

CHARTER RIGHTS

For a group of fishermen, another Caledonia When native interests are involved, the law bends to accommodate them

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The most profound event of my recent book tour happened halfway across the country from Caledonia, the Ontario town that is the subject of the book.

The book is basically about the abandonment of that small town, particularly of the approximately 450 residents who live adjacent to Douglas Creek Estates, a residential subdivision that was occupied by natives from the nearby Six Nations reserve in February of 2006 and remains a no-go zone. With the Ontario and federal governments and the Ontario Provincial Police standing by with their thumbs in their mouths, residents were subjected to acts of violence and intimidation by the occupiers, and for about a month that summer, forced to show native-issued "passports" and subjected to arbitrary searches and curfews by self-appointed native security officers.

No one from government or the OPP lifted a finger to interfere or stop it.

That it all happened, with the sanction of the state, is still hard to accept.

But one day this fall I found myself in a meeting room in downtown Vancouver speaking to a small group of B.C. fishermen.

They were believers, even before I opened my mouth.

They knew first-hand already how government could throw a group, or a town, under the bus, even as spokesmen denied that was what was going on. They knew that in the name of placating aboriginal interests, anyone could be sacrificed. They knew that there could be different laws for one group of citizens, or as one of the fishermen, Russ Jacobson, once put it in court, "How could you possibly have a law for this guy and a separate law for me?"

Mr. Jacobson always believed, throughout his long fight, "100 per cent in my heart that my day in court, I was going to win."

He didn't win. It's pretty clear he and his fellows never had much of a chance.

A year ago, with about 45 others, Mr. Jacobson was convicted of a Fisheries Act offence in connection with "protest fisheries" that non-native fishermen organized in 2001 and 2002 in response to so-called "food, social and ceremonial" fisheries authorized on the Fraser River for assorted first nations.

The non-native fishermen knew, as did federal officials ostensibly in charge of enforcing the size of the catches, that often these traditional fisheries weren't ceremonial at all, no nod to the aboriginal need to feed family but rather another commercial opportunity for natives, this during a period when there was either just a minimal salmon fishery for non-natives or none at all.

The protests were peaceful, and indeed, the non-native fishermen gave advance notice; they wanted to be arrested precisely so that they could test in court the special treatment being given the natives.

But an earlier protest - over a "pilot sales" fishery designed to solve the chaos long surrounding the food fishery - had ended up at the Supreme Court of Canada two years ago.

In a case called *R v Kapp*, the high court overturned the decision of the trial judge (who had found that the special licences granted natives in the pilot program had breached the Charter rights of the non-natives) and ruled that Ottawa had been trying to help a disadvantaged group (the natives) when it introduced the pilot program, thus rendering it "affirmative action" and immune from Charter scrutiny.

But in fact the government, or the Crown, had never argued that.

At trial, the Crown admitted the goal of the program was to try to get a handle on widespread poaching during the ceremonial fishery, widely believed to be nothing more than another exclusive commercial leg-up for natives.

As then-fisheries minister John Crosbie told a parliamentary committee in May, 1993, the entire purpose of the pilot program was to rein in aboriginal poaching.

That is just a bit of the background that led to the "protest fisheries" in question, and probably I've condensed it badly.

The point, however, was that to these fishermen, Caledonia was all too familiar, and like their counterparts in Southwestern Ontario, they were law-abiding citizens with a firm belief that when push came to shove, the agencies of the state would protect them, if only they were patient enough.

As Bruce Probert, a third-generation fisherman, told B.C. Provincial Court Judge James Wingham last month, for a dozen years he's spent an average of 60 days a year in meetings with government officials, lived through God knows how many incarnations of federal inquiries into the fishery, gone to Ottawa and testified before committees. "I lost the house I was living in for 25 years. I had depression," he told the judge. "And now look, when we hit this wall, what are we supposed to do? I've tried everything legally I could possibly do . . ."

Here we are, Mr. Probert told the judge: "We can be discriminated against because it's in the best interests of the natives, you see?"

Mr. Probert, Mr. Jacobson and my friend Phil Eidsvik, spokesman for the B.C. Fisheries Survival Coalition and the man who arranged the gathering of fishermen I met, and the others will be sentenced in Surrey on Tuesday.
