

## CO-MANAGEMENT SCHEMES: LEGALITIES AND FISH

Rebecca Brown, University of British Columbia, Vancouver

### ABSTRACT

The classic of Garrett Hardin entitled *The Tragedy of the Commons* describes the inevitable tragic destiny that develops when humans are able to use a resource freely and unregulated.

Participants become locked into a system that compels them to increase their use of the resource without limit. They continue to maximize own personal gain even though they recognize that ruin is the end result. Hardin states that users do recognize the necessity to scale back for sustainability; however, as there is no certainty that other users will follow such a course, the pursuit of users' own best interests continues until the resource is destroyed.

This theory has been well quoted for almost thirty years, and is an underlying principle in resource and environmental issues. Today, many of the fisheries are on the brink of extinction. What can be done to save them?

The theory of co-management suggests that involving the actual communities and user groups who depend upon the resource for their livelihoods, within the full fledged management scheme, will lead to good stewardship. There are examples where co-management has been utilized with successful results in many areas of the world. Some of these schemes are very old and unsophisticated and era specific, while others are very modern, complex and self-sufficient.

Co-management in its truest sense transfers the management responsibility for the resource from the government agency to the

community based user groups in varying degrees. Studies have proven that the "tragedy" described by Hardin does not necessarily occur when co-management schemes are utilized.

There are a number of questions that arise from co-management schemes which include: Who has ultimate responsibility for the management of the resource, the government or the management group? What legal changes may arise? What is the government's motivation in utilizing these schemes in fisheries: down-sizing or an improved system that will conserve and protect the resource?

My paper proposes to discuss the theory of co-management and the questions posed above to determine if co-management schemes can aid in bringing about sustainability in the fisheries.

## RÉSUMÉ

L'ouvrage classique de Garrett Hardin, *The Tragedy of the Commons*, décrit le destin inévitable et tragique qui survient lorsque l'homme utilise les ressources naturelles sans réglementation et sans réserve.

Les participants sont piégés dans un système qui les pousse à surexploiter les ressources. Ils continuent à maximiser leurs propres gains, tout en sachant que cela ne peut conduire qu'à la ruine. Selon Hardin, les usagers reconnaissent la nécessité d'une gestion durable; toutefois, puisqu'il n'existe aucune assurance que les autres usagers agiront en ce sens, l'exploitation se poursuit en fonction des intérêts immédiats des usagers jusqu'à ce que les ressources soient détruites.

Depuis trente ans, cette théorie a été fréquemment citée et demeure un des fondements de la gestion des ressources et des questions environnementales. Aujourd'hui plusieurs types de pêches sont en voie d'extinction. Que peut-on faire pour les sauver?

Selon la théorie de la cogestion, il est possible de parvenir à une bonne gestion des ressources en impliquant les communautés et les usagers dont la survie dépend de ces ressources. Certains exemples montrent que la cogestion a été utilisée avec succès dans plusieurs régions du monde.

Certaines de ces approches sont très rudimentaires et spécifiques à une région, tandis que d'autres sont très modernes, complexes et atteignent l'autosuffisance.

La cogestion, dans son sens le plus pur, reporte, à divers degrés, la responsabilité de la gestion des ressources des agences gouvernementales vers les groupes d'usagers de la communauté. Des études ont démontré que la tragédie décrite par Hardin, ne se produit pas nécessairement lorsqu'on utilise les approches de la cogestion.

La cogestion soulève plusieurs questions: Qui possède, de façon ultime, la responsabilité de la gestion des ressources? Le gouvernement ou les groupes de gestionnaires? Quels sont les changements légaux qui surviennent? Qu'est-ce qui pousse le gouvernement à recourir à ces modèles dans les pêches: la réduction des effectifs ou un système amélioré qui protège et qui conserve les ressources?

Au cours de cette communication, nous traiterons de la théorie de la cogestion et des questions énoncées ci-haut, afin de déterminer si les approches de cogestion peuvent contribuer au développement durable dans les pêches.

## **INTRODUCTION**

In this paper, I will focus on British Columbia (herein B.C.) and the concept and present use of co-management schemes for fisheries. The questions I propose to canvas include: Is there a legal foundation for co-management agreements? Can Department of Fisheries and Oceans (herein DFO) legally delegate its legislative authority to the parties to the agreements? What are the perimeters of these agreements? What challenges may occur to their authority? What is the motivation of DFO, a down-sizing scheme, or an improved system that ultimately will conserve and protect the fisheries?

The first part of my discussion will focus briefly on the history of fisheries management in B.C. The second part of my paper will discuss what is meant by co-management. The third part will review the legislative foundation for such schemes, the perimeters of and challenges to such

schemes, and the First Nations case law that interacts within the regulatory framework of the fisheries in Canada. The fourth part will look briefly at one of the present schemes of co-management between DFO and First Nations being the Aboriginal Fishing Strategy. In the final part, I will discuss what may happen in the future with co-management, its viability, who promotes it, and what are some of the problems it may face.

## 1. THE EVOLUTION OF FISHERIES MANAGEMENT IN BRITISH COLUMBIA

Since time immemorial, the First Nations peoples on the west coast have lived within social organizations, somewhat varied from group to group, yet each having a system for property rights over fish, generally salmon. These fishing rights were generally vested in family based corporate groups, headed up by one person who exercised the primary right to regulate access to the fishing site. Equity in and conservation of the fisheries were the results of these communal property rights based fisheries. This system also achieved management of the fisheries and regulation of access and distribution of surplus<sup>1</sup>.

With the advent of the European settlers, the west coast fisheries became common property fisheries for non-First Nations fishers, while the First Nations peoples maintained their own communal property rights system. Within the salmon fishery, the late 1800s was marked by rapid growth due to the expansion of canneries requiring the taking of more fish, and the entrance of more non-First Nations peoples into the fishery. This entrance also commenced the steady decline of the First Nations' role and involvement in the fisheries in B.C. which has been most noticeable within the last thirty years due to a number of programs and matters including the Davis Plan of 1968 which brought in the concept of "limited access" to the fisheries, the growth of the non-First Nations fishing fleet to the point of over-capitalization with bigger boats and better equipment searching for the

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<sup>1</sup> See generally Newell, D. *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993) [hereinafter Newell] and Pinkerton, E. W. "Indians in the Fishing Industry" in P. Marchak, N. Guppy & J. McMullan, *Uncommon Property: the Fishing and Fish Processing Industries in British Columbia* (Toronto: Methuen, 1987) [hereinafter Pinkerton "Indians"].

same allocation of fish leaving less fish for the First Nations peoples who continue their traditional methods of fishing with less sophisticated equipment and smaller boats, and the closure of processing plants<sup>2</sup>.

The *Pearse Report* of 1982, commissioned by the federal government in the previous year due to the crisis state of the west coast fisheries, noted that present day regulation of the fisheries is based upon the reconciliation of competing interests being First Nations' traditions of fishing and hereditary fishing areas, federal and provincial governments' constituted responsibilities over First Nations peoples and fisheries, and the need to conserve fish stocks, all of which are at times in conflict<sup>3</sup>. These conflicts and competing interests continue today.

## 2. WHAT IS CO-MANAGEMENT?

Since 1983, the term "co-management" has been the buzz word in British Columbia fisheries<sup>4</sup>. It has a range of meanings from that of just the basic need of improvement in advisory process, through to a higher responsibility of putting user groups in charge of management of the fishery. The concept includes co-operative management, joint management, and multi-party agreements.

These management concepts most often have developed around common property resources such as fisheries or forestry. Such management arrangements involve power sharing in a genuine way between the community based users and government agencies so that they each act as a check on the other to ensure the resource is not over-exploited. Often such arrangements have evolved from practices developed by the community to prevent over-exploitation of a local resource by use of formal and informal

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<sup>2</sup> Supra Newell at note 1 at 150 and following.

<sup>3</sup> *Turning the Tide, A New Policy For Canada's Pacific Fisheries, The Commission on Pacific Fisheries Policy, Final Report* (Vancouver: Supply and Services Canada, 1982) [Commissioner: P.H.Pearse] at 175 [hereinafter *Pearse Report*].

<sup>4</sup> Cassidy, F. & N. Dale. *After Native Land Claims? The Implications of Comprehensive Claims Settlements for Natural Resources in British Columbia* (Lantzville, B.C.: Oolikan Books & Halifax, N.S.: Institute for Research on Public Policy, 1988) at 41.

mechanisms. Such regulates the local users and the access to the resource by outsiders. These schemes can be found throughout the world. For example the lobster fishers in Maine created their own local self-regulation where if an outsider's lobster pot is found, a knot is tied in its rope as a warning to leave. If such intrusion continues, the traps will be cut. In cases where the encroachment still persists, the local fishers take more drastic action<sup>5</sup>.

The management schemes that appear to be the most successful have commenced most often due to crisis or near disaster in the resource, most usual when it is realized that the resource is almost at the point of collapse. If there is provision for long term solutions, involvement of the communities affected and the user groups at a level of actual decision making and not just consultation with the government body, the promoting of dialogue through data collection, discussions of the positions of the parties, and true working together, there have been successful results<sup>6</sup>.

The most usual scheme set up for co-management is by way of an agreement signed by the parties setting out all the pertinent legal rights and duties and responsibilities of the respective parties. The agreement often includes financial considerations being made by the government to the

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<sup>5</sup> Pinkerton, E. & M. Weinstein. *Fisheries That Work: Sustainability Through Community-Based Management* (Vancouver: Suzuki Foundation, 1995) at 11 [hereinafter Pinkerton & Weinstein].

<sup>6</sup> There have been numerous studies prepared and their results reported about co-management schemes. Good examples include: Berkes, F. & T. Henley. "Co-management and Traditional Knowledge: Threat or Opportunity?" (1997) 18:2 Policy Options 29; Berkes, F., P. George & R.J. Preston. "Co-management: The Evolution in Theory and Practice of the Joint Administration of Living Resources"(1991) 18:2 Alternatives 12; Hanna, S. S. "User Participation and Fishery Management Performance within the Pacific Fishery Management Council" (1995) 28:1-3 Ocean & Coastal Management 23; Pomeroy, R.S., & F. Berkes. "Two to Tango: the Role of Government in Fisheries Co-Management" (1997) 21:5 Marine Policy 465; Paisley R., M. Healey & T. McDaniels. "Analysis of Strategies for Co-operative Fisheries Management Between Government and Native Indians" (prepared for Native Affairs, Department of Fisheries and Oceans) (Vancouver: Westwater Research Centre, 1998); Pinkerton, E. W. "Local Fisheries Co-Management: a Review of International Experiences and Their Implications for Salmon Management in British Columbia" (1994) 51 Can. J. Fish. Aquat. Sci. 2363 and "Translating Legal Rights Into Management Practice: Overcoming Barriers to the Exercise of Co-Management" (1992) 51:4 Human Organization 330.

management group.

This formal contractual scheme could be equated to the recent concept of government contracting out whereby services performed by the government are actually undertaken by a private organization by way of contract.

For protection of the public, the rules of administrative law have always been applied where a government department is fulfilling a statutory function either as a duty or on discretionary terms. Based on that principle, it would be contrary to have those rules reduced as the decision making has been moved from government to private organization. The courts have shown their willingness to require that either the government department maintain the public law responsibility or that the private organization must be subject to the public law controls where appropriate<sup>7</sup>. In fact, courts have gone so far as to actually apply the public law principles to private organizations fulfilling government regulatory roles<sup>8</sup>.

As to who will be held responsible to ensure that the rules of administrative law are followed will depend upon the nature of the statutory duty or discretion that has been handed over. If it is a duty or discretion of a high standard with profound results, then most likely the government department will be held legally responsible<sup>9</sup>.

Co-management signifies a paradigm shift in the principles that have directed the fishing industry over the last century. Joel Barker, the futurist often referred to as "The Paradigm Man", has built his career on identifying paradigm principles and of assisting people to adapt to these ever-changing rules that create success in every field<sup>10</sup>. He describes a paradigm as being:

a set of rules and regulations (written or unwritten) that does two things: (1) it establishes or defines boundaries; and (2) it tells you how to

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<sup>7</sup> Craig, P.P. *Administrative Law*, 3d ed. (London: Sweet & Maxwell, 1994) at 112, see examples of where the courts have held private organizations must maintain public responsibility, at chapters 6 & 15 [hereinafter Craig].

<sup>8</sup> Ibid. at 113.

<sup>9</sup> Ibid. at 113.

<sup>10</sup> See generally Barker, J. A. *Future Edge: Discovering the New Paradigms of Success* (New York: William Morrow & Company, 1992) [hereinafter Barker].

behave inside the boundaries in order to be successful<sup>11</sup>.

In the past, the paradigm in fisheries has been premised upon there being an abundance of fish and everyone's right to take those fish. The government has been involved as the regulator and the overseer fulfilling the roles of keeping order and protecting the public's rights. Within the last two decades, we have seen the implementation of fisheries management schemes that include individual and vessel fishing quotas, closed fishing seasons and areas, and fisheries that have collapsed. The government's role has not greatly changed since encountering these problems and implementing these new schemes.

When change occurs with a set of rules, a paradigm shift most usually transpires which in turn, moves the world order in another direction<sup>12</sup>. People messing with the rules are the early signs of a significant change to come. Creating a new paradigm forces people to look in different directions<sup>13</sup> which in turn allows them to consider ideas and courses of action that previously they would not.

Barker notes that change is always froth with anxiety and doubts, and when a paradigm shift occurs, all parties are placed back at zero<sup>14</sup>. Barker advocates that there is almost always more than one right answer and we, the public, can chose to change our paradigms<sup>15</sup>.

In the area of fisheries management, such a paradigm shift begins with the change in attitude and view of the fishers' relationship to the resource. The users have always considered the fishery as inexhaustible and that DFO, or some government agency, would be there to act as the protector and conservationist. This premise must now envisage that the sustainability of the fisheries relies on the enhancement, stewardship and management involvement of the users themselves.

Another view that must be altered is that of DFO's supreme control

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<sup>11</sup> Ibid. at 32.

<sup>12</sup> Ibid. at 37.

<sup>13</sup> Ibid. at 85.

<sup>14</sup> Ibid. at 140.

<sup>15</sup> Ibid. at 150 and following.

and that they are the only appropriate manager of the resource. The system of fisheries management presently consists of a government system that assumes exclusive responsibility and capacity for managing the common property resource. The government manages for certain levels of sustainability determined from a knowledge base predicated upon scientific data, and then allocates the resource to the users on an economic and political basis. Management problems are resolved in a technical and historical framework. The system is bureaucratic and hierarchically organized with authority centralized and coming from the top down. The difference between managers and users is very clearly delineated. In the end management objectives become focussed on specialized matters such as gear type within one fishery, and thus the inter-connection of the resource to the elements that sustain it become separated<sup>16</sup>.

In the late 1970s into the 1980s, the "messaging of the rules" as noted by Barker commenced the paradigm shift in fisheries with the emergence of fisheries co-management agreements. Some of the first agreements were the comprehensive land claims agreements between the federal government and First Nations in the North which included co-management schemes for resources including fish<sup>17</sup>.

Before determining the perimeters of these management agreements and the challenges that may be faced, I will review the legislative jurisdiction of fisheries to determine if there exists a legal basis for co-management agreements.

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<sup>16</sup> Notzke, C. "A New Perspectives in Aboriginal Natural Resources Management: Co-Management" (1995) 26 *Geoforum* 187 at 188.

<sup>17</sup> The matter of management of the fisheries has been dealt with in a number of the comprehensive land claims settlement agreements such as James Bay and Northern Quebec Agreement, 1975, Northeastern Quebec Agreement of 1978, Inuvialuit Final Agreement of 1984, and the Nunavut Final Agreement of 1993. These agreements include provisions about First Nations use and management of fisheries within the geographic areas covered by the agreements.

### 3. THE LEGAL BASIS OF THE PUBLIC RIGHT TO FISH

#### 3.1 The Starting Points - *Magna Carta* and the *Constitution*

The principle of the public right to fish originates in England with the signing of the *Magna Carta* in 1215<sup>18</sup>. As the English law is the foundation of Canadian law, this principle became a right afforded to the Canadian public. From this grew the concept of the fisheries being classified as a common property resource as anyone could fish without restriction.

Under the *British North America Act 1867*, now the *Constitution Act 1867*<sup>19</sup>, jurisdiction for certain matters were divided between the federal and provincial governments. By section 91(12) the federal government was given exclusive power for "Sea Coast and Inland Fisheries" and by section 91(24) "Indians, and Lands reserved for the Indians".

There has been a wealth of cases since Confederation where the courts have discussed this division and the overlap in fisheries matters that often occurs between the federal and provincial powers as section 92(13) gives the provinces exclusive power to legislate in matters of "Property and Civil Rights in the Province". For the purposes of this paper, I do not intend to review the division of powers between the two government levels. I base my remaining remarks on the premise that the federal government has the exclusive jurisdiction to legislate in the area of fisheries even if such legislation impinges on a provincial power as long as the purpose of the federal legislation is for the conservation of the fisheries.

#### 3.2 The Present State - the *Fisheries Act*

Until 1877, fisheries in British Columbia were essentially unregulated, except for the schemes being utilized by the First Nations as

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<sup>18</sup> Historians and legal scholars state that paragraph 33 is the operative section that provides the public with the right to take fish in any public waterway, as noted in *R. v. Gladstone* (1996), 137 D.L.R. (4th) 648 (S.C.C.), by Chief Justice Lamer. [hereinafter *Gladstone*].

<sup>19</sup> *Constitution Act 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly the *British North America Act 1867*) [hereinafter *Constitution Act 1867*].

communal fisheries. In that year, the *Dominion Fisheries Act* became applicable to the Province, and a similar regulatory mechanism has continued in one form or another to the present *Fisheries Act*<sup>20</sup>.

By legislation, the fisheries were assessable to any one who paid a fee to obtain a license, and thus, were an open fishery. In 1968, the commencement of the Davis Plan put into effect a limited licensing system which has eroded the concept of the public right to fish. Following this, there have been further limits put into place whereby some fisheries are actually closed with no fishing permitted, while other fisheries permit no new entrants except those who have purchased retiring licenses from another.

The *Fisheries Act* is not a vast document, and most of the legislative design is by way of regulations providing for specific fisheries in specific geographic areas. The infrastructure of fisheries regulation is found within the policy DFO creates under the legislative power of licensing pursuant to sections 7 and 9 of the *Act*.

These sections give the Minister broad discretionary powers for licensing and the suspension or cancellation thereof. Licenses are issued on a yearly basis and the law is clear that the issuance of a fishing license does not create any form of property rights in such license, other than a beneficial interest for the year, or portion thereof remaining, for which the license is issued. The legislation creates only a right or privilege to apply for a license<sup>21</sup>.

The *Act* contains no express authority for the entrance by DFO into co-management arrangements. Section 43, whereby the Governor in Council is empowered to make regulations for the purposes and provisions of the *Act*,

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<sup>20</sup> *Fisheries Act*, R.S.C. 1985, c. F-14.

<sup>21</sup> *Smith v. Humchitt Estate* (1990), 48 B.C.L.R. (2d) 361 (B.C.S.C.).

could be used as the basis for such arrangements, under the subsections of:

- " (a) for the proper management and control of the sea-coast and inland fisheries;
- (b) respecting the conservation and protection of the fish;
- (g) respecting the terms and conditions under which a license and lease may be issued; and
- (l) prescribing the powers and duties of persons engaged or employed in the administration or enforcement of this Act and providing for the carrying out of those powers and duties."

To date the only regulations involving co-management agreements are the Aboriginal Communal Fishing License Regulations<sup>22</sup> passed in 1993. These regulations came about as a result of the Aboriginal Fishing Strategy set up by DFO in 1992 in response to the *Sparrow*<sup>23</sup> decision. The Aboriginal Fishing Strategy provides for negotiation of agreements with First Nations peoples in regards to fishing and will be further discussed in section four of my paper. There are no management agreements in regards to the fisheries that are with groups other than First Nations peoples<sup>24</sup>.

How then is it that DFO has entered into agreements for the co-management of the fisheries? The creation of DFO policy in response to situations created by overfishing and overcapitalization of fleets, as well as the social justice demanded by the First Nations court rulings, have lead to these arrangements without a clear legislative basis.

The present co-management agreements signed by DFO are subject to the rules of administrative law. I base this on the analogy these agreements are similar to those of contracting out and the stance taken by the courts as previously mentioned. The nature of the statutory duty or discretion that has been handed over and the results that can be effected will be the deciding factor as to what party to the agreement will be held responsible for the

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<sup>22</sup> *Aboriginal Communal Fishing Licenses Regulations*, SOR/93-332.

<sup>23</sup> *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.) [hereinafter *Sparrow*].

<sup>24</sup> All management agreements discussed in supra Pinkerton & Weinstein at note 5, supra Cassidy at note 4, and *Canada Department of Fisheries and Oceans, Aboriginal Fishing Strategy* (Ottawa: Fisheries and Oceans, 1992-1994); and *Canada Department of Fisheries and Oceans, West Coast Fisheries: Changing Times* (Ottawa: Supply and Services, 1993) involve First Nations.

proper use of such authority<sup>25</sup>.

Administrative law principles in regards to exercising a discretionary power operate within the basic perimeters of: promoting the policies and objectives of the governing statute, not frustrating or thwarting the interest of the legislation, and not utilizing the power to achieve a purpose not contemplated by the legislation<sup>26</sup>, will be therefore applicable to co-management agreement situations.

Further, other principles including: ensuring decisions are based on factors that are pertinent to the policy and objectives of the legislation, and not using extraneous, irrelevant and collateral considerations in making a decision will also be applicable. The elements of good faith and of fair and impartial treatment, and that discrimination shall play no part, are relevant to such agreements.

The concepts of non-fettering of discretion, refusal to exercise discretion and absence of bias in decision making are not alleviated due to the process being taken over by the non-government party to the management agreement. Guidelines, policies and directions need to be part of these agreements to add clarity to the decision making process for all parties involved and effected.

Even though the maxim of *delegatus non potest delegare* (a delegate cannot delegate) exists in law, it has been recognized by the courts that the nature of government today requires Cabinet be able to delegate its decision making process to the Ministers who in turn have an implied right to delegate such powers to their Deputy Ministers and officials within their Ministries, unless the legislation demands that the Minister be the one to exercise the power. Most often such requirements of the Minister's direct decision are in the areas of appeals and approval of by-laws and regulations<sup>27</sup>.

DFO has entered into management agreements even though there is no direct authority within the *Act*. In all cases, it is suggested by the studies

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<sup>25</sup> Supra Craig at note 7 at 113.

<sup>26</sup> As to the basic principles of administrative law see Blake, S. *Administrative Law in Canada* (Toronto: Butterworths, 1992) at 88 [hereinafter Blake].

<sup>27</sup> Ibid. at 131.

and reviews of such agreements that DFO has retained the paramount jurisdiction over fisheries<sup>28</sup>, and in that respect, most likely the agreements would be valid. DFO has recognized the need to have some legislative provisions for the schemes, and has produced amendment legislation which we will now review.

### 3.3 The Future State - Bill C-62

In 1982, Dr. Peter Pearse produced his lengthy report on the state of the Pacific coast fisheries and his recommendations on how to maintain sustain ability<sup>29</sup>. Some of those recommendations were implemented; however, most have sat idle until the presentation of Bill C-62, the new *Fisheries Act*<sup>30</sup>, to Parliament on 3 October 1996.

The provisions proposed in Bill C-62 include legislative authority for the signing of "fisheries management agreements" as set out in section 17 which is traceable to the *Pearse Report*. The drafters of this legislation have included within the Preamble of Bill C-62 the following statement reflecting on management agreements:

"WHEREAS persons engaged in fishing and their organizations wish to have a greater and more direct participation in decisions respecting the management of Canada fisheries;"

Inclusion of this statement will aid in showing any reviewer that there is a justification for these management agreements coupled with the responsibility of the federal government to conservation and protection of the fisheries. The drafters have attempted to join the users' (being members of the public) want of participation to the federal responsibility for management of the fisheries.

Section 17 provides for a fisheries management agreement to be entered into by the Minister "with any organization that, in the opinion of the Minister, is representative of a class of persons or holders" (holder being

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<sup>28</sup> Supra Cassidy at note 4 at 42.

<sup>29</sup> Supra *Pearse Report* at note 3.

<sup>30</sup> Bill C-62, *Fisheries Act*, 2nd Sess., 35th Parl., 1996.

defined as "a person, a fishing vessel, or a member of a prescribed class of persons who holds a license"). One must note that the discretion of determining whether an organization is representative is placed with the Minister. To gain insight into challenges that could be made to the Minister's discretion, the judicial interpretations made to date in regards to sections 7 and 9 of the present *Act* are insightful.

The cases of *Joys v. M.N.R.* and *Comeau's Seafoods Ltd. v. Canada*<sup>31</sup> clearly state that the Minister's discretion in making decisions under both these sections is of a broad and absolute nature as long as the rules of administrative law have been complied with in making such decisions. The wording used in all three sections is somewhat different. Section 7 uses the wording "absolute discretion" while section 9 is more akin to the proposed section 17 in that it uses "may". There is little substantial difference in these three sections, and it is probable that the new section 17 would have imparted to it, the broad discretionary powers as presently afforded the present sections.

In making answer to a challenge of the Minister's decision under section 17, the most important evidence will be what information was placed before the Minister as evidence to show that a group was indeed representative of a class of persons or holders. There will need to be very real and concrete connections between the parties in the group, and in turn between the group and the fishery. Such connections could be based on specific area, gear type, specific fishery, or even culture in light of the courts decisions on Aboriginal fishing rights.

The cases of *Joys* and *Comeau's Seafoods* concluded that it is difficult to successfully question the Minister's discretion, and success in regards to a section 17 challenge may rest on whether one can show that members of a group have been affected differently. Take for example, the commercial salmon fishery includes mainly non-First Nations fishers and a small number of First Nations fishers. Should the Minister deal with the First Nations commercial fishers as a sole representative group under section 17, such could create a situation ripe for challenge as the commercial group has been split along cultural lines with some of the members being treated differently.

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<sup>31</sup> *Joys v. M.N.R.*, [1996] 1 F.C. 149 (F.C.A.); *Comeau's Seafoods Ltd. v. Canada* (1997), 1 S.C.R. 12 [hereinafter *Joys and Comeau's Seafoods*].

Caution must be exercised by DFO in determining the representative groups and making agreements with them. There has been much dissention and hostility within the west coast salmon fishery between the First Nations and non-First Nations groups. There has also been great tension between the commercial and sport sectors. Changes in groups could become a contentious issue with much litigation.

Section 17 further provides that the management agreement can include harvest times and other management measures, the number of licenses that may be issued, fees payable for such licenses, and two very broad areas being:

- (d) obligations, responsibilities and funding arrangements with respect to management of the fishery, and
- (e) conservation and management programs for the fishery.

The definition of "fishery" includes the terms: an actual specific species of fish, a place where fishing may be carried on, a method of fishing or particular type of gear, equipment or vessel. An agreement can thus be solely about a specific fishery such as salmon, limited to the gill net or seine salmon fishery, and narrowed further to the gill net salmon fishery in a particular geographic area.

These two subsections as noted provide DFO with the ability to turn over its mandate for responsibility for fisheries under an agreement to another organization. Such a scheme can also include the actual allocation of fish among different user groups. The implications of these two subsections are very wide reaching.

Sections 18 and 19 provide that notice is to be given to various parties about the negotiation of an agreement. Section 18 specifically states that notice "shall be given to the holders or persons likely to be subject to it" before the agreement is entered into. Determination of the holders is quite an easy task as they already hold licenses and the pertinent information about them is in DFO records.

As to who "persons likely to be subject to" the agreement are, there are no directions for determination of these parties within the *Act*. The rules of administrative law would then become most important to ensure that the

principles of fairness and reasonableness were employed in determining these persons.

Section 19 provides that the Minister shall publish the agreement "in the manner the Minister sees fit". Again DFO must follow the rules of administrative law in regards to publication. The wording in this section suggests that the publication comes after the agreement has been signed. This provision affords DFO latitude as to when, how and where such publication will be accomplished. The publication may include the names and addresses of the license holders whether they be actual persons or corporations.

These sections have literally set up a notice regime that appears to provide information to the persons who might be aggrieved by the entering into of an agreement, yet has not gone the extra step of providing any mechanism for public input and assessment, and further appeal of the actual change of management of the fishery. These sections clearly suggest that the legislators are giving the persons who will be effected by the signing of the agreement, a chance to know what is happening but at the same time no opportunity to be heard. This flies in the face of administrative law principles and could well produce challenges by the aggrieved individuals and/or user groups should the *Act* come into force.

Upon a thorough reading of sections 17 to 20, one could deduce that DFO is able to give up all its responsibility for the management of the fisheries; however, section 21 retains for the Minister the right to make a fisheries management order which pursuant to section 10 is truly an order closing a fishery, or placing restrictions of time, quota, or size on a fishery, and may be applicable to a specific group such as Aboriginal, commercial, recreational, gear type or class of license. The Minister may issue such an order when it is considered that it is "required for the conservation of a resource".

The section goes on to state that any management agreement in place pursuant to section 17 has no bearing when this type of order is issued. The latitude for the Minister's discretion in making such an order under section 21 would be again based on the broad discretion afforded by the present case law. This section provides DFO with the authority of advancing that its absolute power over fisheries is intact and has not been abrogated.

It is interesting to note that the *Act* is silent as to provisions such as: how long the agreements are to last, regular reporting to DFO, review and evaluation processes, and collection and turn over of data on a regular basis to DFO.

At present, Bill C-62 has received no further discussion in Parliament since its introduction in the fall of 1996, and its fate is unknown.

### 3.4 The Incorporation of the Aboriginal Right to Fish

As I have noted, there are presently management agreements respecting fisheries in place in British Columbia. It is therefore useful to look at how these agreements have come into being without any direct legislative authority. They appear to be in response to the 1990 Supreme Court of Canada decision in *R. v. Sparrow*<sup>32</sup>. Commencing with the case of *Calder*<sup>33</sup> in 1973, there has been recognition by the courts that Aboriginal title is a legal right derived from First Nations' historical occupation and possession of their tribal lands where they fished and hunted.

*Sparrow* was a landmark decision to which all courts now refer when dealing with the claim of an Aboriginal right. The case interpreted the scope and content of Aboriginal rights pursuant to section 35(1) of the *Constitution Act, 1982*, which recognizes and affirms "existing Aboriginal and treaty rights of the Aboriginal peoples of Canada"<sup>34</sup>.

The court rejected the notion that rights could be extinguished by the mere fact laws had been enacted dealing with the right being claimed; instead it ruled that legislation must show a "clear and plain" intention to extinguish rights. As the *Fisheries Act* did not show such clear and plain language, the Aboriginal right of the Musqueam people to fish for salmon within the area they claimed had not been extinguished, and was thereby protected by section 35(1). Further, the court stated that the Aboriginal right to fish was not "frozen" to the activities that the First Nations were carrying

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<sup>32</sup> *Supra R. v. Sparrow* at note 23.

<sup>33</sup> *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313.

<sup>34</sup> *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

on in 1982 when the section was proclaimed; however, this right was subject to the federal regulations as their purpose was the conservation of the fishery.

The court was satisfied that the Musqueam had proven by the historical evidence presented they had an Aboriginal right to fish for food, and social and ceremonial purposes. The case determined that DFO in managing the fishery must afford the First Nations peoples a priority over all other users in the fishery except in matters of conservation. The court did not deal with the matter of an Aboriginal commercial fishery.

The cases that have followed have somewhat narrowed the principles set out in *Sparrow* by adding extra tests that must be met in order to determine an Aboriginal right. The cases in 1996 of *Van der Peet*, *Gladstone* and *N.T.C. Smokehouse Ltd.*<sup>35</sup> turned on the question of an Aboriginal commercial fishery.

*Van der Peet* qualified the *Sparrow* test by requiring the proof that the Aboriginal right must be shown to be "integral to the distinctive culture of the Aboriginal community claiming the right" at the time of the arrival of the European settlers. In determining such right, the courts must give liberal interpretation of the Aboriginal historical evidence presented and relax the usual rules of evidence.

In *Van der Peet*, the court found that the appellant, Dorothy Van der Peet, had not proven that the exchange of fish for money or other goods based on the historical evidence deduced at trial was sufficient to show it was an integral part of the distinctive culture of her Aboriginal community which existed prior to contact with the Europeans. Therefore, she had no right to the commercial sale of fish.

On the same day two companion cases as noted above were brought down. *N.T.C. Smokehouse Ltd.*, was not successful as it was determined the historical evidence presented did not prove that commercial fishing was an integral part of the distinctive culture of the specific Aboriginal community claiming that right. In *Gladstone*; however, the court did find that the evidence produced met the test of integral practices at the time of the

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<sup>35</sup> *R. v. Van der Peet* (1996), 137 D.L.R. (4th) 289 (S.C.C.); supra *R. v. Gladstone* at note 18; *R. v. N.T.C. Smokehouse Ltd.* (1996), 137 D.L.R. (4th) 528 (S.C.C.).

European settlers arrival; however, the court remitted the matter back to trial for further evidence on the issue of justification under section 35(1).

The courts have clearly stated that the Aboriginal right to fish and the extent of that right is to be decided on a case by case basis, and is site specific. The recent case of *Delgamuukw v. British Columbia*<sup>36</sup> confirmed the *Van de Peet* test for proof of an Aboriginal right. What is troublesome about *Delgamuukw* is that there were a number of other justifiable infringements added to the previous conservation infringement determined by *Sparrow*. Albeit *Delgamuukw* dealt with Aboriginal land title and not specific Aboriginal rights; yet, the decision may signal a trend that in future the court will conclude there are other justifiable infringements for fisheries thus further narrowing the Aboriginal right to fish.

It is clear from the present law that in regards to treaty rights to fish and Aboriginal rights to fish where there is no treaty<sup>37</sup>, such rights will only be protected and subject to the federal justified limitation for conservation of the fishery if it can be proven that through historical evidence the right to fish existed at the time of the arrival of the European settlers, was integral to the society claiming the right and the right has not been extinguished.

As the case law has concluded First Nations peoples within certain communities in British Columbia have a right to fish, DFO must incorporate these rights and the needs of the First Nations to the fishery within its policies and guidelines.

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<sup>36</sup> *Delgamuukw v. British Columbia*, (1993), 104 D.L.R. (4th) 470 (B.C.C.A.); reversed and new trial ordered in part [1997] S.C.J. No. 108, unreported, 11 December 1997.

<sup>37</sup> The Province of British Columbia is mainly without treaties except for the fourteen Douglas Treaties of the 1850s on parts of Vancouver Island, and the Peace River district.

#### 4. PRESENT FISHERIES CO-MANAGEMENT IN BRITISH COLUMBIA - ABORIGINAL FISHING STRATEGY

Since 1973, the federal government has made various commitments to negotiating land claims with First Nations which would include fisheries matters. DFO in recognition of that commitment had during the 1980s, most often in conjunction with the Department of Indian and Northern Affairs, entered into a number of management regimes with various First Nations fishing groups in British Columbia. These included fishing enhancement, financial aid to buy boats (Northern Native Fishing Corporation purchase of B.C. Packers Ltd. fleet in 1982), and agreements whereby actual First Nations groups took on limited management responsibilities (Haida Co-management Proposal in 1984-85)<sup>38</sup>.

In 1991, DFO entered into the Aboriginal Fisheries Co-operative Management Program which saw 96 co-management agreements with First Nations in British Columbia funded in that year. Those agreements were intended to achieve a variety of economic, social and biological objectives, as well as lay a foundation for broader agreements on the sharing of responsibility for fisheries between DFO and First Nations<sup>39</sup>.

After *Sparrow* in 1992, DFO set about redefining its department and fishing policies to ensure that First Nations were allowed to exercise first claim on the resource, after conservation needs were met, and before the claims of other users<sup>40</sup>. In that same year, DFO implemented the Aboriginal Fishing Strategy (herein AFS), a seven year initiative worth \$140m with approximately 70 % earmarked for the west coast fisheries<sup>41</sup>. This strategy sought to include First Nations in the actual delivery of DFO services and

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<sup>38</sup> Supra Cassidy at note 4 at 49 and following.

<sup>39</sup> Paisley R., M. Healey & T. McDaniels. "Analysis of Strategies for Co-operative Fisheries Management Between Government and Native Indians" (prepared for Native Affairs, Department of Fisheries and Oceans), (Vancouver: Westwater Research Centre, 1998) at 1 [hereinafter Paisley].

<sup>40</sup> *Canada Department of Fisheries and Oceans, West Coast Fisheries: Changing Times* (Ottawa: Supply and Services, 1993) [hereinafter West Coast] in discussing the implementation of the requirements set out in *Sparrow*.

the making of policies.

Many initiatives were commenced with First Nations including enhancement, enforcement and conservation. There were also pilot projects (Lower Fraser Aboriginal Fisheries Commission, Tsu-ma-uss Fisheries, and three First Nations on the Skeena River) which permitted the commercial sale of salmon, and the salmon license retirement program whereby commercial salmon licenses were purchased by DFO and the fish quotas therefrom re-allocated to the First Nations. Such a scheme ensured that the commercial fleet would not suffer any loss of fish<sup>42</sup>.

Implicit in the negotiations of each initiative were decisions on who would fish, how much fish would be taken, what geographic areas the initiatives would encompass, who would provide the enforcement and other management matters. Under the *Aboriginal Communal Fishing Licenses Regulations* brought into force in 1993, these matters could be included within the communal licenses.

As of 1997, there were 77 AFS agreements signed in British Columbia with 58 First Nations groups which represented about 80% of the First Nations population<sup>43</sup>. The agreements vary in degree of Aboriginal stewardship from group to group. The pilot sale arrangements have not progressed beyond the experimental stages. DFO has made a commitment to continuing AFS indefinitely<sup>44</sup>.

The review of the pilot sale arrangements in 1994 by Gardner Pinfold Consulting Economists Ltd. suggested that the AFS provisions are

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<sup>41</sup> Ibid.

<sup>42</sup> See generally Gardner Pinfold Consulting Economists Ltd. *An Evaluation of the Pilot Sale Arrangement of Aboriginal Fishing Strategy (AFS)* (Vancouver: Gardner Pinfold, 1994)[hereinafter Gardner].

<sup>43</sup> Matkin, James G. "Working Towards More Certainty and Stability: Fact Finding Review of the AFS Pilot Salmon Sales Program" (February 1997, prepared for Department of Fisheries and Oceans) [unpublished] at 7; and see information at "Press Release: Aboriginal Fishing Strategy" printed from Labrador Metis Home Page at <http://www.publib.nf.ca/CAP/west/StLewis/metis/afs.htm>, and interview of William G. Duncan, Program Officer, Aboriginal Fishing Sector, Department of Fisheries and Oceans, Canada (14 November, 1997).

<sup>44</sup> Ibid. interview of William G. Duncan.

identical to those suggested by the *Pearse Report* in regards to the Aboriginal fishery.<sup>45</sup> Gardner Pinfold further noted that AFS has been able to generate economic opportunities for First Nations communities while at the same time making improvements in fishery management<sup>46</sup>.

Studies of co-management schemes record results of an economic and social nature for the users and communities, as well as sustain ability for the resource. Improved trust and communications between user groups, sharing of a greater realm of knowledge and data, investment of the users' own resources, and improved economic self-sufficiency are some of the hallmarks of successful co-management<sup>47</sup>.

Fisheries is one matter that is to be contained within all future treaties concluded through negotiations on First Nations land claims between the provincial, federal and First Nations governments<sup>48</sup>. As previously noted, B.C. in 1993 announced its preference of working with First Nations interests in this way rather than resorting to further litigation. The agreement-in-principle with the Nisga'a Nation of 1996 was the first such treaty worked out, and has now been finalized by the negotiators for the

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<sup>45</sup> Supra Gardner at note 42 at 47; also recommendations in supra *Pearse Report* at note 3 at 182.

<sup>46</sup> Ibid. Gardner at 58.

<sup>47</sup> See generally supra Pinkerton & Weinstein at note 5, and supra Paisley at note 39.

<sup>48</sup> See the documents from the three parties involved in the treaty process as well as the Treaty Commission: *British Columbia Treaty Commission Annual Report 1997* (Vancouver: The Commission, 1997); *British Columbia Treaty Commission Agreement, 21 September, 1992* (Vancouver: The Commission, 1992); *British Columbia Treaty Commission Update, 1994 to present* (Vancouver: The Commission, 1994 to present); *British Columbia Treaty Negotiations: the Federal Perspective* (Ottawa: Federal Treaty Office, November 1996); Province of British Columbia, Ministry of Aboriginal Affairs "Information About...Interim Measures", October 1995; Province of British Columbia, Ministry of Aboriginal Affairs. "British Columbia's Approach to Treaty Settlement Lands and Resources", 12 June 1996; Province of British Columbia, Ministry of Aboriginal Affairs. "British Columbia's Approach to Treaty Settlements", 8 October 1996; Province of British Columbia, Ministry of Aboriginal Affairs. "Federal-Provincial Cost-Sharing for Treaties", November 1997; Province of British Columbia, Ministry of Aboriginal Affairs. "Quick Facts About Treaties" undated; *The Report of the British Columbia Claims Task Force* (Vancouver: The Task Force, 1991).

three parties. It is scheduled to be signed by them on 4 August 1998 with ratification by all the parties to come as soon as possible<sup>49</sup>.

Provisions regarding fisheries are contained within the Nisga'a Agreement with conservation stated as the primary consideration. DFO and the Province are specifically cited as retaining overall responsibility for conservation and management of the fisheries and fish habitat. The Nisga'a Nation is responsible for managing the harvest which is determined at approximately 18% of the Canadian Nass River total allowable catch<sup>50</sup>. This leaves the determination of the actual allowable catch numbers to DFO.

The agreement further provides for an allocation of certain salmon species for commercial purposes with monies to be provided to aid in buying existing vessels and licenses so that the Nisga'a people are able to participate within the commercial fishing industry, and thus no new users will be added to the existing fleet. A joint management committee to make recommendations to both government levels in regards to the Nisga'a's fishing and enhancement activities is also a feature of the agreement.

The Nisga'a agreement is an example of the type of formal and all inclusive agreement that the federal government and the Province envisage with First Nations which encompasses all outstanding issues including fisheries<sup>51</sup>. The management agreements under the Aboriginal Fishing Strategy at present provide for a good opportunity for the parties to determine and try out management arrangements with respect to the fisheries prior to the treaty process<sup>52</sup>.

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<sup>49</sup> The forerunner to the final agreement was the *Nisga'a Agreement in Principle*, 15 February, 1996 (Ottawa, 1996). Full text of the final agreement can be viewed at the B.C. Aboriginal Affairs Ministry website at: <<http://www.aaf.gov.bc.ca/aat/>>. The Province of British Columbia has stated that it will work diligently to put the final agreement before its Parliament for ratification this year or early in 1999; see Hunter, Justine. "\$2.3 million to be spent promoting Nisga'a deal" *The Vancouver Sun* (21 July 1998) A1[hereinafter Hunter].

<sup>50</sup> *Nisga'a Agreement in Principle, in Brief*, 15 February 1996, at 3-4.

<sup>51</sup> The Premier of B.C. has stated that he would like to see the Nisga'a Agreement as the template for future treaty settlements in the Province; supra Hunter at note 49.

<sup>52</sup> There are 197 First Nations bands in British Columbia with 112 of them being included within the filed Statements of Intent which represents more than 70% of the First Nations population in the Province. (see First Nations Summit. "BC Treaty

## 5. WHAT DOES THE FUTURE HOLD FOR CO-MANAGEMENT?

### 5.1 The Government Positions Today

Since the AFS was created in 1992, the Royal Commission on Aboriginal Peoples (herein RCAP) has released its report<sup>53</sup> which recommends all government levels should work towards creating co-management arrangements for the traditional territories of the First Nations. These arrangements would serve as interim measures until treaty negotiations are finalized<sup>54</sup>. The co-management bodies created would have equal representation from both First Nations and government, and ideally respect for and incorporate of the Aboriginal traditional knowledge would be a result<sup>55</sup>.

The RCAP recognizes that in order for such co-management bodies to be effective, there must be monies available for the long-term to ensure their stability and building of skills and expertise, and thus recommends that the federal government provide such funding to meet such objectives<sup>56</sup>.

Courts have often been used as the instrument to determine resource allocation and ownership. The RCAP suggests that co-management may be the answer to these contentious issues as it provides for a compromise

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Process Facts" 1 April 1998). As of 30 March 1998, there are fifty-one First Nations participating in the treaty process in British Columbia, with thirty-five at stage 4 of the process where they are negotiating an agreement in principle. There are no First Nations beyond this stage. (The information about the participants in the treaty process was obtained directly from the B. C. Treaty Commission office on 9 April, 1998. This information also provides that the Carcross/Tagish First Nation are as of 30 March, 1998 at stage 2 of the treaty process and are the fifty-first participant).

<sup>53</sup> Canada. Royal Commission on Aboriginal peoples. *Report of the Royal Commission on Aboriginal Peoples* (Minister of Supply and Services Canada: Ottawa, 1996) [hereinafter RCAP].

<sup>54</sup> *Ibid.* at volume 2:2 at 679-680.

<sup>55</sup> *Ibid.* at 680.

<sup>56</sup> *Ibid.* at 680.

between the First Nations objective of self-determination and the governments' objectives of retaining management authority<sup>57</sup>.

The federal government's comprehensive lands claims process, and the British Columbia treaty process are two good indications of the direction the governments are moving towards in respect of First Nations issues and particularly in matters of resource management.

The Government of Canada stated in its 1996 policy paper on the British Columbia treaty process that the treaties produced would recognize the rights of all residents of the Province to benefit from the natural resources, which would in turn benefit the aspirations of the First Nations for sustainable communities and self-reliance<sup>58</sup>. The federal government clearly notes its preference for negotiation over litigation on Aboriginal issues. The end result contemplated by successful negotiation throughout the country, is the abolition of the Department of Indian Affairs and the *Indian Act*, with First Nations taking charge of their futures<sup>59</sup>.

These are pragmatic goals, and suggest a determination on the part of the federal government to negotiate all First Nations issues and finalize treaties. As to natural resources, the federal position suggests a balancing act between achieving certainty, promoting First Nations self-reliance, ensuring conservation of resources, and integrating and coordinating land and resources management<sup>60</sup>.

Under the heading of "resources" within the federal position paper are included "fish, ..., offshore areas and ocean management". The exclusive power for fisheries resources is retained by the federal government in keeping with history. The reasons set forth for such federal control are the conservation and integration of the management of all fisheries.

An interesting point mentioned in the federal policy is that treaty provisions will be made in the context of a coast-wide strategy<sup>61</sup>, suggesting

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<sup>57</sup> Ibid. at 666.

<sup>58</sup> Supra *British Columbia Treaty Negotiations: the Federal Perspective* at note 48 at 6.

<sup>59</sup> Ibid. at 8 where it speaks of these results. *Indian Act*, R.S.C. 1985, c. I-5.

<sup>60</sup> Ibid. *Federal Perspective* at 14-15.

<sup>61</sup> Ibid. at 18.

that the federal government will be at the treaty table with their overall plan for the fisheries off the British Columbia coast, and First Nations will be expected to fit into that plan. This stance does not suggest much ability to negotiate on the issues of fisheries or ocean management.

Prior to 1990, the Province had not been involved in any way with treaty negotiations, and in fact had maintained the ideology that these were federal matters. In 1991, the provincial government joined with the federal government and the First Nations Summit in creating the B.C. Treaty Commission<sup>62</sup>. The Province may have been slow to get involved yet they have been most prolific in publication of their policies and vision for the Province *vis-a-vis* the treaty process.

In regards to natural resources, the Province's main objective is for treaties to create economic certainty by ending the questions over the ownership and use of Crown lands and resources, and thus encourage continued development in the province<sup>63</sup>. John Cashore, the then Minister of Aboriginal Affairs, stated in 1995 that "any proposed treaty which doesn't support regional economic development will be rejected by Cabinet and sent back for more work<sup>64</sup>".

The Province sets out it will negotiate with a view towards producing clearly-defined rights for the First Nations "to land and resources in a manner that fits with contemporary realities of economics, law and property rights in British Columbia, and treaties that respect the rights and interests of all British Columbians" and provide the basis for sustainable economic and social development<sup>65</sup>.

Achieving co-operative management and land use planning for both

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<sup>62</sup> Province of British Columbia, Ministry of Aboriginal Affairs. "Quick Facts About Treaties" undated [hereinafter "Quick Facts"]. The legislation creating the commission is found at: *British Columbia Treaty Commission Act*, S.C. 1995, c. 45, and *Treaty Commission Act*, R.S.B.C. 1996, c.461. Both Acts were proclaimed in force on 1 March 1996.

<sup>63</sup> Ibid. "Quick Facts".

<sup>64</sup> Ibid.

<sup>65</sup> Province of British Columbia, Ministry of Aboriginal Affairs, "British Columbia's Approach to Treaty Settlement Lands and Resources", 12 June 1996, at 2.

land and resources with First Nations by their participation in the present structures and regimes that exist is an ideal expressed by the Province<sup>66</sup>.

From these policies set out by the two government levels, it appears very likely that co-management will be part and parcel of treaties that will be finalized in the future with First Nations in regards to resource management.

## 5.2 The Possible Problems

The paradigm shift in resource management to co-management is not without its detractors. One of the first and foremost may be the slow down of the treaty process in British Columbia as commented upon by the media, and in particular some who are been involved in the actual process<sup>67</sup>. Professor Frank Cassidy, advisor on Aboriginal Affairs to a former premier states "[t]here's every appearance that the provincial government would really like to back out of the treaty process<sup>68</sup>". Barbara Fisher, a former commissioner, suggests that a new approach is needed for the process to be successful<sup>69</sup>.

The Premier has stated it is important to complete the Nisga'a agreement as soon as possible suggesting that the government is still

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<sup>66</sup> Ibid. at 6.

<sup>67</sup> David Mitchell. "Government Moving Too Slowly on Indian Claims" *The Vancouver Sun* (27 April, 1998) A10; Justine Hunter. "Efforts to settle Indian land claims staggers at starting line" *The Vancouver Sun* (14 May, 1998) A 1, and "We didn't scuttle treaty deal, First Nations chief claims" *The Vancouver Sun* (15 May, 1998) A6; and the articles by Stewart Bell. "B.C. cabinet accused of reneging on treaty" *The Vancouver Sun* (21 May, 1998) A7, and "A Fragile Detente On Land Claims Fades Away" *The Vancouver Sun* (27 June, 1998) A1. See also the article "B.C. Indian chiefs press treaty talks" *The Vancouver Sun* (27 June, 1998) B6 where it was reported that the B. C. Indian chiefs told their leaders to keep working with the two governments to kick-start treaty talks.

<sup>68</sup> Stewart Bell. "Fears growing that B.C. Will abandon the treaty process" *The Vancouver Sun* (29 May 1998) A1.

<sup>69</sup> Barbara Fisher. "Why the drumroll that will signal treaty-talk success isn't likely soon" *The Vancouver Sun* (24 June 1998) A15 and "Treaty-making paralysis will end when negotiators change approach" *The Vancouver Sun* (25 June 1998) A19.

committed<sup>70</sup>. There has been discussion of streamlining the process to conclude treaties in a more timely fashion, and there is a review of the treaty process being made. There has also been talk and movement of First Nations resorting again to the courts to determine Aboriginal title to their traditional territories<sup>71</sup>.

The other situation that may complicate co-management agreements of the fisheries, is that of challenges to such agreements by the non-First Nations fishers. There is a long history of antagonism between the different user groups in the fisheries and especially the growing share being given to the First Nations due to *Sparrow*. Surprisingly there has not been a challenge to the AFS schemes prior to the 1998 case of *R. v. Cummins*<sup>72</sup>. John Martin Cummins, MP for Delta, decided to fish when the season in the area of the mouth of the Fraser River, near Vancouver, was closed to all except First Nations fishers for commercial purposes.

The accused was backed by the Fisheries Survival Coalition who had been looking for a test case where they could argue that there is no right to an Aboriginal commercial fishery in this specific area. Mr. Cummins was charged and found guilty of illegally fishing during a closed time. The important point here is the trial judge's comments about the AFS, and not the conviction.

The trial judge determined, without much in the way of reasoning, that there was no evidence before him to prove the First Nations in that area (being the Musqueam, Burrard and Tsawwassen bands) had an Aboriginal right to fish commercially as per the test found in *Van der Peet* which set out that to prove an Aboriginal right, there must be evidence that demonstrates such right was "integral to the distinctive culture of the Aboriginal community claiming the right" at the time of the arrival of the European settlers.

The court held that the Minister of Fisheries and Oceans had no

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<sup>70</sup> *Supra* Hunter at note 49.

<sup>71</sup> Culbert, Lori. "Native band critical of Nisga'a deal" *The Vancouver Sun* (17 July 1998) A1, and Bell, Stewart. "Sechelt band orders firms to pay for their resources" *The Vancouver Sun* (23 June 1998) A1.

<sup>72</sup> *R. v. Cummins* (26 January 1998), Surrey 93472-01 (B.C.Prov.Ct.).

authority to determine such a fact. The judge stated that if he was incorrect on that point, the AFS was still invalid as the Minister had no authority to delegate to the Band Chiefs by way of communal fishing licenses, the authority to permit people to fish.

DFO issues communal fishing licenses to a Band rather than an individual and the license provides that the Band Chief will determine who fishes, when, and how much, and report such information back to DFO.

The trial judge concluded that on either point the AFS commercial fishery at this site was illegal and the only fishery that was open was to those First Nations who were exercising their Aboriginal right to fish for food, social and ceremonial purposes as had been previously decided in *Sparrow* for this specific site.

The case was not appealed, and DFO has continued business as usual. There have been further rumblings from the commercial, non-First Nations community that this is not the end of the matter and it may well be that litigation over the validity of AFS may come about at some later date in a higher court. This may be the beginning of more challenges to the inclusion of First Nations in the fishery under co-management agreements. One welcome outcome from this case would be the federal government's movement forward on enacting the provisions for co-management as set out in Bill C-62.

## CONCLUSIONS

In this age of down-sizing, right-sizing, shrinking departmental budgets, and the public's demand for less government intrusion in their lives, the schemes of co-management are most attractive to any government department delivering services to the public. DFO has announced that its budget will decrease from \$775m in 1995 to less than \$450m by the year 2000.<sup>73</sup> These schemes are also attractive to the users as the wealth of studies conclude there are benefits of economic, social and sustain ability realized<sup>74</sup>.

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<sup>73</sup> Canada Department of Fisheries and Oceans, "The New DFO Framework, Fact Sheet" printed from <http://www.ncr.dfo.ca/communic/fact/1995/950228e1.htm>.

<sup>74</sup> See sources in note 6.

It could be said that DFO is off loading its responsibility for fisheries to the fishers themselves and the communities that depend upon the resource. Placing the responsibility for fisheries in that arena makes good political sense for governments who have been blamed for the collapse of various fish stocks and communities, the prime example being Newfoundland and the cod fishery<sup>75</sup>. Co-management schemes provide for less accountability by governments, and more accountability by the communities and the users of the resource.

DFO has the ability to lessen its costs in administration and enforcement, enhancement and protection by use of these agreements which literally download much of the cost associated with the responsibility for management of the fishery from DFO to the actual users, by adding the costs as noted to the internal costs of the fishing industry. Grant monies appear to be part of the initial start up costs of these agreements, and as the studies note, costs are highest in the first years of implementation<sup>76</sup>. Studies do provide evidence that costs become significantly less in the following years by implementing taxes on catches, user fees, and other schemes to produce financial resources with many organizations becoming self-sufficient after a few years<sup>77</sup>.

Questions arise from all of this. How far can DFO go in handing over the fishery to other groups? When do they come to the point of actually giving up their legislated authority to be the protectors of the fisheries according to the Constitution? In part three of my paper, I have provided some comment on these questions.

The inclusion in Bill C-62 of management agreements provides the legislative backdrop for DFO to legally make use of these down loading schemes. Challenges to these agreements will determine what provisions must be included. DFO is not able to abrogate its ultimate constitutional responsibility for fisheries. Allocation matters may be the one area that DFO will be held responsible for even if handed over to another by the terms of an agreement, due to its contentious nature.

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<sup>75</sup> Aubry, Jack. and David Pugliese. "Ottawa smacked over cod" *The Vancouver Sun* (21 March 1998) A3.

<sup>76</sup> *Supra* Gardner at note 42 at vi, 49 and following.

<sup>77</sup> See generally *supra* Pinkerton & Weinstein at note 5, and *supra* Paisley at 39.

It is possible that the argument will be made that as First Nations have the right to fish as determined by *Sparrow*, they in turn have the right to determine their own allocations and the management of their fisheries. Courts to date have not been prepared to deal with such issues, and in light of the decisions since *Sparrow*, it does not appear likely that they will make any determinations in the near future. To make such decisions could serve to disrupt the precarious balance and certainty that exists in the fisheries law of Canada.

By including the user groups with direct involvement within the management of the fishery, studies show that the "Tragedy of the Commons" model<sup>78</sup> described and advocated for so long as the inevitable result of common property resource use, is not the absolute result<sup>79</sup>. These co-management agreements may produce the desired effect of achieving sustainability in the fisheries of the west coast.

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<sup>78</sup> Hardin, G. "The Tragedy of the Commons" (1968) 162 Science 1243.

<sup>79</sup> Studies have proven that the tragedy does not necessarily happen as Hardin predicted it always would. See supra Pinkerton & Weinstein at note 5 at 177 and following; Feeny, D., F. Berkes, B. J. McCay, & J. M. Acheson. "The Tragedy of the Commons: Twenty-Two Years Later" (1990) 18:1 Human Ecology 1; Pinkerton, E. W. "What is Co-Management?" (1993) 19:3 Alternatives 37, and supra "Indians" at note 1.