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First Nations, Consultation, and the Rule of Law: Salmon Farming and Colonialism in British Columbia

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The coast of British Columbia (BC) is host to runs of salmon that have been the economic, social, and cultural basis of Northwest Coast Native societies for millennia. Wild salmon hatch in streams and spend varying amounts of time there before migrating to the ocean. After spending up to several years in the ocean, these fish return to their natal streams to spawn once, then die. These spawning cycles facilitated productive Native fisheries over the centuries and, since the 1870s, industrial fisheries for global markets. Today, industrial salmon aquaculture sites can be found almost everywhere in the protected waters near shore, along the migration routes of what were once flourishing populations of Pacific salmon. Fish farms compound the destructive effects of more than a century of logging, overfishing, and urbanization on the wild salmon fisheries. The most direct and striking impacts of fish farms—ones that are directly observed by many local Native people—are the spread of fish diseases and waste materials into the surrounding habitat. Sea lice infestations of wild stocks are on the rise: these parasites and other disease organisms concentrate in the densely stocked net pens and appear to spread easily to passing wild salmon.[1] Although a few fish farms are stocked with chinook salmon, a species that is native to the region, most farm sites contain Atlantic salmon. The reality of salmon escapes from net pens and the fact that Atlantic salmon originating from fish farms have been shown to spawn successfully in BC's rivers have raised grave concerns about the ecological consequences of the invasion of local streams by this exotic species of salmon.[2] Furthermore, the effects of the sewage emanating from fish farms are often noted by Native people using traditional clam digging and fishing spots.[3]

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North American indigenous peoples have always made use of and altered, sometimes dramatically, their natural environments.[4] In addition, Native peoples across Canada have, Arthur Ray reminds us, accommodated and often fully participated in the new economic opportunities after contact with Europeans in their home territories.[5] However, all coastal groups, whether they have accepted or resisted fish farming, have asserted their rights to assess environmental damage for themselves and decide whether fish farming is something they want in their territories. The conflicts between and within coastal Native communities about whether or not to participate in fish farming have centered on what degree of cooperation or contention will allow First Nations to resolve the tension that has always characterized their involvement in local industrial developments. Although most First Nations wish to derive some benefit from an industry that the province is intent on promoting with or without Native approval, they are also struggling to resolve long-standing disputes regarding land with the Canadian state. Cooperative strategies, such as those centered on the legal construct of consultation, promise a postcolonial relationship and method for adjudicating competing claims to ocean space. Here, I explore the gap between the promise of consultation and the ways in which consultation serves to entrench rather than overcome the colonial relationships of the past.

In this article, I point out the possible pitfalls of a cooperative strategy—"consultation"—that appears to have placed the burden of creating consensus between settlers and First Nations squarely on the shoulders of Native peoples and their continued cooperation with the property and productive arrangements of the status quo. Over the past several decades, several Native leaders have spoken out publicly about the cost of cooperation to Natives. Following the Mohawk scholar Taiaiake Alfred, I suggest that what may appear to be politically neutral routines and procedures are important sites of contemporary colonial power, through which indigenous resistance is managed and diffused.[6] Alfred urges us to consider whether seemingly benign practices seek to transform the relations between settlers and Natives or whether the ultimate goal is the entrenchment of patterns of accommodation that surrender whatever possibilities for Native ways of life that may remain. Decolonization, Alfred suggests, can only occur by maintaining a noncooperative stance toward the legal and bureaucratic structures of the state. The Sto:lo writer Lee Maracle has explained how Native peoples are being destroyed by the concessions they are expected to make: "a compromise, by definition, is two sides giving up something in order to come closer together. What the middle class is asking us to do is to continue to make concessions. Any more concessions and we will be falling down the abyss of national suicide."[7] Many indigenous scholars have recognized colonization as "a system of oppression, rather than as personal or local prejudice."[8] In order to resist the engrained nature of colonial power, we must first recognize that colonialism is alive and well in the most unlikely of places: the apparently cooperative relationships involved in the practice of consultation. Although the ultimate goal of decolonization and resistance is a lasting and justly negotiated peace between Native peoples and the settlers, this result may only be attainable by rejecting,

for the moment, cooperative and integrationist approaches and by asserting a "politics of difference" that recognizes the distinct social, economic, and cultural interests of Native peoples.[9]

The First Nations of the Northwest Coast have a deep and enduring interest in their local salmon populations. On the Pacific coast, and up to several hundred miles inland, the salmon rivers are like capillaries that bring life to Native people's lands. However, since World War I wild salmon management has restricted the Native fishery to a small, increasingly regulated, food fishery.[10] When salmon farming began expanding in BC in the early 1990s, the troubled wild fishery had already been undergoing considerable reorganization for the past one hundred years. Under license limitation schemes imposed by the federal government since the early twentieth century, and especially since the 1960s, the fishing industry lost vessels and became increasingly capitalized.[11] Native coastal communities suffered the most from these rationalizations in the fishery, in spite of varied government schemes aimed at increasing their access to other fisheries and fishing-related activities.[12] A major consequence of increasing concentration in the salmon fisheries, both spatially and financially, and of the steady decline in the overall stocks and failure of many local stocks, is that it has become nearly impossible for First Nations to make a livelihood out of fishing in their home territories. The problems in the salmon fisheries have only intensified in recent years, and salmon farming represents the latest stage in the industrialization and capitalization of world fisheries.[13]

For the past several decades, BC has been issuing leases to salmon aquaculture companies to operate in what it regards as empty, underdeveloped territories. The federal government is engaged in promoting fish farming, despite the Department of Fisheries and Oceans' mandate to protect wild fisheries and the Crown's long-standing obligations to First Nations peoples.[14] The federal government of Canada has a special "fiduciary," or trust-like, relationship with Native peoples—a relationship that developed over centuries of dealings between the British Crown and Aboriginal nations, and that is reflected in the language of the Royal Proclamation of 1763.[15] This proclamation was issued by King George and reserved the interior of the continent as a vast Indian hunting ground, where Indians would not be "molested or disturbed" on land that could only be ceded to or purchased by the Crown.[16] This means that the federal government is supposed to be protecting the interests and status of Native peoples as unique political entities.

NATIVE RESPONSES TO FISH FARMING

Many Native groups are not confident that the obligations of the government in regards to them are being met and have been resisting salmon aquaculture, citing damage to clam beaches, the escape of Atlantic salmon, destruction of the ocean bottom, pollution from waste feed, sewage, and pharmaceuticals, and the transfer of disease to wild fish. Perhaps the strongest opposition to this industry has developed in the Broughton Archipelago, which comprises the smaller islands scattered between northern Vancouver Island and the

mainland. These are the territories of several Kwakwaka'wakw tribes, and it is here that fish farms are most concentrated: roughly 30 percent of approximately one hundred farms at present.[17] But fish farming also has a strong presence further south off Vancouver Island, between Campbell River and the mainland, and on the western coast of Vancouver Island, in Clayoquot Sound, where the Ahousaht First Nation has joined the BC Salmon Farmers' Association and appears to be sceptically tolerant of the industry.[18] Opposite central Vancouver Island, on the mainland coast, is Bute Inlet, where the Homalco, who are Coast Salish, are as a group actively opposing the fish farm in their area. On the northern coast, the small Kitasoo/Xai'xais Band, which turned to fish farming after its economy was devastated by the closure of the local fish cannery, operates fish farms in partnership with Marine Harvest, a company that invested in the farms in 1998 and runs them under a provincial license.[19]

Salmon farms, which consist of clusters of net pens anchored to the shallow bottom near shore, began to appear along the BC coast in the 1980s, and, following a brief moratorium in the 1990s, new sites continued to be approved by the provincial government (though other sites have become dormant due to declines in markets for BC farmed salmon). Treaties to the Crown never ceded the nearshore waters in which fish farming takes place, and coastal Native people strongly believe that these areas are still part of their traditional territories.[20] The Kitasoo/Xai'xais First Nation believes that fish farming can help make up for the economic gap left by industrial overfishing and state mismanagement of its wild salmon fisheries.[21] The Homalco, especially the leadership of these Coast Salish people of Bute Inlet, originally accepted fish farming but have recently decided that the industry brings little in the way of jobs and economic development and threatens their already fragile wild fisheries.[22]

Native groups on the coast affected by fish farming have looked to consultation as a way of voicing concerns, as a forum in which to push for certain environmental or job-related concessions from the salmon farming companies, or, in many cases, as a way of working toward getting fish farms removed from their ocean territories. For these Native groups, all of whom want, for one reason or another, to effect changes in fish-farming practices, the path of consultation is one that is available and encouraged by the provincial and federal governments and by the aquaculture industry. But the environment that is the subject of consultation regarding fish farming is not understood by Native peoples as an outside reality that can be negotiated simply and routinely. Indigenous statements of concern about the coastal ocean, which are often, but not always, expressed through leaders, tend to be grounded in narratives in which the environment is an active, cultural force of continuity and change in Native life, including the "modern life" of industrial resource development. The Musgamagw Tsawataineuk Tribal Council (MTTC), headquartered in Alert Bay at the edge of the Broughton Archipelago, represents the tribes of the Nimpkish River, Gilford Island, and Kingcome Inlet and integrates declarations of ownership regarding unceded ancestral territories with statements about the negative environmental impacts of fish farming and the failure to consult:

> The Musgamagw Tsawataineuk People have inhabited the Broughton Archipelago for thousands of years. We consider it our garden; it has nourished us for as long as we have been here. But that has changed with the arrival of the salmon farms. We, the First Peoples of this land, have had direct experiences with the Atlantic salmon farms and have witnessed the negative impact they have on the environment. . . . Despite our many documented objections to fish farms in our traditional territories, the industry and governments continue to place farms where they are not wanted. . . . *The Musgamagw Tsawataineuk Tribal Council . . . [has] never been consulted with, and [has] always had zero-tolerance towards fish farms in their traditional territories.*[23] (emphasis added)

Though some Kwakwaka'wakw people support fish farming, the Kwakwaka'wakw people represented by these statements have taken what is perhaps the strongest stance against fish farming of any First Nation in BC.[24] While calling for further consultation, the declaration asserts a Native presence that must be recognized precisely *because* of Native peoples' distinct system of governance—leaders, chiefs, and elders—and unique status as occupants of the land for millennia. However, indigenous economic and social forms are not generally recognized in a practical sense by the state. Coastal First Nations are increasingly separated from the decisions made about the resources of their territories. Much wealth is extracted from Native lands and waters, but very little of it ever reaches the Native peoples whose ancestors inhabited those territories since time immemorial. As the Nuu-chah-nulth leader Simon Lucas pointed out at the signing ceremony of the protocol agreement between the Ahousaht First Nation and Pacific National Aquaculture in September 2002, "we were strangers in our land . . . but maybe now that's changing."[25] In his speech, Lucas remained optimistic about the potential of continued dialogue and cooperation with salmon farmers to minimize the negative impacts on marine habitat while creating some monetary benefits for his people.

THE BEGINNINGS OF CONSULTATION: THE SALMON AQUACULTURE REVIEW

The Crown's legal duty to consult with Native people is a complex and developing doctrine in Canadian Aboriginal law. The duty to consult arises from several sources, including the fiduciary duty of the Crown toward Native people and the justification tests used to deal with the infringement of Native peoples' constitutionally protected rights and title.[26] The Supreme Court of Canada in *R. v. Delgamuukw* [1997] clearly established consultation as a routine procedure for "substantially addressing the concerns of the aboriginal peoples whose lands are at issue."[27] The Court in *Delgamuukw* linked consultation to questions about the *infringement* rather than the *exercise* of Native title: "whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified."[28] The ability of consultation to overcome the legal claims that may arise when Native rights

are infringed may be one reason that industries and governments have so eagerly embraced consultation.

Certainly, Native perspectives are expressed in consultation meetings, but the record of consultation provided in 1997 by the Salmon Aquaculture Review demonstrates that those concerns are taken seriously only if they are expressed as infringements on the rights of *all* Canadians. [29] The Native submissions to the review described environmental impacts in the context of a continued Native presence in the areas occupied by fish farms and the immediate effects of increasingly degraded fisheries. At the time the provincial government undertook the review, salmon had already been farmed in ocean net cages in the province for more than a decade, and around 1990 the industry had begun to expand quickly and in earnest. By 1995, environmental concerns and the presence of a new government in power had led to a provincial moratorium on further expansion. BC's Environmental Assessment Office undertook the Salmon Aquaculture Review to examine the effectiveness of the provincial regulations that controlled the farming of salmon in net pens on the coast. The inclusion of First Nations people in the process was an early form of consultation that tried to reconcile the Native presence with the desire of fish farmers to use coastal environments.

The letters and reports submitted by First Nations presented damage to clam beds, fishing grounds, and wildlife in terms of Aboriginal rights emanating from prior occupation, Aboriginal systems of law, and the obligations of the Crown. Yvon Gesinghaus of the MTTC wrote that "as the Creator has tasked us with the duty of stewards of our territories, we insist that fish farms be removed from our territories and that they are not permitted to return."[30] Most significant, however, was that nearly all indigenous submissions to the Salmon Aquaculture Review correctly anticipated the ways in which these inputs would be used to fulfill consultation requirements. Charlie Williams of the Kwa-wa-aineuk people (one of the tribes of the Kwakwaka'wakw people) warned that "your studies will never be acceptable," and "you can't call this economic development, because this has a drastic effect on our wild stock, our clam beaches, our way of life."[31] In this way, many Native leaders tried to preempt discussions of progress, development, and the common good by pointing out that the conflict between salmon farms and First Nations is a political one and that consultation can never hope to expose true knowledge about the industry if it does not recognize the competing interests that are at stake. Williams went on to say that "all they [fish farmers] see is money for themselves," and "salmon farming grossly infringes our rights, and interferes with our traditional and cultural activities."[32] The Nuu-chah-nulth Tribal Council commented specifically on the findings and recommendations of the Environmental Assessment Office's Technical Advisory Team, which had come up with a set of "recommended salmon farm siting criteria." The tribal council reminded the Environmental Assessment Office that their reserves were meant to serve as fishing stations and to guarantee access to fish: "The reason that coastal First Nations have such small reservations . . . is that coastal First Nations depend almost exclusively on the sea for their sustenance and livelihood."[33] It follows from this that First Nations must have

the power to decide regarding salmon farming in their traditional territories and that, as the Nuu-chah-nulth Tribal Council suggested, they be the ones to "decide the siting criteria for salmon farms from their most important harvesting areas."[34]

One of the recommendations of the Nuu-chah-nulth Tribal Council was that in the case of salmon farming, as in any other industry, Aboriginal rights be given high priority.[35] The tribal council stated that it envisioned consultation being carried out as stipulated by the BC Court of Appeal in *R. v. Jack* [1995].[36] In that case, three Aboriginal men were charged with fishing in contravention of federal regulations, while a sport fishery at the entrance to an inlet closed to Aboriginal fishing was kept open. On appeal, Judge Legg found that a lower court judge had erred in finding that the Mowachaht Band was adequately consulted about restrictions to the food fishery. Although there may have been discussion regarding the details of gear and area restrictions, the Department of Fisheries and Oceans failed to fulfill its duty to "fully inform itself of the fishing practices of the aboriginal group and their views of the conservation measures."[37] In other words, the consultation that did take place failed to consider seriously the existing Aboriginal rights to fish. Without this type of consideration, the Nuu-chah-nulth Tribal Council feared that the need to consult would be interpreted in ways that are convenient for salmon farmers, thereby preserving the environment, or what counts as the environment, for non-Native interests.

In its response to the findings of the Salmon Aquaculture Review, the Nuu-chah-nulth Tribal Council expressed dismay at the idea that "salmon farming . . . presents low probability of risk adverse effects to the province's environment" by saying that "of particular concern to the Nuu-chah-nulth is the implied exclusion of First Nations people from the 'province's environment.'"[38] This exclusion is not new. Since the industrial salmon fisheries of the late nineteenth century, the goals of capitalist production quickly transferred ownership and control of fisheries resources out of the hands of the Native lineages.[39] Despite their willingness to participate in the new circuits of capital in their region, Native goals associated with maintaining their social relations and building local wealthy and prosperous societies were replaced by non-Native goals of accumulating capital and reproducing capitalist forms of production.[40] Redefining Native territories as "the province's environment" runs the risk of defining Native rights out of existence, by forever shrinking what counts as Aboriginal or traditional in ways that fit with the prerogatives of progress and development. In the Salmon Aquaculture Review, Native peoples warned that they, not a general public, would bear the environmental and cultural costs of fish farming, but these concerns seemed not to alter the course that the government had set for the province's fish-farming industry: to continue with the industry in the name of public benefit. Yet by the time the Salmon Aquaculture Review began, the law had created a space in which contention could work to resolve conflicts between Native people and a settler society. The Supreme Court case in *R. v. Sparrow* [1990] resulted in a key decision that allowed contention, and talk about conflicts of interest, to enter the language of the law.[41]

SPARROW AND *BLANEY*: TWO MODELS FOR CONSULTATION

The 1990 decision of the Supreme Court of Canada in *R. v. Sparrow* is a landmark in the development of Aboriginal rights regarding access to fisheries resources. Ronald Sparrow, a Musqueam man who lived on the reserve located on the Fraser River at Vancouver, had been arrested for violating the fisheries regulations by fishing with a net that was longer than permitted under the terms of his band's food-fishing license. The Crown argued that the net-length restriction was necessary to ensure conservation; the defense argued an Aboriginal right to fish for subsistence, social, and ceremonial purposes and that any regulations that restrict Aboriginal rights must be in keeping with the guarantee, under section 35(1) of the Constitution Act, 1982, that protects Aboriginal rights from interference by legislation. Section 35 of the Constitution Act, 1982, protects any Aboriginal or treaty rights that were not extinguished prior to 1982. The standards that must be met when these rights are infringed were developed in *Sparrow* and subsequent court decisions. In *Sparrow*, the Supreme Court of Canada ruled that Aboriginal rights were not extinguished simply because they were controlled in great detail through regulations nor did those regulations define or delineate the rights. In addition, the court found that although conservation is a legitimate legislative objective, any restrictions on Aboriginal rights must meet a strict test of justification and be consistent with a priority scheme in which Indian fishing has priority above that of other users. The protection afforded Aboriginal fishing rights under section 35(1) of the Constitution Act, 1982, comes directly from the recognition, by the court, that "the constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others, given the limited nature of the resource."[42]

This problem of competing interests to resources is what drives the second part of the stringent test for justification laid out by the Supreme Court of Canada in its decision in *Sparrow*. Although the decision states that questions about consultation—whether the Aboriginal group has been consulted with respect to the measures being implemented—should be part of the analysis to decide whether an infringement is justified, consultation does not stand alone as a way to deal with competing claims. Competing claims to resources can be resolved only from a certain point of view. In *Sparrow* that point of view is a strong commitment to Aboriginal rights, which includes the right to harvest fish at ancestral fishing sites for subsistence, social, and ceremonial needs. Infringements of Aboriginal rights can only be justified if federal power is reconciled with the federal duty to protect (in accordance with the fiduciary obligations of the government toward First Nations), thereby upholding the honor of the Crown. Consultation can only begin with an inquiry into the rights that are at stake, the unequal relations of power that led to and continue to inform the conflict at hand, and the duty of the Crown to protect Native interests. In delivering the unanimous judgment, Chief Justice Dickson and Justice La Forest suggest that we look beyond the words of the Aboriginal rights provision in the Constitution Act, 1982 and understand "the purposes behind the constitutional provision itself."[43] They point out that constitutional

protection "represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights."[44] In this context, superficial neutrality, usually associated with the public interest, is dangerous:

> Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation.[45]

The vision of consultation laid out in *Sparrow* sanctions challenges to the status quo and is a useful guide to resolving Aboriginal claims in ways that take seriously the asymmetrical relations between First Nations and the newcomers. Fifteen years after *Sparrow*, the recent BC Supreme Court decision in *Blaney et al. v. British Columbia* [2005] presents a very different model for consultation—one that is predicated on First Nations' cooperation, participation, and integration into the economic mainstream.[46] The outcome of the case is ambiguous, and both salmon farming interests and First Nations opponents to fish farming have claimed victory.[47] In *Blaney*, the Homalco First Nation of Bute Inlet sought a declaration from the court that the provincial minister of agriculture, food, and fisheries had failed to consult properly and accommodate them. At issue was an amendment to the license of the fish-farming company, Marine Harvest, to replace the chinook salmon at the Church House site in Bute Inlet with Atlantic salmon. The provincial ministry responsible for fish-farm licenses rushed the amendment through the approval process, giving only perfunctory attention to the Homalco First Nation's concerns.

The Homalco motivations behind bringing this case to court went beyond the substitution of Atlantic for chinook salmon and the relatively simple matter of a consultation that had been botched by the provincial ministry and Marine Harvest. Wild runs of Pacific salmon move past the fish farm at the head of Bute Inlet, which create opportunities for the transfer of disease to fish that are an integral part of Homalco territory. Chinook salmon, the Homalco say, have already escaped from the site, and the consequences of the invasion of an alien species would be devastating. Clam and other shellfish beds in the vicinity of the farms would be damaged if fish farming continued, and the harvesting of sea urchins, prawns, herring, red snapper, rockfish, and other species could not go on in the wild if harvesters detected any evidence of contamination.[48] The consequences of these scenarios are catastrophic to the Homalco, a band struggling to maintain its wild runs of salmon through science-based hatchery and salmon-enhancement initiatives and already alienated from its traditional territories since its relocation from the Church House Reserve to Campbell River.

Salmon farming had been supported by the previous elected chief of the Homalco band, Richard Harry, who pushed for the installation of the

site directly adjacent to the Church House Indian Reserve in Bute Inlet in 2002. However, with the election of the new chief, Darren Blaney, the lack of a commitment from the company to hire Homalco as staff, and growing concerns regarding damage to the environment, the band began to worry about the presence of the fish farm in its ocean territory. The court found that there was a good chance the Homalco would be able to establish Aboriginal title to at least some portions of the territory in Bute Inlet, following the recent decisions regarding logging and mining in *Haida Nation v. British Columbia* [2004] and *Taku River Tlingit First Nation v. British Columbia* [2004].[49] Those decisions established that there is a duty to consult Native peoples when it seems from the preliminary evidence that there is a good chance rights or title will be "proven" to exist in court.

The decision in *Blaney* fell short of ordering the removal of the farmed fish from the Church House site, because of the large amount of money involved: "Marine Harvest . . . would suffer significant damages if . . . salmon [were] requested [to be] removed. . . . This would be particularly unjust if the only issue is further consultation and a similar decision may be the ultimate result."[50] The judgment did, however, order that no new fish be added to the site, pending further consultation between the parties. The Ministry of Agriculture, Food, and Fisheries and the Homalco were urged to enter into negotiations with an "open mind" and to consult in "good faith."[51] Judge Powers held out great hope that through "balance" and "compromise" an agreement would be reached.[52] In his written decision, he quoted extensively from the Supreme Court of Canada decision in *Haida*, in which the province was found to have failed to engage in meaningful consultation with the Haida Nation regarding the transfer of timber rights to a forestry company.

The decision in *Haida* is significant, because it confirms that the province, not just the federal government, has a duty to consult with First Nations, and it prevents the province from shifting its duty to consult onto third parties or ignoring as of yet "unproven" rights. Faced with a situation in which First Nations are increasingly able to put forward convincing cases of Aboriginal rights and title, the focus in *Haida* is on reconciliation, and this means that Aboriginal claimants "must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions."[53]

The picture of consultation that emerged in *Haida*, and that is reproduced in *Blaney*, is one in which First Nations are required at all times to cooperate and compromise, even when it is not in their best interest to do so. In *Haida*, the *Sparrow* decision was interpreted thus: "The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. . . . Balance and compromise are inherent in the notion of reconciliation."[54] It appears that "despite the strong position the Homalco appeared to take," their claims were taken seriously mainly because "they did not at any time assert that they were not prepared to change their position as the result of consultation."[55]

The decision in *Blaney* and the decisions in *Haida* and *Taku* on which *Blaney* is based do not recognize the positional and political nature of Aboriginal rights and move away from the *Sparrow* decision in that they separate consultation

from questions of priority or analyses of historically based injustice. The position on consultation presented in *Blaney* is consistent with the routine sorts of interactions that take place between fish farmers and First Nations resisting the incursion of the industry into their waters. Decisions about where to place, or "site," fish farms, what kinds of monitoring work to do, how accurately existing regulations reflect damage to traditional fish and shellfish harvesting areas, and how escapes are detected are all possible subjects of consultation. Consultation with First Nations about fish farming appears to get away from the strictly legal discourse of rights by focusing on the practical details of fish farming. The practice of consultation using letters, phone calls, and meetings seeks to normalize First Nations as citizens of Canada and as supposed beneficiaries of Canadian progress, development, and prosperity. In order to remain in the consultation process, First Nations must not be seen to frustrate the process that has been laid out to manage their concerns and are subject to constant evaluation by government and industry as to the soundness of their claims and the reasonableness of their objections. Consultative interactions, though they might not always qualify as consultation in the legal sense, constitute the kind of "balancing of interests and concerns and weighing of risks" that allow First Nations claims to be effectively diverted into discourses about the public interest.[56]

PROGRESS, FISH FARMING, AND CONSULTATION

First Nations people can participate in the bureaucratic mechanisms of "siting," or allocating marine space to fish farms, but the nitty-gritty of biological assessment and planning used by government and industry to determine where fish farms will be placed suggests that this decision-making process may mask important issues of power and rights. In 2002, Mark Ayranto of the BC Salmon Farmers' Association explained to the Fish Farming and Environment Summit that

> siting is critically important as they [fish farmers] need to ensure that aquacultures don't infringe on, or negatively impact the public good, while enabling . . . economic opportunities and other benefits to coastal communities. . . . First Nations are one of the most critical groups in the application and siting process. . . . First Nations bring thousands of years of experience and knowledge in the siting process. And this knowledge can and should be used.[57]

Here, First Nations' knowledge is used to accomplish particular economic objectives, by "helping" First Nations administer, conserve, and use their lands in ways that are consistent with modern-day Canadian industrialization and nation building.

These agendas of environmental sustainability link social progress to particular kinds of resource use. Fish-farm placements are administered "jointly by the federal and provincial government" and, as Duncan Williams from the provincial agency Land and Water BC freely admitted, "in consultation with industry."[58] The resulting "harmonized" application process incorporates

guidelines from various provincial agencies controlling "Crown" assets, pollution, and the fisheries license, while the federal Department of Fisheries and Oceans is responsible for maintaining fish habitat. "Each applicant is referred to appropriate agencies . . . including First Nations and local government for comment."[59] This process, in which First Nations are part of a long line of approvals that need to take place, is possible because Native people are understood as existing in little pockets of culture in an otherwise wasted land of underdeveloped resources. Ayranto claimed that one thing his organization takes "very critically" is making sure fish-farming sites "respect First Nations territories and aboriginal title. . . . The government siting criteria states basically that a site must be one kilometre from a First Nations community, that shellfish beds are to be located at least 300 metres away . . . and finally to avoid areas of cultural or heritage significance."[60] Instead of recognizing that Aboriginal title is a right to the territory (and not just to the tiny village, fish camp, and burial ground reserves), a government-industry coalition effectively uses bureaucratic procedures to make its use of indigenous territories continuous with resource management and the administration of the Canadian state.

Consultation guidelines are general, saying only that the process should be "meaningful" and "should be selected in relation to the nature of the proposed activity." Letters, meetings, telephone calls, and site visits are listed as possible ways to meet the duty to consult.[61] Despite the "new relationship" policy launched in 2005, which the government of BC claims is a fundamental shift in its dealings with First Nations, consultation continues to focus on so-called reconciliation.[62] This focus on reconciliation appears to propose a new kind of Canadian multicultural relationship—a "celebration of our diversity"—that assumes that "First Nation citizens" understand their interests as aligned with those of *all* Canadians.[63] Consultation, therefore, posits inclusion and cooperation, while sidelining the unique politically and historically based rights to territories and resources.

At public forums about aquaculture, meetings of Aboriginal political organizations, and private meetings between salmon farming companies and tribal leaders, First Nations communities and individuals are encouraged to participate in and become part of the modernizing project of salmon farming. This demands that they become useful and self-disciplined colonial subjects in accordance with notions of progress and economic development. Native participation, even as fully integrated workers or site managers, is premised on what could be interpreted as the colonial need to civilize—to correct backwardness, sustain the forward march of progress, and emphasize the colonial difference between salmon farmers and First Nations people. Ken Brooks, a non-Native biological consultant for salmon farming companies, used the language of evolution and conquest in his speech at the Fish Farming Summit in 2002, when he urged his largely Native audience to participate rather than "stand in the way":

> We are transitioning from buffalo hunting to feeding people using intensive cultivation. . . . If you stand in the way, and think you're going to stop this industry, you're going to get run over, because it's an

> evolutionary process and we are going—the world is going to produce more and more of its seafood in intensive systems.[64]

Here, "being run over" is the same message that has been delivered to small-boat fishers since the federal government began buying up smaller, supposedly inefficient and obsolete boats in the 1970s.[65] Salmon farming makes it even more difficult for local fishers to make a living, as fish production continues to globalize through the growth of salmon farming. However, for Native fishers, the threat of being "run over" is an assault on the very existence of their rights to fish. As James McDonald has suggested, Aboriginal rights are suppressed not because they are inherently traditional but because those rights are always redefined in ways that respond to the needs of industry.[66] In the case of salmon farming, those needs include ocean spaces as net pen sites and sewage dumping grounds—needs that are not necessarily compatible with the long-term association between local Native groups and wild fish populations.

Furthermore, the link Ken Brooks made between the poverty of contemporary First Nations communities and the imagined poverty of a hunter-gatherer society shows how these types of colonial constructions work to maintain the relations of power that make salmon farming possible. The historical removal of tribal waters from Native control likely precipitated the present-day conditions for First Nations people on the BC coast—conditions of poverty and economic marginalization. These same coastal waters, formerly under the jurisdiction of particular lineages and tribes, are now being claimed by salmon farmers, who see themselves as improving on this "primitive" state of affairs in Indian Country. This strange inversion, in which the present day is understood as a holdover from the past (that led to contemporary conditions in the first place) denies the colonial context and presents progress as the only possible historical explanation.

Through vocabularies of progress, which constitute Native people as newly civilized, productive Canadians, First Nations societies are opened up to certain kinds of economic intervention that can be at odds with their aspirations of self-determination. For example, one letter from the BC Salmon Farmers' Association informed all general managers of salmon farms in the province that a "cultural awareness feast" would be held at the Big House in Campbell River but that this event would be complemented by what it called "an information session on economic development."[67] According to the BC Salmon Farmers' Association, these meetings can "achieve the balance needed for respect of First Nations and environmental values, while ensuring that we can provide jobs for our economic future."[68]

But "the economy" does not stand apart from First Nations struggles; in fact, it is made possible by the dispossession of Native people and, in particular, by the redefinition of Native land as Crown land. This redefinition has made space for salmon farming in the landscape of BC but is not generally considered a factor in the economic development of the fish-farming industry. Bruce Braun, in his analysis of the forest industry in BC, found that what counts as an economic factor is important, and he wonders why it is that the historical processes that have made forestry resources so cheap

and plentiful, and so readily available to forestry companies, are not recognized in most analyses of underdevelopment. Instead of taking into account this context, underdevelopment, Braun argues, is usually presented as a preexisting condition rather than as one upon which great industrial wealth is built.[69] The provincial government and the fish-farming industry are eager to involve Native people in fish farming, claiming that it will remedy Native economic marginalization, and although most Native groups have rejected offers of outright participation in salmon aquaculture, all groups have agreed to consult with the industry.

THE SALMON FARMING INDUSTRY, NETWORKS OF POWER, AND THE LAW

Consultation, however, has not created a space in which Native leaders have much room to define themselves in relation to this new industry. Only proper Aboriginals—and not "radicals," as one BC Salmon Farmers' Association member described them—are consulted in the first place.[70] When the Ahousaht on the west coast of Vancouver Island first asserted the authority of their *ha'wiih*, or hereditary chiefs, to control access to ocean sites now occupied by salmon farmers, or when they made reference to court decisions such as *Delgamuukw*, which affirmed the existence of Aboriginal title, fish farmers dismissed them as radical agitators. For a time, the Ahousaht people were known by the salmon farming industry to be particularly radical, so much so, that one fish farmer claimed that "they cut their noses off to spite their face . . . they seem more intent on beating up the person talking to them instead of saying let's move forward."[71] Here again, the idea of "moving forward" promises a new kind of multicultural relationship, while at the same time premising itself on colonial intervention and control.

When Native people become involved in environmental monitoring, inevitably their activities as monitors overlap with the practices of salmon farming, and this helps to normalize salmon farming as part of the modern reality. Through a complex apparatus of assessment techniques, laboratories, government regulations, and industry codes of practice, salmon farmers are able to extend their networks of operation and management to the consultation arena. Steve Cross, who works for a number of different salmon farming companies doing "environmental assessment work," was at the BC Aboriginal Fisheries Commission's 2002 Fish Farming and Environment Summit "looking for some First Nations participants." "I would like participants in the field to acquire the animals, to help me cook them and label them and acquire data so everything is a shared type of an evaluation approach.. . . So please, sign up after this talk if you will," he said enthusiastically.[72]

However, he remained silent on how useful this sort of monitoring is to the salmon farming operation. Records of sea lice numbers, for example, can serve fish farmers well in designing recipes for salmon production: First Nations participants become fully integrated into decisions about when to divide the contents of a pen in two, when to harvest fish, how much to feed, when to administer a particular antilouse medication, and what kinds of

disease loadings can be tolerated. In this setting, Native participants are integrated into discussions about *how* fish farming can proceed rather than about *whether* it should proceed. Diane Morrison, a veterinarian with Marine Harvest Canada, claims her technicians monitor the same environment as that experienced by Native people: "Everyone in this room has concerns regarding fish diseases, and we all share a common concern for the health of our fish . . . we all want our stocks to be healthy and productive," she said at the Fish Farming Summit. "One of our differences though is the opportunities we have to address those concerns."[73] By authorizing the voice of techno-science to speak for otherwise empty physical (not cultural) landscapes, salmon farmers can claim to speak in the interests of all. Pacific Mariculture Products, for example, has found a way to relay its message of environmentalism through the activities of Native people: the company has taught First Nations people how to evaluate damage to the seabeds around fish farms.[74] Now, "they have their own monitoring program, where they record the number of phyla, families, and species," a public relations employee for the company stated. "After salmon farming," she said, "they end up with more [species], not less!"[75]

The bureaucratic paternalism inherent in consultation about salmon farming conveniently establishes "resource management" as a sort of White Man's Burden. Steve Roe found that in the case of Indian Reserve 172, a colonial discourse uses impoverished environments as a symbol of (often exaggerated) Native destitution and disease, without recognizing the colonial developments through which these conditions of ill health came about.[76] Similarly, in the case of salmon farming, government or industry-run programs claiming to educate First Nations people to become stewards of the resource are infused with a kind of self-congratulatory colonial benevolence. One salmon farming company, which runs this type of monitoring program, has now assumed responsibility for what it claims is the newfound *choice* vested in the local First Nation: "they [the First Nation] approached us . . . [but] we are the tenants . . . they can cut the rug out from us and send us away."[77]

The tendency for consultation to separate questions of environmental damage from questions of rights regarding territory is supported by the recent Supreme Court of Canada decision in *Taku*. The Taku River Tlingit First Nation people were "full participants" in the assessment process leading to the approval of the reopening of an old mine.[78] In keeping with the purpose of the Environmental Assessment Act to "promote sustainability by protecting the environment and fostering a sound economy and social well being," the Taku were told that questions of land rights fell outside the assessment process and would have to be negotiated with the government at a later date.[79] The idea that consultation should strive to "balance societal and Aboriginal interests" sets up Aboriginality as an element, outside of normal society, that is opposed to progress and prosperity.[80] It appears that the problems associated with consultation in the *Taku* case are similar to those faced by other First Nations regarding salmon farming, in that no matter how long and involved the environmental assessment process, Native people's concerns tend to be redefined as matters of managing a resource hinterland rather than as matters of control in an ancestral territory.

CONCLUSION

Many coastal First Nations communities see consultation as a positive way of getting around the firmly entrenched position of both provincial and federal governments on fish farming. Even those Native groups such as the MTTC and the Homalco First Nation, who are adamantly opposed to any open net fish farming in their waters, eagerly engage in consultation. The Native response to unsatisfactory interactions with the provincial ministry and fish-farming companies is most often a call for further consultation or a declaration that exchanges worthy of being called "consultation" have not yet taken place. We hear this in the statement of the MTTC—"we have never been consulted"—and in the actions of the Homalco First Nation in taking Marine Harvest to court over a failure to consult properly. However, the protection afforded Aboriginal rights by consultation could be somewhat of a fantasy, particularly in light of the recent *Blaney* decision, which sees the whole process rather simplistically as an exercise in reasonableness and open-mindedness and does not acknowledge the conflicts of interest that are inevitably involved.[81] The stance presented by the court in *Blaney* is consistent with BC's provincial policy on consultation, which states that only so-called sound interests will be accommodated.[82] However, this approach, in assuming that there are no competing interests (competing interests can be easily reclassified as "unsound"), commits the worst kind of bias. Industrial access to space and rights to dump sewage and contaminants into what are understood as underused, underdeveloped waters, are not constitutionally protected.[83] Aboriginal rights to ancestral fishing grounds *are* constitutionally protected under the Constitution Act, 1982, and according to the decision in *Sparrow*, should therefore be infringed only if Canada's unique relationship with Aboriginal peoples can be upheld in the process. The suggestion by the judgment in *Blaney* (that the parties should be able to work things out) ignores the client-style relationship salmon farming companies have with the provincial government and the long history of federal involvement in fisheries management that over time nearly eliminated Native access to commercial fisheries.

The on-the-ground reality of consultation regarding fish farming that I have described and the relatively mundane ways in which Aboriginal rights are redefined in utilitarian terms as matters of public benefit make it difficult to confront the inherent conflict between government power and Native rights. However, in consultation, the boundaries between legal rights, "economic development," conservation, and resource management become confused, and it becomes exceedingly difficult to delineate either government power or Native agency. In order to cooperate with the consultation procedure as it is structured at present, Native people must effectively participate in the language and practices of fish farming. In the courts, meetings with industry representatives, government assessments, and ecological monitoring programs, Native peoples' resistance or cautious approval is diverted into more manageable narratives of progress, economic development, and cultural sharing. In this way, salmon farmers are able to make Native people the object of certain kinds of intervention, management, and control that appear to come from

the apparently rational and just law on consultation and not from a colonial power. This contradiction becomes most obvious when we consider that the progress and development promised by salmon farming, which appears on the surface to be in line with the Crown's responsibility toward Native peoples and with provincial policy and new case law, brings with it the danger of the continued marginalization of Northwest Coast First Nations.

An we-are-all-in-this-together approach has a strong influence on Native-settler relations in BC today, and it is a convenient way of avoiding questions about how fish farmers can operate in areas where no treaties were ever signed with the First Nations or where a treaty process is in place but at present under review or negotiation. As a result of this political climate, Native people are forced to redefine their rights in terms of those of *all* Canadians, thereby maintaining long-standing colonial relations of domination. Taiaiake Alfred has suggested that the BC Treaty Process—in place for a decade with as yet no agreements concluded—is one example of how a policy of inclusion is acting in the service of assimilation and continued colonization.[84] In the BC Treaty Process, as in negotiations regarding salmon farming, "aboriginal interests" are not recognized if they conflict with Canadian plans for nation building, progress, and economic development. Court cases subsequent to *Sparrow* made it clear that infringement of Aboriginal rights and title could be justified by what Chief Justice Lamer in *R. v. Gladstone [1996]* called "objectives of compelling and substantial importance to the community as a whole."[85] Lamer described these objectives in *Delgamuukw* as including any industry, such as agriculture, forestry, mining, or hydroelectricity that leads to "general economic development."[86] Clearly, salmon farming, though the courts have not yet explicitly named it as a justifiable infringement, fits well with this list of objectives.

One of the lessons to be learned from the consultations between fish-farming companies and First Nations communities and individuals in BC is that even though consultation gets away from some of the more heavy-handed approaches to colonial control in the past, it uses equally powerful techniques to integrate Native people into modern colonial projects. The movement toward "progress" at the economic level runs the risk of opening up First Nations communities to new forms of intervention that regulate people's links with each other, their fisheries and other resources, and the cash economy in which they are partially immersed. These relationships, Alfred and Jeff Corntassel have argued, require that Native peoples' identities remain "confined . . . to state-sanctioned legal and political definitional approaches," thereby minimizing contention and obscuring the contemporary face of colonial power.[87] The assimilationist pressures exerted by consultations are most likely linked to the kind of bureaucratic power the Canadian state exerts through funding for economic development projects, the treaty process, and the Indian Act. However, by recognizing that consultation, as a social practice, often works as a tactic of repression rather than as a means of protecting Aboriginal title and rights, the government of Canada may be able to transform the practice of consultation and thereby make progress toward a just and long-term resolution of Native peoples' claims.

NOTES

An earlier version of this paper was presented at the XIVth International Congress of the Commission on Folk Law and Legal Pluralism, 26–29 August 2004, Fredericton, New Brunswick. Dianne Newell and three anonymous reviewers provided many useful suggestions for improving the manuscript.

1. Scientists for the industry and others contest the assertion of a sea lice infestation in the wild stocks (claiming it is a "natural" occurrence) and deny that sea lice are transmitted from farmed fish populations to wild stocks. The majority opinion among scientists, however, supports the existence of a link. See, e.g., Martin Krkosek, Mark A. Lewis, and John P. Volpe, "Transmission Dynamics of Parasitic Sea Lice from Farm to Wild Salmon," *Proceedings of the Royal Society Series B* 272 (2005): 689–96.

2. John Volpe and his colleagues have documented the phenomenon of farmed salmon escaping from their pens and reproducing in nearby streams. See J. P. Volpe, E. B. Taylor, D. W. Rimmer, and B. W. Glickman, "Natural Reproduction of Aquaculture Escaped Atlantic Salmon (*Salmo salar*) in a Coastal British Columbia River," *Conservation Biology* 14 (2000): 899–903.

3. See, e.g., the testimony of Mano Taylor, a Kwakwaka'wakw clam digger, speaking in Alert Bay at the Leggatt Inquiry on 4 October 2001. Stuart Leggatt, a retired judge, was hired by the David Suzuki Foundation to travel to communities affected by salmon farming—Alert Bay, Campbell River, Port Hardy, and Tofino—and hear the testimony of both Native and non-Native people. Readers can obtain copies of the verbatim transcript by contacting the court reporting service Allwest Reporting Ltd., 814 Richards Street, Vancouver, BC V6B 3A7.

4. Shepard Krech III, *The Ecological Indian: Myth and History* (New York: W. W. Norton, 1999).

5. Arthur Ray, *I Have Lived Here since the World Began* (Toronto: Key Porter Books, 1996).

6. Taiaiake Alfred, *Wasase: Indigenous Pathways of Action and Freedom* (Peterborough, Ontario: Broadview Press, 2005).

7. Lee Maracle, *I Am Woman* (North Vancouver, BC: Write-on Press, 1988), 166.

8. This was the way Marie Battiste summarized the theme of the volume she edited. *Reclaiming Indigenous Voice and Vision* (Vancouver: University of British Columbia Press, 2000), xvii.

9. This is a term used by Cole Harris in *Making Native Space: Colonialism, Resistance and Reserves in British Columbia* (Vancouver: University of British Columbia Press, 2002), 304.

10. Dianne Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1997), 96.

11. These license limitation schemes began with the Davis Plan of 1968 and continued under the recommendations of the Pearse Commission in 1982. See Newell, *Tangled Webs of History*, 149–71.

12. Ibid., 148–79.

13. Dean Bavington has pointed out that large freezer factory trawlers are the precursors to the modern industrial fish farm. See "From Jigging to Farming," *Alternatives Journal* 27, no. 4 (2001): 16–21.

14. In 2000, the Department of Fisheries and Oceans launched its Program for Sustainable Aquaculture, which provides funding to "enhance sector innovation and productivity." See http://www.dfo-mpo.gc.ca/aquaculture/ref/AAP_e.htm (accessed 27 June 2005).

15. For more information on the nature of the fiduciary relationship, see Brian Slattery, "First Nations and the Constitution: A Question of Trust," *The Canadian Bar Review* 71 (1992): 261–93.

16. Ibid., 272.

17. Most Kwakwaka'wakw from this region live today on the reserve at Alert Bay. Many are registered as band members (under the Indian Act) with the Namgis First Nation, which has a population of approximately 1,600 individuals.

18. Today the southern Kwakwaka'wakw of this area are distributed among several reserves in Campbell River and at Cape Mudge that combined have about 1,500 registered members. The Ahousaht (population of approx. 2,000) is one of the Nuu-chah-nulth tribes of the west coast of Vancouver Island.

19. The Kitasoo Band is part of the Tsimshian Tribal Council and has around 500 band members.

20. In *R. v. Haines* [2003] 1 C.N.L.R. 191, both the Native fishers and the BC Provincial Court recognized that the Haida and Nisga'a nations have marine territories. See Douglas Harris, "Indigenous Territoriality in Canadian Courts," in *Empty Box or Box of Treasures: Two Decades of Section 35*, ed. Ardith Walkem (Penticton, BC: Theytus Books, 2003), 175–91.

21. See the statement of the Kitasoo/Xai'xais First Nation on salmon farming at http://www.kitasoo.org/fisheries/salmonfarm/index-salmon.html (accessed 21 April 2006).

22. Quentin Dodd, "Island First Nation Backs Off Fish Farming," *The Tyee*, 4 May 2004, http://thetyee.ca/News/2004/05/04/Island_First_Nation_Backs_Off_Fish_Farming (accessed 21 April 2006).

23. Musgamagw Tsawataineuk Tribal Council, "Salmon Farming and First Nations," http://www.mttc.ca/pdf/SalmonFarmingandFirstNations.PDF (accessed 27 June 2005).

24. One notable example is Tom Sewid and some members of his family. See Tom Sewid, "'Battle for Broughton' Bad for Tourism," letter to the editor, *North Island Gazette*, 23 April 2003, 7.

25. The "protocol agreement" described how the informal relationship between a fish-farming company, Pacific National Aquaculture, and the local First Nation, the Ahousaht, would develop. The only publicly known part of the agreement was that the Ahousaht would accept the presence of fish farms in exchange for recognition of the existence of their hereditary chiefs (*ha'wiih*) and their territories (*hahoulthee*). This agreement, which involved confidential deals between band administrators and company officials regarding cash payments and promises of employment for band members, never adequately addressed many Ahousaht peoples' concerns regarding the long-term effects of the company's practices on the wild fisheries.

26. Thomas Isaac, *Aboriginal Law: Commentary, Cases, and Materials* (Saskatoon, Saskatchewan: Purich Publishing Ltd., 2003), 216–17.

27. *Delgamuukw* [1997] 3 S.C.R. 1010 at para. 168 [hereinafter *Delgamuukw*].

28. *Delgamuukw* at para. 168.

29. Environmental Assessment Office, *Salmon Aquaculture Review: Volume 2—First Nations Perspectives* (Victoria, BC: Government of British Columbia, 1997).

30. Ibid., 26.

31. Ibid., 27.

32. Ibid.

33. Ibid., 62.

34. Ibid.

35. Ibid., 77.

36. *R. v. Jack* [1995] 16 B.C.L.R. 201 [hereinafter *Jack*]

37. *Jack* at para. 77.

38. Environmental Assessment Office, *Salmon Aquaculture Review,* 55.

39. James A. McDonald, "Social Change and the Creation of Underdevelopment: A Northwest Coast Case," *American Ethnologist* 21, no. 1 (1994): 154.

40. McDonald, "Social Change," 162.

41. *R. v. Sparrow* [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].

42. Ibid. at 1079.

43. Ibid. at 1106.

44. Ibid. at 1105.

45. Ibid. at 1110.

46. *Blaney et al. v. British Columbia (The Minister of Agriculture, Food, and Fisheries)* [2005] B.C.S.C. 283 [hereinafter *Blaney*].

47. See the response of the BC Salmon Farmers' Association, http://www.salmonfarmers.org/files/03_03_05.html. Chief Darren Blaney of the Homalco First Nation responded to the decision by saying: "I don't think government agencies will take us so lightly anymore. They won't be able to sweep us under the carpet." See http://thetyee.ca/News/2005/04/05/ChiefLeadsHomalco (accessed 28 June 2005).

48. *Blaney* at para. 23–24, 30–31, 59–63.

49. *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511 [hereinafter *Haida*]; *Taku River Tlingit First Nation v. British Columbia* [2004] 36 B.C.L.R. 370 [hereinafter *Taku*].

50. *Blaney* at para. 129.

51. Ibid. at para. 20, 127.

52. Ibid. at para. 20.

53. *Haida* at para. 42.

54. Ibid. at para. 18.

55. *Blaney* at para. 106.

56. Ibid. at para. 45.

57. Fish Farming and Environment Summit, organized by the BC Aboriginal Fisheries Commission, 24–26 September 2002, Tseil-Waututh Nation Community Centre, North Vancouver, BC.

58. Ibid.

59. Duncan Williams, speaking at the Fish Farming and Environment Summit, n. 57.

60. See n. 57.

61. British Columbia, *Provincial Policy for Consultation with First Nations* (Victoria, BC: Government of British Columbia, 2002), 19.

62. In 2005, BC's Ministry of Aboriginal Relations and Reconciliation developed

the New Relationship. *The New Relationship*, http://www.gov.bc.ca/arr/popt/the_new_relationship.htm (accessed 28 November 2005).

63. *The New Relationship*, 1–2.

64. See n. 57.

65. Thanks to one anonymous reviewer for pointing this out.

66. McDonald, "Social Change," 161.

67. BC Salmon Farmers' Association headquarters, Campbell River, British Columbia. This letter was dated 21 January 1998.

68. BC Salmon Farmers' Association headquarters, Campbell River, British Columbia. Letter from the BC Salmon Farmers' Association to Hereditary Chief Henry Scow of the Kwicksutaineuk, 26 February 2001.

69. Bruce Braun, "Colonial Vestiges: Representing Forest Landscapes on Canada's West Coast," in *Troubles in the Rainforest: British Columbia's Forest Economy in Transition*, eds. Trevor J. Barnes and Roger Hayter (Victoria, BC: Western Geographical Press, 1997), 112–15.

70. This material stems from conversations I had at the BC Salmon Farmers' Association office in Campbell River during my participant observation there in May of 2002.

71. Ibid.

72. See n. 57.

73. Ibid.

74. The name of this salmon farming company has been changed.

75. Interview with salmon farming company representative, name and location withheld, February 2003.

76. Steve Roe and Students of Northern Lights College, "'If the Story Could Be Heard': Colonial Discourse and the Surrender of Indian Reserve 172," *BC Studies* 138/139 (2003): 129–30.

77. See n. 86. Given that the provincial government continues to oversee the licensing of fish farms, it is unlikely that a First Nation could ever effectively evict a salmon farming company against the wishes of the province. The MTTC, e.g., has been trying to achieve this for years and has not succeeded.

78. *Taku* at para. 40.

79. Ibid. at para. 5, 12.

80. Ibid. at para. 42.

81. *Blaney* at para. 20.

82. British Columbia, *Provincial Policy for Consultation*, 13.

83. Kent McNeil asks, "Since when . . . can constitutional rights be overridden for the economic benefit of private persons who do not have equivalent rights? Isn't this turning the Constitution on its head by allowing interests that are not constitutional to trump rights that are?" Kent McNeil, *Defining Aboriginal Title in the 90s: Has the Supreme Court Finally Got It Right?* (Toronto: Robarts Centre for Canadian Studies, York University, 1998), 19.

84. Taiaiake Alfred, "Deconstructing the British Columbia Treaty Process," University of Victoria, December 2001, http://www.taiaiake.com/words/articles/index.html (accessed 31 May 2004). See also Alfred, *Wasase*, 111, 185.

85. *R. v. Gladstone* [1996] 4 C.N.L.R. 65 at para. 73 [hereinafter *Gladstone*]. This case involved two Heiltsuk men who claimed an Aboriginal right to sell herring spawn-

on-kelp. The Supreme Court of Canada found that a commercial right existed but that there was insufficient evidence to decide whether an infringement of the right, through licenses and fisheries regulations, was justified.

86. *Delgamuukw* at para. 165.

87. Taiaiake Alfred and Jeff Corntassel, "Being Indigenous: Resurgences against Contemporary Colonialism," *Government and Opposition* 40, no. 4 (2005): 600.