

## GLADSTONE AND THE PUBLIC RIGHT OF FISHERY

Whatever may be said of the wider implications of the *Gladstone* case it has dramatically changed the landscape of the commercial fishery in which it originated. Before *Gladstone* the commercial herring spawn-on-kelp (“SOK”) fishery was conducted on the basis of legal regime that accorded equality rights of access to all Canadians. Since *Gladstone* the SOK fishery has been divided between the Heiltsuk, who have a priority right of access, and all other Canadians (mostly members of other aboriginal bands) who have second class rights of access.

*Gladstone* is the first and only case in any area of the Canadian economy where the Court has used s. 35(1) of the *Constitution Act 1982* to effect the restructuring of a commercial regulatory regime. It therefore gives us a unique opportunity to examine the consequences of the *Gladstone* doctrine in light of almost 10 years experience.

### **The Public Right**

It is essential first to understand the basic egalitarian principles of fisheries law upon which the SOK fishery was founded prior to *Gladstone*. As the Supreme Court said in *Gladstone*, this principle derives from the *Magna Carta*. It accords equality of access to tidal fisheries to all citizens regardless of personal characteristics such as ethnicity or place of residence. This “public right of fishery” cannot be set aside by Ministerial policy. It can only be taken away by competent legislation.<sup>1</sup>

The *Magna Carta*, as Hall J. said in *Calder*, “followed the flag” as England established colonies throughout the globe.<sup>2</sup>

The first attempt to set aside equality rights in British Columbia was rebuffed when the Hudson Bay Company was forced by the government in London to relinquish its claim to exclusive fishing rights in the colony of Vancouver Island. Thus the prospectus for settlement was able to proclaim that everyone “shall enjoy the right of fishing all sorts of fish in the seas, bays, and inlets of, or surrounding, the said Island.” And Governor Douglas was able to explain to the aboriginal population of the colony that the Queen’s laws, including fishing, hunting and mining laws, would afford equal protection and equal rights of access to them as to all others alike.<sup>3</sup>

This body of common law which was incorporated into crown fisheries policy protected the aboriginal inhabitants from claims to exclusive rights by other aboriginal groups. The only prejudice suffered was by those aboriginal groups that asserted priority rights over others – because all such claims were denied. As early as 1845 the law was stated as follows:

...the right to fish in public navigable waters in Her Majesty’s dominions is a common public right – not a regal franchise – and I do not understand any claim the Indians can have to its exclusive enjoyment.<sup>4</sup>

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<sup>1</sup> *Gladstone*, para. 66

<sup>2</sup> *Calder v. Attorney-General of British Columbia* (1973), 34 D.L.R. (3d) 145, at p. 203 (S.C.C.)

<sup>3</sup> See *R. v. Nikal*, [1996] 12 S.C.R. 1013; [1996] 5 W.W.R. 305, at p. 317.

<sup>4</sup> See *R. v. Nikal*, [1996] 12 S.C.R. 1013; [1996] 5 W.W.R. 305, at p. 318. See also Wright, R., *The Public Right of Fishing, Government Fishing Policy, and Indian Fishing Rights in Upper Canada*, Ontario History, vol. 86, Dec. 1994.

When the federal *Fisheries Act* was extended to British Columbia in 1876 this equality-based policy continued. Indians (as they were then called) were “entitled only to the same freedom [in the fishery] as whitemen, and are subject to precisely the same laws and regulations”.<sup>5</sup>

An exception to this principle was made with respect to aboriginal fishing in traditional locations for “domestic” purposes. The British Columbia Fishery Regulations of 1888 provided that “Indians shall, at all times, have liberty to fish for the purpose of providing food for themselves but not for sale, barter or traffic, by any means other than with drift nets, or spearing”. This ripened into the aboriginal right to fish for food, social and ceremonial purposes.<sup>6</sup>

With respect to commercial fishing aboriginal fishers were required to take out the same commercial fishing licences and abide by the same laws as everyone else. As the commercial fishing industry developed in the late 1800’s aboriginal commercial fishers were licensed in large numbers and have continued to have a major presence in the fishing industry on this coast ever since. It is for this reason that the Court in *Gladstone* held that the Heiltsuk’s right to fish commercially had never been extinguished.<sup>7</sup>

The herring spawn-on-kelp (“SOK”) fishery developed in the early 1970’s in response to a market demand in Japan. Thirteen SOK licences were issued in 1975. The number was increased to 21 a year later. Between 1980 and 1990 there were 28 licences, 16 of which were issued to aboriginal bands. Of the remaining 12, some were issued to aboriginal individuals. In all, 80% of this industry was in aboriginal hands at the time the *Gladstone* case arose in 1988. The Heiltsuk had one of the 28 “J” licences. Each licence entitled the holder to harvest 8 tons (16,000 lbs) of herring SOK.

### **Challenges to equality rights brought by the Heiltsuk**

The SOK fishery was administered by the DFO in accordance with the long-standing policy (based on the public right of fishery) of according equal access rights to all. This presented an inherent allocation problem whenever conditions allowed for the issuance of new licences. Sometime during the 1980’s the DFO determined that the resource and the market for SOK could accommodate an increase from 28 to 38 licences. It was further determined that the additional 10 licences should be issued to Indian bands. A committee comprised of highly regarded aboriginal persons was struck to advise the Minister as to which bands were the most deserving. An analysis based mainly on need was carried out and a priority list drawn up. Interestingly, the Heiltsuk were not among the first 10 and did not receive any of the 10 new licences issued in 1990.

The course of litigation conducted by the Heiltsuk in the late 1980’s illustrates the difference between civil and criminal proceedings raising s. 35 issues.<sup>8</sup> Civil proceedings were commenced in 1989 by the Heiltsuk in the Federal Court claiming entitlement to 5 “J” licences. William Gladstone was one of the Plaintiffs suing on behalf of the band. A long trial was held. A wealth of expert and other evidence was examined. An industry intervenor was permitted to address

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<sup>5</sup> This is taken from an 1875 memo written on behalf of the Minister to local fisheries overseers. See Wright, *supra*.

<sup>6</sup> *R. v. Sparrow*.

<sup>7</sup> *Gladstone*, para. 37.

<sup>8</sup> See the Court’s comment that summary conviction proceedings are not conducive to adjudicating fairly on aboriginal claims in *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, at paras. 142-143.

legal issues but not to adduce further evidence. After a long reserve the Court declared that a s. 35 commercial right had not been made out.<sup>9</sup> The principle of equal access to licences based on the Minister's discretion prevailed.

Meanwhile, a criminal case was moving through other courts based on a fisheries charge of selling SOK not caught pursuant to a "J" licence. There was less evidence and no intervenor. This is the now famous *Gladstone* case in which the Supreme Court of Canada held in 1996 that the Heiltsuk had a s. 35 commercial right to herring SOK. The Court held that the evidence was not sufficient to judge whether the limitation of 16,000 lbs of commercial product imposed by the Heiltsuk's single "J" licence was a justified infringement of the right. In this respect the Supreme Court differed from the Courts below (trial and Court of Appeal) which held that the limitation to one "J" licence was justified.

It is interesting to speculate whether the Supreme Court would have come to a different conclusion had it known that by the time the case was argued the Heiltsuk had been issued a second "J" licence and thus held more than any other band on the coast.

As every reader will be aware, the Court sent the case back to trial on the issue of justification. The re-trial never took place because the Crown entered a stay and the DFO attempted to deal with the matter politically rather than through the judicial process. What transpired, therefore, cannot necessarily be taken as a critique of the Court's legal analysis, but it does show what is possible when astute political action by an Indian band is combined with a vaguely worded test established by the Court and a bureaucratic disregard for the rights of others in an industry.

### **The Impact of *Gladstone***

The Supreme Court paid lip service to the Magna Carta-based rights of others SOK fishers, but gave no specific direction to the Minister.<sup>10</sup> The government did not, therefore, feel that it was required to resort to the usual "buy-back" model for transitioning licences. This would have compensated those in the industry who were willing to sell their "J" licence (which then had a market value of \$2 million each) and would have enabled the transfer to the Heiltsuk of licences, *i.e.* harvest capacity, without increasing the market supply of product. On this model public rights would have been respected and the market would not have been flooded with new product.

Instead the Minister issued 7 new licences to the Heiltsuk. This increased the amount of product on the SOK market by 112,000 lbs, or over 30%. It gave the Heiltsuk a total of 9 licences or 144,000 lbs of product. Partly as a result of this sharp increase in supply to a relatively small market in Japan the price of SOK dropped from a high in 1995 of \$39.40/lb to \$11.00/lb in 1998.

Then, not content with 9 licences, the Heiltsuk commenced a civil action in July 2000 for further licences. The government settled this case in 2001 by allowing a further additional harvest of 96,000 lbs, or the equivalent of 6 further "J" licences.

The effect of this, combined with new product from Alaska, was that the market price in 2004 hit a new low of \$5.00/lb. In the recent (2005) season product sold for as low as \$4.00/lb and much

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<sup>9</sup> *Reid v. Her Majesty*, Federal Court, Trial Division, T-1265-89, Feb. 28, 1993.

<sup>10</sup> At paras. 67 and 68 the Court noted that the rights of aboriginal groups that did not possess s. 35 rights were not "eliminated" because they still enjoyed the right of public access to the fishery.

of it remains unsold. Some industry participants (who it must be remembered are mostly aboriginal bands from other areas) have found that their expenses now exceed their income. This sector of the fishery, once the most profitable on the coast, has suffered a total financial collapse.<sup>11</sup>

### **Conclusion**

I suggest that the following conclusions may be drawn from this brief examination of the *Gladstone* decision and its 10 year sequel:

1. The *Vanderpeet* test, when applied to a commercial activity, requires historical evidence that one aboriginal group sold or bartered product on such a scale that it was an integral and defining feature of that group's society and culture prior to European influences. Since the only buyers at that time would have to be other aboriginal groups, the test inevitably produces a disequilibrium amongst aboriginal groups. One group (the historic sellers) will enjoy a s. 35 commercial right today while the rest of the aboriginal community (the historic buyers) will have second class commercial rights along with all other Canadians. Thus the equality rights applicable as "between Indian and Indian" are inevitably swept aside by application of the *Gladstone* doctrine, as are the equality rights "as between all Canadians whether Indian or non-Indian".<sup>12</sup>

2. This disequilibrium amongst aboriginal groups can very easily be enlarged and exacerbated by astute negotiating on the part of the group with s. 35 rights. The possession of a s. 35 priority right is a huge advantage in any First Nation to government negotiations, as the Heiltsuk experience has shown.

3. In view of the vagueness of the *Gladstone* justification analysis, any challenge to government action brought by the disadvantaged aboriginal groups would likely fail. Such a challenge could be based on s. 15 of the *Charter* but would be difficult to establish since the government would take refuge in s. 25 of the *Charter*. This section appears to permit discrimination as between s. 35 rights-holders and other Canadians, whether aboriginal or not.

4. Thus, the *Gladstone* case has created an exception to equality rights in the commercial arena which is likely not in the best interests of either the aboriginal community or the public at large. Societies that have turned their back on the principle of equality under the law in their commercial affairs have not had a happy history.

Christopher Harvey, Q.C.

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<sup>11</sup> See the Appendix to this paper for supporting data from the SOK Operators Association, TNAC and other sources.

<sup>12</sup> *R. v. Drybones*, [1970] S.C.R. 282, at p. 300 (per Hall J.)

## Spawn on Kelp History

Year	Licenses	#	Requirements	Total Production	Price (\$/lb)	Total Value (\$'000)	Gross Earnings
1975	13 J's issued from 22 applications	13	Experience, (bait ponds), residence location Residence location	16	3.20	100	7,700
1976	8 more licences issued	21		62	4.60	570	27,200
1977	3 more licences issued (one returned)	24		128	5.50	1,410	58,750
1978	5 licences issued to Native Bands	29	None	168	7.50	2,510	86,550
1979	1 licence retired to go roe herring	28	None	246	11.60	5,020	179,285
1980-1989	Status Quo	28		214	15.00	6,420	229,285
1990	10 licences issued to Native Bands Re-allocation of Herring for bait	28	Retirement of 6 gillnet or 1 roe herring licence  Retirement reduced to 4 gillnet or 1 roe licence AFS purchased 1 gillnet licence for each of the 10 bands, reducing retirement to 3.	247	16.80	8,310	296,785
1991		38	No requirement. DFO report recommends that no further expansion occur until licences issued in 1990 complete relinquishment requirements.	311	13.80	8,610	226,578
1992		38		308	14.20	8,740	230,000
1993	1 licence issued to Native Band	39		302	19.50	11,780	234,000
1994	DFO requires monitoring program	39	\$5000.00 fee paid by licence holders to meet DFO monitoring criteria - SOKOA formed Cost to AFS - 2 million. Private transaction, not open to all licence holders	289	29.50	17,130	439,000
1995		39		282	39.40	22,200	569,200
1996	J3 purchased by AFS and reissued as J40 to Native Band	39		295	30.80	16,240	416,000
1997		39	Retirement of only 2 gillnet licences? No access fees paid	339	18.00	12,000	279,000
1998	7 new FJ permits issued to one Native Band	46		370	11.00	8,140	177,000
1999	40 J Licences operating under DFO policies - 2 J & 7 FJ Licences operating under AFS agreement	46	DFO clarifies that management policies are not applied to AFS black market activity, market uncertainty and concerns over fairness & conservation. SOKOA requests a co-management agreement to facilitate some stability. DFO prepares 2000 management plan without input from SOKOA.	393	10.20	8,017	174,286
2000	Status Quo	46	DFO expands the fishery without notice or compensation. DFO changes monitoring requirements for FJ's. One year deal!	358	14.00	10,024	217,913
2001	Six more licences issued without consultation	52		402	13.70	11,007	211,677

Production and Price Range

Year	Production Canada	Canada I	Canada II	Canada Total	Price Range	Alaska	Total
2002	198,000	590,000	788,000	788,000	13.00-16.80	N/A	788,000
2003	231,000	589,000	820,000	820,000	9.00-14.00	500,000	1,320,000
2004	240,000	590,000	830,000	830,000	5.00-9.00	900,000	1,730,000
2005	138,000	422,000	560,000	560,000	4.00-7.00	850,000	1,410,000

*Bella Bella*  
Canada I

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Note: Production in pound

High side prices are for Kitasoo and/or Bella Bella product

Prices in Canadian currency

Canada I Bella Bella Production and Canada II Others

one licence  
equals 16,000 pounds

(28/03/01)  
Distributed at TNAC Fisheries Committee

**BACKGROUNDER**  
**Heiltsuk Spawn on Kelp Interim Measure**

**Background**

In 1996, the Supreme Court of Canada (SCC) ordered a new trial for certain members of the Heiltsuk Nation (HN) who had been convicted of offering to sell herring spawn on kelp without the licence required under the *Fisheries Act*. The SCC found that the accused had been acting under an Aboriginal right of the Heiltsuk to trade herring spawn on kelp on a commercial basis. The SCC found that this Aboriginal right could, in principle, be infringed by a regulatory regime if that regime could be justified. On the basis of the evidence before the trial judge, however, the SCC found that there was insufficient evidence for the Court to determine whether the government's regulatory regime constituted a justified infringement of the Heiltsuk Aboriginal right.

Following the decision, the HN and the Department of Fisheries and Oceans (DFO) attempted to negotiate an annual allocation of herring spawn on kelp for the HN.

There was an initial increase to the HN's allocation, which has since remained at the same level of 144,000 pounds. The initial increase was over a two-year period.

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In July 2000, the HN commenced a civil action against Canada, arguing that the amount of spawn on kelp that its current licences permit the HN to harvest constitutes an unjustified infringement of its Aboriginal right.

In February 2001, the HN, DFO and the Department on Indian & Northern Affairs Canada (DIAND) signed a letter of agreement for an Interim Measure (IM) for a one-year period. A main component of the IM, an industry study, is intended to benefit all users of the spawn on kelp resource.

**Interim Measure**

The IM is designed to address the management of the resource in the central coast region, establish some certainty for the industry and provide a constructive environment for treaty negotiations.

**Under the IM:**

the overall allocation of herring to the HN fishery will remain the same as

(28/03/01)

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last year;

for the period of the IM, three existing HN closed-pond operations will be converted to nine open-pond operations. This constitutes an additional harvest of 96,000 pounds (43,200 kilograms) of spawn on kelp;

the IM includes an independent study that will assess the impact of increased spawn on kelp production on market prices. All herring spawn on kelp stakeholders will be consulted during the study;

Canada and the HN also agreed to negotiate the terms and conditions of an abeyance agreement with respect to the HN's July 2000 litigation. This abeyance agreement will lead to a more constructive environment for treaty negotiations; and,

for the 2001 fishing season, the HN will work closely with the DFO to ensure a peaceful and orderly fishery.

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**Consultation**

Canada recognizes that commercial fishers of herring spawn on kelp may have concerns about this IM.

In response to industry concerns, Canada will meet with Interested Advisory Committees, fishing sectors and community groups to provide information on this agreement.