

Commission of Inquiry into the Decline of
Sockeye Salmon in the Fraser River



Commission d'enquête sur le déclin des
populations de saumon rouge du fleuve Fraser

Public Hearings

Audience publique

Commissioner

L'Honorable juge /
The Honourable Justice
Bruce Cohen

Commissaire

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Salle 801
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701, rue West Georgia
Vancouver (C.-B.)

le mardi 26 octobre 2010

MR. LOWES:

Mr. Commissioner, J.K. Lowes for the B.C. Wildlife Federation and the B.C. Federation of Drift Fishers.

Dealing with the paper that was done by Commission counsel, I, too, like British Columbia and Canada, start by commending Commission counsel on the report. Mr. Commissioner, they've produced a framework, which, given the controversial nature of the issues involved, provides a reasonably objective summary of the jurisprudence, as it stands today. I qualify that, as did Canada and British Columbia, with the speculative nature of the comments on title and some of the extrapolations from cases dealing with land and land-based resources to the fishery.

In addition to being comprehensive and just as important, Commission counsel have recognized the dynamic and evolving nature of the jurisprudence, as well as the inherent difficulty of translating that jurisprudence into fisheries policy and management practice.

Mr. Commissioner, my submission is in two parts, one general and one specific. In this oral submission, I will only refer to the general comments and leave it to you to look at the specific paragraph-by-paragraph review. Mr. Commissioner, the fundamental point of fisheries law is that the resource is rights-based. Unlike the land and land-based resources, the fishery, which is the subject matter of this inquiry, the Fraser River sockeye, is not a Crown asset. It is the common property of all Canadians. The Crown is a steward or a trustee for the public. As pointed out in the practice report, the relationship of the Crown to the resource has been expressed in terms of a legal obligation or duty to the public different from the general political obligation of providing good government.

Mr. Commissioner, ensuring the integrity of the public nature of the resource is the prime concern of this participant. And in that light, we commend to the Commission the ***Railway Belt*** case, which describes the origins of the public right and its nature as an ancient liberty recognized in *Magna Carta*. The ***Railway Belt*** case is contained in my book of authorities and I won't ask you to turn it up. As can be seen, however, Mr. Commissioner, from those reasons for judgment, the right of fishing is as much a part of Canada's British heritage as it is of the aboriginal heritage of some aboriginal communities.

In passing, I also make reference, Mr. Commissioner, to the ***Armor*** case, again, referred to in my authorities, a decision of the Australian High Court in which the High Court of Australia identified the public right of fishing, together with that of navigation, as constraints on the Crown's capacity to recognize aboriginal title to submerged land, which would be in conflict with those public rights so that any aboriginal title to submerged land must be consistent with those public rights.

And this participant, Mr. Commissioner, stresses the fact that the public to which the

resource belongs includes every individual Canadian of aboriginal descent. Aboriginal Canadians when fishing other than pursuant to aboriginal or treaty rights, i.e., recreationally or commercially, are exercising the same public right of fishery, as their non-aboriginal countrymen.

Mr. Commissioner, this proposition seems obvious but it is usually overlooked in the public, political and even sometimes the legal discourse about aboriginal rights. To put it bluntly, there's no such thing as a non-aboriginal fishery. Aboriginal fishing rights are not substitutional; they are additional. The public right is not exclusionary but inclusive. And that inclusiveness is the central position of this participant. We ask you, therefore, Mr. Commissioner, to be careful in the use of terminology, that if it is necessary to distinguish, the distinction not be between aboriginal and non-aboriginal fisheries but between fishing pursuant to an aboriginal right or treaty right and fishing pursuant to a public right, between the aboriginal fishery and the public fishery and that it be kept in mind that the public fishery is inclusive of all aboriginal Canadians.

Mr. Commissioner, it's the recognition of the special and additional nature of aboriginal rights that drives the substance and the methodology for the determination, description and application of those rights laid down by the Supreme Court of Canada in the seminal cases of **Sparrow**, **Van der Peet** and **Gladstone** and which this Commission should, with respect, keep in mind throughout. Mr. Commissioner, in its conclusion, the report states, and I quote:

In practical terms, uncertainties may remain as to exactly how such rights and titles ought to inform the detailed decision-making inherent to managing a complex fishery.

Mr. Commissioner, this participant couldn't agree more. It is suggested that much of the focus of this Commission should be on the question of how such uncertainties have been dealt with and how such dealings may be improved in the future. In opening remarks made before this Commission in June, the point was made by many that scientific controversies and uncertainties, although important in themselves, were secondary to the issue as to how such controversies and uncertainties were managed by government. The point made here is that the same applies in controversies over aboriginal fishing rights. The function of this Commission is not to settle the law or even to apply it, but rather, we submit, to review the way in which the jurisprudence informs or doesn't inform fisheries management and to provide guidance for that process. We suggest, respectfully, therefore, that the Commission be alive not simply to controversies or uncertainties themselves, and there many and serious, but also to the sources and potential sources of those uncertainties.

Clearly, Mr. Commissioner, some of those uncertainties are based in the jurisprudence itself. The courts have clearly stated that aboriginal claims to fishing rights are fact specific and consequently must be dealt with on a case-by-case basis. Further, such concepts as priority and consultation are relative and contextual rather than absolute and categorical. Still further, the jurisprudence is dynamic and developing. The report, like any survey of the jurisprudence, is a snapshot of a process.

Another source of uncertainty to which particular attention should be paid is the interface between law and policy, between the judicial and the executive functions. Appellate decisions, even at the level of the Supreme Court of Canada, are focused primarily on correcting error and providing guidance to lower courts. They are not policy manuals. Government and, in particular, the DFO, however, must follow the law, as laid down in those decisions. This is particularly the case where, as stated above, it is managing the exercise of rights of access by individuals to their own common property. This Commission, with respect, should examine how DFO, its policies and practices, are informed by the law with a view to making recommendations for the improvement of that process.

A further potential source of uncertainty, we suggest, is the administrative level at which the law is to be interpreted and applied. Briefly put, this Commission should investigate where in the management process and by whom such difficult questions as whether priority has been given, consultation occurred or food, social and ceremonial needs met, are answered. Notwithstanding the preliminary and general nature of both the practice report and this comment, however, there are two concerns about the application of the policy on aboriginal rights, which are of concern to this participant and should be raised here. These are the dual systems of fisheries management and the lack of quantification or transparency about quantification respecting aboriginal fishing rights.

With respect to the first, Mr. Commissioner, there's a tension in the management of the aboriginal fisheries between an integrated management and segregated fisheries. It is the concern of this participant that numerous management problems are caused or exacerbated by the existence of two management regimes, one for the public fishery and the other for the aboriginal fishery. Without getting into detail, this participant is concerned that these dual systems result in different standards and, in particular, different standards with respect to conservation, i.e., different escapement objectives, different fishing rules, differences in the reliability of data and differences in enforcement. The existence of a dual system also runs counter to the nature of managing the fishery as organic hole. This latter problem, which I will refer to briefly in a moment, was commented on by Mr. Justice Mackenzie of the Court of Appeal in *Kapp* when he recognized the management problems caused by the Balkanization of the commercial fishery.

The second area of concern is the lack of quantification. There's no apparent attempt to qualify the real food, social and ceremonial needs of the groups holding aboriginal food fishing rights. This results in apparent per capita allocations which are out of all proportion to reasonable domestic needs. This, in turn, leads to the inference that substantial quantities of food fish are, in fact, sold. The lack of quantification also concerns this participant in the context of treaties and harvest agreements where it results in the lack of any indication as to the ultimate extent to which access is to be reallocated from the public to the treaty-based fishery.

Mr. Commissioner, the essence of the law, both Canada and British Columbia have suggested that there is a core in the report that is sound and some speculation. And this

participant agrees. The essence of the law is in the seminal cases decided in the 1990's and in particular, **Sparrow, Van der Peet** and **Gladstone** in which the Supreme Court of Canada consciously laid down the substantive principles and the methodologies for the determination of the claims to aboriginal fishing rights, their existence, nature and scope, their relationship to other rights and their relationship to government power. This is the core of the law dealing with aboriginal rights of fishing. Cases involving aboriginal title, together with cases involving consultation and accommodation with respect to land and land-based resources, are at the periphery. It is appreciated that this -- the consideration of these matters is necessary for the sake of completeness but in relating them to the fishery, however, they must be recognized as speculative.

And finally, dealing with the translation of law into policy, Mr. Commissioner, and this is in my written submission, it's notable that of the three judges who commented on the policy underlying the commercial aboriginal fishery in the aboriginal fishing strategy in the case of **Kapp** all were critical of it. Judge Kitchen found that the impugned licensed provisions were not only unconstitutional but socially disruptive and, hence, unwise. Chief Justice Brenner, although finding constitutionality queried whether the program, which was then suspended, should be reinstated, he stated, and this is at paragraph 120 and 121 of the report, which is in my report, and quote:

In many respects, the pilot sales program has had an unfortunate history. It has generated much ill will between those who work in the two fisheries. It has also generated ill will amongst Aboriginals who work in the commercial fishery and those who work in the P.S.P. fishery. This stands in contrast to the positive acceptance of other A.F.S. measures such as a licence buy-back program.

In view of my conclusion that there has been no s. 15 breach, the Minister, subject to further decisions of the higher courts, is left with the absolute discretion...to reinstitute the P.S.P. However, before doing so and perhaps in giving consideration to other methods, or to changes in the P.S.P. that might be employed to accomplish the same objective, it would be this court's hope that the Minister would consider the history of the P.S.P. and would further consider the extent to which it has enhanced or diminished the overall strategic objective of reconciliation between Aboriginals and non-Aboriginals in our country.

And again in the same case but at the level of the Court of Appeal, I read from paragraph 115 of the judgment of Mr. Justice Mackenzie in **Kapp**.

In my view, there are sound reasons not to constitutionalize aboriginal commercial salmon fisheries. Sparrow pointed out that there are 91 separate bands along the Fraser with a claim to an aboriginal food fishery. If a commercial fishery is constitutionally recognized for some it will be hard to deny it to others. Recognition of the right also would require defining its extent in terms of quantities of fish taken and there is no obvious limit to commercial catches as there is with the food fishery to the reasonable food, cultural, and ceremonial requirements of particular bands. It would risk Balkanizing the commercial fishery and compounding the already formidable management challenges facing the DFO. It would fail to recognize the aboriginal component of the existing

commercial fishery, including the nearly half of the seine fleet, that accounts for a large share of the commercial catch of Fraser sockeye in most years. It would threaten to undermine the greater aboriginal participation in the integrated commercial fishery which in many ways sets the fishery apart as an example for other sectors of the economy.

Thank you, Mr. Commissioner, those are my submissions.

THE COMMISSIONER:

Thank you, Mr. Lowe. And thank you very much for your words with respect to Mr. Otway.

MR. LOWES:

J.K. Lowes. Mr. Commissioner, I know it's late and I have three brief points. Notwithstanding that it's late, two of them are very technical, and the third is more general.

Dealing with the technical points, you've heard a number of submissions dealing with what could be called a governance dimension to Aboriginal fishing rights, and the suggestion that the law is -- there's no law on the point, I would point out, and I've referred to this in paragraph 43 of my submissions, Mr. Commissioner, that the **Nikal** case in the Court of Appeal was argued on 47 the basis of a self-governance dimension to the Aboriginal fishing right, and I've included in my list of authorities, or my authorities brief, the passages from the Court of appeal.

I might say that the case then went on to the Supreme Court of Canada and was argued by **Nikal** as a self-government case. Now, if you read the Supreme Court of Canada decision, you'll see that the decision was virtually devoid of any reference to self-governance, and what I say in my submission is that implicit, or at least that silence in the face of the way in which the case was argued in the courts below, is, in itself, significant and that what, indeed, the Supreme Court of Canada did implicitly in **Nikal**, was what they did explicitly in **Pamajewon**, and that is, in effect, reject a self-government claim in favour of an analysis based on **Van der Peet**.

The second technical point I'd like to take up is with respect to Mr. Janes' submission on the public right and why it either was not received or was modified in British Columbia. That submission clearly overlooks the **Railway Belt** case, a decision of the judicial committee in 1914, which explicitly held that the public right existed in British Columbia.

But on a more technical point, the **Yarmirr** case, which I have referred to, was not based on anything to do with the reception of the common law. The concept in the **Yarmirr** case was that the public rights of navigation and fishery were, in effect, a burden on the prerogative power of the Crown and, of course, the assertion of

sovereignty, colonial sovereignty, is an exercise of the prerogative power. In other words, the Crown, in asserting sovereignty over Australia, could not recognize Aboriginal title that was inconsistent with the rights which had been guaranteed in **Magna Carta**, but the situation is identical in British Columbia, in my submission.

And on the more general point, you've heard a lot about conservation consciousness, stewardship and traditional knowledge, and I would simply make the point, which should go without saying, that the conservation ethic is not confined to the Aboriginal community.