The Legal Capture of British Columbia's Fisheries: A study of law and colonialism

by

DOUGLAS COLEBROOK HARRIS

B.A. (History), The University of British Columbia, 1990
LL.B., The University of Toronto, 1993

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS in
THE FACULTY OF GRADUATE STUDIES (Faculty of Law)

We accept this thesis as conforming to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA
June 1998
© Douglas Colebrook Harris, 1998
In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.
Abstract

This is a study of the human conflict over fish in late nineteenth and early twentieth century British Columbia, and of how that conflict was shaped by law. Law, understood broadly to include both the legal forms of the Canadian state and those of Native peoples, defined and in part created both Native and state fisheries. When those fisheries clashed, one finds conflict between legal systems. When one fishery sought to replace the other, its laws had to replace the other. Thus, this is a study of law and colonialism, seen through a close analysis of the conflict over fish.

Native fisheries and the web of regulation surrounding them preceded non-Native interest in British Columbia's fish. The fishery was not an open-access resource, but rather a commons, defined by entitlements, prohibitions and sanctions that allowed certain activity, proscribed others, permitted one group to catch fish at certain times in particular locations with particular technology, and prohibited others. The Canadian state denied the legitimacy and even the existence of Native fisheries law in imposing its law on the fishery.

This study, based largely on government records and a secondary anthropological literature, describes the legal apparatus constructed by the Canadian state to reduce Native control of the fisheries in British Columbia through the creation, in law, of the "Indian food fishery". Law became a means of constructing a particular economic and social order that marginalized Native participation in the fishery and eliminated Native control. It was a "rhetoric of legitimation" that supported state domination, but also local resistance. Native peoples and their supporters used law, both Native and state law, to
defend their fisheries. The history of the conflict over fish is the history of competing legal cultures, and the struggle on the Cowichan River and the Babine River over fish weirs reveals those cultures, constructed in opposition to each other. The study concludes by integrating the local conflicts over fish into a wider literature on law and colonialism, reflecting on the role of law in particular colonial settings.
# Table of Contents

Abstract ii
Table of Contents iv
List of Figures vi
Acknowledgments vii

## Introduction

1 From “there is no law governing fish in British Columbia”, to an “Indian food fishery” 12

The Native fishery 16
“as may be found necessary or expedient” 23
Season of conflict -- 1877 27
Salmon fishery regulations 34
“legitimate and hereditary rights” 39
Increasing surveillance 52
“but not for sale, barter or traffic” 55
“an act of grace” 64

2 The law runs through it: weirs, nets, lumber mills and fly-fishing on the Cowichan river, 1877-1937 71

The Cowichan river and its people 72
The Indian Reserve Commission and Cowichan land 75
Early challenges to the Cowichan weirs 80
“there’s the lock-up!” 85
“idle & well-to-do indians” 95
Figures

2.1 Cowichan Reserve Map 132
2.2 Cowichan Weir and Road Bridge 133
2.3 Cowichan Weir and Farmhouse 134
2.4 Cowichan Weir with Fishers 135
2.5 Fly Fisher on the Cowichan River 136
2.6 Fly Fishers on the Cowichan River 137
2.7 Esquimalt & Nanaimo Railway over the Cowichan River 138

3.1 Babine Reserve Map 189
3.2 Maps including Babine Weirs 190
3.3 Fort Babine, 190- 191
3.4 British America Cannery, Port Essington, 189- 192
3.5 Babine Weir, 1906 193
3.6 Chief Big George, Father Coccola, and Chief Tzack William, 1906 194
Acknowledgments

Although I alone am responsible for any errors or omissions in this thesis, there are many people who have contributed and who deserve my sincerest thanks.

First, a profound thanks to Wes Pue who, as my supervisor, guided my theoretical explorations, provided constant support, showed enthusiasm for my project, and was always prepared to listen, and who, as Director of the Graduate Program at the Faculty of Law, built an extraordinary environment of camaraderie and shared intellectual inquiry that I will remember fondly. Many thanks as well to Hamar Foster at the University of Victoria who, although at another Faculty, agreed to be my secondary reader and provided extensive comments on many drafts. His knowledge of British Columbia’s legal history was invaluable.

Thanks to Mike Thoms for numerous discussions and comments on earlier drafts, and to Bob Galois at UBC’s Department of Geography, whose knowledge of the archival record in British Columbia is remarkable and who pointed me in many useful directions.

Thank you to the many archivists and librarians who assisted in my search for historical records, particularly those in Special Collections and Government Publications at the University of British Columbia, the British Columbia Archives and Records Service, the Archives Deschâtelet in Ottawa, the Union of British Columbia Indian Chiefs, the Pacific Region Federal Records Centre, and the National Archives of Canada. Thanks as well to Vanderberg & Associates who allowed me to use their extensive collection of documents relating to First Nations.
Thanks to Norm and Heather Keevil for lodging on my many trips to Victoria, and to John Hannaford and Anne Lawson for similar stays in Ottawa.

Financial support from the Law Foundation of British Columbia, the Faculty of Law at the University of British Columbia, the Osgoode Society for Canadian Legal History, and the Canadian Law and Society Association was much appreciated.

To my classmates who assembled in Vancouver for a remarkable year and who have since scattered to the four points of the compass, thanks, best of luck, and may we meet again. And to the many people who expressed an interest in my work, thanks for reaffirming my belief that this project was worthwhile.

Finally, to my parents and to Candy Thomson who contributed to this project in so many ways, I am deeply grateful.
Introduction

People who have law make and debate claims about what law permits and forbids that would be impossible—because senseless—without law and a good part of what their law reveals about them cannot be discovered except by noticing how they ground and defend these claims.¹

This is a study of human conflict over fish in late nineteenth and early twentieth century British Columbia, and of how that conflict was shaped by law. Put another way, it is a study of competing legal cultures in a shared time and place, and how they produced a conflict over fish. People caught fish, creating a fishery, and they defined that fishery with a collection of rights of use and exclusion—with law. Whether the emphasis is placed first on fish or on law matters little. Law gathered around a fishery that it, in part, created. When one fishery sought to replace another, its laws had to replace the other.

This is also a study of colonialism, of a distant imperial power displacing existing systems of control with its own, for its own benefit. The Dominion of Canada did not enter what it thought an open-access fishery on the Pacific coast fishery in the late nineteenth century. A commons perhaps, the fishery was not unregulated.² A web of entitlements, prohibitions and sanctions governed the Native fishery, allowing certain activities, proscribing others, permitting one group to catch fish at certain times in particular locations with particular technology, prohibiting others. Native fishers were not

---

operating outside law as Dominion officials frequently claimed; rather, they were fishing
within an alternative legal framework that preceded non-Native settlement. The Canadian
state insistently denied the legitimacy and even the existence of these systems of Native
management and resource allocation. It justified imposing its law on the Native fishery by
finding an absence of law.

Dominion fisheries law was unevenly enforced. In some places the fisheries
officers could not enforce the law as written; in other places they did not try. However,
they assumed that Natives were subjects of the Crown and subject to Dominion law. The
displacement of the Native fishery did not go unchallenged, but nor could it be stopped.
Some Native people worked within the new fishery, accommodating their patterns of life
to the changing legal and economic order. Others resisted, choosing instead to defend
their fisheries from the encroaching state and justifying their resistance on the basis of their
own legal traditions. Many combined accommodation and resistance, alternately working
within the imposed legal framework and rejecting it. That the system was imposed,
however, is not in doubt. Through myriad colonial strategies designed to induce fear,
foster division, create truths and assimilate the other, the Canadian state replaced
indigenous fisheries law with its own. Only in the last few years, more than one hundred
years after the processes of colonialism began, are Natives and non-Natives beginning to
untangle the colonial nets and release indigenous legal forms. While the emerging laws
may bear only a faint resemblance to earlier forms of Native resource allocation, they
share the defining characteristic of legitimacy in the eyes of many Native peoples.
The history of the conflict over fish in late nineteenth and early twentieth century British Columbia is the history of conflicting legal cultures. A rights-based discourse enveloped the conflict, justifying both intervention and resistance. Law was the "rhetoric of legitimation" used by Native peoples to defend their fishery and by the Dominion to capture control. Of course the legal discourse did not stand on its own. Complementary discourses of science and economic liberalism supported the Dominion’s assertion of legal hegemony. Native peoples countered with competing discourses of traditional management, ownership, and communal resource allocation to defend their jurisdiction. However, the conflict crystallized around competing claims of legal authority and of right that defined power to control particular fisheries. Law was the vehicle of oppression and resistance.

Using old statute books, government records and newspapers, one can piece together the fisheries legislation and regulation, the enforcement policy and the court decisions that comprised the fisheries law of the Dominion government. These records catalogue its effort to colonize a resource. They reveal that the process was neither settled nor determined, but rather was much contested, even among government departments. They also reveal fragmentary yet vivid glimpses of Native strategies of resistance and accommodation through Native voices that appear repeatedly, sometimes

using, sometimes rejecting the Canadian legal system to defend their claims. What emerges is the story of struggle within the many-layered Canadian legal spaces.

The danger is that one sees the struggle only through the prism of the Canadian legal system. Native legal spaces are difficult to reconstruct. To do so, one must rely on the fragmentary reports of anthropologists and other observers (including fur traders and government officials), and on oral histories that are dimmed by more than a century of colonial interference. No court or newspaper reporters were at the feasts (potlatches) where Native authority was recognized and resource entitlements confirmed. The feast, the source of legal authority in many Native societies, delimited rank and the resources and practices attached to rank. The Canadian state refused to recognize these legal spaces, eventually prohibiting the potlatch in an effort to eradicate what it thought a wasteful and destructive practice. The authority of the potlatch diminished and Native peoples' ability to govern resource allocation declined, creating new divisions or accentuating existing ones within Native society. This becomes apparent in the following chapters in the disputes within Native communities between those who controlled the weir fisheries, and thus sought to keep them, and those who did not and might have preferred to use nets. Notwithstanding the divisions, the forbidden legal space of the feast formed the foundation of Native fisheries law and, consequently, of Native resistance to Dominion authority. Understanding it is crucial to understanding the dispute over fish.

---

4 See, for example, Joseph Masco, “‘It is a Strict Law that Bids Us Dance’: Cosmologies, Colonialism, Death and Ritual Authority in the Kwakiutl Potlatch, 1849-1922”, Journal of Comparative Studies in Society and History 37 (1995): 41-75.

This legal study is not based solely on an analysis of a statute (although one figures prominently), or on the common law (although judicial decisions appear frequently). Rather, it is a study of the rights-based arguments that collected around disputes over control of and access to the west coast fisheries.

Anthropologists are inclined to find law wherever there is a society. Legal scholars, on the other hand, are inclined to limit their study of law to formal instruments such as statutes and judicial decisions, or to the judicial process. They view law as originating from a sovereign command, whether through Parliament, state appointed courts, or in the judicial process itself. In this study I am using the term “law” broadly to describe both state regulation and patterns of indigenous governance. In doing so I am not denying the important differences between systems of social control in modern and pre-modern societies. Perhaps most significantly, Native societies prospered without a state and the fixed points of power in its administrative structure. Nonetheless, indigenous societies had rules and a variety of mechanisms, including coercion, to enforce compliance. I am little concerned whether one considers the fishing practices of Native peoples to be governed by custom, tradition, “folkways”, or “law-ways”, or as part of

---

6 Pierre Clastres, Society Against the State: The leader as servant and the humane uses of power among the Indians of the Americas (New York: Urizen Books, 1974).
a Native “habitus”, 11 “lifeworld”, 12 or “semi-autonomous social field”. 13 The important point is that Native peoples controlled their fisheries through rights of use and exclusion that pre-dated non-Native interference. Native peoples owned their fisheries. The justifications for ownership varied, but at the core were spiritual connections, developed from centuries of co-existence between Native people and the fish. The Native claim was a moral and ultimately a legal claim, based not only on efficient management or material need, but on a sense of right that originated from within their own culture.

Chapter 1 considers the first two decades of Canadian fisheries law in British Columbia, the time when the Fisheries Branch of the Dominion Department of Marine and Fisheries (hereafter “Fisheries”) redirected ownership and control of the resource from Native peoples to the Canadian state. It is a province wide study, intended to survey the Dominion’s early regulation of the west coast fishery and its impact on Native control of these fisheries. The study begins in 1871 when British Columbia joined the Canadian Confederation, and by doing so ceded control of its “Seacoast and Inland Fisheries” to the Dominion government in Ottawa. This government replaced the Colonial Office in London as the distant site of authority, and, in effect, consolidated an existing colonial relationship. Both fish and Native peoples fell within the jurisdiction of the Dominion government, and thus were one step removed from direct control of the local settler

society. The Dominion managed fish and Native peoples within the context of a larger strategy to bring the west within its economic sphere, much as Britain had done, to secure markets and access to raw materials. Union with Canada coincided with the establishment of the first permanent canning operation in British Columbia at the mouth of the Fraser River. A powerful economic and political force, the canning industry grew rapidly, demanded a secure supply of fish, and directed many of the state’s efforts to wrest control of the fishery from Native peoples. Some of the links between canneries and state were direct, including canny nomination of Fisheries officers who worked in the field enforcing the law. Others were more subtle and indirect, but included a shared set of cultural assumptions about progress, civilization and the law. The result was state capture of a resource for the benefit of the canneries. Fish, particularly salmon, were “conserved” by the state for the canneries.14

The chapter ends in 1894 for several reasons. First, in 1894 the Dominion formally removed any independent Native control by requiring “Indians” to seek permission from Fisheries to fish for food. Previously, the government regulated the commercial fishery, but left the “Indian food fishery” to operate largely unfettered. After 1894, no part of the Native fishery was exempt under Canadian law from state regulation; the capture of the resource was, in this sense, complete. Second, in 1894 Fisheries officials charged a Cowichan man for fishing with a net in the Cowichan River, contrary to the Fisheries Act, marking the beginning of direct legal action by the state against the

14 Dianne Newell, Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries (Toronto: University of Toronto Press, 1993), pp. 6-8.
Cowichan fishery. The survey approach of chapter 1 becomes a case study of the conflict over fish in the Cowichan River in chapter 2.

Chapter 2 is the story of the late nineteenth and early twentieth century struggle to allocate, or re-allocate fish in the Cowichan River. More generally, it illustrates how the various forces of colonialism and resistance unfolded on one particular river. By 1894 the key elements of the Dominion’s fisheries laws were in place, but the struggle over fish had just been engaged. Although fish were the prize, the contest on the Cowichan River emerged as a struggle over the appropriate fishing technology. The Cowichan families who held the names that entitled control of the weirs defended their long, uncontested use of weirs in the river. Other Cowichan, those with uncertain access to the weirs, preferred to use nets. Immigrant working class fishers selling fresh fish in the Victoria markets advocated nets in Cowichan Bay, as did cannery fishers. Victoria’s elite and railway interests imagined the river as a fly-fishing and hunting preserve. Many settlers in the Cowichan Valley supported the Cowichan. Opinion within Cowichan and settler societies varied enormously, but in general the Cowichan were intent on maintaining control of their fishery, and the Canadian state was equally intent on asserting its authority.

The dispute over Cowichan River fish continued for many years but became most visible in the legal arena. In court the weirs were challenged and defended, vilified and supported, justified and condemned. The fisheries trials provide a marvelous record of the battle over fish. Similarly, the Fisheries’ records provide the details of Dominion enforcement. However, law was important not only because it enhanced the visibility of the dispute. The language of rights, customs, entitlements and privileges pervaded the
discourse that enveloped the weirs. All parties justified their actions by appealing to some form of legal right, whether based on the feast, custom, statute, or the common law. The Dominion government used its statutory powers and the assumed authority of the Crown to challenge the weirs; the Cowichan responded with an assertion of right based on their history with the river. The conflict over fish was part of a larger story about competing visions of right and of law.

Chapter 3 addresses the struggle over fish on the Babine River. It is another detailed study of law and the processes of colonialism. Every August and September, until 1905, the Lake Babine people fished with weirs, catching salmon that were returning to spawn in the Babine River. The late summer catch, smoked and stored, supplied the bulk of their food for the ensuing winter and spring and a valuable trade good; it had supported them for longer that any could remember.

In September 1904, towards the end of the Babine's fishing season, a Department of Fisheries officer told the Babine that fishing with weirs (he called them barricades) was illegal. He informed them that the law prohibited barricades and, threatening imprisonment, insisted that they dismantle the weirs. This marked the beginning of a short, but intense conflict for control of a large sockeye salmon run. The Canadian state and the Babine asserted conflicting rights to manage and allocate sockeye. The dispute was shorter and in some ways simpler than that on the Cowichan River. The canning industry located near the mouth of the Skeena River co-opted the state to secure a fishery for its use, and in this they were largely successful; state law created a particular order and
justified that order. Similarly, the Babine used their law to resist the state’s intrusion and to justify that resistance.

In chapter 4, I step back from the detail to consider law and colonialism, and then to consider the general themes in the context of the conflict over fish in late nineteenth and early twentieth century British Columbia. A much more theoretical chapter that draws on studies of law and colonialism in other places, it is intended as an overview and conclusion. I attempt to draw out the themes introduced here.

Most of the theoretical discussion is left for the concluding chapter, but one approach inspired my own and warrants earlier mention. E.P. Thompson’s studies of law, custom and rural practice in eighteenth century England reveal the local struggles for control of resources. He argues that law became a site of conflict between ruling class and peasantry where differing conceptions of right were advanced and contested, and control of resources determined. Law mediated class relations for the benefit of the ruling class, but it did offer space for resistance. Peasant foresters and farmers filled this space with claims based on customary use. Thompson insists on taking the claims of plebeian England seriously: to look for the legal in local custom, the moral in food riots, the ritual in marriage breakdown, the community norms in public disapprobation. He writes of enforcement and resistance, of law on the ground, among the people. Without ignoring the role of the state, he captures that which a study of legal doctrine or of

political history misses—the local struggles carried through in legal forms, broadly construed, to dominate and resist.

Law, understood broadly, ordered both the colonial project and resistance to that project in British Columbia. This, I hope, is illustrated in the following chapters about contested fisheries. Laws, legal cultures, legal discourses ordered the colonial encounter, but that lopsided cultural meeting also formed the laws. In the language of social theory, law constituted and was constituted by the society of which it was a part. The resulting story is one of legal capture and of slow, sometimes disruptive, but inexorable release of indigenous legal forms. That which is released may only faintly resemble that which was caught, but such is the transformative power of colonialism.
From “There is no law governing fish in British Columbia”, to an “Indian Food Fishery”

The first report, in 1872, to the Parliament of Canada on the state of British Columbia’s fish stocks presented an enthusiastic vision of the west coast fishery. Salmon, herring, sturgeon, oolican and other species were plentiful, the resource was underdeveloped, and if only a few more fishing-minded immigrants would arrive on the coast, the wealth of the province could begin to be realized. The author of the report, the Honourable H.L. Langevin, Minister of Public Works, delighted in observing the potential of the fishery. The province’s wealth, he concluded, lay not in the gold that had attracted so much attention, but in the relatively under-appreciated fishery. He was not the first non-Native to recognize a potential bonanza in fish. In 1849 the future Governor of Vancouver Island and British Columbia, James Douglas, remarked on “valuable fisheries which will become a source of boundless wealth.”

Langevin was similarly optimistic. The fishing industry needed encouragement to realize its promise, he argued, but not government regulation. The Government had not yet intervened to regulate the fishery, and that was as it should be. Federal regulators, Langevin wrote, must maintain a discreet distance while the fledging industry established itself in Canada’s Pacific coast province:

There is no law governing fish in British Columbia. Fishing is carried on throughout the year without any restrictions. This state of things is well suited to a new and thinly populated country. The restrictions of a close season would be very injurious to the Province at present, and for many years to come.

---

Langevin was correct that neither the Dominion, the provincial government, nor the earlier colonial governments had turned their legislative or regulatory attention to the west coast fishery. When British Columbia joined the Canadian Confederation in 1871, it ceded control of the fisheries to the Dominion government; under the *Constitution Act, 1867*, ‘Seacoast and Inland Fisheries’ were a Federal responsibility, supervised by the Fisheries Branch of the Department of Marine and Fisheries (hereafter “Fisheries”). The Canadian Parliament had passed a *Fisheries Act* in 1868, but according to the Terms of Union, it was not immediately law in British Columbia, and would not be adopted until 1877. The Colonial Office in London raised the issue of regulating fisheries in 1861 when it sent Governor Douglas a memorandum on protecting the salmon fishery and forwarded copies of fisheries legislation from the United Provinces of Canada. Douglas acknowledged receipt of the documents, “which afford so much useful information on the methods of preserving and regulating Fisheries,” but he did not act. Few non-Natives were fishing and regulating the Native fishery was not a priority for the colonial governor. Furthermore, two commissions on the British fisheries— an 1863 Royal Commission on the Scottish herring fishery and an 1866 Commission on sea fisheries of the United...
Kingdom—concluded that state regulation of the fishery was unnecessary; it did not preserve fish stocks and succeeded only in favouring one class of fishers over another. Providing a vivid reflection of the dominant liberal paradigm, both commissions recommended that the British Government deregulate the fishery. State interference simply reallocated the resource to those who lobbied most effectively, damaging fishing communities and the national economy. The commissioners believed the ocean fishery to be inexhaustible; if heavy fishing reduced fish stocks in one area, low returns would force fishers from that area allowing the fish a chance to recover their former abundance.

Market forces and the common law were the only regulation required.

Langevin’s sweeping statement about the absence of law ignored the common law, but the common law had not ignored fisheries. Although legislation became the focus of fisheries law in British Columbia, the common law underlay the development of the fishery. It did not recognize property in fish until they were caught, but it did settle the right to fish. The common law presumption was that the right to fish, whether in tidal or non-tidal waters, belonged to the owner of the soil. For riparian fisheries, ownership of land included ownership of the fishery to mid-stream. The Crown, as owner of the

---

27 Great Britain, House of Commons, Parliamentary Papers 1866, vol. 17, Reports from Commissioners, Report of the commissioners appointed to inquire into the sea fisheries of the United Kingdom.
29 Except where it was inappropriate given local circumstances, English law, including the common law, applied in the colonies as it existed on the date of reception. Hamar Foster, “British Columbia: Legal Institutions in the Far West, from Contact to 1871”, *Manitoba Law Journal* 23 (1996): 293-340, at 298, notes that English law was received by the mainland colony of British Columbia in 1858, but not by the colony of Vancouver Island until it joined the mainland colony in 1866.
foreshore, owned the tidal fisheries. The right to fish could be severed from ownership of the soil or divided, but this was not presumed. However, the Crown’s right to fish (and to grant rights to fish) was circumscribed by the public right to fish.

The doctrine of the public right to fish, said to have originated in the Magna Carta (1215), vested the right of fishing in the public as a whole, not the Crown. The public had a right to fish in all tidal waters. In effect, the Crown was a trustee for the public. It could not grant an exclusive fishery to any individual or group. Parliament could circumvent the doctrine by statutory grants, but centuries of common law militated against granting exclusive fisheries. Fish belonged to the public. They were not to be reserved to a particular user. Exclusive fisheries that pre-existed the doctrine’s origin were

---

32 Gerard V. La Forest, *Water Law in Canada: The Atlantic Provinces* (Ottawa, 1973), p. 196, suggests that although there is some case law for the proposition that the public right to fish extends to all navigable water in Canada, particularly where the Crown owns the land, the weight of authority limits the public right to tidal waters.
33 Roland Wright, “The Public Right of Fishing, Government Fishing Policy, and Indian Fishing Rights in Upper Canada”, *Ontario History* 86 (1994): 337-362, argues that while the public right to fish prevented the Crown from ceding Native fisheries to non-Natives without legislative sanction, it also prevented the Crown from protecting Native fisheries. Lakeshore or river-side reserve allotments were insufficient to protect a Native fishery, if the body of water was navigable, because the Crown’s ability to grant exclusive fisheries was limited by the public right to fish. Protecting a Native fishery from non-Native interference required legislative action.


While the elevation of common law Aboriginal rights to constitutional status obviously has an impact on the public’s common law rights to fish in tidal waters, it was surely not intended that, by the enactment of s.35(1), those common law rights would be extinguished in cases were the Aboriginal right to harvest fish commercially existed. ... As a common law, not constitutional, right, the right of public access to the fishery must clearly be second in priority to Aboriginal rights; however, the recognition of Aboriginal rights should not be interpreted as extinguishing the right of public access to the fishery. (para 67)
recognized by English courts, but in Canada none were thought to exist because the country, "was not settled before then."

This is only one of many assumptions that inhibit the recognition of Native fisheries in Anglo-Canadian law. Canada was settled, its fisheries intensively managed and extensively used by Native peoples. Thus, Langevin's statement about the absence of law not only ignored the common law, but also a complex network of Native rights and entitlements that divided the fishery between and within Native communities. The fishery in 1871 was not the unregulated, open-access fishery that Langevin supposed. Native rules preceded, and would soon conflict with non-Native fishers and the interventions by Fisheries in Ottawa.

The Native fishery

Along the west coast and in much of the interior, fish were the predominant source of Native sustenance and wealth. Access to fish was regulated, not by the common law or the Fisheries Act, but by the Native peoples themselves. The important fishing sites were controlled by high-ranking individuals or families and a web of entitlements governed the various fisheries. In certain areas fishing sites were owned by the holder of a hereditary title who had the power to exclude other users. In other areas, control implied the right to manage a fishery by allocating the resource among members of a family house or clan group. The owner assumed the role of steward, ensuring that all members of the group had enough and that the fishery remained healthy for future generations. Whatever the

34 La Forest, Water Law, p. 196.
particular configuration, Natives regulated and managed their fisheries intensively, reflecting the importance of fish in their lives.\textsuperscript{35}

The Native fishery was one where Native people decided who could catch fish, at what locations and in what quantity. It was a fishery subject to, and even created by, Native laws that allowed certain activity and proscribed others. Before non-Native peoples arrived on the coast the entire fishery was a Native fishery, controlled locally by prominent Native families, and it remained so throughout the Hudson’s Bay Company’s tenure and the colonial years, 1848 to 1871. Although Native people sold fish to the HBC, the fur traders never asserted control of the resource. The fishery remained part of the Native domain, largely ignored by non-Natives except as a source of food. Similarly, in the early stages of the commercial canning industry the Dominion government played a small role in regulating the fishery. Many Natives sold fish to the canneries, sometimes in competition with non-Native fishers, but neither the Dominion nor the province restricted the Native catch. The Native and non-Native fishery existed side-by-side, unregulated by the Canadian state. However, as the canning industry grew, so did Dominion intervention, the areas of Native control began to shrink. Native involvement in the fishing industry remained high, a fact highlighted by Rolf Knight in \textit{Indians at Work},\textsuperscript{36} and developed in a case study by Leona Marie Sparrow, \textit{Work Histories of a Coast Salish Couple.}\textsuperscript{37} Nowhere were Native peoples more involved in the industrial, export-based resource

extraction economy that characterized early British Columbia than in the fishing industry. Native women worked in the canneries cleaning fish and filling cans, Native men worked as fishers, and their wage or piece-work labour was, in various regions, essential to the success of the commercial canning industry. They provided flexible, industrious and subsidized labour. Cannery operators and Fisheries officers frequently asked Indian Agents (Department of Indian Affairs officials) stationed along the coast to encourage Native people to work in the industry.

However, despite their participation as workers, Native people lost control of the resource—it was no longer a Native fishery. Dominion regulation controlled the catch for a cannery dominated industry. In the late 1880s, Fisheries isolated a portion of Native fishing, the food fishery, allowing it to remain under Native control for a few more years. It was an artificial distinction with no historic or traditional roots; Native people had caught fish for food, but also for trade and sale. The fishery was a source of wealth, not just of sustenance, and confining the Native fishery to a food fishery was a means of reallocating the resource to the canneries. Yet, for a time the food fishery remained an area of Native control. The Dominion regulated the commercial industry first and only later, when the canneries demanded greater access to fish, turned its attention to the Native food fishery.

State control of the fishery did not happen everywhere along the west coast at the same time. Fisheries did not interfere with some Native fisheries until the 1900s. The Babine weir fishery in the headwaters of the Skeena River was one such. Despite the

rapid development of a canning industry at the mouth of the Skeena in the 1880s, the Babine were far enough removed from non-Native population centres and the canneries to avoid state interference in their fishery until 1904. Other Native people, particularly those along the lower Fraser River where the canning industry was most active, were losing control in the early 1880s. On Vancouver Island the Dominion began asserting its control in the late 1880's. Many Native people were willing participants in the commercial canning industry, enjoying a degree of prosperity by joining the industrial workforce. However, other Native people, those with established control of a fishery and a strong sense of ownership, were determined to maintain their control, leading to frequent and sometimes violent conflict with Fisheries officials. While this chapter describes the increasing regulation by the Dominion of the fishing industry, it is also the story of the diminishing Native fishery--of a colonial power wresting control from Native peoples for the benefit of industrial canneries.

It seems likely, however, that Native consumption of Pacific fish, particularly salmon, was at low ebb in the second half of the nineteenth century. Native peoples along the Pacific had been decimated by their contact with Europeans. Warfare had taken its toll, but the biggest killers were exotic diseases -- small-pox, measles, influenza and others. In some areas disease moved more quickly than Europeans, arriving through adjoining Native populations before the Europeans themselves. Each epidemic brought

---

40 Cole Harris, *The Resettlement of British Columbia* (Vancouver: UBC Press, 1997), pp. 3-30, provides an account of the 1782 small-pox epidemic around the Straits of Georgia.
horrendous suffering, and the cumulative effect was massive depopulation, perhaps by as much as ninety percent in British Columbia in the contact century, as elsewhere in the Western Hemisphere.\footnote{Harris, \textit{Resettlement}, p.30.} By the time the canning industry appeared on the Pacific coast the Native population was a fragment of its former self and its use of salmon was greatly reduced. Some have projected a "conservational effect" from the declining Native population that produced an unusual abundance of salmon.\footnote{Hewes, "Indian Fisheries," p. 149.} If so, this abundance coincided with European advances in transportation and canning technology that enabled the fishing industry to catch and preserve fish and ship the product to distant markets. The canners' good fortune may have been a product, in part, of Native misery.

Although reduced, the Native fishery had by no means disappeared. An extract from Alexander Caufield Anderson's "Government Prize Essay" on British Columbia followed Langevin's enthusiastic promotion of the fishery in 1871. Anderson, a retired officer of the Hudson's Bay Company, would become British Columbia's first Inspector of Fisheries in 1876. In his report he described the various fisheries in the province and the methods and technologies used by Native peoples to catch and process fish. He recognized the potential for a lucrative commercial fishery in BC, but was also aware that the fishery supported the Native population. Of the Native salmon fishery on the Fraser River, fishing territory of Salish speaking peoples in lower reaches and of Athapaskan speakers in the northern headwaters, Anderson wrote: "In the lower part of the river the natives secure them in large quantities by means of drift-nets. Higher up, scoop nets are chiefly used, which are wrought from stages suspended from the rocks bordering on rapid..."
currents; and above Alexandria the Tâcully tribe construct ingenious weirs for their capture.\textsuperscript{43} Drift nets and scoop nets were used in the silty lower reaches of the Fraser. Up river and in the tributaries where the water was clearer Native peoples used a variety of weirs.\textsuperscript{44}

Anderson's recognition and defence of the Native fishery is one of the defining features of his tenure as the Inspector of Fisheries. In the early years of fisheries' regulation, he acted as something of a buffer between the demands of cannery owners' and the Native fishery. However, Anderson was keen to promote the fishing industry, and under his tenure Fisheries began the process of reducing Native control of the resource. Fisheries officials assumed that a subsistence food fishery pre-existed White settlement, and that only this should be protected in the new commercial economy.

The rest of this chapter considers the development of Canadian fisheries law in British Columbia in the crucial first twenty years of state intervention: from 1874 and the first steps to introduce the \textit{Fisheries Act}, until 1894 when the Native fishery was formally reduced to a highly regulated food fishery. When British Columbia joined the Dominion of Canada the non-Native fishery was inconsequential. The early fur-trade explorers had purchased fish from Native people for food, and the Hudson's Bay Company exported barrels of salted, Native caught fish, but there were few non-Natives catching fish. Unlike the Atlantic cod fishery which had been the focus of European interest on the East Coast

\textsuperscript{43} Fisheries Annual Report, 1872, p. 182.
\textsuperscript{44} Hilary Stewart, \textit{Indian Fishing: Early Methods on the Northwest Coast} (Vancouver: J.J. Douglas Ltd, 1977) provides descriptions and illustrations of the many methods of Native fishing.
from the early sixteenth century, \textsuperscript{45} the Pacific salmon fishery was too far removed from European markets to transport profitably until canning technology was introduced. \textsuperscript{46} Once this technology arrived on the Fraser, a west coast industry based on the export of canned sockeye salmon developed rapidly. In the 1870s and 1880s an industrial commercial fishery in British Columbia expanded to dominate the fishery and the provincial economy. In many regions of the province, particularly in the north on the Skeena and Nass Rivers, Native fishers and cannery workers provided essential labour for the canning industry. However, as Dominion regulation spread across the Province, Native peoples lost control of their fisheries. The \textit{Fisheries Act and Regulations}, enforced by a hierarchy of Fisheries officials, increasingly determined how fish were caught and by whom. In the process, fish were re-made as an industrial resource and Native peoples as an industrial labour force.

Two important studies have covered some of this material already. Reuben Ware's \textit{Five Issues, Five Battlegrounds: An Introduction to the History of Indian Fishing in British Columbia, 1850-1930},\textsuperscript{47} charts the creation of an Indian 'food fishery' in Anglo-Canadian law, paying particular attention to the Stó:lo fishery in the lower Fraser River. He claims, correctly, that the distinction between Native 'food fishing' and commercial fishing that developed in the 1880s was a distortion imposed on the Native fishery by White governments to limit the Native catch. Ware marks the 1880s as the beginning of


\textsuperscript{47} Reuben Ware, \textit{Five Issues Five Battlegrounds: An Introduction to the History of Indian Fishing in British Columbia, 1850-1930} (Chilliwack, B.C.: Coqualeetza Education Training Centre, 1983).
Federal efforts to regulate the Native fishery on the Fraser, and suggests that in the following two decades regulation spread throughout the province, regulating and confining the Native fishery. The other important work is Diane Newell’s, *Tangled Webs of History: Indians and the Law in Canada’s Pacific Coast Fishery*. Newell surveys what she labels ‘the politics of resource regulation’ from Confederation to the 1990s. She argues that the burden to conserve salmon stocks consistently fell most heavily on the Native fishery. ‘Conservation’ needs became the means by which Fisheries justified taking control of the resource on behalf of the industrial canneries. Newell does not dispute that conservation was at times an important goal, but rather that conservation claims need to be followed by the question: for whom are we conserving? The answer, she concludes, is that Native people bore the brunt of conservation for the sport and industrial fisheries. I largely concur with the conclusions of both scholars, both of whom have added significantly to our understanding of the conflict over fish in British Columbia. A study of Dominion fisheries law and the details of its early enforcement against the Native fishery, however, has yet to be done. Here I attempt to provide that study—the colonization of the west coast fishery.

“as may be found necessary or expedient”

The industrial commercial fishery on the west coast depended on canning, a preserving technique first used for fish in Great Britain and Ireland in the early nineteenth

---


century. In the mid-1860's canning technology reached San Francisco Bay on the west coast. From there it moved north to the Columbia River, and to the mouth of the Fraser River. The first permanent canning operation on the Fraser began in the early 1870s, probably 1871,50 and by 1873, when Fisheries began keeping records of British Columbia’s fishing industry, the firm of Findlay, Durham & Brodie canned 115 tons of Fraser River sockeye. Several other smaller operations together canned another 80 tons. That year Fisheries hired James Cooper to act as its agent on the Pacific coast. Cooper agreed with Langevin’s assessment that to extend the Fisheries Act to BC would not benefit the nascent industrial commercial fishery, and the cannery operators themselves gave no indication that they wanted regulation either. Cooper was also concerned that enforcing the Fisheries Act would, “probably lead to complications with the Aborigines.”51 This early observation about the disjuncture between Native fishing practices and the Fisheries Act would prove entirely accurate.

The reticence of Dominion officials and of the fishing industry in British Columbia towards the Fisheries Act was short-lived. As the industrial commercial fishery grew, so did cannery owner concerns about their competitors’ fishing practices and about competing uses of the rivers. Alexander Ewen, initially a partner in the New Westminster canning operation of Loggie & Co., wrote to Cooper in 1875, complaining that gold miners were destroying the spawning beds and Indians were destroying the spawn. He

51 Fisheries Annual Report, 1873, Appendix 5, p. 205.
asked that the Government intervene to stop the ‘wholesale destruction by Indians,’ and that it consider establishing fish hatcheries as the Americans had done on the Columbia and Sacramento Rivers. Cooper also received an extract of a US Senate Committee report that blamed overfishing, dams and interference in spawning beds as the causes of the salmon shortfall on American rivers. It recommended laws to regulate fishing as well as hatcheries to increase the stock. Cooper forwarded this material to Fisheries as part of his yearly report, in the process making it clear that the industry was ready for government regulation—at least of Indians and gold miners.

By the time industry complaints reached Ottawa, the Dominion Government had already begun the process of implementing the *Fisheries Act*. In May 1874 it passed an act to extend the application of the *Fisheries Act* to British Columbia, Prince Edward Island and Manitoba. The legislation suspended the application of the *Fisheries Act* in each province until proclaimed into force by the Governor General; in British Columbia that occurred in May 1876, with a provision that the *Fisheries Act* would come into effect on 1 July, 1877. Six years after British Columbia joined the Canadian Confederation, it became subject to Dominion fisheries law.

In 1876 Fisheries appointed A.C. Anderson as the first Inspector of Fisheries for British Columbia. Anderson, the recent Federal appointee to the Indian Land Reserve

---

53 SC 1874, c. 28.
54 Canada Gazette, Vol. 9, p. 1513.
Commission, held the position of Fisheries Inspector until his death in 1884. He was well aware that in 1877 British Columbia received a *Fisheries Act* based on the first comprehensive fisheries legislation of the United Provinces of Canada from 1857,\(^{55}\) and modified for the Maritime provinces in 1868.\(^{56}\) None of the sections had been drafted with the west coast fishery in mind, and much of the Act was irrelevant. Anderson wrote repeatedly to Ottawa, in an increasingly frustrated manner, that the Pacific salmon, unlike the Atlantic salmon, only spawned once and therefore the regulations for the province would need to be different. Nonetheless, parts of Act were general enough to apply to either coast. In the twelve provisions dealing specifically with the salmon fishery, subsections prohibited the killing of salmon fry, parr and smolt, the use of nets in non-tidal waters, fishing within 200 yards of spawning channels, fishing at an ‘artificial pass or salmon leap’, except with rod and fly, and the taking salmon spawn or injuring spawning beds.\(^{57}\) These provisions could apply to British Columbia without shutting down the industry, and the commercial industry was soon clamouring for Anderson to enforce the Act against the Native fishery. However, in response to obvious legislative shortcomings, Anderson took what he believed to be the pragmatic approach: he would apply those parts of the *Fisheries Act* that were appropriate to British Columbia’s fishery, adapt other sections as needed, and would generally manage the fishery in what he thought were the best interests of all fishers. In his annual report for 1876, Anderson wrote:

> With regard to the provisions of the Fishery Act, at large, there are many portions which, under the showing I have made, are necessarily inapplicable to this Province. Their application,


\(^{56}\) SC 1868, c. 60, *An Act for the regulation of Fishing and protection of Fisheries*.

\(^{57}\) SC 1868, c. 60, ss. 7(4), 7(6), 7(10), 7(11), 7(12).
Indeed, would in some cases neutralize all fishing operations: for instance, of the salmon, at present the most lucrative. I have therefore assumed that such portions, only, of the Act, as are obviously of general application, with such other portions as, on more minute enquiry, may be found to be of particular application, shall be locally adopted. Without, therefore, interfering, and injuriously as I conceive, with existing practice, I shall continue, as hitherto, to exercise a captiously watchful surveillance for the common benefit; reporting from time to time, the result of my observations, and under your sanction, extending such further protective portions of the law, as may be found necessary or expedient.58

In essence, Anderson undertook to manage and police the fishery as he saw fit. The Fisheries Act was a point of reference, some of the general provisions were applicable, but otherwise it was largely irrelevant to British Columbia. Anderson, with the blessing of the Fisheries, adopted a highly discretionary approach to applying and enforcing the Act. The industry would soon question the wisdom and fairness of vesting so much discretion in one man, but in the early days of fisheries regulation Anderson took little direction from Parliament or the government.

Season of conflict -- 1877

In the first years of his appointment Anderson’s discretionary policy amounted to general non-enforcement. He spent the 1877 fishing season traveling with the Indian Land Reserve Commission in the interior, and was not a presence on the fishing grounds near the mouth of the Fraser, nor at New Westminster, site of the emerging canning industry. An editorial in the Daily British Colonist remarked on the Inspector’s absence, suggesting that in future he “personally supervise the fisheries during the season.”59 With heightened activity on the fishing grounds and increasing competition for fish, disputes flared, and in the absence of state regulation, competitors turned to the local courts.

58 Fisheries Annual Report, 1876, p. 343 (his emphasis).
In July a dispute between two canneries over the setting of nets near the mouth of the Fraser River resulted in charges. Ewen and Wise, owners of a cannery at New Westminster, charged John Deas, owner of a cannery on the South Arm, “with having, on 9th July, at South Arm, Fraser River, used violent and threatening language towards certain fishermen in their employment, thereby intimidating said men and preventing them from working.” Deas, according to historian H.K. Ralston, was protecting a drift that he had cleared of net damaging snags.60 He appeared in Police Court before two Justices of the Peace, W.D. Ferris and W. J. Armstrong. After hearing the evidence, Deas asked that the trial be postponed so he could get a lawyer. Concerned that Deas did not intend to appear should they postpone the trial, the justices of the peace denied his request. They sentenced him to three weeks imprisonment on the grounds that he had used very violent language, threatened to cut nets and to shoot Wise.61 On appeal to the County Court, Judge O'Reilly quashed the conviction on procedural grounds.62

The Police Court was also privy to several breach of employment contract disputes that developed in the fishery. In 1877 there were many fish to be caught, and with the growing capacity of the canneries to process fish, fishers were in short supply. Samuel Herring, who operated a salmon salting business at New Westminster, took some of his former employees to court in mid-season for breach of contract. The fishers, mostly Native, had started the season working for him under contract, but left his employment

---

60 Henry Keith Ralston, “John Sullivan Deas: A Black Entrepeneur in British Columbia Salmon Canning.” *BC Studies* 32 (1976-77): 64-78. Deas had also applied for an exclusive lease to protect these drifts, but Anderson denied the request (see below, p. 44).
61 *Mainland Guardian*, 14 July 1877.
after being offered better terms by a cannery. In the first case, *Samuel Herring vs. David Bailey*, Herring argued before two justices of the peace that his employee broke a written employment contract for three months labour at $45/month after working only ten days. The JP’s determined that there was a contract, but dismissed the case because the defendant was a minor and not competent to make such a contract.\(^{63}\) There is no indication of the defendant’s nationality.

The next case, *Samuel Herring vs. John Browne*, was somewhat more involved.\(^{64}\) It was heard by Justice of the Peace Ferris over three days in mid-July at the height of the fishing season when everyone involved was losing valuable fishing time. The basis of Herring’s complaint was that Browne, described as ‘an Indian’, left his employment as a fisher after working seven and a half days of a three month contract and collecting $7 in cash and $7.50 in goods. Herring alleged Browne had gone to work for Mr. Holbrook who ran a canning operation at New Westminster, and he charged Browne with obtaining money under false pretences and for leaving his employment while under contract. On the first charge Browne was released on bail to wait for a hearing in the Supreme Court. Herring withdrew the second charge when it became apparent that the court would not allow two offences to be joined in one information or summons. Browne was released on bail, but Herring immediately swore another information charging Browne with leaving his employment. Browne was arrested again that day and held in custody overnight. The following day, while Browne remained in custody, his counsel (likely hired by Holbrook) argued that the court had no jurisdiction to hear the second charge (leaving employment)

\(^{64}\) *Ibid.*, 18 and 21 July 1877.
because it was really the same as the first (obtaining money under false pretences), and the first charge was set for trial at the Supreme Court. Ferris determined that he had jurisdiction to hear the matter, but that Browne would remain in custody until court reconvened the following morning.

On the third day, Browne’s counsel opened with an argument that the Act under which the complaint had been brought, an 1823 English statute titled, “An Act to enlarge the Powers of Justices in determining Complaints between Masters and Servants”65 did not include ‘fishermen’. The Act gave justices of the peace the authority, on a complaint from an employer, to issue a warrant for the arrest of variously named tradespeople, hear the particulars of the complaint, and sentence an employee for up to three months hard labour for breach of an employment contract. Ferris determined that the Act applied to ‘fishermen’, and proceeded to hear evidence on the nature of the contract, whether its terms had been sufficiently explained to Browne in Chinook (the hybrid working language of the fur trade), and whether he understood when he entered the contract that he might be punished for a breach of its terms. Apparently satisfied with Browne’s understanding of the contract, Ferris ruled that “the man ought to be punished.” However, he still had some reservations about whether the Act applied to ‘fishermen’. He proposed postponing the case until the Attorney-General’s opinion could be sought. Herring’s counsel opposed the delay on the grounds that the fishing season would be over by the time a decision was made. He prompted Ferris to issue a general caution that the legal system would enforce contracts: “If the other Indians who have made agreements with Herring break them they

65 4th Geo.IV C.34.
will be punished.” Counsel for Browne asked Ferris to limit his comments to the case at hand: “... if it goes out that any man going from Herring to any other fishery will be sent to goal, a serious injury will be inflicted upon Mr. Holbrook and others, as the Indians will think Sam Herring has privileges in court that no one else has.” Clearly unhappy with defence counsel’s intervention, and anticipating an appeal whatever the sentence, Ferris sentenced Browne to one month’s imprisonment. He was released pending appeal and there is no further record of the case.

Two more cases stemming from the animosity between Herring and Holbrook were also heard that summer: *Herring vs. Alexr. McLean* and *Green vs. McLean*. Both suits involved the same dispute -- a disagreement over the setting of a drift net. Green (apparently an independent fisher) and McLean (who worked for Holbrook) agreed to deploy their drift nets alternately. A drift net is a gill net, spread across a river, that drifts downstream with the current, catching salmon as they swim upstream. If two nets are deployed, one in front of the other, the net in front has an advantage. Green deployed his net in front of McLean’s, out of turn according to McLean, and an ‘Indian’ working for Herring deployed a net behind McLean’s. McLean damaged the Indian’s net when he attempted to move into a more favourable position, and the first case was a suit to recover the cost of the damaged net. Ferris awarded Herring $5. The second case, a complaint brought by Green that McLean had used violent and threatening language, causing Green to fear for his life, was dismissed.66

---

In *Samuel Herring vs. Harrison River Charlie* the complainant argued that the defendant, who was held in custody before trial, left his employment before the three month contract had expired, and that he had induced other Indians to breach their contracts as well. Council for the defendant asked the Court to hear his client, but council for Herring argued it was "entirely illegal" for an Indian to give evidence. Furthermore, he argued punishing Indians for breach of contract was the only option, given it was "a perfect absurdity" and a waste of time and money to bring Indians to civil court, presumably because collection would be very difficult. Ferris convicted the prisoner and sentenced him to three weeks imprisonment. In a case heard the next day, *Samuel Herring vs. Paul*, reported to be similar to the previous case, the defendant, identified as 'an Indian', was ordered to return to work for Herring.\(^{67}\)

These cases illustrate several things. First, they highlight the lack of intervention by Fisheries. A rather disgusted editorial in the *Mainland Guardian* suggested that the altercation between Deas and Buck could have been avoided if all the cannery owners had met before the fishing season to establish rules for the fishery.\(^{68}\) This had not happened, but the suggestion itself highlights the lack of direct government regulation in these early years. Notwithstanding Anderson’s appointment and the extension of the *Fisheries Act* to British Columbia, fishers on the Fraser had to make their own rules. Although there had not been a formal pre-season meeting, it is clear from these cases that the fishery was governed by a series of informal arrangements. Drifts were shared with some, and defended against others. The vast majority of these arrangements between fishers and

\(^{67}\) *Ibid.*, 25 September 1877.

\(^{68}\) *Ibid.*, 11 July 1877.
between canneries went unrecorded, but when the sharing went awry or the defence became too heated, the parties turned to the courts. The Dominion was beginning to put a regulatory structure in place by passing legislation and appointing officers, but in 1877 it was not yet a presence on the fishing grounds. It spent a paltry $635 that year on the British Columbia fishery, including Anderson’s salary. When serious disputes arose in this regulatory vacuum, the protagonists resorted to threats and then to the local courts to resolve their differences. Thus, although the state was not intervening with regulations directed specifically towards the fishery, it was involved through the courts.

Furthermore, the cases reveal that Native people were very much involved in the canning industry as fishers, and that the legal system was affecting their fishing practices even if the specific legislation dealing with fisheries was not being enforced. The jailing of Natives for breach of contract forcefully illustrates that the Canadian state was asserting its control of the resource. The exchange between Native fisher and non-Native processor, once described as trade, now more closely resembled an employment relationship. Although the state was not regulating the fishery through its fisheries law, the law of master and servant applied and could be enforced by individuals through the courts and jails. Natives were welcome participants in the industrial commercial fishery, their labour was essential, but on terms that were enforceable in the Canadian criminal courts.

---

69 British Columbia Sessional Papers (1905), 5 Ed.7, Prefontaine to Fulton, 12 January 1905.
Salmon Fishery Regulations

Editorial comment at the end of the season demanded that the Dominion Government take more action and spend more money to regulate the fishery. The cannery operators expressed similar sentiments. At a meeting chaired by Anderson they proposed a $20 boat license and taxes of $.08/case of canned salmon and $.25/salted barrel to cover the cost of a hatchery. The demand for more government intervention was apparently heard in Ottawa for the following year, 1878, British Columbia had its first set of fishery regulations that dealt specifically with the Pacific coast fishery. The *Salmon Fishery Regulations for the Province of British Columbia* banned nets in non-tidal and fresh waters, restricted the obstruction of rivers, and closed the fishery on weekends:

1. Drifting with salmon nets shall be confined to tidal waters; and no Salmon net of any kind shall be used for Salmon in fresh waters.
2. Drift nets for Salmon shall not be so fished as to obstruct more than one-third of the width of any river.
   - Fishing for salmon shall be discontinued from eight o’clock A.M. on Saturdays to midnight on Sundays.

The regulations reflected the lack of knowledge in Ottawa about the Pacific salmon and the West Coast fishing industry. The second half of section one--no salmon nets in fresh waters--would have shut down the canneries had it been strictly enforced. Most fish were caught by net in the tidal, but fresh waters of the lower Fraser River, yet the regulations prohibited any salmon nets in fresh waters. Despite this potentially

70 *Mainland Guardian*, 17 November 1877.
71 Fisheries Annual Report, 1893, p. cxiii, memorandum of a meeting held at the Colonial Hotel, New Westminster on 17 December 1877.
serious impediment, the regulations were not changed to accommodate the problem, but
nor were they enforced as written. The clause prohibiting nets in fresh water was not
applied to tidal waters. Regarding the weekend closures which the industry thought too
long, the Minister sent explicit instructions to Anderson to reduce it from 40 to 36 hours. 74
Again, despite this policy change Fisheries did not alter the regulations. In fact, according
to Lieutenant-Governor Clement F. Cornwall, the closure appears to have been
completely unenforced during the peak salmon run in July and August, 1881. 75 The
regulations on paper were not those enforced on the fishery. Both Anderson and Fisheries
took an entirely discretionary and detached approach to managing the fishery on the west
coast. There was very little enforcement of any kind. In these early years, the fishery was
largely unfettered by the specific fisheries legislation.

Despite the wide discretion and lack of enforcement, Fisheries apparently intended
to gain some control over the fishing industry. To this end it directed Anderson to appoint
an enforcement officer, and in 1878, he hired Captain George Pittendrigh as a Fishery
Officer to patrol the Fraser River and all its tributaries below Yale, as well as Burrard Inlet
and all its tributaries. 76 Pittendrigh was responsible for the lower 150 kilometres of the
Fraser River drainage basin and for the extensive watershed of Burrard Inlet. It was a
huge territory for one man to patrol in a row boat. However, the proposition was not as
preposterous as it sounds. Although one cannery at New Westminster (King & Co.) had a
steamer to haul its fish boats to the fishing grounds, in 1878 fish were caught from boats

74 Ibid., A.J. Smith to A.C. Anderson, 24 June 1878.
75 Ibid., p. cxvii, Clement F. Cornwall, Lieutenant-Governor, 20 February 1882.
76 Mainland Guardian, 3 July 1878.
powered by paddle, oar and sail. Furthermore, the salmon processing operations were relatively concentrated; Pittendrigh was responsible for six canneries and three salting operations at New Westminster and two canneries near the mouth of the Fraser on the south arm. The concentrated pattern meant that Pittendrigh could be reasonably certain that the canneries were obeying the weekend closings if he wanted to enforce them. However, he could not ensure that fishers were waiting until midnight on Sunday to resume fishing, and nor could he control fishing outside the main channel of the Fraser. He was probably unable to visit most of the territory for which he was responsible. At the end of the 1878 season, Anderson reported that Pittendrigh had levied several moderate fines for violations, and that the ruckus on the fishing ground of the previous year had not been repeated. However minimal, the Dominion’s presence on the fishing grounds apparently had a calming effect.

In 1879 Fisheries took a large step, at least on paper, towards securing regulatory control of the salmon fishery. The Dominion adopted a nation-wide regulation that prohibited fishing for salmon, except under the authority of a lease or licence from the Department of Marine and Fisheries.77 The regulation did not specify a licence fee, and initially the licensing provision appears to have been ignored in British Columbia. However, in 1881 Anderson wrote to the Minister, recommending that Fisheries establish a licensing scheme to control the fishing practices of the twelve operating canneries. By 1882 there were twenty canneries operating in British Columbia, thirteen on the Fraser alone, and Anderson reported that the licensing scheme he had been authorized to

77 Canada Gazette, Vol. 12, p. 1616.
implement “worked very effectively.” It also provided Fisheries with its first revenue from the BC fishery -- $672.50. The following year Pittendrigh posted a “Notice to Fishermen!” in New Westminster’s *Mainland Guardian*, reminding them that they must renew their licences before the start of the 1883 season. The state was becoming a presence in the Fraser fishery.

Cannery owners wanted the state to protect their interests. Licences were available to anyone and this raised a few concerns among the existing operators. Believing that over-fishing on the Sacramento and Columbia Rivers in United States had reduced a once profitable industry and concerned that Anderson was issuing licences too freely, the cannery owners sought some means of control. In 1882 the British Columbia Board of Trade produced a report warning of the dangers of over-fishing, and in 1883 it passed a resolution questioning the inspector’s discretionary power to issue licences. The cannery owners wanted to restrict the number of licences to protect the fish stocks, but also to protect their fishing grounds from new competitors. Restricting access through licences was one way to ensure their own supply. The Board proposed that a committee of three, including the Inspector of Fisheries, the “Indian Commissioner” and a third person selected by the Board of Trade, “should have the power of determining the fishery limits of each river or other fishing place in this province and of regulating the
number of licenses to be issued.”

Lieutenant-Governor Cornwall supported the Board of Trade proposal, but Anderson opposed it and nothing appears to have come of it.

Nonetheless, the established canneries attempted to use a licensing scheme to monopolize the fishing grounds near the mouth of the Fraser. Aware of the Native interest in salmon, they had included a Dominion official to represent Native interests on the proposed board. At a minimum, business interests in New Westminster were prepared to include Native people in their effort to exclude others.

Notwithstanding state regulation and enforcement officers, in the first thirteen years after British Columbia joined Confederation there was a minimal and highly discretionary regime of fisheries law. Interpretation and enforcement of the law depended almost entirely on Anderson, and he exercised considerable liberty in choosing what parts of the law to enforce or ignore. Given this largely unfettered discretion, one is hard pressed to describe this regime as subject to the rule of law, understood in this context as a set of rules based on broadly known principles and enforced predictably. Apparently, rules are what the industry wanted, especially if they limited competition. Although on occasion it pressed Anderson to ignore certain provisions, the industry frequently urged that the Government regulate the fishery to prevent over-fishing or harmful fishing.

83 Ibid.
84 The “Report on Salmon Culture by the British Columbia Board of Trade” (Fisheries Annual Report, 1893, p. cxxvi) included the following statement:

“Another important reason for guarding against a diminution of the salmon supply exists in the fact that a large Indian population depends upon it as its main article of support. This does not apply only to the Indian residents on rivers, but also to those on the coast, on islands, and in parts of the interior, as the river Indians catch and dry large quantities of salmon which the barter with other Indians who cannot obtain this essential article for themselves, and should salmon become extinct in the rivers, or be so seriously reduced in quantity as to cause destitution among the Indian population, it would be a serious matter for the Government to provide means of support for those Indians.”
practices. The industry was a frequent critic of rules it thought too restrictive, especially when the rules reduced catch and profits, but it also attacked the Dominion for allowing unrestricted access. Having invested heavily in canning equipment, boats and buildings, the cannery owners wanted secure supplies of fish.

"legitimate and hereditary rights"

In these early years of Federal regulation, as Fisheries gradually extended its control of the salmon fishery in British Columbia, the Native fishery was frequently discussed. When Anderson was appointed Inspector in 1876 he thought the Fisheries Act was largely irrelevant to the west coast, and particularly to the Native fishery. Except in cases of gross violation of the Act, Anderson argued against any interference in the Native fishery. A few days after his appointment, he wrote to the Minister to refute cannery owner allegations that the Native fishery in the interior was destroying salmon spawn and fry. The Native fishery, stated Anderson in his annual report for 1876, was not the cause of any perceived reduction in the salmon stock. Much of the yearly fluctuation in salmon stock was explained by the cyclical nature of runs, which Anderson reported revolved around a four year cycle. The sockeye had been plentiful in 1873, followed by three successively weaker years. Anderson explained that the big runs would return on a four year cycle and that the Native fishery was not the problem. Drawing on his experience as a fur trader and his recent travels in the province as a Commissioner on the Indian Reserve Commission, Anderson wrote: “as a rule I believe the native modes of fishing to be altogether unobjectionable, and economical, and that any interference with their

---

proceedings, under these modes, would be unadvisable, save when, through bad example, they infringe a general protective law—as in the case of the occasional use of explosive compounds.  

With regard to fish weirs, which were to become the source of much conflict on the Cowichan and Babine Rivers, Anderson thought them 'quite innocuous.'

Notwithstanding Anderson's reports, the Native fishery was clearly under attack. In 1878 the Provincial Legislature passed a resolution requesting that the Dominion Government take "immediate steps" to stop the "highly pernicious practice now pursued by Indians, in annually taking and using for food the spawn" of salmon and herring. To counteract the increasingly strident complaints about the Native fishery, Anderson sent Fisheries a deposition from Mr. Antoine Gregoire, identified as an interpreter from Kamloops and Adam's Lake. Gregoire refuted the charges that Native people destroyed spawn and fry, providing a glimpse of the web of Native regulation that surrounded the resource. Natives understood the importance of spawning beds and had rules to protect them:

Antoine requests Mr. Anderson to add that, so careful of the salmon are the Chiefs, they will not permit the Indians to use the pole to propel canoes in passing over the spawning shoals, after the spawn is deposited, but paddle only. Also, that in the spring, when the children sometimes seek to amuse themselves by making mimic weirs to entrap young fish, they are at once made to desist by their parents. In brief, he says that he believes firmly that the Indians act most prudently with regard to the salmon, and do all in their power to protect them.

At the beginning of 1878, Anderson recommended that Fisheries exempt Native people from the Fisheries Act. To strictly enforce regulations that, among other things,

86 Fisheries Annual Report, 1876, p. 343.
88 British Columbia Sessional Papers, 1878 p. 55.
89 Fisheries Annual Report, 1877, pp. 297-298.
prohibited nets in non-tidal waters, would eliminate much of the Native fishery. He suggested to the Minister:

That, as a rule, the provisions of the Fishery Act, as modified to suit the exigencies of this Province, shall not be deemed to apply to the Indians, working to supply their own wants in their accustomed way.  

Contrary to Anderson’s advice, in May, 1878, Fisheries pushed through the Salmon Fishery Regulations for the Province of British Columbia, banning nets in non-tidal and fresh waters without any exemption for the Native fishery. This prompted a reaction from Gilbert Malcom Sproat, the remaining commissioner on the Indian Reserve Commission established in 1876 to settle the Native land question. To enforce the Regulations, he argued, “would simply deprive the numerous Indian population on the Fraser and in the interior of the country of an essential and much prized article of diet which in fact constitutes their staple food during the whole year. The Government of England, 25 years ago, might as well have prohibited the cultivation of potatoes by the Irish.”

Sproat was at a loss as how to proceed with his work as a reserve commissioner given his explicit instructions from the Minister of the Interior at the outset of the Commission’s work not to disturb Indian fishing practices. Reserve land had been allocated on the basis that the fishery would provide Native people with their enduring sustenance, and Sproat had assured Native peoples that their fisheries would be undisturbed. To the extent that Native peoples were prepared to accept the reserves allotted by the Reserve Commission, they did so on grounds that they would retain access

90 Ibid., pp.303-304, Anderson to Minister of Fisheries, 3 January 1878.
91 National Archives of Canada (NAC), Department of Indian Affairs (DIA), RG 10 vol. 3663 file 9756 part 1, Sproat to E.A. Meredith, Minister of the Interior, 30 July 1878.
92 Ibid. Sproat refers to instructions from the Minister of the Interior, dated 20 August 1876.
to their fisheries. To the extent that the Federal and Provincial governments justified the small reserve allotments in British Columbia, they did so on the grounds that Native peoples of the province were fishers and did not need a large land base. Both Native acceptance and government justification for the small reserves were undermined by the 1878 regulations. Without an exemption for "Indians", they removed the foundation on which Sproat had built his painstaking efforts to settle the land question. With a mix of legal and moral indignation, he wrote:

They have had no treaties made with them, and we are trying to compromise all matters without treaty making. Had treaties been made, stipulations as to salmon would have been in the front. It is, with absence of treaties, all the more necessary to recognize the actual requirements of the people.93

Eventually conceding that the Native fishery needed special consideration, in August 1878 the Minister of Fisheries authorized Anderson "to suspend the application in regard to the Indians, of the fishery enactments."94 Unsatisfied with this informal recognition of the Native fishery, Anderson pressed the issue, requesting that the Government formally exempt the Indians of the province from the Fisheries Act by Order In Council. Officials in Indian Affairs made similar requests. Powell, the Indian Superintendent for British Columbia, argued that the 1878 regulations, if enforced, "would act disastrously (sic) upon the Indians," and asked that they be modified.95 Chief Justice Sir Matthew Begbie suggested that nothing in the regulations should apply "to Indians fishing by their accustomed methods for the support of themselves or their tribes and not

---

93 BCARS, Gilbert Malcom Sproat’s Letterbooks, Sproat to the Deputy Minister of the Interior, 6 November 1878.
The Honourable David Mills, Minister of the Interior, wrote to Sir Albert Smith, Minister of Marine and Fisheries, citing the protection of Indian fishing rights under treaty and requesting "important modifications" to the regulations, "insofar as Indians are affected." None of the requests for formal exemption were granted.

Fisheries wrote to Indian Affairs that, "the Inspector of Fisheries for British Columbia has been instructed practically to exempt Indians from the operation of the Fishery Regulations of 30th May last, affecting the salmon fishery, in all instances where the fishing is not carried on amongst white people and does not injuriously affect other fishermen." At least for the moment, Fisheries was prepared to leave the enforcement of its fisheries laws, with respect to Native people, to the discretion of the Inspector of Fisheries, but it was not prepared to recognize this policy officially or publicly.

Increasingly, Anderson relied on legal arguments to defend the Native fishery. In 1877, John Deas, operator of a cannery near the mouth of the Fraser River, applied to Anderson for an exclusive lease on various salmon drifts near his operation. Anderson denied this and other requests for exclusive leases partly, "(i)n view of the complications connected with existing Indian rights." His exposure as a Commissioner on the Indian Land Reserve Commission to Native demands and needs likely convinced him that the

---

96 BCARS, GR 429, box 1, file 7, 89/78, Chief Justice Begbie to Attorney General Walkem, 26 June 1878.
97 Ibid., Mills to Smith, 18 July 1878.
98 Ibid., Commissioner of Fisheries Whitcher to Deputy Minister of the Interior Meredith, 5 August 1878.
99 Fisheries Annual Report, 1877, p. 290. The Provincial Legislature also passed a resolution requesting the Dominion Government, 'not grant exclusive rights to fish for salmon in the waters of British Columbia,' although this request was probably driven by the common law tradition of the public right of fish, and not a concern over Native title.
'hereditary rights' of Native peoples needed protection until satisfactorily recognized.\textsuperscript{100} Anderson was not about to grant leases that might infringe Native rights and create future problems. In response to further complaints from cannery owners and the reluctance of Fisheries to formalize its policy towards the Native fishery, Anderson referred the Minister to the recently published \textit{Papers Connected with the Indian Land Question, 1859-1875}. This volume contained copies of the fourteen agreements signed with various Native peoples on Vancouver Island between 1850-1854. Each agreement contained a clause providing the Native signatories the right, "to carry on (their) fisheries as formerly."\textsuperscript{101} Anderson argued that this right attached not just to the fourteen signing groups, but was recognition that Native people across the province had a right to continue practicing their fishery.

In this, Anderson had the support of Sproat as well. Sproat understood that the process of allocating reserve lands was an attempt to bypass further treaty making, but that the rights of Native people did not disappear simply because there were no treaties. A dispute over the location of a sawmill on part of the Cowichan Reserve (discussed in the following chapter) became a fisheries issue when Sproat learned that the owners of the mill proposed to float logs down the river, potentially damaging the Cowichan fish weirs. Sproat wrote to Indian Superintendent Powell that the Cowichan, although not signatories

\textsuperscript{100} In 1876 the Dominion had appointed Anderson as its representative on the Commission, a post that he held until 1878. Archibald McKinlay was appointed by the province and Gilbert Malcom Sproat was the joint appointee.

\textsuperscript{101} In 1989 the British Columbia Court of Appeal, in \textit{Saanichton Marina v. Claxton} (1989) 57 D.L.R. (4th) 161, agreed with the Tsawout Band, signatories of a treaty with Governor Douglas in 1852, that the building of a marina on their traditional fishing grounds would infringe their treaty right to carry on their fisheries as formerly.
of a treaty, had a right to continue fishing as formerly and therefore it would be necessary to receive their consent before floating logs down the river.\textsuperscript{102} Furthermore, the Cowichan weirs should be exempt from the weir prohibition in the \textit{Fisheries Act}.\textsuperscript{103} Fisheries responded to Sproat as follows: "... it should be clearly understood that Indians and whitemen are all alike subject to the fishery laws. There is, however, no present intention to apply the \textit{Fisheries Act} to the Indians of British Columbia."

Thus, both Anderson and Sproat proposed the Native fishery should be left alone, not only on compassionate grounds, or because it was an effective and efficient fishery, but also because Native people were \textit{legally} entitled to continue their fisheries uninterrupted by White settlement. "I have so far sought to place this subject before the Department," Anderson wrote, "on grounds solely of humanity, of justice, and of prudential consideration. I have now to add that, in my opinion, the exercise of the aboriginal fishing rights cannot be legally interfered with.\textsuperscript{105} Later in the same report he added this following unequivocal endorsement of a Native right to fish:

\begin{quote}
I am quite prepared to advocate and to sustain the legitimate and hereditary rights which I conceive to be inalienably secured to the Indians, both on grounds of abstract justice, and of formal concession by the Crown.\textsuperscript{106}
\end{quote}

Not everyone agreed with Anderson’s assessment of a legal right, particularly within the provincial government.\textsuperscript{107} Anderson’s understanding of the right he was

\begin{itemize}
\item \textsuperscript{102} NAC, DIA, RG 10, vol. 3663, f.9756, pt. 1, Sproat to Powell, 22 April 1878.
\item \textsuperscript{103} Ibid., Sproat to Supt.-Gen., 6 May 1878.
\item \textsuperscript{104} Ibid., Commissioner of Fisheries Whitcher to Deputy Minister of the Interior Meredith, 15 June 1878.
\item \textsuperscript{105} Fisheries Annual Report, 1878, p. 293.
\item \textsuperscript{106} Ibid., p. 299.
\item \textsuperscript{107} BCARS, GR 429, box 1, file 7, memo by provincial Attorney General Walkem, 2 July 1878.
\end{itemize}
enunciating is perhaps best explained by his years of service as HBC officer. Between 1832, when he arrived at Fort Vancouver at the mouth of the Columbia, and 1854 when he retired from active service, Anderson served the HBC as an officer throughout the Columbia Territory and New Caledonia. During his tenure he had command of several posts and conducted expeditions to find alternate fur routes for the HBC, made necessary after the Oregon Treaty in 1846 when the lower Columbia River became part of the United States and the HBC lost its route to the Pacific. Anderson traveled widely in the region and, as a HBC officer traded, traveled, negotiated and, on occasion, fought with Native people. Shortly after he retired from the HBC, Anderson wrote an article on the ‘Indian Tribes’ of the northwest coast that was later published in *The Historical Magazine*. Reflecting his own cultural biases, Anderson thought the ‘interior tribes’ much superior to those who lived on the coast and depended on fish.

Such of my readers as in the absence of other opportunity, may have formed their impressions of Indian life and character from the alluring fictions of Mr. Cooper; or those who on the opposite hand, have imbibed well founded prejudices from communication with the wretched fish eaters of the Columbia and its neighbouring coast, will do well to pause as regards the majority, between both extremes. Procuring an abundant livelihood with little exertion; gross, sensual, and for the most part cowardly—the races who depend entirely, or chiefly, on fishing, are immeasurably inferior to those tribes, who, with nerves and sinews braced by exercise, and minds comparatively ennobled by frequent excitement, live constantly amid war and chase. Notwithstanding Anderson’s prejudice against coastal Native peoples who relied on fish, the business of the HBC depended on Native-caught fish. Many of the HBC posts in the region relied on Native-caught salmon, and at Fort Langley the export of Native-caught fish was, for a time, the HBC’s primary commercial activity. As with furs, the HBC made

---

108 Anderson wrote a history of his experiences in *A History of the Northwest Coast*, 1878, a copy of which is located at the University of British Columbia, Special Collections.
little or no effort to catch fish itself, or to regulate or interfere with the Native fishery. It was content to purchase fish that the Native people supplied; the fishery remained entirely Native.

For Anderson then, the Native sale of fish was commonplace, even necessary for the continued viability of the fur trade in the west, and the right of Native people, “to carry on their fisheries as formerly,” would certainly have included the practice of selling fish. The enforcement of the Fisheries Act was not necessarily triggered by the Native sale of fish. The important distinction for Anderson was not between a food fishery and a commercial fishery, but rather was technological. If Natives fished in their “accustomed way” and “to supply their own wants,” then their fishery should be undisturbed and they should be allowed to sell fish freely. The phrase, “to supply their own wants,” included more than a food fishery. Anderson expected that Native people would sell fish as a means of supporting themselves. In his 1878 report, he described the salting operation of a Mr. Huson near the mouth of the Nim-Kish River on Vancouver Island. According to Anderson, “Mr. Huson procures his supply of fish chiefly from the Indians of the Nim-Kish River, at a very economical rate.”

Similarly, Anderson noted that the HBC at Fort Babine relied on fish purchased from the Babine. That post, wrote Anderson, “has always been a staple mart where large supplies of dried fish were procurable, for the supply of other posts, less fortunately situated on the head waters of the Fraser, not far distant. Twenty of thirty thousand salmon, or more if required, have thus been annually procured

---

110 Fisheries Annual Report, 1877, pp. 303-304, Anderson to Minister of Fisheries, 3 January 1878.
111 Fisheries Annual Report, 1878, p. 296.
by the Company for many years, bought from the Indians out of their enormous superfluity.”112 Anderson knew that the Babine fishery was a commercial weir-based fishery, conducted contrary to the Fisheries Act and Regulations, but he did not suggest that it was a problem or that it stop. Both the Nim-Kish and Babine fisheries fit nicely within the ex-fur trader’s paradigm: Native people were supplying a staple product, in this case fish, to a commercial company for food or for export.

Further reflecting his background in the fur trade, where cordial relations with Natives were a business imperative, Anderson believed that conflicts over fishing sites could be avoided if Whites behaved in an honourable manner. Anderson commented at length on the diligent and prudent efforts of a Mr. Robertson to build a small sawmill and fishing station on the Nass in 1878. According to Anderson, Robertson’s relations with the people of the Nass were exemplary. However, Anderson related strained relations between Native fishers and the canneries near the mouth of the Skeena. The North West Company complained that some of its nets had been seized by Natives who believed the Company was using their fishing grounds.113 “I cannot conceal my opinion,” Anderson wrote, “that much of the ill-success complained of (by the cannery owners) may be ascribed to the line of proceeding adopted.”114 Elsewhere, Sproat reported that settler pre-emptions and water rights for irrigation in Thompson territory were creating conflict on small streams where Natives caught fish for food and as “a commodity in intertribal

112 Fisheries Annual Report, 1878, p. 296.
113 NAC, DIA, RG 10, vol. 3643, f. 7705, Powell to Superintendent General of Indian Affairs, 29 April 1878.
114 Fisheries Annual Report, 1878, p. 296.
Native and non-interests were increasingly in conflict, but Anderson believed diplomacy would satisfy many of the concerns.

In comparison to the Inspectors that followed him, Anderson defended the Native fishery. Nonetheless, when Natives were using modern technology and selling to the canneries in competition with non-Native fishers, Anderson enforced the *Fisheries Act* and he instructed his officers to do likewise: "... where fishing with white men and with modern appliances, the Indians so fishing should be considered as coming in all respects under the general law." In one of the earliest, if not the first, instance of direct Fisheries action against a Native fishery, in 1881 Anderson investigated a report from Guardian Pittendrigh on the Fraser River that Natives, fishing above the tidal water, were selling their catch to a cannery on the coast. British Columbia's *Salmon Fishing Regulations* prohibited fishing with nets in non-tidal waters. The fishery was illegal, but it would almost certainly have been left alone were it not that Native people were selling to a cannery that was in competition with other canneries that were purchasing fish from non-Native fishers. Anderson stopped the practice on the basis that it was an abuse of 'Indian privilege', and that the fish were stale and not fit for canning. That passage of Anderson's report is reproduced below, and it marks an important turning point in fisheries policy.

Indian fishermen, fishing above tide-water with their own appliances, had been encouraged by several of the canneries to bring salmon down for sale, for canning purposes. On the report of Mr. Pittendreigh, (sic) I went to New Westminster, early in October, and after enquiry the practice was interdicted. A wide field for abuse was being opened, both in regard to the Indian

---

115 NAC, DIA, RG 10, vol. 3657, f. 9361, Sproat to Superintendent General of Indian Affairs, 4 February 1878.
116 Fisheries Annual Report, 1878, p. 293.
privilege and the maintenance of the character of the River brands; since the fish thus procured in a stale condition were not fit for canning.\textsuperscript{117}

This event marks a change in Anderson’s approach to the Native fishery, and it is evident in the language he uses. In closing the Native fishery, Anderson referred not to a right, but to a ‘privilege’. This is the first time that he used the word ‘privilege’ rather than ‘right’ to describe the Native entitlement to a fishery. The Native fishery had to be curtailed because the Indians were abusing their ‘privilege’ by selling fish.

The distinction between a right and a privilege is important. Privileges have a long constitutional history in Britain, particularly in reference to the ‘privileges’ of Parliament, and in certain contexts they can amount to a claim as strong as a rights claim. However, English dictionaries of the late nineteenth and early twentieth centuries suggest a fundamental distinction between the two words. A right is a “just claim”\textsuperscript{118} or, a “justifiable claim, on legal or moral grounds, to have or obtain something, or to act in a certain way.”\textsuperscript{119} A privilege, by one definition, is “a right, advantage, or immunity granted to or enjoyed by a person, or a body or class of persons, beyond the common advantages of others.”\textsuperscript{120} To privilege is to “invest with rights or immunities; grant a privilege.”\textsuperscript{121} The quality that distinguishes a privilege from a right is that a privilege is granted or invested by something or somebody else; it is not rooted, as a right, in a moral or legal claim. Although it has value and may, in some cases, be rigourously upheld or defended, a

\textsuperscript{117} Ibid., 1881, p. 203.
\textsuperscript{118} Johnson’s Dictionary of the English Language (London: 1882).
\textsuperscript{119} A New English Dictionary (Oxford: Clarendon Press, 1909). This was the first edition of what became the Oxford English Dictionary in 1933.
\textsuperscript{120} Ibid.
\textsuperscript{121} Johnson’s Dictionary of the English Language.
privilege suggests a discretionary benefit that may be removed by the one who has conferred it. By using the word privilege, Anderson suggested that any special claim Native people had to the fishery came to them by virtue of a Crown grant. Native fishing entitlements could be traced to the Crown, and not to any moral or legal foundation inherent to Native peoples. Thus, despite his exposure to the unresolved issue of Native title and his stated belief that Native people were entitled to legal recognition of their fishery, in this case Anderson believed that he was curtailing a privilege, something he could do at his discretion and without compensation, and not interfering with a right.\textsuperscript{122} Both his actions and his choice of words suggest that restricting this particular Native fishery was an important step towards confining the Native fishery, eventually, to a food fishery.

Anderson, the old fur trader, was cut from the same cloth as Governor James Douglas. In fact, the change in Fisheries policy in British Columbia after Anderson's death is similar to the change in land policy after Douglas' retirement in 1864. Much has been written about the colonial land policy under Governor Douglas, and of the change when Joseph Trutch assumed responsibility for land as Provincial Commissioner of Lands.\textsuperscript{123} Douglas had formally recognized a burden on Crown sovereignty in the 1850's


by making agreements (recognized by the courts as treaties since the Supreme Court of Canada decision affirming the BC Court of Appeal decision in *R. v. White and Bob*124) with Native peoples on Vancouver Island. Thereafter, no further agreements were made; formal recognition of Native title in British Columbia ended (except for the north east corner of the province that was included in Treaty 8). Nonetheless, Douglas adopted a relatively generous although entirely discretionary policy of recognizing Native land. He instructed the surveyors to respect Native wishes in the setting aside of reserve lands. Native peoples were to have their villages, burial grounds, important resource procurement sites, and other lands they deemed necessary. However, few of these reserve grants were officially recorded, and the discretionary nature of the policy made it relatively easy to change when Douglas left. When Trutch became Commissioner of Lands in 1864 he exercised his discretion to minimize future reserve grants and in some cases reduce existing reserves. Anderson’s discretionary approach towards the Native fishery continued for a few years after his death, only on terms less favourable to Natives. The process of confining the Native fishery to a food fishery gathered speed.

**Increasing surveillance**

When Anderson died in 1884 (reputedly after a short illness precipitated by exposure during an unexpected overnight stay on a patrol ship) he was replaced as Inspector of Fisheries by Captain George Pittendrigh, the guardian for the lower Fraser River. That year was relatively poor, both in terms of yield and market price for salmon, and 1885 was even worse, especially for what should have been a dominant year for

---

124 52 D.L.R. (2d) 481 (S.C.C.), affirming 50 D.L.R. (2d) 613, 6 C.N.L.C. 684 (B.C.C.A.)
Fraser sockeye. Only six canneries operated on the Fraser that year, only nine on the entire coast, down from a high of twenty-four in 1883 and seventeen in 1884. While Anderson had been careful to defend the Native fishery from charges of waste, Pittendrigh attacked it, blaming declining stock on Native consumption of young salmon.

... even when spared from these perils [natural hazards for salmon spawn such as floods, dry spawning beds, and predators] the instant it is hatched, the fish is exposed to new dangers, more especially in the fry state, becoming easy prey of the Indians who, if not closely watched, capture them in buckets full, and make them, with vegetables added, into soup. 125

While there is no doubt that Native people were catching salmon, both fry and mature fish, the charge that Native people were damaging the salmon stock by using fry to make soup is incredible given the quantities of mature fish that had been caught in preceding years by the cannery boats.

Pittendrigh’s tenure as Inspector of Fisheries lasted only until 1886, but it marked a distinct change in fisheries policy towards Native people. Although Anderson had begun to restrict the Native fishery to a personal use fishery, he had shielded it from direct attack by the cannery owners. Pittendrigh and the inspectors who followed were openly hostile to any Native fishery, and pushed it to the margins of the industry, first by confining it to a food fishery and then by restricting the food fishery. Pittendrigh, for example, recommended placing local fisheries officers on the Cowichan and Nanaimo Rivers to remove the Native fish weirs which Anderson had described as innocuous.

Notwithstanding Pittendrigh’s enthusiasm to enforce the law, state regulation in these early years was sporadic at best. When Pittendrigh assumed the responsibilities of

125 Fisheries Annual Report, 1885, p. 275.
Fisheries inspector for the province, he was also a justice of the peace in the New Westminster Police Court and spent much of his time, even during the fishing season, conducting trials that were unrelated to the fishery. Before 1885, state regulation on the Fraser was minimal, and almost non-existent elsewhere. Anderson made several trips up the north coast, accompanying Indian Superintendent Powell to inspect fishing stations and canneries in 1879 and 1881, but Fisheries had no permanent or even seasonal presence on the fishing grounds.

The subsequent expansion of Fisheries surveillance was driven, in large part, by the desire to control and restrict Native riverine fisheries. In 1885, Fisheries hired a local fisheries officer (known as a fisheries guardian) to patrol the Skeena River from Port Essington. The following year Thomas Mowat replaced Pittendrigh as the Inspector of Fisheries, and he hired guardians for the Cowichan, Nanaimo, Comox, Alberni, and Sooke Rivers and at Shawnigan and Sooke Lakes, all on Vancouver Island. The ostensible purpose of these appointments was to manage the Native weir fisheries, and at the end of the season the guardians on the first four rivers reported that the weirs had been opened during the weekly close times. On the mainland, Mowat divided the lower Fraser between two Guardians -- one responsible for the lower reaches near its mouth and the other for the upper Fraser valley. To justify these appointments, Inspector Mowat weighed various explanations for the continuing shortfall in expected salmon runs, including fluctuating water levels in spawning beds and the cyclical nature of the salmon, and concluded that to stop the excessive catch in the estuaries by the cannery boats and Native fishing in the
headwaters was “the most plausible solution to the difficulty.”

Non-Native fishing needed regulating, but the Native weir fisheries needed to be stopped.

“but not for sale, barter or traffic”

In 1887, Guardian John McNab, recently appointed to the Skeena and Nass Rivers, reported that the existing licensing scheme was not working in the northern region. Cannery salmon were caught ‘almost exclusively’ by Natives he reported, and although some boats were licensed, a good portion of the catch was transferred to these boats from unlicensed boats, and then delivered to the canneries as though caught under licence.

Inspector of Fisheries Mowat related these concerns to the Minister, claiming that some of the canneries were willfully ignoring this practice and that this fostered discontent among Natives when the guardians attempted to enforce the law. By circumventing the law, the canneries encouraged Natives to think they had a right to sell fish without a licence.

Although the 1879 regulation requiring a licence to fish for salmon had been adopted by Anderson in 1882, there was little enforcement on the northwest coast. When the guardians attempted to enforce the licence requirement in 1888 they met strong resistance from Native fishers. Informed by Guardian McNab that Natives on the Skeena (probably Tsimshian and Gitksan) were refusing to purchase licences, Inspector of Fisheries Mowat went at the end of the 1888 fishing season to investigate. The Gitksan at Hazelton questioned him about the fisheries laws, about the licences and about who received the licence money. They stated emphatically that they would not purchase

---

126 Ibid., 1886, p. 248.
127 Ibid., 1887, p. 253.
licences, and further, that they would continue to fish as they were accustomed. Unable to compel Native fishers to buy licences, Mowat attempted to enforce the licensing scheme through the canneries. He informed the cannery operators that if they purchased fish from unlicensed Native fishers, then they must purchase the necessary licences. Fish had to be caught under licence, even if the canneries purchased licences when Native fishers refused. However, Mowat believed this directive was insufficient to stop the illegal fishery. The only way to enforce the regulations, he wrote to the Minister, was to send a "sufficient force of guardians or a small armed cruiser to seize all nets, boats and canoes which do not comply with the regulations."

McNab encountered similar difficulties enforcing the licensing requirement on the Nass. In the middle of the 1888-season he met with Nisga’a at Kincolith, at their request. They asserted ownership of the Nass River and of the fish, and rejected any attempt by the Dominion Government to assert its jurisdiction, particularly the efforts of Fisheries to collect licence fees. Furthermore, they refused to buy licences and insisted that any licence fees collected from non-Native fishers belonged to them. In fact, by sending its officers to collect licence fees, the Dominion violated Nishg’a law. The Nass was not an open-access fishery; it was owned by the Nishg’a who rejected the Dominion’s competing claim. Of the meeting, McNab reported:

They asked me many questions about the law in regard to catching salmon of the Naas River; wanted to know exactly how much money I had collected this year, and what I had done with it. After being satisfied on these points, the chief very gravely informed me that I had done very wrong in collecting money for fishing on the Naas, without having asked permission from him, that the river belonged to him and to his people, that it was right that white men should buy licenses, but that he and his people should receive the money, that they were entitled to it all; but that as I had been sent to collect it, they were willing that I should retain half for my

---

128 Ibid., 1888, p. 243.
trouble. After consultation amongst themselves, I was told that they had intended to demand half the money collected this year, but would let it pass until next year, and charge me to inform the Government to that effect ... 129

While its officers were active in the field, attempting with mixed success to enforce Dominion fisheries law, the Fisheries Branch in Ottawa was preparing new regulations. In November 1888, it rescinded the regulations of 1878 and replaced them with a more comprehensive set for British Columbia. There were three significant additions: a boat registration scheme that required fishers to notify Fisheries of their equipment and intended fishing location before receiving a licence; a provision that enabled Fisheries to limit the number of boats in a region; and an exemption for “Indians”. For the first time the Native fishery was specifically addressed in the British Columbia Regulations. Fishing for salmon required a lease or a licence issued by the Dominion government, but ‘Indians’ were exempt from the licensing requirement and the close times if they were fishing, “for the purpose of providing food for themselves”. The terms were as follows:

1. Fishing by means of nets or other apparatus without leases or licences from the Minister of Marine and Fisheries is prohibited in all waters of the Province of British Columbia;
   Provided always that Indians shall, at all times, have liberty to fish for the purpose of providing food for themselves but not for sale, barter or traffic, by any means other than with drift nets, or spearing. 130

The wording of this section was ambiguous; it was unclear on the basis of the text whether Indians were free to catch fish for food, except by drift net or spear, but were not allowed to sell fish without a licence, or, whether they could catch fish for food by any means, and sell fish caught by drift net or spear without a licence. The intention was certainly the

129 Ibid., pp. 249-250.
former--Natives were not to sell fish without a licence--and Fisheries clarified this interpretation when the regulations were amended in 1894.\(^\text{131}\) The corollary of excluding the Native ‘food-fishery’ from the licensing requirement, however, was that any fishing by Natives for sale must be under licence. Native and non-Native commercial fishers had to be licensed and abide by a set of rules that regulated the mesh size of nets, confined drift nets to tidal waters and prohibited nets in fresh waters, restricted nets to no more than one-third the width of a river, extended the fishing closure from 6 a.m. Saturday to 6 a.m. Monday, and required fishers to register their fishing boats and identify their boats and nets. The final clause of the 1888 Regulations enabled the Minister to limit the number of fish boats.\(^\text{132}\)

Armed with the new regulations, Guardian McNab returned to the Nass in 1889 and seized three boats belonging to Natives who were fishing for the canneries without a

\(^{131}\) *Canada Gazette*, Vol. 27, p. 1579.

\(^{132}\) Except for a short section closing the trout fishery from 15 October to 15 March, all the provisions pertained only to the salmon fishery. They are as follows:

2. Meshes of nets used for capturing Salmon shall be at least six inches extension measure, and nothing shall be done to practically diminish their size.

3. (a) Drifting with salmon nets shall be confined to tidal waters, and no salmon net of any kind shall be used for Salmon in fresh waters.

(b) Drift nets shall not be used so as to obstruct more than one-third of any river.

(c) Fishing for salmon shall be discontinued from 6 o’clock a.m. on Saturday to 6 o’clock a.m. on the following Monday ...

4. (a) Before any salmon net, fishing boat or other fishing apparatus shall be used, the owner or persons interested in such net, fishing boat or fishing apparatus shall cause a Memorandum in writing setting forth the name of the owner or person interested, the length of the net, boat or other fishing apparatus and its intended location, to be filed with the Inspector of Fisheries who, if no valid objection exists, may, in accordance with instructions from the Minister of Marine and Fisheries, issue a fishery license ...

(b) All salmon nets and fishing boats shall have the name of the owner or owners marked on two pieces of wood or metal attached to the same ...

5. The Minister of Marine and Fisheries shall, from time to time, determine the number of boats, seines, or nets, or other fishing apparatus to be used in any of the waters of British Columbia.
licence. McNab reported that the Natives reacted strongly, with “a great deal of loud and threatening talk.” Nevertheless, after several days they agreed to apply for licences. With licence applications in hand, McNab released the boats without collecting a fine. To do so, he reported, would have required “a large special force,” but even without imposing a fine he believe the point had been gained.\textsuperscript{133} Thus, by 1889 Native people around the province who were fishing to supply canneries found themselves subject to Dominion fishery regulations that Fisheries was actively enforcing. Their willingness to comply with the licensing scheme varied. Despite initial reticence in the northern fishery, some Natives were prepared to purchase licences. The guardian on the Skeena reported that when he arrived two weeks into the 1889 season, Natives sought him out with their licence fees and requests for licences.\textsuperscript{134} However, while some on the Skeena were buying licences, McNab reported that those on the Nass, “adhere very tenaciously to what they consider their privileges.”\textsuperscript{135} The issue of licensing flared again when, in 1891 Fisheries raised the license fee to $20. The increase provoked Natives to complain not only about the increasing costs, but also about the fundamental injustice of having to pay a fee to a White government for what they believed were their fish.\textsuperscript{136} However, the dispute over the $20 licensing fee seems to have dissipated by the following year. The guardian on the Skeena reported that Native fishers bought licences from him when he arrived shortly after the

\textsuperscript{133} Fisheries Annual Report, 1889, p. 257.
\textsuperscript{134} Ibid., 1890, p. 187.
\textsuperscript{135} Ibid., 1891, p. 167.
\textsuperscript{136} NAC, DIA, RG10, vol. 3849, f. 75,317, Department of Fisheries to the Department of Indian Affairs, April 1891.
beginning of the season. Over the course of the season he levied and collected two fines, both against Native fishers for fishing during a closing.\(^\text{137}\)

It was not just the licence requirement that caused some Natives to object. When the guardian at Rivers Inlet attempted to enforce the regulation prohibiting fishing above the tidal boundary in 1893, he met with considerable Native resistance. He reported that, "(t)hey have the idea that because they cannot fish as high up the river as they please, their rights are being encroached on; and although they came down when ordered, yet they were saucy and slow to do so..."\(^\text{138}\) Non-compliance was a common form of Native resistance to regulations that they perceived infringed their rights. However, resistance was also a function of increasing enforcement; Fisheries officers were now actively regulating the commercial fishery.

Although the regulations prohibited any sale of salmon without a licence, the enforcement of the provision still varied depending on the buyer. Unofficially, Fisheries did not pursue Native fishers who were trading or selling fish to other Native groups for their consumption. The sale or barter of salmon between Native peoples continued unimpeded by the licensing requirement. Generally, the licensing requirement was only enforced if Natives were selling to the canneries, or in competition with other non-Native fishers. Even this requirement was weakened by a reluctance on the part of Fisheries officers to prosecute Native fishers who sold fish to supply the local fresh fish market. In August 1889, Indian Agent Lomas of the Cowichan Agency expressed concerns about the licensing scheme. He indicated that he knew, "of no instance of an Indian being punished

for selling salmon but this is simply because Indians are the chief and only reliable
providers for the fresh fish markets on the Coast, and the feeling of the inhabitants is so
much against the regulation that scarcely any Justice would take an information against an
Indian under it." In response, Inspector of Fisheries Mowat wrote to the Minister to
defend the regulation. He claimed it was informal policy, “not to prosecute an infirm
Indian for selling a Salmon or a string of Trout to a farmer, and have allowed the
Guardians the same discretionary power.” Nevertheless, Mowat argued that requiring
Natives to purchase a licence was necessary as a management tool (to conserve salmon
stock), as a source of revenue (according to his records, two thirds of salmon fishing was
done by Natives) and as a matter of equity (Natives and non-Natives should be treated
alike).

Under Mowat’s direction Fisheries officers became increasingly vigilant and began
to enforce rigorously the mandatory licence for salmon sales. At the urging of Indian
Agent Lomas, A.W. Vowell, the Indian Superintendent for BC, forwarded Native
concerns about the licence requirement to Indian Affairs in 1891. Vowell reported much
dissatisfaction among the Natives of the BC coast, “on account of the restrictions placed
upon them as regards the taking of salmon with spoon or herring bait and offering the
same, to a very limited number, for sale.” He suggested that the licence fee, if enforced
against Natives catching fish for local fresh markets, should be set as low as possible.

139 NAC, DIA, RG 10, vol. 3828, f. 60,926, W.H. Lomas, Indian Agent at Quamichan, to Moffat,
Acting Indian Superintendent, Victoria, 23 August 1889.
140 NAC, DIA, RG 10, vol. 3828, f. 60,926, Mowat to John Tilton, Deputy Minister of Fisheries,
17 October 1889.
141 NAC, DIA, RG 10 vol. 3849, file 75,317, A. W. Vowell to L. Vankoughnet, Deputy
Superintendent General Indian Affairs, February 1891.
Fisheries responded by announcing a permit policy that allowed Natives to “troll for salmon in the bays and sea shores of British Columbia; but not in the estuaries or fluvial portions of rivers,” and to sell their catch for a licence fee of $1 instead of the $5 fee charged to independent commercial fishers.\textsuperscript{142} The policy was introduced informally and unofficially without any change to the Regulations, but rather by letter between government departments.

Although Fisheries was increasingly vigilant, the degree of surveillance was sporadic given the lack of personnel, their lack of equipment and the size of the territory to patrol. The Fraser, the most heavily regulated river in the province, was patrolled in 1887 by two guardians in row boats. One of them wrote that, “to protect the 70 miles of fishing ground is more than two in row boats can do efficiently.” He requested Fisheries to employ a steamer to improve their mobility\textsuperscript{143} Mowat reported the obvious—that enforcement depended on the guardians: “New regulations for salmon and trout fishing have been adopted for this province; but so far as their being carried into active operation is concerned, the matter rests entirely with the Department as to the number of guardians to be employed for their proper enforcement.”\textsuperscript{144} The need for a power launch on the Fraser became particularly apparent in 1889 when Fisheries instituted its most invasive control of the fishery. The 1888 amendments to the British Columbia Fishery Regulations enabled Fisheries to limit the number of fish boats, and in 1889 it acted on this power, limiting the number of licences on the Fraser River to 450. Of these, 350 licences went to

\textsuperscript{142} NAC, DIA, RG 10 vol. 3849, file 75,317, S.P. Bauset, Acting Deputy Minister of Fisheries, to L. Vankoughnet, Deputy Supt. General of Indian Affairs, 4 February 1891.

\textsuperscript{143} Fisheries Annual Report, 1887, p. 257.

\textsuperscript{144} Fisheries Annual Report, 1888.
cannery owned boats and the remaining 100 were allocated to independent fishers. The following year, after pressure from the independent fishers, Fisheries increased the quota to 500, allowing for 150 independently held licences.\textsuperscript{145} The cannery licences, allotted on the basis of past pack size, cost $20 for each of the first 20 licences and $50 for every licence thereafter. Independent fishers could hold only one licence, costing $5. The experiment lasted for three years. In 1892 the limit was removed, and any "\textit{bona fide} fisherman, being British subjects and actual residents of the province" was entitled to a commercial licence for a fee of $10.\textsuperscript{146} The Guardians on the Fraser received their steam launch in 1890.

By 1893 the number of guardians assigned to patrol the fisheries had risen to 14, and the Fisheries 'General Service' budget for British Columbia was almost $5,500.\textsuperscript{147} There were four guardians on the Fraser River, two each on the Skeena and the Nass Rivers, one each on the Courtney and Cowichan Rivers, one shared between Victoria and Esquimalt, and one at each of Rivers Inlet, Burrard Inlet and Mud Bay. In addition, special guardians were appointed occasionally to help enforce close seasons.\textsuperscript{148}

\textsuperscript{145} Canada Gazette, Vol. 23. p.1903. \\
\textsuperscript{146} 1 June 1892. (find OIC) \\
\textsuperscript{147} British Columbia Sessional Papers (1905), 5 Ed.7, Prefontaine to Fulton, 12 January 1905. \\
\textsuperscript{148} Fisheries Annual Report, 1893, p. cxxxvi.
“an act of grace”

Despite increasing efforts to control the commercial catch, Fisheries did not attempt to regulate the Native food fishery until the 1890s. In the 1870s, Anderson had advocated strongly that the Dominion recognize a legal right to a Native fishery. By the end of his tenure he had begun to see the Native sale of fish as a privilege rather than a right. This was the predominant view through the 1880’s, and was reflected in the regulations requiring licences for the commercial fishery. Only the Native food fishery was exempt. However, by the 1890’s Fisheries began to view the Native food fishery as a privilege as well. The notion that Natives had a claim to their fisheries that underlay Dominion regulation disappeared entirely. In 1891, Charles Tupper, the Minister of Marine and Fisheries from 1888 to 1894, described the practice of exempting the Native food fishery from regulation as, “an act of grace” dependent on the goodwill of the Department of Fisheries:

... the valuable privilege they now enjoy of taking fish for their own use, whenever and howsoever they choose, such permission is not to be considered as a right, but as an act of grace, which may be withdrawn at any time, should it be found that it is abused or used for other purposes than those for which it is granted, or in such a manner as to embarrass the action of this Department and interfere with its officers, in the performance of their duties.149

Before he left office in 1894, Tupper amended the fishery regulations to reflect this view of the Native fishery. The 1894 amendment contained a provision requiring that Native people receive permission from the Inspector of Fisheries to procure fish for food. The Dominion had assumed control of the entire fishery. The regulations, set out below,

149 Letter from the Honourable Charles Tupper, Minister of Marine and Fisheries to the Honourable E. Dewdney, Minister of the Interior, 24 August 1891. (emphasis added)
required Indians to apply for a food fishing permit and further restricted their methods of catching fish:

1. Fishing by means of nets or any other fishing apparatus whatever for any kind of fish without licenses from the Minister of Marine and Fisheries is prohibited in any of the waters of the province of British Columbia.
   (a). Provided always that Indians may, at any time, with the permission of the inspector of fisheries, catch fish for the purpose of providing food for themselves and their families but for no other purpose, but no Indian shall spear, trap or pen fish on their spawning grounds, nor catch them during the close season, or in any place leased or set apart for the natural or artificial propagation of fish, or in any other place otherwise specially reserved.

6. No nets of any kind shall he used for catching any kind of salmon in the inland lakes or in the fresh or non-tidal waters of rivers or streams. But Indians may, with the permission of the inspector of fisheries, use dip-nets for the purpose of providing food for themselves and their families, but for no other purpose.\textsuperscript{150}

With this amendment, the Native fishery was reduced to a rump food fishery, at least on paper. It would take longer for the regulations to be enforced across the province, but they were in place. A commercial licence was available to each ‘\textit{bona fide} fisherman’ for $10; businesses involved in shipping, salting or selling fish could purchase seven licences; and cannery operators could obtain up to twenty licences. In addition, the regulations provided that “every settler or farmer actually residing on his lands or with his family being a British subject” was entitled to obtain a ‘domestic licence’ for the sum of $1. The licence enabled the holder to fish in any waters of the province, “for the use of the owners’ families and not for sale trade or barter,” subject to prescribed limits during the close season and a net length limit of 100 yards. Essentially, the domestic licence was a food fishing licence. Apart from the net restriction and the possibility of a close season,

\textsuperscript{150} \textit{Canada Gazette}, Vol. 27, p. 1579.
for a $1 licence fee a non-Native settler had the same rights to fish for food as a Native person.

Where had the idea come from that Native fishing entitlements were subject to the will of the Crown? Charles Tupper, Minister of Marine and Fisheries, was also a lawyer and was almost certainly familiar with the decision of the Judicial Committee of the Privy Council in the case of *St. Catherine's Milling & Lumber Co. v. The Queen*.151 In this case, a dispute between the Dominion Government and Ontario over the right to issue a timber cutting permit, the Privy Council discussed the nature of Aboriginal rights to land. Lord Watson determined that Aboriginal rights were rooted in the *Royal Proclamation of 1763*, and, “that the tenure of Indians was a personal and usufructuary right, dependent on the good will of the Sovereign.” Crown title underlay Native title, the later existing solely at the good will of the Crown. Neither consent nor compensation were required to extinguish title. Similar language appeared in court cases closer to the British Columbia fishery. In an 1886 decision regarding disputed land at Metlakatla, Chief Justice Begbie held that Indians had no rights except those that “the grace and intelligent benevolence of

151 (1888), 14 App. Cas. 46 (J.C.P.C.); denying an appeal from the Supreme Court of Canada (1887), 13 S.C.R. 557; upholding the lower court decisions of the Ontario Court of Appeal (1886), 13 O.A.R. 148, and Chancellor Boyd at trial (1885), 10 O.R. 196 (Ch.). In 1873, under the terms of Treaty 3, the Ojibway ceded part of their land to the Dominion Government. A portion of that land was subsequently included within the provincial boundaries of Ontario. The Dominion Government issued a permit to the St. Catherine’s Milling & Lumber Co. to cut timber within the ceded lands, and Ontario disputed the right of the Dominion Government to issue the permit. The Dominion argued that by virtue of section 91(24) of the BNA Act, 1867, it had jurisdiction over ‘Indians and land reserved for Indians.’ The Privy Council held that on the basis of the Royal Proclamation of 1763, which reserved land for Indians, the Dominion did have jurisdiction over the territory, but once the Indian title was ceded under treaty, the province acquired the beneficial interest.
the Crown may allow.¹⁵² Tupper’s remarks were neither unusual nor exceptional by the 1890s.

In many ways this represented the closure, or perhaps the enclosure of a resource. In the twenty years from 1874, when the Department of Marine and Fisheries began the legislative process to bring the *Fisheries Act* to British Columbia, to the 1894 *Fishery Regulations for the Province of British Columbia*, the fishery went from an unregulated and relatively untapped resource to a highly regulated and exploited industry. Although many Native people joined the industry as fishers or cannery workers, many others resisted as their share of the catch was reduced to a food fishery for which they needed permission from the Inspector of Fisheries. Those who wanted to join the commercial fleet faced obstacles as well. There was work for Natives as hired hands, but they had difficulty obtaining licences. Charlie Caplin, identified as “Chief of the Musqueam Indians” testified before the British Columbia Fishery Commission in 1892. The Commission had been appointed to review the regulation and supervision of the British Columbia fisheries, particularly the Fraser River salmon fishery. Caplin testified that his people were unable to purchase all the licences they wanted. They had ten licences, but wanted more. Those with licences owned their boats and nets and fished independently, selling to the canneries. Those without licences earned less as cannery employees.

*By Mr. Wilmot:*

Q. Well, what is it the chief wants?—A. (After being interpreted.) He wants to tell you that it is about licences— there are lots of Indians on the same ranch as himself and they can’t get licences.

Q. How is it they cannot get licences?--A. He says he don't know what is the reason, but it has been for lots of times--some Indians get licences, but he could never get one.

Q. Ask him how many Indians get licences?--A. Ten Indians get licenses on his ranch.

By Mr. Armstrong:

Q. Ten Indians of his tribe?--A. Ten only.

By Mr. Wilmot:

Q. Where do they fish when they get licences?--A. They fish always on the North Arm of the Fraser.

Q. What do they fish with?--A. With gill-nets, the same as whitemen.

Q. They follow the same regulations as are given by the department for the whitemen?--A. Yes, sir.

Q. Do they pay the same fee?--A. Just the same, sir.

Q. Do they fish for their own use, or for sale to canneries?--A. They fish for sale to the canneries.

Q. Are there many other Indians besides these ten who fish for the canneries without licenses?--A. Ten more fish for the canneries without licenses.

Q. How do they fish without licenses?--A. They work by the day, sir.

Q. Do any work on shares?--A. They always work by the day, sir.

Q. What usual price per day do they get?--A. $2 for a net-man, and $1.50 for a boat-puller.153

Caplin testified that he was also concerned about the size of the nets that white fishers were using. He thought they were too large to let sufficient salmon reach the spawning grounds and that the stocks were in danger. Even during his lifetime the runs had declined dramatically, he testified, to the point where they were dangerously low.

Further up the Fraser River the Commissioners heard similar testimony from a witness identified as "Captain George, a native chinook Indian, of Harrison River." Mr. Tiernan, the Indian Agent (who also acted as the interpreter), testified just before George that fifty Indians had wanted to testify, but he convinced them that one was enough to

convey their message to the Commission. When Commissioner Wilmot asked what his concerns were, George replied:

A. He says that the whole of the Indians only get forty licences, and that they are very much displeased at the number they get.

Q. What is the number of their tribe?--A. His tribe is about 120 all told, but that does not cover all—the forty licences cover all the tribes.

Q. Then their complaint is because they only get forty licences?--A. He say the white men come here and get licences and his people were here first. It is the same old story. The White men come and get licences first in preference to them, and he says they should not.154

Thereafter George's testimony gets superseded by argument between the Commissioners and Indian Agent Tiernan. The Commissioners state that without the Whiteman the Indians would do nothing with the fish so they should not complain. Commissioner Higgins pointed out, “You see if even the Indians catch less fish than the average whiteman, he gets some $200 at least for them, and if it was not for the canneries they would get nothing at all.”155

Native fishing was confined on all sides. “Indians” could still fish for food, but that right was increasingly confined, and when they attempted to join the industrial commercial fishery they were thwarted by discriminatory licence restrictions. Licences were allotted to White fishers to encourage settlement. A few Natives received licenses, but most were told they could either fish for food or work for the canneries as employees. In the early years cannery work was plentiful, but increasingly it was taken by immigrants. The importance of Native labour diminished, but cannery control of the resource, through the

154 Ibid., p.392.
155 Ibid., p.395.
Department of Marine and Fisheries, would not. The legal capture of the resource was complete.
2 The Law Runs Through It: weirs, nets, lumber mills and fly-fishing on the Cowichan River, 1877-1937

From headwaters in Cowichan Lake, the Cowichan River winds 47 kilometres east through the narrow and fertile flood plain of the Cowichan Valley on Vancouver Island to the ocean (see Figure 2.1). The river is at its lowest from July to September, before rising with the fall rains and cresting with the winter rains of December and January. Chinook (spring), coho and chum (dog) salmon spawn in the river or its tributaries, as do steelhead trout. All anadromous, these fish live their early lives in fresh water, migrate to the ocean, and return to their natal streams to spawn.\textsuperscript{156} These four anadromous fish, with different but interconnected lifecycles, became the focus of dispute between the Cowichan people and the Canadian state for control of the river.

Just as the river runs through the Cowichan Valley, so law runs through the struggle to control the river. The Canadian state sought to control the river, channeling its use and its resources to lumber mills, fly-fishers and cannery fishers, and away from the Cowichan. It did so with law, and in the process denied the legitimacy and efficacy of Cowichan law. The Cowichan defended their legal traditions, insisting that human use of the river and the fish in it were subject to Cowichan laws. The result after sixty years of struggle, however, was a river subject to the laws of the Canadian state. The Cowichan built their last weir in 1936, a symbolic end to the last vestiges of Cowichan control. The

\textsuperscript{156} Leonard M. Bell and Ronald J. Kallman, \textit{The Cowichan-Chemainus River Estuaries: Status of Knowledge to 1975} (West Vancouver, B.C.: Fisheries and Marine Service Pacific Environment Institute, Environment Canada, 1976), provide a detailed examination of the Cowichan River estuary.
Cowichan were confined to a subsistence fishery, supervised by the state, on what had been their river.

To focus on the result, however, is to miss the processes of colonialism at work. Weirs had been prohibited on British Columbia rivers under Canadian law since 1877, yet the Cowichan continued to build them for sixty more years. To understand the processes of colonialism, particularly the role of law in remaking a people and a territory, one must look to the historical detail. The history of the conflict over fish is the history of conflicting legal cultures. The protracted struggle on the Cowichan River reveals those legal cultures, starkly contrasted over sixty years in opposition to each other.

The Cowichan River and its People

The Cowichan people lived in winter villages along the Cowichan River. They spoke Island Halkomelem, closely related to the Halkomelem dialects spoken on the lower Fraser River. In February the Cowichan traveled to the east side of Saltspring Island to harvest herring and herring spawn-on-kelp. They dug camas root from semi-cultivated beds in the nearby islands and surrounding territory on Vancouver Island. In May they returned to build weirs for a run of chinook salmon. Chinook have two runs on the Cowichan River. One appears in April or May as the water level begins to fall to its summer low. The Cowichan caught the end of this run and the end of the steelhead run that began in October. In late June or early July they crossed the Strait of Georgia to a fishing station near the mouth of the Fraser where they caught and dried sockeye salmon.
and collected edible plants in the surrounding territory to augment their winter food supply. In September they returned to fish in the Cowichan River. 157

Through the fall the Cowichan used as many as fifteen weirs in the river to catch salmon and steelhead trout, some of which they smoked and stored. 158 The high oil content of chum made them particularly valuable because they preserved well. The first runs to move upstream with the fall rains of mid-October were the chinook, steelhead and coho. Chinook would congregate in Cowichan Bay in August and September, migrate to the middle and upper reaches of the Cowichan River with the first fall rains, and spawn in the latter half of October. Steelhead would begin to run at the same time, but their spawning activity would not peak until March or April. Coho would gather in Cowichan Bay from late September to early November, running with the chinook in mid-October, peaking in November, and continuing through December. The chum would follow a similar pattern to the coho, although slightly later. They would begin running in October and peak in late November, spawning in the lower portions of the main stems of the river. 159 The Cowichan weir fishery continued until the late fall rain raised the level of the river to the point where the weirs could no longer withstand the current and the debris.

The three salmon species migrate once to the ocean and return once to spawn, but steelhead trout travel within the river for several years before migrating to the ocean.

159 See Bell and Kallman, (1976).
They spend their first summer in natal streams, migrating to the warmer water in the lower reaches of the Cowichan for the winter. They repeat the cycle in their second year. In the spring of their third year they migrate to the ocean. This migration pattern meant that a young steelhead could pass through the weirs several times before returning to spawn as a mature fish in its fourth year.

A Cowichan headman (occasionally a headwoman) directed the building of a weir (see Figures 2.2, 2.3, 2.4). These were high status people who not only held the right to build a weir, but were usually the head of a house or a family as well. The headman selected a location for a weir and from 4-6 members of his family to help build it. Once built, fishers speared or netted the fish in the traps from the top of the weir. The weirs worked best in shallow water during low run-off, and the Cowichan prized sites a short distance above rapids. The weir belonged to its builders and they took as many fish as they wished. If they were at a weir on the lower river, however, they were required to let enough fish through for the upper weirs. When the builders had taken their fill, others could use the weirs. Once a weir had been constructed, the headman had a right to re-build in the same location the following year. The wicker screens were removed, but the upright poles were left in the water to validate the claim.160

The Cowichan were entitled to build the weirs because, according to Cowichan legend, they were the descendants of the first people to build weirs on the river. The first

---

person to drop from the sky, a man named Siyoletse, moved with his wife and children to a place on the Cowichan River, the site of the village at Somenos. Once at their new home, they discovered there were no fish. Siyoletse built a weir, but still there were no fish. He fished every day for a long time, but always returned home empty-handed. One day Siyoletse took his baby daughter in her cradle-basket to the river. He tied the basket behind the weir with a long cedar bark rope and left her to drift on the current. When he returned the next morning, the cradle was floating on the water, but his daughter had disappeared. The trap behind the weir, however, was full of salmon. The baby girl had been transformed into a salmon. She had been sacrificed so that the salmon would spawn in the Cowichan River and provide her people with food forever. The Cowichan, it is said, are all descendants of Siyoletse, and it is because of this that they have a right to the salmon.\textsuperscript{161}

\textbf{The Indian Reserve Commission and Cowichan land}

In 1877 the Indian Reserve Commission traveled through the Cowichan Valley allocating reserves and settling land disputes. Governor Douglas had purchased the land from Native peoples to the north and south of the Cowichan on Vancouver Island in the early 1850s, but no agreement was ever made with the Cowichan. Commissioner Gilbert Malcom Sproat recorded a series of their outstanding concerns.\textsuperscript{162} Mostly the complaints involved settler encroachment on Cowichan land, but one involved their access to the Fraser River fishery. The Cowichan had heard that their fishing station on the lower

\begin{flushleft}\textsuperscript{161} Rozen, Ethnozoology, pp. 28-29, 112-113.\\\textsuperscript{162} National Archives of Canada (“NAC”), Department of Indian Affairs (“DIA”), RG 10, vol. 3662, file 9756, pt. 1, Sproat in a “Rough Memorandum on Cowichan Reserves” to the Provincial Attorney General, February 1878.\end{flushleft}
Fraser had been purchased by whites and wanted to know if this was true. Sproat acknowledged that the land had been sold, but indicated to the attorney general that the absentee owner had not objected to the Cowichan's seasonal presence. Nonetheless, Sproat thought conflict was inevitable. In 1877 he estimated that 1000 Natives camped at the site during the fishing season.

In 1878, Sproat returned to the Cowichan Valley to find that the province had sold 60 acres of land the Reserve Commission set aside for the Cowichan to a settler, William Sutton, who intended to build a lumber mill (see Figure 2.1). Sproat blamed "the unbusinesslike inaction of the Provincial government" for this mistake. Sutton was an innocent purchaser, but the Provincial Government, with all the documents in its possession, should have known that this was reserve land and not available for sale. However, Sproat was more concerned about the Cowichan weir fishery than the land. Running logs down the Cowichan River to the mill would damage the weirs, interfering with the Cowichan's right to the fish. Sproat wrote to the Indian Superintendent in Victoria, Israel Wood Powell:

In connection both with the clearing of the River and the requirements of the proposed saw mill in getting saw-logs down the River, I may remind you of the absolute necessity of thoroughly explaining to the Indians the effect of these operations upon their numerous fishing weirs, and of obtaining their intelligent consent to such operations and their agreement with your approval to receive compensation for any injury to their weirs.

---

163 Ibid., Sproat to Superintendent General Indian Affairs, 26 April 1878.
164 The province did not formally recognize the Cowichan reserve until 1938, by Order in Council 1036.
165 NAC, DIA, RG 10, vol. 3662, file 9756, pt. 1, Sproat to Indian Superintendent Powell, 22 April 1878.
Sproat’s comments precipitated an extended discussion between the Department of Indian Affairs ("Indian Affairs") and the Fisheries Branch of the Ministry of Marine and Fisheries ("Fisheries") over the applicability of the *Fisheries Act* to Native peoples in British Columbia. Fisheries argued that the Act prohibited weirs and they must be removed. Indian Affairs defended the Cowichan’s use of weirs both as a right and a necessity. The result of this intra-governmental debate was a practical, if not formal, exemption for Native peoples. Fisheries announced that Native peoples and Whites alike were subject to the Act, but informally instructed its Inspector to exempt Natives when not fishing among Whites.\(^{166}\)

The land, however, remained a problem. Sutton wrote to the Minister of the Interior, Sir John A. McDonald, informing him that he had invested $28,000 in his mill and other buildings and that he hoped some amicable arrangement could be reached.\(^{167}\) Indian Affairs then wrote to Powell suggesting it would be desirable not to disturb Sutton, and wondering whether he thought the Cowichan would consent to surrender their land?\(^{168}\) Powell reported that because the Commission had allocated the land to the Cowichan generally and not to any one band, he thought it would be difficult to gain the consent of the entire group. Instead, he suggested it would be simplest to erase the reserve grant from the Reserve Commissioner’s Minutes of Decision. After all, the land was of little value to the Cowichan, and with the mill they would be able to purchase lumber more

\(^{166}\) See discussion in Chapter 1, pp. 29-33.

\(^{167}\) *NAC, DIA, RG 10, vol. 3662, file 9756, pt.1, Sutton to McDonald, 29 March 1879.*

\(^{168}\) *Ibid., Deputy Superintendent General Indian Affairs to Powell, 19 April 1879.*
cheaply. Further, he had consulted with the Provincial Attorney General Walkem and had received his approval. Would the Dominion Government consent as well?¹⁶⁹

Sproat was astonished when he heard of Powell’s solution. Nothing was more certain, he argued, to reinforce distrust among Native people of White government than this duplicitous action. How could Powell recommend in good conscience, “that without any communication with the Indians or explanations to them or their consent obtained, the two Governments should “erase” a portion of the decision of the Reserve Commission embodying one of the most formal, deliberate and solemn acts which the Crown could place on record”? The province had the written decision and relevant maps at its disposal at least nine months before it mistakenly sold the land to Sutton. It was small wonder that the provincial attorney general supported Powell’s position because the whole mess was his government’s costly mistake. Sproat argued for a negotiated solution; the mill was likely useful to the Cowichan, but they were in the best position to judge. Further, they were in the best position to judge the compensation due if they were to relinquish their land and fish weirs. Sproat thought tact and maybe a little money would settle the conflict, but only “if the people had confidence.” “There has been,” he wrote, “too much man of war business on the coast and too little plain kindly dealing.” The taking of Cowichan land was too much like the former.¹⁷⁰

Indian Affairs took Sproat’s advice; Powell was instructed to negotiate a settlement.¹⁷¹ On October 22, 1879 four Cowichan chiefs signed an “Agreement”,

¹⁶⁹ Ibid., Powell to Supt.-Gen. Indian Affairs, 21 May 1879.
¹⁷⁰ Ibid., Sproat to Supt.-Gen. Indian Affairs, 26 July 1879.
¹⁷¹ Ibid., Deputy Supt.-Gen. Indian Affairs to Powell, 20 August 1879.
witnessed by Powell but not signed by anyone else, conveying the land to Sutton in exchange for his payment of $200. The matter seemed closed, but in subsequent correspondence it became clear that the agreement, as written, did not replicate the Cowichan's understanding. The chiefs had wanted a lumber wagon instead of the money, perhaps because they would have the wagon while Indian Affairs would hold the money in trust. Powell thought a single lumber wagon would create disputes among them, so he 'prevailed' upon the chiefs to accept the money. Five wagons (one for each band) would cost approximately $350, and Powell promised he would ask Indian Affairs to cover the additional cost. Indian Affairs eventually agreed, but only if it was viewed as a cost "incurred in order to encourage the Indians at following agricultural pursuits," and not as an obligation arising from the agreement.

The dispute over the agreement seems to have simmered into the following year. Sutton offered to cover any additional costs if that would solve the matter. His offer does not seem to have been accepted, but concern appears to have dissipated. However, the glaring omission from the agreement was fish weirs. The $200 from Sutton, or five lumber wagons from Sutton and Indian Affairs, were to compensate the Cowichan for their land. Sproat's initial concern -- that running logs would damage the fish weirs and interfere with the Cowichan right to fish as formerly -- had been forgotten. Or perhaps the issue had been raised, but the Cowichan had not been prepared to bargain about their

172 Ibid., "Agreement between the undersigned Chiefs of the Cowichan tribes of Indians resident in the Cowichan District and William Sutton of the same place. Gentleman." Sutton had paid $66 to the Provincial Government for the land the year before.
173 Ibid., Dep. Supt.-Gen. to Powell, 22 Nov. 1879.
174 Ibid., Sutton to Vankoughnet, 29 March 1880.
weirs. Whatever the reason, the weirs were not in the agreement and they would become the focus of subsequent dispute.

**Early challenges to the Cowichan weirs**

In the early 1880s the Cowichan weirs received little attention from Dominion officials. Some Cowichan grew potatoes on their reserve land, but salmon remained the focus of economic activity. The traditional summer migration to fishing grounds on the lower Fraser continued, but instead of drying and storing the fish, the Cowichan sold their catch to the canneries or worked for wages as fishers and cannery workers. W.H. Lomas, appointed Indian Agent for the Cowichan Agency in 1881, reported that during the summer much of the Agency was, “almost entirely deserted, men, women and children having found paying employment at the salmon canneries on the Fraser.”\(^\text{175}\) Employment prospects fluctuated with the Fraser salmon run, but when it was available, wage work was an attractive addition to the traditional Cowichan migration. With the end of the salmon season on the Fraser, many Cowichan moved south into the Washington Territory to work in the hop fields, before returning to Vancouver Island for the winter. Instead of harvesting and preserving berries, the Cowichan used paid employment to their advantage. This seasonal movement replicated traditional migrations, but the Cowichan now participated in the industrial economy, working for money.

In April 1885, Fisheries Inspector Pittendrigh received a letter from the lieutenant governor in Victoria complaining about the damage to the fishery caused by the Cowichan

\(^\text{175}\) *Canada Sessional Papers* (“CSP”), Department of Indian Affairs Annual Report (“DIA Annual Report”), 1881.
weirs. The Cowichan were probably taking a mix of spring salmon and steelhead, caught with their weirs. Unlike many of the complaints about Native fisheries around the Province, this one did not come from cannery owners; there were no canneries on the Cowichan River or the vicinity. The Cowichan River, close to Victoria and renown for its steelhead, had become the favourite fly-fishing stream of the local elite. When the Esquimalt and Nanaimo Railway was completed in 1885, the Cowichan Valley became that much more accessible. Sport fishers and those involved in the tourist industry were concerned to preserve the Cowichan as a fly-fishing paradise — one that Issak Walton, the seventeenth century author of *The Complete Angler*, a book that was immensely popular in North America in the late nineteenth century, could not have imagined (see Figures 2.5 and 2.6).

Pittendrigh went immediately to investigate. He found several weirs spanning the River, and instructed Indian Superintendent Powell to explain to the Cowichan that to preserve their food supply and protect the fish they must open the weirs every week from six a.m. Saturday to six a.m. Monday. Pittendrigh acknowledged that the weirs by themselves might not be a problem, but with other users taking fish by other means, it was now necessary to enforce the law as a conservation measure. He did not mention what law he was asking Indian Affairs to enforce, and his instructions do not coincide with either the *Fisheries Act* or *Regulations*. The *Act* prohibited any fishing apparatus, such as...

---

176 Izaak Walton, *The complete angler; or, Contemplative man's recreation; being a discourse on rivers, fish-ponds, fish, and fishing, not unworthy the perusal of most anglers*, was first published in 1653, but was re-published many times, particularly in the late nineteenth and early twentieth centuries, for example: (London, S. Bagster, 1893); (London: J. Lane, 1897); (Oxford: H. Hart, 1900), (London: Methuen & Co., 1903).

177 NAC, DIA, RG 10, vol. 3713, file 20618, Pittendrigh to Powell, 28 April 1885.
the Cowichan weirs, that obstructed ‘the main channel or course of any stream’. The Regulations contemplated salmon fishing with nets in tidal waters, and mandated a close time from eight a.m. Saturday to midnight Sunday. Pittendrigh’s instructions, therefore, reflected neither the Act nor the Regulations. In a sense, he had given the Cowichan an informal permit to fish with weirs, something he had no authority to do. This was his compromise, another illustration that the implementation and enforcement of fisheries law on the west coast remained highly discretionary in the 1880s. Fisheries officers in British Columbia were unable to enforce the law as written. They did, however, attempt to enforce it as far as they could, and frequently requested assistance. In 1886 Pittendrigh recommended that Fisheries appoint an officer for Vancouver Island.

In 1887, W.H. Lomas, the Indian Agent for the Cowichan Agency, filed his first report as the fisheries guardian on the Cowichan River. He claimed that better attention was being paid to the fishery closures than formerly. The compromise of opening the weirs on weekends appeared to be working. However, the increasing pressure on fish in the river was beginning to show. A Cowichan Council met in June 1888 to consider how to secure their supply of fish and to express their concern about the growing number of seine fishers in Cowichan Bay who were catching fish for the Victoria markets. These fishers were using seine nets to catch the schooling fish that appeared in Cowichan Bay before the fall rains. The Council passed the following resolution:

178 S.C. 1868, c.60, s.13(4).
179 Canada Gazette, Vol. 11, p. 1258.
180 CSP, Department of Fisheries Annual Report ("Fisheries Annual Report"), 1887. Lomas continued in his roles as Indian Agent and Fisheries Guardian until 1894 when the conflicts between the positions became too great and he was dismissed from Fisheries service.
That this Council earnestly protest against the granting of licences to fish with seines or Gill nets in Cowichan Bay as the same is only done during the time that the river is too low to admit of the fish ascending to their spawning grounds, and thus last year the fish were all taken, before the Indians had a chance of catching their winter food, which has caused much distress among the Cowichan Indians.\textsuperscript{181}

Lomas suggested that if Fisheries decided to grant this “favour”, it should do so on the condition that the Cowichan relinquish their “right” to use weirs. The right, he claimed, was only held by two or three families in each tribe.\textsuperscript{182} Fisheries replied that several seine licences had already been issued for the season and would not be rescinded, but that the territorial limits set for seine fishing would minimize the problem by keeping the nets away from the mouth of the river.\textsuperscript{183} In September 1889, the Minister announced that all salmon fishing within the Cowichan River estuary must occur beyond a line drawn due north from the Cowichan Wharf (see Figure 3.1).\textsuperscript{184} Then in November, 1890, Fisheries banned salmon fishing with seine nets in British Columbia.\textsuperscript{185}

Otherwise, the late 1880s were a period of relative calm in the Cowichan Agency. Lomas, in his capacity as Indian Agent, wrote that the fish and game laws were causing increasing hardship among the Cowichan who remained in the district, particularly the elderly. Those who were able traveled to the Fraser and to the Washington Territory for seasonal employment, or found work in the Island lumber mills. In these years, well paid wage labour was relatively easy to find. However, those who could not travel were

\textsuperscript{181} NAC, DIA, RG10, vol. 3801, file 49,287, “Resolutions passed by Cowichan Indian Council June 4th 1888”.
\textsuperscript{182} Ibid., Lomas to Powell, 18 June 1888.
\textsuperscript{183} Ibid., Deputy Minister of Fisheries to Powell, 5 July 1888.
\textsuperscript{184} Canada Gazette, vol. 23, p. 546.
\textsuperscript{185} Canada Gazette, vol. 24, p. 876.
increasingly destitute, in large part because of the fish and game laws. In August 1887 Lomas wrote:

All the younger men can find employment on farms or at the sawmills and canneries, and many families are about leaving for the hop fields of Washington Territory; but the very old people who formerly lived entirely on fish, berries and roots, suffer a great deal of hardship through the settling up of the country. The lands that once yielded berries and roots are now fenced and cultivated, and even on the hills the sheep have destroyed them. Then again, the game laws restrict the time for the killing of deer and grouse, and the fishery regulations interfere with their old methods of taking salmon and trout.\(^{186}\)

When the Fraser salmon runs were light or the Washington hops failed, those reliant on the wage economy suffered as well. Lomas, imagining that the Cowichan would evolve into stout farming stock, thought that in the long run this was a good thing. The uncertainty of wage labour would encourage them to cultivate their reserve land and become a land-based farming community. Some of the Cowichan were beginning to farm, but first and foremost they were fishers.

The conflicting uses of the Cowichan River were a further problem. The lumber mills employed a few Cowichan, but running logs down the river damaged the weirs, destroyed fish habitat and eroded farm land. From 1891-94, Lomas insisted that the government take action to prevent the disappearance of valuable farm land, fences, barns and houses. White settlers held a meeting in Duncan in February 1894 and resolved to ask the government to remedy the damage done to the river by the logs.\(^{187}\) Nonetheless, the Cowichan were hit hardest. The combination of White settlement, fish and game laws, saw-logs, and wage labour migration forced an increasing number of elderly Cowichan to turn to Indian Affairs for assistance. Their age-old patterns of subsistence were no longer

\(^{186}\) CSP, DIA Annual Report, 1887, p.105.

\(^{187}\) *Victoria Daily Colonist*, 10 February 1894.
possible as the land and people were made over to fit the new industrial economy, to
provide space for well-heeled agriculturists, or for the sport of a wealthy few.  

"There's the lock-up!"  

In January 1894, Lomas informed Inspector McNab that he had found commercial
gill-nets on the Cowichan River, but could not determine who owned or had set them. He
inquired whether he were justified in seizing the nets. McNab replied that it was his duty.
If the Cowichan owned the nets, "it was exceeding the permit granted to them as it was
not in my opinion, that they should use commercial fishing nets, for catching fish in the
Rivers for their own use during the close time."  

Despite continuing questions about
ownership, McNab charged several Cowichan men for violating the Fisheries Act. If
convicted, they faced fines up to $20 and costs, or between eight days and one month in
jail in default.  

The permit system was new. Native food fishing privileges had been formally
recognized in 1888 Regulations, but after 1894 Natives had to receive permission from
the Inspector of Fisheries to exercise those privileges. The charges were laid before the
1894 Regulations requiring permission for a food fishery were in force, but according to
McNab, the Cowichan had exceeded their permit. They were using commercial nets, even

---

189 Victoria Daily Times, 29 June 1895.
190 NAC, Department of Fisheries ("DMF"), RG23, file 583, part 1, McNab to Deputy Minister of
Marine and Fisheries, 17 February 1894.
191 Under section 3(a) of the Fishery Regulations for the Province of British Columbia, salmon
nets were prohibited in fresh waters. Canada Gazette, Vol. 28, p. 1903.
192 The Act also gave a justice of the peace or fishery officer discretionory authority to reduce any
penalty if, "the offence was committed in ignorance of the law, or that because of poverty of the
defendant the penalties imposed would be oppressive". R.S.C. 1886, e.95, s.18(1).
if only for a food fishery, and they must be confiscated. The case never got as far as sentencing. Lomas reported that it “fell through” because there was no evidence that the Cowichan were taking the fish for “sale, barter or traffic”. Since 1888, the Regulations had allowed Native people, at all times, to catch fish “for the purpose of providing food for themselves, but not for sale, barter or traffic.”

The Department of Fisheries was not pleased with McNab’s work. It informed him that he should pay all costs connected with the prosecution. The deputy minister demanded to know on what grounds McNab had advised Lomas to seize the nets, given that he knew neither who owned them nor whether they were being used for any purpose other than providing food. Was he not aware that the Regulations allowed Indians to fish for the purposes of providing food, and that it did not matter that they were using commercial nets if they were fishing for food? McNab suspected, however, the Cowichan were catching fish under the guise of their food fishery, and were selling them to White merchants for the Victoria markets. He was convinced he had acted correctly, believing it irresponsible for a Fisheries officer to leave unclaimed nets in the water, a practice that was deadly to fish. The deputy minister replied that McNab ought to have known better than to seize Native nets without evidence that the fish were being sold.

The prosecution stirred the Cowichan to action. Although the accused had been acquitted, their nets had been confiscated and they felt increasingly harassed by Fisheries

---

195 NAC, DMF, RG23, file 583, part 1. Deputy Minister of Marine and Fisheries to McNab, 1 March 1894.
196 *Ibid.*, McNab to Deputy Minister of Marine and Fisheries, 9 March 1894.
officers. The Cowichan met with church and government officials later in 1894 to protest the increasing enforcement of fishing regulations.198 Given the debacle of the first prosecution, Fisheries declined to prosecute again in 1894. However, it did rearrange its personnel. McNab requested that Fisheries remove Lomas from the “position which requires him to enforce regulations which in his opinion are so objectionable.”199 In September he hired a local resident, James Maitland-Dougall, who had lived about a kilometre from the mouth of the Cowichan River since 1886, to replace Lomas.

The respite for the Cowichan was short-lived. McNab would not issue permits to allow the Cowichan to use weirs for their food fishery. In April 1895, he instructed Maitland-Dougall “to see that no dams or other obstructions were erected by the Indians or others.”200 Nonetheless, the Cowichan built a weir, and on June 10, 1895, Maitland-Dougall charged Jack Quilshamult, a Cowichan and member of the Somenos Band, with unlawfully maintaining a fish weir and unduly obstructing the passage of fish in the Cowichan River,201 contrary to the Fisheries Act.202 The newly amended Act provided for a maximum penalty on a first offence of $20 and costs, or up to one month imprisonment in default. The penalty doubled for a second offence and increased again for a third. It

198 Ibid., Bishop Bermens and the Honourable Theo. Davie presided at the meeting, while Indian Superintendent Vowell and Indian Agent Lomas endorsed the protest. See letter from Geolbs VanGoethem, 23 June 1895.
199 NAC, DMF, RG23, file 1600, pt. 1, McNab to Deputy Minister of Fisheries, 17 June 1894.
200 NAC, DMF, RG23, file 1469, pt. 1, McNab to Deputy Minister of Fisheries, 25 April 1895.
201 Ibid., Lomas to Vowell, 10 June 1895. The name of the defendant, Jack Quilshamult, appears in the Victoria Daily Colonist, 28 June 1895.
202 Fisheries Act, S.C. 1894 c. 51 s. 5.

14.(16) No one shall erect, use or maintain in any of the waters of Canada, whether subject to an exclusive right of fishery or not, any net, weir, fascine fishery or other device which unduly obstructs the passage of fish; and the Minister of Marine and Fisheries or any fishery officer may order the removal of or remove any net, weir, fascine fishery or other device which, in the opinion of such minister or fishery officer, unduly obstructs the passage of fish.
also provided a justice of the peace or a fishery officer discretionary power to reduce any penalty based on ignorance of the law or undue hardship. However, the severe punishment was the potential destruction of fish weirs.

Lomas appeared with Quilshamult at a preliminary hearing before two justices of the peace, Edward Musgrave and W.H. Elkington. He argued four points. First, the weirs may temporarily delay fish, but do not prevent them from reaching their spawning grounds. Second, in exchange for the Cowichan's promise to open their weirs on weekends, the Indian Reserve Commissioners in 1876 had promised that their rights to take salmon would always be protected. Third, the Cowichan had never surrendered their right to obtain food with their traditional methods. And finally, the Cowichan had once used twelve to twenty weirs and this proved that the weirs do not obstruct the passage of fish. Lomas asked that the trial be set for June 17th to provide time to consult with Indian Affairs and the Provincial Attorney General Helmcken. According to Lomas, the JPs thought that any agreement with the Reserve Commission had been extinguished by the subsequent regulations. The only option was for the Cowichan to request a food fishing permit, and they granted Lomas time to secure this permit.

Lomas was concerned that the Cowichan would retaliate against a conviction by refusing anglers and hunters access to their reserve lands. This was a credible threat, for the Cowichan Indian Reserve No. 1 surrounded much of the lower river and many prime hunting and fishing sites (see Figure 2.1). He turned to the Province, but the attorney

---

203 S.C. 1894, c.51, s.7.
204 NAC, DMF, RG23, file 1469, pt. 1, Lomas to Vowell, 10 June 1895.
general replied that fishing in the Cowichan River was a Federal responsibility. Inspector of Fisheries McNab would not accommodate the weir fishery either. The agreement with the Reserve Commission never had any force, he argued, and if it did the Cowichan must still fish “by lawful methods”. The Act prohibited weirs, and McNab indicated he had no authority to relax the law. The case would be decided “according to the laws in force when the offence was committed.” Given the liberal interpretation of the Fisheries Act and Regulations by his predecessors, McNab’s insistence that the letter of the law be enforced was somewhat unusual. Furthermore, he was incorrect. Even where Native food fishing conflicted with the Act, the Regulations enabled him to grant food fishing permits. He choose not to.

Unable to secure an agreement with Fisheries, Lomas requested a further adjournment to seek legal counsel for Quilshamult. The case was rescheduled, on the condition that the weirs be removed pending the outcome. Lomas hired a Victoria barrister, S. Perry Mills, and promised “an interesting defence.” The Cowichan did not sit idly by. They asked Lomas for a meeting at the Indian Affairs office in Duncan, but he declined, apparently not wanting to appear too closely associated with the Cowichan's position, although he was organizing the legal defence. Three days before trial the Cowichan met at the Quamichan school house and unanimously adopted eight resolutions

---

205 Ibid., Deputy Attorney General, Arthur G. Smith, to Vowell, 12 July 1895.
206 Ibid., McNab to Vowell, 12 June 1895.
207 S.C. 1886, c. 95, s.16. The regulations had “the same force and effect” as the Act, “notwithstanding that such regulations extend, vary or alter any of the provisions of this Act respecting the places or modes of fishing or the times specified as prohibited or close seasons.”
208 NAC, DMF, RG23, file 1469, pt. 1, Lomas to Vowell, 17 June 1895.
209 Victoria Daily Colonist, 20 June 1895. To what extent the defence was financed and run by Indian Affairs is not clear, but Lomas was clearly involved in his capacity as Indian Agent and not as Fisheries Guardian.
which they sent to Indian Superintendent Vowell. The Cowichan asserted a *right* to the fish, to their fishing methods, to hunt game, and to land. The also alleged that White fishers were damaging the stock and should be regulated more closely. The resolutions began:

1. We always had the right to take any fish, by any means, at any time, in any of the waters of British Columbia, and we want to preserve that right in its entirety.
   
   We formerly did not protest against the Fishery Regulations -- except last year -- because their true sense was unknown to us.

2. We claim that the fish is our property; we own it by natural right, and therefore we consider as unjust all Government Regulations depriving us totally or partly of that right. Our history proves that we do not destroy the fish. On the other hand it is evident that the white population does destroy it. The protective regulations then should embrace the white people only, not the Indians. We do take fish for our own daily use, to have a living, and we make use of all the fish we take; the white population on the contrary takes fish mostly for pleasure's sake, and usually destroys the small fish by throwing it away.

   * * * *

3. Now that we are aware of the object of what we claim to be unjust regulations, we strongly protest, and we are decided to keep hold of our natural rights, were we to suffer imprisonment.  

On June 26 Jack Quilshamult appeared before Musgrave and Elkington for trial. Once again Fisheries failed to secure a conviction. The hearing had been improperly adjourned, and the justices of the peace acquitted Quilshamult. Mills, Quilshamult's lawyer, doubted that any defence would have succeeded if the matter had been tried on substantive grounds. This he thought unjust, and recommended that the Government change the law to allow Native food fishing by weir. The Cowichan weir fishery, he

---

210 NAC, DMF, RG23, file 583, part 1. The resolutions were recorded "in substance", by Father Geolbs VanGoethem and sent to Vowell, 23 June 1895.


212 Statutes of British Columbia, *Summary Convictions Act*, 1889, c.26, s.47, allowed adjournments, but for no longer than one week, and the trial had been adjourned for sixteen days.
argued, had been expressly reserved to them by the Indian Land Commission and should not be interfered with.\footnote{Ibid., Mills to Tupper, 2 July 1895.}

A letter to the Editor of the \textit{Victoria Daily Times} from "A Cowichan Indian" appeared two days after the trial. It publicized the Cowichan’s pre-trial resolution that they would risk imprisonment to defend their rights. In a rhetorical manner the author asked, was not their sustenance more important than the sport fishery of ‘a handful of white sportsmen’? Given the uncertain wage income from the Fraser canneries and Washington hop-fields, did they not need their weir fishery to survive the winters? And even had they secure incomes from other sources, why should they be expected to compromise their fishing rights? In a powerful challenge to the Government’s disregard of their fishing rights, the author wrote:

And suppose we were all farmers with plenty of food and clothing; does that by labouring acquired deprive us of our immemorial right of fishing? Since when does Mr. Dunsmuir lose his right to the benefits of his E. & N. railway belt because his Wellington mines pay him more than a hundredfold? Why he should lose all his rights and have nothing, besides enough to keep body and soul together, like us poor Indians.\footnote{\textit{Victoria Daily Times}, 29 June 1895.}

Regarding the recent amendments to the \textit{Fisheries Act}, the author wrote:

We learn that our paternal government by an act of parliament has deprived us of the right of fishing at any time of the year for our daily food. We look upon it as unjust and a most shameful act, and we do not hesitate to say publicly that we will not submit to it. The idea that a few sportsmen, the instigators of such inequitous law, should be allowed to come from all parts of the country to catch in our rivers and lakes hundreds of pounds of fish for mere pleasure’s sake, impudently exhibit their grand catches before us now starving Indians, who have the first right to the fish, and seemingly say with a smile of arrogance on their face: Saaiwash, look out. Don’t you catch a fish in the river. There’s the lock-up!”\footnote{\textit{Victoria Daily Times}, 29 June 1895.}
After this courtroom setback, Fisheries took no further action in 1895, despite the fact that without permits the Cowichan were breaking the law. Fisheries Officer Maitland-Dougall reported that both Lomas and Mills asked him not to prosecute again until they made arrangements with Indian Affairs and Fisheries. In June, the Cowichan set off for work on the Fraser.

The case is interesting on many levels. By pitting Fisheries against Indian Affairs, it highlighted the divisions within the Dominion Government. McNab, as the Inspector of Fisheries for British Columbia, was intent on enforcing an increasingly restrictive set of fisheries laws. He wanted to replace the discretionary approach towards fishery law enforcement in the province that, he believed, had unnecessarily softened the impact on Natives. His job was to enforce the law, not to exercise discretion by exempting Native fishers. However, in his zeal to enforce the weir prohibition, he ignored the provisions that gave him discretionary power to allow a weir based food fishery.

Although generally supporting the Cowichan, Indian Affairs found itself in an increasingly untenable position. Lomas was no longer both Indian agent and Fisheries guardian, but the contradictions inherent within Indian Affairs made his job as Indian agent almost as difficult. On the one hand, Lomas consistently defended the Cowichan fishery from the Fisheries officials who would eliminate it. On the other hand, as an official of the Dominion Government, he was responsible for encouraging Natives to abide by its law. The tension between these two positions became evident when Lomas, who organized the Cowichan legal defence, refused to let them meet in his offices until after the trial. He was, I suspect, trying to maintain a semblance of detachment, perhaps even objectivity,
while at the same time marshaling resources of the Canadian state to defend the Cowichan against that same state. The Dominion was in the awkward position of not only financing, but also conducting both prosecution and defence.

The prosecution is also interesting for the response it elicited from the Cowichan. The Cowichan argued on many levels in defence of their weirs. The arguments were not new, but the court proceedings gave them a forum and a wider audience. On the basis of legal entitlement and need, the weirs were theirs to erect. Legal entitlement arose from two sources: long, uncontested use that pre-dated White settlement, and an agreement with the Reserve Commission. The details of that agreement included guaranteed access to fish, if the Cowichan agreed to open their weirs on weekends. The right to fish was also connected to the allocation of land. The Cowichan had agreed reluctantly to small reserves because the Reserve Commission promised that their fishing rights would not be disturbed.

The Cowichan argument based on need was, quite simply, that they needed the weir caught fish to survive. In response to Fisheries accusations that the Cowichan weirs were destroying the fish stocks, the Cowichan argued that the weirs had been in use for generations without any appreciable decline in the numbers of trout or salmon. Whites were damaging the stock, they argued, and should be regulated by the state. The Cowichan could manage on their own. As if to confirm the Cowichan concerns, later that
year a fisheries officer in a patrol boat discovered thirteen unlicensed boats from the Delta Cannery on the Fraser River fishing in Cowichan Bay.216

Finally, the faith of the JPs in the legal process is intriguing. Edward Musgrave, a member of the Vancouver Island Fish and Game Protection Society (the “Society”), would become one of the most outspoken opponents of the weirs. Nonetheless, when he had an opportunity to convict a Cowichan man for constructing a fish weir, he acquitted Quilshamult on the basis of a procedural failing. If the law was simply a tool for settler society to recreate a territory and a resource in its own image, this was the opportunity. Yet, Musgrave deferred to the formal requirements of the law rather than use the authority granted him by the state to restrict the Native fishery. He expected, no doubt, that the Cowichan weirs would be removed in the near future. This case had failed, but the next would succeed. When Fisheries failed to prosecute again that year, the Society commented on the lack of action, its members stating that the weirs were “the worst sort of obstruction to the run of both salmon & trout.”217 If they were not a problem in the past, they were now because the Cowichan had a market and were catching more fish, particularly trout. To help stop the “illegal fishing” the Society offered some of its members as “honourary inspectors”. They also proposed that Fisheries extend the rod fishing season.

216 NAC, DMF, RG23, file 1469, pt. 1, Captain John T. Walbran to Captain Gaudin, Agent of Marine and Fisheries, Victoria, 5 October 1895.
217 Ibid., James Ewing Bridgman, Secretary, to the Minister of Maine and Fisheries, 19 December 1895.
"idle & well-to-do Indians"

While some demanded tighter restriction, many settlers supported the Cowichan. In 1896, two hundred and eighty petitioners, "residents, Indian Chiefs and Indians of the Cowichan District", sent a statement of support to Indian Affairs. The petition set out six points: the Cowichan claim the right to catch fish for the purpose of providing themselves with necessary food; they have always enjoyed this right, until recent legislative changes; the Cowichan cannot live without salmon; the Cowichan do not destroy the fish; if their rights are restricted the Dominion Government must provide support; and the Cowichan have always been law-abiding and kind to the white population. On these grounds the petitioners asked that Indian Affairs re-establish the Cowichan's rights and privileges.²¹８

The opinion that mattered most, however, was that of the Dominion Fisheries Commissioner, E.E. Prince. Prince, a professor of zoology and comparative anatomy, had been appointed Commissioner in 1893 to bring a scientific approach to fisheries management.²¹⁹ In August 1896, he visited the Cowichan River to investigate the weirs, accompanied by Fishery Officer Maitland-Dougall and Indian Agent Lomas, the latter acting as an interpreter. Prince observed that much of the land reserved for the Cowichan was not being farmed, that except for a few old people most of the Cowichan earned high wages on the Fraser and the hop-fields, and that in his opinion, "(f)ew white settlers (were) so fortunately placed". He concluded his survey of the river with a three-pronged

²¹⁸ Ibid., 28 January 1896.
attack on the Cowichan fishery: the fishery was illegal, the Cowichan had sufficient resources, and the technology was primitive.

It is an outrage that so fine a river should be injured by the idle & well-to-do Indians. For a certain no. of days per week the gates could be lifted with each; but my own view is that no such barriers should be allowed. Ex-Inspector McNab on other rivers caused them to be removed & in some cases personally Destroyed them. These weirs are:
1. A violation of the Act c 95. s 14 ss 4&5
2. Unjustifiable as the Indians on the whole are well off & have good land
3. Unnecessary as other methods of fishing would suffice.

Indian Affairs continued to impress upon Fisheries the need to relax the regulations on the Cowichan, but Fisheries adopted Prince’s position: the Cowichan claims of hardship were exaggerated and that they should obey the law. In 1897 Maitland-Dougall prevented the Cowichan from erecting weirs before they left for the Fraser in June, and when they returned he again warned them against the practice. In response, delegates from the prominent Cowichan families drafted a statement denouncing the Dominion law. The weir prohibition was both “unjust and unlawful”, they asserted, and the destructiveness of their technology was a “myth”. Their land had never been purchased by any government, and their right to fish as formerly had been promised them by the Hudson’s Bay Company, former governments, and the Indian Reserve Commission. As a compromise that had worked in the past, they offered to remove the

---

220 These sections prohibited obstructing the main channels of streams and prohibited nets or other devices that obstructed entirely the passage of fish.
221 NAC, DMF, RG23, file 583, part 1, Memorandum written 4 September 1896.
222 Ibid., Deputy Minister Marine and Fisheries to Deputy Supt.-Gen. Indian Affairs, 10 June 1897.
223 NAC, DIA, RG 10, vol. 3908, file 107,297-1, Lomas to Vowell, 9 October 1897.
weirs two days each week. Fisheries replied that the Cowichan had no grounds for claiming these “exceptional privileges.”

In response to accusations of favouritism towards the sports fishers, Prince replied that the law was intended “solely to prevent the extermination of fish.” In fact, not all sport fishers supported his approach. A deputation of twenty-four “sportsmen” told Prince, much to his astonishment, that the weirs did not hurt the fishing, that the Cowichan treated them well, and they wished Fisheries would not interfere, a view that Prince reported was shared by official circles in Victoria. They were more concerned about the damage caused by running logs down the river. Prince attributed this ‘sympathy’ towards the Cowichan to the belief that Native peoples had certain rights by virtue of their previous occupation of the land, and to a fear that the Cowichan would retaliate if these rights were challenged. He believed the sympathy misplaced. The Cowichan were well provided for, he argued, and the best way to prevent retaliation was to act forcefully. The approach preferred by Indian Affairs, to gradually integrate the Native population by turning them to agriculture, was misguided: “The B.C. Indians are essentially a fishing race & to make them farmers is as hopeless as trying to make tea-planters of Esquimaux.” The Cowichan would remain fishers, thought Prince, but they must abide by Dominion laws designed to protect the fish. The laws, however, were

---

225 Ibid., Deputy Minister Marine and Fisheries to McInnes, M.P., 4 October 1897.
226 30 November 1897 RG23 file 583 part 1.
227 Ibid., “Memo re Conference with Anglers in Victoria, B.C. re Cowichan River”, by E.E. Prince, 22 June 1897.
228 NAC, DMF, RG 23, file 1469, pt. 1, “Memo re Indian disturbances”, by E.E. Prince, 8 February 1897.
229 Ibid. (His emphasis.)
designed to protect fish for particular users, and Native people were not among the favoured few. Fisheries had begun stocking the Cowichan River with steelhead and Atlantic salmon at public expense, but the program was foolish, argued Prince, if the fish were caught in Native weirs. The subsidized fish were to enhance the lucrative sports fishery, not the Cowichan. Prince dismissed the Cowichan offer to open the weirs on weekends as “unworkable”.230

No trespassing

In 1898 Indian Affairs attempted to catalogue Indian fishing privileges across the country. Lomas reported that no fisheries in the Cowichan Agency had been “properly reserved for the Indians”, and he noted a long list of Cowichan grievances that he fully supported.231 Rather than formally recognize Native fishing rights, Fisheries was moving in the opposite direction. Maitland-Dougall, with much of the settler population, believed the weirs did not harm the fishery, but he continued to seize nets.232 In March 1898, he reported that the Cowichan, with the assistance of Indian Agent Lomas, had posted signs on their reserves threatening to refuse access to the river to White anglers.233 Hearing this, Commissioner Prince instructed McNab to remove the weirs, authorizing him “to employ such aid and take such measures” as he judged necessary.234 He reconsidered Edward Musgrave’s proposal to employ sports fishers as honourary inspectors of the Cowichan River, and requested a list of names.235

230 Ibid.
231 NAC, DIA, RG 10, vol. 3908, file 107,297-1, Lomas, 10 January 1898.
232 Ibid., Maitland-Dougall to McNab, 7 March 1898.
233 Ibid., McNab to Deputy Minister of Marine and Fisheries, 10 March 1898.
234 Ibid., Prince to McNab, 19 March 1898.
235 Ibid., Department of Fisheries to Hewitt Bostook, 19 March 1898.
A few days later Maitland-Dougall charged Jim Quilshamult with constructing a weir contrary to the *Fisheries Act*. In response, the Cowichan announced they would prevent all sports fishers from approaching the river through their reserves unless the charges were dropped. Faced with this ultimatum, Musgrave, who had demanded that the weirs come down, wrote to Fisheries claiming that this action would greatly harm the sports fishery, and that he had been mistaken about the damage caused by the weirs. He asked the Department not to interfere with the weir fishery. Indian Affairs asked Fisheries to stay the prosecution, and Lomas succeeded in gaining agreement from Maitland-Dougall and the justices of the peace to adjourn the case until April 16th, when it was hoped that Fisheries would respond. Fisheries did not respond until after the trial. The charge was dismissed on the grounds that the weir did not unduly obstruct fish.

Before Quilshamult had been charged, McNab requested that Fisheries hire legal counsel to prosecute the Cowichan weir fishery. He was told that legal counsel was unnecessary: “If the prosecution is before an honest magistrate and the evidence sufficient, a conviction will likely be secured as well without as with counsel.” In the aftermath of this second courtroom defeat Fisheries may well have had second thoughts. The debate

---

236 Ibid., Indian Superintendent Vowell to Department of Indian Affairs, 29 March 1898. The accused is identified in the letters as “Jim Quilshemet”, but appears to be the same person as “Jack Quilshamult”.
237 Ibid., Edward Musgrave to the Minister of Marine and Fisheries, 11 April 1898.
238 Ibid., Secretary, Dept. of Indian Affairs to Deputy Minister of Marine and Fisheries, 7 April 1898.
239 Ibid., 12 April 1898.
240 *Victoria Daily Colonist*, 20 April 1898. The justices of the peace were E.M. Skinner, H.O. Welburn, and C. Livingstone.
241 NAC, DMF, RG23, file 1469, pt. 1, Dominion Commissioner of Fisheries to McNab, 4 February 1898.
over weirs continued in departmental correspondence and in the local press, but Fisheries would not directly challenge the Cowichan weirs again until 1905.

This second courtroom challenge of the Cowichan weirs and the events preceding it reveal a good deal more about the strategies of power and resistance. Fisheries, lead by Prince, launched a discursive attack against the weir fishery, invoking both law and science. Under the *Fisheries Act* the weirs were illegal and therefore they must be removed. Crown sovereignty was assumed; Parliament was the legitimate source of authority and its laws applied to the Cowichan. Violations called for sanctions. The laws were validated not only by their legal pedigree, but also by science. The weirs destroyed fish stocks; they were a primitive, scientifically unsound method of fishing that must be removed for the benefit of all fishers, including the Cowichan. With the combined authority of law and science, Fisheries challenged the weirs in the local Police Court, and lost.

The Cowichan responded both within the same discourses of law and science, and outside them. They argued the *Fisheries Act* did not apply to them because the Crown was bound by the earlier commitment of its Reserve Commission. This challenge, although not accepted by the court, respected Crown sovereignty. It was a legitimate legal argument within the framework of Anglo-Canadian law. The Cowichan may have been unlikely to succeed with this argument—the common law doctrine of the public right to fish prevented the Crown from conferring exclusive fisheries without Parliament’s

---

242 NAC, DMF, RG23, file 583, part 1, W.W. Stumbles report on a meeting of the Victoria Board of Trade Committee to investigate the Cowichan weir fishery, 14 August 1899.

243 *Victoria Daily Colonist*, 28 September and 10 October 1899, letters to the Editor from Edward Musgrave.
approval—but it was a plausible approach within Canadian courts. Similarly, the Cowichan could argue within a scientific discourse that the weirs did not damage the fish stocks. Although Prince may not have accepted Cowichan knowledge as scientific, the Cowichan could point to a history of intensive fishing and healthy fish stocks. The court agreed to a point, ruling that the weirs did not unduly obstruct the passage of fish.

The Cowichan also challenged the Crown’s assumption of sovereignty with a sovereign discourse of their own. They asserted jurisdiction over the fishery, arguing they had never conceded it to the Crown or anyone else. This argument, at the core of Cowichan resistance, fit uncomfortably within the Canadian courts and is thus somewhat muted in the historical record. It was not something that Indian Affairs, a department of the Dominion, emphasized in their support of the Cowichan fishery. It appears more frequently in the statements drafted on behalf of the Cowichan by various Catholic missionaries.

Among the tactics of resistance, the “no trespassing” signs were perhaps the most effective. The Cowichan had threatened to exclude non-Natives from prime fishing sites before, although not to the point of posting signs on the boundaries of their reserve (see Figure 2.1). The law of trespass was an effective tool. Limited access was a serious concern to White fishers, and the threat apparently caused the most vigorous local

---

244 The doctrine of the public right to fish vests the right of fishing in the public as a whole, not the Crown. In effect, the Crown is a trustee for the public. It may not grant an exclusive fishery to any individual or group, except by statute. Roland Wright, “The Public Right of Fishing, Government Fishing Policy, and Indian Fishing Rights in Upper Canada,” Ontario History 86, No.4, Dec. 1994, p.337, argues that, “It is the necessary starting point of any study of government fishing policy and Indian fishing rights in pre- and post-Confederation Canada.”
opponent of the weirs, Edward Musgrave, to reverse his opposition. The weirs, he now claimed, were not as damaging as he once thought.

The decision also reveals something about the nature of state law in local settings. Fisheries, particularly Commissioner Prince, was convinced that the weirs must go. Opinion in the local community was much less certain, and the petition indicates considerable support for the Cowichan among a group of settlers that were generally well-educated, aspiring agriculturists. The justices of the peace, reflecting local sentiment, were unwilling to convict the Cowichan for building fish weirs. Perhaps the Cowichan’s neighbours feared restricted access to the fishing sites in the lower river; perhaps they thought the Cowichan were entitled to their weirs; or perhaps they thought Fisheries should focus its concern on the lumber mills and not the fish weirs. Weirs and Native peoples fit more comfortably within an English aesthetic and understanding of “nature” than heavy industry. The settlers consistently expressed more concern about the logs in the river than the weirs. Whatever the reason, local settler resistance to state law reduced its effectiveness as a means for the state to limit the Cowichan fishery.

Cannery boats and seine nets in Cowichan Bay

Local sale of Cowichan Bay and river fish caused Fisheries intermittent concern. Generally, Fisheries did not interfere with the small scale local fish trade, but in 1898, it confronted a commercial fishery in Cowichan Bay on an altogether larger scale—cannery boats with seine nets. Three years earlier thirteen cannery boats from the Fraser River had

---

appeared in Cowichan Bay with gill nets. The expedition had been unsuccessful, partly because the gill nets were ineffective in the clear waters at the mouth of the Cowichan and because their unlicensed fishing had been interrupted by Fisheries. In 1898 Fisheries amended the Regulations by removing the seine net restrictions, and when the cannery fishers reappeared on Cowichan Bay that year they brought drag seines.\footnote{Canada Gazette, Vol. 32 p. 280. There were two types of seine nets used in Cowichan Bay: drag seines and purse seines. The drag seine is pulled through the water collecting all fish that cannot escape through the mesh. The purse seines are deployed in a circle around a school of fish. The bottom of the net is drawn tight to enclose the fish and the net is pulled in.}

Lomas forwarded Cowichan complaints that boats with large seine nets and small mesh were fishing salmon in Cowichan Bay for the canneries. McNab claimed that he had issued coho salmon seine net licences for Cowichan Bay to five fishers, “who are all old residents, and have been British subjects and property owners for many years in B.C.” However, McNab also recognized that the “poachers” who traveled the coast in large boats, setting nets and catching salmon, were beyond the reach of the land based fishery guardians.\footnote{NAC, DMF, RG23, file 583, part 1, McNab to Deputy Minister of Fisheries, 8 November 1898.} The Cowichan were incensed, not only because Fisheries granted seine licences while their weir fishery was attacked, but also because they were unable to participate in this lucrative fishery. Seine nets were expensive, and the canneries, while providing nets to the Japanese and White fishers, would not give any to the Cowichan. To alleviate Cowichan concerns, Maitland-Dougall secured promises from the cannery operators in 1898 to supply the Cowichan with nets for the following year.\footnote{Ibid., Geolb VanGoethem to W.W. Stumbles, 28 October 1899.} None were forthcoming, and to make matters worse there was extensive seine net fishing near the
mouth of the river by Japanese and other cannery fishers. The Cowichan sent a petition to Fisheries, signed by Chief Joe KomiaKen, head chief of the Cowichan, requesting permission to use purse-seines in the bay. The chief noted that the Fraser cannery operators, who once thought chum an inferior fish, were now paying seven cents a fish, and the Cowichan “could develop a good business in these fish alone,” he thought, if they were allowed to use purse-seines. However, the Fisheries Act prohibited purse seines, and given the sports fishing lobby on the Cowichan River, Fisheries was not about to make an exception for Cowichan Bay. Commissioner Prince informed Inspector of Fisheries C.B. Sword (who had replaced McNab) that “of course purse seines are out of the question,” and further requests for drag seines from any fishers must be refused.

The gill netters were also keen to have access to more fish in Cowichan Bay. Twenty-four sent a petition requesting that Fisheries allow them to fish closer to the mouth of the river. Fisheries denied this request as well, citing complaints of the “resident Indian communities”. Net fishing inside a line stretching north from the Cowichan Wharf remained prohibited to all fishers (see Figure 2.1).

There were other signs that Fisheries officials were taking seriously the Cowichan complaints about fishing in Cowichan Bay. At the Nanaimo hearings of the 1902 British

---

249 Ibid., W.W. Stumbles to Commissioner of Fisheries, 14 August 1899.
250 Ibid., Chief Joe KomiaKen to W.W. Stumbles, witnessed by Harry Stuary and Geolb VanGoethem, 28 October 1899. This may be the same person as Chief Joe Kukulth, although I identify them separately.
251 S.C., 54-55 Victoria, c. 43 s. 1, ammending the The Fisheries Act, R.S.C. 1886 c. 95, s.14.
252 NAC, DMF, RG23, file 583, part 1, Prince to Sword, 27 September 1900.
253 Ibid., 14 September 1900.
254 Ibid., John Hardie, Acting Deputy Minister of Marine and Fisheries to Mr. Wm. Lumley and others, 2 October 1900.
Columbia Salmon Commission, appointed to investigate the protection and future development of the salmon fishing industry, the Cowichan voiced concerns about the seines and gill-nets. Chief See Heel Tun of Quamichan requested that fishing in Cowichan Bay be reserved for residents of the Cowichan district, Native and White. Joe Kukulth, Chief of the Comeakin, requested half price licences for Natives and free access to fish for food.\textsuperscript{255} C.M. Tate, the Methodist Missionary sent a letter to the Commission on behalf of the Cowichan. They protested the government's double standard, pointing out that Whites were not required to obtain food as their ancestors, and demanding to know why Natives were subject to such stringent regulations? Fisheries officers confiscated Cowichan gill-nets in the river, while at the same time issuing permits to White fishers who caught thousands of fish dragging their long seines through the bay.\textsuperscript{256} Prince indicated that he would like seines removed from the bay and the gill-nets moved further from the mouth of the river.\textsuperscript{257}

The British Columbia Fishermen's Union decided it was time to raise its voice in support of the Cowichan. John Elliot, a member of the Quamichan Band and the Cowichan local of the Fishermen's Union, testified before the Commission about the declining wages earned by Cowichan fishers on the Fraser. Japanese and American fishers were taking their jobs, in part because the Cowichan were staying on their reserves long

\textsuperscript{255} NAC, DMF, RG 23, file 2918, pt. 1, W.R. Robertson, Indian Agent reporting on a meeting of 40 Natives at his office, 29 January 1902. Chief Joe Kukulth testified to the McKenna-McBride Commission in 1913. He may also be the same person as Chief Joe KomiaKen who applied for a seine fishing licence in 1899.
\textsuperscript{256} Ibid., open letter from the Cowichan, transcribed by C.M. Tate, submitted to the British Columbia Salmon Commission, 1902.
\textsuperscript{257} NAC, DMF, RG 23, file 583, pt. 1, Prince to Walbran, 27 February 1902.
enough to plant their crops and were missing the opening of the fishing season.  
Furthermore, their Cowichan River fishery was threatened by the seine nets of other non-local Union members. Even though its members were fishing in Cowichan Bay, the Union advised Fisheries to stop issuing seine licences to non-local members because of the suffering it could cause the Cowichan. Fisheries eventually responded in 1904 by moving the net fishing boundary to the edge of Cowichan Bay (see Figure 2.1).

However, Fisheries did not restrict the fishery in Cowichan Bay solely in response to Cowichan concerns. In fact, protecting the Cowichan riverine fishery was largely a by-product of its efforts to enhance the sport fishery. Throughout this period the Cowichan were under increasing surveillance. Guardian Colvin found three set nets in the river, and spent several nights in the bush in March hoping to catch the person responsible. The Mayor of Victoria, Charles Hayward, had also decided that the illegal weir fishery must end. Although well beyond his jurisdiction, he sent a detective sergeant from the Victoria City Police to investigate. The officer found several weirs in the river, the remains of nets on the banks, fear among the locals that enforcement of the law would bring reprisals, and concluded that, “the Fishery law has never been enforced nor fish protected.” Hayward then went himself, with a photographer, to document the Cowichan weirs. He was President of the Tourist Association, and believed the industry was suffering because the

---

258 NAC, DMF, RG 23, file 2918, pt. 1, British Columbia Salmon Commission, 1902, 16th Session, Nanaimo, 5 February 1902.
259 NAC, DMF, RG 23, file 583, pt. 1, Charles Durham, Grand Secretary Treasurer of the British Columbia Fishermen’s Union, to Gourdeau, Deputy Minister of Marine and Fisheries, 7 April 1902.
261 NAC, DMF, RG 23, file 583, pt. 1, Colvin to Sword, 22 March 1902.
weirs were destroying the fly-fishing. The problem, he thought, was the lack of will among Fisheries officers to enforce the law.\textsuperscript{263}

When Fisheries failed to act, Hayward announced he had evidence that the Cowichan were illegally selling fish. This prompted an investigation. Fisheries Inspector Sword, accompanied by another member of the Victoria police, Detective Perdue, traveled to Cowichan to investigate the charges. They discovered the wife of a hotel keeper in Duncan, newly arrived in the region, had purchased two salmon from an “Indian woman”. Fishery Overseer Galbraith had informed her that she was liable for a $100 fine for possession of illegally caught fish. The fish, however, had no spear or net marks, and the Indian woman told the purchaser that they had been caught in salt water. Fisheries allowed local sale of salmon caught by trolling. Sword expressed his exasperation with the whole affair, suggesting that Fisheries ignore future complaints from Hayward and temper Galbraith’s excessive zeal to remove the weirs.\textsuperscript{264} Detective Perdue reported to Hayward that Sword had done nothing to remove two illegal weirs.\textsuperscript{265} Hayward demanded immediate action from Fisheries, and failing that he would institute “such proceedings as may be necessary to bring the offenders to justice.”\textsuperscript{266} Fifty-seven residents of the Cowichan district, led by Edward Musgrave, followed this with a petition demanding similar action against the “illegal fishery”.\textsuperscript{267}

\textsuperscript{263} NAC, DMF, RG 23, file 1469, pt. 1, Hayward to James H. Sutherland, Minister of Fisheries, 24 April 1902.
\textsuperscript{264} Ibid., Sword to Prince, 9 May 1902.
\textsuperscript{265} Ibid., Perdue to Hayward, 13 May 1902.
\textsuperscript{266} Ibid., Hayward to Sutherland, Minister of Marine and Fisheries, (date?).
\textsuperscript{267} Ibid., Petition sent to Sutherland, June 1902.
The Dominion appointed a Commission to investigate. Senator Templeman, Indian Superintendent Vowell, and Inspector of Fisheries Sword held hearings in Duncan and Victoria in early August. Musgrave sent a letter to the Commission denouncing the weirs. Overseer Galbraith thought firm enforcement of the law would end their use. The Guardians on the Cowichan, he complained, made no effort to stop the practice so it was not surprising that it continued. Otherwise, the vast majority of those who testified, including many who had signed Musgrave’s petition, told the Commission that running logs down the river caused more harm to the fishery than the weirs. In fact, many supported the Cowichan and their weir fishery. John N. Evans, the Reeve of Duncan and a resident of the region for thirty years, testified that: “I do not attribute the decrease (in fish) to the weirs but to the destructive character of the Anglo Saxon race.”

The Cowichan weirs remained. Seine and gill net fishing had been expunged from the bay. This result was the combination of several factors. The Cowichan used legal and ecological arguments to buttress their belief that the weirs should remain. However, other Native peoples around the Province, particularly those on the Babine River, struggled unsuccessfully to keep their weirs. The Cowichan had other things in their favour. First, they had support among much of the local settler population who were inclined to see logging and industrial fishing as a greater problem than the weirs. Second, no cannery relied on the Cowichan River as its primary source of fish. Several Fraser River canneries sent boats to Cowichan Bay, but only to supplement the larger Fraser catch. The Cowichan escaped the concerted efforts of cannery owners to reallocate fish. This was a

268 NAC, DMF, RG 23, file 1469, pt. 2, Galbraith to Senator Templeman, 26 August 1902.
269 Ibid., Notes from Evan’s testimony to the Commission, 6 August 1902.
result, in part, of the sports fishery lobby. The sports fishers were keen to keep the
canneries out, and therefore denied them a foothold from which the industry might have
established itself. Somewhat paradoxically, the sport fishery, a riverine fishery like the
weir fishery, shielded the Cowichan from a direct attack by the industrial canneries. The
uneasy coincidence of interest between sports fishers and the Cowichan, combined with
local settler support, protected the riverine fishery. After 1902 Cowichan Bay was off-
limits to the commercial seine and gill-net fisheries.

Thinking they had removed the cannery threat, the sports fishers would shortly
turn their attention back to the Cowichan weirs. Commissioner Prince, however, had
other ideas. In 1907, Fisheries proposed to lease “the exclusive right for net fishing for
salmon in that part of the tidal waters of the Cowichan River and Cowichan Bay, within an
imaginary line running from Serpentine point to Cowichan head at the entrance to the said
Cowichan bay,” to the Capital City Canning & Packing Company of Victoria for nine
years. In exchange the Company would pay a yearly fee of $50, and build and operate a
salmon hatchery. Prince justified the lease on the grounds that valuable commercial fish,
particularly the chum salmon, were not being caught since nets had been prohibited in
Cowichan Bay. The lease would allow Fisheries to manage the commercial catch without
endangering the sports fishery. At a public meeting in Duncan local settlers denounced the
lease. They did not want a commercial monopoly on the Cowichan River and they passed
a resolution calling Fisheries to cancel the lease, something that appears to have happened.

270 Cowichan Leader, 20 July 1907.
The lease was a direct attack on the Cowichan fishery as well. Chum salmon were an important food fish for the Cowichan, and the commercial monopoly would have affected their supply. Fisheries recognized that the Native fishery needed some protection, and the following provision was included in the lease:

Provided that the said lease does not interfere in any way with any fishing privileges that may have been conceded to Indians and that the said lessees in utilizing the privileges conveyed by this lease adopt no measure which will antagonize the local Indian tribes, and that the said lessees will afford the Indians every reasonable opportunity of obtaining employment in the fishing, canning, or other operations carried on in connection with the said lease.271

Fisheries understood the Cowichan as holding “fishing privileges” to a limited food fishery. This clause, therefore, was intended to protect that food fishery. The Cowichan, however, did not hold such a restricted view of their rights. In 1899 Chief Joe KomiaKen had petitioned for a permit to establish a commercial chum fishery in Cowichan Bay. He had been refused on the grounds that the riverine fishery needed protecting. Now Fisheries proposed to grant an exclusive lease to that same fishery to a Victoria company. Fisheries had different standards for Native and non-Native fishers. “Indians” had their food fisheries and could work as cannery employees. They were systematically excluded from ownership and management of the commercial fishery.

Fly-Fishing, weirs and railways

After a several year hiatus, the effort to remove the Cowichan weirs intensified in 1905. The pressure came from an industrial behemoth, although not one involved directly in the canning industry (see Figure 2.7). The Canadian Pacific Railway (CPR) purchased the Esquimalt & Nanaimo Railway (E&NR), including the E&NR land grant with

271 Ibid., p. 2.
significant property in the Cowichan Valley. The CPR intended to increase ridership on its line and enhance the value of its property by creating fish and game reserves to lure the sports-minded tourist and settler.272 The weir fishery and Cowichan hunting, according to a CPR official, were problems that needed to be resolved before it could begin developing the reserves.273 Fisheries was already moving to eliminate the weirs. Earlier in the season, Indian Agent Robertson intercepted Fisheries Guardian Colvin who was about to act on instructions to remove the weirs. Robertson warned of violence if the weirs were destroyed and asked for a delay to resolve the situation.274 Indian Affairs officials in Ottawa reminded Fisheries that the Cowichan would expect compensation if they agreed to remove their weirs.275 Once again, the Cowichan and Fisheries reached a compromise. The Cowichan agreed to keep the weirs open on weekends and to remove them entirely before they left in early July for the Fraser River fishery.276

The CPR continued to press for abolition of the weirs. In 1906 the Chief Game Warden of the E&NR, Mr. Heald, produced a report on fishing in the region in which he concluded that the Cowichan River was the most valuable sport fishing river, that much of it was within railway lands, and that the best fishing sites should be “set apart as a preserve, and improved by placing rocks, both as “lies” for the fish and to prevent

273 NAC, DMF, RG 23, file 583, pt. 1, C. Drinkwater, Assistant to the President of the CPR, to Gourdeau, Deputy Minister of Marine and Fisheries, 21 August 1905.
274 Ibid., Robertson to Vowell, 22 May 1905.
275 Ibid., Pedley, Deputy Superintendent General of Indian Affairs, to Gourdeau, Deputy Minister of Marine and Fisheries, 31 May 1905.
276 Ibid., Edward G. Taylor, Inspector of Fisheries, to R.W. Venning, Assistant Commissioner of Fisheries, 19 July 1905.
Further, he commented that it was “utterly hopeless” to expect to improve the sport fishing until Fisheries enforced the law. In response to these complaints, Inspector of Fisheries Edward G. Taylor reported that there were few incidents of illegal fishing by Natives and that the incidents were diminishing every year. Furthermore, it was a slow process to change the views of the Native peoples: “The Indian does not consider his methods for taking fish illegal; but look upon them as his right, and we cannot expect to change his views on this delicate subject (the way to obtain his food) in one year.” Taylor wrote that Heald would be better advised to look to the destructive logging practices as the cause of diminishing fish stocks. In reply to Heald’s Report, Fisheries suggested that the CPR’s Chief Game Warden was misinformed, but that a Commission was investigating fishing in British Columbia and would soon report on the question of Native weirs. The Commission’s Report in 1908 reaffirmed the Native right to a food fishery, recommended that all commercial fishers hold a licence, but did not recommend that the Cowichan weirs be removed. The weekend opening compromise continued.

The Royal Commission on Indian Affairs

On May 27th 1913 the Royal Commission on Indian Affairs for the Province of British Columbia (the McKenna-McBride Commission) held hearings in the Cowichan Valley. Several Cowichan testified that they were constantly harassed by Fisheries officers while fishing in their accustomed manner, as was their right. In response to the

---

277 Ibid., extracts from Mr. Heald’s Report sent to Gourdeau, Deputy Minister of Fisheries, 2 January 1907.
278 Ibid., Edward G. Taylor to R.N. Venning, Assistant Commissioner of Fisheries, 24 June 1907.
279 Ibid., Gourdeau to Drinkwater, 10 July 1907.
280 Dominion British Columbia Fisheries Commission, 1905-1907, Report and Recommendations (Ottawa, 1908).
Commissioner questions, Chief Joe Kukahalt of the Komiaken Band, told them that the surveillance and intervention effectively stopped their food fishery and prevented them from selling to the local fresh fish market.

At all times of the year we are in trouble and they will not let us fish at all. The constables are always watching us, no matter when we fish, or what we fish with.281

Shortly after the Commission hearings, Inspector Taylor investigated complaints that the Cowichan weirs were completely obstructing the fish. He traveled to the Cowichan and found a weir in place on a Saturday. Considering this a breach of the earlier agreement to keep the weirs open on weekends, he ordered the two Cowichan weirs destroyed. The Cowichan protested strongly and Taylor agreed to meet with them. They demanded, according to Taylor, permission to operate at least one weir. He agreed, but on the following condition: the weir had to be open for three days each week, from 6 a.m. Saturday to 6 p.m. Monday. Taylor considered this interim arrangement satisfactory, but reported that the Cowichan “were very hostile indeed”.282

The Cowichan were incensed with this interference in their fishery. Despite permission to operate a single weir, the Chiefs of the Cowichan in an open letter printed in the local newspaper informed the White population that they were no longer allowed to cross Cowichan land and that any who attempted to do so would be prosecuted for trespass.283 The Cowichan then sent a letter to the Commissioners, indicating that when

---

281 Evidence of the Royal Commission on Indian Affairs for the Province of British Columbia ("McKenna-Mcbride Commission Evidence"), Vol.1., p.27.
283 Cowichan Leader, 11 March 1914.
they testified to the Commission they had placed their trust in the process. Since

testifying, their weirs had been destroyed without any notice, and they were left to wonder

whether the Commissioners had any authority to restrain such action.284

In response, the Commissioners convened a meeting in 1914 with Dominion and

Provincial Fisheries officials, and representatives from Indian Affairs, to consider Indian

fishing rights. No Cowichan were present.285 The Dominion Fisheries officials believed

the weirs were damaging the fishery, that the Cowichan continually violated any

compromise agreement, and that the extremely valuable sport fishing interests needed

protecting. Chief Inspector of Fisheries Cunningham noted the “large investment in

summer homes” built to accommodate sport fishers in the Cowichan Valley.286 Officials

from Indian Affairs pointed out that the weirs had only become the source of trouble again

since Fisheries interfered the previous year, and the problem was not the weirs, but rather

the law. Earlier Commissions had promised the Cowichan that their fishery would not be

disturbed, and this should be recognized by broadening the current regulations. However,

Inspector Ditchburn of Indian Affairs suggested a further compromise: the Cowichan

might agree to open the weirs three days each week.287 There was some discussion about

allowing the Cowichan to use nets if they agreed to remove their weirs, as the Lake

Babine people had agreed to do in 1906, but nobody seemed convinced that this could


285 Ibid., pp. 413-427. The meeting was held 14 April 1914, in Victoria. Present at the meeting were Commissioners Macdowall, Shaw and McKenna, Chief Inspector Cunningham and Inspectors Williams and Taylor from the Dominion Department of Fisheries, Deputy Commissioner McIntyr and Assistant Commissioner Babcock of the Provincial Fisheries, and Inspector Ditchburn and Agent Robertson of Indian Affairs.

286 Ibid., p. 418.

287 Ibid., p. 421.
work on the Cowichan. At the end of the day's meeting the only decision reached was that another meeting would be held, this time in Duncan with the Cowichan to investigate their concerns.

Inspector of Fisheries Taylor chaired the July 2nd meeting, attended by 120 Cowichan, the Catholic Missionary, representatives of the Cowichan Anglers Association and several local settlers not affiliated with the anglers. David Sillseemult presented a petition on behalf of the Cowichan claiming recognition of their rights:

We are gathered here not to ask for any privileges, but to protest against the injustices, that have been done to us, for the last year or two, we are here to put before you our just claims and we hope you give them your consideration.  

The petition accompanied the testimony of seven Cowichan Chiefs all of whom strongly protested any interference with their rights. They used weirs and nets to catch salmon and trout, and they had a right, recognized since Governor James Douglas' time, to continue fishing in this manner. The Chiefs produced a section of a weir as evidence that the weirs simply impeded the fish, but did not stop them. Father Scheelen spoke for the Cowichan, arguing that they had a right to fish without a licence, and furthermore that they should be allowed to sell their catch. Members of the Cowichan Anglers Association testified that the weirs prevented the upward migration of salmon and trout, and recent poor years were evidence of that. The President, L.C. Rattray, suggested that instead of weirs the Cowichan should be allowed to use gill nets in Cowichan Bay. If the weirs must remain, he recommend a three day opening each week and 2.5 inches between slats in the

---

288 Ibid., p. 433.
289 The Cowichan who testified are indentified as Modiste, son of Schaalten the Head Chief of the Cowichan; Chief Joe Kokahamult of the Comeakins; Chief George Quiockqult of Clemelemalitz; Chief Charley culsowault of Koksilah; and head man Bill Hotalsilock of Quamichan.
weirs. Members of non-angling White community told the Committee that the weirs were not the cause of any recent shortfall and that they should be allowed to remain. Nets, they argued on the other hand, should be prohibited. W.H. Hayward, the local member of the Provincial Legislature, pointed out that relations between Whites and Native had been good until Fisheries destroyed the weirs last year. Why continue to strain relations when the weirs were not a problem?

More than a month after the meeting the Committee issued its report. Following what appeared to be the wishes of the local, non-angling settler community, it recommended that nets should be prohibited in the Cowichan River, but that weirs be allowed in the following manner:

The Indians be granted the privilege of placing three weirs in the Cowichan River, one at Quamichan, one at Somenos, and another at a point to be decided upon, and one in the Koksilah River.

That the lattice work of the weir provide for open spaces of not less than 2 1/2 inches in width.

That the weirs be open for the free passage of fish from Friday at 6 p.m. in each week to the following Monday at 6 a.m. and the opening shall be not less than 15 feet in width in the centre of the weir.

Failure to comply with these terms would result in a fine or imprisonment under the Fisheries Act. The report did not mention the sale of weir caught fish. The Committee did not stipulate that sale was prohibited, but nor did they suggest it should be allowed. Although the Cowichan were clear at the meeting that they believed they were asserting a right and not asking for privileges, the Committee was equally clear in its report that it was granting a privilege.
That in view of the privileges, above granted, it is distinctly understood that the use of nets of any kind is strictly prohibited and will not be condoned.\textsuperscript{290}

In later years, this Committee’s report became the standard against which the Cowichan weir fishery was measured. Later correspondence within the Department of Fisheries describes the 1914 recommendations as an “agreement”, suggesting that the Cowichan must respect the terms to which they agreed. However, apart from a suggestion that the Cowichan agreed to increase the wicker mesh to 2.5 inches, there is no indication that they agreed to these terms or thought them fair. The terms of the report were drawn up after the meeting and there are no signatures of the Cowichan Chiefs on anything except petitions of protest.

The following year Fisheries showed some flexibility towards the Cowichan sale of weir caught fish. At another Commission meeting to discuss “Fishing Privileges of Indians in B.C.”, Inspector Taylor reported that the Cowichan requested a permit to sell fish. He acceded to the request, given “that they were in very poor circumstances”, and directed Indian Agent Robertson to dispense licences allowing for local sale. Commissioner McKenna dubbed this a “Peddler’s licence”, to distinguish it from a commercial licence that allowed sale to the canneries, and did not indicate any concern about the practice.\textsuperscript{291}

The discussion then turned to the “agreement” of the previous year. Taylor reported that apart from a few wicker meshes that were too small, the Cowichan had respected its terms. However, pressure from the Angler’s Association to remove the weirs continued.

\textsuperscript{290}McKenna-McBride Commission Evidence, Vol.1., p.432.
\textsuperscript{291}NAC, DIA, RG10, v. 3908, f. 107,297-2, transcript of a Meeting of the Royal Commission on Indian Affairs for the Province of British Columbia with Representatives of the Dominion and Provincial Fisheries Officials in Regard to Fishing Privileges of Indians in B.C., Victoria, December 1915, pp. 20-21, 23.
Chief Inspector of Fisheries Cunningham continued his efforts to maintain property values. Members of the Association, he reported, "... say they have property up there which is assessed as high as a thousand dollars an acre and in their opinion the river is far more important to them than the few fish that the Indians catch for food". In their final report setting out the reserves for the Cowichan Agency, the Commissioners made no mention of the weir fishery.

**Gill nets, Chinese merchants and fishery cases**

In the early 1920s the Victoria Board of Trade and the Angler’s Association put increasing pressure on the Department of Fisheries to enforce the law. Fishing for salmon with weirs or nets in non-tidal waters was prohibited, but the Cowichan weirs remained by virtue of food fishing permits. Fisheries followed the 1914 “agreement” which allowed up to three weirs. However, anglers were concerned about nets. They complained that the Cowichan frequently used nets in the river and sold their catch. Fisheries knew about the sale of fish, and believed that Chinese purchasers who sold Cowichan caught fish in Victoria were the source of the problem. It was difficult enough to secure a conviction against an Indian for illegal fishing, but the effect was minimal if a Chinese merchant paid the fine and replaced the nets that were destroyed by Fisheries officers. Fisheries Overseer Easton reported that over the space of ten days in early January, 1924, he and Guardian Hodding seized and destroyed seven nets found in the river.

---

293 *The Fisheries Act*, S.C. 1914, 4-5 George V, c.8, s.13.
Near the end of January, 1924, Easton arrested a Chinese merchant, Hong Lee, whom he caught transporting a load of Cowichan caught steelhead to the markets in Victoria. This time Fisheries hired a lawyer to prosecute the accused, but was no more successful in the outcome. Lee was charged with purchasing fish from an unlicensed fisher, contrary to the *Fisheries Act*, and with purchasing fish caught under an Indian food fishing permit, contrary to the *Regulations*. The Stipendiary Magistrate and former Fisheries officer, James Maitland-Dougall, set the trial for February 6th, and released Lee on bail. The *Act* prohibited those engaged in the storing or processing of salmon from buying fish from unlicensed fishers. However, Lee sold the fish fresh; he was not engaged in the storing or processing of salmon and the section did not apply. Under the *Regulations*, Indians had to secure a permit from the Chief Inspector of Fisheries for their

---

295 *Special Fishery Regulations for the Province of British Columbia*, 1922, s.13(2):
13.(2) An Indian may, at any time, with the permission of the Chief Inspector, catch fish to be used as food for himself and his family, but for no other purpose. The Chief Inspector shall have the power in any such permit, --
(a) to limit or fix the area of the waters in which such fish may be caught;
(b) to limit or fix the means by which or the manner in which such fish may be caught; and
(c) to limit or fix the time in which such permission shall be operative. An Indian shall not fish for or catch fish pursuant to the said permit except in the waters by the means or in the manner and within the time limit expressed in the said permit, and any fish caught pursuant to any such permit shall not be sold or otherwise disposed of and a violation of the provisions of the said permit shall be deemed to be a violation of these regulations.
(d) Proof of a sale or of a disposition by any other means by an Indian of any fish shall be *prima facie* evidence that such fish was caught by the said Indian, and that it was caught for a purpose other than to be used as food for himself or his family, and shall throw on the Indian the onus of proving that such fish was not caught under or pursuant to the provisions of any such permit.
(e) No Indian shall spear, trap or pen fish on their spawning grounds, or in any place leased or set apart for the natural or artificial propagation of fish, or in any other place otherwise specially reserved.
(f) Any person buying any fish or portion of any fish caught under such permit shall be guilty of an offence against these regulations.
food fishery. Any person who purchased fish caught under a food fishery permit was guilty of an offence. The Cowichan, however, had not received a permit to use nets in the river. The fish were illegally caught, but because they had not been caught under a food fishery permit, the section prohibiting the sale of fish caught under permit did not apply either. Maitland-Dougall acquitted Lee on both charges.

This precipitated a chorus demanding amendments to the law. The President of the Cowichan Fish and Game Preservation Association wondered if it would help Fisheries “if the lawyer who defended the Chink and who generally defends in all these prosecutions were to draw up suggested amendments to the Act?” In 1925, Fisheries amended the Regulations as follows:

15 b (6) Any person buying any fish or portion of any fish, caught under such permit [Indian food fish permit] shall be guilty of an offence against these regulations, and any person buying any fish or portion of any fish from an Indian, which fish was caught without a permit in an area for which permits are not granted, shall be guilty of an offence against these regulations.

Although the amendment did not specify any particular fish, Fisheries officials were most concerned about protecting the steelhead on the Cowichan River. These were the preferred fish of the sports fishers, a group that had grown in number after the First World War when many retired British officers settled in the Cowichan Valley. The Cowichan used a wide variety of fish, but the single most important fish in their diet was chum salmon. Reflecting its perception that the Cowichan were only entitled to privileges protecting their food fishery, in the 1920s Fisheries attempted to confine the Cowichan

296 S.C., 8-9 George V, c.22, s.3 ammending The Fisheries Act, 1914.
297 PRFRC, DMF, RG23, vol. 2038, file 10-3-31, Jackson to Motherwell, 26 February 1924.
fishery to a chum fishery, at the same time conserving the steelhead for the sporting crowd. The sports fishers were not interested in the chum salmon, so Fisheries began issuing permits to the Cowichan to catch chum for food with drift nets in Cowichan Bay.\textsuperscript{300} Nets were still prohibited in river, but the Cowichan could now apply for limited chum licences in the bay.

The weirs continued to be a difficult issue for Fisheries, but most disputes were resolved by returning to the 1914 “agreement”. Chief Inspector of Fisheries Motherwell believed the Cowichan would voluntarily relinquish any claim to use weirs, perhaps within the next two or three years.\textsuperscript{301} He grossly under-estimated the depth of the Cowichan’s sense of entitlement, and by 1929 the Associated Boards of Trade of Vancouver Island thought they had waited long enough for the weirs to be removed. The Cowichan had two weirs in operation that year, one on the Quamichan Reserve and another on the Somenos Reserve. The Board of Trade passed a resolution requesting that the weirs open from noon Friday to noon Monday and that the slats should be at least three inches apart. These terms extended the 1914 “agreement”, which required open weirs from 6 p.m. Friday to 6 a.m. Monday, and no less than a two and one half inch opening. However, Motherwell announced that the terms would not be changed. He accepted the 1914 arrangement as an agreement that should be upheld.\textsuperscript{302}

\textsuperscript{300} Authorized under the 1922 Regulations, s.19(12)(b), Canada Gazette, Vol. 55, p.
\textsuperscript{301} PRFRC RG23 v. 2038, f.10-3-31, Motherwell to Spaight, 10 September 1924.
\textsuperscript{302} Ibid., Motherwell, Chief Supervisor of Fisheries to Found, 1 September 1929. In 1929 Fisheries changed the designation of its highest officers in the Province from Inspector to Supervisor.
The window of opportunity for weirs in the fall was relatively short. Some years there only a few weeks before the late fall and winter rains raised the level of water in the Cowichan River to the point where the weirs would be swept away by the current and the accumulated debris. If the rains came early or too suddenly, the Cowichan could face difficulties securing their winter supply. In 1930, the water level rose dramatically in early November making the weirs useless. To prevent needless suffering, and realizing that it would be impossible to prohibit nets in the river, J.F. Tait, the new Supervisor of Fisheries for Vancouver Island, formally recognized what had been established practice—he issued permits to allow the Cowichan to use nets in the river to catch chum for their winter food supply.\(^{303}\) His officers continued to confiscate nets and prosecute Cowichan when they sold river caught fish, particularly steelhead. In 1930 Fisheries officers seized nine nets and prosecuted two Cowichan. A third, an “old blind Indian” who was peddling fish in Duncan, was allowed to go with a warning.\(^{304}\) However, the Cowichan now could get net permits that allowed a chum food fishery.

**Weirs or nets, but not weirs**

The formal recognition of a net fishery in the Cowichan River proved a mixed blessing for the Cowichan. Increasingly, Fisheries used its power to issue or withhold net permits to influence the Cowichan use of weirs. In 1932 a large group of Cowichan met with Fisheries at the Indian Affairs office in Duncan. According to the Supervisor of Fisheries, J.F. Tait, the majority of Cowichan at the meeting were in favour of

\(^{303}\) *Ibid.*, J.F. Tait, Supervisor of Fisheries to J.A. Motherwell, Chief Supervisor of Fisheries, 3 November 1930.

relinquishing the weirs in exchange for nets. They were opposed, claimed Tait, by a group of influential leaders and "(t)he issue was confused by Indian orators who advocated unrestricted rights in fishing, hunting and many other matters." For Tait the issue was not whether the Department of Fisheries had authority to regulate the Cowichan fishery, but how best to regulate that fishery. He assumed jurisdiction. Cowichan claims of sovereign control "confused" the issue, which was how to remove the weirs. He thought this could be achieved by encouraging the Cowichan to use nets, but the Cowichan resisted, arguing it was for them to decide whether to use weirs or nets, or both. Nothing was resolved at the meeting, but Tait was undeterred. He believed the majority of Cowichan would prefer nets over weirs.

In the fall of 1932 the water in Cowichan River was low and fish could not ascend until the rains came in late October. As the water rose in the river and the salmon moved into the river, Fisheries sought to keep the Cowichan from building weirs to reduce their catch of spring and coho salmon. In return, the Fisheries officers assured the Cowichan that they would receive net permits during the chum salmon run in November. Fisheries also supplied sixteen Cowichan with used gill-nets that it had confiscated for Fisheries Act violations at Port Alberni. The nets had little commercial value, but portions of them could be used in the river to catch chum.

Some Cowichan were keen to have the nets, but those from families who owned the weirs did not want to concede their weir fishery in exchange for nets. Nets were fine, but they should not replace the weirs. In February 1933, a large group of Cowichan met

305 Ibid., 27 September 1838.
306 Ibid., 21 October 1932.
again at the Indian Affairs office in Duncan. A November chum fishery was too short a season, and they insisted on permission to fish with nets during the spring. Tait believed that the majority favoured net privileges and did not care about the weirs. He hoped for a morning vote in favour of weirs, but claimed it was blocked by influential leaders. In the afternoon fewer Cowichan returned. Those who stayed away realized, perhaps, that Tait was not interested in their concerns, but in his agenda to remove the weirs. Those who did return stated they wanted nets, but not at the expense of the weirs. Tait thought that some Cowichan had been coerced into changing their statements. He recommended that the permits not be issued, at least until after the steelhead run had passed.

In the fall of 1933, Fisheries adopted the approach they used the year before. Once the spring salmon had passed upstream, Fisheries issued permits allowing the Cowichan to catch chum with nets. Tait remained convinced that a closely monitored riverine net fishery was the most ecologically sound and practicable method of convincing the Cowichan to give up their weirs. He thought the move away from weirs had already begun, citing as evidence that the weirs had been built later than usual (in August rather than June).

The Cowichan were divided. Fisheries had presented a choice of weirs or nets, and was encouraging the later. Some were prepared to accept nets, but others rejected the limited choice. Once word began circulating that Fisheries intended to prohibit the weirs some of the Cowichan expressed concern. The Cowichan of the upper river were particularly concerned to retain their weirs, while those of the lower river thought the

---

307 Ibid., 9 March 1933.
308 Ibid., 15 September 1933.
weirs should be eliminated in favour of nets. In 1934 Tait received a petition signed by 103 Cowichan requesting that Fisheries abolish the weirs. The petition read:

We, the undersigned Indians of the Cowichan Indian Reserves, hereby petition that the weirs on the Cowichan and Koksilah rivers be done away with, as there are so few that are able to get fish from this means, and that we be given the privilege to catch fish for our food supply by means of nets, gaffs or spears.

Shortly thereafter, Tait received a counter petition signed by 108 Cowichan insisting that Fisheries should allow the weirs to remain. He dismissed this petition, believing the majority wanted to fish with nets. A few influential leaders were preventing an agreement to abolish weirs, he concluded, because they controlled the weirs and thus the access to fish. He labeled Chief Modeste and John Elliot as the primary culprits.

Tait changed his strategy. Instead of encouraging nets, he prohibited their use in the river for any purpose. This would illustrate the benefit of nets, he thought, and convince the majority of Cowichan to reject the weirs. Except for a few compelling cases of need, Fisheries did not issue net permits in 1934 or 1935. It reverted to the terms established by the Committee in 1914, allowing two or three weirs during the week, but prohibiting nets. When Guardian Purvey found a weir in place one Friday evening in July, 1934, he seized the panels and held them for almost one month until Indian Agent Graham intervened.

---

309 Ibid., Memorandum from A. Mackie regarding meeting with Andrew Paul, 1 December 1933.
310 Ibid., Tait to Motherwell, 27 September 1938.
311 Ibid.
312 Ibid., 9 May 1934.
313 Ibid., 21 August 1934.
Graham believed as well that the weirs benefited only a few Cowichan and were the source of "a great deal of dissatisfaction and jealousy". He asked Fisheries to produce a proposal outlining how the Government would secure Cowichan access to a food fishery if they agreed to relinquish their weirs. Tait thought the weirs should simply be abolished, and that this appeared too much like bargaining with the Cowichan over something to which they had no rights. In his opinion the 1914 recommendations that allowed the Cowichan to keep their weirs, referred to repeatedly in the 1920s and 30s as an 'agreement', was not an agreement. It conferred no rights to the Cowichan. Instead, he thought that Fisheries was "quite free to regulate the time, place and methods in providing for permits for Indians to take fish for their own food."\(^{314}\) Despite numerous representations by the Cowichan, it did not occur to him that their rights to the fish in the river and to the methods of taking those fish arose independently of Department of Fisheries.

Chief Inspector of Fisheries Motherwell responded to Graham's request for a proposal by offering to permit gillnet fishing for chum in the river, other net fishing as specifically authorized, spears and dip nets, and purse seines to catch chum for food purposes in Cowichan Bay, if the Cowichan agreed to relinquish their weirs. The terms were as follows:

1. That the Indians be permitted the use of gillnets, at the discretion of the local Fishery Officer, when the main chum run appears in the Cowichan River.
2. That nets be permitted at certain other times of the year but only under the specific authority of the local Fishery Inspector as to times, localities and dimensions of gear.
3. That permits for the use of spears and dip nets be fairly freely issued, which is a continuation of the present privilege.

4. That permission be given each fall during the chum salmon run for the use by the Indians of a purse seine in Cowichan Bay, inside the boundaries, for the purpose of their own food requirements; these operations, of course, to be under the direct supervision of the local Fishery Inspector.\textsuperscript{315}

Indian Agent Graham apparently thought the terms reasonable, but there is no indication that the Cowichan agreed. Several meetings were held in an attempt to secure their consent, but according to the Fisheries officials, on each occasion “a final agreement was prevented by a small majority who were able to dominate the meetings”.\textsuperscript{316} With or without Cowichan approval, Fisheries decided to proceed. It instructed Motherwell not to renew the weir permits in 1936 and to implement the net fishery. Before these instructions were conveyed to the officers in the field, the Cowichan erected one weir. Fisheries determined that, for this last year, it was best left alone, but that the weirs would not be built again.

Some Cowichan were not prepared to relinquish their weirs. They approached Indian Affairs, and on June 11th, 1937, the Department convened a meeting at its office in Duncan.\textsuperscript{317} The Cowichan requested that they be allowed to use both weirs and gill-nets to catch fish for food. Nets worked best in the lower river, but in the upper river where the water was shallow and ran swiftly, weirs were much more effective. They also asked for permits entitling them to fish year round, including Saturdays and Sundays for those who worked during the week. Tait told them, “that the permit system purposed the taking of fish only by those actually in need, and not by Indians who were employed in

\textsuperscript{315} Ibid., Motherwell to Found, 2 October 1935.
\textsuperscript{316} Ibid., Found to Dr. H.W. McGill, Deputy Superintendent General Indian Affairs, 26 June 1936.
\textsuperscript{317} Tait reports that the meeting was attended by Indian Commissioner for British Columbia McKay, Indian Agent Graham, Rev. Father Lauzon, Inspector of Fisheries Lloyd, Fisheries Guardian Sherman, and various Cowichan Chiefs and headmen.
competition with white men, and drawing regular wages”. By this Tait meant that Cowichan working in the wage economy were ineligible for a food fish permit. The food fishery, itself a sharp curtailment of the Cowichan fishery, was now tightly restricted under permits that were doled out by Fisheries only to those without other means of support. Those deemed in need by Fisheries could use gill-nets, dipnets, spears and gaffs to catch fish, but Fisheries refused to issue a weir permit.

After the meeting Fisheries clarified what permits it would issue to the Cowichan. All the permits were for food fishing only and would be issued free. In the late summer and early fall permits would be available from the Indian Agent to “all needy Indians” to catch salmon with spear, gaff or dipnet. The permits would allow fishing from Monday to Friday. Requests for gill-nets would be referred to the Inspector of Fisheries who would ensure that the salmon would be caught “without endangering conservation”. All fish caught during the summer and early fall would be “for consumption fresh”. In the late fall, the Cowichan would be allowed to fish with gill-nets, spear or gaffs, “to obtain all the chums they require for smoking and salting for winter use.” The gill nets used in the river should be no smaller than six and one half inch mesh, no longer than 20 fathoms, and no deeper than sixty meshes. From late December until the end of the steelhead run, permits would “be issued sparingly to only those Indians who might be found to be actually in want.” Fisheries would take similar care issuing permits during the summer when only the spring salmon were running.

---

318 PRFRC, DMF, RG23 vol. 2038, f. 10-3-31, Tait to Motherwell, June 1937.
319 Ibid., Found to Indian Affairs, 13 August 1937.
320 Ibid., Tait to Motherwell, 1 September 1937.
321 Ibid., Tait to Inspector Lloyd, 16 July 1938.
The Cowichan and their supporters continued to press for a compromise that would allow weirs in some form. J.S. Taylor, M.P., suggested that the Cowichan be allowed a weir built halfway across the river with a small return downstream at the outer end. Fisheries refused on the grounds that the Cowichan had plenty of opportunity to catch fish in other ways, that the weirs were a conservation problem, that having finally succeeded in removing the weirs Fisheries was not about to allow even a half weir, and finally that the majority of the Cowichan wanted the weirs gone anyway.322

Cowichan resistance did not disappear. Some refused to recognize the law, and much to the consternation of Fisheries officials, Cowichan caught fish continued to appear in Victoria’s fresh fish markets. The weirs, however, would not be rebuilt. This marked the symbolic end of what had been a long struggle for control of the river. The Cowichan had successfully defended their weirs for longer that any Native group in the province, but after sixty years the Canadian state finally displaced Cowichan law with its own. The battle had been fought on the river, but it had been waged with law.

Law, both Dominion and Cowichan, operated on several levels. The Dominion constructed its fisheries policy in law, thereby legitimizing the threat and use of force against those who disputed its preferred allocation. On several occasions members of the Cowichan were charged with Fisheries offences, arrested and tried. On numerous other occasions, less visible in the historical record, Fisheries officers seized nest, removed weirs, or threatened Cowichan fishers with the legal consequences of continuing to fish.

322 Ibid., Found to Indian Affairs, 29 November 1937.
These included fines and jail, and the destruction of Cowichan property, namely weirs and nets. This continuing legal harassment was, perhaps, more intrusive and ultimately more effective than the formal court appearances which the Dominion consistently lost. Nonetheless, law was the principle device with which the state legitimized and effected the capture of the resource.

Dominion law, including the common law, provided a surprising diversity of tools for Cowichan resistance. Although prosecuted for Fisheries offences, no Cowichan accused was ever convicted for building a weir. With legal assistance from Indian Affairs, the Cowichan successfully defended themselves on both procedural and substantive grounds. Fisheries could not secure a conviction, even with a member of the Vancouver Island Fish and Game Society or a former Fisheries officer as the justices of the peace hearing the charges. Each legal failure of the Crown's, strengthened the Cowichan's position that they had a legal entitlement to fish, and that the weirs did not cause the ecological damage alleged by Fisheries. Although not choosing to enter the Canadian legal space of the courtroom, the Cowichan turned the space to their advantage. They also used the law of trespass to exclude White fishers and hunters from prime hunting and fishing grounds in the lower river. This was a highly effective use of law, largely because it threatened economic damage to the local economy.

Although the tools of the state were, at times, useful to the Cowichan, their resistance was rooted in Cowichan law. Based on a fundamental sense of right and entitlement drawn from within Cowichan teachings, the Cowichan defended their weirs from repeated challenges by the Canadian state. Cowichan law served the same basic
purposes as Canadian fisheries law. It provided a structure for managing the resource, allocating fish among particular users by regulating the time, place and method of harvest. That it was not recognized by the state did not make this alternate system of regulation any less real. It did, however, reduce its effectiveness. Fisheries marginalized the Native fishery to the point where only people on the edge of destitution, as determined by Indian Affairs, could receive a food fishing permit. The Cowichan could work for the canneries, and many did, but when a chief applied for a commercial licence, he was refused, only to see Fisheries propose to lease that same fishery to a Victoria firm. In this environment, Cowichan law as a source of authority declined. The weirs were of declining importance within the Cowichan economy and the interest in fighting for the weirs diminished. They were owned by certain families, and although non-family members might have access to the weir fishery, they were unable to control that access. The divisions that existed in Cowichan society were accentuated by Fisheries officers in their efforts to remove the weirs. In the end, the Canadian state regulated the weirs out of existence, but not without a half century of determined Cowichan resistance, and never with the Cowichan’s consent.
Figure 2.2 Cowichan Weir and Road Bridge (BCARS Photo #D-03689)
Figure 2.3  Cowichan Weir and Farmhouse (BCARS Photo #H-07044)
Figure 2.4  Cowichan Weir with Fishers (BCARS Photo #B-03532)
Figure 2.5  Fly-fisher on the Cowichan River (BCARS Photo #I-51696)
Figure 2.6  Fly-fishers on the Cowichan River (BCARS Photo #G-04300)
"If they are going to be white men let them fish as white men do": fish weirs and legal cultures on Babine Lake, 1904-1907

At the end of the fishing season in 1904 the Department of Marine and Fisheries removed the fish weirs on the Babine River near the outflow of Babine Lake. This was the last year that the weirs would fully operate. In comparison to the protracted dispute over the Cowichan weirs, the confrontation on Babine Lake burned brightly for three years and was gone. It was a shorter, and in many ways a simpler dispute. The canneries operating near the mouth of the Skeena River needed a secure supply of fish. The weirs on the Babine River, principle spawning ground of the Skeena sockeye, threatened that supply, and the cannery owners, who had appointed the local Fisheries officers, co-opted the power of the Canadian state to secure their supply of fish. (See inset map, Figure 3.1.)

The intensity of the dispute over fish in the Babine River brings the dual roles of law into focus. The state used law, at the behest of the Skeena cannery owners, to assert its order on the Skeena and Babine River fisheries, and to justify that order. The enforcement of Canadian fisheries law on the Babine River was the power of industrial capital, legitimized. Similarly, the Lake Babine people used law, their law, to resist the state's intrusion, and to justify that resistance. Unlike the Cowichan, the Babine had neither time nor access to a local settler society to gather the resources of the state in their defence. The result was a clash of legal cultures. Just as one fishery sought to exclude the other, so one legal culture sought to replace the other. What follows, then, is a study of the exercise of power in the colonial setting, through law.
Babine Lake and its People

Babine Lake supports many species of fish, including trout, char and whitefish, but the focus of human activity has always been the anadromous sockeye salmon. Sockeye spawn in the fall in the Babine River above and below Nilkitkwa Lake, and in the tributaries of Babine Lake, particularly those in the North Arm (see Figure 3.1). In the spring the fry migrate to Babine Lake and live in its waters for their first year. In May and June of their second year the young sockeye leave the lake, travel down the Babine and Skeena Rivers to the Pacific where over the next two years they range as far as the Gulf of Alaska feeding on the vast array of oceanic plant life. In their fourth or fifth years they migrate back to the Babine River system in August and September to spawn.323

This yearly concentration of protein supported the people whose ancestral territory borders Babine Lake and who call themselves the Lake Babine Nation or the Ned’u’ten Nation.324 Although their diet included plants, animals and other fish, sockeye salmon was their dietary staple. The Babine caught sockeye with weirs in shallow waters of the Babine River in August and September. The locations of the weirs were recorded by various White observers, and their maps are reproduced in Figure 3.2. The Babine dried

or smoked the sockeye in vast quantities, enough to last until the following year's harvest and longer if, as occasionally happened, the sockeye did not appear. The preserved fish were also a valuable trade item that the Babine exchanged with neighbouring peoples, particularly those to the east on Stuart and Takla Lakes whose sockeye runs were less reliable.

The Lake Babine Nation is commonly known among anthropologists as a regional group within the Athapaskan-speaking Carrier. They divide themselves into four matrilineal clans, and sometimes call themselves the "Four Clan Nation". The clans -- Likhc'ibu (Bear), Jilh ts'e yu (Frog), Gil lan ten (Caribou) and Lakh tsa mis yu (Beaver) -- correspond to clans among neighbouring peoples, creating links that foster trade and marriages, and allow access to resources in other territory. The clans divide further into family groups or "Houses". Within these Houses, individuals can hold a personal crest or name that only they are entitled to use. Each name fits within a social hierarchy, and those holding the highest ranking names are the hereditary chiefs. Not everyone holds a hereditary title; they are reserved for the nobility and acquired by holding a series of feasts or potlatches, known to the Babine as "bah'lats". The chief of the leading House within a clan usually holds the position of clan chief. The more important the name, the more expensive the bah'lats. The chiefs are known by their crest or name, and it is to this name and not the person that the rights associated with being a chief attached. A contemporary anthropologist, Joanne Fiske, and a hereditary chief, Betty Patrick, describe the rights that accompany a name as follows:

Each chief is known by the potlatch name s/he has paid for in a series of potlatches. Each chief enjoys prerogatives that are associated with and inalienable from the potlatch name, such as
rights to intangible property, to perform rituals, and to control access to traditional resource territories.\textsuperscript{325}

Fiske and Patrick survey anthropological studies of the Carrier, all of which emphasize that the important resource procurement sites, including traplines and fishing places, were owned by clan chiefs.\textsuperscript{326} However, there are some differences among anthropologists about what ownership entailed. Michael Kew, working as a young student in the mid-1950s, observed that: “Fishing sites were traditionally regarded as property by the Carriers; and families still retain a certain degree of exclusive right to fish in specific places.”\textsuperscript{327} According to J.C. Hackler, also a student in the 1950’s, the Lakh tsamis yu or Beaver clan (he identified it as “Laksamasyu”) were the largest and most important clan within the Lake Babine Nation. They controlled three of the four Babine fish weirs that once operated on the Babine River. Furthermore, he identified De wisim dsik (he wrote “Deo-tsum-tsak”) as the highest ranking name within the clan, and thereby the most important title of the Babine. To take fish at the Beaver weirs, one had to receive permission from De wisim dsik.

While not disagreeing with the lines of control, Fiske and Patrick choose to emphasize the idea of stewardship rather than ownership.\textsuperscript{328} The fish weirs belonged to the clan. It was the responsibility of the chief to allocate individual sites along the weir or the times and order in which clan members were allowed to fish. Thus, the chief managed

\textsuperscript{325} Fiske and Patrick \textit{Lake Babine Nation}, p.75.
\textsuperscript{326} Ibid., pp. 234-43.
\textsuperscript{327} Kew, \textit{Notes}, p.6.
\textsuperscript{328} Arthur J. Ray, “Fur Trade History and the Gitksan-Wet’suwet’en Comprehensive Claim: Men of Property and the Exercise of Title”, in Kerry Abel and Jean Friesen, eds., \textit{Aboriginal Resource Use in Canada: Historical and Legal Aspects}, pp. 301-315, makes a similar argument based largely on William Brown’s records at Fort Kilmaurs.
the resource for the people of his or her clan. Control of the resource traveled with the
name, but the effect of that control was to ensure that the all the clan members were
provided for and that the resource remained healthy for future generations. Nonetheless,
fishing rights were strongly defended against trespass; unauthorized use could result in a
penalty as severe as death.\footnote{329}

During the dispute with the Dominion government over fish weirs in the early
twentieth century, the name of De wisim dsik was held by Tszak (Jack) William, head of
the Grouse people, a family group within the Beaver clan. His wife, Hazelcho, was an
important leader of Babine resistance, and is widely remembered as the woman who
knocked the Fisheries Officer into the river. The other prominent figure is Big George,
Gwis ta’ of the Mountain people within the Caribou clan.\footnote{330} Both Tszak William and Big
George traveled to Ottawa with the Oblate Missionary Father Coccola in 1906 to
negotiate a resolution to their weir dispute with the Dominion government.

Big George explained to the Minister of Fisheries, L.P. Brodeur, at the first of two
meetings in Ottawa in 1906 that his people relied on salmon for virtually all their food, and
that without barricades they could not catch enough fish to survive. He could not say how
long his people had been fishing with barricades, but it was the way his father and

\footnote{329} Given that access to resources is at stake, the nature of ownership is not only of anthropological
interest but contested today within the Lake Babine Nation. Fiske and Patrick, \textit{Lake Babine
Nation}, p. 384, comment about the divisions within the contemporary society:

“While at least one hereditary chief argues that the fishery was always a resource controlled by
Lak tsa mis ‘yu, with final authority and control over revenues accruing to the chief whose
lands surround the traditional fishing ground, others assert the opposite. They suggest that a
communal right was vested in the village as a whole, and differ as to whether or not residents of
Fort Babine, the closest village, retained any advantages over the residents of the Old Fort.”

\footnote{330} Hackler, ”Social Disorganization,” p. 44., identifies Big George as De wisim dsik, but this is
refuted by several Babine chiefs; see Fiske and Patrick, \textit{Lake Babine Nation}, pp. 73, 242.
grandfather had fished. When he was a boy the Babine built three barricades, but because
their numbers were declining they had used just two weirs in the past few years, and this
year they built only one. Big George explained that his people erected barricades every
August, and removed them about four weeks later when they had caught enough fish.
The chief gave the order to erect the weirs, and all the people helped. Everyone had their
own space to fish and did so on their own accord. The chief, according to Big George,
did not allocate places.

The Babine had mechanisms for settling internal disputes over the weirs. William
Brown, the Hudson's Bay Company (HBC) Trader, recounted the sketchy outline of a
dispute over the weirs in 1825. One group accused another of blocking the entire river,
thereby preventing the salmon from reaching Babine Lake. The dispute was settled by the
middle of August with a feast held by one of the disputing parties. Once resolved, fishing
began in earnest and by the end of October 44,000 fish had been delivered to Fort
Babine. 331 Indian Agent Loring recorded another dispute at the weirs in 1894. Acting on
the request of some Babine who did not want a dispute over fish to escalate, Loring
taveled to the weirs to help settle differences. 332

The feast recorded by Brown in 1825 was a traditional method of recognizing and
reinforcing authority, and of dispute resolution. The feast or bah’lats system was, and still
is the source of the hereditary chiefs’ authority. Emphasizing the communal and
cooperative aspects of the bah’lats, Fiske and Patrick describe its role as follows:

331 Hudson’s Bay Company Archives (“HBCA”), B 11/a/3, Fort Kilmaurs Journal, 8 and 12
September, 1825.
332 National Archives of Canada (“NAC”), Department of Indian Affairs (“DIA”), RG 10, reel C-
10101, vol. 3571, file 126, part A, Loring to Superintendent of Indian Affairs Vowell. (date?)
Legal authority of the hereditary chiefs is derived from and exercised through the bah 'lats. It is their position within the matrilineal clan system, symbolized by the seating order in the potlatch hall, that grants them the authority to interpret customary laws and to adjudicate disputes according to those laws. The names they carry confer specific obligations and privileges that are denied all others. But this is not to suggest chiefs exercise a form of autocratic powers, for their capacity to carry through their obligations rests on their willingness to be generous to others, to show respect to one another and to their legal institutions, and to exercise wise judgments for the well-being of their lands, clans people, and future generations.  

A permanent White presence

The HBC established Fort Kilmaurs on the head of land between the two arms of Babine Lake in 1822 (see Figure 3.1). The Fort created a permanent White presence on the lake, and a new market for furs and fish. The Babine took advantage of the HBC presence, supplying fish and furs, in some years delivering tens of thousands of fish and hundreds of furs in exchange for HBC goods. In 1825, for example, the Babine delivered 44,000 salmon to Fort Kilmaurs, and many of these were shipped to Fort St. James on nearby Stuart Lake. In 1871 the HBC moved its Fort (then Fort Babine) to the north end of the Lake, hoping to stem the flow of furs to competitors on the coast and to take advantage of the proximity to the Babine fishing sites. A sketch drawn by the HBC’s Roderick Finlayson, marking the HBC claim at the north end of the lake in 1871, is reproduced in Figure 3.2. Finlayson noted the location of three weirs, one at the outflow of Babine Lake opposite the village site, and two connecting Smokehouse Island.

---

333 Fiske and Patrick, Lake Babine Nation, p. 89.
334 Although only a few kilometres apart, Stuart Lake and Babine Lake drain in opposite directions. Stuart Lake empties into the Fraser River and is hundreds of kilometres further up that system than Babine Lake is up the Skeena River system. Consequently the sockeye run on the Babine was more reliable and abundant that the Stuart run, and the HBC fort on Babine Lake regularly supplied neighbouring Fort St. James with fish.
335 British Columbia Archives and Records Service ("BCARS"), A.C. 20. VI3F, Ft. Victoria Correspondence Outward, Roderick Finalysonto P. O’Reilly, Gold Commisioner, Omineca Stuarts Lake, 29 May 1871. The post is widely reported to have moved to the north end of the lake in 1835, but this is incorrect. The HBC did not use Finalyson’s survey, instead building its post just
As well as creating a new market for fish and furs, the forts created permanent Native settlements where there might only have been seasonal fishing or hunting camps. In 1879, the surveyor George Dawson visited the Babine village, Wit-at, at the north end of the Lake. Wit-at, from “wit’ane keh” meaning site of making dry fish, was once a seasonal fishing settlement, but had become a permanent village since the HBC moved its fort. Dawson provided the following description of the Babine village:

The Indian village seems to have some vitality here, there being quite a number of small shanty-like houses, several of them new. Many salmon caches, standing as high board erections on posts. Great quantities of salmon are annually taken here, a wicker weir with fish traps being placed completely across the river. The Indians are provided enough to keep nearly a years supply ahead and consequently have plenty to sell to trading parties of Indians.  

Despite the proximity of HBC posts, the Canadian state was relatively unobtrusive in Babine territory before 1904. Indian Affairs appointed R. E. Loring as the Indian Agent for the newly established Babine Agency (an area that included much of the Upper Skeena, not just Babine Lake) in 1889. He traveled frequently into Babine territory, but was a transient presence, by no means controlling or even supervising Babine life. Peter O’Reilly, the Reserve Land Commissioner, arrived in 1891 to allot reserves, and he set aside 4,348 acres of land for the Babine, spread over nine reserves (see Figure 3.1). The sketch that accompanies his minutes of decision also includes the locations of three Babine weirs (see Figure 3.2).

---

336 Fiske and Patrick, Lake Babine Nation, p. 57.
337 BCARS, BG47, George Dawson diary entry, 29 June 1879, (emphasis in original). Thanks to Bob Galois for providing this reference.
338 Federal Collection of Minutes of Decision, Correspondence & Sketches, Peter O’Reilly, May 1889 to October 1894, File 29858, Vol. No. 7 [Copy held by the Department of Indian Affairs,
Although the reserves were staked in 1891, there were few non-Babine settlers in the area and it is unlikely Babine movement through their traditional territory was seriously hindered. Undoubtedly Babine society had changed by its encounter with the non-Native world. The presence of an Indian Agent, a person whose authority derived from sources outside the Native world and who could intervene to help settle a dispute over fish, would have changed power relations within Babine society. Similarly, the Oblate Missionaries were an important presence since the arrival of Father A.G. Morice at the Fort St. James Mission on Stuart Lake in 1885. Nonetheless, the state was a weak presence, and while the Babine could not remove the HBC from their territory, it was likely welcomed as a new source of wealth. The expanded market for furs and fish could be accommodated by the Babine in ways that, to some degree, they could control. This was much less true of the direct intervention by the Department of Fisheries that began in 1904.

Departments of the Dominion

In its dispute with Babine over fish weirs the state was not a monolithic actor. The division was not along Dominion/provincial lines as is so often the case in the Canadian federal state. Instead, a division existed between departments of the Dominion government—-the Fisheries Branch of the Department of Marine and Fisheries (“Fisheries”) and the Department of Indian Affairs (“Indian Affairs”).

Regional Office, Vancouver]. Note the different location of the weirs compared to the maps of Finlayson and Skinner.
Fisheries' hierarchy in 1904 requires some explanation. At its base were the “fishery guardians” who worked in the field enforcing the *Fisheries Act* and *Regulations*. They were assigned to a river or a relatively small region, usually just for the fishing season. In 1904 Fisheries employed two guardians on the Upper Skeena, E. Nordschow and G.F. Church, for five months at $60/month. In 1905 Fisheries raised the rate to $75/month. The guardians reported to a “fishery officer,” a position occupied on the Upper Skeena by Hans Helgesen who was based in Hazelton.339 As a fishery officer, Helgesen was responsible for the guardians in his region, but also worked in the field enforcing the *Fisheries Act*. In 1904 and 1905 Fisheries paid him $750 for six months work ($125/month) each year. The fishery officer reported to the “inspector of fisheries”. Before 1904 there was one inspector of fisheries for all the British Columbia, but that year Fisheries divided the province into two regions: District No. 1 included Vancouver Island and the mainland south of Bute Inlet; District No. 2 comprised the northern coast. The following year Vancouver Island became District No. 3. John T. Williams, based in Port Essington near the mouth of the Skeena, was the inspector for District No. 2. He reported to the Minister of Fisheries in Ottawa, a position held from 1902-06 by Raymond Prefontaine, and then by L.P. Brodeur until 1911.

The role of Fisheries in the dispute is relatively transparent. By 1904 eleven canneries operated near Port Essington at the mouth of the Skeena, supported by more

339 NAC, Department of Marine and Fisheries (“DMF”), RG23, file 583, part 1. Helgesen, an MLA in the 1880s, described himself as a fisherman at the November 1906 Conference at the DMF in Ottawa. In 1905 and 1906, in partnership with John Witty and Albert A. Argyle, he held foreshore fishing station leases on the southwest coast of Vancouver Island, Metchosin District; BCARS, GR 1402, box 5, file 20, and box 6, file 14.
than 700 fish boats and 2,500 workers (see Figure 3.4). Fishing was big business on the north coast, and the enforcement of the *Fisheries Act* reflected its agenda, notwithstanding the rhetoric that removing the barricades was a conservation measure in the interests of all users. The fishery guardians and officers on the Upper Skeena were political appointees. The Skeena Liberal Association nominated the candidates who were hired; Fisheries did not exercise any discretion. This hiring practice created discipline problems. Responding to the Oblate Missionary Father Coccola’s complaint about the conduct of several fishery guardians, Inspector Williams told his Department that the Liberal Association appointed the officials, and that until he had “efficient, honest, and trustworthy Guardians”, he could not properly enforce the *Fisheries Act*. Personnel concerns were exacerbated by a second factor: fishery officers received half of any fines levied for *Fisheries Regulations* violations. In 1904, eight fishery guardians from the south coast wrote to the Minister, complaining that this practice made it difficult to enforce the *Regulations* because the cannery operators and fishers accused them of extortion.

The role of Indian Affairs was somewhat more ambiguous. The Department was charged with responsibility for ‘Indians’. In this capacity, it’s officers resisted the attempt to minimize the Native fishery and to characterize Native peoples as the cause of the salmon shortfall. Instead, Indian Affairs argued that Native people were entitled to fish in the manner they were accustomed, certainly for the purposes of food, and to buy clothing, ammunition and other staples. Further, its agents believed, as did the Babine, that the

---

340 NAC, DMF, RG23, file 23, Inspector Williams to R.N. Venning, Assistant Commissioner of Fisheries, 19 January 1907.
341 NAC, DMF, RG23, file 1469, part 1, Fisheries Guardians to Raymond Prefontaine, Minister of Marine and Fisheries, 22 August 1904.
cause of the salmon shortage was not the weir fishery, but rather the wasteful practices of the cannery operators. Indian Affairs had a fixed budget and every Native person it had to support reduced funds for other purposes. If the canneries were responsible for the shortage of fish, then Fisheries should be responsible for the consequences of its poor management—in this case the compensation of Native peoples—not Indian Affairs. Indian Affairs likely objected to policies of another department that reduced Native self-sufficiency and increased its costs. However, Indian Affairs was part of the Dominion government and responsible for upholding its laws. Even if it disagreed with a law, it could not publicly condemn the policy of another department.

Indian Affairs had its own hierarchy. At its base were the Indian agents, assigned to a particular band or region. Indian Agent R.E. Loring was responsible for the Babine Agency, and he operated from Hazelton. He reported to the Superintendent of Indian Affairs for British Columbia in Victoria, A.W. Vowell. Vowell reported to the Deputy Superintendent General of Indian Affairs in Ottawa, who in turn reported to the Minister of Interior, the Honourable Frank Oliver. At the time of the dispute, the Indian Affairs was part of the Ministry of the Interior.

**Barricade Conflict, 1904**

Before the mid 1870s, non-Native interest in fish on British Columbia’s northwest coast was a relatively insignificant appendage to the fur trade or the gold rushes. This began to change when, in 1876, a San Francisco based outfit, the North-West Fishing
Company, opened the first cannery on the Skeena River.\textsuperscript{342} The operation was a limited success its first year, but it marked the beginning of an industrial fishery on British Columbia’s north coast, connected by ships to distant markets in England, Australia and other parts of the British Empire. From these tentative beginnings the industrial commercial fishery on the north coast grew so that by 1904 eleven canneries operated near Port Essington at the mouth of the Skeena, supported by more than 700 fish boats and 2,500 workers.\textsuperscript{343} Three more canneries operated nearby on the Nass River. The commercial canning industry was a major presence on the northwest coast.

In 1904, Fisheries began a concerted effort to eliminate a particular form of Native fishing—the fish weir—from the headwaters of the Skeena River.\textsuperscript{344} Until then, Fisheries had left the Babine and their fish weirs entirely alone. However, in 1904 the cannery operators at the mouth of the Skeena demanded that the Government remove the weirs.\textsuperscript{345} The catch on the Skeena in 1902 set new records; the canneries shipped 155,936 cases of

\footnotesize{\textsuperscript{342} CSP, 40 Vic., 1877, Department of Marine and Fisheries Annual Report (Fisheries Annual Report), 1876, p. 339.}
\footnotesize{\textsuperscript{343} CSP, 5-6 Ed.VII 1906, Fisheries Annual Report, 1905, p.219.}
\footnotesize{\textsuperscript{344} Although the following description is drawn from primary sources, the events are also described in part by Barbara Lane, “Federal Recognition of Indian Fishing Rights in British Columbia,” prepared for The Union of B.C. Indian Chiefs, April 1978; Dianne Newell \textit{Tangled Webs of History} (Toronto: University of Toronto Press, 1993), pp. 91-5; Geoff Meggs, \textit{Salmon: The Decline of the B.C. Fishery} (Vancouver: Douglas & McIntyre, 1995), pp. 74-80; and Jos C. Dyck, \textit{And Then We Will Mind the Law': The Enforcement of Federal Fisheries Regulations in British Columbia and the Resistance of Native Fishers, 1894-1916} (Simon Fraser University, M.A. Thesis, 1994).}
\footnotesize{\textsuperscript{345} Cannery operators along the coast were concerned about Native fish weirs. In a letter to Prefontaine, Henry Doyle wrote: There should be a systematic and annual examination of every salmon stream up which sockeye ascend, in order to see that fallen trees and other natural obstructions do not impede the upward progress of fish, and that artificial barricades, such as the Indians employ are also removed. (University of British Columbia, Special Collections, Henry Doyle Papers, Doyle to Prefontaine, 15 August 1904.)}
tinned salmon, and the value of all fish caught on the Skeena that year was $824,266.55.\textsuperscript{346} The owners were anticipating an even better year in 1903. According to the anecdotal evidence of one manager, the 1899 salmon run on the Skeena had been uncommonly large, but few fish were caught because the fisher’s had been on strike.\textsuperscript{347} As the salmon swam past the relatively idle canneries that year, the managers consoled themselves, expecting a big run four years later. However, the 1903 catch produced only 98,688 cases, and the value of the total catch was half the previous year’s record. When relatively few salmon appeared, the cannery operators blamed the Native fish barricades in the Upper Skeena.

John T. Williams, the Inspector of Fisheries for the Northwest Coast, responded to the cannery owners’ complaints by sending Fishery Officer Hans Helgesen and Fishery Guardian Nordschow to Hazelton in September 1904 to investigate reports that Natives were catching salmon by barricading the headwaters of the Skeena. Helgesen and Nordschow reached Fort Babine at the north end of Babine Lake on September 14, 1904. The following day they borrowed a canoe, hired two Native men and proceeded seven miles down the Babine River. There, where the water was about a metre deep and running swiftly, they found the Babine working two weirs about half a mile apart, each spanning the 200’ wide river (see Figure 3.2).\textsuperscript{348} With considerable admiration, Helgesen

\textsuperscript{346} CSP, 3-4 Ed.VII, 1904, Fisheries Annual Report 1902, p.212.
\textsuperscript{347} NAC, DMF, RG23, file 2235, pt. 2, Peter Wallace of The Wallace Brothers Packing Company Ltd., Claxton, Skeena River, to the Honourable William Sloan, MP for Skeena, 11 April 1905.
\textsuperscript{348} CSP, 5-6 Ed. VII, 1906, Fisheries Annual Report, p. 206. The map labelled “Hans Helgesen, 1904” is a best guess at the weir locations based on Helgesen’s description that the weirs were seven miles downstream of the HBC post, spanning a two hundered yard wide river. This places the weirs just below the outflow of Nilkitkwa Lake.
described the weirs as, “constructed of an immense quantify of materials, and on scientific principles.” The Babine had driven posts into the river bed at intervals of six to eight feet to support the weir. Helgesen’s description continued:

Then sloping braces well bedded in the bottom and fastened to the top of posts, then strong stringers all the way on top and bottom, in front of posts, then panel beautifully made of slats woven together with bark set in front of all, these were set firmly into the bottom, and reaching 4 feet above the water. This made a magnificent fence which not a single fish could get through.

On the upper side of dam were placed 12 big traps or fish bins. Opposite holes made in the panels for fish to enter the traps, prepared with slides to open and shut, and if the traps did not have a sufficient quantity of fish in them, when the women wanted more fish on the bank, the men would take their canoe poles, wade out in a line and strike the water, making a noise which could fill the traps in a moment, then shut the slides down, take a canoe on each side of bin, raise the false bottom, by some contrivance so as to elevate the fish, then load up canoes with gaff hooks.

Altogether the barricades presented a most formidable and imposing appearance. Helgesen reported 16 houses filled with dried salmon and racks of drying salmon outside. Although the run was coming to an end in mid-September, the fishers were still catching 500 - 600 salmon a day, and Helgesen estimated that the Babine had caught 750,000 salmon that year. The total figure reported by Helgesen is extraordinarily high, by far the highest in the historical record. It is possible that Helgesen exaggerated the catch to emphasize the magnitude of the perceived problem. However, there is no doubt that the Babine had the capacity to catch immense quantities of fish. They consumed many fish themselves, traded with other Native people, and it is likely that the non-Native market for dried or smoked fish increased in the late nineteenth and early twentieth centuries. The HBC traders had been buying fish since the early nineteenth century, but the Omineca gold rush of the 1870s and the rush to the Klondike in the 1890s brought a stream of miners through Babine territory. Similarly, the flood plain of the Bulkley valley

---

349 Ibid.
enticed White farmers into neighbouring Gitksan territory. These immigrants -- trappers, miners, packers, traders and farmers who lived or worked in the region -- bought salmon from the Babine for food. As more arrived it is likely that the demand increased. Furthermore, fur bearing animals were increasingly scarce in the region, and given that this had been an important source of income for the Babine, they may have been trying to compensate with increased trade in preserved fish.

Helgesen reported that Chief Big George was away when they arrived, so he spoke with “Chief Atio” whom he described as “next in command”. Helgesen told Atio that he had been sent by the government to destroy the barricades; that it was in the interest of all users of the fishery, including the Babine, to allow salmon to spawn; that the law prohibited barricades because they prevented salmon from reaching the spawning grounds; that they must observe the close season; that they were only allowed to fish up to one third of the channel with nets; and that they could only catch fish for themselves and their families, but not for sale. The practice of selling fish as they had done in the past must stop. Helgesen recorded Atio’s interpreted reply:

The chief advanced many points and some of them were well taken, he said they have had an indisputable right for all time in the past, that if it was taken away the old people would starve, that by selling salmon they could always get iktahs, and he wanted to know to what

352 HBCA, B.11/a/7, Babine Post Journals 1899-1905, record that Big George left Fort Babine on 7 September packing goods, and did not return until 22 September.
353 NAC, DMF, RG 23, file 583, pt. 1. At the Ottawa Conference of 25 October 1906, the person Helgesen identified as Chief Atio is identified as Tszak William. However, later in the Conference Chief Big George stated that Atio was not a chief but just an old man present at the weirs whom Helgesen decided to consult.
extent the government would support them, he thought it unfair to forbid them selling fish when
the cannerymen sold all theirs, and I had to promise him to tell the government to compel the
canners to let more fish come up the rivers, as some years they did not get enough, that the
canners destroyed more spawn than they, that formerly he could not see the water below his
barricade for fish, that they were so plentiful that some of them were forced out on the beach,
but latterly they had diminished, little by little every year.\textsuperscript{354}

The Babine clearly felt they had a right to the fish for food and also for sale. They
had used barricades for longer than anyone could remember, and who was Helgesen and
his government to tell them that the barricades must come down? While the cannery
operators blamed the ‘Indian fishery’ for fish shortages, the Babine pointed their fingers
back at the cannery operators. The Babine were concerned about the state of the salmon
run as well, but they believed the cannery fishers at the mouth of the Skeena were catching
too many fish. If more fish escaped the cannery nets, argued the Babine, more fish would
reach the spawning grounds.

Notwithstanding the Babine’s long established use of fish weirs and their assertion
of a right, Helgesen insisted that the practice was “a gross breach of the law”. He
threatened “punishment or imprisonment” if the Babine did not remove the barricades.
Behind these threats lay the Dominion \textit{Fisheries Act}. It prohibited fishing apparatus that
obstructed the main channel of rivers or streams, and required that at least one third of any
river or stream remain unobstructed.\textsuperscript{355} Furthermore, it only allowed such fishing in tidal

\textsuperscript{354} CSP, 5-6 Ed.VII, 1906, Fisheries Annual Report, p.207. ‘Iktahs’ is a Chinook word for basic
supplies such as flour, sugar, ammunition etc.

\textsuperscript{355} \textit{Fisheries Act}, R.S.C. 1886, c.95.

s.14 (4) The main channel or course of any stream shall not be obstructed by any nets or
other fishing apparatus; and one-third of the course of any river or stream, and not less than
two-thirds of the main channel at low tide, in every tidal stream shall be always left open and no
kind of fishing apparatus or material shall be used or placed therein ...  

(5) No net or other device shall be so used as entirely to obstruct the passage of fish to
or from any of the waters of Canada, by any of the ordinary channels connecting such waters,
waters. Anyone convicted of an offence was liable to a fine not exceeding $100 and costs, and if in default, to imprisonment for a term not exceeding three months.

Eventually the Babine agreed to dismantle the barricades, but after two hours work in the cold water and the job only partially completed, they refused to continue unless they were paid for their work. Fisheries frequently hired Natives at a rate of $2 - $3 per day to clear landslides, windfalls and other obstructions blocking rivers in the Upper Skeena. Helgesen relented. He hired six of them to finish removing the weirs. Although he did not want to pay the Babine to do what the law required, he conceded that it was the only way he could get the barricades down. There was little more that two Fisheries officers could do in the face of Babine opposition.

After purchasing the removal of the Babine barricades, Helgesen continued through the tributaries of Babine Lake removing other barricades, that, late in the season were largely abandoned and in various stages of collapse. He destroyed six barricades in all, and everywhere he went he explained the fisheries laws and regulations to the Native people. Next year, he told them, they would not be allowed to fish with weirs because that method of fishing destroyed the salmon stock and the law forbade it.

The Babine were not persuaded. From where, they wanted to know, did the government derive its authority to make these demands? When Helgesen returned to

or prevent their passage to and from accustomed resorts for spawning and increasing their species.

356 *Fisheries Act*, R.S.C. 1886, c.95, s.8(5), as amended by 52 Vic., c.24, s.1.
357 *Fisheries Act*, R.S.C. 1886, c.95, s.18, as amended by 57-58 Vic., c.51, s.7, 61 Vic., c.39, s.3.
Babine Lake from his rounds in the Upper Skeena, one Babine chief asserted a right to fish with weirs and demanded compensation if they were destroyed again. Helgesen wrote:

To show how the Indians feel about loosing their barricades I beg to call your attention to what occurred at Babine, I was asked to attend a meeting of Indians, when I was informed by one who claimed to own the barricades, that if he had been present when the barricades were destroyed they would not have been touched, that unless the government sends him $600 before the fish run next summer, the barricades would surely be constructed again, though he should die for it, this he repeated several times, and I had to promise him that I would tell the government so.\(^{359}\)

Given that the fishing season was almost over when Helgesen and Nordschow arrived at the weirs in 1904, their actions had little impact on the Babine catch. However, their presence raised concerns among the Babine. Over the ensuing winter, the Babine informed Father A.G. Morice that a White man claiming to act on behalf of some government had forbidden their use of fish weirs. They asked him to intercede on their behalf. Morice, the Oblate Missionary based at Fort St. James on Stuart Lake from 1885-1903, had written extensively on the Western Dene, particularly the people of Stuart Lake, but he knew the Babine as well or better than any other White.\(^{360}\) He could scarcely believe that Fisheries had forbidden the Babine to use weirs, and as his letter to Indian Affairs suggests, he thought it must be a matter of correcting a renegade official who had exceeded his authority:

Such a pretension on the part of an official -- whoever he may be -- appeared to me so monstrous that I refused to believe it possible and to this day I have, as you are aware, never yet acted on the Indians’ suggestion. But the latter insist, and seem so earnest that I am almost

\(^{359}\) CSP, 5-6 Ed.VII 1906, Fisheries Annual Report, p. 211. The identity of this person is unclear. Helgesen appears to have known Big George and would likely have identified him if it were him.

\(^{360}\) Morice indicated that the letters came from “the head chief of the Babine tribe”, but he does not indicate who that was. For an account of Father A.G. Morice’s remarkable life as a missionary, linguist, historian and cartographer, see David Mulholland, *The Will to Power: The Missionary Career of Father Morice* (Vancouver: University of British Columbia Press, 1986). For Morice’s own version, published under the pseudonym “D.L.S.”, see *Fifty Years in Western Canada: The Abridged Memoirs of Father A.G. Morice, O.M.I.* (Toronto: Ryerson Press, 1930).
inclined to suppose that some ignorant person may indeed have committed the terrible blunder of trying, through his little familiarity with matters in the northern interior, to starve two whole tribes of Indians, who should on the contrary be helped out of the public funds as a compensation for the loss of furs they have suffered at the hands of white parties during these few years. As to their being allow[ed] to fish only with nets, I shall not lose my time in considering that eventually (sic), since they could not then procure merely what would be necessary for their daily consumption during the fishing season, and would have literally to starve from the beginning of September to the middle of July. 361

Indian Affairs forwarded Morice's letter to Fisheries, suggesting that the matter “be dealt with cautiously”. 362 Fisheries replied that, “the wholesale destruction of spawning salmon, upon which the great salmon industry of the north so largely depends..., threatens most serious results to the industry.” 363 It appointed three guardians, Stuart Norrie, Charles Jones and Harry Frank, all of Port Essington and recommended by the President of the Skeena Liberal Association, to patrol the upper Skeena under Helgesen’s command. 364 Realizing perhaps that the threat to the Babine fishery was more serious than he had anticipated, Morice wrote again to Indian Affairs. He indicated that the money economy was “practically unknown” to the Babine, that the climate could not support agriculture, and that without fish to eat and trade they would not survive. In the past when the runs had failed, the Babine starved, but in the early twentieth century conditions were even worse because fur bearing animals were scarce. 365

---

361 NAC, DMF, RG 23, file 583, pt. 1, Morice to Indian Superintendent Vowell (his emphasis), 2 July 1905.
362 Ibid., F. Pedley, Deputy Superintendent General of Indian Affairs, to F. Gourdeau, Deputy Minister of Fisheries, 14 July 1905.
363 Ibid., Gourdeau to Pedley, 31 July 1905.
364 NAC, DMF, RG 23, file 23, E.E. Prince, Commissioner of Fisheries, to J.T. Williams, Inspector of Fisheries, 23 June 1905. Harry Frank did not accept the commission and was replaced by J. Wells.
365 NAC, DMF, RG 23, file 583, pt. 1, Morice to Indian Superintendent, 15 July 1905. Minister of Fisheries Brodeur claimed at the November 1906 Meeting that Morice went to Ottawa to intercede on behalf of the Babine.
The Babine were concerned about their fishery, but believed that after the final meeting with Helgesen in 1904 they had an agreement with the government. In exchange for a guarantee not to build the barricades, the Babine expected the Government to provide $600, rations for orphans and widows, and nets. Although Helgesen did not think he had reached such an agreement with the Babine, he knew that if the government prohibited barricades the Babine would expect compensation. Furthermore, he thought the $600 would be money well spent. Somewhat tardily, he conveyed these expectations to the Dominion government:

I regret very much that I did not recommend in my Babine report that the Govt. should pay the Indians something in lieu of their barricades. I said in my report of the Babine trip that an Indian who claimed the barricades wanted the Govt. to pay six hundred Dollars. That if he got it, he would divide with the Indians of the two great barricades that we destroyed, if he did not get that sum before the salmon run next season he would put in the barricades though he should Die for it. Now six hundred will reconcile them and I think it would be a fare (sic) way of dealing (sic) with them. I know they are liable for using there (sic) barricades notwithstanding the Inspector had by letter forbid them to do so, but the Indians do not look at it in this way. And they should be treated like big children. I trust you will ask the Govt. to bestow their most favorable consideration on this matters.

Indian Affairs told Fisheries as well that the Babine expected compensation from the government if they were to relinquish their right to fish with barricades. However, while Indian Affairs agreed with Fisheries that it would be best for all concerned if the weirs were removed, it was not prepared to force the issue. The Babine must be convinced, not forced to adopt other methods of fishing. The Indian agents would do their best to arrive at an “amicable arrangement” with the Babine; they would not compel

---

366 NAC, DMF, RG 23, file 583, pt. 1, Father Coccola to Pedley, Deputy Superintendent General Indian Affairs, 6 September 1906.
367 Fisheries spent $1150 on another tributary of the Skeena in 1905 to remove a log jam. NAC, DMP, RG 23, file 2235, pt. 2.
368 NAC, DMF, RG 23, file 23, Helgesen to the Honourable William Sloan, Member of Parliament for Skeena, 3 May 1905.
the Babine to observe the regulations or assist Fisheries in enforcement. Whatever their approach, all the government officials in the area knew that the Babine would defend the weirs with their lives if they were not compensated. Fisheries assumed this intransigence was the work of the Oblate Missionaries.

Father Coccola had assumed the Stuart Lake Mission in 1903 when Morice’s successor lasted only a few months. He traveled to Fort Babine frequently, and the Oblate Church loomed over the settlement (see Figure 3.3). The Oblates certainly provided assistance to the Babine, and having learned their language, often functioned as intermediaries between the Babine and the state. However, while they may have guided the Babine resistance along certain channels, they were not the catalysts. That came from the Babine themselves. Denying Babine agency by attributing resistance to the missionary influence was a means of denying the legitimacy of their claims.

369 NAC, DMF, RG 23, file 583, pt. 1, Pedley to Gourdeau, 15 June 1905.
371 Father Coccola wrote an account of his life that has been published in a book edited by Margaret Whitehead, They Call Me Father: Memoirs of Father Nicolas Coccola (Vancouver, UBC Press, 1988). A biography of Father Coccola appeared in serial form every Thursday in The Cranbrook Courier from January to April 1927. For a version of the weir dispute that places Father Coccola firmly in the centre, see the entries for March 31 and April 7 1927. A copy exists in the Archives Deschâtelets, Ottawa.
372 Brett Christophers, Positioning the Missionary (Vancouver: University of British Columbia Press, 1998) describes the relation between the Nlha7kapmx at the Anglican missionary at Lytton, J.B. Good, noting that Good was, at first, perceived to be useful by the Nlha7kapmx in their relations with White settler society, but they later turned to the representatives of the Queen for assistance, specifically Gilbert Malcom Sproat, the Indian Reserve Commissioner.
Old Cannery Nets, 1905

On July 23, 1905, Helgesen returned to the Babine village with Fisheries Guardian James Wells and reported that they were well received.\(^{373}\) They had brought a collection of used nets, given to them by the cannery operators on the coast, to distribute among the Babine. After consulting with Mr. Waer, the HBC manager at Fort Babine, Helgesen compiled a list of 57 people--all those he believed entitled to a net.\(^{374}\) When he displayed the cannery nets, which were old and full of holes, the Babine refused to accept them. Helgesen told them that the government would not allow weirs; if they refused the nets they would have no means of catching fish. Rather than accept Helgesen’s ultimatum, the Babine sought a way around the weir prohibition. A man described by Helgesen as “the old Chief” requested that they be allowed to build weirs from each side of the river bank, but leave the centre open. Alternatively, he suggested that they be allowed to build a weir on one side of an island, leaving the other side open for the fish to pass upstream. This was a possibility at Smokehouse Island at the head of Nilkitkwa Lake, site of earlier Babine weirs (see Figure 3.2). Helgesen rejected these proposals. The weirs must go. However, he did agree to ask that the government provide the Babine with new sockeye nets every year. On the basis of this promise, the Babine apparently agreed to try the old nets.

When he left the Babine in mid-September, towards the end of the fishing season, Helgesen reported that they had 40,000 dried salmon already, about 600 fish per family, and were still fishing. Helgesen believed by the end of the season they would have enough

\(^{373}\) NAC, DMF, RG 23, file 3031, Helgesen to Williams, 30 July 1905.

\(^{374}\) NAC, DMF, RG 23, file 583, pt. 1, Helgesen to Williams, 19 October 1905.
to last the winter. Any shortfall could be compensated by a winter catch of trout and whitefish. Pleased with his efforts to eliminate the fish weirs with minimal disturbance, Helgesen reported:

The object of my appointment was to enforce the Fisheries Regulations and if possible to deter the Indians from using barricades across the various streams which have in the past prevented the salmon from reaching their natural spawning grounds, with the effect of diminishing the school of fish and the great industry and benefit derived therefrom. In my appointment the Department warned me to use caution and discretion, this I have paid strict attention to, I have given the Indians every privilege possible, without allowing them to use barricades.375

At the end of the 1905 season, Inspector of Fisheries Williams reported that the enforcement work had been a success; no barricades were erected on the Upper Skeena, and the “illegal sale of dried salmon, that had been on the increase and had almost assumed the importance of an industry, was entirely stopped.”376 In the estimation of its officers, Fisheries had successfully confined the Babine fishery to a subsistence food fishery, as the law required.

For the Babine, the 1905 fishery was a dismal failure. They required about three fish per person per day during the winter months, and given a population of between 300-400, their food requirements were approximately 1000-1200 fish per day.377 40,000 fish would have lasted little more than one month, and it certainly did not provide any surplus for trade.378 Despite Helgesen’s assurances to Fisheries that the Babine had enough fish, they survived the winter and spring of 1905-06 only on the reserves of their 1904 catch. Father Coccola reported that by early March a number of families had little food.379 They

375 NAC, DMF, RG 23, file 3031, or, file 2235, pt. 2, Helgesen to Williams, 24 November 1905.
376 CSP, 6-7 Ed.VII, 1907, No.22, Fisheries Inspector’s Report, District No.2, 1905, p.31.
377 NAC, DMF, RG 23, file 583 pt. 1, Coccola at the Ottawa Conference, 6 November 1906.
378 There is no record of any trade in salmon in the HBC Fort Babine journal for 1905.
379 NAC, DMF, RG 23, file 583 pt. 1, Coccola to Pedley, 8 September 1906.
had not received the $600 that they thought had been promised the year before, and nor had the elderly received assistance. Furthermore, the Babine could not understand why their weirs had been targeted when those used by Native people on Stuart and Fraser Lakes were still operating. They had been labeled cowards by their neighbours for acquiescing to the government’s demands, and demanded an explanation from Helgesen.

The explanation was simple. The Babine River was the major spawning ground of Skeena sockeye and the cannery owners wanted the fish. Stuart and Fraser Lakes were thought to be relatively minor spawning grounds in the Fraser River system and therefore of less concern to the Fraser River canneries. Fisheries allocated its resources in response to the canning industry which had demanded action on the Babine, but was not yet concerned about the weir fishery in the distant headwaters of the Fraser. However, Helgesen could not provide this answer. It amounted to an admission that removing the Babine fish weirs was a means of reallocating the fish to the canneries, and Helgesen felt “compelled to stifle the truth”. He told the Babine that his authority did not extend into the neighbouring watershed, but that the government would appoint officials soon. The Stuart and Fraser Lake weirs would not become the focus of government attention until 1911.

Although the Federal *Fisheries Regulations for the Province of British Columbia* explicitly prohibited gill nets in non-tidal or fresh water—a ban that certainly included the

---

380 NAC, DMF, RG 23, file 3031, Helgesen to Williams, 24 November 1905.
381 *Canada Gazette*, Vol. XXIII, p. 1903, *Fishery Regulations for the Province of British Columbia*, as amended by Order in Council, 3 March 1894:

s.6 No nets of any kind shall be used for catching any kind of salmon in the inland lakes or in the fresh or non-tidal waters of rivers or streams. But Indians may, with the permission of the
Babine River—Fisheries and Indian Affairs agreed that the Babine should receive new sockeye nets for the 1906 season. They did not agree over who should pay for them. Fisheries thought it was the responsibility of Indian Affairs, and Indian Affairs wanted more information before it agreed to pay the estimated $200: how had Fisheries determined entitlement, and where else besides the Cowichan and Upper Skeena did it intend to enforce the barricade prohibition? Indian Affairs did not want to commit itself to supplying nets across the province. Fisheries assured Indian Affairs that the hardships caused by the barricade prohibition were localized and that Native people elsewhere did not need nets. Based on these assurances, Indian Affairs bought the nets.

**Barricade Conflict, 1906**

On July 2nd, 1906, Helgesen and the Indian Agent, R.E. Loring, delivered 6000' of new sockeye nets to the Babine, cut into 100' sections. The sections were too short to span the river, and Babine refused to accept them. They intended to build weirs, and told Helgesen as much. Over the next two days Helgesen and Loring attempted to convince the Babine of, “the evil effect of killing every fish at the Dam and the consequences of violating the law.” Loring promised government support if, by using the nets, the Babine caught insufficient fish to last the winter. However, the Babine were adamant that the 1905 experiment with nets had failed, they had not received adequate assistance from the government, and they were not prepared to try nets again. Instead they asserted their

---

382 NAC, DMF, RG 23, file 3031, R.N. Venning, Assistant Commissioner of Fisheries, to Prince, 15 August 1905.

383 NAC, DMF, RG 23, file 583, pt. 1, Pedley to Gourdeau, 15 September 1905.

384 NAC, DMF, RG 23, file 3031, Helgesen to Williams, 19 October 1906.
right to build a weir. This caught Fisheries by surprise. After the 1905 season its officers assumed they had seen the end of "any organized attempts" to infringe the law. 385

Helgesen and Loring left with the nets, both convinced that the Babine were acting on the advice of some unnamed white men:

The nerve of the whole matter lies in this that the Indians there were constantly being assured both by parties on the coast and by others passing to and from Omineca that they had an indisputable right to getting fish in the way referred to, which could not be dispelled by argument. 386

Helgesen also believed that many of the Babine would have accepted the nets were it not that their leaders forbade it. 387 In fact, not all the Babine refused the nets. Donkan Pocat and Halweis accepted sockeye nets from Helgesen and were using them on Babine Lake. 388 When the nets re-appeared, abandoned on the shores of Babine Lake, Helgesen blamed the Old Fort Babine Chief Michel, accusing him of sending four Babine to confiscate the nets. He issued summons for Chief Michel and four other Babine to appear in Hazelton to answer charges of stealing nets. None of them appeared. Father Coccola indicated that Donkan and Halweis were simply asked to return the nets, but that this was characterized by Helgesen as stealing. 389 Whatever the characterization, it appears that Donkan and Halweis were not entitled to accept nets as compensation for something that, according to Babine law, they did not own. The Babine who owned the weirs may have believed that if some among their number accepted nets from the government, the group

385 Ibid., Williams to Prince, 5 January 1905.
386 NAC, DMF, RG 23, file 583, pt. 1, Loring to Vowell.
387 Ibid., Helgesen to Williams, 19 October 1906.
388 The names appear as ‘Duncan’ and ‘Hall’ in NAC, DMF, RG 23, file 583, pt. 1, Loring to Vowell, 27 August 1906, and in Ibid., as ‘Duncan Paquet’ and ‘Hal Louis’ at the Ottawa Conference, 6 November 1906, p. 27.
389 NAC, DMF, RG 23, file 583, pt. 1, Coccola at the Ottawa Conference, 26 October 1906.
as a whole were agreeing not to build weirs. There were divisions within Babine society, and Helgesen may have been correct that many would have used nets, although perhaps not at the expense of the weirs. However, he was certainly wrong to attribute Babine resistance to White advisers. The Babine sense of ownership and entitlement, buttressed by the missionaries who frequently acted as intermediaries, originated within Babine society as this internal dispute reveals.

On August 17, 1906, when Wells reported that the Babine had built a ‘barricade’, Helgesen decided Fisheries must take strong action. He applied to Stipendiary Magistrate Hicks Beach for warrants for the arrest of the six ‘ring leaders’ on the grounds that they had constructed weirs with full knowledge that it was illegal. Then he sent Wells, Guardian Norrie and Constable Rosenthall, accompanied by two Natives of the “Seecanees tribe” to dismantle the weir and to arrest the accused. Wells was in command. The group arrived at Fort Babine on August 21st, and Wells hired two prospectors who happened to be at Fort Babine as constables. The following day the party of five Whites and two Natives headed seven miles down the Babine River to the weirs. Wells reported that before they left the village, Chief Big George shook their hands saying in a loud voice, “Good-bye, Good-bye,” while the women stood nearby singing a last farewell, a “song of death.” Other Babine strongly advised the men not to go downriver for they would never come back. Nonetheless, Wells and his entourage proceeded to the barricades with their warrants, intent on arresting the leaders and destroying the barricades.

390 Ibid., Helgesen summarises Wells’ report in a letter to Williams, 21 October 1906. I have been unable to find the actual report.
Arriving at the weirs on August 22nd, Wells and his party found a large group of Babine intent on protecting their weirs. Wells announced that some of them were wanted for violating the *Fisheries Act*, and he proceeded to read the warrants and arrest them in the name of the King. When officials attempted to take the men into custody, they were rebuffed by the Babine who were armed with clubs. Whatever claims the Fisheries officials made about the law or the King, the Babine were not prepared to let government officials take their men. The officials retreated after the first day, somewhat shaken and bruised, but without serious injury. They returned the next day, this time apparently less concerned about arresting the accused than about removing the barricades. Final negotiations did not produce any agreement; the officials were determined to enforce the law, and the Babine were equally determined to defend their weir fishery. When the officials approached the weirs they were surrounded by a group of Babine women, led by Hazelko, the wife of Tszak William. She knocked Wells off his feet into the river, and then sat on him. The Babine men stood nearby, apparently ready to intervene, but not directly involved. Although the Babine had displayed their guns the night before by firing rifles into the air, none of the officials reported the Babine with any weapons other than sticks or clubs. Wet and bruised, Wells and the other officers retreated again. No Babine had been arrested and the barricades remained standing (see Figure 3.5 taken shortly after the confrontation).

Fishery Guardian Norrie provided the following first hand account:

Next day 22nd in Company with Wells, Rosenthal, Brisco, Spencer, and two Indians went down to Barricade to make arrests.

Found over one hundred men & women all enraged and determined to resist.

Wells read the warrants to the offenders and although arrested, resisted and were speedily

---

392 NAC, DMF, RG 23, file 583, pt. 1.
rescued by friends.
We were then simply driven out of camp.
They mauled us considerable Wells getting the worst.
We went into camp about a mile above and were not further disturbed through the night
although they were firing their rifles and shouting all night.
Next morning got breakfast and determined to have a go at the dam. When we got there we
were immediately surrounded by the same howling mob of the day before.
After a talk we gave them to understand we were going to make an attempt on the dam. They
told us we would do it at our peril or words to that effect. Wells stood guard on the bank and I
accompanied by Rosenthal made for the dam.
Before I could get a stick out I was surrounded by over a dozen women all armed with clubs
and mobbed ashore where the men stood ready for business if we had struck down any of their
women.
I received a bad blow in the small of my back which troubles me considerable yet. Wells was
pushed out into the river but not otherwise hurt. We got together eventually and started for
Babine as we concluded we were powerless against their numbers. 393

The weirs remained and none of the accused were arrested. The Babine had
successfully, if temporarily, resisted White authority, and word spread that the Fisheries
officers, much to their embarrassment, had been handled by the Babine women. Those
concerned with asserting the authority of the Canadian state were outraged, as were those
associated with the fishing industry. Helgesen, Inspector Williams, the BC Fisheries
Commission, the canning industry, Stipendiary Magistrate Hicks Beach, and ‘the residents
of Hazelton and district’ called for a militia of 100 men to enforce the Fisheries Act. They
believed ‘Indians’ of the Upper Skeena were becoming ungovernable and the region was
increasingly unsafe for Whites. The Babine were flouting the law, and unless the
government acted decisively, displaying its power to enforce fisheries and criminal law,
not only would the salmon stock suffer, but Native intransigence would continue. They
were convinced that the Babine were “of bad character,” and that strong state action was
needed. However, they also believed the immediate cause of trouble was “irresponsible

393 BCARS, GR 429, 1906, Box 13, File 4, 2578/06.
white men," who had led the Babine to believe they had a right to fish with weirs. Whatever the source, the Babine had to be disabused of these notions by a strong show of armed force to “maintain the majesty of the Law”.  

On the other hand, Indian Affairs officials recommended a more conciliatory approach. Some realized the importance of the weirs to the Babine, were sympathetic to their assertion of ownership, and recognized the existence of “tribal laws and customs” that determined ownership of the resource. A memo on “Babine Fishing Rights” prepared shortly after the altercation summarized Indian Affairs’ approach:

(t)he Indians had from the early days, before the occupation of the country by whites, depended solely upon dried salmon for their food supply, that the fishery locations had been handed down from one to another through many generations, being highly valued, and not only conferred a certain envied distinction upon the owner, but were the source of considerable revenue as well. These rights ... had been undisputed and possessed for such a length of time, the title being based upon tribal laws and customs and were considered by the natives as being inalienable, that they were ... in accordance with the white man’s laws and customs more or less within the domain of prescriptive rights.

Indian Agent Loring suggested that instead of one hundred militia men, the government should, “err on the side of leniency” by allowing the Babine to continue with their weirs for a few more years. He recommended “a squad of from 8 to 12 of Royal mounted police” to keep the peace in the entire region. The Provincial Government Agent in Port Simpson reported similarly that the affair “had been greatly exaggerated”, that the Babine were “one of the most peaceable and law-abiding tribes of Indians in the Skeena District”, that they were exercising a right “on a river which they consider their

---

395 Ibid., memo of 30 August 1906, summarizing letter from Vowell, 7 February 1905.
396 Ibid., Loring to Vowell, 27 August 1906.
397 Ibid., 30 August 1906.
own”. He thought the Fisheries regulations should be phased in gradually so that the Babine had time to adjust.\textsuperscript{398}

**Surrender and Trial**

Six Babine were now accused of obstructing the passage of fish, contrary to the *Fisheries Act*, and assault, contrary to the *Criminal Code*. Others were charged with stealing a net and failure to appear. Chief Big George had a warrant out for his arrest as well.\textsuperscript{399} According to Canadian law, they were outlaws. Helgesen and Loring returned to Babine village on September 8th for a meeting. They attempted to persuade the Babine to remove the barricade and surrender the accused. Loring promised government support if it were required, and Helgesen used a mixture of persuasion and threat, explaining “the law upon the subject, and the consequences of its violation.”\textsuperscript{400}

After deliberating overnight, the Babine refused. The threats and offers of support were not enough for them to agree to remove their weir. They did, however, indicate a willingness to negotiate. From hiding, Chief Big George sent a telegram to Indian Affairs, offering to open the barricades on weekends, the same as the close time for the cannery boats on the coast:

\textsuperscript{398} BCARS, GR 429, 1906, Box 13, File 4, 2578/06, Provincial Government Agent in Port Essington to the Deputy Attorney-General of British Columbia, 15 September 1906, provides one example of a calm response:

“I found that the reports which had reached the Coast had been greatly exaggerated and that, although a technical assault had been committed, there was not, nor had there been at any time, any serious danger of the Babines’ of any other of the Skeena tribes going on the warpath.”

\textsuperscript{399} NAC, DMF, RG 23, file 583, pt. 1, Loring to Vowell, 30 August 1906.

\textsuperscript{400} Ibid., Helgesen to Wiliams, 19 October 1906.
Will government agree allow us put in salmon barrier opening same from twelve noon Saturday to six p-m. Sunday twelve foot space we wish meet wishes of government but means starvation, authorities wish to arrest us. Will give ourselves up without resistance answer Hazelton.  

Eight days later Indian Affairs, whose officials were apparently uncertain about the appropriate response, replied to this offer in a cryptic fashion—obey the law, but we will see what Fisheries has to say about the matter:

Telegram seventeenth received. On no account resist the law. Am consulting Fisheries Department re salmon barrier.

On September 26th, the day after receiving the telegram from Indian Affairs, nine Babine including Chief Big George surrendered, on the advice of Father Coccola. They were held in custody in the Hazelton Jail while officials from the Ministry of Fisheries and Indian Affairs met in Ottawa to discuss the file. From this meeting came a flurry of telegrams to British Columbia. Fisheries sent instructions to Williams by telegram on September 27th, to release those held in custody on suspended sentences as a guarantee for future good behaviour. Fisheries also sent a telegram to Coccola informing him of these instructions. The Ministers in Ottawa believed the Babine had surrendered in good faith, on the assumption that the government would negotiate an equitable resolution, and they recognized the need for a diplomatic solution. Apparently Williams did not receive the telegram before the trial. Perhaps he chose to ignore instructions. On September 28th the prisoners appeared in court before Stipendiary Magistrate Hicks Beach and two Justices of the Peace, Stephenson and Helgesen. Chief Big George appears to have been

---

401 Ibid., Acting Deputy Superintendent General of Indian Affairs to Deputy Minister of Marine & Fisheries, 18 September 1906, reproducing contents of the telegram dated 17 September 1906.
402 Ibid., Deputy Supt. General Indian Affairs to Deputy Minister of Fisheries, 27 September 1906, reproducing contents of telegram.
acquitted; he was only held in custody for three days.\textsuperscript{403} The others, according to Helgesen, pleaded guilty. The Babine made statements to the court, but Coccola suggested they could not understand the procedure and nor did they understand that they had pleaded guilty.\textsuperscript{404} The bench imposed fines of $20. However, the Babine appear to have been held in custody in Hazelton until October 7th, when they were transported to New Westminster by steamer,\textsuperscript{405} probably for failing to pay the fine. Father Coccola, who had encouraged the Babine to surrender and assured them that they would be treated fairly, later described the hearing as a "sham trial."\textsuperscript{406}

Learning that the Babine had been convicted, and before the Babine were transported to New Westminster, the Minister of Fisheries sent instructions to Magistrate Hicks Beach to remit the full penalty imposed on the Babine for the offences under the \textit{Fisheries Act}. Indian Affairs wrote to Department of Justice to petition for the release of Babine who were convicted of theft and assault under the \textit{Criminal Code}.\textsuperscript{407} Helgesen, reluctant to show any weakness when dealing with "Indians," opined that releasing the Babine was a mistake. He believed that insurrection was the inevitable result of a "coaxing policy". Unless the Babine were punished for their "lawless acts" they would drive Whites from the region: "should the Babines be released in the present instance and justice be defeated, it will be a menace to white men amongst them in future."\textsuperscript{408} Despite

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{403} \textit{Ibid.}, Chief Big George at the Ottawa Conference, 26 October 1906.
\item\textsuperscript{404} \textit{Ibid.}, Coccola at the Ottawa Conference, 26 October 1906.
\item\textsuperscript{405} NAC, DMF, RG 23, file 583 pt. 1, or file 3031, Helgesen to Williams, 19 October 1906.
\item\textsuperscript{406} Archives Deschâtelets, Ottawa. Unpublished "Reminiscences of the Rev. Father Coccola," dictated by Father Coccola while in St. Paul's Hospital in Vancouver, August-September, 1924, recorded and transcribed by Deny Nelson..
\item\textsuperscript{407} J.D. McLean, Acting Deputy Superintendent General, to the Deputy Minister of Justice, 4 October 1906.
\item\textsuperscript{408} \textit{Ibid.}, Helgesen to Williams, 6 October 1906.
\end{enumerate}
\end{footnotesize}
Helgesen’s posturing, officials in Ottawa opted for a negotiated settlement. The interred Babine were released, and Indian Affairs sent another telegram to Coccola recommending that he accompany Chief Big George, Indian Agent Lorring and Fisheries Inspector Williams to Ottawa to consult with the Ministers on the fishery dispute. The Babine accepted the invitation and, accompanied by Father Coccola, Chief Big George and Chief Tszak William traveled to Ottawa in October (see Figure 3.6).

Ottawa Meetings

Chief Big George, Tszak William and Father Coccola met with Minister of Fisheries L.P. Brodeur and Minister of the Interior Frank Oliver on October 25.

Coccola’s account begins as follows:

We were shown through the city and at four o’clock we found ourselves in a large room. The Minister of [the] Interior at the head of a long table, I was offered a seat to his right, my two Indians, trembling close to me and the rest of the table occupied by members of the Indian Department and Fisheries; at one end stenographers. At first the Minister of the interior was cross and sharp in questioning the Indians, I being the interpreter. The two poor men were naturally excited, all in perspiration, but I was interpreting with calm giving them a look of encouragement.409

The transcript does not convey the emotion Coccola remembered. The meeting began with Oliver and Brodeur questioning Big George about the Babine’s fishing practices and about that summer’s catch. He replied that they caught very few fish:

We began to put the barricades but the white men, the Fish Commissioners, came and they prevented us from fishing and many people were terrified and were afraid of getting into trouble. Some others did some little fishing. For my part I could not do any fishing because I had to keep people in order.410

409 Whitehead, Father, p. 145.
Brodeur and Oliver then explored the possibility of using nets. Did the Babine know that Whites were prohibited from fishing in non-tidal waters, but that the government might allow the Babine to fish if they considered using nets? Big George explained that they had tried nets in 1905, but only caught enough food to last until March. The salmon, he explained, could see the nets in the clear water of the Babine and would swim around them. It was simply not possible to catch enough fish to last the winter with short nets, and this is why they had refused the sockeye nets this year, even though they were new.

The Ministers considered various other means that the Babine could support themselves without fishing. Furs had once been an important source of income, but fur bearing animals were scarce. Cannery employment was an option, but the canneries were at the mouth of the Skeena and Coccola discouraged the idea: “It ruins the morals of the Indians. It would be better for them to die at home. They are always in debt. Never come home with money. Their money is always left down there.”411 Another possibility was agriculture. Was there agricultural land? If so, would the Babine consider farming as an alternative to fishing? Coccola reported that there was some land, but it belonged to the government, not the Babine. The Ministers continued to explore ways to secure the self-sufficiency of the Babine while at the same time, reduce their reliance on fish. If the Babine could be taught to farm, then more fish would be available for the canneries. Big George said they planted a garden every year, but it produced little because of the cold.

411 Ibid.
The meeting ended with questions from the Ministers about the barricade incidents and the arrests.

A second meeting was held in Brodeur’s office on November 6th. This time Williams and Helgesen were present, and they spent much of the meeting attempting to justify their actions to Brodeur and Oliver. Their partisanship is evident—they were expounding the views of the industrial fishery. Williams began by outlining the extent of the salmon canning industry at the mouth of the Skeena, the amount of capital invested, and the need to preserve that investment by ensuring that Native fish weirs would not compete for the salmon:

This industry is very valuable; we consider it the principle industry of British Columbia. Now we claim that the most important part of the fishery protection service on the Skeena River is the protection of the spawning grounds. We claim that it is absolutely necessary that the salmon should get to their spawning grounds in order to enable them to propagate, otherwise they will undoubtedly be exterminated. The Department is now spending large sums of money blasting away obstructions in the rivers, and opening up spawning areas, but what is the use of this expenditure if the Babine Indians are allowed to catch and kill fish before they reach the spawning grounds.412

Williams equated the barricades with any other ‘natural’ obstacle that should be removed. Brodeur asked whether the barricades reduced the fish stock. The Babine had fished with weirs since time immemorial, yet there were lots of fish in the river when the cannery operators arrived fifteen years ago. How then were the barricades the problem? Helgesen answered that Babine were now catching more fish than they had before the arrival of Whites. They were now selling fish to the White trappers, traders and miners, as well as for food:

The case is this, -- in olden times the Indians were alone. The Indians got an ample supply, all they cared for. Mind, no one but the Indians in the country, -- probably one or two

412 Ibid., Transcript of the November 1906 Conference, p. 3.
at the Hudson Bay Post, that used the salmon. Now the country is full of packers, prospectors, miners, foresters, etc., and they all buy salmon, more or less. They buy sockeye salmon.

The Babine Indians like to kill every fish that comes along, they mean so many dollars to them. They pounce upon a school of fish which formerly they did not want, -- they did not want it they could not dispose of it. The part which they don't use they sell now. It is most damaging upon the school of fish.\(^{413}\)

Chief Big George countered, claiming they caught fewer fish with the single barricade now in operation than with the three barricades they once used. He did confirm that the Babine sold salmon to the HBC who in turn sold the fish to the Stuart Lake people, but in this the HBC was simply facilitating trade between Native peoples.

Brodeur then asked his Officers to state the fisheries law that prohibited barricades,\(^{414}\) that referred to Indians,\(^{415}\) and that governed fishing in non-tidal waters.\(^{416}\) He concluded that the *Fisheries Act and Regulations* prohibited fishing both with barricades and nets in fresh water, and he wondered why the Babine were being offered gill nets to replace their barricades when the nets were illegal as well. The *Regulations* allowed Indians, with the permission of the Inspector, to use dip nets for the purposes of food, but the regulations prohibited gill nets in fresh water. Williams replied: "The way I looked at it was this, sir, it was for their food. You want the strictly legal aspect of the case? We went a little beyond the strict interpretation of the law, but we kept to the spirit of the law."\(^{417}\) Thus, Williams and Helgesen appear to have arrived at the following position: barricades must be prohibited, but the Babine should be allowed to use gill nets,

\(^{413}\) Ibid., p. 6.
\(^{414}\) *Fisheries Act*, R.S.C. 1886, ss.14(4) and (5).
\(^{415}\) *Fisheries Act*, R.S.C. 1886, s.14(8), and Fishery Regulations for the Province of British Columbia, 1894, ss.1(a) and 6.
\(^{416}\) *Fisheries Act*, R.S.C. 1886, s.8(5), as amended 52 Vic., c.24, s.1.
although illegal, to catch their winter supply of food. If ‘Indians’ fished as ‘Indians’, in their view to support meager subsistence, then they might use nets in fresh water to catch salmon. If Indians fished as White men, that is, to sell, then they must fish as White men fished. The following exchange between Brodeur and Williams illustrates their positions.

Brodeur asked if the Indians were required to pay licence fees:

Mr. Williams: — Not one single cent in any shape of form. All we wish is that if they are going to be white men let them fish as white men do; If Indians, who fish for their winter supply of food, we will give them any kind of nets they want.

Mr. Brodeur: — Will they not require some clothing? How do you expect that they will provide clothing if they cannot sell fish?

Mr. Williams: — Let them come down to the Canneries and work as all other Indians do, not loaf. The Babine Indians must realize that they must work as the other Indians do, they cannot be spared.\(^418\)

Just before the Ottawa Conferences, Alex Noble, a cannery operator at Port Essington, offered Fisheries “an industrial point of view,” coinciding with the position taken by Williams and Helgesen. Noble set out the three basic factors of production: capital, labour and land (in this case, fish). He claimed that more than half a million dollars had been invested on the Skeena, that the industry paid three thousand workers a similar amount annually, and that the thirteen Skeena canneries required 1,600,000 fish.\(^419\) To protect that capital investment, the cannery owners demanded that the Government enforce the law and remove the barricades.

Removing the barricades not only secured a supply of fish, but also a pool of dependent labour. Without barricades, the cannery operators hoped the Babine would turn to the canneries for work, the men as fishers and the women as canners. By 1901 the

---

\(^{418}\) Ibid., p.15.

\(^{419}\) Ibid., Alex Noble of Port Essington to Deputy of Marine and Fisheries, 23 October 1906.
fishing industry on the Skeena employed more than 2500 people on the boats and in the canneries. In 1905 the number for the entire northern coast was 5,740 cannery workers and fishers. Native people were an obvious source of labour, and in many ways were ideal for the isolated north coast canneries. Fishing was seasonal work, and it was difficult to attract White settlers to the north for a few months work. Native peoples, on the other hand, lived in the region and were accustomed to finding other means of support between fisheries. The Fraser River Canner’s Association claimed that the industrial salmon fishery provided Native people on the coast with the largest portion of their income -- $750,000 in 1905. However, notwithstanding active recruitment, labour shortages during the fishing season were frequent. The Fisheries Inspector’s Report for 1881 reveals that despite extensive Native employment the canneries were still looking for workers:

At present the services of all the young men among the Indians who are accessible, and who have more or less been habituated to the work, have been eagerly sought by the canners. It should I opine, be made a special object by the Indian Agents, stationed along the coast, to encourage the young men around them to devote themselves, during the season, to this industry -- profitably alike to those who may engage in it, and to those who employ them.

This was not an isolated shortage. John McNab, Fishery Guardian for the Skeena and Nass, reported in 1888 that a lack of Native labour was a problem given the defection of skilled Tshimsian fishers from Metlakatla to Alaska. Most of these employees worked at ‘piece-rate,’ based on the number of fish caught or tins filled, and the cannery operators frequently complained about labour shortages. By paying piece-rate, the canneries could

---

422 NAC, DMF, RG 23, file 583, pt. 1, Fraser River Canners’ Association to the Minister of Marine and Fisheries, 30 October 1906.
almost always use more fishers. Once the licence fee had been paid, it did not matter how
many were fishing if you were paying for the number of fish caught.

By the early twentieth century, however, the composition of the labour force had
changed. Along with White and Native workers, the Japanese were a significant presence
in the fishing industry, and according to Inspector Williams, by 1905 most of the licences
on the Skeena were held by the canneries for Japanese fishers. Native fishers were less
important than they had been and it was perhaps not so easy as it had been to find work.
The rhetorical stance taken by Williams and Helgesen, suggesting the Babine should go to
the coast to work for the canneries like other Natives did, was less an effort to secure a
labour force as it was to secure a supply of fish. Sockeye salmon was the prize, and the
Fisheries officers on the Skeena were doing their best to direct the resource away from
Native control and towards the canneries.

Seeing the issue as one of allocation and not of fishing technology, the Minister of
the Interior, Frank Oliver, suggested that the Babine should be entitled to catch a fixed
number of fish with their weirs—enough to cover their food needs. Having reached this
threshold the Babine would remove their weirs, but could continue to fish with nets and
sell the catch in order to purchase clothing and other essentials. Oliver did not want the
weir prohibition to push more Natives into a welfare dependency relationship with Indian
Affairs, increasing its costs. Williams, Helgesen and Prince objected to this proposal on

---

425 When Helgesen retired the Skeena River cannery owners publicly thanked him for his work
removing the barricades and gave him $630 and a gold cane. See Terry Glavin, Dead Reckoning:
Confronting the Crisis in Pacific Fisheries (Vancouver: Greystone Books, 1996), Chapter 3, “A
Purse of $630 and a Gold Cane”.
426 NAC, DMF, RG 23, file 583, pt. 1, Transcript of the November 1906 Conference, p. 21.
the grounds if the Babine were allowed to use weirs, other Natives would want to do the same. Furthermore, allowing the barricades would require extensive supervision. It was simpler to reallocate fish by prohibiting fish weirs. The issue was unresolved, and the Conference ended as the first one with a discussion of the August barricade incident. No decision was made, and no agreement reached.

On November 8, two days after the meeting at Fisheries, Oliver wrote to Brodeur, arguing that, as British and Canadian Government policy, Natives had a “first right to their ordinary means of livelihood,” or a right to compensation if they were deprived of their resources.427 Fisheries, he suggested, was concerned solely to protect the interests of cannery owners, and was ignoring the rights of the Babine. If the interests of the cannery operators were to prevail, the Babine must be compensated, and Oliver made clear that the costs should be born by either the canneries or Fisheries: “the Indians are clearly entitled to compensation, either directly at the hands of the canners or on the part of the Government which assumes to subordinate the evident necessities of the Indians to the supposed interests of the canners.”428

Then the Babine, through Coccola, offered to relinquish their barricades in exchange for nets, arable land, farm implements and an industrial school. The terms were as follows:

“Babine Indians’ Proposition”:

| We are willing to relinquish barricades on Babine lake if in return the Government furnishes us: |
| 1. With sufficient netting, i.e., hundred feet for each family, or each individual man or woman depending on himself for support; the nets to be replaced by Government when out of use or so damaged as to render fishing unpracticable. |

427 Ibid., Oliver to Brodeur, 8 November 1906.
428 Ibid.
2. With sufficient arable land, say, 460 acres in front of Babine village on the opposite of the river and 1000 acres to be found on Babine Lake shore where some families are already located, or adjoining Old Fort Reserve.
3. Two ploughs, 2 mowers and horse rakes, 2 pairs of harnesses for each band. Grass seeds and grain sufficient for the amount of land and garden seeds like potatoes, &c.
4. One industrial school in the district.\textsuperscript{429}

The barricades had been conceded, and Fisheries now believed it had something to work with. Brodeur, in a letter to Oliver, responded to his accusations of collusion between Fisheries and cannery owners, claiming that the removal of barricades was not a question of cannery domination, "but of the perpetuation of a national asset" that should not be threatened by "the primitive and destructive method(s)" of the Babine.\textsuperscript{430} Enforcing the law was in everybody's interest, argued Brodeur, including the Babine's, but particularly of the Natives who sought employment as fishers or cannery workers at the coast. Why should their right to "lucrative employment" be sacrificed in the interests of the Babine? The right to fish had been re-cast as the right to lucrative employment.

Brodeur then proposed a draft of what was to become the Dominion's version of the "Babine Barricade Agreement". His version omitted the specifics contained in the Babine proposition regarding net length, acreage of arable land, and farm implements, and it made no mention of an industrial school, but the general outline was similar:

1. It was agreed, in the best interests of all concerned, and in a special endeavour to meet the wishes of the Indians, that the Department of Marine and Fisheries would be willing to relax its Fishery Regulations to such an extent as to admit of a sufficient amount of netting being prosecuted on the River to enable the Indians to obtain their requisite food supply, the cost of the nets supplied from time to time as necessary, to be borne by the Department of Indian Affairs; each head of a family or each individual Indian supporting himself or others, will be furnished with sufficient netting for his needs; the Department of Marine and Fisheries agreeing to provide instruction in the best manner of using the nets in order to obtain a proper food supply;

\textsuperscript{429} NAC, GR 2759, B9870, f. 881-1, pt. 1, attached in a letter from Coccola to DIA, received 10 Nov. 1906.
\textsuperscript{430} Ibid., Brodeur to Oliver, 23 November 1906.
2. The Department of Indian Affairs agreeing to send the Reserve Commissioner early next spring to the Babine Indians, with instructions to ascertain what additional agricultural lands they require, and to adjust their land holdings so as to give them suitable land for farming;

3. The Department of Indian Affairs further agreeing that Reserve Commissioner Vowell will be instructed to make a special study on the spot, of the needs of the Babine Indians, and to suggest such measures as, in his opinion, will assist in providing for their future support;

4. Also, that the Officers of both Departments will cooperate to carry out this arrangement, in order to avoid further difficulties;

5. In consideration of these terms, the Indian Chiefs agree to abandon the use of barricades, to accept these conditions, to abide by the law, to assist the Officers of both Departments in the discharge of their duties and to assist the Departments in carrying out such measures as may be adopted in the best interests of the Indians.\(^{431}\)

This version of the Agreement appears in subsequent correspondence between Fisheries and Indian Affairs. There is no evidence that Chief Big George or William Tszak signed this version, and evidence of their consent to these specific terms is slim. Signed or unsigned, the Babine Chiefs returned home believing they had made a treaty with the Dominion, although probably on the terms they had proposed and not on Fisheries subsequent proposal.

**Implementing the Agreement**

The different understandings created problems implementing the agreement. The two Dominion departments continued to disagree over the terms and over who should bear responsibility for the costs. Discussions between Fisheries and Indian Affairs continued into the following year, with the result that the Babine began to wonder if the terms would be honoured. Indian Affairs was still trying to retain a limited barricade fishery for the Babine. Otherwise, the costs to compensate the Babine and ensure their self-sufficiency would be too high. Further, Oliver expressed concern that the cost of

\(^{431}\) Ibid.
additional land to compensate the Babine fell entirely on his Department, when in fact Fisheries should be responsible because it was demanding the removal for the benefit of one of its interest groups—the canneries. In an attempt to extricate Indian Affairs from shouldering the cost, Oliver suggested there was never any promise to provide the Babine with additional land, but only to ‘adjust’ their existing reserves. Providing additional land for the Babine meant purchasing it from the provincial government. Brodeur responded that compensating Indians was the prerogative of Indian Affairs and he did not want to trench on that prerogative. Further, he reiterated that his Department had made a significant concession by agreeing not to prosecute the Babine for using gill nets on the river, even though nets were illegal. He was not prepared to allow fish weirs of any description.

Another sticking point was the sale of net caught fish. On this issue, Brodeur reluctantly (and temporarily) conceded to Indian Affairs that the Babine be allowed to sell some of their catch.

Since it appears to be a fact that the Indians have hitherto to some extent trafficed (sic) in the food fish they have taken, I would not be disposed at the moment to interfere with the extent to which this traffic has prevailed; but this concession, so far as it may bind in future the policy of the Department, must be distinctly understood as conditional upon whatever action it is deemed advisable for the Government to take upon the recommendation which will shortly be submitted by the British Columbia Fishery Commission ... 432

On the basis of this concession, Indian Affairs agreed to buy nets and additional agricultural land. 433 In February, 1907, Fisheries sent the following instructions to Williams and to Coccola:

---

432 NAC, DMF, RG 23, file 583, pt. 1, Brodeur to Oliver, 14 January 1907.
433 Ibid., Indian Affairs to Brodeur, 9 February 1907 (emphasis added).
The solution of this matter involves:
1. The prohibition of barricades;
2. The permission of netting by the Indians as above explained in lieu of barricades, subject of course to the regular statutory close times;
3. Net fishing in Babine Lake during the winter through the ice, as suggested and explained by Fishery Overseer Helgesen, the Officers of this Department under your control to furnish full and necessary instructions to the Indians, as to the manner and method of using the nets; and
4. The Department of Indian Affairs to supply the nets to be used by the Indians, and to make all possible arrangements to secure agricultural land for their use.  

Farm implements, seed, and schools were missing. Restrictions on net fishing and the proposed ice fishing were new. The later was Helgesen’s idea, and part of his attempt to reduce the Babine sockeye catch. He believed that if the Babine caught white fish in winter they could sustain themselves without needing to catch and store large quantities of sockeye in August and September. It fit his vision of a Babine subsistence economy that neither interfered nor competed with the industrial commercial fishery at the coast.

By June, 1907, the Dominion had not taken any visible steps to honour the agreement, whatever its terms. With the fishing season looming, the Babine were concerned that nothing had happened. Father Coccola wrote to the Minister of Fisheries, stating that no land had been conveyed and that none of the promises had been fulfilled. He warned of impending trouble, “for the Indians at the suggestion of some white people are more or less under the impression that we sold, at our interest, to the canneries and department of Fisheries their natural rights and are in a state of restlessness.” Indian Affairs eventually surveyed and purchased from the province an additional 1,948 acres that it added to the Babine reserves (see Figure 3.1). It provided seed-grain and agreed

---

434 Ibid., Fisheries to Williams, 19 February 1907, and Coccola, 21 February 1907.
435 Ibid., Coccola to Minister of Fisheries Brodeur, 10 June 1907.
436 Department of Mines and Resources, Indian Affairs Branch, “Schedule of Indian Reserves in the Dominion of Canada, Part 2, Reserves in the Province of British Columbia,” 31 March, 1943. Copy held by the Department of Indian Affairs, Regional Office, Vancouver.
to provide relief for those requiring assistance as well. Indian Affairs had authorized the purchase of nets in April, but when Helgesen delivered them in July the Babine were dissatisfied with the length. In response to the seriousness of the situation, Helgesen ordered additional nets, and this eased tensions. At the end of the season the Fisheries Guardian, G. Spinning, reported that the Indians had caught enough fish and were ‘jubilant’ with their new nets. Inspector Williams informed Fisheries of this action after the fact, adding rather gratuitously that, “(t)he Babine Indians have always been a bombastic, trouble some and lazy lot of Indians, and will remain so to the end of the chapter.”

In 1908, Helgesen reported that the Babine had caught sufficient fish for their winter supply and that although their nets needed replacing, they “seemed more satisfied and pleased than on any former occasion.” When Overseer Stewart Norrie traveled through the region towards the end of August in 1908 he observed that the former barricade site was deserted. The buildings that were once there had been stripped and the Babine had built six smoke houses at various locations just below the outflow from Babine Lake. With the introduction of nets, the fishing and processing that had once been concentrated at the weirs had, by 1908, dispersed. What had once required the collective efforts of the group was becoming the work of smaller family units. In 1909 Indian

---

437 Deputy Superintendent General of Indian Affairs to Deputy Minister of Marine and Fisheries, 20 July, 1907.  
439 NAC, DMF, RG 23, file 583, pt. 1, Williams to Assistant Commissioner of Fisheries, 23 July 1907.  
440 Ibid., Helgesen, 22 October 1908.
Affairs spent $700 to replace the nets issued in 1907, and Norrie, Indian Agent Loring and Guardian Charles Pearce distributed 83 nets and lines to the Babine.

Having agreed to allow the Babine to sell fish caught with nets on the Upper Skeena pending the report of the British Columbia Fisheries Commission, the Department of Fisheries got the recommendation it expected when the Commission released its report in 1908. The Commissioners briefly surveyed the barricade disputes on the Cowichan and Babine Rivers and pronounced that to allow the sale of fish from these locales must stop. If Native were to sell fish, they had to catch them under the appropriate commercial licence. The food fishery concession must not expand to allow sales. According to the Commissioners, "(t)o be lenient in one locality and rigid in another is fatal, and all the Indian tribes should be treated with the same uniform regard for their real interests, and with a regard for the stupendous national and commercial interests involved." 441

Despite the apparent calm, the Barricade Agreement would continue to be a thorn in the side of fisheries officials in the region. In 1909, Overseer Norrie wrote that providing the Babine with nets was the source of considerable jealousy among Gitksan at Hazelton and in the Bulkley Valley. They threatened to start fishing with barricades if it would force the government to give them nets as well. Norrie attributed these difficulties to the weakness the Dominion had shown, first when it released the Babine convicted of Fisheries violations, and then when it provided nets: "I can trace this course of unrest right back to our Babine troubles, they saw the law dispised, the Government Officials humiliated and assaulted, and instead of being punished, they have been rewarded,

naturally they think they must commit some depradation before they can expect to be rewarded also. Nonetheless, in 1911 Indian Affairs spent $700 to purchase new nets.

The McKenna-McBride Commission

When Chief William of the Fort Babine people and Chief Michel of the Old Fort Babine testified to the Royal Commission on Indian Affairs for the Province of British Columbia (the McKenna-McBride Commission) in 1915, the Commissioners heard from a desperately poor people. The fur bearing animals were scarce, they were unable to catch enough salmon to feed themselves, and many years the crops they planted were killed by a late spring or an early fall frost. The Dominion had intended to minimize their salmon catch, while at the same time secure access to other resources so that the Babine could provide for themselves. Nine years after the Barricade Agreement, the Babine made it clear to the Commissioners that the resources were inadequate. They sought more agricultural land and wanted their hunting territories included in their reserves, but their focus was salmon. The Babine wanted their fishing territories protected and enough timbered land to fuel the smokehouses that preserved the fish. The Commissioners increased the reserves of the Fort Babine and Old Fort Babine by 1282 acres, including traditional fishing grounds along the lake and river (see Figure 3.1). However, the problem was not just land. Controlling the land where the weirs had been built did not guarantee access to fish. The Commissioners reserved more land to the Babine, but they did not or could not increase the Babine’s allocation of salmon. The fishing sites may have been secured from White settlement, but the Babine were still required under the Fisheries Act to “conserve” fish for the canneries. Justified on the basis of establishing

---

442 NAC, DMF, RG 23, file 583, pt. 1, Norrie to Williams, 6 July 1909.
and preserving a particular economic order, and legitimized with law, by removing the Babine weirs the canneries on the Skeena River succeeded in securing a supply of fish and a flexible labour force.
Figure 3.1 Babine Reserve Map

---

“Indian Trails” from 1907 map by Father A.G. Morice.

- Allotted by Reserve Commissioner Peter O'Reilly, 19 September 1891. Total acres 4,348.
- Purchased from the Province, Original Survey 1908. Total acres 1,948.
- Allotted by Royal Commission, 30 May 1916. Total acres 1,307.75 (Reserves Nos. 17-19, 22-26 not shown).
Figure 3.2 Maps including Babine Weirs
Figure 3.3  Fort Babine, 190- (BCARS Photo #A-05314)
Figure 3.4  
British American Cannery, Port Essington, 189- (BCARS Photo A-04171)
Figure 3.5  Babine Weir, 1906  (NAC, DMF, RG 23, file 583, part 1)
Figure 3.6
Chief Big George, Father Coccola, and Chief Tzack William, 1906
(Archives Deschatelets, Ottawa)
4 Law and Colonialism

Colonialism describes the processes of economic and cultural domination employed by a state to bring territory and people within its sphere of control. It involves the transfer of cultural and economic institutions from one society to another, and results in the appropriation of land and resources. Sometimes it leads to colonization, the more of less systematic settlement of the territory by members of the colonizing society and the eventual transfer of authority to the settler society. In other circumstances, the colonizing state maintains control, extracting resources and labour but not encouraging settlement, and eventually withdraws leaving a transformed indigenous society. In either situation, the varied tactics or strategies of power used to assert control range from gunboats and infantry to cultural definition. Somewhere in between one finds law.

Law was at the forefront of European colonialism in the late nineteenth and early twentieth century. Not only was it a vehicle through which colonizing powers secured control of other territories and people, but at a basic level it justified the colonial projects. In their imperial expansion, Europeans believed they brought civility to supplant savagery, Christianity to banish superstition, and law to replace anarchy. Law, like the Christian gospels, was a contribution from the metropolitan country to its ‘uncivilized’ colony. In knowing and representing the other as savage and superstitious, living in anarchy,

\[\text{Cole Harris, \textit{The Resettlement of British Columbia} (Vancouver: University of British Columbia Press, 1997), uses this phrase to describe relations between European traders and Natives in “Strategies of Power in the Cordilleran Fur Trade”, pp. 31-67.}\]

Europeans could, with confidence, impose their civility, religion and law. With knowledge of the other came power over the other, and although power was expressed in many forms, law was a principle conduit.

Particularly for the British, law justified the colonial project. Law was about order, and establishing a much heralded British legal order was thought to be an unmitigated good. Colonial administrators or the settler societies they established had little doubt that imposing British legal norms secured the well-being of British nationals, but was also justifiable as a means of improving the human condition. The common law was Britain’s cultural treasure, the rule of law the pinnacle of British constitutional achievement. Judge made law in ordinary courts distinguished the British from the civil codes and state tribunals of continental Europe. Individual liberties, it was thought, were protected more effectively from arbitrary official action by the accumulation of judicial decisions than by the generalities of a written constitution. In his Law of the Constitution, A.V. Dicey wrote:

We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.

---

445 Edward Said, Orientalism (New York: Vintage Books, 1978), drawing on the knowledge/power link in the work of Michel Foucault, directed the focus of colonialism studies away from gunboats towards the power of defining and knowing the ‘other’.


447 Alan Hunt and Gary Wickham, Foucault and Law: Towards a Sociology of Law as Governance (London: Pluto Press, 1994), attempt to reintegrate an analysis of law into Foucault through an analysis of law as one of the forms of “governance”.

448 A.V. Dicey, Introduction to the Study of Law of the Constitution (London: Macmillan, 1885),
In territories claimed for the British Crown in the nineteenth century, then, establishing British law was essential to the colonial project. Where necessary, the British used other, blunter instruments of power, including gunboats and infantry, to secure control. These lingered in the background of every imperial enterprise, supporting the power of the state, ready to defend British nationals and their property. However, the British increasingly established their economic, political and social order in distant territories with law. Law was the instrument through which Britain both seized and justified its control of colonial lands, re-making people and resources to fit within its economic sphere as a source of raw materials and labour, a market, or as a destination for “excess” or unwanted population.

Produced and enforced by the state, law was understood by the British in the late nineteenth century as a means of securing order and obedience with rules rather than violence. It was a strongly centralist model, captured most enduringly by John Austin’s mid-nineteenth century definition of law as the command of the sovereign. Austin’s jurisprudential contribution was to combine judge-made law and legislation into a unified theory of law. Law emanated from the state, whether directly through legislative enactment, or indirectly from judges appointed by the state. It could be discovered by applying certain formal tests, and was recognizable as law because it was backed by the

---


force of the state. Some have suggested that this was an overly formal and deficient understanding of law in nineteenth century Britain; that despite an increasingly centralized law under state control, remnants of age-old customary law continued to function, and the emergence of administrative bodies posed a challenge to the hegemony of the ordinary courts. Nonetheless, an “ideology of legalism” prevailed in the legal profession and beyond. Law stood apart, distinct from politics or policy, to be determined by formal legal tests. It was ordered, coherent, and it sought to produce order. Martin Chanock in his study of law in colonial Africa describes the British perception of law in the late nineteenth century as follows:

The British model of civilised government was one in which the state secured obedience and order by command; not a command which enforced itself by capricious terror, but a rule-bound command. Nineteenth-century British jurisprudence emphasized that law came from the state but that it restrained power; that it was the main means of control in social order, and that the alternative was anarchy, which was not a good thing. Law was seen to be essentially about order and obedience, rather than about the expression of social solidarity, the facilitation of market relations, the legitimation of power, the manipulation of symbols, the definition of inalienable rights, or the expression of class interests, all of which have been the foci of other traditions of explanation.

Chanock’s study is part of a growing body of work to describe the interplay of European and indigenous legal forms in late nineteenth and early twentieth century colonial Africa and Asia. He and others have pointed out that colonialism usually involved not only the capture of land and resources, but also the large scale transfer of laws and

legal institutions from the European state to the colonized territory. To understand the colonial processes, one must explore the intersecting legal systems. Other themes emerge.\footnote{Sally Engle Merry, "Law and Colonialism," \textit{Law and Society Review} 25 (1991): 889-922, provides an exceedingly useful review of the literature.}

Greatly outnumbered by the indigenous population in most of their empires, the small cadre of colonial officials could not administer European law across these territories. Instead, they established dual legal systems—one for the colonizer and one for the colonized. The former, administered by Europeans, applied to European nationals, replicated the commercial laws of their home country, and enabled them to conduct business in the colonial territory under a familiar legal regime designed to protect individual property. The later, often described as "customary law", applied to the indigenous peoples who staffed and frequently administered the customary law courts. European law was paramount—unacceptable indigenous customs could be outlawed under the "repugnancy principle"—but otherwise the systems were separate. Although systems of customary law had roots in the pre-colonial social order, many have argued that the legally recognized "custom" was a product of the colonial encounter and a part of the colonizer's efforts to integrate the colonized within the European economic sphere.\footnote{Francis G. Snyder, "Colonialism and Legal Form: The Creation of 'Customary Law' in Senegal", \textit{Journal of Legal Pluralism} 19 (1981) 49-90; Terence Ranger, "The Invention of Tradition in Colonial Africa," in Eric Hobsbawm and Terence Ranger eds., \textit{The Invention of Tradition} (Cambridge: Cambridge University Press, 1983); Chanock, \textit{Law Custom and Social Order}; Sally Falk Moore, \textit{Social Facts and Fabrications: 'Customary' Law on Kilimanjaro, 1880-1980} (Cambridge: Cambridge University Press, 1986).} In fact, some reject the language of duality or pluralism, arguing they convey a parity that "misrepresents the asymmetrical power relations that inhere in the coexistence of
multiple legal orders." From this perspective, the formally recognized systems of customary law were another colonial institution that "transformed conceptions of time, space, property, work, marriage, and the state" in the interests (usually economic) of the colonial power.\footnote{458 June Starr and Jane F. Collier, eds., \textit{History and Power in the Study of Law} (Ithaca and London: Cornell University Press, 1989), p. 9.}

Similar processes were, or had been at work in Europe from the eighteenth century. Sources of wealth emerged that were not directly connected to land. Contract replaced status as the principle tool of social organization.\footnote{459 Merry, "Law and Colonialism," pp. 890-891.} Law and state were engaged in re-making relations between people, land and resources, to fit the emergent industrial capitalism.\footnote{460 Henry Maine, \textit{Ancient Law: Its connection with the early history of society and its relation to modern ideas} (London: Murray, 1861).} Particular social relations, such as 'master and servant' or husband and wife, were defined, categorized and reproduced in law. As E.P. Thompson observed of eighteenth century England, "'law' was deeply imbricated within the very basis of productive relations, which would have been inoperable without law."\footnote{461 See for example E.P. Thompson, "Time, Work-Discipline and Industrial Capitalism" in \textit{Customs In Common: Studies in Traditional Popular Culture} (New York: The New Press, 1993), pp. 352-403.} Furthermore, those productive relations, established, reinforced and reproduced by law, were generally responsive to the interests of the ruling class. As England's constitutional struggles of the seventeenth century receded, Douglas Hay argues that law displaced religion as the legitimate source of authority.\footnote{462 E.P. Thompson, \textit{Whigs and Hunters: The origin of the Black Act} (New York: Pantheon Books, 1975), p. 261.} Neither the priest nor the monarch could command as
they once had; they were no longer legitimate sites of coercion. Law, in the forms of statute and common law, had become the legitimate source of authority. The legitimacy of law, however, was not something that could be assumed; legitimacy had to be maintained through the administration of law. This was done in rural England, Hay argues, by the combined workings of majesty, justice and mercy -- the tools of the assizes courts. By the court's ceremonial splendor (majesty), the periodic hangings, sometimes of a member of the landed gentry (justice), and the frequent commutation of sentences (mercy), the ruling class were able to maintain the widespread perception of legitimacy in a legal system that protected their property. Thus, it was on the thin shoulders of law, as ideology, that the ruling class was able to rule. Hay suggests that, "the criminal law, more than any other social institution, made it possible to govern eighteenth-century England without a police force and without a large army," and not only because it instilled fear with violence.

Notwithstanding the gross imbalance of power between ruling and plebeian classes in eighteenth century England, Thompson concludes that law was never simply the tool of the ruling class. In his study of the struggle for use and control of Windsor Forest in eighteenth century England, he suggests that law provided an arena for struggle. Thompson interprets The Black Act of 1723, passed by the British Parliament to protect the King's forests by, among other things, making poaching a capital offence, as the site of

---

465 Thompson, Whigs and Hunters.
conflict between the property rights of the land owning gentry and the customary rights of peasant foresters and farmers. Sometimes the foresters hanged for killing deer, catching fish, cutting turf, taking timber or defending these ‘unauthorized’ uses of the forest. Other times they successfully defended charges of theft by appealing to customary uses recognized by local forest law. The conflict was sustained not only by competing economic interests or material need, but also by competing visions of legal entitlement.

As Thompson argued in a later work, “(m)any of the classic struggles at the entry to the industrial revolution turned as much on customs as upon wages or conditions of work.”

Legal claims, often made in terms of customary uses or customary rights, were particularly prominent in what Thompson describes as the “rebellious traditional culture” of the eighteenth century. Some customs were, of course, newly conceived or articulated, a defensive response to property rights newly defined by the landed gentry in statute. Law, Thompson argues, was contested ground. Describing it as the ‘handmaiden’ of the ruling class, while accurate to a point, is incomplete:

We reach, then, not a simple conclusion (law=class power) but a complex and contradictory one. On the one hand, it is true that the law did mediate existent class relations to the advantage of the rulers; not only is this so, but as the century advanced the law became a superb instrument by which these rulers were able to impose new definitions of property to their even greater advantage, as in the extinction by law of indefinite agrarian use-rights and in the furtherance of enclosure. On the other hand, the law mediated these class relations through legal forms, which imposed, again and again, inhibitions upon the actions of the rulers.

Highly evocative and compelling, one must be careful applying Thompson’s and Hay’s analysis beyond eighteenth century England. Law, as ideology, functioning both to

---

466 Thompson, Customs in Common, pp. 4-5.
467 Ibid., p. 9.
468 Thompson, Whigs and Hunters, p.264.
recreate the social order and to legitimize that order, emerged from particular historical circumstances, most immediately the conflict and constitutional struggle in seventeenth-century England. Transporting an analysis of a peculiarly English institution to the colonial setting, where the economic relations were fundamentally different and society was divided most obviously by culture and then by class must be done with care. England was riven by class distinctions and diverse local cultures, but, in comparison to the cultural chasm between colonizer and colonized overseas the differences at home were of a smaller order. Language and religion were shared, as was a connection to the Crown. Law and state became strong centralizing forces, but they did so among people who were part, if a marginalized part, of the British polity. Indigenous peoples in the colonies, although nominally British subjects, did not share this common cultural ground. British law in the colonies was entirely foreign. Indigenous peoples were entitled to law, but not self-determination. As Peter Fitzpatrick argues, “law [in the colonial setting] lacks the support of the detailed and tentacular non-legal controls that operate in the West and which go to create a self-determining, and self-regulating subject.”469 Francis Snyder and Hay highlight this distinction in a collection of comparative essays on the making of a working class in Europe and the Third World. In the colonial setting it was assumed that law would reflect the interests of the colonial masters; “(t)he ideology of the rule of law was thus practically absent in many if not most colonies.”470

469 Fitzpatrick, Mythology of Modern Law, p. 111.
Law and state functioned differently in the colonial settings. In his study of colonial Papua New Guinea, Peter Fitzpatrick argues whereas law and state in the first world “were oriented towards the elimination of pre-capitalist modes”, in the third world they were “oriented towards the conservation and continuing exploitation of the traditional mode”. Law and state sustained the traditional society and economy in the colonial setting, constructing “customary law” to shield indigenous societies from the frontal assault of industrial capitalism. The colonial power’s interest in maintaining a nominally traditional sector lay primarily in subsidized labour. It had the further effect of formalizing many of the pre-existing tribal, religious, gender and other divisions in the indigenous society, hindering the emergence of a working class consciousness that might have challenged the capitalist colonial authority. The result, argues Fitzpatrick, was that “the law and state continue(d) to be particularly and predominantly responsive to the interests of the only coherent and potent class element affecting it, the metropolitan bourgeoisie.” Shielding the traditional required sustained effort. It was not enough, as with pre-industrial Europe, to remove pre-capitalist relations. Law and the state, Fitzpatrick suggests, continually intervened to keep the capitalist and traditional separate, allowing the later to create an inexpensive pool of labour, yet integrated so that capital had access to that subsidized labour. The result is that “law and state have a role that is more structurally central and structurally enduring in the third world.”

472 Ibid., p. 39.
473 Ibid.
Nonetheless, a growing body of work suggests that European law was not a totalizing power in the colonial setting either. The colonized were not passive bystanders, caught inside a legal straight-jacket, unable to respond. Instead, they consistently directed and managed change, such as they could, for their benefit. Sometimes this meant using European law to limit the excesses of settler brutality. Other times it meant co-opting the power of the state to affect relations within indigenous societies, enabling some to advance their interests at the expense of others. Indigenous people did not, of course, experience colonialism equally. In either case, law that reproduced the indigenous society in the colonizer’s image also provided the possibility of resistance. It created unintended spaces of resistance, forced compromise, and was a source of power to certain members of the indigenous society. Sally Engle Merry provides the following summary of the law and colonialism literature:

Taken together, the works under review show that European law was central to the colonizing process but in a curiously ambiguous way. It served to extract land from precolonial users and to create a wage labor force out of peasant and subsistence producers. Yet, at the same time, it provided a way for these groups to mobilize the ideology of the colonizers to protect lands and to resist some of the more excessive demands of the settlers for land and labor. Moreover, the law provided a way for the colonial state to restrain the more brutal aspects of settlers’ exploitation of land and labor. Thus, the legal arena became a place of contest among the diverse interest groups in colonial society. The contest included struggles between traditional leaders and new educated elites of the colonized population as well as colonial officials, missionaries, and settler populations. It was an unequal contest, however, in which colonial officials and settler populations exerted vastly greater power than colonized groups. The use of law in colonial processes therefore parallels other state efforts to assert control through law, efforts often undermined by patterns of non-compliance and appropriation by the subjugated.474

In the literature on law and colonialism, then, there are several important observations. First, law was central to the colonial project, both as a source of control

474 Merry, “Law and Colonialism,” p. 891.
and as a justification for that control. Second, legal pluralism\textsuperscript{475} rather than legal centralism characterized the colonial setting; European and indigenous legal forms operated in the same territory, creating intersecting spheres of social control. Third, law in the colonial setting played a different, perhaps more intrusive and sustained role than it did in the metropolitan country. Finally, although both European and customary law channeled resources to the benefit the colonial power, law was not only an oppressive instrument of power. It was that, but more. Law provided space where the colonized might successfully limit the excesses of colonial control. It could not remove the colonial power, but law and legal argument might ameliorate the oppression. It was also a source of power that could be used to affect social relations within the indigenous society, for the benefit of some and to the detriment of others.

**Law and Colonialism, and British Columbia**

The themes that Merry highlights in her survey—the centrality of law in the colonial process, and the possibility of resistance—resonate strongly with the British Columbian experience. Tina Loo, in *Making Law, Order, and Authority in British Columbia, 1821-1871*, argues that “(f)or European British Columbians, law was central to the making of a liberal order ...”\textsuperscript{476} Europeans in nineteenth century British Columbia, she suggests, “were concerned less with countering the possibility of violence and crime with English law and its institutions than they were about structuring a particular kind of social, political and

\textsuperscript{475} John Griffiths, “What is Legal Pluralism?” *Journal of Legal Pluralism and Unofficial Law* 24 (1986): 1-55, characterizes this as “weak legal pluralism”.

economic order and privileging a particular set of values.\textsuperscript{477} Constructed through a discourse of laissez-faire liberalism, law and the state created the "standardization, uniformity, certainty, and above all rationality" that Europeans sought to secure their economic futures.\textsuperscript{478} Law, as others have argued in other contexts, was central to the colonial process. Her study begins with the "Club law" of the Hudson's Bay Company, turns to the miner's law that arrived with the gold rushes of the late 1850s and 1860s, and concludes with imposition of state law on the Chilcotin people in 1864 and the formation of the colonial identity. It is in her final chapter that Loo explores the resistance born of domination, and drawing upon Thompson, the possibility that law creates a "discursive space" that can be harnessed to challenge the state. Law, she suggests, with its assertion of equality, could transcend the material interests of white British Columbia, creating the possibility of justice for Native people. Her case study--the 'Bute Inlet Massacre' where eighteen railway workers were killed in 1864 and eight Chilcotin Indians were arrested for their murder--is perhaps not the best example of law's discursive spaces. The eight were tried and five were hanged, notwithstanding the procedural irregularities of their capture (they surrendered under false pretences). The arrests and trials appear as little more than the transparent, unconstrained exercise of state power. Loo develops the discursive space of law more fully in "Dan Cranmer's Potlatch: Law as Coercion, Symbol and Rhetoric in British Columbia, 1884-1951".\textsuperscript{479} She argues that in the enforcement of the potlatch prohibition in the Indian Act, law and the legal process is revealed "as a system of rhetoric

\textsuperscript{477} Ibid.
\textsuperscript{478} Ibid., p. 4.
or a way of arguing. As such, it contributed to the varied strategies of resistance Native people employed to circumvent the potlatch law.

In general, historical studies of law and colonialism in North America have, however, paid little attention to the extensive work on law and colonial processes elsewhere. Similarly, those interested in law and colonialism in Africa and Asia have ignored late nineteenth and early twentieth century North America. Why have there been few connections? Part of the answer lies in the widespread denial of North America’s colonial past. Law and colonialism scholars use “colonialism” most frequently, sometimes implicitly, to describe nineteenth and early twentieth century European forays into Africa and Asia. Colonialism, they assume, happened on other continents, not in Canada or the United States. That there has been no independence day for the indigenous peoples of North America does not indicate an absence of colonialism. Instead, it points to the relative completeness (devastation) of the colonial project.

The successful colonization of North America has obliterated the colonial past, to the point where the processes of colonialism have almost slipped from the collective conscience. The indigenous population has not been eliminated or entirely assimilated, but it has been pushed so far into the margins, almost to the point of forgetting. This is true not only among the general population, but also, until recently, of academic scholarship. Thus, it was possible for Merry to remark that the study of legal pluralism, once confined

---

480 Ibid., p. 133.
to an analysis of intersecting indigenous and European legal forms in colonial and postcolonial societies, was now being applied to "noncolonized societies, particularly to the advanced industrial countries of Europe and the United States."\(^{482}\) By this she meant that the concept of legal pluralism had resonance beyond colonial settings, and was being used to describe relations between dominant and subordinate groups, as well as various forms of unofficial ordering in developed countries.\(^{483}\) The use of "noncolonized" to describe the United States is unfortunate, but also suggests why little attention has been paid to North America. If one defines colonialism as the late nineteenth century push by European powers into Africa and Asia, then the description of the United States as "noncolonized" may be accurate. However, while Africa and Asia have been the focus of colonial and post-colonial studies, there is no reason why the analysis of colonialism should be so confined. That it has been is, in part, a function of North American settler society's collective amnesia.

British Columbia's formal designation as a colony ended when it joined the Canadian Confederation in 1871, just as the race for Africa among European nation-states was underway. The formal change in status from colony to province, however, did not alter the fact that the colonial processes designed to bring the territory and the indigenous peoples under settler control were only just beginning. Just as it moved south from


\(^{483}\) Merry describes the "new legal pluralism" as follows: "The concern is to document other forms of social regulation that draw on the symbols of law, to a greater or lesser extent, but that operate in its shadows, its parking lots, and even down the street in mediation offices. Thus, in contexts in which the dominance of a central legal system is unambiguous, this thread of argument worries about missing what else is going on; the extent to which other forms of regulation outside law constitute law." *Ibid.*, p.874.
Europe into Africa and Asia, industrial capitalism penetrated the spaces of British Columbia, integrating them into the Empire and the global economy. Although direct political ties to Britain were diminished, many settlers still thought of themselves as British and certain institutions maintained Imperial connections. This was particularly true in law where the Judicial Committee of the Privy Council in London remained the court of last resort in Canada until 1949.

Among the law and colonialism scholars who acknowledge North America’s colonial past, there is an assumption that the interesting legal innovations, such as the systems of “customary law”, occurred elsewhere, predominantly in Africa or Asia. These systems had a formal existence and longevity that outlasted direct colonial rule. In North America the processes of domination and assimilation are assumed to have occurred quickly and completely. Thus, one encounters statements such as the following:

The indigenous populations encountered in North America were quickly subjugated, relocated, or decimated, and even though there continued to be, from the colonial perspective, a “native problem”, it was a military and political one, requiring little in the way of legal or administrative innovation.484

To describe Native people as “quickly subjugated” in the territory that became Canada, given the extensive history of the fur-trade, is wildly inaccurate. As many have pointed out, Native people were trading partners, allies, enemies, employees, wives, sexual partners and much else.485 In varying contexts, relations between Europeans and Natives

were military and political, but also legal and even personal. Perhaps in comparison to the prodigious task of extending English law to hundreds of millions of people in India, the North American experience may seem relatively inconsequential. However, the assumption that the only interesting legal innovation took place elsewhere is wrong. The interaction between Natives and Europeans created a panoply of compromise, accommodation and innovation. Richard White has argued that a social, political and legal “middle ground” emerged in the seventeenth century between French and Native cultures in the great lakes basin. The function of a rough balance of power and the need to explain one’s actions in terms that could fit within the cultural imperatives of the other, argues White, a cultural “middle ground” developed that was neither French nor Native, but a hybrid. After the British consolidated control of North America and the French retreat in 1761, the middle ground diminished with the British need for Native allies. It had all but vanished in the early nineteenth century as American settler society spread over the Appalachians west to the Mississippi.

The lack of law and colonialism analysis in North America, or the denial of its relevance to late nineteenth century studies of imperial domination may reflect an eastern North American perspective. Although pockets of resistance remained, European and American based legal institutions were secure in the east by the early nineteenth century. The balance of power had shifted to the point where the earlier cultural and legal hybrids existed only on the margins. This shift occurred much later in the west and in the north. Cole Harris points out that, because of distance and unresolved territorial claims, the state

was largely absent in the northern Cordillera in the first half of the nineteenth century. Commercial capital, in the form of the Hudson’s Bay Company, “operat(ed) beyond the state, and largely outside a system of law.”

Beyond the HBC forts, “islands of relative security amid unfamiliar, potentially hostile people”, Hamar Foster has argued that disputes were settled “more in keeping with Indian than with English methods.” He describes something akin to White’s “middle ground” existing well into the mid-nineteenth century. Joanne Fiske argues that Native legal forms were much in evidence in Native/settler relations in northern British Columbia until late in the nineteenth century.

The missionaries, whose influence in Native society far exceeded local magistrates, used their knowledge of “Indian law” to resolve or diffuse disputes between Natives and settlers. It was not until the 1880s, argues Fiske, that Indian law was transformed by the state into “privileges”, granted under Canadian law.

In the preceding chapters, then, I have turned the colonial and post-colonial legal gaze towards North America to describe the role of law in one part of the colonial project—the capture of Native fisheries in late nineteenth and early twentieth century British Columbia. How can one understand the colonial processes at work in British Columbia in light of the analysis of experiences elsewhere?

---

486 Harris, *The Resettlement of British Columbia*, p. 64.
487 Ibid., p. 34.
490 Fiske traces the discursive transformation into the twentieth century, arguing that “Indian law” became “oral tradition” within the Canadian legal discourse.
Anglo-Canadian Law and the British Columbia Fishery

In the 1870s, industrial capital penetrated British Columbian spaces that had been the preserve of Native fishing villages and isolated trading posts. In combination with labour and fish, it created an oar and sail powered gill net fishery, located in the tidal waters near the mouth of the province's major rivers, that supplied near-by canneries with salmon for export to markets around the world. To secure their capital investments, the cannery owners sought a guaranteed supply of fish and a flexible labour force. Unable to achieve this on their own, they enlisted the state. Through successively comprehensive fishing regulations, the Department of Marine and Fisheries (hereafter “Fisheries”) reproduced a particular set of relations that secured the preeminence of the canneries in the fishing industry. Fish became an industrial resource; Native people became an industrial labour force.

Cannery owners objected to conflicting users of the rivers, initially gold miners whom they blamed for destroying spawning beds and later loggers for destroying fish habitat. They sought rules to limit the damage. Established canners were also concerned about competitors in the industry, and they sought rules to limit access. Of paramount concern, however, were the Native fisheries. These locally managed fisheries were extensive and, according to the cannery operators, particularly destructive. Were they allowed to remain locally managed, they would have reduced the fish available to the canneries, or at least increased the cost. This was unacceptable to the canners who had invested heavily in their canning operations. They insisted that the Dominion curtail Native fisheries to secure fish stocks and to ensure fair competition. If Native fishers were
subject to different rules, then not only were Native fishers at an advantage, but so were the canneries who purchased Native caught fish.

The local rules regulating the commons, allocating the resource, were replaced by central bureaucratic management designed to secure the capital investment in the canneries. It was with law that the state created an “Indian food fishery” to placate non-Native interests, particularly the canneries. The food fishery allowed Natives to catch fish for food with various methods, and at certain times and places that were prohibited to non-Natives. It created a “traditional economy”, separating a Native fishery from the industrial or sport fishery. It was, however, a traditional fishery that had no precedent in Native society. Native people certainly fished for food, but their fisheries were never so categorized or limited. The Indian food fishery in British Columbia was a product of late nineteenth century state regulation. It was the device with which the state protected a “traditional economy,” marginalizing Native control, and at the same time to integrating Native peoples into the global economy as subsidized labour. When there was work, fishers and cannery workers were relatively well paid, but the work was seasonal and it fluctuated year-to-year with the salmon runs. As the cost of fishing technology grew and canneries consolidated in the early twentieth century, and as settlers arrived in British Columbia to work in the fisheries, the importance of the Native labour diminished. Canneries hired Japanese and other non-Native fishers to supply fish, and the state granted independent licences to Whites to encourage their settlement. Even though their participation in the fishing industry remained higher than any other industry in the province, Native fishers were systematically excluded. If the need for law to create a
flexible labour force for the canneries from a “traditional economy” diminished, the constructed Indian food fishery continued to limit Native control of the resource. Non-Natives may not have wanted Native labour, but they still wanted the fish.

The links between the canning industry and Fisheries were many and obvious, including the de facto appointment of local Fisheries officers in some parts of the province. The officers on the Skeena River, including Babine Lake, were cannery appointed, and the attack on the Babine weirs was a transparent example, in this study, of state appropriation of a resource for industrial capital. The state, through regulation, reallocated fish from the Babine to the canneries.

Nonetheless, senior officials in Ottawa were somewhat more removed from the canning industry than the local officials, and rejected accusations that they were cannery puppets. Fisheries was an independent institution with its own agenda that, while broadly supportive of the canning industry, was not entirely subservient. Its senior officers professed an independent interest in maintaining the long term health of fish stocks, and were not above questioning the work of the local officials when they appeared to be acting too aggressively on behalf of the canneries or the sport fishery. If the general outline of fisheries law suited the cannery owners, they often disagreed about the detail. Initially, at least, they were a fractious group, in competition for fish and employees, wanting to protect their drifts and labour force from each other. They did agree, however, that competing users of the fish must be limited and that efforts should be taken to enhance fish stocks. In this they had the support of Fisheries.
The conflict over fish on the Cowichan River reveals that the colonizing pressures emanated not just from the cannery owners, but from the fly-fishing community as well. Fly-fishing was less obviously a commercial enterprise. With hunting, it was the quintessential leisure activity of the English landed gentry. It was bound to an ethos of sport and fair play, catalogued by Isaak Walton in *The Compleat Angler*, and it defined a particular connection with “nature” that was both individual and masculine. Despite a regal pedigree, local tourist boards and industrial giants such as the CPR did not let Fisheries forget that fly-fishing could also be a business proposition and that it needed protection from both the commercial fleets and Native fishing. The state restricted the Cowichan weir fishery, eventually removing it from the river, although not without an extended struggle.

The Cowichan weirs came down, just as the Babine weirs had done thirty years earlier. Perhaps most importantly, Fisheries officials, cannery owners, and fly-fishers, despite their differences, shared a set of cultural assumptions about progress, civilization and the law. These shared discourses reproduced a set of relationships that excluded Native people from control of their fisheries. The province’s large rivers were dominated by the canning industry; some of the smaller rivers and many lakes were controlled by fly-fishers. Native people participated as workers, but their ownership of the resource was

---

491 Izaak Walton, *The complete angler; or, Contemplative man’s recreation: being a discourse on rivers, fish-ponds, fish, and fishing, not unworthy the perusal of most anglers*, was first published in 1653, but was re-published many times, particularly in the late nineteenth and early twentieth centuries, for example: (London, S. Bagster, 1893); (London: J. Lane, 1897); (Oxford: H. Hart, 1900); (London: Methuen & Co., 1903).

denied and their laws regulating its use were ignored. Even in instances of protracted
Native struggle, where Natives repeatedly asserted in their terms a right to fish, Dominion
officials attributed the resistance to White agitators, particularly missionaries, whom they
accused of fermenting trouble among Native peoples with rights talk. Whites were seen as
the agents of unrest; Native agency was discounted. The fisheries were regulated by
Native peoples, but not in a manner recognizable to the Canadian state. The perceived
absence of law justified, for Dominion officials, the imposition of state law.

At a general level, this much is clear: the state used law to remove the west coast
fisheries from Native control. Law was a form of power, as Martin Chanock argues, "(i)t
is that legal forms enable people to gain particular types of power over others, and
particular sorts of economic advantage." Anglo-Canadian legal forms reproduced
particular relationships between people and their use of resources that directed control of
fisheries away from Native people. With law, the Canadian state captured a resource. Of
course law was by no means the only form of power, but it was central to colonial projects
of the late nineteenth century. In law, power was legitimized. As Douglas Hay writes: "A
ruling class organizes its power in the state. The sanction of the state is force, but it is
force that is legitimized, however imperfectly, and therefore the state deals also in
ideologies." Law, as legitimate power, removed the west coast fishery from Native
control.

When one probes the details of application and enforcement, however, the role of
law is much more ambiguous and uncertain. Law is a site of conflict, flexible in one

instance, rigid the next, and often operating in the particular to support rather than
diminish Native resistance. Replacing one system of resource allocation and social control
with another is not so neat and tidy as it appears from a distance.

The early application of Anglo-Canadian fisheries law under A.C. Anderson is so
flexible that one is hard pressed to describe the fishery as subject to the rule of law. The
Fisheries Act appears to offer occasional guidance, but little more. Myriad forms of
power were at work, transforming people into wage labour and fish into an industrial
resource. Law is but one, and it was seldom used in direct attacks on Native fisheries that
for the most part continued to operate unhindered. In the early years, the state's legal
forms sat in the background, structuring relationships without much direct intervention.
When called upon, however, law explicitly constructed a particular relationship. The
master and servant cases on the Fraser River in 1877 provide one illustration. Native
people were constructed by the local police courts as cannery employees, and jailed for
continuing to act as traders. The law acted sharply and quickly to delimit a new
relationship between capital and labour. Having established the terms of this new
relationship, law receded again into the background, to operate less as a hammer than to
argues that “the legal forms we use set limits on what we can imagine as practical options: Our
desires and plans tend to be shaped out of the limited stock of forms available to us: The forms this
condition not just our power to get what we want but what we want (or think we can get) itself.”}

Through the 1880s and 1890s, Fisheries officers grew increasingly interventionist,
enforcing restrictions on Native fisheries around the province that had previously been
ignored. On the Cowichan River, the law closed around those Cowichan unable or
unwilling to join the wage economy, restricting their access to fish, animals and land. But just as some Cowichan were able to modify their traditional fishing, gathering and semi-agricultural seasonal cycles to accommodate the wage economy of the late nineteenth century, so they were able to use the imposed legal system to defend their interests. Despite repeated attempts, Fisheries was unable to secure a conviction against the Cowichan for weir fishing. The rigidities of courtroom procedure, or the burden of proffering sufficient evidence to support a guilty verdict consistently eluded the Crown. The actions of Edward Musgrave provide a wonderful illustration of the paradoxical effect of Dominion law on the Cowichan fishery. Musgrave was one of the most outspoken opponents of the Cowichan weirs, and one who called loudest for the enforcement of Canadian fisheries law. He thought the weirs must go, and stated so frequently. Nonetheless, as a justice of the peace hearing a charge against a Cowichan man for building a weir, Musgrave acquitted the accused on procedural grounds. Law had a space of its own, beyond the control of the state, and Native peoples and their supporters used that space defensively to protect their fisheries. The Cowichan successfully defended each attack by the state in its own forum. Each failure by the state weakened its claim that the weirs were a conservation hazard; each Cowichan victory gave legitimacy to their claims of unextinguished right and effective traditional management. The state’s legal institutions confined Cowichan resource use, but provided a forum that strengthened and legitimized Cowichan resistance.
Native Law

However much the legal tools of the Canadian state were used by the Native peoples, their resistance was rooted in Native law. Native law governed the use of local fisheries, performing the same functions as Canadian fisheries law—defining and determining ownership of particular fisheries. Just as Canadian law defined fisheries and determined ownership through legal devices such as licences and leases, Native societies determined ownership through a collection of familial and clan ties that were recognized in the feasts. But whereas state law was centralized and applied generally, Native law was local and intensely specific. The state created regulations that applied across the province, largely oblivious to local difference and only tenuously connected to the actually fisheries. Native people could point to a name, the holder of which had the right to fish from a particular rock, cast a net in a certain portion of a river, or direct the building of a weir just above the rapids. These radically different management systems co-existed in British Columbia as the conflict over fisheries attests, but only for a time. Once the wealth of the fishery became apparent to non-Natives, the state replaced the local with the central, the specific with the general, and reallocated the fisheries in the process.

Perhaps it would be more accurate to describe Canadian and Native law as determining the allocation of the resource rather than ownership. Many Native peoples view their control of the resource, not as ownership, but as stewardship. Those who hold name conferring control of a fishery are responsible to ensure that the fishery provides for the wider community as well as future generations. In Canadian law, fish are not owned until caught, and a fisheries licence or lease is not considered a property right. The state
holds the fishery in trust for the public, and grants discretionary permits to particular users. Whether characterized as ownership or stewardship, the dispute over fish between Native peoples and the Canadian state is a dispute over the power to allocate a resource. Claims about the power to allocate come from within the legal traditions of Anglo-Canadian Native cultures.

Without equating the forms of Native law to E.P. Thompson's "moral economy", a term he uses to describe the "legitimising notion" that underscored the food riots in eighteenth century England, there are some striking parallels. Thompson argued that the food riot was more than simply an instinctive reaction of a hungry English peasantry. Instead, "the men and women in the crowd were informed by the belief that they were defending traditional rights or customs; and in general, that they were supported by the wider consensus of the community."\footnote{Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century," in \textit{Customs in Common}, pp. 185-258, at 188.} Thompson was reacting against what he saw as an "abbreviated view of economic man,"\footnote{\textit{Ibid.}, p. 187.} one that ignored the complexity of crowd behaviour by reducing the agency of the English poor to the reactions of hungry people. What was remarkable about the riots, argues Thompson, was the restraint and order of the crowd as it set about rectifying an unjust price for bread. Riotous perhaps, the eighteenth century English crowd was disciplined by strong notions of right.

It is tempting to use Thompson's "moral economy" to describe Native resistance to the Canadian state's fisheries laws. Just as the English peasantry, Native people believed they were defending traditional rights, and there are powerful legitimizing notions

running through their actions. The Babine, for example, display ritual, pageantry and controlled violence led by women in defence of their weirs. However, Thompson warns caution when transporting the idea beyond "the given field-of-force of Eighteenth century English relations." For the reasons discussed above in the context of law as ideology, a cautious approach is warranted. Nonetheless, Thompson’s analysis is compelling, and particularly useful to explain, in part, the longevity of the Cowichan weirs in contrast to the quick removal of the Babine weirs.

Thompson argues that the food rioters succeeded in causing authorities to regulate the market and lower the price of bread, if only temporarily, when the local community endorsed their action. If the wider community saw the action as "just", as based on an earlier custom or tradition that should be respected by authorities, then the rioters might succeed. Without that support, they were isolated, unlikely to succeed and in danger of being hanged.

The Cowichan managed to keep their weirs for as long as they did, in part, because they were able to forge a consensus in the local settler community that they were entitled to the weirs. This was an important difference between their situation and that of the Babine, whose visible support came only from two Oblate missionaries. Apart from a transient mining population and the HBC post manager, virtually no Whites lived along Babine River or Lake. A few settlers were arriving in the neighbouring Bulkley valley, but the canneries on the coast were the dominant presence. The Babine faced the canneries themselves, without a local White community that might have tempered cannery

---

dominance. The Cowichan, on the other hand, felt themselves increasingly constrained by White settlers, their fences and their laws. Nonetheless, the local settler community that much more diverse than the vocal sport fishing interests would indicate, and its support of Cowichan resistance helped to sustain the weir fishery. Instead of state law tempering settler brutality (one of general points arising from the studies of law and colonialism), in this case the local settler community mitigated the brutality of the law. With or without local support, however, Native resistance to Dominion regulation was born of Native systems of resource allocation that were produced and reproduced in Native legal cultures.

It is impossible to escape Canadian law when one considers relations between First Nations and Canadian society in late twentieth century British Columbia. From the provisions in the Indian Act, to the Canadian Constitution, and the decisions of the Supreme Court of Canada, law surrounds the contemporary relationship. If one needs to justify a historical study in terms of its contemporary relevance, it not difficult in a history of the state’s regulation of Native fisheries. The “Indian food fishery”, constructed in British Columbia in the late nineteenth century, continues to linger in Canadian law. In fact, recent Supreme Court of Canada decisions have formalized the division. In R. v. Sparrow, Fisheries charged a Musqueam chief with using a net that violated the Fisheries Act. The Supreme Court of Canada, notwithstanding its strong affirmation of aboriginal rights, constructed the case around food fishing, and pronounced that the

aboriginal food fishery had priority over any other fishery. The commercial fishery was left for another day, to be categorized differently. That day came with the decision of the Supreme Court in *R. v. Vander Peet*. In considering the charges under the *Fisheries Act* against a Stó:lō women who had sold a few salmon, the court recognized the possibility of an aboriginal right to a commercial fishery, but did not find that such a right existed in that case. This distinction between a food and a commercial fishery is entrenched for the foreseeable future in Canada’s highest courts. The categories created in the nineteenth century, transforming fish to fit into tins or to be caught on the end of a dry fly, and Native people into piece workers, remain with us today.

It is increasingly impossible to ignore Native law as we move, with halting steps, towards some manifestation of contemporary legal pluralism. Native declarations of right, of ownership, and of jurisdiction are not new claims, as is often assumed. They precede the attempt by the Canadian state to wrest control of the fisheries from Native people, and come to light in the historical record when the state challenged for control. That Native people are reasserting these claims today should not surprise anyone familiar with the history of the struggle over fish. The Canadian state’s legal capture of British Columbia’s fisheries came at the expense Native legal forms, that while subdued and

---

altered, never disappeared. The knots that have tied the nets of colonialism are slowly, perhaps surely, coming undone.
Select Bibliography

Primary Sources

British Columbia Archives and Records Service
  British Columbia Attorney General Correspondence
  British Columbia Department of Fisheries Records
  Colonial Office Correspondence
  Gilbert Malcom Sproat Letterbooks
  Sir Matthew Ballie Begbie Bench Books

University of British Columbia Special Collections
  Commission on the Salmon Fishing Industry in BC, 1902, Unpublished Reports.

National Archives of Canada
  Department of Indian Affairs Records
  Department of Fisheries Records

Canada
    Ottawa: Queen’s Printer, 1893.
  Dominion-British Columbia Fisheries Commission, 1905-07. Report and
    Recommendations. Ottawa: King’s Printer, 1908.
  Sessional Papers, Parliament of Canada

Newspapers
  Cowichan Leader
  Daily British Colonist (Victoria)
  Mainland Guardian (New Westminster)
  Weekly Standard (Victoria)
  The Cranbrook Courier
  Victoria Daily Colonist
  Victoria Daily Times

British Columbia
  British Columbia Salmon Commission, 1902.
    Victoria: Queen’s Printer, 1875.
  Evidence Submitted to the British Columbia Fisheries Commission (Victoria:
Reported Cases


St. Catherine's Milling & Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (J.C.P.C.).

Statutes

Canada
British North America Act, 1867
Fisheries Act, 1868, 1886, 1906, 1914

An Act respecting the extension and application of “The Fisheries Act,” to and in the Provinces of British Columbia, Prince Edward Island and Manitoba, 1874

British Columbia
Fisheries Act, 1901
Summary Convictions Act, 1889

Great Britain
An Act to enlarge the Powers of Justices in determining Complaints between Masters and Servants and between Masters, Apprentices, Artificers and others, 1823

Secondary sources


--- *Power/Knowledge: Selected Interviews and Other Writings 1972-1977.*


Kew, Michael. *Notes on Indian Communities on Babine Lake.* Unpublished manuscript located in Special Collections at the University of British Columbia.


Linebaugh, P. “(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein.” *New York University Law Review* 60(2): 212-43.


Walton, Izaak *The complete angler; or, Contemplative man's recreation; being a discourse on rivers, fish-ponds, fish, and fishing, not unworthy the perusal of most anglers* [1653]. London: S. Bagster, 1893.

