



The challenge and the promise of indigenous peoples' fishing rights—from dependency to agency[☆]

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Abstract

Access to and use of natural resources as a cornerstone in sustaining indigenous cultures has recently obtained considerable international attention. Access to marine resources has become a key issue for many aboriginal peoples struggling to move from dependency on the nation state to self-determining agency. This essay describes and compares recent developments respecting Eastern Canadian Mi'kmaq and North Norwegian Saami initiatives to achieve recognition and realization of their aboriginal entitlements. Core characteristics of the Canadian and Norwegian nation state responses to these initiatives are outlined and discussed, with an emphasis on the implications of aboriginal entitlements for the present 'privilege allocation' premise and paternalistic character of fisheries management systems. The essay concludes with a discussion of the potentials for an alliance between coastal zone non-indigenous peoples and indigenous peoples for the purpose of developing an alternative approach to fisheries management that will enhance local agency in and the ecological sustainability of fisheries livelihoods. © 2001 Elsevier Science Ltd. All rights reserved.

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The Saami Parliament is of the opinion that Saami fishers have an old customary right and have a right according to international law to their rightful share of fish resources within the Saami territories (Berit Ranveig Nilssen, Member, Saami Parliament, Saami Parliament fisheries seminar, Karasjok, February 21, 2001.)

The UN has asked Canada to ensure that First Nations have an adequate resource base to support our own means of subsistence and to provide for our self-sufficiency. It has also warned that extinguishments or conversion of our aboriginal rights is a

violation of international law (Matthew Coon Come [1], National Chief, Assembly of First Nations, January 31, 2001).

1. Introduction

Contemporary fisheries management systems throughout the globe fundamentally embody and express nation state proprietorial claims and regulatory authority respecting territorial coastal waters and, since 1977, the 200 mile Economic Management Zone (EMZ). Many nation-states have increased their exercise of proprietorial claim and authority over the last 30 years or so through development and implementation of fisheries management systems that, in essence, determine, allocate and regulate access to and participation in fisheries through devices such as licenses and quotas. These management systems treat access and participation as regulated 'privileges' defined and allocated by the state proprietor to fishers and fishing companies. In short, fisheries management for the nation state proprietor has become, in essence, the practice of defining and regulating the allocation of privileges.

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Many fishers have come to comply with and to work within this practice in so far as their conditions of access and economic advantage have been benefited through receipt of regulated license and/or quota 'privileges'. Notably, the expansion of and refinements in nation state proprietorship are co-terminus with the over exploitation of marine environments as well as the collapse or near collapse of key marine resources [2–8].

Lately, the nation-states' proprietorial claims and regulatory authority are being challenged by the legal and political recognition that some indigenous peoples have particular 'rights' respecting access to and participation in fisheries ([9]; Rio Declaration, Agenda 21—1992). For many indigenous peoples, the recognition of fishing rights represents an affirmation of their unique political status within the nation-state as well as a material opportunity that they can mobilise to improve their commonly abysmal employment, income and social conditions (cf. [10–19]).¹ For non-aboriginal fishers and state fisheries managers, affirmation and expression of aboriginal commercial fishing rights raises many concerns. These concerns range from the ways and means to accommodate new entrants, through the implications of increased fishing pressure on usually diminished resources, to the impact of indigenous participation on incomes and the economic values of fishing enterprises, particularly the market values of allocated license and quota privileges.

Indeed, many non-indigenous fishers often greet the news of aboriginal fishing entitlements with howls of protest, demonstrations, threats, and predictions of dire outcomes. This certainly was the case in Eastern Canada following the recent Supreme Court of Canada 'Marshall' ruling (September 17, 1999) which affirmed that Atlantic Canada's indigenous peoples hold a commercial fisheries treaty right, and in North Norway following the proposal by the Saami Parliament, at least as originally expressed, for the creation of a "Saami fisheries zone". Since September 1999, the Canadian government's Department of Fisheries and Oceans (DFO) has been scrambling to develop an effective management response to the 'Marshall' ruling, thus far without much success. In Norway, fisheries authorities have expressed both reluctance and opposition to the idea of a special assigned zone with certain rights and privileges reserved for fishers of Saami origin.

The difficulties in accommodating indigenous fishing rights within fisheries management systems predicated on nation-state proprietorship and regulation of 'privileges' are legion. In this essay, we examine a number of these difficulties through a comparative case

study of developments associated with Eastern Canada's Mi'kmaq First Nation and Norway's Saami. Of particular interest to us are the implications of aboriginal fishing rights for the nation-states' proprietorial claim as the fisheries management authority and as the final arbitrator respecting access to and participation in fisheries. As Sharp has observed respecting the Maori indigenous claims experiences in New Zealand, "The fundamental issues between Maori and the Crown and Maori and Pakenha...are issues of agency...and the issues at stake were *precisely* [original] as to who had the right to act, and in acting to wield authority and to dispose of resources" [15, p. 293]. Indeed, much of nation states' struggles with indigenous peoples' rights is the failure to recognise and to accommodate indigenous peoples' desire to employ their rights with regard to self-defined prerogatives and needs, i.e., to act as self-directing agents. All too commonly states approach indigenous peoples and their entitlements with the mindsets and institutional tools of paternalistic providers, expecting 'their' indigenous peoples to be content with and appeased through receiving state-mediated 'largesse'. For their part, aboriginal peoples pursue entitlements as the legal-institutional means through which they can affirm identity, establish political-legal status, and achieve agency in relations with the nation state and non-aboriginal peoples. These qualities reside at the heart of the Mi'kmaq and Saami experiences discussed here.

We also think that the establishment of aboriginal fishing rights represents an opportunity for non-aboriginal coastal zone fishers and fishing communities to assess and to recast, in partnership with indigenous peoples, coastal zone fisheries management. Such an alliance may even enable non-aboriginal small boat, community-based, fishers to re-establish and affirm their access and participation entitlements in this age of state determined and managed privileges to fish. As Stevens argues, "Indigenous peoples can be powerful allies in conservation efforts" [16, p. 3]. Further, we suspect indigenous-non-indigenous alliances will be critical in the further development of local agency in fisheries and coastal zone management.

The essay opens with a review of key moments in the development of Mi'kmaq and Saami fishing entitlements. This is followed by a discussion of the implications of these entitlements for fisheries management systems predicated on the notion that the nation-state is the unquestioned proprietor. Here we specifically explore the implications of aboriginal fishing entitlements for Norwegian and Canadian fisheries management systems. The essay closes with a discussion of the opportunities represented in aboriginal fishing rights for rethinking and recasting fisheries management, particularly within and for small boat, coastal zone and community settings.

¹"Future challenges for the Saami Parliament." Talk manuscript. Saami Parliament fisheries seminar, Karasjok, February 21, 2001.

2. Mi'kmaq and Saami fishing rights

2.1. The Mi'kmaq case

My community has suffered from extreme unemployment for a very long time. The Marshall decision and the associated access to the commercial fishery has [sic] offered us hope. We share this fishery and we are concerned about its future. But never forget that we have a treaty right that we will not compromise for the sake of greed... (Chief Deborah Robinson, Acadia Mi'kmaq band, February 17, 2001)²

On September 17, 1999 the Supreme Court of Canada issued a judgement that has shaken the very foundations of Canadian commercial fisheries and the fisheries management system. The Court ruled that Donald Marshall Jr., a status Mi'kmaq First Nations aboriginal, held a treaty right to engage in commercial fishing (*R. v. Marshall* 1999). Previous Supreme Court judgements have affirmed First Nations treaty rights to fish for subsistence and ceremonial purposes (*R. v. Sparrow* 1990, *R. v. Badger* 1996).³ Unlike these, the 'Marshall' ruling raises fundamental questions respecting the legal authority and management entitlement of the state to regulate, within the existing fisheries management system, First Nations' participation in commercial fisheries.⁴

² 'Call to cancel licenses frustrates band', *The Chronicle-Herald*, February 17, 2001, p. A6.

³ These decisions can be viewed in their entirety by following the links at <http://www.lexum.umontreal.ca/csc-scc/en/index>.

⁴ On November 17, 1999 the Supreme Court of Canada, in denying a request by the West Nova Fishermen's Coalition for a stay of the Marshall judgement pending a rehearing of the case, availed itself of the opportunity to issue what is now referred to as the 'clarification' respecting the Marshall ruling. This represented a rather extraordinary and unprecedented intervention by the Court in what had become, following the original decision, an on-the-ground conflict between the federal government, non-aboriginal fishers and aboriginal leadership and fishers respecting fisheries management authority and the rules framing aboriginal participation in the commercial fisheries, particularly the high value small boat lobster fisheries. Notably, the Court's clarification emphatically and repeatedly underscored the judgement that the Crown bears the responsibility for justifying its' regulatory system respecting aboriginal participation. In the absence of appropriate justification, the simple imposition of an existing regulatory system would represent an infringement on and impediment to the ability of aboriginals to exercise their treaty rights (cf. *R. v. Marshall* at paras. 14, 15, 18, 19, 21, 22, 26). Notably, this stipulation essentially has been ignored by government and non-native leadership. All have simply insisted that aboriginal participation in the commercial fisheries occur within the existing regulatory system. Contrary to this position, indigenous leaders argue that, in the absence of justifications, their treaty rights are not subject to exercise within the existing management systems. They insist that aboriginal people will develop their own regulatory systems, and that their prerogative to do so is rooted in their treaty rights and their associated rights of self-governance as independent nations. It is worth noting that the legal status of the Court's so-called 'clarification', relative to that of the original

In August 1993, a couple of Canada's DFO fisheries officers apprehended and arrested Donald Marshall Jr. for fishing eels without a license.⁵ Marshall protested that he was simply exercising his treaty right to fish for a living. This event began a 6 year process by the Mi'kmaq First Nation of seeking legal judgement on provisions within their treaties. Of particular importance to them was receipt of a judgement respecting whether or not their treaties entitled them to fish commercially. After wending its way through the Canadian justice system, the case was finally presented before the Canadian Supreme Court, the nation's final legal arbitrators. On September 17, 1999 the Supreme Court issued a judgement affirming that provisions within the 1760–1761 *Treaties of Peace and Friendship*,⁶ negotiated between leaders of the Mi'kmaq, Maliseet, Passamaquoddy First Nations and representatives of Imperial Britain, provided these First Nations peoples with the right to fish for commercial purposes, i.e., to catch and sell marine resources in order to make a living. Donald Marshall Jr. was acquitted on all charges, and his people achieved legal affirmation of yet another critical treaty-based right.

It needs to be noted that for many Canadian First Nations peoples treaties are the foundation and the embodiment of their nationhood as well as the formal basis for their unique political and social position within the Canadian confederation. For them, the treaties concretely represent and acknowledge the 'fact' of their nationhood and of their identity as distinct peoples [10,13,19]. Critically, in defining and concretising their nationhood, treaties for First Nations assure that they will not and cannot be treated simply as an ethnic community within a multiethnic Canada. This is recognised explicitly through the entrenched statements respecting First Nations peoples and their rights that are to be found within the Canadian Constitution (1982). First Nations insist that the leadership and elders negotiating treaty terms and conditions were primarily concerned that these qualities be entrenched and affirmed for their peoples. It is also held that the elders and leaders were also concerned that their nations' and peoples' interests be protected and advanced through explicit rights and privileges entrenched within treaties that specified each signatories responsibilities, obligations and benefits. In return, First Nations surrendered legal claim to vast territories that were then made

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judgement, is at the moment unclear. Further litigation will most likely be required to sort this matter out.

⁵ The Mi'kmaq peoples occupied most of the Maritime Canadian woodlands at the time of European contact. They were hunters-gatherers with a mode of existence well tuned to available resource opportunities. Commonly, the Mi'kmaq spent the winter in extended family/kin groups while gathering into much larger social collectives during the late spring-early fall period. These gatherings formed on the

available for European colonisation. A basic consequence for them was agreement to alter their way of life and culture while also accepting settlement on reservations.

Notably, the federal government has a history of suppressing, violating, ignoring and minimising treaty rights. In fact, until recently the Canadian Government

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coasts and estuaries. At this time, the Mi'kmaq sustained themselves through intensive use of the, then, abundant marine resources.

⁶Only the English, among all of the European Imperial powers contesting for a piece of the Americas, developed the policy and practice of negotiating and signing treaties with various First Nations peoples. It would be an error of mammoth scale to assume that this 'innovation' arose as a consequence of some sort of early 18th century English moral enlightenment and concern for aboriginal peoples' human condition. Notably, the English pursued this as a policy mainly in British North America and New Zealand, places where indigenous peoples posed considerable resistance to Imperial aims. This was not their practice, for example, when dealing with the aboriginal peoples of the West Indies, Australia, and Sub-Saharan Africa. In fact, early in their North American adventures the English more or less followed the European script of using aboriginal peoples when advantageous; but, as often as not, attempting to remove them from the picture through the application of systematic terror and genocide. Of course, aboriginal peoples tended to resist this; and, since they were still at this time a military force of consequence, the English and their New English colonists found themselves mired in a cycle of costly and destabilizing 'Indian Wars'. This situation was further confounded for the English by their more or less continual military conflict with the French and their First Nations allies. By the mid-17th century, the Imperial French had well-established and settled colonies in 'Acadia' (the Eastern Canadian Maritime Provinces) and in the area of the St. Lawrence River Valley (Quebec). The Imperial French never negotiated formal agreements with aboriginal peoples. Their approach was to develop trade and military alliances while introducing the 'humanizing' benefits of Catholicism and French culture. By the early 18th century, the Mi'kmaq were long-standing allies and trading partners of the Imperial French throughout Acadia. These First Nations peoples had generally adopted Catholicism and were often inter-married with French settlers. But, with French settlements still small in scale and widely dispersed, the Mi'kmaq remained in 'de facto' possession of the land and were still a force with which to be reckoned as the 18th century English–French Imperial struggles intensified. The Treaties of Peace and Friendship are examples of a tactical innovation developed by the 18th century Imperial British, initially in the 13 Colonies, as an efficient and effective means for militarily neutralizing Eastern North American Native Peoples in the context of their on-going imperial struggles with the French for possession of the continent and control of trade. Treaties were also considered by the English as an effective means for opening up land for colonisation and settlement. Beginning with the surrender of Acadia by the French to the English in 1711, an entire series of these treaties were negotiated and signed between the Mi'kmaq and the English. Re-engagement of English–French hostilities often drew in the Mi'kmaq, thereby nullifying any existing treaty agreements. In the closing years of the English–French imperial struggles, the Mi'kmaq negotiated and signed, with the English, the final Peace and Friendship treaties. Provisions within these 1760 and 1761 treaties were the basis of the Mi'kmaq appeal to the Supreme Court of Canada and the Court's 'Marshall' decision. Jurisdiction over and responsibility for all 'Indian Affairs', including treaty terms and conditions, were transferred through the British North American Act (1867) from the British Crown to the newly constituted Canadian federal government.

had legally prohibited First Nations from mounting court challenges respecting treaties and treaty rights. None the less, a series of cases through the last 30–40 years as well as changes in the judiciary's moral, social and legal interpretative context have resulted in treaty right clarifications and affirmations, including 'modernisation' of interpretations with respect to the contemporary meaning of benefits, obligations and rights. Notably, the process of legal affirmation is one that First Nations have been forced to pursue by federal and provincial government resistance to and violations of treaty rights. The Marshall case was yet another moment in this track record. The federal government consistently refused to discuss, let alone negotiate, with the Mi'kmaq respecting Mi'kmaq claims of a treaty right permitting their participation in the commercial fisheries. This intransigence left the Mi'kmaq with no alternative but to mount the court challenge. Until very recently the federal policy respecting First Nations has been to foster social assimilation, to remove treaty rights where and when possible, and to 'modernise native peoples' through measures such as forced participation in residential school education. Further, the federal Indian Act, first passed into law in the mid-1870s, specifies the terms and conditions whereby Natives qualify for 'status' under the terms of treaties ([20]).⁷ This was accomplished without any consultation or engagement with First Nations. In short, the federal government has fostered a deeply deterministic 'patron' relation with Canada's First Nations wherein the government directs and controls practically every core aspect of 'status' aboriginal existence.

Over the last 30 years or so Canada's First Nations have been in a struggle with the federal government to transform the basic character of this relationship. Increasingly First Nations have militated for the room within the Canadian confederation to direct their own affairs; that is, to claim agency. Litigation has been a key element in this process, employed as the means to clarify and affirm, within Canadian jurisprudence, the scope and obligations of their treaty rights. In the case of Donald Marshall Jr., the Supreme Court of Canada was asked to overturn his lower court illegal fishing conviction on the basis that provisions in the 1760–1761 'Treaties of Peace and Friendship' assured a Mi'kmaq treaty right to engage in fishing for commer-

⁷Through narrowing the terms of qualification as well as through active assimilationist campaigns, the federal government has created an immense disenfranchised population, the so-called 'non-status' Indian. These persons currently have no rights and receive no special consideration with respect to existing treaties. These peoples have come to constitute the core of displaced Natives within the Canadian urban landscape, disproportionately marginalized, impoverished with many left with little else but the despair of substance abuse, criminality and the sex trade.

cial purposes. In a 5 to 2 judgement, the Supreme Court ruled:

This appeal should be allowed because nothing less would uphold the honour and the integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship, as best the content of these treaty promises can now be ascertained... The trade arrangement must be interpreted in a manner that gives meaning and substance to the oral promises made by the Crown during the treaty negotiations. The promise of access to "necessaries" through trade in wildlife was the key point... ([56], p. 2).

Having affirmed the Mi'kmaq's treaty right to trade (sell) wildlife (including fish), the Court provided the following specification.

The accused's treaty rights are limited to securing "necessaries" (which should be construed in the modern context as equivalent to a moderate livelihood), and do not extend to open-ended accumulation of wealth... What is contemplated is not a right to trade generally for economic gain, but rather a right to trade for necessities ([56], p. 3).

In the Court's judgement, the Mi'kmaq right to participate in capturing wildlife for the purposes of trade is explicitly limited to the economic outcome of satisfying livelihood needs. The treaty right does not provide for participation in the commercial exploitation of wildlife on a scale that would enable wealth accumulation. Notably, the Court did not provide any direction respecting how to distinguish wealth accumulation from livelihood intended commercial activity. But, the Court is clear that the moderate livelihood limit provides the basis for regulating Mi'kmaq commercial exploitation.

The treaty right is a regulated right and can be contained by regulation within its proper limits. Catch limits that could reasonably be expected to provide a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. Such regulations would accommodate the treaty right and would not constitute an infringement... ([56], p. 3).

While clear on the fact that the right can be regulated, the judgement notes explicitly that existing regulatory approaches such as the Canadian fisheries management system should not be simply assumed as the framework within which the right can be limited and expressed.

The accused caught and sold eels to support himself and his wife. His treaty right to fish and trade for sustenance was exercisable only at the absolute

discretion of the Minister [Minister of the Crown, Department of Fisheries and Oceans]. Accordingly, the close [sic] season and the imposition of a discretionary licensing system would, if enforced, interfere with the accused's treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance. In absence of any justification of the regulatory provision, the accused is entitled to an acquittal ([56], p. 3).

In the Court's opinion, the right is to be regulated through some unspecified mechanism of establishing a material basis for the determination of a moderate livelihood. Existing fisheries regulations are clearly characterized, in themselves, as an interference with and infringement on the Mi'kmaq's treaty right.

Critically, the Court identified the right as a collective, not individual, right. That is, the ruling provides a right under treaty for the entire Mi'kmaq people.⁸ The Court counselled the federal government and the Mi'kmaq to enter into negotiations that would specify the terms and conditions within which the right would be exercised consistent with the moderate livelihood provision ([56], para 22, 23). Needless to say, these attributes of the ruling have challenged the jurisdictional and regulatory authority, as applied to the Mi'kmaq, of the entire Canadian government fisheries management system.

Confrontations, inflammatory accusations, and some on-the-water conflict have characterized developments since the September 1999 judgement. In light of the ensuing events, apparently DFO was entirely unprepared for Marshall's acquittal and the affirmation of the treaty right. Much to the dismay of many non-aboriginal harvesters, Mi'kmaq immediately made plans to begin fishing commercially, targeting the lucrative lobster fishery. Several boats set traps in a variety of Maritime Canada locations. Non-aboriginals threatened direct action to stop what was now being framed as a frontal assault on the conservation of sustainable lobster stocks and the basis of their livelihoods [21–23].⁹ DFO fisheries and Royal Canadian Mounted Police officers were engaged in keeping the sides separated as well as in seizing boats and gear, charging Mi'kmaq for fishing out

⁸ Non-status Mi'kmaq leadership, arguing that since the *Treaties of Peace and Friendship* were signed over 100 years before development of the *Indian Act*, insist that non-status Mi'kmaq now also have the treaty right to a moderate livelihood from commercial fishing [51]. Both the federal government and status Mi'kmaq leadership have resisted this interpretation.

⁹ Notably, the scale of Mi'kmaq participation in this fishery, in terms of both the number of traps being fished and the quantities of lobster landed, have amounted to well under 5% of all current non-aboriginal lobster fishing effort, i.e., thousands of traps as compared with hundreds of thousands of traps and thousands of kilograms of lobster as compared with hundreds of thousands of kilograms.

of season and without licenses, and arresting non-aboriginals for destroying Mi'kmaq fishing gear [24–29].

In an attempt to impose order on the situation, DFO developed a strategy of negotiating one year, interim arrangements with individual Mi'kmaq bands, committing \$150 million (Cdn.) to the process. In return for signing on, the bands were promised a specified number of licenses and equipped fishing boats, as well as other benefits such as access to fisheries-related training and education. In return for receiving these 'benefits' the Mi'kmaq bands were required to abide by the existing management system's rules and procedures. Although 30 of the 34 Maritime Canadian Mi'kmaq bands are reported to have signed interim arrangements covering the year 2000, on-the-water conflicts, boat and trap seizures, and illegal fishing charges garnered national and international attention with respect to the fishing activities of a couple of non-signatory bands, especially the Burnt Church band in New Brunswick and the Indian Brook band in Nova Scotia. Their leadership insisted that the Marshall decision enabled them to implement their own fisheries management system and that signing onto the interim arrangements might legally compromise the Mi'kmaq treaty right. For instance, Chief Reg Maloney of Indian Brook has asserted that the deals are little more than "...another flood of money drowning our treaty rights" [30, p. A4].

With the interim agreements set to expire in March 2001 coupled with the approach of the spring lobster season, the federal government through DFO is reported to have dedicated as much as \$500 million (Cdn) to support the development of 3–5 years longer term agreements with Mi'kmaq bands. As with the earlier agreement strategy, the explicit goal is to enable increased aboriginal participation within the commercial fisheries through license and quota buy-backs, boat and equipment purchases, and training. Once again, the Mi'kmaq in order to participate in these 'benefits' are required to abide by and to work within the existing fisheries management system. There is no denying that these resources are very seductive for generally resource poor Mi'kmaq bands. However, their leadership currently is taking a united position arguing that they want the federal government to negotiate fishing access with respect to a general agreement covering all Mi'kmaq bands, one that is an aspect of a broad-based renegotiation of treaty rights [31]. Mi'kmaq leadership is also concerned that participation in longer term fisheries only agreements will establish legal precedents compromising to the future interpretations of treaty rights and entitlements. As Chief Lawrence Paul has stated "We've been clear that the fishing agreements must not be viewed as defining treaty rights, but we are very worried Ottawa does not see it the same way...There's not even a mention of co-management" [32, p. A4].

Many non-Mi'kmaq fishers continue to experience these developments with dismay and concern. While seemingly pleased with the federal government's strategy of framing Mi'kmaq participation within the existing management system, the particular practice of accomplishing this through buying existing licenses and quotas from non-aboriginals and redistributing these to Mi'kmaq bands is increasingly viewed as unfair and destructive [33–35]. In its urgency to purchase licenses and quota for redistribution to the Mi'kmaq, DFO is reported to be offering grossly inflated prices, in the mid hundreds of thousands of dollars (Cdn), that are benefiting individual sellers but that are distorting local market values to the extent that accessing licenses and quotas is now well beyond the financial means of most non-aboriginals. Further, only the license or quota holders are benefiting from the buy-backs. Crew working on the effected boats are reported to be receiving little, if any, compensation or benefit. They are left without their livelihood, unless they can find a situation aboard one of the diminishing number of non-aboriginal boats [36,37]. While hopefully unintended by DFO, outcomes such as these have the potential to fuel social divisiveness and conflict within non-aboriginal coastal communities and families, let alone between Mi'kmaq and non-aboriginal fishers. As a consequence, it now appears that on-the-ground oppositional positions within the non-aboriginal fishing community are hardening and that the short-term prospects for Mi'kmaq and non-indigenous dialogue and alliances are rapidly diminishing [38,39,52].

2.1.1. *The Saami case*

The Saami Parliament proposed the foundation of a fisheries policy zone in Saami settlement areas. This is done in order to maintain and restore long-established rights in fisheries for the coastal Saami population. (Saami President Sven-Roald Nystø at the Saami Parliament fisheries seminar, Karasjok, February 21, 2001.)

Unlike the Mi'kmaq the Saami are not in a position to argue their case with reference to a special treaty. The legal issues involving the Saami relation to the Norwegian state have evolved gradually and are still in process. When Saami claims have been pursued legally with respect to fisheries rights, the reference has been to international law pertaining to ethnic and indigenous rights much more so than to Norwegian law. The year 1990, which in many ways was a turning point in Norwegian fisheries, brought the Saami interests in fisheries management on to the public agenda as never before, beginning a process with which we have yet to see the end.

In that year the coastal and fjord cod fishery also became subject, within Norwegian fisheries policies, to

individual quota management. The open access principle for that particular fishery, which was an important factor in the original Norwegian settlement and development of North Norway, was abolished. 1990 was a year of crisis. Never before had the Total Allowable Catch (TAC) been set so low. Indeed, the situation looked extremely gloomy. But there had been warning signals. In the previous year, 1989, the cod fishery was ordered stopped as early as April 18. The Fisheries Director concluded that this should not happen again. "Never more April 18!", he proclaimed. Until that time, the cod fisheries had been managed by means of a so-called maximum quota, where the regulation specifies that no more than 85% of the TAC could be harvested before September 1. By mid-April, however, this limit had already been reached, hence, the closure. This crisis was felt particularly by small-boat fishers in the northern fjords as their traditional cod fishery season had not even started by April 18. The Fisheries Director responded quickly. The year after he introduced the vessel quota system.

In 1990 no one questioned the need for strict and drastic harvesting regulations. Nevertheless, the way the quota system was designed created immediate controversy, and from one quarter the criticism was especially harsh. The newly established Saami Parliament claimed both that the quota system neglected Saami interests¹⁰ and that it was also in conflict with international law on minorities and indigenous peoples' rights. There is little doubt that this protest took the Norwegian government by surprise and that the protest could neither be overlooked nor simply dismissed. Implicit in Norwegian fisheries legislation is the principle that a fisher is a fisher regardless of ethnic origin. Saami interests and rights are not mentioned in any Norwegian law pertaining to the fishery, and the rights of Saami were until then rarely an issue in the fisheries management discourse. A demand for special treatment and protection of Saami fishers on the grounds that they were indigenous peoples was at that time unprecedented.

The Saami Parliament claimed that the 1990 vessel quota system discriminated against traditional Saami fisheries adaptations. Further, the Parliament regarded

the system as utterly unfair in so far as small boats with non-mobile technologies, which could not by any means be held responsible for the fisheries crisis, would be hardest hit in the regulatory system. The system divided fishers into two groups, depending on their historical fishing track record, as a way of determining their dependency on the cod fishery. One group, those who could document a certain activity level in the fisheries, obtained a guaranteed vessel quota while those who could not, primarily those with small boats and those combining fisheries with other employment activities such as small-scale farming, ended up on a competitive quota. This situated the latter with a less secure position within the commercial fisheries, while also providing them with much reduced fisheries-sourced income and earnings potential [40].

Most Saami fishers could not fulfil the strict requirements to obtain a vessel quota. Not only did they fish on a small scale basis, they also often combined fishing with other occupations, such as farming. The Saami Parliament referred in its formal complaint to the Fisheries Ministry to what occurred in two typical fisheries dependent Saami communes in Finnmark. In one, none of the 90 registered fishers obtained a vessel quota, in the other only one out of 70 had success. Those that did not receive a quota and thus had no guaranteed privilege to fish, were placed under the so-called maximum quota system. This quota was a far less profitable deal. In addition, and perhaps the most critical point from a Saami perspective, they achieved no guaranteed assurance to participate in the commercial fisheries, as the fishery could be stopped at any time regardless of whether fishers had been able to catch their share. In practice, this development further removed Saami fishers participatory privileges and rights in a fishery on which they could claim a long-standing dependency, despite the fact that fishing was rarely a full-time, all year activity as is more typical among Norwegian fishers residing on the outer coast. The Saami argument has only gained weight as the vessel-quota system over the years has led to a de facto transferable/tradeable system. When the vessels are sold the quota follows them, thus considerably inflating the price of buying into participation. By not qualifying for a vessel quota in the first place, Saami fishers were also in practice excluded from engaging in and benefiting from the profit-making attributes of the tradeable quota system.

In 1990, The Saami Parliament asked for more than marginal adjustments in the quota system. It also demanded a full clarification of Saami legal rights in fisheries. The Fisheries Ministry responded by assigning a law professor at the University of Oslo, Carsten Smith, to the task of examining Saami legal rights. Smith filed his report in the summer of 1990 (cf. [57]). This report has contributed considerably to the subsequent debates

¹⁰ The coastal Saami of Norway are a part of the Saami people, as a result of the historical processes, living in four countries—Norway, Sweden, Finland and Russia. The great majority of Saami live in Northern Norway and in the county of Finnmark (literally "the land of Finns—which is an old name for Saami). Besides reindeer pastoralism, small-scale fishing is the traditional occupation. More than 80% are employed in other more "modern" industries and occupations. No one knows the exact number of Saami, let alone of the coastal Saami. Their population has been estimated as somewhere between 50 and 100,000 persons, the majority living along the coast and fjords. The Saami Parliament was opened in 1987 in Karasjok, Finnmark. It has representation from all Saami groups in Norway. Vis-a-vis the Norwegian government, it has basically an advisory status (for more on Saami fisheries, see [55]).

and reforms, and his main conclusions must therefore be presented here in some detail.

Smith began by discussing the UN declaration of civil and political rights, paragraph 27, concerning minority populations. He concluded that the Saami clearly can be defined as a minority population under this declaration, and that their indigenous culture must be protected. Importantly, he stressed that the “material foundation” for Saami way of life must be included in the concept of culture. Hence, their traditional industries must be protected, in addition to their communities, language and art forms. Notably, this argument had already been accepted by the Norwegian Parliament. This is evident in the addition of a new paragraph on Saami rights to the Constitution (paragraph 110a) which states that: “It rests with the Government to arrange the conditions so that the Saami people may ensure and develop their Language, their Culture and their Social Life.” Adding greater specificity, Smith contended that, even though fishing is not a unique Saami industry as is the case with reindeer pastoralism, fishing is nevertheless a traditional Saami occupation. Therefore it followed that the government has a legal duty to make sure that Saami fisheries are sustained, and that Saami fisheries adaptations should not be eliminated as a consequence of management measures.

Smith also found support for this conclusion in the International Labour Organisation (ILO) convention no. 169 regarding indigenous peoples which Norway was first among nations to ratify.¹¹ He acknowledged that non-Saami Norwegian fishers may legitimately claim that the fishery is part of their culture and that they are dependent as well on the fishery for their livelihood. Despite this, he argued that the same legal obligations of the government vis-à-vis the Saami do not apply to the rest of Norwegian fishers. Regulatory and management systems that ostensibly treat Norwegian and Saami fishers equally can not always be defended: If “positive discrimination”, i.e. preferential treatment, of Saami fishers is necessary to sustain Saami fisheries, then the government must do it. Saami fishers must then be granted privileges that their Norwegian counterparts may not enjoy. For instance, if necessary the government must provide Saami fishers with a relatively higher quota than Norwegian fishers.” This, according to Smith, may even be essential in consideration of sustaining the critical state of Saami culture in coastal areas.

Of all Smith’s statements, the one on positive discrimination has been the most controversial. Nota-

bly, he maintained that discrimination on an individual basis would neither be preferable nor realistic. Rather, positive discrimination should be based on residence so that Saami communities rather than Saami individuals should be the beneficiaries of special status and treatment. Notably, Norwegians and Finns (in Norway named *kven*) also residing in Saami dominated fishing communities would benefit from these measures. Smith assumed that this principle would be accepted more readily among non-indigenous fishers than systems of individually-referenced positive discrimination.

The Norwegian government implemented some of Carsten Smith’s recommendations immediately. For instance, the Saami Parliament was promptly given a seat in the national Fisheries Regulatory Council. This body provides advice to the Ministry on matters of fisheries management. On the issue of positive discrimination, however, the general attitude was much less welcoming. As might be anticipated, the Saami Parliament received the Smith report with great enthusiasm, and asked for the introduction of what was termed a “Saami Fisheries Zone” in parts of North Norway. This approach was offered by the Saami as an effective means whereby the Smith proposal for positive discrimination could be actualised with respect to support for communities rather than individuals. In the statement (Issue 33, 1992) the Saami Parliament explained.

With the demand of a distinct fisheries zone, the meaning is a collective right to fish in a commons open for all who reside within a geographically demarcated area. Given the government regulations that are necessary to sustain the resource base, local areas should obtain more responsibility in the management of their own resources. In such management institutions we see it as important that the Saami people, through the Saami Parliament, should be represented in line with those political institutions in which the local populations otherwise are represented. (Our translation)

The Smith report and the Saami Parliament left questions unanswered. Although the basic principles were thoroughly discussed, the more detailed management implications needed further elaboration. The Saami Parliament and the Fisheries Ministry each appointed one committee tasked to examine these issues. The Saami committee [41] had its report ready in January 1995, and launched quite radical ideas. The committee described the Saami fisheries zone proposal enthusiastically. The committee strongly believed in the symbolic value of the zone, and that it would trigger greater interest for Saami issues in general. Among its specific recommendations, this committee proposed that within the zone the fishers should be guaranteed a fixed percentage of the Norwegian TAC; that all mobile gear should be banned from the zone; that the zone should

¹¹ Although quick in ratifying the ILO convention, Norway has been slow in making it national law. This has not yet happened, although the convention frequently serves as a reference in court rulings respecting the Saami. Notably, the other Nordic countries, Sweden and Finland, with Saami populations have yet to ratify. Canada has not yet ratified the ILO convention.

extend four nautical miles from shore; and, that the zone should include the counties of Finnmark, North-Troms, and certain communes in Nordland. The committee was proposing that the Saami fisheries zone would encompass a substantial area of North Norway and Norwegian ocean territory.

The proposals of the government committee were, not surprisingly, far more cautious. The report was submitted in 1997, 5 years after the committee had been formed and tasked [42]. This report recognised that Saami interests in fisheries had lost ground partly due to the quota system. On the issue of the Saami fisheries zone, only a minority of the members indicated support for the concept while the majority claimed they found the idea to be too vague. Furthermore, the committee expressed the fear that a ban on mobile gear would in fact hurt several Saami fishing communities as some employed this kind of fishing technology.

Meanwhile another, but unrelated, committee tasked with the responsibility of examining Saami rights had been in operation for more than a decade. This committee also produced a report that contained some consideration of the fisheries issues [43]. The committee repeated what has been confirmed in several court cases. That is, on the ocean the principle of no-one's property reigns, even though it can be proven historically that in some areas Saami enjoyed the privilege of first use. It claimed that the no-one's property principle has wide support among Saami. This committee regarded the proposal to establish a Saami fisheries zone positively. Thus, it placed itself in between the two other committees that had been established explicitly for the purpose of examining the Saami fisheries issues. Of importance is what this committee did not mention. To begin with, it only discussed the notion of a fisheries zone without any explicit association of the word Saami in relation to the proposal. Further, this committee's report did not elaborate the issue of a Saami commons right, which was part of the Saami Parliament's and its fisheries committee's vision.

The Saami Parliament discussed these reports in March 1998, and launched the concept of a "Fisheries Policy Zone for Saami Areas". It also proposed that experiments respecting the development and effectiveness of local co-management systems be undertaken in some Saami fjords on a 10 year basis, followed up by research. The Fisheries Ministry in a white paper on "Perspectives on the Development of the Norwegian Fishing Industry" (St.meld. No. 51, 1977–1998) responded to some of these recommendations. The language employed here was minimally cautious, if not intentionally vague. This simply reflected the controversial qualities in and sensitivities to the issue. In short, the Ministry acknowledged that local management systems may become required in the future, but it was not willing to support the principle of positive dis-

crimination with respect to geographical areas and ethnic groups. Rather, it preferred to make adjustments in the current quota system for small vessels and for people who combine fishing with other income generating activities. Thus, in 2001, the zone issue is still pending. In the Saami Parliament's 1997–2001 action plan the idea is less prominent. Instead, it defines a process for a more gradual development. The plan identifies three fjords in North Norway—the Tana fjord, the Lyngen fjord, the Tysfjord—that should be chosen as sites for local fisheries management experiments. So far, concrete actions have been taken only in the Tana fjord. The government's position respecting these experiments is, according to Ms. Ellen M. Bergli, the Deputy Minister of Fisheries, that they are "not negative", but that the Ministry still, as the point of departure, holds that the management of fisheries must remain a national responsibility. As to the question of a Saami fisheries zone, the Deputy Minister recently expressed the following perspective.

I am not ready today to give an answer to whether the Fisheries Ministry would work to establish a fisheries zone. But what I can say is that we in the ministry, and in the government, will examine whether a Saami fisheries zone is a suitable tool (February, 2001).

It is fair so say that the government here finds itself in a dilemma. To accommodate the demands of the Saami Parliament, the government would have to depart from what it regards as the founding principle of fisheries management in Norway, i.e., that fish are a national common property resource. The law makes no distinction between large migrating and small local stocks, the latter being of most importance to Saami fish harvesting. It is with reference to this basic principle that the Norwegian government has thus far based its insistence that the right to fish cannot be based on or defined by geographical residence, ethnicity, or, by implication, indigenous entitlement. Court cases such as the one argued in Salten Herredsrett in 1994 [44], that have challenged this principle, i.e. that the state is the sole legally constituted proprietor and manager of the nation's fish resources, have yet to accomplish little more than affirmation of the Norwegian nation state's position.

3. Implications for fisheries management

The issue is here and they're [the federal government and non-aboriginal people] going to have to deal with it. We're not here to take over the country or to take away from other people's livelihood. We're here to

make sure our kids in the future will have something better to live on...I don't think government knows how to deal with native issues...(Donald Marshall Jr., [45, p. A1–2]).

The pursuit, emergence and affirmation of indigenous peoples' rights claims for participation in commercial fisheries have the transformative potential to turn entire fisheries management systems inside out and upside down. This potential largely explains the response to date of government agencies and of many non-aboriginals in both Norway and Canada. While there may be sympathy for the Saami and Mi'kmaq peoples and their concerns, in both settings governments fear the consequences for the fisheries management system as a whole of acknowledging and engaging with indigenous rights. As it is, the tasks and challenges of fisheries management are already complex, and many features of these management systems reflect the character of being a house of cards—uncertain and vulnerable to catastrophic collapse. Consequently, the over-riding Norwegian and Canadian governmental approaches have been to presume that indigenous peoples' fisheries entitlements must be somehow reconciled to and accommodated within the existing fisheries management systems. For example, the Canadian Minister of Fisheries and Oceans has proclaimed repeatedly since the Marshall decision that "...I, as the minister, have the authority to make sure that we are fully responsible and we operate in a consistent [manner (*original*)] towards conservation" [25, p. A3] and "As Minister of Fisheries and Oceans, I can regulate the fishery and I will regulate the fishery... Clearly there is a treaty right, but the court decision said that the right can be regulated..." [46, p. A3]. The Marshall decision and subsequent events represent a direct challenge to the management authority and system of DFO and its Minister. A similar challenge confronts the Norwegian Fisheries Ministry and Minister with respect to the recognition of Saami fishing entitlements.

In both Norway and Canada one of the key areas of difficulty is rooted in the insistence by governments and many non-aboriginal fishers that indigenous participation be framed by the existing rules, regulations, licensing and quota privileges. For instance, the DFOs primary and initial goal is maintenance of the existing fisheries management system by containing Mi'kmaq participation within the limits realised through the purchase of licenses and quota from non-natives, transferring said licenses to the Mi'kmaq, and compelling the Mi'kmaq to abide by and work within the management system. This process is justified on the basis of resource conservation, implying that the core purpose of the existing system is management for the purpose of resource sustainability.¹² But, in the absence of the requisite justifications, DFOs purpose is, first, to

define and to contain the Mi'kmaq treaty right within a 'privilege' allocation and regulation management system. Certainly, from the perspective of aboriginal peoples, this approach is akin to trying to force a round object into a square hole with the likely outcome being considerable damage to entitlements, self-determination, and economic benefits. Critically here, DFOs strategy is to redistribute to the Mi'kmaq privilege management devices or tools, licenses and quotas, that arise directly from and embody the nation states' proprietorship claim respecting access and participation in fisheries. Certainly this strategy is intended to minimally limit Mi'kmaq agency, and embodies the Canadian state's apparent inability to approach and negotiate with the Mi'kmaq as partners, rather than as clients. An example of this is seen in the state's refusal to recognise, let alone discuss, the self-management systems developed by several Mi'kmaq bands. This refusal has precipitated and deepened several of the confrontations and conflicts that were featured during the early days of responses to the Marshall decision [47,48].

Further, the current fisheries management tools were designed with the purpose in mind of limiting the numbers of persons fishing as well as the scale of targeted fishing effort or fishing power (e.g., trap limits, quotas, sector licenses and so on). Consequently, the management tools are defined as privileges allocated either to individual persons or to individual enterprises. Apparently DFO considers each Mi'kmaq band as the equivalent of a fishing enterprise that may hold and work with a number of licenses and/or a resource quota, leaving the issue of allocation dynamics a matter of intra-band preferences and decisions. Individual and enterprise license and quota holders are required to follow the appropriate rules and regulations when fishing. So, a Mi'kmaq band allocated 5 Class 'A' commercial lobster licenses for any particular zone

¹² Arguably, DFO would be hard-pressed to prove the assertion that the existing fisheries management system is dedicated to resource conservation. To begin with, DFO fisheries management policies have been directly intended to facilitate the accumulation of wealth for specific fishing effort, that is, the capital intensive, non-selective harvesting mid-shore and offshore corporate fisheries—the so-called 'economic' fisheries. Resource collapse and the groundfish moratorium are the consequence of this intention. There is little evidence that would convincingly prove that current fisheries management has moved away from this intention. For instance, DFO marine science co-organisers of the 1999 ICES Symposium (Montpellier) invited a senior executive of a major Canadian fishing corporation to take the place of a Canadian government fisheries manager and to represent Canada on a final day international panel discussion of fisheries management policy. Certainly this transposition embodies the commonality of DFO fisheries management goals and worldviews with those of wealth accumulation fishing. Indeed, DFO would seem to be at risk of contravening the substance and spirit of the Court's judgement should they compel the Mi'kmaq to express their treaty right within the existing 'privilege' allocation and regulation system, a system seemingly dedicated to assisting in wealth accumulation processes.

would be permitted to fish the maximum numbers of traps permitted per license within that zone, and no more. Additionally, the Mi'kmaq may be permitted to employ only five boats when fishing the allocated licenses. Obviously, this approach reflects neither the substance of the treaty right nor particular Mi'kmaq interests and concerns with respect to the exercise of their treaty right [54].

The Supreme Court's ruling explicitly states that the Crown can regulate the Mi'kmaq treaty right and place limits upon Mi'kmaq commercial fishing. But, the ruling is equally clear in stating that these regulations must be framed with reference to enabling the Mi'kmaq people access to a moderate livelihood. As shown earlier, the design of the existing fisheries management system is explicitly characterized by the Court ruling as an infringement on and an impediment to the exercise of the treaty right, unless otherwise justified. Further, the treaty right is clearly specified as a collective, not an individual, right. Consequently, the Mi'kmaq are left with the prerogative to determine the ways and means whereby their people will exercise the right with reference to the moderate livelihood provision. Yet, the Canadian state has continued to insist that Mi'kmaq participation only occur within the existing management system, with virtually no attempt to provide the requisite justification for this or to demonstrate how this will assure the Mi'kmaq access to a moderate livelihood.

In Norway, Smith's report to the Ministry acknowledged the governments' authority to manage the Saami fishery, as conservation of stocks would also be in the interest of the Saami. However, he stated that the government, in accordance with international law, has an obligation to create the conditions necessary to maintain fishing as a Saami way of life even if it would require special privileges (positive discrimination). This applies regardless of the fact that the relations between the Norwegian state and the Saami people are not embodied in and specified through a negotiated treaty, as in the case of Eastern Canada's indigenous peoples. The inclusion of the Saami paragraph in the Norwegian constitution has occurred only recently. It is a confirmation of the Norwegian government's duty and responsibility—in this case the Fisheries Ministry—to protect “the material base” of Saami culture.

Another key aspect of the Canadian Supreme Court's ruling and the acceptance of Smith's conclusion is pertinent to both governments' strategy of shoehorning the Mi'kmaq and the Saami into the existing management system. For example, by insisting that Saami interests should be articulated within the frames of the existing management system, the government continues to demonstrate that it is not prepared to engage in radical changes either in its relations with the Saami or respecting the place of the Saami within Norwegian

fisheries. For instance, Saami representation in the Regulatory Council, one consequence of Smith's recommendations, is a minor change. Another representative at the table does not challenge the system as such [49]. Likewise, relaxing some of the rules for the small boat fleet does not provoke anyone or threaten the integrity of the fisheries management system. Arguably, by asserting that Saami interests be framed according to the rules and principles of the prevailing management system the state implicitly rejects the concepts of a Saami Fisheries Zone and Saami agency. Obviously, the Norwegian government fears the consequences. Not only does it have to address a complex legal matter. The fear is also that a more radical accommodation and solution would spread to include others. Perhaps non-indigenous fishers would militate for similar claims and treatment. However, the government now finds itself in a difficult position, not unlike a vice. It would in any case have to demonstrate that the existing management system and the changes it can accept are able to satisfy the requirement of sustaining the material base and hence the culture of the Saami. If unable to satisfy this condition, the Norwegian government would not be fulfilling the obligations that are specified within international law and the Norwegian constitution. On this basis the Norwegian government may be subject to litigation processes similar to those in the Canadian setting and the Mi'kmaq case. It has been argued by another prominent Norwegian law professor that the language of the Saami paragraph in the Norwegian Constitution is rather vague and that this may weaken the Saami position if the issue should ever be brought to court [50]. Since then (1994), Norway has made the UN Convention on Political and Social Rights national law. Here, the paragraphs of the convention have simply been copied. They do not refer, however, to indigenous peoples specifically but the convention does certainly also apply to them. International law regarding indigenous peoples has developed in recent years. For instance, the Declaration on Biological Diversity and the Convention on Elimination of all Forms of Racial Discrimination both have paragraphs that are referring to the resource rights of indigenous peoples. Most countries, including Norway and Canada have ratified these conventions. Now at the drafting stage within the United Nations' system, the Declaration on Indigenous Peoples, goes very far in explicitly stating the rights of indigenous peoples with respect to coastal waters and marine resources.¹³

¹³ It reads: “Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora, fauna and the resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure and institutions for the development and management of resources, and the right to effective

A critical attribute underscoring non-aboriginal concerns is, to put it bluntly, the effect aboriginal entry and participation will have on both their catches/incomes and the market value of their fishing licenses and quotas. Willingly or not, many Canadian and Norwegian non-aboriginal small boat fishers have complied with the development of the existing 'privilege' allocation fisheries management system, at least in so far as it has provided them with substantial economic benefits. This is actually one of the most disturbing qualities of small boat fishing and coastal community experience with the fisheries management system and its agents. When first introduced, most licensing systems were not understood by many fishers to be a hard-edged regulatory and access limiting management device. In some instances, licenses were presented as simply a necessary way to account for the numbers and characteristics of fishers and fishing effort. Further, most fishers never understood that agreement to obtain licenses was, in fact, agreement with the notion of participation as a 'privilege' allocated to them by the nation-state. For the vast majority of small boat, coastal zone fishers, fishing is more than an occupation. It is a way of life that embodies their families' and communities' generations-deep engagement with making a living from the sea. It is what they are and what they do. Of course, few would have ever thought, at least until recently, of fishing in terms of either 'rights' or 'privileges'. Your people fished and you fished, likely on the same grounds, out of the same harbours, and in the same fisheries. It requires systems of imposed external regulations, limitations, and livelihood threats for such people to begin thinking about who they are and what they do in terms of such dry and lifeless legalisms such as 'rights' and 'privileges'.

However, the definition and affirmation of aboriginal peoples participation as a 'right' has had the effect of compelling some non-native fishers to begin thinking about their rights, or rather the formal absence of same. If they accomplish little else, decisions such as Marshall and proposals such as the Saami Fishing Zone have provided many non-aboriginals with the reason to recognise and to challenge the notion that their access and participation is as a consequence of 'privileges' allocated to them and regulated for them by the nation-state. For example, in many coastal and fjord districts Norwegian Saami and non-Saami live in the same communities, and fish side by side for the same species with similar technologies. When the rights issue was

brought to the fore as a consequence of the 1990 quota system and the subsequent response by the Saami Parliament, many non-indigenous fishers started to ask themselves what their rights are, and not only in relation to the Saami but also vis-à-vis large scale fishing. Although "positive discrimination" on a community basis may put intra-communal tensions at rest, inter-communal or -district conflicts may arise. A Saami Fisheries Zone would not solve this issue; but, would raise the issues to a higher geographical and administrative level of consideration. Collective rights for those that reside within such a zone are not necessarily less controversial than a management system based on individual rights, as demonstrated in a meeting of the local branch of the Norwegian Fisher's Union in Finnmark. Here it was argued that the proposal for such a zone was to be regarded as a form of un-acceptable "reverse race discrimination". Consequently, they dismissed the whole idea that their commune should be included within a Saami fisheries zone.

4. Conclusions

Accommodating Mi'Kmaq and Saami commercial fishing rights within the existing management system, in a manner consistent with the terms of the Canadian Supreme Court ruling and the demands of the Saami Parliament and in a manner acceptable to all parties involved, including non-indigenous people, would appear for the moment to be out of reach. Certainly, the Norwegian and Canadian governments and their fisheries managers have yet to come to grips with the fact that 'their' indigenous peoples will not accept anything less than self-determinant agency in relations with government and access to and use of resources. One must not forget the urgency of the matter. Indigenous peoples are under pressure from many sources. Smith, for instance, argues that coastal Saami culture finds itself in a "five to twelve" situation. Consequently, it is necessary to begin a new process as soon as possible, a process that will recast the very basis and substance of fisheries management as it prevails in the two countries. There is little direct evidence to suggest that the two governments are either capable of or interested in initiating an entirely new approach to fisheries management. What options are there to developing a process that both will successfully resolve the immediate indigenous and non-indigenous marine harvester conflict as well as put in place a fisheries management system dedicated to equitable access as well as fisheries ecological and livelihood sustainability?

There are several essential and promising starting points. In both countries, but more so in Canada than in Norway, fisher-organisations have begun exploring a

footnote continued

measures by States to prevent any interference with, alienation of or encroachment upon these rights (Article 26). Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent..." (Article 27) [53].

community- and locality-based approach to fisheries management. That is, they are building experience, with their marine harvester memberships, in developing the ways and means to manage fisheries with respect to local concerns, practices, needs and preferences. Central to these initiatives is the principle of achieving long-term ecological and fisheries livelihood sustainability. These initiatives are realistically working through difficult problems such as coastal fishing boundaries, access rules, and distribution issues. Notably, there is no particularly Saami or Mi'kmaq quality in this approach, as it would generally benefit small-scale fishers and their communities. These initiatives are also consistent with Carsten Smith's proposals pertaining to the implementation of "positive discrimination" on a community rather than individual basis.

In many respects these organisations and their members are concerned about the same issues and outcomes as the Saami and the Mi'kmaq. That is, they want to participate in fisheries where they have some voice in their management and some assurance of access to a sustainable and reasonable livelihood. This is a common ground where indigenous and non-indigenous coastal zone small boat fishers can meet for the purpose of building a new fisheries management system. Also, the situation is such that they, not the government and corporate interests, must initiate the processes in order to take advantage of and work with this common ground.

Allying with the indigenous peoples in developing entirely new approaches to the management of their fisheries would provide a golden opportunity for non-indigenous small-scale fishers to reassert a rights-based claim to their participation in the fisheries. On behalf of the nation as a whole, the Canadian and Norwegian State expresses its proprietorial claim respecting fisheries through its management system. The management system, in effect, allocates state authorised 'privileges' such as licenses and quotas. By accepting these practices as determinant access and participation criterion, marine harvesters are agreeing that they fish at the behest of the State, thereby enabling the State to assume the empowered role in the determination and imposition of fisheries management policies. So, a non-aboriginal small boat fisher alliance with indigenous peoples such as the Saami and Mi'kmaq would offer non-aboriginals the prospect of re-engaging a rights-based protection for their access to and participation in commercial fishing.

Would aboriginal peoples possessing widely recognised rights and in pursuit of agency be welcoming to developing alliances with non-aboriginal coastal zone fishers and communities? Both the Mi'kmaq and Saami have often expressed a willingness to work directly and co-operatively with local non-indigenous fishers. Since the Marshall decision there have been numerous meetings between Mi'kmaq and non-aboriginal fisheries leaders that are dedicated to working out under-

standings and co-operative relations. In Norway, the Saami Parliament, by reconceptualizing the Saami Fisheries Zone as a Fisheries Policy Zone for Saami Areas and by starting cautiously with initial experiments in selected fjord local management, is reaching out to non-indigenous fishers to become involved in a learning process intended to examine the feasibility of a decentralised management system in accordance with the Saami visions and the interest of small-scale coastal fishers in general. One key issue here is the extent to which local management, based on local common property rights, can work with respect to other privileged access based regimes. In Norway "everyone" can see that under the current management system which allocates privileges to individual boat owners in such a fashion that quotas are bought and sold, communities lose out and that access opportunities for Saami and non-Saami small-scale fishers alike have been dramatically reduced. Rooting rights within communities rather than with individuals might then benefit all small-scale fishers, not just Saami. The Saami solution to the management problem, although it may have scared the government, has inspired small-scale fishers and their organisations to start rethinking their positions and to be more innovative about fisheries management. But the framing of this discourse and the words employed are, however, crucial, as the language that was used in the local branch of the Fishers' Union demonstrated. Novel ideas, however well intended and innovative, do not always receive acclamation. Sometimes, a "non-ideal speech situation"—to express this in Habermasian—may distort communication in a way that conflict rather than consensus results.

It has been opined that allowing fish harvesters to manage fisheries is about as sensible as turning the hen house over to the fox, with harvesters lacking both the necessary knowledge about resources and the capability of reaching consensus. The scepticism of the two governments to devolution and localised management is justified in such presumptions. Of course this view offers a rather cynical, if not insulting and uninformed opinion of most fishers. It says that all fishers are alike in so far as they will selfishly and destructively compete with one and another to exploit marine resources until it is economically unfeasible to do so, usually at a point when targeted marine resources are thoroughly over-exploited and the ecosystem has been damaged. This view, one that underscores much of the present Norwegian and Canadian fisheries management systems, intentionally refuses to draw distinctions between fishers and fishing practices that are targeted on achieving livelihood goals and those that are employed in the interests of the corporate wealth accumulation agenda.

As the Eastern Canadian and North Norwegian cases indicate, indigenous and non-indigenous fishers

are in a position to rewrite the basic principles of fisheries management systems so that they begin with the recognition and entrenchment of the distinction between livelihood and wealth accumulation fishing. The Canadian Supreme Court ruling clearly draws the livelihood—wealth accumulation distinction into focus as the basis of meaningful differences and determinations with respect to fishing activities and fisheries management. With this distinction in place it becomes possible to insist that fisheries be managed in the first instance on the basis of attaining and maintaining ecosystem integrity for the purpose of sustaining fisheries livelihoods and coastal communities. Once the livelihood and wealth accumulation distinction is in place, it becomes possible to develop substantial fisheries management policies and practices that would empower small-scale coastal fishers, regardless of ethnic or national origin, to assume direct roles and responsibilities in the co-operative management of their fisheries. Wealth accumulation fishing, now well proven as destructive and ecologically unsustainable, would only continue under direct state management. Further, its continuance would need to be contingent on the provision of proofs, following the precautionary principle, that accumulation fishing is neither destroying resources nor having any intervening or interfering effects on indigenous and non-indigenous coastal fishers' access to marine resources and sustainable livelihoods.

Certainly the legal recognition of indigenous rights respecting access to and participation in commercial fisheries is understood by aboriginal peoples as a critical step toward dismantling dependency and to achieving agency. Affirmation and expression of these rights offer indigenous peoples the possibility of further developing the social and economic basis for their ability to 'act' in their own interests. Furthering their capacity for agency is a critical step for aboriginal peoples. To begin with, agency empowers, and in so doing enhances identity and the concrete embodiment of 'nationhood'. Herein lies the promise of and the prospect for replacing the miseries created by dependency on the 'patron' state with an assured dignity rooted in the knowledge of and experience with self-directed livelihoods. Here also is found a common ground wherein an alliance of aboriginal and non-aboriginal small boat fishing peoples offers tremendous promise for achieving sustainable fisheries and fisheries livelihoods.

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