

CHARTING A COURSE:

*Shellfish Aquaculture and Indigenous Rights in New Zealand and British Columbia**

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PART 1

Shellfish Aquaculture in BC and New Zealand: An Overview

DESPITE A REBOUNDED provincial economy and predictions of a “Golden Decade” ahead,¹ the future of many BC coastal communities remains very much in doubt. Traditional employment opportunities for those living in these communities – particularly in the wild fishery and forestry sectors – have, in many cases, all but disappeared. It is now taken for granted that survival of these communities hinges on economic diversification. Eco-tourism, salmon farming, cruise ships, and offshore oil and gas development have all been heralded as offering promising diversification opportunities.

Largely ignored, at least until quite recently, in this long-simmering diversification debate is the economic potential of the humble bivalve. Shellfish are something British Columbia naturally produces in abundance. And the potential for farming shellfish in British Columbia’s coastal waters is equally abundant. Its long coastline and cold clean marine waters – combined with its proximity to one of the world’s most

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¹ Government of British Columbia, News Release, “Campbell Appoints New Cabinet for British Columbia,” 16 June 2005, <http://www.news.gov.bc.ca>, accessed 6 August 2006.

sought-after markets – provide an enviable set of comparative advantages for BC shellfish producers. Shellfish aquaculture is also an industry that enjoys significant “social licence” advantages, both in terms of its relatively “green” reputation and the level of support it enjoys within coastal Aboriginal communities. Despite these obvious advantages, shellfish aquaculture in British Columbia has remained an infant industry consistently experiencing a slower growth rate and lower returns on investment relative to its counterparts in comparable jurisdictions.

In understanding why BC shellfish aquaculture has been unable to capitalize on these apparent advantages, it is instructive to examine the New Zealand experience. The 1990s were a period of unprecedented growth for the New Zealand shellfish industry. From 1988 to 2001, the sector expanded by over 700 percent. The New Zealand story is not only an interesting one for understanding the factors that can support robust growth in the aquaculture sector, but it also provides some illuminating insights into the negative repercussions that unrestrained growth can have on the sector’s social licence. In New Zealand this began during a period marked by concerns over a shellfish tenure “gold rush” and a high-profile lawsuit by Maori claiming ownership of the foreshore in one of the industry’s key harvesting regions. Soon after, the fortunes of New Zealand aquaculture reversed, precipitating a dramatic decline in exports.

Drawing on the New Zealand example, this article explores the potential for shellfish aquaculture to become a major industry for BC coastal communities. Part 1 provides an overview of the current state and prospects of shellfish aquaculture in British Columbia and New Zealand. To this end, we offer some observations on the current and future relationship between shellfish aquaculture and other economic activities in British Columbia’s coastal zone. This analysis underscores the potential synergy between shellfish aquaculture and other “green” industries as well as the potential benefits of shellfish aquaculture for coastal First Nations. In Part 2 we explore in detail the development of aquaculture in New Zealand, tracing the growth of the industry from its early successes through its more recent difficulties to the new challenges and opportunities it now confronts. In this regard, we consider the complex interrelationships among government, Maori, and the shellfish industry with a view to understanding how the New Zealand shellfish “revolution” derailed and its current prospects in the wake of the New Zealand government’s ambitious 2005 reform initiatives. Part 3 offers a comparative assessment of current BC law and policy in two

areas highlighted in our New Zealand case study: shellfish aquaculture regulation and the accommodation of indigenous rights and interests in the coastal zone. We conclude, in Part 4, by offering some observations on what we see as the main legal and political impediments to shellfish aquaculture becoming a key coastal economic driver in British Columbia based both on our comparative analysis and extensive follow-up interviews with key players involved in BC shellfish aquaculture.

Concepts and Terminology

Aquaculture is typically defined as the “farming of aquatic organisms including fish, molluscs, crustaceans and aquatic plants with some sort of intervention in the rearing process to enhance production.”² The aquaculture industry has two distinct branches of production, consisting of shellfish aquaculture and finfish aquaculture. The former is a specialized form of aquaculture that focuses on farming of animals such as oysters, clams, and mussels. Shellfish farms are normally located in the intertidal and the subtidal zones of coastal regions. Farms in the subtidal zone typically cultivate their product using a combination of ropes and buoys. Shellfish farming is also carried out in the area between the high water mark and the low water mark (the intertidal zone or the foreshore). This type of farming is called bottom culture farming and takes place directly on the foreshore.

The BC Shellfish Aquaculture Industry in Context

Since Confederation, the twin pillars of British Columbia’s coastal economy, indeed of the provincial economy as a whole, have been the forestry sector and the wild fishery. Once a mainstay of West Coast communities, the wild fishery has fallen on difficult times. The salmon fishery has been particularly hard-hit. Since the mid-1990s, British Columbia’s salmon-fishing fleet has been cut in half, and it reached its smallest size in over a century in 1999.³ In the mid-1980s, the wild salmon fishery accounted for the lion’s share of the total GDP of the commercial fishery. Two decades later, it would account for only one-tenth of the GDP of the fishing industry.⁴

² Food and Agriculture Organization (FAO) of the United Nations, “Fisheries Glossary,” <http://www.fao.org/fi/default.asp>, accessed 6 August 2006.

³ BC Statistics, *British Columbia’s Fisheries and Aquaculture Sector September 2002* (Victoria: BC Statistics, 2002), 15, http://www.agf.gov.bc.ca/fish_stats/pdf/BC_Fisheries_&_Aquaculture_Sector_2002.pdf, accessed 6 August 2006.

⁴ *Ibid.*, 28.

The last decade has also been extremely challenging for the provincial forest industry. Since 1997 alone, there have been twenty-seven permanent mill closures resulting in the loss of some thirteen thousand jobs.⁵ The industry has also faced new competition and market access issues, including a protracted trade war with the United States over softwood lumber exports. While the fortunes of the BC forest industry, as a whole, have improved dramatically over the last two years, the primary beneficiaries of this recovery have been companies operating in the province's interior where, due to the pine beetle epidemic, large new volumes of salvage timber have been made available at extremely low stumpage rates.

Few economic forecasters would likely predict that the BC aquaculture sector will soon supplant the economic role and importance of more traditional resource-based industries. Yet in the global context, if current aquaculture growth trends continue, this scenario is by no means inconceivable. Even in British Columbia, a relative newcomer to aquaculture, industry growth statistics are impressive, due primarily to finfish growth. Industry proponents are fond of pointing out that the sector has "out-performed virtually every other industry in the BC economy during the period since 1984."⁶ Even in comparison to other new industries, such as the high-tech sector, aquaculture has shown strong growth. For example, during the 1980s and 1990s the computer and peripheral equipment industry grew by 684 percent; during the same period British Columbia's aquaculture sector (driven principally by finfish) grew by 4,907 percent.⁷

Aquaculture is also critical to Canada's ability to protect its global position in fisheries production.⁸ Prior to the ascent of global aquaculture, during the mid-1980s, Canada ranked first in the world for seafood exports. At that time, Canada accounted for 7 percent of the US\$50 billion industry. By 1991, Canada had fallen to fifth among its global competitors. The nations making the most significant inroads into Canada's market share during this time were Thailand, Chile, China, and Norway. Largely, these nations succeeded in enhancing their market share through development of their aquaculture sectors.⁹

⁵ *BC Heartlands Economic Strategy: The Forestry Revitalization Plan* (Victoria: Ministry of Forests, 2003), 6, <http://www.for.gov.bc.ca/mof/plan/frp/pdf.htm>, accessed 6 August 2006.

⁶ See BC Statistics, *British Columbia's Fisheries*, 32.

⁷ *Ibid.*

⁸ Canada, Department of Fisheries and Oceans, *Achieving the Vision: Report of the Commissioner of Aquaculture Development* (Ottawa: Office of the Commissioner of Aquaculture Development, 2003), 8, http://www.dfo-mpo.gc.ca/aquaculture/ref/Acheive_e.pdf, accessed 6 August 2006.

⁹ *Ibid.*

A key challenge in growing the BC shellfish aquaculture sector is the degree to which it is able to harmonize industry expansion with the protection of the wilderness values and the development of other economic activities in the coastal zone, particularly eco-tourism. In many ways, the interests and values of the fledgling eco-tourism and shellfish aquaculture sectors converge. Eco-tourism typically attempts to uphold conservation values while respecting indigenous communities and their values. Like eco-tourism, shellfish aquaculture has a significant stake in protecting environmental values, particularly those relating to water quality. Shellfish aquaculture also has the potential to promote sustainable local economic development, especially for small indigenous communities. These potential synergies suggest the need for creative solutions to the reconciliation of interests that arise in a multi-use environment. Shellfish aquaculture also has the potential to capitalize on growing consumer demand for organic and sustainably produced goods. Green marketing is already used in the New Zealand shellfish industry to gain access to new markets.

As suggested above, one of the most compelling arguments in favour of investing in shellfish aquaculture is its environmental sustainability. Shellfish are bivalve feeders, which means they feed by filtering water flowing over feed beds. However, shellfish, during this feeding process, may consume contaminants that are present in the water, including chemicals, viruses, and bacteria. These pollutants can then accumulate, at high levels, in the digestive tracks of the animal, rendering them unfit for consumption. Consequently, shellfish aquaculture is heavily dependent on maintaining a clean ecosystem. To this end, no fertilizers or pesticides are used in the growing process. Generally, the only human-made elements in the water are the lines, ropes, and buoys on which the animals are growing.

A second strong argument supporting a larger shellfish aquaculture industry involves the vast and growing global demand for seafood-related food products. According to the United Nations Food and Agriculture Organization, aquaculture (shellfish and finfish) has grown at a rate of 9.2 percent since 1970. This statistic is particularly impressive when one notes that, for that same period, the growth rate of capture fishing and land-based farmed meat products was 1.4 percent and 2.8 percent, respectively.¹⁰

Shellfish aquaculture is also widely hailed as offering significant economic benefits to, and being compatible with, the traditional values

¹⁰ Food and Agriculture Organization (FAO) of the United Nations, *State of the World Fisheries and Aquaculture 2002*, (Rome: FAO, 2002) 25, <ftp://ftp.fao.org/docrep/fao/005/y7300e/y7300e01.pdf>, accessed 6 August 2006.

and cultural practices of BC First Nations. Locations that are ideal for shellfish aquaculture are often in relatively isolated and remote regions of coastal British Columbia. Thus, for the most part, the industry is currently located some distance from densely populated regions of the province such as Victoria and Vancouver. Key growing areas include mid-coast locations on eastern and western Vancouver Island and the Sunshine Coast. While these grow areas are generally not in close proximity to large urban centres, they are located near many remote Aboriginal communities. As a result, reconciling indigenous interests with shellfish operations is critical.

In many ways, shellfish aquaculture is consistent with traditional Aboriginal values and practices. Many BC coastal First Nations people have a long tradition of harvesting shellfish for food and ceremonial purposes. This is a historical relationship that, it has been argued, “provides an ideal foundation for moving into commercial development.”¹¹ As such, the shellfish industry is seen by many as having the potential to bring significant economic growth to Aboriginal communities that, to this point, have been disproportionately affected by the downturn in the fortunes of capture fishing and forestry. On many coastal First Nations reserves, the unemployment rate is close to 90 percent.¹² As a result, many coastal Aboriginal communities are struggling to survive as band members leave to pursue off-reserve employment. The potential of shellfish aquaculture to play a role in reversing this trend is becoming increasingly evident. The Nuu-chah-nulth First Nation of the west coast of Vancouver Island has already sought to capitalize on this opportunity by embarking on an ambitious program of shellfish aquaculture expansion aimed at replacing the revenues and jobs lost due to the decline of the wild fishery.¹³

New Zealand as a Comparator Jurisdiction

A variety of factors make New Zealand and British Columbia highly instructive comparators for the study we have undertaken. Demographically and geographically, the two jurisdictions bear some striking resemblances. The population of both jurisdictions is similar, at just

¹¹ *First Nations Shellfish Aquaculture Regional Business Strategy: BC Central and North Coast* (Nanaimo, BC: Kingzett Professional Services in collaboration with AXYS Environmental Consulting for Land and Water British Columbia Inc., 2002), 1-5, http://www.agf.gov.bc.ca/fisheries/Shellfish/FN_Shellfish_Aquaculture_North_Coast_Strategy.pdf, accessed 6 August 2006.

¹² Interview with Roberta Stevenson, Nuu-Chah-Nulth Shellfish Development Corporation, by Robert Scott, 27 October 2004.

¹³ *Ibid.*

over four million. They also boast coastal zones that are naturally well suited to shellfish aquaculture. In New Zealand's case, many of the prime shellfish growing sites, along its 15,134-kilometre coastline, are already in production. In contrast, in British Columbia there are greater opportunities for expansion due to a much longer coastline - some 26,000 kilometres. At present, only a small fraction of this area is currently being farmed. Moreover, both jurisdictions are well situated geographically to take advantage of shellfish exporting opportunities. In New Zealand's case, Australia and Asia are particularly ready markets. British Columbia, on the other hand, is ideally situated to gain access to the lucrative US market along the Pacific Coast.

Canada and New Zealand also share a common legal and political heritage. Due to their colonial past and membership in the Commonwealth, they share a variety of legal and political traditions and institutions. Both are constitutional monarchies with a Westminster-style parliament. In the political realm, of course, the salient difference is that New Zealand is a unitary state. This, as we will discuss, has allowed it to pursue an ambitious agenda of aquaculture regulatory reform unencumbered by the political and legal constraints and uncertainties that confront federal states such as Canada. Another important difference is that, unlike Canada, New Zealand does not have an entrenched constitution, a factor that plays a role in structuring the legal and political relationship between its national government and indigenous groups.

In recent decades, the need to renegotiate and redefine these indigenous relationships, both in New Zealand and in British Columbia, has been a broad-based political priority. Both jurisdictions have significant indigenous populations that have been increasingly adept and successful at exerting political influence. As of 2001, Maori comprised approximately 15 percent of New Zealand's population,¹⁴ while 4 percent of British Columbia's population is of Aboriginal descent.¹⁵ In both jurisdictions, the relative size of the indigenous population is on the rise.

A final reason why British Columbia and New Zealand are useful comparators is that, in both jurisdictions, the rapid growth of aquaculture in recent years has provoked serious political fallout and debate. In British Columbia, the controversy has focused almost exclusively on salmon farming. In 1995, controversy over the growing number of new coastal finfish operations prompted the provincial government to declare

¹⁴ Statistics New Zealand, "Census Snapshot: Maori," <http://www.stats.govt.nz/products-and-services/Articles/census-snpstt-maori-Apro2.htm>, Highlights, accessed 6 August 2006.

¹⁵ Statistics Canada, "Census 2001: Aboriginal Identity Population, 2001 Counts, for Canada, Provinces and Territories," www.statcan.ca, accessed 6 August 2006.

a moratorium on the granting of new tenures. Much of the heated debate that led to and accompanied this moratorium centred around the effects of salmon farming on the environment and on traditional Aboriginal rights and title in the coastal zone. The BC government lifted the moratorium in 2002, but, if anything, the controversy surrounding the industry has escalated. In New Zealand, the rapid expansion of shellfish aquaculture operations, particularly in the scenic Marlborough Sound area, prompted the national government to announce a similar moratorium on new tenures. As in British Columbia, factors that contributed to the New Zealand government's decision included environmental and indigenous rights concerns. As of 1 January 2005, this moratorium has also been lifted as part of an ambitious overhaul of the regulatory and planning framework governing shellfish aquaculture – an overhaul that guarantees Maori a 20 percent stake in all existing and new shellfish operations. While the aquaculture reform package has been generally well received, it is too early to determine whether it will succeed in addressing the concerns about industry expansion that initially led to the moratorium. In short, in both British Columbia and New Zealand it appears clear that the future of the shellfish aquaculture industry is closely related to the degree to which it is able to chart a course that safeguards its claim to a social licence.

Three Snapshots: Industry, Regulation, and Indigenous Participation

In a sense, New Zealand's aquaculture industry is a mirror image of its BC counterpart. Shellfish aquaculture is the dominant player in New Zealand aquaculture, with finfish farming occupying a much more modest role. In British Columbia, the situation is reversed, and finfish, not shellfish, aquaculture is the dominant subsector – a Canada-wide pattern. In British Columbia, the finfish sector secured dominance in the 1990s when farm gate value of farmed salmon soared from CDN\$79 million in 1990 to CDN\$292 million in 1999.¹⁶ The steepness of this growth curve is underscored by the fact that, at the start of the 1990s, farmed fish accounted for only 6 percent of the total fisheries harvest; a decade later this proportion had almost quadrupled.¹⁷ In ensuing years, however, the fortunes of the finfish industry reversed, due, in part, to

¹⁶ BC Ministry of Agriculture, Food and Fisheries, *British Columbia's Fish Products and Seafood Industry in the 1990s* (Victoria: Ministry of Agriculture, Food and Fisheries, 2001), 5, http://www.agf.gov.bc.ca/fish_stats/pdf/BC_Fish_Product_&_Seafood_Industry_in_the_1990s.pdf, accessed 6 August 2006.

¹⁷ *Ibid.*, 7.

the absence of a strong social licence. Currently, the industry is still struggling to match revenues generated in its peak year of 1999.¹⁸ Like the dominance of finfish in British Columbia, the dominance of shellfish in New Zealand reflects the growth that the sector experienced through the 1990s and into the early part of the current decade, with free on board (FOB) values cresting at approximately CDN\$167 million in 2002. While the BC shellfish industry experienced some growth during the same period, its growth curve was nowhere near as steep or dramatic as was New Zealand's, and production was a modest CDN\$15.9 million in 2003.

Another striking difference between the two industries is the amount of production per hectare. Although poised to expand significantly, New Zealand had approximately 7,500 hectares of land under shellfish production, which produced approximately CDN\$138 million (FOB value) in 2004.¹⁹ In British Columbia, in 2003, 2,800 hectares were devoted to shellfish aquaculture, producing just under CDN\$15 million.²⁰ At present, approximately 3,000 hectares are under production on the BC West Coast, with another 600 to 1,000 hectares earmarked for future use.

Like the industries themselves, shellfish regulatory regimes in New Zealand and British Columbia differ markedly. In British Columbia, the most striking feature of the regulatory regime is its complexity and lack of integration. Part of the complexity is simply explained by the federal nature of Canada. The Department of Fisheries and Oceans, Environment Canada, and the Canadian Food Inspection Agency all play roles at the national level. Provincially, the multiplicity of departments is similarly evident. Local governments, the Ministry of Agriculture and Lands, and the newly created Integrated Land Management Bureau (ILMB) all play a role in regulating the industry.

By sharp contrast, the New Zealand regulatory regime involves far fewer agencies and processes. Prior to the introduction of far-reaching regulatory reforms that came into force in 2005, the shellfish tenuring system was bifurcated and bureaucratic. However, the new system eliminates a former two-stage permitting regime, replacing it with a one-stop process that is integrated with overall coastal marine planning, where regional councils play the central role in the process.

¹⁸ British Columbia Ministry of Agriculture, Food and Fisheries, "Aquaculture Statistics," http://www.agf.gov.bc.ca/fish_stats/statistics-aqua.htm, accessed 6 August 2006.

¹⁹ This number includes 6,535 hectares of mussel farms and 928 hectares of oyster farms. See New Zealand Ministry of Fisheries, "Aquaculture in New Zealand," <http://www.fish.govt.nz/en-nz/Commercial/Aquaculture/default.htm>, accessed 6 August 2006.

²⁰ See note 18.

Shellfish aquaculture in New Zealand and British Columbia also differ in the magnitude and nature of involvement of indigenous peoples. Maori play a central role in the industry and have benefited significantly from its expansion. In British Columbia, conversely, Aboriginal participation in the industry remains fledgling; approximately 490 hectares of the 3,000 hectares currently involved in shellfish farming is held by BC bands. However, initiatives aimed at allocating preferential rights to the fishery resources based on race have been tentative and often highly controversial.²¹

In both countries, indigenous participation in shellfish aquaculture is also significantly influenced by the legal regime that defines indigenous relationships with government. In New Zealand, the rights enjoyed by Maori in large measure are derived from the Treaty of Waitangi (1840).²² This treaty enjoys quasi-constitutional status and is broadly regarded as defining Crown-Maori relations. It is on the basis of this treaty, as elaborated in subsequent treaties and agreements, that Maori have been able to secure significant concessions from the New Zealand government. These settlements account, in large measure, for the high and growing level of indigenous participation in New Zealand aquaculture and the fishing industry more generally. Most notable among these for our purposes is the Maori Commercial Aquaculture Claims Settlement Act, 2004, which allocates 20 percent of existing and future shellfish tenures to Maori.

Unlike in New Zealand, in British Columbia there are few colonial-era treaties and even fewer contemporary ones, despite the significant energies and resources that have been dedicated to this latter task over the last decade under the auspices of the BC Treaty Commission. The uncertainty surrounding the ultimate outcome of these various negotiations has had a profoundly negative impact on British Columbia's resource sector²³ and has hampered development of shellfish aquaculture. With treaty negotiations and litigation offering little by

²¹ This point is well illustrated with the litigation surrounding *Regina v. Kapp* (2004) 205 B.C.A.C. 71 (B.C.C.A.). In this case, a group of non-Native commercial fishers were charged with violating section 78 of the Fisheries Act when they protested a special Aboriginal fishery called the pilot sales program. The plaintiffs argued that the program violated equality rights under the Canadian Charter of Rights and Freedoms. Ultimately, the British Columbia Court of Appeal ruled that the program did not violate the Charter. See Part 3 *Accommodating Indigenous Rights and Interests in the Coastal Zone*.

²² *Treaty of Waitangi*, Queen Victoria and Maori, 6 February 1840.

²³ This point has similarly been made by the BC Treaty Commission. See, for example, British Columbia, BC Treaty Commission, *The Business Case for Treaties* (Vancouver: BC Treaty Commission, 2004), http://www.bctreaty.net/files_3/pdf_documents/Business%20Case.pdf, accessed 6 August 2006.

way of opportunities to secure new shellfish possibilities, some BC First Nations that are highly motivated to get into shellfish aquaculture apply for tenures under the standard provincial tenure process. Many First Nations, however, are reluctant to apply for permission to develop coastal resources that they consider to be their own.

While it is fair to say that governments in both jurisdictions are committed to expanding indigenous participation in shellfish aquaculture, the means by which they have approached this task differ markedly. The BC and Canadian approach has been relatively cautious and incrementalist, involving modest policy measures to support indigenous participation in the sector.²⁴ The New Zealand approach, in contrast, is more ambitious and seeks a fundamental and final reconciliation of competing Crown-Maori interests.

Thus, despite the many similarities between British Columbia and New Zealand across a diverse range of factors (legal, political, and biophysical), shellfish aquaculture in New Zealand has developed at a dramatically different pace than it has on Canada's west coast. Turning to Part 2, we now take a closer look at New Zealand's aquaculture revolution, its aftermath, and its future prospects.

PART 2

Reviving a Revolution? Shellfish Aquaculture and Indigenous Rights in New Zealand

The late 1990s were heady times for aquaculture in New Zealand. In just over a decade, it had become the new star on the nation's export scene. By 2001, the country's leading aquaculture industry organization was boasting that a "revolution" was under way in the coastal waters and rivers of New Zealand. Confidence about the industry's future brimmed. The value of the nation's aquaculture exports was widely predicted to rise from NZD\$200 million to NZD\$1 billion by the year 2020.²⁵

By the summer of 2004, however, quite a different picture was emerging. The industry's steep growth curve had precipitated a backlash, severely jeopardizing its social licence. Not only had the shellfish tenure "gold rush" created regulatory headaches and bad publicity for the

²⁴ Canada, Department of Oceans and Fisheries, *DFO's Aquaculture Policy Framework* (Ottawa: Communications Branch Fisheries and Oceans Canada, 2002), http://www.dfo-mpo.gc.ca/aquaculture/ref/APF_e.pdf, accessed 6 August 2006.

²⁵ New Zealand Aquaculture Council Inc., *Vision 2020* (Blenheim: New Zealand Aquaculture Council Inc., 2001), <http://www.seafood.co.nz/doclibrary/news/AquacultVision2020.pdf>, accessed 6 August 2006.

industry, but it had also provoked a dramatic political showdown over foreshore ownership with the Maori. In the circumstances, the industry reluctantly agreed to a short-term moratorium on new shellfish tenures to allow for an aquaculture regulatory reform package to be implemented. However, as the foreshore issue continued to garner headlines and to provoke political acrimony, export markets softened, the deadline for lifting the moratorium was extended, and the industry found itself awash in red tape and red ink.

Overview of the New Zealand Context

During the past quarter-century, the New Zealand state has, like many of its Western counterparts, moved to an outcome-oriented approach to public governance. To implement this more market-based approach to regulation and service delivery, New Zealand has relied on a new model of public sector management, a model heavily focused on efficiency and influenced by private-sector administration styles and values. Under this new management paradigm, two goals tended to dominate: subsidiarity (i.e., decision-making power should be located as close as possible to the place of implementation) and cost effectiveness (i.e., the preferred governance model is the one that entails the lowest cost to the responsible agency and the businesses it oversees).²⁶

Among the most notable illustrations of this new management strategy were reforms in the areas of resource management and environmental protection that culminated in the enactment of the Resource Management Act, 1991 (RMA). Prior to the enactment of the RMA, the national government had lead responsibility for resource permitting, environmental assessment, and land-use (including coastal zone) planning. Under the RMA, many of these responsibilities were transferred to New Zealand's ten regional councils, which are given broad legal autonomy to manage "natural and physical resources" consistent with broadly defined national policy objectives. As will be discussed, the government's recent aquaculture reform package represents a significant consolidation of the regional councils' control over aquaculture planning and permitting and, as such, reflects a further extension of New Zealand's public management model.

While New Zealand does not have an entrenched written constitution, the Treaty of Waitangi, as stated above, is widely recognized as having quasi-constitutional status. Predictably, the task of defining the principles

²⁶ Jonathan Boston, John Martin, June Pallot, and Pat Walsh, *Public Management: The New Zealand Model* (Auckland: Oxford University Press, 1996), 5.

of the treaty has occupied considerable judicial energies. The treaty itself, a mere three paragraphs long, sheds little light on this question. The leading decision of the Court of Appeal on the point²⁷ opines that it signifies “a partnership between races.”²⁸ From this concept flow other principles that the jurisprudence continues to elaborate and define. Some of these duties are reciprocal, such as the duty of the “partners” to cooperate and act honestly and in good faith. Others fall more squarely on government, such as the responsibility to safeguard Maori interests and to provide redress for violations of Maori rights.²⁹

An emerging issue upon which New Zealand courts have yet to definitively pronounce is whether the treaty imposes a “stand-alone” duty on government to consult with Maori respecting decisions that directly affect Maori interests. It is well established that such an enforceable duty flows by implication where legislation, such as the RMA, specifically mandates. However, whether such a duty exists as an independent principle of the Treaty of Waitangi itself remains uncertain.

No discussion of the Treaty of Waitangi would be complete without reference to the Waitangi Tribunal. This quasi-judicial body was created by special legislation in 1975. While its decisions are not ultimately binding on the government, it is empowered to investigate and make recommendations on how the government may alleviate or rectify a breach of the Treaty of Waitangi. By providing a venue for Maori to pursue complaints about specific government actions or, more generally, about government legislation or policy that are alleged to contravene the Treaty of Waitangi, the tribunal has come to play a central and respected role in New Zealand public life.

Revolution on the Rocks:

Shellfish Aquaculture in New Zealand (2001-04)

By 2001, the New Zealand aquaculture industry had become a benchmark for global shellfish aquaculture. In the preceding twelve years, the industry went from producing a modest 5,800 tons worth CDN\$17 million in 1988 to CDN\$124 million in 2000 – a remarkable growth

²⁷ *New Zealand Maori Council v. Attorney General* [1987] 1 N.Z.L.R. 641 (C.A.). This case arose when the New Zealand government, through the State Owned Enterprises Act, 1986 (N.Z.) 1986/124 3 RS 1306, proposed to transfer Crown lands to state enterprises without considering whether claims to the lands existed under the Treaty of Waitangi.

²⁸ *Ibid.*, 664, line 1.

²⁹ See generally New Zealand, Ministry of Maori Development (Te Puni Kokiri), *The Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal* (Wellington: Te Puni Kokiri, 2001), <http://www.tpk.govt.nz/publications/subject/default.asp#gov>, accessed 6 August 2006.

rate of over 700 percent.³⁰ Optimism about the future brimmed. In the document entitled *Vision Statement 2020*, New Zealand industry experts predicted that the aquaculture industry in New Zealand could reach NZD\$550 million by 2010 and balloon to NZD\$1 billion by 2020, encompassing 17,000 hectares of marine space.³¹ However, while these were heady times for the industry, storm clouds hovered on the horizon. These problems included declining mussel exports, a growing public perception that the industry was growing too quickly, and an emerging sense among many key Maori groups that they deserved a larger stake in the industry. This section focuses on the two main challenges that confronted shellfish aquaculture in New Zealand during the tumultuous period between 2001 and 2004: the quest for regulatory reform and reconciliation of Maori claims.

During the aquaculture industry's early "take-off" years, several weaknesses and deficiencies in the regulatory model became increasingly apparent. The first arose out of the bifurcation of the permitting authority: to operate a marine farm required the proponent to secure both a "resource consent" (granted by regional councils under the RMA) and a permit under the Fisheries Act issued by the Ministry of Fisheries. This bifurcation created a variety of problems.

Among these, perhaps most noticeably, was the gold rush for marine space created by proponents filing literally hundreds of tenure applications with regional councils. Over the course of the decade, "demand for access to unpolluted, nutrient-rich waters for a diverse range of marine farming increased five-fold."³² Not having established coastal zoning policies to define the areas in which such applications would be considered, many regional councils soon found themselves awash in aquaculture paperwork. Inevitably, tensions and pressures mounted. For industry, delays and costs associated with securing new permits increased significantly. Local communities similarly experienced strain from the operation of the system. Communities that made submissions on the suitability of applications experienced "submitter fatigue" from the endless onslaught of applications.

³⁰ Brian Kingzett and Ruth Salmon for Vancouver Economic Developers Association, *Profile and Potential of the BC Aquaculture Industry 2002* (Nanaimo, BC: Kingzett Professional Services 2002), 57, <http://www.bluerevolution.ca/resources/VIDEA%20BC%20Industry%20Overview%20Final%2002June12.pdf>, accessed 6 August 2006.

³¹ New Zealand Aquaculture Council Inc., *Vision 2020*, 4.

³² New Zealand Ministry for the Environment, "Aquaculture Reform 2004: An Overview," <http://www.mfe.govt.nz/publications/rma/aquaculture-info-overview-jano5/aquaculture-overview-jano5.html>, accessed 6 August 2006.

Division of the permitting regime also adversely affected the ability of regional councils to make permitting decisions in a consistent and well-informed manner. Under this bifurcated model, regional councils were not entitled to consider the impact of shellfish aquaculture on the wild fishery: sole jurisdiction over this question rested with the Ministry of Fisheries. Not only did this undermine the potential for integrated coastal zone planning but it also raised the possibility that a permit applicant would invest heavily in putting an application forward that would be rejected by the Ministry of Fisheries at the eleventh hour. This example illustrates the disconnect between a community-based planning model, epitomized by the RMA, and the centralized, expert-driven approach to decision making embedded in the New Zealand Fisheries Act. As is seen below, the goal of regulatory reform was to rationalize aquaculture regulation based on the RMA community-based model.

As demands for marine space increasingly collided with what many were realizing was an inefficient and ineffective licensing system, the government decided to take action. To this end, in March 2002 it committed to a broad-based aquaculture regulatory reform initiative. To set the stage for these reforms, it instituted a moratorium on new marine farms to prevent speculation on coastal marine space prior to the official introduction of the reform legislation. Originally, this moratorium was slated to be lifted at the end of March 2004, a deadline that was later extended to the end of December 2004 due to the emergence of a new and closely related issue onto the national political agenda – namely, Maori claims to ownership and control of the foreshore.

As the government embarked on its aquaculture reform initiative, it realized that this enterprise was tightly tied to the broader and unresolved question of Maori interests in the foreshore and in marine farming. What it failed to recognize was the magnitude and furor of the debate this initiative would trigger.

Much of the controversy that ensued arose out of litigation that culminated in the 2003 landmark decision of the New Zealand Court of Appeal in *Ngati Apa v. Attorney General*.³³ At issue in the case was whether the Maori Land Court had jurisdiction to determine the status of the foreshore and seabed as Maori customary land.³⁴ Maori groups

³³ [2003] 3 N.Z.L.R. 643 (hereafter *Marlborough Sounds*).

³⁴ By way of background, the Te Ture Whenua Maori Act, 1993 (N.Z.), 1993/4, 47, at s.129(1), states that all land in New Zealand is one of six types: Maori customary land, Maori freehold land, general land owned by Maori, general land, Crown land, or Crown land reserved for Maori. Section 18(1)(h) provides that the Maori Land Court has the power “to determine for

argued that certain sections of the foreshore and seabed were Maori customary land, and they sought a resolution of the issue in the courts.

The Crown objected to the suit on two grounds.³⁵ First, it argued that the Maori Land Court had no jurisdiction to make such an order, given the previous ruling of the New Zealand Court of Appeal in *Re The Ninety-Mile Beach*.³⁶ Second, even if Maori were found to hold customary property over the foreshore and seabed, it contended that ownership had been extinguished by legislation that had effectively vested all ownership of the foreshore and seabed in the Crown.

The jurisdictional issue of whether the Maori Land Court could hear the case eventually reached the New Zealand Court of Appeal.³⁷ The Court of Appeal held that the Land Court did indeed have jurisdiction. It based this conclusion on three grounds. First, although legislation could extinguish Maori customary title, the court rejected the notion that the legislation in question had done so.³⁸ Second, the court overruled its former decision in *Re The Ninety-Mile Beach*, stating that it “was wrong in law and should not be followed.”³⁹ Third, the court found that the foreshore and seabed were “land,” within the meaning of the Te Ture Whenua Maori Act, 1993, and that, therefore, the Maori Land Court should have jurisdiction.⁴⁰ However, the court explicitly did not vest ownership of the foreshore and seabed in Maori (a point often obscured in the ensuing political controversy).⁴¹

The Court of Appeal’s decision set off an intense political debate. The government was bombarded from both sides of the political spectrum with calls to respond to this decision. The government’s official Op-

the purposes of any proceedings in the Court or for any other purpose whether any specified land is or is not Maori customary land or Maori freehold land or General land owned by Maori or General land or Crown land.” Prior to this case, it had been believed that the common law established, based on *In Re: The Ninety-Mile Beach*, that ownership of the foreshore and seabed was vested with the Crown and, therefore, that the Maori Land Court had no jurisdiction to determine whether any given part of the foreshore or seabed was Maori customary land. The *Marlborough Sounds* case represents a departure from this approach.

³⁵ *Marlborough Sounds*, para. 4.

³⁶ [1963] N.Z.L.R. 461. In this case, the court was faced with a set of issues analogous to those presented in the *Marlborough Sounds* case – namely, whether the Maori Land Court had jurisdiction to investigate title to the foreshore, and, if it did, had legislation extinguished any Maori claim to the foreshore. Unlike the *Marlborough Sounds* case, the Court of Appeal in 1963 concluded that the Maori Land Court did not have jurisdiction to investigate title in the foreshore. T.A. Gresson J. specifically noted that, on the assumption of sovereignty by Queen Victoria, the entireties of the islands of New Zealand (including the foreshore) were vested in the Crown.

³⁷ *Marlborough Sounds*, 650, line 41.

³⁸ *Ibid.*, 651, line 7.

³⁹ *Ibid.*, 651, line 10.

⁴⁰ *Ibid.*, 661, line 42.

⁴¹ *Ibid.*, 649, line 43.

position, the National Party, demanded that the government act to ensure that the foreshore and seabed was accessible and secure for “all New Zealanders.” Maori groups, on the other hand, called upon the government to abide by the Court of Appeal’s decision and allow the courts to determine the matter of customary ownership. Indeed, the case itself foreshadowed the looming political consequences. The respondents in the case made “predictions of the dire consequences of the recognition of Maori customary land in marine areas for the exercise of long-established rights of other New Zealanders on the beach and in marine areas.”⁴² Government inaction in the face of the decision became fodder for daily attacks from the Opposition benches in Parliament. Among the most vocal critics were National Party MPs who claimed inaction would “open the floodgates to more Maori claims over beaches, estuaries, harbours and almost any stretch of coastline.”⁴³ The National Party provided further agitation by proclaiming: “The foreshore and seabed claimed by Maori has become a line in the sand that New Zealanders do not want to cross.”⁴⁴ Conversely, the Treaty of Waitangi Fisheries Commission⁴⁵ hailed the decision as a landmark case and stated that it “reinforces our views that the legal rights of [Maori] to the foreshore and seabed have never been extinguished.”⁴⁶

Under growing public pressure to show leadership on the issue, the government concluded it had to take decisive action. So, in December 2003, it introduced its foreshore and seabed policy in a document called *Foreshore and Seabed Framework*.⁴⁷ Given the political explosion that erupted after the Court of Appeal decision, the framework’s goal was to clarify the nature of the legal rights in the foreshore and seabed.

Announcement of the policy prompted vigorous debate. One of its most outspoken critics was the Waitangi Tribunal, which claimed the policy was unfair to Maori and was contrary to the rule of law.⁴⁸

⁴² Ibid., 691, line 45.

⁴³ “Seabed Owned by Crown says PM,” *New Zealand Herald*, 23 June 2003, <http://www.nzherald.co.nz>.

⁴⁴ Ibid.

⁴⁵ The Waitangi Fisheries Commission (also known as Te Ohu Kai Moana [ТОКМ]) was created in 1992 to replace the Maori Fisheries Commission, which was set up to hold and eventually distribute Maori fishery assets that had been returned to Maori from the Crown. ТОКМ has played this role since 1992.

⁴⁶ “Fisheries Commission Hails Landmark Maori Seabed Decision,” *New Zealand Herald*, 19 June 2003, <http://www.nzherald.co.nz>.

⁴⁷ New Zealand Government, “Foreshore and Seabed of New Zealand,” <http://www.beehive.govt.nz/foreshore/>, Further information and Resources, accessed 6 August 2006.

⁴⁸ Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy WAI1071* (Wellington: Legislation Direct, 2004), 124, <http://www.waitangi-tribunal.govt.nz>, accessed 6 August 2006.

While acknowledging that the government was entitled to develop a foreshore and seabed policy, it contended that the principles of the Treaty of Waitangi required that such policies must give meaning to Maori rights.⁴⁹

Agitation from National Party leader Don Brash further fuelled the political fires of the foreshore issue. In a speech made shortly after the government released its foreshore policy, Brash spoke of the growing problem of race relations in New Zealand and called for one law for all New Zealanders. According to Brash, the government's policy would impede public access to the foreshore, consolidating the impression that Maori had an "upper hand" in New Zealand society by birthright.⁵⁰

Ultimately, the government decided it would proceed with the legislation substantially modelled on the proposed policy. Political opposition leading up to introduction of the *Foreshore and Seabed Bill* was intense. When Deputy Prime Minister Cullen introduced the bill into Parliament, an estimated fifteen thousand (some claiming as many as thirty thousand) people descended on the parliamentary grounds to protest. Debate within the Parliament was just as fierce. The National Party vigorously opposed the bill, arguing that it would open up "a new grievance industry."⁵¹ Brash, in Parliament on the day the bill was first read, stated: "We want to have a nation where we can go to the beach, where we can catch fish from a dinghy, and *where we can establish a mussel farm*, without regard to ethnicity."⁵² Even within the government's own Labour Party, there was opposition. Labour cabinet minister Tariana Turia resigned⁵³ her seat (and formed a new Maori opposition party) in opposition to her government's stance on the foreshore issue. In the end, however, with the help of its coalition partner New Zealand First, the Labour government was able to build enough support within Parliament to pass the legislation.

The foreshore and seabed issue was by no means the only front on which Crown-Maori relations were being tested. In addition to the debate over the foreshore, there was also the vexing issue of defining the nature and extent of the Maori interest in the growing shellfish aquaculture sector. Public debate on this issue reached a crescendo in 2002, with publication of the Waitangi Tribunal's *Abu Moana* Report.

⁴⁹ Ibid., 131.

⁵⁰ Don Brash, "Nationhood," Orewa speech delivered on 27 January 2004, <http://www.national.org.nz>, accessed 6 August 2006.

⁵¹ N.Z., *Hansard*, First Reading, *Foreshore and Seabed Bill*, 6 May 2004 (Don Brash).

⁵² Ibid. (emphasis added).

⁵³ Ruth Berry and Helen Tunnah, "Turia Quits Labour, Stripped of Portfolios," *New Zealand Herald*, 1 May 2004, <http://www.nzherald.co.nz>.

This report was the outcome of the tribunal's investigation into claims by Maori groups with respect to the introduction of the new aquaculture reform legislation and the subsequent imposition of the moratorium.⁵⁴

A critical threshold finding by the Tribunal was that Maori had a legally protected interest in aquaculture and marine farming deriving from the Treaty of Waitangi and that the government had proceeded without taking appropriate steps to define the extent and scope of these interests.⁵⁵ The report also concluded that government reform initiatives constituted a violation of a variety of its obligations to Maori under the Treaty of Waitangi.

*Building a Community of Interests:
Integrating Aquaculture Reform with
Contending Interests (2004-06)*

Besieged by criticisms on a variety of fronts, the Labour government worked to develop a multifaceted strategy that would appease its critics and permit the increasingly costly moratorium to be lifted. What resulted was a tripartite legislative solution comprised of three new bills: the Resource Management (Aquaculture Reform) Amendment Act⁵⁶ (ARA), the Maori Commercial Aquaculture Claims Settlement Act, 2004⁵⁷ (MSA), and the Foreshore and Seabed Act⁵⁸ (FSSA).

If the reform package was to satisfy the aquaculture industry, two key issues had to be addressed. The first is discussed above: reducing regulatory inefficiencies associated with the former bifurcated permitting system. The second was that of tenure security, which took on added significance as the moratorium wore on and uncertainty about the industry's future mounted.

The ARA enhances tenure security by instituting a standardized twenty-year lease for all sites. At the expiry of the lease, the tenure holder will have a right of renewal if it has been a good corporate citizen and operated in a manner consistent with industry standards. Industry has also welcomed the ARA's elimination of regulatory bifurcation. Under the ARA, permitting becomes a one-stop process, with only one operating permit (called a resource consent) being required and issued from the

⁵⁴ Waitangi Tribunal, *Abu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct, 2002), 2.

⁵⁵ *Ibid.*, 62.

⁵⁶ Resource Management (Aquaculture Reform) Amendment Act (N.Z.), 2004/103.

⁵⁷ Maori Commercial Aquaculture Claims Settlement Act, 2004 (N.Z.), 2004/107.

⁵⁸ Foreshore and Seabed Act, 2004 (N.Z.), 2004/93.

regional council. The former requirement to secure the Ministry of Fisheries' approval is now dealt with up-front by the relevant regional council when they develop their regional coastal plan. Under the new regime, regional councils are required to identify suitable areas for aquaculture, in consultation with industry and the local community. Locations that regional councils decide are suitable for aquaculture are then to be designated as aquaculture management areas (AMAs). Within (and only within) these areas, a person may apply for a marine farming resource consent to enable her or him to carry on shellfish aquaculture.

During this zoning exercise, the Ministry of Fisheries will assess the proposed AMA for any "undue adverse effects" on commercial, customary, or recreational fisheries. The undue adverse effects test is the same as is that applied under the old regime. However, now the process is not done on a farm-by-farm basis but on an AMA-by-AMA basis. The system eliminates the need for each individual proponent to secure two operating permits. It does this while, at the same time, preserving an oversight role for the Ministry of Fisheries in the AMA planning process. The model also allows industry interests to initiate AMA zoning under a procedure known as a "private plan change." Under this procedure, an industry-initiated application can be made to amend a regional council's coastal plan to create or expand an AMA. If the regional council ultimately accepts the proposal, the successful applicant is rewarded by securing right of first refusal on 80 percent of the resulting AMA.

The regulatory reforms also seek to address community concerns. Submitter fatigue is mitigated through the concept of the AMA. Under the new model, consideration of site suitability will be addressed within the broader context of the applicable coastal plan rather than on an ad hoc application-by-application basis. Community input will play a significant role in determining whether an operator's resource consent will be renewed.

What is perhaps most striking about the reform package is the extent to which it devolves even more powers and responsibility to regional councils. Under these reforms, regional councils assume almost unfettered control over coastal zone planning and permitting, including AMA identification and development, consideration of applications for "private plan changes," designation of "aquaculture-excluded" zones, and all ancillary environmental assessment and monitoring. The change to a devolved model is consistent with the original aims of the RMA. Power and authority is moved to the point of implementation while, at

the same time, the central government maintains, through involvement in the initial planning process, its role of oversight and supervision.

The task of regulatory reform paled in comparison with the complexity and political sensitivities associated with addressing Maori interests, which involved both their stake in the aquaculture industry and their claims to the foreshore and seabed. Earlier we discussed the storm of criticism that rained on the government in connection with its decision to legislate on the foreshore issue and its failure to consult adequately with Maori about aquaculture reform. While it remains to be seen whether and to what extent the steps taken by the government will succeed in appeasing its critics, the breadth and ambitiousness of its package cannot be denied.

To secure Maori support for the broader reform package, the government knew that it would need to address, in a substantial way, Maori claims to an interest in marine farming, particularly the potentially lucrative opportunities associated with an expansion of marine farming. For many Maori, the failure of the 1992 Fisheries Settlement to address these issues was a key priority. This 1992 settlement allocated 20 percent⁵⁹ of the wild fisheries to Maori; it did not, however, address Maori rights to aquaculture.

The aquaculture reform package provided a timely opportunity to complete this “unfinished business.” To this end, the government introduced the MSA. The purpose of the MSA is to achieve a full and final settlement of Maori claims to commercial aquaculture since 1992. The MSA tackles the settlement question on two fronts: first by allocating to Maori the equivalent of 20 percent of existing tenures since 1992⁶⁰ and, second, by allocating to Maori 20 percent of all new tenures. One concern in this process is the possibility of fragmentation of the space allocated to Maori. Thus, to prevent fragmentation, regional councils can specifically develop an AMA for the express purpose of meeting treaty obligations. Once a regional council begins to develop other AMAs in their region, it can allocate space within the original AMA to Maori, thereby granting blocks that would be side by side.

Developing a viable and politically acceptable solution to the dispute over the foreshore and seabed was an even taller challenge. On 25

⁵⁹ The percentage is even higher if one includes the various side deals that were negotiated.

⁶⁰ This first 20 percent is not intended to be achieved by means of expropriating existing farms; rather, there are three methods by which this allocation may be achieved. These are as follows: (1) the Crown may instruct regional councils to provide 20 percent of new AMAs to Maori in addition to their normal allocation of 20 percent of new tenures; (2) the Crown may buy, from willing sellers, existing aquaculture space; or (3) the Crown may provide the financial equivalent.

November 2004, the FSSA came into effect, vesting ownership of the foreshore and seabed in the Crown. The government argued that the legislation provided a win-win outcome for all New Zealanders.

To achieve this objective, the act gives new responsibilities to the Maori Land Court and the High Court. Both courts are now empowered to grant a “customary rights order” that gives legal recognition to an applicant to engage in a customary activity, practice, or use that occurs on the public foreshore or seabed. Where such an order is granted, the cultural group (which need not be Maori) may exercise that activity, use, or practice without a resource consent (excluding any activity otherwise governed by fisheries, wildlife, or marine mammal legislation). The High Court is further empowered to make orders recognizing territorial customary rights. Where such an order is made, the applicant may ask that a reserve be established to protect these rights or the applicant may negotiate with the Crown for redress – which may include the establishment of a reserve.

Establishment of a reserve would not exclude the public from the area: responsibility for guardianship of the reserve would transfer to the applicant, who would be obliged to manage the area for the common use and benefit of all people in New Zealand. In discharging this function, a multiparty board (consisting of Maori, the Crown, and the area’s regional council) would be struck to provide management and administrative assistance. On passage of the legislation, the Minister of Maori Affairs sought to reassure Maori that they “have nothing to fear with the passing of this legislation. Customary rights ... are acknowledged and protected.”⁶¹ Of course, the *quid quo pro* for the above processes is that ownership in the foreshore and seabed, as stated, is vested with the Crown.

It is too early to predict whether the government’s ambitious aquaculture reform agenda will put New Zealand’s marine farming revolution back on track. Having deservedly been taken to task for embarking on this agenda without duly consulting Maori interests, that government was nonetheless later able to regroup and garner broad-based (albeit by no means universal) support amongst non-Maori and Maori alike for the package of reforms that ultimately emerged is impressive. That being said, however, it is important to recognize that the industry continues to face serious challenges in restoring its short-lived dominance in

⁶¹ N.Z., *Hansard*, Foreshore and Seabed Bill, Second Reading, 16 November 2004 (Hon Parekura Horomia).

international markets. These include new competitors, a high New Zealand dollar, and weaker world demand for its products.

A year and a half after its introduction, the FSSA continues to be a point of public debate. In the lead-up to the 2005 New Zealand general election, it appeared possible that the Maori Party, formed in opposition to the FSSA in 2004, would hold the balance of power in Parliament. In the fall of 2005, the Maori Party attempted to garner support in Parliament for a private member's bill repealing the beleaguered legislation. The attempt was ultimately unsuccessful, but this was due only to the evaporation of National Party opposition to the legislation. In March 2006, the first test case to determine the boundaries of the FSSA went before the Maori Land Court,⁶² and pressure from the international community was evident. A report released by the United Nations Commission on Human Rights states that the FSSA limits the right to freedom from discrimination and may arbitrarily deprive Maori of property.⁶³ In short, therefore, it seems clear that the foreshore debate is destined to remain a key political issue in New Zealand for years to come.

PART 3

Shellfish Aquaculture Reform and Indigenous Rights in the Coastal Zone: A Comparative Assessment

There can be little doubt that, in British Columbia, we are on the cusp of a comparable debate with respect to the development of coastal zone resources and the legal obligation to accommodate and reconcile indigenous rights affected by such development. The imminence of this debate is signaled by events and developments on a variety of fronts, including ever-evolving judicial elaborations of the Crown's duty to consult with First Nations, burgeoning interest in exploring ways to enhance interim protection of Aboriginal natural resource interests, pending titles claims on the part of the Haida Nation to jurisdiction over foreshore and offshore resources, and the accelerating pace of ongoing of treaty negotiations.

Further underscoring the critical juncture at which British Columbia finds itself is the launch of a "New Relationship" partnership initiative

⁶² Ruth Berry, "Foreshore Claim will Test Act," *New Zealand Herald*, 13 March 2006, <http://nzherald.co.nz>.

⁶³ Commission on Human Rights, Report of the special rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen – Mission to New Zealand, UN ESCOR, 62d Sess., UN Doc. E/CN.4/2006/78/Add.3.

between the provincial government and BC First Nations. This initiative reflects a commitment to reconciling Aboriginal and Crown title and aims to develop systems for cooperative decision making concerning land use planning, management, tenuring, and resource revenue sharing.⁶⁴ A key component of the program is a \$100-million-dollar trust fund (the New Relationship Trust) established specifically to enhance and build capacity within Aboriginal communities.

It would also appear that there is an emerging recognition that the development of a robust and growing shellfish aquaculture sector has the potential to both accommodate Aboriginal interests in coastal resources⁶⁵ and revive the coastal economy (such as by attracting “conservation-based investment”).⁶⁶ This is underscored by the BC government’s announcement in February 2006 of its Central Coast and North Coast Land and Resource Management Plan (LRMP) – a plan that the Liberal government heralds as a new “vision” for coastal British Columbia and coastal First Nations. Involving consultations with twenty-five First Nations, these plans are intended to support sustainable economic activities while addressing coastal community values using an Ecosystem Based Management (EBM) approach.

A Comparative Assessment of Shellfish Aquaculture Planning and Regulation

In enacting the ARA, New Zealand continues to decentralize authority, particularly over resource and environmental management, to local government. It began this journey in 1991 by passing the RMA, which delegated extremely broad operational permitting and planning authority in the coastal zone to regional councils. As discussed in Part 2, bifurcation of the permitting authority over new shellfish tenures was one of the concerns that the ARA aimed to address. The other was the ad hoc, one-site-at-a-time permitting model contemplated by the RMA, a model that thwarted effective public participation in the coastal zone planning process and robbed regional councils of the ability to make

⁶⁴ Government of British Columbia, “The New Relationship with Aboriginals,” http://www.gov.bc.ca/arr/popt/the_new_relationship.htm, New Relationship Document, accessed 6 August 2006.

⁶⁵ See Peter Pearse and Donald McRae, *Treaties and Transition: Towards a Sustainable Fishery on Canada’s Pacific Coast*, April 2004 at para 51, http://www.gov.bc.ca/bcgov/content/docs/@2QS7U_0YQtUW/pearse_mcrare_report-joint_fish_task_group.pdf, accessed 6 August 2006. See also BC Treaty Commission, *The Business Case for Treaties*, 6–7.

⁶⁶ Two of these types of initiatives that are worth noting are the Conservation Investments and Incentives Initiative and the Turning Point Initiative. See <http://www.coastalfirstnations.ca/>, accessed 6 August 2006.

permitting decisions mindful of the broader planning context. The ARA addresses these concerns by moving to a truly one-window model of aquaculture planning and permitting.

Both current and prospective BC shellfish growers are bound to look at the reformed New Zealand model with more than a little envy. In fairness, the BC government deserves credit for seeking to promote the industry by committing to expand it under the auspices of the 1998 Shellfish Development Initiative (SDI), which is a purely economic development program. Further, through ILMB, the provincial government has also made a significant investment in various coastal planning exercises that generate information and community support for sustainable coastal uses and activities upon which industry expansion depends.

Yet, while the province has taken some modest steps to support industry expansion, running a shellfish farm on the BC coast remains a highly bureaucratic and increasingly expensive proposition. Given the modest size of most proposed tenures and their projected revenues, industry advocates have long complained about the costs and delays associated with complying with the requirements of the Canadian Environmental Assessment Act and other regulatory burdens.

Another increasingly significant source of uncertainty – both for existing and prospective tenure-holders – is the interaction between shellfish aquaculture and local zoning requirements. Several regional districts have enacted or are contemplating local zoning requirements that purport to restrict the use of shellfish sites that are otherwise in compliance with federal and provincial law.

In theory, a key goal of integrated coastal zone planning is to ensure that, before new coastal uses or activities are given legal authorization, relevant information and community perspectives are brought to bear in a single, comprehensive, integrated process.⁶⁷ The hope is that decisions that emerge from such a process will be well-informed, thoroughly debated, and contribute to a collective sense of finality and closure. Clearly, the New Zealand aquaculture reform legislation is an attempt to put this approach into effect by bringing within a single process all relevant decision makers and interests, and vesting in a single authority the power to “zone” the coastal areas for particular uses and activities.

⁶⁷ Many terms are used in the literature to refer to the principles of integrated coastal zone planning, including “integrated coastal zone management,” “coastal resource management,” “integrated resource management,” and “coastal area planning and management.” See J.G.M. Parkes and E.W. Manning, *An Historical Perspective on Coastal Zone Management in Canada* (Ottawa: Department of Fisheries and Oceans, Oceans Conservation Report Series, Canadian Technical Report of Fisheries and Aquatic Sciences 223, 1998), 10.

Coastal planning came relatively late to British Columbia. The provincial government's first foray into this area did not occur until the early 1990s. To date, the lead agency, ILMB (formerly under the now disbanded Ministry of Sustainable Resource Management) has developed plans for approximately one-half of the province's coastal area. Two of these efforts are somewhat anomalous in that they represent an attempt to engage in "post facto planning" within the context of areas where aquaculture development has already contributed to a high level of community division (Cortes and Baynes). More representative of ILMB's approach are its subsequent planning efforts, including the ambitious North Islands Straits Coastal Plan and the recently released Johnstone-Bute Coastal Plan.⁶⁸

These plans succeed admirably in generating useful planning data, mapping this data onto planning units, and, in turn, using the data to identify provisional management designation (i.e., conservation, recreation, community, general marine) for each planning unit. It is critical to realize, however, that the aspirations driving these plans are relatively modest. The province takes pains to emphasize that these plans are not an attempt to engage in coastal zoning. Designations contained in such plans have no legal force, nor are they intended to "prescribe recommended uses and activities" as would normally be the case with a conventional land use designation. These designations "represent a characteristic 'flavour' of existing uses, level of development, and values or opportunities" rather than indicating "a specific suite of zoning-based direction as has been developed in terrestrial management plans."⁶⁹

Coastal plans are also constrained in another key respect. Coastal plans "are not intended to replace the need for referrals to local government ... or replace provincial or federal agency referrals or to absolve [the provincial government] from addressing its legal obligations to consult with the First Nations on land tenure applications."⁷⁰ In short, from the shellfish industry's perspective, the primary benefit of these planning exercises is that they will enhance the provincial government's ability to process tenure applications (by, among other things, screening out non-acceptable uses in certain planning units). What these planning processes do not address, and what has been identified as being far more

⁶⁸ The latter represents the state of the art involving formal participation by the Federal Department of Fisheries and Oceans. See Ministry of Sustainable Resource Management and Department of Fisheries and Oceans Canada, *The Johnstone-Bute Coastal Plan Final Draft Plan 2004*, 55, http://ilmbwww.gov.bc.ca/ilmb/lup/coastal/north_island/johnstone_bute/index.htm, accessed 6 August 2006.

⁶⁹ *Ibid.*, 55.

⁷⁰ *Ibid.*, 51.

problematic from the industry's perspective, are the regulatory costs and uncertainty associated with overlapping and conflicting federal, provincial, and local planning powers.

*Accommodating Indigenous Rights
and Interests in the Coastal Zone*

When it embarked on its ambitious aquaculture reform project in 2000, the New Zealand government was well aware that the success of this endeavour would depend on addressing the Maori entitlement in relation to marine aquaculture. The nature and scope of this entitlement was deliberately put on the back-burner during the intense negotiations culminating in the historic Fisheries Settlement of 1992. This settlement, preceded by nearly a decade of litigation that was prompted by the government's move to implement a quota management system for the wild fishery in the mid-1980s, guaranteed Maori fishers 20 percent of quota for new species introduced into the Quota Management System as a full and final resolution of their claims to the wild fishery.⁷¹ In the wake of the shellfish tenure gold rush of the late 1990s, it became abundantly clear that many Maori would accept nothing less than a comparable deal for cultured species.

However, while the government knew that it would be under pressure to allocate significant new marine farming opportunities to Maori as part of the reform package, it was blindsided by both the New Zealand Court of Appeal's ruling in the *Marlborough Sounds* case and the Waitangi Tribunal's claims that the government had inadequately accommodated Maori interests in the reform process. Faced with the unavoidable conclusion that the issues of aquaculture reform and achieving a settlement of outstanding issues relating to the legal interest of the Maori in marine farming and the coastal zone were intimately and unavoidably connected, the New Zealand government set about solving the issue. As a result, it faced the daunting prospect of developing an aquaculture reform strategy that not only resolved Maori claims in relation to commercial aquaculture (unfinished business from the 1992 settlement) but also provided a viable basis for resolving the potentially explosive foreshore/seabed title issue. What emerged, as chronicled in detail in Part 2, is a highly integrated, comprehensive governmental initiative. Key features of the initiative relevant to the current discussion include retrospective and prospective application (redressing post-1992

⁷¹ Andrew Day, "Fisheries in New Zealand: The Maori and the Quota Management System," prepared for The First Nation Panel on Fisheries, at para. 3, <http://www.fns.bc.ca/pdf/New-Zealand.pdf>, accessed 6 August 2006.

Maori claims to existing licensed aquaculture space and assuring access to new space); mandatory “hardwiring” of Maori entitlements into the planning and tenuring process; and enhancement of certainty by clarifying the scope of Maori entitlements and reducing the prospect of protracted “definitional” litigation and ongoing administrative burden (by devolution of the administrative function to an arm’s-length trustee).

In Part 2, we noted the high degree of integration that now exists within the New Zealand aquaculture planning and permitting regime, a level of integration that is particularly striking when contrasted to the dispersed regulatory regime that prevails in British Columbia. As we shall see, in the realm of indigenous rights, if anything the jurisdictional and functional authority is even more dispersed.

In British Columbia, due to the almost complete lack of treaties from the colonial period, for much of the past decade considerable energy has been focused on negotiating modern treaties under the auspices of the BC Treaty Commission. To this end, provincial and federal government representatives have been involved in forty-four sets of negotiations involving fifty-five BC First Nations.⁷² Of late, the treaty process seems to be gaining momentum. In this regard, it received a significant boost by the strong judicial affirmation of the importance of consultation and accommodation by the Supreme Court of Canada in the recent *Haida* and *Taku* cases. These decisions put to rest the notion that governments are entitled to presume the non-existence of Aboriginal rights or title where the legal interests claimed have yet to be established through litigation or acceded to at the treaty table. Perhaps the most dramatic governmental policy shift resulting (at least in part) from this litigation is the Ministry of Forests and Range’s recent efforts to promote Aboriginal forestry under the Forest and Range Agreement (FRA) program.

While in recent months the treaty process has been exhibiting new life, over the twelve years since it was established no new treaties have been concluded under its auspices. The pace of treaty negotiations has been especially frustrating for First Nations due to the relative absence, until quite recently, of any comprehensive initiatives to provide *either* interim (pre-treaty) protection for the resources claimed by First Nations *or* interim opportunities (what we would term treaty transition

⁷² BC Treaty Commission Negotiation, “Update,” http://www.bctreaty.net/files_3/updates.html, accessed 6 August 2006.

measures or TTMs) to share in the economic benefits associated with the development of those resources.

The most long-standing TTM is the Aboriginal Fishing Strategy (AFS) introduced in June 1992 by the Department of Fisheries and Oceans in the wake of the Supreme Court of Canada's decision in *Sparrow*, a landmark decision that recognized a constitutionally protected Aboriginal right to food-fish. The AFS attempts to reconcile the unique dependence of many coastal First Nations with the need for fishery regulation. This reconciliation was achieved through a separate fishery regulated with respect and sensitivity to indigenous values.

A key feature of the AFS is the now discontinued Pilot Sales Program (PSP), an initiative that allowed certain Aboriginal communities to negotiate arrangements to sell commercial fish caught under communal licences. A key rationale advanced to support the PSP was its direct economic development benefits for Aboriginal communities. Furthermore, the PSP had been justified on the basis that it represented an accommodation of commercial Aboriginal fishing rights that may ultimately be recognized judicially or at the treaty table.⁷³

The Ministry of Forests and Range has been slower to take proactive steps to accommodate Aboriginal rights affected by resource development activity. However, over the last two years, forestry TTMs have become a key ministry priority. Work on this front has been primarily carried out under the FRA. The overt rationale for the FRA is to achieve "workable accommodations" with First Nations aimed at "addressing situations where there is a potential for aboriginal rights and/or title to exist in a particular area" that may be affected by ministry-authorized logging development.⁷⁴ In return for grants of volume-based forest tenures (typically five years) and share of provincial forest revenues (calculated on a per capita formula applicable to all FRAs), First Nations must agree that they have been accommodated for the term of the agreement. They must also agree not to disrupt forest activities in their territory or litigate the adequacy of the accommodation agreement. In January 2006, the Ministry of Forests and Range took the further step of reconciling the FRA model with the New Relationship to produce a new template called Interim Agreements on Forest and Range Opportunities (FRO). While the FROs are based on similar principles as are FRAs, they formally recognize the New Relationship.

⁷³ See note 21, at para. 89-102.

⁷⁴ Under this program, Aboriginal title claims are accommodated through grants of forest tenures and/or a share of provincial forest revenues; rights claims are accommodated through operational planning.

The ministry, however, emphasizes that the FRA/FRO program is aimed at addressing the unique realities of the pre-treaty context through accommodation. By providing indigenous groups with economic opportunities prior to the completion of the treaty process, FRA/FROS can have a positive impact on the trust between government and First Nations and can play an important role in building economic capacity within First Nations communities.⁷⁵ However, the ministry underscores that the FRA/FRO is a temporary program: in its words, once treaties are signed, “accommodation will no longer be necessary.”

Both the FRA/FRO and the AFS have proven somewhat controversial, albeit for somewhat different reasons. Most of the criticism of the AFS has come from non-Aboriginal fishers. In *R v. Kapp et al.* (see note 21), the BC Provincial Court struck down the regulation authorizing the PSP on the grounds that it violated the rights of non-Aboriginal fishers who had engaged in a protest fishery, contrary to the federal Fisheries Act. The case worked its way to the British Columbia Court of Appeal where it was held that the PSP did not violate non-Aboriginal fishers’ rights. In the meantime, the PSP program has been discontinued. In contrast, while the FRA/FRO program is currently very robust (the provincial government has signed one hundred and four forest agreements with First Nations since 2002),⁷⁶ it is not without its detractors in Aboriginal circles. Some First Nations argue that the program offers tenure volumes that are too small to be commercially viable. Moreover, they further argue that the conditions imposed on First Nations are overly onerous relative to the benefits offered.

In summary, we are seeing increasing governmental interest in development and implementation of TTM strategies, particularly in the wake of the *Haida/Taku* litigation and its strong affirmation of the obligation to accommodate. In the forestry context, this has led to the creation of the FRA/FRO program and a significant accompanying investment of governmental resources. As far as the wild fisheries are concerned, the future of governmental accommodation efforts will depend on the outcome of ongoing discussions between Victoria and Ottawa over follow-up to the Pearse-McRae report (see note 65).

In comparison, the BC government’s overarching strategy and goals for shellfish aquaculture, both at the treaty table and concerning interim

⁷⁵ Ministry of Forests, “Forest and Range Agreements: Frequently Asked Questions,” http://www.for.gov.bc.ca/haa/Docs/Public_Q&A_Oct27_2004.htm#general1, accessed 6 August 2006.

⁷⁶ Government of British Columbia, New Release, “Nuchatlaht Secures Access to Crown Timber,” 20 April 2006, http://www2.news.gov.bc.ca/news_releases_2005-2009/2006FOR0028-000455.htm, accessed 6 August 2006.

accommodation, is somewhat more difficult to discern. To date, it has adopted a position akin to that adopted by the New Zealand Government in the *Marlborough Sounds* litigation. In other words, while such areas may be recognized on a case-by-case basis as being locations where traditional Aboriginal rights are practiced, inherent title to such areas rests with the Crown, a principle that is non-negotiable.⁷⁷ It is also clear that the BC government is committed to a significant expansion of tenure opportunities for the industry. This commitment dates back to 1998 when the SDI was launched. At that time, it announced that it wanted to double the coastal areas under tenure by 2008. As part of that initiative, it indicated a desire to increase significantly the level of First Nations participation in the industry (without specifying by how much) and to ensure that, in expanding the industry, proper consultation with affected Aboriginal groups takes place.

Provincial aquaculture policy specifically contemplates that a First Nation may apply for a shellfish tenure “through a band corporation, Indian Band or Tribal Council” in essentially the same way that any other applicant might. Such an application, if successful, would lead to the granting of a licence of occupation (usually twenty years) or occasionally a shore lease (thirty years). At present, approximately 490 hectares of coastal land are under use by coastal First Nations bands.⁷⁸

Not all coastal First Nations have been interested in or able to bid on a shellfish tenure on this basis. In order to offer some flexibility to First Nations, the province has therefore developed a Memorandum of Understanding (MOU) policy that allows First Nations with an interest in developing shellfish aquaculture in their traditional territory to have the exclusive right to apply for tenures in designated areas for a period of ten years, or “until the Band asserts its aboriginal rights or title,” or until a final treaty with respect to the lands in question has been signed. As a quid pro quo for this MOU designation being granted, First Nations must agree to participate in a timely way in Crown resource development referrals that may be sought elsewhere in their traditional territory. The MOU process covers approximately one thousand hectares of coastal space and targets another two thousand to three thousand hectares.⁷⁹

⁷⁷ This position of the provincial Crown has been confirmed by our interviews with various provincial government representatives and lawyers, although, to our knowledge, it is not formally documented in any official government website or publication.

⁷⁸ Authors’ interview with Barron Carswell, Manager, Shellfish Development, Ministry of Agriculture and Lands, 20 March 2006.

⁷⁹ *Ibid.*, 20 June 2005.

Detailed information on nature and status of the SDI and the MOU policy as a form of interim accommodation is hard to come by.⁸⁰ In part, this is likely a function of the province's desire to maintain an ability to respond flexibly to emerging and often-changing legal-political situations. Yet the fluidity and opacity of the government's goals and strategy in this area is nonetheless striking, particularly when measured against analogous "accommodation" initiatives in the fishery and forestry contexts. Moreover, the intensity of the New Zealand debate over the foreshore issue, and the complexities associated with crafting a solution that adequately accommodated Maori interests in aquaculture, serves to underscore the value of developing policy (and forging social consensus) before, rather than during, crisis.

PART 4

*Lessons for British Columbia:
Growing Shellfish Aquaculture in an
Era of Accommodation and Reconciliation*

In this final part, we offer some initial reflections on the relevance of the New Zealand experience to British Columbia. Before doing so, it is worth underscoring some of the unique features of the New Zealand context that must be borne in mind when considering the relevance of lessons emerging from the New Zealand experience.

In this regard, a key consideration is the unitary nature of New Zealand's political system, a feature that has – particularly over the past two decades – facilitated an extraordinary level of policy and legal innovation. A central feature of this era of innovation, of course, is the remarkable extent to which frontline permitting and planning authority has been devolved to regional councils. The recent aquaculture reforms confirm this trend. A second key consideration is parliamentary supremacy. This principle has two important implications for New Zealand political life: (1) the ability of Parliament to define, through legislation, the nature of Maori rights and (2) judicial deference to these and other policy choices once they are embedded in duly enacted national legislation. A final consideration worth noting is the powerful

⁸⁰ Provincial government representatives advise that the MOU policy does not exist in a written form; the closest thing to a written version of the policy is a template form of agreement that the province is adapting for use in its negotiations with First Nations over area-specific MOUs. Even though these MOUs are intended to serve as interim accommodation agreements, unlike FRAS neither the MOU template nor the individual MOU agreements are ordinarily made available to the public.

momentum supporting a final resolution of Maori claims to fisheries and coastal resources. The immediate spur for this drive to achieve reconciliation was the broad consensus that Maori rights over aquaculture and aquatic space was “unfinished business” left over from the 1992 Fisheries Settlement. Clearly, as well, New Zealand has shown, as a nation, an admirable commitment to investing in institutions and processes aimed at considering and resolving Maori claims.

With these caveats in mind, we propose to reflect on the merits and “portability” of New Zealand’s aquaculture and coastal zone policies in the areas of (1) shellfish aquaculture planning and regulation and (2) accommodating indigenous rights and interests in the coastal zone.

Shellfish Aquaculture Planning and Regulation

A consistent theme that emerged throughout our research into the barriers to growth confronting the BC shellfish industry were the uncertainties and costs associated with the fragmentation of jurisdiction over permitting, assessment, and zoning. New Zealand initially embarked on its aquaculture reform process with a view not only to decrease industry uncertainty and costs but also to enhance industry’s social licence by securing a more durable consensus about where and how growth should occur.

While the BC government has invested new resources in coastal planning with some promising initial results, these plans are not zoning exercises in the traditional sense. Nor do they reduce or mitigate the effects of jurisdictional fragmentation by bringing federal and local authorities into the process with a view to securing their approval on plans that emerge.

Throughout the interviews conducted in connection with our research, there was uniform acknowledgment of the need for greater integration and efficiency in the planning process. Many also expressed support for the province playing a lead role in a newly crafted process that would see the Department of Fisheries and Oceans pre-approve areas as appropriate for shellfish aquaculture, a role akin to that played by the Ministry of Fisheries in New Zealand. Such pre-approval would affirm, at an initial stage of the approvals process, the suitability of designated areas for shellfish aquaculture based on “no undue adverse effect” analysis. The Department of Fisheries and Oceans reportedly supports moving towards this model. However, because the issue of pre-approving areas for both shellfish and finfish are bundled together, and because of the heightened level of public sensitivity surrounding

approvals of new finfish operations, progress has not occurred as quickly as the shellfish industry would like.

Getting the Department of Fisheries and Oceans to accede to a more focused and discrete role is, of course, only part of the challenge from the perspective of reducing regulatory burden on shellfish operators. One of the key reasons for delays in the current referral process concerns the need to consult and accommodate First Nation interests. For this and other reasons discussed below, the need for a clear and carefully developed provincial strategy for recognizing and respecting First Nations interests in the coastal zone with respect to shellfish aquaculture is compelling.

The other principal stakeholder with interests that need to be considered in this context is local government. Here getting stakeholder consensus to a one-window aquaculture zoning model akin to that prevailing in New Zealand is likely to prove difficult. Municipalities and regional districts have tended to regard provincial planning processes with suspicion and, accordingly, have been cautious about reserving their rights to exercise bylaw-making powers with respect to activities (such as shellfish aquaculture) falling within their jurisdiction. One option for the province might be to legislatively circumscribe the ability of local governments to fetter aquaculture development and operation. Provincial government officials are understandably reluctant to pursue this approach, given the controversy that a measure of this kind would undoubtedly provoke (particularly if it were to encompass finfish and shellfish operations). Moreover, on its face, such an approach would be inconsistent with the provincial government's broader policy objective of empowering local governance through, among other things, the recently enacted Community Charter. For the time being, however, it would appear that the best hope for getting local government to adopt a more constructive role in shellfish aquaculture planning would be to build on the community of interest that exists at the provincial and local levels that support expanded shellfish aquaculture opportunities.

Accommodating Indigenous Rights and Interests in the Coastal Zone

The New Zealand experience underscores the interdependency between growing a sustainable shellfish aquaculture industry and the need to recognize and accommodate existing indigenous rights and interests in the coastal zone. When the New Zealand government initially embarked down the path of aquaculture reform, it is unlikely that it

perceived how closely interwoven these issues were or would become. Ultimately, however, it came to the realization that aquaculture reform, and revival of the flagging aquaculture revolution, could only happen if it were able to broker a political compromise that integrated and harmonized these goals with the broader objective of forging a durable and certain accommodation of Maori interests in the coastal zone. A key feature of that strategy – what might be termed the 20 percent solution – secured broad-based political support not only because it was seen as a prerequisite to aquaculture reform and industry rejuvenation but also because it could be characterized as completing unfinished business left over from the 1992 Fisheries Settlement.

In British Columbia, the “unfinished business” concerning First Nations claims is a greater and more diverse project. As such, the political opportunity that presented itself in New Zealand to “finish the job” does not exist. Additionally, unlike in New Zealand, in British Columbia there is no real sense of urgency to addressing aquaculture reform and indigenous rights in the coastal zone in an integrated fashion. Yet, while the opportunity cost of delay or inaction on this issue is lower than it was in New Zealand, it is arguably higher than may commonly be thought. This is likely true for both TTMS and the longer-term, post-treaty perspective.

In the context of TTMS, the need for (and benefits that derive from) creative strategies that bridge the gap between the status quo and the post-treaty era is becoming increasingly apparent (witness the commissioning of the McRae-Pearse Report, Ministry of Forests and Range’s FRA/FRO program, and the New Relationship). The provincial government has not made a comparable investment in developing TTMS (i.e., measures that build relationships, develop capacity, and set aside, or “bank,” natural resources) within the context of shellfish aquaculture. Moreover, to do so would require developing targets for Aboriginal participation in the industry and ensuring that tenure opportunities are banked to ensure these targets can be met. This was done in the Aboriginal Fishing Strategy and, more recently, under the Ministry of Forest and Range’s FRA/FRO program. Not only does development of such a clearly articulated strategy for increasing Aboriginal participation in the shellfish industry make sense from a public policy perspective, but implementation will also undoubtedly be much less costly and more straightforward than it is in sectors where First Nations resource and tenure rights must be reallocated from other users.

The apparent absence of an overt TTM shellfish aquaculture strategy is regrettable but perhaps not surprising. Our interviews suggest that the apparently low level of government priority accorded this area is a reflection of the relative weakness of the shellfish industry as a lobby (relative to other industry voices). Were First Nations more clearly to identify the absence of shellfish aquaculture TTMs as a key priority, however, it is likely that it, too, would become a higher governmental priority.

Important lessons – both positive and negative – about how to design and implement such a strategy can likely be drawn from the emerging experience with the FRA/FRO and AFS. The type of strategy that we would argue is needed is not one that is intended to serve as a TTM exclusively and that would terminate once treaties are signed (as the FRA program is projected to do); rather, we would see this initiative as being an ongoing one designed to provide capacity and support to First Nations during and beyond the treaty negotiation period as they move into this new sector. Certainly, the commitment under the New Relationship and the New Relationship Trust may serve to aid in building the needed capacity within First Nations to develop the necessary skills required to play a true role in the coastal planning process.

The urgency of moving forward on this agenda is mounting. The experience of the mid-1990s with the Commission on Resources and Environment highlighted the difficulties (indeed, arguably the futility) of trying to develop land-use decisions without first having a clear notion of the extent to which title to the areas being negotiated over and ultimately “zoned” will ultimately revert to First Nations. A decade later, not only do we have the benefits of the lessons from that experience and the LRMP process that followed it, but we also have a much clearer idea of the nature and extent of First Nations rights and title claims thanks, in large measure, to the treaty process. While we commend the government for finally tackling the challenge of coastal planning, we worry that it has seriously under-resourced this initiative and that a more structured, certain planning process that is more closely and formally linked to the treaty process would be vastly more effective.

In short, the work of a wide range of provincial government ministries with ongoing responsibilities in the area of shellfish aquaculture is being hampered by the absence of an explicit government policy on First Nations participation in shellfish aquaculture – a policy that would contain targets and other measurable outcomes, capacity building opportunities, and treaty transition measures. Development of such a

policy is a necessary, but by no means sufficient, condition for the BC shellfish industry to move forward.

The final element that must be considered is the position of the BC government on title to the foreshore. The province's position is that Crown ownership of the foreshore is non-negotiable.⁸¹ This means that, while the Crown would be willing to entertain treaty proposals that would provide recognition and protection for Aboriginal rights to gather shellfish and carry on other activities in the foreshore area, on principle it would not agree to conveying title to that area. Such principles are, of course, never immutable and can always be influenced by public opinion and judicial decisions. So far, the courts have considered relatively few cases concerning Aboriginal use rights in relation to shellfish aquaculture, and in no decision to date has a court rendered an opinion on the potential existence of Aboriginal title in the foreshore and offshore settings.⁸²

Ironically, what might well provoke such litigation is precisely what provoked such litigation in New Zealand: a government decision to authorize non-indigenous shellfish operators to carry on activities in an area traditionally used by indigenous peoples. The saga of the *Marlborough Sounds* case, and of the political fallout and legislative machinations that ensued, should awaken us to the need for the BC government to move quickly to develop a coherent set of principles to guide it in negotiations with First Nations around foreshore ownership and use issues.

Achieving regulatory reform and reconciling First Nations rights and title over coastal resources are fundamental preconditions to growing the shellfish aquaculture sector in British Columbia. However, bedeviling progress on these fronts is the modest nature of the shellfish aquaculture sector's capitalization, revenue, and political influence. Hence, the proverbial "catch 22": before the shellfish aquaculture on Canada's west coast can secure the investment dollars and political constituency that will launch it into a period of sustained growth, these closely related challenges must be tackled.

We would argue that, despite the legal and institutional differences between the two jurisdictions we have studied, Canadian policy and decision makers can learn much from the recent experience of their counterparts in New Zealand. British Columbia regulators are by no

⁸¹ See note 77.

⁸² The Haida Nation has recently begun legal action aiming to secure rights in all of the Queen Charlotte Islands, including the seabed, the foreshore, and the resources within those areas.

means unaware of the need for reform. Indeed, insiders predict that current and pending changes in government operations will move us a significant distance towards a one-window aquaculture regulation of the type that New Zealand reforms aim to establish. But centralizing and integrating governmental functions is only part of the answer; government capacity to engage with the public in meaningful planning processes must also be significantly enhanced. Put another way, a robust commitment to implementing a single permitting regulatory approach to developing the shellfish aquaculture industry that is not accompanied by an equally strong commitment to coastal planning is unlikely to be workable, particularly given the diverse and competing interests in British Columbia's coastal zone. While it is too early to tell whether New Zealand's shellfish reform package strikes the appropriate balance between promoting business efficacy and supporting participatory coastal planning, its commitment to finding creative ways to find this balance cannot be questioned.

Similarly, while the BC government's stated commitment to redoubling its efforts to secure a lasting reconciliation with First Nations is encouraging, achieving this goal in British Columbia's coastal zone is an enormous task, the dimensions of which the government is likely only beginning to appreciate. While the launch of the New Relationship is encouraging at the micro-level, it will require the BC government to revisit its blanket policy on foreshore ownership, an issue that, in New Zealand, single-handedly precipitated a political crisis that came close to bringing down the government. And, even aside from the troublesome and potentially explosive questions of title, there is the challenge of allocating growing rights. What distinguishes shellfish aquaculture from forestry and the wild fishery, as we have noted, is that accommodating First Nations in the latter contexts involves reallocating rights that are presently fully allocated. While the cost and controversies associated with buy-backs or take-backs can likely be avoided in the shellfish aquaculture setting, challenges associated with building the necessary capacity in First Nations communities to take advantage of new tenure opportunities arguably loom larger here than they do in these other sectors. By no means do we suggest that the New Zealand approach provides a template for tackling these unique and pressing legal and policy questions: there is no template. As we have argued, however, an obvious much-needed next step is for the BC government to commit to developing a comprehensive strategy for enhancing First Nations participation in this fledgling industry

that addresses the needs, interests, and rights of the coastal Aboriginal communities during the treaty transition period and beyond. If such a commitment is forthcoming, we are certain that careful scrutiny of the New Zealand experience – both as we have chronicled it here and as it unfolds in the years ahead – will prove highly instructive.