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Rights, Rights Everywhere and not a Fish to Fish:
Considering Aboriginal and Treaty Rights in
Canada as a Platform for Climate Change
Litigation

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Rights, Rights Everywhere and not a Fish to Fish:
Considering Aboriginal and Treaty Rights in Canada as a Platform for Climate
Change Litigation

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ABSTRACT

The very existence and identity of Aboriginal peoples is often tied inextricably to their lands and the natural resources they have depended on for so long are crucial not only for sustenance but also for cultural identity and spirituality. A complex legal regime and unique set of rights has resulted from efforts to reconcile this with the sovereignty of the Canadian crown. This paper aims to lay the foundations for an argument that, as holders of distinctive rights, Aboriginal peoples in Canada are uniquely positioned in a legal fight to force action on climate change.

This article examines aboriginal and treaty salmon fishing rights as a case study to consider whether the scope of those rights might include a right not just to fish, but to a continued presence of fish in the water, in other words, to the continued existence of the resource. At its core, the argument is that a right to fish is meaningless without any fish. Therefore, a right to fish would be violated by the degradation of the environment necessary to sustain the fish. The absence of effective climate change mitigation by the Canadian government in furtherance of protecting that environment would thus be an infringement of that right. More broadly, the idea is to look at Aboriginal peoples and their very unique legal rights to see whether respect for those rights could compel action towards environmental protection. Specifically, the aim here is to look at how aboriginal and treaty rights can contribute to the ongoing conversation about commitments to environmental sustainability in the context of climate change.

Three arguments are presented in favour of a conception of a right to fish as including the continued presence of fish in the water. The first is based on U.S. case law and essentially argues that the court's interpretation of treaty rights in the U.S. could be applied in Canada to support a continued presence of fish and an implied promise not to degrade the resource as part of treaty rights to fish. I further argue for an extension of the logic of the U.S. jurisprudence to aboriginal rights as well. The second argument is based on Canadian aboriginal rights jurisprudence and argues that the law as it stands supports the concept of a right to the continued presence of fish as part of the right to fish. The third argument is based on the incidental rights doctrine as it has evolved in Canada and claims that a right to the presence of fish in the water is incidental to the right to fish.

INTRODUCTION

The world's leading scientists are in agreement that the earth's climate is changing at an unprecedented rate and that the principle cause is human activity.¹ However, despite consensus that long-term consequences will be dramatic if nothing is done to

¹ Environmental Indicators, Climate Change: Greenhouse Gas Emissions online: United Nations Statistics Division
<http://unstats.un.org/unsd/environment/air_greenhouse_emissions.htm>.

stop climate change,² significant disagreement remains on how to best respond to the problem. Adaptation will be required to reduce existing vulnerabilities but a long-term solution calls for a severe reduction in greenhouse gases.

In 2007, the Inter-governmental Panel on Climate Change (IPCC) released its Fourth Assessment Report, reflecting the consensus of hundreds of scientists who reviewed thousands of studies.³ Global greenhouse gas emissions increased by 70% between 1970 and 2004⁴ and despite current climate change mitigation policies and related sustainable development practices, global greenhouse gas emissions will continue to grow over the next few decades.⁵ The effects of warming are already being experienced and will continue even under the most optimistic mitigation scenarios.⁶ Long term, the Fourth Assessment Report concludes that unmitigated climate change would likely exceed the capacity of natural, managed and human systems to adapt.⁷

Climate Change Mitigation in Canada

Canada, the fifth largest greenhouse gas emitter in the world,⁸ ratified the Kyoto Protocol in 1997, agreeing to reduce its greenhouse gas emissions to 6% below 1990 levels by 2008-2012.⁹ However, Canada effectively repudiated its obligation under the Kyoto Protocol when it announced it would not attempt to comply with it. In an April 2007 press release, Environment Canada announced that Canada could not

² See generally IPCC, 2007: *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., Cambridge University Press, Cambridge, UK, 976pp.

³ IPCC, 2007: *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, Pachauri, R.K and Reisinger, A. (eds.)]. IPCC, Geneva, Switzerland, 104 pp. at 30.

⁴ IPCC, 2007: *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, Pachauri, R.K and Reisinger, A. (eds.)]. IPCC, Geneva, Switzerland, 104 pp. at 36.

⁵ IPCC, 2007: *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, Pachauri, R.K and Reisinger, A. (eds.)]. IPCC, Geneva, Switzerland, 104 pp. at 44.

⁶ IPCC, 2007: *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, Pachauri, R.K and Reisinger, A. (eds.)]. IPCC, Geneva, Switzerland, 104 pp. at 45.

⁷ IPCC, 2007: *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, Pachauri, R.K and Reisinger, A. (eds.)]. IPCC, Geneva, Switzerland, 104 pp. at 73.

⁸ Climate Analysis Indicators Tool (CAIT UNFCCC) version 2.0. (Washington, DC: World Resources Institute, 2009), available at <http://cait.wri.org>.

⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Annex B, available at <<http://unfccc.int/resource/docs/convkp/kpeng.pdf>>.

reach its 2008-2012 targets without intentionally manufacturing a recession.¹⁰ In 2006, Canada's greenhouse gas emissions reached 22% above 1990 levels.¹¹ In order to meet its commitment, Canada would have to purchase a significant quantity of international credits and has ruled out purchasing any.

On August 21, 2007, the Government of Canada released its "Turning the Corner" climate change plan, which sets out a plan to implement mandatory intensity-based greenhouse gas emissions reduction targets for major industries starting in 2010. According to the plan, companies within the majority of industries would have to cut their greenhouse gas emissions per unit of production by 18% from 2006 levels by 2010 and by a further 2% every year after that.¹²

Criticisms of the "Turning the Corner" plan abound:

In reality, the regulatory framework's effect on emissions cannot be known with any certainty because (i) its targets are expressed in terms of emissions intensity, not actual emissions (meaning that emissions may be higher than predicted if production grows quickly); (ii) the "compliance options" that companies can use to meet targets are complex and some of them (notably, payments into a Technology Fund and "pre-certified investment credits") represent uncertain amounts of emission reductions occurring at an uncertain future date; and (iii) the legal text of the regulations, including a full definition of the targets, has yet to be published.¹³

The proposed measures are projected to "reduce" greenhouse gas emissions between 2008 and 2012 to a figure that is 34% higher than the Kyoto target for those years.¹⁴ The U.S. Energy Information Administration estimates that, whereas CO₂ emissions in European OECD¹⁵ countries are projected to increase above 1990 levels by 9.42% by 2010 and 15% by 2020, emissions in Canada are projected to rise above 1990 levels by 44% by 2010 and 68% by 2020. By comparison, CO₂ emissions in the U.S. are expected to exceed 1990 levels by 27% by 2010 and 42% by 2020.¹⁶ In 2008, the

¹⁰ News Release: Economic Analysis Shows Implementing Bill C-288 Would Plunge Canada Into a Recession, available at <<http://www.ec.gc.ca/default.asp?lang=En&n=714D9AAE-1&news=2EF3E5A6-6015-46E8-A0E5-08B1C88FB4C0>>.

¹¹ Environment Canada (2008), *National Inventory Report 1990-2006: Greenhouse Gas Sources and Sinks in Canada*, the Canadian Government's Submission to the UN Framework Convention on Climate Change, available at <http://www.ec.gc.ca/pdb/ghg/inventory_e.cfm>.

¹² Environment Canada (2008), *Turning the Corner – An Action Plan to Reduce Greenhouse Gases and Air Pollution*, available at <<http://www.ec.gc.ca/cc/default.asp?lang=En&n=A3CB096D-1>>.

¹³ Bramley, M. & Demerse, C., Evaluation of the Government of Canada's Greenhouse Gas Reduction Policies by the Polaris Institute (2008), Prepared for the Climate Change Performance Index (2009), available at <<http://www.pembina.org/pub/1751>>.

¹⁴ *Friends of the Earth v. The Governor in Council et al.*, 2008 FC 1183, at para. 13.

¹⁵ The Organisation for Economic Co-operation and Development (OECD) is an international organisation of 30 countries that are generally high-income economies with a high Human Development Index and are regarded as developed countries. <www.oecd.org>.

¹⁶ U.S. Energy Information Administration (EIA), Emissions of Greenhouse Gases in the United States 2005, Nov. 2006, at 3, available at

Climate Change Performance Index, which measures current emissions, emissions trends and climate policy, ranked Canada one place from last, just ahead of Saudi Arabia and one place behind the U.S.¹⁷ Suffice to say, Canada's greenhouse gas emissions have not declined; rather, they have steadily increased since 1990 and in the period following the ratification of the Kyoto Protocol.

Climate Change Litigation: Aboriginal and Treaty rights as a New Approach

Disenchantment and frustration with national initiatives and the international process have led states, local governments, non-governmental organizations, and indigenous peoples to seek redress for both the causes and effects of global warming in the courts.¹⁸ This imperative has been felt overwhelmingly in and toward the U.S. where the Bush administration's refusal to deal seriously with the climate change problem led to increasing efforts to use the domestic and international justice system to challenge power politics.¹⁹ This focus on the U.S. is also due to the disproportionate contribution by the U.S. to the problem.²⁰

However, no country has done enough about climate change and a serious attempt to create a comprehensive global warming litigation strategy must implicate countries other than the United States.²¹ This article intends to contribute to those efforts by providing novel avenues for further thought on an action against Canada by Aboriginal peoples.

There is no doubt that climate change is a profound threat to Pacific salmon.²² Insofar as oceans and rivers provide habitat for salmon, the effects of climate change on those waters has a direct impact on the salmon stocks and therefore on the fishing activities that depend on their continued existence. Action on climate change is thus necessary to avert or at least lessen the impact of the threat.

<http://www.eia.doe.gov/oiaf/1605/ggrpt/emission_tbls.html>.

¹⁷ Climate Change Performance Index presented by Germanwatch and CAN-Europe <http://www.germanwatch.org/klima/ccpi09.pdf>

¹⁸ See notes 42-71 in Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. Colo. L. Rev. 701 (2008); See also <<http://www.climatecasechart.com/>>.

¹⁹ Andrew Strauss, *The Legal Option Suing the United States in International Forums for Global Warming Emissions*, 33 *Envtl. L. Rep.* 10185 (2003), at 10185.

²⁰ Climate Analysis Indicators Tool (CAIT UNFCCC) version 2.0. (Washington, DC: World Resources Institute, 2009), available at <http://cait.wri.org>. This on-line tool combines information from sources such as the United Nations, the World Bank, and the International Energy Agency in a database allowing comparison and analysis of reputable climate data. (See <http://cait.wri.org/faq-about-cait.php> for more information); Cumulatively the U.S. is responsible for more emissions than any other country at 29.3%. Kevin A. Baumert, Timothy Hertzog, Jonathan Pershing, World Resources Institute, *Navigating the Numbers: Greenhouse Gas Data and International Climate Policy* (World Resources Institute Report, 2005) <http://pdf.wri.org/navigating_numbers.pdf> at 32.

²¹ Andrew Strauss, *The Legal Option Suing the United States in International Forums for Global Warming Emissions*, 33 *Envtl. L. Rep.* 10185 (2003), at 10191.

²²This will be discussed in much greater detail below.

As it stands, Canada recognizes constitutionally protected rights to fish and recognizes that climate change is harming those fish. Thus, identifiable rights are being affected. However, despite Canada's acceptance that something must be done about the causes of climate change, it has yet to take any effective action in that direction. The challenge is to assess whether a coherent claim exists that an infringement is taking place. What is needed at this point is further theorizing about whether Canada has a legal obligation to do something and what that obligation entails.

This article examines aboriginal and treaty salmon fishing rights as a case study to consider whether the scope of those rights might include a right not just to fish, but to a continued presence of fish in the water, in other words, to the continued existence of the resource. At its core, the argument is that a right to fish is meaningless without any fish. Therefore, a right to fish would be violated by the degradation of the environment necessary to sustain the fish. The absence of effective climate change mitigation by the Canadian government in furtherance of protecting that environment would thus be an infringement of that right. More broadly, the idea is to look at Aboriginal peoples and their very unique legal rights to see whether respect for those rights could compel action towards environmental protection.²³ Specifically, the aim here is to look at how aboriginal and treaty rights can contribute to the ongoing conversation about commitments to environmental sustainability in the context of climate change.

I present three arguments in favour of a conception of a right to fish as including the continued presence of fish in the water. The first is based on U.S. case law and essentially argues that the court's interpretation of treaty rights in the U.S. could be applied in Canada to support a continued presence of fish and an implied promise not to degrade the resource as part of treaty rights to fish. I further argue for an extension of the logic of the U.S. jurisprudence to aboriginal rights as well. The second argument is based on Canadian aboriginal rights jurisprudence and argues that the law as it stands supports the concept of a right to the continued presence of fish as part of the right to fish. The third argument is based on the incidental rights doctrine as it has evolved in Canada and claims that a right to the presence of fish in the water is incidental to the right to fish.

My intention in claiming that a right to fish includes the continued presence of fish in the water is to lay the foundations for a claim that those rights are being infringed in a manner that cannot be justified. Wrestling with every relevant issue and pinning each down to a firm analytical conclusion is beyond the scope of this paper. Rather, the aim is to lay the foundations of an idea to be further theorized and built upon. The fact that Aboriginal peoples stand to suffer so disproportionately from climate change relative to their contribution to the problem triggers in many a sense of great injustice. This paper aims to move that dialogue from the moral to the legal realm, to ascertain whether some redress might be available. The very existence and identity of Aboriginal peoples is often tied inextricably to their lands and the natural

²³ Bradford Morse, *Indigenous Rights as a Mechanism to Promote Environmental Sustainability*, in Westra, Laura, Klaus Bosselmann, and Richard Westra. *Reconciling Human Existence with Ecological Integrity: Science, Ethics, Economics and Law* (London: Earthscan, 2008) 159 to 182 at 178.

resources they have depended on for so long are crucial not only for sustenance but also for cultural identity and spirituality. A complex legal regime and unique set of rights has resulted from efforts to reconcile this with the sovereignty of the Canadian crown. Thus, as holders of these distinctive rights, Aboriginal peoples are uniquely positioned in a legal fight to force action on climate change.

It bears mentioning that while the right to fish, and salmon in particular, are explored here to concretize the problem, the claims I make are intended to be more broadly applicable to other natural resources that are fished, hunted, gathered or harvested by Aboriginal peoples pursuant to their aboriginal or treaty rights, many of which are undoubtedly also being affected by climate change. I have chosen to focus on rights to fish because of the conclusive nature of the relevant climate change science and the fact that many of the key aboriginal and treaty rights legal battles have been fought on these grounds in both the U.S. and Canada. The jurisprudence has resulted in reasonably well delineated conceptions of what these rights mean legally and how they are to be implemented practically.

Part I of the paper introduces the problem by setting out the threats to Pacific salmon posed by climate change and the special relevance of this threat to Aboriginal peoples. Part II of the paper then sets out the relevant legal framework for aboriginal and treaty rights in Canada and the U.S., including the environmental protection rights enjoyed by Indian peoples in the U.S. The analysis in Part III sets out the legal basis for a right to the continued presence of fish and an implied promise not to degrade the resource in Canada. Part IV analyses whether an argument could be made that the rights, if found to exist, are being infringed and if so, whether that infringement is justified. It is in this context that the important issue of causation will be discussed.

PART I: CLIMATE CHANGE, SALMON, AND ABORIGINAL PEOPLES

Salmon at Risk

The IPCC has addressed the troubles ahead for fisheries, and North American fisheries in particular:

Global climate change will affect the physical, biological, and biogeochemical characteristics of the oceans and coasts, modifying their ecological structure, their functions, and the goods and services they provide. Large-scale impacts of global warming on the oceans will include: Increases in sea level and sea-surface temperature, decreases in sea-ice cover, changes in salinity, alkalinity, wave climate, and ocean circulation. Feedbacks to the climate system will occur through changes in ocean mixing, deep water production, and coastal upwelling. Collectively, these changes will have profound impacts on the status, sustainability, productivity, and biodiversity of the coastal

zone and marine ecosystems.²⁴

....

Climate-related variations in the marine environment—including changes in sea-surface temperatures, nutrient supply, and circulation dynamics—play an important role in determining the productivity of several North American fisheries. Projected climate changes have the potential to affect coastal and marine ecosystems, with impacts on the abundance and spatial distribution of species that are important to commercial and recreational fisheries.²⁵

Preferring cold, clear water, salmonids are expected to experience the most negative impacts.²⁶ The British Columbia Ministry of the Environment reports: “[w]armer stream temperatures and lower water levels will make it difficult for salmon to successfully migrate and spawn. During recent warm periods, 50% of Fraser River salmon have died during migration. Further warming will increase deaths and may eventually threaten the survival of less tolerant species.”²⁷

In its fourth report to the UNFCCC in 2006, Canada reported that:

Climatic factors, including air and water temperatures, precipitation and wind patterns, strongly influence fish health, productivity and distribution. Most species of fish have a distinct set of environmental conditions under which they experience optimal growth, reproduction and survival. Changes to these variables could result in shifts in species distribution, reduced or enhanced growth, increased competition from exotic species, greater susceptibility to disease and parasites, and altered ecosystem function. Aquaculture has been considered to be relatively adaptable to climate change, although environmental, social and regulatory considerations may limit the ability of the industry to respond rapidly.

....

²⁴ Intergovernmental Panel on Climate Change, IPCC Third Assessment Report, Climate Change 2001: Impacts, Adaptation and Vulnerability, <<http://www.ipcc.ch/ipccreports/tar/wg2/284.htm>> at 345.

²⁵ Intergovernmental Panel on Climate Change, IPCC Third Assessment Report, Climate Change 2001: Impacts, Adaptation and Vulnerability, <<http://www.ipcc.ch/ipccreports/tar/wg2/284.htm>> at 738.

²⁶ Field, C.B., L.D. Mortsch, M. Brklacich, D.L. Forbes, P. Kovacs, J.A. Patz, S.W. Running and M.J. Scott, 2007: North America. *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., Cambridge University Press, Cambridge, UK, 617-652 at 631 <<http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter14.pdf>>

²⁷ Ministry of the Environment, British Columbia, *Climate Change and its Impacts: British Columbia*, <<http://www.env.gov.bc.ca/epd/climate/about/impacts-bc.htm#future>>.

Climate change has been linked to declining salmon stocks on the Pacific coast. In addition, reports from the Arctic of sockeye and pink salmon captured well outside their known range may be related to recent warming trends.²⁸

In 2007, the Government of Canada released a report on climate change “From Impacts to Adaptation: Canada in a Changing Climate 2007” which details the changes in the government’s understanding of Canada’s vulnerability to climate change during the past decade.²⁹ The effects on fisheries in B.C. will be profound:

Climate change will exacerbate existing stresses on British Columbia’s fisheries. Future impacts include invasion of coastal waters by exotic species, rising ocean and freshwater temperatures, and changes in the amount, timing and temperature of river flows. Freshwater fisheries may experience increased water management conflicts with other uses (e.g. hydroelectric power generation, irrigation, drinking water), particularly in the southern interior. The vulnerability of Pacific salmon fisheries in both freshwater and saltwater environments is heightened by the unique social, economic and ecological significance of these species. Aquaculture, an increasingly important element of economic development on the coast, has potential to enhance food security while lessening the stresses on wild fisheries. However, the cultural and ecological impacts of aquaculture, and salmon farming in particular, are controversial.³⁰

Since the late 1800s, halibut, herring, sardines, hake and salmon have supported major fisheries in B.C. but salmon has always dominated from a socioeconomic perspective.³¹ The importance of salmon to the region’s commercial, recreational and subsistence fisheries and the alarming declines in the salmon catch observed since the late 1980s have led climate change research on the Pacific coast to be focused on salmon.³²

²⁸ Canada. (2006). *Canada's fourth national report on climate change: Actions to meet commitments under the United Nations Framework Convention on Climate Change*. [Ottawa]: Govt. of Canada. at 162 <<http://unfccc.int/resource/docs/natc/cann4.pdf>> .

²⁹ Lemmen, D.S., Warren, F.J., Lacroix, J., and Bush, E., editors (2008): *From Impacts to Adaptation: Canada in a Changing Climate 2007*; Government of Canada, Ottawa, ON, available at <http://www.adaptation.nrcan.gc.ca/assess/2007/pdf/full-complet_e.pdf>

³⁰Lemmen, D.S., Warren, F.J., Lacroix, J., and Bush, E., editors (2008): *From Impacts to Adaptation: Canada in a Changing Climate 2007*; Government of Canada, Ottawa, ON, at 332, available at <http://www.adaptation.nrcan.gc.ca/assess/2007/pdf/full-complet_e.pdf> .

³¹ Fisheries and Oceans Canada (2001): *Fish stocks of the Pacific coast*; Fisheries and Oceans Canada, 162 p., <<http://www-comm.pac.dfo-mpo.gc.ca/publications/speciesbook/PacificFishStocks.pdf>> cited in Lemmen, D.S., Warren, F.J., Lacroix, J., and Bush, E., editors (2008): *From Impacts to Adaptation: Canada in a Changing Climate 2007*; Government of Canada, Ottawa, ON, at 344, available at <http://www.adaptation.nrcan.gc.ca/assess/2007/pdf/full-complet_e.pdf> .

³² Fisheries and Oceans Canada (2000): *DFO climate variability and change impacts and adaptations research for Canada’s marine and freshwater fisheries*; Fisheries and Oceans Canada, Summary,

Salmon is particularly vulnerable as a species as it requires both marine and freshwater aquatic habitats making it susceptible to additional potential climate impacts.³³ Fisheries in B.C. have changed in response to many factors in the last century, including climate variability.³⁴ Sensitivity to climate variability and climate change varies greatly between short-lived species, such as shrimp, salmon, herring and sardines, and long-lived species such as geoduck clams, ocean perch and halibut.³⁵ Short-lived species such as salmon respond quickly to changes in climate and populations can collapse or recover without warning.³⁶

Program Framework, Workshop Proceedings and Background Report, 83 p. no. 1, p. 181–191; Peterman, R.M., Pyper, B.J. and Grout, J.A. (2000): Comparison of parameter estimation methods for detecting climate-induced changes in productivity of Pacific salmon (*Oncorhynchus* spp.); Canadian

Journal of Fisheries and Aquatic Sciences, v. 57, no. 1, p. 181–191; cited in Lemmen, D.S and Warren, F.J., editors (2004): Climate Change Impacts and Adaptation: a Canadian Perspective 2004; Government of Canada, Ottawa, ON, at 97, available at <http://www.adaptation.nrcan.gc.ca/assess/2007/pdf/full-complet_e.pdf>.

³³ Finney, B.P., Gregory-Eaves, I., Douglas, M.S.V. and Smol, J.P. (2002): Fisheries productivity in the northeastern Pacific Ocean over the past 2200 years; *Nature*, v. 416, p. 729–733; cited in Lemmen, D.S and Warren, F.J., editors (2004): Climate Change Impacts and Adaptation: a Canadian Perspective 2004; Government of Canada, Ottawa, ON, at 97, available at <http://www.adaptation.nrcan.gc.ca/assess/2007/pdf/full-complet_e.pdf>

³⁴ Lemmen, D.S., Warren, F.J., Lacroix, J., and Bush, E., editors (2008): From Impacts to Adaptation: Canada in a Changing Climate 2007; Government of Canada, Ottawa, ON, at 344, available at <http://www.adaptation.nrcan.gc.ca/assess/2007/pdf/full-complet_e.pdf>

³⁵ Fisheries and Oceans Canada (2001): Fish stocks of the Pacific coast; Fisheries and Oceans Canada, 162 p., <<http://www-comm.pac.dfo-mpo.gc.ca/publications/speciesbook/PacificFishStocks.pdf>> cited in Lemmen, D.S., Warren, F.J., Lacroix, J., and Bush, E., editors (2008): From Impacts to Adaptation: Canada in a Changing Climate 2007; Government of Canada, Ottawa, ON, at 344, available at <http://www.adaptation.nrcan.gc.ca/assess/2007/pdf/full-complet_e.pdf>.

³⁶ Fisheries and Oceans Canada (2006): Pacific Region, Integrated Fisheries Management Plan, Salmon, Southern BC, June 1, 2006–May 31, 2007; Fisheries and Oceans Canada, 113 p., <[http://www-ops2.pac.dfo-](http://www-ops2.pac.dfo-mpo.gc.ca/xnet/content/MPLANS/plans06/Salmon/southcoast/Salmon%20IFMP.SC.2006.pdf)

[mpo.gc.ca/xnet/content/MPLANS/plans06/Salmon/southcoast/Salmon%20IFMP.SC.2006.pdf](http://www-ops2.pac.dfo-mpo.gc.ca/xnet/content/MPLANS/plans06/Salmon/southcoast/Salmon%20IFMP.SC.2006.pdf)>; McKinnell, S.M., Wood, C.C., Rutherford, D.T., Hyatt, K.D. and Welch, D.W. (2001): The demise of Owikeno Lake sockeye Management, v. 21, p. 774–791; Hyatt, K.D., Stockwell, M.M. and Rankin, D.P. (2003): Impact and adaptation responses of Okanagan River sockeye salmon *Oncorhynchus nerka* to climate variation and change effects during freshwater migration: stock restoration and fisheries management implications; *Canadian Water Resources Journal*, v. 28, p. 689–713; and human health in Canada; *Coasts Under Stress*, Victoria, BC, 7 p., <<http://www.coastsunderstress.ca/pubs/CUSResultsSummary2006.pdf>>; Riddell, B. (2004): Pacific salmon resources in central and north coast British Columbia; Pacific Fisheries Resource Conservation Council, Vancouver, BC, <http://www.fish.bc.ca/files/SalmonResources-North_2004_0_Complete.pdf>; cited in Lemmen, D.S., Warren, F.J., Lacroix, J., and Bush, E., editors (2008): From Impacts to Adaptation: Canada in a Changing Climate 2007; Government of Canada, Ottawa, ON, at 344, available at <http://www.adaptation.nrcan.gc.ca/assess/2007/pdf/full-complet_e.pdf>.

Currently, wild-capture salmon fisheries are decreasing.³⁷ Climate change is affecting the quantity and quality of seasonal to annual water supplies, disrupting life histories and production of resident and migratory Salmonids.³⁸

The IPCC Fourth Assessment reports with respect to North America that: “[c]old- and cool-water fisheries, especially Salmonids, have been declining as warmer/drier conditions reduce their habitat. The sea-run salmon stocks are in steep decline throughout much of North America³⁹. Evidence for impacts of recent climate change is rapidly accumulating. Pacific salmon have been appearing in Arctic rivers.⁴⁰ Salmonid species have been affected by warming in U.S. streams⁴¹.”⁴²

³⁷ Fisheries and Oceans Canada (2001): Fish stocks of the Pacific coast; Fisheries and Oceans Canada, 162 p., <<http://www-comm.pac.dfo-mpo.gc.ca/publications/speciesbook/PacificFishStocks.pdf>> cited in Lemmen, D.S., Warren, F.J., Lacroix, J., and Bush, E., editors (2008): From Impacts to Adaptation: Canada in a Changing Climate 2007; Government of Canada, Ottawa, ON, at 344, available at <http://www.adaptation.nrcan.gc.ca/assess/2007/pdf/full-complet_e.pdf>.

³⁸ Whitfield, P.H., Reynolds, C.J. and Cannon, A.J. (2002b): Modelling streamflows in present and future climates — examples from Georgia Basin, British Columbia; Canadian Water Resources Journal, v. 27, no.4, p. 427–456; Quilty, E.J., Hudson, P. and Farahmand, T. (2004): Living on the edge: climate change and salmon in Lang Creek, British Columbia; unpublished report prepared by Aquatic Informatics Inc. for BC Ministry of Water, Land and Air Protection, 68 p., <wlapwww.gov.bc.ca/sry/p2/eq/special_studies/lang_creek/lang_creek.pdf>; Morrison, J., Quick, M.C. and Foreman, M.G.G. (2002): Climate change in the Fraser River Watershed: flow and temperature projections; Journal of Hydrology, v.263, no.1, p.230–244; Levy, D.A. (1992): Potential impacts of global warming on salmon production in the Fraser River watershed; Canadian Technical Report of Fisheries and Aquatic Sciences 1889; MacDonald, S., Foreman, M., Farrell, T., Williams, I., Grout, J., Cass, A., Woodey, J., Enzenhoffer, H., Clarke, C., Houtman, R., Donaldson, E. and Barnes, D. (2000): The influence of extreme water temperatures on migrating Fraser River sockeye salmon (*Oncorhynchus nerka*) during the 1998 spawning season; Canadian Technical Report of Fisheries and Aquatic Sciences 2326; Hyatt, K.D., Stockwell, M.M. and Rankin, D.P. (2003): Impact and adaptation responses of Okanagan River sockeye salmon *Oncorhynchus nerka* to climate variation and change effects during freshwater migration: stock restoration and fisheries management implications; Canadian Water Resources Journal, v. 28, p. 689–713; cited in Lemmen, D.S., Warren, F.J., Lacroix, J., and Bush, E., editors (2008): From Impacts to Adaptation: Canada in a Changing Climate 2007; Government of Canada, Ottawa, ON, at 345, available at <http://www.adaptation.nrcan.gc.ca/assess/2007/pdf/full-complet_e.pdf>.

³⁹ Gallagher, P. and L. Wood, 2003: Proc. The World Summit on Salmon, June 10-13, 2003, Vancouver, British Columbia, available at <www.sfu.ca/cstudies/science/summit.htm>, cited in Field, C.B., L.D. Mortsch, M. Brklacich, D.L. Forbes, P. Kovacs, J.A. Patz, S.W. Running and M.J. Scott, 2007: North America. *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., Cambridge University Press, Cambridge, UK, 617-652 at 624 <<http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter14.pdf>>

⁴⁰ Babaluk, J.A., J.D. Reist, J.D. Johnson and L. Johnson, 2000: First records of sock-eye (*Oncorhynchus nerka*), and pink salmon (*O. gorbuscha*), from Banks Island and other records of Pacific salmon in Northwest territories. *Canada Arctic*, 53, 161-164, cited in Field, C.B., L.D. Mortsch, M. Brklacich, D.L. Forbes, P. Kovacs, J.A. Patz, S.W. Running and M.J. Scott, 2007: North America. *Climate Change 2007: Impacts, Adaptation and Vulnerability*.

Studies of prehistoric and historical intervals suggest that species dominance in the Georgia Strait and coastal upwelling zone west of Vancouver Island is highly variable with salmon, herring and resident hake being most prevalent during cool conditions.⁴³ Studies have concluded that small coastal communities relying on traditional fisheries will be affected by “the economic dislocation and social stress...likely to increase as climate continues to change, with losses from traditional fisheries exceeding returns from efforts to develop new ones or to replace them with aquaculture operations.”⁴⁴

Matters are complicated by the fact that many BC salmon rear in the offshore waters of the Gulf of Alaska and climate change in that region will result in changes to salmon distribution as salmon migrate north to the Bering Sea in search of cooler waters.⁴⁵ While several different scenarios are possible, as ocean temperatures rise,

Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., Cambridge University Press, Cambridge, UK, 617-652 at 624 <<http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter14.pdf>>

⁴¹ O’Neal, K., 2002: Effects of Global Warming on Trout and Salmon in U.S. Streams. Defenders of Wildlife, Washington, District of Columbia, 46 pp. <<http://www.defenders.org/publications/fishreport.pdf>>, cited in Field, C.B., L.D. Mortsch, M. Brklacich, D.L. Forbes, P. Kovacs, J.A. Patz, S.W. Running and M.J. Scott, 2007: North America. *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., Cambridge University Press, Cambridge, UK, 617-652 at 624 <<http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter14.pdf>>

⁴² Field, C.B., L.D. Mortsch, M. Brklacich, D.L. Forbes, P. Kovacs, J.A. Patz, S.W. Running and M.J. Scott, 2007: North America. *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., Cambridge University Press, Cambridge, UK, 617-652 at 624 <<http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter14.pdf>>

⁴³ Fisheries and Oceans Canada (2006a): State of the Pacific Ocean 2005; Fisheries and Oceans Canada, Canadian Science Advisory Secretariat (CSAS), Ocean Status Report 2006/001, 70 p., <<http://www.pac.dfo-mpo.gc.ca/sci/psarc/OSRs/StateofOceans2005fnl.pdf>>, cited in Lemmen, D.S., Warren, F.J., Lacroix, J., and Bush, E., editors (2008): From Impacts to Adaptation: Canada in a Changing Climate 2007; Government of Canada, Ottawa, ON, at 345.

⁴⁴ Ommer, R.E. (2006): The impact of social and environmental restructuring on environmental and human health in Canada; Coasts Under Stress, Victoria, BC, 7 p., <<http://www.coastsunderstress.ca/pubs/CUSResultsSummary2006.pdf>>; Ommer, R.E. (2007): Coasts Under Stress: Restructuring and Social-Ecological Health; McGill-Queen’s University Press, Montréal, Quebec, 624 p; cited in Lemmen, D.S., Warren, F.J., Lacroix, J., and Bush, E., editors (2008): From Impacts to Adaptation: Canada in a Changing Climate 2007; Government of Canada, Ottawa, ON, at 345, available at <http://www.adaptation.nrcan.gc.ca/assess/2007/pdf/full-complet_e.pdf>.

⁴⁵ The study cited suggests that predicted temperature increases are large enough to shift the position of the thermal limits into the Bering Sea by the middle of the next century. Such an increase would potentially exclude sockeye salmon from the entire Pacific Ocean and severely restrict the overall area of the marine environment that would support growth. Welch, D.W., Ishida, Y. and Nagasawa, K. (1998): Thermal limits and ocean migrations of sockeye salmon *Oncorhynchus nerka*: long-term consequences of global warming; Canadian Journal of Fisheries and Aquatic Sciences, v. 55, p. 937–948; cited in Lemmen, D.S., Warren,

salmon populations may abandon their current migration patterns and habitat ranges. In that respect, Coho salmon have recently been found in Arctic rivers.⁴⁶ In the case of sockeye salmon, it has been proposed that continued warming of the North Pacific Ocean would compress the distributions essentially squeezing them out of the North Pacific entirely and into the Bering Sea.⁴⁷

Aboriginal and Treaty Rights to Fish: A Layer of Complexity

Climate change impacts will not be distributed equally throughout the world⁴⁸ and similar to indigenous peoples the world over, Aboriginal communities in Canada are particularly sensitive to how climate change impacts the resources on which they depend.⁴⁹ "Special attention must be given to indigenous peoples with subsistence livelihoods and groups with limited access to information and few means of adaptation."⁵⁰ These unique social, economic, and ecological dimensions add a layer of complexity to the vulnerability of freshwater and saltwater salmon fisheries.⁵¹

F.J., Lacroix, J., and Bush, E., editors (2008): From Impacts to Adaptation: Canada in a Changing Climate 2007; Government of Canada, Ottawa, ON, at 345, available at <http://www.adaptation.nrcan.gc.ca/assess/2007/pdf/full-complet_e.pdf>.

⁴⁶ Babaluk, J.A., J.D. Reist, J.D. Johnson and L. Johnson, 2000: *First records of sock-eye (Oncorhynchus nerka), and pink salmon (O. gorbuscha), from Banks Island and other records of Pacific salmon in Northwest territories*. Canada Arctic, 53, 161-164, cited in Field, C.B., L.D. Mortsch, M. Brklacich, D.L. Forbes, P. Kovacs, J.A. Patz, S.W. Running and M.J. Scott, 2007: North America. *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., Cambridge University Press, Cambridge, UK, 617-652 at 624 <<http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter14.pdf>>

⁴⁷ Intergovernmental Panel on Climate Change, *IPCC Third Assessment Report, Climate Change 2001: Impacts, Adaptation and Vulnerability*, <<http://www.ipcc.ch/ipccreports/tar/wg2/284.htm>> at 351.

⁴⁸ Field, C.B., L.D. Mortsch, M. Brklacich, D.L. Forbes, P. Kovacs, J.A. Patz, S.W. Running and M.J. Scott, 2007: North America. *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., Cambridge University Press, Cambridge, UK, 211-272 at 248, available at <<http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter4.pdf>>

⁴⁹ Field, C.B., L.D. Mortsch, M. Brklacich, D.L. Forbes, P. Kovacs, J.A. Patz, S.W. Running and M.J. Scott, 2007: North America. *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., Cambridge University Press, Cambridge, UK, 617-652 at 625, available at <<http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter14.pdf>>

⁵⁰ Field, C.B., L.D. Mortsch, M. Brklacich, D.L. Forbes, P. Kovacs, J.A. Patz, S.W. Running and M.J. Scott, 2007: North America. *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., Cambridge University Press, Cambridge, UK, 211-272

Fisheries are economically significant to Canada and particularly so to British Columbia. Combined, the fisheries and aquaculture sector in British Columbia employs about 20 000 people and in 2004 had annual raw-harvest and processed wholesale values of \$620 million and \$1.1 billion respectively.⁵² However, beyond their economic value, fisheries are also a crucial part of the cultural, legal and ecological fabric of British Columbia:

Prior to European contact, aboriginal groups living in the region of the mouth of the Fraser River fished the river for food, social and ceremonial purposes. It is no exaggeration to say that their life centered in large part around the river and its abundant fishery. In the last two decades, court decisions have confirmed that pre-contact fishing practices integral to the culture of aboriginal people translate into a modern-day right to fish for food, social and ceremonial purposes: *R. v. Sparrow*, [1990] 1 S.C.R. 1075. The right is a communal right. It inheres in the community, not the individual, and may be exercised by people who are linked to the ancestral aboriginal community.⁵³

The Musqueam Band, one of several tribes of the Coast Salish Coast people, have lived in their historic territory on the coasts of what is now British Columbia for at least 1500 years. Salmon has always constituted an integral part of the distinctive Musqueam culture and they have fished since time immemorial for reasons connected to their cultural and physical survival. Salmon was not only an important source of food for the Salish people, but played an important part in their system of beliefs and in their ceremonies. Salmon were held to be a race of beings that had established a bond with human beings that required the salmon to come each year to give their bodies to the humans who, in turn, treated them with respect through the performance of a ritual. An attitude of caution toward the salmon and other creatures resulted in effective conservation.⁵⁴

at 248, available at <<http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter4.pdf>>

⁵¹ Lemmen, D.S., Warren, F.J., Lacroix, J., and Bush, E., editors (2008): *From Impacts to Adaptation: Canada in a Changing Climate 2007*; Government of Canada, Ottawa, ON, at 332, available at <http://www.adaptation.nrcan.gc.ca/assess/2007/pdf/full-complet_e.pdf>.

⁵² BC Ministry of Agriculture and Lands (2005), *About the agriculture industry: industry significance...some facts*, available at <<http://www.agf.gov.bc.ca/aboutind/somefact.htm>> cited in Lemmen, D.S., Warren, F.J., Lacroix, J., and Bush, E., editors (2008): *From Impacts to Adaptation: Canada in a Changing Climate 2007*; Government of Canada, Ottawa, ON, at 344, available at <http://www.adaptation.nrcan.gc.ca/assess/2007/pdf/full-complet_e.pdf>.

⁵³ *R. v. Kapp*, 2008 SCC 41, at para. 4.

⁵⁴ *R. v. Sparrow*, 9 B.C.L.R. (2d) 300, 1986 CarswellBC 412 at para. 19; [1990] 1 S.C.R. 1075, 1990 CarswellBC 105 at para. 29.

PART II: ABORIGINAL AND TREATY RIGHTS TO FISH: LEGAL FRAMEWORKS IN CANADA AND THE U.S.⁵⁵

Some of the most acrimonious contests in Canadian aboriginal law have involved the assertion of rights to fish. This is unsurprising given the centrality of these rights to livelihood as well as the broader well-being and continuity of their cultures and societies.⁵⁶ As is evident from the passage above, the practice of subsistence hunting and fishing is a means for Aboriginal peoples to reaffirm their Aboriginal identity and pass on their traditional knowledge to future generations.⁵⁷ The courts have noted that these rights are integral to Aboriginal culture.⁵⁸

In Canada, the Pacific salmon runs primarily occur in areas without treaties thus necessitating a consideration of both aboriginal and treaty rights.⁵⁹ A distinguishing feature of Canadian law is the constitutional recognition afforded to aboriginal and treaty rights in the *Constitution Act, 1982*. Section 35(1) reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." With regards to the meaning of "recognized and affirmed", the court has set down a general guiding principle for s. 35(1) whereby the "Government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The relationship between the Government and Aboriginal peoples is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship."⁶⁰

Aboriginal Rights

Aboriginal rights are derived from Aboriginal laws, governance, practices, customs and traditions. They do not exist by virtue of their recognition in the Canadian constitution but because they were not extinguished by the British or French assertions of sovereignty in what is now Canada. Aboriginal rights are thus unlike any other rights in Canadian society and are a part of both Canadian common law and Canadian constitutional law despite the fact that they arose under neither.⁶¹ Canadian courts have only recently recognized that the existence of aboriginal rights

⁵⁵ The legal frameworks for Aboriginal and treaty rights in Canada and the United States have been evolving for hundreds of years. Due to the limited scope of this paper, only those aspects most relevant to the issues explored herein will be discussed.

⁵⁶ Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Volume 2, Part Two (Ottawa: Supply and Services Canada, 1996) at 448 [RCAP, Vol. 2]

⁵⁷ Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Volume 2, Part Two (Ottawa: Supply and Services Canada, 1996) at 463 [RCAP, Vol. 2]

⁵⁸ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1990 CarswellBC 105 at para. 40.

⁵⁹ Brian Campbell, "Casting a Net into Turbulent Waters: Indian Salmon Fishing Rights in Canada and the United States" (1995-1996) 3 *Hastings W.-Nw. J. Env't'l L. & Pol'y* 101 at 106.

⁶⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1990 CarswellBC 105 at para. 59.

⁶¹ John Borrows, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 3rd ed. (Markham, Ont.: LexisNexis Canada, 2007) at 93.

is not contingent on positive, external recognition but rather, is based on independent existence.⁶²

In *R. v. Van der Peet*, the majority of the Supreme Court of Canada set out the legal test to be used to identify an “existing aboriginal right” within the meaning of s. 35(1) of the *Constitution Act, 1982*. An aboriginal right is an activity that is an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group asserting the right.⁶³ A practice is integral if it is of “central significance” to the Aboriginal society, a “defining” characteristic of the society, “one of the things that made the culture of the society distinctive”.⁶⁴ The practice in question must have developed pre-contact, i.e. before the arrival of Europeans in what is now North America.⁶⁵

Aboriginal title is one kind of aboriginal right. It amounts to the right to occupy land exclusively and permits Aboriginal owners to use the land for a variety of purposes. This would include hunting, fishing and harvesting on that land. However, rights to activities such as hunting, fishing and harvesting can also exist on land for which no aboriginal title exists.⁶⁶

Treaty Rights

Peace and Friendship treaties of the seventeenth and eighteenth centuries generally conferred hunting and fishing rights (as well as other things) in return for peace and usually did not involve cession of land by Aboriginal peoples.⁶⁷ Other treaties that followed, including the Robinson treaties and a series of eleven numbered treaties, covered a large part of Canada and, on their face, ceded large tracts of land to the Crown in exchange for hunting and fishing rights and the reservation of portions of the land for Aboriginal peoples (among other things).⁶⁸

Infringement

Rights protected by s. 35 are not absolute and can be infringed provided a test of justification is met. The test set out by the court stipulates that a justified

⁶² John Borrows, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 3rd ed. (Markham, Ont.: LexisNexis Canada, 2007) at 100.

⁶³ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 1996 CarswellBC 2309 at para. 45.

⁶⁴ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 1996 CarswellBC 2309 at para. 55.

⁶⁵ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 1996 CarswellBC 2309 at paras. 60-62. *But see R. v. Powley*, 2003 SCC 43 (distinguishing Métis claims of aboriginal rights for which the focus on European contact has to be moved forward to the time of effective European control as the Métis people originated from the intermarriage of French Canadian men and Indian women during the fur trade period).

⁶⁶ Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough, Ont.: Thomson/Carswell, 2007) at 782.

⁶⁷ Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough, Ont.: Thomson/Carswell, 2007) at 788.

⁶⁸ Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough, Ont.: Thomson/Carswell, 2007) at 788. Modern treaties will not be discussed due to the limited scope of this paper. Modern treaties involve complex arrangements with regards to development, land use planning, water management, fish and wildlife harvesting, forestry and mining and assure an ongoing role for Aboriginal people in natural resource management.

impairment must have an objective that is compelling and substantial.⁶⁹ Conservation would meet this test but the public interest would be too vague of an objective to serve as a justification.⁷⁰ A further set of compelling and substantial objectives were set out in the court's judgment in *Delgamuukw* including: "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims".⁷¹ Controversially, Lamer, C.J. suggested in *Gladstone* that:

objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.⁷²

McLachlin J., as she then was, criticized this approach in her dissent in *Van der Peet*, where she held that extending the concept of compelling objective to economic and regional fairness and the interests of non-aboriginal fishers would negate the right to fish. McLachlin J. characterized the limitation as being on the basis of the economic demands of non-Aboriginals as opposed to a limitation required for the responsible exercise of the right.⁷³

If a compelling and substantial objective is found, the court moves on to consider whether the infringement is consistent with the fiduciary relationship between government and Aboriginal peoples.⁷⁴ In the context of fisheries, this has required that Aboriginal peoples be given priority over other interest groups.⁷⁵

Depending on the context of the inquiry, the court may have to consider whether there has been as little infringement as possible, whether fair compensation is available in the case of expropriation and whether the Aboriginal group in question has been consulted regarding the conservation measures.⁷⁶ The court chose not to set out an exhaustive list of factors to be considered, preferring to say that "recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians".⁷⁷

⁶⁹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1113, 1990 CarswellBC 105 at para. 71.

⁷⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1113, 1990 CarswellBC 105 at para. 72.

⁷¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 101, 1997 CanLII 302 (S.C.C.) at para. 165.

⁷² *R. v. Gladstone*, [1996] 2 S.C.R. 723, 1996 CarswellBC 2305 at para. 75.

⁷³ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 1996 CarswellBC 2309 at para. 306.

⁷⁴ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1113, 1990 CarswellBC 105 at para. 75.

⁷⁵ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1113, 1990 CarswellBC 105 at para. 78. More will be said on this issue below.

⁷⁶ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1119, 1990 CarswellBC 105 at para. 82.

⁷⁷ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1119, 1990 CarswellBC 105 at para. 83.

While the court has held that violations of aboriginal title will frequently require compensation, the language in *Sparrow* seems to suggest the same may be necessary in certain cases of aboriginal rights infringement.⁷⁸ That said, the “vast majority of trial and appeal court judgments have focused on consultation with the affected Aboriginal group as the touchstone for the constitutionality of an infringement”.⁷⁹ Where government action has been held to be an unjustifiable infringement of s. 35, the “remedy has frequently been an order nullifying the government act in question thus requiring the government to conduct more and better consultation”.⁸⁰

Extinguishment

As of 1982, aboriginal and treaty rights can only be extinguished through clear and plain intention⁸¹ to surrender or to amend the constitution. The possibility of extinguishment by legislation was removed by s. 35 of the *Constitution Act, 1982*. As is explained above, regulation of aboriginal and treaty rights is permitted if the test for justification is met.⁸²

Recognized Fishing Rights

Recognized aboriginal and treaty fishing rights in British Columbia are the product of the framework set out above. The following cases set out the scope and content of the rights at issue.⁸³ Though not all of the cases set out here pertain solely to British Columbia and Pacific salmon, their reasoning is equally apposite.

In *Sparrow*, members of the Musqueam band in British Columbia were found to have an aboriginal right to fish salmon for food, social and ceremonial purposes as the ‘integral to the distinctive culture test’ was met. The issue of allocation had been dealt with earlier in *Jack v. The Queen* where the court set out that a system of priorities applied: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; (iv) non-Indian sports fishing.⁸⁴ The court confirmed this reasoning in *Sparrow*, finding that, after valid conservation, priority had to be given to Indian

⁷⁸ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1119, 1990 CarswellBC 105 at para. 82.

⁷⁹ Lynda M. Collins, "Protecting Aboriginal Environments: A Tort Law Approach" in Sanda Rodgers, Louise Belanger-Hardy, eds., *Critical Torts* (Toronto: LexisNexis, 2009) 61 at 69.

⁸⁰ Lynda M. Collins, "Protecting Aboriginal Environments: A Tort Law Approach" in Sanda Rodgers, Louise Belanger-Hardy, eds., *Critical Torts* (Toronto: LexisNexis, 2009) 61 at 69.

⁸¹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1990 CarswellBC 105 at para. 37.

⁸² Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough, Ont.: Thomson/Carswell, 2007) at 787.

⁸³ This is not to say that every case touching on aboriginal and treaty fishing rights is set out here. There are additional cases in which these rights have been adjudicated but the framework applied is the one set out in the paper. See for example: *R. v. Adams*, 1996 3 SCR 101 in which the court applied the test in *R. v. Sparrow* to find that members of the Mohawk nation in Quebec had an aboriginal right to fish on Lake St. Francis; *R. v. Douglas*, 2007 BCCA 265 in which the B.C. Court of Appeal held that the Crown neither breached its duty to consult nor failed to accord priority to the Cheam nation’s aboriginal right to fish for food, social and ceremonial purposes.

⁸⁴ [1980] 1 S.C.R. 294, 1979 CarswellBC 702, at para. 42.

food fishing.⁸⁵ The consequence was that Aboriginal peoples could receive 100% of the catch, should conservation needs require that the number of fish caught be capped at the number needed for Aboriginal food purposes. This order of priorities would also seem to imply that Aboriginal fishing could be prohibited entirely if reasonable and necessary conservation measures required that no fish be caught.⁸⁶

The court discussed an aboriginal right to fish commercially in *R. v. Van der Peet*⁸⁷, *R. v. N.T.C. Smokehouse Ltd.*⁸⁸ and *Gladstone*⁸⁹. An aboriginal right to fish herring spawn on kelp and sell it commercially was found for the Heiltsuk people in *Gladstone*. However, *Gladstone* controversially backtracked on the priorities confirmed in *Sparrow*. Lamer C.J. wrote for a six member majority that the justification test laid out in *Sparrow* had to be revisited in light of the significantly different context in *Gladstone*.⁹⁰ The same priorities could not apply where a right, here the right to fish commercially, had no inherent limitation in the same sense that the right to fish for food, social and ceremonial purposes did. Essentially the argument was that, at a certain point, the band will have sufficient fish to meet food, social and ceremonial needs whereas the only limits on a need for commercial sale are the external constraints of the demand of the market and the availability of the resource. The reformulated priority reasoning stipulated that, after conservation, the government is not obligated to allocate the fishery so that those holding an aboriginal right to fish commercially have the exclusive right to exploit the fishery. Instead, the government must show that, in allocating the resource, it took into account the “existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users”.⁹¹ A series of non-exhaustive factors must be used in each case to determine whether the government has granted “priority” to aboriginal rights holders. The content of that priority is to remain vague pending consideration in each case but is “something less than exclusivity but which nonetheless give priority to the aboriginal right”.⁹²

On the east coast, the court interpreted the Mi'kmaq Treaties of 1760-61 in *R. v. Marshall* to include a right to fish for a moderate livelihood which the court said includes “food, clothing and housing, supplemented by a few amenities” but does not include the “accumulation of wealth”.⁹³ Interestingly, while Binnie, J. in *Marshall* credits the expression “moderate livelihood” to Lambert J.A. in *Van der Peet*,

⁸⁵ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1990 CarswellBC 105 at para. 78.

⁸⁶ Note that none of the fishing rights decisions delineate the applicable geographic areas where the rights can be exercised. In practice, the licenses provided by the Department of Fisheries and Oceans set out where the relevant rights may be exercised.

⁸⁷[1996] 2 S.C.R. 507, 1996 CarswellBC 2309. The court held that the Sto:lo Nation’s aboriginal right to fish for food and ceremonial purposes did not include the right to exchange fish for money or other goods.

⁸⁸ [1996] 2 S.C.R. 672, 1996 CarswellBC 2307. In *Smokehouse*, the court held that the Sheshaht and Opetchesaht bands had an aboriginal right to fish for food that did not include the right to exchange fish for money.

⁸⁹ [1996] 2 S.C.R. 72, 1996 CarswellBC 2305.

⁹⁰ [1996] 2 S.C.R. 72, 1996 CarswellBC 2305 at para. 56.

⁹¹ [1996] 2 S.C.R. 72, 1996 CarswellBC 2305 at para 62.

⁹² [1996] 2 S.C.R. 72, 1996 CarswellBC 2305 at para 63.

⁹³ [1999] 3 S.C.R. 456, 1999 CarswellNS 262 at para 59.

Lambert J.A. found this wording south of the border in a decision of the United States Supreme Court, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*⁹⁴ upholding the decision of Judge Boldt in *United States v. State of Washington*.⁹⁵ The United States Supreme Court decision was then cited in a number of cases concerning the hunting, fishing and gathering rights of the Lac Courte Oreille Band of Chippewa Indians in Wisconsin.⁹⁶ The federal courts in Wisconsin described the content of the moderate livelihood standard as a “zero savings level of income”⁹⁷, which is consistent with Binnie J.’s holding that a moderate livelihood does not include the “accumulation of wealth”.

Treaty Rights in the U.S.

Similar to many treaties in Canada, Indians in what is now the Pacific Northwest of the United States ceded large tracts of land to white settlers but did not surrender access to their traditional fishing areas⁹⁸. The treaties, known as the Stevens Treaties for the then-Governor of Washington Isaac Stevens, guaranteed Indians the unlimited right to take fish on reservations (which were included as part of the treaties) and the right to take fish “in common with” the settlers in non-reservation waters.⁹⁹

The Stevens Treaties have required repeated judicial interpretation. In *Tulee v. State of Washington*, the requirement of a license to fish was struck down, as it was not necessary for conservation.¹⁰⁰ In *Puyallup I*, the court added that regulation aimed at conservation “must meet appropriate standards and must not discriminate against Indians”.¹⁰¹ It is at this point doctrinally that the Canadian system of priorities arises. The U.S. courts chose instead to interpret the principle of non-discrimination to mean that Indians were entitled to more than just access to the fisheries; Indians were entitled to a “fair share” of the annual catch.¹⁰²

In *United States v. Washington (Phase I)*, Judge Boldt held that the “in common with” treaty language necessitated an apportionment of the catch between Indians and non-Indians on a 50-50 basis, reasoning that “in common with” meant sharing equally.¹⁰³ The Supreme Court affirmed Judge Boldt’s decision and added that the

⁹⁴ 99 S.Ct. 3055 (1979)

⁹⁵ 384 F. Supp. 312 (1974)

⁹⁶ See generally J.P. McEvoy, “*Marshall v. Canada: Lessons from Wisconsin*” (2000), 12 N.J.C.L. 85.

⁹⁷ *Lac Courte Oreilles Band of Chippewa Indians v. Wisconsin*, 686 F.Supp. 226 (1988).

⁹⁸ Michael C. Blumm, *Sacrificing the Salmon: A Legal and Policy History of the Decline of Columbia Basin Salmon* (Den Bosch, The Netherlands: BookWorld Publications, 2002) at 60-61.

⁹⁹ See for example the Treaty with the Nez Perce, art.3, 12 Stat. 957.

¹⁰⁰ *Tulee v. State of Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942).

¹⁰¹ *Puyallup Tribe v. Department of Game (Puyallup I)*, 391 U.S. 392, 398 (1968).

¹⁰² *Sohappy v. Smith*, 302 F. Supp. 899, 911 (D. Or. 1969).

¹⁰³ *United States v. Washington (Phase I)*, 384 F. Supp. 312, 343 (W.D. Wash. 1974).

right secured Indians with a livelihood or moderate living.¹⁰⁴ This 50-50 allocation was later followed in Oregon in *Sohappy v. Smith*.¹⁰⁵

In *United States v. Washington (Phase I)*, the Indians claimed that their treaty right also included a right to salmon habitat protection but Judge Boldt, who heard the first phase of the litigation, postponed this aspect of the claim. *Phase II* of the litigation, heard by Judge Orrick, declared that the Indians had an “environmental right” to protection of the salmon runs. He held that “implicitly incorporated in the treaties’ fishing clause is the right to have the fishery habitat protected from man-made despoliation”, that “[t]he most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken”, and that environmental protection for salmon was necessary or else the Indians’ “right to take fish would eventually be reduced to the right to dip one’s net in the water....and bring it out empty”.¹⁰⁶ The court assigned a burden to the state “to demonstrate that any environmental degradation of the fish habitat proximately caused by the State’s actions (including the authorization of third parties’ activities) will not impair the tribes’ ability to satisfy their moderate living needs.”¹⁰⁷

However, the *Phase II* decision was appealed to the Ninth Circuit and that portion of the decision was reversed. In rejecting the “environmental servitude” created by the district court, the Ninth Circuit held that the State and Tribes must both take reasonable steps commensurate with their resources and abilities to preserve and enhance the fishery when their projects threaten existing levels.¹⁰⁸ The Ninth Circuit also clarified that the Stevens Treaties entitled Indians to 50% of the catch or less if moderate living needs could be met with less. The decision was later reviewed by the court sitting *en banc*, where the district court’s ruling regarding habitat protection was vacated, holding that it was imprecise and uncertain and that the issue ought not be decided without concrete facts and an underlying dispute.¹⁰⁹

A set of concrete facts arose almost twenty years later when a number of Tribes sought to compel the State of Washington to repair or replace any culverts that were impeding salmon migration to or from the spawning grounds. The Tribes maintained that the State had a treaty-based duty to preserve fish runs so that the Tribes can earn a “moderate living”. The issue was framed by the court in terms of whether the right of taking fish imposes on the State a duty to refrain from diminishing fish runs by constructing or maintaining culverts that block fish passage. The court reasoned that the earlier judgment of the Ninth Circuit *en banc* had not rejected the concept of a treaty-based duty to avoid specific actions which impair salmon runs but rather vacated the judgment as too broad and lacking in factual basis. The court in this instance was comfortable that the narrow issue raised with respect to culverts did not raise the specter of “environmental servitude”

¹⁰⁴ *Washington v. Wash State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 687 (1979).

¹⁰⁵ *Sohappy v. Smith* No. 68-513 (D. Or. Aug. 20, 1975) (Order at 5)

¹⁰⁶ *United States v. Washington (Phase II)*, 506 F. Supp. 187, 203 (W.D. Wash. 1980).

¹⁰⁷ *United States v. Washington (Phase II)*, 506 F. Supp. 187, 205 (W.D. Wash. 1980).

¹⁰⁸ *U.S. v. State of Wash.*, 694 F.2d 1374, 1389 (9th Cir. 1982).

¹⁰⁹ *U.S. v. State of Wash.*, 759 F.2d 1353, 1357 (9th Cir. 1985) (*en banc*).

so feared by the state and thus could be decided.¹¹⁰ The court made clear that it was not imposing an affirmative duty to take all possible steps to protect fish runs but rather a narrow directive to refrain from impeding fish runs in one specific manner.¹¹¹ However, the court's precedential value is likely much greater given its reasoning.

In finding a duty on the part of the State to refrain from blocking fish access to their habitat and spawning grounds, the court was guided by the principles of treaty interpretation set out by the United States Supreme Court, including that treaties must be construed not according to the technical meaning of words but in the sense in which they would naturally be understood by the Indians, which in turn has been relied on by the court to broadly interpret treaties in favour of the Indians.¹¹² The court considered that the promise that the Treaties would protect their source of food and commerce was instrumental in obtaining the Indians' assent¹¹³ and that it was the right to take fish not just the right to fish that was secured by the treaties.¹¹⁴ The court concluded that it was the government's intent and the Tribes' understanding that they would be able to meet their subsistence needs forever. The court reasoned that the assurances that Tribes could safely give up land and be certain that their right to take fish was secure "would only be meaningful if they carried the implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource".¹¹⁵

Despite the declaration being limited to the case of culverts, the court's holding can be broken down to the following: (1) a right to fish involves the right to actually take fish; and (2) the right to fish only has meaning if there is an implied promise that actions will not be taken that would degrade the resource.

PART III: THE CANADIAN CASE FOR A RIGHT TO FISH THAT INCLUDES A RIGHT TO THE CONTINUED PRESENCE OF FISH AND AN IMPLIED PROMISE NOT TO DEGRADE THE RESOURCE

In this part I set out my claim that aboriginal rights and treaty rights include the right to the continued presence of fish and an implied promise not to degrade the resource. I make three arguments to support my claim. The first is based on U.S. case law on treaty rights, and argues that a treaty right to fish includes both a right to the

¹¹⁰ United States v. Washington (2007) CASE NO. CV 9213RSM, Subproceeding No. 01-01 p. 7.

¹¹¹ United States v. Washington (2007) CASE NO. CV 9213RSM, Subproceeding No. 01-01 p. 12.

¹¹² Citing *Washington v. Wash State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

¹¹³ United States v. Washington (2007) CASE NO. CV 9213RSM, Subproceeding No. 01-01, p. 9.

¹¹⁴ United States v. Washington (2007) CASE NO. CV 9213RSM, Subproceeding No. 01-01, p. 10.

¹¹⁵ United States v. Washington (2007) CASE NO. CV 9213RSM, Subproceeding No. 01-01, p. 11.

continued presence of fish and an implied promise not to degrade the resource. This argument is then also extended and applied to aboriginal rights. The second argument I make is that Canadian law supports the claim that aboriginal rights to fish include a right to the continued presence of fish. The third and final argument I make is that the incidental rights doctrine in Canadian Aboriginal law supports the claim that aboriginal and treaty rights to fish include the continued presence of fish.

In Part IV, I will discuss whether an argument can be made that aboriginal or treaty rights are being infringed by Canada's failure to regulate greenhouse gases and whether those infringements would be justified. Given the difficulties inherent in proving causation and given that the court has included the development of agriculture, forestry, mining, and hydroelectric power, and general economic development as potentially compelling and substantial objectives for infringement, I argue that the claim may be vulnerable.

1) Extending U.S. Law on Treaty Rights

There is a viable argument to be made that the court's reasoning in *United States v. Washington* (2007) is equally applicable in Canada, namely that: (1) a right to fish involves a right to actually take fish; and (2) a right to fish only has meaning if there is an implied promise that actions could not be taken that would degrade the resource.

A comparison of the principles of treaty interpretation in both jurisdictions is revealing. The U.S. principle that treaties must be construed not according to the technical meaning of its words but in the sense in which they would naturally be understood by the Indians, which in turn has been relied on by the court in broadly interpreting treaties in favour of the Indians, has parallels in the Canadian jurisprudence. The Canadian principles of treaty interpretation include that: treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories; in determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties; a technical or contractual interpretation of treaty wording should be avoided.¹¹⁶ The principles of interpretation differ to the extent that the U.S. jurisprudence calls for the treaties to be construed as Indians understood them, while the Canadian principles require that the words in the treaties be given the sense that they would naturally have held for the *parties* at the time. Thus, it might be said that the Canadian principles of interpretation involve more of a reconciliation of the interests of both parties than the U.S. principles.

The crucial question is whether this would make a difference to the issue being considered, i.e. whether, on the basis that the meaning for both parties must be considered, the Canadian courts would not interpret a treaty right to fish as a right to actually take fish or would not interpret a treaty right to fish as implying a

¹¹⁶ *Marshall v. Canada*, [1999] 3 S.C.R. 456, 1999 CarswellNS 262 at para. 78.

promise not to degrade the resource. My claim is that this would not be the case. I make this claim for three reasons.

Firstly, the court's reasoning in *United States v. Washington* (2007) did not rely on this principle of treaty interpretation. Rather, it seems as though the court specifically considered the understanding of both parties. The court held that it was both the government's intent and the Tribes' understanding that Indians would be able to meet their subsistence needs forever.¹¹⁷

Secondly, the court's holding that the right would be meaningless without the implied promise that the negotiators or successors would not take actions that would degrade the resource is an objective finding and one that does not rely on either sides' understanding of the words of the treaty.

Thirdly, the Canadian principles of treaty interpretation include an overarching principle that the integrity of the Crown is presumed when searching for the common intention of the Parties. The honour and integrity of the Crown would be fundamentally at odds with a finding that the Crown did not mean for the Aboriginal peoples to be able to take fish when they promised them a right to fish or by a finding that the Crown did not impliedly promise not to degrade the resource.

The reasoning of the court in *United States v. Washington* (2007) is encapsulated in the following argument by Ross and Charvit. They argue that because a treaty grants its Aboriginal signatories and their descendants the right to gain their subsistence through hunting, trapping and fishing, that "obviously" the exercise of these rights depends upon the existence and health of habitat and ecosystems as well as the survival of wildlife populations and access to wildlife.¹¹⁸ They argue that the right to earn a livelihood from hunting, trapping and fishing requires access to and preservation of wildlife resources and that the terms of a treaty are breached by the provincial government when its activities result in the prevention or restriction of the exercise of treaty rights. It was not envisioned, they argue, that habitat would be damaged or altered to the extent that treaty rights could no longer be exercised or would be severely restricted.

As mentioned above, the court's holding in *United States v. Washington* (2007) that the right would be meaningless without the implied promise that the negotiators or successors would not take actions that would degrade the resource, is an objective finding and not dependent on the subjective interpretation of both parties. This lends support to an argument that, if extended, the U.S. doctrine need not be limited to treaty rights but could also be extended to aboriginal rights to fish. Indeed, if degradation were allowed, an aboriginal right to fish and treaty right to fish would be equally meaningless.

¹¹⁷ *United States v. Washington* (2007) CASE NO. CV 9213RSM, Subproceeding No. 01-01, p. 10.

¹¹⁸ Monique M. Ross and Cheryl Y. Sharvit, *Forest Management in Alberta and Rights to Hunt, Trap and Fish under Treaty 8*, *Alberta Law Review*, Vol. 36(3) 1998 645 at 647, 676.

2) Aboriginal Rights

As described above, aboriginal rights are held to exist where an activity is an element of a custom, practice or tradition integral to the distinctive culture of the Aboriginal group asserting the right¹¹⁹ and it is integral if it is of “central significance” to the aboriginal society, a “defining” characteristic of the society, “one of the things that made the culture of the society distinctive”.¹²⁰

In recognizing that the Musqueam have an Aboriginal right to fish for food and social and ceremonial purposes in *Sparrow*, the court considered that “the taking of salmon was an integral part of their lives and remains so to this day”.¹²¹ Later the court remarked “the salmon fishery has always constituted an integral part of their [the Musqueam’s] distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions.”¹²² It is my claim that the court’s language in *Sparrow*, namely the use of the expression “taking of salmon” and the repeated references to “consumption” of salmon, is clearly pointing to a right greater than to dip a net in the water. The right to take fish and the right to do so for the purpose of consumption, whether for food or ceremony, necessarily implies the presence of fish in the water.

Further support for this view is found in the recent holding in *Tsilhqot’in Nation v. British Columbia*¹²³. In finding that the Province’s forest harvesting activities had infringed Aboriginal rights to hunt and trap, Vickers J. stated the following:

Recognizing Aboriginal rights to hunt and trap over an area means wildlife habitat must be managed to ensure a continuation of those rights. Section 35(1) of the *Constitution Act, 1982* demands that the protection of those rights is a paramount objective. The declaration of Aboriginal rights is not intended to be hollow or short lived. Tsilhqot’in Aboriginal rights grew out of the pre-contact society of Tsilhqot’in people. This historical right is intended to survive for the benefit of future generations of Tsilhqot’in people.¹²⁴

3) Incidental Rights

The scope of aboriginal and treaty rights to hunt or fish in Canada has not been limited strictly to the specific acts of hunting and fishing. In the line of cases on incidental rights, the court has found that, for example, a right to carry a gun to a hunting ground is implicit in the right to hunt¹²⁵, a right to teach youth how to fish is implicit in the right to fish for food¹²⁶ and a right to build a cabin is implicit in the

¹¹⁹ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 1996 CarswellBC 2309 at para. 45.

¹²⁰ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 1996 CarswellBC 2309 at para. 55.

¹²¹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1990 CarswellBC 105 at para. 29.

¹²² *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099, 1990 CarswellBC 105 at para. 40.

¹²³ 2007 BCSC 1700

¹²⁴ 2007 BCSC 1700 at para 1291.

¹²⁵ [1985] 2 S.C.R. 387, 1985 CarswellNS 226.

¹²⁶ *R. v. Côté*[1996] 3 S.C.R. 139, 1996 CarswellQue 1039.

right to hunt¹²⁷. Beyond a number of specific examples, however, the notion of incidental rights remains severely under-theorized in the jurisprudence.

My claim is that Canadian case law on incidental rights supports the argument that a right to fish includes a right to the continued presence of the fish.¹²⁸ The legal basis for this claim is found in the language of the jurisprudence; I argue that a right to the continued presence of fish is supported by any and all characterizations of incidental rights by the court. My claim applies equally to aboriginal and treaty rights, as the court has not given any indication that the conception of incidental rights ought to be distinguished on that basis.

The Case Law

In *R. v. Simon*, Simon was appealing a conviction for possession of a rifle and shotgun cartridges. Simon claimed in defense that a treaty right to “free liberty of Hunting & Fishing as usual” gave him immunity from prosecution. The court found that:

the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself, an example of which is travelling with the requisite hunting equipment to the hunting grounds.[...] it is implicit in the right granted [...] that the appellant has the right to possess a gun and ammunition in a safe manner in order to be able to exercise the right to hunt.¹²⁹ [emphasis added]

The language the court uses indicates that incidental rights are those that are required to give effect to the rights, thus including in its ambit anything without which the right would have no effect.

In *R. v. Côté* the court found that an aboriginal right to fish for food included the incidental right to teach the younger generation:

In the aboriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration. As such, to ensure the continuity of aboriginal practices, customs and traditions, a substantive aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation.¹³⁰

The language the court uses in *Côté* indicates that incidental rights include activities that ensure the continuity of aboriginal practices, customs and traditions.

¹²⁷ *R. v. Sundown*, [1999] 1 S.C.R. 393, 1999 CarswellSask 94.

¹²⁸ Bradford Morse, *Indigenous Rights as a Mechanism to Promote Environmental Sustainability*, in Westra, Laura, Klaus Bosselmann, and Richard Westra. *Reconciling Human Existence with Ecological Integrity: Science, Ethics, Economics and Law* (London: Earthscan, 2008) 159 to 182 at 177 (Morse argues that the legal basis to make such arguments remains available).

¹²⁹[1985] 2 S.C.R. 387, 1985 CarswellNS 226 at para 28.

¹³⁰[1996] 3 S.C.R. 139, 1996 CarswellQue 1039.

In *R. v. Sundown*, the court held that a treaty right to hunt included an incidental right to cut down trees and construct a cabin to be used as a base for traditional expeditionary style hunting. The court in *Sundown* applied the test set out in *Simon* and elaborated that the question of what is “reasonably incidental” should be approached from the perspective of a reasonable person, fully apprised of the relevant manner of hunting or fishing. This reasonable person should consider whether the activity in question is reasonably related to the act of hunting or fishing.¹³¹ In order to determine what is reasonably incidental, the reasonable person must examine the historical and contemporary practice of the specific right to see how the right has been and continues to be exercised. “Incidental activities are not only those which are essential, or integral, but include, more broadly, activities which are meaningfully related or linked”.¹³² The court concluded that some form of shelter was a necessary part of expeditionary hunting and accordingly, shelter is reasonably incidental to expeditionary hunting.¹³³ “Without a shelter, it would be impossible for this First Nation to exercise its traditional method of hunting and their members would be denied their treaty rights to hunt.”¹³⁴

The court in *Sundown* used language that suggested that an incidental right is that which makes the exercise of the right possible but held that incidental rights are not only those essential to the right but those which a reasonable person would consider reasonably related to the right.

Using language of what is “essential” for a right, Williamson J. in *Campbell v. British Columbia (Attorney General)* seems to suggest that a right to self-government might be implicit in a right to aboriginal title:

On the face of it, it seems that a right to aboriginal title, a communal right which includes occupation and use, must of necessity include the right of the communal ownership to make decisions about that occupation and use, matters commonly described as governmental functions. This seems essential when the ownership is communal.¹³⁵

In *Marshall v. Canada* the court found that a treaty right to *bring* goods to trade entailed a further right to *obtain* goods for trading purposes. Binnie J. held that the trade arrangement must be interpreted in a way that gives meaning and substance to the promises made by the Crown.¹³⁶ Thus, the language in *Marshall* seems to indicate that an incidental right is protected if another protected right would be meaningless or of no substance without it.

Specific support for the inclusion of habitat protection in a right is found in *Saanichton Marina Ltd. v. Claxton*. The BCCA held that a treaty right to “carry on our fisheries as formerly” included the protection of the place where the right was exercised concluding that the treaty right would be infringed by the destruction of habitat. At issue was the construction of a marina. Following the reasoning in

¹³¹ *R. v. Sundown*, [1999] 1 S.C.R. 393, 1999 CarswellSask 94, at para. 28.

¹³² *R. v. Sundown*, [1999] 1 S.C.R. 393, 1999 CarswellSask 94, at para. 30.

¹³³ *R. v. Sundown*, [1999] 1 S.C.R. 393, 1999 CarswellSask 94, at para. 31.

¹³⁴ *R. v. Sundown*, [1999] 1 S.C.R. 393, 1999 CarswellSask 94, at para. 32.

¹³⁵ 2000 CarswellBC 1545; 2000 BCSC 1123, at para. 114.

¹³⁶ [1999] 3 S.C.R. 456, 1999 CarswellNS 262 at para. 52.

Simon, the court held: “[T]he right granted by the treaty is broader than the words of the treaty may on their face indicate. The right to carry on the fishery encompasses other rights which are incidental to the right granted by the treaty.”¹³⁷ In *Saanichton*, those incidental rights included habitat protection and protection of the fishery more generally. Beyond restricting access to important parts of the fishery, the Tsawout Band argued that dredging and construction would cause destruction of the crab fishery, the shellfish habitat, and reduce carrying capacity for fish and food organisms which would pose a danger for the cut-throat trout.¹³⁸

Hinkson J.A. concluded:

In my opinion, construction of the marina will derogate from the right of the Indians to carry on their fisheries as formerly in the area of Saanichton Bay which is protected by the treaty. To begin with it will limit and impede their right of access to an important area of the bay. Further they will not be able to carry on the stationary crab fishery as formerly, indeed with the loss of the eel grass, that part of the fishery will be destroyed in the area to be dredged. Construction will also disrupt other parts of the fishery in that area as well. The development that has already occurred around the bay has not had such a serious effect on the fishery. This development, while of only a small area of the bay will have a harmful impact on the right of fishery granted to the Indians by the treaty.¹³⁹

The analysis of the case law presented above demonstrates a substantial lack of clarity in the court’s jurisprudence on incidental rights. The language the court uses to define incidental rights includes: (1) those required to give effect to the right; (2) those that make it possible; (3) those that ensure the continuity of aboriginal practices, customs and traditions; (4) not only those that are essential but those that a reasonable person would consider reasonably related to the right; (5) those that are essential; and (6) those without which the right would be meaningless and/or of no substance. Thus the courts have characterized incidental rights across the spectrum, on one end describing incidental rights as essential and on the other end describing them as reasonably related. That said, a claim that a right to fish includes the continued presence of fish would fit easily under any, and in fact all, of these characterizations.

PART IV: INFRINGEMENT

Following a conclusion that an aboriginal or treaty right to fish includes the continued presence of fish in the water or that a treaty right includes an implied promise not to degrade the resource, the question arises as to whether the right has

¹³⁷ (1989), 36 B.C.L.R. (2d) 79, 1989 CarswellBC 61 at para. 35

¹³⁸ (1989), 36 B.C.L.R. (2d) 79, 1989 CarswellBC 61 at para. 38

¹³⁹ (1989), 36 B.C.L.R. (2d) 79, 1989 CarswellBC 61 at para. 40. Note that leave to appeal to the Supreme Court of Canada was not sought.

been infringed. This is the crux of the climate change argument. The infringement aspect of the analysis would involve two separate and distinct hurdles for potential plaintiffs. The first is to establish that the failure to effectively regulate greenhouse gas emissions has infringed, or will infringe, the right to actually take fish or the promise not to degrade the resource. The second is to argue that the government's infringement is not justified. While the breadth of possible justifications the court could contemplate may be problematic, the establishment of causation is likely to be a more significant burden.

Causation

In order to prove that the right to actually take fish is infringed by the failure to effectively regulate greenhouse gases, a potential plaintiff would have to prove that the exercise of the right is being undermined by the government's failure to regulate. In other words, a potential plaintiff would need to establish a causal connection between the failure to effectively regulate greenhouse gases and a reduced right to actually take fish.

This causation hurdle would be considerable as significant problems are involved in proving causation in the context of climate change litigation¹⁴⁰. A potential claim by Aboriginal peoples would be no exception. The plaintiff would need to establish that Canada's failure to effectively regulate greenhouse gas emissions was an actual and proximate cause of harm to Pacific coast salmon, even though Canada is a small source of greenhouse gases on a global scale and it is still hard to establish specific environmental effects of greenhouse gas emissions. A plaintiff would also have to contend with the fact that there are many other potential causes of the plight of Pacific salmon, for example overfishing. Therefore, a plaintiff may find it difficult to describe the failure to effectively regulate greenhouse gases as a but-for cause of the plight of Pacific salmon.

While it is admittedly difficult to show causation under a traditional but-for standard, courts may not feel bound to apply such a standard in this context. Courts occasionally depart from this standard in tort cases, for example in the market share liability cases in the U.S.¹⁴¹ Market share liability cases involve scenarios where a plaintiff is able to establish injury as a result of one or more of a group of negligent defendants but is unable to identify which one was the cause-in-fact of the injury. Where, through no fault of the plaintiff, the cause-in fact defendant cannot be identified, the burden of proof shifts to the defendants to show that their culpability is not proportionate to their proven share of the market at the relevant time.

¹⁴⁰ Andrew Strauss, *The Legal Option Suing the United States in International Forums for Global Warming Emissions*, 33 *Env'tl. L. Rep.* 10185 (2003), at 10191.

¹⁴¹ *Sindell v. Abbot Laboratories*, 607 P.2d 924 (Cal. S.C., 1980). The plaintiff, who suffered vulvic cancer as a result of her mother's ingestion of diethylstilbestrol during pregnancy, was unable to identify the specific manufacturer who made the drug taken by her mother. On the traditional approach the plaintiff would have failed because she could not make out causation against any specific defendant. The court adopted a theory of market share liability to permit recovery.

Canadian courts have recognized the viability of the market share doctrine, at least on a threshold test of whether it can sustain a cause of action.¹⁴²

In addition, courts have on occasion reversed the burden of proof in difficult causation cases with multiple potential wrongdoers, requiring the defendants to show that they did not cause the harm. The fountainhead of this doctrine in Canada is *Cook v. Lewis*, in which the plaintiff had been shot by one of two hunters but the jury was unable to say by which. The court found the jury ought to have been instructed that, once the plaintiff had proven that he was shot by one of the defendants, the onus was then on the defendants to establish absence of both intention and negligence. If the jury found themselves unable to decide which of the two shot the plaintiff, because in their opinion both shot negligently in his direction, the court held that both defendants should be found liable.¹⁴³

Moreover, despite the obvious difficulties, one must not preclude the possibility of developing new theories of causation more compatible with the problem at hand. As is evidenced by the examples above, the common law has not shied from the use of creative tools in dealing with difficult causation cases. That said, Percival argues that the common law has never been well suited to solving environmental problems beyond those caused by single sources of pollution causing visible damages.¹⁴⁴

In the context of evaluating a hypothetical suit against the U.S. electricity generating industry by the Inuit, Hsu offers an “adventurous” argument that inducing the U.S. electricity generating industry to substantially reduce its emissions is a necessary but not sufficient condition for the rest of the world “getting down to the business of reducing its greenhouse gas emissions”. In short, Hsu sketches out a “following first movers to the top” argument based on a theory that most countries desire to avoid pariah status. Basically, Hsu argues that the causation argument

will have to rest on the assertion that the U.S. electricity generation industry *must move first* in order for it to be plausible that the rest of the United States and the rest of the world will take up the business of reducing greenhouse gases. To the extent that the refusal of U.S. electricity generation industry to abate its greenhouse gas emissions is causing other greenhouse gas emitters to similarly balk at abatement, it is substantially *causing* the climate-related harms to the Inuit.¹⁴⁵

I set out this example not because I believe it is necessarily applicable to the issues presented here but rather to illustrate my claim that, ultimately, some novel theorizing about the law of causation may be what is needed most. Regretfully, further reviewing potential avenues for development of the law in this area is beyond the scope of this article; suffice to say it is an issue that would need to be considered carefully in any action against Canada.

¹⁴² *Garipey v. Shell Oil Co.* (2000), 51 O.R. (3d) 181 (Sup. Ct.), 2000 CarswellOnt 3684 (dismissing motion to stay for want of jurisdiction), leave to appeal refused, [2001] O.J. No. 1569 (Div. Ct.), 2001 CarswellOnt 1361.

¹⁴³ [1951] S.C.R. 830, 1951 CarswellBC 180.

¹⁴⁴ *Environmental Law in the Twenty-First Century*, 25 Va. Env'tl. L. J. 1 (2007), 5-6.

¹⁴⁵ Shi-Ling Hsu, A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit, 79 U. Colo. L. Rev. 701 (2008), at 753.

Before reaching the issue of justification, it is also worth mentioning that, while proving causation may present substantial difficulties for a climate change case, a potential claimant would in theory benefit from the government's duty to consult essential to the honourable process of reconciliation that s. 35 demands. This would be particularly relevant to a scenario in which it was not possible to prove that Canada's failure to regulate is currently harming salmon but easier to prove that the failure could contribute to harm in the future. The duty to consult arises in the context of established claims, as it did in *Delgamuukw*¹⁴⁶, and in pre-proof claims situations, as it did in *Haida Nation v. British Columbia (Minister of Forests)*.¹⁴⁷ The scope of the duty to consult is controlled at all times by the question of what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.¹⁴⁸ It is my claim that if prospective harm were envisaged by Canada's failure to regulate greenhouse gases, despite some level of uncertainty, the duty to consult and the honour of the Crown would militate in favour of a remedy. In situations of uncertainty, the honour of the Crown is deeply implicated and s. 35 must provide a protective shield, lest it be void of any worth.

Justification

If the causation hurdle were overcome, any infringement would then be scrutinized to assess whether the infringement was justified under the *Sparrow* test. First the existence of a compelling and substantial objective must be ascertained, followed by a consideration of whether the infringement is consistent with the fiduciary relationship between the government and Aboriginal peoples.¹⁴⁹ The court may then go on to consider whether there has been as little infringement as possible, whether fair compensation is available and whether the Aboriginal group has been consulted.¹⁵⁰

In this case, a claim may face significant difficulties at the first stage of the test where the court assesses whether a compelling and substantive objective exists. The controversial suggestion in *Delgamuukw* that the development of agriculture, forestry, mining, and hydroelectric power, or general economic development qualify as compelling and substantive objectives could be fatal to a claim. Herein lies a significant difference with the U.S. jurisprudence where it seems that acceptable infringements have been limited to conservation measures.

In finding that the Treaties did not allow the state to charge Indians licensing fees, the court specified that the Treaties leave the state with power to impose restrictions of a purely regulatory nature concerning the time and manner of fishing outside reservations as are necessary for the conservation of fish. Later the court expanded on the factors that a state regulation must meet, holding that regulation is appropriate if it is in the interests of conservation, meets appropriate standards and

¹⁴⁶ [1997] 3 S.C.R. 1010,

¹⁴⁷ 2004 SCC 73.

¹⁴⁸ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 45.

¹⁴⁹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1113, 1990 CarswellBC 105 at para. 71.

¹⁵⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1119, 1990 CarswellBC 105 at para. 82.

does not discriminate against Indians.¹⁵¹ This was later interpreted to mean that there must be a need to limit the taking of the fish and the regulation must be indispensable to the accomplishment of the needed limitation.¹⁵² Thus, unlike the Canadian courts, the U.S. courts do not seem to have broadened acceptable infringement beyond conservation to other “compelling and substantive” objectives.¹⁵³

In Canadian law, the issue of what constitutes a compelling and substantive objective remains open. The question then, is whether the infringement is consistent with the fiduciary relationship between the government and Aboriginal peoples. Given the lack of clarity the court has shown on the specific content of the fiduciary relationship,¹⁵⁴ it is very difficult to predict how the court would deal with this claim.

Certainly, the federal government may find it more difficult to justify failing to effectively regulate greenhouse gases given its ratification of the Kyoto Protocol. Ultimately, the strength of this argument turns on the weight to be given to the application of international law and treaties in domestic law. *Baker v. Canada (Minister of Citizenship and Immigration)* makes it clear that treaties and conventions are not part of Canadian law, and thus have no direct application within Canadian law, unless they have been implemented by statute.¹⁵⁵ However, the court also held in *Baker* that values reflected in international law might help inform the approach of the court in interpreting domestic law.

Interestingly, the issue of whether the Kyoto Protocol has actually been implemented by statute is a live one. In October 2008, the Federal Court held that the *Kyoto Protocol Implementation Act*¹⁵⁶ is not justiciable as it involves political questions better resolved in a political forum. The KPIA was introduced as a private member’s bill in 2007, with a view to forcing the federal government to comply with its obligations under the Kyoto Protocol. The KPIA became law on June 22, 2007 with the support of opposition parties and a majority of the Senate. The KPIA requires the Minister of the Environment to prepare a Climate Change Plan that ensures Canada will meet its Kyoto target, calls for the federal cabinet to make or repeal regulations to ensure Canada meets its target, and calls for the Minister to publish the greenhouse gas reductions anticipated from such regulations. These obligations are

¹⁵¹ *Puyallup Tribe v. Department of Game (Puyallup I)*, 391 U.S. 392, 398 (1968).

¹⁵² *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169, 172 (9th Cir. 1963).

¹⁵³ It is crucial to note here that although extinguishment, or abrogation as it is termed in the US, requires a clear and plain intention in both jurisdictions, a very important distinction lies in the fact that treaty rights in the U.S. can be abrogated by statute, whereas this is no longer possible in Canada since the *Constitution Act, 1982* came into force; See *United States v. Dion* 476 U.S. 734 (1986) (The defendant could not assert a treaty right defense to the Endangered Species Act charge, considering that the Bald Eagle Protection Act abrogated any such right).

¹⁵⁴ John Borrows, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 3rd ed. (Markham, Ont.: LexisNexis Canada, 2007).

¹⁵⁵ [1999] 2 S.C.R. 817, 1999 CarswellNat 1124 at para. 69 (*Baker*), following *Francis v. The Queen*, [1956] S.C.R. 618 at 621, 1956 CarswellNat 248 at para. 5; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 at pp. 172-73, 1977 CarswellNat 553 at para. 54.

¹⁵⁶ 2007, c. 30 (KPIA).

tied to other provisions, which create additional reporting functions and specific timelines for action. The decision of the Federal Court is currently being appealed. Whether the Federal Court of Appeal decides to reverse the lower court's opinion that the statute is not justiciable could impact the weight the court would give to an argument that Canada's justification for infringing aboriginal or treaty rights is weakened by its international commitment via the Kyoto Protocol. Here, a court might even consider the federal government's inaction vis a vis the steps taken by many jurisdictions to address greenhouse gas emissions pursuant to their Kyoto Protocol commitments.¹⁵⁷

CONCLUSION

At this point, some climate change has occurred and some additional amount is inevitable. Habitats will be lost. Landmasses will be lost. Human and animal health will most certainly suffer. This paper asks from the perspective of Aboriginals in Canada - who stand to lose so much - whether something beyond a moral obligation exists to do something about it. In showing that aboriginal and treaty rights to fish include the right to the continued presence of fish, this paper provides a preliminary "yes" to that question.

However, many more questions must be asked and many more answers must be sought. One of these questions is whether litigation ought to even play a role. Dozens of climate change litigation cases have been filed worldwide and scholarship on the topic is growing. Although courts have often filled in gaps left by legislative inaction, their ability to adapt to the evidentiary issues posed by global climate change has been limited.¹⁵⁸

At this juncture, it is important to note that, whether these arguments can be used to force action on climate change, this paper nonetheless makes an important contribution nonetheless. The argument that a right to fish includes the right to take fish, and a promise not to degrade the resource, may be very powerful in other contexts where aboriginal or treaty rights might be used as a platform from which to prevent various kinds of environmentally harmful activities. The situations like the one described in *Saanichton* is an apt example.

This paper attempts to shed light on a novel way of thinking about the climate change problem and the Canadian government's role in the solution. It points to the potential of legal responsibility and duty and engages those notions, not as a complete solution, but to provide a basis for a shift in the discourse and some much needed momentum for effective political action. Despite the fact that many attempts to litigate climate change have been unsuccessful, there is a reason why efforts have persisted. Consensus among commentators is that there is value in the attempts themselves as vehicles through which matters of importance to communities are brought to the attention of governments. Morse concludes: "utilizing domestic and

¹⁵⁷ Here, I would again refer the reader to the Climate Change Performance Index presented by Germanwatch and CAN-Europe, which measures current emissions, emissions trends and climate policy, <http://www.germanwatch.org/klima/ccpi09.pdf>.

¹⁵⁸ Shi-Ling Hsu, A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit, 79 U. Colo. L. Rev. 701 (2008), at 704.

international law arguments is sometimes the only effective, peaceful way to compel action in this domain.”¹⁵⁹ In their analysis of the duty of care in climate change litigation, Hunter and Salzman argue that increasing awareness of the harm from climate change and decreasing costs of abatement will increase the viability of a negligence action over time.¹⁶⁰ Certainly the potential of prospective liability is as good an incentive as any to change future behaviour.¹⁶¹

Perhaps we must do as Hsu suggests: cheer on the climate litigants but not place too much reliance on their success. Ultimately, litigation should be viewed as one of many strategies and will fall far short of achieving climate change goals if it is not coupled with effective measures at the international and national levels.¹⁶²

¹⁵⁹ Bradford Morse, *Indigenous Rights as a Mechanism to Promote Environmental Sustainability*, in Westra, Laura, Klaus Bosselmann, and Richard Westra. *Reconciling Human Existence with Ecological Integrity: Science, Ethics, Economics and Law* (London: Earthscan, 2008) 159 to 182 at 178.

¹⁶⁰ David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 156 U. Pa. L. Rev. 1741 (2007), at 1776-80.

¹⁶¹ Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. Colo. L. Rev. 701 (2008), at 731.

¹⁶² Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. Colo. L. Rev. 701 (2008), at 766.