The Peter A. Allard School of Law
Allard Research Commons

Faculty Publications Allard Faculty Publications

2003

Indigenous Territoriality in Canadian Courts

Douglas C. Harris
Allard School of Law at the University of British Columbia, harris@allard.ubc.ca

Follow this and additional works at: https://commons.allard.ubc.ca/fac_pubs

Part of the Constitutional Law Commons, and the Indigenous, Indian, and Aboriginal Law Commons

Citation Details
Douglas C Harris, "Indigenous Territoriality in Canadian Courts" in Ardith Walkem & Halie Bruce eds, *Box Of Treasures Or Empty Box?: Twenty Years Of Section 35* (Penticton: Theytus Books, 2003) 176.

This Book Chapter is brought to you for free and open access by the Allard Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

Box of Treasures or Empty Box?
Twenty Years of Section 35

Edited by
Ardith Walkem and Halie Bruce

Theytus Books Ltd.

Indigenous Territoriality in Canadian Courts*

A territorial claim involves the assertion of jurisdiction over space. *Territoriality* describes the communication or assignment of meaning to particular boundaries in order to assert control over a defined space. It encompasses the strategies, used by those attempting to maintain control and those seeking to acquire it, to give meaning to the spatial boundaries that demarcate jurisdiction. A claim of sovereignty, "to final and complete authority in a political community," is one form of territoriality, but there are other, less complete forms that allow the possibility of multiple sources of authority.[1] Territoriality includes claims to the control of space at many different levels.

I use Indigenous territoriality to describe an Indigenous People's sense of belonging to, owning, and being a part of a particular territory. I also use it to describe the attempts of Indigenous Peoples to ascribe meaning to the geographical boundaries that mark their territory, and to have those boundaries recognized in domestic and international legal forums. The territoriality of the Canadian state similarly describes its strategies to consolidate control within defined boundaries. Just as Indigenous Peoples within Canada strive to have the state recognize their boundaries, and their jurisdiction within them, so the state seeks to confirm its jurisdiction, minimizing internal boundaries and the challenges they pose to its claim to sovereignty.

In this essay, I explore the competing territorialities of the Canadian state and Indigenous Peoples in the context of litigation over Aboriginal rights to fish. Access to and management of the fisheries have been and continue to be one of the principal points of conflict between the state and indigenous peoples. The disputes frequently lead the parties to court, and it is here that the competing territorialities, the product of a continuing colonial encounter, are revealed. The decisions display the ways in which Canadian Law sustains the sovereignty of the state, but also the latent possibility to moderate it through the recognition of Indigenous territoriality.

* I thank Louise Mandell for providing trial transcripts and exhibits, Eric Leinberger for drawing the map, and Catherine Dauvergne, Cole Harris, Doug Hay, and Michael Thoms for their comments. Research funding was provided by *Coasts Under Stress* (funded by the Social Sciences Research Council of Canada, the Natural Science and Engineering Research Council of Canada, and associated universities).

In the recent case of *R. v. Haines*, Judge Steven Point of the British Columbia Provincial Court in Prince Rupert addressed Indigenous territoriality explicitly.[2] This case arose following Department of Fisheries and Oceans (DFO) charges against three Nisga'a fishers for violating their commercial and food fishing licenses by conducting the fisheries simultaneously. The accused raised an Aboriginal rights defense, successfully so except for those charges arising from fishing beyond the territorial limits of the Nisga'a Nation. Their Aboriginal Right to fish for food while fishing commercially did not extend beyond Nisga'a waters. In his analysis of "the law of shared territories," Point J. recognized the inviolability of Indigenous territory; the boundaries between nations were meaningful. Territories could be shared, but only with consent. More common, however, is the absence of Indigenous territoriality in Canadian law. Chief Justice Lamer's decision for the majority of the Supreme Court of Canada (SCC) in *R. v. Gladstone*, the one instance where the SCC has recognized an Aboriginal Right to a commercial fishery, is a notable example, and the one explored here.[3] This absence, the SCC's failure to recognize or address Indigenous territoriality in fishing rights cases, has had profound implications for the development of Aboriginal Rights in Canada.

I. The Territorial Limits of Aboriginal Rights

Max Haines and his son Corwin fished halibut from their boat the *Ocean Virtue*. Hubert Haldane, who captained the *Pacific Challenger*, was also a halibut fisher. Each boat carried with it a commercial halibut license (L-License) allowing the operators to catch a fixed weight of halibut over the fishing season, an allocation known as an individual vessel quota (IVQ). The fishers were members of the Nisga'a Nation, and also fished under an Aboriginal and Communal Fishing License for the Nisga'a Tribal Council (Aboriginal License) that recognized their right to fish for food, social, and ceremonial purposes in specified areas.

Over the course of the 1999 fishing season, between March and November, Haldane and the Haines brought their catches to the government dock in Prince Rupert. The DFO monitor validated most of their halibut catches as part of their IVQ and tagged the fish for

commercial sale. After most trips the fishers set aside a portion of their halibut catch, usually the undersized or damaged fish, as food fish for themselves and their communities. These fish were not recorded against their IVQ. In fishing for halibut, they also caught yelloweye, canary rockfish, lingcod, and sablefish, as halibut fishers commonly do. Licensed commercial halibut fishers may sell a portion of their by-catch, measured as a percentage of the halibut catch,[4] and the DFO monitor tagged up to the permitted level of each fish for commercial sale. Haldane and the Haines claimed the excess by-catch as food fish under the Aboriginal License.

In 1999, they had fished primarily within DFO Management Area 3 (Figure 1). Area 3 includes the traditional fishing grounds of the Nisga'a, and the Aboriginal License allowed Nisga'a food fishing within designated sub-areas in Observatory Inlet and the Portland Canal (see the darkly shaded area in Fig.1). On his October fishing trip, Haldane had fished outside these waters, in sub-Area 101-6, off the north coast of Haida Gwaii (Queen Charlotte Islands) within the waters of the Haida Nation. The exact boundaries of Haida and Nisga'a waters were not at issue in the trial; all parties agreed that Haldane had fished commercially and for food in Haida waters.

In December, 1999, the DFO charged Haldane and the Haines with violating their L-Licenses and the Aboriginal License. Under the terms of the L-Licenses the fishers were to return to the ocean any undersized fish that they caught beyond the acceptable limit. Instead of returning these fish, the DFO alleged that the fishers had kept them as food fish. The Aboriginal License included a provision that "[n]o fish harvested under the authority of this license may be on board a vessel engaged in commercial fishing operations."[5] Keeping the undersized halibut and excess by-catch, which had been caught during a commercial fishery, as food fish violated this condition.

Point J. heard the case over six days in 2001 and 2002. The accused admitted the facts, but mounted a defense based on a claim to an Aboriginal Right to fish for food while participating in a commercial fishery. To prove this right and its infringement, defense counsel introduced testimony from the accused, Nisga'a Elders, and an anthropologist as expert witness, to establish the customs, norms, traditions and laws that surround the Nisga'a fisheries and which forbid the dumping of fish. Under-sized halibut and various species of by-catch

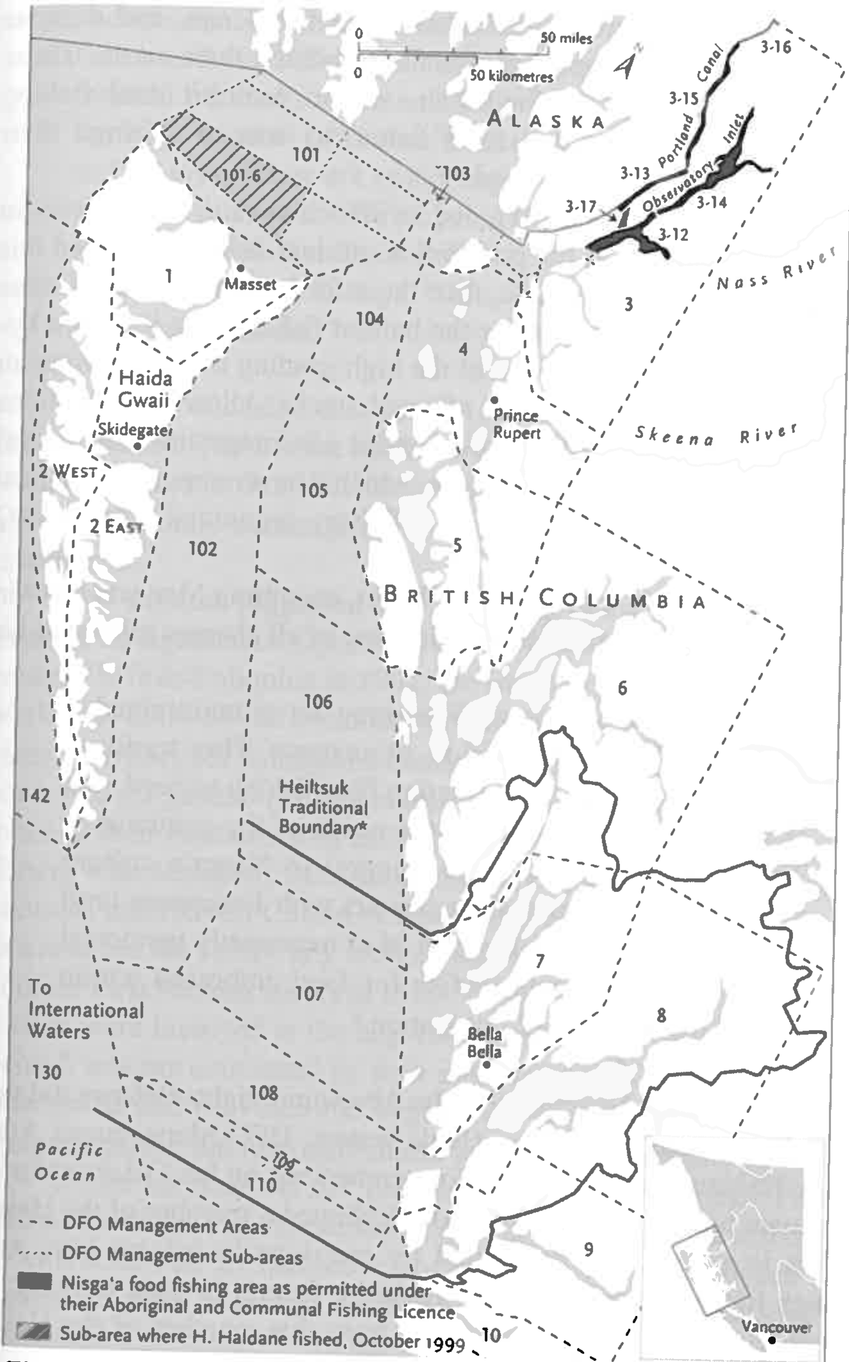

Figure 1. DFO Management Areas, Nisga'a Food Fisheries, and Heiltsuk Traditional Boundary.

* Based on a map provided by the Heiltsuk Tribal Office, 5 August 1999

have low survival rates when returned to the ocean, and defense counsel argued that Nisga'a traditions prohibited their waste. Those fish were to be kept as food fish, and to prohibit dual fishing (combined commercial and food fisheries) was to infringe their Aboriginal Right to fish for food.

The Crown, for its part, led evidence that if there were an Aboriginal Right, and if the prohibition on dual fishing infringed this right, which it did not concede, then the infringement was justified as part of the management plan for the halibut fishery. The limits on by-catch and the measures to prevent the high-grading of halibut were an important part of protecting the affected stocks. Allowing exceptions for Aboriginal fishers gave them an undue advantage and undermined the cohesiveness of the halibut fleet, which was an important element in the successful management of a fishery organized around IVQ allocations.

Point J. upheld the Aboriginal Right, acquitting Max and Corwin Haines of all charges, and Hubert Haldane of all charges related to his fishing within Area 3:

> I find that the accused fishermen have maintained a profound fisheries tradition of respect. This tradition involves practices of not wasting fish, fishing to need, and sharing fish caught to meet the needs of the community. These traditions I find are integral to Nisga'a culture which have continued since contact with Europeans until the present and are thus a part of or necessarily incidental to the aboriginal right to fish for food embraced within s.35 of the Canadian Constitution.[6]

Point J. held, however, that the Aboriginal rights defense did not apply to Haldane's fishing in Haida waters, DFO Management Area 101-6. Haldane testified that before embarking on his October trip to the waters north of Masset, he had telephoned a member of the Haida Nation to whom he was related by marriage to inform him, and through him the Haida, that he would be fishing in their territory. It was only after receiving permission from this member of the Haida Nation, said Haldane, that he fished in Haida waters.

Haldane's testimony about exactly what permission he had to fish in Haida waters was vague. When asked whom he had called to

secure permission, Haldane responded:

> One was Russ, I forgot his last name, he's my dad's – he married my dad's niece and we talk a lot and I – I, you know, as a matter of course he heard me coming out there and he says, "How are you doing?"
>
> "Fine," and I said, "We're going to be fishing halibut out in your area. Is that fine?"
>
> He says, "Sure," he says, "bring me some halibut."
>
> And I said, "Great."[7]

Point J. concluded that this evidence was insufficient to prove Haida consent. There must be, he wrote, evidence of "actual consent to enter another territory for the purposes of sharing fishing resources by way of family connections."[8] A statement from the accused was insufficient.

The defense suggested that the North West Tribal Treaty (the Treaty), an agreement signed by most of the First Nations in north western British Columbia in 1991, provided a resource sharing framework that allowed the members of the various nations to use each other's territory for fishing and hunting.[9] The Treaty, a brief document, contained six general principles that were intended to guide the signatories in their relations with each other. The understanding among the fishers who testified, including Morris Haldane (the father of the accused) and Heibert Clifton (a Hereditary Tsimshian Chief), was that as a result of the Treaty, any Indigenous person could fish in the waters of those First Nations involved in the Treaty.[10] Neither M. Haldane nor Clifton were involved in the negotiating or drafting of the Treaty, and Point J. was not convinced by their interpretation. The Treaty, he held, anticipated and provided the beginnings of a framework for future agreements, but did not itself confer any rights of access.[11]

Under his analysis of "the law of shared territories," Point J. offered the following assessment: "Aboriginal rights and customs can be characterized to include co-operative practices between First Nations to share access to resources which are within one another's traditional territories."[12] "[T]he Nisga'a," he wrote, "have a right at common law to enter into resource sharing agreements with other First Nations regarding access to fish."[13] He also made it clear that the consent to enter the territory of another Nation was important, and in

this case the evidence of Haida consent was insufficient. In other words, the boundaries between First Nations were meaningful; Indigenous territoriality had substance in Canadian law, at least in defining the limits of an Aboriginal Right.

A similar scenario arose several years earlier involving hunting. In a case known as *R. v. Quipp*, Fred Quip and Todd Wood, members of the Sto:lo Nation, shot an elk within the traditional territory of the Upper Similkameen Nation, which is part of the Okanagan Nation Alliance.[14] Quipp then telephoned a member of the Lower Similkameen Nation, also part of the Okanagan Nation, to ask permission to take the elk. The hunting season was closed, and when a police officer discovered the accused with the elk, they were charged under the *Wildlife Act* with hunting out of season.

The accused raised an Aboriginal Rights defense, arguing that they had a right to hunt for food and that their kinship connections entitled them to hunt on Okanagan territory. Judge Klinger of the BC Provincial Court in Princeton rejected this argument:

> Since the accused were not hunting in traditional Sto:lo territory and had not obtained prior permission from the Thompson or Okanagan First Nation authorities, and had not even notified their relative Tammy Allison about the hunt until after the elk had been shot, the accused have failed to demonstrate that their hunting, in the case at bar, was justified by virtue of an aboriginal right recognized and affirmed under s.35(1) of the *Constitution Act, 1982*. Specifically, they have failed to establish that the practice of hunting without prior permission or notification on non Sto:lo traditional territory was an integral part of the specific distinctive culture of the Sto:lo either prior or subsequent to contact with Europeans. The aboriginal right claim has not been proven.[15]

Although Kinger J. did not explicitly recognize an Aboriginal Right to make resource sharing agreements, it is clear from this passage that the lack of prior permission was an important element in his decision. Had the accused had prior permission to hunt in Okanagan territory, it seems the Aboriginal rights defense would have succeeded.

In *Haines* and *Quipp*, Indigenous territoriality has gained a foothold in Canadian courts, albeit at the provincial court level, and only to limit Aboriginal Rights. The courts restricted the right of a Nisga'a fisher to protect the sovereignty of the Haida Nation, and the rights of a Sto:lo hunter to protect that of the Okanagan Nation. These limits, however, appear reasonable in the sense that while restricting the rights of the members of one First Nation, they do so to protect the territorial integrity of a neighbouring First Nation and, by extension, all First Nations. Those wishing to use the resources within the territory of another Nation must seek its permission. In rejecting the Aboriginal Rights defense in *Haines* and *Quipp*, the courts incorporated indigenous territoriality into Canadian Law.

These cases differ from earlier fishing cases where the SCC considered, albeit briefly, the territorial nature of Aboriginal rights. In *R. v. Adams*[16] and *R. v. Côté*[17] the SCC held that Aboriginal rights to fish are site specific and that the defendants must prove their right to fish in a particular lake (*Adams*) or within a provincial controlled harvest zone (*Côté*).[18] Although recognizing that Aboriginal Rights are territorially bounded, these decisions constrain the right to fish, so much so that it must be established for every body of water within a traditional territory. To borrow the metaphor from Ardith Walkem, the box of Aboriginal Rights appears empty in these cases, with the prospect that a few site-specific rights might be added, and at great cost.[19] *Haines* and *Quipp*, by contrast, present an expansive understanding where the space begins full of Indigenous jurisdiction, with the prospect of negotiated access for others.

In acknowledging indigenous territoriality, the courts have recognized indigenous control of a land base, and thus the right to make laws regarding its use, at least in relation to other First Nations. Will the courts take another step to recognize that these rights may also be deployed to contain the claims of the Canadian state? That step appears some distance away. If anything, the SCC seems to be restricting rather than expanding the reach of indigenous law. In *R. v. Nikal* and *R. v. Lewis*, two cases involving Indian reserve boundaries and the application of Indian Band by-laws regulating fishing in the waters adjacent to the reserves, the SCC confined the reserves, and thus Band jurisdiction, to land, even though the reserves had been allotted explicitly for fishing purposes.[20] But it is the absence of

Indigenous territoriality in the SCC's Aboriginal rights jurisprudence, particularly in the *Gladstone* decision, that is most problematic.

II. *R. v. Gladstone* and the Right Without Internal Limitation

In 1988, the DFO charged two Heiltsuk brothers, William and Donald Gladstone, with attempting to sell herring spawn-on-kelp without a J-license. Under DFO regulations, a J-license is required to harvest and sell spawn-on-kelp, and then only in limited amounts. An Aboriginal food fishery is exempt, but anyone participating in the commercial fishery must do so under a J-license. In 1988 there were 28 J-licenses in British Columbia; the Heiltsuk Tribal Council held one.[21]

The Gladstones argued that the J-licensing scheme infringed their constitutionally protected Aboriginal Right to harvest and trade spawn-on-kelp, and the SCC agreed.[22] It decided, however, that there was insufficient evidence in the trial record to determine whether the DFO's infringement of that right was justified, and referred back to the trial court questions about the government's objectives in regulating the fishery. Had the government taken adequate account of its special trust relationship with Aboriginal Peoples and given sufficient priority to the Heiltsuk fishery in the allocation of herring licenses? Rather than pursue these questions, the Crown dropped the charges.

In characterizing the Heiltsuk right to a commercial fishery in *Gladstone*, Chief Justice Lamer described it as "without internal limitation."[23] To understand this characterization of the right, which I shall argue is highly problematic precisely because it ignores indigenous territoriality, one must situate the *Gladstone* decision in the *Van der Peet* trilogy[24] and earlier fishing rights cases, principally *R. v. Sparrow*.[25]

In *Sparrow*, the SCC found that the Musqueam had an unextinguished Aboriginal right to fish for food, ceremonial, and social purposes, and that a regulation restricting net length infringed this right. The SCC then set out a two-part test to determine whether the infringement was justified. First, did the government have a valid legislative objective in regulating the fishery? The SCC determined that the DFO regulated net length to conserve salmon stocks and that conservation was not only "consistent with aboriginal beliefs and practices," but that sound management of the resource would enhance

the Aboriginal Right, ensuring the continued health of salmon runs. The SCC allowed that there might be other "compelling and substantial objectives" that might justify infringing the Aboriginal right (the prevention of harm, for example), but it rejected the finding of the British Columbia Court of Appeal that the "public interest" might be a valid objective. The "public interest" offered "no meaningful guidance" and was "so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."[26]

To satisfy the second requirement (recognition of the special trust relationship between the Crown and Indigenous Peoples) the SCC adopted a priority scheme that placed the continuing viability of the salmon stock first, Aboriginal food fishing second, and only then could the DFO allocate fish to the commercial and sport fisheries. In recognition of its status as a constitutional right, the SCC held that the Aboriginal food fishery must receive priority over any other fishery.[27] The DFO, it concluded, had failed to recognize this priority. The objective (conserving salmon) was valid, but the DFO had restricted the Aboriginal food fishery in order to *conserve* salmon stocks for the commercial and sport fisheries.

In the 1996 *Van der Peet* trilogy, which included *Gladstone*, the SCC addressed the question of Aboriginal Rights to commercial fisheries. To establish an Aboriginal Right to a commercial fishery the SCC held that a First Nation must prove that trade in fish had been an integral part of its distinctive culture before contact with Europeans.[28] The SCC rejected the claims of members the Sto:lo Nation in *Van der Peet*, and of the Nuu-chah-nulth Nation in *N.T.C. Smokehouse* to various aspects of an Aboriginal commercial fishery. Only the Heiltsuk were able to convince the SCC that they met this test, and their right to a commercial spawn-on-kelp fishery was confirmed in *Gladstone*. It was here that the SCC turned to the question of justifiable infringement.

In *Gladstone*, Chief Justice Lamer suggested that unlike Aboriginal food fisheries, which were limited to the fish that could be reasonably consumed by the community, the Aboriginal commercial fisheries were "without internal limitation."[29] If they had absolute priority after conservation and the Aboriginal food fisheries, this priority would create an exclusive fishery. Parliament and the provincial legislatures, he suggested, had not intended to create exclusive

fisheries with the constitutional entrenchment of Aboriginal Rights, overriding the public's common-law right to fish in tidal waters. Priority, therefore, must amount to something less than exclusivity.[30]

How to recognize priority without exclusivity? Lamer C.J. was admittedly uncertain: "The content of this priority—something less than exclusivity but which nonetheless gives priority to the aboriginal right—must remain somewhat vague pending consideration of the government's actions in specific cases."[31] He did suggest that the courts should consider the degree of consultation, compensation, and accommodation, the integration of the Aboriginal Right into the regulatory scheme, the extent of Indigenous Peoples participation in the fishery, the rights of other indigenous fishers, and the importance of the fishery to the First Nation.[32]

The question of government objectives added another layer of analysis. The holders of an Aboriginal Right to a commercial fishery have priority (if not exclusivity) and the government must have valid objectives for diverting fish to other users. Lamer C.J. made some "general observations" about the nature of the objectives that the Crown could legitimately pursue:

> Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, 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.*[33]

These objectives (the pursuit of economic and regional fairness, and recognition of participation in the fishery by non-indigenous group) are based on Lamer C.J.'s interpretation in *Van der Peet* of the purpose behind the constitutional guarantee of Aboriginal Rights in s.35(1). In that case, the SCC determined that Aboriginal Rights were recognized and affirmed in the *Constitution*, "to reconcile the

existence of pre-existing aboriginal societies with the sovereignty of the Crown."[34] Through an analogy with s.1 of the *Charter*, which prescribes limits on enumerated *Charter* rights, Lamer C.J. held that the purpose behind s.35 provided for a similar limiting of Aboriginal rights in order to recognize the interests of the "broader community":

> Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.[35]

Following *Gladstone*, then, if a fishery is fully subscribed by conservation needs, the Aboriginal food, ceremonial, and social fishery, and the Aboriginal commercial fishery, then this commercial fishery might be restricted to allow for a general commercial or sport fishery. The government would be justified in restricting the Aboriginal commercial fishery if it did so to reconcile Aboriginal rights with the interests of the broader political community. This reconciliation could occur if, by regulating the fishery, the government were pursuing "regional and economic fairness," or recognizing "the historical reliance upon, and participation in, the fishery by non-aboriginal groups," while also recognizing the priority of an Aboriginal commercial fishery.

II. Territoriality and the Justifiable Infringement of Aboriginal Rights

The flaws in the SCC's approach to determining when the infringement of an Aboriginal Right might be justified are grounded in the characterization of the Aboriginal Right to a commercial fishery as without internal limit. Such a characterization is only possible if one ignores, as Lamer C.J. has done, Indigenous territoriality.

The claims by First Nations to commercial fisheries are not without internal limit. Each claim is geographically bounded and derived from traditions that allocated fish between competing users both within and between nations. In *Gladstone*, the Heiltsuk never sought unlimited access to a commercial spawn-on-kelp fishery and

priority over every other fisher after conservation and the Aboriginal food fishery. Instead, they sought access to the resources in and jurisdiction over their traditional territory on the central coast (Fig. 1). Their claim was limited by the geographical extent of their traditional use, by the claims of neighbouring First Nations, and by the extent to which territorial waters are recognized in international law. Their use of the resource would be governed by their laws.

In *Van der Peet* Lamer C.J. wrote that "the existence of an Aboriginal right will depend entirely on the traditions, customs and practices of the *particular Aboriginal community claiming the right,*" and reiterated that approach in *Gladstone*.[36] In *Gladstone,* however, Lamer C.J. did not recognize that, as far as the Heiltsuk were concerned, the constitutional right he identified was territorially bounded. He characterized the right to a commercial fishery far more broadly than any Heiltsuk tradition, custom, practice, or claim. Only McLachlin J., in defining the right more narrowly, hinted at the territorial nature of the right: "[T]he Aboriginal right to trade in herring spawn on kelp *from the Bella Bella region* is limited to such trade as secures the modern equivalent of sustenance: the basics of food, clothing and housing, supplemented by a few amenities."[37]

To limit the right that he defined broadly as without internal limit, Lamer C.J. used an analogy with s. 1 of the *Charter* to expand the conditions under which the Crown might justifiably infringe an Aboriginal Right to a commercial fishery. In her dissent in *Van der Peet*, McLachlin J. highlighted the flaws of a test that allows the Crown to limit Aboriginal rights for matters "of sufficient importance to the broader political community." Limiting Aboriginal Rights for the purposes of conservation, as in *Sparrow*, was justified, she argued, because conservation protected the exercise of the right itself; it "constitute[d] the essential pre-conditions of any civilized exercise of the right."[38] Objectives such as "the pursuit of economic or regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups," however, when balanced against Aboriginal Rights, negate rather than protect those rights. "This is not limitation required for the responsible exercise of the right," wrote McLachlin J., "but rather limitation on the basis of the economic demands of non-Aboriginals."[39] Aboriginal Rights were placed in the *Constitution* and outside the *Charter* to protect them

from the vagaries of political expediency, but by balancing these rights against the economic and social objectives of the general public, Lamer C.J. has diminished them with a test that, as McLachlin J. argues, is "indeterminate and ultimately more political than legal."[40]

Fish, of course, do not recognize the meanings that humans ascribe to territorial boundaries; the effective management of a migratory resource must transcend these boundaries. Integrated management is particularly important in the salmon fishery where fish migrate across international boundaries and up-river through the territories of many Indigenous Peoples, each of which have some claim to the fish.

The SCC's decision in *Gladstone* suffers, I believe, from its combination with two salmon-fishing-rights cases. *Van der Peet*, the lead case in the trilogy, involved a salmon fishery on the Fraser River, and Lamer C.J. seems to have been considering the difficulties he would create by recognizing an exclusive fishery for one First Nation on a river system such as the Fraser with many competing claims, when he ruled on the herring fishery in *Gladstone.* Scientists and those in the fishery debate the distinctness of herring stocks and their migration patterns, but whatever their eventual conclusions, herring cross many fewer boundaries than those salmon that run the Fraser River, and never concentrate to the extent that people fishing in one region could monopolize a resource that enters the territories of many.[41] There are, furthermore, many fewer claims to the herring in Heiltsuk territory, and to recognize Heiltsuk priority (after conservation and an Aboriginal food fishery) to a commercial herring fishery could create, at most, an exclusive fishery *within their territory*. Even so limited, the SCC might still have concluded that an exclusive Heiltsuk fishery failed to account for the rights of other Indigenous Peoples or the public right to fish, and that it must be reduced to a priority conferring something less than exclusivity. Its analysis, however, would need to address the Heiltsuk claim to a defined fishery that preceded the assertion of British sovereignty and, therefore, the common-law doctrine protecting the public's right to fish.

The same would be true on large river systems with multiple claims to the fisheries. One can imagine a collection of exclusive and non-exclusive fisheries on the Fraser River, for example. Exclusivity would confer the sole right to fish in a defined area, which might be quite small, and not necessarily the sole right to participate in a fishery.

The actual catch in any area would depend upon a negotiated allocation between those with rights of access, and also with the DFO. To a limited extent, this is what already exists along parts of the Fraser, although the questions of allocation are far from settled, and recent court decisions appear to have overturned the existing process for resolving them.[42]

The *Gladstone* decision has not disappeared. Its influence is considerable in the continuing development of Aboriginal rights, but also in Aboriginal Title and Treaty rights cases. In *Delgamuukw v. British Columbia*, Lamer C.J. built on *Gladstone* to expand the government objectives that might justify infringing Aboriginal title to include:

> 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.[43]

In *R. v. Marshall* (motion for rehearing and stay), the SCC cited *Gladstone* for the proposition that government objectives designed in "the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-Right, and noted, without further explanation, that "[t]his observation applies with particular force to a treaty right."[44]

III. Indigenous Territoriality

Law and geography scholars have argued that territorial or geographic erasure is endemic in the common law tradition; that by failing or refusing to recognize geographic diversity the common-law courts suppress competing legal orders. The courts, they argue, construct and impose a territorial unity that denies an existing legal pluralism, foreclosing recognition of other legal orders that might modify or operate in conjunction with state law.[45] The courts are not alone in this erasure of place. Canadian federalism entrenches, and thereby privileges, provincial and federal territoriality. In doing so, John Borrows suggests, it "constructs 'a legal geography of space' that marginalizes

Indigenous peoples," frustrating their full participation in decisions regarding their land.[46]

It is this territorial erasure that the SCC effected in *Gladstone*, and the consequences go beyond the herring fishery. The claims of Indigenous Peoples are not the claims of racial minorities, but instead of political communities whose right to govern the allocation of resources predates European assertions of sovereignty. The SCC, however, has assumed the boundaries of the Canadian state and within it the jurisdiction of the DFO, represented by the management areas in Figure 1. The failure to recognize Heiltsuk territoriality diminishes that community's efforts to be recognized as a political community with the power to make and enforce laws within its territory. If the constitutional entrenchment of Aboriginal Rights is part of a process of reconciliation, as the SCC has suggested it is, then for the courts to assume one territoriality, that of the Canadian state, and to ignore that of Indigenous Peoples, is to reduce the possibility of meaningful reconciliation.

The decision in *Haines*, however, represents another possibility. At least with respect to the exercise of Aboriginal Rights, Indigenous territoriality and the right to govern the use of resources within defined boundaries, has a place in Canadian law. That place, tentatively sketched out in the provincial courts, is not yet large. Beginnings are tenuous. Nonetheless, the rulings in *Haines* and, to a lesser extent, in *Quipp* recognize a degree of Indigenous control over traditional territories. Resources within those territories may be shared with others, but rights of access are to be the product of negotiation and consent. This is a model to which Canadian governments should aspire.

[1] For useful definitions of territoriality and sovereignty see R.J. Johnston, Gregory, Pratt and Watts, eds. *The Dictionary of Human Geography, 4th Ed.* (Malden, MA: Blackwell Publishers, 2000). For territoriality, see also D. Delaney, *Race, Place and the Law, 1836-1948* (Austin: University of Texas, 1998) at 6.

[2] *R. v. Haines*, [2003] 1 C.N.L.R. 191 (B.C. Prov. Ct.) [*Haines*].

[3] *R. v. Gladstone*, [1996] 4 C.N.L.R. 65 (S.C.C.) [*Gladstone*].

[4] Canada, Dept. of Fisheries and Oceans, Integrated Fisheries Management Plan for Halibut, Appendix 1: Halibut Commercial Harvest Plan. Current versions are available online: Fisheries and Oceans Canada <http://www.pac.dfo-mpo.gc.ca/ops/fm/Groundfish/Halibut/Default.htm> [date accessed: June 27, 2003].

[5] *Haines*, *supra* note 3 at para. 3.

[6] *Ibid.*, para. 136.

[7] *Ibid.*, trial transcript, 29 May 2001 at 17.

[8] *Ibid.*, para. 161.

[9] *North West Tribal Treaty*, Tsimshian, Haida, Nisga'a, Lake Babine, Haisla, Wet'suwet'en, Gitksan, Gitanyow, and Carrier Sekani Nations, 11 February 1991, online: North West Tribal Treaty Nations, <www.nwttgroup.com/treaty.html> [date accessed: June 16, 2003].

[10] *Haines*, *supra* note 3, trial transcript, 28 May 2001 at 65 (M. Haldane); 29 May 2001 at 46. (H. Clifton).

[11] This interpretation seems consistent with the fifth principle in the Treaty: "We [the parties] shall continue to enter into bilateral and multilateral relationships with each other to strengthen and assist in settling matters and common concerns regarding… our respective boundaries according to our traditional laws."

[12] *Haines*, *supra* note 3 at para. 145.

[13] *Ibid.*, para. 155.

[14] *R. v. Quipp*, [1997] B.C.J. No. 1205, (B.C. Prov. Ct.) (11 April 1997) [*Quipp*].

[15] *Quipp*, *supra* note 14, *ibid.*, para. 54.

[16] *R. v. Adams*, [1996] 4 C.N.L.R. 1 (S.C.C.) [*Adams*].

[17] *R. v. Cote*, [1996] 4 C.N.L.R. 26 (S.C.C.) [*Côté*].

[18] In *Côté*, *supra* note 18, para. 39, Chief Justice Lamer, for the majority, concluded that "(a)n aboriginal practice, custom or tradition entitled to protection as an Aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact. As such, an Aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised on a specific tract of land."

[19] See Ardith Walkem, "Constructing the Constitutional Box: The Supreme Court's Section 35(1) Reasoning" in this volume.

[20] *R. v. Nikal*, [1996] 3 C.N.L.R. 178; *R. v. Lewis*, [1996] 3 C.N.L.R. 131. See

D.C. Harris, "Indian Reserves, Aboriginal Fisheries and Anglo-Canadian Law, 1876-1882" in J. McLaren, ed. *Property in the Colonial Imagination and Experience* (forthcoming).

21 For a fuller discussion of the spawn-on-kelp fishery, and an earlier version of this discussion, see D.C. Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery" (2000) 34 *U.B.C.L.R.* 195.

22 *Gladstone, supra* note 4.

23 *Ibid.*, para. 57.

24 *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177 (S.C.C.) [*Van der Peet*]; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 4 C.N.L.R. 130 (S.C.C.) [*N.T.C. Smokehouse*].

25 *R.* v. *Sparrow*, [1990] 3 C.N.L.R. 160 (S.C.C.) [*Sparrow*]. *Sparrow* has received extensive commentary; see, for example, W.I.C. Binnie, "The *Sparrow* Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 *Queen's L.J.* 217; M. Asch and P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow* (1991), 29 *Alta. L. Rev.* 498; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997) 36 *Alta. L. Rev.* 149.

26 *Sparrow, supra* note 26 at para. 72.

27 *Ibid.*, para. 78.

28 This test was quickly and extensively criticized; see R. Barsh and J. Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997), 42 *McGill L.J.* 993; J. Borrows, "The Trickster: Integral to a Distinctive Culture" (1997), 8:2 *Constitutional Forum* 27, and "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1998) 22 *Am. Indian L.Rev.* 37.

29 *Gladstone, supra* note 4 at para. 57.

30 On the impact of the public right to fish see D.C. Harris, *Fish, Law and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: U of T Press, 2001), 27-33; M.D. Walters, "Aboriginal Rights, *Magna Carta* and Exclusive Rights to Fisheries in the Waters of Upper Canada" (1998) 23 *Queen's L.J.* 301.

31 *Gladstone, supra* note 4 at para. 63.

32 *Ibid.*, para. 64.

33 *Ibid.*, para. 75 [emphasis in original].

34 *Van der Peet, supra* note 25 at para. 61.

35 *Gladstone, supra* note 4 at para. 73.

36 *Van der Peet, supra* note 25 at para. 69 [emphasis in original]; *Gladstone, supra* note 4 at para. 65.

37 *Gladstone, supra* note 4 at para. 65 [emphasis added].

38 *Van der Peet, supra* note 25 at para. 306.

39 *Ibid.* For a similar argument about how the courts should interpret s.1 of the

Charter see L.E. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 *Supreme Court Law Review* 469.

40 *Ibid.*, para. 302. McLachlin J. at para. 165, defined the right to a commercial fishery much more narrowly. It is, she wrote, "limited to such trade as secures the modern equivalent of sustenance: the basics of food clothing and housing, supplemented by a few amenities." In *R. v. Marshall*, [1999] 4 C.N.L.R. 161 (S.C.C.) at para. 61, Binnie J. used a similar approach when he interpreted the Mi'kmaq treaty rights to include access to the fishery to support a "moderate livelihood."

41 T. Glavin, "Red Herrings" *The Georgia Straight* (27 March 1997) 15-21, provides a useful summary of the debate among fisheries scientists about herring stocks.

42 *R. v. Kapp*, [2003] B.C.J. No. 1772 (B.C. Prov. Ct.) (28 July 2003).

43 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 165.

44 *R. v. Marshall*, [1999] 4 C.N.L.R. 301 (S.C.C.) at para. 41.

45 N.K. Blomley, *Law, Space and the Geographies of Power* (New York: The Guildford Press, 1994) and W.W. Pue, "Wrestling With Law: (Geographical) Specificity vs. (Legal) Abstraction" (1990) 11 *Urban Geography* 566.

46 J. Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 30.