

Different Sides of the Same Coin: A Comparative View of Indian Hunting and Fishing Rights in the United States and Canada

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INTRODUCTION:

From the time of the first contact between North American Indian Tribes and Europeans their relationship has been complex and controversial. The clash of cultures was fundamental. It was and is reflected in radically different conceptions of the human relationship with the land, its wildlife, and other resources. Native American cultures generally “engaged in relationships of mutual respect, reciprocity, and caring with an Earth and fellow beings as alive and self-conscious as human beings.”¹ Native religious belief and ceremony reflected and perpetuated these beliefs.²

In contrast, European cultures viewed land as something to be changed, dominated, and subjugated: “[T]hey made little attempt to live with their natural communities, but rather altered them wholesale.”³ For the Indian, that natural community included all the nonhuman, natural elements,⁴ that is, the native worldview was one that included humans within nature. The sum of European natural philosophy, on the other hand, created a vision of the human being as “a lonely exile sojourning in a strange and hostile

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1. Annie L. Booth & Harvey M. Jacobs, *Ties That Bind: Native American Beliefs as a Foundation for Environmental Consciousness*, 12 ENVTL. ETHICS 27, 31 (1990).

2. *Id.*

3. *Id.*

4. J. BAIRD CALLICOTT, IN DEFENSE OF THE LAND ETHIC: ESSAYS IN ENVIRONMENTAL PHILOSOPHY, 189 (1989).

world”⁵

Today, these radically different views of humans’ relationship with nature manifest themselves in conflicts over land ownership and use, beneficial rights in natural resources, and particularly in disputes regarding preservation of native hunting and fishing rights. This article examines and compares the treatment of North American native aboriginal and treaty-guaranteed hunting and fishing rights in the United States and Canada.

This article examines the nature of native claims to hunting and fishing rights. Because these claims are based on both original occupation of the land, or “aboriginal rights,” and treaty guarantees, Part I includes first, a review of aboriginal rights from both the native and governmental perspectives; and second, a review of the principles of treaty interpretation as announced by Canadian and U.S. courts. This section also includes a brief description of the principles governing both establishment and extinguishment of these rights. Part II of the article describes the relationship between the two governments and the Indians, and reviews and contrasts major court opinions which have construed the scope and extent of native hunting and fishing rights in the United States and Canada. The article concludes by suggesting that preservation of native hunting and fishing rights, and consequently, preservation of native philosophical view of humankind’s relationship with nature is important for both native and non-native cultures in North America.

I.

THE QUESTION OF SOVEREIGNTY: DEFINING ABORIGINAL RIGHTS

A. *The Perspective of the United States and Canadian Governments*

The point of dispute between North American Indians and the governments of Canada and the United States is not about the existence of aboriginal rights, but rather, over the source, scope, and extent of these rights. The courts of both the United States and Canada have long recognized that North American Indians, by virtue of their original occupation of the land, held aboriginal title to

5. *Id.* at 182. Professor Callicott writes that while there is no one American Indian belief system, common characteristics, such as the view that nature is alive and that humans, plants, and wild animals all have a shared consciousness, serve to provide a united framework for describing the native cultural viewpoint. *Id.* at 177-79 and 184-89.

the land and retained certain aboriginal rights. As Chief Justice John Marshall stated in *Worcester v. Georgia*:⁶ "the Indian Nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power"⁷ The Canadian Constitution protects aboriginal rights;⁸ the Canadian courts have recognized this protection since at least 1887.⁹

The highest courts in both the United States and Canada¹⁰ have

6. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561-63 (1832) (reversed appellant's conviction, holding state statutes which required non-native appellant to receive a license from the state prior to entering a reservation established by treaty between Indians and the federal government are void because they interfere with the exclusive power of the national government to regulate Indian affairs.).

7. *Id.* at 559.

8. Section 35(1) of the Constitution Act, 1982 reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

9. *St. Catharines Milling & Lumber Co. v. The Queen*, 13 S.C.R. 577, 608-09 (1887) (holding that the beneficial interest in timber lands ceded by Indian inhabitants to the Dominion of Canada are vested in the Province of Ontario. Justice Strong noted that the government's policy regarding aboriginal title "may be summarily stated as consisting in the recognition by the crown of a usufructory title in the Indians to all unsundered lands.").

10. For U.S. cases, see, e.g., *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1954), *reh'g denied*, 348 U.S. 965 (1955), in which the Court distinguished between aboriginal title and treaty-granted rights by noting that aboriginal title amounts to a right of occupancy superior to all others but rights asserted by the sovereign; *accord*, *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 n.29 (1979); *United States, as Guardian of the Hualpai Indians of Arizona v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345-47, 356-59, *reh'g denied*, 314 U.S. 339 (1941) in which the Court noted that a claim to aboriginal title based on exclusive occupancy of ancestral homelands need not be based on formal governmental acceptance through a treaty or statute, and determined that aboriginal title to certain off-reservation lands had been extinguished by voluntary cession; and *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 351-52 (7th Cir. 1983), *cert. denied*, 464 U.S. 805 (1983), where the court stated, "[a]boriginal title is the right of native people in the new world to occupy and use their native area. . . . Both aboriginal and treaty-recognized title carry with them a right to use the land for the Indians' traditional subsistence activities of hunting, fishing, and gathering." For an excellent review of 19th century to mid-20th century Supreme Court cases discussing aboriginal title see Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947).

For Canadian cases see, e.g., *Calder v. Attorney-General of British Columbia*, 34 D.L.R.3d 145, 150-51 (1973) in which the Supreme Court of Canada noted that any analysis into the nature of Indian title must begin with the *St. Catharines* case, 13 S.C.R. 577, and noted further that the Canadian courts "were strongly influenced by two early judgements delivered in the Supreme Court of the United States by Chief Justice Marshall: *Johnson and Graham's Lessee v. M'Intosh* 21 U.S. (8 Wheat.) 543 (1823) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561-63 (1832); and *Guerin v. The Queen*, 2 S.C.R. 335, 337-78 (1984), in which Justice Dickson, speaking for four members of the Court, acknowledged that aboriginal title predated any statutory action in Canada, citing both *Johnson v. M'Intosh* and *Worcester v. Georgia*.

consistently followed the precedent set forth regarding the scope and content of aboriginal title by Chief Justice Marshall in *Worcester*, and two other early cases, *Johnson v. M'Intosh*,¹¹ and *Mitchel v. United States*.¹² *Johnson v. M'Intosh* contains perhaps the most explicit and comprehensive description of the development of the legal concept of aboriginal title. In this case, Chief Justice Marshall traced the historical acceptance of the doctrine of aboriginal title to European competition to establish trade between the "old" and "new" worlds.¹³ To avoid conflicting settlements and consequent war, the European nations adopted the principle that "discovery" of an area gave exclusive title to the government in whose name the discovery was made.¹⁴ That title, consummated by possession, gave the discovering nation the exclusive right to acquire the soil from the native occupants.¹⁵ In Marshall's opinion, the form of relations between the native inhabitants and the discovering nation were the province of those natives and that nation.¹⁶

After discussing the origins of the doctrine of aboriginal title, the Chief Justice described its essential, substantive parameters as follows:

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the rights of the natives as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of their ulti-

11. *Johnson and Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). (holding that an individual who claims title to land by virtue of a private purchase from an Indian tribe cannot maintain that title against the federal government or its grantees, where the United States has acquired the land by treaty and has not consented to its disposition by the tribe.)

12. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 743-45 (1835) (Concluded, the United States could only acquire those sovereign rights held by the predecessor sovereign. The case held that the United States could not claim title to land in Florida whose purchase from an Indian tribe had previously been approved by the King of Spain.)

13. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 572-73.

14. *Id.* at 573.

15. *Id.*

16. *Id.*

mate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indians' right of occupancy.

The history of America [citing the practices of Spain, Portugal, France, Holland, and England], from its discovery to the present day, proves, we think, the universal recognition of these principles.¹⁷

In essence, the doctrine of aboriginal title, as interpreted by the courts of both the United States and Canada, recognizes that the Indians have the sole right to occupy and use their ancestral lands, until that right is surrendered by the tribes or extinguished by the dominant sovereign. As the Canadian Supreme Court stated in the *St. Catharines Milling* case, "so far as the possession and enjoyment are concerned; . . . the *dominum utile* is recognized as belonging to or reserved for the Indians, though the *dominum directum* is considered to be in the United States [or Canada]."¹⁸ Thus, Indian tribes in North America retain a diminished sovereignty over their traditional homelands. The limits on native sovereignty can be reduced to two significant constraints. First, because ultimate sovereignty rests with the dominant sovereign by virtue of discovery, the Indians can not transfer fee title to aboriginal lands without consent of that sovereign.¹⁹ Second, and more repugnant to the tribes, aboriginal title in the United States may be extinguished at the will of, and by any means available to, the dominant sovereign,²⁰ without compensation to the tribes.²¹ The Canadian Supreme Court has

17. *Id.* at 574-84.

18. *St. Catharines Milling & Lumber Co. v. The Queen*, 13 S.C.R. 577, 612-13 (1887).

19. *Johnson and Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). For a discussion on the restrictions on native transfers of lands in Canada, see Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. BAR. REV. 727, 742-44 (1987).

20. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 585; see also *United States, as Guardian of the Hualpai Indians of Arizona v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347, *reh'g denied*, 314 U.S. 339 (1941), where the Court noted that the power of Congress to extinguish aboriginal title is supreme and that the manner and method of extinguishment raises non-justiciable political questions. "[W]hether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of [native] occupancy, or otherwise, its justness is not open to inquiry in the courts."

21. While the termination of treaty-recognized rights requires compensation, *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 n.9 (1979), the United States need not compensate tribes for the loss of aboriginal title. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 351 (7th Cir. 1983), *cert. denied*, 464 U.S. 805 (1983); see also *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-79, 285 (1954), in which the Court characterized aboriginal rights as "unrecognized" rights or as permissive occupation of the land, and observed, "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law."

taken a different view of the compensation issue, holding that aboriginal title is a unique interest in land, providing an independent, justiciable right.²²

In Canada, the question of extinguishing aboriginal rights has been made more complex since patriation of the Canadian Constitution in 1982. Section 35(1) of the Constitution Act of 1982 provides that: "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are recognized and affirmed."²³ Until very recently,²⁴ there were no Canadian Supreme Court cases that directly addressed the impact of the section 35 provision on the assumed common law sovereign's power to extinguish aboriginal title at will. Canadian commentators, however, appear to agree that, following enactment of the Constitution Act of 1982, whatever power previously existed to terminate aboriginal rights, that governmental power is now generally absent.

For example, Professor Brian Slattery contends that the enactment of section 35 "protects unextinguished aboriginal land rights from future statutory abridgement, but it does not prohibit voluntary cession to the Crown."²⁵ He notes that the exclusive federal power to appropriate native lands is now defunct, except perhaps in case of necessity.²⁶ Professor William Pentney's recent article reviews the legal literature and concludes there is general agreement that, "Section 35 . . . is a constitutional guarantee of aboriginal and treaty rights which protects those rights from future (post-1982) re-

22. *Guerin v. The Queen*, 2 S.C.R. 335, 375-82 (1984); and *see* Slattery, *supra* note 19 at 752-53.

23. Canada Act, 1982, ch.11.

24. On May 31, 1990, the Canadian Supreme Court handed down its decision in *Sparrow v. The Queen*, 3 Can. Native L. Rptr. 160 (1990). This case concerning federal regulation of aboriginal fishing rights is discussed at length later in this article (*see infra* notes 279-308 and accompanying text). However, the court confirmed that the term "existing right" applied to all rights existing when the Constitution Act of 1982 became law. Therefore, extinguished rights are not revived by § 35. *Id.* at 169-70. Moreover, citing with approval the work of Professors Slattery and Pentney, among others (*see infra* notes 25-27 and accompanying text), the court noted that existing, unextinguished aboriginal rights are not frozen in time to that moment when recognized, but rather are to be interpreted flexibly to permit evolution over time. They are "affirmed in a contemporary form rather than in their primeval simplicity and vigor." *Id.* at 170-71.

25. Slattery, *supra* note 19, at 764.

26. *Id.* at 766; *see also* Brian Slattery, *The Constitutional Guarantee of Aboriginal and Treaty Rights*, 8 QUEEN'S L. J. 232, 254 (1982-83), wherein he notes that passage of § 35 altered the legal status of aboriginal rights in three ways: 1) doubts as to the validity of aboriginal or treaty rights in Canada are now dissipated; 2) to the extent that these rights were precarious, revocable at the pleasure of the sovereign, they are now indefeasible; and 3) procedural barriers to the assertion of these rights in Canadian courts are now removed.

striction or abrogation, unless by consent of the beneficiaries of those rights."²⁷ Arguably, future constitutional amendments could diminish aboriginal rights in Canada.²⁸

The degree to which provincial or state legislation may abridge or destroy aboriginal rights will be discussed in Part II, as will the degree to which federal legislation may limit, curtail, or destroy those rights. A detailed discussion of the various means for extinguishing aboriginal title: through legislation (either expressly or by implication), voluntary cession, hostile occupation, and other methods is outside the scope of this article.²⁹ However, the Canadian and U.S. courts generally agree that, in order to extinguish aboriginal rights, the federal government must demonstrate its intent to do so.³⁰

27. William Pentney, *The Rights of the Aboriginal Peoples of Canada In the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee*, 22 U.B.C. L. REV. 207, 215 (1988).

28. Before any amendment is made however, § 35 requires a constitutional conference and requires the Prime Minister to invite native representatives to the conference. See Alan Pratt, *Federalism In The Era Of Aboriginal Self-Government*, in ABORIGINAL PEOPLES AND GOVERNMENT RESPONSIBILITY 19, 44 (David C. Hawkes, ed., 1989). However, according to § 37 of the Constitution Act of 1982, Constitutional Conferences on aboriginal issues are composed "officially" of the Prime Minister and provincial First Ministers. Native representatives are only "invited participants." Thus, their "status at the conferences is that of a powerless minority group, which may deserve some kind of special recognition, but which is not entitled to share in any real power." Chief John Snow, *Identification and Definition of Our Treaty and Aboriginal Rights*, in THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS 41, 43 (Menno Boldt, J. Anthony Long, and Leroy Little Bear, eds. 1985), (hereinafter, QUEST FOR JUSTICE).

29. For a review of the methods of extinguishing aboriginal title see Slattery, *supra* note 19, at 761-68; and Pentney, *supra* note 27, at 227-32 and 238-54.

30. United States as Guardian of the Hualpai Indians of Arizona v. Santa Fe Pac. R. Co., 314 U.S. 339, 346-58, *reh'g denied*, 314 U.S. 339 (1941); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 352-53 (7th Cir. 1983), *cert. denied* 464 U.S. 805 (1983), and see also Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 492 (1967), in which the court stated, "[w]hile the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. In the absence of a 'clear and plain indication' in the public records that the sovereign 'intended to extinguish all of the [claimants'] rights in their property, Indian title continues."

"The sovereign power to extinguish aboriginal title, first enunciated in Canada in the *St. Catharines Milling* case where Indian title was said to be 'dependent on the goodwill of the Sovereign,' is today firmly established." Pentney, *supra* note 27, at 249 (referring to *St. Catharines Milling & Lumber Co. v. The Queen*, 13 S.C.R. 577 (1887)). As Professor Pentney notes, Canadian courts have established various tests to determine whether title has been extinguished. *Id.* at 249-54. The test that has received the most support is the one announced by Justice Hall in the *Calder* case in which he wrote, "[i]t would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent [sovereign] and that intention must be 'clear and plain.'" *Calder v. Attorney-General of British Colum-*

The limitation of aboriginal title to permissive occupancy and use of traditional homelands subject in the United States (and until recently in Canada) to elimination at will, can be traced in part to the historical conflict concerning its development. Noted American commentator Felix Cohen writes, "[t]he argument that Indians stood in the way of civilization and that progress demanded that they be pushed from the lands they claimed, fell as lightly from the lips of 16th century pirates and conquistadors as it does from those of the 20th century."³¹ Those 16th century traders and explorers, and their lawyers, justified their proposals for wholesale seizure of Indian lands by encouraging the Catholic Church and the Spanish Crown to find that the Indians were unredeemed savages and heretics, "tainted with mortal sin"³²

In contrast, the doctrine of aboriginal title which emerged in the mid-1500s owes much to the legal scholars whose work laid the foundation for modern international law.³³ Francisco de Vitoria, a university professor at Salamanca, and legal advisor for Indian Affairs to the Spanish Crown,³⁴ responded to those who advocated dispossessing Indians of their land, that heretics and sinners were also entitled to own property and could not be punished for their sins without trial.³⁵ Vitoria noted that, by virtue of their humanity, and despite their level of civilization or perceived lack of religion, all people were entitled to respect for their possessions.³⁶ In "De Indis et De Jure Belli: Reflectiones," he wrote, "the barbarians in question cannot be barred from being true owners, alike in public and private law, by reason of the sin of non-belief or any other mortal sin, nor does such sin entitle Christians to seize their goods and lands."³⁷

To the argument that the Pope had given Indian lands to the Kings of Spain and Portugal, Vitoria responded that the Pope had no temporal power over the Indians.³⁸ A Papal division of the Americas could thus serve only to allocate trading zones, not to

bia, 34 D.L.R.3d 145, 210 (1973). This test was recently approved in *Sparrow v. The Queen*, 3 Can. Native L. Rptr. 160, 174-75 (1990).

31. Cohen, *supra* note 10, at 44.

32. *Id.*

33. J. Youngblood Henderson, *The Doctrine of Aboriginal Rights in Western Legal Tradition*, in *QUEST FOR JUSTICE*, *supra* note 28, at 185, 187-95.

34. *Id.* at 188.

35. Cohen, *supra* note 10, at 44.

36. Pentney, *supra* note 27, at 224.

37. *Id.*, quoted in Gordon I. Bennett, *Aboriginal Title in the Common Law: A Stony Path Through Feudal Doctrine*, 27 *BUFFALO L. REV.* 617, 619 (1978).

38. Cohen, *supra* note 10, at 44.

distribute land.³⁹ This position led to European acceptance of the doctrine of aboriginal title, referred to by Chief Justice Marshall in *Johnson v. M'Intosh*,⁴⁰ and was endorsed by Pope Paul II in the "Belle Sublimus Dues" (1537), in which he proclaimed that, "Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ. . . ." ⁴¹

France and England both rejected the notion that Spain and Portugal's initial exploration entitled those two nations to divide the new world.⁴² Moreover, other 16th-century European jurists such as, Gentilis, Grotius, and Pufendorf adopted Vitoria's reasoning, and assured the acceptance and codification of Vitoria's doctrine of aboriginal title in England, France, Holland, and other European nations.⁴³

Given their acceptance of this doctrine, how did the European nations justify the assertion of complete dominion over Indian lands? The answer can be stated in two words: power and misunderstanding. As the populations and technological superiority of European settlements and colonies grew, they were able to assert their will and overcome native populations. In addition, European settlers misunderstood native concepts of property, and thus dismissed the Indians as uncivilized and without "legal" notions of property.

Peter Matthiessen writes that:

[b]ecause the white men were outnumbered, they were forced until the nineteenth century to deal with the Indians as sovereign nations, but increasingly, as the whites achieved dominion (and the red men were lumped with other mammals in the New World natural histories), it was perceived that 'savages' had no claim to lands that were going to waste as wilderness, as hunting grounds.⁴⁴

Most Europeans failed to understand that the native tribes were agriculturalists with a strong sense of home territory rather than nomadic hunting or gathering peoples.⁴⁵ The view that the Indian peoples belonged to the Earth because it supported their needs, that

39. *Id.*

40. *Johnson and Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823); see notes 13-17 and accompanying text.

41. Cohen, *supra* note 10, at 45.

42. Henderson, *supra* note 33, at 190.

43. *Id.* at 187-93.

44. PETER MATTHIESSEN, *INDIAN COUNTRY* 5 (1984).

45. *Id.*

they were part of the land rather than separate from it, and thus could "own" no portion of it, was both foreign to and misunderstood by European cultures.⁴⁶ "[B]ecause the white men would not understand this, . . . the Indian nations had to define [in European legal terms] in formal treaties what was essentially a country of the mind."⁴⁷

Initially, the French and English settlers treated the Canadian natives on the basis of rough equality.⁴⁸ Professor Slattery noted:

Native Canadians could not, however, remain immune forever to European domination. Over several centuries, and after long periods of alliance and trade, they succumbed piecemeal to the Crown's pressure to accept its authority, usually only when their economic fortunes and military capacity had waned, and in the shadow of the growing power of settler communities.⁴⁹

It is not surprising then, to find the twin pillars of European arrogance—the equation of power with progress and a misunderstanding of native cultures—reflected in the judicial opinions that set the tone for the future of white/native relations. Chief Justice Marshall in *Johnson v. M'Intosh*, both recognized and compounded the measure of European arrogance. He wrote:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.⁵⁰

Marshall noted that, generally, conquest does not divest the conquered of their land.⁵¹ He mischaracterized Indians as "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest,"⁵² and said that if the conquered in-

46. *Id.*

47. *Id.*

48. Slattery, *supra* note 19, at 733.

49. *Id.* at 734.

50. *Johnson and Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-73 (1823).

51. *Id.* at 589.

52. *Id.* at 590. As noted earlier, many of the tribes were agriculturalists. MATTHIASEN, *supra* note 44, at 5. Moreover, as Justice Hall noted in his dissent in *Calder*, regarding Marshall's characterization of the Indians as savages whose occupation was

habitants could not successfully mix with their conquerors or be governed as distinct societies, "where incorporation is [im]practicable . . .," property rights may be impaired.⁵³ As to the legitimacy of this attitude and consequent power to dispose of Indian lands, Marshall noted that:

The power now possessed by the government of the United States to grant [Indian] lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts. . . . The existence of this power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. . . .

. . . Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.

. . . To leave . . . [the Indians] in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword. . . .⁵⁴

Nearly ten years later, in *Worcester v. Georgia*, Chief Justice Marshall revisited these themes, concluding that natural law and abstract principles of justice must take a backseat to power and accomplished fact.⁵⁵ Marshall noted (belatedly) that both the

war: "We now know that that assessment was ill-founded. The Indians did in fact at times engage in some tribal wars but war was not their vocation and it can be said that their preoccupation with war pales into insignificance when compared to the religious and dynastic wars of 'civilized' Europe of the 16th and 17th centuries." *Calder v. Attorney-General of British Columbia*, 34 D.L.R.3d 145, 169 (1973) (Hall, J., dissenting).

The characterization of North American Indians as savages without civilized societies is unfounded. As one prominent Indian Law commentator notes: "Before contact with white societies, all the tribal people in the Missouri Basin had political organizations. Some were defined by tribe, others by band or clan. But all of the aboriginal tribes had law ways: they set norms, decided disputes, and rendered punishments." Charles F. Wilkinson, *Law and the American West: The Search for an Ethic of Place*, 59 U. COLO. L. REV. 401, 406 (1988). In fact, the Six Nations parliamentary system of the Iroquois Indians served as a model for the drafters of the U.S. Constitution. MATTHIESSEN, *supra* note 44, at 6.

53. *Id.*

54. *Id.* at 587-90.

55. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543 (1832).

Europeans and Indians were divided into distinct nations, governed by their own laws, and thus:

[I]t is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing right of its ancient possessors

. . . But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend.⁵⁶

In summary, the prevailing view has been that the doctrine of aboriginal title protects native occupancy and traditional uses of ancestral homelands, but only to the extent recognized by the governments of the United States and Canada. Extinguishment of these rights in the United States and until recently in Canada, has been a purely political decision, a prerogative of the sovereign. This view can be traced, in part, to the necessary consequences of the expansion of European populations and culture in the Americas. It can also be explained by the radically different view of humankind's relationship with nature on the part of European settlers and traders, which in turn led to an arrogant dismissal of the native civilizations in the "New World," and of their concepts of "property ownership."

B. *The Native Perspective*

[T]he dilemma posed to the United States' constitutional structure is whether the aboriginal peoples can legitimately be brought into the norms of the Lockean social compact. By contrast, the quandary confronting Native Canadians in their ongoing constitutional talks with the country's political leaders entails identifying a basis on which groups already considered to be within the ambit of the constitutional normative structure can get out.⁵⁷

Resolving issues of aboriginal title and other aboriginal rights is of considerably more importance in Canada than in the United States. Since the Marshall era, tribal sovereignty over reserved

56. *Id.* The Canadian Supreme Court has also acknowledged that prior to European settlement, Indian tribes in Canada were organized into distinct societies, and that while different from European property rights regimes, the tribes employed clearly defined and mutually respected patterns of land use and ownership. *Calder v. Attorney-General of British Columbia*, 34 D.L.R.3d 145, 149-50, 156 (1973).

57. Edward M. Morgan, *Self Government and the Constitution: A Comparative Look at Native Canadians And American Indians*, 12 AM. INDIAN L. REV. 39, 41-42 (1984).

lands in the United States, though limited by federal ownership of Indian lands and congressional power to legislate on Indian affairs, has been a recognized fact.⁵⁸ While the question of whether Canada's Indian peoples can similarly establish a significant measure of sovereignty over traditional homelands lies outside the scope of this article, Canada's natives have emphasized land ownership as a fundamental concept on which they base other aboriginal and sovereign rights.⁵⁹ Therefore, a review of the native perspective of their relationship with the land is necessary to understand their other claims.

The Indians' conception of human beings as part of, or at one with the land, distinguishes their approach to aboriginal rights from that of the white cultures in the United States and Canada. Scholars and intergovernmental organizations, such as the United Nations, have recognized that this special relationship between aboriginal peoples and their lands appears to be universal.⁶⁰ Indian land claims are logically claims to the recognition of a set of rights established by custom, rights which flow from original occupation of ancestral lands.⁶¹ But native claims to aboriginal rights are still more; they are also claims to a right to cultural survival.⁶²

Native American cultures generally see themselves as part of the land, and the land as part of them.⁶³ This world view manifests itself in the religious and cultural traditions of many Indian tribes. Thus one principal difference between Native American and Western religious traditions is that native religions can be described as

58. *Id.* at 43-44; see also Mark Allen, *Native American Control of Tribal Natural Resource Development in the Context of the Federal Trust and Tribal Self Determination*, 16 B.C. ENVTL. AFF. L. REV. 857, 860-61 (1989).

59. Douglas E. Sanders, *The Rights of the Aboriginal Peoples of Canada*, 61 CAN. BAR REV. 314, 329 (1983).

60. Darlene M. Johnston, *Native Rights as Collective Rights: A Question of Self Preservation*, 2 CAN J. OF L. AND JURIS. 19, 32 (Jan. 1989). Johnston noted that the Cobo Report, a comprehensive study of indigenous peoples by a special U.N. Commission concluded that: "It is essential to know and understand the deeply spiritual and special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions, and culture. For such peoples, the land is not merely a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity to be acquired, but a material element to be enjoyed."

61. Douglas E. Sanders, *Aboriginal People and The Constitution*, 19 ALBERTA L. REV. 410, 412 (1981).

62. Michael C. Blumm, *Native Fishing Rights and Environmental Protection in North America and New Zealand: A Comparative Analysis of Profits a Pendre and Habitat Servitutes*, 8 WISC. INT'L. L. J. 1, 2 (1989).

63. Booth & Jacobs, *supra* note 1, at 34.

spatially oriented while Western religions are temporally oriented.⁶⁴ Consequently, native cultures depend upon specific holy places for the practice of their religious traditions.⁶⁵ Moreover, while Western religious tradition is monotheistic, native religions, though they may recognize a "Supreme Being," see the manifestation of the "Great Spirit" in all of nature.⁶⁶

Native American religious traditions are "linked to the Indians' awareness that the earth is the source of all life."⁶⁷ Land, for the Indian peoples, is not viewed as something to be owned and divided, any more than the individual human is separate from his spirit.⁶⁸ Rather, land is the source of life and culture, and inseparable from the people. As one Western Cherokee said during congressional testimony against completion of the Tellico Dam, which would flood the Cherokees' spiritual homeland:

Is there a human being who does not revere his homeland . . . ? In our own history, we teach that we were created there, which is truer than anthropological truth because it was there that we were given our vision as the Cherokee people *In the language of my people . . . there is a word for land: Eloheh. This same word also means history, culture, and religion. We cannot separate our place on earth from our lives on the earth nor from our vision nor from our meaning as a people. We are taught from childhood that the animals and even the trees and plants that we share a place with are our brothers and sisters. So when we speak of land, we are not speaking of property, territory, or even a piece of ground upon which our houses sit and our crops are grown. We are speaking of something truly sacred.*⁶⁹

As the passage above illustrates, native peoples view wildlife very differently than Caucasian cultures. "Indian religious belief is based on the concept that human and non-human entities share the common characteristic of having a soul."⁷⁰ To native peoples, the flora and fauna are their relatives: "The idea which appears over and over [in native cultures] is 'kinship' with other living beings. . . ."⁷¹ "The Indian attitude . . . [is] based upon the consideration that since human beings have a physical body *and* an associated consciousness, all other bodily things, animals, plants, and yes, even

64. Scott Hardt, Comment, *The Sacred Public Lands: Improper Line Drawing in the Supreme Court's Free Exercise Analysis*, 60 U. COLO. L. REV. 601, 603 (1989).

65. *Id.*

66. *Id.* at 604.

67. *Id.*

68. *Id.*

69. MATTHIESSEN, *supra* note 44, at 119 (emphasis added).

70. Hardt, *supra* note 64, at 605.

71. Booth & Jacobs, *supra* note 1, at 35.

stones were also similar in this respect."⁷² Perhaps Black Elk, Holy Man of the Ogalala Sioux, put it best when he asked: "Is not the sky a father and the earth a mother, and are not all living things with feet or wings their children."⁷³ Black Elk's prayer takes on added significance when he beseeches the Great Spirit to, "[g]ive me the strength to walk the soft earth, a relative to all that is!"⁷⁴

C. *Conflicting Views of Hunting and Fishing Rights*

Given the close connection of Native American peoples with their traditional lands and their unique relationship with the wildlife they depend upon for survival, it is not surprising that preservation of traditional hunting and fishing rights especially concern native peoples. The U.S. and Canadian Supreme Courts have recognized this unique relationship, noting that the Native American must continue hunting and fishing for certain species to maintain their cultural identity and native religious traditions.⁷⁵ In Canada, however, the recognition of the cultural or religious importance of certain activities, such as hunting for meat for use in religious ceremonies, has not necessarily insulated Indian peoples from federal, state, or provincial regulation.⁷⁶ Nor have religious and cultural values attached by Indians to certain lands and certain wildlife species insulated American Indians from congressional regulation.⁷⁷

72. CALLICOTT, *supra* note 4, at 185.

73. JOHN G. NEIHARDT, *BLACK ELK SPEAKS* 3 (1979).

74. *Id.* at 6. Also, as Professor Callicott noted, the concepts of the Great Spirit, Earth Mother, and relatedness or kinship of all creatures are very nearly universal precepts to American Indians. CALLICOTT, *supra* note 4, at 186-88.

75. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664-65 (1979) (held, treaties guaranteeing the tribes the right of taking fish at all usual and accustomed grounds, in common with other citizens of the territory, guarantee the tribes a share of each fish run passing through tribal fishing areas). See also Gary D. Meyers, *United States v. Washington (Phase II) Revisited: Establishing an Environmental Servitude Protecting Treaty Fishing Rights*, 67 OR. L. REV. 771, 775-76 (1988). For a similar conclusion, see *Sparrow v. The Queen*, 3 Can. Native L. Rptr. 160, 175 (1990) where the Court noted that, "[t]he Musqueam have always fished for reasons connected to their cultural and physical survival."

76. See, e.g., *Jack v. The Queen*, 2 S.C.R. 332 (1985), and cases discussed in Part II of this article.

77. For example, in *United States v. Dion*, 476 U.S. 734, 740-45 (1986), the Court held that the Bald Eagle Protection Act, 16 U.S.C. §§ 668-668d (1982), divested the Indians of their right to hunt eagles on the reservation without a permit. The Court noted that the permit procedure was a legislative accommodation of Indian religious needs. See also *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447-58 (1988), in which the natives claimed that government activity adversely affecting the quality of public lands considered sacred by the Indians violated their First Amendment rights freely to exercise their religious beliefs. The natives' claim was dismissed by the Court for failing to state a cognizable cause of action.

Aboriginal rights, in the view of North American natives, are group rights that adhere to the benefit of various Indian peoples. As Charles Wilkinson has noted regarding Indians in the United States, "Indian tribes are the basic unit in Indian Law."⁷⁸ These group or collective rights, characterized by one Canadian commentator as claims made by groups within a society, are distinguished from individual rights, which are held by each human being personally.⁷⁹ These collective rights include rights to occupy, own and use a homeland. The fundamental right of group self-preservation, accorded to recognized rights-bearing groups, is "meaningless without a right to control possession and enjoyment of their land."⁸⁰ The source and scope of these rights have been described as follows:

Aboriginal rights are collective rights; they derive their existence from the common law's recognition of prior social organization. Although these rights cannot ensure that aboriginal peoples will be immune from the external forces that have influenced their societies since the time of contact, such rights can ensure that these peoples control the way in which change occurs. . . . If aboriginal rights, as collective rights, ensure that the group can preserve its 'different-ness'[sic], they must include this concept of self-direction for the group.⁸¹

In sharp contrast to the view expressed by U.S. and Canadian courts, which attempt to characterize aboriginal rights simply as property rights arising out of native occupancy of the land,⁸² the Indian view is that aboriginal rights are rights arising out of natural law.⁸³ Professor Lyons, a Peace-Keeper of the Turtle Clan of the Iroquois Nation, writes:

What are aboriginal rights? They are the law of the Creator He did not put the white people here; he put us here with our families, and by that I mean the bears, the deer, and the other animals. . . . We share land in common, not only among ourselves but with the animals and everything that lives in our land. It is our responsibility [to care for it].⁸⁴

Because aboriginal people view themselves as stewards of the

78. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 7 (1987).

79. William Pentney, *The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982, Part I: The Interpretive Prism of Section 25*, 22 U.B.C. L. REV. 21, 24 (1988).

80. Johnston, *supra* note 60, at 32.

81. Pentney, *supra* note 27, at 258.

82. See *supra* notes 6-18 and accompanying text.

83. Oren Lyons, *Traditional Native Philosophies Relating To Aboriginal Rights*, in *QUEST FOR JUSTICE*, *supra* note 28, at 19.

84. *Id.*

land, the concept of aboriginal rights also implies responsibility. Natural law constrains aboriginal peoples to preserve the land for future generations. Lyons explained that, “[w]e have no right to sell it [the land], or give it up, or make a settlement.”⁸⁵ Or, as one leader of the Canadian Inuit people noted: “Our traditional attitude toward the land is expressed best by the man from Gjoa Haven who recently said in a letter, ‘This land does not belong to anyone, it’s just borrowed for a time. Neither the government nor the Inuit have more authority over it.’”⁸⁶

This concept of aboriginal rights is echoed throughout the writings of Native Americans in North America. Fred Plain, a Chipewewa Chief, wrote:

[O]ur attitude toward the land and its use was and still is very different from the European attitude. We aboriginal people believe that no individual or group owns the land, that the land was given to us collectively by the Creator to use, not to own, and that we have a sacred obligation to protect the land and use its resources wisely. . . . The idea that land can be bought and sold, or that you can exercise some rights but not others in the land, is absolutely foreign to the Nishnawbe-Aski way of thinking. Yet this is the basis for all legislation that has been enacted since the coming of the Europeans to North America.⁸⁷

With respect to the nature of hunting and fishing rights, Plain noted:

The economy of the Ojibway and the Cree living in this part of North America was based on the presence of animal, fish, bird, and plant life destined to give sustenance to the people. Hunting, fishing and trapping, and gathering were not separate issues to be dealt with at a political level by certain components of government; they were part of the socio-economic system of our people, and they are included in the overall definition of aboriginal rights.⁸⁸

In summary, the native concept of aboriginal rights is holistic; it is different both in kind and in content than the view held by the dominant white culture in Canada and the United States. The Indian perspective rests on an appeal to natural law. As David Ahenakew, National Chief of the Assembly of First Nations, contends, “[t]he Creator gave each people the right to govern its own

85. *Id.* at 22.

86. Peter Ittinuar, *The Inuit Perspective on Aboriginal Rights*, in *QUEST FOR JUSTICE*, *supra* note 28, at 47.

87. Fred Plain, *A Treatise on the Rights of the Aboriginal Peoples of the Continent of North America*, in *QUEST FOR JUSTICE*, *supra* note 28, at 31, 34.

88. *Id.* at 37.

affairs, as well as land on which to live and with which to sustain their lives. These Creator-given rights cannot be taken away."⁸⁹ The Indian Nations assert that all rights flow from this first principle of natural law—rights to occupancy and use of the land, rights to self-determination, and rights to control others' use of that land.⁹⁰ Therefore, requiring natives to identify and quantify specific rights is an impossible task, as well as unjust.⁹¹

However, early court decisions which laid the foundation for Indian law in North America rejected precisely this appeal to natural law and justice. In *Johnson v. M'Intosh*, Chief Justice Marshall wrote regarding native title to lands:

it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on . . . man, and which are admitted to regulate, in a great degree, the rights of civilized nations, . . . but those principles also which our own government has adopted in the particular case.⁹²

Later in the same opinion Marshall noted, in respect to the principle that the Indians be considered as mere occupants of their traditional homelands:

[H]owever this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled and be adapted to the actual condition of the two people, it may, perhaps be supported by reason, and certainly cannot be rejected by Courts of justice.⁹³

The acceptance of accomplished fact and reliance on assertions of power that deny the Indians the rightful title to traditional homelands, has done more, however, than dispossess the natives of their natural rights. The dominant culture's articulation of the doctrine of aboriginal title has forced native peoples to redefine, in that dominant culture's legal terms, what for them are nearly undefinable rights, flowing from a radically different perception of humankind's relationship with the land, and for that matter, all of nature.⁹⁴ As

89. David Ahenakew, *Aboriginal Title and Aboriginal Rights: The Impossible and Unnecessary Task of Identification and Definition*, in *QUEST FOR JUSTICE*, *supra* note 28, at 24.

90. *Id.* at 25.

91. *Id.* at 27-30.

92. *Johnson and Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572 (1823).

93. *Id.* at 591-92.

94. Michael Asch, *Wildlife: Defining the Animals the Dene Hunt and the Settlement of Aboriginal Rights Claims*, 15 *CAN. PUB. POLICY* 205, 208-212 (1989). Professor Asch, an anthropologist at the University of Alberta, writes regarding the comprehensive land claims settlement between the Dene and Metis (mixed blood) Indians and the Canadian government, that a major flaw in the Agreement is its imposition of Euro-

will be shown in Part II of this article, English-based common law principles of property rights have profoundly affected both the preservation of traditional hunting and fishing rights and the cultural survival of North America's native peoples.⁹⁵

D. *Treaties and Rules of Construction*

Treaties and treaty substitutes, such as bilateral agreements approved by Congress, unilateral congressional action, and Executive Orders have set aside approximately fifty-two million acres of reservation land in the United States.⁹⁶ Similarly, Canadian government and Canadian Natives have negotiated hundreds of treaties reserving Indian lands, providing for Indian education and medical services, and granting continued hunting, fishing, and trapping rights.⁹⁷ The term "treaty" has also been given a broad interpretation by the Canadian courts and encompasses all agreements concluded by the Crown with the Indians, whether land was ceded or not.⁹⁸ The content and scope of these treaties and agreements in both countries is determined by proof of the same customary practices that establish aboriginal rights.⁹⁹ In the United States, these agreements, regardless of their form, are the supreme law of the land and preempt conflicting state laws.¹⁰⁰ Similarly, the British Columbia Court of Appeals held in *Regina v. White and Bob*, that provincial law can-

Canadian cultural and legal values respecting wildlife and property within the Agreement. He comments that, "[m]ost striking is the fact that the Agreement defines the animals as 'wildlife' and hence suggests that they are owned not by the aboriginal people but by the state." *Id.* at 211. The European-Common Law concept of wildlife as animals *ferae naturae*, subject to ownership by capture, is however, at odds with the view of the Dene, who view the animals as part of the land that they "own." *Id.* Professor Asch writes that, "the Dene see their land as a repository for the animal and plant life upon which they rely and that this repository is theirs exclusively." *Id.* at 210. He notes that, "although Dene will often say that animals in the wild belong to 'no one' what they appear to mean is that they do not belong to any one individual before capture . . . [rather,] these animals belong to the Dene as a whole." *Id.* at 211.

95. As one commentator notes: "History demonstrates that there is a strong correlation between the loss of their traditional lands and the marginalization of native people. Displaced from the land which provides both physical and spiritual sustenance, native communities are hopelessly vulnerable to the disintegrative pressures from the dominant culture. Without land, native existence is deprived of its coherence and distinctiveness." Johnston, *supra* note 60, at 32.

96. WILKINSON, *supra* note 78, at 8.

97. Michael Jackson, *The Articulation of Native Rights in Canadian Law*, 18 U.B.C. L. REV. 255, 261 (1984).

98. *Simon v. The Queen*, 2 S.C.R. 387, 410 (1985).

99. Blumm, *supra* note 62, at 13.

100. George Cameron Coggins & William Modrcin, *Native American Indians and Federal Wildlife Law*, 31 STAN. L. REV. 375, 385 (1979).

not supersede treaty terms.¹⁰¹

As noted earlier, treaty-protected rights are distinguishable from aboriginal rights in two principal ways.¹⁰² First, while they may be extinguished by appropriate legislative action, the intent to do so must be express.¹⁰³ Second, when treaty rights are abridged or modified, the tribe possessing those rights must be compensated for their loss.¹⁰⁴ These characteristics flow from the nature of treaties as formal, written documents. Treaty rights are "recognized" aboriginal rights and their expressed recognition means that the rights are durable.¹⁰⁵ Similarly, as one Canadian commentator notes, the common view of the legal status of Indian treaties is that they are contracts or analogous to contracts.¹⁰⁶ While not treated as strictly analogous to treaties between independent and equal sovereigns or strictly as contracts, the Canadian courts consider Indian treaties as legally enforceable *sui generis* agreements.¹⁰⁷

The Canadian and U.S. Supreme Courts have articulated a number of canons of construction to guide the analysis of Indian treaty provisions.¹⁰⁸ Development of these interpretive principles reflects the different legal conceptions brought to the negotiating table by the Indians and the white negotiators.¹⁰⁹ For the natives who brought a strong oral tradition to negotiations, "the promises and discussions during the negotiations formed the centerpiece of the agreements, . . . [while for government negotiators] it was the written text of the treaty which determined its scope and meaning."¹¹⁰ Moreover, the dissonance in Indian/white values regarding

101. *Regina v. White and Bob*, 50 D.L.R.2d 613, 648-49 (1964), *aff'd.*, 52 D.L.R.2d 481 (1965).

102. *See supra* notes 20-21 and accompanying text.

103. *See, e.g.*, *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346-47 (1941); *Mattz v. Arnett*, 412 U.S. 481, 505 (1973) (held, a congressional determination to terminate title to a reservation created by executive order and treaty with the Indians must be expressed on the face of the statute or be clear from its legislative history); and *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968) (noted, while the power to abrogate or modify treaty-guaranteed hunting and fishing rights exists, the intention to do so is not lightly to be imputed to Congress).

104. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-78 (1954) (Supreme Court stated that when Congress by treaty or other agreement recognizes and declares permanent Indian title to lands, compensation must be paid for a subsequent taking of those lands.).

105. Blumm, *supra* note 62, at 13.

106. Pentney, *supra* note 79, at 39; *c.f.*, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979).

107. *Simon v. The Queen*, 2 S.C.R. 387, 404 (1985).

108. Meyers, *supra* note 75, at 774; and Pentney, *supra* note 79, at 43.

109. Jackson, *supra* note 97, at 262.

110. *Id.*

land use and its "ownership" also contributed to significant misunderstanding regarding treaty terms.¹¹¹ Finally, the history of treaty negotiations, the circumstances and mechanics of negotiations, and the fact that Indian leaders rarely spoke English and that government negotiators also acted as recorders, all provide justification for these canons.¹¹²

Three principal canons guide interpretation of U.S./Indian treaties. "First, treaty terms are to be interpreted as the Indians themselves would have understood them and according to the dictates of justice."¹¹³ As the Court said in *United States v. Winans*:¹¹⁴

We have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those whom they owe care and protection, and counterpoise the inequality" "by the superior justice which looks only to the substance of the right without regard to technical rules."¹¹⁵

The second canon is that treaties between Indians and the government are to be interpreted to promote their central purposes, and to give effect to the treaty's provisions;¹¹⁶ in other words, ambiguities are to be resolved in favor of the Indians.¹¹⁷ As the *Winters* Court noted, "[I]t cannot be supposed that the Indians were alert to exclude by formal words every inference which might mitigate against or defeat the declared purpose of themselves and the Government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them."¹¹⁸

Finally, the third canon, which might be considered a summary statement of the other two, holds that Indian treaties are to be liberally construed in favor of the Indians.¹¹⁹ This liberal construction

111. *Id.* at 262-63.

112. Coggins & Modrcin, *supra* note 100, at 385-86.

113. Meyers, *supra* note 75, at 774.

114. *United States v. Winans*, 198 U.S. 371, 380-81 (1905) (held, treaty right of taking fish in usual and accustomed places in common with white settlers is a reserved right and imposes a servitude on lands relinquished to the United States).

115. *Id.*; see also *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979).

116. Meyers, *supra* note 75, at 774-75.

117. *Winters v. United States*, 207 U.S. 564, 576-77 (1908) (held, where U.S. set aside an Indian reservation, it implicitly reserved enough water to accomplish the purposes of the reservation).

118. *Id.*; see also *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975).

119. Meyers, *supra* note 75, at 775; see also *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 351 (7th Cir. 1983), *cert. denied*, 464 U.S. 805 (1983).

means that the courts may consider the treaty's history, the context of the negotiation, and the parties' practical understanding of the treaty's terms to resolve any questions of meaning.¹²⁰

The Canadian Supreme Court employs similar interpretive principles. In *Simon v. R.*, Justice Dickson noted that, "Indian treaties should be given a fair, large and liberal construction in favor of the Indians."¹²¹ Previously, Justice Dickson had stated that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favor of the Indians."¹²² As in the United States, Canadian courts have accepted that the historical record of treaty negotiations, as well as the oral tradition of native peoples are important factors to consider in interpreting specific treaty provisions.¹²³ While these developments are more recent in Canada, it appears that the Canadian courts are moving toward a liberal construction of treaty rights, much like that employed in the United States.¹²⁴

In summary, while the content and extent of the rights protected by treaty are no different than that provided by recognition of aboriginal title or rights, the context of formal negotiations and written instruments provides greater protection for treaty rights. "Recognized" rights require greater specificity of intent on the part of the government to terminate or modify those rights; and termination or modification of rights requires compensating the tribe or band. Moreover, the historical context of the negotiations as well as the nature of the relationship between the Indian Nations and the governments of Canada and the United States have led the courts to formulate principles favorable to the protection of native treaty rights that guide interpretation of those agreements.

120. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 351 (7th Cir. 1983).

121. *Simon v. The Queen*, 2 S.C.R. 387, 402 (1985).

122. *Nowegijick v. The Queen*, 1 S.C.R. 29, 36 (1983).

123. *Pentney*, *supra* note 79, at 45.

124. As Professor Blumm noted, the acceptance by the British Columbia Court of Appeals in *Sparrow v. Regina*, 2 W.W.R. 577 (1987) of the United States rules relating to the liberal interpretation of treaties and resolution of ambiguities in language in favor of the Indians, at least since the *Simon* case, seem to be settled Canadian jurisprudence. Blumm, *supra* note 62, at 20.

II.

JUDICIAL TREATMENT OF NATIVE HUNTING AND
FISHING RIGHTSA. *The Relationship between the Indian Nations and the Federal Governments of the United States and Canada*

The nature of the relationship between the Indian Nations and the U.S. government can essentially be characterized by the concept of protection of "measured separatism." "[T]he reservation system was intended to establish homelands . . . islands of tribalism largely free from interference by non-Indians or future state governments; . . . [but] [t]his separatism is measured, rather than absolute, because it contemplates supervision and support by the United States."¹²⁵ While, on balance, the promise of measured separatism and limited tribal sovereignty within reservation lands has been kept, the evolution of the case law reflects the historical tension between "federal government respect for tribal self-determination and federal attempts to assimilate the tribes into the mainstream of American society."¹²⁶

Federal-Indian relations and policy have been cyclic as "Congress has shifted goals from assimilation to removal to allotment [of Indian lands to individual tribal members]."¹²⁷ This schizophrenic trend has continued in the 20th century.¹²⁸ During the past quarter-century, the Indians' efforts have been concentrated on resisting assimilation and "reestablishing viable, separate sovereignties in Indian country."¹²⁹

Early decisions of the U.S. Supreme Court, (notably, *Worcester v. Georgia*, *Johnson v. M'Intosh*, and *Cherokee Nation v. Georgia*¹³⁰), set the tone for the relationship between the native tribes and the government. In *Cherokee Nation*, the Court denied a tribal motion for an injunction against the state of Georgia on the grounds that the tribe was not a foreign nation in the constitutional sense, and thus could not avail itself of the original jurisdiction of the Court.¹³¹ In that decision, however, Chief Justice Marshall set forth the es-

125. WILKINSON, *supra* note 78, at 14.

126. Allen, *supra* note 58, at 860.

127. Coggins & Modrcin, *supra* note 100, at 380-81.

128. *Id.* at 381.

129. WILKINSON, *supra* note 78, at ix, 14-23.

130. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). (characterized Indian tribes as domestic dependent nations with a relationship to the government like that of a ward to a guardian).

131. *Id.* at 20.

sential principles that continue to govern the relationship between the government and the tribes. The Chief Justice noted that:

The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. . . .

The Indian territory is admitted to compose a part of the United States. . . . They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs. . . .

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether these tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. *They may, more correctly, perhaps, be denominated domestic dependent nations.* They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession where their right of possession ceases. *Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.*¹³²

When *Worcester* reached the Court a year later, Chief Justice Marshall had an opportunity to clarify what the Court had meant by the term domestic dependent nations. He acknowledged that while the treaties between the Cherokee and the United States were negotiated to place the tribe under the protection of the federal government, this “[p]rotection does not imply the destruction of the protected.”¹³³ Returning to the language in *Cherokee Nation*, in which the Court stated that the United States shall have the exclusive right to manage the Indians’ affairs, Marshall noted that to construe these words “into a surrender of self-government, would be . . . a departure from the construction which has been uniformly put on them.”¹³⁴ Rather than a complete surrender of sovereignty, treaties between the United States and the Indians explicitly recognize the national character of the tribes and pledge the United States to assume the duty of protecting treaty-guaranteed rights.¹³⁵

Despite the emergence of a second line of cases which emphasize the power of the federal government to control Indian affairs and thereby to chip away at sovereign tribal rights,¹³⁶ the early Mar-

132. *Id.* at 16-17 (emphasis added).

133. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 552 (1832).

134. *Id.* at 554.

135. *Id.* at 556-57.

136. See WILKINSON, *supra* note 78, at 24-25. Wilkinson noted that a number of

shall-era decisions, coupled with the various canons of construction mandating a liberal interpretation of treaties, have served to establish a "trust-like" relationship between the government and the tribes.¹³⁷ The fiduciary duty of the federal government arises out of the tribes' status as domestic dependent nations,¹³⁸ and is created equally by treaty, congressional action, and executive orders.¹³⁹ Therefore, when the federal government deals with the Indian tribes, its fiduciary relationship requires the government to be "judged by the most exacting standards."¹⁴⁰

In Canada, although the historical roots of the relationship between the government and the Indians extend back to The Royal Proclamation of 1763,¹⁴¹ it was not until the *Guerin* decision, some 220 years later in 1984, that the relationship was described as trust-like, imposing a fiduciary responsibility on the federal government to protect native interests.¹⁴² In the recent *Sparrow* case, the Canadian Supreme Court thus formalized a fiduciary status similar to the position adopted in the United States.¹⁴³

The Royal Proclamation of 1763 was enacted following the Seven Years War through which England acquired Canada from the French.¹⁴⁴ The Proclamation addressed issues arising from this peace, among them, the establishment of a unified policy for dealing with the Indian Nations in England's North American colonies.¹⁴⁵ The Proclamation was "a restatement of the principles which had previously been embodied in compacts with the various Indian Nations; . . . [and in addition to confirming the doctrine of aboriginal title,] acknowledges the protectorate obligation of the Crown to-

court decisions in the late 19th and early 20th centuries "recognized a seemingly unlimited federal power to alter tribal property and jurisdictional prerogatives contemplated by the treaties and treaty substitutes." *Id.* at 24.

137. See COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, INDIAN TREATY FISHING AND WATER RIGHTS, § V., 37-41 (1981).

138. *Id.* at 40.

139. *Id.* at 37-39; and *c.f.*, *Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir. 1981), in which the court stated: "Any federal government action is subject to the United State's fiduciary responsibilities toward the Indian tribes."

140. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

141. See ABORIGINAL PEOPLES AND GOVERNMENT RESPONSIBILITY, *supra* note 28, at 24-26; and Jackson, *supra* note 97, at 259-61. An extensive excerpt of The Royal Proclamation of 1763 is contained in QUEST FOR JUSTICE, *supra* note 28, at app. A, at 357-58.

142. *Guerin v. The Queen*, 2 S.C.R. 335, 375-76 (1984).

143. *Sparrow v. The Queen*, 3 Can. Native L. Rptr. 160, 180 (1990).

144. Jackson, *supra* note 97, at 259.

145. *Id.*

wards the Indian Nations"¹⁴⁶

The Royal Proclamation has been characterized by the Canadian Supreme Court as an "Indian Bill of Rights."¹⁴⁷ In *Calder*, Justice Hall stated, "[i]ts force as a statute is analogous to the status of Magna Carta; . . . [it] must be regarded as a fundamental document upon which any just determination of original rights rests."¹⁴⁸ In *Guerin*, Justice Dickson, speaking for four of the eight members of the Court, stated:

The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indians' interest in the land is inalienable except upon surrender to the Crown.¹⁴⁹

The Proclamation's confirmation of aboriginal title, with ultimate fee in the dominant sovereign, and the undertaking of the British Crown to protect and supervise Indian lands and associated rights contained in that Royal document,¹⁵⁰ thus set the stage for the fidu-

146. *Id.*

147. *St. Catharines Milling & Lumber Co. v. The Queen*, 13 S.C.R. 577, 652 (1887).

148. *Calder v. Attorney-General of British Columbia*, 34 D.L.R.3d 145, 203 (1973).

149. *Guerin v. The Queen*, 2 S.C.R. 335, 376 (1984).

150. In pertinent part, the Royal Proclamation of 1763 reads:

And whereas it is just and reasonable, and essential to our Interests, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.—We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies . . . do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions . . . or upon any Lands whatever, which not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new governments or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid. . . .

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians to the great Prejudice of our Interests and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy

ciary relationship between the Canadian government and Canadian Natives.

In *Guerin*, the court considered whether a private lease of tribal lands negotiated by the government under terms much less favorable than those approved by the tribe, entitled the Indians to compensation for the difference. The trial court found that the government had breached the Indians' trust and awarded the aggrieved party \$10 million in damages, but the federal court of appeals reversed. The Canadian Supreme Court, however, reinstated the trial court's decision. Justice Dickson's opinion spoke for four members of the Court. The other four justices split, however, with three of them describing the Crown's liability in terms similar to a breach of trust,¹⁵¹ and one justice couching his concurrence in terms of the laws of agency.¹⁵²

The quality and scope of the fiduciary duty owed to Canadian Natives will have to be defined in future cases. Chief Justice Dickson wrote in *Sparrow*, that the government's responsibility to protect existing aboriginal and treaty rights from statutory or regulatory infringement must be defined on a case-by-case basis.¹⁵³ He noted that the best way to reconcile federal power with its fiduciary duty to the Indians "is to demand the justification of any government regulation that infringes upon or denies aboriginal [or treaty] rights."¹⁵⁴

In summary, both the U.S. and Canadian Courts have characterized the relationship of their respective federal governments to the Indians as trust-like. The duty imposed on the government is to act in the best interest of the various Indian Nations and protect both aboriginal and treaty-guaranteed rights. The next section of this article explores how well the governments of Canada and the United States have lived up to their respective duties in the context of assuring native hunting and fishing rights.

Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement; but that if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us in our Name. . . .

Given at our Court of St. James', the 7th Day of October, 1763, in the Third year of our Reign

Printed in *QUEST FOR JUSTICE*, *supra* note 28, app. A, at 357-58.

151. *Guerin*, 2 S.C.R. at 364-91.

152. *Id.* at 391-95.

153. *Id.*; see also *Sparrow v. The Queen*, 3 Can. Native L. Rptr. 160, 180-81 (1990).

154. *Guerin*, 2 S.C.R. at 181.

B. *Native Hunting and Fishing Rights in the United States*

In the United States, exclusive federal power in the field of Indian affairs flows from the Constitution. The Commerce Clause gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁵⁵ The Constitution assigns the President the power to make treaties.¹⁵⁶ The Supremacy Clause of the Constitution establishes that the laws passed by Congress "and all the Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land"¹⁵⁷ Treaties with the Indian tribes are treated as having the same force as treaties with foreign nations.¹⁵⁸ Therefore, states are not permitted to regulate or legislate in a way which conflicts with or defeats treaty-guaranteed rights.¹⁵⁹ Most of the litigation concerning Indian hunting and fishing rights has involved state attempts to control native rights, and these cases will be considered first. Federal regulation of wildlife is more recent,¹⁶⁰ and will be considered second.

Many treaties between the United States and Indian tribes contain language assuring the continuance of hunting and fishing rights on tribal lands.¹⁶¹ The Supreme Court has determined that lands reserved by the tribes, "to be held as Indian lands are held," include the right to fish and to hunt" on those lands,¹⁶² even when this right is not specifically mentioned. These rights extend to lands subject to both unextinguished aboriginal title and treaty-recognized title.¹⁶³ Moreover, the right to hunt and fish may extend off reservation lands onto privately held lands.¹⁶⁴

In *United States v. Winans*, a landmark case in American Indian law, the United States brought suit on behalf of the Yakima Indian Tribe of Washington State to enforce a treaty provision that reserved to the Indians the right of taking fish at all usual and customary places in common with white territorial citizens. The

155. U.S. CONST., art I, § 8, cl. 3 (emphasis added).

156. U.S. CONST., art. II, § 2, cl. 2; see *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411, n. 12 (1968).

157. U.S. CONST., art. VI, cl. 2.

158. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558-559 (1832).

159. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 682 (1979).

160. *Coggins & Modrcin*, *supra* note 100, at 396-98.

161. *Id.* at 375.

162. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968).

163. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 352 (7th Cir. 1983).

164. *United States v. Winans*, 198 U.S. 371, 381 (1905).

Winans, who owned riverfront property, blocked access over their land which the Indians needed to reach a traditional fishing site on the Columbia River. The Court found that by treaty the Indians had reserved a prior right of access, that the right was not a grant to them, and held that, "the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned."¹⁶⁵ More recently, Judge Boldt, in *United States v. Washington* (Phase I),¹⁶⁶ relied upon similar reasoning to assure that no state could interfere with several tribes' treaty-protected rights to fish off-reservation for religious, ceremonial, and subsistence purposes.¹⁶⁷

Winans thus set the stage for a series of cases which consider the ability of the states to regulate Indian hunting and fishing rights. In 1942, the issue of state regulation was squarely presented in *Tulee v. Washington*.¹⁶⁸ In *Tulee*, the Indian defendant was convicted in state court for fishing off the reservation without a state license, despite a treaty provision protecting fishing rights at traditional fishing grounds. Reflecting its understanding of the canons of treaty interpretation, and in accordance with fiduciary standards, the Court noted, "[i]t is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by tribal representatives . . . in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."¹⁶⁹ Although the license requirement was struck down and the defendant's conviction overturned, the *Tulee* Court nonetheless opened the door for further state regulation. The Court held that "while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory matter concerning

165. *Id.*

166. *United States v. Washington* (Phase I), 384 F. Supp. 312 (W.D. Wash. 1974), vacated *sub nom.* *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). See *infra* note 183. For a description of the various phases of this litigation, see, Meyers, *supra* note 75.

167. *U.S. v. Washington* (Phase I), 384 F. Supp. at 343.

168. *Tulee v. Washington*, 315 U.S. 681 (1942) (treaties reserved the right to fish at usual and accustomed places on lands ceded to the U.S.); *Seufert Brothers v. United States*, 249 U.S. 194, 198-99 (1919) (held that the harvest right applies to usual sites outside lands ceded in a treaty with the U.S.). See also *Antoine v. Washington*, 420 U.S. 194 (1975) (upheld congressional authority to limit state power to regulate off-reservation hunting rights. The Court noted with regard to tribal hunting rights held in common with non-Indians, ambiguities in treaty language are to be read in the Indians' favor and their wording is not to be construed to the prejudice of the Indians). *Id.* at 199.

169. *Tulee*, 315 U.S. at 684-85.

the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here."¹⁷⁰ This dicta seems to imply that the court concluded that species conservation interests should triumph over the interest in protecting traditional native hunting and fishing rights.

The *Tulee* Court did not precisely define what it meant by "purely regulatory" conservation measures. However, the Ninth Circuit Court of Appeals elaborated on the *Tulee* rule and what was meant by the term "necessary conservation measures," in *Maison v. Confederated Tribes of the Umatilla Indian Reservation*.¹⁷¹ The court held that, "to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed is 'indispensable' to the accomplishment of the needed limitation."¹⁷²

In a series of cases involving the Puyallup Tribe in Washington,¹⁷³ and in the various phases of the *United States v. Washington* litigation,¹⁷⁴ the Supreme Court addressed the issue of appropriate state regulation of off-reservation tribal hunting and fishing rights. In *Puyallup I*,¹⁷⁵ the Court held that the state may not qualify off-reservation treaty rights. The Court essentially repeated what it had said in *Tulee*: "But the manner of fishing, the size of the take, the restriction of commercial fishing . . . may be regulated by the State in the interests of conservation, provided the regulation meets appropriate standards and does not discriminate against Indians."¹⁷⁶

Not until after *Puyallup I* was remanded to the state to determine whether particular regulations were reasonable and necessary for conservation did the Court define what it meant by appropriate, non-discriminatory conservation regulation. In *Puyallup II*,¹⁷⁷ the Court overturned a state finding that its regulations were appropriate, because they failed to apportion the annual steelhead catch fairly between Indians and non-Indian sport fishermen.¹⁷⁸ Instead,

170. *Id.* at 684.

171. 314 F.2d 169 (9th Cir. 1963).

172. *Id.* at 172.

173. For a description of the Puyallup litigation, see generally *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 681-84 (1979).

174. See Meyers, *supra* note 75, at 772, n. 4.

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

176. *Id.* at 398.

177. *Department of Game v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973).

178. *Id.* at 45-48.

the regulations had banned all net fishing, which, while appearing non-discriminatory, in fact exclusively regulated the Indians, the only parties fishing with nets. The Court remanded again, noting that the scope of the regulations must accommodate Indian treaty fishing rights, as well as the rights of others.¹⁷⁹ The Court cautioned both the state and the Indians that treaty rights do not allow for extinction of the fish, that is, they "do not persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species."¹⁸⁰ This aspect of the Court's decision was reemphasized in *Puyallup III*,¹⁸¹ which approved the application of state conservation regulations on the Indian reservation, in order to conserve fish and to insure that others may also fish in common with the tribe.¹⁸²

United States v. Washington's phased litigation confirmed that Indian tribes, pursuant to treaty provisions, are due an allocable share of resources fished or hunted in common with non-Indians, and that the state may not discriminatorily regulate against Indian harvests. In *Phase I*,¹⁸³ the court ruled that various tribes were due a 50% share of fish passing through tribal fishing grounds, and ordered the state to adopt regulations protecting tribal treaty rights. When the Washington Supreme Court later held that the Department of Fisheries was unable to comply with the injunction,¹⁸⁴ the Federal District Court ordered federal supervision of the state's fisheries to assure that tribal rights were protected. Subsequently the Ninth Circuit¹⁸⁵ and the U.S. Supreme Court¹⁸⁶ upheld the district court's ruling.

179. *Id.* at 49.

180. *Id.*

181. *Puyallup Tribe, Inc. v. Department of Game (Puyallup III)*, 433 U.S. 165 (1977).

182. *Id.* at 174-76.

183. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd.*, 520 F.2d 676 (9th Cir. 1975), *vacated sub nom.*, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (Supreme Court agreed with the district court that the tribes were due some share of the fish passing through tribal lands, but rejected the formula adopted by the lower court for determining the tribe's share).

184. *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wash. 2d 677, 565 P.2d 1151 (1977) and *Fishing Vessel Ass'n v. Tollefson*, 89 Wash. 2d 276, 571 P.2d 1373 (1977), both *vacated sub nom.*, *Fishing Vessel*, 443 U.S. 658 (1979).

185. *Puget Sound Gillnetters Ass'n v. United States District Court*, 573 F.2d 1123, 1128-34, (9th Cir. 1978), *vacated sub nom.*, *Fishing Vessel*, 443 U.S. 658 (1979) (Supreme Court found that the federal courts could use an injunction to supervise the State's fisheries until State agencies adopted regulations which complied with the district court ruling on the tribe's fishing rights, but could not use an injunction to require the State agencies to adopt specific regulations).

186. *Fishing Vessel*, 443 U.S. at 694-96.

When hunting and fishing rights are reserved by Indian tribes in treaties ceding land to the federal government, there is arguably a corresponding duty imposed on the states and federal government to preserve those resources from degradation.¹⁸⁷ In *Phase II*,¹⁸⁸ the district court held that it was improper to impose an environmental servitude on the state's dominion over its fisheries in order to fulfill treaty promises and assure the tribes more than an opportunity to dip their nets in the water and bring them up empty.¹⁸⁹ However, despite Supreme Court precedent¹⁹⁰ to support the district court's ruling, this portion of its opinion was ultimately vacated by the appellate court on procedural grounds.¹⁹¹

Tribal regulation poses a further area engendering conflict between the states and Indian tribes. While the tribes generally have an exclusive right to regulate hunting and fishing by members and non-members within their reservation,¹⁹² they may not regulate non-Indian fishing and hunting on state lands or state waters that pass through a reservation.¹⁹³ While this precedent seems clear, the potential for conflict remains. Despite the Ninth Circuit's en banc ruling in *Phase II, Fishing Vessel* seems to sanction a tribal right to protect off-reservation game and fish reserved to the tribes.¹⁹⁴ At the same time, the tribes' rights to exclusively control hunting and fishing within the bounds of the reservation appears to be limited by the decision in *Puyallup III*.¹⁹⁵

Conflicts over federal regulation of Indian hunting and fishing rights are rarer than state-Indian conflicts. However, the potential for considerable conflict is present. As Coggins and Modrcin point out, such conflicts most likely arise when provisions in federal conservation statutes limit Indian hunting and fishing rights.¹⁹⁶ Federal wildlife conservation statutes such as the Migratory Bird

187. See Meyers, *supra* note 75; see also Blumm, *supra* note 62.

188. *United States v. Washington (Phase II)*, 506 F.Supp. 187 (W.D. Wash. 1980), *aff'd. in part, and rev'd in part*, 694 F.2d 1374 (9th Cir. 1982), *vacated in part*, 759 F.2d 1353 (9th Cir. 1985) (en banc).

189. *United States v. Washington (Phase II)*, 506 F.Supp. at 202-205.

190. See *United States v. Winans*, 198 U.S. 371, 381 (1905); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 678-79 (1979). See also Meyers, *supra* note 75, at 793-95.

191. *United States v. Washington*, 759 F.2d 1353, 1357, 1360 (9th Cir. 1985). See Meyers, *supra* note 75, at 780-82.

192. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

193. *Montana v. United States*, 450 U.S. 544 (1981).

194. See *supra* notes 187-91 and accompanying text.

195. See *supra* notes 181-82 and accompanying text.

196. Coggins & Modrcin, *supra* note 100, at 396-98.

Treaty Act (MBTA),¹⁹⁷ the Bald Eagle Protection Act (BEPA),¹⁹⁸ the Marine Mammal Protection Act (MMPA),¹⁹⁹ and the Endangered Species Act (ESA),²⁰⁰ have the potential to curtail, or in some cases, to completely abridge treaty-guaranteed hunting and fishing rights.²⁰¹

In *United States v. Dion*,²⁰² the Court faced the question of whether the BEPA, as amended, and the ESA had abrogated the Indians' right to hunt eagles on the reservation. The Court held that Congress had intended to divest the Indians of their right to hunt bald and golden eagles when it passed amendments to the Bald Eagle Protection Act in 1962.²⁰³ Because the BEPA divested the Indians of their right to hunt eagles, the Court did not reach the question of whether the ESA had also abrogated those rights, since its inclusion of eagles as endangered or threatened species was sufficient to prohibit Indian hunting.²⁰⁴

While the *Dion* Court noted that an express legislative statement of the intent to abrogate treaty rights was not an absolute prerequisite, it also stated that an "explicit statement by Congress is preferable. . . ."²⁰⁵ The Court determined, however, that the requirement of clear and plain intent required by *Menominee*,²⁰⁶ was satisfied by the Court's scrutiny of the BEPA and its legislative history.²⁰⁷ The Court concluded that since the 1962 amendments explicitly addressed the religious and ceremonial needs of the Indians by allowing limited Indian hunting subject to a permit, the legislation, "reflected an unmistakable and explicit legislative policy that Indian hunting of bald or golden eagles, except pursuant to permit, is inconsistent with the need to preserve those species."²⁰⁸ The result in *Dion* is consistent with those cases subjecting Indian hunting and fishing rights to state regulation in the interest of wildlife conserva-

197. 16 U.S.C. §§ 703-712 (1988).

198. 16 U.S.C. §§ 668-668d (1988).

199. 16 U.S.C. §§ 1361-1407 (1988).

200. 16 U.S.C. §§ 1530-1544 (1988).

201. For example, recent proposals to list the Sockeye Salmon as an endangered species may severely curtail or eliminate native fishing rights in the Pacific Northwest. Paul Koberstein, *U.S. Agency Seeks to List Sockeye as Endangered*, THE OREGONIAN, April 3, 1991, at A1.

202. *United States v. Dion*, 476 U.S. 734 (1986).

203. *Id.* at 740-45.

204. *Id.*

205. *Id.* at 745-46.

206. *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968), *supra* note 103 and accompanying text.

207. *United States v. Dion*, 476 U.S. 734, 743-44 (1986).

208. *Id.* at 745.

tion.²⁰⁹ As the Court noted in *Puyallup II*, treaty rights do not allow for extinction of the species hunted or fished subject to those rights.²¹⁰

Coggins and Modrcin write that similar results should be obtained through application of the MMPA and the ESA.²¹¹ Both the MMPA, which prohibits, with limited exceptions, all takings of marine mammals and the ESA, which prohibits all takings of species listed as endangered or threatened, contain provisions excepting Native Alaskans.²¹² Coggins and Modrcin reason that since exceptions are provided for certain Native Americans, Congress has manifested its intent to exclude all other takings by American Indians.²¹³ In effect, Coggins and Modrcin anticipate the *Dion* holding when they write that provisions in both Acts allowing particular native rights and the accompanying legislative history imply that "Congress considered an Indian exemption and consciously chose to override treaty rights in conflict with the ban on taking . . . [species protected by those acts]."²¹⁴

The MBTA is of particular relevance, since one of the four treaties it implements is a treaty for the protection of migratory birds signed by Great Britain in respect to Canada.²¹⁵ Although the MBTA itself is silent on its application to North American Natives, Coggins and Modrcin note that the treaty terms, incorporated by reference in the Act, "do create limited exceptions to the general prohibitions by providing that Indians may take certain species for

209. See *supra* notes 170-82 and accompanying text.

210. *Puyallup Tribe, Inc. v. Department of Game (Puyallup II)*, 414 U.S. 44, 49 (1973).

211. Coggins & Modrcin, *supra* note 100, at 401-05.

212. The Marine Mammal Protection Act permits the taking of marine mammals for subsistence purposes or for creation of authentic native handicrafts. 16 U.S.C. § 1371(b) (1988). The exception is limited to any Indian, Eskimo, or Aleut dwelling on the coast of the North Pacific or Arctic Ocean. *Id.* The right may be modified, however, by the Secretary of Interior if a species population level warrants additional protection. *Id.*

The Endangered Species Act contains a similar provision which exempts any Alaskan Native (Indian, Eskimo, Aleut) who resides in Alaska, as well as non-native permanent residents of Alaskan Native villages from prohibitions on the taking of listed species when that taking is primarily for subsistence purposes. 16 U.S.C. § 1539(e) (1988). The taking must be accomplished in a non-wasteful manner and taking may be proscribed to preserve any listed species. *Id.*

213. Coggins & Modrcin, *supra* note 100, at 403-04.

214. *Id.* at 404.

215. For a description of the treaties and Migratory Bird Treaty Act provisions, see Gary D. Meyers & Kyla Seligsohn Bennett, *Answering "The Call of the Wild": An Examination of U.S. Participation in International Wildlife Law*, 7 PACE ENVTL. L. REV. 75, 93-97 (1989).

food and clothing.”²¹⁶ Therefore, a similar logic, limiting Indian hunting rights under the ESA, MMPA, and BEPA to expressly permitted activities, ought equally to be construed in the MBTA to limit treaty-guaranteed rights.²¹⁷

A reasonable interpretation of *Dion*, as well as the conservation message of *Puyallup III*, supports this conclusion. As Coggins and Modrcin note:

Examination of federal wildlife protection statutes does not provide conclusive answers as to their effects on treaty rights, but does establish the probability that Congress intended to bind Indians [T]here is a discernible pattern in the treaties and statutes of carving out exceptions for some, but not all Indians and for subsistence, but not commercial purposes Finally, the purpose of each statute argues for its applicability to Indians, because each is a congressional response to a perceived population crisis of the species protected; such conservation legislation must be comprehensive to be effective.²¹⁸

The question remains whether limitation of treaty-guaranteed hunting and fishing rights by federal conservation statutes requires compensation to the tribes. Both the majority and the dissent in the *Menominee* case indicate in dicta that treaty rights cannot be destroyed by federal legislation without compensation.²¹⁹ While the issue has not been strictly addressed by the Supreme Court, lower federal courts have held that federal conservation statutes which limit treaty rights, without measurably interfering with those rights, are permissible without compensation.²²⁰ Moreover, to the extent that federal conservation legislation is necessary to preserve species upon which Indians depend, the legislation works to the benefit of the natives. Effective limits on hunting or fishing, though they may present a short-term hardship to certain tribes, will in the long run continue to promote native interests.²²¹ A total destruction of na-

216. Coggins & Modrcin, *supra* note 100, at 398-99. Canadian cases construing the Migratory Bird Treaty provisions and their applicability to Canadian Natives is discussed *infra* at note 283, and accompanying text.

217. *Id.* at 399.

218. *Id.* at 405.

219. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411, 413, 417 (1968); see also cases cited *supra* note 21, and accompanying text.

220. See, e.g., *Andrus v. Allard*, 444 U.S. 51, 64-68 (1979) (holding that regulations enacted pursuant to the BEPA and MBTA that prohibit commercial transactions in pre-existing avian artifacts do not constitute takings under the Fifth Amendment and no compensation is due those Indians who trade in Indian artifacts); *Aleut Community v. United States*, 117 F. Supp. 427 (Ct. Cl. 1954) (holding that regulation of sealing for purposes of preservation of seal herds and breeding grounds is within Federal police power).

221. See *Kruger v. The Queen*, 1 S.C.R. 104, 112 (1978) (Justice Dickson noted that,

tive hunting and fishing rights is unlikely, except where a species becomes extinct. For Congress not to act to preserve such species might equally subject the United States to charges of failing to live up to its fiduciary duty to protect native interests. Therefore, regulation of native hunting and fishing rights held in common with the rights of others, without eliminating those rights for any measurable time, comports with the duty to protect the Indians' long-term subsistence, religious, and ceremonial interests in wildlife. For these reasons, species preservation interests should supersede Native American traditional hunting interests.

C. *The Evolution of Canadian Native Hunting and Fishing Rights Policy*

Historically, as in the United States, exclusive power to deal with Indians and Indian affairs has been vested in the British Crown or federal Canadian government. As previously mentioned, "the existing policy of central administration of aboriginal lands and the policy of regulating interaction between native people and non-natives" was enunciated in The Royal Proclamation of 1763.²²² In 1982, the English Court of Appeal acknowledged the continuing vitality of The Royal Proclamation, stating that it had governed Indian affairs in Canada for over one hundred years and was still in effect when not superseded by specific treaties with the Indians.²²³

Federal power to legislate in the area of Indian affairs was confirmed by enactment of the British North America (BNA) Act of 1867.²²⁴ Section 91(24) of the BNA Act, also known as the Constitution Act of 1867, vests exclusive authority over Indians and lands reserved for Indians . . . in the Canadian Parliament.²²⁵

In *Ex parte Indian Association of Alberta*, the Court described the Constitution Act of 1867 in the following manner:

It proclaimed the union of the provinces . . . into one dominion under the name of Canada, . . . [and] set up a federal government . . . and contained a written constitution. . . . The Executive Government

"[i]t might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource.").

222. Pentney, *supra* note 27, at 248.

223. *Regina v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Ass'n of Alberta and Others*, 78 I. L. R. 421, 427 (Eng. Court of App. 1982).

224. British North America Act, 1867, 30 & 31 Vict., ch. 3, *reprinted in* CAN. REV. STAT. app. II, No. 5 (1970).

225. *Regina v. White and Bob*, 50 D.L.R.2d 613, 618 (B.C. Ct. App. 1964), *aff'd*, 52 D.L.R.2d 481 (Can. 1965).

[was] . . . vested [in the Crown of England]. . . . It set up a Dominion Parliament . . . [and] refashioned the provincial governments. . . . It set out detailed provisions . . . distributing legislative powers between the Dominion Parliament and provincial legislatures.²²⁶

As to the Act's effects on Indians, the England Court of Appeal noted that, "[s]ection 91(24) gave the Dominion Parliament the exclusive power to legislate for 'Indians, and lands reserved for the Indians.'"²²⁷ Until enactment of the Constitution Act of 1982, the British Crown retained the sole power to alter, repeal, or amend the 1867 Act.²²⁸

Federal conflicts with Native Canadians will be discussed following an examination of native/provincial conflicts. Briefly however, the power to alter the balance of power between the federal government and provincial governments now rests with the Canadian Parliament, as circumscribed by section 35 of the Constitution Act of 1982.²²⁹ Additionally, like its U.S. counterpart, the Canadian Constitution's "supremacy clause" (section 52) limits provincial legislation to areas not within the exclusive jurisdiction of the federal government.²³⁰

Federal control of Indian affairs in Canada has not insulated Indians from conflict with the provinces. As in the United States, much of the Canadian controversy over native hunting and fishing rights is generated by conflicts between the provinces and various native bands.²³¹ These conflicts arise because the Indian Act²³² allows the provinces to pass general legislation, including wildlife conservation and game laws applicable to all citizens. Section 88 of the Indian Act provides as follows:

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which

226. *Ex parte* Indian Ass'n of Alberta, 78 I. L. R. at 428.

227. *Id.*

228. *Id.* at 432-33.

229. See *infra* notes 277-309 and accompanying text.

230. Pentney, *supra* note 27, at 209; Slattery, *supra* note 19, at 775-76 ("[u]nder general constitutional principles, the provinces cannot legislate in relation to subject-matters falling within exclusive federal jurisdiction. Thus, provincial laws that single out Indians and Indian lands for special treatment are invalid." (footnote omitted)).

231. See generally David E. Sanders, *Indian Hunting and Fishing Rights*, 38 SASK. L. REV. 45 (1973-74).

232. Indian Act, CAN. REV. STAT. ch. I-6 (1970).

provision is made by or under this Act.²³³

The majority of cases considered before and after the enactment of section 88 of the Indian Act have determined that Section 91(24) of the BNA Act of 1867 insulates on-reserve hunting and fishing rights from provincial regulation.²³⁴ One exception is an unreported case which occurred in an area where the provincial government maintains that the Royal Proclamation does not apply.²³⁵ In *Cardinal v. Attorney-General of Alberta*,²³⁶ the court, upholding a conviction for selling game out of season on a reserve, found that provincial game laws which have as their objective the conservation and management of provincial resources do not relate to Indians *qua* Indians.²³⁷ In this case, however, the Indian defendant was charged with selling game, rather than with hunting for food, a protected activity under provincial and federal law.²³⁸

In general, the protection of native hunting and fishing rights in Canada from interference by provincial regulation appears to be similar to that afforded Indian tribes in the United States. For example, one commentator writes that provincial legislation may usually stand if directed to the conservation of fish and game.²³⁹ However, another analysis suggests that, with some variation, the strength of native rights appears to hinge on the degree of recognition afforded a particular right. Thus, on-reserve treaty rights seem to be protected to a greater degree than off-reserve aboriginal rights.

233. *Id.* at § 88.

234. Sanders, *supra* note 231, at 48-49, n.29.

235. *Id.* at 48-49. The case, *Regina v. Grouix* (Quebec Dist. Ct. 1965) is unreported. See Sanders, *supra* note 231, at 48. Moreover, this ruling would appear to be overruled by the *Calder* case, in which both Justice Judson and Justice Hall agreed that aboriginal title does not depend on The Royal Proclamation, other treaties, executive orders, or legislative enactments, but rather pre-dates any official recognition. *Calder v. Attorney-General of British Columbia*, 34 D.L.R.3d 145, 152-53, 200-201 (1973).

236. S.C.R. 695 (1974).

237. *Id.* at 706.

238. Sanders, *supra* note 231, at 49. The case can also be contrasted with a provincial court case dealing with aboriginal rights. In *Regina v. Dennis and Dennis*, 56 D.L.R.3d 379, 387 (B.C. Prov. Ct. 1974), an Indian defendant relied on a defense of aboriginal hunting rights to contest a charge of hunting moose out of season. The court concluded that a provincial law that extinguished aboriginal title is legislation in relation to Indians because it deals with rights peculiar to them. Since § 91(24) of the BNA Act of 1867 assigns exclusive authority to the federal government to deal with Indians, the court concluded that the provincial law was inapplicable to the defendant. *Id.* at 390.

239. Diana Ginn, *Indian Hunting Rights: Dick v. R., Jack and Charlie v. R., and Simon v. R.*, 31 MCGILL L.J. 527, 528 (1986).

Though the preference is not explicit as it is in the United States,²⁴⁰ the Canadian courts appear to give more protection to treaty rights than to "unrecognized" aboriginal rights. Whether this distinction survives after enactment of section 35 of the Constitution act of 1982 remains an open question. Section 88 of the Indian Act can be distinguished from section 35 of the 1982 Constitution Act in that section 88's protection extends to treaties and other acts of Parliament, while section 35 affirms and recognizes both existing treaty and aboriginal rights. A review of the cases seems to confirm this distinction.

In an early case, *Regina v. White and Bob*,²⁴¹ the British Columbia Court of Appeals construed section 87 (now section 88) of the Indian Act as affording protection of on-reserve treaty-protected hunting rights. At trial, the defendants were acquitted of possessing deer out of season without a permit. Addressing the Crown's appeal, the court determined that an agreement between the Saalequun Tribe for the sale of land to the Hudson Bay Company,²⁴² which reserved hunting rights on unoccupied lands, was a treaty within the meaning of the Indian Act.²⁴³ Employing a liberal interpretation of the term "treaty" and drawing on the history of provincial settlement and the role played by the Hudson Bay Company, the court found that the rights reserved by the Saalequun in the agreement were treaty-recognized hunting rights.²⁴⁴ The court held that provincial legislation requiring a permit abridged these rights. Because Parliament was granted exclusive authority by the Indian Act to administer Indian rights, the legislation could not stand.²⁴⁵

In direct contrast to *Regina v. White and Bob* stands *Kruger and Manuel v. The Queen*,²⁴⁶ as well as two other cases decided by the Supreme Court in the mid-1980s: *Dick v. The Queen*,²⁴⁷ and *Jack and Charlie v. The Queen*.²⁴⁸ In all three cases, Indian defendants raised either non-treaty or aboriginal rights defenses to charges of

240. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 372, 382 (1954) (characterizing aboriginal title as "unrecognized" title), *reh'g denied*, 348 U.S. 965 (1955).

241. *Regina v. White and Bob*, 50 D.L.R.2d 613 (B.C. Ct. App. 1964), *aff'd*, 52 D.L.R.2d 481 (S.C.R. 1965).

242. See *supra* note 150, wherein The Royal Proclamation mentions the Royal Charter granting territory to the Hudson Bay Co. as if it were a territorial government.

243. *Regina v. White and Bob*, 50 D.L.R.2d at 615-18.

244. *Id.* at 617-18.

245. *Id.* at 618-19.

246. *Kruger and Manuel v. The Queen*, 1 S.C.R. 104 (1978).

247. *Dick v. The Queen*, 2 S.C.R. 309 (1985).

248. *Jack and Charlie v. The Queen*, 2 S.C.R. 332 (1985).

having violated provincial game laws. In all three, the defendants lost.

In *Kruger*, members of the Penticton Band, a non-treaty tribe, were charged with hunting without a permit on unoccupied lands within their traditional hunting grounds. A permit was available under the British Columbia Wildlife Act. Despite the Indians' argument that aboriginal hunting rights were no less valuable than treaty rights, the Court determined that non-treaty, aboriginal rights were not shielded from the application of provincial game laws.²⁴⁹ The Court noted that, "however abundant the right of Indians to hunt and fish, there can be no doubt that such right is subject to regulation and curtailment by the proper legislative authority."²⁵⁰

The significance of *Kruger* lies in its articulation of a two-pronged test to determine whether provincial legislation violates section 88 of the Indian Act. The Court first noted that if a provincial law is not applied uniformly throughout the province, it is not a law of general application within the meaning of section 88, and is thus inapplicable to Indians.²⁵¹ If the law is applied uniformly, both its intent and effects must be examined to determine whether they impermissibly discriminate against Indians.²⁵² The Court noted that while a statute may have graver consequences for one group, such as natives, without necessarily disqualifying the legislation as a law of general application,²⁵³ "[t]he line is crossed, however, when an enactment, though in relation to another matter, by its effects impairs the status or capacity of a particular group."²⁵⁴

Seven years later, the Court further refined the *Kruger* test in *Dick v. The Queen*.²⁵⁵ The facts in *Dick* were similar to those in *Kruger*. *Dick*, a member of the Alkali Lake Band, a non-treaty tribe in British Columbia, was charged with a violation of the same British Columbia Wildlife Act. While fishing within traditional aboriginal hunting grounds, the defendant shot a deer for food during the closed season. Justice Beetz, writing for a unanimous court, acknowledged that the Wildlife Act might impair the status of the appellant, and that without section 88, the Act might not be

249. *Kruger v. The Queen*, 1 S.C.R. at 114.

250. *Id.* at 111-12.

251. *Id.* at 110.

252. *Id.*

253. *Id.*

254. *Id.*

255. 2 S.C.R. 309 (1985).

applicable.²⁵⁶

The significance of the *Dick* decision lies in the reformulation of the *Kruger* test into two separate questions.²⁵⁷ In *Dick*, the Court held that the general applicability of a provincial law must be determined on the basis of legislative intent,²⁵⁸ relegating the "effects" question to a secondary role. Because it was not proven that the British Columbia Wildlife Act singled out Indians for regulation or special treatment, the Act was a valid law of general application and applied to the tribes by virtue of section 88 of the Indian Act.²⁵⁹

According to *Dick*, a court must first ask . . . whether the provincial legislation has the effect of regulating the Indians qua Indians. If it does, a court must then consider whether this was intended by the legislature. [If so] . . . the Act is ultra vires; if not, . . . the statute is a law of general application within the meaning of section 88.²⁶⁰

In *Jack and Charlie*, defendants, members of a Band of the Coast Salish Peoples, were convicted of shooting a deer out of season to provide Jack's mother with deer meat for a religious ceremony honoring her deceased great-grandfather. The defendants were non-treaty Indians and raised a defense of aboriginal religious rights to the charge. The ceremony, described by an anthropologist as "a very ancient traditional practice," was intended to provide food for the dead, which the Coast Salish People believe have the same needs as the living.²⁶¹ Justice Beetz again delivered a unanimous Supreme Court opinion affirming the defendants' convictions. The Court accepted the government's arguments that obtaining meat was not part of the ceremony and that the Indians' religious motives were irrelevant.²⁶² The Court concluded that the British Columbia Wildlife Act's prohibitions raised no question of religious freedom.²⁶³ The issue of whether the Act regulated the Indians as Indians, i.e., that it impaired their status because it impinged on hunting rights

256. *Id.* at 320-21.

257. Ginn, *supra* note 239, at 531.

258. *Dick v. The Queen*, 2 S.C.R. at 323-24.

259. *Id.* at 326.

260. Ginn, *supra* note 239, at 531.

261. *Jack and Charlie v. The Queen*, 2 S.C.R. 332, 336 (1985). According to Dr. Barbara Lane, an anthropologist called as an expert witness for the defense, the Coast Salish People have a very different world view than those raised in the Judeo-Christian tradition. They believe the world is "an intimately inter-related phenomenon in which the living and the dead animals and humans, all things are intimately connected and belong together in this place and do not leave it. They have "mutual responsibilities and respect . . . to accord all of the other parts of the world as they see it." *Id.*

262. *Id.* at 343-45.

263. *Id.* at 345.

at the root of the culture, was dismissed as indistinguishable from the issue raised in *Dick*, decided that same day.²⁶⁴

In contrast with the cases raising non-treaty or aboriginal rights defenses to the application of provincial wildlife laws (*Kruger, Dick*, and *Jack and Charlie*), *Simon v. The Queen*,²⁶⁵ like *R. v. White and Bob*, raised a treaty defense. In *Simon*, the appellant, a registered Micmac Indian was convicted of possession of a shotgun and shells in violation of the Nova Scotia Lands and Forests Act. This act prohibited carrying weapons in certain provincial lands, as well as carrying a weapon out of hunting season.²⁶⁶ On appeal, the defendant reasserted as a defense to the conviction, that the Peace and Friendship Treaty of 1752 entered into by the government of Nova Scotia and the Micmacs provided in Article 4 that the Indians retained the rights of hunting and fishing as usual in the province. The Court found that "[t]he Treaty was entered into for the benefit of both the British Crown and the Micmacs . . . with the intention of creating mutually binding obligations, . . . [among them,] to recognize and confirm the existing hunting and fishing rights of the Micmacs,"²⁶⁷ and held that the agreement embodied in the 1752 Treaty was "validly created by competent parties." In other words, the agreement was a treaty within the meaning of section 88 of the Indian Act. Chief Justice Dickson went on to find that Article 4 of the Treaty "constitutes a positive source of protection against infringements on hunting rights."²⁶⁸ He also noted that the fact that these rights existed at the time of the Treaty as aboriginal rights did not negate or minimize the significance of subsequent treaty protection.²⁶⁹

The Court also discussed whether the term, "hunting and fishing as usual," limited the Micmacs to hunting only for the purposes and only with the methods usual in 1752. The Chief Justice stated that to limit these rights to the methods and weapons used in 1752 would be "out of keeping with the principle that Indian treaties should be interpreted liberally, . . . [and that such a construction would be an] . . . unnecessary and artificial constraint."²⁷⁰ Additionally, the Court found that the treaty terms were broad enough

264. *Id.* at 346.

265. *Simon v. The Queen*, 2 S.C.R. 387 (1985).

266. *Id.* at 390-91.

267. *Id.* at 401.

268. *Id.* at 401-02.

269. *Id.* at 402.

270. *Id.*

to include both commercial and non-commercial hunting.²⁷¹ Significantly, with respect to the specific charges faced by the appellant, the Court held, "that the right to hunt to be effective must embody those activities reasonably incidental to . . . hunting, . . . an example of which is travelling with the requisite hunting equipment to the hunting grounds."²⁷² These rights, the Court said, are implicit in the guarantees of Article 4 of the Peace and Friendship Treaty of 1752.²⁷³

One commentator suggests that Justice Beetz's approach in *Jack and Charlie* may have been too narrow and that obtaining fresh meat could be characterized "as a necessary incident of the [religious] ceremony."²⁷⁴ This would parallel the approach followed in *Simon* with respect to carrying a weapon in order to hunt. However, Justice Beetz noted in *Jack and Charlie* that the Act provided for appellants' needs and that the Indians could, for example, retain and store deer meat hunted during the open season.²⁷⁵ This result is compatible with the focus in non-treaty cases on the intent of the legislation rather than on its effects.²⁷⁶

The conclusion that emerges from a review of these cases is that the most significant factor in determining whether a native right is shielded from provincial legislation depends on the degree of recognition given those rights. Despite any express statements by the Court confirming this proposition, recognized treaty rights insulated Indians from application of provincial game laws under section 88 in both *R. v. White and Bob* and in *Simon*. In the other cases, non-treaty or aboriginal defenses failed to achieve the same result. This approach is legally defensible as a literal interpretation of section 88, which speaks only of treaties or Parliamentary acts. But such a literal approach is at odds with the interpretive principles that the Court employs in conflicts over native and white understandings of native rights which attempt to assure that the content of native rights comports with the Indians' understanding of that content.

Because provincial governments should not have greater power to abridge existing native rights than the federal government, section 35 of the Constitution Act of 1982 was enacted. This section

271. *Id.*

272. *Id.* at 403.

273. *Id.*

274. Ginn, *supra* note 239, at 538.

275. *Jack and Charlie v. The Queen*, 2 S.C.R. 332, 340 (1985).

276. *Id.*

affirms and recognizes both existing aboriginal and treaty rights. "Section 35(1) . . . also affords aboriginal peoples constitutional protection against provincial legislative power."²⁷⁷ The Canadian Supreme Court first addressed section 35 in *Sparrow v. R.*, which concerned federal regulation under a national statute, the Fisheries Act.²⁷⁸

In *Sparrow*, the issue was whether section 35 of the Constitution Act of 1982 limited Parliament's power to regulate native fishing. Appellant, a member of the Musqueam Indian band, was convicted by the trial court of violating the Fisheries Act by fishing in the band's licensed area with a drift net longer than the Indians' food fishing license permitted. The appeals court, while characterizing the right as a protected aboriginal right, nonetheless limited the right to a priority to fish for food and also held that restrictive regulation was proper when reasonably necessary for management and conservation of the resource.²⁷⁹

Specifically, the Supreme Court considered whether the net-length requirement complied with section 35.²⁸⁰ The Court first noted that the term "existing aboriginal and treaty rights" as used in section 35, means those rights which were unextinguished at the time of section 35's enactment.²⁸¹ These rights "cannot be read so as to incorporate a specific manner in which [they were] regulated before 1982."²⁸² The Court held that the term "existing aboriginal rights" should be interpreted flexibly, and not as frozen in any particular time.²⁸³

Prior to *Sparrow* and the enactment of the Constitution Act of 1982, the Canadian courts, like their counterparts in the United States, had consistently held that federal conservation statutes may curtail or destroy treaty and non-treaty aboriginal hunting and fishing rights.²⁸⁴ Conversely, as in the United States, there is also pre-

277. *Sparrow v. The Queen*, 3 Can. Native L. Rptr. 160, 178 (1990).

278. *Fisheries Act*, R.S.C. c.n. F-14 (1985).

279. *Sparrow v. Regina*, 2 W.W.R. 577, 592-95, 607-608 (B.C. Ct. App. 1987).

280. *Sparrow*, 3 Can. Native L. Rptr. at 166.

281. *Id.* at 169.

282. *Id.* at 170.

283. *Id.* at 171.

284. See *Michael Sikyea v. The Queen*, R.S.C. 642 (1964), where the Court dismissed an appeal from an Indian convicted of killing a duck protected by the Migratory Bird Convention Act. The appellant claimed that a treaty between the government and his Band exempted him from the prohibitions of the Act. But the Court adopted the reasoning of the Northwest Territories Appeals Court and dismissed the appeal. *Id.* at 646. In the Appeals Court decision, *Regina v. Sikyea*, 46 W.W.R. 65, 74 (N.W.T. Ct. App. 1964), Justice Johnson wrote:

cedent in Canada suggesting that recognized treaty hunting and fishing rights are protectable property rights, analogous to *profits à pendre*, in that they may impose an environmental servitude constraining government actions that limit or destroy these rights.²⁸⁵ The enactment of section 35 and its interpretation in *Sparrow* will likely limit the former and strengthen the latter.

The most important aspect of the *Sparrow* case is its rejection of the pre-1982, rigidly legalistic approach to the protection of Indian rights and the Court's promotion of a "purposive approach" in interpreting these rights.²⁸⁶ As the Court noted, "[f]or many years [after the settlement of Canada by Europeans] the rights of the Indians to their aboriginal lands—certainly as legal rights—was virtually ignored."²⁸⁷ Justices Dickson and Forest wrote that section 35 of the Constitution Act of 1982, "represents the culmination of a long and difficult struggle in both the political forum and the courts

It is, I think, clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its regulations. How are we to explain this apparent breach of faith on the part of the government, for I cannot think it can be described in any other terms? This cannot be described as a minor or insignificant curtailment of these treaty rights, for game birds have always been a most plentiful, a most reliable and readily obtainable food in large areas of Canada. I cannot believe that the government of Canada realized in implementing the Convention they were at the same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked—a case of the left hand having forgotten what the right hand had done.

See also Sanders, *supra* note 231, at 45-48. For a recent case interpreting the Migratory Bird Convention Act in light of § 35 of the Constitution Act of 1982, see Regina v. Elnew, 10 D.L.R.4th 137, 140 (Sask. Ct. App. 1984) in which the court noted that the Act did not abridge native treaty rights because by the terms of the treaty itself, those rights were subject to government regulation. Therefore, § 35 only recognized "existing" rights.

Regarding Fisheries Act regulation of native rights, see Blumm, *supra* note 62; see also Regina v. Derrikson, 71 D.L.R.3d 159 (1976), where the Canadian Supreme Court held that the aboriginal right to fish is governed by the Fisheries Act and its regulations.

285. Bolton v. Forest Management Inst., 21 D.L.R.4th 242 (B.C. Ct. App. 1985). In *Bolton*, the plaintiff, a member of a registered Indian Band in British Columbia, sued for an interlocutory injunction to restrain the defendants' herbicide spraying as part of a government research program which took place in areas where the Indians harvest fish, game, and edible plants and where Bolton held a registered trapline. The trial court dismissed the suit, but the Appeals Court held that plaintiff's registered trapline constituted a sufficient interest in the land to bring a private nuisance action (*Id.* at 249), and granted an interim injunction (*Id.* at 253). While not reaching the ultimate merits of the claim, the court characterized the Indian trapline as a *profit à pendre*, i.e., the right held by one to enter the land of another and take some profit from the soil such as minerals, trees, fish, or game. *Id.*, at 248-49. As such, it is a property right which includes protection from interference by others. *Id.*

286. *Sparrow v. The Queen*, 3 Can. Native L. Rep. 160, 177-79 (1990).

287. *Id.* at 177.

for the constitutional recognition of aboriginal rights.”²⁸⁸ In their view, the import of section 35 extends beyond the fundamental effect of constitutional recognition of these rights to include interpretative principles reflecting the purposes behind the provision.²⁸⁹ “When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous liberal interpretation of the words in the constitutional provision is demanded.”²⁹⁰

The purposive approach applies to the interpretation of both aboriginal and treaty rights.²⁹¹ Moreover, the *Guerin* case produces a general guiding principle for applying section 35: “[T]he Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in the light of this historic relationship.”²⁹²

The Court’s interpretation of section 35 does not wholly insulate all native rights from regulation. The Court declared, “[r]ights that are recognized and affirmed are not absolute.”²⁹³ Thus, the federal government still has power under section 91(24) of the 1867 Constitution Act to legislate on Indian affairs, but this power must be reconciled with the section 35 guarantees.²⁹⁴ “[T]he best way to achieve that reconciliation,” the court opined, “is to demand the justification of any government regulation that infringes upon or denies aboriginal [or protected treaty] rights.”²⁹⁵

The *Sparrow* Court ultimately remanded the case for a determination of whether the Fisheries Act net-size regulation is consistent with section 35 guarantees.²⁹⁶ The remainder of the opinion proposed a framework for determining whether specific federal regulations can justifiably limit the exercise of native treaty and aboriginal hunting and fishing rights. The first question under the *Sparrow* test is whether a particular legislative enactment interferes with an existing native right. If so, it represents a *prima facie* interference with rights guaranteed by section 35.²⁹⁷ The Court cautions that

288. *Id.* at 178.

289. *Id.*

290. *Id.* at 179.

291. *Id.*

292. *Id.* at 180.

293. *Id.* at 181.

294. *Id.*

295. *Id.*

296. *Id.* at 188.

297. *Id.* at 182.

this inquiry must take into account the historical aspects and cultural context of the rights in question, being careful "to avoid the application of traditional common law concepts of property" It must also be conducted within the framework of the *sui generis* fiduciary responsibility owed to the Indians by the government.²⁹⁸ "For example," the Court writes, "it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised."²⁹⁹

To aid in the inquiry regarding the effects of any regulation, courts must determine whether the limitation of rights is reasonable, whether it imposes undue hardship, or whether it denies the Indians their preferred methods of hunting or fishing.³⁰⁰ The burden for developing the historical and cultural evidence to support a *prima facie* infringement lies on those challenging the legislation.³⁰¹ However, the inquiry involves more than asking whether rights have been reduced to less than subsistence and ceremonial needs, instead it involves a deeper probe to determine whether the purpose or effect of the challenged restriction unnecessarily infringes protected rights.³⁰²

If a *prima facie* interference is found, the courts must engage in a second inquiry to determine whether the specific regulation is justified.³⁰³ The objective of Parliamentary legislation or departmental regulations must be valid.³⁰⁴ Objectives which preserve section 35 rights or prevent harm to the general populace or the holders of section 35 rights are likely to be valid.³⁰⁵ The Court noted, however, that while the *Kruger* presumption of the validity of conservation measures is now outdated, the value of conservation regulation has long been recognized and is usually consistent with both aboriginal beliefs and practices, and the enforcement of native rights.³⁰⁶

The finding that a legislative objective is valid does not, however, end the inquiry. The *Guerin* holding and the "honour of the Crown" to enforce its special relationship with native peoples, imposes special duties on the government to preserve Indian rights.³⁰⁷

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 183.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at 183-84.

There must, therefore, be a link between the justification question and the allocation of priorities to use the resource.³⁰⁸ At a minimum, this appears to mean that once valid conservation standards are adopted, native rights to use the resource should take precedence over non-native uses. As the Court noted in *Sparrow*, "[t]he constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing."³⁰⁹

In sum, the *Sparrow* decision establishes a purposive approach to the resolution of conflicts over rights assured by section 35, similar to the approach advocated by Pentney.³¹⁰ The purpose is both to preserve the constitutional rights of natives, guaranteed in section 35, and to comply fully with the special fiduciary responsibility of the government to the Indians. In such an approach, environmental protection measures may limit aboriginal and treaty-guaranteed hunting and fishing rights to the extent needed to preserve the resource. Once conservation of the resource is assured, natives have priority in its use. Moreover, in determining the appropriateness of those conservation measures, both the historical patterns of native resource usage and the cultural methods used to capture the resource must be taken into account.

III. CONCLUSION

A comparison of the treatment of Indian hunting and fishing rights in Canada and the United States reveals many similarities, as well as some unique differences. The similarities are perhaps not surprising, given the common origins of the law in both countries. In addition, the Indian Nations of North America are as related, if not more so, than those Europeans who settled North America.

308. *Id.* at 184.

309. *Id.*; see also *Denny, Paul and Sylliboy v. The Queen*, 2 Can. Native L. Rep. 115 (N.S. Ct. Ap. 1990), in which the Nova Scotia Court of Appeals found that provincial fishing regulations enacted pursuant to the Fisheries Act were partially inconsistent with the § 35 rights of the Micmac Indians. The court awarded the Micmacs a priority fishing right after conservation needs were served. The court noted: "To afford user groups such as sports fisherman . . . a priority to fish over the legitimate food needs of the appellant and their families is simply not appropriate action on the part of the federal government. It is inconsistent with the fact that the appellants have for many years, and continue to possess an aboriginal right to fish for food This constitutional entitlement is second only to conservation measures that may be undertaken by federal legislation." *Id.* at 131-32.

310. Pentney, *supra* note 79, at 22-23.

These natives also share a common socio-cultural, political, religious, and historical heritage.

In both the United States and Canada, exclusive authority to deal with Indian affairs is vested in the federal government.³¹¹ Both the U.S. and Canadian constitutions provide that federal law is supreme and supersedes conflicting state or provincial law.³¹² Nevertheless, many of the conflicts over native hunting and fishing rights are tribal-state/province conflicts. As a result of constitutional interpretation and national legislative enactments, the states and provinces are permitted to regulate native access to natural resources, but only to the degree necessary to conserve those resources.³¹³ Furthermore, the Supreme Courts of both countries have cautioned the state and provincial governments that their regulations may not discriminate by singling out the natives for specific regulation or treating them differently.³¹⁴

With respect to treaty-guaranteed rights, there is emerging case law in both the United States and Canada suggesting that treaty language providing for "sharing of resources in common with" means that the natives have some priority to those resources, after conservation measures are met.³¹⁵ This "priority" reflects the duty to interpret agreements made between the natives and their governments as the natives understood them. The "priority" also owes a debt to the nature of aboriginal rights, as rights existing from time immemorial.³¹⁶ Additionally, in both countries, there is also an emerging sense that native rights may impose a servitude on the federal and state/provincial governments to protect the "property right" in the resource.³¹⁷

At the federal level, both Canada and the United States recognize that native rights may arise from either aboriginal or treaty origins. More importantly, both Supreme Courts have held that the nature of the relationship between the natives and the federal government is trust-like and imposes a fiduciary duty on the national government to protect native rights and interests in lands.³¹⁸ This special

311. See *supra* notes 155-59, 222-30, and accompanying text.

312. See *supra* notes 157-59, 230, and accompanying text.

313. See *supra* notes 170-82, 239, 305-08, and accompanying text.

314. See *supra* notes 177-79, 269-72, 298-301, and accompanying text.

315. See *Washington v. Washington State Commercial Passengers Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Sparrow v. The Queen*, 3 Can. Native L. Rptr. 160. (1990); *supra* notes 307-08 and accompanying text.

316. *Calder v. Attorney-General of British Columbia*, 34 D.L.R.3d 145, 173 (1973).

317. See *supra* notes 187-91, 284, and accompanying text.

318. See *supra* notes 137-40, 142-43, 149-50, and accompanying text.

relationship has led the Courts to develop similar canons of construction to guide them in interpreting both aboriginal and treaty-guaranteed rights.³¹⁹ In both Canada and the United States, however, at least until the *Sparrow* decision, the courts accorded less protection to aboriginal rights or "unrecognized" rights, than to treaty guarantees. Until recently, the law in both countries provided that Indian title can be extinguished at will and that the federal government can also extinguish treaty rights. However, in the United States, only the destruction of treaty rights is compensable, as distinguished from Canada, where the destruction of both is compensable.³²⁰ Though both countries have acknowledged the historical, cultural, and religious importance of the Indians' rights to hunt and fish,³²¹ the courts of both have determined that religious needs and differences may not always insulate the Indians from regulation.³²²

The differences in the treatment of Indian hunting and fishing rights in Canada and the United States may owe as much to the different historical patterns of settlement, political authority, and relationships with the natives as to the unique constitutional protection given native rights by section 35 of the 1982 Constitution Act. The importance of section 35 cannot be overstated; its recognition of aboriginal and treaty rights is clearly a major step forward for Native Canadians. But geography, population density, settlement patterns, and the fact that white contact with many Canadian Natives is relatively recent, have played significant roles in shaping the white-native relationship. While Canada occupies an area somewhat larger than the United States, approximately 3,852,000 square miles as compared to approximately 3,623,000 miles, the U.S. population is roughly ten times larger, 225-250 million as compared to approximately 25 million people.³²³ Moreover, the population in the United States settled and dispersed earlier and far more evenly throughout the country, while the Canadian population still clusters along the U.S.-Canadian border and along Canada's south-eastern coast.³²⁴

319. See *supra* notes 108-24, and accompanying text.

320. See *supra* notes 20-22, and accompanying text.

321. See, e.g., note 75, and accompanying text.

322. See *United States v. Dion*, 106 S. Ct. 2216 (1986), *supra* notes 202-10, and accompanying text; see also *Jack and Charlie v. The Queen*, 2 S.C.R. 332 (1985), *supra* notes 261-64, and accompanying text.

323. HAMMOND DISCOVERY WORLD ATLAS (Hammond Inc. 1988).

324. *Id.*

As in the United States,³²⁵ the Canadian government's relationship with the Indians has proceeded in stages.³²⁶ But these stages are of much more recent origin and of a more linear character than the vacillation in U.S. policy.³²⁷ The first period, beginning with confederation, lasted approximately 100 years. During this period, government policy was founded on judicial interpretation of section 91 (24) of the BNA Act of 1867.³²⁸ Under section 91 (24), the Dominion government took on the traditional and exclusive role of administering relations with the Indians and their lands, assumed the obligations of the Colonial government for administering existing treaties and reserves, and negotiated new treaties.³²⁹ The second stage, beginning in the 1960s, was rapid and unstable, a time when "[p]olicy developments . . . were influenced by Canadian court decisions on Indian and Inuit land claims, by increased activity of aboriginal political associations, by intensified demands for aboriginal self-government and aboriginal rights, and by pressures from various Indian band councils for social and economic improvements."³³⁰ The third stage dates to the 1982 Constitution Act,³³¹ and continues to be influenced by the concerns articulated in the 1960s and 1970s, "but the forum for resolving these issues has been expanded from the courts and the bureaucracy to include the constitutional conferences."³³²

The impact of section 35 of the Constitution Act of 1982 has, in one commentator's view, "altered dramatically and perhaps irreversibly . . ." the political and legal landscape in Canada.³³³ As the editors of *Quest for Justice* note:

If there is a watershed in government policy toward aboriginal peoples it is represented by the proclamation of the Constitution Act, 1982. The significance of that event lies not so much in any major shift in government policy, but rather in the fact that the constitution placed aboriginal peoples on a new footing in their relationship to the Canadian government.³³⁴

325. See *supra* notes 125-29, and accompanying text.

326. Bradford Morse, *Government Obligations, Aboriginal Peoples And Section 91(24) Of The Constitution Act, 1867*, in *ABORIGINAL PEOPLES AND GOVERNMENT RESPONSIBILITY*, *supra* note 28, at 64-80.

327. *QUEST FOR JUSTICE*, *supra* note 28, at 4.

328. Morse, *supra* note 325, at 64.

329. *Id.* at 64-65.

330. *QUEST FOR JUSTICE*, *supra* note 28, at 4-5.

331. Morse, *supra* note 325, at 74.

332. *QUEST FOR JUSTICE*, *supra* note 28, at 5.

333. Morse, *supra* note 325, at 74.

334. *QUEST FOR JUSTICE*, *supra* note 28, at 13-14.

In contrast to the situation in the United States, where continuing aboriginal rights play less of a role and where most tribes have some form of agreement with the government,³³⁵ many of the tribes in Canada, particularly in the Western and Northern Provinces and Territories, have no such treaties.³³⁶ The Canadian government, by virtue of a more recent history in dealing with the Indians, by virtue of the existence of fewer treaty-status tribes, and by virtue of constitutional enactment (section 35), now has an opportunity to make significant strides in preserving the cultural identity of its native peoples, as well as their rights to hunt and fish as their economic, religious, and cultural needs dictate. Canada has an opportunity to create flexible options for native-government relations, and in that process possibly to provide lessons for the United States. In the words of the *Sparrow* Court:

The constitutional recognition afforded by the [Section 35] provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal [or treaty] right protected under Section 35(1).³³⁷

The Canadian government has the responsibility and opportunity to protect Indian societies and a way of life which has been handed down through many generations in North America. The constitutional protections now afforded aboriginal and treaty rights in Canada will protect and encourage the survival of unique socio-cultural traditions, religious beliefs, and life practices. Moreover, the native tradition has much to teach those reared in the Euro-American or Judeo-Christian traditions about the human relationship with the natural environment.

Many native societies in North America live, as David Case has described, in a subsistence economy.³³⁸ To the natives, subsistence

335. WILKINSON, *supra* note 78, at 7-8.

336. For example, there is no treaty with the Eskimos, the major native group occupying the North West Territories. *Regina v. Koonunguak*, 45 W.W.R. 282, 302 (1963). See also Johnston, *supra* note 60, at 31. Regarding British Columbia, see Blumm, *supra* note 62, at 18.

337. *Sparrow v. The Queen*, 3 Can. Native L. Rptr. 160, 181 (1990).

338. David S. Case, *Subsistence And Self-Determination: Can Alaska Natives Have A More Effective Voice?*, 60 U.COLO. L. REV. 1009 (1989).

does not mean a marginal way of life, but rather encompasses a lifestyle that symbolizes a life based upon "unique hunting and fishing rights as well as the complex web of cultural practices, social relationships, and economic rewards associated with those rights."³³⁹

The process of integrating the native lifestyle and worldview with that of the dominant culture in the United States and Canada is likely to be complex. But the Canadian experience may provide lessons for policy makers in the United States.

In the 1970s, Canada began negotiations with various native peoples to settle outstanding aboriginal rights claims.³⁴⁰ Three "comprehensive lands claims settlements" were completed by 1989, and a fourth should be completed in 1991.³⁴¹ One commentator has called these comprehensive agreements "comanagement regimes," whereby, "public authorities share power with indigenous user groups" as a means of resolving conflicts between what have been characterized as 'state' and 'indigenous' systems of wildlife management."³⁴² Such state systems traditionally rely on scientific research to formulate written management rules administered by government bureaucrats, wherein "the people who do the research and develop and enforce the regulations are organizationally segregated from each other."³⁴³ These state systems sharply contrast with native indigenous systems where, "research and management of the resource are organically connected to the act of harvesting and enforcement is largely a matter of adherence to community values."³⁴⁴ In other words, as described earlier in this article, state systems of resource management perpetuate the separateness of humans from the natural environment, while native management systems are grounded in the inclusion of humans within the natural world.³⁴⁵

The scope of this article does not permit extensive discussion of the various comprehensive lands claim settlement agreements in

339. *Id.*

340. Asch, *supra* note 94, at 205.

341. *Id.* The three completed comprehensive claims settlement agreements are the James Bay Agreement with the Cree and Inuit of Quebec (1975), the Northwest Quebec Agreement with the Naskapi (1978), and the Western Arctic Agreement with the Inuvialuit People (1984). The fourth claim, the Dene-Metis Agreement to settle claims in the Mackenzie River Valley, was signed in principal in 1989. *Id.*

342. Case, *supra* note 337, at 1012.

343. *Id.*

344. *Id.*

345. *See supra* notes 1-5, 61-74.

Canada.³⁴⁶ Nor does it permit discussion of similar, but less comprehensive wildlife management regimes established between the United States government and Alaskan Natives.³⁴⁷ However, these management regimes document the possibilities for including the native worldview to govern the use and preservation of common natural resources. These comanagement regimes are by no means perfect. For example, in each of the Canadian land claims settlement agreements, the Wildlife and Harvesting Agreement clauses are written in legal terms that render "them suspect with respect to aboriginal concepts and interests."³⁴⁸ Specifically, in each agreement, wildlife and other resources are defined in Euro-North American property law terms that contrast with Indian views of "property ownership."³⁴⁹ These comprehensive settlement agreements do, however, represent a significant step in the direction of achieving truly cooperative resource management.

Providing North American Indian peoples with an effective role in managing their affairs, particularly with respect to the wildlife and other resources they depend on for physical and cultural survival, ought to be the goal of the governments of Canada and the United States, and would serve the purpose of the fiduciary relationship between the native peoples and their sovereign governments. Both cultures, native and non-native, can learn from each other.³⁵⁰ Moreover, to the extent that government policy preserves traditional native hunting and fishing rights, that policy will promote the continuing viability of those cultures, rather than their destruction.³⁵¹ Typically, as well, policies which insure the survival of native economic, cultural, and religious traditions, will also be effective resource conservation policies.³⁵² In fashioning those policies through legislation and regulation, (especially in comanagement regimes), attention ought to be paid to interpreting native rights without undue reliance on Euro-North American, common law

346. See generally QUEST FOR JUSTICE, *supra* note 28, for a further discussion of aboriginal rights.

347. See Case, *supra* note 337, at 1015-32.

348. Asch, *supra* note 94, at 206.

349. *Id.* at 208-11. See note 94 *supra* for an explanation of the conflicting interpretations of property rights in wild animals.

350. Case, *supra* note 337, at 1030-32.

351. See Pentney, *supra* note 27, at 258; Johnston, *supra* note 60, at 32; Blumm, *supra* note 62, at 2; Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 664-65 (1979); and Sparrow v. The Queen, 3 Can. Native L. Rptr. 160, 175 (1990).

352. Case, *supra* note 337, at 1013; and Sparrow, 3 Can. Native L. Rptr. at 183.

conceptions of property rights.³⁵³

Finally, it is in our interest, native and non-native alike, to resolve these issues with sensitivity to the perspective of North American Indian peoples. "In ways that we may not fully recognize or appreciate, . . . [Native North Americans] represent our society's only deep historical links to the land, consolidated over millenia. If their land is now our land as well, their relationship with that land is particularly worthy of understanding and respect."³⁵⁴

353. *Sparrow* at 182.

354. Slattery, *supra* note 19, at 783.

