2006

A Principled Approach to Property Rights in Canadian Aquaculture

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A principled approach

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Introduction

The 1995 *Federal Aquaculture Development Strategy* summarized some of the difficulties facing aquaculture development in a federal state such as Canada, where the jurisdictional entitlements relevant to this "new" (or at least newly significant) industry are by no means clear:

> Aquaculture is a formidable policy challenge. As a new industry, it straddles the line between fishing and farming, cuts across significant regional differences and is placed in a context involving the participation of municipal, provincial/territorial and federal governments.[1]

Added to the welter of relevant jurisdictions and departmental mandates is the complexity introduced by the application of common law principles to the definition of property rights in aquaculture operations. The fundamental problem is simply stated: aquaculture as a business depends on *some* level of tenure over defined aquatic spaces, but the common law evolved in such a way that it was not fully suited to the effective allocation of property rights in these spaces, or for these uses.[2] In Wildsmith's definitive review of the state of aquaculture law in Canada in 1982, he presented the following assessment of the state of the law with respect to the property rights underlying aquaculture operations:

> The single most important legal issue confronting an aquaculturist concerns the nature and extent of his property rights. Every industry (I can think of no legal exceptions) is premised upon property rights which are on the whole clear and well-defined. Financing is dependent upon the security of these rights. Aquaculture is unique in that it depends almost exclusively on property rights, both real and personal, which are either structured against the aquaculturist or are equivocal as to his position. Only where he maintains his stock in artificial structures located on or in his lands do his rights seem clear.[3]

Wildsmith went on to note that this was "a matter crying out for legislative intervention," and recommended the introduction of legislation that would include provision for aquaculture leases dealing with both the seabed and the water column.[4] This is precisely what has occurred in the years since 1982. The majority of provinces (and all coastal provinces) have aquaculture legislation, and in those most actively engaged in aquaculture, there is provision for some form of lease or analogous entitlement to aquaculture areas, in addition to licensing requirements.[5] The introduction of these arrangements has not, however, answered all of the questions surrounding the nature of property rights involved in aquaculture in Canada. A 2001 review of legislative and regulatory issues conducted by the federal Office of the Commissioner for Aquaculture Development (OCAD) identified a number of outstanding issues relating to the scope, duration and enforceability of property entitlements in aquaculture sites and products, and recommended that improvements be implemented:

> Uncertainty . . . exists regarding public rights of access to waters near aquaculture sites [and] prevention of interference with aquacultural activities by other users of aquatic resources. . . . It usually takes several years for aquaculture operations to generate a return on the initial investment. To become established, the businesses require leases that last for a period that is relevant to the commercial activity being carried out and rational, transparent regulatory regimes. Yet, it is unclear what rights and obligations aquaculturists have under the existing legislative and regulatory regime, and how these rights and obligations are upheld and enforced.[6]

What is notable about this assessment is the lack of precision as to the exact nature of the problem. Where and how do the property rights available under the existing lease schemes fail to meet the needs of the industry? What tenure arrangements would satisfy the requirements of the industry, and will this vary with different types of aquaculture operations? Industry representatives have noted problems with duration and security of tenure under existing lease arrangements, but again with little indication of exactly what would be sufficient.[7]

These concerns can all be addressed in the context of modifications to the dominant approach to aquaculture tenure for marine areas in Canada (described in the following sections), which rests on continued Crown ownership of submerged lands, and government issuance of leases or similar instruments granting rights to identified areas. Such measures would seem to respond, at least in part, to the main property-related requirements for successful aquaculture:

> The single most significant question one must ask about any legal framework affecting marine aquaculture is: how secure is the interest that the sea farmer receives from the government? For the interest to

> function as a property interest it should have some or all of the following attributes: transferability, duration and renewability, and revocability only for failure to perform specified conditions.[8]

There have also, however, been calls in recent years for the development of full private property entitlements for aquaculture, with rights equivalent to terrestrial freehold property, through the "alienation of the Crown's rights to the foreshore, the water column, and the seabed analogous to the way in which land has been alienated for agriculture."[9] These arguments rest in part on the comparison to agriculture, but also on an ideological conviction that continued government involvement, even to the extent of ultimate control over the issuance of leasehold rights, is bound to be dysfunctional:

> [F]ish farming should be governed by a system of property rights analogous to that which has been so successful in North American agriculture. Like agriculture, aquaculture is *culture*, and should not be governed by rules suited to the hunter/gatherer nature of the wild fishery. Above all, however, property rights would provide the legal framework within which the economic enterprise of aquaculture could achieve *efficiency* – that is, the greatest output for society at the least cost. In the absence of a strongly entrenched, well-defined, rationally constructed set of individual property rights in aquaculture, the assertions of special interests can be given political force through misinformed public opinion or failures in government. The structure of the industry itself then becomes inefficient, inequitable, and dysfunctional in every respect.[10]

There are a number of difficulties with this argument, including the simple fact that the present arrangements for aquaculture in Canada *are* based on the assignment of property rights, in the form of leases or similar instruments, and not on the common property or open access[11] approaches associated with capture fisheries. At a more fundamental level, however, it must be remembered that one is not starting with a blank slate: it is inevitable that aquaculture will often be conducted in an environment shared by a number of other users.[12]

These issues tend to be addressed by way of the regulatory system, which should protect against damage to other resources and uses, and by the development of transparent siting and lease approval processes that allow for other interests to be taken into account.[13] At a more fundamental level, however, it must be remembered that in addition to the existence of other users, there is a complex structure of legal entitlements, protecting some (but not all) of their interests, which has existed for hundreds of years. The displacement of these other interests, whether in full (through privatization) or at least to a greater degree than at present (through enhancement of existing lease rights), raises questions of equity and access that cannot simply be ignored.[14]

The debate over property rights for aquaculture, therefore, cannot be limited to an examination of the functional requirements of aquaculture alone, and whether they are met by the present system. It must also incorporate some understanding of the place, and the legal entitlements, of other interests in the affected marine spaces, and whether the further erosion of those entitlements is both necessary and feasible. Furthermore, as will be seen later in the chapter, the management of marine and other aquatic spaces in Canada engages constitutional doctrines that may affect the validity of current federal–provincial arrangements. These issues are addressed in this chapter through consideration of the following legal elements which combine to create the current structure of marine aquaculture property rights in Canada, and which must be taken into account in any proposals to further alter that structure:

- common law rights relevant to the creation of private property interests in marine and other aquatic areas;
- statutory schemes that have modified the common law position, primarily through the introduction of leasehold arrangements; and
- constitutional doctrines that set limits on the effectiveness of provincial statutory schemes in establishing private rights to marine areas.

The examination of these issues is followed first by a consideration of their impact on current lease arrangements, and by a final section that offers a number of conclusions and recommendations with respect to the policy implications arising from the legal analysis.

Common law property rights and aquaculture operations

Any consideration of the current state of property rights over aquaculture sites[15] in all provinces except Québec[16] must begin with a review of the status of the relevant areas of water and submerged lands at common law.[17] The current statutory framework, which will be dealt with in the "Statutory responses" section (p. 122) was designed in reaction to the pre-existing situation at common law, and can only be fully understood by reference back to the regime it sought to replace or modify. This examination may conveniently be divided into two parts: non-tidal and tidal waters. For the purposes of this section, the constitutional issues related to the respective federal and provincial powers to grant property interests, or to regulate the exercise of those interests, are put aside, and will be addressed in the "Constitutional issues" section (p. 129).

Non-tidal waters

The legal status of lakes and non-tidal rivers in English common law was relatively straightforward: the ownership rights of riparian landowners were

presumed to extend to the midpoint of the watercourse (*ad medium filum aquae*),[18] and this ownership of the solum, or soil, extended above and below the bed of the stream or lake in the same way as property rights on land.[19] The ownership rights did not extend to the water itself, or to fish (until captured), but ownership of the soil did bring with it as an "incident of ownership," an exclusive right of fishery.[20] This right to the fishery could, however, be alienated from the ownership of the soil, whether as part of the original grant or by subsequent conveyance.[21]

In English law, it was clear that there was no public right of navigation in non-tidal, as opposed to tidal, waters. In Canada, however, non-tidal waters that were actually navigable came to be treated differently in most provinces (with the Atlantic region as a possible exception),[22] in part because of a recognition of the different physical circumstances in North America, but also because of the assignment of the power over navigation and shipping to the federal government, and the need for one consistent regime.[23] Public rights of navigation in these waters are recognized, and are "dominant" even over validly granted property rights, unless modified or eliminated by legislative action:

> Nothing short of legislation can take away the public right of navigation. The Crown in right of the Dominion or of a province cannot abolish the right in the absence of an authorizing statute. Accordingly, a Crown grant of land does not and cannot give a right to interfere with navigation.[24]

In addition to upholding the public right of navigation, courts have also found that the *ad medium filum aquae* presumption did not apply in non-tidal, navigable waters (again with the possible exception of the Atlantic region). Thus, riparian owners on these water bodies were not presumed to own to the midpoint, and any such submerged lands that were not explicitly included in a grant of land were presumed to be vested in the Crown.[25] There have also been some suggestions that in these waters, where the rule of prima facie Crown ownership was the same as in tidal waters, a "public right" of fishing might also exist, similar to that in tidal waters.[26] It seems clear, however, that the term "public right" is used in this context to mean a mere common right of fishing which exists subject to extinguishment, conveyance or modification by the Crown. In this, it must be distinguished from the public right of fishing in tidal waters, which, as will be discussed in the following section, exists as a "protected" Magna Carta right that cannot be granted or extinguished by the Crown alone.[27]

Tidal waters

The basic framework of common law rights to the seabed of the foreshore and coastal waters dates back to the restraint imposed upon the Crown's

exercise of prerogative powers in Magna Carta of 1215.[28] Proprietary rights in the foreshore, and later the seabed of the territorial sea, were normally vested in the Crown, but were subject to the dominant public rights of fishing and navigation. Furthermore, the Crown could make private grants of rights over these submerged areas, but "any private grantees must take title subject to this overriding public right."[29] This position was clearly stated by the Judicial Committee of the Privy Council in the *BC Fisheries Reference*:

> Since the decision of the House of Lords in *Malcomson v. O'Dea*, 10 H.L.C. 493, it has been unquestioned law that since *Magna Charta* no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation.[30]

The major exceptions to the dominance of the public rights are contained within the statement of the law set out above. First, if a grant or prescriptive right of fishery existed pre-Magna Carta, it could be maintained against any public right to fish. Second, and more relevant to the Canadian situation, the public rights of navigation and fishing could be modified or extinguished by an explicit act of the legislature, but not by the Crown. This framework of rights was adopted in Canada in both pre- and post-Confederation cases. In *Meisner* v. *Fanning* in 1842, the Supreme Court of Nova Scotia considered a claim to an exclusive fishery in Deep Cove, arising under a Crown grant. Hill J was prepared to assume for the purposes of argument that a grant to the seabed in the cove could be made by the Crown, but denied the possibility of a grant to the waters[31] and affirmed the general proposition respecting the limitation on the Crown's powers.[32] This view was confirmed in *Donnelly* v. *Vroom et al.* in 1907, in which the defendants owned the foreshore as part of a Crown grant of title to their farm. Their counterclaim against the plaintiffs for the digging and removal of clams from the foreshore was denied, on the basis that the ownership of the land did not remove the public right to fish by digging the clams, notwithstanding the defendants' own activities in this regard.[33] Further, in *Belyea* v. *City of St. John* in 1920, a private lease of the foreshore for purposes of a fish curing operation was used as the basis for a claim to an exclusive fishery. In finding against the lessee, the New Brunswick Supreme Court (Appeal Division) held as follows:

> The settled law of the realm appears to be that . . . [w]ithin the territorial waters, subject to the ebb and flow of the tides, the public, being subjects of the realm, are entitled to fish, except where the Crown, or some subject of the Crown has gained a propriety exclusive of the public right, *or Parliament has restricted the common law rights of the public*.[34]

In sum, then, the common law established the following four essential elements which defined the legal status of tidal waters: (1) title was vested in the Crown, which could grant that title (in whole or in part) to others; (2) the Crown rights, and thus the rights of any grantee taking from the Crown, were subject to the public rights of navigation and fishing; (3) new grants of exclusive fisheries required action by the legislature; and (4) the legislature also retained the power to regulate, even to the point of extinguishment, the rights of the public in common law.

The implications of this general structure for the creation of property rights in aquaculture operations are significant, though perhaps not entirely clear in all respects. The basic propositions can be simply stated:

- First, it seems clear that anyone attempting to exert proprietary control over submerged lands in the tidal areas would be a trespasser, against either the Crown or any grantee under the Crown's title, unless they could show their own grant, or that they fell within the exceptions noted above.
- Second, it would be possible, given the validity of Crown grants in the foreshore and other areas, for an aquaculturist to obtain "the right to occupy these subaquatic lands and the water column by grant, lease, or license from the Crown, or from a successor in title to the Crown."[35]
- Third, despite the validity of such Crown grants, no occupier of these lands, including the Crown and its grantees, could in the course of their use and occupation restrict or impede the public rights of fishing and navigation, and to do so would constitute an enjoinable public nuisance.
- Fourth, the interference with the public rights could nonetheless be authorized, but only under the authority of an explicit legislative enactment.

If it is assumed, then, that an aquaculture operation requires protection from interference by others who might otherwise exercise their rights of fishing and navigation, then legislation would be required, either to make the grant or lease explicitly effective in that respect, or to otherwise restrict the public rights in the area by separate regulatory action. It should be remembered, however, that the grant or lease could be effective against *other* uses, not encompassed within the public rights of fishing and navigation. The extent of public rights was limited to the specific categories, as noted by Parker J in *Lord Fitzhardinge* v. *Purcell*, a case in which the court declined to extend similar protection to a claimed right of fowling:

> [T]he public have no rights in the sea itself except rights of fishing and navigation and rights ancillary thereto . . . This beneficial ownership of the Crown, or the Crown's grantee, can only . . . be considered to be limited by well known and clearly defined rights on the part of the public.[36]

While protection against duck hunters may not be of great significance, the principle can be applied to other uses as well.[37] If this reasoning were applied, for example, to the actions of someone fishing inside an enclosed aquaculture pen for species that were the product of that operation, it could readily be argued that this was not an exercise of the public right of fishing, in that it was simply the taking of private property.[38]

Summary

In sum, the common law allowed for Crown grants of private rights in submerged lands in tidal waters. Such grants could conceivably include rights to aquaculture sites, given that this is an activity distinct from fishing, and thus would not constitute a private grant of a *fishery* (which is beyond the scope of the Crown's powers). However, any such *Crown* grant was subject to the dominant public rights of fishing and navigation, so that private rights obtained from the Crown would be ineffective to prevent the continued exercise of those rights. Only grants made under the authority of explicit *legislative* provisions could supersede these public rights. Given that aquaculture sites would generally require this protection, it is assumed that legislative schemes are necessary to provide a sufficiently secure form of tenure. The common law, then, resulted in a requirement for legislative action to create *effective* grants of property rights in marine areas for purposes of aquaculture. The general structure and operation of the legislative lease arrangements that have actually been developed in Canada will be considered in the next section.

Statutory responses

As we have noted, most provinces have legislated to provide for leasehold or similar rights over aquaculture sites, typically in addition to a separate license or permit issued for the conduct of aquaculture operations. This section provides a summary of the main elements of provisions respecting the legislative grants of property rights in five provinces with significant interests in marine aquaculture: Newfoundland and Labrador; Prince Edward Island; Nova Scotia; New Brunswick; and British Columbia. Procedures for the review and processing of applications for tenure, and the involvement of the federal government, will be dealt with separately at the end of the section.

Provincial approaches

Newfoundland and Labrador

The Newfoundland and Labrador *Aquaculture Act*[39] makes no provision for the assignment of leasehold or other property interests in aquaculture sites

on Crown lands. However, by s. 4(7)(a), no proponent shall be granted an aquaculture license unless "the proposed licensee owns, leases or otherwise has a right to occupy the parcel of land comprising the site." Therefore, unless the proponent has a private interest in the land at the time of application, they must apply for a grant or lease of Crown land under the provisions of the province's *Lands Act*[40] when applying for an aquaculture license. A number of provisions in the *Lands Act* have a bearing on the grant of land interests for the purpose of aquaculture.

In s. 2(f), "land" is defined as including "land covered by water, both tidal and non-tidal, and the water column superjacent to it," which makes it clear that the entitlements under a lease can encompass both submerged lands and the water. The interests that can be obtained over these areas are of three types: lease,[41] grant[42] or a license to occupy.[43] Given the wording of s. 4(7)(a) of the *Aquaculture Act* (quoted above), it would appear that a prospective licensee could satisfy the requirements by obtaining any of the three forms of entitlement. However, the policy publicized by the provincial government specifies that an applicant for an aquaculture license must have applied for a Crown *lease*.[44]

The *Lands Act* does not specify the nature of the tenure available under a lease with respect to such issues as exclusivity, transferability, divisibility, cancellation and term, although the minister is given wide discretion under s. 3 to specify any terms and conditions that may be required. However, with respect to some of these issues, other provisions and policies should be noted:

- The government has announced a policy of granting aquaculture leases for a period of 50 years.[45]
- Section 3(2) of the *Aquaculture Regulations*[46] states that aquaculture licenses are not transferable, which would render the value of a lease moot, given the lack of a valid license.
- Powers for the minister to suspend or cancel aquaculture licenses for failure to comply with terms and conditions are provided in the *Aquaculture Act*.[47]
- Special provision is made in the *Lands Act* for the 15-metre strips of land adjoining lakes, ponds or the seashore. By s. 7(1), in the absence of an express provision, no lease or grant of Crown lands adjoining the water bodies includes this area. Furthermore, any such grant must be made with the approval of the Lieutenant-Governor in Council, and only for specified purposes, which include aquaculture operations (see s. 7(2)(b)).

In sum, Newfoundland and Labrador relies on the aquaculture licensing provisions for much of the specifics respecting terms and conditions of operations, and the review process for approval.[48] The leasing arrangements are made under a "generic" lands act, without any aquaculture regulations, and

as such do not incorporate detailed aquaculture-specific conditions, such as are found in the legislation of other provinces (although these can be inserted in leases, on the decision of the minister).

Nova Scotia

In Nova Scotia, the *Fisheries and Coastal Resources Act* (FCRA) authorizes the responsible minister to issue aquaculture licenses and leases, both of which will be required for aquaculture operations on Crown land.[49] The Act provides for the general content of a lease, as well as terms and conditions to which such leases are subject, including, *inter alia*, the following:

- By s. 52(1), a lease "shall" be "granted for a specific geographic area," "shall" specify the plants and animals to be cultured, and "shall" contain as attachments those permits and approvals that are required (both federal and provincial).
- Leases are for a term of ten years, renewable for five-year terms "at the Minister's option." No provision is made with respect to transferability (s. 52(2)(a)).
- Lessees must submit annual reports to the minister on the lessee's use or the productivity of the leased area (s. s. 52(2)(d)).
- With respect to termination, "the lease may be terminated by the Minister at any time if the lessee breaches any of the terms or conditions of the lease" (s. 52(2)(g)). In addition, leases may be amended upon request of the lessee, with approval of the minister (s. 59(1)).

Exclusivity of access is dealt with in s. 52(3), which provides that, other than where there are restrictions in the lease or legislation, "the holder of an aquaculture lease has, for aquacultural purposes, the exclusive right to use the leased sub-aquatic lands and water column."[50] A similar provision in s. 44(3) states that the grant of a license "carries with it the exclusive right to possession of the water column and sub-aquatic land described in the licence."[51]

New Brunswick

New Brunswick has also adopted a system that provides for both licenses and leases (for Crown lands), issued under the authority of the *Aquaculture Act*.[52] Under s. 4, no person is to carry on aquaculture without a license, licenses being issued under three categories: commercial aquaculture; private aquaculture; and institutional aquaculture.[53] By s. 14(1), the registrar, who is responsible for issuance of licenses and leases,

> shall not issue, renew or amend an aquaculture licence in relation to an aquaculture site on other than designated aquaculture land unless the

applicant is the owner or lessee of the aquaculture site and has a right to occupy the site.

"Designated aquaculture lands" are dealt with in the legislation as follows:

- Section 2 of the *Aquaculture Act* defines the term as meaning "land under the administration and control of the Minister that has been designated by the Minister under section 24 as aquaculture land."
- Section 24(1) simply gives the minister the power to designate lands under his administration and control as "designated aquaculture lands."
- Section 25(1) provides that "the Minister may, in accordance with the regulations, lease designated aquaculture land for the purposes of aquaculture."

In sum, the minister may only lease "designated aquaculture lands," but it is not entirely clear what the significance of that term is, other than that the minister has chosen to so designate particular areas. By s. 25(2), the minister has a general power to make an aquaculture lease subject to "such terms, covenants and conditions as the Minister considers appropriate." In addition to this broad discretion, the Act and regulations specify a number of terms and conditions, including the following:

- Leases are for a term not exceeding 20 years (Act, s. 25(3)(a)).
- Leases may be assigned or transferred, with the consent of the Minister (Act, s. 25(3)(b)).[54]
- The lease "conveys the right to the exclusive use of the land covered by the lease" (Act, s. 25(5)), and "land" is defined in s. 2 to include the water column.[55]
- The minister may cancel a lease for a number of reasons, including failure to abide by any lease or license terms (Act, s. 27(1)).
- Application forms and content are specified (regs., s. 24(3)), and shall include a site development plan.
- Anyone seeking an aquaculture lease must also submit a license application (regs., s. 24(1)).
- Decisions of the registrar respecting leases and licenses may be appealed to the minister, and a process is set out in the regulations (regs., ss. 32, 33).

In addition to leases, the New Brunswick legislation also provides for a second category of entitlement: the Aquaculture Occupation Permit (AOP). The AOP allows the holder to "occupy and use" designated aquaculture lands, for a period of up to three years, and is not assignable or transferable.[56] It is clear that the AOP is intended to create a lower level of property entitlement than the lease, if only because of the shorter term and lack of transferability.[57]

British Columbia

In British Columbia, as in Newfoundland and Labrador, the licensing and leasing authorities derive from different statutes, and different forms of tenure are available, as in New Brunswick. The *Fisheries Act*[58] requires that any person carrying on aquaculture in the province have a permit. For the necessary land tenures, applicants deal with the Integrated Land Management (ILMB) of the Ministry of Agriculture and Lands, which processes applications for leases and other entitlements under the *Land Act*.[59] Three forms of tenure are available to aquaculturists under the Act:[60]

- *Investigative permit.* A permit for a term of up to two years, without exclusive access, "to conduct appraisals, inspections, analyses, inventories, surveys or other investigations of the land or of its natural resources."[61] According to the applicable policy, these are not usually used for aquaculture sites.[62]
- *License of Occupation.* The License of Occupation[63] is the most common form of tenure granted to aquaculturists operating on Crown land. This license does not convey an interest that can be registered or mortgaged, and allows restriction of public access only to the extent necessary to protect the licensee's use.[64] Initial five-year licenses can be followed by the most common form of aquaculture tenure in the province, a twenty-year license of occupation.[65]
- *Lease.* Leases are authorized under s. 38 of the *Land Act*, and offer a higher degree of tenure, including exclusive use, a thirty-year term and the right to make modifications and improvements.[66] Leases are considered the exception for aquaculture operations, and are not typically issued for this purpose.[67]

The primary form of tenure used for aquaculture in British Columbia, the License of Occupation, does not appear to offer the same degree of security of tenure as is available under the legislative schemes in place in the provinces considered above, with respect to both exclusivity and registration of the interest. It is, however, considered to be an assignable interest, with permission.[68]

Prince Edward Island

Prince Edward Island (PEI) is the only province in which the federal government, through the Department of Fisheries and Oceans' (DFO's) Prince Edward Island Aquaculture Division, administers the licensing and leasing of aquaculture operations.[69] There is little information contained in the enabling legislation regarding the procedure to be followed in the issuance of an aquaculture lease, or the nature of the property right obtained by the proponent, but the details of the leasing scheme are found

in the *Prince Edward Island Aquaculture Leasing Policy* of the PEI Aquaculture Division.[70]

Under the policy, leases are issued for terms up to twenty-five years, with options to renew. Within the overall term of the lease, the policy distinguishes between a "developmental phase" and a "commercial phase." In the former phase, the lessee "will assess the biological and environmental aspects for a proposed site prior to entering full scale commercial operations."[71] Once the site is fully developed, and obligations under the lease are satisfied, the lease is in the commercial phase, during which the operation is to be periodically assessed to ensure compliance with lease conditions. In addition to the classification of phases, leases are defined with respect to the following types of operation: a "bottom culture lease" covering use of the seabed to cultivate designated mollusk species; and a "water column lease," which is actually a bottom culture lease with a special permission to use the superjacent water column.[72]

Apart from duration, other terms and conditions of these leases are set out in the federal provincial memorandum of understanding (MOU),[73] and expanded upon in the Aquaculture Leasing Policy. These include, *inter alia*, the following:

- Leases are transferable and assignable (including to lending institutions), and may be sublet, but the permission of the Division is required for such transactions.[74]
- Lessees acquire the exclusive rights to species produced within their sites, but with respect to the issue of exclusivity of access, the policy refers to the "use of the sea-bed and water column,"[75] which could indicate a limited approach to exclusion of other uses, as in the British Columbia License of Occupation. However, the MOU states that the coordinating committee established by the agreement can determine conditions, which could include complete exclusivity.[76]

The Prince Edward Island policy also includes an aquaculture zoning system, which divides the province into areas approved or not approved for consideration for bottom or water culture leases. The zoning exercise that resulted in the current structure considered potential conflicts with other uses, as well as the needs of the industry.[77]

Summary

The provincial schemes that have been outlined here all offer some level of property rights in aquaculture sites. They do, however, vary significantly on such key issues as duration, assignability, and exclusivity of access under the property rights obtained. In some cases, notably those of Prince Edward Island and British Columbia, there appears to be more recognition of the possibility of "layering" rights depending on the type of access and use

required by a particular operation, so that full exclusivity may not be necessary in all cases.

Review processes and federal involvement

Some of the provincial schemes provide for varying degrees of review and consultation on licensing and leasing decisions. These provisions are not the primary focus of this chapter, which is concerned with the actual proprietary entitlements that result, but it is useful to note some of the provisions currently in place, and to consider the extent of federal agency involvement.

In Nova Scotia, the *Aquaculture Act* provides for a review process, in general terms, which applies to decisions respecting both leases and licenses.[78] The province has established ten Regional Aquaculture Development Advisory Committees (RADACs), as provided for in s. 47(b), and is committed to using these bodies as an integral part of the approval process, including site approval.[79] Recommendations of the RADAC are forwarded to the minister for consideration.

In New Brunswick, the *Aquaculture Act* and regulations make some provision for public review and consultation,[80] including a specific requirement in s. 37(2) that the minister "shall establish advisory committees to advise the Minister in relation to health standards for aquacultural produce and in relation to site selection criteria for designated aquaculture land." More important than the legislative provisions, however, are the policy guidelines that have been developed to deal with the application process in general, which include aspects of relevance to site selection review and lease arrangements. In particular, the Bay of Fundy Marine Aquaculture Site Allocation Policy sets up a system of zoning built around Aquaculture Bay Management Areas (ABMAs).[81] Aquaculturists operating in a given ABMA will collaborate with the government and local management bodies to produce Bay Management Agreements (BMAs), which will define operating standards and practices to be followed in that particular ABMA, including allocation and review processes.[82]

In British Columbia, the aquaculture land use policy incorporates two review processes for applications for tenures. First, the referral process, which feeds into decision-making, provides a means for consultation with interested departments and others.[83] Second, for more complex proposals, the Project Review Team (PRT) process is utilized. This interagency group includes relevant federal agencies, and has a more proactive role to seek out information, consult more generally and make recommendations.[84]

A common element in the provincial processes, even where it is not formalized, is the involvement of federal agencies that are required to give approvals of their own for the aquaculture activity, under their own regulatory mandates.[85] The role of these agencies, however, is largely con-

fined to the *regulation* of aquaculture, and does not address the grant of proprietary rights, except indirectly, in that refusal of a permit may prevent the grant of a lease or other entitlement. Otherwise, it is the provinces (with the exception of PEI) that have taken the lead on the proprietary aspects of aquaculture management, consistent with the MOUs[86] signed by seven provinces and territories (including those considered above) and the federal government.[87] The assumption underlying this approach to the grant of statutory grants of leasehold and other entitlements for aquaculture sites is that the provinces are constitutionally competent to enact legislation that provides for the desired degree of certainty and security of tenure over all potential sites. As will be seen in the following section, this is by no means clear.

Constitutional Issues

The analysis in the previous section demonstrated that, at least to the extent that aquaculture operations require authorization to interfere with public rights of fishing and navigation, or protection from the exercise of those rights, legislative intervention is required to secure the required level of property rights,[88] and those provinces most involved in aquaculture have indeed opted for statutory leasehold arrangements or similar mechanisms. The next obvious question, therefore, is which level of government, federal or provincial, has the constitutional power under the *Constitution Act, 1987*,[89] to make such legislation, and in what circumstances. More particularly, given the approach taken in the majority of coastal provinces, do those provinces have the constitutional authority to legislate for aquaculture property rights in the manner that they have legislated?

It is beyond the scope of this chapter to detail the heads of federal jurisdiction over *regulatory* issues that necessarily impinge on the exercise of provincially granted proprietary rights in aquaculture operations, or to review the provincial regulation of non-proprietary aspects of aquaculture.[90] The concentration here is on the proprietary aspect of aquaculture operations, rather than on the regulatory control that is exerted over it by both federal and provincial governments, and it is assumed throughout that both levels of government have valid jurisdictional interests in other aspects of the regulation of aquaculture.[91] In considering the various relevant heads of jurisdiction as they may affect the subject of this study – the control over proprietary aspects of the industry – a number stand out as potentially relevant. At the provincial level, the following legislative powers, all falling under s. 92, confer extensive control over matters related to property rights on the provinces:

> 92 (5) The Management and Sale of the Public Lands belonging to the Province . . . [*in that submerged areas of Crown land may be conveyed for aquaculture*]

(8) Municipal Institutions in the Province . . . [*possibly relevant for municipal zoning and development control under statute*]
(10) Local Works and Undertakings . . .
(13) Property and Civil Rights in the Province . . .
(16) Generally all Matters of a merely local or private Nature in the Province.[92]

Of this list, it is "property and civil rights" that has emerged in the case law as the most important to the definition of provincial powers over property rights in submerged areas, both tidal and non-tidal.[93] At the federal level, the *direct* authorization of power over property rights *per se* in s. 91 is more limited, but, as we shall see, non-proprietary powers such as navigation and fisheries have been interpreted as significant limitations on the exercise of proprietary rights:

91 (1A) The Public Debt and Property . . .
(10) Navigation and Shipping . . .
(12) Sea Coast and Inland Fisheries . . .
(24) Indians, and Lands reserved for the Indians.[94]

It is implicit in the discussion above that jurisdiction over property rights and jurisdiction to legislate respecting an activity are separate concepts, and indeed this distinction is central to understanding the current structure of federal and provincial interests in property rights over aquaculture. Accordingly, before we turn to the question of jurisdiction over property rights as such, it is necessary to consider the significance of this distinction in Canadian constitutional law.

Legislative jurisdiction and proprietary rights

Origin and nature of the distinction

As is indicated above, a fundamental distinction has been drawn in Canadian constitutional law between legislative jurisdiction and proprietary rights. That is, the fact that one level of government has been given legislative jurisdiction over a matter does not imply that it has acquired proprietary rights over the subject of that legislative control. Equally, the existence of proprietary rights in the provincial government does not mean that the assigned legislative powers of the federal level are eliminated.[95]

In the early post-Confederation case of *The Queen* v. *Robertson*,[96] the Supreme Court of Canada considered the relationship between the provincial power over property and civil rights in the province, and the legislative jurisdiction of the federal government over sea coast and inland fisheries. The case involved an attempt by the federal Minister of Marine and Fisheries to issue an exclusive lease of a fishery in the South West Miramichi River in

New Brunswick (an area of non-navigable waters). The lease was successfully contested by the prior holders of a private right in the area in question, and the grantee of the lease sought compensation from the Crown for the loss of the rights and other expenses. Ritchie CJ set out a number of fundamental propositions in his judgment, the first of which concerned the relationship between federal and provincial powers in general:

> [A]s there are many matters involving property and civil rights expressly reserved to the Dominion Parliament, the power of the local legislatures must, to a certain extent, be subject to the general and special powers of the Dominion Parliament. But while the legislative rights of the local legislature are in this sense subordinate to the rights of the Dominion Parliament, I think that such latter rights must be exercised so far as may be consistently with the rights of the local legislatures, and therefore the Dominion Parliament would have only the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada.[97]

Proceeding from this proposition, which allowed for the coexistence of the two heads of jurisdiction to the extent possible, Ritchie turned to consider the nature of the rights in issue in the case. He noted that there was a public right to float logs on the river, and "a right of passage by canoes &c," but found that such a right was "not in the slightest degree inconsistent with an exclusive right of fishing, or with the rights of the owners of property opposite their respective lands."[98] In sum, he confirmed that in rivers beyond the ebb and flow of the tide, the right to fish was not a *public* right, but a private right connected to ownership of the soil.[99] Building on this common law distinction, Ritchie went on to note the existence in pre-Confederation New Brunswick of private rights of the type in question, and of regulatory legislation dealing with fisheries,[100] and found that, while the previous regulatory jurisdiction had been ousted by s. 91(12) of the *British North America Act* (BNA Act), no such conclusion could be drawn with respect to the control over aspects of the fishery dealing with property and civil rights.[101]

The same position was adopted by the Supreme Court in the 1896 *Provincial Fisheries Reference*. The judgment of Strong CJ confirmed the decision in *Robertson* as it applied to provincial powers over proprietary rights in non-navigable waters,[102] and extended that finding to navigable lakes and rivers within provincial boundaries,[103] including tidal waters.[104] In 1898, the Judicial Committee of the Privy Council, in the *Ontario Fisheries Reference*, followed the same approach and acknowledged the same distinction as did the previous cases.[105]

The significance of these decisions for the structure of common law rights has been touched on earlier, and their impact on the grant of property rights under legislation will be dealt with later, but for the purposes of this section

it is clear that *Robertson*, *Provincial Fisheries* and *Ontario Fisheries* all proceeded from the same starting point: that proprietary and regulatory aspects of fisheries could be separated, with federal and provincial levels both having valid constitutional interests under the different spheres.

Implications of the federal regulatory power

The first and most obvious implication for the legal status of aquaculture operations is that, *within* the boundaries of the provinces, the assignment of proprietary interests will fall within the provincial jurisdiction over property and civil rights (see below). The second point arising from these and other cases is that, despite the provincial jurisdiction over proprietary issues, the federal regulatory power over fisheries could be used to restrict, potentially to a very great extent, the exercise of any property rights held or assigned by the province.[106] It might be argued that cases such as *Ontario Fisheries* dealt with fairly direct conflicts between the federal fisheries power and provincial jurisdiction over property and civil rights, and that they may be less applicable to aquaculture, which is on its face a very different activity from the traditional fishery encompassed by s. 92(12) of the *Constitution Act*. These decisions did not, however, limit their effect to provincial measures that were purely fisheries related, but clearly extended to any instances where the valid exercise of the federal power necessarily impinged upon the provincial proprietary interest. In sum, then, a provincial proprietary grant would be effective, *up to the point* that it collided with the valid exercise of a federal regulatory power.

It is assumed, for the purposes of this chapter, that any private exercise of property rights granted under provincial legislation is subject to extensive federal regulation.[107] Given that general context, the next section considers how the provincial power over the proprietary aspect of aquaculture has been structured and limited, apart from the general federal regulatory involvement. In addition, the significance of federal jurisdiction over proprietary aspects of aquaculture in non-provincial waters is examined.

Jurisdiction to legislate property rights

Delineation of constitutional jurisdiction over property rights in aquaculture sites requires consideration of three separate legal regimes, defined with reference to the following categories of waters: non-tidal waters in a province; tidal waters within a province; and waters outside any province. This division is necessary in part because of the common law principles related to public rights of fishing and navigation, as discussed earlier, and in part because of the structure of territorial jurisdiction under the constitution.

Non-tidal waters in a province

The early cases of *Robertson*, *Provincial Fisheries* and *Ontario Fisheries*, referred to earlier, confirmed that provinces generally have jurisdiction over proprietary rights in non-tidal areas within the province. As the Supreme Court found in *Provincial Fisheries*, all waters (tidal and non-tidal) within the provinces at the time of Confederation were vested in the Crown in right of the provinces, except to the extent that they were subject to other existing grants or specific exceptions within the constitution itself.[108]

There are at least three central points that emerge from this general proposition, and from the other cases discussed above, respecting the provincial entitlements. First, areas that were "ungranted" (and not within some category of federal lands) would be held by the Crown in right of the province. Second, where there were pre-existing private rights over the submerged areas in question, whether by operation of riparian entitlements or by explicit Crown grant, those rights survived as private entitlements. Third, and critically important for the development of aquaculture rights, the Crown in right of the province could, by virtue of its power over property and civil rights, make new grants over these areas, whether by lease or by other form of grant. Similarly, the Crown could modify or remove rights gained under existing grants. There are, however, a number of exceptions and limitations to these powers that must be considered.

Perhaps the most significant restriction on the provincial power concerns lands within the provinces that fell under federal jurisdiction by virtue of the *Constitution Act* itself. To begin, the general power under s. 91(1A) to legislate in respect of public property has been interpreted quite broadly, and represents a significant potential source of federal power over proprietary aspects of aquaculture within the provinces.[109]

This position was clearly stated in the *BC Fisheries* case, in which the Judicial Committee of the Privy Council found, *inter alia*, that certain lands of the "Railway Belt" (including river waters) had been conveyed from the Province to the Dominion, as part of the agreement for the building of the Canadian Pacific Railway.[110] For the non-tidal waters of the Fraser River and other bodies of water within the Provinces, the conveyance of the property right meant that the federal government stood in the position that would otherwise have been occupied by the Province, insofar as the control over proprietary rights such as fisheries was concerned.[111]

Further issues arise in dealing with non-tidal waters that are *actually* navigable. As was noted earlier, in at least some, if not all, provinces, the public right of navigation has been extended to non-tidal navigable waters (unlike the approach taken in England). It has also been suggested, as noted above, that there may be a "public right" of fishing in such waters. As was argued above, however, the reference to a "public right" of fishing was not a "protected" Magna Carta right as found in tidal waters, but merely a common right to fish that could be modified or extinguished by a grant of private

right by the Crown, with or without legislation. The impact of such a "right" is simply to shift ownership rights from the riparian to the provincial Crown, not to the federal Crown, and the provincial Crown can freely grant both the lands and any fishing rights, unimpeded by Magna Carta rights.

With respect to navigation rights, the position is different. Unlike fishing, which may involve both proprietary elements and use rights, the interest in navigation is of the nature of a right of passage or an easement, maintainable even against the owner of the bed.[112] The resulting irrelevance of the proprietary aspect removes the claim to jurisdiction that supports provincial involvement in the property aspects of fisheries, and the position of navigation rights in non-tidal waters is thus analogous to the status of both navigation and fisheries in tidal waters: a "dominant" right that cannot be interfered with by Crown grant, but only by legislative intervention. Once it is accepted that legislative action is required, it seems clear, as stated by La Forest, that such legislation must be federal, given the power over navigation and shipping.[113]

In sum, any provincial grants in areas of navigable waters would certainly be subject to the federal regulatory power over navigation and shipping, though not to the extent of a federal interest in the proprietary aspect of the submerged lands, which remains provincial. This coexistence of interests means that any private actor wishing to develop a work or undertaking that interferes with navigation in non-tidal waters would require a grant of property rights from the provincial government, and a statutory authorization for the interference with navigation from the federal government.[114] Indeed, this was the basic scheme of rights and requirements identified as early as the *Provincial Fisheries* case, in which it was made clear that a grantee under the province could build a structure in navigable waters, operating under their property rights granted by the provincial Crown, but such activities would of course be subject to federal statutory authorization.[115]

Tidal waters in a province

The status of tidal waters within the boundaries of a province is similar to that of other provincial waters insofar as the granting of property rights is concerned: the river or seabed in these areas may be privately owned, but in the absence of other owners (including the federal Crown), title is in the provincial Crown, and issues relating to property and civil rights are within the jurisdiction of the provincial government.[116] The general position, which is to treat tidal waters on the same footing as non-tidal waters for purposes of determining proprietary interests, was stated in *Provincial Fisheries*,[117] in which it was held that ungranted submerged lands in "all lakes, rivers, public harbours and *other waters* within the territorial limits" of the provinces were vested in the provincial Crowns.[118] Ritchie CJC went on to make it absolutely clear that "other waters" included tidal waters.[119]

Apart from the impact of aboriginal and treaty rights,[120] the most significant limitation on property rights within these waters arises from the existence of the public rights of navigation and fishing and the subordination of any private property interest to the dominant public rights, save for cases in which the legislature has acted either to make the private grant, or to limit the exercise of the public right. From the constitutional perspective, the jurisdiction to grant property rights remains in the province, but the critical question is which legislature has the jurisdiction to authorize any resulting interference with the identified public rights. For navigation, the answer for tidal waters is the same as for non-tidal navigable waters: only the federal Parliament has the power to remove or limit these rights. In the case of public fishing rights, one might expect a different answer, given that the grant of rights in the fishery has a proprietary aspect that does not apply to navigation, and that that proprietary element must be provincial. That is, it could be argued that it is within the competence of the provincial legislatures to modify or eliminate a public right of fishing within their territory, subject of course to regulation of the fishery by the federal government.[121] This approach was, however, rejected by the Judicial Committee of the Privy Council in the *BC Fisheries* case in 1913, which found that the control of public fishing in tidal waters, including grants of new exclusive rights in fisheries, was *ultra vires* the provincial legislature.[122] In light of the centrality of these waters to aquaculture operations, and the significance of the proprietary issues to the relevant lease schemes, it is important to consider the rationale for this decision in some detail.

Viscount Haldane proceeded from the fundamental proposition that the right of fishing in tidal waters was distinguished from that in non-tidal waters by the fact that it was not a matter of property at all, in that the right of fishing in these waters was a public right and was not an incident of ownership of the land.[123] Thus, the Privy Council's previous decision in *Ontario Fisheries*, which recognized the provincial jurisdiction over proprietary aspects of fishery rights, was distinguished as irrelevant, and a different analysis put forth for tidal waters:

> The decision ... does not, in their Lordships' opinion, affect the decision in the present case. Neither in 1867, nor at the date when British Columbia became a member of the Federation, was fishing in tidal waters a matter of property. It was open equally to all the public, and, therefore, when, by sec. 91, sea coast and inland fisheries were placed under the exclusive legislative authority of the Dominion Parliament, there was in the case of fishing in tidal waters nothing left in the domain of the provincial legislature. The right being a public one, all that could be done was to regulate its exercise, and the exclusive power of regulation was placed in the Dominion Parliament.[124]

This reasoning was extended to cover any and all interference by the provincial legislature, whether by regulatory action or by the grant of exclusive rights to individuals:

> Interference with it [the right], whether in the form of direct regulation, or by the grant of exclusive or partially exclusive rights to individuals or classes of individuals, cannot be within the power of the province, which is excluded from general legislation with respect to sea coast and inland fisheries.[125]

While the prohibition from direct regulation of fisheries is clear enough, there are a number of queries that might be raised about the logic of the reasoning related to the grant of exclusive rights. First, while fishing in tidal waters may indeed have been something generally open to the public, it was, even under the Magna Carta restriction, possible to create a private or exclusive right of fishery by explicit act of the legislature. If that power to affect property rights (i.e. to create them) rested in the provincial legislatures at Confederation, why would it not have survived, as did the same power in non-tidal waters (despite the presence of the federal regulatory power in those waters as well)? Second, and related to this point, the decision seems to assume that *only* if the right of fishing is seen as a matter of "property" could it come within the jurisdiction of the provincial legislature. However, if the public right of fishing itself was considered to be a matter of "civil rights" within the province, would it not have come within the scope of "property and civil rights"? Haldane, however, advanced an additional justification for full federal control, based on the fact that non-residents of the province may have access to the right of fishing:

> The right to fish is . . . a public right of the same character as that enjoyed by the public on the open seas. A right of this kind is not an incident of property, and is not confined to the subjects of the Crown who are under the jurisdiction of the province.[126]

One might have thought that the exercise of the right *in the territory* of a province would have placed these subjects "under the jurisdiction" of that province, at least for these purposes. Elsewhere in the decision, however, the same point was made in slightly different words: "It was most natural that this should be done [i.e. assigning full jurisdiction to the federal level], seeing that these rights are the rights of the public in general and in no way special to the inhabitants of the province."[127] This argument is also less than convincing: it is not clear why the pre-Confederation jurisdiction of the provincial legislature to grant exclusive fisheries would not have extended, within the territory of the Province, to individuals from outside who have come into the province. Similarly, no clear argument is presented as to why this territorial jurisdiction could not have been continued.

Whatever qualms one may have about the quality of the reasoning in this case and the subsequent *Québec Fisheries* case, which took the same approach, the argument is now moot. It is, however, important to understand the limits of these decisions insofar as they affect the ability of the provinces to make private grants in tidal areas within their boundaries. There is nothing in either decision to suggest that provinces cannot make grants of private rights in these areas, so long as they avoid the two intrusions on federal jurisdiction identified in both cases: an actual grant of an exclusive fishery; or any other grant that has the effect of interfering with the public right of fishing or the regulation of that right.

Thus, in *BC Fisheries* Haldane noted in *obiter* that the situation would be quite different for provincial grants of "fishing" rights based on "kiddles, weirs or other engines fixed to the soil" that would "involve a use of the *solum* which, according to English law, cannot be vested in the public, but must belong either to the Crown or some private owner."[128] In *Québec Fisheries*, this issue arose again, and Haldane confirmed the ability of the province to make such a grant, even for an activity so closely tied to fishing, so long as it was not strictly within the definition of the true public right of fishing. In such cases, however, the limits related to provincial *interference* with the public right of fishing still obtained:

> In so far as the soil is vested in the Crown in right of the Province, the Government of the Province has the exclusive power to grant the right to fix engines to the *solum*, so far as such engines and the affixing of them do not interfere with the right of the public to fish, or prevent the regulation of the right of fishing by private persons without the aid of such engines.[129]

At the same time, of course, the federal Parliament was still restricted from granting proprietary rights, and from exercising its regulatory power "to deprive the Crown in right of the Province or private persons of proprietary rights where they possess them."[130] The result, as was frankly acknowledged in these two decisions, was to create a bifurcated power where there had been a unity, so that, as in non-tidal waters, most grants of private rights would require action by both levels of government to be effective.[131]

Waters outside any province

The fundamental basis of provincial jurisdiction under the Constitution is territorial in nature, and the enumerated powers, including property and civil rights, are explicitly limited in effect to the territory of the several provinces.[132] Thus, as Wildsmith concluded in 1982, in marine areas of federal jurisdiction outside the provinces, the legal status is clear: "The conduct of aquaculture in those areas is clearly a matter for federal control in its entirety."[133] This applies equally to regulatory and proprietary aspects of

aquaculture and is subject, of course, to the limitations relating to public rights of fishing and navigation, and aboriginal and treaty rights. The impact of this legal status on the validity of current approaches to leasing arrangements will be dealt with later, but it is useful here to consider the preliminary question of where the boundaries between federal and provincial waters can be found.

The territorial extent of a province includes all of those areas that it brought into Confederation; that is, the extent of the former colony defines the geographical scope of the province.[134] With respect to marine areas, including submerged lands, the general position in British law at the time of Confederation was that the realm, and thus any colony, ended at the low-water mark, in the absence of a legislative enactment to the contrary, and subject to certain exceptions.[135] The exceptions included "waters *inter fauces terrae* (i.e. "within the jaws of the land"), which the common law considered to be . . . within the realm of England."[136] These waters would include bays and estuaries, and possibly straits, but the term is by no means precise and is subject to examination on a case-by-case basis. In sum, coastal waters and submerged lands subject to potential claims by a province could be brought within the province either as part of the general exception, depending on the criteria applied, or by identification of a positive act of the legislature under British rule, as the question was put by the majority in the *Georgia Strait Reference*:

> In order to succeed . . . British Columbia must demonstrate that prior to Confederation either the lands and waters in question were "within the realm" as that term is used in *R.* v. *Keyn* or else that by some overt act Britain incorporated them into the territory of the Colony of British Columbia.[137]

In that case, British Columbia was able to identify an "overt act," but the central point arising from this and the other cases[138] is that the status of a particular area of water and submerged lands will be dependent on an analysis of its geographical configuration and legal history, all aimed at determining whether it was part of the previous colonial territory prior to Confederation. The result is that the determination of the precise status of many areas of coastal waters is ill defined, and could require close examination and possible litigation to determine,[139] in the absence of some more general settlement of the issues with the provinces.[140]

Other limitations on legislative jurisdiction over property rights

Before we turn to the application of the common law and constitutional principles to existing lease arrangements, it is necessary to briefly note two other general limitations on the jurisdiction of the provincial and federal governments to make grants of property rights in non-tidal and marine areas: aboriginal and treaty rights, and international law.

First, aboriginal and treaty rights, given their constitutional status,[141] can limit or exclude the exercise of federal and provincial legislative powers over fisheries and other relevant natural resources, and it is the exercise of those powers (or of the Crown prerogative) that enables the governments to create new property rights in aquaculture operations. Thus, the presence of aboriginal entitlements, whether through treaties or through aboriginal rights, must stand as a limitation on the ability of federal or provincial governments to issue leasehold rights in any affected areas, if only by virtue of a duty to consult in advance.[142] This complex area of law, which is still evolving, is the subject of Chapter 8 of this volume, and thus will not be addressed here.

Canada is also subject to various obligations at international law which may be of relevance to aquaculture sites located outside internal waters, whether in the territorial sea or in the exclusive economic zone (EEZ), should operations eventually be sited further offshore.[143] Relevant obligations could include the requirement to respect rights of innocent passage in the territorial sea, and the broader navigational rights of other states in the EEZ.[144] In addition, there are more vaguely stated obligations with respect to preservation and protection of the marine environment that may come into play, particularly in the EEZ.[145] For the purposes of this chapter, however, the primary relevance of these obligations is the additional support they give to the assertion of federal jurisdiction, certainly in marine waters, and to a lesser degree in non-tidal waters, to the extent that they engage Canada's international obligations.[146]

Impact on aquaculture lease arrangements

Summary of jurisdictional structure

Allowing for the areas of doubt that have been addressed in the preceding sections, it is possible to summarize federal and provincial powers to create property entitlements over aquaculture sites, and to identify the main potential problem areas that arise when those powers are compared to the leasing and other arrangements discussed in the subsection "Tidal waters" (p. 134). The examination to this point suggests the following general jurisdictional structure with respect to the issuance of property rights in aquaculture sites in Canada.

Non-tidal waters in a province

- The provinces have the power under common law to grant property entitlements over the beds of non-tidal waters within their territory (including the zone above the beds). Such grants could be made by the Crown with or without legislation, although removal of pre-existing rights (including riparian rights) may require legislation.

- Any such grants would be subject to the government's constitutional obligations with respect to aboriginal and treaty rights.
- The exercise of property rights is subject to federal regulatory jurisdiction, particularly over fisheries and navigable waters.
- Any interference with navigation rights can only be justified by legislative authority, and that authority must be federal.

Tidal waters in a province

- A provincial Crown, with or without legislation, may make grants of property rights over the bed of tidal waters that fall within the province.
- Such grants are, as with non-tidal waters, subject to aboriginal entitlements and the paramount federal regulatory power over matters within federal jurisdiction.
- Any grant that interferes with the public rights of fishing or navigation must be authorized by legislation, and that legislation must be federal.

Waters Outside Any Province

- The federal Crown may make grants of property entitlements to the bed of waters outside the provinces, and such grants could be made with or without legislative authority.
- However, where such grants interfere with the exercise of the public rights of fishing and navigation, the federal Crown cannot act in its prerogative, but must be acting pursuant to legislative authority.
- The federal ability to make such grants is also subject to any aboriginal entitlements, and to the international law obligations to which Canada is subject.

Application to the present leasing system

When the general propositions set out above are considered in the light of the existing statutory approach to aquaculture leases in the provinces considered earlier (with the exception of Prince Edward Island), a number of potential problem areas of varying degrees of significance become apparent.[147]

Waters within provinces

The first general area concerns the extent to which the grant of leases or other tenures inside the provinces may interfere with matters within federal jurisdiction. For sites within provincial, non-tidal waters, this issue appears to have been adequately addressed by the requirements for compliance with federal regulations, including the referral of sites for federal review and the necessity of acquiring relevant federal permits.[148] That is, consistent with

the various cases that have addressed the issue, the current scheme allows the (provincial) proprietary interest to coexist with the additional (federal) regulatory power, particularly with respect to fisheries and navigation.

Tidal waters and the problem of public rights

In tidal waters within the provinces, however, the situation is more complex. The provincial ability to control proprietary interests remains unquestioned, and the federal regulatory powers are fully acknowledged, as reflected in the requirements for permits under the *Navigable Waters Protection Act* (NWPA)[149] and the *Fisheries Act*.[150] Nonetheless, the existence of the public right of fishing in the tidal areas fundamentally changes the legal situation in a manner that is not fully addressed in the current law. Respect for the public rights of fishing and navigation requires something more than mere provincial avoidance of conflict or incompatibility with federal regulatory powers; to the extent that a provincial grant in tidal waters interferes with either of the public rights, it requires positive authorization under a legislative enactment, and that enactment must be federal. That is, the rights involved reside with the public, and raise questions beyond disputes over constitutional authority.

For navigation, the power under s. 5 of the NWPA is explicit in granting the federal government authority to permit interference with rights of navigation, and so long as permits under this section are issued where relevant, there seems no question that any authorized works will be legally justified with respect to interferences with navigation.[151] For fisheries, however, the issue is more complicated. As a starting point, it seems clear that if a grantee holds no *federal* authorization, under either a lease or another form of permit (as with the NWPA for navigation), then any resultant interference with the public right of fishing is simply a public nuisance, for which an action could be brought by members of the public.[152] The question, then, is whether or not the current system provides for adequate federal authorization to prevent the activity being considered an enjoinable nuisance.[153] The primary federal aquaculture approval of relevance to fisheries is a permit under s. 35 of the federal *Fisheries Act*, dealing with the alteration of fish habitat:

> 35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.
>
> (2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.[154]

This section does not seem to constitute an authorization for interference with the public right of fishing in any but the most indirect way, but is

rather directed to the regulatory aspect of the federal government's control over fisheries in general, through protection of fish habitat. By contrast, the entire purpose of s. 5 of the NWPA is to permit works that would otherwise constitute an interference with navigation.

The federal aquaculture policy does require consideration of "utilization by other groups," including the traditional fishery and aboriginal fisheries, during the review process for aquaculture siting,[155] but it seems clear that a policy requirement cannot substitute for an explicit legislative authorization for an abrogation of the public right of fishing. In any event, the federal position is equivocal on whether or not its approval is even mandated:

> As a result of the existing regulatory regime, in most provinces, the Minister of Fisheries and Oceans has legal authority by virtue of the *Fisheries Act*, for fisheries management reasons, to be consulted on and to provide recommendations regarding the issuance or expansion of leases issued by Provinces. These recommendations and/or advice will be taken into account by the provincial leasing authority. Considering the wording in the relevant regulations, ***DFO's approval* of the provincial lease, based on fisheries management considerations, in most cases, is *not* required.**[156]

This assessment may be correct from the perspective of DFO's *regulatory* mandate, but it raises problems for the proprietary aspect of the leasing schemes. It would appear that for many leases in provincial tidal waters, presumably including some that interfere with public rights of fishing, the federal government acknowledges no regulatory requirement to *authorize* the private interference with the public right, despite the fact that it may be consulted and regulate "for fisheries management reasons." However, the exclusivity provisions of some provincial lease schemes, which are supported by the MOUs referred to earlier, are intended to provide for an exclusion of the public right of fishing. The federal input to this legislative grant of proprietary rights (leaving aside regulatory involvement) consists of some participation in the siting approval process[157] and possible, but not mandatory, permit issuance. The difficulty with this approach, again from the narrow perspective of the property rights involved, is that it seems to rely on a delegation of federal powers that may be constitutionally invalid.

The delegation "solution"

It has long been accepted in Canada that one level of government can delegate *administrative* powers to another, and this is frequently done by way of government-to-government MOUs, or similar documents. While such agreements have been found to be valid, it is clear that delegation of *legislative* powers is not permitted, in that the parties would otherwise essentially be amending the constitutional distribution of legislative powers by way of

a non-constitutional agreement.[158] Thus, any such delegation from the federal level should be based on a clear legislative enactment, the administration of which is then delegated to the provincial authority. In cases where management of freshwater (and some coastal) fisheries has been delegated to provinces, the legislative provisions are still federal.[159]

While there may be some scope for allowing discretion or latitude in the hands of the provincial authority to which the power is delegated,[160] there must still be a legislative basis for the delegation. With respect to interference with the public right of fishing, it seems clear that any authorization of such interference *must* have an explicit legislative origin, and cannot be a purely administrative matter within some larger scheme. This would be true of the delegation of leasing authority from the federal level to the provinces (for extra-provincial waters), and similarly to any delegation of leasing authority to the federal government in provincial waters (as in the case of Prince Edward Island). The courts' treatment of Magna Carta rights in tidal waters, which prohibits the Crown from acting without legislative authority, would make any other characterization impossible.

If the federal Parliament had enacted a lease scheme, the administration of which was then delegated to the provinces via MOUs, that would clearly be an acceptable structure.[161] The question here is whether there is anything in the *Fisheries Act*, the most directly relevant federal legislation, that could be seen as accomplishing this same purpose. There are at least four sections that might be relevant.

- Section 7 of the *Fisheries Act* provides for the issuance of "licenses and leases for fisheries and fishing," wherever no exclusive right of fishing exists. This section, however, restricts the purposes of such leases and licenses to "fisheries and fishing," which does not encompass aquaculture,[162] and s. 3(1) specifically excludes any grant of exclusive fisheries "in property belonging to a province."
- Section 57 provides that the minister "may authorize any river or other water to be set apart for the natural or artificial propagation of fish." It is unclear whether this is meant to be restricted to sanctuary and hatchery operations; that is, for the "propagation" of fish in the natural environment. In any event, it does not appear to have been used for the purpose of permitting aquaculture, and is not explicit with respect to the impact on public rights.
- Section 58 authorizes the minister to issue leases and licenses to "plant" or "form" oyster beds, and provides that "the holder of any such license or lease has the exclusive right to the oysters produced or found on the beds within the limits of the licence or lease." The reference to exclusivity, however, is only to the use of the oysters, and the tenure granted under the lease or license might be limited to the stated purpose of oyster culture, which need not exclude public fishing.
- Section 59(1) does provide for the delegation of leasing powers to

provinces,[163] but only for the culture of oysters, and only for waters within the province in question. As with s. 58, the rights accorded do not explicitly remove the public right of fishing in the lease area (except to the extent of according exclusive rights over all oysters, cultured or not). Similarly, the rights do not appear to extend to exclusive use of the site.

None of these provisions provides for the extent of exclusive use and occupation set out in some provincial schemes, nor for the range of operations that must be accommodated, and they are thus unlikely to be effective as a legislative delegation allowing for the resultant intrusion on the public right of fishing. In any event, the legislative authority for the existing MOUs, which purport to carry out the delegation of powers to the provinces, is not based on these provisions. The most recent MOU between Nova Scotia and the federal government is made (by Canada) on the authority of an Order in Council[164] under the *Department of Fisheries and Oceans Act*, which allows the minister, with the approval of the Governor in Council, "to enter into agreements with the government of any province or any agency thereof respecting the carrying out of programs for which the Minister is responsible."[165] It does not seem likely that the "carrying out of programs" would be a sufficiently explicit legislative authority for removal of the public rights in question.[166]

The situation in Prince Edward Island is, of course, quite different. Here the question is not the extent of provincial authority, but simply whether the federal government has sufficient legislative authority to act so as to restrict or exclude the public right of fishing. As was noted earlier, in "Statutory Responses," the 1928 and 1987 MOUs purport to authorize the federal government to issue leases within the province, but an intergovernmental agreement cannot be legislative authority for anything, let alone removal of the public right of fishing. The federal legislative basis for issuing leases is clear for oysters under s. 58 of the *Fisheries Act* (see earlier), but what of other forms of aquaculture? It may be argued, as already noted, that the power under s. 57 is sufficient, but this is by no means clear.

General regulation under the Fisheries Act

If it is accepted that the provincial leases and other tenures may be ineffective in ensuring exclusivity as against anyone exercising a public right of fishing, an alternative solution is to rely upon the federal power over fisheries, and the licensing provisions of the *Fisheries Act*, to impose the necessary removal of public rights in provincially leased aquaculture areas, whether by specific regulation or by inclusion of license terms. Two issues arise: could the federal government validly legislate to provide the necessary protection to the leasehold areas; and second, does the *Fisheries Act* currently provide for the removal of public rights on this basis?

On the first question, the answer would seem to be that the requisite authority does exist. In the early cases, as noted earlier, it was established that the scope of federal legislation could be extremely broad insofar as it affected provincial jurisdiction,[167] even though it was, in tidal waters in the provinces, always limited to the regulation of the public, and not the proprietary rights.[168] The general approach that was applied up to the 1970s and 1980s was focused on a concept of "protection and preservation" as the basis of management, which could be taken as narrowing the federal power as applied within the provinces.[169] As Meany points out, however, this test arose primarily in the context of potential conflicts with provincial powers, and has been found to be less useful where the issue is the breadth of the federal power in the absence of such conflict. Thus, the courts have found that the federal power over fisheries can extend to the establishment of "close times for catching fish not only for the purpose of conservation, but also for socioeconomic purposes, such as allocation."[170] In a similar vein, sector management rules restricting the operations of vessel types to certain areas were found to be valid, even though they were "directed at the socioeconomic conditions of fishermen."[171] In sum, the federal power, where it does not run up against valid provincial jurisdiction, must be seen as quite extensive.[172] If this reasoning is applied to the situation of aquaculture in tidal waters within the province, the first and most obvious point is that the regulation of the public right of fishing has been found to be entirely within the jurisdiction of the federal government, as has already been discussed. This removes the only *constitutional* impediment, and leaves it to the Dominion Parliament to regulate the matter as it sees fit.

The second question, whether the *Fisheries Act* currently provides for the desired removal of the public right, is more problematic. There is no question that the Minister of Fisheries and Oceans has a very high degree of discretion in the issuance or refusal of fishing licenses, and is statutorily authorized to impose a wide range of conditions by regulation, which could almost certainly extend to prohibitions on fishing within specified areas or types of areas (such as leased aquaculture sites). The minister's discretion may be nearly absolute, but some limited challenges may be possible.

In *Alford* v. *Canada*, Brenner J of the British Columbia Supreme Court considered a challenge by commercial fishers to the federal issuance of communal aboriginal fishing licenses, based, *inter alia*, on a claim that the licenses constituted a grant of exclusive fishery without parliamentary authorization, in that neither the Constitution nor statute had given the minister this power.[173] At the heart of this argument was the contention that the public right to fish had been regulated, but never extinguished, by federal legislation (the *Fisheries Act*):

> The plaintiffs say that the public right to fish has not been extinguished in Canada, it has only been regulated, just as the aboriginal right to fish was found to be merely regulated and not extinguished in *R. v.*

> *Sparrow*. . . . The plaintiffs contend that the Minister, by granting an exclusive right to the fishery to aboriginal fishers, has violated the public right to fish and that, assuming the latter is a common law and not a constitutional right, so "privatizing" the public fishery would take nothing less than a statute specifically doing so. In particular, regulation and exercise of ministerial discretion are not enough.[174]

The defendant Attorney General applied to have the action dismissed as disclosing no cause of action, but the court accepted the existence of a public right to fish which "cannot be interfered with except by statute,"[175] and further found that it was "not plain and obvious that the public right to fish had been extinguished by competent federal legislation."[176] The low standard of proof required of the plaintiff on an application for dismissal obviously limits the usefulness of this decision, but the basic approach of requiring some proof of extinguishment of the right in question may be of assistance, particularly when the nature of the current problem is considered. In *Alford*, the plaintiffs were in the position of having to challenge the validity of a minister's positive grant or licenses to others, a difficult task given the breadth of discretion afforded the minister under the *Fisheries Act*. If, however, we assume that a challenge to a *private* aquaculture site arises from a claim by a fisher or fishers against the leaseholder, the following line of argument could be put forward:

- Any private interference with the public rights of fishing or navigation in tidal waters, even by a grantee from the Crown, is an actionable public nuisance *unless* it can be shown that it was explicitly authorized by legislation.[177]
- The provincial lease cannot serve as the requisite authorization, as it is merely a provincial grant of proprietary rights, and action by the Dominion Parliament is required.
- It is for the grantee to show that the interference with the public right was justified by an explicit legislative authorization.[178]

As was argued earlier, the authorization for interference with navigation can be satisfied by the permit under the NWPA, but it is not immediately clear where the grantee could turn to show a federal legislative authorization for exclusive use and occupation that extended to a bar on public fishing rights. That is, the leaseholder needs to be able to show their own positive authorization, not merely a permit restriction separately imposed on the plaintiff (although this may be relevant in a procedural sense – see later in the chapter). Section 23 of the *Fisheries Act* does prohibit the taking of any fish "within any fishery described in any lease or licence."[179] This might be argued to be a restriction on the public right of fishing in *any* leases, federal or provincial, but there are two problems with this approach. First, the section refers to taking fish "within any fishery" contained in such leases,

which would seem to eliminate aquaculture sites as such.[180] Second, in the statutory context it would be difficult to make the case that "leases" did not refer to leases issued pursuant to s. 7 of the Act (discussed earlier).[181]

In sum, while the law is by no means clear at this point, it is entirely conceivable that a private action in public nuisance could be brought against a leaseholder of an aquaculture site in provincial tidal waters where an interference with the right of fishing could be shown, on the grounds that no valid federal legislative authorization supports that interference. The procedural difficulties that might arise from this action are dealt with below.

Waters outside the provinces

As was shown earlier, outside provincial waters federal authority over both the regulatory and the proprietary aspects of aquaculture is unquestioned. This does not, however, entirely dispose of the matter. There remains the possibility, perhaps unlikely, that a challenge analogous to that in *Alford* could be brought against the minister, claiming that the *Fisheries Act* does not provide the necessary explicit statutory authorization for removal or modification of the public right of fishing. Alternatively, as was earlier suggested with respect to tidal waters, a claim in public nuisance might be brought directly against the leaseholder, putting the proof of legislative authorization on them.

These possibilities may lie in the future, but at present the greater difficulty arises from the imprecision attached to the notion of provincial tidal waters, as discussed, for while the legal *status* of the extra-provincial waters is clear, their *location* is not. The various provincial legislative instruments that authorize aquaculture leases do not purport to extend their effect to areas outside the various provinces, and indeed if they did so they would be *ultra vires* the provinces in any event. There has been no delegation of responsibility from the federal level, for the MOUs only refer to authority over leasing and other activities within the provinces.[182] At time of writing, the only apparent method for application of provincial aquaculture laws outside provincial waters is by delegation as specified in s. 9(1) of the *Oceans Act*, which has not been utilized for this purpose:

> 9. (1) Subject to this section and to any other Act of Parliament, the laws of a province apply in any area of the sea
>
> (a) that forms part of the internal waters of Canada or the territorial sea of Canada;
>
> (b) that is not within any province; and
>
> (c) that is prescribed by the regulations.[183]
>
> . . .
>
> (3) For the purposes of this section, the laws of a province shall be applied as if the area of the sea in which those laws apply under this section were within the territory of that province.

The problem of territoriality was briefly addressed in the *Legislative and Regulatory Review* conducted by OCAD, in which it was noted that the provinces "administer the leasing process for all 'near-shore' activities (except in PEI),"[184] a somewhat restrained characterization of a process in which most coastal provinces both *legislate* and *administer* the schemes. Given the acceptance of two distinct geographic areas of responsibility, the Review noted the following problem in a footnote:

> Near-shore is an indefinite term. The federal and provincial governments do not agree on the jurisdictional authority, that is, where provincial authority ends and federal authority starts, with respect to the seabed beyond the tidal mark.[185]

The implications of these statements are clear. First, given that most of the leases in areas of potential doubt are being issued under provincial legislation, it is highly likely that the provinces are issuing leases in areas that are not within provincial jurisdiction. Second, any such leases that are found to be outside provincial waters on the particular facts of a case must be of no force and effect. One response to the apparent untenability of this situation is to rely on the continued cooperation of the two levels of government, neither of which has an interest in pressing the matter. However, this ignores the fact that an action could, as already noted, be brought by private individuals alleging interference with the public right to fish, and the question of location would obviously be relevant to whether *any* authorization (let alone a provincial one) could be raised as a defense.

Consequences and implications

If stability and certainty of tenure is one of the primary objectives of legislative schemes assigning property rights in aquaculture operations, this examination of constitutional issues suggests that the current approach may present a number of difficulties, which can be summarized as follow.

First, for tidal waters inside a province, the provincial power to grant property rights, including leases, over submerged lands does not extend to authorization of any resulting interference with the public right to fish. It is possible that the federal legislative power to restrict fishing for a wide variety of reasons may be sufficient to effectively remove that right for leased aquaculture sites. However, it is also conceivable that in a private action against a leaseholder, the lease itself could be found to be invalid, as an interference with a public right of fishing unsupported by any explicit legislative provision. That is, regardless of the validity of the federal restrictions on the exercise of fishing rights, the grant of the leasehold rights must be legally sound in its own right.

Second, for any waters that are not within the boundaries of a province, the leasehold arrangements as currently structured are ineffective to provide

the desired property entitlements. Provincial legislation cannot have extraterritorial effect in this case, and the limited opportunities for assertion of provincial laws outside the province (as set out in the *Oceans Act*) have not been applied. Accordingly, under current provincial legislation the grant of leasehold rights in any area of marine waters that is outside a province would be invalid, in that such a grant would be *ultra vires* the province. Furthermore, the invalidity of the lease would mean that the leaseholder would have no clear defense against a private claim for interference with the public right of fishing.

The first of these difficulties, dealing with tidal waters in the province, may be more theoretical than practical. The private action in public nuisance can be problematic from a procedural standpoint, in that the plaintiffs must show "special damage" above and beyond that suffered by the public at large, in order to maintain the action without the consent of the Attorney-General. While the law is by no means settled, this has been interpreted in the fisheries context to mean that commercial fishers had no special interest, in that they were asserting infringement of the same general right as other members of the public.[186] In any event, the ability of the federal government to regulate fishing in a broad fashion may be seen as effectively removing the truly public nature of the right in such cases. The territorial issue is, however, more problematic. Given that the actual extent of provincial and federal waters is unclear, a site-by-site resolution could be required in order to determine whether a valid provincial lease was even possible. Furthermore, it seems clear that at least *some* aquaculture leasehold areas will be in federal waters, and for those sites there is little doubt that the leases under which they operate could be successfully challenged, leaving a situation in which some operators would have valid leases and others would not, depending on a finding with respect to the status of particular waters. The legal regime should be able to provide for both certainty and general application to all locations and operators, and, given the problems set out here, it may fail on both counts.

Conclusions: the way forward

The analysis in the preceding sections leads to a number of conclusions and recommendations as to how the development of property rights for aquaculture might be pursued in the future. These fall into two general categories: jurisdictional gaps and the need for federal legislation; and the value of a principled approach to any potential expansion of property rights beyond their current status.

Jurisdictional gaps and the need for federal legislation

While the focus of many observers is on improving the scope and intensity of property rights available to aquaculturists, the review conducted in this

chapter suggests that the more immediate problem is ensuring the legal validity and effectiveness of those rights that already exist. The potential jurisdictional gaps and other problems with the assignment of property rights in aquaculture, as set out in the preceding sections, point to the necessity for federal aquaculture legislation, for a number of reasons. First, the present reliance on provincial legislative schemes leaves leasehold arrangements subject to a degree of insecurity and vulnerability to legal challenge. Within provincial boundaries, leases in tidal waters could be subject to private claims for interference with the public right of fishing, in the absence of federal legislation explicitly authorizing such interference. As was noted earlier, it is by no means certain that such claims would succeed, but in waters beyond provincial boundaries the situation is clearer, and more difficult.

The provincial acts under which most of the current leases are issued do not purport to extend, nor could they validly extend, to marine areas outside the boundaries of the provinces. This would not present an insuperable problem were it not for the fact that the definition of federal and provincial marine areas, while well set out in some areas, is less than clear in many others. If the validity of a lease is to depend upon whether the waters in question are ultimately defined as federal or provincial, the following choices emerge. A province could decide to issue leases only in areas definitively settled as falling within provincial boundaries, and leave out of consideration any waters whose status is in doubt, letting the federal government act in those areas if it wished. It could also, as seems to be the current unstated practice, simply issue the leases in all requested areas, in the hope that they are not challenged. Neither option is particularly sound: one leads to the elimination of potentially valuable sites, while the other exposes the leaseholders to the risk of losing their investment as a result of the *ultra vires* character of their provincial lease.

It might be argued that this problem could be addressed by federal aquaculture legislation dealing only with federal waters. That is, provinces would continue to legislate for leases within their boundaries, and a federal leasehold system would be in place in adjacent waters beyond the provincial boundaries. This is a less than optimal solution, however, in that it would lead to a patchwork approach to the granting of rights in the same region, and would still not address the problem of identifying all sites as either federal or provincial waters. Nor is the enactment of a federal scheme that would apply to all marine waters a viable approach. While it may provide the prospect of uniformity, the federal government does not have jurisdiction to make grants of private property rights in provincial marine areas (even though it can control the *public* right of fishing in those waters). As was noted earlier, action by both levels of government is needed to make such grants effective.

There are, however, legislative options that could satisfy the requirements of uniform (and constitutional) application to all waters and operators within a region, while at the same time respecting the provincial jurisdic-

tion and recognizing that the provinces have in fact been the lead players in the promotion and management of aquaculture. First, the federal government could act under the *Oceans Act*, ss. 9 and 26, to provide for the application of provincial laws in marine areas outside the provinces. Regulations would be required for the areas adjacent to each province, and would in essence designate the relevant provincial aquaculture and leasing schemes as applicable to those waters. This would have the advantage of ensuring a uniform system across a geographical area, with no uncertainties as to whether waters were federal or provincial.[187] There are, however, potential disadvantages to this approach. As discussed earlier, it could be subject to challenge as an impermissible delegation of legislative authority to the provinces. Alternatively, it might be argued that a regulatory power to allow for the application of provincial laws is not a sufficiently explicit legislative limitation on the public right to fish, opening up the potential for private challenges, as discussed earlier.

There are also broader policy reasons to reject this option. This chapter has not been concerned with the regulation of aquaculture (see Chapter 3), but rather with the assignment of property rights. Given that the proprietary aspect also depends on legislation, however, there would seem to be benefits in integrating the regulatory requirements in one coherent scheme with the critical property elements. This can best be accomplished by the development of a federal aquaculture act, a step suggested by Wildsmith in 1985.[188] In the draft federal Act which he proposed at that time, the focus was on the regulatory aspects, but he included the following proposed provision for empowering the federal government to issue leases:

> The Governor-in-Council may make regulations . . .
> (g) respecting the terms of occupation, including leases, of marine or tidal areas outside the boundary of any province for the conduct of aquaculture, including exclusive rights of the occupier, lease fees, and performance standards.[189]

This draft section highlights one of the limitations of federal legislation, with nothing more; for purposes of the proprietary grants (as opposed to regulation) it can only apply outside the provinces, leaving in place the problems of uncertainty (as to the status of waters) and lack of uniformity within the same region. Nonetheless, federal legislation could, at a minimum, put in place a general authorization for the grant of leasehold entitlements that interfere with the public right of fishing, in all marine waters. Within provincial boundaries, this could be implemented by the simple grant of a federal permit to leaseholders, in the same way that a permit under the NWPA deals with the question of interference with navigation issue in provincial waters. That is, the federal legislation would not be effecting the grant, but rather would be authorizing the interference with the public right of fishing, consequent on the provincial grant.

For federal waters, the legislation could provide for the issuance of leases but delegate the operation of the scheme to the provinces. In order to maintain the diversity of provincial approaches, and to ensure regional uniformity, it could be desirable to establish regulations for each province, adopting by reference the provincial lease arrangements in place within that province. The administration of the leases, which would be consistent with those applicable in adjacent provincial waters, could be delegated to the province. This approach would go one step beyond that suggested under the *Oceans Act*, in that the relevant provincial provisions would actually be incorporated into federal regulations by reference, making it clear that only the administration of the scheme (in federal waters) was being delegated to the provinces.

Potential modification of property rights

The arguments presented in this chapter suggest that there may be more pressing issues related to property entitlements in aquaculture than the immediate expansion of those interests: there is sufficient reason to believe that the current system of entitlements is founded on doubtful ground with respect to both constitutional jurisdiction and common law doctrines. Nonetheless, there is a legitimate debate as to whether the existing forms of property entitlements for aquaculture operations are adequate to the functional requirements of the industry, in particular because of the divergence in current provincial approaches. The general examination in the section "Statutory responses" (p. 122) illustrates that, while the provinces have all moved to grant *some* degree of property entitlement in aquaculture sites, these arrangements vary with respect to some of the key descriptors of a property entitlement, noted in the introduction to this chapter: exclusivity, duration, transferability and assignability, and enforceability.[190] Complete uniformity in the provincial approaches to property rights (and even regulation) is not necessary, but a higher level of consistency across jurisdictions might avoid the imposition of comparative disadvantages on aquaculture operators, or alternatively on other resource users, in some provinces.

It must be remembered, however, that this debate cannot be limited to the functional requirements of the aquaculture industry, as was noted at the outset of this chapter. The existence of other users, with long-standing and potentially enforceable rights of their own over the areas in question, means that the debate should be focused on the appropriate balance to be sought between the private and public rights, and simple recourse to full privatization is unlikely to achieve this outcome. While the introduction of more extensive private rights need not lead inevitably to privatization of the resource base, it is important to remember that non-aquaculture users of these areas are likely to view moves in this direction as a threat to their legal rights, and to continued equitable access to important resources.[191] The solu-

tion will lie in part in ensuring that open, transparent and *negotiated* processes are used where public rights are, inevitably, reduced or compromised by the introduction of new private rights.[192]

Even before we consider the issues of equity and process, however, there is a need to develop the independent case for enhancement of private property interests in a common resource; in the absence of a demonstrated need to increase the private role, the existing interests of other users would prevail by default. The term "property" in this context denotes a highly variable mix of the characteristics listed above, especially exclusivity, assignability and duration. General assertions that more property rights are needed will not be sufficient; it will be necessary to break down the functional requirements of different types of aquaculture operations with reference to the multiple characteristics of "property" rights. This has not, to date, been a feature of the public debate, but a systematic application of such functional criteria, based on the actual needs of the industry, will at least provide a principled basis for consideration of the industry's needs, and a starting point for the comparison of those requirements with the interests of the wider community of resource users.

Notes

1 Department of Fisheries and Oceans, *Federal Aquaculture Development Strategy* (Ottawa: Minister of Supply and Services, 1995) at 1 [Federal Strategy].

2 See the section "Common law property rights and aquaculture operations" (p. 118).

3 B. H. Wildsmith, *Aquaculture: The Legal Framework* (Toronto: Emond-Montgomery, 1982) at 93. Wildsmith did note the existence of limited exceptions relating to some oyster beds.

4 *Ibid.* at 95, 233–235.

5 See the section "Statutory responses" (p. 122). For a summary of the initial stages of legislative development in the provinces, see S. Coffen and A. Smillie, "The Legal Framework for Canadian Aquaculture: Issues in Integrated Ocean Management," in D. VanderZwaag, ed., *Canadian Ocean Law and Policy* (Toronto: Butterworths, 1992) at 51–63.

6 Office of the Commissioner for Aquaculture Development (OCAD), *Legislative and Regulatory Review of Aquaculture in Canada* (Ottawa: Department of Fisheries and Oceans, 2001) at 18 [OCAD Legislative Review]. The same passage goes on to highlight the need for sufficient duration of tenure, and for the development of a federal approach to leasing (citation omitted):

> Part of the uncertainty relates to the lack of long-term security for various forms of authorization and licensing of aquaculture activities. This is a deterrent to private investment in aquaculture. The lack of a clear federal leasing policy and regulations (or delegation of administrative responsibilities to the provinces) impedes development of the aquaculture sector, particularly as interest increases in developing areas further offshore.

7 *Aquaculture in Canada's Atlantic and Pacific Regions*, Report of the Standing Senate Committee on Fisheries (Ottawa: Senate of Canada, 2001) at 28 [Senate Report 2001]:

> Generally speaking, aquaculturists and their representatives told us they needed to have access to new sites, more secure tenures, and longer term approaches to leasing. Lease terms were deemed to be too short; the lack of security of tenure was said to make financing difficult to obtain.

See also *The Federal Role in Aquaculture in Canada*, Report of the Standing Committee on Fisheries and Oceans (Ottawa: House of Commons, 2003) at 28 [Commons Report 2003].

8 A. Reiser, "Defining the Federal Role in Offshore Aquaculture: Should It Feature Delegation to the States?" (1996–1997) 2 *Ocean and Coastal Law Journal* 209 at 212. See also A. Scott, "Property Rights and Property Wrongs," (1983) 16(4) *Canadian Journal of Economics* 555, where the characteristics of property rights are defined as exclusivity, divisibility, enforceability and transferability.

9 OCAD Legislative Review, *supra* note 6 at 22.

10 R. Neill, *Fencing the Last Frontier: The Case for Property Rights in Canadian Aquaculture* (Halifax, NS: Atlantic Institute for Market Studies, 2003) at 2. The debate over the appropriate use of property rights is not confined to aquaculture, but has also been a feature in the management of capture fisheries. For a review of this issue, see R. Shotton (ed.), *Use of Property Rights in Fisheries Management*: *Proceedings of the FishRights99 Conference* (Rome: FAO Fisheries Technical Paper 404, 2000).

11 Property rights regimes in the natural resource context have been categorized as falling within four main types: private property, with individual ownership; common property, with collective ownership; true open access, with no property entitlements; and state ownership. See the discussion at P. Knight, "Oceans Policy and Property Rights: The Case for Common Property Regimes," (2002) *New Zealand Surveyor* 19 at 21. As will be seen in the following sections, the property regimes in place for sites of interest to aquaculture range from private property (as with some inland freshwater areas) to state ownership (for unallocated submerged lands in tidal waters), and include combinations of the two, where private property rights are assigned by lease but the ownership remains with the Crown.

12 Commons Report 2003, *supra* note 7 at 28. See also Senate Report 2001, *supra* note 7 at (iii): "One of the challenges faced by government now and in the years ahead will be to achieve a delicate balance between various competing users of the marine environment (a common property resource)." For discussions of the conflicts between and among users, see also Reiser, *supra* note 8 at 213–214; and B. Vestal, "Dueling with Boat Oars, Dragging through Mooring Lines: Time for More Formal Resolution of Use Conflicts in States' Coastal Waters," (1999) 4 *Ocean and Coastal Law Journal* 1 at 2–3, 6–10.

13 The challenge is described by Reiser, *supra* note 8 at 213, as follows:

> It is crucial, therefore, that the government's process for issuing the lease or license itself protects the sea farmer from conflicts with other marine uses. The statute authorizing the conveyance of a lease of public waters or submerged lands for aquaculture should identify other public and private uses of the marine environment that are potentially affected by aquaculture activities. It should then provide a fair but efficient process for information to be brought forward about those uses in the area proposed for use as a sea farm, allowing the leasing agency to make a balanced and informed decision in which other users believe they have been fairly considered.

See also the discussion at Commons Report 2003, *supra* note 7 at 28–31.

14 See the examination of social impacts and equity of access in the introduction

of commercial aquaculture in the Bay of Fundy, in J. Marshall, "Landlords, Leaseholders and Sweat Equity: Changing Property Regimes in Aquaculture," (2001) 25 *Marine Policy* 335. See also J. Phyne, "Capitalist Aquaculture and the Quest for Marine Tenure in Scotland and Ireland," (1997) 52 *Studies in Political Economy* 73.

15 Prior to the development of the provincial legislative regimes, there was ambiguity respecting the property rights of aquaculturists in the plants and animals contained within their facilities. This issue has been addressed in most provinces by statutory provisions similar in effect to that found in s. 60 of the Nova Scotia *Fisheries and Coastal Resources Act*, S.N.S. 1996, as amended, and will not be addressed further in this chapter:

> 60. All aquatic plants and animals of the species specified in an aquaculture license or aquaculture lease in or on the licensed or leased area, except free-swimming or drifting flora or fauna not enclosed by a net, pen, cage or enclosure, are the exclusive property of the holder of the license or lease.

16 Although the situation under civil law is not addressed in this chapter, the current position in Québec, with respect to the issuance of leases and the rights of aquaculturists is similar to that which has developed in the common law provinces: see Commons Report 2003, *supra* note 7, dissenting report of the Bloc Québécois at 88.

17 It is assumed that aquaculture operations conducted on land, in tanks or similar facilities, will be subject to the normal regime for property in the jurisdiction, and raise no special issues of relevance to this study. Such operations would, of course, still require an aquaculture license under provincial legislation (see later in this section).

18 See, for example, the judgment of Ritchie CJC in *The Queen* v. *Robertson* (1882) 6 S.C.R. 52 at 117. This presumption could, however, be rebutted, as was held in *Wishart* v. *Wyllie*, 1 Macq. H.L. Cas. 389, in a passage cited with approval by Ritchie *ibid.*:

> It may be rebutted, but, generally speaking, an imaginary line running through the middle of the stream is the boundary; just as if a road separates two properties, the ownership of the road belongs half-way to one and half-way to the other. It may be rebutted by circumstances, but if not rebutted, that is the legal presumption.

See also *R.* v. *Lewis* [1996] 1 S.C.R. 921 at para. 56.

19 See the discussion at G. V. La Forest and Associates, *Water Law in Canada: The Atlantic Provinces* (Ottawa: Information Canada, 1973) at 234. As La Forest notes (at 200–201), the ownership rights of the riparian landowner are distinct from their "riparian rights" (including rights of access, drainage and accretion, and some rights relating to flow, quality and use). The most important distinction is that the riparian owner "has certain rights respecting the water therein whether or not he owns the bed" (citation omitted).

20 M. Walters, "Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada," (1998) 23 *Queen's Law Journal* 301 at 313.

21 *The Queen* v. *Robertson*, *supra* note 18 at 133, per Strong J. See also *R.* v. *Nikal* [1996] 1 S.C.R. 1013 at para. 1053.

22 *Friends of the Oldman River Society* v. *Canada (Minister of Transport)* [1992] 1 S.C.R. 3 at para. 76.

23 La Forest, *supra* note 19 at 179.

24 *Ibid.* at 190.

25 *R.* v. *Nikal*, *supra* note 21 at paras. 67–72.

26 See the discussion in Walters, *supra* note 20 at 325–326, where this view is advanced.

27 This is precisely the distinction noted by the Supreme Court of Canada in the *Provincial Fisheries* case (*Re Provincial Fisheries* (1895) 26 S.C.R. 444 at 527):

> That the Crown in right of the provinces could grant either the beds of such non-tidal navigable waters or an exclusive right of fishing is, I think, clear. Before Magna Charta the Crown could grant to a private individual the soil in tidal waters with the fishery as an incident to it, or the exclusive right of fishing as distinct from the soil. Then, as the restraint imposed by Magna Charta does not apply to any but tidal waters, there is no reason why the prerogative of the Crown to make such grants in the class of waters now under consideration, large navigable lakes and non-tidal navigable rivers, should not be exercised now as freely as it could have been with reference to tidal waters before Magna Charta.

28 See the description of the pre-Magna Carta position in Coulson and Forbes, *Water Law* (1902), as cited in *Donnelly* v. *Vroom et al.*, (1842) 3 N.S.R. 97 (N.S.S.C.) at 589. For a longer discussion of the issues addressed in this section, see P. Saunders, "Marine Property Rights and the Development of Jurisdictional Regimes: Private Rights, Communal Tenure and State Control," in D. Vickers, ed., *Marine Resources and Human Societies in the North Atlantic* (St. John's: Memorial University, 1997).

29 C. D. Hunt, "The Public Trust Doctrine in Canada," in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981) at 153.

30 *A. G. British Columbia* v. *A. G. Canada* (1913) 15 D.L.R. 308 (P.C.) at 317, per Viscount Haldane, Lord Chancellor [*Re. B C Fisheries*].

31 (1842) 2 N.S.R. 97 (N.S.S.C.) at 99: "There is no pretence for saying the crown could make any such grant. It might as well grant the air around the cove. These waters, fluctuating and in a constant state of change, are not the subject-matter of a grant."

32 *Ibid.* at 99–100:

> [T]he crown could not grant a general fishery – a grant to support that must be as old as the reign of Henry II, and therefore beyond the time of legal memory, for, by Magna Charta, and the second and third charters of Henry III, the king is expressly precluded from making fresh grants.

33 (1907) 40 N.S.R. 585 (N.S.S.C.) at 588:

> It appears . . . that when the defendants dug clams on the flats they did so merely in exercise of a right which belonged to them in common with all other members of the public . . . the question of ownership of the soil, as well as possession thereof, and user, with, or without, leave, seems to me to be immaterial. This right could also be maintained against the Crown, where it stood as owner.

34 (1920) 51 D.L.R. 495 (N.B.S.C. – A.D.) at 497 (emphasis added). The case was somewhat complicated by the fact that the lessor city acquired its title by virtue of its charter, confirmed by an act of the provincial legislature, and had the power to regulate and control fisheries in the area in question. In this sense, both aspects of the legislative power were engaged: the power to make an explicit grant of an exclusive fishery (which was not done on the facts); and the power to regulate and control the public right to fish (as exercised by the city under statute). *Ibid.* at 497, 500–502.

35 Wildsmith, *supra* note 3 at 106.

36 [1908] 2 Ch. 139 at 165–166. It should be noted that the position in the

United States evolved quite differently. There the doctrine of the public trust imposed limits on the alienability of submerged lands to protect dominant public interests, and a critical distinction from the British position was that the list of public trust interests was capable of expansion. See the discussion at Hunt, *supra* note 29, *passim*.

37 See, for example, *Foster* v. *Warblington Urban Council* [1906] 1 K.B. 648 (C.A.). The plaintiff's actions in placing clams on a section of foreshore belonging to another, but over which the plaintiff had prescriptive rights, was seen by Stirling LJ as "totally different from anything that he could have done simply as a member of the public exercising the right of fishing" (at 671). See the discussion of this case at Wildsmith, *supra* note 3 at 106, 108–109. The view expressed in *Foster* was endorsed at the trial level in *Donnelly* v. *Vroom*, which referred to the oysters in *Foster* as the "plaintiff's property," in contrast to the clams in *Donnelly*, *supra* note 28 at 592.

38 This assumes that the "captured" property inside could be designated as private property. This argument would be separate and distinct from any claim that the pen might be an impediment to fishing for wild species within the parameters of the public right.

39 R.S.N.L. 1990, c. A-13, as amended [*Aquaculture Act*].

40 S.N.L. 1991, c. 36. According to the policy of the Department of Fisheries and Aquaculture, the Crown lands lease application should be presented with the application for an aquaculture license.

41 *Ibid.* at s. 3: "The minister may issue a lease to a person of an area of Crown land for the period and upon those terms and conditions and subject to the payment of those rents, royalties or other charges that the minister may set out in the lease."

42 *Ibid.* at s. 4(1) (less than 20 hectares) and 4(2) (greater than 20 hectares).

43 *Ibid.* at s. 6(1): "The minister may issue a licence for occupancy of an area of Crown land subject to those terms and conditions and subject to the payment of those fees, rentals and other charges that the minister may set out in the licence."

44 See the Government of Newfoundland and Labrador website, http://www.fishaq.gov.nl.ca/aqua/licencing.stm#Application (accessed 8 August 2005).

45 See Government of Newfoundland and Labrador website, http://www.env.gov.nl.ca/env/lands/cla/aquaculture_leases-licences.html (accessed 8 August 2005).

46 *Aquaculture Regulations under the Aquaculture Act*, 1996 (O.C. 96-939).

47 *Aquaculture Act*, *supra* note 39 at s. 6(6)–(8).

48 This even extends to the protection of private property rights in the product of operations found in sites, which is found in s. 5 of the *Aquaculture Act*.

49 *Supra* note 15, s. 44(2). On other lands, by s. 44(1), a license is still required. Under s. 44(3), the grant of a license (without a lease) "carries with it the exclusive right to possession of the water column and sub-aquatic land described in the licence." The purpose of this section would seem to be to ensure that the exclusive possession granted by the *lease* on Crown lands is still available to an operator on private submerged lands, where the title would not otherwise extend to the water column.

50 The restriction to "aquacultural purposes" could raise some difficulties of interpretation. Does it mean that others may be excluded only to the extent necessary to conduct aquaculture, or is it more broadly intended to allow for true exclusivity, so long as the purpose of exercising the exclusion is to conduct aquaculture?

51 The purpose of this section would seem to be to ensure that exclusive possession of the water column and submerged lands granted by the *lease* on Crown lands is still available to an operator on private lands, where the title would not otherwise extend to the water column, and where exclusion from the submerged areas might also be in doubt. It is unclear why the exclusivity provision for licenses does not have the same restriction to "aquacultural purposes" as is found

in the lease provision, *supra*. In fact, it is not clear why a separate provision was required for the lease at all, as any aquaculture operator would require a license, and would therefore obtain the desired exclusivity in any event.

52 S.N.B. 1988, c. A-13, as amended [*Aquaculture Act*].

53 There is no similar requirement for a lease, but given that anyone carrying out such activities on Crown lands would be a trespasser, the practical effect is the same.

54 Further specification of requirements for transfer and subletting of leases are set out for the Bay of Fundy area in the *Bay of Fundy Marine Aquaculture Site Allocation Policy* (Government of New Brunswick, 2000) [Bay of Fundy Policy] at 6–7.

55 *Aquaculture Act*, *supra* note 52: by s. 25(6) the exclusive right does not include mineral rights, and by s. 25(7), the lease may make provision for access by adjacent landowners.

56 *Ibid.* s. 26(1), (3).

57 According to the Department of Agriculture, Fisheries and Aquaculture (DAFA), AOPs are usually issued "prior to the issuance of a lease," as a temporary measure. See DAFA Licensing Policy. Online. Available http://www.gnb.ca/0177/01770002-e.asp (accessed 8 August 2005).

58 R.S.B.C. 1996, c. 149, s. 13.

59 R.S.B.C. 1996, c. 245 [*Land Act*]. The responsibility for processing tenure applications formerly rested with a Crown Corporation, Land and Water British Columbia, Inc. (LWBC), but in 2005 this role was transferred to the ILMB. See the description of the ILMB mandate at http://ilmbwww.gov.bc.ca/ilmb/index.html. As of time of writing, the various policy documents were, however, maintained on the LWBC website at http://lwbc.bc.ca/.

60 Other forms are available in the act, but those available to aquaculturists are limited in a policy document issued by the Ministry of Agriculture and Lands: *Crown Land Use Operational Policy: Aquaculture* (Government of British Columbia: 2005) at 5–6. Online. Available http://www.lwbc.bc.ca/011wbc/policies/policy/land/aquaculture.pdf.

61 *Land Act*, *supra* note 59, s. 14(1)

62 *Crown Land Use Operational Policy: Aquaculture*, *supra* note 60 at 5.

63 *Land Act*, *supra* note 59, s. 39.

64 *Crown Land Use Operational Policy: Aquaculture*, *supra* note 60 at 5. See also the following clause from a 1988 License of Occupation (on file with author), which is consistent with the policy:

> (9.05) This license shall not entitle the Licensee to exclusive possession of the Land and the Owner [the Crown] may grant licenses to others to use the land for any purpose other than permitted herein, so long as the grant does not materially affect the exercise of the Licensee's rights hereunder. The question of whether a grant materially affects the exercise of the Licensee's rights hereunder shall be determined by the Owner at his sole discretion.

65 *Crown Land Use Operational Policy: Aquaculture*, *ibid.* at 5: "The standard form of Crown land tenure for a shellfish or finfish aquaculture operation is a 20-year licence of occupation."

66 *Ibid*. at 6. The *Land Act*, *supra* note 59, s. 38, contains only the essentials: "The minister may issue a licence to occupy and use Crown land, called a 'licence of occupation', subject to the terms and reservations the minister considers advisable."

67 *Crown Land Use Operational Policy: Aquaculture*, *ibid.* at 6: "Crown land leases are not typically used for aquaculture tenure and where they are, it is more common for shellfish operations than finfish farms."

68 *Ibid.* at 20–22. Both leases and Licenses of Occupation can be assigned or "subtenured," which refers to a grant of an interest in the land by the primary tenant to another party, without a full transfer of the right.

69 The origins of this situation date back to a 1928 agreement between the federal and provincial governments in which it was "agreed that the federal government would be responsible for the control, administration, development and improvement of the oyster or mollusk industry, as well as for conducting surveys and issuing leases." *The Prince Edward Island Report: Report of the Standing Committee on Fisheries and Oceans No. 8* (December 1998). This agreement was subsequently confirmed and updated in the *1987 Agreement for Commercial Aquaculture Development between the Government of Canada and the Government of Prince Edward Island* [1987 PEI MOU] at s. 5.1 A, for mollusks, and salmonids and other finfish were added to the agreement by s. 5.1 C: "Canada shall licence and issue leases for salmonids and other fin fish covered under this Agreement and its Amendments."

70 *Aquaculture Leasing Policy Prince Edward Island* (Ottawa: DFO, 2005 ed.) [PEI Policy 2005]. The leasing policy (at 6) states that leases are issued under "the authority" of the 1928 MOU, but, as noted *ibid.*, the authority for species other than mollusks comes with the 1987 agreement. The policy also notes (at 6) that for "more detail on the rights and obligations of a leaseholder, one can reference the Fisheries Act and Regulations, the Management of Contaminated Fisheries Regulations (MFCR) and the 1928 Agreement." No precise reference is included. For the purposes of this section, the validity of leases issued under the policy is assumed, and the implications of the vague legislative basis will be dealt with in "Constitutional issues" (p. 129).

71 *Ibid.* at 7. Under the previous policy, in effect until 2005, these operational phases were dealt with under two distinct leases, the developmental lease (which offered a range of durations, but typically were for three to five years), and the long-term lease (for up to twenty years). See *Aquaculture Leasing Policy Prince Edward Island* (Ottawa: DFO, 2000–2001 ed.) at 5–6.

72 PEI Policy 2005, *supra* note 70. Licenses are available for the collection of seed, but are not considered to be leases.

73 1987 PEI MOU, *supra* note 69 at s. 5.1 B and D.

74 PEI Policy 2005, *supra* note 70 at 25–26.

75 *Ibid.* at 6.

76 1987 PEI MOU, *supra* note 69 at s. 5.1 B. The focus is stability and security of tenure:

> In recognition of the need to convey property rights and stability to licensing, both Canada and the Province agree that appropriate tenure should be granted subject to conditions to be determined by the Coordinating Committee.

77 PEI Policy 2005, *supra* note 70 at 9–11.

78 The main features of the process are as follow:

1. Prior to making a decision on an application, the minister *shall* consult with a number of specified departments and agencies (s. 47(a)) and "*may* refer the application to a private sector, regional aquaculture development advisory committee for comment and recommendation" (s. 47(b) – emphasis added)
2. After the completion of the required consultation, the minister may: issue the license or lease, as submitted or with conditions; reject the application; or refer the application to a public hearing (s. 48). If a hearing is conducted, the matter then reverts to the minister for decision (s. 50).

See the description of the current policy on licensing and leasing of the Government of Nova Scotia. Online. Available http://www.gov.ns.ca/nsaf/aquaculture/radac/index.shtml (accessed 8 August 2005).

79 *Ibid*. Recommendations of the RADAC are forwarded to the minister for consideration. Where an RADAC is not in place in a region, the intent is to use the public hearing process as a means of obtaining community input on the decisions.

80 The general duty to consult, found in s. 35(1), is vague and discretionary: "The Minister shall undertake such public consultation in relation to aquaculture as the Minister considers appropriate or as is required by or in accordance with the regulations."

81 Bay of Fundy Policy, *supra* note 54 at 4–5.

82 The potential impact of the ABMA scheme is significant. The policy states that the ABMAs will take the form of written contractual agreements, and that they will address such issues as technical aspects of management and day-to-day operations: *ibid.* at 5.

83 *Land Use Policy: Aquaculture*, *supra* note 60 at 13:

> Referrals are a formal mechanism to solicit written comments on an application from recognized agencies and groups. Referrals are initiated as per legislated responsibilities and formal agreements developed with other provincial and federal government agencies. Referrals may also be used to address the interests of local governments and First Nations.

84 *Ibid.* at 14–15.

85 These responsibilities, which are dealt within the next section, "Constitutional issues," and in Chapter 3 by VanderZwaag, Chao and Covan in this volume, may include the following: approval of alteration or disruption of fish habitat; approval for deposits of substances deleterious to fish or fish habitat; environmental assessment requirements; and authorization of obstructions to navigation.

86 See Memorandum of Understanding on Aquaculture Development, Canada–Nova Scotia (2002) [Canada–NS MOU 2002]; Canada–New Brunswick Memorandum of Understanding on Aquaculture Development (1989) [Canada–NB MOU 1989]; Canada/Newfoundland Memorandum of Understanding on Aquaculture Development (1988) [Canada–NL MOU 1988]; and Canada–British Columbia Memorandum of Understanding on Aquaculture Development (1988) [Canada–BC MOU 1988]. The Prince Edward Island MOU is addressed *supra*, note 69. See also the discussion of the MOUs and their role in delegation of regulatory responsibilities at D. VanderZwaag, G. Chao and M. Covan, "Canadian Aquaculture and the Principles of Sustainable Development: Gauging the Law and Policy Tides and Charting a Course – Part II," (2002–2003) 28 *Queen's Law Journal* 529 at 532–536.

87 Senate Report 2001, *supra* note 7 at 28:

> The approval process for site leases is governed by Memoranda of Understanding (MoUs) between the federal and provincial governments. The Memoranda . . . were intended to establish a "one-stop shop" approach for lease applicants. . . . Except in the case of Prince Edward Island, the provinces were said to be the lead agency, and each has developed its own policies and site-specific approval process.

88 Even in areas where legislation is not required, as, for example, where the provincial Crown has full authority to make the necessary grants and there is no actual conflict with fishing or navigation rights, a clearly defined regime is desirable for the purpose of providing certainty and transparency to the process.

89 *Constitution Act, 1987* (UK), 30 of 31 Vict., C.3, reprinted in R.S.C., 1985, App. II, No. 5.

90 See Chapter 3 by VanderZwaag, Chao and Covan in this volume on the scope of provincial and federal regulatory control; and for a full discussion of the current application of regulatory controls under provincial jurisdiction, see VanderZwaag *et al.*, *supra* note 86. For a review of the extent of federal powers to regulate non-proprietary aspects of aquaculture, see B. Wildsmith, *Federal Aquaculture Regulation*, Canadian Technical Report of Fisheries and Aquatic Sciences No. 1252 (Ottawa: Department of Fisheries and Oceans, 1984), and in particular 3–9, 27–52. With respect to provincial regulatory powers and their interaction with federal powers, see Wildsmith, *supra* note 3 at 34–37, 53–57. See also A. Scott, "Regulation and the Location of Jurisdictional Powers: The Fishery," (1982) 20 *Osgoode Hall Law Journal* 720, for an analysis, in the context of fisheries, of the "optimal" assignment of federal and provincial jurisdiction over a common property resource.

91 In 1982, Wildsmith, *supra* note 3 at 71–81, set out an extensive list of federal powers under s. 91 of the *Constitution Act*, including fisheries, public property, navigation and shipping, taxation, and criminal law. See also OCAD Legislative Review, *supra* note 6 at 15–17. The provincial powers under s. 92 derive primarily from jurisdiction over property and civil rights.

92 *Constitution Act, 1867*, *supra* note 89 at s. 92.

93 For a discussion of the impact of provincial powers in the practical regulation of aquaculture within the provinces, see Senate Report 2001, *supra* note 7 at 11:

> The scope of permissible provincial regulation includes the following: the management and use of Crown land; the licensing of aquaculture operations; the setting of standards for the business of aquaculture and those who conduct it; local marketing and consumer protection; waste management; and labour relations and employment standards ... at the local level, regional districts and municipalities administer zoning bylaws.

94 *Ibid*. at s. 91. It should also be noted that the "public property" of the federal Crown extends to all areas outside of any province, meaning that in significant marine areas the federal government has complete proprietary jurisdiction.

95 In this approach, the constitutional jurisprudence mirrors the separation of these two aspects of entitlements to marine space in common law, as described earlier, and it is perhaps not surprising that a number of the cases that have helped to establish the general position have arisen in the context of fisheries.

96 *Supra* note 18.

97 *Ibid*. at 111. This approach was affirmed in *Venning* v. *Steadman* (1884) 9 S.C.R. 206 at 214–215, per Strong J. The structure of the analysis in this section has drawn on the more extensive review of the early cases found in Wildsmith, *supra* note 3 at 37–53. It should be noted that in an earlier case, *Robertson* v. *Steadman* (1876) S.C.R. 621 at 633–634, the Supreme Court did uphold a federal grant of a "lease" of a fishery in non-tidal waters in New Brunswick. However, that decision was dealing with a grant that did not profess "to give ... an exclusive right of fishery," and the Court found it unnecessary to determine the nature and extent of the *property* rights arising under the lease as between the plaintiff and defendants, noting that it might be the case that "the only liability incurred by a person for fishing without permission, within the bounds of the lease, would be a prosecution for a penalty ... [under the Act]." As such, it seems to stand as an affirmation of the federal legislative power to regulate fisheries, despite some language in the case that might be taken to refer to the grant of proprietary rights.

98 *Robertson*, *supra*. note 97 at 115.
99 *Ibid.*:

> There is no connection whatever between a right of passage and a right of fishing. A right of passage is an easement, that is to say, a privilege without profit, as in the common highway. A right to catch fish is a *profit à prendre*, subject no doubt to the free use of the river as a highway and to the private rights of others.

100 *Ibid.* at 119–120.
101 *Ibid.*:

> I cannot discover the slightest trace of an intention on the part of the Imperial Parliament to convey to the Dominion Government any property in the beds and streams or in the fisheries incident to the ownership thereof, whether belonging at the date of the confederation either to the provinces or individuals, or to confer on the Dominion Parliament the right to appropriate or dispose of them.

102 *Provincial Fisheries*, *supra* note 27 at 519.
103 *Ibid.* at 521–522. The impact of this case on the common law with respect to leasehold grants was considered earlier.
104 *Ibid.* at 514–515.
105 *Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia* [Ontario Fisheries Reference] [1898] A.C. 700 at 712, per Lord Herschell:

> Their Lordships are of the opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noted the distinction which must be borne in mind between rights of property and legislative jurisdiction. . . . Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment.

106 The nature of this interaction, and the outer limits of the federal power, were set out by Lord Herschell in the Ontario Fisheries Reference, *ibid.* at 712–713:

> At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. . . . The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute nature of the power of legislation conferred. . . . If, however, the Legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by s. 91.

107 See OCAD Legislative Review, *supra* note 6 at 15–17.
108 *Provincial Fisheries*, *supra* note 27 at 514–515:

> At the time of confederation the beds of all lakes, rivers, public harbours and other waters within the territorial limits of the several provinces which had not been granted by the Crown were vested in the Crown as representing the provinces respectively. . . . The ungranted beds of all streams and waters were therefore lands belonging to the several provinces in which the same were situated . . . subject only to the exception respecting existing trusts and interests mentioned in that section, and excepting the beds of

public harbours, which by operation of section 108, were vested in the Dominion.

109 La Forest, *supra* note 19 at 8 (citation omitted):

> Section 91(1A), which gives the Dominion exclusive legislative power over its public property, is a most important source of federal power in relation to the development of water resources. In the first place, the Dominion may do whatever it wishes with its property, and accordingly where it owns land it may . . . make any legislation concerning the property even if such legislation would ordinarily fall within the provincial ambit. So long as it retains title, the Dominion may lease the land and control its development.

110 *Attorney-General for British Columbia* v. *Attorney-General for Canada* (*BC Fisheries)* (1913) 15 D.L.R. 308 at 311. These measures were incorporated in the Orders-in-Council effecting the union.

111 *Ibid.* at 314–315:

> [Fishing rights] are, in their Lordships' opinion, the same as in the ordinary case of ownership of a lake or river bed. The general principle is, that fisheries are in their nature mere profits of the soil over which the water flows, and that the title to a fishery arises from the right to the *solum*.

For a discussion of the range of lands that might be defined as federal, whether as harbors, reserve lands or otherwise, see Wildsmith, *supra* note 3 at 73–74; La Forest, *supra* note 19 at 18–27.

112 See, for example, *Robertson*, *supra* note 18 at 115.

113 La Forest, *supra* note 19 at 190: "The only legislature competent to authorize interferences with navigation is the federal Parliament" (citations omitted). This point is of general application, with no distinction as between tidal and non-tidal navigable waters in Canada (again, with possible exceptions noted in some cases). La Forest does go on to note that there is also an exception for provincial statutes passed prior to Confederation and never repealed by either the federal or provincial legislatures.

114 *Ibid*. at 190 (citations omitted):

> Thus federal statutory permission to build a dam in navigable water is necessary, but such permission cannot interfere with the rights to the bed, which will usually be in the province or a private owner. Conversely, while a province may incorporate log boom companies, such companies are not thereby authorized to unreasonably interfere with the rights of others to navigate a river.

115 *Provincial Fisheries*, *supra* note 27 at 516:

> [I]n the case of a provincial grant such as the question supposes the grantee would have a right to build upon the land so granted, subject only to his compliance with the requirements of the statute [a federal act respecting works in navigable waters] . . . and to his obtaining an order in council authorizing the same, and provided the work did not interfere with the navigation of the lake or river.

116 This is, of course, subject to the important exception, as noted earlier, where the federal Crown holds proprietary rights.

117 *Supra*, text quoted in note 108.

118 *Provincial Fisheries*, *supra* note 27 at 514 (emphasis added).

119 *Ibid.* This was confirmed in *BC Fisheries*, *supra* note 30 at 318.

120 These issues are addressed in Chapter 9 by Murphy, Devlin and Lorincz and will not be dealt with in detail here. It should be noted, however, that with

respect to the public right of fishing, it may be limited but not extinguished by the existence of aboriginal rights: *R.* v. *Gladstone* [1996] 2 S.C.R. 723 at para. 67:

> As a common law, not constitutional, right, the right of public access to the fishery must clearly be second in priority to aboriginal rights; however, the recognition of aboriginal rights should not be interpreted as extinguishing the right of public access to the fishery.

121 If this line were followed, the position would be the similar to that for non-tidal waters within the province, with the exception that any new grant of a fishery or other restriction on public fishing rights would require action by the provincial legislature, and not by the provincial Crown alone.

122 *BC Fisheries*, *supra* note 30 at 320, per Viscount Haldane LC. The decision in this case was endorsed and confirmed by the Judicial Committee in the *Québec Fisheries case* in 1920: *Attorney-General for Canada* v. *Attorney-General for Quebec* [*Re Québec Fisheries*] (1920) 56 D.L.R. 358 at 370–371.

123 In *BC Fisheries*, *supra* note 30 at 320, in a passage dealing with "the right of fishing in arms of the sea and the estuaries of rivers," the Lord Chancellor held the following: "The right to fish is . . . a public right of the same character as that enjoyed by the public on the open seas. A right of this kind is not an incident of property." Further (at 317), in a discussion directed to Dominion ownership of the soil in the "railway belt," but which nonetheless states the underlying position, we have the following description:

> In the non-tidal waters they belong to the proprietor of the soil. . . . In the tidal waters, whether on the foreshore or in the creeks, estuaries, and tidal rivers, the public have the right to fish, and by reason of the provisions of Magna Charta no restriction can be put upon that right of the public by an exercise of the prerogative in the form of a grant.

124 *Ibid.* at 317–318.

125 *Ibid.* at 320.

126 *BC Fisheries*, *supra* note 30 at 320.

127 *Ibid.* at 318.

128 *Ibid.* at 317.

129 *Québec Fisheries*, *supra* note 122 at 370.

130 *Ibid.* at 370–371.

131 *Ibid.* Haldane, in considering a pre-Confederation statute that covered both the "disposal of property and the exercise of the power of regulation," noted that neither government could now act alone: "The former of these functions has now fallen to the Province, but the latter to the Dominion; and accordingly the power which existed under s. 3 of the Act no longer exists in its entirety."

132 The preamble to s. 92 of the *Constitution Act, 1867*, *supra* note 89, begins with the following words: "In each Province, the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject [as enumerated in s. 92]." This point is further emphasized in both s. 92(13) and 92(16):

> 13. Property and civil rights in the Province . . .
> 16. Generally all matters of a merely local or private nature in the Province.

For a full review of the development of the territorial limitation on provincial jurisdiction in the case law, see E. Edinger, "Territorial Limitations on Provincial Powers," (1982) 14 *Ottawa Law Review* 57.

133 Wildsmith, *supra* note 3 at 75.

134 See, for example, *Reference Re Offshore Mineral Rights of British Columbia* [*BC Offshore Minerals*] [1967] S.C.R 792.

135 The position adopted in *BC Offshore Minerals* and the subsequent case, *Reference*

Re Bed of the Strait of Georgia and Related Areas [1984] 1 S.C.R. 388 [*Georgia Strait Reference*], was based on the finding in the British case of *R.* v. *Keyn* (1876) 2 Ex. D. 63, where the majority "held that unless specifically extended by Parliament, the realm of England ended at the low-water mark" (*Georgia Strait Reference* at 400).

136 *Georgia Strait Reference*, *supra* note 135 at 397.

137 *Ibid.* at 400.

138 In the provincial reference to the Court of Appeal of Newfoundland, which preceded the *Hibernia Reference* at the Supreme Court, the Court found that the then 3-nautical mile territorial sea was a part of Newfoundland at Confederation, and thus that area remained part of the province: *Re: Mineral and Other Natural Resources of the Continental Shelf off Newfoundland* (1983) 145 D.L.R. (3d) 9 (Nfld. C.A.). The territorial sea was not addressed in the Supreme Court reference, presumably leaving this ruling in place, but in a subsequent case the Court of Appeal reversed itself on this point, finding that the Supreme Court in the *Hibernia Reference* had effectively assumed that the province ended at the low-water mark (although this was not in issue in the *Hibernia Reference*): *ACE-Atlantic Container Express Inc.* v. *The Queen* (1992) 92 D.L.R. (4th) 581 at 601.

139 See, for example, the situation in New Brunswick in the Bay of Fundy: In *R.* v. *Burt* (1932) 5 M.P.R. 112 (N.B.S.C. App. Div.), a location more than a mile offshore was found to be in the province: see the discussion of this case, and others (including Conception Bay in Newfoundland) in *BC Offshore Minerals*, *supra* note 134 at 809.

140 The *Oceans Act*, S.C. 1996, c. 31, does not settle the matter, but rather leaves it for case-by-case determination. Section 7 provides that both the 12-nautical mile territorial sea and internal waters "form part of Canada," but says nothing about their status as federal or provincial waters. Section 8(1) provides for the vesting in the federal Crown of title to the seabed and the subsoil of the territorial sea and internal waters, but only for areas outside of any province (and without prejudice to previously held rights and interests). In sum, then, the *Oceans Act* simply relies, as it must, on the general position in constitutional law, and the status of particular coastal areas remains subject to the case-by-case determination described earlier.

141 *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11.

142 See *Haida Nation* v. *British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511, in which the Supreme Court confirmed a duty of prior consultation where a government decision might adversely affect potential aboriginal claims.

143 *United Nations Convention on the Law of the Sea*, 10 December 1982 (entered into force 16 November 1994). Online. Available http://www.un.org/Depts/los/index.htm (accessed 8 August 2005) [LOS 1982]. Canada ratified this convention in November 2003. In the EEZ which extends from the outer limit of the 12-nautical mile territorial sea to a maximum of 200 nautical miles seaward from the coastal baselines, Canada's jurisdiction is limited mainly to "sovereign rights" over economic uses of the area, including its natural resources: see LOS 1982, Part V, Articles 55, 56. While this would certainly give jurisdiction to control and regulate aquaculture, the rights are limited as to the extent of permissible interference with foreign shipping, pipelines and submarine cables, all elements which would need to be taken into account in siting decisions.

144 See, for example, LOS 1982, *ibid*. Article 58(1):

> In the exclusive economic zone, all States . . . enjoy . . . the freedoms . . . of navigation and overflight and of the laying of submarine cables and

pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

145 *Ibid*. Articles 192, 194.

146 See, for example, *R.* v. *Crown Zellerbach Canada* [1988] 1 S.C.R. 401, in which the existence of international implications, and treaty obligations, respecting marine pollution influenced a finding for federal jurisdiction over the dumping of waste in marine areas within the province of British Columbia.

147 It is assumed throughout that provision for aboriginal and treaty rights must be made to ensure that grants of rights do not infringe upon those constitutional rights. As was noted earlier, this is the subject of Chapter 9 by Murphy, Devlin and Lorincz in this volume, and for the purposes of this section it will be assumed that the necessary consultations are conducted and accommodations are made.

148 For a review of the processes by which the federal and provincial processes are integrated and coordinated, see the discussion of the Atlantic provinces in VanderZwaag *et al.*, *supra* note 86 at 532–562. See also Commons Report 2003, *supra* note 7 at 19–120 for a summary of federal agency involvement in the process; Senate Report 2001, *supra* note 7 at 28–30, on concerns related to the complexity and delays resulting from the roles of multiple agencies, particularly in site selection and approval.

149 R.S.C. 1985, c. N-22.

150 R.S.C. 1985, c. F-14. Apart from any required regulatory approvals, DFO asserts the more general position that its mandate would enable it to object to creation or expansion of lease areas, assuming a fisheries management concern was engaged, while acknowledging that the regulations may not all be in place to permit direct action, see DFO, *Interim Guide to Fisheries Resource Use Considerations in the Evaluation of Aquaculture Site Applications*. Online. Available http://www.dfo-mpo.gc.ca/aquaculture/fisheries_resource_use/pg001_e.htm (accessed 8 August 2005), section 3.

151 *Supra* note 149 at s. 5, which provides, *inter alia*:

> 5. (1) No work shall be built or placed in, on, over, under, through or across any navigable water unless the work and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction.

DFO has also prepared interim guidelines on some of the requirements related to these approvals: DFO, *Interim Guide to Application and Site Marking Requirements for Aquaculture Projects in Canada Under the Navigable Waters Protection Act* (Ottawa: DFO, 2002).

152 This action is subject to particular restrictions, which will be discussed later.

153 It is assumed for the purposes of this discussion that the grant of an aquaculture lease or other tenure does not violate the prohibition on Crown grants of a "fishery," as that term is applied to the public right of fishing. As was noted earlier, both the *BC Fisheries* case, *supra* note 30, and the *Québec Fisheries Case*, *supra* note 122, distinguished even fishing operations based on "fixed engines" such as weirs from the exercise of the public right of fishing. This reasoning would apply *a fortiori* to aquaculture facilities. Any potential problem, then, will lie in the second element, which is the non-interference with public right. In the words of the *Belyea* case, *supra* note 34 at 498, the federal government could be seen as having "restricted the common law rights of the public" without the authorization of Parliament.

154 *Supra* note 150 at s. 35. Approvals may also be required under s. 36, which deals with deposits of substances deleterious to fish or fish habitat. On the necessity for approval under s. 35 and s. 36, see OCAD Legislative Review, *supra* note 6 at 16. As is noted in the OCAD review, the application of ss. 35 and 5 of the NWPA can also engage the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. For a detailed description of departmental expectations for the application of s. 35 in one type of operation, see DFO, *Interim Guide to the Application of Section 35 of the Fisheries Act to Marine Salmonid Cage Aquaculture* (Ottawa: DFO, 2002).

155 OCAD Legislative Review, *supra* note 6 at 16. See also *Interim Guide to Fisheries Resource Use Considerations*, *supra* note 150 at 7–8 and Appendix A, for guidance on groups to be consulted and information to be sought in federal reviews from a fisheries management perspective.

156 *Interim Guide to Fisheries Resource Use Considerations*, *ibid.* at 5 (emphasis in original). An exception is noted for Newfoundland salmon operations, and of course in PEI the federal government has a direct role in leasing.

157 This is also clearly the view of both the Senate and House of Commons committee reviews as to how the current system is intended to operate: Senate Report 2001, *supra* note 7 at 32–33; Commons Report 2003, *supra* note 7 at 28.

158 See the statement of the doctrine at *A.G. Nova Scotia* v. *A.G. Canada* [1951] S.C.R. 3. Any delegation of administrative powers must also be considered as revocable, for otherwise a current government could bind future Parliaments, in violation of the principle of parliamentary supremacy: *Reference Re Canada Assistance Plan (British Columbia)* [1991] 2 S.C.R. 525 at 548, per Sopinka J.

159 On the use of this approach in fisheries management, see Wildsmith (1984), *supra* note 90 at 5: "The practice invariably followed where control of aspects of the fishery are turned over to the province is to designate provincial officials, usually Ministers of provincial governments, to administer province-specific regulations, which are still federally enacted."

160 See, for example, *Peralta et al.* v. *The Queen In Right of Ontario* (1985) 49 O.R. (2d) 705 (C.A.), affirmed by the Supreme Court of Canada in *Peralta* v. *Ontario* [1988] 2 S.C.R 1045. In this case, the delegation of fisheries licensing powers, pursuant to regulations, was found to be valid despite the fact that the provincial authorities set quotas for individual species, which were not specifically provided for in the federal regulations. In essence, the setting of individual quotas was seen as consistent with powers provided for in the regulations.

161 See "Conclusions" (p. 149) for suggestions as to how this might be accomplished under federal legislation.

162 Wildsmith (1984), *supra* note 90 at 14, noted that in the Act at that time, some fisheries regulations contained aquaculture licensing provisions, meaning that aquaculture was being construed as part of the fishery for regulatory purposes. He did not, however, take this to mean that this section authorized aquaculture leases. On the current definitions in s. 2 of the *Fisheries Act* for "fishing" ("fishing for, catching or attempting to catch fish") and "fishery" (which refers to methods of catching fish and the localities where they are used), it seems unlikely that this section could be considered applicable to aquaculture.

163 Section 59(1) sets up the power to delegate a power held by the federal government as well, under s. 58. Section 58(2) excludes any additional intrusion on federal use of the lands if they are located in a public harbor.

164 O.I.C. P.C. 2002–1082, 18 June 2002.

165 *Department of Fisheries and Oceans Act* R.S.C 1985, c. F-15, s. 5. See also the Order in Council authorizing the updated MOU with Nova Scotia: *Authority to*

Enter into a Memorandum of Understanding on Aquaculture Development with the Province of Nova Scotia That Will Allow the Parties to Continue Their Collaboration in the Development of Commercial Aquaculture, Order In Council P.C. 2002-1086, 18 June 2002.

166 Neither the Newfoundland and Labrador nor the BC agreements specify a statutory basis, so they might be presumed to fall under the same general authority.

167 See, for example, *Provincial Fisheries*, *supra* note 27; and *Québec Fisheries*, *supra* note 122.

168 See, for example, the discussion in J. Meaney, "Federal Fisheries Law and Policy: Controls on the Harvesting Sector," in VanderZwaag, *supra* note 5, 27–48 at 29; considering the impact of the *BC Fisheries* case, *supra* note 30: "It can be seen that the scope of the federal power to legislate with respect to marine fisheries is not absolute, but limited to the regulation of the public right to fish."

169 See the following discussion of this issue at Meaney, *ibid.* at 29–30 (citations omitted), referring to the Supreme Court's decision in *Interprovincial Co-operatives Ltd.* v. *R.* [1976] 1 S.C.R. 477 at 495:

> The traditional scope was thought to relate to the protection and preservation of fisheries as a public resource – that federal fisheries laws are only valid if they relate to biological conservation. . . . This view continued to be applied by the Supreme Court in the 1970's and 1980's. In *Interprovincial Co-operatives Ltd. v. R.*, Chief Justice Laskin noted that the federal power in relation to fisheries "is concerned with the protection and preservation of fisheries as a public resource, concerned to monitor or regulate undue or injurious exploitation."

170 Meaney, *supra* note 168 at 31.

171 *Ibid.* at 31–32.

172 *Ibid.* at 32. The breadth of the minister's discretion under s. 7 was confirmed in *Comeau's Sea Foods Ltd.* v. *Canada (Minister of Fisheries and Oceans)* [1997] 1 S.C.R. 12 at para. 37, which emphasized the broad discretion available to the minister in virtually all aspects of licensing, assuming minimal requirements for natural justice were met:

> This interpretation of the breadth of the Minister's discretion is consonant with the overall policy of the *Fisheries Act*. Canada's fisheries are a "common property resource," belonging to all the people of Canada. Under the *Fisheries Act*, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43). Licensing is a tool in the arsenal of powers available to the Minister under the *Fisheries Act* to manage fisheries.

173 [1997] 31 B.C.L.R. (3d) 228 at para. 18:

> [T]he plaintiffs say that the Minister of Fisheries and Oceans, as a minister of the Crown, has violated the public right to fish by granting an exclusive fishery to aboriginal fishers without parliamentary authorization. They contend that neither s. 91(12) of the *Constitution Act, 1867*, nor any provisions of the *Fisheries Act* have taken away the public right to fish or given to the Minister the authority to take it away.

The plaintiffs had also claimed that the public right of fishing was a constitutional right, but the Court found at para. 19 that this position had already been rejected by the Supreme Court of Canada in *R.* v. *Gladstone*, *supra* note 120, and that it was purely a common law right at stake.

174 *Alford*, *supra* note 173 at para. 20
175 *Ibid.* at para. 17.
176 *Ibid.* at para. 21. The decision on the motion was appealed, and was affirmed by the BC Court of Appeal: *Alford* v. *Canada (Attorney General)* [1998] B.C.J. No. 2965 (B.C. C.A. 11 December 1998).
177 See *Esson* v. *Wood* (1884) 9 S.C.R. 239, which involved interference with navigation through construction of a wharf on privately owned submerged lands in Halifax harbor. In that case, the plaintiff was the landowner who had created the obstruction, claiming for trespass against a defendant who had destroyed it. The obstruction was referred to as a public nuisance, and although the defendant might have sought an order for removal, their self-help was justified as abatement of the nuisance (at 243–244, per Strong J), defeating the claim for trespass.
178 In Esson, *ibid.*, it was clear from the decisions of Ritchie CJ and Strong J at 242 and 243 that it was for the landowner to show any justification for the prima facie infringement, and that the justification must involve legislative authority.
179 Section 23 provides as follows:

> 23. No one shall fish for, take, catch or kill fish in any water, along any beach or within any fishery described in any lease or license, or place, use, draw or set therein any fishing gear or apparatus, except by permission of the occupant under the lease or license for the time being, or shall disturb or injure any such fishery.

180 This is consistent with the approach taken in the regulations, which distinguish between aquaculture and fishing. See, for example, s. 3(1)(d)(i) of the *Maritime Provinces Fishery Regulations*, SOR 93-55, P.C.1993-188, 4 February 1993, which provides that the regulations do not generally apply to "cultured or cultivated fish" found in or taken from aquaculture sites leased or licensed by the Nova Scotia and New Brunswick governments. This provision does not purport to restrict the public right of fishing, but would permit such fish to be taken by an owner without need for a fishing permit.
181 As was noted earlier, oysters are a special case. Section 59 of the *Fisheries Act* empowers the federal government to authorize provincial governments to grant leases for oyster production within the provinces, and provides that any grantees have the exclusive rights (subject to the fishery regulations) to the oysters "produced or found within the limits" of the lease areas. It is not entirely clear whether it extends to an authorization for any interference with the public right of fishing, save that it would prevent any other fisher from accessing oysters "found" within the lease area.
182 See, for example, the Canada–NS MOU 2002, s. 2.1: "This MOU applies only to aquaculture activities carried out or operated in Nova Scotia." See also Canada-BC MOU 1988, which, in its preamble, refers to "development of the aquaculture industry in British Columbia." This MOU does not deal in detail with leases, but does confirm the continuing effect of provincially issued tenures, defined as falling within the province: " 'Provincial Tenure' means the right to occupy Provincial Crown lands."
183 The regulations, by s. 26(1)(b) of the *Oceans Act*, must be made on the advice of the Minister of Justice.
184 OCAD Legislative Review, *supra* note 6 at 15.
185 *Ibid.*
186 In *Hickey* v. *Electric Reduction Co.* (1970) 21 D.L.R. (3d) 368 (Nfld. S.C.), the Newfoundland Supreme Court held that losses to commercial fishers from a fishery closure caused by pollution were not "special" or distinct from the

damage suffered by the public at large from damage to a public right of fishing. However, in the later case of *Gagnier* v. *Canadian Forest Products Limited* (1990) 51 B.C.L.R. (2d) 218 (B.C.S.C.), which also resulted from a pollution incident leading to a fishery closure, the court found, *inter alia*, that private claims under public nuisance need only show a "significant difference in degree of damage" (at 230).

187 Other federal regulatory provisions under the *Fisheries Act* and the NWPA would still apply, in that s. 9(5) of the *Oceans Act* provides that the application of s. 9 shall not be interpreted as "limiting the application of any federal laws."

188 B. Wildsmith, *Toward an Appropriate Federal Aquaculture Role and Legislative Base*, Canadian Technical Report of Fisheries and Aquatic Sciences No. 1419 (Ottawa: Department of Fisheries and Oceans, 1985) at 30–31.

189 *Ibid.* at 27–28.

190 With respect to enforceability against others (apart from the Crown), the situation is not as clear, in that enforceability against private users in common law would depend to some extent on the nature of the property right asserted, and the extent to which any outside party *actually* interfered with that particular right. Furthermore, the essential problem with the continued existence of public rights, as discussed earlier, is one that relates to enforceability, and the current situation in that regard is untested.

191 See, for example, the description of these fears in a study (Marshall, *supra* note 14 at 350) of the impact of commercial aquaculture on a community in the Bay of Fundy (citation omitted):

> Increasing privatization of the marine commons is fundamentally a disenfranchisement of all traditional fishers, effectively precluding sustainable livelihoods within the wild fishery. The loss of local control threatens to transform the communities into "competitive, atomized, and dependent" entities.

192 See *ibid. passim* on the difficulty of ensuring the introduction of truly negotiated rights in situations of pressure to develop new industries. Advocates of full privatization, on the other hand, would tend to reject the inherently political dynamic involved in transferring rights in this manner, and prefer market-based approaches such as auctions or other forms of sale: see, for example, Neill, *supra* note 10 at 12–16.