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THE LAW OF NATIVE AMERICAN HUNTING, FISHING AND GATHERING RIGHTS OUTSIDE OF RESERVATION BOUNDARIES IN THE UNITED STATES AND CANADA

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ABSTRACT: This article examines and compares the law of Native American/Aboriginal hunting, fishing and gathering rights in those areas which are located outside of reserved land area in Canada and the United States. The article argues that despite the differing statutory and constitutional traditions, both states' law and policy towards the Native American continues to reflect the underlying premises of the colonial project. While indigenous peoples have significant use rights, national, state and provincial power remains the primary locus of regulatory authority. However, there may be opportunities to extend use and co-management rights to allow tribes to be involved in land use and environmental regulatory decisions. Ultimately, changes in the doctrine of indigenous usufructuary rights over time suggests that constitutional innovation, not simply incremental judicial decision-making, will be necessary if the two nations wish to address fully some of the historic grievances of indigenous people.

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I. INTRODUCTION

This article examines and compares the law of Native American/Aboriginal hunting, fishing and gathering rights in those areas which are located outside of reserved land area in Canada and the United States. This law allows these groups to exploit the resources in a manner which is not available or is illegal for non-tribal members. Emphasizing the historical basis of this legal doctrine, the article argues that despite the differing statutory and constitutional traditions both states' law and policy towards the Native American continue to reflect the underlying premises of the colonial project. While indigenous peoples have significant use rights, national, state and provincial power remains the primary locus of regulatory authority. Nevertheless given the continued pressure on natural resources, there may be opportunities to extend use and co-management rights to include legal claims for tribes to be involved in land use and environmental regulatory decisions in order to protect usufructuary interests.

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."[1] Law "gave the Anglophone a way of seeing aboriginal peoples both as organized groups and as individuals" and it was a key mechanism by which the colonialists dealt with the occupants of newly settled territories.[2] 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. Later as the colonial state established jurisdictional hegemony, the law was used to control, pacify, amalgamate and govern indigenous populations.[3]

The extension of law created new cultural and legal boundaries between the colonizer and the aboriginal communities and 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

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[1] ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 6 (1990).

[2] PAUL G. MCHUGH, ABORIGINAL SOCIETIES AND THE COMMON LAW: A HISTORY OF SOVEREIGNTY, STATUS AND SELF-DETERMINATION 4 (Oxford University Press 2004).

[3] John L. Comaroff, *Colonialism, Culture, and the Law: A Foreword*, 26 L. & SOC. INQUIRY 305 (2001).

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."[4] 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 enabled the colonial state to ameliorate, if state authorities so chose, some of the more brutal aspects of settler interaction with indigenous peoples.[5]

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 applicable law. These rights are either reserved by or derived from treaties, common law aboriginal title or 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," "unextinguished rights," "inherent rights," "non-territorial aboriginal title" and "customary rights." They have been analogized to "profits à prendre," access rights" or easements by the courts.[6] 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

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[4] LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY 2-3 (Cambridge University Press 2002).

[5] Sally Merry, *Law And Colonialism*, 25 L. & SOC'Y REV. 889, 891 (1991).

[6] A profit à prendre is defined as a "right to take a part of the soil or product of the land of another . . . [including] the right to hunt and fish on another's land." 25 AM. JUR. 2d *Easements and Licenses in Real Property* § 4 (1996). "[A] profit à prendre is a liberty in one person to enter another's soil and take from it the fruits not yet carried away." In this sense, it is distinguishable from an easement which only allows access, which does not incorporate the right to take the fruits of the land." "A profit à prendre is therefore distinguishable from an easement, since one of the features of an easement is the absence of all right to participate in the profits of the soil charged with it. It is similar to an easement, however, in that it is an interest in land."; C.J.S. *Easements* § 9, p. 179, "The [profit] is in the nature of an easement . . . but it is more than an easement. It is an interest or an estate in the land itself as distinguished from a mere personal obligation of the owner of the reality." The right to cross another's land to take water or fish from sites along the water edge is by an access easement alone, rather than a profit. "A profit à prendre is a right to take from the land of another some part of the soil of that tenement or minerals under it or of its natural produce, or the animals *ferae naturae* existing upon it. The subject matter of a profit must be capable of ownership . . . ." PAUL JACKSON, THE LAW OF EASEMENTS AND PROFITS 28 (1978). *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 1542 (7th ed., 1999). The terms "profits à prendre" and "usufruct" are essentially analogous in English law despite the Roman and civil law origins of usufructs. Nevertheless usufructuary right as the term is used in indigenous jurisprudence implies a right to use property for purposes that include the "ownership" or possession of the items taken from the land. Such things as the use of resources for religious and cultural purposes or the general environmental management of area do not fit well within the strict English law definition of a profit or usufruct. *See* L. F. E. Goldie, Note, *Title and Use (and Usufruct) — An Ancient Distinction too Oft Forgot*, 79 AM. J. INT'L L. 689, 690-695 (1985); Gary D. Meyers, *Native Title Rights in Natural Resources: A Comparative Perspective of Modern Jurisprudence*, 19 ENVT'L & PLANNING L.J. 245 (2002).

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, as well as a right to preserve the resource from activities that might damage continued use.[7] Occasionally the use rights can include commercial exploitation.

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. The disputes over usufructary rights energize many politically potent interest groups as well as implicate fundamental social values. Hunting and fishing are important industries in each country. Employment in many areas where the rights are asserted is often specifically geared to tourism or extractive industries. Naturally, lumbering, ranching and extractive industries are concerned about what impact the 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 effectively manage the resource. 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, thus restricting the opportunities of non-aboriginals to use the resources and as well as overexploiting them. 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 where 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 and food but usually indigenous struggles to gain resources and territory are intertwined with claims for sovereignty, autonomy, cultural recognition and the redress of historical grievances. These are 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 to use the resources in a particular area. At the same time, the resources in question are often perceived, rightly or not, 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,

[7] 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*, 8 WIS. INT'L L.J. 2 (1989).

fishing and tourism groups, that aboriginal resource use will derogate from non-aboriginal (primarily sporting) use. In this environment, 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 issues also involve issues that are central to the foundation and development of social, legal and constitutional structures. Often the process of delimiting 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.[8] 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 to other citizens. They also must consider national constitutional limitations due to such requirements as federal structures 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 the usual indeterminacy inherent in such matters. 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 internal to the law. [9]

II. THE AMERICAN DOCTRINE OF OFF-RESERVATION HUNTING, FISHING AND GATHERING RIGHTS

While the principles governing Native American 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: rights are reserved either explicitly or implicitly in treaty, statutory agreements or executive orders establishing reservations.[10] The rights reserved by tribal sovereigns have "a significant geographical component" which for the most part is limited to the reservation. Federal

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[8] JAMES S. FRIDERES, ABORIGINAL PEOPLES IN CANADA: CONTEMPORARY CONFLICTS 2-20 (Prentice Hall Allyn and Bacon Canada 5th ed. 1998).

[9] JOHN G.A. POCOCK, TIME, INSTITUTIONS AND ACTION: AN ESSAY ON TRADITIONS AND THEIR UNDERSTANDING, POLITICS, LANGUAGE AND TIME ESSAYS ON POLITICAL THOUGHT AND HISTORY 233 (University of Chicago Press 1971).

[10] Executive Orders may establish off-reservation hunting, fishing and gathering rights both prior to and after statehood. However, after statehood there will be no implied rights found and the rights must be set forth explicitly in the Executive Order. *See* Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334 (Wash. 1996).

jurisdiction is paramount within the reservation, and state jurisdiction is paramount where an activity takes place off the reservation, absent some federal treaty or federal statute to the contrary.[11] As the United States Supreme Court noted in *Mescalero Apache Tribe v. Jones*:

> [T]ribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation." Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.[12]

However, the issue becomes relatively complex once the analysis proceeds beyond the rule set forth in *Mescalero Apache.*

First, it is not always clear and often bitterly disputed what the historical circumstances surrounding the existence, content or extinguishment of aboriginal or treaty rights are. Typically, the disputes involve a degree of factual specificity which require the court to resolves difficult questions of historical fact and historiography. Second, the evidentiary problems are often compounded by the difficulty in determining legal import of treaty language or a federal statute(s) in light of the particular circumstances of the tribe claiming the rights. Through the use of interpretive approaches considered protective of Native American interests, the courts have generally eschewed a plain language approach to treaty texts or the application of traditional rules of statutory construction methodologies. As such, it has been necessary to consider the particular text *in pari materia* with other legislative enactments and in light of the general historical relationship between the Indians and the federal government in general, and in relation to the particular relationship of the federal government and the tribe claiming usufructuary rights. Third, even where the content and scope extent of the federal action is clear, off-reservation usufructuary privileges involve the balancing and blending of federal and state authority; an analysis that 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.[13] 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

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

[12] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973).

[13] Baldwin v. Fish and Game Comm'n of Montana*,* 436 U.S. 371 (1978). Burger, C.J., concurring notes at p. 392 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" (citations omitted).

Indians a federal right to pursue the last living steelhead until it enters their nets.[14]

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 can extend state jurisdiction and regulate activities of tribal member even within the reservation in certain instances.[15] 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 dependent upon the idea of efficacious elected local governments.[16] 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 this domain, and they continue to apply structural considerations and the equal footing doctrine to federal actions which may affect the state authority.[17] 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.[18]

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

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

1. Historical Occupation and Use

American law sources hunting, fishing and gathering rights in the historic tribal use, occupation and possession of territory by tribal entities, which exercised jurisdiction over territory.[19] In *Johnson v. M'Intosh* Chief Justice

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[14] Dep't of Game of Washington v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44, 49 (1973).

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

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

[17] *Nevada*, 533 U.S. 353; South Dakota v. Gregg Bourland, 508 U.S. 679 (1993); Montana v. United States, 450 U.S. 544 (1981).

[18] Wisconsin v. Baker, 698 F.2d 1323, 1333 (1983) (holding that 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).

[19] I am using the term possession the same way that it is used by Professor Kent McNeil in his book *Common Law Aboriginal Title*. Prof. McNeil suggests that possession is a legal concept or a conclusion of law which arising from a sufficiently close physical relationship between a person and a parcel of land due to an actual presence or control over it, coupled with an intention to hold the territory for the person's own purposes. KENT MCNEIL, COMMON LAW

Marshall noted that the legal relationship governing American-Native 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 . . . ."[20] According to Marshall and later Court decisions, the rule is derived from the earlier British practice during the era of discovery which was then adopted by the new United States.[21] While occupancy, use, and possession are often claimed by tribes to have existed from "time immemorial" there is no requirement that Indian title predate European discovery or assertion of sovereignty. It simply must be continuous and exclusive unless there was a forced removal.[22] Possession and use is not determined according to the criteria found in British and American common law. Rather it is 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.[23]

The rights included in Indian title are "as sacred and as securely safeguarded as is fee simple absolute title."[24] It is "good against all but the sovereign" and can be terminated only by "sovereign act" of the federal government.[25]

The historic Native American possession of territory as legal basis for exercising various activities necessary for their continued governmental and physical survival is incorporated into American law by the Discovery doctrine as understood in *Johnson v. M'Intosh* (1823), *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832).[26] The doctrine presumed that "discovery gave

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ABORIGINAL TITLE 6-14 (Clarendon Press 1989). Absent an explicit Congressional or Executive determination of the territory 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 base on the intention of the parties and all the surrounding circumstances. *See* United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 345 (1941).

[20] Johnson v. M'Intosh, 21 U.S. 543, 574 (1823).

[21] *See* Mitchel v. United States*,* 34 U.S. 711 at 745 (1835):

> 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.

[22] Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935 (Ct. Cl. 1974).

[23] Mitchel v. The United States, 34 U.S. 711, 746 (1835).

[24] United States v. Shoshone Tribe, 304 U.S. 339 (1941).

[25] Oneida Nation of New York v. New York, 414 U.S. 661, 667 (1974).

[26] Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1, 33 (1831); Worcester v. Georgia, 31 U.S. 515, 559 (1832). The Act of State Doctrine, which denies the existence of aboriginal interests absent statutory recognition and enactment, has had little applicability in American Indian jurisprudence since American courts recognized Indian

title to the government by whose subjects, or by whose authority, it was made" against all other European governments and "necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it."[27]

Much attention has been focused on the justification this doctrine provides for the American colonial project that has dispossessed the tribes of their territory and lifestyle. It has been faulted for establishing the legal basis for the extension of state jurisdiction over tribes and the plenary power doctrine. The American version of this doctrine excluded the 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 discovering Europeans. Rather 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 *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia* and *Worcester v. Georgia* it was established that subject to the national government's

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possessory interests at common law and the special governmental status of tribal entities early in the history of the republic. The particular reading of the holding in Johnson v. M'Intosh (*i.e.* discovery is equivalent to absolute title by conquest) as well as Chief Justice Marshall's statement that "Conquest gives a title which the Courts of the conqueror cannot deny" is suggestive of the judicial impotence toward the recognition of aboriginal property rights assumed by the Act of State doctrine as it is understood in Canada. However the M'Intosh Court was looking as the issue from a separation of powers perspective — it never held that judicial recognition of Indian property rights was dependent upon a legislative act. The Act of State doctrine is also related to the "political question" doctrine outlined by the Court in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), but the Court never applied that doctrine to its logical limits nor is does the doctrine preclude judicial recognition of aboriginal interests. As early as 1914 in Perrin v. United States, the Court, while nevertheless holding the plenary power of Congress over Indian affairs, noted that "[a]s the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential for their protection, and that, to be effective, its exercise must not be purely arbitrary but founded upon some reasonable basis." Perrin v. United States, 232 U.S. 478, 486 (1914). Similarly, the Court's discussion of "recognized title" and the constitutional protection of aboriginal title under the Fifth Amendment in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) suggests that some positive step of recognition must be taken by the federal government to secure common law property rights. However, the precedential force of this decision is weak because the case occurred in Alaska and the constitutional issue was relatively narrow. Tribes retain the federal common law right to enforce their aboriginal land rights. Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985). Throughout the 20th century the Court has also diminished the reach of the political question doctrine. In Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977), the Court noted that government authority over tribal property, although plenary, may be challenged when the governmental action infringes on constitutional rights because Indian rights are rooted within the Constitution. Today, while Congressional authority is broad, Congressional acts that affect Indians are subject to judicial review and ordinary constitutional protects may be invoked where an action is not rationally tied to congressional trust obligations. The test is found in Morton v. Mancari: "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." Morton v. Mancari, 417 U.S. 535, 555 (1974).

[27] Johnson v. M'Intosh, 21 U.S. 543, 573 (1823).

overarching sovereignty to extinguish title by purchase or conquest, the tribes have a legal interest in their territory;[28] they have a fiduciary relationship with the national government which can be used as a measure to evaluate governmental conduct;[29] and they are assumed to have governmental capacity and limited sovereignty over their territory,[30] which allows them to be governed by their own

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[28] *See id.* at 573-74:

> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them. 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.

See also Worcester v. Georgia, 31 U.S. 515, 559 (1832):

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians.

[29] *See* Cherokee Nation v. Georgia, 30 U.S. 1, 33 (1831):

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

[30] *See M'Intosh*, 21 U.S. at 588 (emphasis added):

> 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.*

laws to the exclusion of state jurisdiction.[31] While judicial recognition of these protective premises has varied over the years, all subsequent Indian jurisprudence has been informed by them.

Finally, the pre-existing sovereignty of the tribes and the recognition of Native American legal possession establish that 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 residual inherent sovereignty of the tribes provides them with an exclusive source of authority to manage certain aspects of their collective existence as well as precludes challenges from non-Indians based on due process and equal protection constitutional provisions that have arisen in off-reservation disputes.[32]

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.[33]

Yet because the Discovery doctrine incorporated Native American occupancy and use rights into municipal law and subsequent federal treaties and

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[31] *See Worcester*, 31 U.S. at 561:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with 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.

[32] United States v. Winans*,* 198 U.S. 371, 380-81 (1905):

> 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 (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.

See also the United States Court of Appeals' decision in United States v. Washington*,* 384 F. Supp. 312 (W.D. Wash. 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."

[33] United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 347 (1941).

legislation occupied the entire field of American-Indian relations, Indian use and occupancy are also federal rights. The 1789 U.S. 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.[34] 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.[35]

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 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 highlighted 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.[36]

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 far removed from a particular tribe's historic territory; a situation which commonly occurred, particularly during the

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[34] *See* Oneida Nation of New York v. New York, 414 U.S. 661, 670 (1974):

> 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.

[35] United States v. Michigan, 653 F.2d 277, 278 (1981).

[36] Wisconsin v. Envt'l Prot. Agency, 266 F.3d 741 (2001) (citations omitted). The author was involved in this case when he was tribal attorney for the intervenor Sokaogon Chippewa Community.

removal period. These removed tribes continue to have various rights associated with their use and occupation of their historic territories despite their removal to a different area. On 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 reserve rights doctrine informs all legal interpretations of treaty texts or federal statutory agreements.[37] The doctrine, which has its source in international law, 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 American sovereignty.[38] "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory". In this respect, they continue hold their "natural rights" to sovereign authority in areas where it has not been relinquished.[39] As noted by Justice O'Connor in *Mille Lacs*: "The

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[37] "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 aboriginally and the United States was the grantee." United States v. Michigan, 471 F. Supp. 192, 254 (W.D. Mich. 1979).

[38] In Worcester v. Georgia, 31 U.S. 515, 520 (1832), Chief Justice Marshall noted the international law basis of tribal sovereignty:

> In opposition to the original right, possessed by the undisputed occupants of every country, to this recognition of that right, which is evidenced by our history in every change through which we have passed, are placed the charters granted by the monarch of a distant and distinct region, parcelling out a territory in possession of others, whom he could not remove, and did not attempt to remove, and the cession made of his claims, by the treaty of peace. The actual state of things at the time, 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 to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognising their title to self-government. The very fact of repeated treaties with them recognises it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says 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." At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.

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

Chippewa were on the land long before the United States acquired title to it."[40] In the oft-cited quotation in *United States v. Winans* the 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.[41]

Under the reserved rights doctrine, all members of the signatory tribes retain whatever rights they possessed which are not conveyed or relinquished.[42] The rights reserved 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.

The effect of the reserved rights doctrine can be overstated. Absent contrary language, the courts assume that the United States was negotiating for the unimpeded settlement and economic exploitation of the area. As such, the scope of rights obtained by the United States is not limited by the uses they intended in the 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*. American negotiators' historically situated specific intent, *e.g.* to cut the white pine or clear the area of Indians, is not a limiting factor in determining the extent of the agreement. In contrast, the specific intent to reserve various uses is required by the courts when considering Native American reserved treaty rights. Moreover, these uses have generally been understood by the courts to be "traditional", thus limiting the range of reserved uses.

Nevertheless, the reserved right 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. It has three implications for

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[40] Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs*), 526 U.S. 172, 195 n.5 (1999).

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

[42] *See* Winters v. United States, 207 U.S. 564, 576 (1908):

> 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?

See also United States v. Wheeler, 435 U.S. 313 (1978).

hunting, fishing and gathering privileges. First, the grant to the United States where hunting, fishing and gathering rights are explicitly or implicitly reserved must be 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 or by implication, or by subsequent federal statute, remain within the governmental competence and use of the tribe. Included in this category 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 type activities involving harvested natural resources. This is consistent with the idea of the continuing sovereignty of the tribe as a contemporary source of authority.

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 between the United States and 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.[43]

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.[44]

The trust responsibility is also a source of federal authority over the tribes and provides a standard for the judicial evaluation of Congressional and Executive action.[45] However, perhaps reflecting the plenary power of the federal

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[43] Johnson v. M'Intosh, 21 U.S. 543, 597 (1823).

[44] Bd. of Cnty. Comm'rs v. Seber, 318 U.S. 705, 715 (1943).

[45] *See* United States v. Kagama, 118 U.S. 375, 383-84 (1886):

> 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.

government to deal with Native American as it sees fit, the obligations required by the court under the general trust relationship are limited. Unless the United States assumes or has control or supervision over tribal monies or properties no substantive fiduciary standards are required.[46]

For the most part, the trust responsibility impacts the area of hunting, fishing and gathering activities as an interpretive principle applied by the court to determine the existence, content and extent of a claimed right under a treaty or agreement as well as the character of the negotiating parties.[47] 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."[48] This political relationship is ongoing; and historic representations made by the Americans as evidenced by treaty texts, statutory and executive agreements understood in light of the historic context, are 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 to swindle the Indians.[49] There is an additional assumption that the United States

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See also Morton v. Mancari, 417 U.S. 535, 555 (1974) ("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"). In *Cohen's Handbook of Federal Indian Law* 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." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 221 (Neil Newton ed., 2012).

[46] 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, 506 (2003) (citations omitted); *see also* United States v. Mitchell, 463 U.S. 206 (1983).

[47] The principle also requires that the United States bring suit to preserve a treaty guaranteed right.

[48] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658, 675 (1979).

[49] The assumption of good faith discussed here is not a manifestation of the political question doctrine. The political question doctrine holds that the formation of an agreement, once accepted by Congress, may not be litigated before the courts. An example of the political question doctrine is found in United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979). Discussing the 1836 Treaty with the Chippewa and Ottawa in Michigan, Justice Fox noted:

> [I]n view of the dismal history which generally surrounds the dealings of the United States with these first inhabitants of this land, and the history of this specific treaty negotiation, punctuated by numerous instances of underhanded and perfidious dealings with these trusting and gentle people, simple justice requires that this court begin to put an end to the unfairness which has plagued the Indians in their dealings with the white man from their first contact with him, and restore to the Indian that which was by nature his, and now by right also. The holding does not go so far as to void the treaty because of lack of consent. *See, e.g.*, Lone Wolf

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 that it considered the adverse consequences to the tribal interests and it choose to reconcile those opposing interests by curtailing or abrogating the tribal rights.[50]

The fiduciary nature of the tribal/federal relationship is most apparent in the "traditional canons of construction" which have been developed to interpret treaties, agreements incorporated into statute and executive agreements between the federal government and the tribes. The Supreme Court has generally approached hunting, fishing, and gathering rights as the 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 treaties, statutes incorporating agreements or executive orders 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.[51] Resolving disputes about the extent and content

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> v. Hitchcock, 187 U.S. 553 (1903), where the Court held that it could not consider the validity of an agreement allegedly obtained by fraudulent misrepresentation because the question of the validity of the agreement belonged to Congress. The language of the treaty does grant territory to the United States. Were it not for Lone Wolf, and DeCoteau v. District County Court, 420 U.S. 425, which proscribe invoking the canon that legal ambiguities are to be resolved for the benefit of the Indians to the extent of disregarding clear expressions of tribal and Congressional intent, this court, would, on the record before it, identify this as an invalid treaty because it was the product of fraud, duress, conflicts of interest, coercion, and was very likely produced by the alcohol of liquor peddlers who sought to keep the Indians from knowing what they were doing.

Michigan, 471 F. Supp. at 258 (citations omitted). The assumption of good faith focuses on the textual and judicially found understanding of the agreement, not the formation. It is an assumption that, as noted by Justice Stevens, "[w]hen the signatory nations have not been at war and neither is the vanquished, it is reasonable to assume that they negotiated as equals at arm's length." *Fishing Vessel*, 443 U.S. at 675.

[50] It could be argued that the use of legislative materials simply confirms pre-existing decision by the Court relying upon other judicial predilections. When applying the traditional canons of construction to materials generated by the legislative process, the ambiguities inherent in such an analysis (*e.g.* which legislator's views are important or determinative? What non-statutory documents generated within the legislative process are relevant?) become manifest. However, the use of legislative intent in hunting, fishing and gathering cases has had three major effects. 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 favor of a particularized fact based 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 Americans.

[51] Statutory rules of construction regarding agreements with specific tribes and enacted on behalf of Indians are interpreted using the same methodology as those involving treaty construction, except that in the latter case Native Americans had no "understanding" of the enactment because it was imposed upon them and neither their consent nor understanding of

of a particular text in favor 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.[52] This voluntary aspect of American-Indian relations is central for the recognition and integration of Native American tribal governments and rights into the American federation.

The first protective principle holds that a treaty should be understood as the tribal signatories would have understood them 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 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

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its terms are considered material. *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 at 766 (1985) (citations omitted):

> [T]he standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, "[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 . . . .

See also Choatte v. Trapp, 224 U.S. 665 (1912).

[52] United States v. Michigan*,* 471 F. Supp. 192, 249-61 (W.D. Mich. 1979). I am indebted to Justice Fox for his discussion and citations of the canons of treaty interpretation. The principles of treaty construction, while related to the United States' fiduciary obligations to Native Americans, contrasts with an unwillingness to differentiate among those situations where an agreement is the result of misrepresentation, coercion, or the result of mutual bargaining. The courts have recognized the distinctions but fail to attribute different consequences to each situation. In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Court refused to look behind an agreement allegedly based on misrepresentation and fraud since it had been accepted by Congress. At the same time, the Court has recognized the coercive nature of certain treaties. In Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), Justice Marshall, writing for the majority, noted that the various treaties with the Cherokees in Oklahoma were not arms-length transactions. The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. *Id.* at 630-31. Justice Marshall's conclusion is at odds with Justice Stevens who wrote that "[w]hen the signatory nations have not been at war and neither is the vanquished, it is reasonable to assume that they negotiated as equals at arm's length." *Fishing Vessel*, 443 U.S. at 675.

> 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.[53]

This principle necessarily makes an analysis factually specific and incorporates tribal legal and cultural concepts into law;[54] since understandings of the tribal participants are imbricated with Native American cultural and legal concepts which are then subsumed in text.[55] For example, the Court in *Menominee Tribe of Indians v. United States* found that the 1854 treaty language "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."[56] It would "seem unlikely," Justice Douglas, continued for the Court:

> [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.[57]

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

[54] For example, the Court in *Fishing Vessel*, 443 U.S. at 677-78 (emphasis in original) stated:

> 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.

[55] In Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 357 (1945), Justice Jackson, in a concurrence, noted the inappropriateness of applying Anglo-American property concepts to the conceptions of ownership held by the tribes: "We doubt if any interpreter could intelligently translate the contents of a writing that deals with the property concept, for the Indians did not have words to fit ideas that have never occurred to them. Ownership meant no more to them than to roam the land as a great common, and to possess and enjoy it in the same way that they possessed and enjoyed sunlight and the west wind and the feel of spring in the air. Acquisitiveness, which develops a law of real property, is an accomplishment only of the 'civilized.'"

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

[57] *Id.* at 405 n.2.

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 absent 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.[58]

The second principle is that doubtful expressions or textual ambiguities in treaty and statutes are to be resolved in favor of the tribal parties.[59]

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.[60]

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.[61] The ambiguity may be in the agreement itself, or in various statutory expressions and/or ratifications of the agreement passed by Congress.[62] Of course, what precisely constitutes an unclear expression or phrase of course is the woof and warp of legal argument. Under the canons of construction an ambiguity can be found either in the text as it is presently analyzed 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."[63] As such

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[58] Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs*), 526 U.S. 172, 198 (1999).

[59] 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. Ariz, State Tax Comm'n, 411 U.S. 164, 174 (2001) (quoting Carpenter v. Shaw, 280 U.S. 363, 367 (1929)).

[60] Winters v. United States, 207 U.S. 564, 574-77 (1908).

[61] Worcester v. Georgia, 31 U.S. 515 (1832).

[62] Antoine v. Washington, 420 U.S. 194 (1975).

[63] Menominee Indian Tribe of Wisconsin v. Thompson, 943 F. Supp. 999, 1007 (W.D. Wis. 1996).

these "instruments 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." [64] 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.[65]

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.[66]

Third, the rules require that treaties and agreements should be construed liberally in favour of the Indians.[67]

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[64] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978).

[65] Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs*), 526 U.S. 172, 202 (1999). Justice O'Connor continued, "an analysis of the history, purpose, and negotiations of *this Treaty* leads us to conclude that the Mille Lacs Band did not relinquish their 1837 treaty rights in the 1855 Treaty" (emphasis in original).

[66] South Carolina v. Catawba Indian Tribe, 476 U.S. 498 (1986); "We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent." DeCoteau v. Dist. Cnty. Court, 420 U.S. 425, 447 (1975); *See also* Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943):

> Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.

[67] "In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear." In United States v. Winans, 198 U.S. 371 (1905), the Court held that, despite the phrase "in common with citizens of the Territory," Article III conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their "usual and accustomed places" in the ceded area; and in Seufert Bros. Co. v. United States, 249 U.S. 194 (1915), a similar conclusion was reached even with respect to places outside the ceded area. *See also* Tulee v. Washington, 315 U.S. 681, 684-5 (1942) where the Court stated:

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 . . . .[68]

The liberal construction rule is applied in two ways. On 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.[69] On the other hand, the rule applies where a treaty or an agreement is silent concerning a particular issue. For example, the *Mille Lacs* Court held that the usufructuary rights reserved by the 1837 Treaty were neither a *profit à prendre* nor a license.[70] Because the rights

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> From the report set out in the record before us, of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

[68] Antoine v. Washington, 420 U.S. 194, 212 (1975) (Douglas, J. concurring).

[69] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658, 662 (1979).

[70] The procedural history of the *Mille Lacs* case is complex. After Mille Lacs Band initially sued Minnesota 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 Mille Lacs Band of Chippewa Indians v. Minnesota, 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. This decision is found at 861 F. Supp. 784 (D. Minn. 1994) and 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 952 F. Supp. 1362 (D. Minn. 1997). 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 a 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 wherein the court rejected making a further allocation of resources affected by the regulations and excluded certain privately held lands where the treaty

were not an interest in land, 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.[71] In many instances textual silence relates to the purported extinguishment of abrogated treaty rights by the United States. In this case, the Court has held that treaty rights may not be extinguished by implication and required that either an explicit statement of treaty rights has been extinguished or "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."[72]

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 of the treaty that is consistent with tribal understandings and the federal government's general trust obligation. The Court stated 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.[73]

Nevertheless, such an exception provides more in the way of 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 favor of some other interest. In *Montana v. 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

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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).

[71] *Mille Lacs I*, 853 F. Supp. 1118. Note, however, that the Court in United States v. Winans*,* 198 U.S. 371, 381 (1905) seemed to conceptualize the usufructuary access right as an interest in land*.*

[72] South Dakota v. Bourland, 508 U.S. 679, 693 (1993); United States v. Dion*,* 476 U.S. 734, 738 (1986).

[73] United States v. Choctaw Nation, 179 U.S. 494, 535 (1900).

prohibit all hunting and fishing by nonmembers on non-Indian property within reservation boundaries. The ability of the tribe to regulate non-members on the Big Horn River was dependent upon its ownership of the riverbed. The treaty outlined the territory of the reservation but was silent as to the ownership of the streambed. The Court's opinion 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"[74]

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 absent a treaty which designates

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[74] Montana v. United States, 450 U.S. 544, 552 (1981). When considering the treaties through which the Crow claimed title, the Court stated that the "effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory." *Id.* at 553. As to the tribe's claim to regulate non-member hunting and fishing on non-Indian fee land within the reservation boundaries, the Court held that the extent of authority granted by the treaty only extended to territory where the tribe exercised "absolute and undisturbed use and occupation." The Court further stated on p. 559:

> And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq*., and the Crow Allotment Act of 1920, 41 Stat. 751. § 8. If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians.

The dissent (Blackmun, J. dissenting, joined by Marshall, J. and Brennan, J.) argued on p. 578 that the "public purpose" exhibited by the United States in establishing the reservation was evident based on the historic record and that the retention of the bed of the river was consistent with the understanding of the Crow negotiators:

> It is hardly credible that the Crow Indians who heard this declaration [to protect the Crow by saving for them land and providing them with a means to sustain themselves] would have understood that the United States meant to retain the ownership of the riverbed that ran through the very heart of the land the United States promised to set aside for the Indians and their children 'forever.'

The dissent agreed with the Court's resolution of the question of the power of the tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the tribe.

new territory, a hunting, fishing and gathering activity is restricted to a particular area of land over which the tribe held aboriginal title over or an area over which it exercised enough historic usage such that the exercised activities could be characterized as an aboriginal right. Third, that the area where the rights are exercised could be reduced by subsequent federal activity such as issuing patents or land or flooding lands for irrigation and flood control purposes. Fourth, reserved natural resources are not exclusively for Indian harvest. Finally, the courts assume that the content of the reserved rights 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 dependent upon the territorial extent of a tribes' original Indian title or 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.[75] 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 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 unextinguished aboriginal title. Aboriginal title is the territory that a tribe historically occupied, used, and possessed. It is not defined with reference to American and 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."[76] The historic uses remain important in determining the content of rights reserved under a treaty or legislatively ratified agreement.[77] Whether the particular tribe

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[75] 18 U.S.C.A § 1151 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.

[76] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 275 n.4 (1955).

[77] *See* Lac Courte Oreilles Band v. Wisconsin (*LCO III*), 653 F. Supp. 1420; Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 839 (D. Minn. 1994). *LCO* involved the U.S. Circuit Court for the Western District of Wisconsin and numerous appeals to

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.[78]

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.[79] Extinguishment of aboriginal title also extinguishes hunting, fishing and gathering rights based on that title.[80] 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 areas.[81]

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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 Judge Doyle 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 is found at Lac Courte Oreilles Band v. Voight, 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 Lac Courte Oreilles Band v. Wisconsin (*LCO II*), 760 F.2d 177 (7th Cir. 1985). (District Court used a particular date prior to which changes in land ownership from public to private in order to determine which date excluded that land from exercise of usufructuary right is inappropriate); *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); Lac Courte Oreilles Band v. Wisconsin (*LCO IV*), 668 F. Supp. 1233 (W.D. Wis. 1987) (State regulation of usufructuary right must be least restrictive alternative in the interest of conservation); Lac Courte Oreilles Band v. Wisconsin (*LCO V*), 686 F. Supp. 226 (W.D. Wis. 1988) (Chippewa could not reach modest living needs from available harvest in ceded territory); Lac Courte Oreilles Band v. Wisconsin (*LCO VI*), 707 F. Supp. 1034 (W.D. Wis. 1989) (Chippewa may regulate their own harvest provided they enact and implement conservation certain measures); Lac Courte Oreilles Band v. Wisconsin (*LCO VII*), 740 F. Supp. 1400 (W.D. Wis. 1990) (harvestable resources in ceded territory allocated equally between Chippewa and Wisconsin); Lac Courte Oreilles Band v. Wisconsin (*LCO VIII*), 749 F. Supp. 913 (W.D. Wis. 1990) (Eleventh Amendment of U.S Constitution prevents recovery of monetary damages against state for violation of treaty rights); Lac Courte Oreilles Band v. Wisconsin (*LCO IX*), 758 F. Supp. 1262 (W.D. Wis. 1991) (treaty right does not extend to commercial timber harvesting); Final Judgment in case is found at Lac Courte Oreilles Band v. Wisconsin (*LCO X*), 775 F. Supp. 321 (W.D. Wis. 1991).

[78] United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 345 (1941).

[79] There has 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. *See* State v. Coffee, 556 P.2d 1185 (Idaho 1976).

[80] Confederated Tribes of Chehalis Indian Res. v. Washington, 96 F.3d 334 (9th Cir. 1996).

[81] People v. Le Blanc, 399 Mich. 31 (Mich.1976); State v. Gurnoe, 53 Wis. 2d 390 (Wis. 1972); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918).

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.[82] The federal government can extinguish aboriginal title either by purchase or by simply taking the territory – an action that the Court has stated will not be "lightly implied."[83] Coupled with the power to extinguish aboriginal title is the power of the United States to determine which tribes held aboriginal title and the extent of the territory over which the tribe holds aboriginal title.[84] 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 not or may not be identical to the original territory the tribe possessed prior to the agreement.[85]

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, it entrenches the signatory tribe's collective existence and inherent residual sovereignty within the American federal system.[86] As Justice Marshall noted in *Worcester*: "The acceptance of these cessions is an acknowledgment of the right

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[82] *See* Beecher v. Wetherby, 95 U.S. 517 at 525 (1877):

> It is true that, for many years before Wisconsin became a State, that tribe [the Menominee] occupied various portions of her territory, and roamed over nearly the whole of it. In 1825, the United States undertook to settle by treaty the boundaries of lands claimed by different tribes of Indians, as between themselves, and agreed to recognize the boundaries thus established, the tribes acknowledging the general controlling power of the United States, and disclaiming all dependence upon and connection with any other power. The land thus recognized as belonging to the Menominee tribe embraced the section in controversy in this case. Subsequently, in 1831, the same boundaries were again recognized. But the right which the Indians held was only of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians.

[83] People v. LeBlanc, 248 N.W. 2d 199, 206 (1976).

[84] "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, 227 (1923).

[85] State v. Buchanan, 941 P.2d 683 (Wash. App. Div. 1997)

[86] "The failure to ratify the treaty or statutory agreement does not necessarily preclude the incorporation of the aboriginal rights mentioned because the historical circumstances may be construed as an implied promise on the part of the federal government to protect such rights." Worcester v. Georgia, 31 U.S. 515, 566 (1832).

of the Cherokees to make or withhold them."[87] The aboriginal rights are not limited to the reservation but can extend throughout the ceded territory where they have been explicitly or impliedly reserved.[88] 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 under the Fifth Amendment of the U.S. Constitution.[89] 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.[90]

In this sense, the rights guaranteed by treaty, statutory agreement and executive order are a residue of previously existing aboriginal title held by the tribe which, in its original state, provides for the complete use and access rights necessary to maintain the Indians' hunting, fishing and gathering lifestyle. It is clear, however, that the rights reserved 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 arises 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 parties.[91] Where a right of access is not

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[87] *Id.*

[88] Antoine v. Washington, 420 U.S. 194 (1975); 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 which made a federal law prohibiting the sale or introduction of liquor applicable to lands ceded in the treaty).

[89] Indian title cannot be encumbered or taken by third parties but has no constitutional protection against federal seizure or extinguishment. However, the Court of Claims does have statutory authority to determine claims based on Indian title. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 275 n.4 (1955); Oneida Nation of New York v. New York, 414 U.S. 661 (1974).

[90] Tribes may bring suit against the states for prospective injunctive relief against violations of their federal treaty rights. However the Eleventh Amendment, which bars suits "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State", 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 (1995). Thus, the United States must join a suit for monetary damages due to state interference with hunting, fishing and gathering rights if money damages are to be awarded. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 749 F. Supp. 913 (W.D. Wis. 1990).

[91] 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. *See*

reserved, the use right is limited to those lands which a tribal member would otherwise have access to as a member of the general public, *i.e.* "public lands." 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."[92] Where the tribal members have no right of access however, the territorial extent of their ability to exercising to existing right is diminished.[93]

Second, the diminishment of territory may occur because the use right is 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. When issued a citation by the State of Idaho, they claimed they possessed off-reservation rights to hunt under Article 4 of the 1868 Fort Bridger Treaty, which states that the tribes shall

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Thomas Lund, *The 1837 and 1855 Chippewa Treaties in the Context of Early American Wildlife Laws*, in FISH IN THE LAKES, WILD RICE, AND GAME IN ABUNDANCE: TESTIMONY ON BEHALF OF MILLE LACS OJIBWE HUNTING AND FISHING RIGHTS 486, 490 (James McClurken et al. eds., 2000). In Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 834 (D. Minn. 1994), the Court held:

> 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.

[92] Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs II*), 861 F. Supp. 784, 836 (D. Minn. 1994).

[93] 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. In this sense, the use right is essentially a *profit à prendre* limited to tribal members. However, it is not the same as a "several" *profit à prendre* as described in property law because the profit, while it is enjoyed by tribal members, does not include the owner of the servient land. *See* JONATHAN GAUNT & PAUL MORGAN, GALE ON EASEMENTS 75-77 (16th ed. 1977).

have "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."[94] The land on which the elk were taken was open rangeland 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."[95] It found that Idaho had maintained fencing and "other indicia of occupancy such as "signs, buildings, machinery, water projects, cattle guards, roads and campgrounds."[96]

Thus even though the state allowed hunting on the land, and the land itself was open rangeland apart from settlements, off-reservation rights were extinguished.[97] Similarly, the *Mille Lacs II* Court found that:

> 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.[98]

Third, the territory over which the rights may be exercised may be diminished by the extinguishment of the right by a subsequent federal statute inconsistent with their continued existence. For example, in *United States v. Peterson*, the district court held that the establishment of Glacier National Park by Congress abrogated wherever hunting right the Blackfeet Tribe retained in the

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[94] Idaho v. Cutler, 708 P.2d 853, 855 (Idaho 1985).

[95] *Id.* at 857.

[96] *Id*. at 859.

[97] The dissenters (Bistline and Huntley, JJ.) in *Cutler*, 708 P.2d 853, 863 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." Moreover, they noted that the indicia of occupancy found to be determinative by the majority, for example fencing, government signs, forest service stations, campgrounds, flood control and water conservation projects, also existed on national forest land.

[98] Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 834 (D. Minn. 1994). The Court in Lac Courte Oreilles Band v. Wisconsin (*LCO III*), 653 F. Supp. 1420, 1432 (W.D. Wis. 1987) however protested against the Court of Appeals holding that the usufructuary right under the 1837 treaty was diminished by settlement. Doyle J. wrote:

> Free of any direction by the court of appeals on the point, I would find that in 1837 and 1842 the Chippewa did not understand that their reserved usufructuary rights could be diminished or eliminated lawfully under those treaties unless a removal was properly ordered. In my actual findings, above, I have limited this proposition in an effort to be obedient to the court of appeals, but without excessive violence to the factual record. I have found, and now repeat, that the Chippewa understanding in 1837 and 1842 was that in the absence of a lawful removal order or in the absence of fresh agreement on their part, settlement and private ownership of parcels by non-Indians would not require the Chippewa to forego anywhere or in any degree exercise of their reserved usufructuary rights necessary to assure that, when the exercise of those rights was combined with trading with non-Indians, the Chippewa would enjoy a moderate living within the entire ceded territory.

ceded lands within the boundaries of the park.[99] The Court held that the Blackfeet retained hunting rights in 1896 Agreement ceding some of their reservation lands that 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 of entry.[100]

D. Who May Exercise Hunting, Fishing and Gathering Rights

In American law there is no one definition of what constitutes the ethnological and political terms "Indian" or "Indian tribe."[101] 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.[102] 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.[103] 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.[104] 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.[105] However, unless the agreement provides for an expansion of the scope of the rights, such a merger establishes no independent rights.[106]

The courts have consistently held that one aspect of the retained inherent sovereignty held by a tribe is the power to determine its own membership.[107]

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[99] United States vs. Peterson, 121 F. Supp. 2d 1309 (D.C. Mont, 2000).

[100] 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).

[101] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 3-17 (Neil Newton ed., 2012).

[102] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658, 675 (1979).

[103] As pointed out earlier, 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. In fact, individual bands were often politically divided.

[104] 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 et al. v. Maine et al., 528 F.2d 370 (1975) the First Circuit Court of Appeals stated that the Passamaquoddy were entitled to federal protection under the Indian Nonintercourse Act.

[105] United States v. Suquamish Indian Tribe, 901 F.2d 772 at 776 (9th Cir. 1990).

[106] Wahkiakum Band of Chinook Indians v. Bateman, 655 F.2d 176 (9th Cir. 1981).

[107] "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, 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 HANDBOOK OF FEDERAL INDIAN LAW 21-23 (Neil Newton ed., 2012).

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 supercede 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 who has no Indian blood who has been acknowledged as a tribal member by the tribe, would be afforded immunity from state law to hunt, fish and gather.[108] Such tribal authority to create immunity from state law for individuals would be a power inconsistent with the tribes' status within the American federation;[109] and it would be not be necessary to protect tribal government or control the internal relations of the tribe.[110]

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"[111] or "as sacred and securely safeguarded as is fee simple absolute title."[112] It provides the possessing tribe the "full use and enjoyment of the surface and mineral estate, and the fruits of the land, such as timber resources."[113]

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 for example noted that:

> 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

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[108] 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 HANDBOOK OF FEDERAL INDIAN LAW 3-17 (Neil Newton ed., 2012) 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 HANDBOOK OF FEDERAL INDIAN LAW 19-20 (Neil Newton ed., 2012).

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

[110] Nevada v. Hicks, 533 U.S. 353 (2001); Montana v. United States, 450 U.S. 544 (1981).

[111] United States v. Alcea Band of Tillamooks, 329 U.S. 40, 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."

[112] United States v. Shoshone Tribe, 304 U.S. 111, 177 (1938).

[113] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 491 (Neil Newton ed., 2012).

> 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. They understood that they would be able to continue these efforts. Although Band members testified at trial that "commercialization" is not the "Indian way", they also testified that they and their forbears have traded and sold furs, deer hides, wild rice, berries, and other resources to make a living . . . . The record reveals that the privilege granted in 1837 includes the right to harvest the resources 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.[114]

Moreover, unless limited by the agreement, the right is not limited to the harvesting of particular species.[115]

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

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[114] Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 838 (D. Minn. 1994). The Court in Lac Courte Oreilles Band v. Wisconsin (*LCO III*), 653 F. Supp. 1420, 1430 (W.D. Wis. 1987) also held that the 1837 reserved rights provided for a wide scale and differentiated natural resource harvesting:

> [P]laintiffs have the right to exploit virtually all the natural resources in the ceded territory, as they did at treaty time . . . .Subject to agreements they may reach with the state of Wisconsin, or to unilateral action by the Congress state of Wisconsin, or to unilateral action by the Congress, and subject to current and lawful state regulation, they may exploit these natural resources anytime. Plaintiffs are not confined to the hunting and fishing methods their ancestors relied upon at treaty time. The method of exercise of the right is not static. Plaintiffs may take advantage of improvements in the hunting and fishing techniques they employed in 1842. . . . Plaintiffs assert, and defendants dispute, that the Chippewa commercially disposed of a substantial part of the fish and game they obtained by fishing and hunting during the treaty era. Plaintiffs assert they are free now commercially to dispose of fish and game they obtain by off-reservation fishing and hunting performed under the treaties. Specifically, they assert they may now trade and sell to non-Indians, in the modern manner, from their current harvests. Their assertion is valid. The Chippewa were clearly engaged in commerce throughout the treaty era. Commercial activity was a major factor in Chippewa subsistence.

[115] United States v. Washington, 157 F.3d 630 (1998).

> stipulation, upon any notion of equity or general convenience, or substantial justice.[116]

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 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."[117] Paradoxically, while the textual basis of the reserved rights need not be express on the face of the document, the courts, despite the reserved rights doctrine, have required that there be a textual basis for the rights reserved.[118] Moreover, the entire panoply of rights reserved by an agreement can not arise by implication unless an access right to hunt, fish 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. Without identifiable textual support in the treaty or agreement, the access rights of trial members are the same as those of general public who wish to engage in similar activities. Thus, the language limits the content or scope of the judicial

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[116] United States v. Choctaw Nation, 179 U.S. 494, 533 (1900).

[117] Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943).

[118] The textual basis need not be in the particular instrument that is subject to the litigation but can be found in previous or subsequent treaties or agreements with the tribe. Oregon Department of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985). The idea that off-reservation rights need to have a textual basis contrasts with the situation within the reservation where it is assumed that the tribe has retained all uses related to unextinguished aboriginal title. *See* Menominee Indian Tribe of Wisconsin v. Thompson, 943 F. Supp. 999 (W.D. Wis. 1996). The explicit reservation is consistent with the presumption articulated in Johnson v. M'Intosh, 21 U.S. 543 (1823) 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, 458 (1909). The recognition of reserved rights in the transaction was a necessary concession by the United States to achieve the agreement. Thus a legal conveyance by the tribe would unite all land interests in the United States, absent a reservation by the tribe. Where the rights have been reserved the presumption then shifts to the idea that the United States intended to preserve previous reserved rights absent an explicit extinguishment.

exegesis because the reserved rights "should be construed in accordance with the tenor of the treaty" or the agreement.[119]

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. As such, language is strictly construed against the drafter and any diminishment of tribal rights in favor of the United States must be done explicitly. 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 comport with the language used, but the understanding and intentions of American negotiators, particularly 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 of the agreement, 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 absent limiting textual language.[120] 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 commercially harvest timber under the 1837 Treaty:

> 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.[121]

Thus the predicate for a finding that the tribe has reserved various usufructuary rights is a proffering of historical, anthropological, and archaeological evidence which indicates 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.[122]

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 of Indian

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[119] Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 353 (1945).

[120] Kimball v. Callahan, 493 F.2d 564, 566 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974).

[121] Lac Courte Oreilles Band v. Wisconsin (*LCO IX*), 758 F. Supp. 1262, 1270 (W.D. Wis. 1991).

[122] *Id.* 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 it desired. The fact that some species were not taken before treaty time because they were inaccessible or the Native American chose not to take them, does not mean that the Indians' right to harvest the natural resources was similarly limited. *See* United States v. Washington, 157 F.3d 630, 644 (9th Cir. 1998).

jurisprudence.[123] 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."[124] 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."[125] Thus, where the tribes in 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 rights will be extended to those activities.[126]

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 as well as shared across all Indian cultures. Tribes only negotiate to reserve specific traditional cultural practices and cannot

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[123] "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." Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658, 676 (1979).

[124] Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs*), 526 U.S. 172, 196 (1999).

[125] United States v. Winans, 198 U.S. 371, 380 (1905).

[126] Discussing the negotiations leading to the 1855 Treaty the Court in Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs II*), 861 F. Supp. 784 (D. Minn. 1994) observed:

> The statements of the Chippewa during the treaty negotiations also indicate that they would continue to hunt, fish, and gather after the treaty was negotiated. *See, e.g.*, 1855 Treaty Journal at frs. 440, 445, and 446 (discussing whether the Chippewa could receive their annuity payments in early September when it would not interfere with their other activities). Not even Hole-in-the-Day [authors note: a leading proponent of the Chippewa assuming a more sedentary lifestyle similar to the settlers] would have considered abandoning the traditional way of life immediately because transition to an agricultural society would take a very long time.

seemingly reserve even reasonably anticipated prospective uses. Where the issue is commercial exploitation, be it hunting, 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 terms of the agreement — the tribes only wish to hunt, fish and gather like they have always done.

For example, 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.[127]

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.[128]

An evaluation of the practices of the Chippewa at the time led it to conclude that logging was not within the circle of activities in which the Chippewa engaged at the time they entered into the agreement with the United States 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.[129]

As such, the Chippewa could not 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.[130]

It is not so much that the judicial construct comprehends historic Native American "traditional" activities and "traditional" trade in a historically inaccurate manner.[131] 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,

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[127] Lac Courte Oreilles Band v. Wisconsin (*LCO IX*), 758 F. Supp. 1262, 1270 (W.D. Wis. 1991).

[128] *Id*.

[129] *Id.*

[130] *Id.* at 1271.

[131] Richard White & William Cronon, *Ecological Change and Indian-White Relations*, *in* THE HANDBOOK OF NORTH AMERICAN INDIANS, HISTORY OF INDIAN-WHITE RELATIONS Vol 4, 417 (Wilcomb Washburn, ed., 1982); James E. Fitting, *Patterns of Acculturation at the Straits of Mackinac*, in CULTURAL CHANGE AND CONTINUITY ESSAYS IN HONOR OF JAMES BENNETT GRIFFIN 321 (Charles E. Cleland ed., 1976).

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. It also means that tribes could not have reserved a wide range of usufructuary uses, or new uses that which might arise because of increased 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.

An obverse judicial assumption operates when the courts construe the intent of the American officials. In this case, the courts assume that they were negotiating for the unimpeded settlement and economic exploitation of the area. The content and scope of the rights secured by the agreement however are *not* limited by the uses they intended in the area (*e.g.*, agriculture, mining, cutting timber) but by the assumption that the treaty was a textual reference extending settler jurisdiction to an area over which the United States had asserted a pre-existing claim of *imperium*. The American officials historically situated specific intent, then, is not a limiting factor in determining the extent of the treaty or agreement. They bargained for and obtained as part of the agreement, 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 objective of absolute jurisdiction and maximal property conveyance from the Indians is essentially the same.

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.[132] Regarding the amount of fish allocated under the 1855 Stevens Treaty to the Indians 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

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[132] The Court in Lac Courte Oreilles Band v. Wisconsin (*LCO VII*), 740 F. Supp. 1400, 1415 (W.D. Wis. 1990) stated:

> [The Chippewa] were aware that settlement by non-Indians had occurred and was occurring . . . . The Chippewa would be competing to some degree with the non-Indians for the kind of natural resources the Chippewa had been exploiting. This competition and accommodation would be on a scale which would not threaten in any degree the moderate living the Chippewa would continue to enjoy from the exercise of their usufructuary rights and their trading. This guarantee was permanent . . . . In the absence of a lawful removal order or in the absence of fresh agreement on the part of the Chippewa, the presence of non-Indian settlers would not require the Chippewa to forego in any degree that level of hunting, fishing, and gathering, and that level of trading necessary to provide them a moderate living off the land and from the waters in and abutting the ceded territory and throughout that territory . . . . The Chippewa at treaty time did contemplate their subsistence and did understand that the usufructuary rights they reserved would be sufficient to provide them with a moderate living.

> secures so much as, but no more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living.[133]

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.[134]

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 activities would be for subsistence purposes only.[135] 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 such as conservation. The non-discriminatory and conservation element was evident in the 1942 case *Tulee v. Washington* where the U.S. Supreme Court noted that:

> [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.[136]

The issue only became manifest where the courts had allocated to the tribes a certain percentage of the harvest and the resource was not sufficient to meet

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[133] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658, 686 (1979).

[134] Doyle, J. in Lac Courte Oreilles Band v. Wisconsin (*LCO III*), 653 F. Supp. 1420, 1424 (W.D. Wis. 1987) reflected on 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.

[135] Sohappy v. Smith, 302 F. Supp. 899, 905 (D. Or. 1969) (stating fishing "still provides an important part of [tribal] subsistence and livelihood"); United States v. Washington, 384 F. Supp. 312, 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 357-58 (noting present subsistence, cultural and economic role of fishing to tribes).

[136] Tulee v. Washington, 315 U.S. 681, 684 (1942). As to the permissible scope of state regulation *see also* Puyallup Tribe of Indians v. Washington (*Puyallup I*), 391 U.S. 392 (1968); Dep't of Game of Washington v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44 (1973).

Indian and non-Indian demand.[137] The confrontation between the state of 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 U.S. Supreme 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 to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens.[138]

The sharing of the fishery led the U.S. Supreme 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."[139] Following the reasoning of the lower court, Stevens, J. 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."[140] This measure enables the allocation given to the Indians to be adjusted. 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 tribe's 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.[141] 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

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[137] *Puyallup II*, 414 U.S. at 49 (stating that the Treaty of Medicine Creek protects commercial net fishing by Indians); United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979) (stating that the Treaty of 1836 reserves the right to fish in area of the Great Lakes ceded to United States without state regulation).

[138] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658, 684-85 (1979).

[139] *Id.* at 686.

[140] *Id.* at 687.

[141] Lac Courte Oreilles Band v. Wisconsin (*LCO V*), 686 F. Supp. 226 (W.D. Wis. 1988).

stating it was a flawed "single-indicator analysis."[142] Rather it noted that the tribes "lag significantly behind other residents of the State of Washington in their overall standard of living."[143] 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 when it interpreted the 1837 and 1842 Chippewa treaties as they relate to ceded territory in Minnesota. 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 non-Indians and the Bands, an allocation should be made.[144]

Despite this uncertain application, the doctrine has developed into a somewhat reasonable (and not necessarily "unhistorical") method due to it being based on aboriginal oral tradition and archeological evidence. In this way, the intent and purposes of the treaty and the allocation of scarce resources can be achieved in the judicial process. As noted by Mary Christina 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.[145] Nevertheless, it remains a limiting and elusive concept perched uneasily between 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 it does not guarantee the tribes any amount of the treaty guaranteed resources. It explicitly limits tribal resource harvesting to a historically static economic standard. It implicitly incorporates this economic standard into the cultural paradigm as the idea of moderate living has been tied 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 federally guaranteed rights exercised *outside* of the

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[142] United States v. Washington, 873 F. Supp. 1422 (W.D. Wash. 1994) (addressing that the treaty right to take fish "in common with all citizens of the territory . . . . *provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens*" provides the tribes with the right to take shellfish from natural beds).

[143] *Id*.

[144] Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs IV*), 952 F. Supp. 1362, 1393 (D. Minn. 1997).

[145] Mary Christina Wood, *The Tribal Property Right To Wildlife Capital (Part II): Asserting A Sovereign Servitude To Protect Habitat Of Imperiled Species*, 25 VT. L. REV. 355, 413 (2001).

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.[146] Provided state regulation does not discriminate against treaty Indians, 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 courts have been reluctant to apply in non-Native American cases), the impact of the state regulation 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 the activity occurs on or off the reservation.[147] 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.[148]

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

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[146] The Conservation Code enacted by a tribe may include provisions for state enforcement of its code. *Mille Lacs IV*, 952 F. Supp. at 1366-7.

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

[148] The Court in New Mexico v. Mescalero Apache Tribe (*New Mexico*), 462 U.S. 324, 333-34 (1983) stated:

> Although a State will certainly be without jurisdiction if its authority is pre-empted under familiar principles of pre-emption, we cautioned that our prior cases did not limit pre-emption of state laws affecting Indian tribes to only those circumstances. "The unique historical origins of tribal sovereignty" and the federal commitment to tribal self-sufficiency and self-determination make it "treacherous to import . . . notions of pre-emption that are properly applied to . . . other [contexts] . . . By resting pre-emption analysis principally on a consideration of the nature of the competing interests at stake, our cases have rejected a narrow focus on congressional intent to pre-empt state law as the sole touchstone. They have also rejected the proposition that pre-emption requires "an express congressional statement to that effect." State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.

I owe this idea to LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW Vol. I at 1173-79 (3d ed., 2000).

scope of the police power of a State"[149] To be sure, state regulatory authority is curtailed by the objectives of the treaty participants (*e.g.* to maintain the ability of the tribe to live off the ceded territory in exchange for the cession) and the precise content of the standards is dependent upon the specific environmental, territorial, and regulatory context, nevertheless the emphasis is not whether or not 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.[150]

Despite the general presumption that the state does have some regulatory authority, the limitations on state authority can nevertheless be substantial. 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.[151] Second, the manner in which the state regulates off-reservation activities, or the effect state regulations have, must not discriminate against Native Americans exercising their off-reservation rights

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[149] Puyallup Tribe of Indians v. Washington (*Puyallup I*), 391 U.S. 392, 402 n.14 (1968).

[150] People v. LeBlanc, 248 N.W. 2d 199 (1976).

[151] The Court in United States v. Choctaw Nation, 179 U.S. 494, 532-335 (1900) stated:

> But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the Government. . . . We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops — whatever may be the imperfections or difficulties which it leaves behind . . . . In the next place, this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not 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. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal part of the treaty, equally give the rule to the judicial tribunals.

See also United States v. State of Washington, 157 F.3d 630 (9th Cir. 1998).

or favor non-Indian harvesters.[152] 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 member of the 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.[153] 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."[154] 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 Native American off-reservation harvest is necessary in order for it to fulfill its reasonable conservation objectives. In this context, a "necessary and reasonable" regulation is necessary when it 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. [155] Under this "conservation necessity test" equal regulatory (*e.g.*

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[152] Lac Courte Oreilles Band v. Wisconsin (*LCO IV*), 668 F. Supp. 1233, 1237 (W.D. Wis. 1987).

[153] *See* Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 839 (D. Minn. 1994 ("The State may not impose its own regulations if the Band can effectively self-regulate and if tribal regulations are adequate to meet conservation, public health, and public safety needs.").

[154] Puyallup Tribe of Indians v. Washington (*Puyallup I*), 391 U.S. 392, 398 (1968). Thus the standard set forth in Tulee v. Washington, 315 U.S. 681 (1942), 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*, 315 U.S. at 684, the Court states that:

> [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.

The analysis presupposes that the federal right has priority over all other uses because disproportionate impact on Indians is not only measured against non-Indian users but also against absolute use rights reserved in the treaty or agreement.

[155] Dep't of Game of Washington v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44, 49 (1973):

> We do not imply that these [Indian treaty] fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the

restricting all gill nets in the fishery) treatment of Indians and non-Indians is generally not permissible because equal treatment will disproportionately burden the smaller off-reservation harvest.[156]

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."[157] In order to determinate whether the standards are "reasonable and necessary" the state regulation must meet a four 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."[158] Second, the state must demonstrate that the proposed regulation is necessary to prevent or improve a public health or safety hazard.[159] Third, in order for the proposed regulation to be applied to guaranteed tribal off-reservation rights, the state must show that it is necessary to effectuate the particular health or safety interest.[160] Finally, "the State must show that its regulation is the least restrictive alternative available to accomplish its health and safety purposes."[161]

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 interests of the European settlers and undermine the continued existence of the tribes.[162] As hunting, fishing, and gathering rights are parasitic on possession of the underlying

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> 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.

See also Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 391 (1978); Antoine v. Washington, 420 U.S. 194, 206-07 (1975); Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); Lac Courte Oreilles Band v. Wisconsin (*LCO IV*), 668 F. Supp. 1233, 1235-36 (W.D. Wis. 1987).

[156] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658, 682 (1979) (citing *Antoine*, 420 U.S. at 207-08).

[157] *LCO IV*, 668 F. Supp. at 1241-42.

[158] Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs IV*), 952 F. Supp. 1362, 1369 (D. Minn. 1997) (citing *LCO IV*, 668 F. Supp. at 1239).

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] Gordon Christie, *A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation*, 23 WINDSOR Y.B. ACCESS JUST. 17 (2005) [hereinafter Christie, *A Colonial Reading*]; for a general discussion of treaty abrogation *see* Charles F. Wilkinson & 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*, 63 CALIF. L. REV. 601 (1975).

aboriginal title, extinguishment terminates corresponding use and occupancy rights, including fishing rights, unless those rights are reserved in a treaty, statute or executive order.[163] Extinguishment may be accomplished either directly or by various Congressional actions implying an intention to extinguish aboriginal title.[164] 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.[165] The possessing tribe has no right of compensation for the taking of the aboriginal title.[166] The manner, method, and time of such extinguishment raise political, non-justiciable, issues.[167]

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. Such aboriginal rights of use 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 rights.[168] Without this explicit statutory language, the courts have been extremely reluctant to find congressional abrogation of treaty rights;[169] because such explicit acknowledgement of intent is considered to be

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[163] Western Shoshone National Council v. Molini, 951 F.2d 200, 202-03 (9th Cir. 1999).

[164] "Only Congress can abrogate an Indian treaty right by expressing that intention clearly and plainly." United States v. Dion*,* 476 U.S. 734, 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: *see* 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. Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs*)*,* 526 U.S. 172, 188-89 (1999).

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

[166] Lac Courte Oreilles Band v. Voight (*LCO I*), 700 F.2d 341, 351 (7th Cir. 1983).

[167] "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 Johnson v. M'Intosh, 21 U.S. 543 (1823):

> [T]he 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.

Quoted in United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 347 (1941)).

[168] Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs*)*,* 526 U.S. 172, 199 (1999). The standard similarly applies to rights reserved in statutory agreements or executive orders. *See also* Bryan v. Itasca County, 426 U.S. 373 (1976); Antoine v. Washington, 420 U.S. 194 (1975).

[169] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658, 690 (1979).

"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."[170] Should the right be relinquished by a signatory tribe by way of a superceding treaty or agreement, the courts similarly require express language to that effect in the document.[171]

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.[172] 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.[173] Nevertheless where express language is absent, the court will construe the particular circumstances surrounding the purported extinguishment in light of the protective canons of treaty interpretation. Where ambiguity or uncertainty exists in the legislation, 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 are inconsistent with the claimed extinguishment, it is unlikely that the courts will find the right extinguished.

The leading case regarding the extinguishment of hunting, fishing, and gathering rights under a treaty is *Menominee Tribe of Indians v. United States*.[174] 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 an 1854 Treaty.[175] The United States Supreme Court held that the hunting, fishing, and gathering rights within the reservation had not been extinguished. Douglas, J. writing for the Court observed that the 1954 Termination Act was enacted only two months after a statute, Public Law 280, had granted Wisconsin and other states jurisdiction "over offenses committed by or against Indians" on the

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[170] United States v. Dion*,* 476 U.S. 734, 740 (1986).

[171] Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs*)*,* 526 U.S. 172, 195-96 (1999).

[172] Wilkinson & Volkman, *supra* note 162, at 623-34.

[173] *Dion,* 476 U.S. at 739-40.

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

[175] 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. *See id.* at 408-11.

reservation.[176] This bill "came out of the same committees" in the Senate and House as the Termination Act.[177] Douglas, J. noted that Public Law 280 stated that:

> 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.[178]

Reading the two statutes together Justice Douglas held that the 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. It observed that:

> [T]o construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate those rights exists "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."[179]

The Menominee continued to hold their treaty reserved hunting, fishing and gathering rights.

The relatively clear standard established by the *Menominee* Court was extended by the United States Supreme Court in *Mille Lacs*, which eviscerated 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*[180], held that treaty rights (or treaty "privileges") which are "temporary and precarious" will be necessarily extinguished upon statehood. 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.[181] As mentioned above, O'Connor, J. 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

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[176] *Id.* at 410.
[177] *Id.*
[178] *Id.* at 410-11 (emphasis in original).
[179] *Id.* at 413.
[180] 163 U.S. 504 (1896).
[181] "[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." *Id.* at 207 (emphasis in original).

Congress could "eliminate the right whenever it wished."[182] Chief Justice Rehnquist objected to the majority's reasoning, stating that it was an "overruling *sub silentio* of a precedent [*Race Horse*] of 103 years' vintage."[183] He argued that *Race Horse* precedent clearly was applicable to the 1837 and 1842 rights because the rights had been only guaranteed during the pleasure of the President.

III. THE CANADIAN DOCTRINE OF OFF-RESERVE HUNTING, FISHING AND GATHERING RIGHTS

The *Marshall* Decision is representative of the current understanding of the Doctrine of aboriginal hunting, fishing and gathering rights in Canada. The doctrine is an exegesis of precedent (Canadian, provincial, American, U.K., and other Commonwealth sources); federal and provincial statute and policy; colonial law and policy; as well as a judicial understanding of the historical context of aboriginal interactions with the imperial and colonial state.

As mentioned above, the existence of these rights had never been denied either in the Dominion of Canada or in the colonies prior to Confederation:

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.[184]

In the first few decades of settlement, given the large land 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 the aboriginals exercised common law rights on Crown lands and/or treaty rights to hunt, fish, and gather along with settlers but such activity 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."[185] At the same time, it was a governmental policy that the tribes would continue to harvest food from Crown land until it was developed, a right that might otherwise not be available to other citizens.[186] As stated by the Supreme Court of Canada recently referring to lands surrendered in 1899 by Treaty 8:

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[182] Minnesota v. Mille Lacs Band of Chippewa Indians (*Mille Lacs*), 526 U.S. 172, 206-07 (1999).

[183] *Id.* at 219.

[184] R. v. Sikyea, (1964) 43 D.L.R. (2d) 150 (N.W.T. C.A.), *aff'd* [1964] S.C.R. 642 (Can.).

[185] R. v. Coté, [1996] 3 S.C.R. 139, 170; *see* SIDNEY L. HARRING, WHITE MAN'S LAW: NATIVE PEOPLE IN NINETEENTH-CENTURY CANADIAN JURISPRUDENCE 122 (1998). There probably was a common law right to fish in 19th century Ontario on water 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*, 86 ONT. HIST. 337 (1994). *See also* Canada v. Robertson (1882), 6 S.C.R. 52 (Can.).

[186] JAMES R. MILLER, SKYSCRAPERS HIDE THE HEAVENS A HISTORY OF INDIAN-WHITE RELATIONS IN CANADA 137 (3d ed. 2000) (statement of William Benjamin Robinson, reporting to the Superintendent General of Indian Affairs regarding treaties with the Ojibwa of Northern Ontario) ("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

> 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 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."[187]

Moreover, in some areas, such as British Columbia, tribal harvesting filled an economic niche by supplying food to settlers.[188] As 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".[189]

The exemptions for food harvesting or various common species have continued to the present day in various provincial and federal regulatory regimes.

Treaties agreed to 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 early 19th century as settlement expanded the tribes in Upper Canada and what 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 for hunting, fishing, and gathering purposes. There was no thought given to the legal implications of the particular wording used in the treaty nor whether the rights were reserved by the aboriginals or granted back to them by the Crown.[190]

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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 not doubt would have preferred had this not been done.").

[187] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 S.C.C. 69, para. 26 (Can.).

[188] R. v. Jack, [1980] 1 S.C.R. 294, 307-13 (Can.).

[189] R. v. Isaac (1975), 13 N.S.R. 2d 460, 484-85 (N.S. C.A.) (Can.).

[190] *See, e.g.*, R. v. Taylor and Williams, (1981) 34 O.R. 2d 360 (Ont. C.A.) (Can.). The Taylor and Williams case concerned a 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

Despite the recognition that hunting, fishing and gathering rights were important to aboriginal existence, for the most part prior to the 1960s the colonial, provincial, and Canadian courts were not willing to give clear effect to them.[191] With few exceptions, the courts resorted to narrow interpretations of treaty terms as well as technicalities and legal fictions to avoid holding for aboriginals. They refused to review Crown actions *vis-à-vis* the tribes while generally accepting colonial and federal supervision of them, and they sanctioned the application of provincial and federal laws in areas that had arguably been reserved by treaty.[192] Where an aboriginal common law right was found to exist,

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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 (author's omission) are open to all & you have an equal right to fish and hunt on them." *Id.* para. 7.

[191] There was substantial 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. *See* R. v. Sioui, [1990] 1 S.C.R. 1025 (Can.) Historical context surrounding 1760 document signed by British General Murray which made peace with Hurons and guaranteed additional rights are a treaty under Section 88 of Indian Act. *See e.g.*, HARRING, *supra* note 185, 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." *See also* R. v. White and Bob (1965), 50 D.L.R. 2d 613 (B.C.C.A.) (Can.), *aff'd*, (1965), 52 D.L.R. 2d 481 (S.C.C.) (Can.) (addressing the agreement between members of the Saalequun tribe and Governor Douglas of British Columbia, dated December 23, 1854, which gave the right to hunt for food over the land a "treaty" for purposes of Sec. 87 [now 88] of Indian Act.).

[192] Perhaps the most significant exception in early Canadian legal history is Connolly v. Woolrich, [1867] 1 C.N.L.C. 70 (Que. Super. Ct.) (Can.). 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. "It is easy to conceive," Monk, J. noted, "in the case of joint occupation of extensive countries by Europeans and native nations or tribe, that two different systems of civil and even criminal law may prevail." *Id.* at 90. As such:

> When Connolly went to Athabaska, in 1803, he found the Indian usages as they had existed for ages, unchanged by European power or Christian legislation. He did not take English law with him, for his settlement there was not preceded by discoveries made either by himself or English adventurers, nor was it an uninhabited or unoccupied territory. This pretension . . . to the exclusion of the laws and customs of the natives, the common law of England prevail at Rat River in 1803, or in any subsequent period, must be over-ruled, and in doing so the Court may remark that it was not competent in any case for Mr. Connolly to carry with him this common law of England to Rat River in his knapsack, and much less could he bring back to Lower Canada the law of repudiation in a bark canoe.

Id. at 91. Cree law therefore governed the marriage and that marriage must be recognized in British courts:

> The supreme authority of the empire, in not abolishing or altering the Indian law, and allowing it to exist for one hundred years (since the Hudson's Bay Charter of

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.[193] Extinguishment by operation of law, *i.e.* not by treaty, was generally presumed where a statute or regulation demonstrated an intention to exercise complete dominion over the territory and activities of the band. Before the *Constitution Act, 1982*, as Mahoney, J. noted:

> 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.[194]

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.[195] In any event, treaty rights only provided immunity to aboriginals from provincial jurisdiction under Section 88 of the Indian Act.[196] The Federal government retained full authority under Section 91(24) to disregard aboriginal rights:[197]

> 1670) impliedly sanctioned it, and 2nd. The sovereign power in these matters, by proclamation, has tacitly acknowledged these laws and usages of the Indians to be in force, and so long as they are in force as a law in any part of the British empire or elsewhere, this Court must acknowledge and enforce them. *Id.* at 132.

[193] St. Catherine's Milling and Lumber Co. v. The Queen, [1888] 14 App. Cas. 46, para. 6 (P.C.) (appeal taken from Can.)

[194] R. v. Sparrow, [1990] 1 S.C.R. 1075, 1098 (Can.) (quoting Mahoney J. in Baker Lake v. Ministry of Indian Affairs and Northern Development, [1980] 1 F.C. 518, 568 (T.D.) (Can.)). 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. *Id.* at 1098-99.

[195] Francis v. The Queen, [1956] S.C.R. 618 (Can.) (treaty between United Kingdom and United States granting customs exemptions to aboriginals not enforceable because treaty provisions not enacted into statute).

[196] In Sero v. Gault, [1921] 64 D.L.R. 327, 331-32 (Can.) (citations omitted), Riddell, J., was representative of the judiciary's generally dismissive attitude toward treaty rights when he stated:

> As to the so-called treaties, John Beverly Robinson, Attorney-General for Upper Canada (afterwards Sir John Beverley-Robinson C.J.), in an official letter to Robert Wilmot Horton, Under Secretary of States for War and Colonies, March 14, 1824, said: "To talk of treaties with the Mohawk Indians, residing in the heart of one of the most populous districts of Upper Canada, upon lands purchased for them and given to them by the British Government, is much the same, in my humble opinion, as to talk of making a treaty of alliance with the Jews in Duke street or with the French emigrants who have settled in England" . . . I cannot express my own opinion more clearly or convincingly.

Robinson subsequently served as Chief Justice of Upper Canada from 1829 to 1862. There are thirteen reported aboriginal law decisions by Robinson which are an important foundational component to common law aboriginal rights in Canada.

[197] R. v. George, [1966] S.C.R. 267 (Can.).

> 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.[198]

Since the *Constitution Act, 1982*, however, Canadian courts have provided a high level of protection for those aboriginal and treaty rights existing in 1982. As the *Sparrow* Court stated:

> Section 35 [of the *Constitution Act, 1982*] 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.[199]

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.[200] The doctrine provides a methodological framework for the courts to determine the existence, content and scope of aboriginal hunting, fishing and gathering rights while describing and systematizing the source and content of these rights.

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

1. Historical Occupation and Use

Binnie, J. in *R. v. Marshall* firmly grounds hunting, fishing, and gathering rights in the historic use of natural resources when he equates the Marshalls' eel fishing with the fishing and trading activities of Mi'kmaq 235 years earlier.[201] This approach is consistent with the Supreme Court of Canada's current determination that source of the rights described and systematized in the doctrine of indigenous hunting, fishing and gathering rights arises from aboriginal use, occupation and possession of particular territories prior to European contact:[202]

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[198] Kruger v. The Queen, [1978] 1 S.C.R. 104, 111-12 (Can.).

[199] R. v. Sparrow, [1990] 1 S.C.R. 1075, 1106 (Can.) (citations omitted) (quoting Professor Noel Lyon, *An Essay on Constitutional Interpretation*, 26 OSGOODE HALL L.J. 95 (1988)).

[200] Aboriginal and Treaty rights may not be unilaterally extinguished. The consent of the aboriginal peoples is required.

[201] "The thread of continuity between these events, it seems, is that the Mi'kmaq people have sustained themselves in part by harvesting and trading fish (including eels) since Europeans first visited the coasts of what is now Nova Scotia in the 16th century." R. v Marshall (*Marshall I*), [1999] 3 S.C.R. 456, para. 2 (Can.). The 1999 *Marshall I* decision was comprised of two separate opinions, the main opinion (McLachlin and Gonthier JJ. dissenting) and an opinion dismissing an application for rehearing in which the Court clarified the previous decision. The original Supreme Court decision was delivered September 17, 1999. *Id.* The Court rendered the motion decision unanimously dismissing the application for rehearing on November 17, 1999 that is found at R. v. Marshall (*Marshall II*), [1999] 3 S.C.R. 533 (Can.). The decision rendered on the issue of treaty protected commercial logging is dealt with in R. v. Marshall (*Marshall III*); R. v. Bernard, 2005 SCC 43, [2005] S.C.R. 220 (Can.).

[202] Thus in Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 144 (Can.), the Court noted that:

> At the time of the assertion of British sovereignty, North America was not treated by the Crown as *res nullius*. The jurisprudence of this Court has recognized the factual and legal existence of aboriginal occupation prior to that time.[203]

The rights in question therefore arise from both the occupation of the land as well as the existence of distinctive aboriginal cultures and the social organization and law on that land. They survive the transfer of sovereignty to Great Britain[204] and are not dependent upon the *Royal Proclamation of 1763* or some other recognition by either the British pre-Confederation colonies or Canada; nor is their existence dependent upon executive action or legislative enactment. "[I]t has become accepted in Canadian law," Lamer, C.J 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 . . . ."[205] 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 apply to the colony. [206] As constitutionally protected rights, the rights differentiate aboriginal citizens from non-aboriginals within the Canadian polity, may only be

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> In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title. In the context of aboriginal title, sovereignty is the appropriate time period to consider for several reasons. First, from a theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law. Aboriginal title is a burden on the Crown's underlying title. The Crown, however, did not gain this title until it asserted sovereignty and it makes no sense to speak of a burden on the underlying title before that title existed. Aboriginal title crystallized at the time sovereignty was asserted. Second, aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact. Under common law, the act of occupation or possession is sufficient to ground aboriginal title and it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans. Finally, the date of sovereignty is more certain than the date of first contact.

[203] *Marshall III*, 2005 SCC 43, para. 132 (LeBel, J. concurring).

[204] 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. *See* Amodu Tijani v. Southern Nigeria (Secretary), [1921] 2 A.C. 399, 404 (P.C.) (appeal taken from Nigeria).

[205] R. v. Van der Peet, [1996] 2 S.C.R. 507, para. 112 (Can.).

[206] *See* Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. B. REV. 727, 738-39 (1987).

regulated by the federal government and the province in a limited manner, and may not be extinguished without consent of the aboriginals concerned.[207]

The premise that the tribes had an interest in the use or title to land has always been a part of the British and Canadian colonial project.[208] 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 later continued.[209] For example, the terms of the sale of Rupert's Land by the Hudson's Bay Company to the Dominion explicitly relieved the company of an obligation to compensate aboriginals "for lands required for purposes of settlement . . . ."[210] 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 for annuity payments and hunting, fishing and gathering rights in the ceded territory. The Natural Resource Transfer Agreements, which transferred Crown lands from the federal government to the three Prairie Provinces, incorporated aboriginal and treaty rights to hunt and gather for food outside of the reserves.[211]

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[207] In *Van der Peet*, [1996] 2 S.C.R. 507, para. 30, the Supreme Court of Canada observed:

> [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.

[208] An example of a provincial statute recognizing the claims of tribes who are occupying the territory is House of Assembly of Upper Canada 2 Vic., Ch. 15 relating to Indian Commissioners. *See* Little v. Keating, [1842] 6 U.C.Q.B. (O.S.) 265 (Can. Ont.).

[209] The latest pre-Confederation treaties were made by the Province of Canada. They include the Robinson-Huron Treaty and the Robinson-Superior Treaty of 1850 and the Manitoulin Island Treaty of 1862.

[210] Rupert's Land and North-Western Territory Order, 1985 R.S.C. App. II, No. 9, Schedule B at 12 (Can.).

[211] The Natural Resource Transfer Acts for Saskatchewan (now titled the Constitution Act, 1930, 20-21 George V, c. 26 (U.K.), *reprinted in* R.S.C. 1985, App. II, No. 26 (Can.)) (clause 12), Alberta (clause 12) and Manitoba (clause 13) have the following wording:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish 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.

Pursuant to s. 1 of the Constitution Act, 1930, 20-21 George V, c. 26 (U.K.), *reprinted in* R.S.C. 1985, App. II, No. 26 (Can.), the Natural Resource Transfer Acts have constitutional status. *See* also R. v. Horseman, [1990] 1 S.C.R. 901 (Can.); R. v. Sundown, [1999] 1 S.C.R. 393 (Can.).

The judiciary likewise recognized an aboriginal interest in the use and occupation of land. As noted by then Chief Justice Robinson in 1846 case *Brown 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.[212]

Aboriginal possessory interests were confirmed by the Supreme Court of Canada and the Privy Council in the seminal case *St. Catherine's Milling & Lumber Co. v. The Queen*. Ritchie, C.J. writing for the Supreme Court of Canada wrote:

> I am of opinion, [*sic*] 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 . . . .[213]

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[212] Brown v. West, [1846] 1 U.C.E. & A. 117, para. 4 (Can. Ont.).

[213] St. Catherine's Milling & Lumber Co. v. The Queen (1887), 13 S.C.R. 577, 608-09 (Can.). Strong, J., writing in dissent, was more even more emphatic:

> In the Commentaries of Chancellor Kent and in some decisions of the Supreme Court of the United States we have very full and clear accounts of the policy in question. It may be summarily stated as consisting in the recognition by the crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested. This short statement will, I think, on comparison with the authorities to which I will presently refer, be found to be an accurate description of the principles upon which the crown invariably acted with reference to Indian lands, at least from the year 1756, when Sir William Johnston was appointed by the Imperial Government superintendent of Indian affairs in North America, being as such responsible directly to the crown through one of the Secretaries of State, or the Lords of Trade and Plantation, and thus superseding the Provincial Governments, down to the year 1867, when the confederation act constituting the Dominion of Canada was passed. So faithfully was this system carried out, that I venture to say that there is no settled part of the territory of the Province of Ontario, except perhaps some isolated spots upon which the French Government had, previous to the conquest, erected forts, such as Fort Frontenac and Fort Toronto, which is not included in and covered by a surrender contained in some Indian treaty still to be found in the Dominion Archives.

In the *St. Catherine's Milling* appeal the Privy Council, while diminishing the possessory nature and legal efficacy of the rights nevertheless found that aboriginal peoples had a "right" in the territory they occupied and used.[214] These rights survived the transfer of sovereignty to Great Britain and had been recognized or confirmed by the *Royal Proclamation of 1763*.[215] In *Calder v.*

Strong, J.'s dissent was joined by Gwynne, J. A majority of the Court agreed with the proposition that aboriginals had an interest in the territory they used and occupied.

[214] 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 and Lumber Company v. The Queen, [1888] 14 App. Cas. 46 para. 6 (P.C.) (appeal taken from Can.).

[215] Prior to being settled by the Supreme Court of Canada in Calder v. British Columbia (Att'y Gen.), [1973] S.C.R. 313 (Can.) there had been an issue whether aboriginal rights were only created by the Royal Proclamation of 1763 and thus only cognizable in those areas covered by the Proclamation, that is, being 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 and thus applying to the entire territory of present day Canada. The Privy Council, by Lord Watson in St. Catherine's Milling & Lumber Co. v. the Queen, suggested that the rights only exist as a result of the Proclamation. In *St. Catherine's Milling*, [1888] 14 App. Cas. 46 para. 6, his Lordship wrote at para. 6 (emphasis added):

> Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. *It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign.* The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and pleasure of the sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

Watson's discussion led to a split in the Canadian courts regarding whether the Proclamation created the rights or whether they exist independently at common law. The Court in R. v. Wesley, [1932] 4 D.L.R. 774, para. 48 (Alta. S.C.) (Can.), for example, noted that:

> [W]hether it be called title, an interest, or a burden on the Crown's title, the Indians are conceded to have obtained definite rights under this proclamation [of 1763] in the territories therein mentioned which certainly included the right to hunt and fish at will over those lands in which they held an such interest.

Calder, [1973] S.C.R. 313 at 328, 375 settled the issue:

Attorney-General of British Columbia, the Supreme Court of Canada held that the rights were not created by the Proclamation.[216]

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. Rather, the pre-existence of aboriginal law, rights, and title are recognized as positive rights only when the historic rights are reconciled with Canadian common law perspectives. "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 . . . .[217]

If this process was not undertaken, LeBel, J. in *Marshall III* suggested:

> [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.[218]

Reconciliation has different effects when considering the content of a claimed right as opposed to its source. In terms of what aboriginal and treaty practices are accorded protection, the claimed practice must be translated into a

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> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means . . . . What emerges from the foregoing evidence is the following: the Nishgas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law . . . .

This view was articulated by the Federal Court of Canada when it noted that "[T]he law of Canada recognizes the existence of an aboriginal title independent of the Royal Proclamation or any other prerogative act or legislation. It arises at common law." Baker Lake v. Ministry of Indian Affairs and Northern Development, [1980] 1 F.C. 518, 556 (T.D.) (Can.). *See* MCNEIL, *supra* note 19, at 267-90. Today there seems little difference between common law aboriginal rights and aboriginal rights affirmed by the Royal Proclamation. However, there probably is a difference when determining the content of the aboriginal rights. Where the land is covered by the Royal Proclamation the relevant date is 1763; in areas not covered by the Proclamation the relevant time period is immediately prior to European contact. *See* Ontario (Att'y Gen.) v. Bear Island Foundation (1984), 49 O.R. (2d) 353, 379-86 (Can. Ont. H.C.); R. v. Van der Peet, [1996] 2 S.C.R. 507, para. 73 (Can.).

[216] *Calder*, [1973] S.C.R. at 313 (Can.)

[217] Mitchell v. M.N.R., 2001 SCC 33, para. 10 (Can.).

[218] R. v. Marshall (*Marshall III*); R. v. Bernard, 2005 SCC 43, para. 127 (Can.).

modern legal right, *i.e.* to match those rights within various categories of Canadian common (and presumably statutory) state law. "[T]he nature of the right at common law" must be considered in order to determine "whether a particular aboriginal practice fits it."[219] In this process the core of the particular right claimed, from an aboriginal perspective, must correspond to the "core concepts" of the claimed modern day right which in turn is an amalgam of common and indigenous law. "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."[220]

The transposition of aboriginal law to "core" state law concepts regarding the source of the rights, despite the judicial determination that they are inherent rights, nevertheless 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 . . . .[221]

Accepting unquestioned political sovereignty precludes judicial recognition of aboriginal authority, which in turn eliminates aboriginal law as a parallel source of authority within the Canadian polity. Given the protections provided aboriginal and treaty rights in the *Constitution Act, 1982* such recognition would constitutionalize a non-settler or non-state source of authority that could continuously generate legally efficacious rights.[222]

The legal determination that aboriginal rights are inherent but aboriginal sovereignty has been extinguished as a source of aboriginal rights is also suggested by treaty jurisprudence. Early treaty cases that 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 which the Crown negotiated.[223] For example, the court in *R. v. Syliboy*,

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[219] *Id.* para. 48.

[220] *Id.* para. 50.

[221] R. v. Sparrow, [1990] 1 S.C.R. 1075, 1103 (Can.).

[222] I owe this idea to Gordon Christie, *Justifying Principles of Treaty Interpretation*, 26 QUEEN'S L.J. 143-224 (2000) [hereinafter Christie, *Justifying Principles*].

[223] The Privy Council in Can. (Att'y Gen.) v. Ont. (Att'y Gen.) (Indian Annuities case) [1897] A.C. 199 (appeal taken from Can.) held that the 1850 Robinson Treaty was nothing more than a personal obligation by its governor and suggested that the use of international law concepts applicable to aboriginal treaties was not appropriate. At para. 14, Lord Watson stated:

> They (the arbitrators) start from the proposition that the treaties of 1850, being in the nature of international compacts, ought to be liberally construed. That rule when rightly applied, in circumstances which admit of its application, is useful and

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.[224]

In the post-*Constitution Act, 1982* decision *R. v. Simon* the 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 critical commentary of *Syliboy* which noted that:

> 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.[225]

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 within the law means that the inherent nature of aboriginal law cannot create additional practices but can only elaborate on the ones that were practiced historically prior to European contact. Aboriginal rights cannot arise after contact with the Europeans. As Lamer, C.J noted in *R. v. Van der Peet*:

> 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

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> salutary, but it goes no farther than this, that the stipulations of an international treaty ought, when the language of the instrument permits, to be so interpreted as to promote the main objects of the treaty. Their Lordships venture to doubt whether the rule has any application to those parts, *even of a proper international treaty*, which contain the terms of an ordinary mercantile transaction, in which the respective stipulations of the contracting parties are expressed in language which is free from ambiguity (emphasis added).

[224] R. v. Syliboy, [1929] 1 D.L.R. 307, 313 (Can.).
[225] Simon v. The Queen, [1985] 2 S.C.R. 387, 400 (Can.).

> 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.[226]

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 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 an issue of domestic politics and law with one sovereign party (the Crown) to the agreement as Canadian law posits, then principles of international law can apply to the determining the content of the agreement.[227] One immediate impact of the importation of international law principles would be the potential 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 international law rule that when a consensual alteration of rights is made by treaty the "failure to delegate an incident of sovereignty leaves it undisturbed." [228] From a non-international law perspective the policy and interaction of colonial officials and the tribes leads to the conclusion that the tribes did not intend in most instances to concede their rights to self-government, territory or uses not specifically demanded by the Europeans.[229] The notion of

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[226] R. v. Van der Peet, [1996] 2 S.C.R. 507, para. 73 (Can.).

[227] *See* R. v. Sioui, [1990] 1 S.C.R. 1025, 1052-53 (Can.), where the Supreme Court of Canada noted that relations with the tribes were similar to relations between independent states.

[228] MAUREEN DAVIES, Aspects of Aboriginal Rights in International Law *in* ABORIGINAL PEOPLES AND THE LAW 16, 24 (Bradford W. Morris, ed., 1985).

[229] England and Imperial Britain had law and policy that in some instances acknowledged the independence, if not sovereignty, of the tribes, while at other times they seemingly refused to accept the notion that tribes were nothing more than temporary occupiers of land under Crown sovereignty. There is considerable evidence that at least until the 1760s the British treated the tribes as sovereign, either in an internal sense, or in an external sense as allies or as associated political organizations bordering British colonies. First, the original colonists seemed to believe that the tribes were sovereign owners of their lands and this idea remained widely held throughout the eighteenth century. Second, the British negotiated many treaties and maintained relationships with the tribes as equal diplomatic partners. For example, in 1761 Sir William Johnson, Imperial Indian Superintendent recognized the independent and equal status of the Six Nations Iroquois with the United Kingdom by entering formally into the 1758 Covenant Chain alliance. This status was confirmed in the 1766 Treaty of Oswego entered into after Pontiac's Rebellion. This war was a military defeat for the tribes but it nevertheless re-established the tribes' equal status with the British and the necessity of diplomatic adjustments of borders and disputes. *See* Jon William Parmenter, *Pontiac's War: Forging New Links in the Anglo-Iroquois Covenant Chain 1758-1766*, 44:4 ETHNOHISTORY 617-654 (1997). Third, the tribes were recognized as controlling territory, having established borders, living under their own law and owning no allegiance to the Crown except when this was specifically negotiated.

retained rights implies an expansion of the area of constitutionally protected rights as the political, social and economic circumstances of the tribes change across time. Third, the legal recognition of sovereignty, historically or residually 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.[230] In the area of hunting, fishing and gathering rights the same idea carries with it the notion that management of the resources should either be done by the aboriginal group and include or take account of aboriginal law relating to the usage.

In any event, the failure to recognize the residual sovereignty of aboriginal tribes lessens the ability of the tribes to expand the range of constitutionally protected practices. While aboriginal rights are recognized as pre-existing the Canadian state and the indigenous law, which supports those rights and flows from an independent juridical source, the source is not "sovereign" in the same sense as the Canadian state. Thus, it is no surprise that the rights guaranteed under sec. 35 seem not to be included in the "living tree" analysis used by the courts to analyse constitutional rights; neither in its traditional form of providing an interpretation conferring the "widest amplitude" for the exercise of authority under sec. 91 and 92 of the *Constitution Act, 1867,* nor as part of the ongoing process of constitutional development and evolution applied in Charter

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For instance, during Pontiac's Rebellion a treaty was signed by the Ottawa, Chippewa, Shawnee and Wyandot in which Britain asserted sovereignty over the Indians. These avowals of British suzerainty, according to one contemporary, must "Have arisen from ignorance of the Interpreter or from some other mistake; for I am well convinced that they can never mean or intend, anything like it, and that they cannot be brought under our Laws, for some Centuries, neither have they any word which can convey the most distant object of subjection, and should it be fully explained to them, and the nature of subordination punishment etc., defined, it might produce infinite harm." The Treaty was disavowed by British General Thomas Gage for a variety of reasons. White & Cronon, *supra* note 131, at 294. The tribes took a similar position that they were independent and sovereign and that the Europeans had no rights except those that had been granted. During the summer of 1765 when George Croghan, British deputy superintendent of Indian Affairs met with the tribes concerning the right of passage through the Wabash country, the idea that France could transfer the tribes' territory to the British was denied. "[W]e have been informed that the English, wherever they settle, make the Country their own, and you tell us, that when you conquered the French, they gave you this Country. That no difference may happen hereafter, we tell you now the French never conquered, neither did they purchase a foot of our Country, nor have [they a right] to give it to you, we gave them liberty to settle for which they always rewarded us and treated us with great Civility." Quoted in DOROTHY V. JONES, LICENSE FOR EMPIRE COLONIALISM BY TREATY IN EARLY AMERICA 73 (1982). Fourth, the tribes were able to fight both offensive and defensive war, as evidenced by treaties of alliance and peace which were recognized numerous times by the French and British in North America over the centuries as an indispensable component of sovereignty. *See* EMER DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUES A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS (reprinted in James Brown Scott ed., THE CLASSICS OF INTERNATIONAL LAW 235-236 (1964)).

[230] International law theorists posited that the sovereignty of a state consisted of two parts – internal sovereignty and external sovereignty. 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. *See* HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW: Part I, Chapter II, § 5, 29-30 (1855).

jurisprudence. Instead, the reconciliation process is to give modern expression to traditional uses, practices, and customs as they existed in history without creating a "new" uses or practices.[231]

B. General Principles of Interpretation

1. The Purposive Approach

The doctrine of aboriginal rights, of which the doctrine of indigenous hunting, fishing and gathering rights is part, is a body of Canadian common law:

> [T]he constitutional links between aboriginal peoples and the Crown and governs the interplay between indigenous systems of law, rights and government (based on aboriginal customary law) and standard systems of law, rights and government (based on English and French law . . . [It] is a form of inter-societal law, in the sense that it regulates the relations between aboriginal communities and the other communities that make up Canada and determines the way in which their respective legal institutions interact.[232]

The initial determination of the existence and content of this inter-societal law is heavily dependent upon a purposive interpretive methodology that is used to determine the content and scope of sec. 35 of the Constitution Act, 1982. 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.[233] 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 sec. 35 is not part of the *Charter of Rights and Freedoms* the purposive methodology language used to discuss sec. 35 is similar to the way the courts have approached the rights guaranteed by the Charter.[234] This purposive methodology is outlined in the early Charter case *R. v. Big M Drug Mart* where Dickson, J. stated "the meaning of a right or freedom guaranteed by the Charter

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[231] PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA Vol. 1 28-1 (5th ed. 2014) (looseleaf). I owe this idea to Michael Coyle, *Loyalty and Distinctiveness: A New Approach to the Crown's Fiduciary Duty Toward Aboriginal Peoples*, (2003) 40 ALBERTA L. REV. 841, 844. *See also* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 248 (Can.).

[232] Brian Slattery, *Making Sense of Aboriginal and Treaty Rights*, 79 CAN. BAR REV. 196, 198 (2000). The idea that the law relating to aboriginal rights is a form of inter-societal law was most recently endorsed in R. v. Marshall (*Marshall III*); R. v. Bernard, 2005 SCC 43, paras. 45-60 (Can.). *See also* R. v. Van der Peet, [1996] 2 S.C.R. 507, 547 (Can.).

[233] *See* R. v. Van der Peet, [1996] 2 S.C.R. 507, para. 31 (Can.) ("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.").

[234] I owe many of the idea in this section to HOGG, *supra* note 231. Section 35 is in part of the Canadian Charter of Rights and Freedoms.

was to be ascertained by an analysis of the purpose of such a guarantee; it was understood, in other words, in light of the interests it was meant to protect."[235]

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, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

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."[236] Rights are constantly in need of re-articulation over time and the areas of social life to which the right applies changes. The judicial expansion of the scope of the guaranteed rights through the generous and broad approach has been a significant difference in post-1982 rights jurisprudence.

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 favorable 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 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*, 175 U.S. 1 (1899) '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.'[237]

In *Sparrow* the Court expanded Dickson's interpretive principle to include sec. 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

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[235] R. v. Big M Drug Mart Ltd, [1985] 1 S.C.R. 295, para. 116 (Can.).
[236] HOGG, *supra* note 231.
[237] Nowegijick v. The Queen, [1983] 1 S.C.R. 29, 36 (Can.).

the constitutional provision is demanded." [238] However unlike Charter jurisprudence (which uses the methodology to determine the content and scope of the right as textually expressed), the purposive methodology has been used to determine the existence, content and scope of the guaranteed rights under sec. 35. In *Marshall I*, for example, the majority found that a negative covenant in the "truckhouse clause," which textually precluded trade anywhere but at the British truckhouses, protected the right of the Mi'kmaq to engage in small scale commercial fishing of eels.

The expansion of rights implicit in the purposive approach to Charter jurisprudence is qualified by sec. 1 of the Charter. Section 1 states that the guaranteed rights are subject to reasonable limitations that can be "demonstrably justified in a free and democratic society." As sec. 35 is outside of the Charter, there is no such textual limitation on the purposive methodology. As such, the purposive approach presents the danger of expanding aboriginal rights beyond what would be acceptable to the non-aboriginal polity with the concomitant undermining of the reconciliation process.

As a result, the courts have limited the content, scope, and efficacy of sec. 35 rights by 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 cannot preclude jurisdiction, regulation and use by the general community. [239] Resources ultimately are shared among aboriginal and non-aboriginal users. In addition, various claimed rights such aboriginal self-government and sovereignty, or the traversing of international bounders without immigration control, are simply incompatible with the assertion of sovereignty by the Canadian state and can be given no judicial protection. Perhaps more importantly, rights are further limited by the judicial determination that the purpose of sec. 35 rights can only be effectuated in a particular factual circumstance. Their recognition is to ameliorate an injustice perpetuated upon a particular aboriginal group or prevent the infringement of aboriginal rights within a particular historic situation with a particular tribe. 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.[240]

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[238] R. v. Sparrow, [1990] 1 S.C.R. 1075, 1106 (Can.).

[239] R. v. Gladstone, [1996] 2 S.C.R. 723, paras. 61-75 (Can.).

[240] R. v. Pamajewon, [1996] 2 S.C.R. 821, para. 27 (Can.) ("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); *see also* R. v. Sundown, [1999] 1 S.C.R. 393, 407-8 (Can.).

2. Honour of the Crown

Another interpretative principle the courts have repeatedly applied to aboriginal and treaty rights cases has been the "Honour of the Crown" principle. This principle is evident in Binnie, J.'s majority decision in *Marshall I* where he observed that the Supreme Court of Canada 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 to secure their peace and friendship, as best the content of those treaty promises can now be ascertained." [241]

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.[242] Likewise, the idea that the Crown owes obligations to promulgate policies that are protective or solicitous of the tribes has likewise been a longstanding political obligation. The Crown's fiduciary obligations are not a public law duty nor a private law duty, but rather arise from the historic Crown-aboriginal relationship that "import[s] some restraint on the exercise of sovereign power."[243]

Regardless of the conceptualized restraint on governmental power, fiduciary obligations towards the tribes have been honored more in the breach. Such breaches were permissible at law because the fiduciary obligation was "political" and not legally enforceable. The Crown's obligations to the aboriginals, as Supreme Court Justice Tashchereau noted in *St. Catherine's Milling*, are a "sacred political obligation, in execution of which the state must be free from judicial control."[244] The non-legal nature of the obligation was re-emphasized by Rand, J. in the 1950 Supreme Court decision *St. Ann's Island Shooting & Fishing Club, Ltd. v. The King*:

> The language of the statute [Section 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.[245]

After the passage of the *Constitution Act, 1982* the political obligation was recognized as a legal obligation in *Guerin v. Canada*.[246] In *Sparrow* the Court entrenched the fiduciary obligation as a general principle of sec. 35 jurisprudence:

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[241] R. v Marshall (*Marshall I*), [1999] 3 S.C.R. 456, para. 4 (Can.).

[242] As Binnie, J. noted 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 . . . ." *Id.* para. 53.

[243] LEONARD I. ROTMAN, PARALLEL PATHS: FIDUCIARY DOCTRINE AND THE CROWN-NATIVE RELATIONSHIP IN CANADA (University of Toronto Press 1996).

[244] St. Catherine's Milling & Lumber Co. v. The Queen (1887), 13 S.C.R. 577, 649 (Can.).

[245] St. Ann's Island Shooting & Fishing Club, Ltd. v. The King, (1950) 2 D.L.R. 225, 232 (Rand, J.) (Can.) (emphasis added). (Section 51 of Indian requires that Governor-in-Council provide direction to Superintendent of Indian Affairs to lease surrendered Indian lands and the absence of authorizing order for lease for surrendered Indian land with private club renders lease void).

[246] Guerin v. Canada, [1984] 2 S.C.R. 335 (Can.) (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).

> In our opinion, *Guerin*, together with *R. v. Taylor and Williams* . . . 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.[247]

Where the Crown has assumed discretionary control over aboriginal resources, the "Honour of the Crown" gives rise to a legal fiduciary duty."[248] It presumes that governmental authority *vis-à-vis* the aboriginals is limited or structured by sec. 35.[249] This legal recognition of the fiduciary relationship has been an important and dynamic aspect of sec. 35 jurisprudence.[250]

The "Honour of the Crown" concept is related to fiduciary obligation in law, but as the term is used here, refers to an interpretive principle. 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 of 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 that may or may not be historically accurate. The principle requires the court to presume that when an action by the Crown could be interpreted in a manner that may damage an aboriginal interest or a representation by the Crown to the aboriginals, 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."[251] 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 the Crown's previous representation and actions towards the aboriginals or preserve the aboriginal interest in the use or land in question where 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 favour of aboriginal peoples."[252]

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:

> 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

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[247] R. v. Sparrow, [1990] 1 S.C.R. 1075, 1108 (Can.).

[248] Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, para. 19. (Can.); Wewaykum Indian Band v. Canada, [2002] 4 S.C.R. 245, para. 79 (Can.).

[249] *Sparrow*, [1991] 1 S.C.R. at 1108.

[250] Wewaykum Indian Band v. Canada, [2002] 4 S.C.R. 245, 287-88 (Can.).

[251] Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, para. 19. (Can.).

[252] R. v. Van der Peet, [1996] 2 S.C.R. 507, para. 25 (Can.).

> (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 . . . 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 [First Nation] interests and those of the Crown.[253]

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.[254] When applied to a statute, the interpretive principle requires that the statute be given a broad and liberal construction and doubtful expressions should be resolved in favour of the tribes.[255] When applied to aboriginal rights, the framework will be used to review the Crown's action on the basis for whether or not it acted in good faith and sought to accommodate aboriginal concerns where it has real or constructive knowledge that aboriginal interests will be affected.[256]

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 would 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 an area over which it exercised enough historic usage such that the exercised activities could be characterized as an aboriginal right. Third, the area where the rights are exercised could be reduced by subsequent Crown and settler activity.[257] Fourth, the reserved natural resources are not for exclusive aboriginal harvest.[258] 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 in treaty cases it is presumed that tribal negotiators intended to retain various traditional uses rather than reserve other uses or forgo traditional uses for future undetermined or unanticipated uses.

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[253] R. v Marshall (*Marshall I*), [1999] 3 S.C.R. 456, para. 14 (Can.) (emphasis included).

[254] R. v. Marshall (*Marshall II*), [1999] 3 S.C.R. 533, para. 54 (Can.).

[255] Nowegijick v. The Queen, [1983] 1 S.C.R. 29, 36 (Can.); Simon v. The Queen, [1985] 2 S.C.R. 387, 410 (Can.).

[256] Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74, [2004] 3 S.C.R. 550 (Can.), Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73 (Can.). The obligation reflects the protective relationship, assumed by the Crown under the Proclamation and in various treaties, applies even in those instances where a claimed right itself has yet to be recognized.

[257] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) [2006] 1 C.N.L.R. 78 (Can.).

[258] *Id.*; R. v. Badger, [1996] 1 S.C.R. 771 (Can.).

C. Who May Exercise The 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 and 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.[259]

The difficulty for the courts in effectuating these communal rights is that the membership of certain individuals to the sec. 35 categories of "Indian, Métis, and Inuit" or an individual's connection to a tribe or band 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 under the *Indian Act*.[260] Generally, only status Indians are included in the federal and provincial legislation that provides certain hunting, fishing and gathering rights, but other non-status aboriginals (often Métis) also have been included. A non-status Indian is an individual 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 have 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 Nations and Inuit women and European fur traders and fishermen. They have a distinct cultural tradition combining European and aboriginal heritages.[261]

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[259] R. v. Powley, [2003] 2 S.C.R. 207, 221 (Can.).

[260] § 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.

[261] No federal legislation defines the Métis. Alberta is the only province to have defined the term in law. The Métis Settlements Act. R.S.A.2000, c. M-14, s.1(j) (Can.) defines a Métis as "a person of aboriginal ancestry who identifies with Métis history and culture" in the context of creating a test for legal eligibility for membership in one of Alberta's eight Métis settlements. In *Powley*, [2003] 2 S.C.R. 207, the Supreme Court of Canada outlined three broad factors to identify Métis who have rights as aboriginal peoples: (a) self-identification as a Métis individual; (b) ancestral connection to an historic Métis community; and (c) acceptance by a Métis community. All three factors must be present for an individual to qualify under the legal definition of Métis. In addition, the court stated that: "[t]he term Métis in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own

As the rights are collective, the courts have focused on an individual's aboriginal ancestry and cultural practice in order to establish a connection with the aboriginal group that is the source of the right. At the same time, the court will consider the historical and present day existence of the aboriginal group. In disputes involving the 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 white 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 whether the individual claiming the right is a member of the tribe that signed the treaty.[262] It is necessary to show an ancestral connection to the tribe, but not necessarily 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 inhabiting the eastern part of Nova Scotia in the Shubenacadie area" which had signed the Treaty of 1752.[263] The Court dismissed the Crown's argument, holding that where an individual is a member of a band covered by a treaty the requirement for the claimant individual to establish a direct genealogical connection would place too onerous a burden "for otherwise no Micmac Indian would be able to establish descendancy."[264] 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 defense on "his descent from a member of a tribe that was a signatory" to the Robinson treaty despite his mixed blood.[265] He had "inherited the right to hunt granted to his ancestors."[266] There is no indication that cultural factors are important to membership determinations 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 test 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.[267] *Powley* concerned a Métis who killed a moose for food. He claimed an aboriginal right to do so without a

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customs, ways of life, and recognizable group identity separate from their Indian or Inuit and European forebears." *Id.* para. 9.

[262] "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. Syrette*, [1989] O.J. No. 3157 (Can.), quoted in R. v. Shipman, [2006] 2 C.N.L.R. 284, 293 (Can.).

[263] Simon v. The Queen, [1985] 2 S.C.R. 387, 396-97 (Can.).

[264] *Id.* at 407-8.

[265] R. v. Chevrier, [1989] 1 C.N.L.R. 129, 130 (Can.).

[266] *Id*.

[267] R. v. Acker, [2004] N.B.J. 525 (N.B. Prov. Ct.) (Can.); *see also* R. v. Harquail, 144 N.B.R. (2d) 146 (N.B. Prov. Ct) (Can.).

provincial license under sec. 35.[268] 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 finally, the claimant must demonstrate that he or she has been accepted by the modern community.[269] 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.[270]

Inuit have been considered "Indians" under sec. 91(24) of *Constitution Act, 1867* since 1939.[271] Canada has approached the issue of Inuit identity by recognizing regional Inuit groups and permitting the particular groups to determine membership or entitlement criteria.[272]

D. Territory Where Rights Are Exercised

Aboriginal rights to hunt, fish and gather in a manner not allowed to other Canadian citizens extend only to certain territory. In Canada, aboriginals may practice these activities on four classes of land. The federal government has paramount authority to regulate Indians and lands reserved for Indians under Sec. 91(24) and (12) of the *Constitution Act,* 1867. Provincial regulation across these territories varies. The province, as owner of Crown lands, has an inherent right to regulate natural resource harvesting within its border. Without a treaty, federal or provincial statutory authority or a recognized right under sec. 35, aboriginals are subject to provincial game laws and regulation.[273]

Tribal members may exercise various hunting, fishing and gathering activities on territory within the boundaries of the reserve. Pursuant to Section 91(24) of the Constitution Act, 1867 federal legislation, and provincial legislation of general application pursuant to sec. 88, may apply to the activities on the reserve.[274] Within the reserve, provincial game laws generally have no application and bands may promulgate by-laws under the Indian Act that displace provincial law in certain instances.[275]

Second, the right to hunt, fish and gather may extend to land where the tribe held aboriginal title, which was subsequently ceded in a particular treaty that reserved various rights, or alternatively, where aboriginal title remains

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[268] *See Powley*, [2003] 2 S.C.R. 207.

[269] *Id.* at 224-5.

[270] R. v. Lavigne, [2005] 3 C.N.L.R. 176 (N.B. Prov. Ct); *see also* R. v. Ferguson, [1993] 2 C.N.L.R. 148 (Alta Prov Ct) (Can.).

[271] Re Eskimos, [1939] S.C.R. 104 (Can.).

[272] John Giokas & Robert K. Groves, *Collective and Individual Recognition in Canada, in* WHO ARE CANADA'S ABORIGINAL PEOPLES? RECOGNITION, DEFINITION, AND JURISDICTION 41, 45 (Paul Chartrand, ed. 2003).

[273] "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." R. v. Horseman, [1990] 1 S.C.R. 901, 933 (Can.); Simon v. The Queen, [1985] 2 S.C.R. 387, 410-14 (Can.).

[274] Cardinal v. Alberta (Att'y Gen.), [1974] S.C.R. 695 (Can.).

[275] R. v. Nikal, [1996] 1 S.C.R. 1013 (Can.).

unextinguished.[276] 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.[277] Excluding modern treaties, the ceded territory includes the area of Quebec, Manitoba, and Ontario as well as the Prairie provinces. The areas where aboriginal claims are based on unextinguished aboriginal title include most of British Columbia, the Maritimes, 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 unextinguished aboriginal title, the nature and extent of the rights are determined using the criteria set forth in *Delgamuukw* and *Van Der Peet*.[278]

Third, rights to hunt, fish and gather are exercised on Crown land and unoccupied private lands in Manitoba, Saskatchewan, and Alberta.[279] 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 subject only to aboriginal title. The occupying tribes then relinguished their interest in the territory to the federal government from 1871 to 1921. The territory is subject to the Natural Resource Transfer Agreements (NRTAs) between the federal and provincial governments. Each NRTA contains an identical provision, which supercedes and replaces any treaty rights regarding hunting, fishing, and gathering.[280] The NRTAs preclude provincial regulation of

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[276] "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" R. v. Marshall (*Marshall III*); R. v. Bernard, 2005 SCC 43, para. 38 (Can.).

[277] *Guerin*, [1984] 2 S.C.R. at 382.

[278] *See* Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (Can.).

[279] In *Badger*, the Supreme Court of Canada extended the area that can be used by aboriginal to hunt and fish for food to unoccupied private lands. Cory J. noted at para. 54 that "[a]n interpretation of the Treaty [Treaty 8 subsequently incorporated in the Natural Resources Transfer Act] properly founded upon the Indians' understanding of its terms leads to the conclusion that the geographical limitation on the existing hunting right should be based upon a concept of visible, incompatible land use." After reviewing the case law the Court summarized:

> Where lands are privately owned, it must be determined on a case-by-case basis whether they are "other lands" to which Indians had a "right of access" under the Treaty. If the lands are occupied, that is, put to visible use, which is incompatible with hunting, Indians will not have a right of access. Conversely, if privately owned land is unoccupied and not put to visible use, Indians, pursuant to Treaty No. 8, will have a right of access in order to hunt for food. The facts presented in each of these appeals must now be considered.

R. v. Badger, [1996] 1 S.C.R. 771, para 66 (Can.).

[280] *See* Moosehunter v. The Queen, [1981] 1 S.C.R. 282, 285 (Can.):

> 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

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."[281] The food gathering activities are beyond provincial regulation.[282] The provinces remains able to regulate for sport or commercial uses under their 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 province may be able to restrict the harvest for food purposes.[283] The Court in *R. v. Badger* determined that the food harvesting rights extended to unoccupied private lands because the aboriginal tribes in the various treaties replaced by the NRTA 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."[284] Where there is no visible incompatible use, aboriginal food gathering activity is allowed.

Fourth, rights extend to lands where the aboriginal group 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 rise to a claim for aboriginal title. The use of the land is limited to particular activities, which are integral to the particular tribes distinctive culture and this use has been continuous from pre-contact times. Such aboriginal rights land is unique to Canadian jurisprudence. It has arisen because the necessary reconciliation of claimed aboriginal rights with common law concepts that can often have little correspondence to the nomadic and semi-nomadic lifestyles of certain tribes.

> commercially could be regulated by provincial game laws but the right to hunt for food could not.

See also R. v. Horseman, [1990] 1 S.C.R. 901 (Can.). 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. *See* R. v. Blais, [2003] 2 S.C.R. 236 (Can.).

[281] *See Horseman*, [1990] 1 S.C.R. at 913-14.

[282] *See id.* at 933:

> Further, the means employed by them in hunting for their food was placed beyond the reach of provincial governments. For example, they may hunt deer with nightlights and with dogs, methods which are or may be prohibited for others. Nor are the Indians subject to seasonal limitations as are all other hunters. That is to say, they can hunt ducks and geese in the spring as well as the fall, just as they may hunt deer at any time of the year. Indians are not limited with regard to the type of game they may kill. That is to say, while others may be restricted as to the species or sex of the game they may kill, the Indians may kill for food both does and bucks; cock pheasants and hen pheasants; drakes and hen ducks. It can be seen that the quid pro quo was substantial. Both the area of hunting and the way in which the hunting could be conducted was extended and removed from the jurisdiction of provincial governments.

[283] *Id.* at 920-21.

[284] R. v. Badger, [1996] 1 S.C.R. 771 (Can.).

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

Emphasis on the idea that sec. 35 rights are "aboriginal" colors the entire analysis used to determine the nature and extent of protected hunting, fishing, and gathering rights. "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." Because these rights are held collectively by a group and flow from the pre-existing possession and use of the territory prior "to the arrival of Europeans" and, at the same time, must be reconciled with the assertion of British sovereignty, the rights themselves are circumscribed by judicial understandings of what traditional aboriginal practices and traditions involve. In light of this basic premise, which implicitly contrasts aboriginal rights to those of the "liberal enlightenment," rights and duties are given content.[285]

Thus, aboriginal rights must be specifically framed and historically grounded rather than conceptualized in a broad or universal manner.[286] This framing is the "necessary specificity, which comes from granting special constitutional protection to one part of Canadian society."[287]

1. Aboriginal Title

Until *R. v. Adams* and *R. v. Côté* a judicial finding that the claimant group held aboriginal title over a territory was considered necessary in order for there to be aboriginal rights to hunt, fish, and gather. At present, the courts consider aboriginal title to be "simply one manifestation of a broader-based conception of aboriginal rights."[288] Since those decisions however, aboriginal groups have continued to make claims that various usafructuary uses are permitted because they hold unsurrendered aboriginal title to the land they occupied at the time the British asserted sovereignty in their territory. 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."[289] It is a right of use and occupation prior to the assertion of British sovereignty, 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 is characterized as an interest in land itself. The 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."[290]

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[285] R. v. Van der Peet, [1996] 2 S.C.R. 507, para. 18 (Can.).

[286] R. v. Pamajewon, [1996] 2 S.C.R. 821 (Can.). 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, 277 (Can.).

[287] *See Van der Peet*, [1996] 2 S.C.R. 507, para. 20.

[288] R. v. Côté, [1996] 3 S.C.R. 139, para. 25 (Can.).

[289] *See Van der Peet*, [1996] 2 S.C.R. 507, para. 119 (L'Heureux-Dubé J., dissenting).

[290] Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 112 (Can.). The *Delgamuukw* Court noted that aboriginal title was a sui generis interest because it was inalienable, it pre-dates British sovereignty and it not dependent upon British sovereignty for

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."[291]

The characterization of aboriginal title as a form of "inalienable fee simple" is reflected in the seminal Indian law cases of American Chief Justice John Marshall in the early 19th century. This line of 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.[292] 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.[293] In *Delgamuukw*, however, the Supreme Court of Canada conceptualized aboriginal title differently. For the *Delgamuukw* Court:

> [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.[294]

The historic aboriginal occupation and use of a particular territory is reconciled with the core common law conceptions of occupancy and title.[295] This reconciliation process "must be sensitive to the context-specific nature of common law title, as well as the aboriginal perspective."[296] "Absolute congruity is not required, so long as the practices engage the core idea of the modern right."[297]

From a common law perspective, the content of occupation and use as well as customary law covering the claimed activity, and the extent to which it can be reconciled with the common law, is dependent upon the tribal particular 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 at the time the British asserted sovereignty rather than the pre-contact period (as in

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its existence whereas all other property estates depend upon the British legal system; it is held communally and land use decision are made communally rather than by individual members. *Id.* paras. 112-15.

[291] MCNEIL, *supra* note 19, at 242.

[292] BRIAN SLATTERY, ANCESTRAL LANDS, ALIEN LAWS: JUDICIAL PERSPECTIVES ON ABORIGINAL TITLE, ISSUE 2 OF STUDIES IN ABORIGINAL RIGHTS 31-38 (University of Saskatchewan Native Law Centre 1983).

[293] MCNEIL, *supra* note 19, at 216-35.

[294] Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 117 (Can.).

[295] St. Mary's Indian Band Band v. Cranbrook (City), [1997] 2 S.C.R. 657 (Can.); Osoyoos Indian Band v. Oliver, [2001] 3 S.C.R. 746 (Can.).

[296] R. v. Marshall (*Marshall III*); R. v. Bernard, 2005 SCC 43, para. 54 (Can.).

[297] *Id.* para. 50.

the case of other aboriginal rights).[298] In short, an aboriginal group cannot claim aboriginal title to territory they did not possess 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, or 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 dependent upon a "group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed".[299] As noted, 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.[300] Second, the occupancy must be exclusive at the time of sovereignty. In *Marshall III*, McLachlin, C.J., writing for the majority, set forth the criteria necessary to sufficient exclusive occupancy to prove aboriginal title:

> [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.[301]

If an aboriginal group cannot show that it occupied and used a particular territory exclusively, it could still assert a claim for an aboriginal right to engage in certain activities on the territory.

Lamer, C.J., who authored the majority opinion in *Delgamuukw*, 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.[302]

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298 Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 84 (Can.).
299 *Marshall III*, 2005 SCC 43, para. 49.
300 *Delgamuukw*, [1997] 3 S.C.R. 1010, paras. 143-54.
301 *Marshall III*, 2005 SCC 43, para. 70.
302 *Delgamuukw*, [1997] 3 S.C.R. 1010, para. 119.

On the surface the approach is a marked departure from earlier jurisprudence which conflated aboriginal title and aboriginal rights such that "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."[303] However, upon closer analysis there seems to be little difference between an aboriginal rights claim and an aboriginal title claim. While Lamer C.J.'s discussion departs in some sense from precedent, it remains consistent with the underlying principles of previous case-law. This earlier case law equated the content of aboriginal title with the use of the territory for traditional hunting, fishing and gathering activities.

The conflation of the doctrine of aboriginal title and the doctrine of aboriginal rights is evident in *St. Catherine's Milling and Lumbering Co.* There Lord Watson, while declining to ascertain the "precise quality of the Indian right" did find that aboriginal title was not fee simple (as posited under the doctrine of common law aboriginal title). Otherwise the decision would have been in favor if the Dominion.[304] Rather, "the tenure of the Indians was a personal and usufructuary right" as recognized by the *Proclamation of 1763*. Such tenure was simply a burden upon the Crown's underlying proprietary title. In the circumstances, the "usufruct" that composed the aboriginal right was described by the Proclamation, which characterized the reserved aboriginal lands as "hunting grounds."

Lord Watson's conflation of aboriginal title and aboriginal rights, which then consisted of various traditional use rights, is even more evident in Strong, J.'s earlier dissent when the case was 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.[305]

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[303] *Id.* para. 110.

[304] "Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, Ontario (Att'y Gen.) v. Mercer, 8 App. Cas. 767 (Can.), might have been an authority for holding that the Province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the union. But that was not the character of the Indian interest. The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the same," within the meaning of sect. 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed." St. Catherine's Milling & Lumber v. R., 58 Law Journal Reports (N.S.), 54, 58 (J.C.P.C. 1889) (appeal taken from Can.).

[305] St. Catherine's Milling & Lumber Co. v. The Queen (1887), 13 S.C.R. 577, 612 (Can.) (Strong, J. dissenting) (citing Kent's COMMENTARIES and Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835). The quote from *Mitchel* relied upon by Kent 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

In either case, the mutually generative characterization of aboriginal title and aboriginal rights seemingly precludes any ownership or activity that is inconsistent with traditional subsistence activities.

The usufructuary nature of aboriginal title and the equation of it with aboriginal rights to hunt, fishing, gather and other traditional activities evident in *St. Catherine's Milling and Lumbering Co.,* has become an underlying premise of aboriginal jurisprudence.[306] Lord Duff, writing in the 1921 "*Star Chrome*" case, 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.[307]

The legal concepts of title and usufruct were conceptually distinct, but in practice merged. Aboriginal title was either defined as a "burden" on the Crown's interest, which was subsequently extinguished by treaty or legislation, or was defined as an aboriginal right to traditionally harvest various natural resources. The reasoning of McGillivray, J.A in *R. v. Wesley* is indicative of the pragmatic melding of the two 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

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respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals." *Mitchel*, 34 U.S. (9 Pet.) at 746.

[306] Can. (Att'y Gen.) v. Ontario (Att'y Gen.), [1897] A.C. 199 (Can.) [hereinafter Att'y Gen.]; Ont. Mining Co. v. Seybold, [1903] A.C. 73 (Can).

[307] Que. (Att'y Gen.) v. Can. (Att'y Gen.), [1921] 1 A.C. 401, 408 (Can.) Lord Duff noted in his speech, *Que.*, [1921] A.C. at 410-11 (emphasis added):

> 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."

right to hunt and fish at will all over those lands in which they held such interest.[308]

The idea that aboriginal title gave rise to traditional natural resource gathering rights fit well in the jurisprudence, even in those areas that arguably had un-extinguished aboriginal title such as British Columbia. It also reflected political reality. By generally treating aboriginal title and aboriginal rights as mutually constitutive, the courts avoided any discussion of whether the holder of unextinguished aboriginal title has the right "to use it [the land] according to their own discretion."[309] Indeed, until the 1973 *Calder* decision there was no substantive discussion of aboriginal title in the case law.[310]

However, the idea that aboriginal title could have meaning apart from aboriginal rights was revived in *R. v. Adams*. *Adams* disentangled aboriginal title from aboriginal rights as a legal basis for traditional harvest activities.[311] 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 sec. 35. Lamer, C.J., for the Supreme Court of Canada, noted that the Mohawk could not sustain a claim for aboriginal title because their occupation and use of the land and 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."[312] Nevertheless, the Mohawk defendant could maintain an aboriginal rights claim because the courts must look at both the relationship of an aboriginal claimant to the land and at the traditions, customs and traditions arising from the claimant's

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[308] R. v. Wesley, [1932] 4 D.L.R. 774, para. 48 (Alta. S.C.) (Can.).

[309] Johnson v. M'Intosh, 21 U.S. 543, 588 (1823).

[310] 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. In R. v. Kogogolak, (1959) 28 W.W.R. 376 (Can.), Sissons, J. implied that aboriginal title includes only an unfettered right to hunt and a potential to prevent non-Inuit hunting:

> I think the Royal Proclamation of 1763 is still in full force and effect as to the lands of the Eskimos. The Queen has sovereignty and the Queen's writ runs in these Arctic "lands and territories." This is the Queen's court and it needs must be observant of the "Royal will and pleasure" expressed 200 years ago and of the rights royally proclaimed. The lands of the Eskimos are reserved to them as their hunting grounds. It is the royal will that the Eskimos "should not be molested or disturbed" in the possession "of these lands. Others tread softly, for this is dedicated ground. This may be obiter dictum, but I question whether other persons have, or should have, the right to hunt or fish on the lands reserved to the Eskimos as their hunting grounds, except by special leave or license of the government of Canada. There has been no treaty with the Eskimos and the Eskimo title does not appear to have been surrendered or extinguished by treaty or by legislation of the Parliament of Canada. The Eskimos have the right of hunting, trapping, and fishing game and fish of all kinds, and at all times, on all unoccupied Crown lands in the Arctic.

Id. at 383-84.

[311] R. v. Adams, [1996] 3 S.C.R. 101 (Can.).

[312] *Id.* para. 28.

distinctive culture and society. Lamer, C.J., 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 asserted to the court. 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 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.[313]

In that instance, the Court held that the Mohawk have an aboriginal right to fish in Lake St. Francis.

In *Delgamuukw v. British Columbia* the Court elaborated on the nature and extent of aboriginal title.[314] Lamer, C.J. held that "aboriginal title encompasses the right to exclusive use and occupation of the land held . . . for a variety of purposes." These purposes do not need be "aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures" nor need they be tied to aboriginal rights *per se*. Lamer, C.J. 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 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."[315] In short, aboriginal title is not a "normal" proprietary interest but imposes an inherent *sui generis* limitation on land use.[316] 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."[317] In order 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."[318]

"[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."[319]

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313 *Id.* para. 26.
314 Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (Can.).
315 *Id.* para. 117.
316 *Id.* para. 125.
317 *Id.* para. 126.
318 *Id.* para. 127.
319 *Id.* para. 128.

Not surprisingly given the history discussed above, the inherent limitation on the use of the territory, which emphasizes that the extent that aboriginal title is the embodiment of certain 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.[320]

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.[321] From this point of view, despite Lamer, C.J.'s claim that aboriginal title is "not restricted to the practices, customs and traditions of aboriginal peoples", the concept remains firmly tied to specific traditional practices for the present.

2. Aboriginal Rights

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.[322]

Despite this emphasis on the fact-specific nature of aboriginal rights, the Court has laid out a comprehensive analytic framework to determine the existence and content of aboriginal rights under sec. 35. In practice, applying the framework has been problematic since the categories of analysis are somewhat abstract.

The Supreme Court of Canada outlined the approach to be used to determine the existence and the content of an aboriginal right in the 1996 case, *R. v. Van der Peet.*[323] *Van der Peet* concerned the sale of 10 salmon caught under an Indian

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[320] *Osoyoos*, [2001] 3 S.C.R. 746, para. 46.

[321] "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 v. British Columbia, [1997] 3 S.C.R. 1010, para. 129 (Can.).

[322] R. v. Gladstone, [1996] 2 S.C.R. 723, para. 65 (Can.).

[323] R. v. Van der Peet, [1996] 2 S.C.R. 507 (Can.).

food license issued by British Columbia to the aboriginal defendant under federal regulations. Lamer, C.J., writing for 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."[324] The rights that are protected are those activities 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 dependent on the perspective of the aboriginal people themselves, but the activity must be of central significance to the particular group. In addition, the perspective needs to be framed in terms that are "cognizable to the Canadian legal and constitutional structure."[325] Finally, the activity must be an activity that was integral *prior* to the arrival of the Europeans and which has continuity with present day activities.[326]

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."[327] 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."[328]

The two-step approach in *Van der Peet* can be disaggregated and has been modified by subsequent jurisprudence so that the analysis encompasses five separate steps.[329] First, the court must identify the "true nature of the claim".[330] 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 outcome.[331]

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[324] *Id.* para. 30. Lamer, C.J. stated:

> 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 assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes . . . .

Id. para. 43.

[325] *Id.*

[326] *Id.*

[327] *Id.*

[328] "[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, para. 46 (Can.).

[329] I owe this typology to Robertson, J.A. of the New Brunswick Court of Appeal who discussed it in R. v. Sappier, [2004] N.B.J. No. 295 (N.B.C.A.) (Can.).

[330] Mitchell v. M.N.R., 2001 SCC 33, para. 14 (Can.).

[331] *Id.*

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.[332] 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 since 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 Lamer, C.J. observed in *Delgamuukw*, "aboriginal rights . . . fall along a spectrum with respect to their degree of connection with the land." [333] Most aboriginal rights claims have some geographical element even though a claim having a geographical component is not dependent 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.[334]

A claimed right may be quite site-specific and can only be exercised at a particular place. These rights often involve religious and ceremonial activities. The relevance of geography in hunting or fishing cases is more determinative because the activities are "inherently tied to the land" as compared with "more free-ranging rights, such as the general right to trade . . . ."[335]

Third, the court must determine whether the practice existed prior to contact with Europeans. As Lamer, C.J noted in *R. v. Van der Peet*:

> 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

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[332] *Van der Peet*, [1996] 2 S.C.R. 507, paras. 53-63.
[333] Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 138 (Can.).
[334] R. v. Côté, [1996] 3 S.C.R. 139, 167 (Can.).
[335] *Mitchell*, 2001 SCC 33, para. 56.

then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.[336]

Evidence of pre-contact activity must be "clearly demonstrated" by oral histories and archeological evidence. 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."[337]

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. "To recognize and affirm," writes Lamer, C.J. in *Van der Peet*, "the prior occupation of Canada by distinctive societies *it is to what makes those societies distinctive* that the court must look in identifying aboriginal rights."[338]

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 done *only* in that culture. Rather, it means that if the activity was not undertaken by the group, its culture would be fundamentally changed.[339] 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, archeological and historical data:

> 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

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336 R. v. Van der Peet, [1996] 2 S.C.R. 507, para. 73 (Can.).

337 Mitchell v. M.N.R., 2001 SCC 33, para. 38 (Can.).

338 *Van der Peet*, [1996] 2 S.C.R. 507, para. 56 (emphasis in original).

339 *Id.* para 55 (emphasis in original):

> To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive — that it was one of the things that truly *made the society what it was*.

> cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question.[340]

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."[341] Continuity, however, may be shown where an historical practice evolved into a modern day practice. It is permissible for the practice to have evolved over time and a historical pre-contact practice may find a modern expression.

The *Van der Peet* integral-to-a-distinctive-culture approach 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 culture and perceptions and evaluates what is "significant" in that culture by the claimant aboriginal group and the court. As Justice McLachlin said in *Mitchell* "[c]ultural identity is a subjective matter and not easily discerned . . . ."[342] An evaluation of the historic significance and perceptions of the significance of that activity increases the difficulty of this analysis.[343] 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 particular culture's understanding of that activity. Given that the cultural framework must be considered 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 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."[344]

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*."[345]. The determination of the legal nature of the treaty is dependent upon how the treaty agreement is initially characterized in law – be it in 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, case law has analogized treaties to both private

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[340] *Mitchell*, 2001 SCC 33, para. 12.
[341] *Id.*
[342] *Id.* para. 32.
[343] I owe this point to Russel Barsh & James Henderson, *The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand*, 42 MCGILL L.J. 994, 998-1002 (1997).
[344] R. v. Gladstone, [1996] 2 S.C.R. 723, para. 75 (Can.).
[345] Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, para. 20 (Can.).

contracts and international agreements. The Court in *R. v. Sioui* noted that "A treaty with the Indians is unique, that it is an agreement sui generis which is neither created nor terminated according to the rules of international law."[346] In *Marshall I*, Binnie J. applied contract law principles to find that a truckhouse clause provided a right to trade.[347] Whether rooted in international law or in contract, treaties between aboriginal peoples and the British Crown are a distinctive type of agreement which require additional interpretive principles.[348] 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.[349] Unlike aboriginal rights, whose content depends on a judicial examination of pre-contact practices, where the aboriginal activities are covered by a treaty are they those exercised at the time of 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.[350]

Treaty jurisprudence and the canons of construction emphasizes 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 mutual 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]."[351] This emphasis on the specific factual circumstances of the treaty process has led to the development of extensive principles and interpretive methodologies.[352] First, treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favor of the tribes.[353] Second, the

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[346] R. v. Sioui, [1990] 1 S.C.R. 1025, 1043 (Can.).

[347] In R. v Marshall (*Marshall I*), [1999] 3 S.C.R. 456, para. 43 (Can.), the Court stated:

> The law has long recognized that parties make assumptions when they enter into agreements about certain things that give their arrangements efficacy. 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, e.g., where it meets the "officious bystander test"

[348] *Sioui*, [1990] 1 S.C.R. at 1043.

[349] *Marshall I*, [1999] 3 S.C.R. 456, para. 9-17. Prior to *Marshall I*, courts would first look at the text of the treaty 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.

[350] R. v. Badger, [1996] 1 S.C.R. 771, para. 52 (Can.).

[351] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 S.C.C. 69, para. 28 (Can.).

[352] R. v Marshall (*Marshall I*), [1999] 3 S.C.R. 456, paras. 107-10 (Can.).

[353] *Badger*, [1996] 1 S.C.R. 771, para. 52.

court must be sensitive to the different cultural and linguistic characteristics of the tribes and the British or Canadian negotiators and the impact these different factors can have in determining the content of their agreement.[354] Third, the objective of treaty interpretation is "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."[355] Fourth, the honour of the crown is presumed.[356] Fifth, the treaty words need to be given the meaning that they would have held for the parties at the time of signing, and technical or legalistic interpretations should be avoided.[357] 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.[358]

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 to be considered in 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 is similar to the judicial conflation of aboriginal title with historic aboriginal usages and practices discussed above. These judicially constructed indigenous understandings, which presume a relatively unsophisticated negotiating posture, are seemingly immutable in 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 like they have always done.

The most recent example of this reasoning is in the *Marshall III* decision. In *Marshall III*, the Supreme Court of Canada's characterization of the treaty right

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[354] R. v. Horseman, [1990] 1 S.C.R. 901, 907 (Can.); MILLER, *supra* note 186, at 165 (when considering the nature of the numbered treaties negotiated between 1871 and 1877 in western Canada, James Miller notes "[t]he Indians' understanding [of the treaty negotiations] was different. Though they agreed with Sweet Grass that the territory was theirs and that no one could sell it out from under them, they did not hold to a concept of absolute property right in a European legal sense. The land and its resources were the creation of the Great Spirit, and the Indian was but one inhabitant of the world with obligations to use its resources prudently and pass them on to succeeding generations undiminished. They could not negotiate surrender of title because they did not possess it. What the Indians sought in the negotiations of the 1870s was the establishment of a relationship with the Dominion of Canada that would offer them assurances for the future, while agreeing to permit entry and some settlement of the region. To them the treaties were intended to be pacts of friendship, peace, and mutual support; they did not constitute the abandonment of their rights and interests.").

[355] *Marshall I*, [1999] 3 S.C.R. 456, para. 107.

[356] R. v. Badger, [1996] 1 S.C.R. 771, para. 41 (Can.).

[357] Nowegijick v. The Queen, [1983] 1 S.C.R. 29, 36 (Can.).

[358] R. v Marshall (*Marshall I*), [1999] 3 S.C.R. 456, para. 107 (Can.).

in the 1999 *Marshall II* rehearing left little room for the argument that commercial logging was an evolution of the Mi'kmaq people's commercial uses of wood in the 18th century. The *Marshall II* Court essentially limited the scope of the treaty right to the historically understood contemplation of the parties:

> The word "gathering" in the September 17, 1999 majority judgment was used in connection with the types of the resources traditionally "gathered" in an aboriginal economy and which were thus reasonably in the contemplation of the parties to the 1760-61 treaties. While treaty rights are capable of evolution within limits, as discussed below, their subject matter (absent a new agreement) cannot be wholly transformed.[359]

The uses that "cannot be wholly transformed" are the "traditional" uses of a particular resource found in the culture and society of the signatory tribe. In *Marshall III,* McLachlin, C.J. noted with approval the statement by the trial court concerning the difference between present day logging and the Mi'kmaq's historic use of the Acadian trees:

> Logging was not a traditional Mi'kmaq activity. Rather, it was a European activity, in which the Mi'kmaq began to participate only decades after the treaties of 1760-61. 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 1*, was a traditional activity.[360]

McLachlin, C.J. suggests logging was not only a non-traditional use, but that it also interfered with other uses and management practices of the Mi'kmaq that were "traditional." This reinforces the 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. As LeBel, J. in his concurrence notes:

> [T]here was some evidence before the New Brunswick courts that logging may even have interfered with the Mi'kmaq's traditional activities, such as salmon fishing, at or around the time the treaties were made. With respect to stories from Mi'kmaq oral history from after 1763, Chief Augustine testified that:
>
> the stories were mostly about British people coming in and cutting timber, cutting large big trees and moving them down the river systems and clogging up the rivers, I guess, with bark and remnants of debris from cutting up lumber. And this didn't allow the salmon to go up the rivers . . .
>
> Given this evidence, it is doubtful that the right of access to forest resources for trade would be for the purpose of engaging in logging and similar resource exploitation activities.[361]

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[359] R. v. Marshall (*Marshall II*), [1999] 3 S.C.R. 533, para. 19 (Can.).
[360] R. v. Marshall (*Marshall III*); R. v. Bernard, 2005 SCC 43, para. 34 (Can.).
[361] *Id*. para. 122 (emphasis in original).

Under these circumstances, where logging is not a traditional activity and actually interfered with other traditional activities, trade in commercial timber could not be a treaty protected right. LeBel, J. concluded:

> 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.[362]

An obverse judicial assumption operates when the courts construe the intent 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 they intended in the area (*e.g*., agriculture, mining, cutting timber) but by the assumption that the treaty was a textual reference 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 in *Marshall I, II,* and *III* ― is not a limiting factor in determining the extent of their treaty bargain. Non-aboriginal negotiators bargained for and obtained as part of the agreement, 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 objective of absolute jurisdiction and maximal property conveyance from the aboriginals is essentially the same.

The effect of construing the non-aboriginal and aboriginal intent in this manner is that the doctrine of reserved rights does not exist in Canadian treaty law. The U.S. doctrine of reserved rights 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."[363] The judicial construction assumes the 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.[364] 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 did the activity concretely as part of their historic occupancy of the territory.

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[362] *Id.* para. 32.
[363] United States v. Winans, 198 U.S. 371, 381 (1905).
[364] Johnson v. M'Intosh, 21 U.S. 543, 574 (1823).

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 done in accordance with the criteria set down in *R. v. Sparrow*.[365] *Sparrow* concerned aboriginal rights, but the Supreme Court of Canada later extended the same approach to treaty rights in *R. v. Badger*.[366]

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 issued by British Columbia.[367] Sparrow argued that he was exercising an aboriginal right to fish and the drift net requirement was inconsistent with sec. 35(1) of the *Constitution Act, 1982.* The Crown argued that the aboriginal right claimed by Sparrow 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."[368] 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.

The Supreme Court of Canada, in considering Sparrow's immunity claims, interpreted the meaning of "existing" aboriginal rights as well as the impact of sec. 35(1) of the *Constitution Act, 1982* 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 unextinguished on April 17, 1982 (the day the *Constitution Act, 1982* took

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[365] R. v. Sparrow, [1990] 1 S.C.R. 1075 (Can.).

[366] R. v. Badger, [1996] 1 S.C.R. 771 (Can.). In that case Cory, J. also articulated an oft cited approach to treaty interpretation. At para. 41 he stated:

> At the outset, it may be helpful to once again set out some of the applicable principles of interpretation. First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.

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

[368] *Id.* at 1097.

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" in a manner that would preclude the "freezing" of the particular historical use or the regulatory regime in existence in 1982.[369] "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."[370] Moreover, the aboriginal rights could not be extinguished by extensive regulation. Rather 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."[371]

Once the aboriginal right had been established, the Court then proceeded to outline how to determine whether a particular regulatory scheme was inconsistent with sec. 35(1). "The 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 of s. 35(1)." 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 is legitimate and justifiable provided that aboriginal uses have a priority in the allowed resource allocation. In *Marshall I* the Court found that regulation schemes which provide absolute discretion to the minister that would affect an aboriginal right, or give no direction to the Minister to exercise his or her authority, were unjustifiable:[372]

> 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.[373]

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[369] *Id.* at 1093.
[370] *Id.* at 1099.
[371] *Id.*
[372] R. v Marshall (*Marshall I*), [1999] 3 S.C.R. 456, para. 77-81 (Can.).
[373] *Id.* para. 80, citing R. v. Adams, [1996] 3 S.C.R. 101 (Can.).

This analysis must also include consideration of the "Honour of the Crown" interpretive principle which, in effect, raises the burden on the Crown to prove that the regulation is a justifiable infringement on the aboriginal right.[374]

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 of Canada calls a "moderate livelihood" or for "necessaries."[375] 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 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*, where the Court stated "[i]n 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."[376]

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.[377]

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[374] Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73 (Can.); R. v. Côté, [1996] 3 S.C.R. 139 (Can.).

[375] *Marshall I*, [1999] 3 S.C.R. 456, para. 71, where the Supreme Court of Canada stated:

> The recorded note of February 11, 1760 was that "there might be a Truckhouse established for the furnishing them [*sic*] 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 . . . . The concept of "necessaries" is today equivalent to the concept of what Lambert, C.J., in *Van der Peet* . . . , described as a "moderate livelihood." Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth. It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today.

[376] *Id.* para. 74.

[377] Christie, *Justifying Principles*, *supra* note 222, at 185.

There has been a judicial awareness that in specific circumstances an aboriginal right to commercially exploit natural resources could exist apart from the need for food. In *Jack v. The Queen*, Dickson, J. noted that the 1871 Terms of Union under which British Columbia entered the Canadian Confederation implied a commercial *and* subsistence aboriginal fishery. [378] At the time 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 and throughout the treaty period encouraged the continued use of natural resources for subsistence purposes. [379] 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 in their historic contexts to subsistence activities. In the Prairie provinces where 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. These 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 the establishment of inconsistent uses by non-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

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[378] *See* Jack v. The Queen, [1980] 1 S.C.R. 294 at 311 (Can.):

> What protection, then, is afforded Indian fishing by art. 13 of the Terms of Union? At a minimum, one can say that 'a policy as liberal' requires no discrimination against the Indian fishery as opposed to the commercial or sports fishery. I also think that one could go further — the Colony gave priority to the Indian fishery as an appropriate pursuit for the coastal Indians, primarily for food purposes and, to a lesser extent, for barter purposes with the white residents. Thus, when it comes time to take into consideration the emergence of commercial and sport fisheries, one could suggest that "a policy as liberal" would require clear priority to Indian food fishing and some priority to limited commercial fishing over the competing demands of commercial and sport fishing. Finally, there can be no serious question that conservation measures for the preservation of the resource — effectively unknown to the regulatory authorities prior to 1871 — should take precedence over any fishing, whether by Indians, sportsmen, or commercial fishermen. From Dr. Lane's testimony, as well as that of Joseph Elliott, an old member of the Cowichan band, it appears that the Indians themselves practiced some form of self-imposed discipline for conservation purposes.

[379] *See* R. v. Sikyea, (1964) 43 D.L.R. (2d) 150, para.4 (N.W.T. C.A.):

> 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

rights for subsistence purpose McGillivay, J.A. exploring the rights of the tribes under the 1930 Natural Resource Transfer Act 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.[380]

When it did arise, the issue 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.[381]

The entrenchment of aboriginal rights in the *Constitution Act, 1982* changed the focus of the inquiry concerning aboriginal uses of natural resources for non-subsistence and commercial purposes. Where an aboriginal or treaty right to trade was found, the courts distinguished between the right to the sell, trade and barter for livelihood, support and sustenance purposes versus harvesting for commercial market based purposes.[382] Trade for subsistence purposes was considered less problematic as it was subject to an inherent limitation, *i.e.* there is a natural 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 "without internal limitation."[383] In either circumstance, a prohibition from commercial exploitation needed to be justified under the *Sparrow* analysis, which allowsg for governmental regulation that infringed upon existing rights for "conservation and resource management."[384]

Coupled with the Crown's fiduciary duty to the aboriginals, the *Sparrow* framework suggests that where the 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.[385] Nevertheless, even as the courts

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[380] R. v. Wesley, [1932] 4 D.L.R. 774, para. 33 (Alta. S.C.) (Can.); Prince and Myron v. The Queen, [1964] S.C.R. 81 (Can.).

[381] *Jack*, [1980] 1 S.C.R. at 311; R. v. Horseman, [1990] 1 S.C.R. 901 (Can.). The Natural Resource Transfer Acts provide that treaty aboriginals who to hunt for sport or commercially could be regulated by provincial game laws but those who hunt for food could not. *See* Moosehunter v. The Queen, [1981] 1 S.C.R. 282 (Can.).

[382] *Horseman*, [1990] 1 S.C.R. 901; R. v. Jones (1993), 14 O.R. (3d) 421 (Ont. Prov. Div.) (Can.) (members of Saugeen 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).

[383] R. v. Gladstone, [1996] 2 S.C.R. 723, para. 57 (Can.).

[384] R. v. Sparrow, [1990] 1 S.C.R. 1075, 1113 (Can.).

[385] R. v. Sutherland, [1980] 2 S.C.R. 451 (Can.) (The fiduciary relationship of the Crown and aboriginal peoples means that that any doubt or ambiguity as to what falls within the scope

have recognized the legal efficacy of the rights and the curtailed means by which the governments have sought to regulate them, it tied commercial exploitative activity based on usufructuary rights firmly to cultural practices that in turn limited resource usage to small-scale trading and bartering activities that had an "inherent limitation."[386] First, the resource exploitation was limited because of conservation was identified by the courts as coincident with tribal cultural interests. For example, the *Sparrow* Court noted:

> 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.[387]

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 those only usages that are compatible with traditional aboriginal uses.[388] The Court's decision in *Adams* and *Côté,* reinforced the traditional use paradigm. [389] 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 activities that are protected.[390]

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and definition of § 35(1) and a treaty term must be resolved in favour of aboriginal peoples.); *see also* Simon v. The Queen, [1985] 2 S.C.R. 387 (Can.).

[386] R. v. Gladstone, [1996] 2 S.C.R. 723, para. 57 (Can.) 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. ("[T]he doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.").

[387] R. v. Sparrow, [1990] 1 S.C.R. 1075, 1114 (Can.) (emphasis added).

[388] Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 123 (Can.).

[389] R. v. Côté*,* [1996] 3 S.C.R. 139, para. 38 (Can.) ("[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.").

[390] As Lamer, C.J noted in R. v. Van der Peet, [1996] 2 S.C.R. 507, para. 73 (Can.):

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 as in Nova Scotia, can not serve as the basis for claiming an aboriginal right.

3. Extinguishment

The colonialist 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 develop land and resources in the North American colonies.[391] However, since the enactment of sec. 35 existing aboriginal and treaty rights of the tribes, aboriginal common law and treaty rights may only be extinguished with the consent of the tribe concerned.[392]

Nevertheless, in order to gain constitutional protection, the rights need to be unextinguished as of April 17, 1982.[393] The Constitution 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. [394] Before Confederation, the imperial Crown by the *Royal Proclamation of 1763* and each individual colony were considered capable of extinguishing aboriginal rights,

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> 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.

[391] *See* Christie, *A Colonial Reading*, *supra* note 162.

[392] Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (Can.) (§ 35(1) providing that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.").

[393] Aboriginal title is extinguished where there has been the issuance of a Crown patent. It is settled that aboriginal rights in much of the territory have not been extinguished on Crown land in the Maritimes, British Columbia and the Northwest Territories and Nunavut and parts of Ontario and Quebec. Where the rights have not been extinguished, hunting, fishing and gathering rights are limited to the particular practices of the aboriginal group claiming the right and the doctrine of priority.

[394] R. v. Sparrow, [1990] 1 S.C.R. 1075, 1091 (Can.) (quoting R. v. Eninew, [1983] 7 C.C.C. (3d) 443, 446 (Sask. C.A.) (Can.)).

either through legislation or through a treaty where the treaty was not disallowed or reserved by the imperial Crown.[395] 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. At either level of jurisdiction, the intent to extinguish could be inferred. 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.[396] In the common law context, the extinguishment generally concerns whether specific legislation regulating various aboriginal uses or establishing reserves extinguished the claimed right prior to 1982.[397] 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 by the court to be both rational and knowledgeable when they entered into an agreement to extinguish aboriginal rights and title. Extinguishment, not the retention of rights, is presumed despite the generous interpretive methodologies where the treaty is primarily concerned with land cession.

Reflecting the bias inherent in the colonial process, prior to 1982 the courts — consistent with the notion that the rights existed only at the pleasure of the Crown — have often found that they had been extinguished by the Canadian Parliament, by the Provinces acting under one of their heads of power, or by the individual colonies prior to confederation.[398] The rights do not survive if their continued existence was found to be incompatible with the Crown's assertion of sovereignty (*i.e.* there is no aboriginal right to cross international borders); where they were surrendered voluntarily via the treaty process; or when they are extinguished by government action that is incompatible with the continued

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[395] 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. Ontario (Att'y Gen.) v. Bear Island Found. et al. Potts et al. v. Ontario (Att'y Gen.), [1984] 49 O.R. (2d) 353, 468 (Ont. H.C.J) (Can.).

[396] Calder v. British Columbia (Att'y Gen.), [1973] S.C.R. 313, 333 (Can.) (Judson, J., dissenting).

[397] "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 v. Ministry of Indian Affairs and Northern Development, [1980] 1 F.C. 518, 565 (F.C.T.D.) (Can.).

[398] St. Catherine's Milling & Lumber Co. v. The Queen (1887), 13 S.C.R. 577, 599-600 (Can.).

existence of the right[399] 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 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 that the courts must give it. That is as true of an aboriginal title as of any other common law right.[400]

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 in about the rights of aboriginals under treaties in *A-G for Canada v. A-G for Ontario*, stated that treaty obligations are nothing more than a non-legally enforceable personal obligation of a colonial governor:

> While this refers 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.[401]

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."[402] 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 an 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, while excluding aboriginal original fishing in common with any other fishery, nevertheless provided for specific aboriginal licenses. The Court held in part that the exceptions, rather than evidence of a comprehensive regulatory framework

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[399] Mitchell v. M.N.R., 2001 SCC 33, para. 154 (Can.) (Binnie, J. concurring) (it is unlikely that any aboriginal right would survive where it is incompatible with Canadian sovereignty).

[400] *See* R. v. Sparrow, [1990] 1 S.C.R. 1075, 1098-99 (Can.) (quoting Mahoney, J. in *Baker Lake*, [1980] 1 F.C. at 568). 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.

[401] R. v. Sikyea, (1964) 43 D.L.R. (2d) 150, para. 12 (N.W.T. C.A.) (Can.).

[402] *Sparrow*, [1990] 1 S.C.R. at 1099 (it is unlikely that extinguishment can only occur with a statement of specific intent enacted in the statute).

attempting to balance the total needs and uses of the fishery, evidenced the continued efficacy of the aboriginal right.

IV. CONCLUSION: POLITICS, LAW AND HISTORY IN AMERICAN AND CANADIAN INDIGENOUS USUFRUCTUARY RIGHTS

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.[403]

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. As such, in many respects the shape and context of hunting, fishing and gathering rights have been affected by larger constitutional issues on the one hand, and the processes of legal decision-making process on the other hand.

First, it is clear that the significant differences between the non-recognition of aboriginal sovereignty in Canada in contrast to the United States is dependent upon the unitary notion of Crown sovereignty that survived the establishment of the Canadian Federation and the concomitant inability of tribe to resist the encroachment of the Canadian state. In contrast, the issue of tribal sovereignty in the United States was caught up in the Federal government's determination to assert its primacy over the states in the decades prior to the American Civil War. Because constitutional and governmental structures varied *and* because of differences in judicial self-understandings of how settlement was to proceed and how the national polity was to exist, each state exhibits different permutations on the more general common law doctrine of aboriginal rights today.

Second, the persistence of these usufructuary rights in court decisions and rhetoric suggests that values internal to the law, such as the relational and normative components of the rule of law and judicial decision-making and the use of doctrinal paradigms to organize and justify judicial decisions, are an

[403] JOHN C. WEAVER, THE GREAT LAND RUSH AND THE MAKING OF THE MODERN WORLD, 1650-1900 151 (2003).

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.[404] 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 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 opposed. The law and legal doctrine are both sources of conflict and a mechanism to manage conflict in the society at large. From this perspective it is not surprising that the legal recognition of indigenous hunting, fishing and gathering rights in Canada and the United States is similar despite their different constitutional trajectories. Both source there initial legal rules and policy to regarding indigenous peoples to English sources. The use of treaties and other ostensibly "consensual" mechanisms to secure land acquisitions and ground title in the Crown or Federal government provided a legal means by which these rights survive until the present day and tribes across the continent generally secured important aspects of their substance from these activities which would be disrupted by settlement and settler economic exploitation. This process has been facilitated by access to the courts and common law jurisprudence, which has resulted in an imposing doctrinal edifice.

Third, 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 to 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 has been 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.

Fourth, it appears that this focus on "traditional" activities will not prevent further development of the doctrine of hunting, fishing and gathering activities with respect to whether these use rights provide a scope for additional indigenous

[404] *See, e.g.*, CONTESTED STATES: LAW, HEGEMONY AND RESISTANCE 5 (Susan F. Hirsch & Mindie Lazarus-Black eds., 1994).

control or management of non-member land uses. Canadian law provides for extensive consultative rights and in many instances American treaty specific institutional arrangements provide for extensive tribal say in the co-management process. However, simple "consultation" and the legal and factual indeterminacy that it entails may not provide sufficient protection to the usufructuary resources where economic, demographic and environmental impacts of development can have increasingly large impacts on resources. If the law recognizes that tribes have a legally cognizable interest to exploit resources in an area, it arguably follows that any non-tribal uses that impact the right may be subject to tribal defeasement or tribal control where it seriously impacts or diminishes the resource. It is in this area that more litigation is to be expected.

Finally, the changes in the doctrine of indigenous usufructuary rights over time suggests that constitutional innovation, not simply incremental judicial decision-making within the confines of a legal doctrine, will be necessary if the two nations wish to address fully 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. This is particularly salient in hunting, fishing and gathering disputes because for indigenous groups these issues are often about asserting their "sovereignty rights at the 'grass roots' level."[405] A 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 public debate and conciliation.

[405] Anthony G. Gulig & Sidney L. Harring, *"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*, 38:1 TULSA L. REV. 87, 102 (2002).