

January 2004

Fisheries: Fishers, Natives, Sportsmen, States and Provinces

Donald M. McRae

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>

 Part of the [Transnational Law Commons](#)

Recommended Citation

Donald M. McRae, *Fisheries: Fishers, Natives, Sportsmen, States and Provinces*, 30 Can.-U.S. L.J. 189 (2004)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol30/iss/33>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

FISHERIES: FISHERS, NATIVES, SPORTSMEN, STATES, AND PROVINCES

Donald M. McRae[†]
Canadian Speaker

Thank you, Jim, for your introduction. And thank you, Henry, for inviting me, again, particularly since I know a couple years ago when you invited me, I cancelled at the last minute. And I appreciate nevertheless of being invited back.

I want to follow along from what David Colson was talking about in terms of the complexity of entering into international agreements on fisheries. What I am going to do is look at the different ways interests are reconciled in Canada, make some comparisons between the Canadian and the U.S. approach, and examine the implications for future agreements.

Some basic information to start with. Canada is not nearly as complex as the United States in terms of trying to negotiate fisheries agreements. Ocean fisheries are subject to federal jurisdiction, and are administered by the Department of Fisheries and Oceans.¹ Provincial jurisdiction is limited to lakes, inland fisheries.² Salmon fisheries, which are both ocean and river fisheries, are subject to federal jurisdiction and agreements with other countries are negotiated by the federal government.

Therefore, in principle, it is all quite simple. The federal government through the Department of Fisheries and Oceans and the Department of For-

[†] Donald M. McRae is the Hyman Soloway Professor of Business and Trade Law at the University of Ottawa and Fellow of the Royal Society of Canada. He has been Advisor to the Department of Foreign Affairs of the Government of Canada and counsel for Canada in fisheries and boundary arbitrations, including the Gulf of Maine case and the St. Pierre and Miquelon arbitration and advisor to the governments of Canada and New Zealand on international trade law matters. He has sat on dispute settlement panels under the Canada-U.S. Free Trade Agreement (Chaps. 18 & 19), the U.S.-Israel Free Trade Agreement, NAFTA (Chap. 20), and the WTO. He has published widely on international law, law of the sea, and international trade law and is the Editor-in Chief of the Canadian Yearbook of International Law. Recently, he was awarded the John E. Read Medal by the Canadian Council of International Law. During 1998 and 1999, Prof. McRae was Chief Negotiator for Canada for the Pacific Salmon Treaty. He is currently Co-Chair of the Federal-Provincial Joint Task Group on Post Treaty Fisheries.

¹ Fisheries and Oceans Canada, *available at*: <http://www.dfo-mpo.gc.ca/index.htm> (last visited Sept. 25, 2004).

² Leo Gross and Linda A. Caruso, Book Review, 78 AM. J. INT'L L. 978, 979 (1984).

eign Affairs sits down and negotiates with another country. Although there may be consultations, there is no legal entitlement either in the provinces or in First Nations to be involved in this process.

The complexities that David talked about, we have to deal with in the Pacific salmon negotiations in 1998 and 1999 in which I was involved. The complexities on the Canadian side were less complicated in terms of dealing with the United States. They were complicated internally, but eventually the Federal Government, a group of three of us, actually, sat down with the United States without all of the stakeholders that grew and grew, and simply negotiated it alone.

However, the legal form belies the substance. The complexities on the US side that David talked about, we have to deal with in the Pacific salmon negotiations in 1998 and 1999 in which I was involved. The complexities on the Canadian side were less. They were complicated internally, but eventually the federal government, a group of three of us, actually, sat down with the United States without the sizable group of stakeholders that had grown and grown, and simply negotiated the agreement on our own.

But we negotiated it in a way that responded to the interests that David was speaking about. We sat down not with the "United States Government"; we sat down with the representatives of the Government of Alaska. Alaska could not talk to the State of Washington on this issue, and the Federal Government could not reconcile the interests of Washington, Oregon, Alaska, and the Tribes. So, we said, "all right, if you cannot do it, we will." We sat down with Alaska and worked on a deal for the North. We then sat down with the States of Washington and Oregon, and the Tribes and worked on a deal for the South. Then we got the U.S. delegation back in the room together, and we worked it all out as a delegation. In that way, we were able to respond to complexity with a unique negotiating process.

Now, I am not certain the Canadian Government would appreciate the reverse. If the Government of the United States were to say, "We will talk to Quebec, we will talk to Ontario" And when we get everything organized, we will talk to the Government of Canada. I do not think this would be looked on favorably in Ottawa.

However, I think that things are changing. The harsh attitudes that existed on both sides of the border during the Pacific salmon negotiations seem to have gone. Things are working very well in the implementation of the agreement and that augurs well for future negotiations on these issues. There are also changes affecting the relationship of the federal and provincial governments in Canada, and changes affecting aboriginal fishers, commercial fishers, and sports fishers. I want to look at some of those changes.

First, there is quite a different relationship on fisheries issues between the federal government and the Province of British Columbia. They were barely speaking during the negotiation of the Pacific Salmon Treaty.³ Now, there is a good deal of cooperation. The Province of British Columbia has sought to enhance its expertise in fisheries and look to more collaborative work with the Federal Government. One example is the task group on post-treaty fisheries of which I am co-Chair and about which I shall speak shortly. Thus, on the West Coast there are opportunities for a new relationship to be developed.

The relationship of the Province of Newfoundland and the Government of Canada on fisheries issues is different again. Newfoundland wants Canada to extend its 200-mile jurisdiction to get authority over the nose and the tail of the Grand Banks through what is called “custodial management”. The federal government has resisted this and thus, there is a major difference between that provinces and the federal government.

WHAT ABOUT THE FIRST NATIONS AND GOVERNMENTS?

On the East Coast, where there have been treaties formally establishing the relationship between government and aboriginal peoples. Recent interpretations of those treaties have recognized rights in First Nations and aboriginal rights that were not perhaps asserted or even understood before. A claim to a right to engage in a fishery not only for food purposes, but also to provide some degree of economic livelihood led to a major confrontation in the lobster fishery in New Brunswick and Nova Scotia. Eventually the problem seems to have been resolved through negotiations between the federal government, the First Nations and the non-aboriginal fishery.

The West Coast of Canada is very different because very few treaties were concluded between First Nations and the Crown on the West Coast. There are fourteen Douglas treaties on Vancouver Island, but for the rest, aboriginal rights on the West Coast have never been reduced to treaty form. However, this is now changing.

A treaty concluded between the Nisga’a and the Governments of Canada and British Columbia. The Nisga’a are a nation in northern British Columbia. They led the way in the resolution of land claims and of other issues that are being negotiated with First Nations in British Columbia. At present, there are negotiations with 55 separate First Nations⁴ and there are 45 different negotiating tables.⁵ Five agreements in principle have been concluded⁶

³ Fisheries Pacific Salmon Treaty Between the United States of America and Canada, T.I.A.S. No. 11091, (Mar. 18, 1985).

⁴ See http://www.bctreaty.net/files_2/faqs.html (last visited Sept. 25, 2004).

⁵ *Id.*

and four of those have been ratified.⁷ These agreements in principle will be turned into formal treaties. All of these agreements in principle have provisions for fisheries.

This negotiation process has led to considerable unrest in the fishery in British Columbia. In the absence of treaties, the nature of First Nations fishing rights on the West Coast has never been clearly defined. In 1990, in the Sparrow case,⁸ the Supreme Court of Canada recognized an aboriginal right protected under Section 35 of the Canadian Constitution to fish for food, social and ceremonial purposes, but that this did not include a right to fish for commercial purposes. The Court said that if a First Nation was able to establish that it had a right to fish for commercial purposes then it could do so. However, there is no general right to fish for commercial purposes.

This led to the development of what was called the Aboriginal Fisheries Strategy, an arrangement between the federal government, the Government of the Province of British Columbia and the First Nations. Under the Aboriginal Fisheries Strategy, the federal government, through the Department of Fisheries and Oceans, entered into agreements with separate First Nations to provide fish for food, social, ceremonial purposes and to ensure in the administration of the fishery that there would be an opportunity to catch those fish.⁹

In addition, as a way of providing an interim transition to treaties with First Nations the federal government entered into what are referred to as "Pilot Sales" which permitted commercial fishing by aboriginal. The "Pilot Sales" arrangements became very controversial. They provided commercial allocations to First Nations separate from commercial allocations for non-aboriginal people.¹⁰ As runs became smaller and fishing became less frequent, considerable resentment emerged within the non-aboriginal fishing community against what was perceived as a preferential status being granted to an aboriginal commercial fishery.¹¹

This led to a couple of developments. First, the commercial fishers launched a protest fishery during the opening of one of the First Nations "Pilot Sales" fishery.¹² When prosecuted, they challenged the constitutional

⁶ *Id.*

⁷ *Id.*

⁸ 1990 1 SCR 1075

⁹ See http://www.dfo-mpo.gc.ca/communic/fish_man/afs_e.htm (last visited Sept. 30, 2004).

¹⁰ Emily Walter, R. Michael M'Gonigle & Celeste McKay, *Fishing Around the Law: The Pacific Salmon Management System as a "Structural Infringement" of Aboriginal Rights* 45 MCGILL L.J. 263, 286 (2000)

¹¹ *Id.*

¹² Steve Mertl, *Commons Committee Says Ottawa Mismanaged Fraser River Salmon Fishery*, CANADIAN PRESS NEWSWIRE, June 12, 2003.

validity of “Pilot Sales” on the ground that they violated the equality rights provision of Section 15 of the Charter of Rights and Freedoms. They said that it was a “race-based” fishery.¹³

In 2003, a Provincial Court Judge upheld that claim.¹⁴ This led to outrage by the First Nations fishers who found the proposition that what they regarded as an aboriginal right was itself discrimination against aboriginal fishers. They saw the decision as a cynical attempt to deny the history of the treatment of First Nations by Europeans in Canada.

Although ultimately the decision was not upheld on appeal,¹⁵ the federal government’s immediate reaction was to cancel all of the “Pilot Sales” fisheries. Following the appeal, the federal government is again looking at ways to re-establish some form of First Nations commercial fishery.

The second development was that, the British Columbia Government became somewhat concerned about the implications of treaty settlements. On the one hand, the province took the view that failure to settle treaties is a bad thing for the economy; it just fosters uncertainty.¹⁶ Therefore, the treaties should be settled. On the other hand, the province saw that there was opposition to treaty settlements by commercial fishers who believed that their livelihoods would be threatened by the transfer of rights to First Nations, and they saw no guarantee of compensation for the commercial fleet.¹⁷ There was also concern that separate commercial allocations all the way up the Fraser River, including 90 bands on the Fraser River watershed,¹⁸ would result in a salmon fishery that simply could not be managed.

The problem with salmon fisheries is inherent in the salmon’s life cycle. Salmon spawn in the streams, they go down the rivers, out to the ocean, and then they come back through Alaskan waters, down through British Columbia, down through Washington as far as the waters off Oregon. As they come down the coast they turn and go into the rivers that they come from and go back to spawn. Fishing takes place in the oceans, and bays, estuaries, and in the river as the salmon return. Managing the salmon fishery means trying to ensure that enough fish get through all of the commercial and other fisher-

¹³ Gary Oakes, *Judge Finds Aboriginals-Only Salmon Fishery 'Grossly Unfair'*, THE LAWYERS WEEKLY, Aug 13, 2003.

¹⁴ *R. v. Kapp*, [2003] B.C.J. No. 1772 (B.C., 2003).

¹⁵ *R. v. Kapp*, [2004] B.C.J. No. 1440 (B.C., 2004).

¹⁶ Greg Joycen, *Nisga'a Natives Get Tentative Claims Deal. Nisga'a Struggle Dates Back a Century. Liberal Leader Says Deal not Carved in Stone*, CANADIAN PRESS NEWSWIRE, Feb. 12, 1996.

¹⁷ Alison Auld, *Months After the Decision & the Confrontations, Some Commercial Fishermen are Still Bitter About How the Issue was Handled and Pessimistic About the Future*, CANADIAN PRESS NEWSWIRE, Dec. 21, 1999.

¹⁸ *Commercial Sockeye Season Unlikely for Fraser River in 2000*, CANADIAN PRESS NEWSWIRE, July 5, 2000.

ies back up to the spawning grounds in order to continue the regeneration process. That is the context in which “Pilot Sales” and treaty settlements are viewed. The question is whether it will be possible to let sufficient fish get back up the river when there are multiple obligations to allow fisheries on the river?

The Province of British Columbia convinced the Government of Canada to set up a two-person task group to look at the question of treaty settlements and their implications for the fishery; including whether there will be any fish left for a commercial fishery.¹⁹ The province appointed Peter Pearse, a former professor at UBC and a well-known fisheries and forestry economist, while the federal government appointed me to that task group.²⁰

In a period of about seven months, we talked to representatives of the various groups. We looked at the broad spectrum of interests in the fishing industry, including the recreational industry, as well as commercial, aboriginal, and environmental interests.²¹ Let me outline some of the issues we had to consider and then look at the implications for fisheries, generally, and for the negotiation of treaties.

First, First Nations fisheries rights are going to be established in British Columbia table-by-table through negotiations. But not all First Nations are prepared to enter into negotiations particularly in the light of the court decision on “Pilot Sales”. A number of First Nations in British Columbia are incredulous at the actions of the federal government in canceling “Pilot Sales” simply because of a provincial court decision. They contrast that with what they see as a failure of the federal government to implement Supreme Court of Canada decisions on aboriginal rights. Thus, they do not see the federal government as a reliable negotiating partner and would prefer to go back to Court. So we may see more litigation.

At the same time, the nature and extent of First Nations fishing rights are going to be decided table-by-table over time as allocations are made under separate agreements. Therefore, the question that is often asked is, “how is the fishery going to be divided at the end of the day between First Nations and non-First Nations fishers?” Further, will there be any fish left for non-First Nations fishers after the treaty negotiating process has been completed?

This table-by-table approach may be contrasted with the Boldt decision in *State of Washington*.²² The division in the State of Washington between

¹⁹ *Federal and B.C. Governments Set up Task Force to Study West Coast Fishing*, CANADIAN PRESS NEWSWIRE, July 29, 2003.

²⁰ *Id.*

²¹ The report of the joint task group was released on May 5, 2004, available at: http://www-comm.pac.dfo-mpo.gc.ca/pages/release/JTG-report_e.htm (last visited Sept. 26, 2004).

²² *United States of America et al. v. State of Washington et al.* 384 F.Supp. 312 (DC. Wash, 1978).

tribal and non-tribal fisheries was established by a decision of the court interpreting a treaty that said that tribal and non-tribal fishing would be “in common”. Judge Boldt took the view that “in common” meant equal sharing – a 50-50 share.²³ That approach seemed simple, straightforward and equitable and some consider that that is what ought to be done in the British Columbia fishery even though there is no treaty in British Columbia on which to base a 50 percent sharing.

However, adapting to that 50-50 sharing in the *State of Washington* was not easy. It took a long period of litigation to establish fishery by fishery what 50 percent actually meant. There were agonizing adjustments within the tribes themselves with a battle between those who saw fish in food, ceremonial and social terms, and those who saw fishing as an economic opportunity. Further, a 50 percent allocation has not been continued over time. It has ended up in practice being somewhat different.

Take for example, the U.S. catch of Fraser River Sockeye. In the 1999 negotiations between Canada and the United States over the Pacific Salmon Treaty, the United States agreed to lower the Washington State catch, tribal and non-tribal, of Fraser River Sockeye to 16.5 percent of the catch.²⁴ Now, the tribal groups, particularly the Lummi Tribe, who have a very large fishing interest in Puget Sound, took the view that the U.S. Government and the State of Washington could agree to what they liked, but the tribes were not going to take any less fish. So that even if the US catch was going to go down to 16.5 percent, the tribes share of the 16.5 percent would have to be equivalent to the catch they were getting in the past. Thus, the only way the State of Washington and the U.S. Government could actually implement that was to buy out the non-tribal fishery. So, in fact, today the tribal share is not 50 percent of that fishery, because the non-tribal fishery is being bought out. As a result, there are many in British Columbia who say that the State of Washington approach is not the way to go in British Columbia.

Let me refer to some other matters that are changing the nature of the salmon fishery in British Columbia before talking about the implications for the longer term.

One is the question of conservation. When we negotiated the amendments to the Pacific Salmon Treaty, we had no endangered species legislation in Canada. We now have the Species at Risk Act, which is somewhat similar, in objectives at least, to the Endangered Species Act.²⁵ The Species at Risk Act mandates that listed species cannot be harmed. In the case of salmon, such harm would be caused if insufficient salmon were permitted to

²³ *Id.*

²⁴ Jason Dunn, *The 1999 Pacific Salmon Treaty Agreement*, 1999 COLO. J. INT'L ENV'T. L. Y.B. 164, 170 (1999).

²⁵ Species at Risk Act, S.C. 2002, c. 29

return to their spawning grounds. But the problem with salmon is they do not swim separately; they swim together. If you have an endangered stock that has to go to a spawning ground one third of the way up the Fraser River, then you may not be able to fish any stocks until that stock has reached its spawning ground. That means no fishery in the Fraser River until you are past the streams where the endangered stock spawns. That, of course, changes the nature of the fishery. The fishery becomes closer inshore; it becomes an upriver fishery, which in turn creates major difficulties for the management of the fishery and raises questions about the economic viability of the ocean fishery.

Another issue is the developing impact of sport fishers. Sport fishing is hard to define, because it includes the occasional "weekend angler" as well as the large, expensive fishing lodges that attract people from all over the world. The value of the recreational fishery is also difficult to assess because it does not rest on the economic value of the fish, it rests on the economic and psychological value of the opportunity to fish. So how do you compare the value of the recreational fishery with other fisheries?

The number of sport fishing licenses in British Columbia is in the thousands and the political influence of sport fishers is not inconsiderable. Many sport-fishing organizations think that the value of the sport fishery is far higher than the value of the commercial fishery. Salmon is an icon of the British Columbia fishery, but the economic value of the commercial salmon fishery has actually declined. In fact, the commercial fishery of greatest economic value in British Columbia is the Geoduck fishery – a clam-like shellfish that is very popular in the Japanese market.²⁶ Salmon is no longer an economic contributor to the economy of the province that it once was. Sports fishers argue, therefore, that since they provide more economic benefit to the province than the commercial fishery does, they should be given priority in the fishery.²⁷

In the State of Washington, there was willingness on the part of the government to buy out the non-tribal fishery, in part because it saw the sport fishery as being more important to its economic future than the non-tribal commercial fishery.²⁸ It is not clear that the same perception exists in British Columbia.

²⁶ Laura Jones Mihlar, *This Fishery is as Happy as a Clam*, NATIONAL POST, Jan 2, 2003, at A15.

²⁷ Constance Sathre, *Symposium on Salmon Law: Restoration and Harvest Allocation: Salmon Interception on the High Seas: A Continuing Controversy Between the United States and Japan*, 16 ENVTL. L. 731, 742 (1986)

²⁸ See generally Hearings on the U.S.-Canada Pacific Salmon Treaty and the 1999 Pacific Salmon Agreement Before the Subcomm. on Fishery Conservation, Wildlife and Oceans of the House Comm. on Resources, 106th Cong. (1999) (testimony of James Pipkin, U.S. Special Negotiator for Pacific Salmon and Acting U.S. Federal Commissioner of Pacific Salmon

WHAT DOES THIS ALL MEAN FOR FUTURE U.S.-CANADA NEGOTIATIONS ON FISHERIES?

First, I think the single state model in which Canada sits down and negotiates with the United States over salmon or other fisheries is over. It was partly over as far as the U.S. side was concerned in 1998 and 1999, and I think it is probably declining on the Canadian side, as well. Developing relations between the Government of Canada, the provinces and the conclusion of treaties with First Nations are going to affect these negotiations in the future. The Nisga'a agreement requires the Government of Canada to consult with the Nisga'a before it negotiates an international agreement affecting their fishery.²⁹ That is a greater right than the Province of British Columbia has. The Province has no formal right to be consulted. Therefore, if all of the treaties with First Nations provide for such consultation, it will change the way the Federal Government organizes itself in dealing with fisheries negotiations.

Second, I think that the reallocation of rights to First Nations on both sides of the border will have implications for future fisheries negotiations. Changes in Washington and in British Columbia will mean that substantial parts of the commercial fishery in both countries will be in First Nations hands. This leads to questions of consultation across borders and whether a coalition will develop. In our consultations on the task group, we were told that when there was a problem with sufficient fish being provided for the aboriginal food fishery upriver on the Fraser, the various First Nations on the River contacted the Lummi tribes in Washington and talked about how they could as First Nations solve the problem without government involvement. The First Nations on the Canadian side seemed optimistic about similar co-operation in the future. Therefore, coalitions across the border may develop.

Third, just as the growing importance of sport fishery has made governments rethink the purpose of fisheries, so too has the impact of aquaculture caused some rethinking about what the real value of the commercial fishery can be. The world production of salmon from aquaculture exceeds the world production of wild salmon, thus, the price of wild salmon is driven down. At the same time, some estimates are that many stocks of the salmon in British Columbia have never been in better condition.³⁰ The problem is that they are just not worth as much anymore. There was a record run of 25 million pink

Commission)

²⁹ Timothy Dickson, *Self-Government by Side Agreement?* 49 MCGILL L.J. 419, 432 (2004).

³⁰ *SFI Applauds Increased Fishing Opportunities in 2003*, CANADA PRESS NEWSWIRE, Jan. 22, 2003.

salmon on the Fraser River in 2003 but the value of pink salmon is very low.³¹ The stocks are there but the value is not.³²

In some respects, there is a parallel between the way things have been developing in the State of Washington and the way things are developing in British Columbia; increased First Nations involvement in fishery, increased sport fishery, increased attention to aquaculture. By contrast, in Alaska, the changes are not so evident: aquaculture is still a fighting word in Alaska!

In 2010 and 2012, when the current annexes to the Pacific Salmon Treaty expire, Canada and the United States will once again sit down to negotiate over the salmon fisheries. But, as I have suggested, the context will have changed from 1985 or 1998 and 1999, and although the issues may be fundamentally the same, the actors might also be quite different.

³¹ Laine Welch, *Chile's Fish Tainted by Dangerous Antibiotic*, ANCHORAGE DAILY NEWS, Sept. 13, 2003, at D1.

³² Larry Pynn, *More Salmon Returning to B.C. Than Fishermen Can Catch of Process*, PORTAGE DAILY GRAPHIC, Aug. 13, 2003.