

## BOOK REVIEWS

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*Tangled Webs of History; Indians and the Law in Canada's Pacific Coast Fisheries*, by Dianne Newell. Toronto: University of Toronto Press, 1993. 303 pp. Illus., maps. \$40.00 cloth, \$18.95 paper.

In the early 1970s I acted for eight Indians from Cowichan who were charged under the Fisheries Act. The legal argument I used was based on the Terms of Union of British Columbia and Canada. The argument was one developed by Andrew Paull, the Squamish Indian leader who had been involved with the Native Brotherhood, the Indian fisherman's organization. He used the argument to try to block the extension of income taxation to Indian fishermen. The Indian people at Cowichan, with a couple of exceptions, accepted my work on their behalf with some fatalism. Getting charged under the Fisheries Act was a common experience, as predictable as the salmon runs themselves — some years lots of arrests, other years not so many.

I argued that the Indian fishery should be given priority over commercial and sports fishing — an approach taken from judicial decisions in the US Pacific Northwest. Representatives of the Department of Fisheries testified about their competence to manage the fishery, in effect asking the court to trust their skill. I had feared that they would say the opposite — that the offshore commercial fishery was indiscriminate in terms of its impact on particular runs. As a result conservation restrictions would often have to be imposed at the last minute on the river fisheries, largely Indian, because only when the salmon were starting up the rivers and streams could anyone tell the extent to which the run had been depleted by the offshore commercial and sports fisheries. If Fisheries officers had testified along such lines, then a court would have been unable to order Fisheries to give priority to the Indian river fishery without also ordering the restructuring of the industry.

At the trial the Indians were convicted. I took the case through to the Supreme Court of Canada because I felt the testimony by Fisheries officers was the most favourable we could hope to get for such a case. But that was 1979 and the *Jack* case was just another in a long series of Indian fishing cases where the government and the Fisheries Act won. A new judge on the Supreme Court of Canada, Brian Dickson, wrote a concurring judgment which was mainly a dissent, upholding rights but saying that conservation seemed to support the application of the Fisheries Act in the particular case. Later, as Chief Justice, Brian Dickson quoted from his judgment in the *Jack* case in the *Sparrow* decision, the first decision of the Supreme Court of Canada to uphold aboriginal rights to fish, and the first decision to interpret the constitutional provision on aboriginal and treaty rights that, after disputes, became part of our basic law in 1982.

The *Jack* case is just one of many modern test cases on Indian harvesting rights in British Columbia. Professor Dianne Newell later testified in the *Reid* case, where an Indian claim to commercial harvesting of herring roe or spawn on kelp was dismissed perfunctorily. Other British Columbia cases on commercial fishing rights are to be heard by the Supreme Court of Canada in the 1995-96 term.

While the *Jack* case was not unique, it had for me the set of elements which ran through all the west coast Indian fishing disputes: the history of Indian political struggle (for I was a staff lawyer for the Union of BC Indian Chiefs using an argument developed by Andrew Paull, the Indian leader who functioned for many years as an "unlicensed lawyer"); the common patterns of arrests and the continuation of fishing by communities in spite of convictions; the ability to call impressive expert evidence on the historical character of the issues that would, in the end, not impress any of the judges involved in the case; the sense that the United States was ahead of us in recognizing rights in this area and the hope that the attitudes of Canadian judges would also come around; and the nagging sense that the Department of Fisheries would always win because the complexity of the management issues would always trump the temptation of judges to do good.

The court cases each tried to pull together the strands of fisheries law and policy in British Columbia as they involved Indians and Indian communities. The need for litigation reflected the marginality of the issues in the eyes of the politicians. The cases were asking for some kind of balance or prioritization between the rights of different user groups. Dianne Newell of the history department at UBC has

attempted to pull all the strands together in *Tangled Webs of History*. The title is a warning. Readers will not find the book light reading.

The account runs as follows. For thousands of years fishing was an activity central to Indian economies and culture. Indian populations declined, settler populations grew, and settlers established what Newell calls the "industrial fishery." The pattern of small multiple reserves for individual Indian communities was based on an assumption that Indians would continue to fish.

In 1888 licensing was introduced for the industrial fishery and a subsistence fishery was recognized for Indians. This was the "invention" of an Indian right or tradition, the real significance of which was the exclusion of Indians from traditional rights in the commercial or industrial fishery. In the industrial fishery they were to be subject to the full regulatory regime of the Fisheries Act and regulations which regulated the fishery in the interests of the fish processing companies. Indians had a limited presence in the fleet and a substantial presence in the shore work at canneries, and Indian agents cooperated with the canneries in promoting Indian labour in the industry.

The industry declined during the Depression and boomed during the Second World War. After the war there were attempts to rationalize the industry economically, which led to the licence limitation program, the "Davis Plan" of 1968. But the response to licence limitation was a radical increase in investment in equipment. The changes protected the processing companies and their increasingly centralized operations. They further excluded Indians from the industrial fishery, limited their subsistence fishery, and moved the cannery jobs away from the sites of seasonal Indian labour. It was occasionally suggested that Indians had a future in the forest industry, but not in fishing — with the exception of a small number of prosperous Indian fishermen often linked to canneries.

Special Indian programs, such as the Indian Fishermen's Assistance Program, the A-1 Indian licence, the Indian Fishermen's Emergency Assistance Program, and the take-over of BC Packers' gillnet fleet in 1980, meant that the Indian portion of the fleet declined more slowly than the fleet as a whole. In the postwar period Indians only retained a strong presence in the salmon fishery in the northern district.

The Indian role in the fishery was considered sympathetically, for the first time, in the Pearse Commission report of 1981. The context of land claims and the legal developments in Washington state led the federal government to change its historic view of the Indian subsistence fishery and to begin to recognize limited commercial rights. The

Supreme Court of Canada endorsed a shift to a "rights" position in the 1990 *Sparrow* decision, though subsequent judicial decisions have denied commercial rights.

The story is left hanging, as it had to be. At the time of writing there would have been little or no information on the actual implementation of the *Sparrow* decision. Cases are still in the courts on commercial rights. The impact of the treaty process in British Columbia on Indian fisheries is still in the future.

The book brings together this story in great detail. It attempts introductory overviews at the start of each chapter, as well as having an introduction and a conclusion. But one is still puzzled by a number of parts of the account.

While the Indian struggle for rights is noted throughout the book, the account is surprisingly faceless. There are only brief references to Andrew Paull, Peter Kelly, Bill Mussell, George Manuel, and Noll Derriksan. There is almost nothing on the Native Brotherhood and its links with the Liberal party which helped it get the Indian Fishermen's Assistance Program for its members (who were the economic élite in the Indian part of the fishery). There is nothing on the Native Brotherhood's troubled relationship with the United Fishermen's and Allied Workers Union. There is almost nothing on the UFAWU and only side references to strikes in the industry. There is nothing on the modern organization of litigation on fishing rights.

The book is focused on the regulatory regime under the federal Fisheries Act. The Department of Fisheries is consistently described as incompetent and callous. This account is also faceless. While the "invention" of the Indian subsistence fishery is described in such a way as to suggest that it was a deliberate federal strategy, there is no naming of the possible architects of the policy. Professor Newell notes a parallel to regulations in Ontario which limited fishing to subsistence (and such a limitation occurs in the Natural Resources Transfer Agreements of 1930). We cannot even be sure whether the policy was invented for British Columbia by federal or provincial officials. A pattern developed of allowing provincial officials to draft the regulations under the federal Fisheries Act which applied to individual provinces. These provincially drafted regulations would be enacted under the sweeping federal jurisdiction over "Sea Coast and Inland Fisheries." So the inventors of the policy could be federal or provincial. The dynamics of federal-provincial relations on such issues are not alluded to (and are a particularly hidden part of the story for lawyers, legislators, policy analysts, and historians). We are given a

glimpse of the figure behind the litigation which ruled that the federal government could not regulate canneries, but I got no sense of the impact of that decision on management patterns. According to Newell, the federal government favoured the processors before and after the decision.

Another difficult area is the relationship between the two federal relevant departments — Indian Affairs, on the one hand, and Fisheries, on the other. Over the years, Fisheries had more clout within the federal government than Indian Affairs, with the result that the lawyers for the Department of Justice supported Fisheries in court and opposed Indian rights arguments. The federal government ignored arguments from Indians in British Columbia that it had a conflict of interest on matters like Indian fishing rights. For a number of years there was an attempt to formulate a federal Indian fishing policy. This is another hidden part of the story, but one which is part of the explanation of why Fisheries was vulnerable in the *Sparrow* case. The only federal Indian fishing policy around was a prioritization statement of Jack Davis, as federal Minister of Fisheries, which was clearly not being followed in the actual management of the resource. The *Sparrow* decision, stripped of rhetoric, imposed Davis' prioritization statement on a management system that was ignoring it. Officials may have dismissed it as unworkable. It would be interesting to know more of Jack Davis' role, the origins of his prioritization statement, and the story of internal resistance to its implementation. But that would have taken the kind of protracted Ottawa-based research project that produced Sally Weaver's study of the Chretien-Trudeau white paper on Indian policy of 1969. This again shows the complexity of the story Professor Newell has set out to tell.

Newell describes the fishery as the most highly regulated in the world, though she cites no material for that proposition. Perhaps she regards it, as well, as the most incompetently regulated fishery in the world. The overcapitalization of the industry and its relationship to patterns of regulation is reasonably well known and is described in detail in the book. The description brings a familiar sense of despair: how could we have been so stupid to increase costs of harvesting at the same time we were reducing the harvest? The book does not give us a real sense of why this happened, or, to put it another way, what the realistic regulatory alternatives were. She is critical of "tragedy of the commons" concerns, but also suggests that in the end that kind of concern did not dictate the system of management. These management questions are difficult and complex, a fact which has served

to sustain government's monopoly on management. I came away from the book without a clear sense of what Peter Pearse had recommended in his 1981 report. Did Pearse really come to grips with the management problems of the industry? The reader is left to suspect that he did not.

The *Sparrow* decision was a radical departure from previous judicial decisions on aboriginal and treaty rights. The decision was justified as an interpretation of section 35 of the Constitution Act of 1982, but the Supreme Court of Canada had already begun to turn around on Indian rights issues before *Sparrow*. The sweeping, uncautious character of the judgment can be understood, in part at least, on the basis that it was the final legacy, the "swan song," of the two strongest members of the court, Chief Justice Brian Dickson and Madam Justice Bertha Wilson, both of whom were retiring. Like the judgment of Emmett Hall in the 1973 Nishga land claims decision, it was the effort of retiring judges to leave a legacy that redressed at least some part of the black history of our marginalization of Indian peoples. The decision, as well as the new approach to land claims (and perhaps also any response to the Pearse report), has led to the need for fishing agreements with individual bands or tribal councils — a complex and detailed task that seems to be underway, with the federal government maintaining a basic management role to balance interests and promote conservation. I find it hard to see how this complex process of reaching agreements with individual Indian communities will work itself out in practice. Will some Indian fisheries commission with legal authority emerge to broker claims between Indian communities? Even that is a move away from the focus on individual communities which is central to aboriginal rights. But these issues are for a different book.

I came to Professor Newell's book with high hopes for the final answers on all sorts of questions, from aboriginal politics to federal-provincial relations. My utopian dreams should not detract from the fact that this is the first book to give us a detailed historical analysis of an extremely complicated story. It has moved us ahead. I hope Professor Newell continues her work in this field.