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4 The Boldt Decision in Canada

ABORIGINAL TREATY RIGHTS TO FISH ON THE PACIFIC

Douglas C. Harris

The Oregon Treaty of 1846 established the forty-ninth parallel as the boundary between British and American interests in western North America. Described in treaty text and drawn on a map in a distant capital, this international border severed Aboriginal worlds that at the time were largely oblivious to the remote geopolitical maneuverings of two imperial powers. Eventually the border would constrain the movement of people whose lives spanned it, in some cases restricting or eliminating access to important resource procurement and village sites, and also to markets on its other side.[1] More immediately, after 1846 those to the north of the border negotiated with the British Crown the terms of their coexistence with incoming settlers, those to its south with the United States. As a result, while some of the Coast Salish and Kwak′waka′wakw peoples in what would become British Columbia concluded treaties between 1850 and 1854 with the Crown's representative, James Douglas, the tribes in the United States settled with the governor of the Washington territory, Isaac I. Stevens, in 1854 and 1855.

In the Douglas and the Stevens treaties, as the agreements came to be known, Britain and the United States sought to extinguish Aboriginal rights and title and to replace them with a defined set of treaty rights. These treaty rights included monetary payment and guarantees of reserved land, hunting rights, and fishing rights.[2] The fisheries provi-

sions in the written text of the treaties were short. The Douglas treaties reserved to Aboriginal peoples the right to "their fisheries as formerly";[3] the Stevens treaties provided that "the right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory."[4]

This essay focuses on the relationship between U.S. and Canadian judicial interpretations of these treaty rights to fish. In the first two sections the essay describes the rulings in *United States v. Washington* (known as "the Boldt decision")[5] and *Washington v. Washington State Commercial Passenger Fishing Vessel Association* (*Passenger Fishing Vessel*).[6] It then explores the impact of these two cases from the United States on the general development of Aboriginal and treaty rights in Canada. Although not widely cited in Canadian courts, the U.S. decisions have had a profound influence on Canadian Aboriginal law.[7] In particular, the priority that Canadian courts accord to conservation and then to the Aboriginal food fisheries, before commercial and sport fisheries, is closely correlated with the fishing rights framework established in the Boldt decision. In addition, the idea that treaty rights to fish entail a right to a moderate livelihood, now well established in Canada, comes directly from the U.S. Supreme Court's interpretation of the Stevens treaties in *Passenger Fishing Vessel*.

The third part of the essay considers the historical evidence pertaining to fishing rights in the Douglas treaties and suggests various interpretations. Finally, it turns to the Boldt decision and away from *Passenger Fishing Vessel* to offer the outlines of a reasonable judicial determination of treaty rights to fish in British Columbia. The question remains whether these U.S. decisions provide useful guidance for the interpretation of the fishing rights provision in the Douglas treaties. The difference in legal jurisdictions certainly limits their applicability, but Canadian courts are more inclined to consider decisions from other jurisdictions than are their U.S. counterparts. In the area of Aboriginal law Canadian courts frequently refer to U.S. Supreme Court Chief Justice John Marshall's nineteenth-century trilogy and many later Indian and treaty rights cases as well.[8]

Beyond case law, the fact that many fish—including salmon, halibut, and herring—traverse the international boundary suggests that courts should pay some attention to judicial pronouncements from its other side. Moreover, except for the two treaties with the Kwak′waka′wakw

at the north end of Vancouver Island, the fisheries covered by the Douglas treaties are in Coast Salish territory, as are the Stevens treaties around Puget Sound. Douglas and Stevens negotiated with peoples who shared a cultural heritage and an economic base in the fisheries that long preceded the Canada-U.S. border in western North America.[9] They also share a broadly similar history of lost access to their fisheries, at least until the Boldt decision.[10] For these reasons, and for the simple fact that the fishing rights under the Stevens treaties have received more legal and scholarly attention than the fishing rights under the Douglas treaties, the U.S. decisions are a relevant and important resource in determining the division and management of the fisheries in British Columbia.

UNITED STATES V. WASHINGTON (THE BOLDT DECISION)

In 1970 the U.S. government and several tribal governments sued the State of Washington for its repeated harassment of Indian fishers and its disregard for the fishing rights in the Stevens treaties. The treaties provided that "the right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory."[11] From the advent of an industrial commercial fishery on the Pacific Coast in the last quarter of the nineteenth century, the state, which has jurisdiction over fisheries in state waters, maintained that the treaties did little more than permit tribe members to participate individually in the fisheries on the same terms as the rest of the public. The federal government disagreed. It presented extensive historical and anthropological evidence to the court to establish that although the tribes had ceded land under the treaties, they had reserved to themselves extensive off-reservation fishing rights, including the right to a substantial share of the fish that returned to the tribes' "usual and accustomed" fishing places.[12] Given this divergence of opinion, all the parties understood *U.S. v. Washington* to be an important test case, meant to settle issues unresolved after several earlier judicial interpretations of treaty fishing rights.[13]

The principal rulings in the ensuing decision, released on February 12, 1974, involved the allocation and management of the fisheries. First, Judge George Boldt held that the treaty right to fish "in common" amounted to a right to catch up to 50 percent of the harvestable anadromous fish

(salmon and steelhead) at "usual and accustomed" tribal fisheries: "'In common with' means *sharing equally* the opportunity to take fish at 'usual and accustomed grounds and stations'; therefore, non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish."[14] By "harvestable" Judge Boldt meant *commercially* harvestable; the fisheries were to be divided equally after accounting for conservation requirements and the needs of the Indian ceremonial and subsistence fishery. Ceremonial and subsistence fishing, he wrote, had "a special treaty significance distinct from and superior to the taking of fish for commercial purposes."[15]

Judge Boldt also held that the tribes had the right to manage their off-reservation fisheries, and he set out the terms under which that responsibility might be assumed. Two tribes—the Quinault and the Yakima—could assume jurisdiction immediately because of their existing fisheries management experience, the others when they had established the capacity to do so. The state had the right to regulate the off-reservation treaty right to fish but only to the extent necessary to ensure the preservation of the species: "The fishing right was reserved by the Indians and cannot be qualified by the state. The state has police power to regulate off reservation fishing *only to the extent reasonable and necessary for conservation of the resource*. For this purpose, conservation is defined to mean perpetuation of the fisheries species. Additionally the state must not discriminate against the Indians, and must meet appropriate due process standards."[16] In other words the treaty right to fish had priority over the state's right to manage the fishery, with the one exception that the state might limit the treaty right in order to preserve and sustain the fisheries. However, the state had to achieve its conservation objectives legitimately and fairly; it could not discriminate against the Indians by imposing conservation burdens so that others might fish.

The Boldt decision outraged many non-Aboriginal fishers, who turned to protest and civil disobedience but also to the state courts.[17] In 1977 the Washington Supreme Court held that Judge Boldt's interpretation of the treaties, by allocating the right to catch up to half of the commercial fisheries to a small proportion of the population (treaty Indians), violated the equal rights protection in the U.S. Constitution.[18] In this

context of legal and political turmoil, Judge Boldt assumed continuing oversight of the implementation of his ruling.

Then in 1979, on appeal from the cases in the state courts, the U.S. Supreme Court largely confirmed the Boldt decision. However, in *Passenger Fishing Vessel* the Supreme Court altered the original decision in two ways: it held that the 50 percent allocation was to include the tribal ceremonial and subsistence fishery (rather than calculated after accounting for that fishery) and 50 percent was the maximum allocation (not the minimum). If the ability of tribal members to secure a "moderate living" from the fishery required fewer fish, then the treaty right could be honored with an allocation of less than 50 percent. The Supreme Court offered no legal or historical basis for limiting the right to a level that supported a "moderate livelihood"—a ruling that has not been widely adopted in U.S. Indian treaty interpretation[19] but, according to the Court, was central to the decision:

> The central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians *secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living*. Accordingly, while the maximum possible allocation to the Indians is fixed at 50%, the minimum is not; the latter will . . . be modified in response to changing circumstances. If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45% or 50% allocation of an entire run that passes through its customary fishing grounds would be manifestly inappropriate because *the livelihood of the tribe* under these circumstances could not reasonably require an allotment of a large number of fish.[20]

Although measures to implement the treaty rights were contested after the Supreme Court decision, the basic parameters had been established. Under the Stevens treaties Indian tribes had a right to catch up to 50 percent of the harvestable fish at usual and accustomed places in order to secure for their members a "moderate living"; if that could be achieved with fewer fish, then the entitlement would be reduced. Once they had demonstrated the capacity to manage the fisheries, Indian tribes were to assume jurisdiction over their fisheries. The Washington Fisheries and Game departments had the capacity to limit the treaty right, but only

for the purpose of ensuring the continuing viability of the resource. Conservation measures could not discriminate against Indians.

FROM THE BOLDT DECISION TO *JACK*, *SPARROW*, *GLADSTONE*, AND *MARSHALL*

Within three weeks after the U.S. Supreme Court's 1979 decision in *Passenger Fishing Vessel*, the Supreme Court of Canada released its decision in *Regina v. Jack*.[21] It was the first foray of that Court into Aboriginal fishing rights in British Columbia, although the members of the Cowichan Tribes who were charged with *Fisheries Act* offenses did not raise an Aboriginal or treaty rights defense. The Cowichan, a Coast Salish community on eastern Vancouver Island, were not party to the Douglas treaties, and the entrenchment of Aboriginal and treaty rights in the Canadian constitution was still three years away.[22] The Cowichan therefore relied on the colonial policy not to interfere with Aboriginal fisheries and on the federal government's commitment in the terms of union with British Columbia, when it assumed responsibility for Indians and fisheries in British Columbia in 1871, that it would continue "a policy as liberal as that hitherto pursued by the British Columbia government" in its management of Indian affairs.[23]

The *Jack* decision turned on the details of Canadian federalism, whereas the Boldt decision involved an interpretation of treaty rights in Washington State. It is hardly surprising therefore that the Supreme Court of Canada did not refer to the U.S. case. However, two basic principles outlined in the Boldt decision—that the government with jurisdiction over the fisheries might limit the exercise of the treaty right to fish only for conservation purposes, and that the Indian food and ceremonial fishery had priority over other fisheries—reappeared in the Canadian decision. The majority dismissed the Cowichan defense, rejecting the argument that the terms of union inhibited or limited Canada's jurisdiction over Aboriginal fisheries. Justice Brian Dickson concurred in the result, although for very different reasons.

Justice Dickson found that "the colony [of British Columbia] *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 white residents."[24] Therefore, because the federal government assumed responsibility for Indians and fisheries in British

Columbia and undertook to treat the former as liberally as the colonial government had done, it had to recognize the priority of the Indian fisheries. However, this priority was subject to the overriding goal of conservation, and Justice Dickson adopted the following priority scheme: "(i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing, or (iv) non-Indian sports fishing." The priority of the Indian fishery, he continued, "is at its strongest when we speak of Indian fishing for food purposes, but somewhat weaker when we come to local commercial purposes. If there are to be limitations upon the taking of salmon here, then those limitations must not bear more heavily upon the Indian fishery than the other forms of the fishery."[25] The proposition that an Indian food fishery had priority and that the federal Department of Fisheries might have to justify its regulation of the Indian fisheries on the basis of conservation were important developments—ones that bore a distinct resemblance to the ruling in the Boldt decision.

Eleven years later the Supreme Court of Canada, then led by Chief Justice Dickson, would develop this priority scheme in *Regina v. Sparrow*, the case that would become the cornerstone in the interpretation of Aboriginal rights in Canada.[26] In *Sparrow* the Court held that the Musqueam, a Coast Salish community at the mouth of the Fraser River and not party to the Douglas treaties, had an "aboriginal right to fish for food and social and ceremonial purposes."[27] Chief Justice Dickson and Justice Gérard La Forest then applied the priority scheme first outlined in *Jack* to infuse the right with content. In practice, the right provided that "if, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport and commercial fishing."[28] Thus, after conservation the Indian food fishery had priority. But conservation was, in the Court's words, a "compelling and substantial" objective that would justify the federal government's infringement of an Aboriginal right to fish.[29] To this extent, the judgment mirrored the Boldt decision without citing it.

However, Canada's Supreme Court went further, suggesting that the federal government might have other objectives, such as the prevention

of harm, that might justify infringing an Aboriginal right. The standard was high; the "public interest," for example, was too vague and uncertain an objective to justify limiting a constitutional right.[30] This constraint on the Crown's capacity to infringe Aboriginal and treaty rights marks an important difference between Canadian and U.S. law. While federal power to abrogate Indian treaty rights in the United States is nearly unconstrained,[31] if seldom exercised, in Canada the federal government's capacity to limit Aboriginal and treaty rights has been reduced since those rights were entrenched in the constitution in 1982. As a result, in *Sparrow* the Supreme Court held that the federal government must justify its infringement of an Aboriginal right by establishing a compelling and substantial objective (such as conservation), and that its actions in pursuing that objective reflect the honor of the Crown in its relationship with Aboriginal peoples.[32]

In *Sparrow* the Supreme Court did not address the priority of an Aboriginal right to a commercial fishery. Justice Dickson had hinted in *Jack* that it would be less secure, and the Court confirmed this approach six years later in the case of *Regina v. Gladstone*.[33] In that case Chief Justice Antonio Lamer, writing for the majority, concluded that the Heiltsuk had an Aboriginal right to a commercial herring-spawn-on-kelp fishery. This right, he continued, conferred priority but not exclusivity.[34] As a result, the federal government might justifiably infringe the right to a commercial fishery not only for conservation purposes, but also to pursue policies of "economic and regional fairness" or to recognize "the historical reliance upon, and participation in, the fishery by non-aboriginal groups."[35]

These objectives were too broad for some members of the Court. Justice Beverley McLachlin replied in *Regina v. Vander Peet*, a decision the Supreme Court released with *Gladstone*, that Chief Justice Lamer's test, which required a balancing of social policy objectives against constitutional rights, was "indeterminate and ultimately more political than legal."[36] In rejecting Chief Justice Lamer's approach, Justice McLachlin defined the right to a commercial fishery much less expansively, suggesting that "the Aboriginal right to trade in herring spawn on kelp from the Bella Bella region is limited to such trade as secures *the modern equivalent of sustenance*: the basics of food, clothing and housing, supplemented by a few amenities."[37] Similarly, in her dissenting opinion in *Vander Peet*, Justice Claire L'Heureux-Dubé constructed the commercial

fishing right as "an Aboriginal right to sell, trade and barter fish for *livelihood, support and sustenance purposes*."[38] These dissenting opinions defined the right more narrowly and thus avoided Chief Justice Lamer's expansive understanding of what might justify infringing an Aboriginal right. However, the basis for this narrower interpretation is unclear. Chief Justice Lamer responded that "the evidence in this case [*Gladstone*] does not justify limiting the right to harvest herring spawn on kelp on a commercial basis to, for example, the sale of herring spawn on kelp for the purposes of obtaining a 'moderate livelihood.'"[39]

The definitions in the dissenting opinions of Justices McLachlin and L'Heureux-Dubé of Aboriginal rights to commercial fisheries as securing the "modern equivalent of sustenance" or "livelihood, support and sustenance" were new developments in the Supreme Court of Canada. They derive from the U.S. Supreme Court's decision in *Passenger Fishing Vessel*, although through reference to the dissenting opinion of Justice Douglas Lambert in the British Columbia Court of Appeal rather than to the U.S. cases themselves. In *Vander Peet* Justice Lambert described the Aboriginal right to the salmon fishery fish as securing the right to "a moderate livelihood" from that fishery, and he acknowledged *Passenger Fishing Vessel* as his source.[40]

In the context of Aboriginal rights, therefore, the right to fish for food is broadly established following *Sparrow*. However, each First Nation must establish the right to a commercial fishery independently. Where established (and to this point only the Heiltsuk in *Gladstone* have successfully established such a right, and only for their herring spawn-on-kelp fishery), the commercial right is expansive, although subject to broad federal powers to infringe that right. The dissenting approach—to define the rights in terms of a moderate livelihood—has not been adopted.

In the context of treaty rights (as distinct from Aboriginal rights) to fish, however, the moderate livelihood standard is well established in Canada. Again, although the Canadian rulings have not included direct citations, it is plain that this understanding originates in the U.S. Supreme Court's interpretation of the Stevens treaties in *Passenger Fishing Vessel*. In *Regina v. Marshall*, for example, the Mi'kmaq of Nova Scotia contested a prosecution on the grounds that they had a treaty right to fish derived from an eighteenth-century agreement with the British. The Supreme Court of Canada agreed in 1999 but limited the

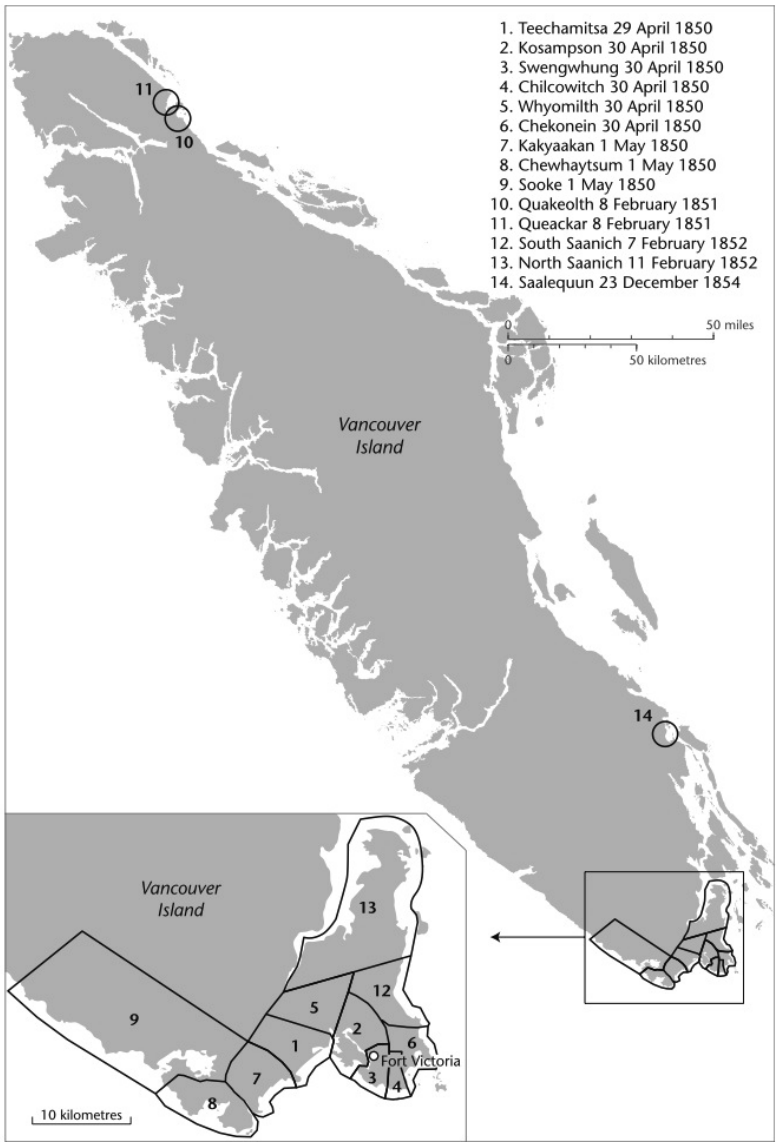
commercial right to fish to that which secured the "*equivalent to a moderate livelihood*"; the right did "not extend to the open-ended accumulation of wealth."[41] Justice Ian Binnie, who wrote for the majority, tracked the lineage of the "moderate livelihood" definition of the right from Justice Lambert in the B.C. Court of Appeal to Justices McLachlin and L'Heureux Dubé in *Gladstone* and *Vander Peet*.[42] He did not cite the American antecedents, but their incorporation through Justice Lambert, who dealt with them at length, seems clear.[43]

In sum, the principles articulated in the interpretation of the Stevens treaties are a significant presence in the interpretation of Aboriginal and treaty rights to fish in Canada, even if the U.S. decisions are seldom cited. Given the importance of fishing rights to the articulation of Aboriginal and treaty rights in general, the impact of these principles has been pervasive. With this legal framework established, the question remains how the courts will interpret the fisheries clause in the Douglas treaties. That will turn, at least in part, on the historical evidence.

"FISHERIES AS FORMERLY"

The agreements known as the Douglas treaties are the fourteen land purchases from Aboriginal peoples on Vancouver Island made between 1850 and 1854 by James Douglas, the Hudson's Bay Company's (HBC) chief trader and eventual governor of the colonies of Vancouver Island and mainland British Columbia. They followed the British grant in 1849 of Vancouver Island to the HBC as a proprietary colony for the purposes of settlement. The purchases were limited to the land around the fort at Victoria, the Saanich Peninsula, the future townsite of Nanaimo midway up the island, and land around Fort Rupert near the island's north eastern end. (See map 4.1.) With the exception in 1899 of Treaty 8 covering the northeast corner of British Columbia, the Douglas treaties marked the beginning and the end of a treaty process and of the formal recognition of Aboriginal title in the province until the 1990s.

Much has been written about why Douglas undertook these purchases on Vancouver Island and why he did not continue them. It seems that recognition of a legal requirement to extinguish Aboriginal title was an important part of his motivation for beginning the process, but ebbing enthusiasm for treaties in the Colonial Office in London reduced the incentive to continue the process when other interests intervened.



MAP 4.1 *Boundaries of the Douglas Treaties, 1850–54. The treaty process did not continue beyond 1854, leaving the issue of Native title unresolved on the rest of Vancouver Island and throughout most of the mainland colony of British Columbia.* SOURCE: *The treaty boundaries were adapted from information available in the Government of Canada's Directory of Federal Real Property (http://www.tbs-sct.gc.ca/dfrp-rbif/treaty-traite.asp?Language=EN).*

Historical geographer Cole Harris has emphasized Douglas's pragmatism, born of a lifetime in the fur trade, suggesting that he was less concerned about theories of Indian land policy and even of the law of Aboriginal title than about finding workable solutions for Native and European coexistence.[44] Legal historians Hamar Foster and Alan Grove speculate that the decision of an Oregon court to deny the existence of Aboriginal title, discredited in Oregon and Washington but picked up later in Alaska, may also have influenced Douglas and his successor in the formation of colonial land policy, Commissioner of Lands Joseph Trutch, who was openly hostile to the idea of Aboriginal title.[45]

The legal standing of Aboriginal title may have been fragile enough in the mid-nineteenth century that colonial authorities were prepared to ignore it, but there was less doubt about the existence of specific Aboriginal rights, particularly rights to hunt and fish. Moreover, protecting these rights, on which Aboriginal economies depended, fit Douglas's pragmatism. Aboriginal peoples' hunting could coexist with non-Aboriginal ownership, if not use and occupation, of the land, and the fishery could be secured without much impact on the land available for incoming settlers. In anticipation of the treaties, Douglas wrote to the HBC that he "would strongly recommend, equally as a matter of justice, and from regard to the future peace of the colony, that the Indians Fishere's [*sic*], Village Sitis [*sic*] and Fields, should be reserved for their benifit [*sic*] and fully secured to them by law."[46] HBC secretary Archibald Barclay, in setting out the company's obligations and policy toward Aboriginal peoples on Vancouver Island, instructed Douglas that the "right of fishing and hunting will be continued to them."[47]

On the basis of these instructions, Douglas entered negotiations with the tribes on southern Vancouver Island. After minimal discussions (of which no minutes were kept), Douglas asked the chiefs to place X's on blank sheets of paper. Following the conclusion of the first nine agreements at Fort Victoria between April 29 and May 1, 1850, Douglas wrote to the HBC to explain his understanding of what had transpired: "I informed the natives that they would not be disturbed in the possession of their Village sites and enclosed fields, which are of small extent, and that they were at liberty to hunt over unoccupied lands, and *to carry on their fisheries with the same freedom as when they were the sole occupants of the country*."[48] He forwarded the "signatures" of the chiefs and asked that the HBC supply the proper conveyancing instrument to

which the signatures could be attached. Several months later Barclay replied, approving the agreements and sending a template, based on New Zealand precedents, that would become the text of the Douglas treaties.[49] The first paragraph would provide a description of the lands that were covered by the treaty; the second described the terms as follows:

> The condition of or understanding of this sale is this, that our [Indian] village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us; and the land shall be properly surveyed, hereafter. It is understood, however, that the land itself becomes the entire property of the white people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and *to carry on our fisheries as formerly*.[50]

Although the structure and content of Barclay's template emulated the New Zealand deeds, the final clause setting out the hunting and fishing rights was new. The guarantee that the tribes were "at liberty . . . to carry on our fisheries as formerly" appears to be an abbreviated version of the agreement Douglas described several months earlier when he wrote that the Native peoples "were at liberty . . . to carry on their fisheries with the same freedom as when they were the sole occupants of the country."

Given this sequence of events, the treaties are best understood as oral agreements between Douglas and the chiefs. The written texts, based on imperial precedent, drafted by someone not present at the negotiations and supplied months afterwards, should be considered as evidence of the terms of those agreements, not as the agreements themselves.[51] As evidence, the written texts probably provide reasonable indication of what the HBC thought it needed to do and of how Douglas understood the treaties. The anthropologist Wilson Duff considered the texts to be "the white man's conception (or at least his rationalization) of the situation as it was and of the transaction that took place."[52] They provide little or highly qualified evidence at best of how the Aboriginal participants understood the agreements and should not be considered the full texts of what were oral agreements. However, given the thin documentary and oral history record surrounding the treaties, the written texts assume particular importance.

Even the terms of the written texts are not self-evident.[53] It is clear, however, that "fisheries" were important parts of the agreements. A "fishery" (or its plural, "fisheries") refers not only to the act of fishing but also to the places where it occurs. In reserving "fisheries," therefore, the Douglas treaties reserved the right to fish in the places where Aboriginal people fished. It was the same approach that Governor Stevens and the tribes in the Washington Territory would adopt in reserving the "right of taking fish at usual and accustomed grounds and stations."[54] In neither case, however, were the boundaries of the right carefully drawn. An abundance of fish was assumed in the 1850s, and there was little non-Aboriginal interest in the fisheries. Even so, the fisheries were not an afterthought. The HBC had deployed some of its workers to the fisheries of the Fraser River in the 1840s but had realized that it was more efficient and effective to purchase fish from Aboriginal fishers. Those fish, which the HBC had been barrelling and salting on the Fraser since the late 1820s, had become one of its principal exports from the Pacific Coast of North America.[55] Thus the treaties were concluded in a context of well-established and ongoing commercial fishing involving the HBC and Aboriginal peoples. Douglas believed that this would continue and hoped it would grow.

There is no evidence that either Douglas or the Aboriginal parties understood their agreements as limited to food fishing. Several years after concluding the last of the treaties, Douglas informed the Vancouver Island House of Assembly that Aboriginal peoples "were to be protected in their original right of fishing on the coast and in the bays of the Colony."[56] In describing the fishing right as "original," Douglas meant that it preceded the British assertion of sovereignty and therefore derived from sources other than the British Crown, not that it was limited to a food fishery. In fact, the category of "Indian food fishing" was not yet a way of thinking about Aboriginal fishing in British Columbia. Established in Canadian fisheries regulations in the late nineteenth century, it would become an important part of fisheries management and an effective way of diminishing Aboriginal peoples access to the fish, but it was not part of the framework in which the treaties were negotiated.[57] Rather, the treaties emerged in the context of a long-established commercial relationship. The parties would have understood that the right to "fisheries as formerly" included a continuing commercial fishery.

How expansive, then, was the understanding of the commercial aspect

of the treaty right to fish? At one end of a spectrum of possible meanings, the treaty right might have been intended to protect only commerce between Aboriginal peoples. This is not likely. In fact, given the context and the wording of the written text it is highly implausible that the Aboriginal peoples who participated in the negotiations understood they had conceded anything in respect of their fisheries. Instead, the text suggests that the Aboriginal signatories could continue their fisheries without any non-Aboriginal restriction—that is, "as formerly." At the other end of the spectrum, therefore, the right could be interpreted literally as securing the fisheries exclusively to Aboriginal peoples. When the treaties were concluded, Aboriginal peoples worked and managed the fisheries exclusively. Moreover, the laws of many First Nations established certain fisheries as the exclusive property of one family or house-group.

However, Douglas certainly did not intend to preclude non-Aboriginal fishing. He believed that the long-term prosperity of the colony depended on attracting immigrants and that the fisheries would be one of its principal draws. The HBC had sought control of the fisheries as part of the Crown grant of Vancouver Island, but the Crown appears to have withdrawn this provision, which was in an early draft, in the midst of widespread public disapproval of the HBC in London.[58] As a result, the HBC prospectus for the colonization of Vancouver Island informed prospective settlers that "*every freeholder shall enjoy the right of fishing* all sorts of fish in the seas, bays, and inlets of, or surrounding, the said Island."[59] With respect to tidal waters, then, the prospectus asserted the right of the landowning public to fish as indeed the common law doctrine of the public right to fish established it for the public at large.

Is it possible to reconcile previously exclusive Aboriginal fisheries with the colonial public's right to fish? In English law the Crown could not limit the public right to fish in tidal waters (except with the sanction of Parliament), but the common law doctrine did not affect exclusive fisheries that preexisted the British assertion of sovereignty and thus preexisted the common law in British Columbia.[60] Such preexisting fisheries would include exclusive Aboriginal fisheries. Under Aboriginal law some fisheries were understood as exclusive property, but others were public, at least in the sense that allies and trading partners were welcome to participate.[61] As a result, where Aboriginal peoples held what they understood to be exclusive fishing rights, the Douglas treaties did not interfere with those rights. In fact, the text confirms that existing fisheries were to

be protected "as formerly." Where they did not have exclusive fisheries —areas that were understood as public fisheries—the treaties provided the basis for non-Aboriginal participation.

Just as some areas of land under the treaties were to remain for the exclusive use of Aboriginal peoples (village sites and fields), so some Aboriginal fisheries in tidal and nontidal waters were also to remain exclusively for Aboriginal peoples. But whereas most of the land was to be opened for non-Aboriginal settlement and the reserved parcels were small, the opposite was true in the fisheries. The treaties provided expansive protection for the Aboriginal fisheries, with the prospect that non-Aboriginal fishers could participate where they could do so without interfering with these fisheries. Similarly, just as Aboriginal peoples had the right to continue hunting in a manner that did not interfere with non-Aboriginal occupation of lands (the right "to hunt over the unoccupied lands"), so non-Aboriginal fishers had a right to fish so long as they did not hinder the existing Aboriginal fisheries.[62] In sum, the right to "fisheries as formerly" is best understood as protecting the Aboriginal fisheries, including the rights to catch fish and manage the fisheries in the places where they conducted their fishing and the right to dispose of fish for whatever purpose, but also as securing for the Crown the right to grant settler access to fisheries that were not exclusive before the treaties.

This was a satisfactory resolution in the 1850s, when abundance was assumed and there was little prospect that non-Aboriginal fishing would interfere with the Aboriginal fisheries. However, beginning in the 1870s, many Aboriginal fisheries would come under great strain when, with the introduction of an industrial fishery, cannery boats worked by Aboriginal and non-Aboriginal fishers occupied owned fishing grounds, and cannery fleets radically diminished the upriver fisheries on which many Aboriginal peoples relied. At that point the federal Department of Marine and Fisheries largely ignored the existing treaties and the province, with federal acquiescence, refused to negotiate others. Indian Reserve Commissioner Gilbert Malcolm Sproat, while working to allot Indian reserves along the Fraser River as part of an Indian land policy in the absence of treaties, wrote that "if the Crown had ever met the Indians of this Province in council with a view to obtain the surrender of their lands for purposes of settlement, the Indians would in the first place have made stipulations about their rights to get salmon to supply their particular requirements."[63]

Instead of negotiating treaties, the two levels of government imposed an Indian land policy that was premised on continuing Indian access to their fisheries. The small and scattered Indian reserves allotted under treaty or by the reserve commissions were intended primarily to provide points of access to the fisheries that would support viable local economies. Without the fisheries the Indian reserve geography in British Columbia provided little prospect for other commercial activity and made little sense except as a means of clearing Aboriginal peoples from the land.[64] In this context the Aboriginal fisheries ought to have been, in the words of James Douglas, "fully secured to them by law." Those who were parties to the Douglas treaties reasonably believed that they had been.

JUDICIAL INTERPRETATION OF "FISHERIES AS FORMERLY"

As of 2007, Canada's courts had yet to provide a definitive judicial interpretation of the right to "fisheries as formerly" in the Douglas treaties. The British Columbia Court of Appeal's 1989 decision in *Saanichton Marina Ltd. v. Tsawout Indian Band* remained the principal judicial statement of the treaty right to fish.[65] In that case the Tsawout presented evidence that Saanichton Bay, where they and their ancestors lived, "provided a wide variety of fish, shellfish, sea mammals and waterfowl important in the economy and diet of the Saanich people."[66] They claimed a continuing treaty right to fish and argued that a proposed marina development in the bay infringed this right. The court agreed, concluding that "the effect of the treaty is to afford to the Indians an independent source of protection of their right to carry on their fisheries as formerly,"[67] and that in this case the "construction of the marina will derogate from the right of the Indians to carry on their fisheries as formerly in the area of Saanichton Bay which is protected by the treaty."[68] Although the court was not explicit, the decision seemed to imply a right to participate in determining what activities might coexist with their fisheries. In other words the treaty recognized the Tsawout right to access and manage their fisheries.

After that decision the courts struggled to define the treaty right to fish more precisely. It seemed clear that the treaties protect and give priority to a food fishery, a category that was firmly entrenched in Cana-

dian law by then. In *Regina v. Ellsworth*, a case involving charges against a member of the Tsartlip First Nation who was fishing coho and chinook salmon in the Goldstream River for food purposes, Justice Murphy of the British Columbia Supreme Court defined the right broadly to include "fishing, conservation and the use of fish by the Indian people for whatever purpose the fish were used by the signatories to the treaty. One of these purposes was for food obviously."[69] In this view the treaty recognized the priority of the Native fishery, at least but not limited to a food fishery, as well as a right to participate in the conservation or management of the fish stocks.

Justice Harvey Groberman, also of the British Columbia Supreme Court, described a similar set of treaty rights, including priority to the fishery and management rights, in *Snuueymuxw First Nation v. British Columbia*. In that case the Snuueymuxw (Nanaimo) First Nation sought an interlocutory injunction to remove log booms from the Nanaimo River estuary on the basis that they damaged fish habitat and infringed the treaty right to fish. Justice Groberman held: "The contours of the right to 'carry on fisheries as formerly' have not been fully articulated by the courts. The treaty would seem, at the very least, to entitle the First Nation to priority over the fish stocks that exist. It also places responsibilities on the Crown and vests the First Nation with powers to manage the fishery in such a manner as not to jeopardize the constitutionally protected rights of the Douglas Treaty First Nations."[70] The nature of the priority, including the question of whether priority extends to a commercial fishery, remained undeveloped. In *Regina v. Hunt*, Justice Brian Saunderson of the British Columbia Provincial Court held that the treaty right does not include either a commercial fishery or a deep-water fishery because the Kwakiutl had not established, to his satisfaction, that either activity was integral to the distinctive culture of the Kwakiutl.[71]

The Kwakiutl did not appeal Justice Saunderson's decision, but they subsequently brought a treaty fishing rights case on their terms. In *Hunt v. Canada* they sued Canada and the province for a declaration that their treaty right to fish in their territory includes "a priority right to harvest the aquatic resources . . . and to the commercial sale of a reasonable quantity of fish *to meet their livelihood needs*" and "a right to manage and conserve the aquatic resources . . . exercisable together with Canada's power to manage the fishery."[72] These pleadings, which frame the right to a fishery in terms of "livelihood needs," reveal how central that

approach has become to the interpretation of treaty fishing rights. The Kwakiutl did not append "moderate" to their claim, but the term "livelihood needs" suggests that they recognize some limit on their treaty right beyond conservation. And rather than claiming jurisdiction over the fisheries, the Kwakiutl sought a declaration of joint management. The pleadings are an indication of what some First Nations believe to be possible within the parameters of Canadian law.

Although the fisheries certainly supported Aboriginal peoples' livelihoods, there is no evidence that the Douglas treaty right was limited to fisheries that supported "moderate" livelihoods. Where this limitation has been imposed, as in *Passenger Fishing Vessel* and *Marshall*, it is a later construct designed to establish some grounds for those without treaty rights to participate in the fishery. Although the aim is legitimate, the "moderate livelihood" standard is flawed. Beyond the fact that there may be no historical evidence for such a standard, it is inherently vague and changeable, and not something that courts are equipped to determine. Moreover, the building of a moderate livelihood, if its meaning can be determined, depends on so much more than access to a resource that it seems peculiar to establish the level of access on the basis of that standard. A clear division of the fisheries along the lines of the Boldt decision, which provides certainty and is broadly if not unanimously perceived as a fair interpretation of the treaty, is eminently preferable to all those working in the fisheries, and to the sustainability of the fisheries themselves.

CONCLUSION

In attempting to account for the Boldt decision, legal scholar Fay Cohen has suggested that by the early 1970s the state of the law on Indian treaty rights to fish was such that "a definitive ruling could hardly have been avoided."[73] Perhaps so. Perhaps thirty years later Aboriginal and treaty rights to fish in British Columbia are at a similar point, and perhaps a case such as *Hunt v. Canada* will provide a definitive ruling. However, unlike Washington State, where most of the tribes hold rights to fish under treaties with virtually identical fisheries provisions, in British Columbia in 2007 there is a patchwork of arrangements that include historical treaties, one modern treaty, two final agreements in the process of ratification, and several agreements-in-principle, all with different fish-

eries provisions. For most of the province there are no treaty rights but, instead, ill-defined Aboriginal rights to fish or rights to fisheries as an incidence of claimed but not-yet-recognized Aboriginal title. In this context a single definitive ruling seems unlikely. A clear ruling from the courts on the meaning of the fisheries provision in the Douglas treaties will not resolve the continuing conflict over fish, but it might hasten a resolution.

The recognition of Aboriginal and treaty rights to fish in Canada has been building slowly since they were entrenched in the Canadian constitution. Steps to enhance Aboriginal peoples' access to the fisheries, following decisions such as *Sparrow* and *Marshall*, have produced determined opposition from many in the commercial fleet, including court cases based on the proposition that privileging Aboriginal fishers violates the equality guarantee in the Canadian Charter of Rights and Freedoms.[74] In this there are important similarities to the reaction against the Boldt decision in Washington. However, judicial recognition of substantial treaty rights to fish in British Columbia, should it occur, could hardly shock the fishers and fisheries managers in the province to the same degree that it did those in Washington.

Although a small number of Aboriginal peoples are parties to the Douglas treaties, a fuller judicial interpretation of the right to "fisheries as formerly" will be important across the province. It will establish the extent to which the tribes reserved their fisheries to themselves when they granted to the Hudson's Bay Company the right to occupy certain areas of their traditional territories. Understood as reserved rights instead of granted rights (rights that the treaty tribes reserved to themselves rather than received from the Crown), the treaty rights would represent, at a minimum, the fishing rights that nontreaty nations still retain. As a result, the impact of a judicial interpretation of the fisheries clause in the Douglas treaties has the potential to extend across most of the province, building on the basic platform of fishing rights that the Supreme Court of Canada established in the *Sparrow* decision.

Given the continuing conflict over the fisheries in British Columbia and the great difficulty in reaching negotiated settlements, a court-directed interpretation of the fisheries provision in the Douglas treaties seems inevitable. That interpretation, when it occurs, will be based on the text of the treaty and the surrounding circumstances at the time each treaty was negotiated. It is hard to imagine that the interpretation of the

Stevens treaties in Washington State will not also have some impact on the outcome. In a dissenting opinion in the British Columbia Court of Appeal on a commercial fishing rights case, Justice Lambert suggested that the interpretations of the Stevens treaties certainly ought to be considered. He thought it "of great importance to try to achieve harmony between the recognition of aboriginal rights in British Columbia and the recognition of aboriginal rights in Washington State, where the Indians are closely related to the Indians of British Columbia and where they share many of the same customs, traditions, and practices."[75]

The holding in the Boldt decision that access to the commercial fishery should be divided evenly between Aboriginal and non-Aboriginal fishers may not be reproduced. That conclusion is perhaps too closely a product of the particular language in the Stevens treaties. However, the general conclusions that the treaties include rights to a substantial commercial fishery and to manage that fishery seem applicable and appropriate to the interpretation of the Douglas treaties. If a ruling fails to recognize that the treaties protected significant Aboriginal control of the fisheries, it will appear manifestly unjust.

NOTES

I thank Hamar Foster, Alexandra (Sasha) Harmon, Cole Harris, Joseph Taylor, and Michael Thoms for their comments on earlier versions of this essay; Barbara Lane, who served as an expert witness in many of the U.S. and Canadian cases discussed in this chapter, for numerous discussions about the cases and the historical evidence presented in them; Betsy Segal for her research assistance; and Eric Leinberger for drawing map 4.1. Any errors are entirely mine.

1. The Oregon Treaty of 1846, also referred to as the Treaty of Washington, is officially known as the *Treaty with Great Britain, in Regards to Limits Westward of the Rocky Mountains*, United States and United Kingdom, June 15, 1846, 9 *U.S. Statutes* 869. On the role of the border that cut through the middle of Coast Salish territory, see Lissa Wadewitz, "The Nature of Borders: Salmon and Boundaries in the Puget Sound/Georgia Basin," Ph.D. dissertation, University of California, Los Angeles, 2004.

2. The Stevens treaties also included the promise of agricultural and industrial schools, and of a doctor to provide medical care.

3. Copies of the treaties are contained in *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria, B.C.: Queen's Printer, 1987), 5–11.

4. This clause from the Treaty of Medicine Creek (December 26, 1854, 10 *U.S. Statutes* 1132) that Stevens concluded with the Nisqually and Puyallup on Decem-

ber 26, 1854, appears with some slight variations in each of the treaties along the Washington coast: Treaty of Point Elliott (January 22, 1855, 12 *U.S. Statutes* 927); Treaty of Point No Point (January 26, 1855, 12 *U.S. Statutes* 933); Treaty with the Makah (January 31, 1855, 12 *U.S. Statutes* 939); and Treaty of Olympia (July 1, 1855, 12 *U.S. Statutes* 971).

5. *United States v. Washington*, 384 *Federal Supplement* (F. Supp.) 312 (1974) (hereafter *U.S. v. Washington*.

6. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979) (hereafter *Passenger Fishing Vessel*).

7. Of the two U.S. decisions, Canadian courts have referred to the Boldt decision more frequently. See *Regina v. Adolph*, [1982] 2 *Canadian Native Law Reporter* (CNLR) 149 (B.C. Prov. Ct.); *Regina v. Sparrow* (1986), 36 *Dominion Law Reports* (DLR) (4th) 246, at paragraphs 75–79, [1987] 1 CNLR 145 (British Columbia Court of Appeal [BCCA]); *Regina v. Vander Peet*, [1993] 5 *Western Weekly Reports* (WWR) 459, at paragraphs 115–17, [1993] 4 CNLR 221 (BCCA); *Regina v. N.T.C. Smokehouse*, [1993] 5 WWR 542, at paragraph 159, [1993] 4 CNLR 158 (BCC.A.); and *Regina v. Jack* (1995), 131 DLR (4th) 165, at paragraph 60, [1996] 2 CNLR 113 (BCCA); and *Kwakiutl Nation v. Canada*, 2006 British Columbia Supreme Court (BCSC) 368, at paragraph 8.

8. Christopher D. Jenkins, "John Marshall's Aboriginal Rights Theory and Its Treatment in Canadian Jurisprudence," (2001), 35 *University of British Columbia Law Review* (UBCLR), 1.

9. Wayne Suttles, "Central Coast Salish," in *The Handbook of North American Indians*, *Vol. 7: Northwest Coast*, edited by Suttles (Washington, D.C.: Smithsonian Institution, 1990); and Wayne Suttles, *Coast Salish Essays* (Vancouver: Talon Books, 1987).

10. See Daniel L. Boxberger, "Lightning Boldts and Sparrow Wings: A Comparison of Coast Salish Fishing Rights in British Columbia and Washington," *Native Studies Review* 9 (1993–94): 1. Although the history is broadly similar, U.S. courts interpreted the Stevens treaties to provide some protection for Indian fisheries in the late nineteenth and early twentieth centuries. The most important of these early cases is *United States v. Winans*, 198 U.S. 371 (1905). There are no contemporary Canadian counterparts. For histories of the Aboriginal fisheries in Washington State and British Columbia, see Daniel L. Boxberger, *To Fish in Common: The Ethnohistory of Lummi Indian Salmon Fishing* (Seattle: University of Washington Press, 1989; Dianne Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993); and Douglas C. Harris, *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001).

11. Treaty of Medicine Creek, Article 3.

12. See Barbara Lane, "Summary of Anthropological Report in *U.S. v. Washington*," expert report submitted at trial, November 30, 1972. Lane also produced individual reports for each tribe involved in the litigation.

13. Some of the immediately preceding decisions include *Puyallup Tribe v.*

Department of Game, 391 U.S. 392 (1968); *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969) (hereafter, *Sohappy*); and *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973). See also Alexandra Harmon, *Indians in the Making: Ethnic Relations and Indian Identities around Puget Sound* (Berkeley: University of California Press, 1998), 227–36.

14. *U.S. v. Washington*, at 343, emphasis in original (citation omitted).

15. Ibid.

16. Ibid., emphasis added. See also *Sohappy*, at 908 (cited in *U.S. v. Washington*, at 346): "It [the state] may use its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource."

17. See Fay G. Cohen, *Treaties on Trial: The Continuing Controversy over Northwest Indian Fishing Rights* (Seattle: University of Washington Press, 1986); and Boxberger, *To Fish in Common*.

18. *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 571 P.2d 1373 (Wash. 1977). See also *Puget Sound Gillnetters Ass'n v. Moos*, 565 P.2d 1151 (Wash. 1977). For commentary see Shannon Bentley, "Indians' Right to Fish: The Background, Impact, and Legacy of *United States v. Washington*," (1992) 17 *American Indian Law Review* 1.

19. See Jack Landau, "Empty Victories: Indian Treaty Fishing Rights in the Pacific Northwest," (1979–1980) 10 *Environmental Law* 413, at 450–52; Dana Johnson, "Native American Treaty Rights to Scarce Natural Resources," (1995–96) 43 *UCLA Law Review* 547.

20. *Passenger Fishing Vessel*, 686–87, emphasis added (citation omitted).

21. *Regina v. Jack* (1979), [1980] 1 Supreme Court Reports (SCR) 294, [1979] 2 CNLR 25 (hereafter, *Jack*).

22. Aboriginal and treaty rights are protected under section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11. Although the Cowichan are not one of the Douglas treaty tribes, Hamar Foster and Alan Grove (in their contribution to this volume, "'Trespassers on the Soil': *United States v. Tom* and a New Perspective on the Short History of Treaty Making in Nineteenth-Century British Columbia") adduce the evidence for an unrecorded treaty with the Cowichan.

23. Under term 13 of the *British Columbia Terms of Union*, RSC, 1985, appendix II, No. 10, the federal government covenanted in 1871 to continue "a policy as liberal as that hitherto pursued by the British Columbia government" toward the Indians in the province. Under the *British North America Act, 1867*, sections 91(12) and 91(24), the federal government assumed responsibility over "Seacoast and Inland Fisheries" and "Indians and Lands Reserved for Indians."

24. *Jack,* at paragraph 37 (emphasis added).

25. *Jack*, at paragraph 43.

26. *Regina v. Sparrow*, [1990] 1 SCR 1075, [1990] CNLR 160 (hereafter, *Sparrow*).

27. Ibid., at paragraph 45.

28. Ibid., at paragraph 78.

29. Ibid., at paragraph 71.

30. Ibid., at paragraph 72.

31. *Lone Wolf v. Hitchcock* 187 U.S. 553 (1903).

32. In recent decisions the Supreme Court of Canada has clarified how the honor of the Crown gives rise to duties to consult with Aboriginal peoples where an infringement occurs and, so far as possible, to accommodate the Aboriginal or treaty rights. For a review of these developments, see Gordon Christie, "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39 UBCLR 139.

33. *Regina v. Gladstone*, [1996] 2 SCR 723, [1996] 4 CNLR 65 (hereafter, *Gladstone*).

34. In *U.S. v. Washington*, at page 401, Justice Boldt wrote: "Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or preempt it totally."

35. *Gladstone*, at paragraph 75.

36. *Regina v. Vander Peet*, [1996] 2 SCR 507, at paragraph 302, [1996] 4 CNLR 177 (hereafter, *Vander Peet*).

37. *Gladstone*, at paragraph 165 (emphasis added).

38. *Vander Peet*, at paragraph 221 (emphasis added). In *Regina v. Horseman*, [1990] 1 SCR 901, at paragraphs 8–31, [1990] 3 CNLR 95, Justice Wilson (in dissent) interpreted Treaty 8 and the Natural Resources Transfer Agreement to recognize a right to hunt for "livelihood" purposes as opposed to hunting both for personal consumption only and for commercial purposes.

39. *Gladstone*, at paragraph 57.

40. *Vander Peet* (BCCA), at paragraphs 168–74 (emphasis added).

41. *Regina v. Marshall*, [1999] 3 SCR 456, at paragraph 7 (emphasis added), [1999] 4 CNLR 161 (hereafter, *Marshall*).

42. *Marhsall*, at paragraphs 57–61. In the SCC's ruling on a motion for a rehearing and a stay of decision in *Marshall*, it adopted the expansive justifications for the infringement of Aboriginal rights found in *Gladstone* to the treaty rights context: *Regina v. Marshall*, [1999] 3 SCR 533, at paragraph 41, [1999] 4 CNLR 301.

43. If Canadian courts borrowed the moderate livelihood approach from the U.S. Supreme Court, then it is much less clear where the U.S. Court drew its inspiration. The approach does not appear to rest on historical evidence or established legal doctrine.

44. Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002). See also Paul Tennant, *Aboriginal People and Politics: The Indian Land Question in British Columbia, 1849–1989* (Vancouver: UBC Press, 1990); and Chris Arnett, *The Terror of the Coast: Land Alienation and Colonial War on Vancouver Island and the Gulf Islands, 1849–1863* (Burnaby, B.C.: Talon Books, 1999).

45. Foster and Grove, "Trespassers on the Soil" (in this volume).

46. Hartwell Bowsfield, ed., *Fort Victoria Letters: 1846–1852* (Winnipeg, Manitoba: Hudson's Bay Record Society, 1979), 43, Douglas to Archibald Barclay, HBC Secretary, September 3, 1849.

47. Hudson's Bay Company Archives, A.6/28 fos. 90d-92, Archibald Barclay to James Douglas, December 17, 1849.

48. Bowsfield, *Fort Victoria Letters*, 96, Douglas to A. Barclay, May 16, 1850 (emphasis added).

49. B.C. Archives, AC 20, Vi7 M430, A. Barclay to Douglas, August 16, 1850. On the New Zealand connection and understandings of Native title, see Hamar Foster, "The Saanichton Bay Marina Case: Imperial Law, Colonial History, and Competing Theories of Aboriginal Title," (1989) 23 UBCLR 629.

50. *Papers Connected with the Indian Land Question*, 5–11 (emphasis added).

51. The Supreme Court of Canada appears to have adopted this approach in the hunting rights case of *Regina v. Morris*, 2006 SCC 59, [2007] 1 CNLR 303. Justices Deschamps and Abella (for the majority) wrote: "The Douglas Treaties were the reflections of oral agreements reduced to writing by agents of the Crown" (at paragraph 19). The capitalized "Douglas Treaties" in this sentence appears to refer to the written text, but several paragraphs later Justices Deschamps and Abella wrote: "The oral promises made when the treaty was agreed to are as much a part of the treaty as the written words" (at paragraph 24). For a similar approach to understanding the treaties between the British and the Mi'kmaq, see William C. Wicken, *Mi'Kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002). See also Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 *Canadian Bar Review* 196, at paragraph 208.

52. Wilson Duff, "The Fort Victoria Treaties," (1969) 3 *BC Studies* 4. See a Tsartlip account of the treaties in David Elliot Sr., *Salt Water People* (Saanich, B.C.: School District No. 63, 1983), 45–50.

53. On the possible meanings of "village sites," for example, see Harris, *Making Native Space*, 25–26.

54. There is some evidence that the Douglas treaties influenced Stevens. He had visited Vancouver Island in 1854 and thought that the emerging land policy, based on small reserves and access to the fisheries, might also work in Washington. Records of the Washington Superintendent of Indian Affairs, roll 1, frame 0100, Stevens to Manypenny, February 1, 1854. Thanks to Sasha Harmon and Kent Richards for bringing this to my attention.

55. See Richard Mackie, *Trading beyond the Mountains: The British Fur Trade on the Pacific, 1763–1843* (Vancouver: UBC Press, 1996).

56. House of Assembly Correspondence Book, August 12, 1856, to July 6, 1859 (Victoria, B.C.: 1918), Douglas to House of Assembly, February 5, 1859.

57. On the construction of an "Indian food fishery," see Douglas C. Harris, *Landing Native Fisheries: Indian Reserves and Fishing Rights in British Columbia, 1849–1925* (Vancouver: UBC Press, 2008), chapter 6.

58. In correspondence over the application of the Reciprocity Treaty with the United States to the inhabitants of Vancouver Island, Herman Merivale (permanent undersecretary of the Colonial Office) wrote that the Crown grant of Vancouver Island to the HBC "not only omits the fisheries, but these were specifically and deliberately omitted." British Columbia Archives (BCA), Colonial Office Cor-

respondence, CO 305/6, 237, Merivale annotations to a letter from E. Hammond to H. Merivale, June 13, 1855.

59. *Prospectus for the Colonization of Vancouver Island* (London, 1849) (emphasis added).

60. Harris, *Landing Native Fisheries*, chapter 4.

61. Harris, *Fish, Law, and Colonialism*, 18–27, 61–65.

62. Historian Michael Thoms has argued that in the treaties of the late eighteenth and early nineteenth centuries in Upper Canada (now southern Ontario), the Ojibwa and the Crown constructed a divided ecology: the Ojibwa secured the lowlands to protect their fisheries; the Crown acquired the right to open the uplands to non-Ojibwa settlers who were interested principally in farming. See Thoms, "Ojibwa Fishing Grounds: A History on Ontario Fisheries Law, Science, and the Sportsmen's Challenge to Ojibwa Treaty Rights, 1650–1900," Ph.D. dissertation, University of British Columbia, 2004.

63. Federal Collection of Minutes of Decision, Correspondence, and Sketches (copy held by Department of Indian Affairs and Northern Development, Vancouver Regional Office), Volume 1, Letterbook No. 2, Joint Indian Reserve Commission to Sproat, March 1878 to January 1879, 193–97, Sproat to E. A. Meredith, July 30, 1878.

64. Harris, *Landing Native Fisheries*.

65. *Saanichton Marina Ltd. v. Tsawout Indian Band* (1989), 57 DLR (4th) 161, [1989] 3 CNLR 46 (BCCA) (hereafter, *Saanichton Marina*). See Foster, "Saanichton Bay Marina." Thanks to Clo Ostrove of Mandell Pinder for providing access to the appeal books in this case.

66. *Saanichton Marina*, at paragraph 7.

67. Ibid., at paragraph 46.

68. Ibid., at paragraph 52.

69. *Regina v. Ellsworth*, [1992] 4 CNLR 89, at paragraph 13, [1992] *British Columbia Weekly Law Digest* 1004.

70. *Snuueymuxw First Nation v. British Columbia* (2004) BCSC 205, 26 *British Columbia Law Reports* (BCLR) (4th) 360, at paragraph 20.

71. *Regina v. Hunt*, [1995] 3 CNLR 135. This test, drawn from an early variant of the test in *Vander Peet* to establish Aboriginal rights to commercial fisheries, has not been adopted to interpret treaty rights.

72. *Hunt v. Canada*, (Vancouver Registry No. S013414), Second Further Amended Statement of Claim (June 30, 2004), 7–8 (emphasis added). This case is slowly working its way toward trial. See *Kwakiutl Nation v. Canada (Attorney General)* (2006) BCSC 1368.

73. Cohen, *Treaties on Trial*, 16.

74. *Regina v. Kapp*, 2006 BCCA 277, 56 BCLR (4th) 11, [2006] CNLR 282, leave to appeal to SCC granted.

75. *Regina v. N.T.C. Smokehouse Ltd.* (1993), 80 BCLR (2nd) 158, [1993] 4 CNLR 158, (BCCA), at paragraph 179.