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Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery

Douglas C. Harris
Allard School of Law at the University of British Columbia, harris@allard.ubc.ca

TERRITORIALITY, ABORIGINAL RIGHTS, AND THE HEILTSUK SPAWN-ON-KELP FISHERY*

DOUGLAS C. HARRIS†

In 1988, the Department of Fisheries and Oceans ("DFO") charged two Heiltsuk brothers with attempting to sell herring spawn-on-kelp without a J-licence. In 1989, the Heiltsuk Tribal Council initiated legal action to compel the DFO to issue it additional J-licences and to recognize Heiltsuk jurisdiction to manage the fishery in their traditional territory on the central coast. An analysis of these cases and of the historical regulation of the herring spawn fisheries reveals a continuing conflict between the state and a First Nation over a fishery and over the legitimacy of increasingly intertwined legal systems. The Heiltsuk defence of their fishery in court may be seen as an attempt to give meaning in Canadian law to the boundaries of their traditional territory, and the state's response an attempt to establish its hegemony over the fisheries within its boundaries. In its Gladstone[1] decision the Supreme Court of Canada ("SCC") recognized a Heiltsuk right to a commercial spawn-on-kelp fishery, but referred to the trial court questions about whether the state's infringement of that right was justified. In so doing, the SCC ignored the territorial nature of the Heiltsuk claim. It assumed the territoriality of the Canadian state and within it, the authority of the DFO. The SCC's failure to recognize Heiltsuk territoriality diminishes Heiltsuk

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* This paper is dedicated to the memory of Gordon Bisaro who, in the final fisheries law course that he taught at the University of British Columbia Law School in 1996, enthusiastically supported my interest in the herring spawn-on-kelp fishery, even if he did not entirely agree with my assessment. See G. Bisaro, "Native Rights After *R.* v. *Gladstone*" *The Westcoast Fisherman* (November 1996) 45 at 45-46, for his published thoughts on the spawn-on-kelp fishery. This paper benefited enormously from discussions with Jennifer Carpenter, William Gladstone, Edwin Newman, Cecil Reid, and Arlene Wilson of the Heiltsuk First Nation, and Sue Farlinger from the Department of Fisheries and Oceans ("DFO"). Frances Dickson from the DFO generously allowed me to look at her files and Dennis Chalmers provided copies of numerous studies. Maria Morelatto provided the appeal books from *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, Arthur Pape provided the trial books from *Reid* v. *Canada*, [1993] F.C.J. No. 180 (Q.L.) (T.D.), and Kim Roberts generously provided office space to review the latter. Thanks to John Borrows, Douglas Hay, Rosanne Kyle, Barbara Lane, Kent McNeil, Dianne Newell, Alex Semple, Brian Slattery, and Michael Thoms for their comments on earlier drafts, and to Eric Leinberger for drawing the map. The British Columbia Heritage Trust, the Law Foundation of British Columbia, and the Osgoode Society for Legal History provided financial support.

† D.Jur. candidate, Osgoode Hall Law School, York University.

1 *R.* v. *Gladstone*, [1996] 2 S.C.R. 723 [hereinafter *Gladstone*].

efforts to be recognized as a political community with authority to govern its fisheries, and, by expanding the scope of what might constitute a justifiable infringement of an Aboriginal right, weakens the protection for those rights in the constitution.

I. INTRODUCTION

The Heiltsuk, the people who occupy the land and sea of what is now the central coast of British Columbia, are a political community with a strong sense of territory and a long history of governing the use and allocation of resources within it. For the past century the government of a settler society has challenged Heiltsuk authority to govern the human use of these resources. In coastal fisheries the Canadian state has superimposed its management regime, represented by the grid in Figure 1, on Heiltsuk and other Native fisheries, including the herring spawn-on-kelp fishery. Unable to negotiate a mutually satisfactory division of access to and authority over this fishery, the government of Canada and the Heiltsuk have turned to the Canadian courts. The courts, however, in attempting to define the rights of Heiltsuk to the herring fishery, have ignored the territorial nature of Heiltsuk claims. The legal decisions do not lack a sense of territory, but they assume the territoriality of the Canadian state, erasing Heiltsuk territorial claims. The effect is to diminish Heiltsuk efforts to be recognized as a political community with authority to govern resource use in their traditional territory on the central coast. And because of their failure to recognize the geographical boundaries of Heiltsuk claims, the courts have expanded the scope of what might constitute a justifiable infringement of an Aboriginal right, weakening the protection for those rights in the constitution.

I use the concept of territoriality to describe the Heiltsuk sense of belonging to and owning the area of British Columbia's coast shown in Figure 1. Territoriality also describes the communication or assignment of meaning to particular boundaries in order to assert control over a defined space.[2] To the Heiltsuk, their territorial boundaries have meaning—they define the limits of Heiltsuk jurisdiction—and Heiltsuk forays into Canadian courts may be seen as an attempt to have that meaning recognized in Canadian law. The boundaries of the Canadian state and the fisheries management grid portray another, competing territoriality. The

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2 R.J. Johnston et al., eds., *The Dictionary of Human Geography*, 4th ed. (Malden, MA: Blackwell Publishers, 2000). See also D. Delaney, *Race, Place and the Law, 1836-1948* (Austin: University of Texas, 1998) at 6.

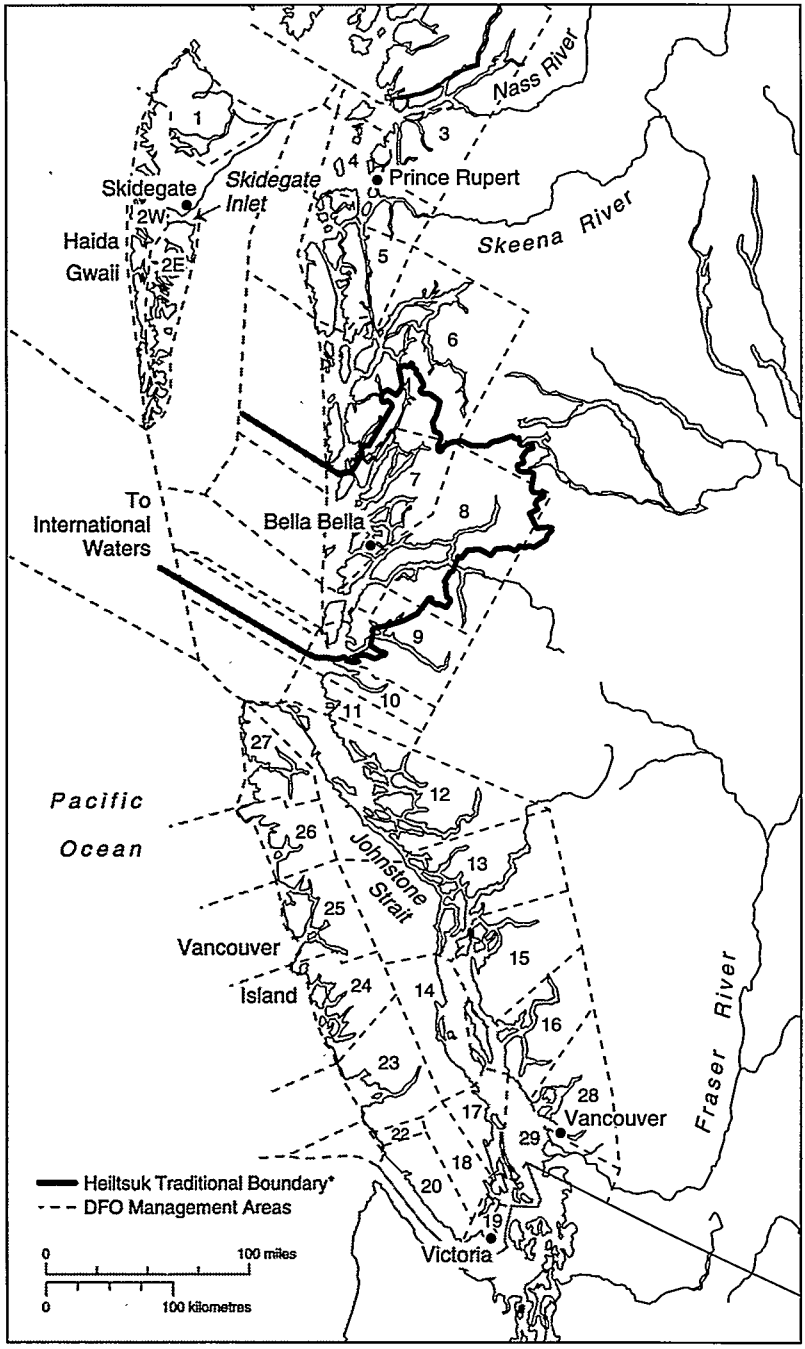

Figure 1 Heiltsuk Traditional Boundary and DFO Management Areas.

*Based on a map provided by the Heiltsuk Treaty Office, 5 August 1999.

meanings ascribed to these lines on the map both contain the state *and* announce its hegemony over coastal fisheries within its boundaries.[1]

The Department of Fisheries and Oceans ("DFO") regulates the herring spawn-on-kelp fishery under its "J-licence" scheme; only those with J-licences can harvest and sell spawn-on-kelp, and then only in limited amounts. A Native food, ceremonial, and social fishery is exempt; but anyone, Native or non-Native, who harvests herring spawn-on-kelp *for sale* must hold a J-licence. In 1988, the DFO charged two Heiltsuk brothers, William and Donald Gladstone, with attempting to sell spawn-on-kelp without a J-licence. At trial in the provincial court, the Gladstones argued that the J-licensing scheme infringed their constitutionally protected Aboriginal right to harvest and trade spawn-on-kelp, and consequently that the regulations were invalid. The Crown argued that no right existed, but that if it did, any infringement caused by the licensing scheme was justified as part of its responsibility to manage and conserve the herring stock. After appeals to the British Columbia Supreme Court and Court of Appeal, the SCC recognized that the Heiltsuk had an unextinguished Aboriginal right to a commercial herring spawn-on-kelp fishery, and that the J-licensing scheme infringed that right. The SCC found insufficient evidence, however, to determine whether the DFO's infringement was justified, and it referred to the trial court questions about the government's objectives in regulating the fishery.[2] Had the government taken adequate account of its special trust relationship with Aboriginal people and given sufficient priority to the Heiltsuk fishery when it allocated herring licences? These questions remain. Rather than pursue the issue, the Crown dropped the charges.

After the Gladstones had been charged, the Heiltsuk Tribal Council, then led by Chief Councillor Cecil Reid, initiated an action in Federal Court[3] to compel the DFO to issue spawn-on-kelp licences and to recognize Heiltsuk jurisdiction to manage the herring fishery in their traditional territory on the central coast. In *Reid* the Heiltsuk argued that they had an Aboriginal right both to the resource and to govern the use of that resource. Despite an impressive array of Heiltsuk testimony and expert opinion, the trial judge dismissed their claim in a two-page judgement, and although the Heiltsuk filed an appeal they have not

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1 J.M. Thoms, "'A Place Called Pennask': Fly-fishing and Colonialism in British Columbia" *BC Studies* [forthcoming] provides a cogent analysis of maps, grids, and power in the context of one Native fishery.

2 *Gladstone, supra* note 1.

3 *Reid* v. *Canada*, [1993] F.C.J. No. 180 (Q.L.) (T.D.) [hereinafter *Reid*].

pursued it.[4] For the legal scholar concerned with doctrine, *Reid* is an unimportant case. The judge's ruling—that there was no Heiltsuk right to a commercial spawn-on-kelp fishery—has been superseded by the SCC's decision in *Gladstone*. For the legal historian, however, the case remains exceedingly interesting, especially when set beside the Crown's *Gladstone* prosecution. The Crown has prosecuted Native peoples for *Fisheries Act* offences in British Columbia since the 1890s, but seldom have Natives entered the courts as plaintiffs to assert their fishing rights.[5] The Heiltsuk were attempting in *Reid* to reassert access to and control over a resource in their traditional territory through the courts; in effect, they were using the Canadian legal system to reassert contemporary versions of Heiltsuk legal traditions that had once regulated the fishery.

Gladstone and *Reid*, taken together, reveal a continuing conflict between the state and a First Nation over a particular fishery, and also over competing territorialities and over the legitimacy of two different but increasingly intertwined legal traditions. The Canadian state struggles to erase internal boundaries and to absorb another legal regime; Heiltsuk struggle to have their boundaries and their legal traditions recognized as such; and the SCC, a forum which they share (if not by choice), struggles *to reconcile* Aboriginal rights with the interests of non-Native Canadians. Although by no means occupying the space as equals, the courts have become a shared forum for the competing claims of legal authority of First Nations and the Canadian state. It is, therefore, important to understand the SCC's Aboriginal rights jurisprudence, particularly rights to commercial fisheries, and I will outline and critique its approach in Part II and evaluate its aftermath in Part III. Those interested primarily in the legal interpretation and prepared to accept my historical conclusions may wish to proceed directly to that discussion. To situate *Gladstone* and *Reid* within the larger conflict over legitimate authority, however, is to understand not only the legal doctrine and the particular details on which

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[4] Dianne Newell's expert's report for the Heiltsuk formed the basis of her book, D. Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993) [hereinafter *Tangled Webs*]. Wayne Suttles provided an extensive anthropologist's expert opinion. Duncan Stacey and Sheila Robinson provided expert opinions for the Crown. See P. Pryce, "The Manipulation of Culture and History: A Critique of Two Expert Witnesses" (1992) 8 *Native Studies Review* 35.

[5] For the details of early enforcement see D.C. Harris, *Fish, Law and Colonialism: The legal capture of Aboriginal salmon fisheries in British Columbia*(Toronto: University of Toronto Press, forthcoming) [hereinafter *Fish, Law and Colonialism*]; *Tangled Webs*, *supra* note 6. The Ontario case of *Sero* v. *Galt* (1921), 64 D.L.R. 327 is an early and rare example of Natives as plaintiffs. See C. Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: Osgoode Society for Canadian Legal History & University of Toronto Press, 1999) at 103-21.

the cases arose, but also the long history of Heiltsuk resource use on British Columbia's central coast and the century of state intervention in and consolidation of control over the herring fishery. It is only in the historical detail that the legal systems of two political communities, both of which claim jurisdiction over defined but overlapping territories, are seen responding to the other—and being transformed in the process. In Part I, therefore, I provide that historical detail constructed from numerous archival and court records, government documents and personal files, and secondary sources.[6] It is this detail that the SCC thought was missing when it sent the DFO and the Gladstones back to the trial court, and it is here that the importance of Heiltsuk territoriality, or of a sense of territory, is revealed.

II. HEILTSUK FISHERY AND GOVERNMENT REGULATION

A. THE HEILTSUK FISHERY

Pacific herring (*Clupea harengus pallasi*; *Wáńái* in Heiltsuk) congregate in vast schools and spawn during the late winter and spring along British Columbia's shoreline in the intertidal (between high and low tides) and subtidal (below low tide) zones. Female herring release their eggs when they brush against marine plants, including kelp, and the eggs adhere to that surface (the substrate). Herring will deposit their eggs on many substrate, and Native peoples along the coast have long harvested herring spawn by placing kelp, eelgrass, cedar boughs, hemlock boughs, or hemlock saplings where herring are known to spawn.[7] Gilbert Malcolm Sproat, a young English businessman who established a lumber camp in Nuu-chah-nulth territory on Vancouver Island in the 1860s, described the Native harvest of herring spawn as follows: "The natives put cedar branches or stalks of long grass into the water and press them to the bottom with stones—each person having his own piece of ground—and

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[6] In some cases the documents appear in more than one place or in more than one court file. Where possible I have provided the archival reference. Otherwise, I have provided the court reference (and only one if the document was introduced in more than one action) or have indicated that the document is held in a personal file.

[7] See B. Lane, *Indian Regulation of the Herring, Roe Herring and Herring Spawn Fisheries at Nootka Sound from the 1780's to the Present* (Union of British Columbia Indian Chiefs, April 1975) [unpublished, archived at Union of British Columbia Indian Chiefs Library, Vancouver] [hereinafter *Indian Regulation*]; B. Lane, *Harvest of Herring Spawn and Commerce in Herring Spawn by the Heiltsuk (Bella Bella) Indians of Central British Columbia from Aboriginal Times to the Present* (April, 1990) [unpublished, copy in possession of author] [hereinafter*Harvest of Herring Spawn*]; A. Brown & C. Martin, *Heiltsuk Herring Roe: A Living History* (Waglisla, B.C.: Heiltsuk Cultural Education Centre, 1985).

when the herrings have deposited their spawn, the pieces of grass or the branches are lifted, and the egg-bed is found firmly attached to them."[8] This is only one of many reports of the Native herring spawn fishery.[9]

The following description comes from the Kwakiutl, southern neighbours of the Heiltsuk:

> When the herring is about to spawn, the man who goes after herring-spawn looks for fine hemlock-branches with smooth leaves. When he finds them, he goes home. Then he watches for the herring to spawn. As soon as the sea begins to look milky, the man goes for the hemlock, and breaks off long branches of the hemlock; and after he has broken many, he carries them to the spawning-place. Then he takes long cedar-poles and takes them to the spawning-place; and he also takes stout rope and long stones, and he ties the end to the long stones. Then he takes a thin, long rope and takes a long pole and puts it into the sea. Then he takes the hemlock-branches and ties them to the pole with the long, thin rope; and he only stops when he reaches the end of the long pole. Then he puts it into the water at the spawning-place of the herrings, and he takes the big rope and ties its end to the pole, and he puts the stone into the water. Then it is an anchor when it is in the water.
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> For four days it is left in the water. After it has been in the water for four days, the herrings have finished spawning. Then the man takes his canoe and washes it out. When it is clean, he goes out to where the hemlock is in the water. He unties the rope, and puts the hemlock with the spawn on it into the canoe.[10]

So gathered, herring spawn was consumed locally and traded extensively. In her expert's report prepared for the Heiltsuk in *Gladstone*, Barbara Lane argued that "[f]or at least two centuries the Heiltsuk have been the hub of a trade network, exporting herring spawn to almost all of the surrounding native people."[11] Lane cites numerous passages from the journals of Hudson's Bay Company employees, including an April 1834 entry from Dr. William Tolmie's journal describing canoe loads of dried herring spawn shipped from Heiltsuk territory to be traded for oolichan, a small fish valued for its oil.[12] This age-old harvest and trade of herring spawn continues, and the contemporary Heiltsuk fishery is a thoroughly

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[8] G.M. Sproat, *The Nootka: Scenes and Studies of Savage Life* (London: Smith, Elder, and Co., 1868), cited in *Indian Regulation*, *supra* note 9 at 11.

[9] *Tangled Webs*, *supra* note 6 at 189-92, provides a good survey of the historical accounts of the Native herring spawn fishery.

[10] F. Boas, *Ethnology of the Kwakiutl: Based on Data Collected by George Hunt* (Washington, D.C.: Smithsonian, 1921) at 184.

[11] *Harvest of Herring Spawn*, *supra* note 9 at 1.

[12] *Ibid.* at 9.

modern, productive, and profitable industry, employing many members of the community and supporting many community projects.[13]

Although the J-licensing scheme is recent, regulation of herring spawn fisheries is not. Long before the DFO first took an interest in the herring fishery in the late nineteenth century, Native peoples regulated and managed their catch. The herring spawn fishery was not an open-access fishery; as Sproat observed of the Nuu-chah-nulth fishery, each person had a place to fish. Similar regulations surrounded Heiltsuk fisheries. In their statement of claim to the Federal Court the Heiltsuk argued: "When the Crown first asserted sovereignty to the central coast area of British Columbia, the Heiltsuk People comprised a distinct and organized social group who occupied their own territory, and harvested and relied on the territory's resources according to their own laws, technology and customs."[14] Under cross-examination in *Reid*, Cecil Reid described how similar Heiltsuk regulation survived in the present, although circumscribed by the Canadian state. When asked about non-Heiltsuk fishers in Heiltsuk territory, Reid replied:

> We have always objected because we have an outstanding claim for those resources which should have been dealt with by the Federal Government. We don't harass individual fishermen for coming in because it is not their fault. We kiddingly treat them as trespassers and they know how we feel. Some of them agree with us of course and others don't.[15]

Heiltsuk fisheries remain subject to their legal traditions that, although much changed, survive under layers of state regulation.[16]

B. EARLY STATE REGULATION OF THE HERRING SPAWN FISHERY

The Canadian state managed the harvesting of herring spawn as part of a larger herring fishery long before it began issuing permits for spawn-on-

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[13] For a description of a modern Native spawn-on-kelp fishery, see D. Newell, "'Overlapping Territories and Entwined Cultures': A Voyage into the Northern BC Spawn-on-Kelp Fishery" in D. Newell & R.E. Ommer, eds., *Fishing Places, Fishing People: Traditions and Issues in Canadian Small-Scale Fisheries* (Toronto: University of Toronto Press, 1999) 121 [hereinafter "Overlapping Territories"]. See M.E. Harkin, *The Heiltsuks: Dialogues of Culture and History on the Northwest Coast* (Lincoln: University of Nebraska Press, 1998) for a view of traditional and contemporary Heiltsuk society.

[14] *Reid, supra* note 5, statement of claim at 2.

[15] *Reid, supra* note 5, transcript at 428-29.

[16] R. Mathews & J. Phyne, "Regulating the Newfoundland Inshore Fishery: Traditional Values versus State Control in the Regulation of a Common Property Resource" (1988) 23 *Journal of Canadian Studies* 158, discuss the co-existence of local and state regulation in the east coast fishery.

kelp in the 1970s.[17] Herring are first mentioned in the DFO Annual Reports in 1876, and the following year the department began keeping records: 263 salted barrels and some smoked herring were exported, the total value $3,304.[18] A commercial herring fishery continued on a small scale into the twentieth century, primarily as a bait fishery for halibut, but also as a food fishery, particularly during the First World War.[19] Beginning in 1905, the DFO required that all herring fishers hold a licence,[20] and five years later, fearing damage to the stocks, it prohibited a developing reduction fishery which produced herring meal and oil.[21] The DFO reopened the reduction fishery for the 1924 season and its officers increased their surveillance of the Native fisheries.[22] J.A. Motherwell, the chief inspector of Fisheries for British Columbia, reported that Japanese were arranging to purchase herring harvested by Natives off the east coast of Haida Gwaii (Queen Charlotte Islands) and he sought instructions.[23] In 1929, he reported the sale of herring spawn and again asked how he should proceed.[24] W.A. Found, the director of Fisheries in Ottawa, responded that although the fishery was not illegal, "every feasible means should be taken to discourage the practice."[25] The fishery regulations prohibited herring fishing during their spawning period, but did not prohibit the harvesting of herring spawn itself.[26] Unable to stop the harvest without a means of enforcement, Motherwell asked whether the *Fisheries Act*, which prohibited the destruction of food fish fry but said

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17 For an analysis of the science behind the management of the commercial herring fisheries see M. Stocker, "Recent Management of the British Columbia Herring Fishery" in L.S. Parsons & W.H. Lear, eds., *Perspectives on Canadian Marine Fisheries Management* (Ottawa: National Research Council and DFO, 1993) 267.

18 Canada, "Annual Report of the Department of Marine and Fisheries, 1877" in*Sessional Papers* vol. 3 (1878) at 308.

19 On the early herring fisheries see W.A. Carrothers, *The British Columbia Fisheries* (Toronto: University of Toronto Press, 1941) at 109-18, and D. Newell,*Tangled Webs*, *supra* note 6 at 192-94.

20 O.C. (31 January 1905), C. Gaz. 1905.I.1648.

21 *Fisheries Act*, R.S.C. 1906, c. 45, s. 51, as am. by S.C. 1910, c. 20, s. 10.

22 Government Notice (26 December 1923), C. Gaz. 1923.I.2254.

23 Letter from J.A. Motherwell, chief inspector of Fisheries, to W.A. Found, director of Fisheries (17 February 1925) [unpublished, archived at Pacific Region Federal Records Centre, Burnaby ("PRFRC"), RG 23, vol. 1012, f. 721-4-64].

24 Letter from Motherwell to Found (8 June 1929), PRFRC, *supra* note 25.

25 Letter from Found to Motherwell (8 June 1929), PRFRC, *supra* note 25.

26 O.C. 264 (16 February 1928), C. Gaz. 1928.I.2627.

nothing about spawn,[27] gave him authority to prosecute Natives at Skidegate who were selling spawn-on-kelp.[28] The response to Motherwell's query has not survived, but was likely that he had no authority to prosecute. In 1932, the Canadian government added a clause to the *Fisheries Act* that specifically prohibited the destruction of fish eggs or fry on spawning grounds.[29] This scant record of early enforcement reveals a history of trade between Natives and Japanese in herring spawn, and of government efforts to eliminate that trade, both predating the formally sanctioned commercial fishery by 50 years.

In 1952, G.E. Moore, a DFO official based in Prince Rupert, asked the fisheries inspectors to provide details of Native "trafficking" in herring spawn harvested from branches suspended in the ocean.[30] None of the inspectors had any direct evidence of trade, but several reported rumours of the practice. H. Burrow, DFO officer in the Heiltsuk village of Bella Bella, reported no trade in herring spawn, but attributed the absence to a poor harvest sufficient only to meet local needs.[31] J. Fielden, DFO officer in the Kitkatla territory to the north, reported no "trafficking in herring spawn," but noted that there had been considerable interest: "[O]ne Kitkatla Indian approached the writer early in the herring spawning season to inquire whether it was legal for him to sell spawn, he having a Vancouver Japanese buyer who wanted to buy a considerable quantity. I replied in the negative."[32] Fielden informed the Kitkatla that the DFO allowed Natives to harvest herring spawn for food even though it was not strictly legal, but that a commercial harvest was prohibited. Moore chose not to prosecute. He reported that the sale of herring spawn, common before the war, had ceased with the internment of Japanese and Japanese Canadians who had been the primary purchasers, but had resumed with their return to the coast after the war, and he recommended amendments to the *Fisheries Act* to allow effective prosecution.[33]

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[27] R.S.C. 1914, c. 8, s. 39.

[28] Letter from Motherwell to Found (24 April 1930), PRFRC, *supra* note 25.

[29] *Fisheries Act*, R.S.C. 1927, c. 73, as am. and consolidated by S.C. 1932, c. 42, s. 30.

[30] Letter from G.E. Moore, acting supervisor of Fisheries, Prince Rupert, to inspectors (29 May 1952) [unpublished, archived at DFO Prince Rupert Office, Box IFF 1952-1959].

[31] Letter from H. Burrow, fisheries officer, Bella Bella, to Moore (10 June 1952) [unpublished, archived at DFO Prince Rupert Office, Box IFF 1952-1959].

[32] Letter from J. Fielden to Moore (6 June 1952), Gladstone Appeal Books Exhibit 34, vol. 10 at 2073 [hereinafter GAB, unpublished].

[33] Letter from Moore to A.J. Whitmore, chief supervisor of Fisheries, Vancouver (26 June 1952) [unpublished, archived at DFO Prince Rupert Office, Box IFF 1952-1959].

In 1953, the DFO district supervisor for Prince Rupert reported that "Albert Derrick Indian of Skidegate Mission" shipped 125 pounds of herring spawn, labelled as seaweed, to a Vancouver company.[34] The local DFO inspector investigated, discovered a Japanese couple packing herring spawn in Derrick's house, and told them to stop. Before taking further action, however, he consulted the village councillors, apparently securing their agreement to seize and distribute the spawn among the villagers. Derrick was "rather hostile at first" when he discovered the inspector removing the herring spawn from his house, but apparently consented to cease trading with the Japanese and to harvest spawn for food only, or for barter with other Natives.[35] Derrick's consent and that of the village councillors was necessary—the officer had no legislative authority to prohibit the sale of spawn-on-kelp—but it was likely more apparent than real. The sale of herring spawn had long preceded government intervention, and would continue despite state efforts to eliminate the fishery.[36]

In 1955, the Canadian government amended the Fisheries regulations to recognize the Native food fishery, and to prohibit Native trade in herring spawn:

> 21A. No person shall take or collect by any means herring eggs from herring, spawning areas, and no person shall buy, sell, barter, process or traffic in herring eggs so taken; but an Indian may at any time take or collect herring eggs from spawning areas for use as food by Indians and their families but for no other purpose.[37]

This provision entrenched a constructed distinction between an "Indian food fishery" and a commercial herring fishery—as the DFO had done in the salmon fishery late in the nineteenth century.[38] The ostensible justification was conservation. Prohibiting the harvest and sale of herring spawn, DFO officials argued, was essential to conserve herring stocks. The underlying issue, however, was allocation. The herring reduction fishery was a large enterprise by the 1950s, growing to a peak catch in 1963. While the DFO prohibited Native trade in herring spawn, it

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[34] Letter from G.S Reade, regional supervisor of Fisheries, to Whitmore (21 May 1953) [unpublished, archived at DFO Prince Rupert Office, Box IFF 1952-1959].

[35] Letter from Summins, Fisheries inspector, to Reade (28 May 1953) [unpublished, archived at DFO Prince Rupert Office, Box IFF 1952-1959].

[36] "Herring Spawn on Kelp Propagation," memo from R.A. Crouter, manager, Southern Operations Branch, to W.R. Hourston, director of Fisheries, Pacific Region (15 January 1975), GAB, *supra* note 34 at 2099.

[37] *B.C. Fishery Reg.* S.O.R./54-659, s. 21A, as am. by S.O.R./55-260, s. 3.

[38] See *Legal Capture*, *supra* note 7.

expanded the allowable catch of herring in some regions,[39] lengthened the fishing season in others,[40] and allowed trawl nets in regions that had been restricted to the less efficient purse-seines and drag-seines.[41] If conservation were the goal that justified eliminating the Native sale of herring spawn, then it was to conserve herring for the reduction fishery. That fishery collapsed in 1967, the DFO closed it in 1968, and then allowed small fisheries in 1969 and 1970.

Thus, the Canadian state was a presence in the herring spawn fishery before the 1970s, restricting the harvest as part of a policy *to conserve* herring for the reduction fishery. It was only when the reduction fishery collapsed that the DFO tentatively began to allow a modern, experimental spawn-on-kelp fishery. In doing so, however, it did not relinquish any of the jurisdiction it had earlier assumed. In assessing the government's objectives in implementing the J-licensing scheme, which I will address later, one must not begin with the premise that the government was regulating a new fishery.[42] Rather, it was regulating an ancient fishery that it had shut down in the first half of the twentieth century and, in the 1970s, was taking tentative steps to reopen. One must judge the *priority* granted to Native fishers under the J-licence scheme in light of state efforts, beginning in the 1920s, to eliminate a commercial fishery and to exclude Native authority.

C. A GOVERNMENT-SANCTIONED COMMERCIAL SPAWN-ON-KELP FISHERY

The collapse of the reduction fishery caused the DFO to re-evaluate its priorities, and the opening of the Japanese market for spawn-on-kelp created new opportunities that Alaskan fishers were already exploiting. To take advantage of the market for herring roe, the DFO experimented with and quickly licensed a roe herring fishery where fish are caught by seine or gill net and sold to a processor who extracts the roe.[43] By 1975,

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39 S.O.R./54-729; S.O.R./55-31.

40 S.O.R./54-82.

41 S.O.R./53-142.

42 LaForest J. (in dissent), *Gladstone, supra* note 1 at para. 97, and Macfarlane, J. for the majority in *R.* v. *Gladstone* (1993), 180 B.C.L.R. (2d) 133 at para. 44 (B.C.C.A.) [hereinafter *Gladstone* (1993)] mistakenly assumed that a commercial spawn-on-kelp fishery appeared for the first time in the early 1970s.

43 To differentiate the two principal herring fisheries, I shall use herring *spawn* to describe the fisheries where herring eggs are collected after spawning, and *roe* herring to describe the fishery where the eggs are extracted from herring that are caught just before they spawn.

when the DFO stopped issuing new roe licences to non-Native fishers, it had issued nearly 1,500 seine and gill-net licences (these would later be called "H-licences"), and licence holders caught herring for its roe with a total landed value of $13.3 million, a figure that would quickly grow as licensees increased their catch capacity.[44] The licences had been available to anyone paying the licence fee, creating for a time an open-access fishery, as Dianne Newell suggests.[45] Native fishers could continue to purchase roe herring licences for reduced fees until 1978 when approximately 30 percent of the roe herring licences were held by Native fishers.[46] The earlier open-access policy, however, as I suggest later, is a crucial consideration when evaluating DFO objectives that might justify infringing the Heiltsuk right to a spawn-on-kelp fishery.

In contrast to the open-access roe herring fishery, the DFO moved much more cautiously with spawn-on-kelp. In April 1971, towards the end of the spawning season, it granted an experimental permit to members of the Skidegate Band for a spawn-on-kelp fishery in Skidegate Inlet. The DFO cancelled the permit shortly thereafter because of "irregularities in the operation,"[47] but interest was growing. Reid applied for a commercial permit on behalf of the Heiltsuk Tribal Council. The spawn, he proposed, would be harvested either by traditional Heiltsuk methods (from sunken hemlock trees and limbs) or by suspending kelp from a floating frame in known spawning grounds (this would become known as the "open-pond" method).[48] The DFO replied that neither method would be allowed while the policy was under review, and it suggested that the Heiltsuk reconsider their request for a commercial permit. At present they enjoyed a "special status" which allowed them a "traditional subsistence fishery," but "[o]nce a fishery of this kind is authorized for commercial purposes, it will be authorized for all, both Indian and non-Indian."[49] Aboriginal

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[44] ARA Consulting Group Inc. & Archipelago Marine Research Ltd.,*The 1991 Expansion of the Herring Spawn-on-Kelp Fishery: An Evaluation* (6 August 1993) at Exhibit C.2 [unpublished, copy in possession of author] [hereinafter *1991 Expansion*].

[45] *Tangled Webs*, *supra* note 6 at 195-96.

[46] B.R. Turris, *Heiltsuk and Native Participation in the Spawn-on-Kelp (J Licence) and Roe Herring (H Licence) Fisheries* (October 1990) at 11 [unpublished, copy in possession of author].

[47] "British Columbia Herring Spawn on Kelp Fishery," letter from Dickson, biologist, North Coast Branch, to R.A. Crouter, director, Field Operations Directorate (22 December 1976) [unpublished, F.V. Dickson's personal files, copy in possession of author] [hereinafter "FVD Files"].

[48] Letter from Reid to T. Rothery, fisheries specialist, Department of Indian Affairs (22 December 1971), *Reid*, *supra* note 5, Exhibit 1.

[49] Letter from J.R. MacLeod, Northern Operations Branch manager, to Rothery (2 March 1972), *Reid*, *supra* note 5, Exhibit 3.

fishing rights, as the DFO had understood them since the 1880s in British Columbia, extended only to a limited food fishery. A herring spawn permit was not forthcoming, but the Department of Indian Affairs ("DIA") did provide $4,450 to help outfit 15 Heiltsuk boats for an inshore gill-net roe herring fishery.[50]

In 1972, the DFO conducted two experimental spawn-on-kelp fisheries in Haida Gwaii.[51] The first, judged the more successful, utilized a modified herring bait pond in Skidegate Inlet. The fishers suspended strips of kelp from the floating frame of the enclosed bait pond. Then, using seine nets, they caught herring about to spawn, towed and transferred them to the enclosure where the female herring deposited their spawn on the suspended kelp. This system, the "closed-pond" method, became the preferred method of producing spawn on kelp for export.[52] The herring that survive the impoundment (and most do in a good operation) are released. In the other operation, conducted in nearby Cumshewa Inlet, fishers harvested spawn-covered kelp from a natural kelp bed just offshore. Dubbed the "beach harvest" method, it was a simpler, less capital-intensive operation, but DFO scientists concluded that the harvesting damaged kelp beds and produced an inferior product.

The DFO did not issue any permits in 1973, and not everyone thought the herring stocks could support another commercial fishery. The collapse of herring stocks in the 1960s had eliminated not only the reduction fishery, but also a highly valued Native food fishery, and this had not been forgotten.[53] Fearing that a commercial spawn-on-kelp fishery would limit Native access to yet another resource, the Native Brotherhood of British Columbia ("Native Brotherhood") announced, "We are not in favour of Spawn Fishery on Kelp and feel it would totally deplete the Herring. The use of Herring Spawn on Kelp is used for Native Indian food only and should not be exported."[54] Notwithstanding this objection, one that not all Native people on the coast shared, the DFO issued a

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[50] Letter from R.C. Moses to T.S. Barnett, M.P. (9 May 1972),*Reid, supra* note 5, Exhibit 7.

[51] The experimental fisheries are reported in Canada, Department of the Environment, Fisheries Service, Pacific Region, *Propagation and Harvesting of Herring Spawn on Kelp* (Technical Report 1972-13) by F.V. Dickson, G.A. Buxton, & B. Allen.

[52] See "Overlapping Territories," *supra* note 15 at 130-39, for diagrams and a detailed description of the modern fishery.

[53] Personal conversation with Edwin Newman, past president of the Native Brotherhood (4 August 1999).

[54] Letter from W. Cook, secretary/treasurer, and G. Jeffery, first vice-president, Native Brotherhood of British Columbia, to R. Hourston, B.C. Herring Committee (7 September 1973), GAB, *supra* note 34 at 2108.

permit to members of the Skidegate Band in 1974, authorizing them to harvest, process, and market spawn-on-kelp. Although the permit was granted late in the season and only a small amount was successfully harvested, the DFO deemed this second experimental fishery a success and decided to expand the fishery in 1975. Frances Dickson, a biologist, and Blaine McEachern, an economist, the two DFO officials most involved in formulating and considering options, recommended allocating permits to those who had been most active in promoting the fishery, plus a few additional permits to those who had worked in the herring fishery, had expressed an interest in the past, lived in remote communities, involved Natives, and had access to a processing plant. They recommended an equal Native presence: "We feel that Indians in remote coastal communities should be given every opportunity to enter this fishery, and recommend that about 50 percent of permits issued go to Indians provided they have a good proposal."[55]

This policy was never publicly announced, but it does seem to have guided the initial allocation of permits. It also supports the frequent assertion that Natives received special consideration when the DFO allocated permits.[56] How this figure of 50 percent had been determined is not entirely clear, but there are several likely influences. Perhaps most importantly, DFO officials thought the fishery could provide employment and income to impoverished coastal Native communities still suffering from the consolidation of licences and fish processing plants in the 1960s.[57] Native peoples, moreover, knew the herring life cycle and migration patterns intimately, essential knowledge for a herring spawn fishery. They were also heavily involved in the commercial roe herring fishery and in the bait pond operations that resembled the closed-pond herring fishery. In 1975, Dickson and McEachern recommended that the DFO restrict entry to the spawn-on-kelp fishery to those who had held commercial bait pond permits the year before, 50 percent of whom were Native.[58] Another possible influence, although not mentioned in any

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[55] "Permits for Herring Spawn on Kelp Propagation, 1975," unsigned copy of memo from Dickson and McEachern to R.A. Crouter, Southern Operations Branch manager (8 November 1974), FVD Files, *supra* note 49.

[56] Virtually every study of the spawn-on-kelp fishery indicates that Natives received "special consideration," but none provide any details of what that entailed.

[57] Canada, *Turning the Tide: A New Policy for Canada's Pacific Fishery* (Royal Commission on Pacific Fisheries Policy final report) by P. Pearse (Vancouver: Commission on Pacific Fisheries Policy, 1982) [hereinafter *Turning the Tide*], concluded at 136 that the DFO operated the spawn-on-kelp fishery "to achieve vague social objectives."

[58] "Herring Spawn on Kelp Propagation Permits," unsigned copy of memo from Dickson and McEachern to Crouter (18 November 1974), FVD Files, *supra* note 49.

correspondence, was the decision of Justice Boldt that American Indians in Washington state were entitled, by treaty, to 50 percent of the total allowable catch.[59] The DFO would have known of this decision, and it may have had an impact on its own policy, particularly as it allocated permits in what it considered a new commercial fishery.

The Herring Advisory Board, composed of DFO officials and industry representatives, approved the proposed commercial spawn-on-kelp fishery, and the DFO amended the fishery regulations to allow the granting of permits: "[N]o person shall, except by written permission of the Regional Director, by any means take or collect herring eggs from herring spawning areas, or buy, sell, barter, process or traffic in herring eggs so taken."[60] In December 1974, the DFO placed notices in newspapers around the province requesting applications, and it sent letters to herring bait pond operators, the United Fishermen and Allied Workers Union, the Native Brotherhood, the Union of British Columbia Indian Chiefs, and the West Coast District Council of Indian Chiefs informing them of its intention to issue permits. Applicants were told that those with previous experience in catching and live-holding herring (primarily bait pond operators), as well as residents of remote coastal communities, would have priority.[61]

The Native Brotherhood objected. It withdrew its earlier opposition to a commercial fishery, but insisted that it manage the fishery and that permits go only to Native fishers. Furthermore, it recommended another year of experimentation, perhaps to allow Native fishers an opportunity to assemble the necessary resources, before proceeding to a commercial fishery.[62] In early January 1975, representatives from the Native Brotherhood met with the DFO Spawn on Kelp Advisory Committee ("Advisory Committee") to oppose non-Native participation. The Advisory Committee refused to concede a Native-only commercial fishery for fear that it would violate the anti-discrimination provisions in the *Canadian Bill of Rights*, but did recognize that Native applicants deserved "some special consideration" when the DFO allocated licences.[63] In his formal reply to the Native Brotherhood, DFO Minister

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[59] *United States* v. *State of Washington*, 384 F. Supp. 312 (1974).

[60] *B.C. Fishery Regs.*, S.O.R./54-659, s. 21A as am. by S.O.R./55-260, s. 3 and S.O.R./74-50, s. 9.

[61] "Herring Spawn on Kelp Propagation," unsigned memo from Crouter to Hourston (17 January 1975), FVD Files, *supra* note 49.

[62] "Position on the Propagation of Herring Spawn on Kelp," J. Clifton, president of the Native Brotherhood (6 January 1975), GAB, *supra* note 34 at 2132.

[63] Undated memo apparently from the Herring Spawn on Kelp Advisory Committee, GAB, *supra* note 34 at 2106.

Romeo LeBlanc acknowledged that coastal Natives had a food fishing right but he rejected an exclusive Native fishery. Natives would be eligible for commercial permits, as would non-Native Canadians, and the government would consult with Native peoples over management of the fishery, but control would remain with the DFO. LeBlanc's measured response offered "every consideration," not "special consideration":

> I have carefully read your brief and acknowledge the fact that coastal British Columbia Indians have traditionally had, and continue to have the right to harvest herring roe for food purposes. I also agree that many coastal Indian reserves are ideally located for the propagation of herring spawn on kelp, and I hope that they will be interested in entering such a commercial venture. However, I am unable to agree with the Native Brotherhood's request that entry to this fishery be restricted to Indians only.
>
> ...There is nothing in the Fisheries Act or Regulations which would permit us to introduce an Indian-only fishery, and developing a restricted entry to a commercial fishery based on racial grounds would be contrary to the Canadian Bill of Rights. However, I can assure you that *every consideration* will be given to Indians who have applied for permits. While we are prepared to consult with the Native Brotherhood of British Columbia in regard to the spawn on kelp fishery, responsibility for management for this and other fisheries must remain with the Fisheries Service.[64]

These exchanges between the DFO and the Native Brotherhood are important. The trial judge and one court of appeal justice in *Gladstone* held that this was sufficient consultation to justify infringing the Heiltsuk right to a commercial fishery, even though the Heiltsuk were not involved. They reveal, furthermore, the basic disagreement over the sources of legal and political authority that would eventually lead the DFO and the Heiltsuk to the SCC. In deference to the common law doctrine of the public right to fish (which prevented the Crown from allocating exclusive fisheries in tidal waters except with the express consent of Parliament) LeBlanc claimed he had no authority from Parliament to license a Native-only fishery.[65] LeBlanc also invoked the anti-discrimination provisions in the *Canadian Bill of Rights* to reject an exclusively Native fishery. The Native Brotherhood, however, was not arguing for an exclusive Native fishery based on race or derived from the Crown, but authorized by the long history of resource use and

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[64] Letter from LeBlanc to Clifton (22 January 1975), GAB, *supra* note 34 at 2130 [emphasis added].

[65] Lamer C.J. would also invoke the common law doctrine of the public right to fish in *Gladstone*, rejecting the argument that Aboriginal rights to commercial fisheries extinguished the public right to fish.

management by distinct political communities which had preceded the Canadian state and whose rights had not been extinguished either by common law or statute.[66] Another Native organization, the Union of British Columbia Indian Chiefs ("Union"), argued that the DFO had no authority to limit Native access to a spawn-on-kelp fishery, or to authorize non-Native access,[67] and it hired anthropologist Barbara Lane to produce a report chronicling the history of Native control over the herring fishery. Her report established a history of Native ownership and control over a fishery that had not been ceded through treaty and, as far as the Union and the Native Brotherhood were concerned, remained intact.[68]

The DFO, however, had begun to receive and evaluate Native and non-Native applicants on the basis of a point system. Points were awarded for each year that an applicant and crew members had participated in a spawn-on-kelp fishery, a herring bait pond operation, or in another commercial herring fishery; for a previously expressed interest in the spawn-on-kelp fishery; and for living in remote areas of the province. Native applicants were given "special consideration." The DFO received 22 applications, including nine from status or non-status Indians or Native organizations, and issued 13 permits, eight of which went to Native fishers. Although not an exclusive Native fishery, the DFO was well above its goal of an even split (Table 1).

Table 1: Herring Spawn-on-Kelp Permit/Licence Applicants & Recipients

Year	Appli-cants	Non-Native applicants	Native Appli-cants*	Permits/ licences	Non-Native	Total Native *	Heiltsuk Tribal Council
1975	22	13	9	13	5	8	(0)
1976	32	20	12	21	10	11	(0)
1977	127			24	11	13	(0)
1978				29	11	18	(1)
1979-90				28	10	18	(1)
1991-92				38	10	28	(1)
1993-96				39	10	29	(2)
1997				44	10	34	(7)
1998				46	10	36	(9)
1999				46	10	36	(9)

[66] H. Foster, "Honouring the Queen: A Legal and Historical Perspective on the Nisga'a Treaty" (1998/99) 120 *BC Studies* 11 at 29, notes the irony in an argument that the recognition of Aboriginal rights and title discriminates on the basis of race, given the history of explicitly racist laws that denied Indians access to land, resources, and the political process.

[67] "Union of British Columbia Indian Chiefs Position Paper on Commercial Production of Herring Spawn on Kelp" (1975) [unpublished, archived at Union of British Columbia Indian Chiefs Library, Vancouver].

[68] *Indian Regulation*, *supra* note 9.

The DFO allocated permits for particular locations (Table 2). The permit issued to R.C. Jones, for example, required that he harvest spawn-on-kelp "in vicinity of Jedway to Skidegate," essentially DFO management area 2E, the southeastern coast of Haida Gwaii. As the fishery expanded, locations became more specific. In 1979, Jones could only operate in Skidegate Inlet; others fishing within Area 2E were directed elsewhere.

Table 2: Geographic and DFO Management Areas of Permit/Licence Holders, 1975, 1976, 1979

Geographic Area and DFO Management Area	**1975**		**1976**		**1979**	
	Total permits	Native* permits	Total permits	Native* permits	Total licences	Native* licences
Queen Charlotte Islands (Haida Gwaii)						
Area 2E	2	2	5	2	11	8
Area 2W			1	1		
Prince Rupert						
Area 4	1	1	5	4	4	3
Area 5	2	1	2	1	5	5
Central Coast						
Area 6					1	1
Area 8	2	2			1	1
Area 10					1	
Vancouver Island (Inside)						
Area 12	1	1	1	1	1	
Area 13			1		1	
Area 15					1	
Area 16	3		3			
Area 17					2	
West Coast Vancouver Island						
Area 23			2	2		
Area 24	1	1				
Area 23/25	1					
Area 23/24/25						
Total	13	8	21	11	28	18

*Tables 1 and 2: Native includes status and non-status Indians and band or tribal councils.

D. A HEILTSUK PROPOSAL

The Bella Bella (Heiltsuk) Band Council was the only Native applicant that did not receive a permit in 1975, even though it had been included on an initial list of preferred applicants. The DFO rejected the Heiltsuk application because it proposed a traditional fishery where fishers gathered spawn from hemlock trees that they had submerged in known spawning grounds. This was the method with which the Heiltsuk were most comfortable and, in their experience, which produced the best results. Furthermore, they had neither the experience with the closed-pond method nor the finances to purchase seine nets and build impoundments. Nonetheless, the DFO informed the Heiltsuk that "[p]ermits will only be issued for propagation of herring spawn on kelp within an enclosed area, such as a floating impoundment, a trap or some other type of enclosure."[69] Rather than amend their application, the Heiltsuk attempted to persuade the DFO that their methods were efficient and practical. They provided a detailed plan and budget, and asked for an opportunity to prove their method. Cecil Reid wrote:

> The Heiltsuk method ... is flexible, follows the natural spawning pattern of the herring, is not carried out from the beach, does not cause die-off, is relatively inexpensive to carry out and therefore can be economically viable without having to be an ancillary function of a bait pond, and produces superior quality spawn.[70]

The Heiltsuk plan included a proposal for 15 licences, each with a quota of 3000 pounds, to be drawn by lot and issued by the Heiltsuk to community members for a designated area within Heiltsuk traditional territory. Boat owners' pay would depend on the grade of their product, and packers would receive a piece rate. The product would be sold by auction, with net profits distributed to the boat owners. The DFO, however, was on another track. Each permit it issued contained the following restriction: "Spawn on kelp for commercial sale is to be produced in herring impoundments only. Sale of 'wild' spawn on kelp taken from natural spawning areas will not be permitted."[71]

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[69] Letter from R.N. Palmer, Northern Operations Branch acting manager, to Reid (22 January 1975), GAB, *supra* note 34 at 2136.

[70] Letter from Reid to DFO (25 January 1975), GAB, *supra* note 34 [emphasis in the original].

[71] Excerpt from permit issued to R.C. Jones (27 January 1975), FVD Files, *supra* note 49.

Another Heiltsuk application in early February produced a meeting with DFO officials.[72] Reid told them that it was unreasonable to insist that the Heiltsuk use closed ponds because capital and maintenance costs were high, water quality and strong tidal currents created problems, kelp was only available in a few places, and they could not assemble the necessary material for the 1975 harvest. The Heiltsuk, furthermore, had serious concerns about the mortality rates of the closed ponds and many objected outright to the roe herring fishery. Reid would tell the Federal Court:

> Most Indian leaders in Indian communities have real problems with the sac roe fishery which kill all the herring. We prefer to have the herring spawn on the kelp freely and then they would swim away and spawn the following year without having to be killed. I remember having very serious debates in the Union of B.C. Indian Chiefs Conferences and Conventions over that issue. The elders especially, were totally opposed to the gillnet fishery which was being set up in 1975.[73]

The DFO, however, would not alter the permit criteria.[74] In his formal reply, Minister LeBlanc informed the Heiltsuk that the DFO had insufficient resources to supervise unenclosed herring spawn fisheries, and he anticipated that the "Heiltsuk method" would produce a lower quality product. The Heiltsuk proposals to regulate their fishery and to sell their product by auction, both of which seemed to address the minister's concerns about supervision and quality, were ignored. LeBlanc informed them that the DFO would conduct an experimental fishery using the "Heiltsuk method," but meanwhile he hoped they would apply for a closed-pond permit.[75]

This sequence of events shows the Heiltsuk responding to new opportunities in an ancient fishery by creating a regulatory structure to manage and allocate a resource within their community. They were attempting to build a contemporary legal framework that was local *and* integrated into a coastal management regime. It also reveals the Heiltsuk as part of a larger coastal Native community that was debating the nature of acceptable and sustainable resource use. At the same time, it emphasizes the unwillingness of the Canadian state to recognize a

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[72] Letter from Bella Bella Band Council to LeBlanc (2 February 1975), GAB, *supra* note 34 at 2155.

[73] *Reid*, *supra* note 5, transcripts at 131-32.

[74] Memo from J.B. Hawley, chief, Central Coastal Division, to file (10 February 1975), GAB, *supra* note 34 at 2153.

[75] Letter from LeBlanc to the Bella Bella (10 February 1975), GAB, *supra* note 34 at 2161. There is no record of a DFO-sponsored experimental fishery of the Heiltsuk method.

competing jurisdiction or to accommodate another legal order, and the very limited space within which a Heiltsuk legal order could operate. The DFO offered one permit, on its terms. The special consideration for Native applicants did not include allowing harvest by traditional methods, and the Heiltsuk would not receive a permit until 1978.

E. FURTHER EXPANSION

The success of those receiving permits in 1975 was mixed. Most had been given a six-ton limit, but few reached their quota. The work of the permit holders in Skidegate Inlet was ruined by an oil spill; algae and sand prevented another permit holder's product from going to market; a strike and the loss of a fish boat in bad weather hurt another operation; two late applicants missed most of the season; and internal dissension limited the operation of another group.[76] At the end of the season, Dickson reported that nine of the permit holders had produced a marketable product, but only six had made a profit. Nonetheless, the product was good and she was optimistic that the Japanese market could absorb more. She recommended that the DFO expand the fishery from 13 to 30 permit holders, and that Native applicants continue to receive special consideration. The DFO should again issue permits without a licence fee, because it would pose "a hardship to new applicants, especially Indian." Given the continuing objections of the Native Brotherhood, however, she suggested that it might be less contentious to issue 20 permits.[77]

The DFO received 32 applications for the 1976 season, including 12 from status or non-status Indians (Table 1). Six of the Native applicants had held permits in 1975 and were renewed without being re-rated. The six new Native applicants were screened under the point system as were the non-Native applicants, and five were awarded permits. The sixth was not eligible for a permit because he held a roe herring licence and the DFO would not allow new applicants to hold both a roe herring and a spawn-on-kelp licence.[78] In the end, it issued 21 permits in 1976, 11 to Native fishers.[79]

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[76] "Brief Summary of Progress of 1975 Herring Spawn on Kelp Operations," unsigned copy of a memo from Dickson to E.R. Zyblut, North Coast Division acting chief (20 May 1975), FVD Files, *supra* note 49.

[77] "1976 Trial Herring Spawn on Kelp Fishery," unsigned copy of a memo from Dickson to Crouter (4 December 1975), FVD Files, *supra* note 49.

[78] Those renewing their permits were informed that if they held a roe licence they could operate in both fisheries for one more year, but then must chose between the two.

[79] "1976 Herring Spawn on Kelp Fishery," unsigned copy of a memo from Dickson to Crouter (19 February 1976), FVD Files, *supra* note 49.

For the 1977 season, the DFO received 127 applications, awarded 25 permits, and raised the quota from six to ten tons of product for each permit holder. One applicant refused to relinquish his roe herring licence, so the DFO issued 24 permits, 13 to status or non-status Indians or Indian organizations (Table 1).[80] Given the increased interest and the number of refused applicants, the DFO anticipated more appeals and therefore modified its rating scheme and evaluated all applicants, including those who had held a licence in 1976. The new rating scheme emphasized the same attributes: previous experience in the spawn-on-kelp fishery, herring impoundments, or other herring fisheries; previous expressions of interest in the spawn-on-kelp fishery; and place of residence. Those who were permanent residents of the west coast of Vancouver Island, Haida Gwaii, or "isolated Indian villages" received the most points, followed by residents of Johnstone Strait, and finally by residents of the east coast of Vancouver Island or the Sunshine Coast. Applicants resident elsewhere received no points. Once again, DFO officials recorded the Indian status of each applicant. In previous years, all Native applicants whose application fit DFO guidelines received a permit, but given the limited number of permits and the decision to allow non-Natives to participate in the commercial fishery, the DFO could no longer allocate permits to every Native applicant. DFO officials sought political direction from the minister. Should a 50-percent Native fishery remain a target? Should licence fees be introduced, and if so, should they apply equally to Native and non-Native licence holders?[81]

Before the 1978 season the DFO removed the 1955 prohibition, and began to issue renewable licences instead of the temporary permits.[82] That year Dr. W.E. Johnson, DFO director general for the Pacific, issued licences to all 24 permit holders from the 1977 fishery and five new licences to First Nations on the north and central coast: the Masset, Kitasoo, Lax'Kw'alaams, Kitkatla, and Heiltsuk.[83] To make room for this expansion to 29 licences, the DFO reduced the quota from ten to eight

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80 "1977 Herring Spawn on Kelp Fishery," unsigned copy of a memo from Crouter to C. Geen, director general, Fisheries Management-Pacific (6 January 1977), FVD Files, *supra* note 49. W. Brillon, a non-status Indian who had held a permit in 1975 and 1976, did not receive a permit in 1977 because he held a roe herring licence. He sued the Crown, but did not regain his permit.

81 *Ibid.* I have been unable to locate a response to these questions.

82 *Pacific Herring Fishery Reg.*, S.O.R./77-719, s. 17(1).

83 The Spawn on Kelp Advisory Board had recommended no expansion ("Minutes of the Herring Spawn on Kelp Advisory Board Meeting, 3 November 1977," FVD Files,*supra* note 49; attendees were Dickson, McEachern, and four advisors who were participants in the fishery).

tons per licence. Johnson explained the expansion as part of an effort "to encourage participation in this fishery by residents of remote coastal communities where there are few other employment opportunities."[84] This choice reflected a general change in policy that the DFO announced in 1976; henceforth the DFO would manage the fishery not to maximize the fish stock but rather to make the *best use* of society's resources, paying particular attention to those who depended on the fishery:

> Although commercial fishing has long been a highly regulated activity in Canada, the object of regulation has, with rare exception, been protection of the renewable resource. In other words, fishing has been regulated in the interest of the fish. In the future it is to be regulated in the interest of the people who depend on the fishing industry.[85]

Some in the industry were concerned that the new licences had gone only to First Nations, a concern exacerbated by the fact that several of the Native operations, including those of the Heiltsuk and the Masset, did not produce any marketable product in 1978. Other First Nations wanted licences, and those with successful operations wanted more.[86] The DFO decided, however, that the combined catch of the different herring fisheries (roe herring, spawn-on-kelp, bait pond and Indian food fisheries) was at the limit of what was thought to be sustainable, and increasing the spawn-on-kelp fishery would entail reductions elsewhere, primarily in the roe herring fishery. It was also concerned that the market might not be large enough to sustain current prices for spawn-on-kelp with an influx of new product. In the end, one licence holder relinquished his spawn-on-kelp licence to use his roe herring licence, and only 28 licences were issued in 1979 (Table 1).

The DFO renewed these non-transferable licences every year thereafter, but did not issue new licences again until 1991. In 1983, it labelled the spawn-on-kelp licence a "J-licence," and began charging a licence fee of $2,000 for non-Natives, and $10 for individual Native licence holders and First Nations.[87] It also began managing the herring fishery on the basis of a 20 percent annual harvest rate. The DFO estimated the total biomass, set the yearly total allowable catch ("TAC")

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[84] "Information Bulletin: 1978 Herring Spawn on Kelp Fishery," signed by Johnson (21 November 1977), *Reid*, *supra* note 5, Plaintiff's Documents.

[85] Canada, Fisheries and Marine Service, *Policy for Canada's Commercial Fisheries* (Canada: Fisheries and Marine Service, 1976) at 5. The fish might have been somewhat surprised that the fishery had been managed in their interests before 1976.

[86] "Herring Spawn on Kelp Fishery," confidential memo from Dickson to Herring Resource Board (15 September 1978), GAB, *supra* note 34 at 2103.

[87] *Pacific Fishery Registration and Licensing Reg. 1983*, S.O.R./83-102, ss. 71-75.

at 20 percent of that total and then divided the TAC. It allocated herring first to the Native food fishery, the sport and commercial bait fishery, and for charity and aquarium use, all relatively small fisheries. Then for each J-licence operator using a closed pond, the DFO allocated 100 tons, consuming in total between six and eight percent of the TAC.[88] It allocated the great bulk of the TAC, usually 80-85 percent, to the seine and gill-net roe herring fishery, and because it was last in line, the roe herring fishery absorbed most of the fluctuations in the TAC caused by diminished stock estimates in particular regions. Between 1996 and 1999, for example, the DFO closed the roe herring fishery in Area 5 because of local shortages.

F. MAINTAINING THE STATUS QUO

The lack of new J-licences was not for lack of applicants, and no organization was more persistent than the Heiltsuk Tribal Council. Although the Heiltsuk had struggled to produce a marketable product when they received a licence in 1978, by 1980 their fishery was producing a good income both for the fishers and for the tribal council. They renewed their campaign to acquire more licences—a minimum of five—and assume greater managerial responsibility for the herring fisheries on British Columbia's central coast.[89] In reply, the Heiltsuk received the first of many letters from the DFO denying their request.[90] The roe herring fishery was already in something of a crisis because of a collapsing Japanese market and too many highly capitalized boats chasing too few fish, and the DFO was not about to expand the spawn-on-kelp fishery.[91]

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[88] In 1999, DFO allocated 6.5 percent of the TAC to the spawn-on-kelp fishery. See Canada, DFO, *Pacific Region, Integrated Fisheries Management Plan, Herring Spawn on Kelp, 2000*, online: http://www.pac.dfo-mpo.gc.ca/ops/fm/mplans/mplans.htm [hereinafter *SOK Management Plan*] (date accessed: 10 February 2000). For a comparison of allocation between herring fisheries from 1975-93, see *1991 Expansion*, *supra* note 46 at "Exhibit B: The Roe Herring and Herring Spawn-on-Kelp Fisheries 1975 to 1993." Although most herring survive the spawn-on-kelp operation, the fishery reduces the reproductive potential of the stock, and Fisheries estimates that loss at 100 tons per licence.

[89] C.N. Carpenter, Heiltsuk Tribal Council, to W. Shinners, director-general Fisheries, Pacific Region (9 December 1980), *Reid*, *supra* note 5, Exhibit 12.

[90] Shinners to Carpenter (8 January 1981), *Reid*, *supra* note 5, Exhibit 13.

[91] "Discussion Paper on Development of a 1981 Herring Roe Management Plan," submitted to the 1982 Royal Commission on Pacific Fisheries Policy (30 July 1981), PRFRC, *supra* note 25, RG 33/132 vol. 16, Exhibit 141b.

In 1981, the Heiltsuk initiated a comprehensive claim to their traditional territory, including "all landforms, fresh and tidal waters, foreshores, and the watersheds of all streams and rivers flowing into these fresh and tidal waters, and ... as far westward as the 200 mile international limit"[92] (Fig. 1). The Heiltsuk claimed herring foremost among ocean resources; greater access to the spawn-on-kelp fishery was the first item the Heiltsuk put to the federal negotiators.[93] Not only was it an important issue for the Heiltsuk—they wanted more licences and assurances that the DFO would not issue licences to non-Native fishers in their territory—but Reid believed it would be an easy issue to resolve.[94] If fishers used the traditional Heiltsuk method (suspended hemlock trees) or the open-pond method, the fishery was thought to have a relatively small impact on the stock. He continued to apply on behalf of the Heiltsuk Tribal Council for licences and an increased say in managing the fishery. The applications were always for licences held collectively; Reid objected to the licences held by individuals, whether Native or non-Native, because while they reaped windfall profits, unemployment soared on coastal Native reserves. His model was the community-held licence restricted to the local waters of the Native community. The community would be responsible, with the DFO, for ensuring that the fishery within that area was properly managed to allow a sustainable harvest.[95] The prospect of a jointly managed fishery, repeatedly rejected by the DFO, was increasingly appealing to some DFO officials who saw it as the only way to reduce a growing illegal harvest.[96] If the Heiltsuk assumed control of the central coast fishery, enforcing their laws to manage and allocate herring spawn, then perhaps they could reduce the illegal trade. Despite the possibilities of a jointly managed fishery, however, the DFO chose to enforce existing regulations and the 1988 charges against the Gladstones for attempting to sell spawn-on-kelp without a licence would become the test case.

The DFO had been under increasing pressure from many applicants, not just the Heiltsuk, to expand the spawn-on-kelp fishery. Several First

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92 "Statement of Comprehensive Aboriginal Rights Claim of the Heiltsuk Nation to the Governments of Canada and British Columbia" (January 1981),*Reid, supra* note 5, Exhibit 15.

93 Letter from Reid to Shinners (9 May 1985) GAB,*supra* note 34 at 2171. Letter from Reid to Shinners (11 April 1984), *Reid, supra* note 5 at Exhibit 19.

94 *Reid, supra* note 5, transcripts at 142-43.

95 *Ibid.* at 136-37.

96 E. Kremer to G.E. Jones (26 May 1987), *Reid, supra* note 5 at Exhibit 104. L.S. Parsons, "Management of Marine Fisheries in Canada" (1993) 225 *Canadian Bulletin of Fisheries and Aquatic Sciences* 211, estimated the value of the illegal harvest at $3 million, or eight additional licences.

Nations and Native and non-Native individuals were pressing for licences. Rupert Wilson, chief of the Kwakiutl, testified to the Royal Commission of Pacific Fisheries Policy that his people, despite requests, had been unable to secure a licence:

> The kind of harassment I get—There was a letter written to all Bands in B.C. concerning the roe on kelp licences. So I tried to apply on behalf of eight band members from my reserve. I got turned down. I brought the letter to the licencing branch in Vancouver, and they said, oh you're asking for too much. None of us got any licences for roe on kelp. I don't know who has got the licence for it. Somebody else with big money I guess.[97]

The final report of the royal commission and two DFO studies suggested that the Japanese market could absorb more product without a significant decline in price, and recommended expanding the fishery.[98] In 1988, DFO's Pacific Regional Branch produced such a proposal to meet three objectives: increase Canada's market share, increase the number of licensed participants with a minimum impact on other herring fisheries, and provide employment and income for coastal Native communities.[99] Those who received licences would be required to retire one roe herring seine licence or six gill-net licences ("H-licences") to prevent an overall increase in herring consumption. This could be done either by retiring H-licences that the recipient already held, or by purchasing and retiring others. The director general of the Pacific region, P.S. Chamut, stated his preference that the new licences go to First Nations. No decision was forthcoming that year, and in 1989 the Pacific Regional Branch pushed again for an expanded spawn-on-kelp fishery, believing its proposal—to issue ten new J-licences to First Nations in exchange for retired H-licences—best met the concerns of the various interests in the herring fishery.[100]

In the meantime, the Heiltsuk continued to press without success for more licences. The one licence they held provided employment to a rotating group of fishers, and provided funding for tribal council

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[97] Canada, Royal Commission on Fisheries Policy, "Proceedings" Vol. 25 (Burnaby, B.C.: Audiotron Enterprises Ltd., 1982) at 5,412 [unpublished, archived at University of British Columbia Special Collections].

[98] *Turning the Tide, supra* note 59 at 136; P. Leitz & P. MacGillivray, *B.C. Spawn-on-Kelp Fishery: Optimal Production Level and Licence Allocation Policy* (15 September 1983) [unpublished, copy in possession of author]; *Proposal to Expand the British Columbia Spawn-on-Kelp Fishery* (September 1986) [unpublished, copy in possession of author].

[99] P.S. Chamut, director general Pacific region to P. Asselin, assistant deputy minister, DFO (5 July 1988), *Reid, supra* note 5, Exhibit 121.

[100] Chamut to Asselin (25 July 1989), *Reid, supra* note 5, Exhibit 123.

initiatives such as a fish processing plant, an airstrip, and a friendship centre. Unemployment, however, remained high; one J-licence could only provide so much. Unable to convince the Canadian government to issue additional licences through land claims negotiations or applications to the DFO, in June 1989, the Heiltsuk Tribal Council filed a statement of claim in the Federal Court claiming five additional licences and an exclusive right to harvest herring spawn in their traditional territory. In cross-examination, Reid described the nature of the Heiltsuk claim:

> Our claim in this lawsuit is not for unlicensed commercial fishing. We are trying to do this through the existing rules of the only game that we have at the moment. There are 2,000 Heiltsuk people and we couldn't possibly all go out and fish individually without any regulation and sell individually. The only way our people would benefit is if we treat roe-on-kelp as a collective right which is controlled by the Tribal Council and by fisheries through co-management of some kind. We can keep fifty percent of the proceeds from this very lucrative fishery as a resource base for our tribal government for social and economic development. We can also rotate the fifty people we have working annually. We recognize that each and every one of us has a right but it is a collective or tribal right.[101]

The issue of the Heiltsuk right to a commercial spawn-on-kelp fishery was now before the courts in two different actions, one initiated by the DFO to stop what it considered illegal trade and the other initiated by the Heiltsuk to expand both their access to and control over the central coast herring fishery.

G. EXPANDING THE SPAWN-ON-KELP FISHERY

Eventually responding to the pressure, DFO Minister Tom Siddon created an Indian Licence Advisory Board ("ILAB") in November 1989, to advise on all aspects of the commercial fishery involving Natives. He also announced that the DFO would issue ten new J-licences to First Nations, and that the ILAB would recommend how to distribute these licences.[102] Based on the following criteria 12 First Nations were short-listed for the ten new licences: saltwater sites, a history in harvesting herring roe, availability of macrosystis kelp, and availability of herring stocks.[103] The DFO issued ten licences in 1991, nine of them from the short list, but none to the Heiltsuk or other First Nations who held a J-licence. Those

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[101] *Reid, supra* note 5, transcripts at 446-49.

[102] DFO News Release (3 November 1989), PRFRC, *supra* note 25, RG 23, v. 1995-96/614, box 3.

[103] C. Atleo, *Report to Indian Licence Advisory Board Re: Consideration of 10 New "J" Licences* (31 March 1990) [unpublished, copy in possession of author].

who did receive a licence were required to retire one roe herring seine or six gill-net licences by 1999, and the DFO contributed to the cost of doing so.

The Heiltsuk learned in late 1990, at the conclusion of argument in *Reid*, that their action would be dismissed.[104] *Gladstone*, however, continued its way through the courts. At trial in the provincial court, Judge Lemiski determined that the regulations infringed the defendants' Aboriginal right to trade and barter, but found the infringement was justified because the Crown had demonstrated a valid legislative objective—conservation. Furthermore, although the infringement was excessive the DFO had consulted the Native Brotherhood and this justified the measures taken. The Gladstones appealed to the British Columbia Supreme Court, but Anderson J. dismissed the appeal on the grounds that the Heiltsuk had not proven an Aboriginal right to a commercial spawn-on-kelp fishery.[105] He held that the Heiltsuk had a right to gather spawn-on-kelp "for food, social and ceremonial purposes and as incidental thereto, to trade this type of food for another."[106] Justice Macfarlane, writing for the majority in the Court of Appeal, agreed, providing little elaboration: "I do not think that the aboriginal right extends to the sale of herring spawn on kelp on a commercial basis." Only Justice Lambert, in dissent, would have acquitted the Gladstones: "In my opinion the trading of 4,200 lbs. of herring roe by attempting to sell it to a Japanese buyer with access to Japanese customers in Canada and perhaps also in Japan, represents the exercise in modern form by modern means of the original aboriginal right reflected in the pre-Sovereignty customs, traditions and practices of the Heiltsuk people."[107]

Despite these decisions, the DFO agreed under its Aboriginal Fishing Strategy[108] to provide the Heiltsuk Tribal Council with one additional J-licence in 1993 if the Heiltsuk retired six gill-net licences.[109] The Heiltsuk

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[104] The exceedingly brief written reasons followed two and a half years later on 28 February 1993.

[105] *R.* v *Gladstone* (1991), 13 W.C.B. (2d) 601.

[106] *Gladstone* (1993), *supra* note 44, para. 40.

[107] *Ibid.* para. 89. For a critical summary of the lower court decisions see A. Bowker, "*Sparrow*'s Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995) 53 U.T. Fac. L. Rev. 1.

[108] *Aboriginal Communal Fishing Licences Reg.*, S.O.R./93-332, s. 5, provides authority for this program.

[109] "Spawn on Kelp Licence Agreement" (29 August 1992) online: DFO, Pacific Region, Aboriginal Fisheries Agreements, Heiltsuk Tribal Council <http://www.pac.dfo-mpo.gc.ca/ops/fm/AFS/agreements/agree_pages/Heiltsuk.htm> (date accessed: 25 May 1999) [hereinafter "Heiltsuk Agreements"].

then held two of 39 J-licences. The DFO also took an initial step towards returning control of the fishery to the Heiltsuk by authorizing Heiltsuk guardians "to monitor the Heiltsuk Tribal Council Fishery" under a guardian agreement. The duties of the unarmed Heiltsuk guardians included issuing warnings, gathering evidence, seizing fish and fishing gear, issuing appearance notices, and detention, although without using physical contact.[110] Further intervention required the local DFO officer. This was the state of the Heiltsuk spawn-on-kelp fishery before the SCC's 1996 decision in *Gladstone*. The decision produced a dramatic increase in the number of Heiltsuk J-licences and other changes in the spawn-on-kelp fishery. Before turning to those changes, however, the decision itself deserves some attention, for it has been pivotal, not only in shaping the Heiltsuk's relation with the Canadian state but also in the evolution of Aboriginal rights in Canadian courts.

III. INFRINGEMENTS IN THE SUPREME COURT OF CANADA

Gladstone was one of a trilogy of Native fishing rights cases, including *Van der Peet*[111] and *NTC Smokehouse*,[112] that were the latest in a line of important Aboriginal rights cases involving fishing.[113] The most important of the earlier cases, *Sparrow*,[114] involved the fishing rights of the Musqueam people at the mouth of the Fraser River, and an analysis of the SCC's Aboriginal rights jurisprudence must begin there.

A. R. *V.* SPARROW

In *Sparrow* the SCC found that the Musqueam had an unextinguished Aboriginal right to fish for food, ceremonial, and social purposes, and that a regulation restricting net length infringed this right. The SCC then set out a two-part test to determine whether the infringement was justified.

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[110] *Ibid.* "Guardian Agreement" (21 September 1993) Part 5(e), (date accessed: 26 May 1999).

[111] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*].

[112] *R.* v. *NTC Smokehouse Ltd.*, [1996] 2 S.C.R. 272 [hereinafter *NTC Smokehouse*].

[113] For a recent survey of Aboriginal fishing rights jurisprudence, see R. Kyle, "Aboriginal Fishing Rights: The Supreme Court of Canada in the Post-*Sparrow* Era" (1997) 31 U.B.C. L. Rev. 293.

[114] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*]. *Sparrow* has received extensive commentary. See, for example, W.I.C. Binnie, "The *Sparrow* Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217; M. Asch and P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on*R.* v. *Sparrow* (1991) 29 Alta. L. Rev. 498; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997) 36 Alta. L. Rev. 149.

First, did the government have a valid legislative objective in regulating the fishery? The SCC determined that the DFO regulated net length as part of a conservation plan to ensure that sufficient salmon reached their spawning grounds. Conservation was not only "consistent with aboriginal beliefs and practices," suggested the SCC, but sound management of the resource would enhance the Aboriginal right by ensuring the continued health of salmon runs. The SCC allowed that there might be other "compelling and substantial objectives" that might justify infringing the Aboriginal right (the prevention of harm, for example), but it rejected the finding in the British Columbia Court of Appeal that the "public interest" might be a valid objective. The "public interest" offered "no meaningful guidance" and was "so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."[115]

To satisfy the second requirement—recognition of the special trust relationship between the Crown and Native peoples—the SCC adopted a priority scheme that placed the continuing viability of the salmon stock first, Indian food fishing second, and only then could the DFO allocate fish to the non-Native commercial and sport fisheries. In recognition of its status as a constitutional right, the SCC held that the Aboriginal food fishery must receive priority over any other fishery, and it outlined what priority meant:

> The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport and commercial fishing.[116]

The SCC concluded that the DFO had failed to recognize this priority. Its objective—conserving salmon—was valid, but the DFO had restricted the Native food fishery in order *to conserve* salmon stocks for the non-Native commercial and sport fisheries that had earlier access to the fish.

B. R. *v.* GLADSTONE

In the 1996 trilogy, the SCC addressed the question of Aboriginal rights to commercial fisheries. To establish an Aboriginal right to a commercial fishery the SCC held that a First Nation must prove that trade in fish had been an integral part of its distinctive culture before contact with

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[115] *Ibid.* at 113.

[116] *Ibid.* at 116.

Europeans.[117] Only the Heiltsuk were able to convince the SCC that they met this test, and their right to a commercial spawn-on-kelp fishery was confirmed in *Gladstone*. The SCC then turned to the question of justifiable infringement.

In his *Gladstone* decision, Chief Justice Lamer, writing for the majority (Sopinka, Gonthier, Cory, Iacobucci, and Major J.J. concurring) adapted the *Sparrow* priority scheme to an Aboriginal commercial fishery. Unlike Aboriginal food, ceremonial, and social fisheries that were limited to the fish that could be reasonably consumed by a Native community, Lamer C.J. concluded that the Aboriginal commercial fisheries had no "internal limit." If they were given priority after conservation and the Aboriginal food, ceremonial, and social fisheries, priority would create an exclusive Native fishery. Parliament and the provincial legislatures had not intended to create exclusive Native fisheries, overriding the public's common-law right to fish in tidal waters, when Aboriginal rights were entrenched in the Constitution, Lamer C.J. concluded, and therefore priority must amount to something less than exclusivity.[118]

How to recognize priority without exclusivity? Lamer C.J. was admittedly vague: "The content of this priority—something less than exclusivity but which nonetheless gives priority to the aboriginal right—must remain somewhat vague pending consideration of the government's actions in specific cases."[119] He offered the following list of questions as guidance:

> Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are those enumerated in *Sparrow* relating to consultation and compensation, as well as questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example), whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights

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[117] This test was quickly and extensively criticized. See R. Barsh and J. Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993; J. Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8:2 *Constitutional Forum* 27, and "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1998) 22 Am. Indian L.Rev. 37.

[118] On the impact of the public right to fish see Harris, *Fish, Law and Colonialism*, *supra* note 7; M.D. Walters, "Aboriginal Rights, *Magna Carta* and Exclusive Rights to Fisheries in the Waters of Upper Canada" (1998) 23 Queen's L.J. 301 [hereinafter "Aboriginal Rights"] provides an excellent analysis of the relation between Native fisheries and the public right to fish.

[119] *Gladstone*, *supra* note 1 at para. 63.

> holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food versus commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licenses amongst different users.[120]

This list directs lower courts to consider a mix of social, economic, and demographic factors, as well as DFO policy when it evaluates the priority accorded Native fishing (and I argue in the following section that it provides little guidance).

The question of government objectives complicates the analysis further. Where the SCC recognizes an Aboriginal right to a commercial fishery, that fishery has priority (if not exclusivity) and the government must have valid objectives for diverting fish to other users. Lamer C.J. found insufficient evidence of the government's objectives and he sent the matter back to the trial court. However, before doing so, he made some "general observations" about the nature of the objectives that the Crown could legitimately pursue:

> Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of Aboriginal societies with the rest of Canadian society may well depend on their successful attainment.*[121]

These objectives—the pursuit of economic and regional fairness, and recognition of participation in the fishery by non-Aboriginal groups—are based on Lamer C.J.'s interpretation in *Van der Peet* of the purpose behind the constitutional guarantee of Aboriginal rights in s. 35(1). In that case, the SCC determined that Aboriginal rights were recognized and affirmed in the Constitution, "to reconcile the existence of pre-existing Aboriginal societies with the sovereignty of the Crown."[122] Through an analogy with s. 1 of the *Charter*, which prescribes limits on enumerated *Charter* rights, in *Gladstone* Lamer found that the purpose behind s. 35 provided for a similar limiting of Aboriginal rights in order to recognize the interests of the "broader community":

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[120] *Ibid.* at para. 64.

[121] *Ibid.* at para. 75 [emphasis in original].

[122] *Van der Peet, supra* note 113 at para. 61.

> Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.[123]

Following *Gladstone*, then, if a fishery is fully subscribed by conservation needs, plus the Aboriginal food, ceremonial, and social fishery, as well as the Aboriginal commercial fishery, then the Aboriginal commercial fishery might be restricted to allow for a non-Aboriginal commercial or sport fishery. The government would be justified in restricting the Aboriginal commercial fishery if it did so to reconcile Aboriginal rights with the interests of the broader political community. This reconciliation could occur if, by regulating the fishery, the government were pursuing "regional and economic fairness," or recognizing "the historical reliance upon, and participation in, the fishery by non-aboriginal groups," and at the same time recognizing Heiltsuk priority.[124] With these instructions, the chief justice sent the matter back to the trial court to hear evidence about the government's objectives in regulating the spawn-on-kelp fishery through the J-licensing scheme. He also directed the trial court to hear evidence on whether the regulatory scheme recognized the Heiltsuk priority. In doing so, Lamer C.J. noted that the allocation of the J-licences—60 percent of which were held by Native individuals or organizations in 1988—was itself insufficient evidence of the government's objectives. That allocation might be consistent with the proper recognition of the Aboriginal right, but barring further evidence the chief justice was not prepared to draw that conclusion.

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[123] *Gladstone, supra* note 1 at para. 73.

[124] Since *Gladstone, supra* note 1, the Court has considered the question of justifiable infringements in the context of Aboriginal title and treaty rights. In *Delgamuukw* v. *British Columbia*, [1998] S.C.R. 1010 at para. 165, Lamer C.J. expanded the government objectives that might justify infringing Aboriginal title to include "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims." In *R.* v. *Marshall*, [1999] 4 C.N.L.R. 301 (motion for rehearing and stay) [hereinafter *Marshall*] at para. 41, the Supreme Court addressed the issue of justifiable infringement that is notably absent in *R.* v. Marshall, [1999] 4 C.N.L.R. 161. The Court cited *Gladstone, supra* note 1, for the proposition that government objectives designed in "the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups" could justify infringing an Aboriginal right, and noted that "[t]his observation applies with particular force to a treaty right."

C. TERRITORIALITY AND THE JUSTIFIABLE INFRINGEMENT OF ABORIGINAL RIGHTS

The flaws in Lamer C.J.'s approach to the justifiable infringement of Aboriginal rights begin with and follow from his characterization of the Aboriginal right to a commercial fishery as without internal limit. Such a characterization is only possible if one ignores, as Lamer C.J. has done, the territorial nature of the Heiltsuk claim.

"I fail to understand," wrote Kent McNeil in a useful survey of the justifiable infringement test, "why the right [to a commercial fishery] would be exclusive except in circumstances where the Heiltsuk were capable of taking all the herring spawn on kelp available after conservation requirements had been met."[125] His perplexity is warranted because Lamer C.J. offers no guidance. Although he wrote in *Van der Peet* that "the existence of an Aboriginal right will depend entirely on the traditions, customs and practices of the *particular Aboriginal community claiming the right*," and reiterated that approach in *Gladstone*,[126] Lamer C.J. has defined the right to a commercial fishery far more broadly than any Heiltsuk tradition, custom, practice, or claim. The claims by First Nations to commercial fisheries are not without internal limit. Each claim is geographically bounded and derived from traditions that allocated fish between competing users both within and between nations. The Heiltsuk, for example, never sought unlimited access to a commercial spawn-on-kelp fishery and priority over every other fisher after conservation and the Indian food fishery. Instead, they argued in *Gladstone*, *Reid*, and their comprehensive claim for access to resources and jurisdiction over their traditional territory on the central coast (Fig. 1). Their claim was limited by the geographical extent of their traditional use, and by the claims of neighbouring First Nations.[127] Even within their territory, Heiltsuk claims

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[125] K. McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?" (1997) 8:2 *Constitutional Forum* 33.

[126] *Van der Peet*, *supra* note 113 at para. 69 [emphasis in original]; *Gladstone*, *supra* note 1 at para. 65.

[127] *Hill* v. *Canada (Minister of Fisheries and Oceans)*, [2000] F.C.J. No. 383 at para. 12 (T.D.), online: QL (FCJ), illustrates this point further. The DFO closed Kitkatla Inlet and all of Area 5 to commercial herring fishing between 1996-1999 because stocks were too low to support the Kitkatla First Nation food fishery. In 2000, however, the DFO anticipated increased stocks and authorized a commercial roe herring fishery to precede the Kitkatla food fishery. The Kitkatla sought an injunction to stop the commercial fishery in Kitkatla Inlet, an area within their traditional territory and subject to outstanding claims, to safeguard their food fishery. In denying their request, a decision confirmed by the Federal Court of Appeal, MacKay J. noted the territorial limits of the Kitkatla's request: "[T]he concern of the Kitkatla people is only to avoid an opening for a commercial fishery at Kitkatla Inlet, not in other locations in the Prince Rupert region or any of the other four regions where roe herring may be harvested."

were modest: in *Reid* they sought a minimum of five additional licences. In *Gladstone*, however, Lamer C.J. did not recognize that, as far as the Heiltsuk are concerned, the constitutional right it identified is territorially bounded. Only McLachlin J., in defining the right more narrowly, hinted at the territorial nature of the right: "[T]he Aboriginal right to trade in herring spawn on kelp *from the Bella Bella region* is limited to such trade as secures the modern equivalent of sustenance: the basics of food, clothing and housing, supplemented by a few amenities."[128]

Fish, of course, do not recognize the meanings that humans ascribe to territorial boundaries, and effective management of a migratory resource must transcend these boundaries.[129] Integrated management is particularly important in the salmon fishery where fish migrate across international boundaries and up-river through the territories of many First Nations, each of which have some claim to the fish. The SCC's decision in *Gladstone* suffers, I believe, from its combination with two salmon-fishing-rights cases. *Van der Peet*, the lead case in the trilogy, involved a salmon fishery on the Fraser River, and Lamer C.J. seems to have been considering the difficulties he would create by recognizing an exclusive right of fishing for one First Nation on a river system such as the Fraser with all the competing Native and non-Native claims when he ruled on the Heiltsuk herring fishery in *Gladstone*. Although scientists and those in the fishery debate the distinctness of herring stocks and their migration patterns, herring cross many fewer boundaries than those salmon that run the Fraser river, and never concentrate to the extent that people fishing in one region could monopolize a resource that enters the territories of many.[130] There are, furthermore, many fewer claims to the herring in Heiltsuk territory, and to recognize priority (after conservation and a Native food fishery) to a Heiltsuk commercial herring fishery could create, at most, an exclusive fishery *within their territory*. Even so limited, the SCC might still have concluded that an exclusive Heiltsuk fishery failed to account for the public right to fish and therefore must be reduced to a priority conferring something less than exclusivity. Its analysis, however, would have had to address the Heiltsuk claim to a defined fishery that preceded the assertion of British sovereignty and

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[128] *Gladstone, supra* note 1 at para. 65 [emphasis added].

[129] For a discussion of law, space, and power, and a model for integrated management in environmental planning see J. Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47 U.T.L.J. 417.

[130] Terry Glavin, "Red Herrings" *The Georgia Straight* (27 March 1997) 15-21, provides a useful summary of the debate between fisheries scientists over whether there are distinct stocks. Thanks to Steve Mackinson for this reference and his help on this issue.

therefore the common-law doctrine protecting the public's right to fish.[131] In *Van der Peet* Lamer C.J. held that each First Nation must prove its right to a commercial fishery, and once proven, must consider the local circumstances of each fishery. His decision in *Gladstone* and his approach to justifiable infringements are flawed because he did not do so.[132]

Having defined the right broadly, and not being prepared to allow for an exclusive Native fishery, Lamer C.J. searched for a means to recognize the priority without exclusivity. He proposed a long and unwieldy list of questions (reproduced above) that provides little guidance and, by inserting government objectives into a discussion about priority, combines the two parts of the *Sparrow* test in a confusing manner. From the history of the spawn-on-kelp fishery recounted in the first half of this paper, the answers to some of the questions posed by Lamer C.J. suggest recognition of Native priority, but answers to others suggest it has been ignored. There is no evidence, for example, of significant consultation with the Heiltsuk when the DFO began granting permits in the 1970s. The few meetings between the Heiltsuk and the DFO appear to have been opportunities for the latter to reiterate its refusal to consider an open-pond fishery. The DFO had held discussions with the Native Brotherhood (which both Lemiski J. in the trial court and Hutcheon J.A. in the Court of Appeal considered sufficient consultation to justify infringing the right), but the Native Brotherhood had initially opposed the commercial fishery while the Heiltsuk were applying for permits. As Lambert J.A. noted in dissent in the Court of Appeal, meetings with the Native Brotherhood should not be a proxy for consultation with the Heiltsuk.[133] Regarding compensation, Indian Affairs contributed $4,450 to help outfit Heiltsuk boats for the roe herring gill-net fishery in 1974 when the DFO declined to issue a spawn-on-kelp permit. Nothing more has been paid, but the state has accommodated Native fishers to the extent that it charges them only a nominal licence fee and has assisted those First Nations who

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[131] "Aboriginal Rights," *supra* note 120.

[132] N.K. Blomley, *Law, Space and the Geographies of Power* (New York: The Guildford Press, 1994) and W.W. Pue, "Wrestling With Law: (Geographical) Specificity vs. (Legal) Abstraction" (1990) 11 *Urban Geography* 566, have argued that territorial or geographic erasure is endemic in the common law tradition; that by failing or refusing to recognize geographic diversity the common-law courts suppress competing legal orders. The courts, they argue, construct and impose a territorial unity that denies an existing legal pluralism, foreclosing recognition of other legal orders that might modify or operate in conjunction with state law. The territorial erasure in *Gladstone*, therefore, has consequences beyond the herring fishery: it diminishes Heiltsuk efforts to be recognized as a political community with the power to make and enforce laws within their territory.

[133] *Gladstone* (1993), *supra* note 44 at para. 97.

received a licence in 1991 to retire the required roe herring licences. Native participation in the fishery is high—60 percent at the time of the trial—but less dramatically so if measured against the proportion of Natives living in communities close to the spawning grounds or the importance of the fishery to those communities. And finally, Natives did receive special consideration in the early fishery, but this only translated into one licence for the Heiltsuk. In sum, the list presents more questions than answers.

To limit the right which he defined broadly as without internal limit, Lamer C.J. used an analogy with s. 1 of the *Charter* to allow the Crown more scope to justify an infringement. In her dissent in *Van der Peet*, Justice McLachlin highlighted the flaws of Lamer C.J.'s test which allows the Crown to limit Aboriginal rights for matters "of sufficient importance to the broader political community." Limiting Aboriginal rights for the purposes of conservation, as in *Sparrow,* was justified because conservation protected the exercise of the right itself; it "constitute[d] the essential pre-conditions of any civilized exercise of the right" argued McLachlin J.[134] Objectives such as "the pursuit of economic or regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups," however, when balanced against Aboriginal rights, negate those rights rather than protect them. "This is not limitation required for the responsible exercise of the right," wrote McLachlin J., "but rather limitation on the basis of the economic demands of non-Aboriginals."[135] Aboriginal rights were placed in the Constitution and outside the *Charter* to protect them from the vagaries of political expediency, but by balancing the constitutional rights of Natives against the economic and social objectives of non-Natives, Lamer C.J. is vulnerable to McLachlin J.'s charge that his test is "indeterminate and ultimately more political than legal."[136]

These flaws in the majority decision notwithstanding, what were the government's objectives when it re-opened the herring fishery in the 1970s, and would they have withstood the trial court's scrutiny had the Crown not dropped the charges?

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[134] *Van der Peet supra* note 113 at para. 306.

[135] *Ibid.*

[136] *Ibid.* at para. 302. McLachlin J., *ibid.* at para. 165, defined the right to a commercial fishery much more narrowly. It is, she wrote, "limited to such trade as secures the modern equivalent of sustenance: the basics of food clothing and housing, supplemented by a few amenities." In *Marshall, supra* note 126 at para. 61, Binnie J. used a similar approach when he interpreted the Mi'kmaq treaty rights to include access to the fishery to support a "moderate livelihood."

D. GOVERNMENT OBJECTIVES

The DFO limits the combined herring fisheries to 20 percent of the estimated total biomass, and it does so to ensure that the herring stock can reproduce itself. It then manages the fishery based on five local stocks (Table 3), and the roe herring fishery (and occasionally the herring spawn fishery) is reduced or closed in areas where local estimates suggest insufficient fish. There appears to be general agreement that so limiting the catch is a valid conservation objective. The objectives behind allocating the allowable catch to the various herring fisheries are less clear. The DFO encouraged the roe herring fishery to expand rapidly in the early 1970s, issuing licences to anyone who applied. It moved much more slowly with the spawn-on-kelp fishery, issuing only a few licences and carefully screening each applicant. The result is that at least 85 percent of the herring fishery is a roe fishery, and only six to eight percent is allocated to spawn-on-kelp. Does this allocation reflect objectives that might justify the limits imposed on the Heiltsuk spawn-on-kelp fishery?

Native fishers held approximately 30 percent of the roe herring H-licences through the 1980s, and the DFO did allow Natives to purchase these licences until 1978, three years after it stopped issuing licences to non-Natives. One of its objectives, therefore, was to increase Native participation in the fishery, and to the extent that this broader Native participation reduced Heiltsuk access to the spawn-on-kelp fishery, the objective might justify the infringement. With regard to the non-Native roe herring licences, which it issued until 1975, the DFO could argue that it was acting to protect the historical reliance of non-Natives involved in the reduction fishery before it collapsed, or that it was pursuing regional and economic fairness. Its open-access policy, however, suggests that these were not DFO objectives. Anyone, not just those previously involved in or historically relying on the fishery, could purchase a licence. As a result, the allocation between herring fisheries does not reflect objectives that, under the SCC's test in *Gladstone*, might justify infringing the Heiltsuk right.

If the allocation between herring fisheries is suspect, what were the government's objectives when it allocated some of the commercial spawn-on-kelp permits to non-Native fishers in the 1970s? Based on the history of the fishery presented above, the only stated objective for allowing non-Natives to apply for spawn-on-kelp permits was a desire to avoid violating the anti-discrimination provisions in the *Bill of Rights*. Why LeBlanc invoked the *Bill of Rights* is unclear, except perhaps that it was a useful device for expressing the idea of the fishery as a public resource. Although it is only hinted at in the surviving correspondence, the public's common-law right to fish in tidal waters probably influenced the minister's sense that the fishery should not be reserved for any

particular group. Except with the express consent of Parliament, the Crown may not allocate exclusive fisheries in tidal waters, and even where it has such authority, the weight of the public right to fish militates against such grants. There is no evidence, however, that a non-Native public participated in or relied on this fishery before the 1970s. The only non-Natives who were a presence in the herring spawn fishery and who might have a claim under this test were Japanese-Canadian fishers. Wartime internment had curtailed their activity, and the evidence suggests that in this fishery they were primarily buyers of Native-caught herring spawn, not fishers. As a mechanism to promote regional and economic fairness, the stated objectives of the licensing scheme were to provide employment in isolated Indian villages on the central and northern coast. This is a valid objective so far as the licences issued to non-Heiltsuk Natives are concerned. It does not create a valid objective for allocating licences to non-Natives, mostly on the south coast.

In sum, the government's objectives in allocating herring to other fisheries and J-licences to non-Native fishers do not appear sufficient according to the SCC's test in *Gladstone* to justify infringing the Heiltsuk right to a commercial spawn-on-kelp fishery. The DFO appears to have concluded as much in the aftermath of *Gladstone*.

IV. AFTER *R.* V. *GLADSTONE*

The SCC's decision left the Crown the opportunity to justify in the trial court the DFO's infringement of the Heiltsuk right. Once the Crown dropped the charges, however, the DFO moved quickly to increase Heiltsuk access to the spawn-on-kelp fishery. It issued five more J-licences to the Heiltsuk in 1997 and two more in 1998. Negotiations continue yearly over further licences, but the DFO has refused to allocate more (Table 1). In allocating these new licences, it has not required the Heiltsuk to relinquish or retire any roe herring licences, and it has agreed that the Heiltsuk need not retire three of the six herring gill-net licences required under the 1993 agreement.[137] These actions suggest the DFO believed it had not done enough to recognize Heiltsuk priority in the fishery and that its infringement was not justifiable.

Furthermore, in allocating the spawn-on-kelp fishery between various user groups, the DFO has interpreted the SCC decision to require that it give priority to conservation, the Aboriginal food, ceremonial, and social fishery, and then to the Heiltsuk commercial fishery before any other Native or non-Native commercial or sport fishery. This new recognition

[137] Heiltsuk Agreements, *supra* note 111, "Transfer Agreement" (February 1997) (date accessed: 26 May 1999).

of a Heiltsuk priority is reflected in the second objective of the Herring Spawn on Kelp Management Plan: "To meet the federal Crown's obligations regarding aboriginal fisheries for food, social and ceremonial purposes and the Heiltsuk right to harvest spawn-on-kelp for commercial purposes."[138] Other commercial users, including other Native fishers, will be granted access only after the Native food, ceremonial, and social fishery and the Heiltsuk commercial fishery.

The DFO has also taken steps to formalize consultation with First Nations. Industry and First Nations representatives sit on the Herring Technical Working Group that helps the DFO to set and divide the total herring allocation between the various herring fisheries. A similarly comprised Spawn on Kelp Technical Working Group advises the DFO on matters relating specifically to that fishery. Annual consultations with First Nations in each local area augment the input of the working groups.[139] Final decisions remain with the DFO.

Although other First Nations may have strong constitutional claims to commercial spawn-on-kelp fisheries, the DFO has hesitated to allocate more licences. It has other concerns, including managing the supply to protect product price for existing operations and a fully subscribed herring fishery that, it believes, cannot absorb an increased catch without threatening sustainability. The DFO continues to issue J-licences for geographically defined areas and to manage the fishery on the basis of five relatively distinct stocks (Table 3 and Fig. 1). To account for egg removal, it allocates 35 tons of the TAC to each open-pond operation and, because of the additional mortality, 100 tons to each closed-pond operation. The nine Heiltsuk licences (three closed-pond and six open-pond) amount to 20 percent of all J-licences, but the 510-ton allocation represents only 14 percent of the spawn-on-kelp fishery, and approximately one percent of the total herring fishery. Within traditional Heiltsuk territory (which includes DFO management area 7 and parts of 8 and 9 on the central coast) their J-licence fishery amounts to approximately eight percent.[140]

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[138] *SOK Management Plan, supra* note 90, Part 2.

[139] *Ibid.*, Part 8.

[140] These percentages are based on figures in the *SOK Management Plan,supra* note 90, and Canada, DFO, *Pacific Region, Integrated Fisheries Management Plan, Roe Herring, 2000*, online: http://www.pac.dfo-mpo.gc.ca/ops/fm/mplans/mplans.htm (date accessed: 10 February 2000).

Table 3: Distribution of Licences According to Geographic and DFO Management Areas, 2000[141]

Geographic Area and DFO Management Area	Number of Licences	Herring Tonnage Allocation (Tons)
Queen Charlotte Islands:		
Area 2E	9	900
Prince Rupert:		
Area 3/4	8	800
Area 5	3	300
Central Coast:		
Area 6	2	200
Area 7	9	510
Area 7/8 (Kwakshua)	3	300
Area 10	3	(170)
Vancouver Island (Inside):		
Area 12	1	(100)
West Coast Vancouver Island:		
Area 27	4	(105)
Area 25	2	200
Area 23/24	2	200
Total	46	3410 (375)

*Note: minor stock (small irregular herring stock) tonnage in brackets.

A. HEILTSUK MANAGEMENT

Since 1998 the Heiltsuk Tribal Council has held nine licences, three for closed-pond operations and six for open ponds, and its Spawn on Kelp Management Board has directed the operations. The tribal council controls the closed-pond fisheries, hiring the seine boats to impound the herring and the crew for each boat from a pool of Heiltsuk applicants. Any Heiltsuk may apply, and the crew are selected on the basis of need and experience, although no one is allowed to serve as a crew member in consecutive years. Each operation fills a single licence quota; the crew receives a share of profits, and the tribal council retains 40 percent for community projects, primarily the fish processing plant.

In the open-pond fishery, the tribal council pools the licence quota into a single Heiltsuk allocation. Any member of the First Nation with the necessary boats and equipment may fish towards the open-pond allocation, but must register, pay a $10 fee to the tribal council, and follow the harvest and packing regulations contained in the Heiltsuk Commercial Aboriginal Right Management and Operations Plan. The fishery, supervised by Heiltsuk guardians, remains open until the total

[141] *SOK Management Plan*, *supra* note 90 at 17-18.

allocation is filled, and the participants are paid on the basis of their contribution. It is a highly competitive system. Those who deliver product after the allocation is filled distribute their harvest among the community for food, or sell it for a reduced price in an unofficial market. According to DFO regulations, this sale is illegal, but to the Heiltsuk it continues an age-old practice that, if challenged by the Canadian state, would likely be upheld in the courts as an Aboriginal right. This unofficial sale will probably continue, as it has for most of this century despite DFO efforts to eliminate it, until the Heiltsuk have adequate access to the resources and the tribal council has sufficient authority to manage and regulate the fishery in its traditional territory.[142]

Given the current impasse in treaty negotiations, the courts have again become the site of conflict. The Heiltsuk voted to set aside five percent of profits from the open-pond fishery to build a "war chest" to fund future court actions, and in July 2000, they filed a statement of claim in the B.C. Supreme Court requesting compensation for the state's continuing and, in their view, unjustifiable infringement of their recognized right to a commercial spawn-on-kelp fishery. The DFO has not intervened to charge Heiltsuk fishers involved in the unofficial sale of spawn-on-kelp, and rather than wait to defend such a charge, the Heiltsuk, now led by Chief Councillor Robert Germyn, have once again turned to the courts to press their claim to commercial fisheries.

V. CONCLUSION

The extended historical analysis in this paper reveals the long history of herring-spawn harvest and trade by Native peoples along the coast of British Columbia, and the efforts of the Canadian state to curtail that fishery. The state appropriated Native herring fisheries, creating an "Indian food fishery" as a marginalized remnant of what was once a Native resource. Native peoples contested and resisted the state's assumption of sovereignty, insisting instead on the legitimacy of their legal processes derived from a long history of managing and using local resources. The balance of power was such, however, that for most of the twentieth century the story is largely of Native dispossession. At the same time, the analysis reveals a long history of trade between Natives and Japanese, which the DFO was never able to eradicate. The modern spawn-on-kelp fishery that developed in the 1970s has deep roots in a

[142] K. McNeil, *Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got it Right?* (Toronto: York University, Robarts Centre for Canadian Studies, 1998) at 13-14, recognizes this necessary connection between Aboriginal rights or title and self-government.

long trading relationship between Japanese and Japanese-Canadian buyers and Native fishers.

The struggle to give boundaries meaning is inescapable in the Heiltsuk claim to the spawn-on-kelp fishery and in the DFO's response. The traditional boundary reproduced in Figure 1 marks the limits of the Heiltsuk claim; the management grid declares the hegemony of the DFO within the boundaries of the Canadian state. This competing territoriality underlies the conflict between First Nation and state. Any individual fishery is subject to numerous, often competing claims among various First Nations. However, the claims of First Nations to natural resources are, in most cases, territorially bounded, just as are claims of nation-states. They are not the claims of racial minorities, but instead of political communities whose right to govern the allocation of resources pre-dates European assertions of sovereignty. To recognize traditional Heiltsuk ownership of the herring fishery does not necessarily create an exclusive Heiltsuk fishery, but rather the right to control and benefit from the human use of that resource *within their territory*. It is this territoriality, or sense of territory, and the Heiltsuk understanding of themselves as a political community that the SCC has failed to recognize. It has assumed the boundaries of the Canadian state and, in the context of the fishery, the hegemony of the DFO. The tests that the Canadian courts devise *to reconcile* the prior claims of First Nations to their fisheries with the later claims of the Canadian state provide a legal background against which the parties can negotiate access to and management of the fisheries. To assume one territoriality and ignore the other diminishes the possibility of reconciliation.

The contest over the human use of herring spawn is part of a larger and more general conflict over legitimate authority. Ultimately it is a question of sovereignty, and is the product of a particular colonial history. The outline of this larger dispute comes into focus when the state's prosecution of the Gladstones in the provincial court is placed against the Heiltsuk action in the federal court for additional licences and managerial control of the resource. The courts and the treaty negotiating table where Heiltsuk are defending and asserting their jurisdiction over the herring fishery on the central coast are only part of the story. The other part is found in the community where Heiltsuk are determining and enforcing an allocation of herring spawn that, although under an imposed framework, operates according to their rules. Although the details of these rules are contested within the community, the legitimacy of this legal system is not. Heiltsuk struggle to secure the recognition of their legal system by the Canadian state and, at the same time, to manage and allocate spawn-on-kelp effectively and fairly. The two struggles are so intertwined that it will be difficult, if not impossible, to achieve one without the other.