance of the frontier. Moreover, the extension of state jurisdiction and termination of the permissive use was a matter of policy and was not reviewable by the courts. Federal efforts, either by treaty or through the commerce power to protect Indians and prevent the extension of state jurisdiction, were unconstitutional because they impermissibly trenched upon state sovereignty.

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[374] For a further discussion of the Law-Politics distinction as Marshall understood the term see William E. Nelson, "The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence" (1978) 76 Mich. L. Rev. 893 at 944-53.

[375] Robertson, *supra* note 327. See for example *Caldwell v. The State* where Saffold, J. of the Alabama Supreme Court wrote: "The circumstance of the United States having the ultimate right of soil, cannot impair the right of sovereignty. There is no incongruity in the proposition, that the right to the public domain resides in the United States, while the ordinary right of empire, over the same territory, is vested in the state government. Such is, and has been, the condition of most or all the new states. While the United States have possessed and exercised the right to dispose of the unappropriated lands, and even to remove intruders from them, the states, containing them, have, as uniformly, exercised the ordinary municipal government." *Caldwell v. The State*, *supra* note 65 at 376-7.

No state was more assertive in this regard than Georgia. Georgia had ceded its western territory in 1802 to the United States with the understanding that the federal government would extinguish Indian title in its borders as quickly as possible. After gold was discovered in territory reserved to the Cherokee by treaty, Georgia had passed a series of laws assuming jurisdiction over Cherokee country after efforts to move them west by mutual agreement had failed.

Worcester involved the arrest and conviction by Georgia of a U.S. citizen who had entered Cherokee country to proselytize under a federal law but contrary to Georgia law. The Court reversed the conviction stating that: "the whole power of regulating the intercourse with [the Indians] is vested in the United States."[376] Historically, the Court noted, the power of regulating the relationship with the Indians did not extend to the regulation of their internal affairs. "He [the king] ... never intruded into the interior of their affairs, or interfered with their self-government so far as respected themselves only."[377] This condition was guaranteed by treaties; first with the British Crown and later with the United States. As the Cherokee nation is recognized by treaty as a separate independent entity, state authority within Indian country is "extra-territorial" and *ultra vires.*

> The Cherokee nation, then, is distinct occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, in which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with the treaties and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[378]

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[376] *Worcester*, *supra* note 65 at 561.
[377] "[O]ur history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, who might seduce them into foreign alliances." *Ibid.* at 496.
[378] *Ibid.* at 561.

The decision in *Worcester* was not enforced. Either President Jackson refused to enforce the ruling or deficiencies in federal law made enforcement impracticable.[379]

Marshall's opinion was again grounded on international law and concepts of federal supremacy. Echoing *McCulloch* and the commerce power case *Gibbons v. Ogden*, the Court argued that the change from the Articles of Confederation to the 1789 Constitution fundamentally altered the relationship between the states and the federal government.[380] It stated again that the 1789 constitution provided that federal authority was supreme within the sphere of its enumerated powers.[381]

> That instrument [the U.S. Constitution] confers on congress the powers of war and peace: of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free action. The shackles imposed on this power, in the confederation, are discarded.[382]

The fundamental pre-eminence of the federal government under the 1789 constitution was not the sole factor in the Court's decision. The Court, as it did in *M'Intosh* and *Cherokee Nation*, firmly grounded the tribes within the ambit of international law while recognizing the sovereignty of the tribes and their exclusive intercourse with the federal government.

During the Marshall Court era, international law theorists posited that the sovereignty of a state consisted of two parts -- internal sovereignty and external sovereignty.[383] Internal sovereignty is the "right of control" which is inherent in the people of any state, or vested in its ruler, by the constitution or by municipal law.[384] As Vattel noted:

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[379] Burke, *supra* note 367 at 525-8.
[380] *Gibbons*, *supra* note 313 at 187.
[381] Hobson argues that the principal significance of *Gibbons* lay "not so much in building up and centralizing federal power as in circumscribing state power." Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence, Kan.: University of Kansas Press, 1996) at 138-49.
[382] *Worcester*, *supra* note 65 at 559.
[383] Henry Wheaton, *Elements of International Law* (Boston, Mass: Little, Brown and Company, 1855).
[384] *Ibid*. at 29-30, Part I, Chapter II, §5.

> Every Nation which governs itself, under what form soever with dependence on any foreign power, is a *Sovereign State*. Its rights are naturally the same as those of any other state. Such are the moral persons who live together in a natural society, subject to the law of nations. To give a nation the right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent, that is, that it govern itself by its own authority and laws.[385]

The sovereign state had both the right and duty to preserve its existence and to expect the obedience of individuals who lived within its border to abide by its rules.

> In the act of association, by virtue of which a multitude of men form together a state or nation, each individual has entered into engagements with all, to promote the general welfare; and all have entered into engagements with each individual, to facilitate for him the means of supplying his necessities, and to protect and defend him….The entire nation is then obliged to maintain that association; and as their preservation depends on its continuance, it thence follows that every nation is obliged to perform the duty of self-preservation.[386]

The control over individuals and the competence to legislate and bind the political society differentiated the sovereign state from a non-sovereign state. "Sovereignty" Pufendorf stated "is properly used only as over men...."[387] The ability to bind members of the society must be paramount within that society.

The Discovery doctrine, from this perspective, does not provide the discovering nation with sovereignty over the tribes. The Discovery doctrine, Marshall wrote:

> [R]egulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.[388]

This diminished international sovereignty reserves the right of self-government to the tribes and provides the federal government with the exclusive right (as international sovereign) to incorporate the tribes into the American federal system or the internal sovereignty of the

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[385]E. De Vattel, *The Law of Nations or Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Soveriegns,* from Joseph Chitty (Clark, N.J.:The Lawbook Exchange Ltd., 2005) at 2 [emphasis in original].
[386] *Ibid.* at 4.
[387] Pufendorf, *supra* note 347 at 585.
[388] *Worcester, supra* note 65 at 544.

United States. This incorporation was either through a treaty by which a tribe does not lose its residual sovereignty with its consent, or by conquest.

This tribal sovereignty is contrasted to the sovereignty of the states. The Court found that the practices of European nations and the United States treated the tribes as international sovereigns.

> The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth.[389]

These practices, as set forth in British foreign policy documents and American treaties, treated the tribes as juridical equals. Moreover for the most part, the tribes, as was generally acknowledged and required by international practices had voluntarily agreed to enter into treaties ceding territory. "Tributary and feudatory states," the Court stated (quoting Vattel), "do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state."[390] Thus, in the *Worcester* Court's opinion, the tribes had some external sovereignty at least at the time they signed the treaties, regardless of whether the land lay within the external borders of the United States.

While the tribes were recognized as independent and sovereign nations under international law, *i.e.* having external sovereignty, their characteristics also suggested they had internal sovereignty. They had a territory with clearly delineated borders within which they asserted exclusive authority to enforce their own law. They had both the right and practice of self-government. They had agreed to certain codes of conduct regarding non-citizens within their territory and demanded different treatment for their citizens from the federal government. Finally, they had the ultimate right of war and peace, a right recognized

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[389] *Ibid.* at 500-1.
[390] *Ibid.* at 501.

to inhere only in sovereigns.

In contrast, the colonies as described in *Worcester* were found to have no external or internal sovereignty - ultimate authority and title was asserted by the British Crown under the Discovery doctrine. This title granted proprietorship to Great Britain and the colonies as grantees of the Crown but had no impact on the independence of the tribes. "[T]hese grants asserted a title against Europeans only, and were considered a blank paper so far as the rights of the natives were concerned."[391] Unlike the tribes, the boundaries of the colonies were set by the Crown. Moreover, the Crown could modify the rights of individuals within those boundaries such as it did by *The Royal Proclamation of 1763.*[392] Crucially from an international law perspective, the power of making offensive and defensive war, the ultimate prerogative of the international sovereign, was not given the colonies by the Crown. "The power of making war is conferred by these charters on the colonies, [but] *defensive* war alone seems to have been contemplated."[393] As Vattel noted:

> A right of so momentous a nature,--the right of judging whether the nation has real grounds for complaint, whether she is authorized to employ force, and justifiable in taking up arms…belong only to the body of the nation, or to the sovereign, her representative….It is the sovereign power alone is possessed of authority to make war....War is either *defensive* or *offensive*…. The object of a defensive war is simple; it is no other than namely self defense; in that of offensive war there is as great variety as in the multifarious concerns of nations; but in general, it relates either to the prosecution of some rights, or to safety. [394]

The inability to wage offensive and defensive war, according to international law would prevent the colonies from acquiring dominion and sovereignty over the Indians by right of

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[391] *Ibid.* at 497.
[392] *Ibid.* at 496-7.
[393] *Ibid.* at 545 [emphasis in original]. The Court found that the Crown conferred the power of defensive and offensive was but "only on just cause" on the colony of Rhode Island.
[394] Vattel, *supra* note 385 at 292-3[emphasis in original].

conquest or as grantees of the crown. All the success of their arms would redoubt to the benefit of the British sovereign.[395]

The assertion of independence by the united colonies should have changed this dependence upon the Crown, and with it should find the Court assessing the various accoutrements of sovereignty as they apply to each individual state. However, *Worcester* does not understand the revolution to have changed the less than full sovereign status of each colony. According to the Compact Theory, each state became a sovereign independent nation within the society of nations at the time they declared independence. Instead, the *Worcester* Court emphasized the "sovereign" role of the Confederation Government and Continental Congress prior to the 1789 constitution. From this perspective, the international affairs aspect of Native American relations is crucial evidence of the pre-eminence of the national government. The relations of war and peace and international relations in general, the Court stated, were recognized by all the colonies as residing in the Crown. As the revolution commenced, the colonies sent delegates to the Continental Congress and later the Confederation Congress.

> Congress, therefore was considered as invested with all the power of war and peace, and congress dissolved our connexion with the mother country and declared these United Colonies to be independent states. Congress employed diplomatic agents, negotiated treaties and signed treaties.[396]

Moreover "from the same necessity and on the same principles, congress assumed the management of Indian affairs in the name of the colonies and later for the Confederation." Attempts were made to have treaties of peace and trade with the Indians, but "[t]hese not proving successful, war was carried on under the direction and with the forces of the United

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[395] "But according to the law of nations, not only the person, who makes war upon just grounds; but any one whatsoever, engaged in regular and formal war, becomes absolute proprietor of every thing which he takes from the enemy: so that all nations respect his title, and title of all, who derive through him their claim to such possessions." Hugo Grotius, *The Rights of War and Peace*, trans. by A.C. Campbell (New York: M. Walter Dunne, 1901) at 335.

[396] *Worcester*, *supra* note 65 at 558.

[S]tates....The confederation found congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe."[397]

The Articles of Confederation simply adopted this state of affairs. "That instrument [the Articles of Confederation]" the Marshall wrote, "surrendered the powers of peace and war to congress, and prohibited them to the states, respectively unless the state be actually invaded....." The 1789 Constitution in contrast conferred "on congress the powers of war and peace; of making treaties, and of regulating commerce...."[398] The Court emphasizes the non-international status of the states when it then asserted that neither the colonies nor later the states could alter the rights of the tribes because the power of making treaties, (and breaking treaties) was transferred directly from the British Crown to the federal government.[399] For the Court, the transfer of authority from the Crown to the United States did not include the recognition of internal and external sovereignty in each of the states, despite the 1776 Declaration of Independence and the 1783 Treaty. The authority went from the British Crown directly to the federal government.

C. Supreme Sovereignty and Tribal Rights in the American System

The collision of national and state governments in the first decades of the 19th century created a reticence on the part of the Court regarding the sovereign premonitions of the states. The Compact Theory, which was the driving ideological engine for state authority and the concomitant deprecation of federal authority, was anathema to those with nationalistic orientation.[400] In the Marshall trilogy cases discussed above, the Court particularly

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[397] *Ibid*. at 558.
[398] *Ibid*. at 558-9.
[399] "The actual state of things at the time [the founding of the colonies], and all history since, explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending them first, the protection of Great Britain, and afterwards that of the United States." *Ibid*. at 560.
[400] Marshall, C.J. for example, noted: "The argument in all its forms is essentially the same. It is founded, not on the words of the constitution, but on its spirit, a spirit extracted, not from the words of the instrument, but

disparaged the authority and international sovereignty of states when it discussed the relationship between tribes and the federal government. In many respects, of course, the Court was commenting on the status of the states after the establishment of the 1789 constitution. However, the cases suggest that the Court advocated a more radical position -- that the states were never actually sovereign in an international or external sense during and after the revolution, and "as states," they did not have capacity to create the federal government. This perspective echoed the Court's position in *McCulloch* where Marshall argued that the states, despite their "international" premonitions, were incompetent to form a federal union represented by the federal government.

> It has been said, that the people already surrender all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government does not remain settled in this country. *Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves.* To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when "in order to form a more perfect union," it was necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and deriving its powers directly from them, was felt and acknowledged by all.[401]

Because all state action was sub-national, the Lockean concepts privileging state authority were also discarded. The early Indian cases make clear that only the federal government could claim sovereignty over various Indian lands as successor-in-interest to Great Britain, where a corresponding state claim (based on Locke and emphasising that cultivators were more legitimate rights to land than hunters and gatherers) was advanced.

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from his view [counsel for Virginia] of the nature of our union and of the great fundamental principles on which the fabric stands." *Cohens v. Virginia*, 19 U.S. (6 Wheat) 257 at 295 (1821).

[401] *McCulloch, supra* note 312 at 404 [emphasis added].

> To the United States, it could be a matter of no concern, whether their whole territory was devoted to hunting grounds, or whether an occasional village and an occasional corn field interrupted, and gave some variety to the scene.[402]

From this perspective, the national government of the United States, from the Continental Congress, to the Confederation Congress, and the federal government created by the1789 Constitution had always been the pre-eminent receptacle of the sovereignty of the American people.

This depreciation of state authority embedded tribal rights within the American legal system as federally guaranteed rights. Rhetorically, the Court placed the tribes back into the international sphere and used international law to justify the federal government's exclusive authority as a demonstration of its sovereign prerogative in the domestic and international arenas. From these early cases until the present, American law has consequently recognized that Indian tribes retain a national character and residual sovereignty that provides for, among other things, a right of self-government and a guarantee of a possessory interest in their lands. It also includes a duty of protection and fair dealing on the part of the United States.

These tribal rights were the result of the judicial recognition that Indian tribes had a pre-existing sovereignty and independence that could be diminished only by federal authority. And this authority remained exclusive and paramount. The tribes, although analogous to international states were not equated with other international "state" actors such as Great Britain or the federal government. While the recognition that discovery did not annul their pre-existing rights to the natural right to possession of their lands, it did not mean that the Native Americans were entitled to the same "natural rights" that other individuals and societies had to the lands they occupied. Instead, it signified that the federal government had the exclusive right to determine the status of Indians within the legal system -- not that federal government or federal courts needed to *recognize* those rights. The result was an

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[402] *Worcester, supra* note 65 at 553.

expansion of federal authority under the commerce power and the plenary power doctrine.[403] The fact that an Indian tribe has a treaty does not alter the fact that they are a conquered people who nevertheless did not acquire any rights to their possessions under international law. The treaty rights or common law possessory interests could be conditioned or subject to statutory diminishment.[404] For the Court, as set forth in *M'Intosh* and reiterated in *Worcester*, all rights and title in the United States ultimately rested upon conquest. Conquest or, the act of making war, or extinguishment of title by purchase resided exclusively in the national government.

Nevertheless, the preclusion of state authority in American Indian jurisprudence has also given rise to legal doctrines that can be protective of Indian rights against the federal government. These doctrines justify federal power but also include corresponding protective principles. First, the opinions in *Cherokee Nation* and more particularly *Worcester* held that the tribe had the contractual capacity to create legally binding obligations that were enforceable in federal and state court, a crucial element in hunting, fishing and gathering disputes. The 1789 Constitution made treaties self-executing but the issue of contractual capacity had not been addressed. The British Crown and other European governments had entered into treaties of cession that recognized the sovereign authority of the indigenous chiefs or native princes but attitudes were changing -- even as the federal government implemented a policy of conciliation and civilization towards the tribes. These attitudes spilled over into the legal system. "Where is the rule to stop?" asked Justice Johnson as he

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[403] Arguably the Indian commerce clause was not designed to give Congress exclusive or plenary power over Indian tribes but was designed to resolve conflicts between the federal and state governments over the management of commercial and political relationships with the tribes. Federalist 42 (Madison) *The Federalist Papers*, *supra* note 321 at 215. The basic rule of the powers conferred by the commerce clause within the borders of the United States were set forth in the case *Gibbons*, *supra* note 313 and *Wilson v. Black Bird Creek Marsh Company*, 27 U.S. (2 Pet.) 245 (1829).

[404] *United State v. Cook*, 86 U.S. 591 (1873)(Indian possessory interest allows Indians to use lands for whatever purpose provided it is for improvement) *The Cherokee Tobacco*, 78 U.S. 616 (1870) (jurisdiction of United States extends to all territory of United States and federal statute supersedes earlier federal treaty).

argued against the notion that the Cherokee constituted a state in *Cherokee Nation*: "Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state?"[405] Nevertheless, the *Worcester* majority simply held that the contractual capacity related to self-government, and the status of the other contracting party and the use of a treaty was a political decision of the federal government.[406] This act of recognition itself was arguably an act only an international sovereign could make.[407]

Second, the existence and continued traction of the Reserved Rights doctrine with its corresponding reservation of usufructuary hunting, fishing and gathering rights owes its existence to judicial recognition of the tribe's diminished sovereignty and independent character. On the one hand, the doctrine can be understood in contract terms: as an application of the rule construing an agreement against the drafter, as a recognition that contracts involving land must use precise language and that implied terms of a contract must not be contrary to the underlying purposes of the agreement. On the other hand, the reserved rights doctrine is due to recognition that the tribes retain a diminished international sovereignty and right of self-government over a particular territory. While the national government holds radical title to the territory, the fee is united only by cession or a conquest: a grant of pre-existing allodial rights from a previously subsisting legal entity. Indeed, courts have continuously recognized and applied the idea that treaties with Indians are analogous to international treaties. "[T]he power to make treaties with the Indian tribes is," the Court stated in *United States v. Forty-Three Gallons of Whiskey*, "…coextensive with that to make

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[405] *Cherokee Nation*, *supra* note 358 at 34.
[406] Justice M'Lean in his *Worcester* concurrence was explicit that self-government, not sovereignty, was crucial to contractual capacity. *Worcester*, *supra* note 65 at 581.
[407] See for example *Rose v. Himely*, 8 U.S. (4 Cranch.) 241 at 271 (1808).

treaties with foreign nations." [408] Under international law rules of treaty interpretation, the relinquishment of these pre-existing rights, either of self-government or other implied rights which enable the continued existence of the contracting party, such as hunting rights, is preserved by treaty unless explicitly extinguished.[409]

Related to this is the recognition of residual sovereignty, which provides a mechanism for the exercise of tribal law and authority over areas outside the territorial boundaries of the reservation. Within the context of the state-federal disputes, sovereignty was considered coextensive with territory but tribal sovereignty was articulated as sovereignty over its members. The state may hold sovereignty and authority over the territory within borders, but tribal sovereignty, or control and jurisdiction over tribal members, remained in the tribe; guaranteed by and subject to federal authority. In the absence of federal action to diminish this sovereignty, the right to regulate tribal membership remains both an inherent right and a federally guaranteed right. This right of regulation over members has been an important aspect in the exercise of off-reservation hunting, fishing and gathering rights. In many circumstances tribal regulation of members outside of the reservation can supersede to state regulation.

Third, the process gave rise to the fiduciary doctrine and the protective canons of treaty interpretation as *legal* rather than political commitments of Congress and the Executive. The federal government had inherited this duty of protection from the British Crown and it remains a primary justification for federal resistance to state assertions of jurisdiction over the tribes. In the late 19th century, as expected by the discussion above, the fiduciary relationship was used a justification for the exercise of plenary federal power over

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[408] *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 at 197 (1876).

[409] I do not mean to argue that international law rules control the federal, state and tribal relationship or that there has been a direct incorporation of international law rules of treaty interpretation into American Indian law. This would ignore the Discovery doctrine which presumes that international law rules do not apply. I simply note that international rules regarding consent and the scope of agreement between sovereigns and the interpretation of treaties have influenced the legal interpretation of Indian treaties and statutory agreements.

the tribes or for the political question doctrine.[410] Nevertheless, in treaty negotiations the doctrine and canons created a presumption that the United States would not use its superior power and knowledge to the detriment of the tribes and applied canons of treaty jurisprudence that were solicitous of tribal perspectives. In cases such as *Mille Lacs*, these interpretive principles were been crucial to the decision.

VI. Conclusion

This chapter has argued the federal state conflict prior to the American Civil War informed the judicial decision-making in early Indian jurisprudence and these institutional disputes have had a significant impact on the existence and scope of off-reservation hunting, fishing and gathering rights.

It is clear the Marshall Court did not accept the argument that the federal government and the states were co-equal sovereigns or that their relative authority and power within the federal system were reciprocal. The federal government penetrated the states but a state could not assert its authority in areas of federal authority -particularly in those areas that involved fundamental issues of sovereignty like "war and peace," "treaties," and "title to and jurisdiction over territory." In this sense, the federal government was "more" sovereign. It had both internal and external sovereignty. It existed on both the domestic and international plane. It claimed jurisdiction over the entire area and population of the United States as the Lockean civil society. In contrast, each "sovereign" state was analogous to a tribe in that it held a "diminished sovereignty" within the federal system. Unlike a tribe however its residual sovereign powers had nothing whatsoever to do with the fundamental issues of war and peace nor did they have any pre-existing sovereignty cognizable under international law principles.

With the Union victory in the Civil War, the logic of the colonial project and absolute

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[410] See *e.g. Kagama*, *supra* note 10 at 383-4.

federal authority over Indian tribes as exhibited by *Kagama* became manifest. Yet ironically, the legal basis of the continued or renewed exercise of off-reservation treaty rights was bound up in the same determination of paramount and exclusive federal authority. These rights included the legally enforceable nature of Indian treaties, the Reserved Rights doctrine, the fiduciary duty the national government had toward the tribes and the protective canons of treaty interpretation.

Despite these positive rights, the vindication of federal authority need not have resulted in the legal determination that the federal government held exclusive and absolute power over the tribes. The courts, by analogizing tribes to foreign states and recognizing their independence and self-government as collective entities within the legal system provided a framework through which the tribes could have been incorporated into the federal system. However, accommodations for their dependant status and natural rights, using accepted categories of international law and natural law, which would have enabled individual Indians and the tribes the choice and power to more successfully mediate their relations with the American state were also available within the jurisprudence.

Chapter Four Canada

I. Introduction

The confederation of the United Province of Canada, Nova Scotia, and New Brunswick by the Imperial Parliament in 1867 transferred whatever authority the colonies held over aboriginal affairs to the federal government.[1] Within this legal regime inherited from pre-confederation law and practice and the *Constitution Act, 1867* aboriginal rights were precarious.[2] First, there was considerable uncertainty about the precise legal source and status of treaty and aboriginal rights. The law was an amalgamation of common law rights, customary practices, statutes, international legal doctrines, imperial and colonial policy and imperial prerogative instruments such as *The Royal Proclamation, 1763*. Second, there was uncertainty about the content and the scope of aboriginal and treaty rights. Third, there was uncertainty about how aboriginal and treaty rights related to provincial authority within the federal system. Finally, the rights were subject to the doctrine of parliamentary supremacy and to regulation and extinguishment by legislation.[3]

Canadian courts have protected aboriginal hunting, fishing and gathering rights on

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[1] The United Kingdom transferred legislative authority over aboriginals to the United Province of Canada (Ontario and Quebec) in 1860. Since about 1800 the colony of Nova Scotia had paid for any funds to be spent on the Mi'kmaq in the colony. These funds were spent at the discretion of the executive. In March, 1842 an aboriginal affairs and funding bill was passed by the Nova Scotia assembly and approved by the colonial office which required that expenditures would be accountable to the assembly. From that time the Committee on Indian Affairs would be the ultimate authority on aboriginal policy. Aboriginals were completely neglected in New Brunswick but aboriginal affairs remained under the nominal authority of the Lieutenant-Governor and Colonial Office until Confederation. However, there was little imperial input to colonial Indian land legislation from the 1840s when the reserves in New Brunswick were dramatically reduced. L.F.S. Upton, *Micmacs and Colonists Indian-White Relations in the Maritimes, 1713-1867* (Vancouver: University of British Columbia Press, 1979) at 91.

[2] Canada was created by the *British North America Act, 1867*. This act was renamed the *Constitution Act, 1867* in when the Canadian constitution was patriated in 1982. All sections of the *British North America Act, 1867* cited in this chapter are identical to the section in the *Constitution Act, 1867*. All references will be to the *Constitution Act, 1867* unless otherwise noted.

[3] Peter W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: The Carswell Company, Ltd., 1985) at 563-68.

reserves or as guaranteed in treaties or federal statute from provincial encroachment.[4] In doing so, they resolved some of the uncertainty concerning the content and scope of the rights. Nevertheless, the rights have also been deliberately ignored by the federal and provincial governments; have been subject to extensive regulation and complete defeasement by federal parliament until the *Constitution Act, 1982*.[5] With the protections set forth in ss. 25 and 35 of the *Constitution Act, 1982* secured by the Supremacy Clause in s. 52,[6] First Nations have gained constitutional protection for various aboriginal and treaty rights.[7] Post-1982, the courts have developed a relatively coherent doctrine of aboriginal rights, including hunting, fishing and gathering rights based on the constitutional text, common law precedent, new historiography and historical knowledge, procedural innovations, and evolving standards of collective rights within the Canadian context.

This chapter will use the 1999 case *R. v. Marshall* to examine the legal doctrine of non-territorial hunting, fishing and gathering rights in Canada.[8] The dispute concerns Mi'kmaq hunting, fishing and gathering arising from a series of treaties signed between Great Britain and the Mi'kmaq in the 18th century. In the Canadian context, the doctrine seeks to balance the assertion of Canadian sovereignty in a de-centralized federal system with

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[4] Peter A. Cumming and Neil H. Mickenberg, eds. *Native Rights in Canada*, 2d ed. (Toronto: The Indian-Eskimo Association of Canada in Association with General Publishing Co. Ltd., 1972) at 209-26.

[5] For a discussion how various laws and policies solicitous to tribal interests were suppressed see Hamar Foster, "Romance of the Lost: The Role of Tom MacInness in the History of the British Columbia Indian Land Question" in G. Blaine Baker and Jim Phillips, eds. *Essays in the History of Canadian Law In Honour of R.C.B. Risk* (Toronto: University of Toronto Press, 1999) vol. 7 at 171.

[6] Section 35 of Part II, Schedule B of the *Constitution Act, 1982* provides in part: 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. Section 52(1) of Part IV, Schedule B of the *Constitution Act, 1982* states: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

[7] In this Chapter I will use the terms "aboriginal", "First Nations" and "Native Americans" interchangeably to refer to indigenous groups.

[8] *R. v. Marshall*, [1999] 3 S.C.R. 456. The 1999 *Marshall* case is compromised of two separate decisions, the main decisions and a subsequent decision rendered dismissing an application for rehearing in which the Court clarified the previous decision. The original Supreme Court decision was delivered September 17, 1999. It is found at [1999] 3 S.C.R. 456. I will refer to the first *Marshall* decision as *Marshall I*. The decision dismissing an application for rehearing is found at [1999] 3 S.C.R. 533 [1999]. I will call the rehearing decision *Marshall II*.

constitutionally entrenched aboriginal rights. This nexus requires that it describe and systematize specific historic facts and contexts which are then incorporated into more general constitutional assumptions and rules developed from earlier case law. Looking at the process from the perspective internal to the aboriginal law framework, the process necessarily incorporates judicial assumptions and legal doctrines that have developed by the courts to explain and give order to the messy process of colonization. These include a juridical history of aboriginal-settler relations as well as judicial evaluations of aboriginal society and law and its relationship to non-aboriginal society. From the perspective of constitutional law, the process implicates the consolidation of the Canadian state and the elaboration of Canadian federalism. Initially, it involved implicit or explicit policy and legal obligations inherited from the individual provinces, the imperial crown and the common law as incorporated into the jurisdiction by the colonial courts. Over time it has subsumed the rules and assumptions generated by judicial resolution of various historic post-Confederation Dominion-Provincial disputes and delineation of government authority over individual rights holders.

This chapter proceed as follows. First, there will be a brief discussion of the historical and legal context of British -- aboriginal interaction in Nova Scotia and New Brunswick. Second, the 1999 *R. v. Marshall* decisions of the Supreme Court of Canada will be discussed. These decisions will then be used a means to identify the major components of the Doctrine of hunting, fishing and gathering rights in Canada. Finally, there will be consideration of how the law has been affected by various post-Confederation constitutional disputes between the federal and provincial governments.

II. Canadian Law and Maritime First Nations

A. Aboriginal Law and Colonization in North America

Prior to the American Revolution, the British Crown had established the legal basis for colonization. This legal ground was an amalgam of expediency, political theorizing, constitutional innovation and common law exegesis as well as conventions based on the lessons and protocols of European-aboriginal interaction. English law and practice carried over to Acadia (present day New Brunswick, Prince Edward Island, and Nova Scotia) after the 1713 *Treaty of Utrecht* and to the remainder of New France in1763. Contrary to France, which asserted both absolute *imperium* and ownership of the territory, the British asserted absolute *imperium* but they recognized the juridical independence and territory of the tribes.[9] *The Royal Proclamation, 1763* was an imperial expression to this policy. It provided that the tribes had a right to enjoy "by virtue of a recognized title, their lands not surrendered or ceded to the crown", prohibited "all interference with such lands by private persons by way of purchase or settlement" and granted the Crown exclusive rights to purchase aboriginal lands.[10]

Until 1763, each North American colony pursued its own land cession and trade policies. Initially, there was uncertainty about the juridical nature and status of the tribes the colonists encountered and the mechanisms to allocate jurisdiction and facilitate relations between them. On the one hand, much of the English discourse on the settlement of North America revolved around the conquest of the aboriginals, whose resistance to the extension of Crown sovereignty was considered both irrational and unlawful. On the other hand, as

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[9] French settlement and economic objectives, however, more easily led to accommodation with tribal understandings of their independence and possession of territory. Cornelius J. Jaenen, "French Sovereignty and Native Nationhood" in J.R. Miller, ed., *Sweet Promises A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) 19 at 30.

[10] *St. Catharine's Milling and Lumber Co. v. The Queen,* [1887] 13 S.C.R. 577at 626, Strong J. dissenting. *The Royal Proclamation, 1763* (U.K.) George R., Proclamation, 7 October 1763 (3 Geo. III) reprinted in R.S.C. 1985, App. II, No. 1.

Williams notes:

> For Europeans, long-held legal notions about the diminished rights of "savage" and "barbarian" peoples were forced to yield to the reality of formidable and well organized Indian tribes, with their own deeply ingrained traditions of law for governing relations between different peoples.[11]

In light of the situation, the rhetoric of conquest was usually disregarded in practice.[12] "In a new world far removed from the power of the monarch…," Hermes writes, "major players used different sets of rules, negotiation, compromise, and consent…for fashioning far-reaching structures of power."[13] The sheer vulnerability of the colonial settlements and the developing economic dependence and interdependence - for food, furs and other trade goods - made colonial disregard for indigenous power and autonomy bad policy.[14] Colonial governments generally recognized tribal autonomy (if not independence), self-government, and customary law as well as legal rights in possession and use of lands and natural resources.

The Imperial government likewise accepted the idea that the tribes were governmental entities having laws and territory, subject to the pre-emptive claim of *imperium* under international law. In contrast to ideas of European superiority and conquest "[t]his imperial discourse stressed the expediency of maintaining, above all, peaceful relations with powerful Indian Tribes and confederacies of the frontier."[15]

One mechanism used to facilitate this plural inter-societal relationship and create a

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[11] Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600 – 1800* (Oxford: Oxford University Press, 1997) at 28.
[12] Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).
[13] Katherine A. Hermes, "Jurisdiction in the Colonial Northeast: Algonquin, English and French Governance" (1999) 43 Am. J. Legal Hist. 52 at 59.
[14] Jeremy Webber, "Relations of Force and Relations of Justice: the Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 623 at 630-7.
[15] Robert A. Williams, Jr., "The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought" (1983) 57 S. Cal. L. Rev. 1.

shared legal order was the treaty.[16]

> The English placed great faith in these treaties, which had a once-and-for-all time formality about them and did away with the need to be constantly nurturing the goodwill of the native people. These treaties stood in direct contrast to the French practice of persuading and befriending them year after year.[17]

In North America, the treaty relationship is perhaps the clearest manifestation that the English and British recognized that tribes were entities having their own law and territory.[18] They reflected the idea "that whatever *imperium* was asserted over Indians rested on their agreement rather than the fact of their forced submission."[19] Most treaties consisted of a written record outlining the substance of the agreement as well as various minutes and protocols that were part of the negotiations. The negotiation of treaties was an important activity. At least 64 treaties among the colonies and the eastern tribes were negotiated between 1607 and 1699 and at least 111 additional treaties were signed between 1700 and 1775.[20]

Recognizing aboriginal possession and ownership by treaty was a simple recognition of the actual state of affairs on the ground. Tribes were in *de facto* control of territory and possessed the requisite diplomatic skill and/or military power to support their interests. Under the circumstances it was necessary, particularly due to French imperial competition and

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[16] "From 1764 until 1867 there were approximately 375 treaties between the British Crown and First Nations. From 1867 until 1923 there were approximately another 150 treaties between the Crown and indigenous peoples north of the 49th parallel." The contemporary round of treaty-making in Canada stared with with the 1975 James Bay and Northern Quebec Agreement. Joel Bakan *et al., Canadian Constitutional Law*, 3rd ed. (Toronto: Emond Montgomery Publications Limited, 2003) at 592.

[17] Upton, *supra* note 1 at 37.

[18] But see Jennings who argues that early colonial society in New England viewed the continent as empty and open to settlement without moral or legal regard for the aboriginals. Yet even in these circumstances the seizure of aboriginal property was usually done "with some show of legality." Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (Chapel Hill, N.C.: University of North Carolina Press, 1975) at 144; John Peacock, "Principles and Effects of Puritan Appropriation of Indian Land and Labor" (1984) 31 Ethnohistory 39.

[19] Paul G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004) at 103.

[20] Dorothy V. Jones, "British Indian Treaties" in Wilcomb E. Washburn, ed., *Handbook of North American Indians* (Washington: Smithsonian Institution, 1988) vol. 4 at 185.

settlement pressure in the Ohio valley prior to 1763, to engage in diplomatic practices (including treaty negotiation over territorial boundaries) similar to those among international states at the time. Moreover, use of the treaty was an extension of the assumption, evidenced by various letters patent and company charters, that either some European power or indigenous people actually had possession of North American territory when England began exploring and settling the continent.[21] Finally, the multiple sources of authority within colonial society (common law, imperial, colonial, corporate and tribal) and the diffuseness of that authority, particularly on the frontier, made a pluralist juridical environment more consistent with the realities of the colonial North America. Treaties with tribes gave form and structure to one aspect of the ever-changing colonial project.

The juridical recognition of tribal interests in treaties, premised on the idea that tribes were alternative sources of authority within the polity, was also accepted because the international and national conceptions of sovereignty and constitutionalism were more amorphous and accommodating to pluralistic legal environments.[22] First, prior to the mid-19th century, sovereignty (whether territorial or civil) was not an exclusive absolutist concept but was conceived of as a more personal feudalistic relationship between the subject and the ruler.[23] The assertion of sovereignty did not necessarily entail the extension of total jurisdiction over territories and peoples.[24] Furthermore, the jurisdictional categories that arose between the aboriginals and the colonists were fluid and depended upon the context.[25] Second, international law concept of the juridical equality of states, regardless of power, or their ability to enter into a subordinate relationship with larger states by treaty, was extended

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[21] Brian Slattery, "Paper Empires" in John McLaren, A.R. Buck & Nancy E. Wright, eds., *Despotic Dominion Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 50.
[22] McHugh, *supra* note 19.
[23] *Ibid.* at 61-116.
[24] *Ibid.* at 95.
[25] Yasi Kawashima, "Jurisdiction of the Colonial Courts over the Indians in Massachusetts 1689-1763" (1969) 42 New England Quarterly 532.

to non-Christian powers. While the issue of whether Native American tribes actually constituted political societies or had a natural right to their territory was debated among international law theorists, state practice in North America was premised on the idea that tribes held territory under their own law. [26] Provided that there was a political organization and a leadership with whom to negotiate, the British did not hesitate to treat with these societies on the basis of juridical equality. While most of the agreements were ultimately used to undermine or destroy the sovereignty or independence that was acknowledged, international law as it related to these societies had not yet evolved toward the idea that their status was unrecognized or unknown.[27] Third, constitutionalism as a theory for organizing government authority and elaborating the relationship among various levels of government (imperial and colonies) was unarticulated and where articulated was contested.[28] It did not however, eliminate consideration of the juridical existence of the tribes, tribal legal systems and tribal interests outside of or within the legal and constitutional system of the settlers.[29]

For the settlers, the acceptance of colonial jurisdiction by the signatory tribes and the sale of land (usually with continued use rights) in exchange for payment and/or protection were the most important elements of the treaty relationship. The purchasing of

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[26] It is beyond the scope of this paper to examine the argument whether the various indigenous tribes lacked or held sovereign status (as opposed to holding various subsidiary rights) under international law at the time of first contact or at the time various treaties were signed. See Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681 at 684; James (Sakej) Youngblood Henderson, Majories L. Benson & Isobel M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough, Ont.: Carswell, 2000) at 101. But see L.C. Green, "Claims to Territory in Colonial America" in L.C. Green and Olive P. Dickason, eds., *The Law of Nations and the New World* (Edmonton, Alta.: The University of Alberta Press, 1989) 1 at 125-6 for an opposing view.

[27] Nevertheless, after the decline in British-American hostility after the War of 1812, the decline of the Montreal based fur trade and an increased number of settlers who required agricultural land the colonial courts did not hesitate to find that an Indian tribe had no capacity to hold property or any status recognizable in law. *Doe d. Jackson v. Wilkes* (1835), 1 C.N.L.C. 259 (U.C.K.B.); *Doe d. Seldon v. Ramsay* (1852), 1 C.N.L.C. 439 (U.C.Q.B.). See also J.R. Miller, *Skyscrapers Hide the Heavens A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989) at 83-98 for a discussion of factors affecting the change in aboriginal-British relations.

[28] Daniel J. Hulsebosch, "*Imperia in Imperio*: The Multiple Constitutions of Empire in New York 1750-1777" (1998) 16 L.H.R. 319 at 322-6.

[29] A 19th century example of the idea that aboriginal regimes remained sources of law and that aboriginal and colonial legal regimes could contemporaneously exist across territory is evident in *Connolly v. Woolrich*, 1 C.N.L.C. 70 (1867) (Q. Sup. Ct.).

land by treaty both expanded the land base of the colony and extended its jurisdiction. While both societies held vastly divergent views regarding the ownership and sale of land - aboriginals generally regarded the sale of land as the transfer of a particular use without the concomitant right to exclude - both parties generally understood that a sale would transfer jurisdiction from the tribe to colonial authorities.[30]

Purchasing land from the tribes began with the Virginia Company's efforts to establish the first English settlement in North America. Like the Virginians, settlers in the northern colonies were anxious to secure their land titles from the local tribes. They wished to avoid occupying land that might have aboriginal claimants or create the impression that they were defrauding the tribes.[31] "New England's records" notes Jennings, "abound with deeds attesting to purchases by 17th century Englishmen from stipulatedly rightful Indian landlords."[32] By the early 17th century, English and colonial law held that all transfers of title from the aboriginals, either individually or collectively as tribes, were to be done only by the Crown or needed to be re-affirmed by the Crown.[33]

The recognition of aboriginal independence, self-determination, and territorial possession with the consequent incorporation of aboriginal rights into the common law; and the creation of shared understandings formed an important premise for legitimizing the settler presence while establishing the basis for private property and economic development. Yet settler compliance with treaty agreements was often honoured only in the breach. War,

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[30] Jennings, *supra* note 18 at 128-34.
[31] In the early years of the New England colonies the deeds were often fee simple conveyances that suggest that the colonists regarded the tribes as having full ownership, rather than only equitable interest in the land. James W. Singer, "American Indians and the Law of Real Property in Colonial New England" (1986) 30 Am.J. Legal Hist. 25 at 44.
[32] Francis Jennings, "Virgin Land and Savage People" in Peter Charles Hoffer, ed., *Indians and Europeans Selected Articles on Indian-White Relations in Colonial North America* (New York: Garland Publishing, Inc., 1988) 100 at 103, 120-1.
[33] Peter Karsten, *Between Law and Custom "High" and "Low" Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia, and New Zealand 1600-1900* (Cambridge: Cambridge University Press, 2002) at 49-61.

skirmishing, squatting and legal legerdemain eroded aboriginal possessions.[34] Accommodation with the tribes often entailed that the tribes act in a manner consistent with British designs. The recognition of aboriginal rights could not completely submerge the colonialist impulse. English conceptions of land ownership, possession and use coupled with the English/British concept of *imperium* and territorial jurisdiction were ultimately too dissimilar for any accommodation between the parties to be more than temporary.[35] For the British, control of territory necessarily included actual control, or right to control all persons and subject matters arising in that territory. As the British and the colonists gained power, shared jurisdiction or the assertion of colonial jurisdiction with aboriginal consent, which was an implicit recognition of aboriginal power, slowly gave way.[36]

The shift of power away from the tribes, which allowed colonial governments to show less solicitude to tribal interests, was accompanied by the development of more unitary and euro-centric conceptions of sovereign and national authority.[37] Unlike the Americans, who developed the view that the tribes retained an inherent authority based on the pre-contact occupation and use of territory, the British and settlers replaced the idea of a juridical equality for the tribes. "As the settler state consolidated its sense of self," Paul McHugh writes, "it tended to increasingly see and treat aboriginal peoples as part of and entirely subject to its own sovereignty rather than as separate polities."[38] From the settler's point of view, the issue of political authority and sovereignty was increasingly understood as a fight for local responsible government under a unified sovereign imperial crown.

The political shift away from a more pluralist view of authority was accompanied by

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[34] See various examples in Jennings, *supra* note 18 at 144-5.
[35] Hermes, *supra* note 13.
[36] *Ibid.* at 73.
[37] McHugh, *supra* note 19 at 117-59.
[38] *Ibid.* at 127.

an increasingly ethnocentric and racist bias. Initially, during what Williams has called the "encounter period" in North America (16th to late 18th century), the English settlers were intrigued by colour differences between themselves and aboriginal peoples. The assignation of endemic and irremediable characteristics based on colour was not widely held. The two predominant assumptions - assimilation and appropriation of land - that formed early attitudes towards the aboriginals were consistent with Christian and enlightenment ideas of equality and individual dignity.[39] These attitudes justified the appropriation of land based on Lockean notions of property and subscribed to the idea that aboriginals could enter mainstream white society by becoming farmers. A certain perspective was maintained whereby it was recognized that indigenous peoples were individuals, (albeit of a "fallen" state), and that war or violence perpetuated by them was, in some sense, justifiable. However, anger over aboriginal hostility and violence directed towards the settlers, frustration over their rejection of Christianity and "civilization" and the exposition of various scientific theories, which beginning in the late 18th century argued that racial characteristics were related to intellectual prowess and cultural development, led many settlers to conclude that Native Americans were inferior and borne to servitude. As stated by Vaughan:

> A certain type of cultural relativity and moral absolutism combined…to show that though white and red man were of the same biological mould, the Indian possessed customs that fitted him perfectly to his level of development in the history of man, but the level was far inferior to that of the white European. The savage was the zero point of human society.[40]

In settled regions, where the threat of attack had disappeared there were often more benign viewpoints, but attitudes generally changed from envisioning the tribes acquiring "civilization" and assimilating into white society to racially motivated hostility,

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[39] Williams, *supra* note 15.
[40] Alden T. Vaughan, *Roots of American Racism: Essays on the Colonial Experience* (New York: Oxford University Press, 1995) at 21-8. See also Robert F. Berkhofer, Jr., *Salvation and the Savage: An Analysis of Protestant Mission and the American Indian Response, 1787-1862* (Westport, Conn.: Greenwood Press, 1977) at 11.

particularly on the frontier. By the mid-19th century, racist attitudes and racial categories, as a justification for imperialism, genocide, "Manifest Destiny," or land dispossession and as basis for differentiation were firmly entrenched.[41] These racial attitudes both justified and were evidenced by technological progress and imperial expansion coupled with the concomitant encroachment, by arms or otherwise, onto aboriginal-controlled territory.

Despite the fundamental shifts in attitudes and power, the formalities and legalism included in a nation-to-nation treaty relationship and the solicitude towards aboriginal interests (albeit based on their uncivilized degraded state) survived Confederation. The practice of concluding treaties with purportedly independent indigenous entities was too deeply ingrained within the colonial process to be entirely discarded. What was similar in form however, was transformed in substance. The recognition the juridical equality of tribes was abandoned while the recognition aboriginal interests was no longer considered a legal imperative but a political and moral obligation.[42] The objective of post-Confederation treaties continued to be to extinguish the "personal and usufructuary rights" of the tribes but all colonial and imperial officials acknowledged that the ceded rights could have been legally extinguished without consent. Courts would not enforce the treaty provisions absent express statutory enactments relating to the treaty terms.[43] More important, the federal government vigorously pursued an assimilation policy that sought to completely absorb aboriginal entities

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[41] Reginald Horsman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism* (Cambridge, Mass.: Harvard University Press, 1981).

[42] *Doe Ex.Dem. Jackson v. Wilkes* (1835), 1 C.N.L.C. 259 at 262-5 (U.C.K.B.); *Doe d. Sheldon v. Ramsay* (1852), 1 C.N.L.C. 439 (U.C.Q.B.) In *Sheldon*,at page 457 Robinson, C.J. reflected the unitary notion of law and authority in Canada. "We cannot recognize any peculiar law of real property applying to the Indians—common law is not part savage and part civilized. The Indians, like other inhabitants of the country, can only convey such lands as they legally hold, and they must convey by deed executed by themselves, or by some person holding proper authority."

[43] The leading case in Canada prior to 1951 was *Rex v. Syliboy* [1929], 1 D.L.R. 307 (N.S. Co. Ct.).

and individuals into white society.[44]

B. The Establishment of British Hegemony and Aboriginal Treaties in Nova Scotia and New Brunswick

Hermes has noted that the "governance of the northeastern corner of North America…was not achieved by invasion and conquest. It was a process of interaction between three peoples; Algonquian, French, and English, from which emerged rules of who would govern what and how."[45] This interactive process in what the French called Acadia and what the Mi'kmaq call Mi'kmak'ik (ancestral Mi'kmaq territory) began with the initial encounters between coastal Mi'kmaq and Basque, Norman, and Portuguese fishermen of the 1400s.[46] As European sailors sought out fishing grounds they often landed to cure their catch and take on provisions. They traded with the coastal inhabitants in the area.[47] The initial encounters were followed with increased penetration by French fishers, explorers, and fur traders in the mid-1500s and later French missionaries and settlers in the early 1600s.

The French Crown proceeded with the acquisition and settlement of New France upon different principles than those later used by the English.[48] When the French extended their influence in Acadia through trade and missionary activities, their presence was never incompatible with Mi'kmaq, Maliseet and Passamaquoddy hunting and trading society. To be

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[44] John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in Ian A.L. Getty and Antoine S. Lussier, eds., *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: UBC Press, 1983) 39.

[45] Hermes, *supra* note 13 at 53.

[46] Mi'kmak'ik (or Mi'kma'ki) encompassed all of present day Nova Scotia and Prince Edward Island and most of New Brunswick, and the Gaspe Peninsula of Quebec. Some include the southwestern region of Newfoundland in Mi'kmak'ik. It was divided into seven political districts. Suzanne Berneshawi, "Resource Management and the Mi'kmaq Nation" (1997) 17 Canadian Journal of Native Studies 115 at 117..

[47] The aboriginals of what are now the Canadian Maritime Provinces of Nova Scotia and New Brunswick included the Mi'kmaq, Maliseet and Passamaquoddy tribes. The Mi'kmaq occupied the Gaspe Peninsula, eastern and northern parts of what is now New Brunswick, peninsular Nova Scotia and Cape Breton Island. The Maliseet were settled about the St. John River in central and southern New Brunswick. The Passamaquoddy lived in the coastal regions of New Brunswick. Philip K. Bock, "Micmac" and Vincent O. Erickson, "Maliseet-Passamaquoddy" in Bruce Trigger, ed., *Handbook of North American Indians – Northeast,* vol. 15 (Washington, D.C.: Smithsonian Institution, 1978) at 109, 123.

[48] Cornelius J. Jaenen, "French Sovereignty and Native Nationhood" in J.R. Miller, ed., *Sweet Promises A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) 19.

sure, liquor and disease as well as changes in lifestyle due to the introduction and desire for European goods impacted aboriginal society. As the French were more attuned to the cultural significance of bestowing and exchanging gifts with the tribes and showed little interest in settling or cultivating aboriginal land, the Mi'kmaq had little trouble acceding to the idea that they were independent allies of the French Crown in Acadia in spite of the "national and supra-national Christian claims of France."[49] They acknowledged the French Crown to be the lord of the country but did not submit themselves to French law.

When France ceded Acadia to the United Kingdom in 1713, neither the French nor the Mi'kmaq considered the settlement permanent.[50] The British presence in the region amounted to several small military outposts.[51] Prior to the establishment of Halifax in 1749, the British presence amounted to a handful of soldiers based in Annapolis and Canso.[52] The Mi'kmaq had the military power to resist the transfer of their territory. Before the expulsion of the Acadians in 1755 and the defeat of Louisbourg in 1759, the French provided the Mi'kmaq with weapons, ammunition and trade opportunities to sustain their opposition to British rule. Moreover, the Mi'kmaq did not accept that they were bound by a peace and cession agreement to which they were not a party. At the same time, they were aware of the

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[49] Hermes, *supra* note 13 at 58.

[50] The 1713 *Treaty of Utrecht* ceded Acadia "according its ancient boundaries" from France to the United Kingdom. Ile Royale (Cape Breton Island) and Ill Saint-Jean (Prince Edward Island) were retained by France. The extent of the territory ceded was disputed. The British took the position that they had acquired title to all of mainland Nova Scotia, New Brunswick and the French claims to Maine. French diplomats took the vague wording of Article 12 to insist that "Acadia" meant only peninsular Nova Scotia, while the territory west of the Bay of Fundy and the isthmus of Chignecto remained under French control. John G. Reid, "1686-1720 Imperial Intrusions" in Phillip A. Buckner and John Reid, eds., *The Atlantic Region to Confederation: A History* (Toronto: University of Toronto Press, 1994) 78. L.F.S. Upton and O. Dickason, "Louisburg and the Indians: A Study in Imperial Race Relations" (1976) 6 History and Archaeology 1.

[51] "The British Diplomats knew that the transfer of "L'Acadia" was merely a symbolic concession. One British diplomat described Britain's treaty [of Utrecht] jurisdiction as 'in words something, in substance little.'" Henderson, *supra* note 26 at 113.

[52] Reinforcing the weak position of the British was the French establishment of a colony on Isle Royale (Cape Breton Island) in 1714. The port and military fortifications of Louisbourg were a major defence center in America as well as base to compete with the British for the cod fishery. See John Robert McNeill, *Atlantic Empires of France and Spain Louisbourg and Havana 1700-1763* (Chapel Hill: University of North Carolina Press, 1985) at 80-5.

French-British rivalry in the area and were astute in utilizing their pivotal position to extract gifts and concessions from both sides.[53]

The British sought to change the basic terms of the relationship that the Mi'kmaq had had with the French despite their weak military position. First, they insisted that the French cession made the area British territory by right of war. The Mi'kmaq and French Acadians living there were necessarily subject to British sovereignty and jurisdiction. As Lieutenant-Governor of Nova Scotia wrote in 1762 to the Lords of Trade:

> Your Lordships will permit me humbly to remark that no other Claim can be made by the Indians in this Province, either by Treaties or long possession (the Rule, by which the determination of their Claims is to be made, by Virtue of his Majesty's Instructions) since the French derived their Title from the Indians and the French ceded their Title to the English under the Treaty of Utrecht.[54]

The British determination not to concede Mi'kmaq sovereignty and independence was pursued assiduously, despite the fact that the British had no real control over the Mi'kmaq from 1713 until the French defeat in 1760. Thus when the Mi'kmaq declared war in 1749, the Nova Scotia council decided not to declare war in return because to do so would be to "own them [the Mi'kmaq] a free & independent People; whereas they ought to be treated as so many Banditti Ruffians, or Rebels to His Majesty's Government."[55] Unsurprisingly, the Mi'kmaq fundamentally disagreed with this British position. While the Mi'kmaq, as allies of France, had acknowledged that the French King was "their father," they did not accept that he held sovereignty over them so as to control their actions. The king could not subject them to French law, and he neither owned their land nor did he have the capacity to cede their

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[53] The ability of the Mi'kmaq to condition the dispersal of presents by the British to their relationship with the French in wartime or the peaceful establishment of British settlements was a matter that plagued the Nova Scotian colonial administration. See for example the Letter from Lieutenant-Governor Doucette to Governor Philipps to the Lords of Trade, 11 March 1718 in W.E. Daugherty, "*Maritime Indian Treaties in Historical Perspective*: *The British Administration in Nova Scotia, 1713-1739*," online: Canada, Indian and Northern Affairs < http://www.ainc-inac.gc.ca/pr/trts/hti/Marit/index_e.html > at 25.

[54] Letter of Jonathon Belcher to the Lords of Trade, 2nd July, 1762 in Cumming and Mickenberg, *supra* note 4 at 286-7.

[55] Upton, *supra* note 1 at 52.

territory to another European power.[56] They had welcomed the French Crown in their territory as independent allies and their relationship to the United Kingdom in Acadia was necessarily independent of France.[57] They insisted that the British likewise needed to recognize their independent status. Second, unlike in the American colonies, the British gave no regard to aboriginal property interests. The Mi'kmaq consistently asserted their ownership to land that the British assumed they could simply occupy.[58]

It followed that British did not feel that land cessions by treaty were necessary since Mi'kmaq aboriginal title had been extinguished by France. "The British were equally firm in their belief that whatever title the Micmac (or any other Acadian aboriginal) might have had had been lost in the two-fold process of French colonization followed by French defeat."[59] When the protection of and compensation for aboriginal lands and hunting grounds was incorporated into policy by *1761 Royal Instructions to the Governors of various North American colonies* and more formally by *The Royal Proclamation, 1763*, it did not apply to Acadia. Regarding the effect of *The Royal Proclamation, 1763* in the Maritimes, Cumming and Mickenberg note:

> [T]here is no indication that any land cession treaties were made nor any compensation paid to the Indians….[T]he conclusion can be drawn that although the proclamations of 1762 and 1763 applied to the maritime provinces, the procedures outlined in them were not followed. The reasons for this are not clear….The pressures generated by the influx of settlers combined with the fact that the Indian nations were severely ravaged by disease in the early 19th century, permitted the taking of Indian lands in the Maritimes with little concern for aboriginal rights.[60]

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[56] Cumming and Mickenberg, *supra* note 4 at 96-7.
[57] Norman McL. Rogers, "The Abbe Le Loutre" (1930) 9 Canadian Historical Review 105.
[58] Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back* vol. 1 (Ottawa: Royal Commission on Aboriginal Peoples, 1996) at 126.
[59] Olive Patricia Dickason, "Amerindians Between French and English in Nova Scotia, 1713-1763" in Miller, *supra* note 9, 45 at 47. See also R.O Macfarlane, "British Policy in Nova Scotia to 1760" (1938) 19 Canadian Historical Review 154; Upton, *supra* note 1at 37-9.
[60] Cumming and Mickenberg, *supra* note 4 at 105. The Royal Instructions for the Governors of Nova Scotia, New Hampshire, New York, North Carolina, South Carolina and Georgia are found in Cumming and Mickenberg at 285-6.

Thus when Lieutenant-Governor Belcher issued the Nova Scotia Proclamation in 1762 (Belcher's Proclamation) enjoining individuals from settling or interfering with hunting, fowling and fishing "upon any Lands so reserved to or claimed by" the Mi'kmaq, the Lords of Trade repudiated and invalidated it.[61] Later in 1764 the Lords of Trade disallowed Belcher's Proclamation though the Nova Scotia government never took formal action to revoke it.

Third, the British had little patience for tribal customs and traditions, which could have been integrated into a new ongoing and reciprocal relationship with the Mi'kmaq. For example, the British essentially thought that dispensing and exchanging gifts was bribery rather than part of a reciprocal pattern of ongoing relations among allies, which was the Mi'kmaq understanding of such exchanges. They also sought to colonize and settle lands in a manner that undermined the traditional subsistence base of the tribes.[62] The unwillingness to justify British actions in terms of the Mi'kmaq's social and cultural premises across Mi'kmaq territory -- to reach what White calls the "middle ground," -- contributed to the intermittent warfare which the British tended to attribute to French machinations. [63] However, the relative insensitivity of the British tended to force the Mi'kmaq into a greater reliance on the remaining French presence maintained through Catholic missionaries.[64] This greater reliance on the French served French interests because they believed that any accommodation between the Mi'kmaq and the British would be detrimental to the French presence in Canada.

The British approach in Acadia not only differed from that of the French but also

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[61] Daugherty argues that in part the invalidation of the Proclamation was due to domestic political relationships in the Nova Scotia Legislative Council. Daugherty, *supra* note 53 "*The Struggle for Acadia: The Final Phase 1744 -1779*" at 64. Belcher's Proclamation is found in Cumming and Mickenberg, *supra* note 4 at 287.
[62] Richard White, *The Middle Ground Indians, Empires, and Republics in the Great Lakes Region 1650-1815* (Cambridge: Cambridge University Press, 1991); James E. Fitting, "Patterns of Acculturation at the Straits of Mackinac," in Charles E. Cleland, ed., *Cultural Change and Continuity Essays in Honor of James Bennett Griffin* (New York: Academic Press, 1976) 321.
[63] "The middle ground depended on the inability of both sides to gain their ends through force." White, *Ibid.* at 52, see also 53-60.
[64] Upton, *supra* note 1at 38-40; McL. Rogers, *supra* note 57 at 107.

differed from British practice farther south. The British only entered into treaties for military and strategic considerations, not for the peaceful acquisition of land and the extension of settled frontier.[65] The treaties therefore emphasized the acceptance of British dominion and jurisdiction over the tribes as well as peace provisions.

The 1713 *Treaty of Portsmouth* New Hampshire was one of the first treaties that affected Acadia. The treaty included aboriginals in what later became the province of New Brunswick but did not include Mi'kmaq in Nova Scotia.[66]In the treaty, the tribes agreed to cease hostilities against the British and acknowledged themselves to be "the lawfull [sic] subjects of our Sovereign Lady, Queen Anne" and promised their "hearty Subjection & Obedience unto the Crown of Great Britain…."[67] The tribes agreed leave the colonists "Rights of Land & former Settlements, Properties, & possessions" unmolested and free from any aboriginal claims but "Saving unto the said Indians their own Grounds & free liberty of Hunting, Fishing, Fowling, and all other their Lawful Liberties & Privileges...." This reference to hunting, fishing and gathering rights is apparently the first in a treaty affecting Canadian aboriginals.[68] Additionally, the terms provided that any dispute between the parties would be governed by English law.

For the next decade, the British were engaged in low-level conflict with the Mi'kmaq and other Algonquin tribes throughout northern New England and Acadia. The Mi'kmaq, who considered the British enemies, were particularly "deeply affected" by the French cession of the territory.[69] As they stated through an Acadian intermediary after the British demanded a return of a vessel they seized in 1720 "we are here to tell you that this land here

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[65] Dickason, *supra* note 59 at 50-4.
[66] *R. v. Paul*, [1998] 1 C.N.L.R. 209 at 219. (N.B.Q.B.).
[67] Cumming and Mickenberg, *supra* note 4 at 297.
[68] Dickason, *supra* note 59 at 64; see text accompanying note 35.
[69] Reid, *supra* note 50 at 99-103.

that God has given us…cannot be disputed by anyone…We are masters, independent of all, and would have our country free."[70]

Given Acadian aboriginal hostility, the different British approach to the tribes and French efforts to foster hostility, the British were unable to enter into another treaty until 1725 in the aftermath of a conflict known in New England as Dummer's War. The treaty conference and the resultant series of treaties that came out of it were unique in that it included aboriginals from Maine, New Hampshire, New Brunswick and Nova Scotia. The Boston negotiations for the 1725 treaty involved minimal direct input from Acadian tribes.[71] Nevertheless following instructions from the Nova Scotia government, Major Paul Mascarene, Nova Scotia Treaty commissioner during the negotiations, offered additional reciprocal promises (Mascarene's Promises) in a separate document tailored to the situation in Acadia in order to obtain ratification of the Nova Scotia version of the treaty when it was presented for tribal ratification the following summer.[72] Among other things, Mascarene's Promises included a stipulation that the "[i]ndians shall not be molested in their persons, Hunting, Fishing and Planting Grounds nor in any other their lawfull Occassions by His Majestys [sic] subjects or their Dependants…."[73] These additional articles as well as the treaty language which acknowledged British "jurisdiction and dominion" over Acadia were

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[70] *Ibid.* at 100.

[71] The treaties that came out of the 1725 Boston Conference were negotiated by the Penobscot who claimed to "speak for all the Indians of Maine and eastward" but did not have the authority to bind any other tribes except the Penobscot. The negotiators did have promises from the Mi'kmaq and the Maliseet that there would be peace during the negotiations. The British would necessarily need to seek ratification of the treaty from the other tribes. For a discussion of the events surrounding the 1725 Treaty see Stephen E. Patterson, "Anatomy of a Treaty: Nova Scotia's First Native Treaty in Historical Context" (1999) 48 U.N.B.L.J. 41. The ratification of the version of the treaty concerning Nova Scotia was ratified by various Mi'kmaq bands, the Maliseet and some Penobscot in the summer of 1726 at Annapolis Royal.

[72] A copy of the Mascarene's Promises is found in Andrea Bear Nicholas, "Mascarene's Treaty of 1725" (1994) 43 U.N.B.L.J. 3 at 17-8.

[73] The promises given by Mascarene to the Mi'kmaq and other Acadian tribes during the negotiations in December 1725 were in a separate document that was not signed by the various tribal representatives in Annapolis Royal. At Annapolis Royal because of Mascarene's absence, the treaty and separate promises were redrafted to reflect the fact that the Lieutenant Governor of Annapolis Royal John Doucette was the British representative. Patterson, *supra* note 71 at 60-1.

ratified in June 1726 at Annapolis Royal and in 1728 by the Mi'kmaq and other Acadian tribes.[74]

Land cessions were not mentioned in the 1725 treaty ratified at Annapolis. This pattern of no land cessions as the British pursued their strategic and military objectives *vis-à-vis* the imperial rivalry with the French coupled with a Mi'kmaq agreement to cease fighting and accede to British jurisdiction was followed in all subsequent treaties.[75] The Treaty of 1725 applicable to Nova Scotia was renewed with the Maliseet, Passamaquoddy and one band of Mi'kmaq with Governor Cornwallis upon the establishment of Halifax in 1749.[76] This agreement was superseded by a renewal of hostilities between the Mi'kmaq and the British. In August 1749, in response to Mi'kmaq attacks throughout Nova Scotia, Cornwallis issued a proclamation authorizing the military and all British subjects to "annoy, distress, take or destroy" any Mi'kmaq that they ran across.[77]The British and the Mi'kmaq again entered into a treaty in 1752. This treaty was made between Governor Hopson of Nova Scotia and "Major Jean Baptiste Cope, chief Sachem of the Tribe of Mick Mack Indians Inhabiting the Eastern Coast of the said Province" who agreed to attempt to persuade other Mi'kmaq bands to make peace. The parties again agreed to renew the Treaty of 1725 and stated that all

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[74] The ratification process included reviewing the terms of the 1725 Treaty negotiated in Boston which related to Nova Scotia. This version, called Mascarene's treaty arrived in Annapolis at least 2 months prior to June 4, 1726, the official date the treaty was ratified. On June 4, 1726 at Annapolis, representatives of the Passamaquoddy, Maliseet, and Mi'kmaq from Cape Sable, Shubenacadie, Minas, Chignecto, Richibuctou, Shediac appeared and were met by Lieutenant Governor of Annapolis John Doucette. Not all areas were represented. The terms were read to the assembled bands who were then invited to sign. The ratification process was spread over several weeks. Patterson, *supra* note 71 and Bear Nicholas *supra* note 72.

[75] William Wicken suggests that the purported acceptance by the Mi'kmaq of the British Crown's dominion and jurisdiction over the area in the 1725 treaty were not in fact agreed to by the tribe due to difficulties in translation. William C. Wicken, "Mi'kmaq and Wuastukwiuk Treaties" (1994) 43 U.N.B.L.J. 241.

[76] Cumming and Mickenberg, *supra* note 4 at 304-6; Daugherty, *supra* note 53 at 51. The Treaty of 1749 between Governor Cornwallis and various Mi'kmaq bands at the time of the establishment of Halifax was a renewal of the 1725 Treaty. Canada: *Canada Indian Treaties and Surrenders*, vol. 2 *(*Facim. Reprint Toronto: Coles Publishing Company, 1971 originally published Queen's Printer, Ottawa, 1891 by Fifth House Publishers, 1993) at 200–1.The issue of whether the Mascarene or Doucette promises were included in this renewal is not clear. Patterson argues that they were not. Patterson, *supra* note 71 at 63.

[77] Daugherty, *supra* note 53 at 54.

hostilities would be "buried in oblivion with the hatchet."[78] Article 4 was the primary *quid pro quo* of the treaty. It stated:

> That the said tribe of Indians shall not be hindered from but have free liberty of hunting and fishing as usual: and that if they shall think, a truck house needful at the River Chibenaccadie or any other place of their resort, they shall have the same built and proper merchandize lodged therein to be exchanged for what the Indians shall have to dispose of, and that in the meantime the said Indians shall have free liberty to bring for sale to Halifax or any other settlement within this Province, skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best advantage.[79]

After the French defeat at Quebec, the Mi'kmaq and the British again entered into a series of treaties in which they agreed to cease all hostilities. Under the terms of these 1760/61 treaties, the Mi'kmaq recognized British domination and jurisdiction over Nova Scotia and promised not to molest any British subjects. They were to make restitution for any crimes committed by them and they were to resolve any disputes between the aboriginals and colonists in colonial courts under colonial law. They also agreed to trade only at a truckhouse established for them. The language and the additional promises found in the Treaty of 1725 and 1752 were not specifically included in these later treaties. All Mi'kmaq bands signed similar versions of this agreement. Additional treaties renewing the submission of the Mi'kmaq to British jurisdiction, along with a guarantee of various usufructuary rights, were entered into in 1779 and 1794.[80] These treaties were in response to the American and French revolutions that once again raised the spectre of imperial conflict and aboriginal war in the area.

Except for the renewal of interest in the aboriginals due to their perceived potential to engage in military activity in concert with the American and French revolutions, British and

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[78] *Ibid.* at 56-59. Daugherty further notes that the Nova Scotia Council's decision to not even address the Cope proposal to compensate the Mi'kmaq for land taken for settlement is further indication that the British believed they had sole title to Acadia based of the *Treaty of Utrecht.*

[79] *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 392-4 [*Simon*].

[80] The operative language of the 1779 Treaty states: "That the said Indians and their Constituents shall remain in the Districts beforementioned Quiet and Free from any molestation of any of His Majestys Troops or other his good Subjects in their Hunting and Fishing." Quoted from *R. v. Paul* (1980), 30 N.B.R. (2d) 545 at para. 18 (C.A).

colonial policy towards the Mi'kmaq and the Maliseet essentially fell into desuetude after the French departure from Canada. The influx of Loyalists rapidly reduced the remaining unsettled areas in the region and extended British control and jurisdiction throughout the area. In this emergent colonial society, aboriginals were marginalized. With increased European settlement, Miller notes: "the Indians ceased to be allies and economic partners [and] they increasingly assumed the roles of obstacle to development and consumer of public funds."[81] The aboriginals were accorded no land rights and were expected to follow the colonial practice of petitioning for land grants from the colonial government. Until a reserve policy was developed settlers and the colonial government occupied and seized whatever land they wished to occupy. Where reserves were established, little effort was made to protect them from squatting.[82] Imperial authorities remained committed to the protection of aboriginal peoples but the actual responsibility for the tribes was with the provinces, which were at best indifferent to aboriginal land claims.[83] The policies that were enacted were usually not implemented. As the Colonial Office committed to self-government for the settler colonies in the mid-19th century, the ability of imperial authorities to implement an effective protective policy, which had always been somewhat rhetorical and tenuous in practice, simply disappeared.[84] The treaties with the Mi'kmaq and other Acadian tribes were simply ignored

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[81] Miller, *supra* note 27 at 98.
[82] Sidney L. Harring, *Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: Osgoode Society for Canadian Legal History by University of Toronto Press 1998) at 178-85.
[83] Since *The Royal Proclamation, 1763* the Imperial government had control of aboriginal affairs. It retained control over aboriginal policy after granting the United Province of Canada responsible government in 1846 as well as in New Brunswick and Nova Scotia. However, the Colonial Office generally deferred to local policy decisions and depended upon local colonial officials to implement policies. The Province of Canada officially assumed control of aboriginal affairs in 1860. Despite the 1763 Proclamation, Nova Scotia to a certain extent always had control of aboriginal affairs since its formation in 1754, as did New Brunswick when established in 1784. The policies of the separate colonies on Vancouver Island and mainland British Columbia were legally controlled by the colonial office prior to 1871 when British Columbia joined Confederation but the office generally left policy in the hands of the first colonial governor James Douglas and his successors. Upton, *supra* note 1 at 81-97.
[84] David T. McNab, "Herman Merivale and Colonial Office Indian Policy" in Ian A.L. Getty and Antoine S. Lussier, eds., *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: UBC Press, 1983) 85.

by the colonial government and the imperial Crown.[85]

The Mi'kmaq protested their situation as best they could. They continued to insist on their treaty rights and launched appeals to the colonial assembly as well as directly to the British Crown, requesting both an improvement of their poverty and recognition of their aboriginal and treaty rights. These petitions were either forcefully denied or led to a flurry of investigatory activity, but failed to address the issues in any meaningful way due to lack of political will and money.[86] The failure of these political attempts to seek recognition and redress of their aboriginal and treaty rights was mirrored by the inability to get colonial and Canadian courts to recognize and effectuate aboriginal, treaty and land rights. "As distinct as Newfoundland, Nova Scotia, and New Brunswick were in local matters, the Indians in all these jurisdictions did not have access to local courts to protect their lands."[87] When aboriginal rights were judicially considered the aboriginal participant was usually a criminal defendant and the court refuse to recognize the claimed rights.

III. The 1999 Marshall Decision by the Supreme Court of Canada

A. Facts and Argument

The context and factual details of *R. v. Marshall* have been extensively examined.[88] The specific dispute began in 1993 when Donald Marshall, a registered member of the Mi'kmaq Membertou Band, which has a reserve on Cape Breton Island, netted 463 pounds of eels at Pomquet Harbour in the northeastern mainland of Nova Scotia. The eels were placed in holding pens situated adjacent to the Mi'kmaq Afton Reserve in Antigonish County. Marshall later sold the eels to a fish processor. He was charged with violations of ss. 4(1)(a) and (2) of

[85] Harring, *supra* note 82 at 178-85.
[86] See example of petition in Bruce H. Wildsmith, "Vindicating Mi'kmaq Rights: The Struggle Before, During and After Marshall" (2001) 19 Windsor Y.B. Access Just. 203 at 207-8.
[87] Harring, *supra* note 82 at 183.
[88] Ken S. Coates, *The Marshall Decision and Native Rights* (Montreal and Kingston, Ont.: McGill-Queen's University Press, 2000); Thomas Isaac, *Aboriginal and Treaty Rights in the Maritimes: The Marshall Decision and Beyond* (Saskatoon, Sask.: Purich Publishing, 2001).

the *Maritime Provinces Fishery Regulations* and s. 35(2) of the *Fishery (General) Regulations* promulgated under the authority of s. 78(a) of the Federal *Fisheries Act*.[89]

At the time Marshall was arrested by Nova Scotia Fisheries officers, the legal landscape of aboriginal rights in the area had changed significantly from the earlier non-recognition of aboriginal interests. The courts had determined neither the Mi'kmaq nor the Maliseet had ceded their territory by treaty. *R. v. Syliboy*, which denied the Mi'kmaq hunting and fishing rights under the 1752 treaty, was no longer considered good law. The courts had held that local aboriginals had common law aboriginal rights to hunt, fish and gather on lands and waters adjacent to their reserves. In *Simon v. The Queen* the Supreme Court ruled that the Mi'kmaq had a right to hunt under Article 4 of the 1752 Treaty outside of reserves.[90] Indeed, the Crown attorney told the *Marshall* Trial Court that if Marshall had not been fishing commercially, he would not have been prosecuted.[91] Moreover, it was settled that any member of the Mi'kmaq, including those Mi'kmaq who remained under French jurisdiction on Cape Breton Island until 1758, could claim the treaty right under the 1752 treaty in spite of the fact that only one band had actually signed it.

The rights retained were protected by the *Constitution Act, 1982* and governmental regulation was subject to the justification test set forth in *R. v. Sparrow*.[92] In *R. v. Peter Paul*, the Mi'kmaq had briefly won a major expansion of their treaty rights under the 1725 and 1752 treaties that would have allowed them to log in New Brunswick forests.[93] Though the case had been reversed on appeal, the facts had not been developed enough to allow the New

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[89] R.S.C. 1985, c. F-14 as amended.
[90] *Simon*, *supra* note 79 at 402.
[91] Wildsmith, *supra* note 86 at 214.
[92] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*].
[93] *R. v. Peter Paul* (1998), 158 D.L.R. (4th) 231 (N.B.C.A.). For a detailed discussion of the controversy and reactions of the various interested parties in the case see Coates *supra* note 88 at 94-126.

Brunswick Court of Appeals' decision to be determinative.[94] The legal significance of the 1760/61 Treaties had not been addressed.

Marshall argued that he held an aboriginal right and treaty right under the Treaty of 1752 or the trade clause of the treaties signed 1760/61, to fish and to sell fish. The Treaty of 1752 stated in Article 4:

> It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting & Fishing as usual…[and] the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage.[95]

In the period of 1760-1, the British had entered into a series of peace treaties with various Mi'kmaq bands in an effort to end the fighting after the overthrow of Louisbourg in 1758. The British later intended to gather all the bands together for a general treaty covering the entire province, but this never happened. Marshall also claimed that the clause found in the Treaty of Peace and Friendship signed March 10, 1760 in concerning trade and the establishment of truckhouses by the British (the "truckhouse clause") provided the treaty right to fish and trade fish, and that this particular treaty was representative of the various treaties entered into at the time. The March 10, 1760 truckhouse clause stated:

> And I do further promise for myself and my tribe that we will not either directly nor indirectly assist any of the enemies of His most sacred Majesty King George the Second, his heirs or Successors, nor hold any manner of Commerce traffick nor intercourse with them, but on the contrary will as much as may be in our power discover and make known to His Majesty's Governor, any ill designs which may be formed or contrived against His Majesty's subjects. <u>And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall</u>

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[94] Subsequently in *R. v. Sappier*, the Crown conceded and the New Brunswick Court of Appeal, basing its decision on the 1725 Treaty as ratified at Annapolis Royal in 1726 (Mascarene's Treaty of 1725), found that the Maliseet community had a treaty right to harvest timber for personal use. It also found that the tribe held an aboriginal right to harvest wood for personal use. *R. v. Sappier,* [2004] N.B.J. No. 295 (C.A.). This decision was upheld by the Supreme Court in *R. v. Sappier; R. v. Gray,* [2007] 1 C.N.L.R. 359 (S.C.C.).

[95] *Marshall I, supra* note 8 at para. 15. A copy of the full 1752 Treaty is reproduced in *Simon, supra* note 79 at 392-5.

be appointed or Established by His Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia.[96]

Marshall argued that the 1760/61 treaties should be understood within the context of several decades of Mi'kmaq-British relations. Included in this context were the series of treaties signed by the Mi'kmaq and other Acadian tribes commencing in 1725, which Marshall argued created a set of expectations between the parties and shed light on their intentions when they agreed to the truckhouse clause in 1760. This context made it clear that the Mi'kmaq and the British intended to confirm that the Mi'kmaq would have the free liberty to trade without restriction. The British intended the Mi'kmaq to continue their current lifestyle, which included hunting, fishing and gathering, when they signed the peace treaties. Moreover, the context showed that the Mi'kmaq did not agree to unilateral regulation by the Crown. Furthermore, Marshall argued that if his fishing and trading activities were subject to regulation, it must be in accordance with the test set forth in *R. v. Sparrow*.

The Crown argued that the only treaties which potentially governed the relationship between the Mi'kmaq and the Crown were the 1760/61 treaties. The Treaty of 1752 was no longer operative as it had been terminated by subsequent hostilities or superseded by the later 1760/61 Treaties. The 1760/61 treaties did not grant the Mi'kmaq the right to fish, much less fish commercially. In the alternative, the Crown argued that if the court did find that the 1760/61 Treaties *did* grant the right to fish commercially, the Crown retained the right to regulate the activity because the right of regulation was inherent in the right conveyed. The Crown further argued that if a commercial fishery was granted to the Mi'kmaq, the right is subject to the Crown's right to regulate the fishery and its regulation need not be justified under *Sparrow*.

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[96] *Marshall I*, *supra* note 8 at para 5 [emphasis in original]. For a full copy of the March 10, 1760 Treaty see *R. v. Marshall*, [1996] N.S.J. No. 246 Appendix VI (Prov. Ct.). The Trial Court accepted that the terms of this agreement were similar to other agreements signed between the Mi'kmaq and the British in 1760/61 and that the written terms were applicable to the dispute.

After evidence was presented, Marshall dropped any reliance on the Treaty of 1752 or common law aboriginal rights. He requested that the trial judge proceed on the basis of the 1760/61 treaties. According to Marshall's lead counsel Wildsmith, reliance on the 1752 Treaty was not necessary because the Crown's expert witness Dr. Patterson expressed an opinion under cross-examination about the 1760/61 treaties that had not been previously disclosed. "In that evidence," states Wildsmith:

> Dr. Patterson offered the opinion that the British understood the Mi'kmaq lived by hunting and fishing and gathering, that these activities would provide the products to trade, and that the Mi'kmaq therefore "have the right to trade it."[97]

Patterson had previously testified that all of the known Mi'kmaq had subscribed to the Treaties of 1760/61, and that the treaties continued to be valid and operative. According to Wildsmith, with the Crown's expert conceding that the treaties continued to be valid and in force, and that they also contained the "right to fish and to trade the fish," reliance on the 1752 Treaty was unnecessary.[98]

The lower Nova Scotia courts ruled in favour of the Crown. While the Trial Court, by Justice Embree was satisfied that the agreements among the various tribes and the British were valid aboriginal "treaties" under Canadian law, it nevertheless ruled that the truckhouse clause did not provide Marshall with the right to engage in commercial eel fishing; the treaty provided a more limited right to trade that expired when the truckhouse trading system was dismantled. As for the more general rights to trade beyond the long disestablished and short-lived truckhouse trading regime, the Court simply found that the "British did not intend to convey and would not have conveyed the right which the Defendant claims as a treaty right."[99] The Nova Scotia Court of Appeal upheld Marshall's conviction.[100] Marshall

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[97] Wildsmith, *supra* note 86 at 217-9.
[98] *Ibid.*
[99] *R. v. Marshall*, *supra* note 96 at 43.
[100] *R. v. Marshall* (1997), 146 D.L.R. (4th) 257 (C.A.).

appealed to the Supreme Court of Canada which reversed.

1. The Majority Opinion of Justice Binnie in the Supreme Court of Canada.[101]

Justice Binnie writing for the majority in the Supreme Court of Canada based his opinion on the observation that only a ruling for the Mi'kmaq would uphold "the honour and integrity" of the Crown; an exegesis which assumed an historic continuity in Crown-Mi'kmaq relations and Mi'kmaq fishing and trading activity.[102] These considerations, combined with the generous rules of interpretation, were essential to his decision in favour of the treaty right. He noted that if the dispute "had arisen out of a modern commercial transaction…the Mi'kmaq [would] had inadequately protected their interests"; as the document, "standing in isolation" did not support Marshall's argument that the Mi'kmaq had a right to trade as well as the "right to pursue traditional hunting, fishing and gathering activities in support of that trade."[103]

In part, Justice Binnie's conclusion was based on an extension of the interpretive principles involving the use of extrinsic evidence in the interpretation of treaty terms. The Nova Scotia Court of Appeal had concluded that "[w]hile treaties must be interpreted in their historical context, extrinsic evidence cannot be used as an aid to interpretation, in the absence of ambiguity."[104] Binnie rejected this strict interpretative approach. First, he reasoned that Canadian courts had always considered parole evidence to show whether the written text of an agreement was the exclusive record of the agreement. Second, even where the treaty document purports to contain all the terms, extrinsic evidence of historical and cultural context might still be considered where there is no ambiguity. Prior to *Marshall I*, it was settled that extrinsic evidence could be used to determine the existence of a treaty and the

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[101] I will not be discussing the dissent of Justices McLachlin and Gonthier.
[102] *Marshall I*, *supra* note 8 at 466.
[103] *Ibid.* at 466, 470.
[104] *Ibid.* at 471.

interpretation of ambiguous terms, but it was not settled when to use extrinsic evidence where the treaty text presented no textual ambiguity.[105] The "generous" rules of interpretation avoided this problem but did not eliminate it.[106] "The special rules," according to Justice Binnie:

> [A]re dictated by the special difficulties of ascertaining what in fact was agreed to. The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty, the completeness of any written record (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement) and the interpretation of treaty terms once found to exist. The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown.[107]

Third, where a treaty is concluded verbally and written up later by a Crown representative, it is unconscionable to ignore oral terms while relying on written terms.

The majority then applied these judicial methodologies to the facts found by the trial court. It noted that the determination of the existence and scope of an aboriginal and treaty rights on the basis of facts found by the lower court was a question of law to which the appellate court owes no deference. At the same time, the findings of fact from which an inference of aboriginal and treaty rights is drawn should be accorded deference by the appellate court unless there is a "palpable and overriding error."[108]

The Court then determined that the findings of the trial court were contradictory and

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[105] *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1068.
[106] For example the "words in a treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction." *Marshall I*, *supra* note 8 at 474. There was a stated intent to interpret treaty provisions to favour the protection of aboriginal rights. Moreover where there is a case of clear conflict between a treaty and a statute or where the terms of a treaty could be fairly interpreted two different ways, the favoured interpretation should be the one most favourable to the aboriginals or would not involve a breach of treaty provisions. The use of these and other presumptions favourable to the preservation of aboriginal and treaty rights had been recognized by Canadian courts throughout the 20th century. Cumming and Mickenberg, *supra* note 4 at 53-62. See also Kenneth Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967) 45 Can. Bar Rev. 513 at 527-35.
[107] *Marshall I*, *supra* note 8 at 474[emphasis in original][footnotes omitted].
[108] *Ibid*. at 478.

not in accord with the evidence. Binnie noted Justice Embree's conclusion that the written treaties contain all the promises made and all the terms and conditions of the agreement was contradicted by his earlier statement: "I am satisfied that this trade clause in the 1760/61 treaties gave the Mi'kmaq the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade".[109] Moreover, the restrictive interpretation of the treaty text did not accord "with the British-drafted minutes of the negotiating sessions" that took place with the Maliseet and Passamaquody from which the text of March 10, 1760 treaty with the Mi'kmaq was generated, the historic context of Mi'kmaq-British relations, or the subsequent actions of the parties.[110] For the Court, the earlier negotiating sessions (which occurred in February, 1760) were relevant because the treaty with the Mi'kmaq was found to "make peace on the same conditions" as the peace treaties with the Maliseet and Passamaquody.[111] At the time, the Mi'kmaq remained a potent military threat to the British despite the French defeat. The British wished to secure peace and this peace was necessarily "bound up with the ability of the Mi'kmaq people to sustain themselves economically."[112] It also required that the British supply the Mi'kmaq with trade items that had previously been supplied by the French at preferential prices. Finally, the British had negotiated prices for various truckhouse trade items, established six truckhouses (subsequently reduced to two) and the Nova Scotia House of Assembly passed an act restricting aboriginal trade to truckhouses within weeks of the March 10, 1760 agreement.[113] For the Court this approach "would only be effective if the Mi'kmaq had access both to trade and to the fish and wildlife resources necessary to provide them with something to trade."[114]

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[109] *Ibid* at 477.
[110] *Ibid*. at 479, 483-4.
[111] *Ibid* at 484.
[112] *Ibid.* at 482.
[113] *Ibid.* at 485-6.
[114] *Ibid.* at 486.

Once Justice Binnie had determined that the treaty text was incomplete, he then considered what would be the content of the terms not included. In order to do this, he reviewed the assumptions the parties had had when they entered the agreement as revealed by historic evidence. For the Court, such an evaluation of assumptions was not unusual. "Courts will imply a contractual term on the basis of presumed intentions of the parties where it is necessary to assure the efficacy of the contract…." Applying the "officious bystander" test, Binnie found that the Mi'kmaq assumed a continued right to hunt and fish when they agreed to the truckhouse restriction. Yet in a commercial bilateral negotiation such an assumption was not legally efficacious -- a right to trade did not imply any right of access to trade items. However the treaty relationship differed from typical commercial agreements in that the Crown's honour was also involved. The honour of the Crown was specifically invoked in these agreements and it is bound up in the historic relationship with tribes and the treaty process.

> If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations.[115]

As the honour of the Crown was always at stake when the Crown interacted with aboriginal peoples, it becomes a crucial principle of interpretation that informs the determination of unwritten assumptions underlying the treaty agreement. No appearance of "sharp dealing" or failure to perform agreements through legal subterfuge or legerdemain is acceptable: "an interpretation of events that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is [in]consistent with the honour and integrity of the Crown."[116]

Thus the right to engage in small scale commercial fishing was a treaty right protected

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[115] *Ibid.* at 493.
[116] *Ibid.* at 498.

by s. 35(1) of the *Constitution Act, 1982*.

> [T]he surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities….

The treaty did not confer preferential rights to fish as argued by the Crown, but rather conferred a higher level of legal protection to activities that enjoyed by all Canadian citizens.

> The fact the content of Mi'kmaq rights under the treaty to hunt and fish and trade was no greater than those enjoyed by other inhabitants does not, unless those rights were extinguished prior to April 17, 1982, detract from the higher protection they presently offer to the Mi'kmaq people.[117]

Once the Court found that the treaty right existed, the issue of the scope and extent of the right needed to be considered. This limitation was of particular importance to the Crown and non-aboriginal parties because the extent of the treaty right to trade related to the aggregate fish catch rather than as a component part of a provincial and federal regulatory regime which could include an entrenched treaty protected regulatory regime.

> The Crown expresses the concern that recognition of the existence of a constitutionally entrenched right with, as here, a trading aspect, would open the floodgates to uncontrollable and excessive exploitation of the natural resources. Whereas hunting and fishing for food naturally restricts quantities to the needs and appetites of those entitled to share in the harvest, it is argued that there is no comparable, built-in restriction associated with a trading right, short of the paramount need to conserve the resource.

This fear, which Justice Binnie characterized as a leveraging a treaty right into indigenous-owned factory trawler, was held to be misplaced because the treaty right to trade and fish was limited by the treaty text.[118] He noted that the text uses the term "necessaries" to describe those items that the Mi'kmaq could procure at the truckhouses. "Necessaries" for Binnie were

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[117] *Ibid.* at 496.

[118] "The recorded note of February 11, 1760 was that 'there might be a Truckhouse established for the furnishing them with necessaries. What is contemplated therefore is not a right to trade generally for economic gain, but rather a right to trade for necessaries. The treaty right is a regulated right and can be contained by regulation within its proper limits." *Ibid.* at 501 [emphasis in original].

those traditionally traded items that would allow the aboriginals to secure a "moderate livelihood" through market exchange. This moderate livelihood "includes such basics as 'food, clothing and housing supplemented by a few amenities'….It address day-to-day needs."[119]

> [I]t is not suggested that Mi'kmaq trade historically generated "wealth which would exceed a sustenance lifestyle". Nor would anything more have been contemplated by the parties in 1760.[120]

Thus natural resource exploitation to achieve a moderate livelihood was the extent of the treaty right. Importantly from the Crown's perspective, catch limits that would produce a moderate livelihood could be established by regulation and enforced without violating the treaty right and would they need to be justified under the *Sparrow*/*Badger* test.[121] Where the trade and related fishing activities "extend beyond what is reasonably required for necessaries," a Mi'kmaq harvester "would be outside treaty protection…[and could be] dealt with accordingly."[122]

After determining both the existence and the extent of the treaty right, the majority considered whether the regulatory regime violated by Marshall impermissibly infringed upon his treaty rights. Citing *Sparrow* the Court outlined the test for infringement under s. 35(1).

> To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation.[123]

The Court observed that the regulations provided the Minister with absolute discretion to issue licenses. Citing *R. v. Adams,* it held this "unstructured discretionary administrative

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[119] *Ibid.* at 502.
[120] *Ibid.* at 503.
[121] *Ibid. R. v. Badger*, [1996] 1 S.C.R. 771 [*Badger*]. *Badger* extended the *Sparrow* justification analysis to s. 35(1) treaty rights.
[122] *Ibid.* at para. 79.
[123] *Ibid* at 504.

regime" carried the risk of infringing upon constitutionally protected aboriginal rights "in the absence of some explicit guidance."[124] As the restrictions imposed on Marshall included the method, timing and extent of treaty harvesting, they constituted a prima facie infringement. Treaty rights could only be interfered with in accordance with the justification analysis and the Crown had presented no justification for the regulations, therefore the regulations under which Marshall had been charged were invalid. The Court acquitted Marshall on all charges.

B. The Rehearing Decision

After the decision was released an intervener in the case, the West Nova Fisherman's Coalition applied for a rehearing and a stay of judgment. It asked the Court to order a limited trial on the issue of whether the application of the fisheries regulations to the 1760/61 treaty rights "could be justified on conservation or other grounds."[125] Because the Crown had argued in the criminal prosecution that the treaty right did not exist, it had not sought to justify its licensing regulations and closed season restriction. The Crown, along with Marshall and the other interveners opposed the motion. The Court dismissed the motion.

While there were good procedural and due process reasons for summarily dismissing the motion without comment, the Court nevertheless embarked on a lengthy discussion clarifying the earlier judgment. This discussion emphasized the continued ability of the federal and provincial governments to regulate maritime fisheries in spite of the recognition of the treaty right, while limiting the potential scope of the *Marshall I* judgment. As an initial observation, the Court noted that the rehearing application reflected a "basic misunderstanding of the scope" of the earlier judgment.[126] That judgment, according to the Court was "directed solely to the issue of whether the Crown had proven the appellant [Marshall] guilty as charged." Marshall, the Court continued, had "established that the

[124] *Ibid*. at 504; *R. v. Adams*, [1996] 3 S.C.R. 101[*Adams*].
[125] *Marshall II*, *supra* note 8 at 534.
[126] *Ibid.* at 542.

collective treaty right held by his community allowed him to fish for eels" on a small-scale commercial basis.[127] The treaty right to obtain necessaries by trading various products obtained by hunting and fishing is "subject to restrictions that can be justified under the *Badger* test." [128] The *Badger* test requires that an infringement of a treaty right could be done only with sufficient justification but this higher standard did not prevent the regulation of Mi'kmaq treaty activity "on the basis of conservation or other compelling and substantial public objectives."[129] Moreover, while the Court did not preclude the idea that the judgment protected a wide range of tribal hunting, fishing, and gathering activity, it noted the decision only protected fishing for eels.

> The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right "to gather" anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower. No evidence was drawn to our attention, nor was any argument made in the course of this appeal, that trade in logging or minerals, or the exploitation of off-shore natural gas deposits, was in the contemplation of either or both parties to the 1760 treaty; nor was the argument made that exploitation of such resources could be considered a logical evolution of treaty rights to fish and wildlife or to the type of things traditionally "gathered" by the Mi'kmaq in a 1760 aboriginal lifestyle. It is of course open to native communities to assert broader treaty rights in that regard, but if so, the basis for such a claim will have to be established in proceedings where the issue is squarely raised on proper historical evidence, as was done in this case in relation to fish and wildlife. Other resources were simply not addressed by the parties….[130]

The Court then addressed the issue of justification and the content of the treaty right recognized in *Marshall I.* First, it again asserted that any treaty right was subject to limitation and governmental regulation in order to conserve the resource or because of other compelling and substantial public objectives. The validity of the *Fisheries Act* and its regulations remained unaffected. Second, the implied right to harvest for trade was limited to the issue before the Court, *i.e.* the small scale right to trade and fish for eels. Any other resource

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[127] *Ibid.* at 543.
[128] *Ibid.*
[129] *Ibid.* at 551-2.
[130] *Ibid.* at 545-6

exploitation under the treaty would need to be tested before the courts.[131] Third, harvest rights under the treaty were limited to "necessaries," and to those things that traditionally gathered at the time and within the reasonable contemplation of the parties. "While treaty rights are capable of evolution within limits…their subject matter (absent a new agreement) cannot be wholly transformed."[132] Fourth, the treaty use and level of exploitation was subject to a cultural limitation. Mi'kmaq simply did not seek to amass wealth historically and did not contemplate negotiating for treaty rights that would allow them to engage in treaty protected large scale commercial fishing. Fifth, the treaty right did not establish an exclusive right to harvest or the right to harvest outside of government regulation. Sixth, given the rights of non-aboriginal citizens to use resources, regulation to ensure their participation in the harvest was not precluded.

> The Minister's authority extends to other compelling and substantial public objectives which may include economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups. The Minister's regulatory authority is not limited to conservation.[133]

The treaty rights recognized in *Marshall I* which can be regulated under *Badger* were also subject to limitation based on the harvest rights of non-aboriginals. To underscore this point the Court observed that the *Marshall I* majority opinion cited *R. v. Nikal* for the proposition that the regulation of treaty and aboriginal rights is not necessarily invalid but must be justified.[134] However, in its rehearing opinion, the quotation from *Nikal* was not directly related to the issue of justification requirements (*e.g.* conservation or public interest) but instead was decidedly "rights-based," shifting the emphasis from the treaty right to the larger rights of the non-aboriginal community.

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[131] *Ibid.* at 548.
[132] *Ibid.* at para. 19.
[133] *Ibid.* at 562.
[134] *R. v. Nikal*, [1996] 1 S.C.R. 1013 [*Nikal*].

> It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group is [sic] necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a Charter or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. Section 1 of the *Canadian Charter of Rights and Freedoms* is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. [135]

Thus, allocation of the harvest and consideration of proportionality among the various parties justified by the interest of non-natives was both legitimate and necessary.[136] Seventh, the regulation of the resource beyond that required to provide for necessaries to the Mi'kmaq need not be justified under *Badger*:

> Only those regulatory limits that take the Mi'kmaq catch below the quantities reasonably expected to produce a moderate livelihood or other limitations that are not inherent in the limited nature of the treaty right itself have to be justified according to the *Badger* test.[137]

In sum, the Court significantly narrowed the *Marshall I* decision. It suggested that federal regulatory power remained for the most part intact and that a full determination of the treaty rights would entail legal costs to the Mi'kmaq; forcing individual Mi'kmaq to risk conviction in criminal proceedings in order to extend treaty protection to a particular hunting, fishing and gathering activity.

IV. The Doctrine of Hunting, Fishing and Gathering

The *Marshall* decisions are representative of the current understanding of the Doctrine of aboriginal hunting, fishing and gathering rights in Canada. The doctrine is an exegesis of

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[135] *Marshall II*, *supra* note 8 at 553.
[136] The Court cites Lamar, J. in *R. v. Gladstone*. "Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment." *Ibid.* at 562 [emphasis in original].
[137] *Ibid.* at 561.

precedent (Canadian, provincial, American, U.K., and other commonwealth); federal and provincial statute and policy; colonial law and policy; and a judicial understanding of the historical context of aboriginal interactions with the imperial and colonial state.

As mentioned above, the existence of these rights was neither denied in the colonies prior to Confederation nor by the Dominion of Canada.

> The right of Indians to hunt and fish for food on unoccupied Crown lands has always been recognized in Canada in the early days as an incident of their "ownership" of the land, and later by the treaties by which the Indians gave up their ownership right in these lands.[138]

In the first few decades of settlement, given the large area and low European population there was little impetus for any regulation of hunting, fishing and gathering activities - aboriginal or otherwise. It was assumed that aboriginals exercised common law rights on Crown lands along with settlers and treaty rights providing for hunting, fishing, and gathering was part of the "general liberty accorded to all of the King's subjects rather than the recognition of a special right enjoyed by aboriginal peoples."[139] At the same time, government policy was that the tribes would continue to harvest food from Crown land until the land was developed, a right that might otherwise not be available to other citizens.[140] This harvesting right would enable the tribes to feed themselves thus lowering government expense.

> The hunting, fishing and trapping rights were not solely for the benefit of First Nations people. It was in the Crown's interest to keep the aboriginal people living off the land, as the Commissioners themselves acknowledged in their Report on

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[138] *Regina. v. Sikyea* [1964], 43 D.L.R. (2d) 150 (N.W.T.C.A.) at 152 aff'd [1964] S.C.R. 642.
[139] *R. v. Côté,* [1996] 3 S.C.R. 139 at 170; See Harring, *supra* note 82 at 122. There probably was a common law right to fish in 19th century Ontario on waters adjacent to Crown lands or on major waterways that applied to aboriginals and Europeans. Roland Wright, "The Public Right of Fishing, Government Fishing Policy, and Indian Fishing Rights in Upper Canada" (1994) 86 Ontario History 327. See also *Canada v. Robertson,* [1882] 6 S.C.R. 52.
[140] William Benjamin Robinson, reporting to the superintendent general of Indian Affairs regarding treaties with the Ojibwa of Northern Ontario stated "In allowing the Indians to retain reservations of land for their own use I was governed by the fact that they had in most cases asked for such tracts as they had heretofore been in the habit of using for purposes of residence and cultivation, and by securing these to them and the right of hunting and fishing over the ceded territory, they cannot say that the Government takes from their usual means of subsistence and they have no claims for support, which they no doubt would have preferred had this not been done." Quoted in Miller, *supra* note 27 at 108-9.

> Treaty 8 dated September 22, 1899 (at p. 5): We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them. [141]

Moreover, in some areas such as British Columbia, tribal harvesting filled an economic niche by supplying food to settlers.[142]

As national and provincial jurisdiction expanded and economic development took up larger areas of territory, the presumption that aboriginals would continue to harvest for food was incorporated into statute. For example, Nova Scotia has a long history of special exemptions for aboriginals.

> Pre-Confederation fish and game laws occasionally recognized that Indians were in a special position. The first game act, providing for closed seasons for partridge and black duck, 1794, c. 4, exempted "any Indian or other poor settler who shall kill any partridge or black duck ... for his own use". A like exemption respecting snipe and woodcock appeared in 1816, c. 5, and, as to trout, in 1824, c. 36. An Act of 1843, c. 19, prohibiting the use of moose snares, did not specifically exempt Indians, but seemed to presume they were excluded. It noted that the use of snares would "lead to the destruction of all the Moose ... thereby depriving the Indians and poor Settlers of one of their means of subsistence". [143]

The exemptions for food harvesting for some common wildlife species have continued to the present day in various provincial and federal regulatory regimes.

Treaties, both before and after Confederation, also have provisions for the exercise of hunting, fishing and gathering rights. In the 18th century, various treaties such as the 1752 Treaty with the Mi'kmaq, mentioned hunting and fishing. Beginning in the early19th century, as settlement expanded in Upper Canada and into what is now Manitoba; tribes began to make an issue of hunting and fishing in negotiations. These aboriginal concerns were settled rather perfunctorily with the Crown acknowledging the continued use of the ceded territory.

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[141] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at 402-3 (*Mikisew Cree First Nation*).
[142] *Jack v. The Queen*, [1980] 1 S.C.R. 294 at 307-13.
[143] *R. v. Isaac* (1975), 13 N.S.R. (2d) 460 at 484-5 (C.A.).

There was little thought given to the legal implications of the particular wording used in the treaty or whether the rights were reserved by the aboriginals or granted back to them by the Crown.[144]

Despite the recognition that hunting, fishing and gathering rights were important to aboriginal existence, colonial, provincial and Canadian courts were generally not willing thoroughly to effectuate them prior to the 1960s.[145] With few exceptions, the courts resorted to narrow interpretations of treaty terms, technicalities and legal fictions to avoid finding for aboriginals. They refused to review Crown actions *vis-à-vis* the tribes while generally accepting colonial and federal supervision of them, and sanctioned the application of provincial and federal laws in areas that had arguably been reserved by treaty.[146] Where an aboriginal common law right was found to exist, the courts, consistent with the notion that the rights existed only at the pleasure of the Crown, often found that they had been extinguished by Parliament. Prior to the *Constitution Act, 1982*, extinguishment by operation of law was generally presumed where a statute or regulation sufficed an intention to exercise a "complete" dominion over the territory and activities of the band.

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[144] See *Regina v. Taylor and Williams*, (1981), 62 C.C.C. (2d) 227 (Ont. C.A.). *Taylor and Williams* concerned Treaty No. 20 where some Bands of Chippewa ceded land to around Lake Simcoe, Upper Canada (now Ontario) to the Crown. The treaty text was silent as to hunting and fishing in the area after the cession. The treaty minutes showed that the Crown negotiator had promised them: "The Rivers are open to all & you have an equal right to fish & hunt on them." *Taylor and Williams* at 232.

[145] There was been much litigation regarding the effect of unilateral reservations of land and other rights made by colonial and military officials as well as agreements which did not have the formalities associated with treaties. *R. v. Sioui*, [1990] 1 S.C.R. 1025. See, Harring, *supra* note 82 at 35-61 on the continuing Six Nation land claims under the 1784 Haldimand Grant along the Grand River in Ontario. The agreements signed with the various tribes of Vancouver Island have also been subject to litigation regarding their status as "treaties." *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613 (B.C.C.A.) aff'd (1965) 52 D.L.R. (2d) 481.

[146] Perhaps the most significant exception in early Canadian legal history is *Connolly v. Woolrich*, 1 C.N.L.C. 70 (1867) (Q. Sup. Ct.). The dispute concerned the relative rights of the children of William Connolly to his estate. Connolly married a Cree woman in the Athabaska area in 1803 under Cree law. He had six children from this marriage. He later moved to Montreal where he remarried under Quebec law and had two children. Monk, J. ruled that the Cree marriage and by extension Cree law survived the assertion of British (and French) sovereignty and that the Doctrine of Discovery did not annul the pre-existing rights and law of the inhabitant tribes. This state of affairs was not changed by *The Proclamation of 1763*, any other subsequent law nor Connolly's own actions as a British subject.

> Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right.[147]

Where the rights were reserved by treaty, the courts often held that the tribe lacked the capacity to enter into such an agreement or found that the treaty provisions had not been incorporated into statute.[148] In any event, treaty rights only provided immunity to aboriginals from provincial jurisdiction under s. 88 of the Indian Act.[149] The Federal government retained full authority under s. 91(24) of the *Constitution Act, 1867* to disregard aboriginal rights.[150]

> However abundant the right of Indians to hunt and to fish, there can be no doubt that such right is subject to regulation and curtailment by the appropriate legislative authority. Section 88 of the Indian Act appears to be plain in purpose and effect. In the absence of treaty protection or statutory protection Indians are brought within provincial regulatory legislation.[151]

Since the *Constitution Act, 1982* Canadian courts have provided a high level of protection for those aboriginal and treaty rights that had not been extinguished when the Act came into force. As the *Sparrow* Court states:

> Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.[152]

Building on earlier jurisprudence, the judiciary has developed a more or less fully articulated legal doctrine of hunting, fishing and gathering rights consistent with current Canadian constitutionalism. The doctrine provides a methodological framework for the courts to

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[147] *Sparrow, supra* note 92 at 1098 quoting Mahoney, J. in *Baker Lake v. Ministry of Indian Affairs and Northern Development,* [1980] 1 F.C. 518 (F.C.T.D.). The *Sparrow* Court noted that the regulation of an aboriginal right does not necessarily extinguish the right and that the burden for proving extinguishment rested on the Crown. *Sparrow* at 1098-9.
[148] *Francis v. The Queen*, [1956] S.C.R. 618; *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 at 347 (P.C.).
[149] Riddell, J. in *Sero v. Gault* was representative of the judiciary's generally dismissive attitude toward treaty rights. *Sero* v. *Gault* (1921), 64 D.L.R. 327 at 331-2 (Ont. S.C. Second Div. Ct.).
[150] *R. v. George*, [1966] S.C.R. 267.
[151] *Kruger v. The Queen*, [1978] 1 S.C.R. 104 at 111-2.
[152] *Sparrow, supra* note 92 at 1106 [footnotes omitted].

determine the existence, content and scope of aboriginal hunting, fishing and gathering while describing and systematizing the source and content of these rights.

A. The Source of the Hunting, Fishing and Gathering Rights

1. Historic Occupation and Use

Justice Binnie in *Marshall I* firmly grounds hunting, fishing and gathering rights in the historic use of natural resources when he equates the Marshall's eel fishing with Mi'kmaq fishing and trading activities 235 years earlier. This approach is consistent with the Supreme Court's current determination that the source of the rights described and systematized in the doctrine of aboriginal hunting, fishing and gathering rights arises from aboriginal use, occupation and possession of particular territories prior to European contact.[153] The rights arise from both the occupation of the land and the existence of distinctive aboriginal cultures, social organization and law on that land. The rights survived the transfer of sovereignty to Great Britain[154] and are not dependent upon *The Royal Proclamation,1763* or some other recognition by either the British, pre-Confederation colonies or Canada; nor are their existence dependent upon executive action or legislative enactment. "[I]t has become accepted in Canadian law," Chief Justice Lamar states in *Van der Peet*, "that aboriginal title, and aboriginal rights in general, derive from historic occupation and use of ancestral lands by the natives and do not depend on any treaty, executive order or legislative enactment…."[155] As inherent aboriginal rights they "are part of the fundamental constitutional law that was logically prior to the introduction of English common law" and determined what rules would

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[153] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at 1017. [*Delgamuukw*]
[154] *Amodu Tijani v. Southern Nigeria (Secretary),* [1921] 2 A.C. 399 at 404 [*Amodu Tijani*]. "As the result of cession to the British Crown by former potentates, the radical title is now in the British Sovereign. But that title is throughout qualified by the usufructuary rights of communities, rights which, as the outcome of deliberate policy, have been respected and recognized. Even when machinery has been established for defining as far as is possible the rights of individuals by introducing Crown grants as evidence of title, such machinery has apparently not been directed to the modification of substantive rights, but rather to the definition of those already in existence and to the preservation of records of that existence."
[155] *R. v. Van der Peet,* [1996] 2 S.C.R. 507 at para. 112 [*Van der Peet*]

apply to the colony.[156] As constitutionally protected rights, the rights differentiating aboriginal citizens from non-aboriginals within the Canadian polity, may only be regulated by the federal government and the province in a limited manner and may not be extinguished without consent of the aboriginals concerned.[157]

The premise that the tribes have an interest in the use or title to land has always been a part of the British and Canadian colonial project.[158] As discussed above the doctrine of common law aboriginal title and the imperial policy of recognizing aboriginal interests in land the tribes used and occupied by signing treaties with them was an important aspect of the colonization process. The colonial governments in Lower Canada and Upper Canada (1791-1841) and the United Province of Canada (1841-1867) also pursued this policy which the Dominion continued.[159] For example, the terms of the sale of Rupert's Land by the Hudson's Bay Company to Canada explicitly relieved the company of an obligation to compensate aboriginals "for lands required for purposes of settlement...."[160] In 1871, the federal government embarked on a series of land surrender agreements which, when ended in 1921, extinguished aboriginal title over most of western Canada (except British Columbia) while providing annuity payments and hunting, fishing and gathering rights in the ceded territory. The Natural Resource Transfer Agreements (NRTAs), which transferred federal Crown lands to the three Prairie Provinces, incorporated presumed and agreed upon aboriginal and treaty

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[156] Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 738-9.
[157] "[T]he doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status." *Van der Peet, supra* note 155 at para. 30.
[158] An example of a provincial statute recognizing the claims of tribes who were occupying territory is House of Assembly of Upper Canada 2 Vic. Ch. 15 relating to Indian Commissioners. See *Little v. Keating* (1842) 1 C.N.L.C. 285 (U.C.Q.B.).
[159] The last Pre-Confederation treaties were made by the Province of Canada. They include the Robinson-Huron Treaty, the Robinson-Superior Treaty of 1850 and the Manitoulin Island Treaty of 1862.
[160] *Rupert's Land and North-Western Territory Order*, 1985 R.S.C. Appendix 9, Schedule B at 12.

rights to hunt and gather for food outside of the reserves into statute.[161]

Likewise the judiciary recognized an aboriginal interest in the use and occupation of land. As noted by then Chief Justice Robinson in *Bown v. West*:

> The government, we know, always made it their care to protect the Indians, as far as they could, in the enjoyment of their property, and to guard them against being imposed upon and dispossessed by the white inhabitants.[162]

Aboriginal possessory interests were confirmed in the seminal case *St. Catherine's Milling & Lumber Co. v. the Queen.* Chief Justice Ritchie writing for the Supreme Court wrote:

> I am of opinion, that all ungranted lands in the province of Ontario belong to the crown [*sic*] as part of the public domain, subject to the Indian right of occupancy in cases in which the same has not been lawfully extinguished, and when such right of occupancy has been lawfully extinguished absolutely to the crown, and as a consequence to the province of Ontario. I think the crown owns the soil of all the unpatented lands, the Indians possessing only the right of occupancy, and the crown possessing the legal title subject to that occupancy, with the absolute exclusive right to extinguish the Indian title either by conquest or by purchase....[163]

In the *St. Catherine's Milling* appeal to the Privy Council, Lord Watson, while diminishing the possessory nature and legal efficacy of the rights, nevertheless held that aboriginals had a "right" in the territory they occupied and used.[164] These rights survived the transfer of sovereignty to Great Britain and had been recognized or confirmed by *The Royal*

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[161] The Natural Resource Transfer Acts for each Prairie Province have been renamed and consolidated in the *Constitution Act, 1930* are found at R.S.C., 1985, App. II, No. 26. The NRTAs have constitutional status. See also *R. v. Horseman*, [1990] 1 S.C.R. 901 [*Horseman*] and *R. v. Sundown*, [1999] 1 S.C.R. 393.

[162] *Bown v. West*, 1 C.N.L.C. 30 at 31 (1846) (U.C. Exec. Council).

[163] *St. Catherine's Milling & Lumber Co. v. the Queen*, [1877] 13 S.C.R. 577 at 599-600. [footnotes omitted] Strong, J. writing in dissent was more even more emphatic. *St. Catherine's Milling & Lumber Co.* at 608-609, Strong, J., dissenting. Justice Strong's dissent was joined by Justice Gwynne. A majority of the Court agreed with the proposition that aboriginals had an interest in the territory they used and occupied.

[164] Aboriginal title is a "personal and usufructuary right, dependent upon the good will of the Sovereign" which is a "burden" on the Crown's "present proprietary estate in the land". *St. Catherine's Milling & Lumber Co. v. the Queen* (1888) 14 A.C. 46 at 54, 58 [*St. Catherine's Milling*].

Proclamation, 1763.[165] In *Calder v. Attorney-General of British Columbia*, the Supreme Court held that the rights were not created by the Proclamation.[166]

2. Reconciliation with Common law

In aboriginal jurisprudence, it is not enough to ground the source of hunting, fishing and gathering rights in the historic aboriginal use and occupation of a territory prior to the extension of sovereignty. The pre-existence of aboriginal law, rights and title are recognized as positive rights only when these historic rights are reconciled with Canadian common law. "European settlement…," writes Chief Justice McLachlin:

> [D]id not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights….[167]

If this process is not undertaken, Justice LeBel in *Marshall III* suggests:

> [W]e might be implicitly accepting the position that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights.[168]

When considering the content, as opposed to the source of a claimed right as opposed

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[165] Prior to being settled by the Supreme Court of Canada in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 [*Calder*] there had been an issue of whether aboriginal rights were only created by *The Royal Proclamation, 1763* and thus only cognizable in those areas covered by the Proclamation and limited in content to those activities included in the term "hunting grounds," cited in the text; or whether they existed independently of that prerogative act; thus applying to the entire territory of present day Canada. The Privy Council, by Lord Watson in *St. Catherine's Milling* suggests that the rights only exist as a result of the Proclamation. Watson's discussion let to a split in the Canadian courts regarding whether the Proclamation created rights or whether they exist independently at common law. See *Rex v. Wesley* [1932], 2 W.W.R. 337 at 348 (Alta.S.C.) [*Wesley*]. The opposite and prevailing view today is found in *Baker Lake v. Ministry of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 at 556 (F.C.T.D.)[*Baker Lake*] which noted that the existence of an aboriginal title is independent of the Royal Proclamation or any other prerogative act or legislation. See Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 267-90. Today there seems little difference between common law aboriginal rights and aboriginal rights affirmed by the Proclamation. However, there probably is a difference when determining the content of the aboriginal rights. Where the land is covered by the Proclamation the relevant date is 1763; in areas not covered by the Proclamation the relevant time period is immediately prior to European contact. See *Attorney-General of Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 at 379-86 (H.C.) and *Van der Peet*, *supra* note 155 at para. 73.

[166] *Calder, supra* note 165.

[167] *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 29 at para. 10 [*Mitchell*].

[168] R. *v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 at para. 127[*Marshall III*] [footnotes omitted].

to its source reconciliation has different effects. In terms of which aboriginal and treaty practices are accorded protection, the claimed practice must be translated into a modern legal right, *i.e.* the court must match the rights within various categories of Canadian common (and presumably statutory) law. "[T]he nature of the right at common law" must be considered in order to determine "whether a particular aboriginal practice fits it."[169] In this process the core of the particular right claimed, from an aboriginal perspective, must correspond to the "core concepts" of the contemporary right and these concepts must in turn be analogous to common law rights. "Absolute congruity is not required, so long as the practices engage the core idea of the modern right. But…a pre-sovereignty aboriginal practice cannot be transformed into a different modern right."[170]

Despite the judicial determination that aboriginal rights are inherent rights, the transposition of aboriginal law to "core" state law concepts regarding the source of the rights, prevents the recognition of inherent aboriginal sovereignty. Within Canadian legal doctrine, the continued sovereignty of aboriginal tribes, as evidenced by judicial recognition of aboriginal law, cultural practice and historic occupation and use of natural resources, does not survive the assertion of European sovereignty.

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown….[171]

The acceptance of unquestioned political sovereignty precludes judicial recognition of inherent aboriginal governmental authority, eliminating tribal law as a parallel source of authority within the Canadian polity. From the perspective of the Canadian state, such a result

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[169] *Ibid.* at para. 49.
[170] *Ibid.* at para. 50.
[171] *Sparrow, supra* note 92 at 1103.

is not necessarily undesirable. With the protections provided aboriginal and treaty rights in the *Constitution Act, 1982* such recognition would constitutionally entrench a non-settler or non-state source of authority, which could continuously generate legally efficacious rights.[172]

The legal determination that aboriginal rights are inherent, but that aboriginal sovereignty has been extinguished as a source of aboriginal rights, is also suggested by treaty jurisprudence. Early treaty cases which denied legal efficacy to treaties unless the terms were enacted into statute also denied the existence of an independent sovereign aboriginal nation, or the existence of residual sovereignty, with whom the Crown negotiated.[173] For example, the court in *R. v. Syliboy* emphatically denied the existence of Mi'kmaq sovereignty despite the seeming international aspects of the 1725 and 1752 treaties.

> Treaties are unconstrained Acts of independent powers. But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.[174]

In the post-*Constitution Act, 1982* decision *R. v. Simon*, the Supreme Court held that the same treaty dismissed by the *Syliboy* Court continued to have legal force but refused to apply rules of international law to determine whether it had been terminated. On the crucial question of whether the tribe had the capacity to enter into the treaty, the *Simon* Court, rather than positing a mutual compact between juridical equals, instead relied on a 1929 commentary critical of *Syliboy* which had noted:

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[172] Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's L.J. 143.
[173] The Privy Council held that the 1850 Robinson Treaty was nothing more than a personal obligation of the governor and suggested that the use of international law concepts applicable to aboriginal treaties is not appropriate. *Atty-Gen. For Canada v. Atty-Gen. For Ontario (Indian Annuities case)*, [1897] A.C. 199 at para. 14 .
[174] *Syliboy*, *supra* note 43 at 313.

> Ordinarily "full powers" to the British specially conferred are essential to the proper negotiating of a treaty [these were not given to Nova Scotia Governor Hopson who negotiated and signed the 1752 Treaty], but the Indians were not on a par with a sovereign state and fewer formalities were required in their case.[175]

What is the impact of the failure to recognize inherent aboriginal rights without the concomitant recognition of residual aboriginal sovereignty on hunting, fishing and gathering rights? First, failure to recognize residual sovereignty means that the inherent nature of aboriginal law cannot create additional practices but can only elaborate the ones practiced historically prior to European contact. Aboriginal rights cannot arise after contact with the Europeans.

> The fact that Europeans in North America engaged in the same practices, customs or traditions as those under which an aboriginal right is claimed will only be relevant to the aboriginal claim if the practice, custom or tradition in question can only be said to exist because of the influence of European culture. If the practice, custom or tradition was an integral part of the aboriginal community's culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.[176]

Second, related to the idea that aboriginal and treaty rights have pre-contact genesis is the preclusion of the idea that tribes have "reserved" rights similar to those posited by the Reserved Rights doctrine in the United States. If treaty-making between the Crown and the tribes is construed as a diplomatic act between juridical co-equals, rather than as an issue of domestic politics and law with only one sovereign party (the Crown) to the agreement (as Canadian law posits), then principles of international law apply in the determining the content of the agreement.[177] One impact of the importation of international law principles would be

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[175] *Simon*, *supra* note 79 at 400.
[176] *Van der Peet*, *supra* note 155 at para. 73, Lamar C.J.C.
[177] See *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1052-3 where the Court notes that relations with the tribes were similar to relations between independent states.

the expansion of reserved treaty rights. Unless a treaty clearly dismembers the legal existence of the tribe, sovereign authority is necessarily reserved to the tribe because of the rule that when a consensual alteration of rights is made by international treaty the "failure to delegate an incident of sovereignty leaves it undisturbed."[178] As it appears that many treaty signatories did not intend to concede their rights to self-government, territory or uses not specifically demanded by the Europeans, there would be potentially a great expansion of aboriginal governmental competence and rights should the doctrine be adopted.[179] Retained rights imply an expansion of constitutionally protected rights as the political, social and economic circumstances of the tribes change across time. Third, the legal recognition of sovereignty, either historically or as a residual characteristic implies that the tribes have an inherent constitutionally protected right to manage the natural resources under tribal law as well as legally prevent non-aboriginal resource uses. In the area of hunting, fishing and gathering rights, the idea carries with it the notion that management of the resources should be done by the aboriginal group or include tribal law relating to the usage.

In any event, the failure to recognize the residual sovereignty lessens the ability of the tribes to expand the range of constitutionally protected practices. While aboriginal rights are recognized as pre-dating the Canadian state, and tribal law - which supports those rights - flows from an independent juridical source, the source is not "sovereign" in the same sense as the Canadian state. Thus, it is not surprising that the rights guaranteed under s. 35 seem not to be included in the "living tree" analysis used when discussing other constitutional rights; neither in its usual form which privileges a judicial interpretation conferring the "widest

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[178] Maureen Davies, "Aspects of Aboriginal Rights in International Law" in Bradford W. Morse, ed., *Aboriginal Peoples and the Law* (Ottawa, Ont.: Carleton University Press, 1985) 16 at 24.

[179] England and Imperial Britain had law and policy that in some instances acknowledged the independence, if not sovereignty, of the tribes while at other time it seemingly refused to accept the notion that tribes were nothing more than temporary occupiers of land otherwise under Crown sovereignty. See Jon William Parmenter, "Pontiac's War: Forging New Links in the Anglo-Iroquois Covenant Chain 1758-1766" (1997) 44 Ethnohistory 617; Dorothy V. Jones, *License for Empire Colonialism by Treaty in Early America* (Chicago: The University of Chicago Press, 1982) at 73.

amplitude" for the exercise of authority under ss. 91 and 92 of the *Constitution Act, 1867* nor as part of the ongoing process of constitutional development and evolution applied in Charter jurisprudence. Instead, the reconciliation process is meant to give modern expression to traditional uses, practices and customs as they existed in history without creating "new" uses or practices.[180]

B. General Principles of Interpretation

1. The Purposive Approach

The reconciliation of aboriginal law and common law concepts with the Canadian common law underscores the "inter-societal" nature of aboriginal rights jurisprudence.[181] The initial determination of the existence and content of this inter-societal law is heavily dependant upon a purposive interpretive methodology that is used to determine the content and scope of s. 35. The methodology is premised on the political and legal dominance of the settlers; it is used to reconcile the historic and present day assertion of Crown sovereignty with the historic occupation and use by aboriginal peoples.[182] It also requires the courts to be solicitous and protective of aboriginal and treaty rights in order to protect their continuing rights and provide for a just settlement of their historic and present-day grievances.

While s. 35 is not part of the *Charter of Rights and Freedoms* the language of purposive methodology used by the courts to discuss s. 35 is similar to the way the post-1982

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[180] Peter W. Hogg, *Constitutional Law of Canada,* vol. 2 looseleaf (Scarborough, Ont.: Thomson Carswell, 1997) at s. 33.7; Michael Coyle, "Loyalty and Distinctiveness: A New Approach to the Crown's Fiduciary Duty Toward Aboriginal Peoples" (2003) 40 Alta L. Rev. 841 at 844. See also *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at 248.

[181] Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. 196 at 198. The idea that the law relating to aboriginal rights is a form of inter-societal law was most recently endorsed in *Marshall III*, *supra* note 168 at paras. 45-60. See also *Van der Peet, supra* note 155 at 547.

[182] "The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." *Van der Peet, supra* note 155 at para. 31.

courts have approached Charter rights outlined in cases such as *R. v. Big M Drug Mart.*[183]

> The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such guarantee; it was understood, in other words, in light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore…be placed in its proper linguistic, philosophic and historical contexts.[184]

Besides focusing on the underlying intent of the text, the approach also includes a "generous rather than a legalistic" interpretation of the rights. In Charter jurisprudence "[t]he justification for a generous interpretation…is that it will give full effect to the civil liberties that are guaranteed by the Charter."[185] Rights are constantly in need of re-articulation over time as the areas of social life to which the right applies change.

As mentioned above, until the 1960s the courts generally construed aboriginal and treaty rights rather narrowly while reading statutory enactments that affected the rights of aboriginals rather broadly. A more favourable approach, premised on preserving aboriginal perspectives and rights when the rights arguably were within the scope of valid legislation, was articulated by Justice Dickson in 1983.

> It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax

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[183] Hogg, *supra* note 180 at ss. 33.7–11.
[184] *R. v. Big M Drug Mart Ltd*,[1985] 1 S.C.R. 295 at 344[emphasis in original].
[185] Hogg, *supra* note 180 at s. 33.7(b).

> exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption. In *Jones v. Meehan*, it was held that 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.[186]

In *Sparrow* the Court expanded Dickson's interpretive principle to include s. 35 jurisprudence. "When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded."[187] However, unlike Charter jurisprudence, (which uses the methodology to determine the content and scope of the right as textually expressed) the purposive methodology under s. 35 has been used to determine existence, content and the scope of the guaranteed rights.

The expansion of rights implicit in the purposive approach is qualified in Charter jurisprudence by s. 1 of the Charter, which states that the guaranteed rights are subject to reasonable limitations that can be "demonstrably justified in a free and democratic society." As s. 35 is outside of the Charter, there is no such textual limitation on the purposive methodology. The approach could potentially expand aboriginal rights beyond what would be acceptable to the non-aboriginal polity with the concomitant undermining of the reconciliation process through the expansive assertion of judicial power. As a result, the courts have limited the content, scope and efficacy of s. 35 rights by narrowly defining the purpose of the section. Only those rights necessary for the "just settlement" of historic violations, which can be affirmed in a manner consistent with Canadian sovereignty and its constitutional structure, are given constitutional protection. This reflects the idea that aboriginal rights must co-exist within a dominant liberal state and that aboriginal rights

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[186] *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36 [footnotes omitted] [*Nowegijick*].
[187] *Sparrow, supra* note 92 at 1106.

cannot preclude jurisdiction, regulation and use by the general community.[188] Ultimately resources are shared among aboriginal and non- aboriginal users. In addition, various claimed rights such as aboriginal self-government and sovereignty, or the traversing of international borders without immigration control, are simply incompatible with the assertion of Canadian sovereignty and can be given no judicial protection. Perhaps more importantly, the rights are further limited by the judicial determination that the purpose of s. 35 rights can only be effectuated in particular factual circumstances. As the Court stated in *R. v. Pamajewon*:

> Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right.[189]

This specificity prevents the use of judicial power to accord constitutional protection to a set of generalized aboriginal "rights" such as a right to hunt for subsistence, regardless of the particular historic interaction between the aboriginal group and the settlers.

2. Honour of the Crown

Another interpretative principle the courts have applied repeatedly to aboriginal and treaty cases has been the "honour of the Crown" principle. This principle is palpable in *Marshall I*, where Justice Binnie writes that the court *must* rule in favour of Marshall "because nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people…."[190] Where the Crown has assumed discretionary control over aboriginal resources, the principle gives rise to a legally enforceable fiduciary duty."[191] It presumes that governmental authority *vis-à-vis* the aboriginals is limited or structured by s. 35 and, as part

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[188] *R. v. Gladstone*, [1996] 2 S.C.R. 723 at paras. 61-75 [*Gladstone*].
[189] *R. v. Pamajewon*, [1996] 2 S.C.R. 821 at para. 27. "We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case[emphasis in original][footnotes omitted]." *R. v. Sundown*, [1999] 1 S.C.R. 393 at 407-8.
[190] *Marshall I*, *supra* note 8 at para. 4.
[191] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at 523 [*Haida Nation*]; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 at 284-6.

of the growing salience of fiduciary claims, has become an increasingly important element in s. 35 jurisprudence.[192]

The idea that the Crown owes an obligation to citizens in the performance of its governing functions has a long history in Canadian and British public law.[193] Likewise, the idea that the Crown owes fiduciary-like obligations to promulgate policies that are protective or solicitous of the tribes has a long pedigree. These obligations are neither public law duties nor are they strictly analogous to private fiduciary law duties, but arise from the historic Crown-aboriginal relationship that "import[s] some restraint on the exercise of sovereign power."[194] Nevertheless, regardless of the conceptualized restraint on governmental power, fiduciary obligations towards the tribes have been honoured more in the breach. Such breaches were permissible at law because the fiduciary obligation was "political" and not enforceable. The Crown's obligations to the aboriginals, as Supreme Court Justice Tashchereau noted in *St. Catherine's Milling & Lumber Co.* are a "sacred political obligation, in execution of which the state must be free from judicial control."[195] The non-legal nature of the obligation was re-emphasized by Justice Rand in the 1950 Supreme Court decision *St. Ann's Island Shooting & Fishing Club, Ltd. v. The King*.

> The language of the statute [s. 51 of the *Indian Act*] embodies the accepted view that these obligations are, in effect, wards of the state, whose care and welfare are a political trust of the highest obligation.[196]

After the passage of the *Constitution Act, 1982* the political obligation was recognized as a

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[192] *Sparrow*, *supra* note 92 at 1108; *Wewaykum Indian Band v. Canada*, *supra* note 192 at 287-8.
[193] As Binnie, J. writes in *Marshall I*: *"*The honour of the Crown was, in fact, specifically invoked by courts in the early 18th century to ensure that a Crown grant was effective to accomplish its intended purpose…." *Marshall I*, *supra* note 8 at para. 53.
[194] Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996).
[195] *St. Catherine's Milling & Lumber Co. v. the Queen*, [1887] 13 S.C.R. 577 at 649, Taschereau J.
[196] *St. Ann's Island Shooting & Fishing Club, Ltd. v. The King* (1950), 2 D.L.R. 225 at 232 (S.C.C.), Rand J.

legal obligation in *Guerin v. Canada*.[197] In *Sparrow*, the Court entrenched the fiduciary obligation as a general principle of s. 35 jurisprudence.

> In our opinion, *Guerin*, together with *R. v. Taylor and Williams (1981) 34 O.R. (2d) 360*, ground a general guiding principle for s. 35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition of aboriginal rights must be defined in light of this historic relationship.[198]

As an interpretive principle the concept is related to a fiduciary obligation in law but "fiduciary obligation" does not encompass its entire meaning for the courts. In one sense, the interpretive principle subsumes legal fiduciary duties including consultation, but in another sense, it characterizes and structures the judicial descriptions and legal conclusions related to a particular Crown-aboriginal interaction. It is a principle that supplies a description of the both the state of mind and the actions of the Crown and its representatives but this description that may or may not be historically accurate in any particular historic circumstance. The principle requires the court to presume that when a representation or action by the Crown could be interpreted in a manner that may detract from an aboriginal interest the Crown does not intend that result. The Crown must act, from this interpretive position "with honour and integrity, avoiding even the appearance of sharp dealing."[199] A Crown action must have "legal" meaning based on "legal" premises with "legal" consequences, rather than political expediency. A preferred interpretation, then, is one whereby the Court would uphold a previous representation or preserve the aboriginal interest in the use or land in question if the Crown's action is ambiguous. Where there "is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in

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[197] *Guerin v. Canada*, [1984] 2 S.C.R. 335.
[198] *Sparrow*, *supra* note 92 at 1108.
[199] *Haida Nation*, *supra* note 191 at para. 19.

favour of aboriginal peoples."[200]

The interpretive construct informs judicial evaluations of treaties, statutes and aboriginal rights. In treaty jurisprudence, the interpretive construct means that courts should assume that the Crown will not engage in legal legerdemain to cheat the tribes and undermine the common intention of the treaty because of their control of the treaty negotiation and implementation process. Further, it requires that the court supply any missing terms in a manner that would be consistent with the representations of the Crown at the time the treaty was signed.[201] When applied to a statute, the interpretive principle requires that it be given a broad and liberal construction and doubtful expressions should be resolved in favour of the tribes.[202] When applied to aboriginal rights, the framework will be used to review the Crown's action as to whether it acted in good faith and sought to accommodate aboriginal concerns where it has real or constructive knowledge that aboriginal interests will be affected.[203]

3. Specific Interpretive Assumptions in Hunting, Fishing and Gathering Rights cases

In hunting, fishing and gathering rights cases, the courts have applied additional interpretive principles and assumptions. First, where there are aboriginal and treaty rights, the courts assume that the rights will be subject to some governmental regulation. Second, absent statutory expression (such as the *Natural Resource Transfer Act*) a hunting, fishing and gathering activity is restricted to a particular area of land over which the tribe held aboriginal title or to an area over which it exercised enough historic usage such that the activities could

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[200] *Van der Peet, supra* note 155 at para. 25.
[201] *Marshall II, supra* note 8 at para. 54.
[202] *Nowegijick, supra* note 186 at 36*; Simon, supra* note 79 at 410.
[203] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* [2004] 3 S.C.R. 550; *Haida Nation, supra* note 191. The obligation reflects the protective relationship that the Crown assumed under the Proclamation and in various treaties and applies even in those instances where a claimed right itself has yet to be recognized.

be characterized as an aboriginal right. Third, that the area where the rights are exercised can be reduced by Crown and settler activity.[204] Fourth, the reserved natural resources are not for exclusive aboriginal harvest.[205] Finally, the courts assume that the content of aboriginal and treaty rights is always in some sense related to traditional activities. A corollary of this principle is that it is presumed in treaty cases that tribal negotiators intended to retain various traditional uses rather than to reserve other uses or forgo traditional uses for future undetermined uses.[206]

C. Who May Exercise Rights

Aboriginal hunting, fishing, and gathering rights are constitutionally protected collective rights. They are held collectively and only arise because of the historic existence of an aboriginal group that has a present-day distinct form and existence. At the same time, the rights are held by an individual as a member of an historic aboriginal community for which they provide immunity from governmental regulation.

> Aboriginal rights are communal rights: They must be grounded in the existence of a historic and preset community, and they may only be exercised by virtue if individual's ancestrally based membership in the present community."[207]

The difficulty for courts giving effect to these communal rights is that an individual's membership in one of the s. 35 categories of "Indian, Métis, and Inuit" or an individual's connections to a tribe or band that signed a treaty can be uncertain.

Section 35 of the *Constitution Act, 1982* names three distinct aboriginal groups that may exercise usufructuary hunting, fishing and gathering rights: Indians, Inuit and Métis. The "Indian" category is further divided into Status or registered Indians, Non-status Indians, and Treaty Indians. A Status Indian is an individual who is registered or entitled to be registered

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[204] *Mikisew Cree First Nation, supra* note 141.
[205] *Ibid.*; *Badger, supra* note 121.
[206] *Marshall III, supra* note 168.
[207] *R. v. Powley*, [2003] 2 S.C.R. 207 at 221.

under the *Indian Act*.[208] Federal and provincial legislation which provides for certain hunting, fishing and gathering rights generally include only Status Indians but other non-status aboriginals (often Métis) have also been included. A Non-status Indian is an individual who is not registered as an Indian under the *Indian Act* for a variety of reasons. Treaty Indians are descendants of aboriginals who signed treaties with the Crown and who have registered or affiliated with an aboriginal group that has a treaty relationship with the Crown. Inuit are the indigenous people of northern arctic Canada. They are primarily located in the Northwest Territories, Nunavut, Northern Quebec and Labrador. The word "Métis" is French for "mixed blood." Historically, the term has been used to describe the children of First Nation/Inuit women and European fur traders and fishermen. They have a distinct cultural tradition combining European and aboriginal heritages.[209]

As the rights are collective, the courts have focused on an individual's aboriginal ancestry as well as cultural practice and identification in order to establish a connection with the aboriginal group. At the same time, the court will consider the historical and present-day existence of the aboriginal group. In disputes involving Métis, an investigation into the historic community is often crucial because there must be a cultural differentiation between the Métis community and the aboriginal and non-aboriginal communities. In those areas not covered by the Natural Resource Transfer Agreements and where there are no treaties, the historic group must continue to exist for aboriginal rights to be exercised.

In treaty cases, if the individual is a registered Indian, the court must determine

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[208] Section 2.(1) states "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;" *Indian Act*, R.S.C., 1985 Chap. I-5

[209] Canada: Indian and Northern Affairs Canada, online: <http://www.ainc-inac.gc.ca/pr/info/info125_e.html; http://www.ainc-inac.gc.ca/pr/info/info114_e.html>.

whether the individual claiming the right is a member of the tribe that signed the treaty.[210] It is necessary to show an ancestral connection to the tribe, but not necessarily to the band that actually signed the treaty. In *R. v. Simon*, the Crown had argued that the defendant had "not established any connection by 'descent or otherwise' with the original group of Micmac Indians...who had signed the Treaty of 1752."[211] The Court dismissed the argument, holding that where an individual is a member of a band covered by a treaty, forcing him/her to establish a direct genealogical connection would be overly burdensome.[212] Where an individual is not a Status Indian, the lower courts have held that ancestral connection to the signatory band is sufficient. In *R. v. Chevrier*, a non-status Ojibwa aboriginal charged with hunting moose out of season argued that the 1850 Robinson-Superior Treaty precluded provincial regulation of his activities. He based his successful treaty defence on "his descent from a member of a tribe that was a signatory" to the Robinson treaty despite his mixed blood.[213] He had "inherited the right to hunt granted to his ancestors."[214] There is no indication that cultural factors are important in treaty rights cases where an individual has direct lineage to a member of a signatory band.

The self-identification, ancestral connection, and community acceptance approach used by the Supreme Court in *R. v. Powley* to identify members of the Métis community has also been applied by lower courts to determine Non-status Indians who claim to be exercising an aboriginal right.[215] *Powley* concerned a Métis who killed a moose for food. He claimed an

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[210] "The Indian seeking to rely on a treaty to establish that he or she is not subject to certain provincial legislation can only rely on a treaty to which he is privy, that is to say a treaty which his ancestors were signatories to or to which he himself was a party." *R. v. Shipman*, [2006] 2 C.N.L.R. 284 at 293 (Ont. Ct. J.).
[211] *Simon, supra* note 79 at 396-7.
[212] *Ibid.* at 407-8.
[213] *R. v. Chevrier*, [1989] 1 C.N.L.R. 129 at 130 (Ont. Dist. Ct.).
[214] *Ibid.*
[215] *R. v. Acker* [2004], N.B.J. 525 (Prov. Ct.). See also *R. v. Harquail (L.)*[1993], 144 N.B.R. (2d) 146 (Prov. Ct.).

aboriginal right to do so without a provincial license under s. 35.[216] The *Powley* Court indicated three bases for determining Métis membership: the individual must self-identify with the Métis, there must be a demonstrable ancestral connection to the community; and the claimant must demonstrate that he or she has been accepted by the modern community.[217] In *R. v. Lavigne*, New Brunswick Provincial Court applied this test to find that the non-registered aboriginal defendant was a Mi'kmaq entitled to hunt without a license.[218]

Inuit have been considered "Indians" under s. 91(24) of *Constitution Act, 1867* since 1939.[219] Canada has approached the issue of Inuit identity by recognizing regional Inuit groups and permitting the particular groups to determine membership or entitlement criteria.[220]

D. Territory Where Rights Are Exercised

Aboriginal rights to hunt, fish and gather in a manner not permitted in respect to other Canadian citizens extend only to certain territory. Aboriginals may practice these activities on four classes of land. The permitted uses varies based on the character of the land and the uses are limited by the federal government's paramount authority to regulate Indians and lands reserved for Indians under s. 91(24) and (12)[sea coast and inland fisheries] of the *Constitution Act, 1867* (subject to s. 35 of the *Constitution Act, 1982*), and under provincial regulation. The province, as owner of Crown lands, has an inherent right to regulate natural resource harvesting within its borders. Without a treaty, federal or provincial statutory

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[216] *Powley*, *supra* note 207.
[217] *Ibid.* at 224-5.
[218] *R. v. Lavigne* [2005], N.B.J. No. 92 (Prov. Ct.) See also *R. v. Ferguson*, [1993] 2 C.N.L.R. 148 (Alta. Prov. Ct.).
[219] *Reference re Eskimos*, [1939] S.C.R. 104.
[220] John Giokas and Robert K. Groves, "Collective and Individual Recognition in Canada" in Paul L.A.H. Chartrand, ed., *Who Are Canada's Aboriginal Peoples?: Recognition, Definition and Jurisdiction* (Saskatoon, Sask.: Purich Publishing Ltd., 2002) 41 at 45.

authority providing for such activity, or a recognized right under s. 35, aboriginals are subject to provincial game laws and regulation.[221]

First, tribal members may exercise various hunting, fishing and gathering activities on territory within the exterior boundaries of an aboriginal reserve. Pursuant to s. 91(24) of the *Constitution Act, 1867*, federal legislation, and provincial legislation of general application pursuant to s. 88 of the *Indian Act* might apply to the activities on the reserve.[222] However within the reserve, provincial game laws generally have no application and bands may promulgate by-laws under the *Indian Act* that in certain instances can displace provincial law when the province has not otherwise exempted the activity.[223]

Second, the right may extend to land where a tribe holds un-extinguished aboriginal title or where it once held aboriginal title which was subsequently ceded in a treaty that reserved various usufructuary rights.[224] The legal interest in these lands is a *sui generis* interest which allows the aboriginals to possess the lands they occupy and use according to their own discretion subject to the Crown's ultimate title.[225] Excluding modern treaties, the ceded territory includes areas of Quebec, Manitoba and Ontario and the Prairie provinces. The areas where aboriginal claims are based on un-extinguished aboriginal title include most of British Columbia, the Maritimes, and the Northwest and Nunavut territories. Where treaties remain in force, the nature and extent of the right is determined by the treaty text in light of aboriginal understanding of the agreement and the historical context. Where the rights are exercised pursuant to un-extinguished aboriginal title, the nature and extent of the rights

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[221] "However abundant the right of Indians to hunt and to fish, there can be no doubt that such right is subject to regulation and curtailment by the appropriate legislative authority. Section 88 of the Indian Act appears to be plain in purpose and effect. In the absence of treaty protection or statutory protection Indians are brought within provincial regulatory legislation." *Horseman*, *supra* note 161at 933; *Simon*, *supra* note 79 at 410-14.
[222] *Cardinal v. Alberta (Attorney General)*, [1974] S.C.R. 695.
[223] *Nikal*, *supra* note 134.
[224] Where title to lands formerly occupied by an aboriginal people has not been surrendered, a claim for aboriginal title to the land may be made under the common law. *Marshall III*, *supra* note168 at para. 38.
[225] *Guerin v. The Queen*, *supra* note 197 at 382.

are determined using the criteria set forth in *Delgamuukw* and *Van der Peet*.[226]

Third, the rights are exercised on Crown land and unoccupied private lands in Manitoba, Saskatchewan, and Alberta. Crown Land in this territory did not go to the respective provinces when they came into existence because the area had been purchased by the federal government from the Hudson's Bay Company in 1871. The Dominion held the territory in fee simple subject only to aboriginal title. The occupying tribes then ceded the territory from 1871 to 1921. The territory is subject to the NRTAs between the federal and provincial governments. Each NRTA contains an identical provision, which supersedes and replaces any treaty rights regarding hunting, fishing and gathering.[227] The NRTAs preclude provincial regulation of aboriginal hunting, trapping and fishing for food at all seasons of the year "on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."[228] The Court in *R. v. Badger* determined that the food harvesting rights extended to unoccupied private lands because in the various treaties replaced by the NRTA, the tribes understood "that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting."[229] Where there is no visible incompatible use, aboriginal food gathering activity is allowed. Food gathering activities and the means used are beyond provincial regulation.[230] The province remains able to regulate sport or commercial uses under its general game laws and these game laws apply to the reserve insofar as they do not affect the right to harvest for food. However, where a conservation measure is necessary to preserve the survival of a species, the

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[226] *Delgamuukw*, *supra* note 153.
[227] "The Agreement had the effect of merging and consolidating the treaty rights of the Indians in the area and restricting the power of the provinces to regulate the Indians' right to hunt for food. The right of Indians to hunt for sport or commercially could be regulated by provincial game laws but the right to hunt for food could not." *Moosehunter v. The Queen,* [1981] 1 S.C.R. 282 at 285; *Horseman, supra* note 161. Métis are not considered "indians" under the Natural Resource Transfer Acts and may not exercise any of the usufructuary rights reserved to "Indians" in those acts. *R. v. Blais,* [2003] 2 S.C.R. 236.
[228] *Horseman*, *supra* note 161 at 913-4.
[229] *Badger*, *supra* note 121 at para 53. See also paras. 49 – 66.
[230] *Horseman*, *supra* note 161 at 933.

province may be able to restrict the harvest for food purposes.[231]

Fourth, the rights extend to lands where an aboriginal group has been engaged in various activities sufficient to establish an aboriginal right without reaching a measure of occupation necessary to establish aboriginal title. The legal interest in these lands is also a *sui generis* interest but the historic use does not give raise to claim for aboriginal title. The use of the land is limited to particular activities, necessarily integral to the particular tribe's distinctive culture which has been continuously carried on from pre-contact times. The "Aboriginal-rights" land category was once unique to Canadian jurisprudence but has subsequently been borrowed by other jurisdictions. It has arisen because the necessary reconciliation of claimed aboriginal rights with common law concepts often has little correspondence to the nomadic and semi-nomadic lifestyles of certain tribes.

E. Determining the Content and the Scope of Hunting, Fishing and Gathering Rights

The entire analysis used to determine the nature and extent of hunting, fishing and gathering rights protected is coloured by the idea that s. 35 rights are "aboriginal": "Aboriginal rights cannot…be defined on the basis of the philosophical precepts of the liberal enlightenment…They arise from the fact that aboriginal people are aboriginal."[232] It is this "aboriginal nature" of the rights which the courts have used to reconcile s. 35 rights with other rights and duties across the polity.[233]However, the judicial emphasis on the aboriginal nature of the rights, *i.e.* the rights are held collectively by the tribe, the rights flow from the pre-existing possession and use of the territory prior to the arrival of Europeans, and the rights must be reconciled with the assertion of British sovereignty has limited their content to judicial conceptions of "traditional" aboriginal practices and traditions.

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[231] *Ibid.* at 920-1.
[232] *Van der Peet, supra* note 155 at 534.
[233] *Ibid.*

Aboriginal rights must be specifically framed and historically grounded rather than conceptualized in a broad or universal manner.[234] This is the "necessary specificity, which comes from granting special constitutional protection to one part of Canadian society."[235] In this sense, even though s. 35 is reflective of the constitutional principle of respect for minority rights, neither treaty rights, nor rights which arise from pre-European occupation and use of territory under aboriginal customary law are fundamental constitutional rights, without which Canadian constitutionalism would be unrecognizable. Instead, s. 35 provides constitutional protection for those rights that would otherwise be subject to legislative extinguishment.[236]

1. Aboriginal Title

Until *R. v. Adams* and *R. v. Côté*, a judicial finding that the claimant group held un-surrendered or un-extinguished aboriginal title over a territory was considered necessary to sustain a claim to hunt, fish and gather. These aboriginal title claims are claims to land and the various usufructuary rights practiced are parasitic on the underlying title.

"[A]boriginal title exists when the bundle of aboriginal rights is large enough to command the recognition of a *sui generis* proprietary interest to occupy and use the land."[237] It is a right of use and occupation arising prior to British sovereignty, it is held communally, and it is inalienable except to the Crown. It is more than the right to engage in a set of specific practices and has been characterized by the courts as an interest in land itself. The

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[234] *R. v. Pamajewon*, [1996] 2 S.C.R. 821. This approach precludes an aboriginal right to self-government because "without specificity, any collective right could be argued on the basis of a right to self-government." *Samson Indian Nation and Band v. Canada*, [2006] 1 C.N.L.R. 100 at 277 (F.C.).
[235] *Van der Peet*, *supra* note 155 at 535.
[236] The protection of minorities, which the Supreme Court recognized along with federalism, democracy and constitutionalism and rule of law as one of the four underlying constitutional principles in the *Reference Re Secession of Quebec*, [1998] 2 S.C.R 217, has a strong structural component in Canada. It is particularly dependent upon the principles of federalism to effectuate its purpose. Indeed prior to the Charter all group rights were dependent upon the federal division of powers, and the predominance of Francophones in Quebec. Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's L. J. 143.
[237] *Van der Peet*, *supra* note 155 at para. 119, L'heureux-Dube J. dissenting.

interest is *sui generis* because it "cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems."[238] Aboriginal title pre-dates and survives the assertion of British sovereignty and provides the aboriginals who occupied the particular territory "the full benefit of the land, including subsurface and any non-precious metals contained therein."[239]

The characterization of aboriginal title as a form of "inalienable fee simple" is reflected in the seminal Indian law cases of Chief Justice Marshall in the early 19th century. These American cases embraced the notion that tribal occupancy rights provided the tribe with full use of the soil and enabled the tribe to the use the territory as they thought appropriate.[240] From this perspective, the only difference between a fee simple estate and common law aboriginal title is that individual settlers, by common law and legislation, were prevented from purchasing aboriginal titled land.[241] However the Supreme Court of Canada in *Delmaguukw* conceived aboriginal title differently.

> [T]he content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.[242]

The historic aboriginal occupation and use of a particular territory is reconciled with the core common law conceptions of occupancy and title.[243] This reconciliation process "must be sensitive to the context-specific nature of common law title, as well as the aboriginal

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[238] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 112.
[239] McNeil, *supra* note 165 at 242.
[240] Brain Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (*Studies in Aboriginal Rights No. 2*) (Saskatoon, Sask.: University of Saskatchewan Native Law Centre, 1983) at 31-8.
[241] McNeill, *supra* note 165 at 216-235.
[242] *Delmaguukw*, *supra* note 238 at para. 117.
[243] *St. Mary's Indian Band Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746.

perspective."[244] "Absolute congruity is not required, so long as the practices engage the core idea of the modern right."[245] From a common law perspective, the type of occupation and use covering the claimed activity, and the extent to which it can be reconciled with the common law is dependant upon the particular tribal law, culture, demography, natural resources, and the existence and nature of a land tenure system. As one source of aboriginal title is occupancy, use and possession under tribal law, the appropriate time period to examine the aboriginal perspective is when the British asserted sovereignty rather than the pre-contact period for other aboriginal rights.[246] In short, an aboriginal group cannot claim aboriginal title to territory they did not "possess" under their own legal system at the time the British asserted their sovereignty and radical title to the area.

Two core common law factors are considered important. First, the court must determine whether the tribal occupation is sufficient to ground title. Occupancy may be established in many different ways; from the building of dwellings, planting fields, by using specific territory for hunting and fishing or otherwise exploiting various resources. The legal character of the occupation is based on the aboriginal societies' traditional way of life. This will vary among tribes and be dependant upon a "group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed".[247] The land must be occupied prior to British sovereignty. In addition, if present occupancy is used as evidence of historic occupancy, there must be continuity between the present and pre-sovereignty occupation.[248] Second, the occupancy must be exclusive at the time of sovereignty. In *Marshall III*, Chief Justice McLachlin set forth the criteria necessary to prove exclusive occupancy.

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[244] *Marshall III*, *supra* note 168 at para. 54.
[245] *Ibid.* at para. 50.
[246] *Delmaguukw*, *supra* note 238 at para. 84.
[247] *Marshall III*, *supra* note 168 at para. 49.
[248] *Delmaguukw*, *supra* note 238 at paras. 143-54.

> [E]xclusive possession in the sense of intention and capacity to control is required to establish aboriginal title. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources: Less intensive uses may give rise to different rights. The requirement of physical occupation must be generously interpreted taking into account both the aboriginal perspective and the perspective of the common law: These principles apply to nomadic and semi-nomadic aboriginal groups; the right in each case depends on what the evidence establishes.…The ultimate goal is to translate the pre-sovereignty aboriginal right to a modern common law right. This must be approached with sensitivity to the aboriginal perspective as well as fidelity to the common law concepts involved.[249]

If an aboriginal group cannot show that it occupied and used a particular territory exclusively, the group could still assert a claim for an aboriginal right to engage in certain activities on the territory.

Chief Justice Lamar who wrote the majority opinion in *Delmaguukw* insisted that aboriginal title was not equivalent to a usufructuary right to engage in traditional aboriginal practices.

> Despite the fact that the jurisprudence on aboriginal title is somewhat underdeveloped, it is clear that the uses to which lands held pursuant to aboriginal title can be put is not restricted to the practices, customs and traditions of aboriginal peoples integral to distinctive aboriginal cultures.[250]

On the surface, this approach is a marked departure from earlier jurisprudence which conflated aboriginal title and aboriginal rights such "that aboriginal title was often considered to be no more that a bundle of rights to engage in traditional activities that were also considered aboriginal rights."[251] Upon closer examination however, there continues to be little difference between an aboriginal rights claim and an aboriginal title claim.

The conflation of the doctrine of aboriginal title and the doctrine of aboriginal rights is evident in the seminal *St. Catherine's Milling* opinion.[252] The claims in *St. Catherine's*

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[249] *Marshall III, supra* note 168 at para. 70.
[250] *Delmaguukw, supra* note 238 at para. 119.
[251] *Ibid.* at para. 110.
[252] *St. Catherine's Milling, supra* note 164 at 48.

Milling were based on respective theories of the nature of Indian title. Ontario claimed that the title to lands occupied by the aboriginals and over which aboriginal title had not been extinguished had always been in the Crown. "Their title was in the nature of a personal right of occupation during the pleasure of the Crown, and it was not a legal or equitable title in the ordinary sense." As Crown land by virtue of s. 109, Ontario took fee simple title in the area once the aboriginal interest was extinguished by treaty. The Dominion argued that Crown lands under s. 109 did not include Indian lands as "from the earliest times the Indians had, and were always recognized as having, a complete proprietary interest, limited by an imperfect power of alienation." As they had purchased the land directly from the tribe by treaty, the Domination held the total fee in the land. Lord Watson, while declining to ascertain the "precise quality of the Indian right" did hold that aboriginal title was not analogous to fee simple (as posited under the doctrine of common law aboriginal title); otherwise the decision would have been in favour if the Dominion.[253] Rather "the tenure of the Indians was a personal and usufructuary right" recognized by *The Proclamation of 1763*. Such tenure was simply a burden upon the Crown's underlying proprietary title. In these circumstances, the "usufruct" that composed the aboriginal right was described by the Proclamation, which characterized the reserved aboriginal lands as "hunting grounds."

The conflation of aboriginal title and aboriginal rights, which then consisted of various traditional use rights, is even more evident in Justice Strong's earlier dissent before the Supreme Court of Canada.

> [I]n reference to Indian habits and modes of life and the hunting grounds of the tribes were as much in their actual occupation as the cleared fields of the whites, and this was the tenure of Indian lands by the laws of all the colonies.[254]

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[253] *Ibid*. at 55, 58.
[254] *St. Catherine's Milling & Lumber Co. v. the Queen,* (1887) 13 S.C.R. 577 at 612, Strong J. dissenting. (Citing Kent's *Commentaries* and *Mitchel v. The United States*, 34 U.S. (9 Pet.) 711 (1835).The quote from

In either case, the mutually generative characterization of aboriginal title and aboriginal rights seemingly prevents any ownership or activity that is inconsistent with traditional subsistence activities.

The usufructuary nature of aboriginal title, and the equating of it with aboriginal rights to hunt, fishing and gather (and other traditional activities) evident in *St. Catherine's Milling* has become an underlying premise of aboriginal jurisprudence.[255] Writing in the 1921 "*Star Chrome*" case, Lord Duff emphasizes this aspect of aboriginal title.

> While the language of the statute of 1850 undoubtedly imports a legislative acknowledgment of a right inherent in the Indians to enjoy the lands appropriated to their use under the superintendence and management of the Commissioner of Indian Lands, their Lordships think the contention of the Province to be well founded to this extent, that the right recognized by the statute is a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown. [256]

Although conceptually distinct, in practice the legal concepts they were merged. Aboriginal title was either "defined" as a "burden" on the Crown's interest, which was subsequently extinguished by treaty or legislation, or it was defined as an aboriginal right to traditionally

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Mitchel relied upon reads: "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals." *Mitchel* at 746.

[255] *A.-G. for Canada v. A.G. for Ontario*, [1897] A.C. 199; *Ontario Mining Company v. Seybold*, [1903] A.C. 73.

[256] *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401 at 408 (P.C.) ("*Star Chrome*" case) Lord Duff wrote at 410 in his speech: "The object of the Act of 1850, as declared in the recitals already quoted, is to make better provision for preventing encroachments upon the lands appropriated to the use of Indian tribes and for the defence of their rights and privileges, *language which does not point to an intention of enlarging or in any way altering the quality of the interest conferred upon the Indians by the instrument of appropriation or other source of title*; and the view that the Act was passed for the purpose of affording legal protection for the Indians in the enjoyment of property occupied by them or appropriated to their use, and of securing a legal status for benefits to be enjoyed by them, receives some support from the circumstance that the operation of the Act appears to extend to lands occupied by Indian tribes in that part of Quebec which, not being within the boundaries of the Province as laid down in the Proclamation of 1763, was, subject to the pronouncements of that Proclamation in relation to the rights of the Indians, a region in which the Indian title was still in 1850, to quote the words of Lord Watson, 'a personal and usufructuary right dependent upon the good-will of the Sovereign [emphasis added].'"

harvest various natural resources. The reasoning of Justice McGillivray in *R. v. Wesley* is indicative of the pragmatic melding of the concepts.

> It is thus clear that whether it be called a title, an interest, or a burden on the Crown's title, the Indians are conceded to have obtained definite rights under this proclamation in the territories therein mentioned which certainly included the right to hunt and fish at will all over those lands in which they held such interest.[257]

The concept that aboriginal title gave rise to traditional natural resource gathering rights fit well in the jurisprudence, even in those areas such as British Columbia that arguably had un-extinguished aboriginal title. It also reflected political reality in that judicial protection of aboriginal title could not threaten non-aboriginal uses premised on liberal economic principles or federal/provincial regulatory regimes. By generally treating aboriginal title and aboriginal rights as mutually constitutive, the courts avoided any discussion of whether the holder of un-extinguished aboriginal title had the right "to use it [the land] according to their own discretion."[258]Indeed, until the 1973 *Calder* decision there was no substantive discussion of aboriginal title in the case law.[259]

In *Delgamuukw v. British Columbia* the Court elaborated on the nature and extent of aboriginal title.[260] Chief Justice Lamar held that "aboriginal title encompasses the right to exclusive use and occupation of the land held…for a variety of purposes."[261] These purposes need not be "aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures" and are not tied to aboriginal rights per se. Lamar pointed out that the exploitation of mineral rights underneath land on which the tribe holds aboriginal title is an example of a non-traditional use. The Court, however, limited the notion of the

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[257] *Wesley*, *supra* note 165 at 348.
[258] *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 681 at 688 (1825).
[259] As such, where the issue of extinguishment of aboriginal title was contested as in the eastern Northwest Territories, the content of the right was not analogized to fee simple. *R. v. Kogogolak* (1959), 28 W.W.R. 376 at 383-4 (N.W.T. Terr. Ct.).
[260] *Delgamuukw*, *supra* note 153.
[261] *Ibid.* at para. 117.

tribal owner's absolute discretion to determine land uses by holding "that those protected uses must not be irreconcilable with the nature of the group's attachment to that land."[262] In short, aboriginal title is not a "normal" proprietary interest but has an inherent *sui generis* limitation on land use.[263] Any use that is "irreconcilable" with the group attachment to the land is not a property right.

The Court explained the inherent limit by stating that aboriginal title was premised on the pre-existing occupation of territory. "Implicit in the protection of historic patterns of occupation is recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time."[264] For the relationship to continue into the future "uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title."[265]

> [L]ands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place. [266]

This inherent limitation on the use of the territory, which emphasizes that aboriginal title is the embodiment of the practices, customs and traditions, undermines the idea that aboriginal title is an interest in property apart from these practices. As the Court stated in *Osoyoos Indian Band:*

> The aboriginal interest in land will generally have an important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community.[267]

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[262] *Ibid.*
[263] *Ibid.* at para. 125.
[264] *Ibid.* at para.126.
[265] *Ibid.* at para. 127.
[266] *Ibid* at para. 128.
[267] *Osoyoos Indian Band v. Oliver (Town), supra* note 243 at para.46.

Thus the *sui generis* interest is culturally bound, which may exclude resource harvesting for commercial purposes or commodification of various uses, as these types of uses may interfere with the on-going relationship to the land.[268] From this point of view, despite Lamar's claim that aboriginal title is "not restricted to the practices, customs and traditions of aboriginal peoples", the concept remains for the present firmly tied to specific traditional practices.

2. Aboriginal Rights

The idea that aboriginal title could have meaning apart from aboriginal rights was revived in *R. v. Adams* which detangled aboriginal title from aboriginal rights as a legal basis for traditional harvest activities.[269] Adams, a Mohawk, was charged with fishing without a license on Lake St. Francis, a section of the St. Lawrence River. He challenged his conviction on the basis that he was exercising an aboriginal right to fish protected by s. 35. The Court, by Chief Justice Lamar noted that the Mohawk could not sustain a claim for aboriginal title because their occupation and use of the land as well as the fishing resource on Lake St. Francis was itinerate. "[T]he Mohawks did not settle exclusively in one location either before or after contact with Europeans."[270] Nevertheless, the Mohawk defendant could maintain an aboriginal rights claim because the courts could look both at the relationship of an aboriginal claimant to the land and at the traditions, customs and traditions arising from the claimant's distinctive culture and society. Lamar noted that while aboriginal title "falls within the conceptual framework of aboriginal rights" a claim for aboriginal rights does "not exist solely where a claim to aboriginal title" is proffered. Thus:

> Where an aboriginal group has shown that a particular activity, custom or tradition taking place on the land was integral to the distinctive culture of that

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[268] "The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value." *Delgamuukw*, *supra* note 153 at para. 129.
[269] *Adams*, *supra* note 124.
[270] *Ibid.* at para. 28.

> group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition.[271]

The Court held that the Mohawk have an aboriginal right to fish in Lake St. Francis.

The Supreme Court has stated that aboriginal rights are not general and universal and that their scope and content must be determined on a case-by-case basis.

> [A]boriginal rights are highly fact specific -- the existence of an aboriginal right is determined through consideration of the particular distinctive culture, and hence of the specific practices, customs and traditions, of the aboriginal group claiming the right. The rights recognized and affirmed by s. 35(1) are not rights held uniformly by all aboriginal peoples in Canada; the nature and existence of aboriginal rights vary in accordance with the variety of aboriginal cultures and traditions which exist in this country.[272]

Despite this emphasis on the fact specific nature of aboriginal rights, the Court has laid out a comprehensive analytical framework to determine the existence and content of aboriginal rights under s. 35. Applying the framework in practice has been problematic as the categories are somewhat abstract.

The Supreme Court outlined the approach in the 1996 case *R. v. Van der Peet.*[273] *Van der Peet* concerned the sale of 10 salmon caught under an Indian food license issued by British Columbia to the aboriginal defendant. The Court began by noting that the doctrine of aboriginal rights has arisen because "when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries."[274] The rights that are protected are those activities

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[271] *Ibid*. at para. 26.
[272] *Gladstone*, *supra* note188 at para. 65.
[273] *Van der Peet*, *supra* note 155.
[274] *Ibid.* at 538. See also para. 43 where Lamar, C.J.C. states: "The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section: the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the

that have an element "of a custom, practice or tradition" which is "integral to the distinctive culture" of the group claiming the aboriginal right. The determination of what is integral and distinctive is dependant on the perspective of the aboriginal people themselves but the activity must be of central significance to the particular group claiming the right. In addition, the perspective needs to be framed in terms that are "cognizable to the Canadian legal and constitutional structure." [275] Finally, the activity must be an activity that was integral *prior* to the arrival of the Europeans which has continuity with present day activities. [276]

The *Van der Peet* Court outlined a two-step analysis to determine the existence of the right. First, the Court must "identify the nature of the right being claimed."[277] Second, once the court has determined the precise nature of the claimed right, it must determine if an activity is "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right." [278]

The two-step approach can be disaggregated and has been modified by subsequent jurisprudence so that the analysis encompasses five separate steps.[279] First, the court must identify the "true nature of the claim".[280] The characterization of the right is crucial to whether the claimed activity is a protected right. The characterization must not be general but be determined in light of the specific context of the alleged activity and the aboriginal community. It must not be artificially broadened or narrowed to achieve a desired

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assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes…."
[275] *Ibid.*
[276] *Ibid.*
[277] *Ibid.* at 509.
[278] "[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right." *Ibid.* at 549-50.
[279] Robertson, J. of the New Brunswick Court of Appeal discussed this process in *R. v. Sappier*, [2004] N.B.J. No. 295 (C.A.).
[280] *Mitchell*, *supra* note 167 at 929.

outcome.[281] The factors that need to be considered are: the nature of the action claimed to be an aboriginal right, the nature of the governmental action claimed to infringe the right and the ancestral traditions and practices relied upon to establish the right.[282] An aboriginal right may not be characterized as a right to harvest a specific species (such as salmon, moose or maple) nor can it be characterized by the harvesting method that is used; as such characterization is too specific or characterizes the right in a non-evolutionary historicist fashion.

Second, it is necessary for the court to determine whether the claimed right has a site specific component. As Chief Justice Lamer observed in *Delgamuukw*, "aboriginal rights ... fall along a spectrum with respect to their degree of connection with the land."[283] Most aboriginal rights claims have some geographical element even though a claim having a geographical component is not dependant upon a prior finding of aboriginal title by the court.

> [A] protected aboriginal right falling short of aboriginal title may nonetheless have an important link to the land. An aboriginal practice, custom or tradition entitled to protection as an aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact. As such, an aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised upon a specific tract of land.[284]

A claimed right may be quite site specific. These rights often involve religious and ceremonial activities. The relevance of geography in hunting or fishing cases is more determinative of the claimed right because the activities are "inherently tied to the land" as compared with "more free-ranging rights, such as the general right to trade…."[285]

Third, the court must determine whether the practice existed prior to contact with Europeans. As Lamar noted in *Van der Peet:*

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[281] *Ibid.*
[282] *Van der Peet*, *supra* note 155 at paras. 53-63.
[283] *Delgamuukw*, *supra* note 153 at para. 138.
[284] *R. v. Côté*, [1996] 3 S.C.R. 139 at 167.
[285] *Mitchell*, *supra* note 167 at 950.

> The fact that Europeans in North America engaged in the same practices, customs or traditions as those under which an aboriginal right is claimed will only be relevant to the aboriginal claim if the practice, custom or tradition in question can only be said to exist because of the influence of European culture. If the practice, custom or tradition was an integral part of the aboriginal community's culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.[286]

Evidence of pre-contact activity must be "clearly demonstrated" by oral histories and archaeological evidence; but the evidentiary value of oral histories must not contravene the fundamental principles of evidence law that directs the court to value evidence according to "general principles of common sense."[287]

Fourth, if the evidence establishes that an ancestral practice existed prior to contact, the court must determine whether that practice was integral to the distinctive culture of the particular community claiming the right. The idea that the practice must be integral to a particular culture lies at the heart of the Supreme Court's characterization of an aboriginal right.[288]

For an activity to be integral to the distinctive culture it must be a central and significant part of the particular aboriginal society. This does not mean that the claimed activity need be only done in that culture. Rather, it means that if the activity was not undertaken by the group its culture would be fundamentally changed.[289] The significance of the activity (and the nature the society as altered by the absence of the activity) is understood from the perspective of the aboriginals themselves as well as using ethnological, archaeological and historical data.

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[286] *Van der Peet, supra* note 155 at para. 73.
[287] *Mitchell, supra* note 167 at 939.
[288] *Van der Peet, supra* note 155 at 553.
[289] *Ibid.*at para. 55.

> The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was". This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question.[290]

Fifth, the claimant must establish continuity between the practice that existed prior to contact with Europeans and the practice as it exists today. "[A]n aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact."[291] Continuity may be shown where an historical practice evolved into a modern day practice.

The integral to a distinctive culture approach used in *Van der Peet* is less a distillation of the case law, statutes and regulations regarding the existence and content of aboriginal rights than a free-standing conceptual approach. It has been extensively critiqued. First, it emphasizes pre-contact aboriginal culture and perceptions coupled with a judicial evaluation whether a claimed activity is "significant" in that culture, an inquiry fraught with difficult historical, psychological and culture problems. As Justice McLachlin pointed out in *Mitchell* "[c]ultural identity is a subjective matter and not easily discerned…."[292] An evaluation of historic perceptions of the significance of an activity increases the difficulty of the analysis.[293] Second, the emphasis on tradition and traditional activities tends to restrict the scope of the rights. The evolution of activities within a cultural framework closes off any activities whose "meaning" cannot be embedded within the court's construction of a

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[290] *Mitchell*, *supra* note 167 at para. 12.
[291] *Ibid.*
[292] *Ibid.* at para. 32.
[293] Russel Lawrence Barsh and James Youngblood Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993 at 998-1002.

particular cultural understanding of that activity. Given that the cultural framework must be considered as more or less static, new activities having "new" meanings are circumscribed. Third, a particularized culturally based concept of aboriginal rights is more easily derogated when weighed against the politically or philosophically premised rights of the non-aboriginal community. For example, in *Gladstone* where the Court found that the Heiltsuk people had a free standing commercial right to harvest herring spawn on kelp, it limited the right to a "priority" and held that the harvest could be limited by "objectives [that] are in the interest of all Canadians."[294]

An alternative approach would have been to re-establish the "doctrine of continuity" in s. 35 jurisprudence. This would have provided that aboriginal laws and rights on the own lands would retain their efficacy and be protected by s. 35 to the extent that they were not extinguished prior to 1982. From this perspective the determination of an aboriginal right has essentially three criteria; it must have existed prior to European contact, it must be central to the aboriginal society (but not necessarily culturally significant or meaningful) and it must be reconciled with Canadian law.

3. Treaty Rights

"Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*."[295] The determination of the legal nature of the treaty is dependant upon how the treaty agreement is initially characterized in law -- be it international law, domestic law, aboriginal customary law, a mixture of European and aboriginal law or natural law -- and the juridical nature of the signatory tribe. Recently, the case law has analogized treaties to both private contracts and international agreements.

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[294] *Gladstone*, *supra* note 188 at para. 75.
[295] *Haida Nation*, *supra* note 191 at para. 20.

Whether rooted in international law or in contract, treaties are a distinctive type of agreement which require additional interpretive principles.[296] The rights retained by a tribe under a treaty depend upon the particular treaty terms as determined by the treaty text and the historical context.[297] Unlike aboriginal rights, whose content depends on a judicial examination of pre-contact practices, the aboriginal activities are covered by a treaty are those exercised at the time the agreement.

> [W]hen considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement.[298]

Treaty jurisprudence and the canons of construction emphasize that the meaning of treaty terms is based on a judicial determination of the mutual understandings embodied in the agreement. As the treaty text was negotiated in a cross-cultural environment, the courts have determined that the text and agreement should be understood in a manner that is consistent with the tribal understandings of the agreement. However "[t]he interpretation of the treaty must be realistic and reflect the intentions of both parties, not just that of the [First Nation]."[299]

The emphasis on the specific factual circumstances of the treaty process has led to the development of extensive principles and interpretive methodologies.[300] First, treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour

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[296] *R. v. Sioui*, *supra* note 177 at 1043.
[297] Prior to *Marshall I* the court would first look at the treaty text to determine if any ambiguity existed. If the treaty was ambiguous then the court would consider the historical context. The *Marshall I* Court ruled that extrinsic evidence, including oral terms that may have been stated in treaty negotiations, should be used to determine the treaty terms even where no textual ambiguity is found. *Marshall I*, *supra* note 8 at paras. 9-17.
[298] *Badger*, *supra* note 121 at para. 52.
[299] *Mikisew Cree First Nation*, *supra* note 141 at para. 28.
[300] This list of principles and interpretive approaches is derived from McLachlin, J.'s dissent in *Marshall I*. *Marshall I*, *supra* note 8 at paras. 107-10. See also Justice Cory's an oft-cited approach to treaty interpretation in *Badger*, *supra* note 121 at para. 41.

of the tribes.[301] Second, the court must be sensitive to the different cultural and linguistic characteristics between the tribes and the British/Canadian negotiators and the impact these different factors can have in determining the content of their agreement.[302] Third, the objective of treaty interpretation "is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed."[303] Fourth, the honour of the crown is presumed.[304] Fifth, the treaty words need to be given the meaning that they would have held for the parties at the time and technical or legalistic interpretations should be avoided.[305] At the same time when interpreting treaty terms a generous construction cannot alter the terms of the treaty or stretch the language beyond what is realistic. Sixth, the rights embodied in a treaty should not be interpreted in a "static or rigid way." The court must construe the retained rights so that they can be exercised in a modern way.[306]

An evaluation of the tribal negotiating position from an historic review of the cultural and economic practices at the time the treaty was signed is an important aspect of determining the intent of the parties. However, as part of determining the parties' understanding of the agreement, the courts have constructed a version of tribal intentions within the negotiating process that equates tribal intent and tribal understanding with a judicial understanding of tribal culture at the time the treaty was signed. This determination is similar to the judicial conflation of aboriginal title with historic aboriginal usages and practices discussed above. These judicially constructed indigenous understandings presume a relatively unsophisticated tribal negotiating posture, which are seemingly immutable in

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[301] *Badger*, *supra* note 121 at para. 52.
[302] *Horseman*, *supra* note 161 at 907, Wilson J. dissenting.
[303] *Marshall I*, *supra* note 8 at para. 107.
[304] *Badger*, *supra* note 121 at para.
[305] *Nowegijick*, *supra* note 186 at 36.
[306] *Marshall I*, *supra* note 8 at para. 107.

content, place, and time and are paradoxically shared across all aboriginal cultures. Tribes only negotiate to reserve specific traditional cultural practices. Where the issue is commercial exploitation, be it fishing or logging, the intent and understandings of all tribal negotiators are deemed to be the same legally constructed intent, regardless of the historic context or the treaty terms -- the tribes only wish to hunt, fish and gather as they have always done.

The most recent example of this reasoning is in the *Marshall III* decision. In *Marshall III*, the claimants sought to include commercial logging within a treaty harvest which allowed for the harvest of "resources traditionally "gathered" in an aboriginal economy and which were thus reasonably in the contemplation of the parties to the 1760-61 treaties."[307] They argued that modern commercial logging was an evolution of traditional Mi'kmaq wood uses done at the time the 1760/61 treaties were signed.

The Supreme Court disagreed. It held that the logical evolution of uses cannot completely transform those "traditional" uses of a particular resource found in the culture and society of the signatory tribe. An important determinant of whether the claimed activity is "traditional," and thus within the contemplation of the tribal negotiators, is to analyze whether the activity is antithetical to, or would interfere with, other "traditional" activities either at the time the treaty was signed or in the present day. From this perspective, commercial logging was not only a non-traditional use (and thus not reserved under the treaty), but it also interfered with other "traditional" Mi'kmaq uses and management practices. "If anything, the evidence suggests that logging was inimical to the Mi'kmaq's traditional way of life, interfering with fishing which, as found in *Marshall I*, was a traditional activity."[308] This meshing of the cultural ramifications of various economic activities coupled with a static cultural standard for "traditional" activity use reinforces the

[307] *Marshall II*, *supra* note 8 at para. 19.
[308] *Marshall III*, *supra* note 168 at para. 34.

conclusion that logging is not within the scope of the treaty right and that the treaty would only reserve uses that are traditionally "aboriginal" as understood by the Court.[309] As Justice LeBel concludes in his concurrences:

> Trade in logging is not the modern equivalent or a logical evolution of Mi'kmaq use of forest resources in daily life in 1760 even if those resources sometimes were traded. Commercial logging does not bear the same relation to the traditional limited use of forest products as fishing for eels today bears to fishing for eels or any other species in 1760. ... Whatever rights the defendants have to trade in forest products are far narrower than the activities which gave rise to these charges.[310]

Not surprisingly an obverse judicial assumption operates when the courts construe the intention of the British and Canadian negotiators. In this case, the courts assume that the Crown was negotiating for the unimpeded settlement and economic exploitation of the area. The scope of their treaty rights however, is not limited by the uses the Crown negotiators intended at the time (*e.g*. agriculture, mining, cutting timber) but by the assumption that the treaty was a textual reference for extending state jurisdiction to an area over which it had asserted a pre-existing claim of *imperium*. The non-aboriginal negotiators historically-situated specific intent, such as their intention to preserve peace and their military position through subsidized trade with former enemies evident throughout the *Marshall* trilogy -- is not a limiting factor in determining the extent of their treaty bargain. Instead, non-aboriginal negotiators bargained for and obtained all property interests and natural resources not otherwise explicitly or implicitly reserved under the appellation of "traditional." Regardless of the place, time or historically pressing objectives, the aim of absolute jurisdiction and maximal property conveyance from the aboriginals is essentially the same.

The effect of construing non-aboriginal and aboriginal intent in this manner further underscores the non-recognition of the doctrine of reserved rights in Canadian treaty law.

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[309] *Ibid*. at para. 122.
[310] *Ibid.* at para. 32.

This American doctrine is premised on the idea that a treaty is not as a "grant of rights to the Indians, but a grant of rights from them -- a reservation of those granted."[311] In contrast the Canadian judicial construction assumes a more totalizing prior defeasance of tribal property and sovereign interests before the treaty was negotiated. This in turn reinforces the narrowness of the rights reserved. The assumption is one way in which treaty jurisprudence remained couched within a legal framework that, in the words of American Chief Justice John Marshall, "impairs" and "necessarily" diminishes the right of the original inhabitants of North America.[312] The result is that treaty provisions and judicial methodologies used to interpret the treaty can only intrude a little upon the sovereign claims of the settler state. They cannot reserve or create property interests incompatible with, or exclusive of, non-aboriginal rights to occupy and use the territory, unless the tribes concretely engaged in the claimed activity as part of their historic occupancy of the territory.

F. Regulation and Limitations of the Right

1. Justification Analysis

Hunting, fishing and gathering rights may be regulated for a variety of reasons. In all cases the federal and provincial regulation of an aboriginal or treaty right must be done in accordance with the criteria set down in *R. v. Sparrow*.[313] *Sparrow* concerned aboriginal rights, but the Supreme Court later extended the approach to treaty rights in *R. v. Badger*.[314]

Sparrow outlined various principles for balancing the constitutionally protected aboriginal right to fish for food against the federal/provincial power to pass laws to regulate the resource. The dispute involved an aboriginal from Musqueam Band who fished with a drift net longer than that permitted by his aboriginal food fishing license. Sparrow argued that

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[311] *United States v. Winans*, 198 U.S. 371 at 381 (1905).
[312] *Johnson v. M'Intosh*, *supra* note 258 at 574.
[313] *Sparrow*, *supra* note 92.
[314] *Badger*, *supra* note 121.

he was exercising an aboriginal right to fish and the drift net requirement was inconsistent with s. 35(1). The Crown argued that the aboriginal right claimed had been extinguished due to extensive resource regulation "where the sovereign authority is exercised in a manner 'necessarily inconsistent' with the continued enjoyment of aboriginal rights."[315] It also argued that if the aboriginal right continued to exist, the aboriginal resource use could nevertheless be regulated in the public interest or to ensure the proper management and conservation of the resource.

In considering Sparrow's immunity claims the Supreme Court interpreted the meaning of "existing" aboriginal rights and the impact of s. 35(1) on the ability of the federal and provincial governments to regulate aboriginal rights. The Court held that the word "existing" means those aboriginal and treaty rights which were un-extinguished on April 17, 1982 (the day the *Constitution Act, 1982* took effect). These constitutionally guaranteed rights were not limited to those uses or necessarily subject to regulations that were in effect in 1982. Rather the rights "must be interpreted flexibly so as to permit their evolution over time" to prevent the "freezing" of the particular historical use or the regulatory regime in existence in 1982.[316] "The Musqueam have always fished for reasons connected to their cultural and physical survival...the right to do so may be exercised in a contemporary manner."[317] Moreover, the aboriginal rights could not be extinguished by extensive regulation. The Court stated: "The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."[318]

Once the aboriginal right had been established, the Court then proceeded to outline how to determine whether a particular regulatory scheme was inconsistent with s. 35(1). "The

[315] *Ibid.* at 1097.
[316] *Ibid.* at 1093.
[317] *Ibid.* at 1099.
[318] *Ibid.*

first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a prima facie infringement…." The Court held that the burden of proving a prima facie infringement lies on those challenging the legislation. If a prima facie interference is found, the infringement must be justified. For the Court the justification analysis needed to consider the legislative objective of the regulation. If the objective is not valid the regulation would be impermissible. The Court determined that an infringement based on conservation and resource management was legitimate and justifiable, provided that aboriginal uses had a priority in the allowed resource allocation; a holding expanded upon in *Marshall I*, where the Court found that regulatory schemes which provided absolute ministerial discretion to affect an aboriginal right or gave no direction for the exercise of authority were unjustifiable.[319]

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the Sparrow test.[320]

This analysis must also include consideration of the "honour of the Crown" interpretive principle which raises the burden of proof for the Crown to prove that the regulation is a justifiable infringement.[321]

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[319] *Marshall I*, *supra* note 8 at paras 77-81.
[320] *Ibid.* at para. 80 [citing *Adams*].
[321] *Haida Nation*, *supra* note 191; *R. v. Côté*, [1996] 3 S.C.R. 139.

2. The Cultural Limitation on Exploitation of Usufructuary Rights

Another aspect of the traditional assumption mentioned above is the determination that the usufructuary harvest is subject to an internal cultural limitation. The harvest of natural resources is limited to what the Supreme Court calls a "moderate livelihood" or "necessaries."[322] The limitation is either inferred by a judicial examination of tribal custom and/or it is assumed that maintaining this cultural limitation was the intention of tribal negotiators when the treaty was negotiated.

The courts have found that this culturally circumscribed level of exploitation was the intent of aboriginal treaty negotiators when they reserved various usufructuary rights. It effectively precludes any resource exploitation for commercial purposes beyond the level needed to generate enough income to provide for necessary products that could not be obtained from the territory. The harvest for personal use only sustains the tribal member and his family. The harvest for commercial trade is similarly limited. The cultural-derived intent of the tribal negotiators is construed such that the commercial use itself is limited by the cultural exploitative practices based on a subsistence economy. For the courts, traditional activity is always for subsistence purposes.

The judicially constructed notion of traditional use and low exploitation is apparent in the *Marshall I.*

> In this case, equally, it is not suggested that Mi'kmaq trade historically generated "wealth which would exceed a sustenance lifestyle". Nor would anything more have been contemplated by the parties in 1760.[323]

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[322] In *Marshall I, supra* note 8 at para. 71-2 .
[323] *Marshall I, supra* note 8 at para. 74.

In short, the aboriginals were not infected with the desire to accumulate wealth. The tribes would have no need to exploit a resource, for subsistence or for trade, in a manner beyond personal use.[324]

There has been a judicial awareness that in specific circumstances an aboriginal right to exploit natural resources commercially could exist apart from the need for food. In *Jack v. The Queen,* Justice Dickson noted the 1871 Terms of Union under which British Columbia entered the Canadian Confederation implied a commercial and subsistence aboriginal fishery.[325] In the 19th and early 20th centuries the issue simply did not receive any sustained consideration by the courts or policymakers. The vast land area and lack of population pressure allowed for the continued use of natural resources by the tribes without the same political pressures to curb resource use. National policy prior to and throughout the treaty period encouraged the continued use of natural resources for subsistence purposes.[326] The subsistence policy was consistent with perceived aboriginal needs and the conceptions of property that they brought to the treaty process. In addition, the treaties signed by both the British and Canadian governments were generally limited by their terms and their historic contexts to subsistence activities. In the Prairie Provinces where the treaties could often be construed as providing for commercial harvest, the treaty rights were transformed without re-negotiation into subsistence rights when the federal government turned over its Crown lands to the provinces. The Natural Resource Transfer Acts explicitly limited aboriginal hunting, fishing, and gathering activities on land outside the reserves to the procurement of "food." Finally, prior to the *Constitution Act, 1982* many treaty rights were unenforceable at law or simply extinguished by legislation and by the establishment of inconsistent uses by non-

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[324] Christie, *supra* note 172 at 185.
[325] *Jack v. The Queen*, *supra* note 142 at 311.
[326] "The right of Indians to hunt and fish for food on unoccupied crown lands has always been recognized in Canada—in the early days as an incident of their 'ownership' of the land, and later by the treaties by which the Indians gave up their ownership right in these lands." *Regina. v. Sikyea*, *supra* note 138 at 152.

aboriginals.

The result was that despite the acknowledgement of a commercial aspect to aboriginal and treaty rights, the emphasis was on the exercise of usufructuary rights for subsistence purposes. Justice McGillivay exploring the rights of the tribes under the NRTA reflects this bias in the 1932 case *R. v. Wesley*.

> I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who generally speaking does not hunt for food and was by the proviso to s. 12 [of the Natural Resources Agreement signed between Canada and the Province of Saskatchewan in 1930] reassured of the continued enjoyment of a right which he has enjoyed from time immemorial.[327]

When commercial issues did arise, they concerned the priority of aboriginal commercial uses over non-Indian uses and the extent of provincial regulation over the commercial or sale aspects of the transaction.[328]

The entrenchment of aboriginal rights in the *Constitution Act, 1982* changed the focus of the inquiry concerning aboriginal uses for non-subsistence and commercial purposes. Where an aboriginal or treaty right to trade was found, the courts distinguished between the right to sell, trade and barter for livelihood, support and sustenance purposes and the right to harvest for commercial market.[329] Trade for subsistence purposes was considered less problematic as it was subject to an inherent limitation, *i.e.* there is a limit to the amount of natural resources that can be used and consumed for food, social and ceremonial purposes by a given population. In contrast the right to commercial exploitation for the market was

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[327] *Wesley*, *supra* note 165 at 344; *Prince and Myron v. The Queen*, [1964] S.C.R. 81.
[328] *Jack v. The Queen*, *supra* note 142. The NRTAs provide that treaty aboriginals who hunt for sport or commercially could be regulated by provincial game laws but those who hunt for food could not. *Moosehunter v. The Queen*, *supra* note 227.
[329] *Horseman*, *supra* note 161; *R. v. Jones* (1993), 14 O.R. (3d) 421 (Ont. Prov. Ct.) (members of Suageen Ojibway First Nation have treaty and aboriginal right to fish for commercial purposes in order to derive subsistence use of resource and have priority over other user groups in the allocation of fish surplus).

"without internal limitation."[330] In either circumstance, a prohibition from commercial exploitation needs to be justified under the *Sparrow* analysis which allows for governmental regulation that infringes upon existing rights for "conservation and resource management."[331]

Coupled with the Crown's fiduciary duty to the aboriginals, the *Sparrow* framework suggests that where commercial exploitation of natural resources is held to be within the scope of the protected right, it would be difficult for the provinces and federal government to regulate.[332] Nevertheless, even as the courts recognized the legal efficacy of the rights and curtailed the means by which the governments can regulate them, they have tied commercial exploitative activity based on usufructuary rights firmly to cultural practices, which in turn limit resource usage to small-scale trading and bartering activities having an "inherent limitation."[333] First, the resource exploitation was limited because conservation was identified by the courts as coincident with tribal cultural interests.

> While the "presumption" of validity is now outdated in view of the constitutional status of the aboriginal rights at stake, it is clear that the value of conservation purposes for government legislation and action has long been recognized. Further, the conservation and management of our resources is consistent with *aboriginal beliefs and practices*, and, indeed, with the enhancement of aboriginal rights.[334]

Second, aboriginal title (and by implication aboriginal rights), while considered by the courts to be "possessory" and "not restricted to those uses with their origins in the practices, customs and traditions integral to distinctive aboriginal societies," is nevertheless limited to

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[330] *Gladstone*, *supra* note 188 at para. 57.
[331] *Sparrow*, *supra* note 92 at 1113.
[332] The fiduciary relationship of the Crown and aboriginal peoples means that any doubt or ambiguity as to what falls within the scope and definition of s. 35(1) and a treaty term must be resolved in favour of aboriginal peoples. *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Sutherland*, [1980] 2 S.C.R. 451.
[333] In the exceptional circumstance where commercial exchange for money or other goods was a central, significant and defining and distinctive feature of an aboriginal culture the aboriginal right to exclusive use of the resource is restricted by the "doctrine of priority" which allows for an aboriginal preference but does not exclude commercial and sport uses by non-Indians. *Gladstone*, *supra* note 188 at para. 57.
[334] *Sparrow*. *supra* note 92 at 1114 [emphasis added].

those usages that are compatible with traditional aboriginal uses.[335] The Court's decision in *Adams* and *Côté,* reinforced the traditional use paradigm.[336] Detached from a possessory interest and all that this entails, the use rights then become those particular customs or traditional cultural practices, seemingly "frozen" in history prior to European contact, exercised at the time the British asserted sovereignty in the area or at the time the treaty was signed. Third, the Court has tied protected usages and practices to "distinctive" cultural practices that existed prior to European contact. Practices that arose after European contact, such as commercial "market-based" trading due to increased demand from Europeans and aboriginals engaged in the fur trade, are not protected.[337] Evidence of aboriginal economic and social activity in response to the non-aboriginal Indian "market," as well as and shifting economic patterns within and among the tribes generated by the fur trade and later by settler mining, logging and agriculture, (even if such new activities existed over several centuries such as in Nova Scotia), cannot serve as the basis for claiming an aboriginal right.

G. Extinguishment

The colonial impetus behind the law has made the extinguishment of indigenous rights perhaps the most egregious example of the use of law to advance the interests of the European settlers while undermining the continued existence of the tribes. The Act of State doctrine, the non-recognition of legal rights that arise because of aboriginal use and occupancy under common law aboriginal title, and the consequent extinguishment of any rights if any are found, were important tools used by the imperial and colonial state to

[335] *Delgamuukw*, *supra* note 153 at para. 123.
[336] *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 38. "[T]here is no a priori reason why the defining practices, customs and traditions of such societies and communities should be limited to those practices, customs and traditions which represent incidents of a continuous and historical occupation of a specific tract of land."
[337] *Van der Peet*, *supra* note 155 at para. 73.

develop land and resources in the British North America.[338] However, since the enactment of s. 35 existing aboriginal and treaty rights may only be extinguished with the consent of the tribe concerned.

Nevertheless, in order to gain constitutional protection, the rights need to be un-extinguished as of April 17, 1982. The Act only protects those rights "being in actuality in 1982" and the issue of whether a particular right has been extinguished as of that day remains heavily litigated.[339] Before Confederation, the imperial Crown by *The Royal Proclamation, 1763* and each individual colony were considered capable of extinguishing aboriginal rights, either through legislation or by treaty provided colonial legislation or actions were not disallowed or reserved by the imperial Crown.[340] After Confederation, only the federal government could extinguish or enter into treaties, but each province could regulate and extinguish aboriginal rights off the reserve provided it was acting within its constitutional authority or where such authority was conferred by federal statute. In either jurisdiction the intent to extinguish could be inferred. Where the legislature enacted a series of acts that taken together which indicated "a unity of intention to exercise…absolute sovereignty over all the lands…inconsistent with any conflicting interest" such legislation would extinguish aboriginal title and whatever aboriginal usufructuary rights dependant upon that title.[341] In the common law context, the extinguishment generally concerns whether specific legislation regulating various aboriginal uses or establishing reserves extinguished the claimed right

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[338] Gordon Christie, "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation" (2005) 23 Windsor Y.B. Access Just. 17.
[339] *Sparrow*, supra note 92 at 1091 quoting *R. v. Eninew* (1983), 7 C.C.C. (3d) 443 (Sask. Q.B.) at 446.
[340] Prior to Confederation the Crown-in-Right of the Province of Canada "had full power, by legislation, administrative acts and treaties, to unilaterally revoke Indian rights" based on the theory that no colonial act relating to aboriginals was disallowed or reserved for disapproval. *A-G Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 at 468.
[341] *Calder, supra* note 165 at 333, Judson J.

prior to 1982.[342] In a treaty context, the emphasis is on whether the terms and historical context of the treaty exempted the claimed right from the more general extinguishment and land cession provisions and/or subsequent legislation regulating land ownership and use. In a paradoxical twist on the cultural limitation of hunting, fishing and gathering rights, the tribal negotiators are assumed to be both rational and knowledgeable when they entered into an agreement to extinguish aboriginal rights and title, but not rational for purposes of preserving non-traditional uses. Despite the generous interpretive methodologies extinguishment, not the retention of rights, is presumed where the treaty is primarily concerned with land cession.

Prior to 1982, the courts - reflecting colonial bias and consistent with the notion that the rights existed only at the pleasure of the Crown - often found extinguishment by the Canadian Parliament, by the provinces acting under one of their heads of power, or by the individual colonies prior to confederation.[343] The rights did not survive if their continued existence was found to be incompatible with the Crown's assertion of sovereignty (*e.g.* there is no aboriginal right to cross international borders); where they were surrendered voluntarily via the treaty process; or when they were extinguished by government action that was incompatible with the continued existence of the right.[344] Extinguishment by operation of law, *i.e.* not by treaty, was generally presumed where a statute or regulation expressed an intention to exercise a complete dominion or modify common law rights over the territory and activities of the band.

> Once a statute has been validly enacted, it must be given effect. If it's necessary effect is to abridge or entirely abrogate a common law right, then that is the effect

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[342] "The coexistence of an aboriginal title with the estate of the ordinary private land holder is readily recognized as an absurdity. The communal right of aborigines to occupy it cannot be reconciled with the right of a private owner to peaceful enjoyment of his land." *Baker Lake*, *supra* note 165 at 565.
[343] *St. Catherine's Milling*, *supra* note 164 at para. 6.
[344] *Mitchell*, *supra* note 167 at para. 10. In the Binnie, J. concurrence it is unlikely that any aboriginal right would survive where it is incompatible with Canadian sovereignty.

> that the courts must give it. That is as true of an aboriginal title as of any other common law right.[345]

Similarly, treaty rights could be extinguished by the enactment of inconsistent legislation or the assertion of Canadian sovereignty. The Northwest Territory Court of Appeal in *R. v. Sikyea*, noting Lord Watson's dismissive language about the rights of aboriginals under treaties in *A-G for Canada v. A-G for Ontario* stated:

> While this refers [the non-legal obligation of the governor] only to the annuities payable under the treaties, it is difficult to see that the other covenants in the treaties, including the one we are here concerned with, can stand on any higher footing. It is always to be kept in mind that the Indians surrendered their rights in the territory in exchange for these promises. This "promise and agreement", like any other, can, of course, be breached, and there is no law of which I am aware that would prevent Parliament by legislation, properly within s. 91 of the B.N.A. Act, from doing so.[346]

Current case law has reversed the onus on the issue of extinguishment. It presumes that the Crown intended to preserve aboriginal and treaty rights and the Crown bears the burden of proof that an aboriginal right is extinguished. "The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."[347] Where the courts previously found that an aboriginal or treaty right could be extinguished by the enactment of "inconsistent" legislation, current doctrine prevents the extinguishment of aboriginal rights where the rights were simply regulated or the prohibition was based on regulation without a explicit statement of intention to extinguish the rights. In *Marshall I*, for example the historic regulation of the fishery by the federal and provincial government nevertheless provided for specific aboriginal licenses. The Court held in part that the statutory exceptions, rather than evidence of a comprehensive regulatory framework

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[345] *Sparrow*, *supra* note 92 at 1098. The *Sparrow* Court noted that the regulation of an aboriginal right does not necessarily extinguish the right and that the burden for proving extinguishment rested on the Crown.
[346] *Regina. v. Sikyea*, *supra* note 138 at 154.
[347] *Sparrow*, *supra* note 92 at 2000.

attempting to balance the total needs and uses of the fishery, evidenced the continued efficacy of the aboriginal right.

V. Indigenous Rights and Canadian Constitution

Law and legal doctrine exists as "one of the ways in which people make sense of the world around them and make it coherent" while they search for a particular identity and political culture. In Canada, the law as it applies to First Nations seeks to reconcile "aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions" while incorporating them into the Canadian state with its larger set of constitutional principles and law.[348] Yet the very act of this incorporation privileges certain "claims, interests and ambitions" of individuals and groups while establishing governmental and federal structures which give rise to additional interests.[349] As aboriginal interests were intimately intertwined with larger issues of territory, self-government, community, diversity and sovereignty they were necessarily caught up in the colonial nation-building project. Thus conflicts that involved the general nature of the federal system, the division of powers, land titles, and individual and collective rights impacted on the articulation of aboriginal legal doctrine.

The conflict that had a major impact on the development of aboriginal law in Canada was the early conflict between the federal government and the provinces, particularly Ontario and Quebec, over which level of government had primary or residual authority within the Canadian federation. Many of the drafters of the *British North America Act, 1867* (renamed *Constitution Act, 1867*) felt that a powerful centralized national government was necessary to

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[348] Binnie, J. stated: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding." *Mikisew Cree First Nation, supra* note 141 at para. 1.

[349] Susan F. Hirsch and Mindie Lazarus-Black, "Introduction Performance and Paradox: Exploring Law's Role in Hegemony and Resistance" in Susan F. Hirsch and Mindie Lazarus-Black, eds., *Contested States Law, Hegemony and Resistance* (New York: Routledge, Inc., 1994) 1at 5.

concentrate sufficient resources to settle the west and avoid the centrifugal forces of localism which could destroy the separate existence of British North America. The provinces supported a loose confederation of "fully autonomous, equal, self-governing provinces" based on local responsible government which they felt was threatened by both the centralizing aspects of the *Constitution Act, 1867* and the centralizing ambitions of nationalist politicians.[350] These conflicting perspectives led the respective governments to clash over the issue of aboriginal title and treaty rights, which were intertwined with federal/provincial jurisdictional and possessory issues under ss. 91 and 92, as well as the extent of provincial ownership under ss. 109 and 117 - with profound consequences for the tribal possessory and use interests.

A. The *Constitution Act, 1867*, Provincial Rights and Judicial Interpretation

Regardless of the moral, political and legal obligations that Great Britain and the separate colonies of Canada [Ontario and Quebec], New Brunswick and Nova Scotia may have had towards First Nations, aboriginals were totally excluded from the constitutional debates and the subsequent constitutional exegesis that followed the establishment of Canada in 1867.[351] As noted by the *Royal Commission on Aboriginal Peoples*, the status of the tribes was considered to be unimportant in the nascent Canadian state.

> Work on the Confederation project had begun as early as 1858, and as the tempo quickened between 1864 and 1866 the 'Fathers' met in Charlottetown, Quebec and London. At those meetings, in the editorial pages of the colonial press and even on the hustings, the details of the federation and a pan-colonial consensus were hammered out. At no time, however, were First Nations included in the discussion, nor were they consulted about their concerns. Neither was their future position in the federation given any public acknowledgement or discussion.

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[350] Michael D. Behiels, Book Review of *Getting it Wrong: How Canadians Forgot Their Past and Imperiled Confederation*" by Paul Romney (2000) 38 Alta. L. Rev. 595 at paras. 5 and 6.

[351] Major reasons for confederation were the perceived need to defend British North America against the United States, a need to combine resources of the colonies for westward expansion, and the political deadlock between the English and the French, who had been combined in the province of Canada since 1841. Richard Risk and Robert C. Vipond, "Rights Talk in Canada in the Late Nineteenth Century: 'The Good Sense and Right Feeling of the People'" (1996) 14 L.H.R. 1 at 4.

> Nevertheless, the broad outlines of a new constitutional relationship, at least with the First Nations, were determined unilaterally. The first prime minister, Sir John A. Macdonald, soon informed Parliament that it would be Canada's goal "to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion.[352]

It was not that aboriginals were completely ignored. The basic principles of protection, assimilation and civilization established by the imperial government and pre-confederation colonial policy remained.[353] However, the tribal interests as collective *de facto* self-governing entities with nearly exclusive control of the population, finances, and land provided them by earlier imperial control from 1763 to 1860 were dramatically changed.[354] After the constitutional assignation of institutional responsibilities and jurisdiction for the tribes and their lands, their interests and rights became in part the interests of various institutional, governmental or non-indigenous groups. The federal government, granted paramount authority over "Indians, and Lands reserved for Indians," under s. 91(24) assumed institutional responsibility for the tribes and took extensive control of the reserves and tribes in the 1876 *Indian Act*. The former colonies, now provinces, were given "exclusive" jurisdiction over local affairs under s. 92, (including the "property and Civil Rights in the Province" under s. 92(13); and "all lands, Mines, Minerals, and Royalties" under s. 109) while retaining their "public property not otherwise disposed of" in the Act under s. 117; local authority which they were determined - for material, political, ideological and philosophical reasons - to retain against federal encroachment.[355]

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[352] Canada: *Report of the Royal Commission on Aboriginal Peoples: Looking Forward Looking Back*, vol. 1 (Ottawa: The Royal Commission on Aboriginal Peoples, 1996) at 48-9.
[353] Tobias, *supra* note 44.
[354] John S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change" in J.R. Miller, ed., *Sweet Promises A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) 145.
[355] Section 109 of the *Constitution Act, 1867* states: "All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same." Section 117 states: "The several

There has been much debate about whether the structure and intent of the *Constitution Act, 1867* was to create a powerful federal government and the role of the Privy Council interpreting the Act to fit an *a priori* view of a decentralized federal system.[356] On one hand, the document has been understood as providing the federal government with "formidable weapons of centralization".[357] It was assigned the general power of disallowance over provincial legislation, the federal power of appointment over provincial lieutenant-governments and the residual power under s. 91 to make "Laws for the Peace, Order, and good government of Canada, in relation to all Matters not coming within the Classes of Subjects" assigned exclusively to the provinces in s. 92. [358] The centralizing thrust of the document was premised on the idea that the American constitution, which enumerated a short list of powers to the national government while reserving the remainder to the states and the people "commenced at the wrong end."[359] For the Confederation framers the U.S. Civil War was empirical proof of the need for strong central authority. On the other hand, under s. 92 the provinces were granted exclusive and extensive authority over local affairs. These local powers, a counterargument to centralists such as first Canadian Prime Minister John A. MacDonald, reflected an underlying diversity among the provinces and local political

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provinces shall retain their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country."

[356] For a discussion of the centralist-nationalist interpretation of the Confederation and a critique of the decentralization approach see Frederick Vaughan, "Critics of the Judicial Committee of the Privy Council: the New Orthodoxy and Alternative Explanation" (1986) 19 Canadian Journal of Political Science 495. For a discussion of the B.N.A. Act as guaranteeing the principle of provincial autonomy and constitutional balance in the federal system see Paul Romney, "The Nature and Scope of Provincial Autonomy: Oliver Mowat, the Quebec Resolutions and the Construction of the British North America Act" (1992) 25 Canadian Journal of Political Science 3; Robert C. Vipond, *Liberty and Community Canadian Federalism and the Failure of the Constitution* (Albany, N.Y.: State University of New York Press, 1991). For an argument supporting the decentralized judicial approach of the Privy Council see Alan C. Cairns, "The Judicial Committee and Its Critics" (1971) 4 Canadian Journal of Political Science 310.

[357] A.R.M. Lower, "Theories of Canadian Federalism" in A.R.M. Lower *et al., Evolving Canadian Federalism* (Durham, N.C.: Duke University Press, 1958) 3 at 14.

[358] Eugene Forsey, "In Defence of Macdonald's Constitution" (1976) 3 Dal.L.J. 529.

[359] Hon. John Alexander Macdonald, February 6, 1865 quoted in P.B Waite, ed., *The Confederation Debates in the Province of Canada* (Toronto: McClelland and Stewart Limited, 1963) at 44. See also Eugene Forsey, "In Defence of Macdonald's Constitution" (1976) 3 Dal. L. J. 529.

cultures which equated provincial communities with individual freedom.[360] As subsequently interpreted by the Privy Council, the exclusive constitutional grant of local authority accorded the provinces substantial autonomy and equal status with the federal government within the federation.

Whatever the true nature of the Act, there is no question that after Confederation, politicians in Ontario and Quebec advocated interpretations which tended to expand the power of the provinces at the expense of the federal government. They objected vehemently to the idea, advocated by MacDonald, that the constitution set up a legislative union or a subordinate federal system which granted all residual power to the federal government and contemplated that the provinces be analogous to municipal governments.[361] In this wide ranging political dispute, the courts, particularly the Privy Council, became a significant forum in which to press for an interpretation of the Act that would provide for expansive provincial power. "Its advocates realized that the thing they wanted—whether prestige, power, protection of certain cultural values, or economic independence—depended expressly on constitutional reforms."[362]

Over time, the constitutional perspective led them to develop a "constitutional doctrine of provincial autonomy" which the courts, particularly the Privy Council, would use to circumscribe federal power. This doctrine, most forcefully articulated in Ontario under long-serving Liberal Premier Oliver Mowat, was premised on the idea that the historically autonomous relationship the colonies of the United Province of Canada, New Brunswick and

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[360]Vipond, *supra* note 356.
[361] "Subordinate federalism" is a system whereby provincial governments would have only those powers strictly needed for local purposes and which would provide for sectional interests and prejudices. The national government, with all remaining authority would protect minorities and achieve constitutional liberty without being subject to the pressures of populist democracy. Bruce W. Hodgins, "Disagreement at Commencement: Divergent Ontarian Views of Federalism, 1867-1871" in Donald Swanson, ed., *Oliver Mowat's Ontario* (Toronto: MacMillian, 1972) 53 at 67-8.
[362]Vipond, *supra* note 356 at 8.

Nova Scotia had had with the imperial Crown was not diminished by the creation of Canada and on a political theory which equated provincial rights with liberal individualism. Among other things, the doctrine provided the conceptual justification for provincial opposition towards various federal-provincial financing arrangements, dual membership in provincial and federal legislatures, municipal affairs and control of the liquor trade, the role of the Lieutenant-Governor, the federal disallowance of provincial legislation and control of territory that had been ceded by the tribes to the Dominion. Vipond outlines the core principles the doctrine advocated by these provincial rights proponents.

> First, the provincialists argued that the federal principle means, at a minimum, that the federal government had no right to interfere in those subjects placed within the control of the provincial legislatures, just as, conversely the provincial governments have no right to infringe upon federal jurisdiction. Federalism means that each level of government is supreme or sovereign within its sphere, which is why the BNA Act conferred upon each "exclusive" authority to legislate on a given set of subjects. Second, the provincialists argued that real federalism requires a balanced division of power in which neither level overwhelms the other. In this sense, federalism implies political parity, and the autonomists argued that the division of powers outlined in section 91 and 92 of the BNA Act established a rough balance between national and provincial powers respectively. Third, the provincialists argued that federalism means contractualism. Confederation, they said, was created as a compact among the provinces which, according to the act's preamble, had "expressed their desire to be federally united in one Dominion."[363]

The doctrine of provincial rights should not be confused with the American "State's Rights" ideology. Canadians conceived of property, sovereignty, federalism and the tension between state power and individual liberty in a different way from Americans. Dominant assumptions were that "ideal governance was best epitomized by municipal government controlled by highly localized but interconnected"[364] reform-minded elites and that the legislature, particularly the provincial legislature, had the constitutional responsibility to determine the

[363] Vipond, *supra* note 356 at 5.
[364] Behiels, *supra* note 350 at para. 7.

content and limits of individual rights.[365] Federal assertions of jurisdiction or prerogative which trenched upon provincial legislative competence were seen as a fundamental governmental assault upon individual liberty. The argument for a local residuum of power was in turn buttressed by the idea that provincial political power was not limited to enumerated subjects because liberty and property were best protected at the local level by provincial legislatures.

B. Provincial Rights and *St. Catherine's Milling*

The constitutional doctrine of provincial autonomy lay at the core of Ontario's dispute with the federal government in *St. Catherine's Milling & Lumber Co. v. the Queen.*[366] *St. Catherine's Milling*, as mentioned above, concerned the ownership of lands ceded by treaty to the Dominion by the Ojibwa in 1873. However, the dispute had its genesis in the federal government purchase of Rupert's Land (the North West territory) from the Hudson's Bay Company in 1867.[367] At the time, the southeastern boundary of Rupert's Land was unclear. Ontario, which had been carved out of French territory ceded to the Great Britain in 1763, argued that when King Charles II conveyed Rupert's Land to the Hudson Bay Company in 1670 the limits of French (Quebec) possessions in North America extended west of Lake Superior.[368] The federal government disputed this position. As a purchaser of the territory, the federal government wanted control of all Crown lands (subject to aboriginal interests) in the territory. If Ontario's western boundary were extended west then federal control of the

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[365]Risk and Vipond, *supra* note 351 at 14-5.
[366] *St. Catherine's Milling*, *supra* note 164.
[367] The Dominion argued that the western boundary of Ontario was on a line drawn due north from the confluence of the Mississippi and Ohio Rivers. It established this line as the eastern boundary of the new province of Manitoba in 1881. Ontario claimed that its western boundary was the Lake of the Woods, a distance over 300 miles west of the federal proposal. See J.C. Morrison, "Oliver Mowat and the Development of Provincial Rights in Ontario: A Study in Dominion-Provincial Relations" *Three History Theses* (Toronto: Ontario Department of Public Records and Archives, 1961).
[368] The federal government subsequently sought reimbursement from Ontario for the money it paid to the tribes as a result of the 1873 treaty. It was unsuccessful in this action. *Canada v. Ontario* (1907), 10 Ex. C.R. 445; *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637 (P.C.).

territory would be lessened since s. 109 provided that the province held proprietary rights to all Crown land within its borders. After a protracted dispute, the Privy Council held in favour of Ontario in 1884.[369] The result was implemented by imperial legislation in 1889.

After the 1884 decision, the federal government did not concede the boundary question immediately or cede control of the resources in the area. MacDonald, as both Prime Minister and Attorney General, took the position that the 1873 treaty conveyed fee title to Dominion as a bona-fide purchaser, thus rendering irrelevant Ontario's apparent victory on the boundary extension.

> The land belonged, so far back as the grant of Charles II could give it, to the Hudson's Bay Company, but it was subject to Indian title. They and their ancestors had owned the lands for centuries until the Dominion Government purchased them. These lands were purchased, not by the province of Ontario—it did not pay a farthing for it—but by the Dominion…By seven treaties the Indian of the Northwest conveyed the lands to Canada; and every acre belongs now to the people of Canada, and not to the people of Ontario;…there is not one stick of timber, one acre of land, or one lump of lead, iron or gold that does not belong to the Dominion, or to the people who purchased from the Dominion government.[370]

MacDonald's logic depended on an expansive interpretation of the s. 91(24) which would include within the phrase "lands reserved for Indians" those areas reserved as hunting grounds under *The Royal Proclamation, 1763*, as well as a recognition that the tribes "owned" their land subject only to the Crown's exclusive right of pre-emption. The effect of the treaty, which "relieved" the Indian title and occupancy rights, therefore resulted in the Dominion holding fee simple title.[371] The Dominion argued that its position was in complete accord with English, British and American precedent as "from the earliest times the Indians

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[369] Morrison, *supra* note 367 at 159-60.
[370] Quoted from Anthony J. Hall, "The St. Catherine's Milling and Lumber Company versus the Queen: Indian Land Rights as a factor in Federal-Provincial Relations in Nineteenth-Century Canada" in Kerry Abel and Jean Friesen, eds., *Aboriginal Resource Use in Canada: Historical and Legal Aspects* (Winnipeg, Manitoba: University of Manitoba Press, 1991) 267 at 271-2.
[371] Before the Supreme Court of Canada counsel for Ontario argued that Dominion's position "could not be put forward on the part of the Dominion without operating as a fraud on the rights of the Province of Ontario." *St. Catherine's Milling & Lumber Co. v. the Queen,* [1887]13 S.C.R. 577 at 595.

had, and were always recognized as having, a complete proprietary interest, limited by an imperfect power of alienation."[372]

Ontario argued that title to all lands occupied by the aboriginals, regardless of whether aboriginal title had been extinguished, had always been in the Crown (and thus "belonging to the several Provinces" under s. 109) and that tribal tenure was not analogous to fee simple. "Their title was in the nature of a personal right of occupation during the pleasure of the Crown, and it was not a legal or equitable title in the ordinary sense."[373] Thus Ontario took fee simple title in the area once the aboriginal interest was extinguished by treaty.

The Privy Council sided for the most part with Ontario. Lord Watson, while agreeing with the Dominion that the tribes had a "property" right in their lands, nevertheless did not find that aboriginal title was equivalent to fee simple. The tribes' tenure "was a personal and usufructuary right, dependant upon the good will of the sovereign" which arose from *The Royal Proclamation, 1763* itself. [374] As s. 109 provided that Ontario held the beneficial interest in all Crown lands, subject "to any Interest other than that of the Province" the 1873 treaty with the Dominion fully vested the land in Ontario.

From the perspective of the doctrine of provincial autonomy, Ontario's argument in *St. Catherine's Milling* was about its own autonomy and the exclusiveness of its jurisdiction, as well as the equality of the Crown-in-Right of the Province with the Crown-in-Right of Canada. As such, even though the Dominion's lawyers argued: "The provincial government were [was] no party to this treaty," and admitted that "no surrender had been made of Indian title except to the Dominion," the province as direct delegate of the imperial Crown, held the

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[372] *St. Catherine's Milling*, *supra* note 164 at 48.
[373] *Ibid.* at 49. This argument was made before the Judicial Committee. Ontario's argument before the Supreme Court of Canada and the lower courts was even less disposed towards the existence of tribal title. Before the lower courts Ontario argued that "No title beyond that of occupancy was ever recognized by the crown as being in the Indians, and this recognition was based upon public policy and not upon any legal right in the aboriginal inhabitants." *St. Catherine's Milling and Lumber Co. v. The Queen*, *supra* note 371 at 597.
[374] *St. Catherine's Milling*, *supra* note 164 at 54.

proprietary interest in the lands.[375] Ontario's interest in the "Crown" lands within its boundaries was not only superior to those of third-party purchasers, but equal to the claims of the other imperial delegate, the federal government. This explains the reasoning behind Ontario's allegation before the Supreme Court of Canada that the federal position amounted to a "fraud" because it violated constitutional equality and was a conscious attempt to avoid the contractual obligations set forth in the *Constitution Act, 1867*. From Ontario's perspective, the Act envisioned shared federal and provincial authority to implement treaty obligations. Moreover, Ontario's claim was superior and prior to that of the federal government because it derived directly from *The Royal Proclamation, 1763* and the administration of the lands by the Province of Canada prior to the creation of Canada.[376] Lord Watson wrote:

> Had the Indian inhabitants of the area in question released their interest in it to the Crown at any time between 1840 and the date of that Act, it does not seem to admit of doubt, and it was not disputed by the learned counsel for the Dominion, that all revenues derived from its being taken up for settlement, mining, lumbering, and other purposes would have been the property of the Province of Canada.[377]

As such, s. 109 is "sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown…"[378] Under the doctrine of provincial autonomy, the balance of the federal structure is maintained.[379] A

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[375] *Ibid.* at 47.
[376] "The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, *by the Provincial Governments*, and (since the passing of the British North America Act, 1867), by the Government of the Dominion." *Ibid.* at 54 [emphasis added].
[377] *Ibid.* at 55.
[378] *Ibid.* at 57.
[379] "There can be no à priori probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the Provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the

province, like the federal government has "authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial parliament in the plenitude of its power" could bestow.[380]

The brief discussion by Lord Watson of the source and content of aboriginal title in *St. Catherine's Milling* had the effect of considerably expanding the status and power of the provinces within the Canadian federation and legitimized a view of aboriginal title which equated it with little more than traditional hunting and fishing.[381] Moreover, by grounding aboriginal title and rights as a *legal* right sourced in *The Royal Proclamation, 1763* and by connecting the land covered by the Proclamation with the exclusive constitutional authority of the province over non-reserve lands, later courts had little difficulty dispensing with the idea that inherent tribal authority or tribal law could be a separate source of authority in the Canadian federation. A federal victory would have established the proposition that aboriginal law *as law* was to be recognized in Canadian courts, since a tribe could only convey what it legally possessed -- and their "possession" in state law would in part require an incorporation of their law relating to occupancy and use.

Moreover, legally enforceable treaty rights were emasculated and the federal authority to secure provincial assistance to procure resources as part of the process by which the tribes obtained services and commodities in exchange for the land ceded by treaty was rendered meaningless. Tribes were severely disadvantaged by this restriction on federal authority to bind the provinces because under the doctrine of parliamentary supremacy the courts were unlikely to enforce treaty obligations against the federal government in the absence of a statute. In *Ontario Mining Co. v. Seybold* the Privy Council held that an agreement to turn

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Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands…." *Ibid.* at 59.

[380] *Hodge v. The Queen*, [1883] 9 A.C. 117 at 132 (P.C.).

[381] S. Barry Cottam, "Indian Title as a Celestial Institution: David Mills and the St. Catherine's Milling Case" in Abel, *supra* note 370 at 247.

over various reserve lands to the federal government and a tribe based on the condition that the proceeds from mineral and land sales on the former reserve land be paid over to the tribes was unenforceable because the land belonged to the province after aboriginal title had been extinguished.[382] In *A-G for Canada v. A-G for Ontario* the Privy Council determined that the 1850 treaties between the Governor of the United Province of Canada and the Ojibwa were unenforceable against the province.[383] The federal government, for itself and on behalf of the tribe, argued that Ontario, as owner of the land surrendered under s. 109 was liable for the increased annuities and payments due under the treaty.[384] It argued that the transfer of land effectuated by the treaty included aboriginal interests and rights to increased payments, which had been agreed as part of the 1850 treaties. From the perspective of s. 109, the treaty had created a legal original interest which was a charge upon Ontario's title similar to a mortgage. This idea of a "treaty-created interest" was noted by the Privy Council: "In substance," Lord Watson wrote, "Indian annuities form a charge upon the lands, and their proceeds arising after Union…." However, the interest was not a legal interest. The Committee "had no difficulty" in concluding that:

> Under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its [the Province of Canada] governor…that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered….[385]

Thus the 1850 treaties did not provide the Ojibwa with any legal or equitable rights to payment from Ontario. The result was that an aboriginal treaty did not give rise to legal obligations either in international law or through contract. They were mere promises and agreements that provided no legally enforceable rights. The obligation and promises in the

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[382] *Ontario Mining Co. v. Seybold*, [1903] A.C. 73.
[383] *Atty-Gen. For Canada v. Atty-Gen. For Ontario (Indian Annuities case)*, [1897] A.C. 199 (P.C.).
[384] The aboriginals had approached the Government of Canada in 1873 for increased annuities under the treaties.
[385] *Atty-Gen. For Canada v. Atty-Gen. For Ontario (Indian Annuities case)*, *supra* note 383 at 213.

agreement are to be carried out "with an exactness which honour and good conscience dictate" but courts would not enforce the agreement against the Crown should it fail to fulfill its obligations.[386] The *Syliboy* Court noted the subterfuge in this approach several decades later.

> Having called the agreement a treaty, and having perhaps lulled the Indians into believing it to be a treaty with all the sacredness of a treaty attached to it, it may be the Crown should not now be heard to say it is not a treaty. With that I have nothing to do. That is a matter for representations to the proper authorities -- representations which if there is nothing else in the way of the Indians could hardly fail to be successful.[387]

The upshot was that in the 19th century Ontario's desire to control its territory without an encumbrance that might result from an extinguishment of aboriginal title undermined the idea of legally enforceable aboriginal title and treaty rights. The notion that a provincial Crown lands and authority were "equal" to those of the federal government necessarily led the courts to the conclusion that federal action by way of treaty or fiduciary obligations could not burden s. 109 Crown land without provincial consent. In this sense, the provinces were equal sovereign members in the Canadian federation, a constitutional position explicitly embraced endorsed by the Privy Council in *Maritime Bank of Canada (Liquidators of) v. Receiver-General of New Brunswick.*

> The object of the [British North America] Act [1867] was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces….[388]

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[386] *Wesley*, *supra* note 165 at 344. McGillivray, J. in *Wesley* at 351 cited the *Indian Annuities* case when he noted: "In Canada, the Indian treaties appear to have been judicially interpreted as being mere promises and agreements."

[387] *Syliboy*, *supra* note 43 at 314.

[388] *Maritime Bank of Canada (Liquidators of) v. Receiver-General of New Brunswick*, [1892] A.C. 437 at 441-2 (P.C.).

C. Impact of the Vindication of Doctrine of Provincial Autonomy on Aboriginal Hunting, Fishing and Gathering

This thesis considers what might be the impact of constitutional and institutional conflicts on the aboriginal law and doctrine. To the extent that Ontario and the provinces were successful in the major aboriginal title and treaty cases with the federal government, many judicial protections that might have been afforded aboriginal interests were read out of the law.

The most salient and significant feature of Canadian hunting, fishing and gathering rights -- and aboriginal rights in general -- is their constitutional protection by s. 35. Yet when reviewing the generally protective post-1982 decisions, one can see the impact of the earlier decisions and the subsequent vindication of the doctrine of provincial autonomy and its subsequent incorporation into the jurisprudence. As Justice Binnie noted:

> The Constitution Act, 1982 ushered in a new chapter but it did not start a new book. Within the framework of s. 35(1) regard is to be had to the common law ("what the law has historically accepted") to enable a court to determine what constitutes an aboriginal right.[389]

The impact of these earlier decisions and the great constitutional battles which were fought over aboriginal rights has led to significant differences in the Canadian doctrine of hunting, fishing and gathering rights from the doctrine of common law aboriginal title and legal doctrine in the United States. First, while the rights are considered "inherent," because the historic occupation, use, and possession of the territory gives rise to inherent rights not derived from Canadian law, the tribes do not possess the inherent right to self-government nor residual inherent sovereignty. The assertion of British sovereignty, *The Royal Proclamation, 1763* and the subsequent accession to that sovereignty by the provinces and the federal government exhausts all sources of authority in Canada. Group rights or collective rights, such as language rights remain premised on liberal individualism while the federal

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[389] *Mitchell, supra* note 167 at para. 115, Binnie J. concurrence.

structure, including the provincial override of Charter rights in s. 33 ensures that the provinces and the federal government remain the only "collective" and inherent sources of authority. Second, aboriginal rights to use land for hunting, fishing and gathering are not parasitic upon aboriginal title while the content of aboriginal title is generally equated with hunting, fishing and gathering rights. This has been characterized by the Court as recognition of the distinct aboriginal nomadic lifestyle and an acceptance of cultural distinctiveness as a generative source of legally efficacious rights within Canadian law. However, it is arguably the result of the peculiar separation of federal and provincial authority. As the province held the proprietary interest in the land, and federal authority was limited to legislation over the tribes, the conceptual necessity of tying hunting, fishing, and gathering rights to aboriginal title disappeared. The rights can extend to territory over which the tribe did not have common law aboriginal title because aboriginal title need not be legally cognizable. The basis of the right is not dependant on title and possession of a particular tract of territory but the historically vague obligation of the Crown to provide for aboriginals and allow them to secure food. The now constitutionally protected s. 35 aboriginal rights, although grounded on the one hand in aboriginal culture and law, and aboriginal occupancy and use of particular territory on the other, nevertheless continue the non-territorial nature of aboriginal hunting, fishing and gathering rights. This is a significant departure from the doctrine of aboriginal title and the jurisprudence in other jurisdictions. In other states, an aboriginal right to hunt and fish is generally parasitic upon a finding of aboriginal title. Third, the constitutional protection and content of aboriginal rights and treaty rights are the same. Treaty obligations relating to hunting, fishing and gathering rights with aboriginals are obligations of the "Crown" and therefore are binding on the provinces. Yet since the "interest" that the federal government extinguishes in a treaty only includes those burdens on Crown title relating to "hunting grounds", the scope of a treaty obligation is only enforceable, if at all, on those

range of activities. These activities are the same activities that constitute common law aboriginal title. Any other treaty obligation which touches a proprietary interest of the province would be *ultra vires* of the federal government and non-enforceable against the province without provincial consent.[390]

VI. Conclusion

Until recently there has been less judicial input in the development of aboriginal law in Canada than in the United States. Nevertheless, since 1982 the courts have played a paramount role in elaborating the existence, content and scope of the rights. With the significant constitutional change that accompanied the *Constitution Act, 1982* the courts have established and elaborated significant protections for aboriginal usufructuary rights.

At crucial times in Canadian political history, disputes between the federal and provincial governments have created the opportunity for the effectuation of aboriginal rights either in the political process or in the courts. Indeed, ss. 25 and 35 are bound up in the political and legal efforts of First Nations to have their rights recognized as the Canada and Quebec were embroiled in the Sovereignty-Association dispute. This federal conflict, which involved differing conceptions of national sovereignty and territorial and non-territorial group and individual rights, enabled aboriginal leaders to achieve significant constitutional recognition for First Nations in the new constitutional polity.

In the first great constitutional battles between the federal government and the provinces concerning the nature of the Canadian federation, First Nations were not directly

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[390] Similarly Lord Haldane's understanding of usufructuary rights in *Amodu Tijani* would be precluded as an element of a treaty extinguishing aboriginal title unless a provinces consented to the invasion of the pre-existing proprietary rights. Lord Haldane noted: "Their Lordships think that the learned Chief Justice in the judgment thus summarised, which virtually excludes the legal reality of the community usufruct, has failed to recognize the real character of the title to land occupied by a native community. That title, as they have pointed out, is prima facie based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference." *Amodu Tijani*, *supra* note 154 at 409.

involved. But the disputes over aboriginal treaties and aboriginal title included issues such as sovereignty and land which were fundamental to the colonial project. As the federal government and Ontario fought over which level of government would be integral to "nation-building" in Canada, the courts were called upon to decide the issue which in turn forced them to assess the legal status of aboriginal rights in the Canadian legal system. The affirmation of the doctrine of provincial autonomy led to a depreciation of aboriginal interests and limited their judicial efficacy.

Yet federal government in the seminal aboriginal cases before the Privy Council and lower courts, was neither seeking to vindicate aboriginal's pre-existing rights nor was it asserting that aboriginal treaties fettered it with legally enforceable obligations. It sought to have the rights recognized so it could control and appropriate aboriginal resources on the basis of its own institutional prerogatives and nation-building program. Nevertheless, with subsequent judicial vindication of the doctrine of provincial autonomy, the institutional interest in and the capacity for making aboriginal rights judicially efficacious disappeared. For example, in the *Indian Annuities case*, a different Privy Council holding, which would have ruled that the 1850 treaties were enforceable against the province, could potentially have led to a later finding that a treaty was legally enforceable against the federal government as both the provinces and the federal government are embodiments of the same Crown. In any event, to find as the Privy Council did in the case that a treaty is a "personal obligation" of the governor, in order to preserve an ostensible constitutional balance set forth in the doctrine of provincial autonomy, renders aboriginal interests more precarious if not arguably non-existent. At the same time, a opportunity to re-assert either common law aboriginal title (which had been transformed in *St. Catherine's Milling* but which remained efficacious across the empire) or treaty rights by a court seeking to vindicate a governmental right disappeared -- because neither the provinces nor the federal government were ever in the

position where a judicial vindication of an aboriginal interest would have such broad constitutional consequences. Finally, as evidenced by the NRTAs and other federal policies, it is likely that the judicial vindication of aboriginal rights supported by federal authority would have been more protective of aboriginal rights because, unlike a sub-national government which often has an institutional interest in extending its singular jurisdiction throughout its territory, a national federal government is more amenable to a plural legal environment provided it does not threaten its jurisdiction and sovereignty.

At the same time, the various decisions did suggest that the federal government had some limited legal obligations to uphold tribal possessory interests, albeit they were conceptualized as fiduciary-like. This seemingly imprinted the idea of fiduciary obligation more strongly within Canadian jurisprudence and has led to an expansive scope for legal claims based on fiduciary obligation and the use of "honour of the Crown" as an interpretive principle. In this sense, the conflicts themselves, and the weight given to aboriginal interests by the courts laid the basis for the later recrudesce of aboriginal title and treaty jurisprudence which commenced in the 1960s.

Chapter Five New Zealand

I. Introduction

This thesis argues that judicially protected aboriginal or treaty rights have been profoundly affected by non-aboriginal disputes over the constitution and the nature of the national polity. The determination of the nature and quality of indigenous legal interests and entitlements involved fundamental questions of land ownership, secure legal title for settler alienation, as well as governmental priority and competence within the larger colonial state. Judicial resolution of these non-aboriginal conflicts was often crucial to the vindication of indigenous rights within the new state. If not for these disputes, court decisions and common law doctrine solicitous of indigenous interests based on idea of indigenous occupancy, use and possession of their territory, as well as the creation of law based on colonial and imperial policy -- which incorporated notions of indigenous sovereignty and supported pluralist legal relations -- would have been discarded by the courts. The courts, despite their genuflections toward aboriginal rights and a fiduciary concern for aboriginal welfare nevertheless embraced the logic of the Eurocentric "conquest as discovery" thesis articulated by Chief Justice Marshall in *Johnson v. M'Intosh* and/or otherwise extinguished aboriginal rights as the colonial state and society moved toward a more positivistic notion of national sovereignty in the 19th century.[1]

New Zealand in its formative constitutional period had fewer disputes regarding its constitutional or institutional structure that might have led a group to champion Maori legal rights in order to vindicate their own claims. The idea of Maori sovereignty and fee simple

[1] The seminal American Indian cases *Johnson v. M'Intosh* 21 U.S. (8 Wheat.) 543 (1823) [*M'Intosh*]; *Cherokee Nation v. Georgia* 30 U.S. (5 Pet.) 1 (1831) [*Cherokee Nation*]; and *Worcester v. Georgia* 31 U.S. (6 Pet.) 515 (1832) [*Worcester*] written by Chief Justice Marshall were known and cited by New Zealand jurists as well as the Privy Council. For a discussion how this reading of *Johnson v. M'intosh* was used by the American states to press their claims for complete jurisdiction over Native Americans within their territory and a concomitant narrow reading of federal authority over them see Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005).

ownership of their territory was probably never accepted by Imperial Britain, the New South Wales government which initially governed the islands or the separate colony of New Zealand. In any event, except for some speculators, missionaries (who had purchased land prior to 1840) or humanitarians, the position had little political or public support either in London or New Zealand, particularly after the New Zealand Company reached an agreement with Imperial authorities which entitled it to one acre of land for every four pounds it had expended on colonization.[2] The historical context of *R. v. Symonds*[3] and the retention of Maori affairs by the Governor Gore Browne after responsible government was granted in 1854 did have the potential to create institutional and constitutional conflict similar to that in North America. However, unlike the more particular debate regarding statutorily created governmental institutions for Maori and the need for a land court, colonial disagreements concerning the respective rights of the Crown and Maori to possess and use land took place within a relatively narrow "frame of reference."[4]

The inability or unwillingness of imperial officials to actually oppose settler policy toward the Maori on the ground, the Land Wars -- which reinforced the colonial government's determination to deny juridical status and *de jure* sovereignty to Maori -- and the colonial commitment to amalgamation made the numerous disagreements over Maori policy more a matter of form than substance.[5] The colonial settlers and imperial officials generally subscribed to liberal political philosophy and did not fundamentally disagree with the allocation of authority or separation of powers set forth in the *Constitution Act 1852*, the colony's relationship with Great Britain, the constitutional doctrine of parliamentary

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[2] Prior to this agreement the Company asserted that the Maori both "owned" their territory and had the contractual capacity to alienate it. Michael Belgrave, *Historical Frictions Maori Claims and Reinvented Histories* (Auckland: Auckland University Press, 2005) at 67-9.
[3] *R. v. Symonds*, [1847] N.Z.P.C.C. 387 (N.Z.S.C.).
[4] N.Z., Crown Law Office, *The Origins of the Native Lands Acts and Native Land Court* by Donald M. Loveridge (Wellington: Crown Law Office Report, 2000) at 233.
[5] Keith Sinclair, *The Origins of the Maori Wars*, 2nd ed. (Wellington: New Zealand University Press, 1961) at 96.

sovereignty and the relationship of that sovereign power with Maori. The constitutional and institutional disputes which did arise, such as between the provinces and the national government, did not implicate tikanga Maori, or treaty or common law rights whose vindication by the courts would have served either provincial or national interests. Indeed, the context for these disputes disappeared when local control over Maori affairs was granted in 1863 and when the provinces were abolished in 1876.

The New Zealand colonists sought to obtain and secure land titles for economic development and minimize the ability of Maori to resist land alienations. The principle of individualization of land title as enacted by *Native Lands Acts* in the 1860s though premised on Maori ownership of all the territory, served to transform Maori tenure and extinguish Maori customary rights. Any tenure transformation was deemed to extinguish whatever territorial and non-territorial usufructuary rights that might otherwise legally burden the territory by virtue of the Treaty of Waitangi, the particular deed of cession, or common law aboriginal title.[6] Combined with increasingly accepted Darwinian notions relating to European cultural and racial superiority, the colonial judiciary became reluctant to look behind governmental policy, broadly construe statutory references favourable to Maori, or recognize common law rights when Maori interests were litigated. Where the courts (either colonial or the Privy Council) occasionally found in favour of Maori interests, legislation was usually enacted eliminating the favourable judgment - or the decision was simply ignored.[7]

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[6] The Maori and English language versions of the Treaty of Waitangi can be found in Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin New Zealand Limited in association with the Port Nicholson Press, 1987) at 257-9.

[7] For example, the Privy Council in *Nireaha Tamaki v. Baker*, [1901] A.C. 561 (P.C.) [*Nireaha Tamaki*] held that aboriginal rights not only "legally" exist where the have not been legally extinguished, but that they can be a basis for judicial proceedings and rule of decision. In *Hohepa Wi Neera v. Bishop of Wellington*, (1902) 21 N.Z.L.R. 655 (N.Z.C.A.) the Court of Appeal distinguished *Nireaha Tamaki* and re-asserted the rule that the judiciary could take no cognizance of Maori customary right where a Crown grant has been issued. The Legislature dealt with the same issue through the *Native Land Act 1909*. The 1909 Act set forth a series of provision which severely restricted the ability of Maori to have their customary title recognized by the courts.

Under these circumstances, one could expect little judicial protection of aboriginal possessory interests, either at common law or through the Treaty. The courts as agents of colonization -- which used the law and rule of law as the preferred mechanism for incorporating indigenous peoples into the Empire -- would assist in the task of settlement. Usufructuary rights, as one component of indigenous possessory interests potentially contrary to economic development, would simply be extinguished or be dramatically curtailed in the face of settler penetration and the development of the colonial state. Reinforcing this impetus was the early acceptance of the "declaratory theory" of law by the New Zealand courts which presumed that judges had no law-making function. Rather they were simply to declare, clarify and apply existing rules and were bound by the unambiguous wording of statutes.[8] The deference was part of a constitutionalism which theorized an omnipotent legislature whose totalizing presence in the constitutional system substantially restricted the courts ability to exercise a more rigorous oversight of individual and common law rights because of separation of powers considerations. At the same time, the deference served the legislative interests of the colonial state *vis-à-vis* the Maori. A unitary constitutionalism necessarily excludes other more plural forms of authority which could incorporate Maori juridical capacity; and dictates that any judicial recognition absent explicit statutory mention or "entrenchment" of Article Two of the Treaty of Waitangi is a legal impossibility.

This Chapter will discuss the legislation and judicial decision-making regarding Maori hunting, fishing, and gathering rights in New Zealand. It will not directly discuss general Maori rights to manage hunting, fishing and gathering resources and other taonga according to their traditional cultural practice or tikanga Maori. These claimed and exercised management rights, often at variance with current conservation and preservation management

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[8] Peter Spiller, "The Courts and the Judiciary," in Peter Spiller, Jeremy Finn & Richard Boast, *A New Zealand Legal History*, 2nd ed. (Wellington: Brookers Ltd., 2001) 187 at 188-9.

practice used by the state and fish and game councils, are incorporated into the guarantee of rangatiranga found in Article Two of the Treaty. [9] It will argue that the interests guaranteed Maori under the Treaty of Waitangi or at common law aboriginal title were either ignored or reconceptualized through various and sundry legal legerdemain as the colonial state crystallized. This process completely obliterated customary usufructuary interests on dry land. All contemporary Maori rights to hunt and gather on land in a manner not afforded the rest of the population are due to statute. The New Zealand state was less focused on legally eliminating Maori interests in inland waterways, the foreshore and the marine fishery. The subsequent assertion of state possessory interests in these areas has led to some of these residual Maori interests being recognized by the courts and in statute. As such the legal defeasement of Maori interests has not been as complete as the hypothesis of the thesis would suggest. In part this has been the result of Maori political pressure and the recognition that Maori had unique needs and a singular place within the polity. Nevertheless it is also because the New Zealand judiciary (including the Privy Council), despite its commitment to the declaratory theory of law and parliamentary sovereignty, with its concomitant total extinguishment of Maori possessory interests, has been seemingly unable to dispense with its institutional function and potentially protective methodologies when confronted with the historical fact of the Treaty, common law and treaty law precedent as well as numerous legislative and political references to the Treaty.

The affect of these various elements is difficult to measure but even where the logic of the law and the interest colonial state coincided, such as in the seminal case 1877 decision

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[9] See *New Zealand Maori Council v. Attorney-General,* [1994] 1 N.Z.L.R. 513 (P.C.). The principles of management and consultation have been established in Waitangi Tribunal, legislation, and in various policy statements relating to resource management and national parks. Rather this chapter will discuss the effectuation of rangatiranga (such as it is incompletely reflected in the legislation) as it relates to judicial decisions as well as specific legislation and regulation such as the *Fisheries Act 1996* or the *Fisheries (Kaimoana Customary Fishing) Regulations,* S.R. 1998/434 (1998). I will also not discuss specific hunting, fishing or gathering activities that may be afforded specific iwi and hapu as part of the Treaty Settlement process. See also Shane D. Wight, Graham Nugent and Hori G. Parata, "Customary Management of Indigenous Species: A Maori Perspective" (1995) 19 New Zealand Journal of Ecology 83.

Wi Parata v. The Bishop of Wellington, Maori possessory and use interests were recognized -- if only by negative implication. As attitudes towards Maori, the Treaty and rights have changed this legal detritus has been refashioned in recent decades by the courts in such cases as *Te Weehi v. Regional Fisheries Officer*, *Huakina Development Trust v. Waikato Valley Authority*, *Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General*, and *Ngati Apa v. Attorney-General.*[10] These developments have been examined by legal scholars through the lens of "treaty-jurisprudence" and "common law" jurisprudence. However, it appears that these developments in aboriginal jurisprudence are simply a continuing manifestation of the partial incorporation of the Treaty into New Zealand law.

II. Maori Hunting, Fishing, and Gathering Rights in New Zealand Jurisprudence

A. Maori Approaches to Hunting and Gathering

Historically, Maori exploited much flora and fauna.[11] They possessed a detailed and intimate knowledge of the "lifecycles and seasonal patterns of fish birds plants and their overall environment".[12] While generalization can be problematic as to uses, and the law varied among iwi and hapu, there were several common elements in Maori customary law and practice which regulated hunting and gathering.

First, Maori related to their environment in a holistic manner which was incompatible with European conceptions of exclusive ownership and economic development.[13] For example, the Waitangi Tribunal in the *Whanganui River Report* noted that the tribe and the

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[10] *Wi Parata v. The Bishop of Wellington*, (1877) 3 N.Z. Jur. (NS) 72 (N.Z.C.A.)[*Wi Parata*]; *Te Weehi v. Regional Fisheries Officer*, [1986] 1 N.Z.L.R. 680 (H.C.) [*Te Weehi*]; 10 *Development Trust v. Waikato Valley Authority*, [1987] 2 N.Z.L.R. 188 (H.C.) [*Huakina*]; *Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General*, [1994] 2 N.Z.L.R. 20 (N.Z.C.A.); *Ngati Apa v. Attorney-General*, [2003] 3 N.Z.L.R. 643 (N.Z.C.A.)[*Ngati Apa*].

[11] Maori customary hunting rights generally concern birds because prior to European contact only mammals Aotearoa had had were three species of native bats and the koire rat.

[12] Cathy Marr, Robin Hodge & Ben White, *Crown Laws, Policies, and Practices in Relation to Flora and Fauna, 1840-1912* (Wellington: Waitangi Tribunal, 2001) at 37.

[13] *Ibid.* at 41-2.

British fundamentally conceived of the river in different ways. The tribe understood the river to be tupuna or an ancestor which was an indivisible life entity.[14] As an indivisible entity or life source the idea that the river bank, water course and water could be parcelled up for exclusive use or alienated was anathema to Maori. This worldview justified customary rules and practices that regulated the taking and the harvest of flora and fauna.[15]

Second, the interconnected worldview informed the use of key Maori legal concepts such as mana (prestige and authority), utu (equal return or reciprocal exchange) and tapu (power of the gods in identifying those places, people and things where the ancestors were present in the world which in turn conditions uses) that regulated natural resource use across the community's rohe.[16] As Solomon notes:

> There were rights and obligations in relation to the taking of resources for human sustenance. So before a tree was taken from the domain of Tane, karakia must be said and permission sought from the deity of the forest for the taking of one of his children…Creatures of the sea and the landscape were imbued with special powers to guard over the people and the resources.[17]

The rules were crucial in establishing who held particular harvesting rights and the amounts and species harvested as well as set forth the necessary local presence and level of exploitation which must occur to maintain ahi ka (to keep one's rights warm).[18] At another perhaps more political level the relationships laid bare how the concept of kaitiakitanga was implicit within rangatiratanga such that modern uses sanctioned by the Crown which have been destructive to particular areas are a major source of Maori grievance.

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[14]New Zealand: Waitangi Tribunal, *Whanganui River Report* (Wai 167) (Wellington: GP Publications, 1999) at 36-47.
[15] N.Z, Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071) (Wellington: Legislation Direct, 2004) at 4-13.
[16] A Glossary of Maori words is attached at the end of this thesis.
[17] Maui Solomon, "The Wai 262 Claim: A Claim by Maori to Indigenous Flora and Fauna: Me o Ratou Taonga Katoa" in Michael Belgrave, Merata Kawharu & David Williams, eds., *Waitangi Revisited Perspective on the Treaty of Waitangi* (Oxford: Oxford University Press, 2005) 213 at 219-20.
[18] Ann Parsonson "The Challenge to Mana Maori" in Geoffrey W. Rice, ed., *The Oxford History of New Zealand*, 2nd ed. (Oxford: Oxford University Press, 1992) 167 at 170-1.

Third, Maori resource exploitation was premised on community ownership, harvest and use of natural resources. Possession and resource entitlements were justified by use.[19] Contemporary uses were supported by reference to whakapapa, particular uses by ancestors, and ongoing present-day relationships.[20] As community resources, control and access to them was rarely absolute and use varied with relationships across individuals, hapu, and iwi. Hapu use rights across different resources often overlapped with use rights held by other hapu within the larger tribe. At the hapu and individual level, use rights were analogous to a license or *profit à prendre* that allowed a holder to exploit a particular resource at a particular time. "In practice," the Waitangi Tribunal states, "no person or group at any level [individual, hapu, iwi] could act without considering the interests of the other two, or at least not without the risk of losing possession of what they had."[21]

Fourth, harvesting activities were timed and designed to maintain sustainable resource exploitation while maximizing the food harvest. Sustainable resource exploitation arose due to Maori conceptions about the inter-relatedness of the natural environment and the spiritual world that in turn delineated the rules and obligations concerning resource use. Use was not to impair the continued existence of the resource. For example, Ngati Koata oral traditions state that only the outer leaves of flax plants may be taken to ensure the continued health of the plant while stipulating that excess plant material should always be returned to the harvesting site for fertiliser.[22] The robustness and diversity of fauna and flora in the islands, in part facilitated by these management practices, created the impression among the colonists that the resources were more abundant then they in fact were.

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[19] Geoff Park, "*Effective Exclusion? An Exploratory Overview of Crown Actions and Maori Responses Concerning the Indigenous Flora and Fauna, 1912 – 1983* (Wellington: Waitangi Tribunal 2001) at 390-1.
[20] Waitangi Tribunal, *Whanganui River Report*, *supra* note 14 at 31.
[21] *Ibid.* at 29-30
[22] Marr, *supra* note 12 at 40.

Maori approaches to wildlife and natural resource regulation were contrary to Western notions of ownership and common law harvest rights. This is not to say that these approaches were unrecognisable to the settler mind. At the time the blending of protection and utilization was also found in the European game hunting tradition. Rather the idea of overlapping use rights and the legal relationships Maori ascribed to use and possession were radically different.[23] As such, Maori legal entitlements to various uses were not "ignored" per se -- rather the Crown seemingly recognized them (and incorporated them into state law) as part of their supersession. Ultimately, the Crown's adoption of the doctrine of feudal tenures and its political commitment to the complete extinguishment of aboriginal title and usufructuary rights, either through pre-emptive sale to the Crown or by way of the Maori Land Court, proved incapable of accommodating continued Maori use rights under tikanga Maori.[24] Strictly defined proprietary lines with the concomitant sets of exclusive, contractually defined or common law rights and uses replaced Maori communal tenure and overlapping use rights defined by tikanga Maori.

B. Regulation of Hunting and Gathering

The history of the legal supersession of Maori customary law, aboriginal common law, statutory and cession specific entitlements is a story that is being told elsewhere. Research associated with the ongoing Wai 262 Claim relating to indigenous flora and fauna currently before the Waitangi Tribunal has been particularly important. Suffice to say that present-day

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[23] Paul Star, "Native Bird Protection, National Identity and the Rise of Preservation in New Zealand to 1914" (2002) 36 New Zealand Journal of History 123 at 129.

[24] This commitment of course may not have been shared by Maori sellers, particularly in Crown pre-emptive purchases. The authors of *Crown Law, Policies, and Practices in Relation to Flora and Fauna, 1940-1912* analyzed 923 deeds between the Maori and the Crown from 1840 to around 1870. Of these deeds 189 had no qualifier whatsoever (either common law phrases or specific references to flora and fauna) but the remainder had some type of qualification whereby the Maori expressly transferred to the Crown a specific incident of title -- be it timber, cultivations, vegetation, general land or surface, water, fishing and coastal, birding, and subsurface rights. The authors conclude that the deeds support the idea that Crown purchasing activity sought to completely extinguish native title. However they point out that 55 percent of the deeds analyzed contained no specific references to flora and fauna, raising the possibility that Maori may have thought they were simply granting the purchaser a right of occupation.

Maori use entitlements and judicial determinations of state-sanctioned indigenous use rights have been for the most part derived from statutory enactments and regulations rather than the common law or treaty jurisprudence. With these statutory enactments, the Crown has vested itself with the exclusive right to conserve and protect all native and non-native flora and fauna. Despite their continuing political and legal assertions of prior use rights based on pre-colonial possession of Aotearoa, Maori have availed themselves of the various statutory provisions that provide for traditional uses.[25] These uses remain important for the materials and sustenance as well as part of a wider Maori cultural identity; where traditional uses of natural resources for food, weaving, carvings and implements assist in maintaining relationships with ancestors.[26]

Colonial regulation of flora and fauna under the *Constitution Act 1852* began relatively early. Consistent with common law notions relating to wild animals and governmental sovereignty (deemed to be consistent with Article 1), the colonial government simply assumed that it held the "power" and "right" to regulate the taking of flora and fauna. For example, the Preamble to the 1864 *Wild Birds Protection Act* (which amended an earlier 1861 Act) simply asserted that "it is expedient further to provide for the Protection of certain Wild Birds of the colony" when it established a limited hunting season for various imported and indigenous birds. Reinforcing the assumed power over Maori activities was the presumption that that the Crown, as holder of radical title over all land in New Zealand could extinguish customary title or set aside land for any purpose whatsoever; appropriations that were increasingly undertaken to protect scenery and indigenous bio-diversity from the end of

[25] For a compilation of harvested materials in 1997 see New Zealand Conservation Authority/Te Pou Atawhai Taiao O Aotearoa, *Maori Customary Use of Native Birds, Plants & Other Traditional Materials* (Interim Report and Discussion Paper)(Wellington: New Zealand Conservation Authority, 1997) at 33-4.
[26] *Ibid.* at 95.

the 19th century. [27] In addition, land conveyances from Maori (including seizures under the *New Zealand Settlements Act 1863*) to the government were deemed to extinguish whatever usufructuary rights that might otherwise burden to the territory by virtue of the Treaty, the particular deed of cession, or common law aboriginal title.

Paralleling these "extinguishing" conveyances was the transformation of Maori tenure by the Native Land Court. An order from the Court vested the applicant(s) and deemed owners with absolute unencumbered title -- free from any other beneficial interest or common law or treaty-guaranteed usufructuary rights. Fee simple Maori owners then assumed all common law resource harvesting rights in common with all other citizens. So totalizing was the idea of extinguishment that it occurred even where the fee simple owners were themselves beneficial owners on behalf of other Maori or where the conversion of title occurred in an area set aside as a native reserve.[28] Crown title, when granted (with or without explicit extinguishment of any usufructuary right) was deemed to extinguish whatever use rights which may have burdened the land.[29] Where there might be an issue of whether the extinguishment of native title was done according to statute, *Wi Parata* held that the court had no jurisdiction to look behind any Crown grant to determine whether native title had been extinguished -- a rule codified in s. 86 of the *Native Land Act 1909*.[30]

Initially regulation and protection did not apply to indigenous species. Statutory

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[27] In this chapter the terms "customary title", "Maori proprietary interests", "native title" and "aboriginal title" are considered to be synonymous.
[28] *Inspector of Fisheries v. Ihaia Weepu and Another*, [1956] N.Z.L.R. 920 (N.Z.S.C.) [*Weepu*].
[29] *Wi Parata*, *supra* note 10; The Privy Council in *Nireaha Tamaki v. Baker*, *supra* note 7 held that because the Crown's authority to sell lands over which native title had been extinguished is derived from statute, Maori claimant's had the right to restrain the Crown if the extinguishment was not done in accordance with statutory provisions. In *Hohepa Wi Neera v. Bishop of Wellington*, (1902) 21 N.Z.L.R. 655 (N.Z.C.A.) the Court of Appeal distinguished *Nireaha v. Baker* and re-asserted the rule that the judiciary could take no cognizance of Maori customary title where a Crown grant has been issued.
[30] The *Native Land Act 1909* s. 86 states "No Crown grant, Crown lease, or other alienation or disposition of land by the Crown, whether before or after the commencement of this Act, shall in any Court or in any proceeding be questioned or invalidated or in any manner affected by reason of the fact that the native Customary title to that land has not been duly extinguished."

protection was provided only to certain "acclimatized" species.[31] Traditional Maori food sources were unprotected and could be harvested by either Maori or settlers. However as settlers transformed the landscape and ecosystem through bush clearing, pastoralism, agriculture and the introduction of exotic species by the end of the 19th century, the Crown enacted laws that restricted or prohibited the taking of various indigenous birds.[32] Territory was also designated as reserves where no hunting or gathering was permitted. These reserve areas were often populated or used by Maori who were forced to relocate but were unable to shift their harvest activities to other areas because of an expanded settler ownership and population.

Although not opposed to conservation measures, Maori vigorously objected to the extended protection and expanding refuges as abrogating their Treaty rights. They pointed out that much of the wildlife population decline was attributable to clearing the bush for settler agriculture. They noted the historic success Maori had had in maintaining populations, the continued strength of native bird populations where extensive Maori use continued, such as the Ureweras, and the disproportionate effect hunting prohibitions had on Maori.[33]

Beneath these Maori protestations against absolute preservation of indigenous species was a cultural conflict over how fauna and flora should be utilized. Maori practice combined

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[31] The *Animal Protection Act 1861* gave protection to 11 introduced bird species (all from the British Isles) except during an established hunting period. The *Salmon and Trout Act 1867* was enacted to protect newly created salmon and trout fisheries. While not subject to judicial decision, it is likely that Maori customary use rights do not extend to imported animals or game because imported animals have been subject to extensive regulation and control. In *McRichie*, the Court of Appeal held that such pervasive control prevented the establishment of a customary fishing right for trout. *Taranaki Fish and Game Council v. McRichie*, [1999] 2 N.Z.L.R. 139 (N.Z.C.A.).

[32] Indigenous species were first mentioned in the 1864 amendment to the *Animal Protection Act 1861*. In 1886 an amendment to the Act allowed the Governor to prohibit by regulation the destruction of "any bird indigenous to the colony." Kaka was absolutely protected in 1888. In 1896 protection was given to the bellbird, kokako, kakapo, kiwi, saddleback and stitchbird.

[33] Park, *supra* note 19 at 397-408. The dispute concerning a Maori right to take kereru (wood pigeon) has been a long standing dispute between the Crown and the Maori. An important food source and taonga of Maori in the 19th century, the extensive exploitation and destruction of habitat by the settlers led to it being absolutely protected by the Crown in 1921. See James W. Feldman, *Treaty Rights and Pigeon Poaching Alienation of Maori Access to Kereru, 1864-1960* (Wellington: Waitangi Tribunal, 2001).

utilization with protection, a practice which was paralleled by the European game hunting tradition and the rising early 20th century conservation ethic. Initially the Maori opposition to absolute use prohibitions was not necessarily considered inappropriate to Pakeha.[34] However, in response to dramatic falls in certain species, usually the result of bush clearing, stoats, weasels, and settlement, the settler populations began to be opposed to the harvest of any indigenous species notwithstanding Maori objections.

State regulation of fauna and flora continued to expand in the 20th century. The *Animals Protection and Game Act 1921* extended regulatory protection to most indigenous and introduced wildlife. The Act expanded the list of indigenous species that were absolutely protected to include species such as the kereru whose continued use was considered to be of importance to Maori. The *Wildlife Act 1953* by s. 57(3) vested all wildlife in the Crown and largely abrogated all remaining common law rules relating to hunting.[35]

Today, New Zealand wildlife legislation is premised on four major principles. First, when the Crown acquired sovereignty it acquired radical title to all territory. This title was burdened by Maori customary title, which included use rights. These use rights were parasitic upon the underlying Maori customary title such that extinguishment of that title, either by purchase, conquest, seizure or by operation of the Native Land Court extinguished any use rights. Second, the Crown assumes that "English law rules, doctrines and presumptions will apply unless Maori can prove customary associations and entitlements."[36] Third, the

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[34] Star, *supra* note 23.

[35] Section 28 of the *Animals Protection and Game Act 1921* granted acclimatisation societies "the property in all animals in the possession or under the control" of the society. These proprietary interests extended to game fish, game birds and introduced game mammals such red deer. The societies received income from license fees and fines. They employed rangers with the power to search and seize game and prohibited tackle, nets or guns. The 1921 Act clarified an arrangement which had been in practice since the 1860s. Ross Galbreath, *Working for Wildlife a History of the New Zealand Wildlife Service* (Wellington: Bridget Williams Books and Historical Branch, Dept. of Internal Affairs, 1993) at 113-44.

[36] David V. Williams, *Matauranga Maori and Taonga: The Nature and Extent of Treaty Rights held by Iwi and Hapu in Indigenous Flora and Fauna, Cultural Heritage Objects, Valued Traditional Knowledge* (Wellington: Waitangi Tribunal, 2001) at 6.

guarantees to Maori in Article Two are limited by "the public interest" as defined by the Crown. As such, the Treaty is understood by the Crown to only have reserved Maori customary title to the foreshore, riverbeds, and lakebeds insofar as this ownership was consistent with other public values such as the rights of navigation, common rights to the fishery, and management and control for conservation and preservation purposes. As Crown has sought to protect indigenous flora and fauna by extending legislation originally intended for introduced species, Maori access to them became heavily regulated or prohibited.[37] Fourth, Maori use rights did not extend to introduced species or to natural resources not exploited by the Maori in 1840.

The principle statute which protects and regulates the taking of flora and fauna is the *Conservation Act 1987* as amended.[38] The Act establishes the Department of Conservation (DOC) and delimits DOC's authority to manage natural and historic resources. All major statutes relating to taking of flora and fauna (*i.e. Wildlife Act 1953, Marine Mammals Protection Act 1978, Native Plants Protection Act 1934,* and *Reserves Act 1977*) are governed by its general provisions. With the included statutes the Act covers most plants, land animals, aquatic life and freshwater fish. Maori natural resource use and interests are relatively strongly acknowledged in the Act. Section 4 states: "This Act shall be interpreted and administered as to give effect to the principles of the Treaty of Waitangi." It also provides for the preparation, approval and review of Conservation Management Plans and Strategies, which may make provision for Maori access to traditional resources in the area covered by the plan.

Whether s. 4 provides Maori with substantive harvesting and use rights remains unclear. On one hand, in *Ngai Tahu Maori Trust Board v. Director-General of Conservation*

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[37] Waitangi Tribunal *Inland Waterways: Lakes* by Ben White (Wellington: Waitangi Tribunal, 1998) at 261.
[38] For an extensive survey of the statutes that affect Maori usufructuary rights today see Robert McClean and Trecia Smith, *The Crown and Flora and Fauna: Legislation, Policies and Practices 1983-98* (Wellington: Waitangi Tribunal, 2001) at 281-365.

the Court of Appeal held that s. 4 should not be narrowly construed and the Department must take into consideration the interests of affected Maori groups when issuing whale-watching permits under s. 6 of the *Marine Mammals Protection Act 1978*.[39] On the other hand, the courts have held that s. 4 does not give general consultation or management rights to affected Maori groups,[40] nor does it allow the court to incorporate Maori use rights into the *Freshwater Fisheries Regulations 1983*.[41]

Nevertheless the *Conservation Act 1987* does provide for some Maori exploitation albeit with the approval of the Crown. In administering the Act DOC has established a general policy toward customary use of protected plants, animals and fish (except commercial fisheries). The use of "traditional materials and indigenous species" is to be authorized on a case-by-case basis. Governmental approval may be obtained if the activity:1) is "consistent with all relevant Acts and regulations (including fisheries legislation) conservation management strategies and plans;" 2) is "consistent with the purposes for which the land is held"; 3) is representative of an established tradition of such customary use at the location where the use is to be carried out, and 4) does not affect the preservation of the indigenous species at the location where the use is to be carried out.[42]

Section 53 of the *Wildlife Act 1953* also allows the Minister to authorize the taking or killing of wildlife for certain purposes. These purposes can include traditional or cultural uses and can include the harvest of such things as feathers and bones as well as killing.[43] Under this section Maori continue hold traditional rights to harvest muttonbirds in certain areas and

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[39] [1995] 3 N.Z.L.R. 553 (N.Z.C.A.).
[40] *Ngatiwai Trust Board v. New Zealand Historic Places Trust*, [1998] N.Z.R.M.A. 1 (H.C.)
[41] *Taranaki Fish and Game Council v. McRichie*, [1999] 2 N.Z.L.R. 139 (N.Z.C.A.) (Maori customary fishing rights do not extend to trout as fish have always been subject to extensive regulation since their introduction into New Zealand. All fishing rights to trout derive from legislation).
[42] N.Z., Department of Conservation, *Conservation General Policies 2005 amended 2007* at s. 2(g). online: <http://www.doc.govt.nz/templates/MultiPageDocumentTOC.aspx?id=42655>.
[43] *Wildlife Act 1953*, s. 6(2).

on certain islands.[44] They may also utilize bones and feathers from protected species provided they are taken from found carcasses.

C. The Foreshore[45]

Prior to the *Foreshore and Seabed Act 2004* contending legal claims over the title and use of the foreshore by Maori and the Crown were legally unsettled but ignored in practice.[46] The Crown's claim to the area was weak but Maori claims were likewise not entirely vindicated.[47] Nevertheless the very uncertainty was construed in favour of the Crown. In the 1963 decision *In Re Ninety Mile Beach* the Court of Appeal, observing that Maori could not be implicitly deprived of property rights by legislation, nevertheless held that unless the Land Court stipulated that the foreshore was included within an issued title to adjacent dry land, Maori customary title was extinguished and the Crown owned the foreshore.[48] The 2003 Court of Appeal decision *Ngati Apa v. Attorney-General* overruled *Ninety Mile Beach* and held the common law presumption that aboriginal possessory interests ended at the high water mark did not apply in New Zealand. Yet, the Court also noted that Maori ownership of the foreshore was both unproven and may have been extinguished in any event.[49] The decision provoked a political firestorm and led to the enactment of the *Foreshore and Seabed Act*

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[44] *Titi (Muttonbird Notice) 2005, s. 3* provides for Maori hunting of muttonbirds on islands surrounding Stewart Island, the Codfish Island Nature Reserve and Crown Titi Islands (defined in Schedule 106 of the *Ngai Tahu Claims Settlement Act 1998*). There are also a small number of Wildlife Sanctuary Orders covering individual islands, such as the middle island of the Trios Islands in the Marlborough Sounds where birding rights were reserved by the former Maori owners as a condition of the land transfer to the Crown. In these cases the right to carry out the birding activity is reserved to the tangata whenua of the islands and their spouses.

[45] "The seashore, foreshore or sea beach is that portion of the realm…which lies between the high water mark of medium high tides and low water mark, but it has been said that all that lies to the landward of the high-water mark and is in apparent continuity with the beach at high-water mark will normally form part of the beach. It has also been held that "foreshore" means the whole shore that is from time to time exposed by the receding tide." *Halsbury's Law of England*, 4th reissue vol. (London: Reed Elsevier (UK) Ltd, 2003) 49(2) at 43, para. 18.

[46] By common law the Crown is presumed to absolutely own the foreshore, the beds of tidal rivers and coastal waters by prerogative right. Unless a claimant can show a Crown grant or where the circumstances allow the courts to presume a grant (continuous occupation of sufficient duration or title by limitation), all exclusive occupation or activities beyond the public rights of navigation and fishing are unlawful. Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 103-5. I will not discuss the seabed.

[47] Richard P. Boast, "*In Re Ninety Mile Beach* Revisited: the Native Land Court and the Foreshore in New Zealand Legal History" (1993) 23 V.U.W.L.R. 145.

[48] *In Re Ninety Mile Beach*, [1963] N.Z.L.R. 461 (N.Z.C.A.) [*Ninety Mile Beach*].

[49] *Ngati Apa, supra* note 10 at para. 49.

2004 which extinguished customary title to the foreshore while establishing a statutory regime for Maori to exercise various usufructuary and guardianship activities. However, the Act delineates relatively onerous standards which claimants must meet in order for uses to receive statutory protection as well as severely restricting the range of allowable activities.

Historically Maori extensively used the foreshore and there is little doubt that tikanga Maori possessory interests extended out from dry land to include the area.[50] The area had both a practical (fishing and gathering) and a spiritual relationship to various coastal iwi and hapu.[51] They utilized the tidal zone for fishing (including staking nets and traps and emplacing associated structures), the collection of shellfish and seaweed, hunting seabirds, using sand and stones, grounding waka as well as other activities. They imposed rahui to protect various natural resource stocks and for other reasons, such as prohibiting harvests from areas where an individual had drowned. The use and property rights were often "complex, contested and overlapping".[52] It is possible that the foreshore was not "owned" in the same way from place to place, but certainly the English common law idea that the foreshore was governed by a different "set" of legal rules regarding ownership and other interests, was not accepted.[53]

When the Colonial Office retracted the 1846 instructions to have the colony assume ownership of unoccupied or "waste" lands in favour of Governor Grey's alternative to recognize Maori possessory rights while extinguishing them through purchase ahead of the frontier, the extent of the Maori title subject to pre-emption was not addressed.[54] There is

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[50] For example, in 1921 the Native Land Commission noted the range of possible property rights in its discussion of claims over Te Whanganui-a-Orotu (Napier inner harbour.) N.Z., *Appendix to the Journal of the House of Representatives, 1921-22* "1921 Reports of Native-land Claims Commission" G.5 at 13.
[51] The Waitangi Tribunal has defined those aspects of tino rangatiratanga which relate to authority over the foreshore and seabed. *Report of the Waitangi Tribunal on the Crown's Foreshore and Seabed Policy*, *supra* note 15 at 130.
[52] Richard P. Boast, *The Foreshore* (Wellington: Waitangi Tribunal, 1996) at 18.
[53] *Ibid.* at 21.
[54] William P. Morrell, *British Colonial Policy in the Age of Peel and Russell* (Oxford: Clarendon Press, 1930) at 315-23.

evidence that Crown officials, including Donald McLean, believed that a valid deed of cession would extinguish property rights on the foreshore; suggesting that the government may not have assumed it owned the foreshore unless title on contiguous land was also extinguished.[55] Some pre-emption deeds include references to coastal waterways. Nevertheless, commencing in 1854 the Crown began to grant areas of the foreshore, which suggests that the government assumed that the foreshore belonged to the Crown by common law.[56] *The Harbours Act 1878* provided that "no part of the shore of the sea" could be conveyed or granted without a special act of the general assembly.[57]

After the passage of the Native Lands Acts in 1862 and 1865 the issue whether the foreshore was land owned under tikanga Maori, (and in spite of continuing assertions of ownership and non-alienation by Maori) devolved into a question of whether the Native Land Court had jurisdiction over an application that included the foreshore. In *Kauwaeranga* Chief Judge Fenton of the Native Land Court recognized the unsettled status of the area but declined to absolutely vest the claimed foreshore in the Maori claimant. He instead found that they held "the exclusive right of fishing upon and using for the purpose of fishing" in the area.[58] However Fenton's order, which prevented the Maori from obtaining "absolute propriety of the soil" below the surface, was influenced by the potential for gold beneath the claimed Thames foreshore.[59] In 1872 the Colonial Legislature enacted legislation suspending the Court's jurisdiction below the high water mark thus excluding other claims in the Thames area. In 1883 the Native Land Court in *Parumoana* held that the Ngati Toa applicants were

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[55] "[T]he general presumption seems to have been that Maori owned the foreshore and it was necessary for the Maori title to be extinguished." Boast, *supra* note 47 at 31.
[56] *R. v. Joyce*, (1906) 25 N.Z.L.R. 78 (N.Z.C.A.).
[57] *The Harbours Act 1878*, s. 147. This provision was incorporated in later legislation and was a major statutory basis for Crown claims in to foreshore to assert its right to the foreshore and extinguish any potential Maori possessory claims and to deny jurisdiction to the Maori Land Court to investigate titles below the high water mark.
[58] The *Kauwaeranga* Judgment is found in A. Frame "*Kauwaeranga* Judgment" (1984) 14 V.U.W.L.R. 227.
[59] *Ibid.* at 245. See also Fergus Sinclair, "*Kauwaeranga* in Context*"* (1999) 29 V.U.W.L.R. 139.

"entitled not to the land but to a right [of] fishery." Later instances involving foreshore claims included Awapuni Lagoon in Gisborne, Napier's inner harbour (Te Whanganui-a-Orotu) and in Northland. In the Northland claim *Ngakororo* the Native Appellate Court did not distinguish between an investigation of the foreshore and the adjoining land. The Court wrote:

> The Native Land Court's decision as to whether these mud flats are papatupu land must rest upon findings of fact. Just as in the investigation of title to customary land, it is necessary for the claimant's to establish their right, and this is done by showing that the land has descended to them from a tribal ancestor and has been in continual occupation of the claimants and their predecessors prior to 1840 and down to the date of investigation.[60]

Nevertheless, there were few claims which led to judicial decision and those that were decided were inconclusive. No doubt the meagre record was in part because Maori claimants felt that the chances of vindicating their claims were rather thin; or perhaps it was because ownership of the foreshore was not a highly salient issue given the common law rights afforded the general population, specific legislation affording Maori some use rights, and the limited extent fee simple title to the area was in fact granted by governmental bodies to private individuals or entities. When the issue arose, government policy was simply to remove the issue from the Native Land Court where the claim was disputed, actively dispute claims before the courts, extinguish claims to particular areas through legislation and/or purchase those areas where a successful claim might be brought to avoid adverse precedents.

In *Ninety Mile Beach* the issue of whether the Maori Land Court had jurisdiction to investigate the foreshore and issue freehold order to the beach was squarely before the Court of Appeal. In 1957 the Maori Land Court had awarded title of a portion of Ninety-Mile Beach to Te Aupouri and Te Rawara. The Crown appealed. It argued that the Court had no

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[60] *Ngakororo* case (1942) 12 Auckland NAC 137 quoted in Richard Boast, *Foreshore and Seabed* (Wellington: LexisNexis, 2005) at 66.

jurisdiction because the foreshore had been Crown property since 1840 by common law. The Supreme Court by Justice Turner ruled in favour of the Crown but not on the basis of its common law claim. Instead it held that the Maori Land Court lacked jurisdiction because Maori common law possessory interests had been extinguished by the *Crown Grants Act 1908* and the *Harbours Act 1950*.[61] The Court of Appeal affirmed. It disagreed with the Crown's argument that the Crown owned the foreshore by virtue of the common law when it assumed sovereignty and instead held that the Crown's radical title subject to Maori use and occupancy rights. Prior to the extinguishment of the use and occupancy rights, the Crown had established a mechanism in the Native Land Acts to transform the rights into freehold title. As such, neither the jurisdiction of the Maori Land Court nor the scope of Maori possessory interests was necessarily limited to dry land. Nevertheless where title to the land adjacent to the foreshore had been investigated and the Land Court did not specifically include the foreshore in the issued title, Maori customary title in the area was extinguished.[62] The foreshore not included in the freehold order "remained with the Crown, freed and discharged from the obligations which the Crown had undertaken when legislation was enacted giving effect to the promise contained in the Treaty of Waitangi."[63] Thus the Maori Land Court did have the jurisdiction to investigate the foreshore but once land adjacent to the area had been investigated, Maori customary title or use rights to the area as a separate legally defined area were extinguished.

Even though the result of *Ninety-Mile Beach* was not necessarily novel and had

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[61] *In Re An Application For Investigation of Title to the Ninety Mile Beach* (*Wharo Oneroa A Tohe*), [1960] N.Z.L.R. 673 (N.Z.S.C.)

[62] *Ninety Mile Beach, supra* note 48. The ruling is curious given that the Court of Appeal held that the Crown's argument and claimed statutory extinguishment "amount[ed] to depriving the Maoris of their customary rights over the foreshore by side wind rather than by an express enactment." Richard Boast noted the Court's strained reasoning and suggested that the decision presumed that the Crown held ownership to the foreshore under common law. Boast, *supra* note 47.

[63] *Ninety Mile Beach*, *supra* note 48 at 473, per North J.

practical appeal, the reasoning of the Court was increasingly seen as unsatisfactory.[64] In part this was because of re-invigorated ideas regarding the application of the common law doctrine of aboriginal title in New Zealand. In the 2003 case *Ngati Apa* the Court of Appeal overruled *Ninety-Mile Beach.* While ostensibly the issue before the Court was whether the Maori Land Court had jurisdiction to investigate the foreshore and seabed in the Marlborough Sounds, the decision held that the foreshore and seabed across the country could potentially be Maori customary land and consequentially freehold land -- a potentiality long since discounted by the Crown, especially in light of the holding in *Ninety Mile Beach*. It held that while in specific circumstances Maori customary title to the foreshore had been extinguished, there was not general statutory extinguishment of Maori title over the entire foreshore. Without a general statutory extinguishment of Maori customary title to the foreshore, Maori claimants were free to apply to the Maori Land Court for an investigation of customary title which could potentially lead to the issuance of a freehold order to the area.[65]

The potentially broad reach of *Ngati Apa* caused the Labour Government to quickly enact general legislation extinguishing Maori customary title to the foreshore and seabed in the *Foreshore and Seabed Act 2004*.[66] Section 13 of the Act vests "the full legal and

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[64] Elias C.J. at paragraph 29 in *Ngati Apa* noted Sir Kenneth Roberts-Wray disparaging views of *Ninety-Mile Beach*. Robert-Wray wrote of *Ninety Mile Beach*: "These extreme views [that Maori could claim their tribal lands only be the grace and favour of the Sovereign, who had an absolute right to disregard native title; all titles had to be derived from the Crown, which was the sole arbiter of its own justice] do not appear to be supported by any other cases mentioned in this review of the situation in New Zealand, all of which were referred to by the Judges in the Ninety Mile Beach case, and with some of them there is clear conflict." Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966) at 635.

[65] *Ngati Apa*, *supra* note 10 at paras. 57-76.

[66] The haste in which the Government sought to enact the bill was criticized by Maori groups and other political parties, as well as in submissions before the Select Committee. The Maori Party was organized specifically in opposition to the Bill and captured a significant portion of the Maori vote and 4 Maori seats in the 2005 election. It increased it total to 5 seats in the 2008 election. Subsequently the statute was reviewed the United Nations Committee on the Elimination of Racial Discrimination. The panel stated in paragraph 6: "Bearing in mind the complexity of the issues involved, the legislation appears to the Committee, on balance, to contain discriminatory aspects against the Maori, in particular in its extinguishment of the possibility of establishing Maori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress, notwithstanding the State party's obligations under articles 5 and 6 of the Convention." It urged the government to resume a dialogue with Maori to "seek ways of mitigating its discriminatory effects, including through

beneficial ownership of the public foreshore and seabed" in the Crown as "its absolute property."[67] It restricts the jurisdiction of the High Court to hear aboriginal and treaty rights claims to the area and eliminates the jurisdiction of Maori Land Court to investigate the title or issuing vesting orders for any land in the foreshore except in accordance with the Act. At the same time, the Act set forth various procedures whereby Maori claimants can establish use rights provided the uses fell within the definitions provided by the statute.

Under s. 33 of the Act a Maori claimant can ask the High Court for a finding that they hold "territorial customary rights" to a particular area of the foreshore. Territorial customary rights are further described as "a customary title or and aboriginal title that could be recognized at common law"[68] which is founded on the exclusive use and occupation of a particular area and would have entitled the group to exclusive occupation and use of the area but for the Act.[69] The Act further outlines that "exclusive" use and occupation by the claimant group must be "without substantial interruption in the period that commenced in 1840" until 2004.[70] Other factors include whether the claimant group has had title (and continues to have title) to a significant part of the land adjoining the area since 1840 and whether it controlled the entry of non-group members to the area. Finally, the use and occupation of the land must be related to physical activity. The Act states "no account may be taken of any spiritual or cultural association with the area, unless that association is manifested in a physical activity or use related to a natural or physical resource."[71]

Once the court finds that a claimant group holds customary rights to the territory

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legislative amendment, where necessary." United Nations Office for the High Commissioner of Human Rights, *Decision 1 (66): New Zealand*, online: Office of the High Commissioner for Human Rights <http://www.unhchr.ch/tbs/doc.nsf/ Symbol)/CERD.C.DEC.NZL.1.En?Opendocument>.

[67] *Foreshore and Seabed Act 2004*, s. 13(1).

[68] *Ibid.* s. 32(1).

[69] *Ibid.* s. 32(1)(a) & (b).

[70] *Ibid.* s. 32(2)a.

[71] *Ibid.* s. 32(3).

under s. 33, the applicant may enter into negotiations with the government to establish a foreshore and seabed reserve. If negotiations are successful, the reserve established need not be approved by the court. Conversely upon the application of an applicant group the court may require the group, local councils, the Attorney-General and the Minister of Maori Affairs to propose a charter to administer the proposed reserve area which it will then review.[72] If the Court is satisfied the proposed charter meets all the statutory requirements under ss. 41 and 42, the court must the set apart and establish a reserve.[73] While Crown ownership, public access and navigation rights continue in the area the designated, the reserve itself is to be designed "to acknowledge the exercise of kaitiakitanga by the applicant group over the specified area of the public foreshore and seabed."[74] The charter-established board of the reserve must then prepare a management plan for the area. The management plan must be in accordance with Part II of the *Resource Management Act 1991* (RMA) and must be consistent with the New Zealand Coastal Policy Statement. Provided the plan does not affect navigation and access rights it may limit resource usage in the area. However, the regulation of any fishing activity under the *Fisheries Act 1996* and the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* cannot be affected by the reserve.

The Act also establishes a procedure for the recognition of "non-territorial" customary rights by way of a customary rights order application in the Maori Land Court.[75] This order protects uses in an area over which the applicant group did not historically achieve the requisite exclusive occupation to establish customary title but where their historic activity was of such a nature that the group could be deemed to hold some lesser usufructuary

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[72] *Ibid.* s. 41.
[73] *Ibid.* s. 43.
[74] *Ibid.* s. 40(1)a.
[75] For an in-depth discussion of customary rights orders see Shaunnagh Dorsett and Lee Godden, "Interpreting Customary Rights Orders Under the Foreshore and Seabed Act: The New Jurisdiction of the Maori Land Court" (2005) 36 V.U.W.L.R 229.

interest. Section 50 of the Act establishes the criteria necessary for a customary rights order. In order to achieve statutory recognition the customary activity:

1) "Is, and has been since 1840, integral to tikanga Maori;
2) "Has been carried on, exercised, or followed in accordance with tikanga Maori in a substantially uninterrupted manner since 1840," in the application area;
3) Continues to be carried on, exercised, or followed in the same area of the public foreshore and seabed in accordance with tikanga Maori;"
4) "Is not prohibited by any enactment or rule of law;" and
5) "[H]as not been extinguished as a matter of law."[76]

Once a customary rights order is obtained from the Maori Land Court the claimant can carry out the customary activity under sections 17A and17B and Schedule 12 of the RMA. This allows for commercial activities and excludes the operation of the s. 17A(1) of the RMA "if the exercise of a recognised customary activity exceeds the scale, extent, or frequency specified for the activity under the customary rights order."[77] The holder of the order may exercise the use rights and limit or suspend the activity if the restriction(s) are in accord with tikanga Maori.

Whether the customary rights regimes created under the Act are sufficiently robust to provide adequate redress to Maori, or how these uses will interact with the RMA as well as other legislation which regulates the area is beyond the scope of this discussion.[78] I will venture only two general observations. First, the idea that separation of Maori use rights can be bifurcated into territorial and non-territorial rights adhering to an area because of the claimant's inability to substantiate aboriginal title has been introduced into New Zealand by the Act. Previously only the 1986 *Te Weehi* decision and the much earlier 1870 *Kauwaeranga* case have suggested that Maori customary title could be disaggregated in such

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[76] *Foreshore and Seabed Act 2004*, s. 50(1)(b)(i-iv) and s. 50(1)(c).
[77] *Ibid.* s. 52.
[78] For more detailed discussion is Dorsett and Godden, *supra* note 75; Catherine Iorns Magallanes, "The Foreshore and Seabed Legislation: Resource-and Marine-Management Issues" Claire Charters and Andrew Erueti, eds, *Maori Property Rights and the Foreshore and Seabed The Last Frontier* (Wellington: Victoria University Press, 2007) 119; Valmaine Toki, "Can the Developing Doctrine of Aboriginal Native Title Assist a Claim Under the Foreshore and Seabed Act 2004"(2008) 34 Commonwealth L. Bull. 21.

a manner. McHugh argues that Chief Judge Fenton's 1871 *Kauwaeranga* decision, which held that the claimant Maori held a right of fishery in the foreshore with no possessory interest in the land itself as well as the attendant shifts made in Native Land Court jurisdiction after the decision is evidence that the Native Land Court and the Maori participants fully understood and recognized that all Maori customary possessory interests were not always equivalent to full beneficial interest in land or a freehold.[79] For McHugh, this historically and "legally correct" "bundle of rights" understanding of aboriginal title, provides the possibility that various uses rights associated with aboriginal title may not have been fully extinguished when that title was purchased by the government or transformed through Native Land Court. *Te Weehi* similarly turns on the idea that Maori could exercise various usufructuary rights despite aboriginal title territory either not existing in its full beneficial sense or where it has been extinguished. However, the decision has had limited precedential effect.[80]

Presumably the Act enacted the two categories because it was felt that some applicants under the statutory scheme set forth in s. 33 would be unable to sustain a claim for aboriginal title -- and to this extent the Act is "more" solicitous of Maori usufructuary rights over the foreshore. However, both s. 33 and s. 50 considerably raise the bar for the determination of various rights over the standard presumed in *Ngati Apa*. On one hand, aboriginal title claimants must contend with the onerous common law exclusivity requirements. These requirements may or may not be important under a tikanga Maori analysis which the Maori Land Court would have undertaken prior to the Act. Moreover, even if customary title is found by the High Court, the claimant group does not obtain full beneficial use of the land. On the other hand, the determination of a use right under the statute is unnecessarily burdened through the inclusion of "cultural salience test."

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[79] Paul G. McHugh, "The Legal Status of Maori Fishing Rights in Tidal Waters" (1984) 14 V.U.W.L.R. 242. McHugh was a leading advisor to the Crown in the drafting of the 2004 Act.
[80] *Taranaki Fish and Game Council v. McRichie*, [1999] 2 N.Z.L.R 139 (N.Z.C.A.).

Incorporating Canadian case law, the Act limits the scope of claimed aboriginal rights by providing protection only for those activities that have some central cultural meaning to the claimant.[81] The high "cultural" component for the establishment of a customary rights order, which equates statutory rights with cultural practices is not only unduly restrictive in the context of the Act but introduces a new cultural meaning test into the law. If applied to other areas, this test may in fact limit the reach of tikanga Maori and Maori input in a variety of decisions. While there are some instances in Canada where the cultural requirement has expanded the range of protected activities, it has more often been used by Canadian and Australian courts to deny various use rights typically associated with aboriginal groups because the protected activities did not have the requisite core or central meaning as a cultural practice.[82] Thus the seeming genuflection in the direction of aboriginal legal systems and cultural norms has in practice created onerous legal and evidentiary burdens for aboriginal claimants. The Supreme Court of Canada has recently lessened the cultural requirement.[83] Indeed, the cultural requirement found in the Act, which gives legal protection only to those practices which are central or at the core of a group's culture, has significant definitional (Whose culture and what is the practice?) historical and developmental (How close must a claimed modern-day exercise of a right be to a historic practice?) as well as cultural (The determination of what is central in a culture is itself an culturally-bound analysis.) problems. While the Maori Land Court has an extensively developed jurisprudence involving tikanga Maori it is unlikely to be able to avoid the difficulties inherent in applying such a standard.

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[81] "[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 549-50.

[82] The *Native Title Act* (Cth) and the Australian courts have held that native title and customary interests are derived from and given content by traditional law and custom. In order to maintain a claim for aboriginal title the claimant group must show the maintenance and efficacy of customary law to the present over the area claimed. *Western Australia v. Ward* (2002), 213 C.L.R. 1 (H.C.A.).

[83] *R. v. Sappier; R. v. Gray*, [2007] 1 C.N.L.R. 359 (S.C.C.).

Second, ss. 33 and 50 make reference to common law aboriginal title and aboriginal rights. Given the actual paucity of such common law jurisprudence in New Zealand, one wonders what "common law" will actually apply. The language of the statute suggests that the legislature has established a legal regime based on an amalgam of Canadian and Australian aboriginal common law. Nevertheless, as Prof. McNeil points out in his seminal study of common law aboriginal title, the various common law jurisdictions where settlers now form a majority of the population have significantly different legal and evidentiary approaches to common law aboriginal rights.[84]

D. Maori Subsistence and Commercial Marine Fishing

Unlike hunting and gathering where the extinguishment of aboriginal title and the attendant parasitic usufructuary rights were relatively straightforward from the Crown's perspective, customary fishing rights have presented a different set of issues.

Maori were already expert and engaged in both subsistence and commercial fishing prior to European settlement.

> [A] vast amount of thought and study was devoted to the habits and movements of different kinds of fish. Fishing grounds at sea were located in the course of time and marked down by taking cross bearings with landmarks ashore. Ingenuity and skill was displayed in solving local problems and utilizing local raw material in their solution. No Maori threw a baited hook into the sea or set a trap on chance but knew definitely the kinds of fish he was after and the time and place where he would meet with success.[85]

Shellfish and fish life were important to the Maori culture and economy. For the most part the exploiting groups had managed to preserve and conserve the resource despite extensive exploitation. Like land, fishing grounds were included within a particular tribal asset base as defined by traditional possessory rights. Recognizing the problems inherent in the translation

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[84] Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 244-97.
[85] Te Rangi Hiroa (Sir Peter Buck), *The Coming of the Maori* (Wellington: Maori Purposes Fund Board Whicoulls Limited 1982) at 236.

of Maori legal concepts such as rangatiratanga and taonga into English legal concepts, the Waitangi Tribunal has noted "in British legal language [the tribes] *owned* their tribal land and sea fisheries."[86]

> Each Clan had its own fishing grounds, and any trespass thereon led to trouble. They were assigned special names, and when folk went out afishing they located the taonga ika or fishing ground, by lining objects on land, hill peaks, promontories trees etc. Two of such lines were utilized, the intersection of which marked the location of the ground.[87]

The mana or authority over waterways, swamps, and the foreshore were not dependant upon a group holding possessory interests and customary rights over adjacent land.[88]

Sea and foreshore products were exchanged or traded by groups living close to the shoreline with inland groups. William Colenso a 19th century European observer of Maori life, wrote in 1868:

> Dried sea-fish, or dried edible sea-weed, or shark oil, or karaka berries, would be given by natives living on the sea coast to friendly tribes dwelling inland; who would afterwards repay with potted birds, or eels, or hinau cakes, or mats….[89]

The general principle of these "gift-exchanges" was probably governed by the tikanga Maori concept of utu -- for every gift given -- a gift would be given in return. While an exchange governed by utu was not dependant upon the value of the goods, expectations of the certain values involved in the exchange were likely to be influenced by past transactions and the social value of continuing reciprocity.[90]

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[86] N.Z., Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report, 1992* (Wai 27) (Wellington: Legislation Direct, 2002) at 102 [emphasis in original] [*Ngai Tahu Sea Fisheries Report*].

[87] Elsdon Best, *The Maori As He Was* (1924) quoted in The New Zealand Law Commission, *The Treaty of Waitangi and Maori Fisheries A Background Paper, No. 9* (Wellington: New Zealand Law Commission 1989) at 29.

[88] Marr, *supra* note 12 at 43.

[89] Quoted from Ministry for Maori Development, *Nga Kai O Te Moana Customary Fisheries Philosophy and Practices Legislation and Change* (Wellington: Ministry for Māori Development, 1993) at 15.

[90] "[A]n outstanding feature of gift-exchange…was that each transaction had the appearance of being free and spontaneous, the donors giving with good grace, apparently of their own volition and without stipulation as to a return gift. In reality, a strict system of obligation applied, involving not only a requirement to give when the situation arose and an obligation to accept, but an imperative to repay the gift by providing another of at least equivalent value. Failure to repay attracted certain penalties, ostracism and doom. Mana required that repayment

After the Treaty was signed in 1840 Maori continued to extensively utilize foreshore, in-shore, and offshore fishing resources. European technology added little to the high level of their fishing technology, methods, and biological knowledge except for the adoption of metal barbs and hooks and European ship technology.[91] In the far north the Waitangi Tribunal found that between 1840 and 1870 Western development and trade were "grafted" onto traditional fishing practices by the Muriwhenua iwi.[92] The colonists, concentrating on agriculture, pastoralism, gold mining, and logging showed little interest in exploiting marine and freshwater resources. Thus as settlement increased, commercial exploitation by Maori increased. The tribes supplied nearly all of the fish to Auckland and many towns depended on local Maori for their fish supply. [93] For example, when John Mansfield established a canning plant in 1883 at Helensville he reported that there was "no systematic fishing by white folks" in the area.[94] According to the Waitangi Tribunal by the mid-1860s Ngai Tahu commercial fishing extended 20 to 30 miles offshore.[95]

As the Land Wars flared in the 1860s and racial attitudes between Maori and the settlers hardened, Maori were subject to increasingly discriminatory legislation. In 1863 the colonial legislature and executive assumed responsibility for Maori affairs.[96] The settlers, now a majority of the population, began to compete with Maori commercial fishing. At the same time, Maori fishing, which was a hapu based activity, diminished because of population decline and breakdown of tribal structures as well the dispersal of tribal members due to

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be somewhat in excess of equivalence. The purpose was not only to effect the transfer of goods to mutual advantage, but to establish continuing bonds and obligations between tribal and sub tribal [*sic*] groups." N.Z., Waitangi Tribunal, *Muriwhenua Fishing Report* (Wai 22) *(*Wellington: The Tribunal, 1988) at 53.

[91] *Ibid.* at 198-202; See also *Ngai Tahu Sea Fisheries Report*, s*upra* note 86 at 35.

[92] *Ibid.* at 220-1.

[93] David Johnson completed by Jenny Haworth, *Hooked The Story of the New Zealand Fishing Industry* (Christchurch: Hazard Press Limited, 2004) at 50 [*Hooked*]; *Muriwhenua Fishing Report* at 4.2.

[94] *Hooked*, *supra* note 93 at 50.

[95] *Ngai Tahu Sea Fisheries Report*, *supra* note 86 at 293.

[96] Keith Sinclair, *A History of New Zealand* (Auckland: Penguin Books, 1991) at 142-3. F.M. Brookfield, *Waitangi & Indigenous Rights Revolution, Law & Legitimation,* 2nd ed. (Auckland: University of Auckland Press, 2006) at 120-2.

insufficient tribal land and fishery reserves.[97] As in-shore fisheries became less productive, the tribes also lacked the capital to purchase boats and equipment better suited to deeper water fishing.

The colonial state also started regulating fisheries. The early statutes and regulations established a basic regulatory regime to manage the fishery. The system sought to conserve the fishery through licensing requirements and the imposition of various controls relating to the equipment, fish size, and closed seasons. Initially, hook and line fishing and common law private fisheries were exempted, but Parliament later required various licenses for these activities as well.

The regulatory framework impacted on the already declining Maori fishing activities in four major ways. First, in spite of the Article Two guarantee to Maori of exclusive possession of their fisheries, state regulation assumed that the colonial state had absolute regulatory authority over all fisheries and ownership of all tidal land as defined by English common law. The presumption further stipulated that Maori fishing rights, like the other aboriginal rights discussed above, were non-severable from land held under customary title such that they were extinguished upon issuance of a Crown grant.[98] After the grant was issued, the aboriginal rights were replaced by statutory and common law rights held by the private owner of the land, unless there was a specific reservation in the land transfer or where there was express legislation regulating the fishery. In *The King v. Joyce* this rule was outlined by Justice Williams.

> A suggestion has been made that the terms of the Treaty of Waitangi, which guaranteed to the Natives their fisheries as well as possession of their lands, showed that it could not have been the intention of the Crown to grant the beds of

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[97] *Ngai Tahu Sea Fisheries Report*, *supra* note 86 at 127.
[98] *Keepa v. Inspector of Fisheries: Wiki v. Inspector of Fisheries*, [1965] N.Z.L.R. 322 (N.Z.S.C.); *Weepu*, *supra* note 28

> streams. But land is not granted by the Crown until the Native title to such land, which the Treaty of Waitangi had guaranteed, has been extinguished by purchase or otherwise. If it could be shown that in any particular stream the Native rights of fishing had not been ceded by the Natives, although the land on each side of it had been ceded, the presumption in that case might well be excluded. But in general where a block of land having streams on it is ceded by the Natives to the Crown, in which streams before the cession of the Natives were accustomed to fish, the right of fishery would be *ipso facto* extinguished.[99]

Where the common law did not clearly secure Crown control, such as in respect to lakebeds and non-navigable rivers, it was modified by legislation or by agreement.[100]

Second, Crown regulation also assumed that the Treaty was not sufficient in itself to create judicially enforceable rights. The guarantee of exclusive and undisturbed possession of fisheries set forth in the Article Two provided neither a Maori harvest entitlement nor did it provide for customary fishing activities without express legislative authorization.[101] The willingness of a court to find a legislative recognition or grant of a treaty right was rather narrow. For example, neither the statutory mention of the Treaty in s. 8 of the *Fish Protection Act 1877* (which stated "[n]othing in this Act shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi" or "take away, annul or abridge" any of the rights secured Maori by the Treaty)[102] nor the 1885 regulations promulgated pursuant to the *Fisheries Conservation Act 1884* (which provided "These regulations shall not extend or

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[99] *The King v. Joyce*, *supra* note 56 at 91-2.
[100] For example s. 2 of the *Fisheries Amendment Act 1908* allowed the Governor, on the recommendation of the Maori Council of the Arawa Maori District to issue trout licenses which "shall authorize the holder thereof to fish for trout for the use and consumption of himself and the members of his family, and for no other purposes whatsoever."
[101] This was the general state of the law after *Wi Parata*. Chief Justice Prendergast in *Wi Parata* refused even to recognize the efficacy of legislative recognition. He noted that the references in the *Native Rights Act 1865* could not be taken seriously because customary law did not in reality exist. "But a phrase in a statute cannot call what is nonexistent into being." *Wi Parata*, *supra* note 10 at 79. In contrast, the Privy Council in *Nireaha v. Baker* held that aboriginal rights not only "legally" exist where the have not been legally extinguished and they can be a basis for judicial proceedings and rule of decision. In *Hohepa Wi Neera v. Bishop of Wellington*, (1902) 21 N.Z.L.R 655 (N.Z.C.A.) the Court of Appeal distinguished *Nireaha v. Baker* and re-asserted the rule that the judiciary could take no cognizance of Maori customary right where a Crown grant has been issued.
[102] *Fish Protection Act 1877*, s. 8.

apply to any Maori");[103] nor s. 77(2) of the *Fisheries Act 1908* (which stated "nothing in this Part of this Act [Part I sea fisheries] shall affect any existing Maori fishing rights")[104] were considered to be a sufficient legislative recognition of Article Two fishing rights.[105] In *Waikpapakura v. Hempton* the Court of Appeal held s. 77(2) did not afford the requisite statutory recognition to Maori fishing rights. It concluded that Maori fishing rights were incapable of recognition in a court of law absent such statutory recognition. Before the *Waikpapakura* Court, Solicitor-General J.W. Salmond set forth the Crown's position on fisheries law as it had been understood in the previous 50 years. Salmond argued:

> The plaintiff's claim is for a non-territorial fishery in the tidal waters of the Crown. The [tidal] land has belonged to the Crown since the Crown came to New Zealand. The principle that tidal waters belong to the Crown is in force here unaffected by the Treaty of Waitangi or Native land legislation. Native customary title is limited by high water-mark, and does not include tidal waters. It is illegal for the Crown to make a grant that would interfere with the public right of fishing and navigation….There can, therefore, be no territorial fisheries in the sea. Apart from legislation the Treaty of Waitangi is merely a bargain binding upon the conscience of the Crown and is not a source of legal rights. There is no legislation giving to Maoris the right to fish in non-territorial waters. The only customary right recognized in the Native legislation is Native customary ownership of land. The Native Land Court has no jurisdiction to ascertain the title to incorporate hereditaments…Section 77, subsection 2, of the Fisheries Act 1908…is merely a saving clause and does not create rights.[106]

Third, fishing legislation assumed that the adoption of English legislation and English common law as it related to fisheries in New Zealand narrowed the scope of Maori fishing rights, both as rights arising from possession of the shoreline and as non-territorial rights.[107]

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[103] N.Z. New Zealand Gazette, 1885 *Regulations under "The Fisheries Act, 1884"* vol. I, March 27, No. 20, April 2 Published.
[104] *Fisheries Act 1908*, s. 77(2).
[105] *Waikpapakura v. Hempton,* (1914) 33 N.Z.L.R. 1065 (N.Z.C.A.). The Court was construing ss. 77(2) and 76(1). Section 76(1) stated: "No Maori or half caste habitually living with Maoris according to their customs shall be sued for any fine or forfeiture under this part of this Act unless and until the authority of the native Minister to take proceedings has been filed in the Court in which such proceedings are intended to be taken."
[106] *Ibid.* at 1068.
[107] The common law held that there was no property right or right of ownership in wild fish until they are killed, captured or impounded. Fisheries then are "mere profits of the soil over which the water flows" and ownership of a fishery is derived from title to the underlying soil. The rights to a fishery can be separated from the underlying soil but the separation must be accomplished by grant or prescription, not by custom as the

On one hand, the courts recognized that local circumstances, including Maori practices or customs and usages led to different rules. In *Baldick v. Jackson*,[108] for example, Chief Justice Stout held that contrary to English law, whales in New Zealand were never considered Royal fish. Moreover, a claim to whales based on the Royal prerogative against the Maori would have no validity because they were accustomed to engage in whaling and the Treaty "assumed that their fishing was not to be interfered with…."[109] On the other hand, where common law rules presumably would have upheld exclusive Maori claims to a fishery or a right of soil over which water flowed (arising from customary practice or as confirmed by the Treaty of Waitangi) the judiciary limited the scope of the common law rule. For example, in the 1871 *Kauwaeranga* judgment Chief Judge Fenton refused to follow English common law and hold that the Maori claimants in the case, who possessed their territory in a manner factually similar to the possession of oyster beds in England which had enabled English claimants to secure title there, were not entitled to a fee simple grant in the foreshore.[110] In contrast to the *Kauwaeranga* judgment, where the Native Land Court disaggregated common law rights to frustrate Maori claims to the foreshore, the Court of Appeal *In Re the Bed of the Wanganui River* held that riparian owners along the Wanganui river were entitled to the common law presumption *ad medium filum* because "the conception of separate ownership of the bed to a river, distinct from that of the banks, is one not met with in Maori legal

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establishment of such a custom would be unlawful. Where there is no grant or prescription, fishing rights attach to the soil. Because the common law held that there could be no ownership in wild fish, a "right of fishery" where the rights holder did not have underlying ownership to the soil, was considered distinct from ownership. Rather, it was a usufructuary right derived from grant or prescription claimed against the owner of a grant. It was not a right of property in the fish or the water. It could not be accomplished by customary practice. Michael Sullivan, "Common Law Fishing Rights" online:<http://www.brookersonline.co.nz.>.See also *Attorney-General v. Emerson*, [1891] A.C. 649 (P.C.).

[108] *Baldick v. Jackson*, (1911) 30 N.Z.L.R. 343 (N.Z.C.A).

[109] *Ibid.*at 345.

[110] *Kauwaeranga*, *supra* note 58 at 244. Fenton, C.J. wrote: "[I]t is remarkable that the use to which this land has been immemorially put by the natives is exactly the same as that to which the shore at Great Crosby was put by Blundell, the plaintiff in *Blundell v. Catterall*, who had "the exclusive right of fishing thereon with stake nets, and of driving those stakes into the soil that they might support the nets." See *Blundell v. Catterall*, (1821) 5 B. & Ald. 268; 106 E.R. 1190.

philosophy."[111] Thus even in absence of the common law presumption of riparian ownership extending out to mid-stream, tribal claims to retain ownership based on un-extinguished native title would have been defeated.

Finally, despite the existence of Maori commercial fishing, legislation assumed that all Maori fishing was non-commercial and geared only toward subsistence and cultural (*e.g.* hui or tangihanga) activities. These subsistence rights did not extend to non-native species such as salmon and trout. The reason for the subsistence limitation differed among policy-makers and across time: racial animus after the wars, the increased European disdain for all things Maori, attitudes towards the purportedly "primitive" stage of Maori society and the communistic nature of Maori land tenure, liberal notions concerning the benefits of equal treatment under the law and the desirability of amalgamation all played a part.

The first fisheries legislation of any type was the *Oyster Fisheries Act 1866*. The Act provided for the commercial leasing of oyster beds, allowed for the enclosure of oyster beds (without Maori permission despite their claims to the foreshore) and sought to encourage artificial propagation. There was no Parliamentary provision for Maori use. However several years after the passage of the Act in debate concerning new fisheries legislation, it was noted in Parliament that an exclusion from the *Oyster Fisheries Act 1866* for Maori subsistence purposes had been made.[112] Later legislation provided for the setting aside of oyster beds in the vicinity of Maori settlements for their exclusive use or exempted them from the regulation when gathering for food.[113] The protective language found in s. 8 of the *Fish Protection Act*

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[111] *In Re the Bed of the Wanganui River*, [1962] N.Z.L.R. 600 at 621 (N.Z.C.A.), Turner J.
[112] "Out of consideration for the aboriginal natives, who were fond of oysters and who might not understand the necessity of preserving them in the way proposed, and who would probably offend against the law." (Pollen, 1874 16 *NZPD* 478) quoted from *Muriwhenua Fishing Report*, *supra* note 90 at 81. The author could find no evidence of an exemption for Maori in any regulations promulgated under the Act referred to by Mr. Pollen.
[113] *Sea-Fisheries Act 1894*, ss. 17 and 72. These provisions were re-enacted as ss. 17 and 76 of the *Fisheries Act 1908*.

1877, while quite broad seems to have been similarly limited to subsistence harvesting.[114] On June 8, 1880 Attorney-General Whitaker, while moving for second reading on a new consolidated fishing bill [ultimately enacted in 1884] stated that he wished to re-visit s. 8 of the 1877 Act, which he noted, exempted "any aboriginal native taking fish for his own use." [115] He felt the exemption should not extend to "fish which the Europeans had introduced into the colony."[116] During the ensuing discussion no member disputed Whitaker's characterization of the section and there was no reference to Maori fishing in the *Fisheries Conservation Act 1884*. However regulations promulgated pursuant to the *Fisheries Conservation Act 1884* adopted Whitaker's suggestion differentiating between indigenous and introduced species.

> Nothing in these regulations shall be deemed to prevent any Maori from taking oysters or indigenous fish (exclusive of seals and other amphibious mammalia) for consumption by himself and family, and not for sale. Nor shall they extend, or apply, to the taking of indigenous fish with rod and line.[117]

The Oyster Fisheries Act 1892 allowed for the dedication of beds to be used exclusively by Maori "for their own food" and allowed for regulations "preventing the sale by Natives of any oysters from such beds."[118] When the *Sea-Fisheries Act 1894* replaced the previous 1887 and 1884 Acts the regulations which exempted Maori subsistence use promulgated under the 1884 Act were not repealed and continued in force.[119] Similarly the *Maori Councils Act 1900* provided that a Maori council, subject to the Governor's approval, could regulate "all oyster-

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[114] Section 8 of the *Fish Protection Act 1877* states: "Nothing in this Act contained shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder."
[115] N.Z. Legislative Council, *Parliamentary Debates*, (June 8, 1880) at 100 (Hon. Frederick Whitaker).
[116] *Ibid.*
[117] The New Zealand Gazette: Section (2) *Regulations under "The Fisheries Conservation Act, 1884"* proclaimed 2 June 1885 No. 35 June 4, 1885. This section replaced an earlier regulation promulgated in April 1885 which stated: "these regulations shall not extend or apply to any Maori, nor to the taking of fish with rod and line."
[118] *Oyster Fisheries Act 1892*, s. 14.
[119] *The Sea-Fisheries Act 1894*, s.73.Regulations promulgated in 1904 under the 1894 Act revoked the remaining protective regulations from the 1884 Act that continued under the 1894 Act. The New Zealand Gazette, 1906 Regulations under the *Sea-Fisheries Act 1894*, No. 41 May 31, 1906.

beds, pipi-grounds, mussel-beds, and the fishing-grounds used by the Maoris or from which they procure food" provided that the Council by-laws did not conflict with general fishing laws.[120] Legislative provisions prohibiting the sale of shellfish and seafood enforced the subsistence aspect of reserved fishing rights.[121]

After the passage of the *Fisheries Act 1908* the idea that Maori fishing rights were limited to subsistence activities continued. The *Fisheries Amendment Act 1923* continued to allow for the setting aside of tribal lands or water "situated in the neighbourhood of any Maori pa or village" for subsistence.[122] The provision was included in subsequent legislation and regulations until repealed by the *Fisheries Act 1983*.[123] On inland lakes the assumption was seemingly the same.[124] For example, s. 14(2) of the *Native Land Amendment and Land Claims Adjustment Act 1922* preserved the right to catch indigenous fish in Lake Taupo as part of the settlement where the Crown assumed ownership of the lake bed.

The subsistence presumption was modified somewhat by recognition that additional harvest was allowable for hospitality purposes. The 1986 *Fisheries (Amateur Fishing) Regulations* exempt various the harvesting restrictions for fish, aquatic life, or seaweed when

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[120] *Maori Councils Act 1900*, s. 16(10). The section was repealed by the *Maori Social and Economic Advancement Act 1945*. The *Maori Councils Amendment Act 1903* provided that the Governor could reserve fishing grounds exclusively for Maori use but provided that the Governor must take into consideration the requirements of the local non-Maori residents.

[121] The *Fisheries Amendment Act 1923*, s. 10 which allowed for the reservation of shellfish beds for foods provided in subs (5) that "no Maori shall sell or give to a European any oysters taken from any such fishery."

[122] The *Fisheries Amendment Act 1923*, s. 10(1); subs. (5) provided: "[N]o Maori shall sell or give to a European any oysters taken from any such fishery." Subsection 4 of the Act stated that where there were more oysters than would be required for food or for propagation, the Minister was authorized to purchase the surplus. The proceeds were then to be used to extend and conserve the oyster beds.

[123] For example in the *Sea-Fisheries Regulations 1939* Part XV (Oyster Reserves for Maoris) Section 1(1) states "No Maori or other person shall sell any oysters taken from" oyster-fisheries reserved under the regulations. In s. 2 the designated oyster areas set forth in s. 1 were "oyster-fisheries wherein Maoris only may at all times take oysters for their own food."

[124] For example s. 2 of the *Fisheries Amendment Act 1908* allowed the Governor, on the recommendation of the Maori Council of the Arawa Maori District to issue trout licenses which "shall authorize the holder thereof to fish for trout for the use and consumption of himself and the members of his family, and for no other purposes whatsoever."

the harvest is used in a hui or tangi.[125] These 1986 regulations controlling harvesting can be augmented where a Maori community has established wider customary fishing opportunities through various legislative provisions enacted in the 1990s such as a taiapure (coastal fisheries in areas of special traditional significance to iwi that are under community management authorized by statute) or mataitai (customary fishing areas established by regulation).[126]

Maori commercial fishing remained small after the decline in the 1870s. Until the 1960s commercial fishing (which after 1885 largely excluded Maori) concentrated on bottom dwelling fish and served the local market.[127] The small vessels in the in-shore fishery (over the continental shelf up to 200 meters or out to the territorial sea boundary) were not suited for deep-sea fishing. Outside of the three-mile territorial sea, and 12 nautical mile fishing zone (established in 1965) harvesting was carried out mainly by foreign vessels.

The small-scale nature of the fishing industry was initially supported by the local orientation of the small independent fishers, distance from export markets, and lack of investment. Prior to 1937 there were few restrictions on entry into the fishing business.[128] Even at this low level of exploitation some over-fishing and market distortion were apparent. In an effort to ameliorate market problems and to conserve the resource, limitations were placed on various areas, fishing methods and the number of export and commercial fishing

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[125] *Fisheries (Amateur Fishing) Regulations*, s. 27A.

[126] The Waitangi Tribunal stated that the current customary reserve framework was relatively inflexible and did not sufficiently affirm customary rights or rangatiratanga over the fishery. *Report of the Waitangi Tribunal on the Crown's Foreshore and Seabed Policy*, *supra* note 15at 114-7. As of June 2008 there were 17 areas that had been approved by the Ministry of as customary fishing areas. There are a total of 9 Mataitai (4 North Island, 5 South island) and 8 Taiapure (5 North Island, 3 South Island). New Zealand: Ministry of Fisheries online: <https://www.nabis.govt.nz/nabis_prd/index.jsp >

[127] Until the mid-1960s the industry had survived by catching seven of the 42 or so fish found close to shore. If a fishing vessel caught fish that sold readily, it brought them ashore. Most others were thrown overboard, dead or alive. *Hooked*, *supra* note 93at 247.

[128] Prior to 1937, the *Fisheries Act 1908* required that all fishing vessels (not fishers, fish processing plants or exporters) must be licensed. Licenses were issued at a nominal cost and the Marine Department had no power to refuse an application for a license.

permits. The closed licensing regime reinforced customary local practices in each port.[129] Despite the extension of jurisdiction to 200 miles, the 1980s saw continued low catches across a growing number of traditionally exploited species and an increased catch in less familiar "low value" species, cost inflation, and overcapitalization. As stated by the Ministry of Agriculture and Fisheries (MAF) before the Waitangi Tribunal.

> The decline in the yields of the major species placed many fishermen and fishing communities under financial pressure. Coastal communities heavily dependent on fishing became at risk. Recreational and traditional and Maori fisheries began to suffer as the fishery resource became further depleted.[130]

The *Fisheries Act 1983* was enacted to address this decline by providing for Fisheries Management Plans (FMPs) and restructuring the licensing regime in an effort to reduce in-shore fishing by reducing the number of fishers.[131] The Act cancelled the permits of part-time fishers and continued the 1982 moratorium on the issuance of new commercial licenses in the inshore.

As initially proposed, the 1983 Fisheries bill repealed the *Fisheries Act 1908* and with it s. 77(2) but contained no equivalent provision.[132] However, after vigorous criticism from the New Zealand Maori Council and Maori members of Parliament, the bill was amended to contain several provisions that the Government contended were protective of Maori interests. The Director-General of Agriculture and Fisheries was required to consult with Maori users when promulgating a FMP, one of five members of the Fisheries Authority (which would review license applications and objections to fishery management plans) would be appointed

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[129] *Hooked*, *supra* note 93, at 179.
[130] *Ngai Tahu Sea Fisheries Report*, *supra* note 86 at 217.
[131] Gina Straker, Suzi Kerr & Joanna Hendy, *A Regulatory History of New Zealand's Quota Management System* (Wellington: Motu, Economic and Public Policy Research Trust, 2002) at 20.
[132] Section 83(2) of the bill stated: "Nothing in this Act, except provided in Section 84(4) of this Act [relating to the operation of s. 14 of the Maori Land Amendment and Maori Lands Claims Adjustment Act 1926] shall affect any Maori fishing rights given under any other enactment." The Lands and Agriculture committee replaced this language with "Nothing in this Act shall affect any Maori fishing rights." This proposed language eventually became s. 88(2) of the *Fisheries Act 1983*.

after consultation with the New Zealand Maori Council, and regulations continued to allow Maori to take extra shellfish for tangi and hui. Most significantly s. 88(2) which provided "Nothing in this Act shall affect any Maori fishing rights" replaced more restrictive language in the initial bill. Nevertheless Maori remained dissatisfied at the failure to recognize the Treaty and the discretionary nature of Maori representation and consultation rights. Moreover, they argued that provisions seeking to reduce the number of part-time fishers disproportionately affected remaining Maori harvesters.[133] In submissions before the Waitangi Tribunal in the Ngai Tahu Inquiry, MAF admitted the extensive cancellations of commercial permits held by part-time fishers as defined by the statute significantly affected Maori involvement in the fishing industry.

The FMPs envisioned by the *Fisheries Act 1983* were never really implemented. After the 1984 election, MAF suggested that the industry embrace a Quota Management System (QMS) and Individual Transferable Quota (ITQs) in both in-shore and deep-water fisheries. This approach, implemented in the *Fisheries Amendment 1986*, sought to manage the fishery by allocating individual quotas to fishers that could then be traded or leased. In contrast to traditional regulations, which sought to limit the harvest through various input controls

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[133] Section 2(1) of the Act declared that a commercial fisherman was an individual who engaged in fishing throughout the year or during a specified season and that who "relies wholly or substantially on his fishing income for his income." Additionally fishing income had to be at least $10,000, held a controlled fishery license where applicable, and obtained 80 percent of non-investment annual income from fishing. The Minister could disregard these limits if the applicant's fishing was a "vital part" of annual subsistence income. *Fisheries Act 1983*, s. 2(1); *Ngai Tahu Sea Fisheries Report*, *supra* note 86 at 219; In the *Muriwhenua Fishing Report*, the Tribunal noted the cumulative adverse affects of decreased fishing on the remote communities of the far north. "A number of small towns and settlements in Northland have fishing as a major part of their economy. These townships are characterized by a narrow economic base and dependence on primary sector and Government employment. Many have problems in providing enough jobs for the needs of the population. Unemployment is already high, and the paucity of job opportunities in pastoral farming or forestry, and the tightening in Government spending suggests that prospects are limited for employment growth….High unemployment…demonstrates that there are few job opportunities for fishers and other displaced from the industry. Therefore the loss of jobs will directly and indirectly result in population loss, with the consequent decline in the living standards of those remaining in the depleted communities. This will be either through direct population loss, if fishers leave in search of work, or through reduced income levels if fishers have to take further cuts in their catch, or leave the industry and remain on the dole. The decline in their spending power contributes to a pattern evident in many areas of New Zealand, the gradual attrition of services in rural areas." *Muriwhenua Fishing Report*, *supra* note 90 at 119. See also *Hooked*, *supra* note 93at 358.

(restrictions on fishing methods, timing of seasons and areas), ITQs allocate the allowable catch among harvesters as a form of individual harvesting rights.[134] They were initially determined on the basis of the full-time fisher's best average catch over the two best years of 1982, 1983 and 1984; and were allocated in perpetuity. In addition, they were to be a property right to harvest (as opposed to ownership of the fish) a certain amount of fish. As a form of property, the quotas could be sold and purchased, leased, used as security and inherited. Where the total allowable commercial catch was too large and the quotas needed to be reduced by Crown action, the Crown would need to pay the owner fair compensation.[135]

The QMS, which created and allocated perpetual property rights in the fishery to a significantly smaller number of fishers than had existed prior to 1982, angered many Maori. Since the foundation of New Zealand, the state had refused to recognize any exclusive Maori right to exploit the marine fishery. This refusal was based on public policy and the common law premise that all individuals, Maori and Pakeha alike, have a right to fish below the high water mark. However, the QMS which in effect "fenced the watery common" undermined whatever legitimacy the common law rule may have had while foreclosing the settlement of any inchoate property or use rights that may arise by virtue of the Treaty.[136] Maori did not object to the introduction of a property rights regulatory regime in principle because they

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[134] An ITQ can be defined as a permanent right to access, catch, and sell a specific proportion of the total allowable commercial catch for a designated species in a specified area. R. Quentin Grafton, "Experiences with Individual Transferable Quotas: An Overview" (1996) 29 Canadian Journal of Economics 135.

[135] *Fisheries Amendment Act 1986* s. 28D(4)a. "After several years of high costs and faced with the prospect of spending NZ$100 million to reduce TACs (total allowable catch) for orange roughy alone, the government switched from quota rights based on fixed tonnages, to denominating the quotas as a share of the TAC (beginning in the 1990 fishing year). In doing so, the burden of risk associated with uncertainty over future TAC levels was moved from the government to the industry." The Government did provide compensation but the total compensation was limited to the amount of resource rental paid during the transition period (1989-1994). Besides money, the Crown alternatively paid partial compensation to fishers adversely affected by providing quotas on other species. The government now can adjust the total allowable commercial catch without having to pay any compensation. Suzi Kerr, Richard Newell and Jim Sanchirico, "Evaluating the New Zealand Individual Transferable Quota Market For Fisheries Management" Motu Economic and Public Policy Research Trust Working Paper #2003-02, March 2003, 4 at 38-9.

[136] The New Zealand Law Commission, *The Treaty of Waitangi and Maori Fisheries A Background Paper, No. 9* (Wellington: New Zealand Law Commission 1989) 11.

could see the advantages such a system had for the environment.[137] However, it was perceived that Maori fishers had already been disproportionally affected by the moratorium on in-shore licenses and the exclusion of part-time fishers.[138] These excluded fishers were not eligible for a quota allocation.

At the same time, the vesting of property rights in the fisheries, seemingly without consideration of Maori interests or claims to the fishery, appeared to be a *prima facie* violation of the Treaty of Waitangi. In June 1985 the former Minister of Maori Affairs Matiu Rata lodged a claim before the Waitangi Tribunal on behalf of five (initially three) Muriwhenua iwi (Ngati Kuri, Te Aupouri, Ngati Kahu, Ngai Takoto and Te Rarawa). He alleged among other things:

> [T]hat the Ministry [of Agriculture and Fisheries] acting on behalf of the Crown has failed to meet its obligation in the terms of the Treaty of Waitangi by presuming that all our customary and traditional fishing rights and interests [have] been completely extinguished.[139]

Because of the importance of the issue and the determination of the Government to implement the QMS, the Waitangi Tribunal severed the Muriwhenua tribes' fishing claims from their other land claims.[140] In 1988 it issued its fisheries report where it held that "[t]he Quota Management System, as currently applied, is in fundamental conflict with the Treaty's principles and terms…."[141] It found that the Muriwhenua tribes' full possession of the territorial sea and fishing activities, which extended outward 12 miles from the shore, had

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[137] R. Fallon, "Individual Transferable Quotas: the New Zealand Case" Organization of Economic Development and Cooperation, *The Use of Individual Quotas in Fisheries Management* (Paris: OEDC, 1993) 44.
[138] As of October 1, 1983 approximately 46% (2260) of license holders had not met the requirements to be a full time fisher under the *Fisheries Act 1983*. Straker, *supra* note 131 at 42.
[139] *Muriwhenua Fishing Report*, *supra* note 90 at 1. The claim was later extended and joined by 2 other Muriwhenua iwi. The claim is found in Appendix 1 of the *Muriwhenua Fishing Report* at 245-54.
[140] The Tribunal noted: "It is enough for us to record that from the testimony as a whole, we are more than satisfied that the five tribes of Muriwhenua share a sufficient inter-relationship, sense of common identity and community of interest as to be seen as one group, and that no purpose would be served in compelling separate claims." *Ibid.* at 4.
[141] *Ibid.* at 239.

been restricted and impinged upon by Crown action. This failure to protect their interests prevented the Maori from developing new technology, exploiting new species in deep water areas and expanding access to markets, leading to a decline of Maori fishing. It further challenged the long held notion that Maori fish harvesting was only for subsistence. For the Tribunal, indigenous culture and tradition is not a stultifying force, but a progressive one as the historical record evidenced indigenous change at the time of European penetration.

> [M]aori tradition does not prevent Maori from developing either their personal potential, or resources, for traditionally Maori were developers. In terms of the equipment at their disposal they substantially modified the natural environment. There was considerable adaptation and development when Maori first arrived here and Maori adopted with alacrity to new development forms when Europeans first came. It is the inherent right of all people to develop their potential.[142]

Despite a recommendation by the Tribunal to not proceed with quota allocation, the Crown proceeded with the implementation of the new regulatory regime for the 1986 fishing year. Regulators did not see any relevance or relationship between Maori claims and the new ITQ system. In 1987 the government intended to add additional species to the system. Because of this Maori Council, Ngai Tahu, Muriwhenua, and Tainui applied in separate court actions for an interim declaration to prevent the further allocation of quota in species not then covered.[143] They argued that further additions to the QMS would affect their fishing rights contrary to s. 88(2) and prejudice their claims currently before the Waitangi Tribunal. In October and November 1987, Justice Greig granted injunctions preventing MAF from further allocations and additions to the QMS covering Muriwhenua's northern fishing grounds, the whole of the South Island and most of the remaining coastline of the North Island. He noted that the tribes had "provided a sufficient ground to show…a recognizable claim in the form

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[142] *Ibid.* at 238.

[143] *NZ Maori Council and Anor v. Attorney-General (Ministry of Agriculture and Fisheries) and Anor*, High Court, Wellington, CP 553/87; *Ngai Tahu Maori Trust Board and Ors v. Attorney-General (Ministry of Agriculture and Fisheries) and Ors, High Court*, Wellington, CP 559/87, 610/87, 614/87. The previous allocation of quota over 29 species carried out in 1986 was not challenged. The injunction prevented new species from being added to the system.

of a proprietary claim or an interest and right" in their fishing areas that are in "conflict" with the proposal to expand the species in the QMS.[144] "It is arguable," he continued, "that the actions of the Minister would affect Maori fishing rights contrary to s. 88(2) and that there was no or no sufficient allowance made for such rights."[145]

1. Legal Developments and the Maori Fishery

At the same time the Maori opposition to the QMS was being fought out in public and in Parliament, the courts were articulating the basis of a new relationship between Maori and the Crown. Based on evolving attitudes towards the Treaty and the common law (and arguably the role of the courts as a separate branch of government charged with protecting rights), these developments added considerable uncertainty to the implementation of the new fisheries legislation. The decisions also expanded the relatively narrow jurisprudential approach historically taken by the judiciary toward Maori in common law and treaty claims; while adding a new constitutional dimension (from the non-Maori perspective) previously lacking in Treaty jurisprudence.

In *New Zealand Maori Council v. Attorney General* the Court of Appeal expanded the interpretive impact of the historic treaty process and delineated a set of substantive obligations within the statutory reference in *State-Owned Enterprise Act 1986* to the "principles of the Treaty". With President Cooke also questioning (in *obiter*) the precedent of the Privy Council's decision in *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*[146] (which held that without statutory rights Maori could not rely on the treaty in the courts), the unanimous Court conceptualized Maori-Pakeha relations as a partnership within

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[144] *NZ Maori Council and Anor v. Attorney-General (Ministry of Agriculture and Fisheries) and Anor*, High Court, Wellington, CP 553/87 in Appendix 5, *Muriwhenua Fishing Report*, *supra* note 90 at 305.
[145] *Ibid.* at 306.
[146] "Under Art. I. there had been a complete cession of all the rights and powers of sovereignty of the chiefs. It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law." *Hoani Te Heuheu Tukino v. Aotea District Maori Board*, [1941] A.C. 308 at 324 (P.C.).

which the Crown owes fiduciary-like obligations to the Maori partners.[147] While the Court tied this good faith aspect to the "principles of the Treaty" set forth in s. 9 of the Act, as well as the *Treaty of Waitangi Act 1975*, the reasoning and language used suggested a broader application. In part the wider approach to the Treaty was anticipated by the Court because of its willingness to understand the Treaty as a "living instrument" relating to fundamental rights. These fundamental rights developed in tandem with international human rights norms.[148]

The 1987 *New Zealand Maori Council* case, particularly the judgment of Cooke P., hinted that the *Treaty of Waitangi Act 1975* was a general statutory incorporation of the Treaty, but ultimately grounded the decision on the language of s. 9 of the *State-Owned Enterprise Act 1986*. However Justice Chilwell in *Huakina Development Trust v. Waikato Valley Authority* suggested a potentially broader approach. [149] He held that the Treaty, as an extrinsic contextual interpretive aid, could provide implied procedural and substantive content to legislation without a specific statutory reference.[150]

> [T]he authorities also show that the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute of the obligations of the Crown to the Maori people….There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.[151]

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[147] *New Zealand Maori Council v. Attorney General the Court of Appeal*, [1987] 1 N.Z.L.R. 641 at 666-7 (N.Z.C.A.), Cooke P. [*New Zealand Maori Council*].
[148] *Ibid.* at 656.
[149] *Huakina, supra* note 10.
[150] While Chilwell, J. noted the New Zealand jurisprudential orthodoxy concerning the status of an international treaty in municipal law he held that an affirmed treaty could nevertheless be used as an interpretive guide. "A Treaty as an international instrument may be used in the interpretation of municipal legislation. International instruments, ratified or otherwise, whether they be covenants, conventions or declarations may be used in the interpretation of municipal legislation. International instruments may indicate legislative policy in regard to municipal law. Parliament may be presumed to legislate in accordance with its international obligations, though those obligations are of more moral than legal force." *Ibid.* at 217.
[151] *Ibid.* at 210.

Alternatively, where a statute was silent on the Treaty but analogous legislation mentioned Treaty principles or suggested/implied an intention to preserve Maori values, the consideration of those values, either procedurally or substantively, would be necessarily included in the administrative process.[152]

The potentially more expansive interpretation of the Treaty, the common law and Maori values in *New Zealand Maori Council* and *Huakina Development Trust* gave additional salience to the 1986 decision *Te Weehi v. Regional Fisheries Officer*. As mentioned above s. 88(2) of the *Fisheries Act 1983* provided "Nothing in this Act shall affect any Maori fishing rights." This statutory provision was similar in form to s. 77(2) of the previous *Fisheries Act 1908* (which stated "nothing in this Part of this Act [Part I sea fisheries] shall affect any existing Maori fishing rights") that the *Fisheries Act 1983* replaced. However, the *Waikpapakura v. Hempton* Court had held that s. 77(2) was merely a declaratory clause -- it conferred no legal rights and had no legal efficacy. In *Te Weehi v. Regional Fisheries Officer*, Justice Williamson took a different approach and held that s. 88(2) allowed Maori to collect a limited amount of undersized shellfish for "immediate eating" notwithstanding other regulations imposing minimum size requirements.[153]

Tom Te Weehi was a member of the Ngati Porou tribe who was collecting paua on Motunau Beach, an area traditionally used by the Ngai Tahu tribe. At the time (1984), Ngai Tahu did not have any proprietary right to land on the foreshore. Two fisheries officers inspected Te Weehi's bag and found that 46 of the 49 paua he had gathered were undersized. Te Weehi claimed that he had the permission of an Ngai Tahu elder and was collecting the shellfish in a customary Maori way under the *Fisheries Act 1983*. The Court held that Maori

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[152] "The New Zealand Courts have on occasion shown willingness to look at Acts of Parliament on a cognate subject-matter basis so that the interpretation of a given Act is kept in harmony with the general policy of other similar legislation." *Ibid.*
[153] *Te Weehi*, *supra* note10

customary fishing rights had not been extinguished by statute and that the "right to take shellfish from the sea along the foreshore need not necessarily relate to ownership of the foreshore."[154] The existence of the Maori customary fishing right then was a "lawful excuse"[155] for not complying with the Act's size requirements.

The significance of *Te Weehi* was not limited to the *Fisheries Act 1983*; it provided another legal ground for the ongoing debate regarding issues of appropriation and the extinguishment which accompanied the resurgence of Maori claims in the 1970s.[156] Nevertheless it had some particularly important impacts on the ongoing disagreement between Maori and the Crown over the implementation of the Quota Management System. First, it revived the Anglo-American doctrine of common law aboriginal title in New Zealand law. This doctrine was enunciated in the 1847 case *R. v. Symonds* and by the Court of Appeal *In Re "The Lundon and Whitaker Claims Act, 1871"*[157] but was subsequently abandoned in 1877 *Wi Parata* decision. Consistent with the common law aboriginal rights doctrine as it is generally understood in Canada and the United States, Justice Williamson held that such rights may not necessarily be extinguished by extensive regulation or a statutory framework which assumes an implied extinguishment. The rights included tribal usufructuary rights to harvest paua, and do not exclude the possibility that Maori had legally cognisable use rights in the foreshore and fisheries absent statutory recognition. Second, it weakened the long-standing rule that Maori customary use rights were co-extensive with Maori customary land

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[154] *Ibid.* at 690.
[155] *Ibid.* at 683.
[156] Paul G. McHugh, "Tales of Constitutional Origin and Crown Sovereignty in New Zealand" (2002) U.T.L.J. 69.
[157] The Court stated "the Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it. But the fullest measure of respect is consistent with the assertion of the technical doctrine, that all title to land by English tenure must be derived from the Crown; this of necessity importing that the fee-simple of the whole territory of New Zealand vested and resides in the Crown, until it be parted with by grant from the Crown." *In Re "The Lundon and Whitaker Claims Act, 1871"*, [1872-1874] 2 C.A. 41at 49 (N.Z.C.A.).

tenure.[158] Prior to *Te Weehi*, the general rule was that where Maori tenure was transformed, either by cession, purchase, confiscation, conquest or the operation of the Land Court, the customary use rights were extinguished. Justice Williamson however recognized a category of customary rights not based on ownership of territory or a claim of proprietary interest. Harvest rights over this area, contrary to the common law property rules, need not be exclusive. Finally, because the reasoning did not exclude the possibility that s. 88(2) could include substantive statutory rights, (rather then simply indicating an intention to preserve un-extinguished common law rights) and it raised the possibility that Maori use rights could extend beyond the bundle of traditional "uses" usually understood as "aboriginal rights" in common law. Given the "non-territorial" nature of the rights in question, a more expansive statutory determination of what constituted Maori rights heightened by the possibility that s. 88(2) could be interpreted as an incorporation of the Treaty of Waitangi; a possibility mentioned by Justice Greig in his 1987 decision granting the injunction to Ngai Tahu.[159]

> It was not put to me during the course of the hearing, but there may be an argument that that specific and direct provision might be treated as the carrying into municipal law of the Treaty obligation, thus making the right under the Treaty obligation enforceable directly, but that is a digression and I not making any decision even on a limited basis on that.

2. Treaty of Waitangi (Fisheries Claims) Settlement Act

The successful injunctions against further issuance of quota, the 1988 Muriwhenua Report, the uncertainty over the extent of Maori non-territorial rights due to *Te Weehi*, *New Zealand Maori Council*, and *Huakina Development Trust* combined to place significant pressure on the Labour Government to eliminate the uncertainty which now gripped the fishing industry.

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[158] In *Weepu* Justice Adams held that Maori customary rights protected by the Treaty of Waitangi were permissive activities allowed by the Crown as long as it held title to the territory. As "[t]he continuing existence of such rights must necessarily depend upon the continuing power of the Crown as proprietor the lands" when the land was transferred to a third party, the customary right were extinguished. *Weepu*, *supra* note 28at 925.
[159] *Ngai Tahu Maori Trust Board and Ors v. Attorney-General (Ministry of Agriculture and Fisheries) and Ors* is found in Appendix 5, *Muriwhenua Fishing Report*, supra note 90, 307 at 311.

There was generally strong backing for the QMS but its effectiveness was threatened by the inability to continue with planned allocations and add new species. Politically, fishing industry groups opposed Maori claims. They argued that the fishery, unlike land, had not been confiscated, and was held in trust for all New Zealanders. It cited the danger of establishing fishing rights based on racial criteria. While the industry did not object to Maori harvesting for subsistence and cultural reasons within relatively restricted areas, it considered the creation of special or preferential Maori ownership or access to the commercial fishery to violate equality rights.[160] These claims were picked up by the National Party opposition and were shared by many members of the House. Indeed, the Labour Acting-Prime Minister Richard Prebble introduced a bill to extinguish all Maori Rights to the fishery.[161]

As the Labour Government had committed itself to the idea that the Treaty of Waitangi was a founding document of constitutional significance and had enacted legislation enabling the Waitangi Tribunal to review Crown actions since 1840, it chose to negotiate with Maori. Soon after the Justice Greig's 1987 injunction decision, the Government and the New Zealand Maori Council set up a Joint Working Group to report on "how Maori fisheries may be given effect, conservation and management of fisheries in the interim, and a timetable for the transition process." The committee, however, was unable to reach an agreement on several major matters.[162] The Palmer Labour Government nevertheless proceeded to introduce legislation without agreement amongst the parties. After extensive changes to the

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[160] "Reaction to Maori Fishing Proposals" Sound Archives MR 880922 online: Radio New Zealand <http://www.radionz.co.nz/popular/treaty/events-1980s>.

[161] While Prime Minister Geoffrey Palmer was out of New Zealand in the winter of 1989, Acting Prime Minister Richard Prebble introduced a bill proposing the complete extinguishment of all Maori rights to the fishery. P.G. McHugh, "Aboriginal Title in New Zealand: A Retrospect and Prospect" (2004) 2 New Zealand Journal of Politics and International Law 139 at 148-9.

[162] The Maori and Crown members were unable to agree in the Joint Working Group. A major difference was that Maori members insisted that Maori were entitled to the 50% ownership, management and control of the fishery. The Joint Working Group on Fisheries consequently issued two reports. The two reports can be found in The New Zealand Law Commission, *The Treaty of Waitangi and Maori Fisheries A Background Paper, No. 9* (Wellington: New Zealand Law Commission, 1989) Appendix E.

proposed legislation before the Select Committee the *Maori Fisheries Act 1989* was enacted.[163]

The *Maori Fisheries Act 1989*, which the Waitangi Tribunal later characterized as a "breakthrough" toward recognition of Maori Treaty fishing rights,[164] established the Maori Fisheries Commission. The Commission was to facilitate the entry of Maori into the commercial fishing industry. It would receive quota from the Crown of 10% of the total allowable commercial catch (transferred in four equal annual instalments) which were to be split equally between iwi and a Commission-owned company, Aotearoa Fisheries Limited. The Act also brought rock lobster into the QMS, provided for the establishment of taiapure,[165] and made a payment of $10 million to the Commission to assist Maori fishing. At the same time, to facilitate further discussions during the transition period prior to a permanent allocation of monies and quota to individual Maori groups under the Act,[166] the Crown and the Maori plaintiffs agreed to adjourn the earlier litigation before Justice Greig pending the resolution of various interlocutory appeals. Despite these steps however, the Crown moved forward with its appeal to discharge Justice Greig's interim injunction.

In *Te Runanga o Muriwhenua Inc. v. Attorney-General* the Court of Appeal considered the Maori Fisheries Act 1989 as it related to Justice Greig's 1987 injunction decision (Wellington CP 553/87) as well as various interlocutory decisions made by the High Court in April, June and August 1989 in the suits filed under s. 88(2).[167] Significantly, the

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[163] Only 24 lines of the original 24 page bill remained. N.Z., Parliamentary Debates, 501 19 September 1989 (D. Kidd, Marlborough)
[164] *Ngai Tahu Sea Fisheries Report*, *supra* note 86 at 237.
[165] Section 54A of the Act defines a taiapure-local fishery as estuarine or littoral coastal waters that have customarily been of special significance to any iwi or hapu either as a source of food or for spiritual or cultural reasons. The establishment of taiapure was part of for the better
[166] During the 4 year transition period the Maori Fisheries Commission could only lease any quota that it received from the government. *Maori Fisheries Act 1989*, s.7.
[167] *Te Runanga o Muriwhenua Inc. v. Attorney-General*, [1990] 2 N.Z.L.R. 641 (N.Z.C.A.). The *Maori Fisheries Act 1989* did not amend or eliminate s. 88(2) and suits could proceed after the moratorium period ended.

Court of Appeal used *Muriwhenua* to embrace the idea that the common law doctrine of aboriginal title and the Treaty of Waitangi implicate a "rights-based" jurisprudence similar to other human rights jurisprudence found within the New Zealand legal system and delimited the basic legal parameters relating to the nature and extent of Maori fishing rights under the Treaty of Waitangi and at common law.

While it was strictly unnecessary for the Court of Appeal to pronounce on these matters, (the issues were yet to be fully litigated before the High Court) President Cooke's judgment rejected the Crown's argument that Maori had no common law or treaty rights to the marine fishery. Rather he intimated that the issue of existence of Treaty and aboriginal rights as they related to sea fishing was relatively settled in New Zealand law.

> Neither the Tribunal's reports, nor the Law Commission paper, nor the other materials can be conclusive. The Crown and the fishing industry are fully entitled to call evidence to rebut or qualify their effect. Nevertheless it may be that the works of the Tribunal and the Commission, perhaps with the support of a selection from the other evidence presumably available, will be enough to establish, with sufficient particularity, at least a prima facie case as to *the general nature and extent of Muriwhenua fishing rights and practices before the Treaty*. Let it be repeated that evidence introduced by the defendants would also have to be weighed in reaching a final, balanced assessment. All these of course are primarily questions for the Court of trial, the High Court.[168]

President Cooke continues:

> While this Court cannot at the present stage rule on questions of law that are not before us for decision and have not been fully argued, there is clearly a real possibility that the view of the law, and in particular Maori customary fishing rights, provisionally taken by Greig J will prove to be right. The judgment of Williamson J in Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 680 points in the same direction.[169]

Despite the precatory nature of the Court's language, the Court's positive comments about Justice Greig's decision and *Te Weehi* are striking when contrasted with *Waipapakura v.*

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[168] *Ibid.* at 654 [emphasis in original].
[169] *Ibid.*

Hempton, on which both the Crown and fishing industry intended to rely on as authority for the proposition that Maori had no legal claim to the sea fishery. The *Waikpapakura* Court had rejected the idea that either a statute or the Treaty (assuming that it had "the effect of a statute") provided for "the creation or recognition of territorial or extra-territorial fishing rights".[170] This case, the Court of Appeal stated, was of "dubious authority"[171] particularly in light of the Privy Council's later decision in *Amodu Tijani v. Secretary, Southern Nigeria*.[172] In *Tijani*, the Privy Council had held "a full native title or usufruct" survived a cession of sovereignty.[173] The usufruct does not owe its existence to any Royal proclamation, statute or executive order and burdens the radical title of the Crown until lawfully extinguished.[174]

The pre-existing nature of the aboriginal legal rights, the *Muriwhenua* Court continued, gives rise in certain circumstances to a fiduciary duty towards "the holders of such rights in dealings relating to their extinction." [175] The Court found that this duty was consistent with the approach taken in the 1987 *New Zealand Maori Council*[176]case which held that the principles of partnership and fiduciary responsibility was bound up in the "principles of the Treaty" set forth in s. 9 of the *State-Owned Enterprises Act 1986*. The application of these principles to Maori fishing rights under s. 88(2) means "[i]n principle the extinction of customary title to land does not automatically mean the extinction of fishing rights."[177] Indeed, Cooke wrote, when considering the continued existence of marine fishing rights, the case for non-extinguishment may be even stronger. As such, there "may" have been no statutory extinguishment of Maori marine fishing rights, and s. 88(2) "is indeed a

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[170] *Waipapakura v. Hempton*, *supra* note105at 1071.
[171] *Ibid.*
[172] *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399 (P.C.).
[173] *Ibid.* at 404.
[174] The *Muriwhenua* Court found that the Privy Council had held that New Zealand law recognizes usufructuary rights and aboriginal title after a cession in *Kapua v. Haimona*, [1913] A.C. 761 (P.C.)
[175] *Muriwhenua*, *supra* note 167 at 655.The Court cited the Supreme Court of Canada decision *Guerin v. Canada*, [1984] 2 S.C.R. 335 (Nature of Indian title and the federal statutory arrangement for disposing Indian land placed upon the Crown a fiduciary duty to deal with the land for the benefit of the aboriginal tribe).
[176] *New Zealand Maori Council*, *supra* note 147.
[177] *Muriwhenua*, *supra* note 167 at 655.

statutory preservation and protection of them."[178]

Given that s. 88(2) incorporated at least some portion of the Treaty, and *New Zealand Maori Council* held that the Treaty is a "living instrument and has to be applied in the light of developing national circumstances",[179] the Court suggested three factors that need to be considered regarding the content and scope of the reserved or un-extinguished rights. First, the Court suggested that the trial court must determine the content and scope of the reserved right in the depleted resources in light of the Maori "expectation was that non-Maori fishing would not unduly impinge" upon their fishing activities without "a prior arrangement or agreement, or unless those interests were clearly waived." Second, the lower court would need to consider how and if Maori fishing rights have changed because of technological developments, which have enabled the deep-water fishery to be extensively exploited. This analysis involves standard causal legal analysis but also includes counterfactual juridical historicizing premised on the idea that all cultures have the right to develop or evolve. It would only minimally involve the sort of traditional aboriginal rights analysis used by courts -- that aboriginal rights extend only to those activities undertaken by the occupying tribes at some specified date (either the assertion of sovereignty or contact) and aboriginal "possessions" extend only in those areas where the activities were exclusively conducted -- to determine the content and scope of the rights. The Waitangi Tribunal had found in the *Muriwhenua Fishing Report* that Crown actions had excluded Maori from the fishing industry and had prevented them from participating in the developing non-traditional deep-water fisheries. However, it concluded that *had* Maori been allowed to develop they would have naturally and eventually exploited these resources. Third, because Maori rights are not absolute and immutable and Pakeha and Maori always shared the resource, the determination

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[178] *Ibid.*
[179] *Ibid.* at 656.

of the rights involves "balancing and adjusting" of the respective interests to take "into account the realities of life in present-day New Zealand." In this situation:

> The High Court Judges, in applying s 88(2) of the Fisheries Act, may find that the question becomes whether the provisions of the Maori Fisheries Act 1989 are a sufficient translation or expression of traditional Maori fishing rights in present-day circumstances.

The *Muriwhenua* decision together with the approaching end of the transition period in October 1992 caused uncertainty in the industry and created the impetus for continued negotiations between the Crown and Maori.[180] Negotiations for a final settlement continued after the new National Government assumed office in November 1990. Pakeha nervousness increased with the issuance of the 1992 *Ngai Tahu Sea Fisheries Report.*[181] The report outlined much broader Maori property, use and development rights over a much larger area (most of the South Island and the whole of the adjacent continental shelf) than the 1988 *Muriwhenua Fishing Report*. Moreover, it reaffirmed that the QMS was "in fundamental conflict with the terms of the Treaty and Treaty Principles."[182]

The opportunity for a complete settlement presented itself when Sealord Products Ltd., which held a large amount of quota as well as a significant catching and processing

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[180] The High Court while reviewing Justice Greig's September 30 and November 2, 1987 decisions noted the difficulties. "More widely, and in the long term perhaps more importantly, there is a shadow of doubt thrown over a major industry. While the present claims to Maori fishing rights are unresolved, and while the present interim orders are in force, investment decisions are being delayed and the future of the industry is left in doubt. It is not in the public interest that Maori claims be foreclosed without proper hearing, but nor is it in the public interest that a major industry be prejudiced by uncertainty and the continuation of interim orders on an indefinite basis." *Ngai Tahu Maori Trust Board v. Attorney-General*, (CP553/87, CP559/87, CP610/87, CP614/87) 1/11/89.

[181] *Ngai Tahu Sea Fisheries Report*, *supra* note 86.

[182] Discussing the QMS the Tribunal wrote: "It is based on an assumed right of the Crown to dispose of Maori fisheries without Maori consent as if they were the property of the Crown. No effort was made by the Crown to ascertain the nature and extent of Maori sea fisheries guaranteed by the Treaty prior to the passage of this legislation. Nor were the tribes consulted. The legislation constitutes a virtual denial of any significant rangatiratanga of Maori in their sea fisheries; far from protecting it, the Act gives the Crown authority to dispose of the Maori right to their sea fisheries. This the Crown has proceeded to do without consent of Maori. The Act, as it stands, constitutes a serious breach of the Treaty." *Ngai Tahu Sea Fisheries Report*, *supra* note 86at 306.

capacity became available for purchase.[183] After negotiations between the Maori Fisheries Commission and the Government, the issue was resolved with the final settlement for all Maori commercial fishing claims in a 1992 Memorandum of Understanding (executed by six Maori negotiators and the Government in August 1992 and followed in September by a Deed of Settlement.

Not all Maori groups were happy with the settlement.[184] They sought to have it set aside in *Te Runanga o Wharekauri Rekohu Inc v. Attorney-General* [*Sealords*].[185] In *Sealords* the petitioning parties were iwi representatives opposed to the Deed of Settlement.[186] They challenged the authority of the Maori representatives to sign the settlement and legality of the deed under the Treaty. After Justice Heron of the High Court rejected the application for an interim order preventing the agreement from being implemented in legislation, both the claimants and the Crown appealed to the Court of Appeal. [187]

The Court of Appeal affirmed the lower court's judgment dismissing the Maori claimants' requests for an injunction and allowed the Crown appeal dismissing the entire cause of action. The judgment, written by President Cooke, is somewhat oblique and meandering, but it significantly advances the idea that there may be judicially enforceable

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[183] See generally Paul Moon, *The Sealord Deal* (Palmerston North, NZ: Campus Press, 1999).
[184] A number of claimants brought the September 1992 Crown-Maori Fisheries Settlement before the Waitangi Tribunal claiming that the Deed of Settlement or the Crown policy it proposed was contrary to the Treaty, had not be adequately agreed upon by all Maori and would prejudice their rangatiratanga and fishing rights. The Tribunal Report released its report after the judgment of the Court of Appeal in *Te Runanga o Wharekauri Rekohu Inc v. Attorney-General*, *infra* note 185 but prior to the passage of *Treaty of Waitangi (Fisheries Claims) Settlement 1992* which eliminated Tribunal jurisdiction to hear fishing complaints. At page 10 the report was highly critical of the extinguishment of Maori fishing rights but stated "it would be difficult not to say that the Crown has acted well to secure a place for Maori in the commercial fishing industry." It also found that sufficient consent to the Deed of Settlement had been secured by the Crown. The Tribunal recommended that the problems with the Deed of Settlement (*i.e*. wording to capture the affirmation of the Treaty principles, extinguishment of fishing interest, allocation) should be rectified in final 1992 settlement. Waitangi Tribunal, *The Fisheries Settlement Report 1992* (Wai 307) (Wellington: Waitangi Tribunal Report, 1992). The report was ignored.
[185]*Te Runanga o Wharekauri Rekohu Inc v. Attoney-General*, [1993] 2 N.Z.L.R. 301 [*Sealords*].
[186] The 1992 Deed of Settlement is attached as an appendix to *Sealords* at 311-22.
[187] CP682/92, CP762/88.

fiduciary obligations within the context of Maori-Crown relations. President Cooke began by observing that recent case law regarding the Maori-Crown relationship (including *Muriwhenua*) held that the Treaty of Waitangi creates "an enduring relationship of fiduciary nature akin to a partnership, [with] each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards each other."[188] According to the President, case law in Canada (*Sparrow*) and Australia (*Mabo II*)[189] had reinforced this understanding. "Clearly," he notes, "there is now a substantial body of Commonwealth case law pointing to a fiduciary duty."[190] In New Zealand, "the Treaty of Waitangi is major support for such a duty."[191] Moreover the duty is evolving as international and domestic appreciation of indigenous aspirations develops and Crown powers and responsibilities in particular circumstances present themselves.

President Cooke further held that the fishing settlement embodied by the deed, despite its shortcomings was "thoroughly consistent" with a solicitous approach to Maori rights recognized by *Muriwhenua*, other New Zealand case law, and foreign case law. "[T]he rights of indigenous peoples are entitled to some effective protection and advancement."[192] Under the circumstances, the willingness of the Crown and Maori representatives to arrive quickly at some mutually beneficial arrangement that would effectuate the evolving Maori interest in the commercial fishery was an opportunity, the failure of which to take "might well have been inconsistent with the constructive performance of the duty of a party in a position akin

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[188] *Sealords, supra* note 185 at 304.
[189] *R. v. Sparrow,* [1990] 1 S.C.R. 1075 at 1108. "[T]he government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The relationship between the Government and Aboriginals is trust-like, rather than adversarial, and contemporary recognition of Aboriginal rights must be defined in light of this historic relationship." *Mabo v. Queensland* (No. 2) (1992), 175 C.L.R. 1. The Australian High Court in *Mabo* held that the doctrine of *terra nullius* together with the denial of native title was not the law of Australia. It restated the common law rule of aboriginal title and held (among other things) that "[n]ative title to land survived the Crown's acquisition of sovereignty and radical title…" subject to defeasement and extinguishment by the valid exercise of the sovereign power by the state. *Mabo* at 69, Brennan J.
[190] *Sealords, supra* note 185 at 306.
[191] *Ibid.*
[192] *Ibid.*

to a partnership."[193]

Against this backdrop of the evolving fiduciary relationship, Cooke observed that the complaint by the plaintiff iwi that the deed, which purported to be a settlement of behalf of all Maori, extinguished "all commercial fishing rights and interests" perhaps had some force.[194] However, noting that time was of the essence in the transaction, and relying on representations by the Crown as well as Maori negotiators, the Courte accepted that the deed was non-binding. In any event the word "Maori" as used in the deed related only to those groups whose representatives were either expressly or impliedly authorized to execute the document.[195] "All that can safely be said," wrote the Court, "is that the deed was negotiated by some responsible Maori leaders and has significant Maori support but also significant Maori opposition."[196] In any event (and curiously), the Deed of Settlement is non-binding because it is in fact not an "agreement" but rather a discretionary undertaking by the Crown.

> The true position is that the Maori negotiators did not ask for any agreement by the Crown to that effect: the Crown has indicated that in return for the benefits to be conferred on Maori under the deed it will introduce legislation as outlined in cl 3.5: Maori who are parties to the deed have impliedly agreed that this would be reasonable.[197]

Nevertheless, for the *Sealords* Court the issue of whether the Deed of Settlement was binding or whether Maori representatives had authority or if there was significant support or

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[193] *Ibid.* at 307.
[194] Section 5.1 of the Deed of Settlement reads: "Maori agree that this Settlement Deed, and the settlement it evidences, shall satisfy all claims, current and future, in respect of, and shall discharge and extinguish, all commercial fishing rights and interests of Maori whether in respect of sea, coastal or inland fisheries (including any commercial aspect of traditional fishing rights and interests), whether arising by statute, common law (including customary law and aboriginal title), the Treaty of Waitangi, or otherwise, and whether or not such rights or interests have been the subject of recommendation or adjudication by the Courts or the Waitangi Tribunal." *Ibid.* at 320.
[195] "The term "Maori", used repeatedly in the deed, is not defined. But the Minister of Justice in his first affidavit stated that he was aware that no person had signed the deed on behalf of either of the plaintiffs, and that the Crown accepts that the deed is not binding on them or others in the same position. The Maori negotiators and other signatories are likewise adamant that they signed only on behalf of those who had authorised them to do so and were not purporting to bind other Maori." *Ibid*. at 307.
[196] *Ibid.*
[197] *Ibid.*

opposition to the proposal among Maori was in the final analysis immaterial -- the Crown could proceed with legislation implementing the deed in any event. The plaintiff iwi, fearful of the legal extinguishment of their customary and treaty protected fishing rights by way of s. 5.1 of the deed, sought the Court to enjoin the Crown from introducing legislation giving effect to the deed as provided for under s. 3.5.[198] The Court, reflecting underlying separation of powers concerns, held that it simply has no authority to prevent legislative proceedings.

> There is an established principle of non-interference by the Courts in parliamentary proceedings. Its exact scope and qualifications are open to debate, as is its exact basis. Sometimes it is put as a matter of jurisdiction, but more often it has been seen as a rule of practice….However it be precisely formulated and whatever its limits, we cannot doubt that it applies so as to require the Courts to refrain from prohibiting a Minister from introducing a Bill into Parliament.[199]

This principle of non-interference is related to the idea that within a representative government there is an implied right to freedom of expression within the legislature. This right suggests that the courts may neither prevent nor compel any measure from being placed before the legislature for consideration. "[P]ublic policy requires that the representative chamber of Parliament should be free to determine what it will or will not allow to be put before it"[200]-- and the Crown ministers should remain free to determine what they intend to place before the house in line with their notions of the public interest. Rather than enjoining the presentation of a bill, the appropriate time for challenging a Parliamentary act in court is after its enactment.

Moreover, despite the ideas concerning freedom of expression or principles of representative democracy, the nature of the agreement and Parliamentary sovereignty nevertheless trumps any effort by the courts to interfere. First, parliamentary sovereignty precludes the imposition of judicial remedies where Parliament chooses to act. Second,

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[198] *Ibid.* at 317-8.
[199] *Ibid.* at 307-8.
[200] *Ibid.* at 308.

because of the subject matter of the deed, it is a "compact of a political kind" it cannot have any "legal" effect. Were it to have legal effect, the subject matter and appropriateness of the transaction would nevertheless be a political question with which the courts should not interfere, reflecting a judicial deference to Parliamentary prerogatives as well as Parliamentary sovereignty. Paradoxically, this non-legal nature of the agreement in turn prevents the deed from repealing the Treaty of Waitangi as alleged by the plaintiffs.

> [A] nation cannot cast adrift from its own foundations. The treaty stands. Parliament is free, if it sees fit, to repeal s 88(2) of the Fisheries Act and to make other legislative changes envisaged in the deed. Parliament was free to do so before the deed and remains free to do so afterwards. Whatever constitutional or fiduciary significance the treaty may have of its own force, or as a result of past or present statutory recognition, could only remain.[201]

The decision was quickly followed by the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* which implemented the September Deed of Settlement. The statute had five major components. First, it provided that Maori would be allocated 20% of any quota for new species brought into the quota system after 1992 in addition to the 10% of earlier introduced species as previously provided in the 1989 Act. It also declared all previously allocated quota valid. Second, the Crown would provide the Maori Fisheries Commission with $150 million to enable it to purchase 50% of Sealord Products Ltd. and further develop Maori participation in the industry. Sealord held approximately 27% of allocated quota at the time. Third, s. 88(2) of the *Fisheries Act 1983* was repealed. Fourth, the Act bound the Crown to introduce legislation and regulations providing for customary non-commercial Maori fishing rights "to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade."[202] Fifth, it extinguished any and all Maori claims in respect to commercial fishing and declared: "The obligations of the Crown to Maori in respect of

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[201] *Ibid*. at 308-9.
[202] *Treaty of Waitangi (Fisheries Claims) Settlement 1992*, s. 34(mb).

commercial fishing are hereby fulfilled, satisfied, and discharged."[203] Further it discontinued certain proceedings regarding fishing issues and denied jurisdiction to any court or tribunal to inquire into the validity of the Deed of Settlement.[204]

III. New Zealand Constitutionalism, Aboriginal Rights and Treaty Jurisprudence

Philip Joseph has observed that "New Zealand is the acme of legislative supremacy" with no fundamental laws and entrenched bill of rights. [205] This centralized Austinian conception of parliamentary sovereignty, as noted by President Cooke:

> [M]ust cover power in the Queen in Parliament to enact comprehensive legislation for the protection and conservation of the environment and natural resources. The rights and interests of everyone in New Zealand, Maori and Pakeha and all others alike, must be subject to that overriding authority.[206]

Within this system of governance the courts function as a check upon executive action; but there is no possibility of judicial review based on entrenched constitutional standards. Provided a valid statute is explicit, the courts are bound to enforce it regardless of prior legislation or the common law. [207]

Given this unitary constitutionalism and the provisions of the English version of Article One of the Treaty of Waitangi it is unsurprising New Zealand has seen fewer examples of judicial recognition and protection of indigenous hunting, fishing, and gathering activities than Canada and the United States. This lack of judicial protection has been the result of the courts' refusal to take notice of the Treaty and formulate some type of reserved

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[203] *Ibid.* s.9(b).
[204] This discontinuance of litigation in the Act was not as draconian as it would appear because the Plaintiffs to the discontinued litigation were the Maori who negotiated the Memorandum of Understanding and the Deed of Settlement.
[205] Philip A. Joseph, *Constitutional and Administrative Law in New Zealand*, 3rd ed. (Wellington: Thomson Brookers, 2007) at 498.
[206] *Ngai Tahu Maori Trust Board v. Director-General of Conservation*, [1995] 3 N.Z.L.R. 553 at 558 (N.Z.C.A.).
[207] "[T]he constitutional position in New Zealand . . . is clear and unambiguous. Parliament is supreme and the function of the Courts is to interpret the law as laid down by Parliament. The Courts do not have a power to consider the validity of properly enacted laws." *Shaw v. Commissioner of Inland Revenue* (1999) 3 N.Z.L.R. 154 at 157 (N.Z.C.A).

rights doctrine which would have supported some Treaty guarantee,[208] and their refusal to provide judicial protection for common law aboriginal title or effectuate express reservations in favour of Maori in various pre-emption deeds.

The unitary notion of legislative sovereignty and lack of judicial protection for Maori is surprising in that British imperial policy and the Treaty of Waitangi seemed to have been premised on exactly the opposite intention.[209] In part perhaps the failure can be attributed to the contradictions inherent in the colonial project which introduced a type of schizophrenia into the law. The tensions inherent within the imperialist project were exacerbated by the use of cultural and linguistic categories that included contradictory segregationist and universal moral and legal premises which were used to characterize indigenous peoples and colonial interaction with them.[210] At various times and places, the tribes were characterized as "partners," "states" or "nations" recognizable under international law, dangerous enemies and helpful allies, "domestic and dependant nations" under the "pupilage" of the settlers, and bands of "small and petty" savages. The changing dialogue and characterizations were further confused as the various symbolic acts and legal mechanisms used to interact with Maori were often inconsistent with the dominant racial and cultural attitudes of the colonizers; found for

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[208] A treaty law doctrine (initially formulated in American treaty jurisprudence) sourced in international law, which is an interpretive rule based on the status of the tribes as sovereign entities and possessors of territory and rights prior to the assertion of European sovereignty. Under the reserved rights doctrine, all members of the signatory tribes despite their dependent status retain whatever rights they possessed which are not conveyed or relinquished. The rights reserved generally include all rights associated with the residual sovereignty of the tribes which is consistent with their dependent status, such as laws pertaining to local government over tribal members and rights to hunt, fish and gather as well as access rights to territory to carry out these activities. *See United States v. Winans,* 198 U.S. 371 (1905); *Winters v. United States*, 207 U.S. 564 (1908); See also *United States v. Wheeler*, 435 U.S. 313 (1978); *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172 (1999).

[209] Benedict Kingsbury, "The Treaty of Waitangi Some International Law Aspects" in I.H. Kawharu, ed., *Waitangi Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 121.

[210] Robert F. Berkhofer, Jr., *The White Man's Indian: Images of the American Indian, from Columbus to the Present* (New York:Vintage Books, 1979). Berkhofer argues that positive and negative images of the Indian can be traced to early writers such as Hobbes and Locke. See also Robert A. Williams, Jr. "The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought" (1983) 57 S. Cal. L. Rev. 1.

example, in Lord Normanby's dispatch to Captain William Hobson ordering him to sign a treaty with the Maori.

> We acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make such acknowledgement in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even or even deliberate in concert.[211]

The categories were further confused by the differing attitudes and policies sanctioned by London in the early years of the colony.

To a certain extent the historical and legal contradictions have been mediated by the construction of a settler state narrative which emphasizes the acquisition of representative institutions and responsible government within a benign highly centralized system of governance. This foundation myth includes the idea that the government has pursued a consistent policy of protecting Maori and giving them all their rights as contemplated under the Treaty -- even though the state essentially marginalized them in practice.[212] Part of the myth also includes a strong "amalgamationist" ethic, which insists that Maori should be made equal in all respects to Europeans. The ethic contributed to the ongoing resistance toward the legal recognition of Maori customary use rights or continuing the territorial and governmental "separateness" of iwi.[213] It also included notions of Pakeha cultural superiority, which depreciated Maori customary use claims to plants, animals and fisheries where Parliament extended protection over native species in the name of conservation and preservation.[214]

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[211] Normanby to Hobson, 14,15 August 1839, CO 209/4, 251-82 157-63. Prendergast, C.J. stated in *Wi Parata* that Normanby's qualification "nullifies the proposition to which it is annexed." *Wi Parata, supra* note 10 at 78 (N.Z.C.A.).

[212] Paul G. McHugh, "Australasian Narratives of Constitutional Foundation" in Klaus Neumann, Nicholas Thomas & Hilary Ericksen, eds., *Quicksands Foundational Histories in Australia and Aotearoa New Zealand* (Sydney: University of New South Wales Press, 1999) 98.

[213] Peter C. Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2004) 184; Alex Frame, "Colonising Attitudes Towards Custom" [1981] New Zealand Law Journal 105.

[214] Marr., *supra* note 12; Park, *supra* note 19; Ross Galbreath, "Displacement, Conservation and Customary Use of Native Plants and Animals in New Zealand" (2002) 36 New Zealand Journal of History 36.

Unitary constitutionalism and equality of rights across the races was antithetical to separate Maori assertions of right under the Treaty but also supported the objective of the perceived need to establish clear alienable land title for economic development.[215] First, equality of rights and the underlying liberalism that justified that equality became the basis to reject any recognition of Maori interests that would entail legal encumbrances upon Crown title and land alienation. According to Ward, from the 1860s the policy of equality was one:

> [O]f the strongest currents in Maori policy for the remainder of the century; a reaction alike against control of Maori affairs by the Governor, against the provision of special machinery for Maori affairs in the form of an elaborate Native Department, and against such centres of residual Maori authority as the Runanga.[216]

The underlying conceptions of liberalism differed across policy-makers and over time, but there was unanimity (even in the face of Maori protest and growing evidence of Maori impoverishment due to the loss of land) on the need for the complete extinguishment of Maori title.

> Maori land policy was a battleground between competing political and economic ideas….Underpinning the policy debate, such as it was, were two competing strands of nineteenth-century Anglo-American liberalism. On one hand there was the individualist liberalism of the mid-century which emphasized clear private property rights, equality of opportunity, free trade and the minimalist state – all central tenets of mid-Victorian political economy. The Native Land Act of 1862 and 1865 were a product of this frame of mind….However in the later nineteenth century the so-called 'New-Liberalism' developed in Britain and echoed strongly in Australia and New Zealand. The New Liberalism emphasis on the importance of state action in the promotion of economic development, mediation between employers and unions, factory inspection, state education and at least a basic level of social protection in the form of old age pensions….This stance…was accompanied by a growing belief that Maori land acquisition could not be left to the private sector but needed to be controlled or even monopolized by the State.[217]

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[215] John William Tate, "The Privy Council and Native Title: A Requiem for *Wi Parata*" (2004) 12 Waikato L. Rev. 101; Orange, *supra* note 6 at 136-58.
[216] Alan Ward, *A Show of Justice* (Auckland: Auckland University Press, 1978) 183.
[217] Richard Boast, *Buying the Land, Selling the Land Governments and Maori Land in the North Island 1865-1921* (Wellington: Victoria University Press, 2008) at 125.

Second, Maori claims to various rights under the Treaty or insistence on common law rights were considered an unacceptable "threat" to state authority. In the 19th century Maori objections to settler policy and assertions of right under the Treaty potentially had military implications and after the Land Wars, often entailed civil disobedience. From this perspective, subsisting Maori customary interests in territory, rangatiratanga and tikanga Maori (as a Treaty right and as evidence of dependant residual sovereignty) and separate "non-common law" usufructuary rights over ceded land, continuing either as part of the "state" legal system or as an alternative source of authority, were an unacceptable challenge to the colonial state and the colonial project.[218] The characterization was the prism through which the colonists viewed such events as the land wars and the Kingitanga movement. As Claudia Orange explains:

> That the question of sovereignty was the critical point of difference between the races had been widely acknowledged in New Zealand. As Frederick Weld, Native Minister in the Stafford Ministry, put it, the government was determined to assert British sovereignty, whereas it was clear that WiremuTamihana 'meant most distinctly a Maori nationality.' To Weld, this would spell ruin because the King movement 'combination' would block the expansion of law and order, a result that would ruin Maori progress too. Many members of the Assembly shared Weld's view. Like Weld, they were convinced that history showed the need to impose supremacy over native races by force. The 'inevitable hour of conflict must come,' warned C.W. Richmond; 'it was one of the necessities of colonization.[219]

At the same time the settlers were rejecting alternative pluralist conceptions of constitutionalism in the face of the Maori military and political threat, the quasi-federal arrangement established by the 1852 Constitution was seen as unable to mobilize and focus

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[218] For example, when Governor Grey introduced the "new institutions" policy based on the *Native Circuit Courts Act 1858* and *Native Districts Regulation Act 1858* enabling village runanga to make by-laws and determine the various interests in land while allowing Maori to participate in local courts in matters affecting Maori individuals, colonial politicians "made it plain that this system was not based on upon nor conceded any inherent Maori authority." Paul G. McHugh, *Aboriginal Societies and the Common Law A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004) at 185.
[219] Orange, *supra* note 6at 159. Later as a member of the Court of Appeal, C.W. Richmond joined in the *Wi Parata* decision.

the limited resources of the colony toward development. While the provinces had originally enjoyed a high standing, they were increasingly unable to fulfil their ambitious developmental policies and many became mired in debt. The debt problems and provincial efforts to control national policy were considered by many to be detrimental to the formulation and implementation of necessary national policy. They were abolished in 1876.

The abolition of the provinces foreclosed the opportunity for a more pluralist constitutionalism with a more activist judiciary policing the boundaries between various levels of government. It reinforced the growing notion that the national legislature was the sole repository of governmental authority in the colony. While not truly federal, the provincial system allowed for the existence of local power centres reflecting local cultural, economic and political circumstances. The diffusion and fragmentation of authority it engendered in practice could have led to a more pluralist federalist system of power-sharing which in turn could have more easily accommodated the establishment of Maori Districts under s. 71 of the *Constitution Act 1852*. However, by the end of the 1880s, unitary conceptions of state power essentially prevailed.

Judicial decisions implicating Maori possessory interests and the Treaty reinforced the centralizing and totalizing development of the colonial state. The courts evolved a circular jurisprudence that disregarded Maori common law possessory interests and the Treaty as a matter of law. First, it asserted that the Crown held both *imperium* and *dominium* over all the territory despite Maori customary interests and the Treaty. As such, Maori claims directed at the Crown about whether customary title had been extinguished were a contradiction in terms and not amenable to legal inquiry. Second, the courts had no jurisdiction to entertain claims of Maori title or rights either at common law or by way of the Treaty. Common law claims could not be entertained because Maori customary rights, while analogous to common law

rights, did not carry with them the necessary attributes or incidents of title which could allow a court to enforce them.[220] Due to these differences and failure of the courts to describe the scope and content of customary rights, any reference in statute to a customary right would arguably be only declaratory mention of the pre-existing non-customary rights. As such the statute referring to the treaty or common law rights arguably retained by Maori would create no rights or entitlements.[221] In any event, the Maori common law rights, based on the doctrine of common law aboriginal title in New Zealand were not in fact "rights" in that they neither created a duty on the Crown nor could the courts recognize the right or hold the Crown to account. Similarly a Treaty claim could not be secured because the Treaty had not been implemented in statute, as required by constitutional law, as an international treaty. In any event, even if the Treaty could legally "secure" or guarantee any rights, these rights were equivalent to common law rights or the equivalent statutory entitlements amenable to the entire population unless a statutory exemption explicitly and specifically carved out a right or activity to be reserved for Maori. As if this analysis was not sufficient to destroy the legal efficacy of the document, the Maori signatories had no contractual capacity to either cede territory or reserve rights in international or municipal law. Third, any usufructuary rights were always parasitic on underlying customary title, regardless of the actual content of the possessory and use interests such title contained. As mentioned above, the interests were therefore entirely extinguished with the transformation of Maori tenure by the Land Court or with a sale to the government.

These constructs continue to inform common law and Treaty jurisprudence today. It was not until *Te Weehi* that the courts recognized any un-extinguished usufructuary rights based on aboriginal title or held that such title could be disaggregated into territorial and non-

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[220] *Mangakahia v. New Zealand Timber Co.*, (1884) 2 N.Z.L.R. 345 (N.Z.S.C.).
[221] *Waikpapakura v. Hempton*, *supra* note 105.

territorial components. Nevertheless the potentially open-ended approach to Maori customary use rights taken by Justice Williamson in *Te Weehi* has not been extended to other harvesting activities and was subsequently limited to include only indigenous species harvested in 1840 in *Taranaki Fish and Game Council v. McRichie.*[222] While the historical existence of the Treaty has been a primary reason for the ongoing treaty settlement process which offers modest compensation for historical grievances, the settlements have neither led to a broader judicial role for interpreting the Treaty nor have they incorporated the Treaty into the legal system. Legislative largesse and political calculation, not legal compulsion has been the drivers of the settlement process. Other Maori possessory interests were either ignored, or in those situations where Maori title may have been vindicated in such a way as to provide for a right of fishery, as in case *Tamihana Korokai v. Solicitor-General*, the Crown has settled and avoided any judicial decision which it presumably could not control.

A. Aboriginal and Treaty Rights in *Symonds* and *Wi Parata*

Given the legal schizophrenia of the colonial project and the underlying political, economic and philosophical opposition to common or Treaty law that may have been solicitous of Maori "separateness" and possessory interests, judicial enforcement of the Treaty or common law in a manner similar to the American or Canadian jurisprudence would have been unlikely. The law and policy had neither the necessary internal logic to sustain a more pluralist approach nor were the courts sufficiently separated from the colonial project to vindicate Maori rights. Indeed without any constitutional, institutional or elite disputes involving the legal character or content of Maori interests, whose vindication one way or other might establish the precedent for judicial protection, the case law and policy regarding Maori common law or Treaty entitlements became a sort of *pas de deux* between the colonial

[222] *Taranaki Fish and Game Council v. McRichie*, [1999] 2 N.Z.L.R. 139 (N.Z.C.A.).

courts and the legislature as to which branch of government would avoid effectuating any alternative interests that would challenge the unitary notion of state sovereignty and the rush toward economic development.

It need not have been so. The 1847 decision *R. v. Symonds* where the Court held that Maori possessory interests were to be respected not only "on moral grounds" but also deserved "judicial support on strictly legal grounds" outlined a basis for ongoing judicial protection of Maori customary rights. It also exhibited the type of conflict which this thesis argues could provide the opportunity to courts to incorporate customary interests into the municipal legal system. Yet despite *Symonds* iconic status in the annals of common law aboriginal rights, the Court's support for Governor Grey's reversal of Governor Fitzroy's earlier pre-emption waivers in favour of a renewed pre-emptive purchasing policy laid the basis for the later *Wi Parata* decision; the judgment turns as much on the idea that Governor Fitzroy was acting *ultra vires* of his authority and his fiduciary duty to the Maori as there are judicially protected Maori common law rights to land. [223]

The *Symonds* Court linked the pre-emption waiver and extinguishment of native title with a broad notion of the colonial project. The Crown, according to the Court, "enjoys the exclusive right of acquiring newly found or conquered territory, and of extinguishing the title of any aboriginal inhabitants…." Under these circumstances individuals can take no title because any acquisition of new territory "vests in the Crown."[224] This Crown interest can only be conveyed by letters patent under the public seal of the colony. Thus the waiver of pre-emption in effect was not simply an issue of the executive acting outside of his Royal Instructions and under *Land Claims Ordinance 1841* but a violation of idea that the Crown did not have the exclusive authority to convey land and establish a colony. As for the Maori,

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[223] *Symonds*, *supra* note 3 at 391, Chapman J.
[224] *Ibid.* at 389, Chapman J.

exclusive pre-emption was a "practice certainly far more conducive to the security of native rights"[225] and is part of the duty of "guardianship" which "necessarily arises out of" the "peculiar" relationship and "out of our obvious duty of protecting them…."[226] As such the individuals who directly purchase Maori possessory interests are in a sense usurping the colonial project and leaving it to the vagaries of the market, which operates in a manner antithetical of Maori interests. As Chief Justice Martin observed:

> [C]olonization is a work of national concernment, a work to be carried on with reference to the interests of the nation collectively; and therefore to be controlled and guided by the Supreme Power of the nation.[227]

This language is similar to the language later used in *Wi Parata* when the Court discussed whether the Maori retained any rights under the Treaty. If land acquisition and extinguishment of customary title was too important to be left to the market, it was also too important to be left to Maori. Should the courts recognize Maori legal rights, the scope and direction of national development could be adversely impacted where the Crown sought to extinguish those rights -- a fear voiced by Chief Judge Fenton in *Kauwaeranga*.[228]

Perhaps more significantly for the development of the law is that the *Symonds* Court used language that equated Treaty guarantees with common law rights. As common law rights the Treaty rights were not *sui generis* (and thus capable of being accorded legal solicitude or heightened judicial protection) but were rather subject to the ordinary constitutional priority. Moreover, the presumption that common law rights applied in all circumstances was heightened notwithstanding the local conditions. This is apparent in Justice Chapman's failure to mention *Worcester v. Georgia* (which was extensively covered

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[225] *Ibid.* at 392, Chapman J.
[226] *Ibid.* at 391, Chapman J.
[227] *Ibid.* at 395, Martin C.J.
[228] "And I think that the Court, in deciding this, the first case of the kind that has occurred in the colony, is justified in allowing some weight to the consideration of the great public interests involved. I cannot contemplate without uneasiness the evil consequences which might ensue from judicially declaring that the soil of the foreshore of the colony will be vested absolutely in the natives…." Frame, *supra* note 58 at 244.

in Chancellor Kent Commentaries cited by the Court) and his seeming misreading of *Cherokee Nation v. The State of Georgia*. Rather than reading *Cherokee Nation* as a treaty law and jurisdictional case which the Cherokee in fact lost and which was later partially reversed by *Worcester*, Justice Chapman opines that the United States Supreme Court "threw its protective decision over the plaintiff-nation, against a gross attempt as spoliation; calling to its aid, through every portion of its judgement the principles of common law" in the decision. From this perspective, common law fiduciary protection was simply not effectuated due to higher level constitutional prohibitions under Article III of the American constitution. The Treaty of Waitangi represented an analogous incorporation of common law principles into the New Zealand legal system. "In solemnly guaranteeing the Native title, and in securing…[the] pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice anything new or unsettled."[229] It follows that the rights guaranteed in Article Two could not independently change the nature of the common law rule centralizing pre-emption in the Crown (as urged by the claimant), because it was in fact no more than a declaration of the common law.

> [T]he adoption of a more righteous and a wiser policy towards the Native people cannot furnish any reason for relinquishing the exercise of a right adapted to secure a general and national benefit. This right of the Crown, as between the Crown and its British subjects, is not derived from the Treaty of Waitangi; nor could that Treaty alter it.[230]

With this language the *Symonds* Court, while holding that Maori interests were to be legally protected, eliminated the idea that an analysis of the intentionality of the treaty parties, or an analysis of the Maori language version of the Treaty in light of the treaty terms used legally mattered. The Treaty was declaratory of common law rights and common law categories. Thus differences in language between the common law rule and the Treaty terms itself (the

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[229] *Ibid.* at 391, Chapman J.
[230] *Ibid.* at 395, Martin C.J.

contention that the Maori signatories conveyed under the Treaty only the "first offer of the land") was "philological rather than legal."[231] Treaty law and common law are equivalent.

If the dicta in *Symonds* can be considered an accurate expression of the law at the time, it can justly be cited as a strong exposition of the doctrine of common law aboriginal title. While courts "could take no notice of any title to land not derived from…colonial government" they were required to protect "lesser" occupancy interests.[232] However it is questionable whether the decision actually recognized Maori customary interests as common law interests where the Crown was one party to the suit or where the defendant had Crown-issued title. As a feigned case it turned more on the prerogative of the Governor or the statutory authority to waive pre-emption and convey land without the public seal of the colony. Indeed, given the Court's reluctance to determine the content of customary title as incorporated into the common law, describing it as ranging from "so high a nature as an actual seisin in fee…[to] a mere possibility of seisin" and the concomitant emphasis on the necessity that the sovereign have a "right of control" to undertake land appropriation for colonization; a project described by Chief Justice Martin as "a work to be carried on with reference to the interest of the nation collectively; and therefore to be controlled and guided by the Supreme Power of the nation",[233] the Court subordinates customary title to the overriding interests of the Crown. Moreover, despite the legal protection accorded customary title in *Symonds* it was clear that the same judges understood that where land was concerned the constitutional prerogative power of the Crown and Governor was quite broad. For example, the same Justices Chapman and Martin held in the 1848 case *R. v. Taylor* that the Governor must have the prerogative right to recognize and extinguish particular customary

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[231] *Ibid.* at 390, Chapman J.
[232] James Kent, *Commentaries on American Law*, *American Law: General Studies* 5th ed., vol. 3 (New York, 1844) Lecture 51 at 378. The Making of Modern Law Legal Treatise 1800-1925 online: <http://galenet.galegroup.com.ezproxy.auckland.ac.nz/servlet/MOML;jsessionid=30B117861F98E2783427EC3DABFEB1F4?locID=learn>
[233] *Symond*s, *supra* note 3at 395, Martin C.J.

interests to particular parcels of land as part of his authority to grant land.[234] For the *Taylor* Court "[t]he granting power is part of the royal prerogative lawfully delegated to the governor" and the prerogative power "cannot be taken away or limited, except by the express words of an Ordinance or statute."[235] Where a claim for customary title was made based on common law aboriginal title it is arguable that a New Zealand court, even at the time of *Symonds*, would rule that such title remains a legal burden when the Executive decides to issue title under the public seal of the colony.

Nevertheless protective common law rules found in American and British precedents and policy, whether or not formally incorporated into the colony were not the only basis for Maori claims. The Treaty, which had been repeatedly reaffirmed by the Crown, also provided the basis for legal recognition of Maori customary rights. Moreover, the American precedents upon which a Treaty claim could be based were stronger and not easily ignored. Even though Chief Justice Marshall wrote in the 1825 case *Johnson v. M'Intosh* that the tribes were "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion"[236] he reaffirmed the principle that discovery gives title to the discovering colonial power. With Discovery doctrine aboriginal "rights to complete sovereignty, as independent nations, were necessarily diminished." In circumstances where the sovereign has conveyed land that might be subject to a subsisting

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[234] *R. v. Taylor* is found at "Appendix: *R. v Taylor*; *Attorney-General v Whitaker*; *Scott v Grace"* (2004) 35 V.U.W.L.R. 31. See also Mark Hickford, "Settling Some Very Important Principles of Colonial Law Three 'Forgotten' Cases of the 1840s" (2004) 35 V.U.W.L.R. 1.

[235] *Taylor* at 48. Justice Chapman continues on page 49. "Under the general rule, "that the colonies settled by British subjects are subject to the law of England, so far as may be applicable to their circumstances and condition," the prerogatives of the Queen as exercised by the governors of colonies are entitled to call those legal safeguards on one hand, and subject to those restraints on the other, which the common and statute law of England have gradually established. It is under this rule (which properly considered, is most beneficial to the subjects of He Majesty) that this Court has invariably considered Crown grants within the colony. We acted upon this view in the case of the *Queen v Symonds*, (*McIntosh's* case), May 1847, and again in the *Queen v George Clarke*, June 1848. In the latter case it was considered that the prerogative of the Crown as exercised by the governors under the Charter, cannot be taken away or limited, except by the express words of an Ordinance or statute."

[236] *M'Intosh*, *supra* note 1 at 574.

aboriginal interest Marshall simply held that "the validity of the titles given [by either the Crown, its grantees and the United States] has never been questioned in our Courts.[237] However, subsequent Marshall opinions suggested a different relationship when there was a treaty between the colonizing nation and the aboriginals. These cases suggested that the non-European treaty signatories, whose legal interests would otherwise be governed by the law of the colonizing nation under the Discovery doctrine, could stipulate to continue to be governed by their own law and secured in their pre-existing possessory interests *as a matter of municipal law*.[238] A treaty is binding wrote Chief Justice Marshall in *Cherokee Nation* because "[l]aws have been enacted in the spirit of these treaties" and the acts of the government "plainly" recognized the Cherokee nation as a state. In such circumstances "the courts are bound by those acts."[239] Similarly the Treaty of Waitangi appeared to have the force of law. Both government policy and statutory references such as the *Land Claims Ordinance 1841* or the *Native Lands Act 1865* suggested legally binding Treaty obligations. The Court of Appeal *In Re "The Lundon & Whitaker Claims Act 1871"* noted that the Crown's "own solemn engagements" led to a "full recognition of Native proprietary right."[240]

The two lines of reasoning, one based on common law and judicial protection of customary title and other based on the Treaty, each potentially providing a basis for the judicial recognition of a claim that un-extinguished customary title continued to legally encumber a parcel of land, directly confronted Chief Justice Prendergast and Justice Richmond in *Wi Parata v. Bishop of Wellington*. Following the line of reasoning in *M'Intosh*

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[237] *Ibid.* at 587-8.
[238] "The decision of the Supreme Court of the United States [in *Worcester*] was not the promulgation of any new doctrine, for the several local governments, before and since our revolution, never regarded the Indian within their territorial domains as subjects, or members of the body politics, an amenable individually to their jurisdiction. They treated the Indians within their respective territories as free and independent tribes, governed by their own laws and usages, under their own chiefs, and competent to act in a national character, and exercise self-government, and while residing within their own territories, owning no allegiance to the municipal laws of whites." Kent, *supra* note 232at 384-5.
[239] *Cherokee Nation*, *supra* note *1* at 16.
[240] *In Re "The Lundon & Whitaker Claims Act 1871"*, *supra* note 157 at 49.

and the holding of *Cherokee Nation*, *Wi Parata* held that the court had no jurisdiction to look beyond a Crown land grant made in contradiction to an earlier Maori gift or grant because the tribe had no prior legal possession (either at common law or recognized by Treaty) upon which they could found a claim.[241] Unlike the Cherokee, for Chief Justice Prendergast the Maori were "without any kind of civil government, or any settled system of law."[242] They had "no regular system of territorial rights nor any definite ideas of property in land" which could be understood by the "Courts of a civilized country."[243] Because there was neither law nor a system of territorial rights, there were no possessory rights that could be recognized under the common law. At the same time the lack of a legal system precluded the existence of a "body politic" which could have entered into the Treaty, even if that body could have reserved any legal interests. In such circumstances "the so-called treaty merely affirms the rights and obligations which, *jure gentium,* vested in and devolved upon the Crown under the circumstances of the case."[244] From this perspective neither the common law or the Treaty as a statement of the common law nor the Treaty as an agreement under international or domestic law legally supported Maori assertions of possession and use. The Crown, Chief Justice Prendergast concluded is the sole arbiter of its own justice on issues of Maori customary title or the Treaty.

With this reasoning the *Wi Parata* Court disclaimed any jurisdiction to determine the existence or non-existence of un-extinguished customary title. The Crown's authority to extinguish native title under the prerogative power was not subject to judicial review.

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[241] *Wi Parata v. Bishop of Wellington*, (1877) 3 N.Z. Jur. (NS) 72 (N.Z.C.A.).
[242] *Ibid*, at 77.
[243] *Ibid.* at 77-8.
[244] *Ibid.* at 78.

B. The Transformation of Aboriginal Treaty Rights and Aboriginal Rights and the Partial Implementation of the Treaty

Wi Parata removed the issue of customary rights from the purview of judicial inquiry and highlighted the centralizing tendencies of New Zealand jurisprudence. With the stroke of a pen, the Chief Justice eliminated Treaty guarantees and common law aboriginal claims for the sake of separation of power principles and judicial deference to the executive. It has been criticized for its seeming dismissal of common law rights mentioned in *Symonds.* For example, Brookfield argues that *Wi Parata* and the continued adherence to the holding in subsequent case law occurred because New Zealand judges either ignored imperial constitutionalism or "misunderstood the law."[245]

However the ambiguities and flux in the law, the contradictions of the colonial project, the prevalent positivist notions of sovereignty and legal rights and the lack of any group or institution within society to benefit from the vindication of a common law or Treaty-guaranteed right against the Crown suggests that Prendergasts's reasoning was not a simple misunderstanding. Such criticism misconstrues the law in a colonial context as it relates to the original aboriginal inhabitants.[246] First, the idea that there existed common law rights in New Zealand analogous to those in North America,(or more specifically the United States because the issue remained unsettled in British North America until the 1888 *St. Catherine's Milling* case) is probably over-estimating the legal effect of *Symonds* in light of the broad construction of the prerogative power or narrowness and relative inefficacy of the "aboriginal rights doctrine" in the British settler colonies at the time. Other than *Symonds*, *In Re "The*

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[245] F.M. Brookfield, "The New Zealand Constitution the Search for Legitimacy" in I.H. Kawharu, ed. *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 1 at 10-11.

[246] Brookfield argues that *Wi Parata* and the continued adherence to the holding in subsequent case law occurred because New Zealand judges "misunderstood the law." Starting with *Wi Parata* they misunderstood *Symonds* and the American authorities which had recognized aboriginal rights as a legal encumbrance on Crown title. He writes "If there is to be criticism of the courts' past treatment of Maori land and fishery rights, the basis for it lies not in their disregard of the Treaty of Waitangi, but in the general misunderstanding and misapplication of the common law which first showed in *Wi Parata's* case." *Ibid.* at 10-12; See also Frederika Hackshaw, "Nineteenth Century Notions of Aboriginal Title" in Kawharu, *supra* note 209at 92.

Lundon & Whitaker Claims Act 1871" and the *Kauwaeranga* case there was no New Zealand case law which supported the idea that Maori have common law proprietary interests or that there were common law uses which could be disaggregated from underlying possession and continue to exist apart from the underlying ownership. Indeed the only time the content of native title was considered, in *Mangakahia v. New Zealand Timber Co.* the Court ruled that the "attributes and incidents of a holding in fee simple according to English law" do not "attach to an ownership according to native custom."[247] In any event, even the most solicitous common law approaches cited in *Symonds* and *Wi Parata*, such as that laid down by Justice Baldwin in 1835 American case *Mitchel v. United States*,[248]were subject to statutory modification and extinguishment. The "common law of England" and the provisions for the extinguishment of customary title rules did not incorporate Maori rules into the municipal legal system in a permanent way. Common law rules and the Discovery doctrine merely held that the rule of decision would be the municipal law of discoverer. And these rules continued to be legally susceptible to replacement under accepted constitutional law processes.

Second, the idea that the Treaty actually created legal "obligations" as opposed to being simply a memorial of future fair treatment was generally not subscribed to by the colonial leadership of the day, regardless of whether the Treaty was understood as a treaty of cession or otherwise. Since the earliest days of the colony the Treaty had always been treated with ambivalence and the opinion that it was merely a "praiseworthy device" to pacify Maori and get their peaceful acquiescence to the imposition of British had a lot of support.[249]

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[247] *Mangakahia v. New Zealand Timber Co*., *supra* note 220 at 350.
[248] Justice Baldwin wrote in *Mitchel v. The United States*: "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals." *Mitchel v. The United States*, 34 U.S. (9 Pet.) 711 at 746 (1835).
[249] In 1846 Governor Fitzroy observed: "[S]ome persons still affect to deride it; some say it was a deception and some would unhesitatingly set it aside, while others esteem it highly as a well considered and judicious work, of the utmost importance." Joseph, *supra* note 205 at 45.

Third, the contradictions among the Treaty articles provided a clear basis for the court to conclude that sovereign colonial power could extinguish all Maori right, title and interest. Presuming that an analysis concluded that the Maori signatories were sovereign or held sufficient *imperium* over their territories to be capable of entering into a cession, the assumption of sovereignty in Article One and the guarantee of equal citizenship in Article Three, coupled with a the growing consensus that the colonial legislature was the sole repository of sovereignty within the colony, provided an alternative set of policy and precedents which pointed away from the idea of a legally binding Treaty.[250]

Fourth, judicial precedent and governmental policy incorporated the idea that aboriginal state relations were not exclusively legal or entirely amenable to judicial resolution -- a quality which can be easily subsumed by separation of power principles within a unitary constitutional system. To the colonial and imperial governments, the political problem of pacifying and amalgamating Maori in light of the treaty guarantees was not considered a self-contained legal problem -- nor was it defined as such by Maori. As mentioned above, Maori political power included the threat of military action or disruptive civil disobedience. Maori-Settler relations were political and legal but in specific circumstances the relationship went simply beyond the courts -- a position to which Chief Justice Marshall in *Cherokee Nation* noted even in the more solicitous legal environment of America.

> In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbours, ought not to be entirely disregarded. At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the union.[251]

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[250] For a discussion the inability of treaties or other law to bind parliament see Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999).
[251] *Cherokee Nation*, *supra* note1at 18.

The notion of the non-existence of Treaty rights or common law proprietary rights based on the incommensurability of customary rights with common law categories and their related rights to hunt, fish and gather effectively ended the common law doctrine of aboriginal rights in New Zealand jurisprudence until it resurfaced in *Te Weehi*. However, at the beginning of the 20th century the underlying rational for the non-recognition of Treaty rights changed when the Legislature enacted s. 14 of the *Sea-fisheries Amendment Act, 1903* (re-enacted as s. 77(2) of the *Fisheries Act 1908*) and the Privy Council challenged the idea that the courts had no jurisdiction to review issues based on statutory references to native title in *Nireaha Tamaki v. Baker* and *Wallis v. Solicitor-General*.[252] In *Nireaha Tamaki* Lord Davey ruled that the Supreme Court had jurisdiction to entertain questions about the existence or extinguishment of Maori customary title.

> Their Lordships think that the Supreme Court are bound to recognise the fact of the "rightful possession and occupation of the natives" until extinguished in accordance with law in any action in which such title is involved, and (as has been seen) means are provided for the ascertainment of such a title. The Court is not called upon in the present case to ascertain or define as against the Crown the exact nature or incidents of such title, but merely to say whether it exists or existed as a matter of fact, and whether it has been extinguished according to law. If necessary for the ascertainment of the appellant's alleged rights, the Supreme Court must seek the assistance of the Native Land Court; but that circumstance does not appear to their Lordships an objection to the Supreme Court entertaining the appellant's action. Their Lordships, therefore, think that, if the appellant can succeed in proving that he and the members of his tribe are in possession and occupation of the lands in dispute under a native title which has not been lawfully extinguished, he can maintain this action to restrain an unauthorized invasion of his title."[253]

In *Wallis* the Privy Council appeared to hold that the Treaty of Waitangi had the force of law per se as it related to customary title.

> As the law then stood under the treaty of Waitangi, the chiefs and tribes of New Zealand and the respective families and individuals thereof were guaranteed in

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[252] *Nireaha Tamaki v. Baker,* [1901] A.C. 561 (P.C.); *Wallis v. Solicitor-General,* [1903] A.C. 173 (P.C.). [*Wallis*].
[253] *Nireaha Tamaki, supra* note 7 at 578.

> the exclusive and undisturbed possession of their lands so long as they desired to possess them, and they were also entitled to dispose of their lands as they pleased, subject only to a right of pre-emption in the Crown. It was not until 1852 that it was made unlawful for any person other than Her Majesty to acquire or accept land from the natives (15 & 16 Vict c 72, s 72).[254]

In light of these developments, the courts reasserted their lack of jurisdiction to protect customary rights but in doing so shifted away from the idea that the interests were incapable of recognition in the common law. Rather they acknowledged the idea that the Treaty recognized certain rights but asserted that the requisite statutory implementation had not incorporated them. Reacting to *Nireaha Tamaki* the Court of Appeal in *Hohepa Wi Neera v. Bishop of Wellington* addressed the issue of native customary title.[255] Clearly concerned about issues of clear title within the colony, Chief Justice Stout seized on the fact that the Privy Council affirmed the ruling in *Wi Parata.*

> The important point in that decision bearing on this case seems to me to be that it declares that *Wi Parata v The Bishop of Wellington* was rightly decided though it disapproves of certain dicta in the judgment. It affirms that the Supreme Court has no jurisdiction to annul the grant for matters not appearing on its face, and that the issue of a Crown grant implies a declaration by the Crown that the Native Title has been extinguished.[256]

The Court concluded that the Privy Council did not overturn the rule that the court had no jurisdiction over questions of native title and that a Crown grant "is conclusive evidence that any Native rights then existing in the land had been ceded to the Crown…."[257] However, the Court departed from *Wi Parata* in the sense that it recognized native customary title existed until it was extinguished by Crown action.

Section 77(2) of the *Fisheries Act 1908* which stated "nothing in this Part of this Act [Part I sea fisheries] shall affect any existing Maori fishing rights" presented a similar

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[254] *Wallis* at 179.
[255] *Hohepa Wi Neera v. Bishop of Wellington*, (1902) 21 N.Z.L.R. 655 (N.Z.C.A.).
[256] *Ibid.* at 667, Stout C.J.
[257] *Ibid.* at 671, Williams J. See also John William Tate, "Hohepa Wi Neera: Native Title and the Privy Council Challenge" (2004) 35 V.U.W.L.R. 73.

problem in that it appeared to be a "savings" clause rather than an "enacting" clause.[258] As the Privy Council had noted previously, statutory references to Maori rights had to *mean* something. As such, the contention that no rights existed that could be recognized could not be argued -- to avoid being superfluous the clause had to "save" something. In *Waikpapakura v. Hempton* the Crown argued instead that the statute conferred no fishing rights, not because the rights did not exist, as suggested in *Wi Parata*, but because the clause was "declaratory" -- it was simply recognition of the fishing rights Maori may have had prior to the assumption of sovereignty and the regulation of the fisheries.

Approaching the section from this perspective led the *Waipapakura* Court to adopt a "statute-based" approach. Thus, it was not that customary rights did not exist or were not reserved by the Treaty; rather s. 77(2) did not afford the requisite statutory recognition to Maori fishing rights.[259] This rule was consistent with the deferential status of courts accepted by Prendergast and was generally in congruence with New Zealand's developing Austinian constitutionalism. Thus legislation relating to transformation of Maori communal tenure, such as the *Native Lands Act 1865* as well as other legislation dealing with Maori land was necessarily understood to be a partial statutory implementation of the Treaty. As Justice Turner stated *In Re the Bed of the Wanganui River*:

> Upon the signing of the Treaty of Waitangi, the title to all land in New Zealand passed by agreement of the Maoris to the Crown; but there remained an obligation upon the Crown to recognise and guarantee the full exclusive and undisturbed possession of all customary lands to those entitled by Maori custom. This obligation, however, was akin to a treaty obligation, and was not a right enforceable at the suit of any private persons as a matter of municipal law by virtue of the Treaty of Waitangi itself. The process of recognition and guarantee was carried into effect by a succession of Maori Land Acts.[260]

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[258] *Fisheries Act 1908* s. 77(2). I owe the ideas in this paragraph to Paul McHugh, "The Legal Status of Maori Fishing Rights in Title Waters" (1984) 14 V.U.W.L.R. 247 at 262-3.
[259] *Waikpapakura v. Hempton, supra* note 105.
[260] *In Re the Bed of the Wanganui River*, *supra* note 111 *at* 623, Turner J.

The process was restrictive and transformative in that the applicant's broad nebulous and often communist possessory and use interests (from the colonial law perspective) were winnowed down to accord with English legal estates. The legislation awarded and protected Crown title to all land the Maori had possessed in 1840 as well as allowed for the recognition of heretofore non-recognizable customary incidents of title. That these "other incidents" of title and uses ceased to exist upon issuance of title did not offend either the Treaty or the common law because they were not in any event capable of recognition without transformation. The award of the "whole legal fee" or for "all practical intents and purposes, private property" to the applicant was a superior legal estate to customary title. The subsequent merger of customary uses with common law uses was therefore part of the exclusive and undisturbed possession guaranteed in the Treaty.[261]

Adopted by the Privy Council in *Hoani Te Heuheu Tukino v. Aotea District Maori Board* the statute-based approach was the basis for the continued refusal of the courts to enforce Article Two of the Treaty despite the numerous implicit references to the Treaty in regulation and statute. Except where the dispute involved factual issues regarding the conversion of native title to through the Land Court, the courts continued to use the statute-based approach as precedent for denying legal efficacy to statutory references to the Treaty, as well as references to use rights either impliedly or directly referenced in the Treaty, such as the right to fish in a customary manner.

Aboriginal rights jurisprudence returned with *Te Weehi* which established the distinction between customary rights to use a territory when the underlying customary ownership has been transformed into Crown title. As customary use rights had previously been deemed to be extinguished or merged into common use rights, the distinction articulated by Justice Williamson had potentially far reaching implications. First, aboriginal customary

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[261] *In Re "The Lundon and Whitaker Claims Act, 1871", supra* note 157 at 50.

rights are cognizable within the domestic state system. They are analogous to state law but have their own force and define their own content. Second, it understood that rights to land and possessory interests were more disaggregated than previously accepted. This "bundle of rights" approach to use rights and possessory interests could potentially reconcile assertions of public power and Maori interest in various uses and over areas such as the foreshore.[262] Third, given that use rights and possession of land is disaggregated, the doctrine suggests that different uses may not have been extinguished even though native title or other possessory interests or rights may have been. Fourth, the approach allows for the possibility that various groups enjoyed different uses over the same parcel of land, providing the opportunity for uses to be recognized where aboriginal title cannot be established. Fifth once established, the courts necessarily need to assert their jurisdiction to determine whether the requisite intent or action by the state had extinguished a particular use and judicially protect those un-extinguished rights.

Te Weehi and subsequent decisions such as *Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General* have been understood by legal scholars and the courts as the re-establishment of the common law doctrine of aboriginal rights.[263] They are potentially a step away from orthodox Austinian constitutional theory toward an "indigenization" of New Zealand constitutionalism.[264] Nevertheless as attractive this interpretation may be it appears that the recrudescence of common law aboriginal doctrine is better explained as being a partial incorporation of the Treaty law standards from other jurisdictions into a "new" aboriginal rights doctrine. Indeed, the "doctrine of aboriginal rights" as understood by New Zealand courts, particularly as it relates to the determination of extinguishing events along

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[262] McHugh, *supra* note 161.
[263] In *Te Ika Whenua* the Court of Appeal formally adopted the doctrine of common law aboriginal title. This title cannot be extinguished except by consent. *Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General*, *supra* note 10 at 23-4, Cooke P.
[264] Paul G. McHugh, "Constitutional Voices" (1996) 26 V.U.W.L.R. 449.

with comments by President Cooke regarding compensation for the extinguishment seemingly incorporates Treaty law standards into the doctrine of common law aboriginal rights *sub silento*.[265]

For example, the Court of Appeal in *Ngati Apa* sets a relatively high standard for extinguishing customary title. "While the content of customary property differed in other colonies" Chief Justice Elias writes:

> [T]he principle of respect for property rights until they were lawfully extinguished was of general application. In New Zealand, as is explained below, land was not available for disposition by Crown grant until Maori property was extinguished. In the North American colonies land occupied or used by Indians was treated as vacant lands available for Crown grant.[266]

While "[p]roperty rights may be abrogated or redefined through lawful exercise of the sovereign power"[267] customary title can only be extinguished by the "crystal clear intention" of Parliament which "would need to be demonstrated by express words or at least by necessary implication."[268] Customary title moreover is presumed to exist and the burden of proving extinguishment lies with the Crown. Paradoxically, this approach is in a way consistent with the overruled *Ninety-Mile Beach* decision where that Court observed that that Maori may not be deprived of their customary title "by a side wind."[269]

The *Ngati Apa* Court observed that this extinguishment standard is shared across those British colonies which were occupied by aboriginal peoples prior to the assertion of sovereignty and in the United States. However, a closer look at the analogous law suggests that the high standard is not a common law standard at all but a treaty law standard based on the entrenched constitutional status of treaties in the United States or aboriginal rights in Canada. As the American 7th Circuit Court of Appeals noted in *Lac Courte Oreilles Band of*

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[265] *Te Ika Whenua*, *supra* note 10 at 24.
[266] *Ngati Apa*, *supra* note 10 at para. 19.
[267] *Ibid*. at para.34.
[268] *Ibid*. at para. 185.
[269] *Ninety Mile Beach*, s*upra* note 48 at 466.

Lake Superior Chippewa Indians v. Voigt:

> The primary relevance of the distinction between aboriginal rights of use and treaty-recognized usufructuary rights…lies in the degree of explicitness required to abrogate such rights.[270]

The United States Supreme Court in *United States v. Dion* stated this standard: "Congress can abrogate an Indian treaty right by expressing that intention clearly and plainly."[271] In contrast to treaty-preserved rights, the extinguishment of aboriginal title may be accomplished either directly or by various Congressional actions implying an intention to extinguish aboriginal title. The United States Congress can "extinguish aboriginal title at any time and by any means" and extinguishment may be explicit or implicit but must involve in some sense an exercise of governmental authority adverse to the tribal right of occupancy.[272] Similarly in Canada prior to 1982 the federal government could extinguish aboriginal title by implication. Canadian law presumed extinguishment by operation of law where a statute or regulation expresses an intention to exercise a complete dominion over the territory and activities of a band.[273] After 1982 the clear and express standard and the presumption against extinguishment found in American treaty jurisprudence was adopted by Canadian courts to protect the new constitutional status of aboriginal rights under ss. 25 and 35 of the *Constitution Act, 1982*.[274]

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[270] *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 at 352 (7th Cir. 1983).
[271] *United States v. Dion*, 476 U.S. 734 at 738(1986). For a general discussion of Treaty abrogation in the United States see Charles F. Wilkinson and John M. Volkman, "Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows upon the Earth.' How Long a Time is That?" (1975) 63 Cal. L. Rev. 601.
[272] *Beecher v. Wetherby*, 95 U.S. 517 (1877).
[273] Where the legislature enacted a series of acts that taken together indicate "a unity of intention to exercise…absolute sovereignty over all the lands…inconsistent with any conflicting interest" such legislation would extinguish aboriginal title and whatever aboriginal usufructuary rights dependent upon that title. *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 at 333, Judson J. dissenting.
[274] *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Badger*, [1996] 1 S.C.R. 771.

IV. Conclusion

All Maori usufructuary rights to hunt, fish and gather in a manner different from the rest of the population are the result of Maori obtaining recognition of various special uses in statute. There are limited judicially-created aboriginal rights or Treaty rights. Nevertheless, there are certain fundamental principles which have informed Maori usufructuary rights as set forth in the various statutes and regulations. First, Maori are recognized as having pre-existing propriety rights subject to the Crown's right of extinguishment. Extinguishment must be clear and plain and cannot be implied. Second, continuous regulation by the Crown can extinguish rights. Third, the rights do not extend to exotic species. Fourth, mahinga kai are considered taonga under Article Two of the Treaty. Fifth, the Crown has the right and obligation to preserve indigenous species for Maori under Article One of the Treaty. Sixth, the Crown's rights and obligations to preserve indigenous species is restrained but not blocked by Article Two of the Treaty and the Crown must make a good faith effort to ensure that Article Two rights to toanga are capable of being exercised, if only in a limited way. Seventh, The Crown's ability to absolutely protect species supersedes any Article Two taonga rights.[275]

The rights secured by Maori in legislation, particularly in the area of traditional and commercial fisheries, are not insignificant. Paradoxically when compared to the United States and Canada, the rights are both more secure -- because they are often enacted in legislation -- and less secure -- because Parliament has historically been willing to legislate them away or limit the jurisdiction of the courts to adjudicate Maori claims when Maori interests have collided with other national interests. Like the other states, Maori hunting, fishing, and gathering rights remain subject to complete extinguishment by the legislature. As evidenced by the hasty passage of the *Foreshore and Seabed Act 2004* this undeniable legal power is

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[275] The New Zealand Conservation Authority/Te Whakahaere Matua Atawhai O Aotearoa, *Maori Customary Use of Native Birds, Plants and other Traditional Materials* (Discussion Paper)(Wellington: New Zealand Conservation Authority, 1994).

seemingly less constrained by constitutional and institutional factors. Moreover, the continuing controversy over the status of the Treaty of Waitangi regarding the nature (constitutional, legal, or political) and content of Treaty obligations creates a palpable sense that policies which either secure traditional use rights or use culturally sensitive implementation strategies are vulnerable to short term political machinations or shifts in public opinion.

The institutional and historical constraints reinforce the ongoing jurisprudential and constitutional controversy within which usufructuary hunting, fishing and gathering rights are contested in the constitutional and political milieu. The legal justifications for these rights continue to be perched uneasily between Treaty of Waitangi jurisprudence and the common law doctrine of aboriginal rights. Treaty jurisprudence, which has arisen due to the political salience accorded the Treaty among Maori and in the polity more generally, continues to be informed by *Wi Parata* and the Privy Council's 1941 decision *Hoani Te Heuheu Tukino v. Aotea District Maori Board*. In *Wi Parata* the Court characterized the cession of sovereignty found in Article On as a "simply nullity" and held that the rights and guarantees set forth in the Article Two were legally unenforceable absent statutory recognition under the "Act of State doctrine." The Privy Council in *Te Hoani Tukino* disagreed with the *Wi Parata* Court about the contractual capacity of the Maori chiefs but agreed that Treaty rights were unenforceable in domestic law absent statutory recognition.[276] In spite of these earlier decisions, courts in the past few decades have found that the Treaty forms an interpretive backdrop when construing legislation that implicates interests encompassed by the treaty

[276] "It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law." *Hoani Te Heuheu Tukino v. Aotea District Maori Board*, *supra* note 146 at 324.

terms and principles.[277]

Aboriginal rights jurisprudence, which originated in *Symonds* starts from the premise that Maori law and custom continued after the assertion or transfer of sovereignty to Great Britain and that Maori property rights were not inconsistent with radical title in the Crown.[278] To the extent that common law rights have not been replaced by legislation they survive. In *Wi Parata*, Chief Justice Prendergast's positivist mischaracterization of Maori law and society incorporated British constitutional norms but excluded Maori law and property rights because he held New Zealand to be a "settled" colony under British imperial constitutional law.[279]As a "settled" colony, aboriginal law and rights were deemed to be either non-existent or superseded immediately upon the first settler setting foot in the "empty" territory. While the Privy Council noted in 1903 that "it is rather late in the day" to argue that "there is no customary law of the Maoris of which the Courts of Law can take cognizance" New Zealand courts did not reapply the aboriginal rights doctrine until it resurfaced in the 1986 *Te Weehi* case.[280] Since *Te* W*eehi* the courts have been (at the rhetorical level at least) more willing to recognize and protect un-extinguished aboriginal rights in specific circumstances.[281]

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[277] *Huakina, supra* note 10; *Te Ika Whenua, supra* note 10; *Whata-Wickliffe v. Treaty of Waitangi Fisheries Commission*, [2005] 1 N.Z.L.R. 388 (N.Z.C.A.).
[278] Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University, 1991).
[279] For a discussion of imperial constitutional law as it applied to British colonisation in North America see Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 737.
[280] The record however is not completely empty of references to aboriginal title at common law. For example in the 1912 case *Tamihana Korokai v. Solicitor-General* the Court of Appeal rejected an argument that native title was not recognisable in law. The Court held that the Maori applicants were entitled to apply to the Native Land Court for investigation of their title to the bed of Lake Rotorua unless it was shown that native title had been extinguished by proclamation, cession of the owners, or Crown grant. Crown title was not inconsistent with native title determined by Maori customs and usages. *Tamihana Korokai v. Solicitor-General*, (1912) 32 N.Z.L.R. 321 (N.Z.C.A).
[281] This judicial re-assertion of the doctrine is particularly evident in *Ngati Apa* where the Court of Appeal held that the Maori aboriginal title to the foreshore may not have been extinguished. The Courts noted: "Any property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature, as the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* held. The content of such customary interest is a question of fact discoverable, if necessary, by evidence. As a matter of custom the burden on the Crown's radical title might be limited to use or occupation rights held as a matter of custom….On the other hand, the customary rights might 'be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference'. The

However, as New Zealand law has presumed that Maori use rights are co-extensive and parasitic upon Maori customary land title, which has for the most part been extinguished, the scope of the rights available under common law aboriginal title may be limited.

The fact that the Courts have had minimal input into the ongoing articulation of Maori aboriginal rights suggests an underlying consensus which has historically underlain the articulation of Maori rights (either at common law or as a Treaty claim) in New Zealand's pragmatic constitutional and political system. In one sense, this is the result of the attitude the courts took towards the settlement process during the nineteenth century. In another sense, it is because the underlying political and constitutional conflicts in New Zealand never set forth a dispute whose legal resolution would have enabled a non-Maori group to benefit from a Maori claim to land or rangatiranga. At various times early missionaries, the New Zealand Company, the Colonial Office, anti-war campaigners such as former Attorney General Swainson, Missionary Octavius Hadfield and the Governor articulated policies and envisioned legal rights for Maori tribes. But the logic of imperial and national control essentially eliminated the possibility of legally efficacious Maori rights or the creation of separate Maori districts (where Maori law and custom were to prevail) under s. 71 of the 1852 Constitution in the drive toward a positivist unitary national polity.[282] In consequence or as part of this process, the courts and the political establishment continued to deny standing and enforceable legal rights where a Maori claim was based on the very idea of aboriginality

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Supreme Court of Canada has had occasion recently to consider the content of customary property interests in that country. It has recognised that, according to the custom on which such rights are based, they may extend from usufructuary rights to exclusive ownership with incidents equivalent to those recognised by fee simple title[footnotes omitted]." *Ngati Apa, supra* note 10at para. 31

[282] In 1884 When King Tawhiao presented the petition to the Colonial Secretary in London for the establishment of native districts under the *Constitution Act 1852* the response from the colonial government by Premier and Attorney General Sir Robert Stout indicated that colonial government's unwillingness to proclaim districts was based on the Imperial Parliament's intention that "the section should be only used for a short time and under the then special circumstances of the colony." He pointed out that Maori would be entitled to form local communities under various local government acts and that the operation of the Native Land Acts eliminated the need for special areas. N.Z., Waitangi Tribunal: *The Kaipara Report* (Wai 674) (Wellington: Legislation Direct, 2006) at 350-2.

and pre-existing sovereignty; judicial resolution of these claims, either based on the treaty or common law with its attendant consequence for their status of aboriginal claims never occurred.[283] Rather to the extent that Maori rights embodied in the Treaty or in the common law were a legal constraint upon the colonial government, settlers sought to circumvent them generally ascribing to the idea that they were in some sense a vestige of imperial control and an impediment to the formation of the national state.[284] From this perspective the Native Land Court is not only a method of transforming Maori tenures and freeing the land market but a method of eliminating any vestiges of Maori customary title to consolidate the land tenures and land regulation in a new national state.

Similarly the courts have had little to do with the idea that the Treaty limits or conditions the sovereign authority of the Parliament and these limitations are not to be equated with the conventional or constitutional limitations posited by Westminster constitutional theory. From this perspective, Treaty jurisprudence presumes that the Treaty's endorsement of rangatiratanga is a guarantee to Maori of sovereignty and/or governmental authority and autonomy in some sense analogous to Crown sovereignty; the New Zealand state is the product of a political bargain that necessarily guaranteed the continued existence of tribal authority and customary rights. [285]

Instead the Court's have underpinned the legal justification for legislative supremacy. Yet such constitutional heights for the legislature is not a "natural" result of legislative development within the colonial state but the unfolding of a relatively deep constitutional consensus about the necessity of a strong unitary national state -- despite alternative models

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[283] McHugh, *supra* note 218 at 191.
[284] Nan Seuffert, *Jurisprudence of National Identity Kaleidoscopes of Imperialism and Globalisation from Aotearoa New Zealand* (Alershot Hampshire: Ashgate Publishing Limited, 2006) at 11.
[285] Richard S. Hill, *State Authority, Indigenous Autonomy Crown – Maori Relations in New Zealand/Aotearoa 1900 - 1950* (Wellington: Victoria University Press, 2004) at 13.

that might be fashioned from imperial Britain, other colonies, Maori or the provinces. This is not to say that the Maori presence and the rights claimed under the Treaty of Waitangi or "preserved" under the doctrine of aboriginal title had no effect on the constitutional development; they arguably reinforced the centralizing tendencies implicit in the Westminster system. The Maori presence and settler/Pakeha resistance to Article Two led to a strong emphasis on Article One and Article Three which provided the basis for an evolving liberal constitutionalism unencumbered by the legacies of collective rights and inherent inequalities. So strong is this underlying sentiment that in *Sealords* (which has been considered a high point of Maori Treaty and common law jurisprudence) the Court of Appeal held that the Deed of Settlement based on an earlier agreement with Maori representatives was non-binding because it was in fact not an "agreement" at all --- but is instead a discretionary undertaking by the Crown.[286]For the *Sealords* Court the issue of whether the Deed of Settlement was binding, whether Maori representatives had authority or whether there was significant support or opposition to the proposal among Maori was, in the final analysis immaterial -- the Crown could proceed with legislation implementing the deed in any event. Parliamentary sovereignty precludes the imposition of judicial remedies where Parliament chooses to act.

Yet the story can never be so simple. It appears from the discussion of usufructuary rights and the case law on customary title that significant aspects of what is today considered "common law aboriginal title" in New Zealand are in fact treaty law jurisprudence borrowed from Canada and the United States. Included in this "treaty law" is the rule that Maori customary rights must be explicitly extinguished and that Maori possessory interests extend

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[286] "The true position is that the Maori negotiators did not ask for any agreement by the Crown to that effect: the Crown has indicated that in return for the benefits to be conferred on Maori under the deed it will introduce legislation as outlined in cl 3.5: Maori who are parties to the deed have impliedly agreed that this would be reasonable." *Sealords*, *supra* note 185 at 307, Cooke P.

beyond the dry land and to fisheries. In this sense, the issues of the extent of jurisdiction of the Native/Maori Land Court and the Maori interest in marine and fish water fisheries is a discussion concerning the implementation of the Treaty. Perhaps these departures from traditional common law priority and the totalizing incorporation of customary interests in state law are the result of the changing human rights discourse which has occurred in New Zealand since the 1960s. Whether the voluminous legislative recognition of Maori rights will force the courts to re-visit the issue of whether the Treaty has been at least partially implemented, and whether this partial implementation is sufficient for the incorporation of the Treaty *as a whole* into the legal system is best left for another day.

Chapter Six Conclusion

In the 19th century it became generally accepted by the English settlers and the Americans that their continued economic and political progress was antithetical to the continued presence of indigenous political and economic forms. The totalizing logic of colonialism and imperialism worked to undermine the laws and policies more solicitous of indigenous rights which had been recognized in the early phase of settlement. As Weaver puts it:

> Law and culture – embracing appropriation of sovereignty, the exercise of governmental pre-emption, a weighing of military costs, a model of civilization that put European agriculture at its pinnacle, and the ideals of material improvement – fashioned a cognitive framework for acquisition.[1]

Within this totalizing framework, informed by increasingly racialist views and unitary ideas of national sovereignty, indigenous peoples were presented the option of either assimilation or extinction. Aboriginal legal orders and indigenous collective existence, which posited alternative sources for legitimacy and justification for governmental authority, were unacceptable; the national liberal state, whether deriving authority and sovereignty directly from the people or from sub-national units of government that in turn owed their sovereign nature to popular consent, would control all aspects of internal and external sovereignty.

Yet contrary to the totalizing logic of imperialism and colonialism this "framework for acquisition" did not completely submerge those laws and policies that recognized indigenous possessory and use interests across the territory they used. Legally efficacious indigenous possessory interests to hunt, fish and gather in a manner not accorded other citizens have survived in all the nations under consideration in this thesis.

It is apparent that why and how these rights exist and are articulated in the states today have in large part been determined by constitutional conflicts over the nature and

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[1] John C. Weaver, *The Great Land Rush and the Making of the Modern World, 1650-1900* (Montreal: McGill-Queens University Press, 2003) at 151.

meaning of the constitutional polity among the settlers where these conflicts required the courts to vindicate or entrench indigenous juridical existence and possessory interests in the course of deciding a dispute. In Canada and the United States aboriginal rights were advocated by one level of government against another in the attempt to extend or preserve their perceived constitutional prerogatives and jurisdictional competence. As both levels of governments grounded their existence and actions in a conscious act of nation-building -- a process intimately intertwined with larger issues of territory, self-government, community, diversity and sovereignty -- the tribes' pre-existing occupation of North America and the unique legal and constitutional arrangements which arose from their presence were necessarily entangled within the new constitutional and political disputes of the developing state. In the United States, the United States Supreme Court construed the prior occupancy and possession of territory and the federal policy of treating with tribes as juridical equals as underlining the federal claim of pre-eminent sovereignty within the American federal system. In Canada, the Privy Council in *St. Catherine's Milling*, as part of its general jurisprudence which re-interpreted the centralizing thrust of the *Constitution Act, 1867* in favour of more provincial authority, refused to recognize aboriginal possessory interests as legally efficacious -- a position argued by the federal government. Subsequently the Canadian courts ignored or narrowly construed aboriginal common law rights and refused to enforce treaties absent statutory implementation. Treaties and aboriginal rights only became judicially protected due to the constitutional innovations which resulted from constitutional battles between Quebec and the federal government in the 1970s and 1980s.

In contrast New Zealand did not have these types of constitutional and institutional conflicts. The settlers and imperial officials generally agreed on the underlying liberal philosophy and the allocation of authority or separation of powers set forth in the *Constitution Act 1852* based on British constitutional forms. The constitutional and

institutional disputes which did arise did not implicate tikanga Maori, or treaty or common law rights whose vindication by the courts would have served non-Maori interests. As such aboriginal rights in general, and hunting, fishing and gathering rights in particular, derive from statute. There are few examples of judicial recognition and protection of aboriginal common law rights or any rights guaranteed under the Treaty of Waitangi. Nevertheless, it is apparent that New Zealand courts have not been able to completely embrace the logic of colonialism and parliamentary sovereignty. Values "internal" to the law, which are in many ways antithetical to the colonial impetus behind much of the law and policy relating to Maori, have enabled Maori to preserve some of their customary possessory interests and use rights, if only because of legislative responses to judicial decisions.

The idea that hunting, fishing and gathering rights are affected by larger constitutional issues provides an insight into legal process as well as providing alternative explanations for the manner in which courts have addressed these issues and how the doctrine of aboriginal rights/title developed. First, the continued persistence of these rights in court decisions and rhetoric suggests that values internal to the law, such as the relational and normative component of the rule of law and judicial decision-making and the use of doctrinal paradigms to organize and justify judicial decisions is an important public component of legal decision-making. This is at odds with those analyses which posit that law is so imbricated with the institutional prerogatives of the national state and the socio-economic dominance of the settlers that it can never be "neutral" in any sense. [2] Yet it is clear that the surviving elements of hunting, fishing and gathering rights in legal doctrine suggest that the law was not simply another device used by the British, Americans and settlers to impose their authority and control upon indigenous groups. As the law is relational it was also a medium by which and

[2] See for example Susan F. Hirsch and Mindie Lazarus-Black, "Introduction Performance and Paradox: Exploring Law's Role in Hegemony and Resistance," in Susan F. Hirsch and Mindie Lazarus-Black, eds., *Contested States Law, Hegemony and Resistance* (New York: Routledge, Inc., 1994) 1.

through which various state institutions and peoples interact with each other and the state interacts with groups and individuals. While law does impose control and structure relationships, it also provides a mechanism whereby certain groups can resist the imposition of the very authority the law seeks to buttress, or paradoxically increase the very state authority they sought to oppose. From this perspective the law and legal doctrine are both sources of conflict and a mechanism to manage conflict in the society at large. In order to facilitate this Janus-like relationship law and the legal system are in this sense "autonomous," and Simpson's "good and compelling" reasons which he argues are needed to justify judicial decisions are necessary to mitigate the connection between social and political imperatives and legal effectuation.

Second, due to the tension between the idea that indigenous peoples have various "group rights" and/or juridical equality with the national state and its underlying liberal ethos, usufructuary rights have for the most part been restricted to "traditional" activities. As the courts have used this "traditionalist" approach to define the existence, content and scope of the rights as well as reconcile them with the rights of other citizens, the potential for an expansive construction of indigenous use rights and the concomitant expansive use of judicial power is curtailed. Yet, the approach mistakenly assumes tradition and traditional activities were static or homogenous, ignores the idea of agency or the bargaining aspect in the treaty process, and assumes that regardless of the historical period and the cultural, commercial, and subsistence practices of the tribe, indigenous peoples had no desire to amass wealth because to do so would be "untraditional." This culturally proscribed limitation on the harvest applies to subsistence activities and extends to those few instances where there has been a judicial recognition of commercial rights, either as a "traditional activity" or as a modern manifestation/evolution of a traditional activity.

Third, the idea that there was a general doctrine of common law aboriginal rights which was legally efficacious without the institutional conflicts discussed above as Slattery, McHugh and Brookfield argue is questionable in light of the paucity of case law prior to the 20th century.[3] Rather than a coherent set of principles and rules to be enforced by the courts, there was a vague notion that indigenous people had various claims, indeed "rights" to the territory they occupied and used, and that the government had an inchoate obligation to prevent the wholesale dispossession of these peoples by individual settlers. These claims and obligations were not "legal" despite being incorporated into the imperial policy, nor did they bind the Crown or national authorities. Common law rights solicitous to indigenous peoples and treaty rights bargained between indigenous peoples and imperial or colonial authorities were only *incorporated into* the state legal system, *i.e.* became judicially recognized and the rule of decision, where their legal vindication also advanced some other non-aboriginal, usually governmental, interest. Because constitutional and governmental structures varied *and* because judicial self-understandings of how settlement was to proceed and how the national polity was to exist differed, each state thus exhibits different permutations on the more general common law doctrine of aboriginal rights as it exists today.

Finally, it suggests that constitutional innovation, not simply incremental judicial decision-making within the confines of a legal doctrine, will be necessary if the nations wish to fully address some of the historic grievances of indigenous people. The centralizing and totalizing claims of the unitary euro-centric state authority have not sat comfortably with alternative pluralistic notions of law and authority advocated by indigenous groups. It is particularly salient in hunting, fishing and gathering disputes because for indigenous groups

[3] See *e.g.* Brian Slattery, "Understanding Aboriginal Rights," (1987) 66 Canadian Bar Review 727.

these issues are often about asserting their "sovereignty rights at the 'grass roots' level."[4] This tension is evident even in some of the more celebrated cases within the jurisprudence. Integrating indigenous entities and individuals within the polity profoundly implicates the foundational myths and the skeleton of principles which structure the polity, leading to issues which are, in many ways, non-justiciable. For indigenous groups to obtain full recognition of their "sovereignty rights" it will be necessary for the larger polity to revaluate how rights in general are understood and enforced by the judiciary within the polity; how alternative levels of government and sources of law interact with one another; and how the separation of powers and sovereignty are conceived of within the legal and political system -- issues which are best left for a public debate and conciliation.

[4] Anthony G. Gulig and Sidney L. Harring, "Symposium 'An Indian Cannot Get a Morsel of Pork…' A Retrospective on Crow Dog, Lone Wolf, Blackbird, Tribal Sovereignty, Indian Land, and Writing Indian Legal History," (2002) 38 Tulsa L. Rev. 87 at 102.

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GLOSSARY

hapu	tribe or sub-tribe
hui	meeting(s)
iwi	people, tribe(s)
kai	food
kaitiaki, kaitiakitanga	guardian or trustee, guardianship or trusteeship
karakia	invocations
kawanatanga	governance
Mahinga kai	place(s) where traditional foods were gathered
mana	customary authority
mana taonga	authority from treasured artefacts
mana tupuna	ancestral authority
matauranga Maori	maori cultural knowledge
mauri	life principle
pakeha	Non-Maori New Zealanders
rahui	prohibitions(s) imposed over the taking of resources
rangatiratanga	chieftainship, customary authority, sovereignty
raupatu	conquest, confiscation
rohe	region, tribal district
take	issue, claim
tangihanga	funeral rituals
tapu	under spiritual restriction, sacred
taonga	tangible and intangible treasure
tikanga	customary rights and duties
tino rangatiratanga	unqualified chieftainship, paramount authority
tupuna (tipuna)	ancestor
utu	maintaining balance
wairua	spiritual balance
waka	canoe(s)
whakapapa	genealogy, to layer

Source: Michael Belgrave, Merata Kawwharu & David Williams, *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (South Melbourne, Vic.: Oxford University Press, 2005) 394-6.