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The Coexistence of Sustainable Development and Aboriginal Fishing Rights in Canada

by Johanna Sutherland

Canadian First Nations are entitled to participate in fisheries and marine resource management consistent with treaties and customary rights protected by the Federal Constitution, court rulings, a Federal Aboriginal Fisheries Strategy and land and sea settlement agreements. These rights are less well recognised in Australia. For example, in its decision in the Miriuwung Gajerrong case[1] on 3 March, the Full Federal Court of Australia did not accept the finding of the trial judge[2] that native title includes a right to trade in resources. The majority also held that the public right to fish had the effect of extinguishing the exclusivity of native title rights to fish in the claim area. In the Croker Island case,[3] a majority of the Full Court held that non-Aboriginal members of the public have a common law right to fish in tidal waters, and ancillary rights to dig bait, and to take shellfish and worms. The claimants' rights to trade in marine resources were not recognised on the questionable basis that their claim to exclusive possession had failed.

Aboriginal Common Law Rights to Fish

In 1999, the Canadian Supreme Court in the *Marshall*case[4] confirmed that the Mi'kmaq, Maliseet and Passamaquoddy peoples in the Maritimes and Quebec provinces have a right to fish commercially. This is a treaty right, first agreed to 240 years ago, which has evolved to extend to participation in the largely regulated commercial fishery of the 1990s. The right may be exercised for the purpose of earning a moderate livelihood.

This was the second momentous fishing decision issued by the Supreme Court this decade. In the 1990 case of *Sparrow*,[5] the Court upheld Aboriginal peoples' right to fish for food, and for social and ceremonial purposes. *Sparrow* gave this right priority over recreational and commercial fishing rights but it was made subject to government regulation for an overriding purpose, such as resource conservation. The *Sparrow* court said that relevant factors for assessing whether regulation was justified included whether the infringement was as minimal as possible to achieve the aims intended, whether fair

compensation was available and whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented. This test for valid regulation was later elaborated,[6] and subsequetly approved in the *Marshall* case.

These decisions are consistent with section 35(1) of the *Canadian Constitution Act* (1982) which provides that '[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.'

The Aboriginal Fisheries Strategy

In response to the *Sparrow* decision, in 1992 Canada launched an Aboriginal Fisheries Strategy ('AFS').[7] The AFS operates where there is a fishery managed by the Department of Fisheries and Oceans ('DFO'), and where land claims settlements have not already resulted in an agreed management regime for that fishery.[8] Agreements negotiated under the AFS address harvesting rights and economic development opportunities including access to commercial licences, the terms and conditions of communal fishing licences (including enforcement provisions and data collection), co-management arrangements between the Aboriginal fishing group and the DFO, and cooperative management projects.

Before *Marshall*, more than 200 licences had already been transferred to Aboriginal fishers under the AFS's Allocation Transfer Program ('ATP').[9] Following *Marshall*, the ATP was expanded to facilitate the voluntary buy-back of more commercial fishing licences. Retired licences were to be re-issued as communal commercial licences under the Aboriginal Communal Fishing Licences Regulations.[10] The AFT program does not impact on conservation objectives because existing access to diverse fish stocks is merely transferred.

After the *Marshall* decision, the Federal Government also appointed a Chief Federal Representative (Mr James MacKenzie) to negotiate the further accommodation of Aboriginal interests in Canada's fishery, which currently has a total landed catch value of about $2.9 billion. It also appointed an Assistant Federal Representative (Mr Gilles Thèriault), to ensure that other stakeholders' views were taken into account. Resources were also made available to both Aboriginal and non-Aboriginal organisations to facilitate their involvement in the negotiations.

By May 2000, more than 1400 commercial fishers had made applications for their licences to be retired; fourteen (about half) of the First Nations affected by the *Marshall* decision had signed interim 12-month fishing agreements with the Federal Government, and four had made agreements in principle. These agreements provide for access to the Atlantic fishery under about 167 communal fishing licences and training, equipment (including about 75 vessels), capacity building and other assistance.[11] However, Canadian First Nations still only represent a tiny proportion of the 23,000 vessels and 44,000 fishers in the Atlantic fishery.[12]

Collaborative Enforcement

Another innovative aspect of the Canadian AFS is the Aboriginal Fishery Officer/Guardian Program ('the AFOGP') which is likely to be expanded following the recent completion of a national review. The review recommends that:

- the AFOGP should be given renewed emphasis by DFO, with the establishment of a National Program Steering Committee comprised of representatives from Aboriginal groups, DFO and other federal government departments. This committee would develop clear objectives, policies and administrative guidelines for the AFOGP;
- Aboriginal Guardians/Fishery Officers should be assigned powers based on the level of training completed and provided that appropriate command, control and support structure is in place for the level of powers allocated; and
- the same training and recruitment standards should be in place for all Fishery Officers and Aboriginal Fishery Officers/Guardians.

The AFOGP review report is currently being considered by DFO managers.[13]

Comprehensive and Specific Settlement Agreements

Canadian comprehensive and specific settlement agreements concerning marine issues are also relatively more progressive and equitable than in Australia.[14] Many Canadian settlement agreements include provisions concerning access to fisheries and the integration of First Nations within management regimes. Fisheries management is also being negotiated as policy and practices evolve concerning First Nations' inherent right of self-government.

The following are examples of the fisheries aspects of selected agreements.

Nunavut Final Agreement

The 1993 Nunavut Final Agreement ('the NFA') provides for the establishment of an integrated and coordinated land and sea co-management regime for Nunavut. Nunavut spreads across the central and eastern Arctic but excludes Quebec. The agreement covers issues such as land-use planning, access to wildlife, water use, impact assessments and research and advisory processes. According to Gillies,

twenty-six of the twenty-seven communities in Nunavut are on the coast. Not surprisingly, therefore .... [t]he agreement recognises seven principles related to marine areas, and no fewer than 13 of its 42 articles ... relate directly to marine matters.[15]

The agreement establishes a Nunavut Wildlife Management Board ('NWMB') as the main instrument of land and sea wildlife management within the Nunavut Settlement Area. The Federal Minister of Fisheries and Oceans can only overturn NWMB decisions

on conservation grounds. Other bodies include the Nunavut Impact Review Board, the Nunavut Water Board and the Nunavut Planning Commission. Each of these is a co-management body with equal government and Inuit representation. These bodies may advise and make recommendations to other government agencies concerning marine management either jointly, as a Nunavut Marine Council, or severally. The Inuit have a priority right to take land and marine products for subsistence and inter-settlement trade, and they can have priority consideration when new commercial harvesting, tourism or other marine activities are to be established. The Inuit are permitted to hunt and fish in protected areas, conservation requirements permitting.

The agreement also establishes two special zones outside the settlement area in recognition of the Inuit's dependence on migratory marine species. 'Zone I' is along the east coast of Baffin Island, and 'Zone II' is in Hudson and James Bay. The NWMB must be consulted with respect to any wildlife management decisions in both Zones which would affect Inuit harvesting within the Nunavut Settlement Area. A structure or structures must also be maintained to promote the coordinated management of migratory marine species within both Zones.[16]

Inuvialuit Final Agreement

The 1984 Inuvialuit Final Agreement for the western Arctic recognises First Nations' priority access rights to marine mammals and all other harvestable resources in the settlement area for subsistence, barter and commercial purposes, up to the agreed quota. The Agreement establishes various institutions for environmental management, including wildlife harvesting and environmental impact controls. It establishes a Fisheries Joint Management Committee ('FJMC'), with two Inuvialuit and two government members. The FJMC advises the Federal Minister of Fisheries and Oceans on quotas, regulations and research, and allocates subsistence quotas for fisheries, including marine mammals, among communities. The minister can accept or reject the recommendations, and provision is made for further consultation with the FJMC. At the community level, Hunters and Trappers Committees sub-allocate quotas, formulate local by-laws, and liaise between the community and the FJMC.

The Agreement also establishes a co-management Environmental Impact Screening Committee, which refers matters with potentially serious environmental impacts to the Environmental Impact Review Board. In turn, this Board advises the appropriate government decision-making agency. Both the committee and the review board have equal Inuvialuit and government appointees but the government-appointed chairman retains the casting vote. The Inuvialuit Final Agreement also provides for equal representation on any land-use planning boards that might be established.[17]

Nisga'a Final Agreement

The Nisga'a Final Agreement was formally approved by the Nisga'a Tribal Council, the Province of British Columbia and the Government of Canada in 1998-9. Chapter 8 of the Agreement details which fishing rights are subject to Nisga'a laws and government

regulation. Non-commercial fishing is exempt from licencing fees. A 25-year renewable fisheries side agreement provides the Nisga'a with access to about 9% of the total allowable catch of Canadian Nass River sockeye and pink salmon.[18]

It is regrettable that Indigenous Australians are being denied recognition of their native title rights in the commercial fisheries sector and that sustainable development policies for Indigenous fishers are far less well protected here than in Canada. As Patrick Dodson might say - this remains 'unfinished business'.

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[1] *State of Western Australia v Ward* (2000) 170 ALR 159.

[2] *Ward v State of Western Australia* (1998) 159 ALR 483.

[3] *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426.

[4] *R v Marshall* (1999) 3 SCR 533. Cf P Jull, 'Canada's Atlantic Indigenous Fishing Decision', (1999) 24(4) *ILB* 18.

[5]*R v Sparrow* (1990) 1 SCR 1075.

[6] *R v Badger* (1996) 1 SCR 771.

[7] See generally: Fisheries and Oceans Canada, 'Fact Sheet: Aboriginal Fisheries Strategy', accessed 5 May from <http://www.dfo-mpo.gc.ca/communic/FISH_MAN/AFS_e.htm>.

[8] The entire Pacific coast of Canada is subject to such agreements, while the Arctic and Labrador coasts are now subject to Inuit land and sea claims settlements, which are currently in the process of implementation or advanced negotiation.

[9] 'Government Response to the Standing Committee on Fisheries and Oceans: The Marshall Decision and Beyond: Implications for Management of the Atlantic Fisheries, April 2000', accessed on 5 May from <http://www.ncr.dfo.ca/COMMUNIC/Reports/marshall/gr-marshall_e.htm>.

[10] Aboriginal Communal Fishing Licences Regulations (SOR/93-332), enacted under the

Fisheries Act RS, c F-14.

[11] Hon Herb Dhaliwal Minister of Fisheries and Oceans, 'Update on fisheries affected by the Supreme Court's Marshall decision', 4 May 2000, accessed on 5 May from <*http://www.ncr.dfo.ca/COMMUNIC/Statem/2000/marshall-may04e.htm*>.

[12] Hon Herb Dhaliwal Minister of Fisheries and Oceans, 'Letter to Mr John Cummins MP', accessed on 5 May 2000 from <*http://www.ncr.dfo.ca/COMMUNIC/Marshall/cummins_e.htm*>.

[13] Above n 9.

[14] For example, in Australia, Torres Strait Islanders have aspirations for a regional settlement, in relation to which discussions are continuing. The first native title agreement addressing marine access was in the Wickham Point Determination (Application No. DF 97/1, available at <www.nntt.gov.au/nntt/determin.nsf>), which involved the compulsory acquisition of native title in relation to the construction of a liquefied natural gas plant near Darwin.

[15] Bruce Gillies, 'The Nunavut Final Agreement and Marine Management in the North', (1995) 23(1) *Northern Perspectives*. For the history of the agreement see P Jull, 'Reconciliation and Northern Territories, Canadian-Style: The Nunavut Process and Product', (1999) 20 (4) *ILB* 4 –7.

[16] Bruce Gillies, 'The Nunavut Final Agreement and Marine Management in the North', (1995) 23 (1) *Northern Perspectives*, accessed 5 May from <http://www.carc.org/pubs/np.htm>.

[17] Harold E ('Buster') Welch, 'Marine Conservation in the Canadian Arctic: A Regional Overview', (1995) 23 (1) *Northern Perspectives*.

[18] Ministry of Aboriginal Affairs, 'Nisga'a financial and fisheries side agreements available', *Information Bulletin,* 3 September 1998, accessed on 5 May from <http://www.aaf.gov.bc.ca/aaf/treaty/nisgaa/nrs/sept3-nisg-side.htm>.