

THE STATE OF PROTEST FISHERIES

Participating in a protest fishery is a brave and, in the right circumstances, a just act. A fisherman with a perfectly clean record, sometimes after decades in the industry, knowingly and openly defies the law that he has spent his entire career meticulously obeying. It is action that strikes at the rule of law and, therefore, at the root of our democratic system of government. It risks fines and forfeiture. It can only be imagined, therefore, what it takes to push a fisherman to throw caution to the wind and participate in a fishery which he knows will lead to his arrest and trial.

Philosophers have asked the question: when is a law so unjust that disobedience to it is justified? Civil disobedience is defined by the leading modern philosopher, John Rawls, as “a public, non-violent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government”. He points out that government action which amounts to a persistent and deliberate violation of the basic principles of justice of the majority of the community invites either submission or resistance, and that resistance is justified in certain narrow circumstances as a last resort.

Lawyers, however, are prevented by their professional code of ethics from ever counselling civil disobedience, no matter how unjust a particular law or government policy may be. It often happens, however, that persons who have knowingly broken the law request that we represent them in Court and voice the injustice that has led to their action. That we are permitted to do.

Thus, let me be clear. The purpose of this article is not to counsel anyone in any circumstances to break the law. In this article I report, for informational purposes only, on a number of protest fishery cases, many of which are currently working their way through the courts, and which have one element in common: they involve the struggle to achieve the recognition of the right of each and every commercial fisherman to basic equality of access without regard for race or ethnic background. The philosopher, Rawls, calls this the struggle for “fundamental equal liberties”.

R. v. Cummins: the First Protest Fishery in this Series

In the mid-1990's there were almost two dozen protest fisheries in which fishermen invited the government to charge them with fishing during a closed time. Their goal was to obtain a legal decision on the validity of the then newly implemented pilot sales component (PSP) of the aboriginal fishing strategy (AFS) which allowed certain members of certain aboriginal bands the right to fish for more than just food, social and ceremonial (FSC) purposes. The PSP was implemented by a licence issued to select aboriginal groups pursuant to a regulation. That had the effect of creating an exclusive fishery for persons designated by chiefs of those groups. This was all done without any amendment to *Fisheries Act*. The protesters took the view that such action by the Minister was unauthorised by the *Fisheries Act* – which contemplates that all citizens are treated equally in the public commercial fishery. In each of these early protests, either the fishermen were not charged or, if they were, the charges were dropped.

The first protest fishery case to proceed to court was conducted on October 26 and 27, 1996. On those two days, John Cummins, a commercial fisherman and Member of Parliament representing Delta, fished during a closed time to protest the PSP and was charged.

John Cummins, represented by Christopher Harvey, Q.C., successfully argued that the PSP was invalid because the Minister had overstepped the limits of his authority. On January 26, 1998, Judge Thomas of the Provincial Court sitting in Surrey declared the PSP invalid. That meant that everyone, PSP fishers and Mr. Cummins alike, were illegally fishing. Mr. Cummins was convicted, but since his actions were done in good faith to test the law he received an absolute discharge. This meant that he would not be punished and his conviction would not be on his record.

R. v. Houvinen: “Opinions are Opinions”

To the surprise and dismay of those who expect all government officials to respect rulings of the Court the *Cummins* decision did not cause the DFO to abandon the PSP. Others who had been charged with protest fishing were brought before the same Court. Mr. Harvey, the fishermen’s legal counsel, brought a motion to stay the charges on the basis of the Court’s ruling in *Cummins*. Judge Thomas held that the DFO had chosen to ignore the law as he had previously stated it and, on August 7, 1998, entered a judicial stay of proceedings. He did not even allow the case to proceed to trial against the fishermen. DFO again failed to respect the judgment of the Court. In a press release the Minister said “opinions are opinions”.

R. v. Anderson: the Strongest Criticism of the DFO

A protest of DFO mismanagement was conducted on August 13, 20 and 23, 2003. On those days, 40 salmon trollers, fed up with DFO’s computer driven and inflexible management scheme, “threw down the gauntlet” and fished the waters of Johnstone Strait. The purpose was to bring attention to DFO incompetence.

On April 28, 2003 the fishermen entered guilty pleas to the charges in the Provincial Court at Campbell River. They sought discharges. The Crown sought substantial fines.

The Court, after hearing the fishermen’s submissions presented by Mr. Harvey, recited what happened:

As the sockeye run moved southeast through Johnstone Strait, it was obvious to the defendants – and to anyone, including the DFO, who cared to visit the area, - that there were exceptionally large numbers of fish. This information was passed on to the DFO in the hope that a commercial opening would be authorized. It wasn’t.

As Mr. Harvey put it, the DFO “...had lost their traditional common sense of looking out the window to see” how many fish there were. They had become computer- and data-driven.

The fishermen also argued that since the introduction of the PSP and AFS, the DFO had known of illegal fishing by aboriginals in the area, but for political reasons chose to ignore it and refused to enforce the laws against poaching and sales of FSC fish. In what is the strongest rebuke yet of the DFO, Judge Saunderson concluded that the DFO had a “lack of courage to carry out its mandate” and had “lost its moral authority”. The judge found that to impose the fines sought by the Crown “would make the court complicit with the DFO in benefiting Indians over others, and

entitled the public to view the court as the handmaiden of the Minister of Fisheries.” The Court granted absolute discharges sought by the fishermen. The Crown’s appeal was dismissed.

R. v. Kapp: \$100 Fines the Birth of the New Crown Approach

Less than two weeks after the Court in the *Houvinen* decision had declared the PSP illegal, the DFO reopened the Musqueam/Tsawwassen-only commercial fishery. That gave rise to an overwhelming sense of outrage by those excluded. On August 19, 1998, more than 300 Area E gillnetters participated in what was and remains the largest protest fishery in Canadian history.

The fishermen succeeded at trial in proving that the PSP was “race-based” and discriminatory. On July 28, 2003, Judge Kitchen of the Provincial Court in Vancouver called the PSP offensive, misguided government-sponsored discrimination. He stayed all the charges.

The Crown’s appeal to the Supreme Court was successful. Chief Justice Brennan essentially concluded that the discrimination felt by the fishermen was more perception than reality. Brennan C.J. removed the stay and entered convictions against the fishermen, imposing a fine of \$100 on each participant. This is a significant development because, in his words,

Whatever the status of the PSP and in any event of their view of it, and indeed the Provincial Court’s view of it, the offenders as long time fishermen clearly understood that they were fishing during a closed time and that that was contrary to the [law]. For that reason, it seems to me that a grant of an absolute discharge would be contrary to the public interest and would not convey the necessary and appropriate message of general deterrence to others inclined to actions of this nature.

Fines for poaching and other *Fisheries Act* infractions are much higher. There is no doubt that the fishermen still had the sympathy of the Court. But the days of receiving absolute discharges for fishery protests came to an end here.

The fishermen appealed to the British Columbia Court of Appeal, which unanimously rejected their appeal. Cloaked within the reasons of Mr. Justice Low is the following passage:

I do not wish to elaborate on this point because it was not fully argued before us. But I think the Crown would have been well advised to take the position at the beginning of the trial that, regardless of the merits of the Charter equality claim with respect to the ACFLR or the PSP, no remedy was available because the [fishermen] deliberately broke a law other than the law they challenge. The lengthy trial in this case might have been avoided on this basis.

Born from this passage is the new Crown approach to protest fishery cases, a matter discussed further below.

The fishermen have appealed to the Supreme Court of Canada. The appeal is scheduled to be heard on November 14, 2007. If the fishermen succeed then the PSP will be struck down as unconstitutional and there will once again be one fishery for all Canadians regardless of race. You can count on hearing a lot more about this case in the near future.

R. v. Boudreau: Another Shot at the PSP?

On August 7, 2002, 123 commercial fishermen again set their nets. The protest was in reaction to the opening of the PSP fishery immediately after the release of a Parliamentary Report that indicated PSP fisheries were illegal.

The *Boudreau* case serves as a backstop to *Kapp*. The fishermen in *Boudreau* have been in a holding pattern pending the Supreme Court of Canada's decision in *Kapp*. It is anticipated that if the fishermen in *Kapp* succeed, the Crown will not proceed with the charges in *Boudreau*. If the fishermen in *Kapp* do not succeed, however, it is hoped that the Supreme Court of Canada will provide the framework necessary for these fishermen to perfect their constitutional fight against race-based fisheries.

R. v. Agricola: \$200 fines

The most recent protest fishery was conducted on August 31 and September 4, 2005. On those two days 28 commercial fishermen set their nets in protest of the DFO's decision not to open the Area E fishery. Some of the fishermen dipped their nets on both days. The DFO's position was that the fishery could not be opened for conservation concerns – the DFO had estimated a return of 12.5 million sockeye but only 6.7 million were returning. The fishermen's view was that DFO budget cuts had wreaked havoc on DFO's stock counting, which was already ultra risk-averse.

The event that triggered the protest, however, was again the fishermen's view that the DFO was not carrying out its mandate. The fishermen felt discriminated against because the commercial fishery was closed virtually all season while the FSC fishery operated almost continuously from April on. Records showed that one band had caught the equivalent of 800 pounds of salmon per person at about the time of the protests. It had all the appearances of a commercial fishery under the guise of an FSC fishery.

All but two of the fishermen entered guilty pleas to their charge. Their goal was to bring attention to DFO mismanagement and unequal enforcement policies. The fishermen presented evidence at their sentencing hearing that the 2005 sockeye return of 6.7 million was above average. In fact, it was the fifth highest return on the cycle since the Hell's Gate Slide of 1913.

Bound by what Brenner C.J. had said in *Kapp*, the fishermen knew that an absolute discharge was no longer available to them. They requested a fine of \$100. The Crown again sought substantial fines. On January 8, 2007, in Surrey Provincial Court, Judge Gill ordered those fishermen engaged in a single day of protest to pay a fine of \$200. Those who engaged in both days of protests had to pay \$400 for the second day.

R. v. Armstrong and the New Crown Approach

On August 22 and September 1, 2002, 48 fishermen engaged in a protest on the lower Fraser River, while the fishery was closed, in protest of allocations of FSC fisheries. Those fisheries allowed certain aboriginal groups along the Fraser River to harvest such high numbers of fish for such lengthy periods of time and with such efficient gear that any reasonable observer would conclude that the DFO was permitting the harvesting of salmon for commercial purposes under the guise of a FSC fishery. The fishermen argued that three groups were breaking the law: first, by admission the fishermen were fishing during a closed time contrary to the *Pacific Fishery Regulation*. Second, aboriginal fishers were selling their FSC fish contrary to the *Aboriginal Communal Fishing Licence Regulation (ACFLR)*. And third, the DFO, by knowing of illegal FSC fish sales and not enforcing the law, were aiding and abetting an offence in contravention of the *Criminal Code*.

The fishermen argued that the unequal enforcement of the law was discriminatory and unconstitutional. While the DFO was enforcing the general fishery laws against them, they were not enforcing the ACFLR against aboriginals.

The Crown, heeding Justice Low's comments in *Kapp*, sought the dismissal of the fishermen's constitutional arguments on the basis that the remedy sought, a judicial stay of proceedings, was not an available remedy. Ordinarily, constitutional cases are brought challenging the particular law of which the person is charged with breaking. If that law is later found to be unconstitutional, then that law will be deemed invalid and the charge stayed. The fishermen, however, as in *Kapp*, were again challenging a law – the ACFLR - with which they were not charged. The Crown succeeded in their application to strike their constitutional arguments. This revealed the new Crown approach in dealing with protest fisheries with constitutional arguments – to try to stop them before they begin.

The fishermen, as this article is being submitted, are considering whether to appeal this decision. I hope they do. As it stands, fishermen face the unsavoury prospect of the government being able to design different laws for different groups of Canadians that results in discriminatory treatment, such discrimination currently being immune from challenge. This is far too dangerous a precedent to leave alone.

Conclusion

It is regrettable that fishermen have been driven to protest fishing in order to have their voices heard. But their voices have been heard. It is further regrettable that they have been driven to protest in order to have the DFO respect the law. The protest fishermen have experienced mixed results. Developments in the law indicate that the days of absolute discharges are over. However, one thing is certain. The ultimate protest case – the *Kapp* case – will now bring the claim for equality rights in the commercial fishery before nine of the top judges in Canada.

A win there would meet all of the protest fishermen's objectives. Keep your fingers crossed.