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ABSTRACT

Native Indian bands in British Columbia continue to assert rights to participation in the West Coast fisheries. Numerous attempts to have legal and aboriginal fishery rights recognised by the courts have failed and pleas to the federal government for political resolution have not yet produced results.

Various bands in the province have, over the last few years, been testing in the courts a new means of securing reserve fisheries for themselves. There is a provision in the Indian Act which allows band councils to pass by-laws relating to a number of subjects, among them the "preservation, protection and management of... fish... on the reserve". The provision has been little-used in the past but, recently, by-laws have been drawn which purport to give band councils authority to fully manage their reserve fisheries. The issue is nascent in the courts as by-laws are now being tendered in defence to prosecutions under the Fisheries Act. The predominant argument in defence to the charges is that, where a fisheries by-law is in place, its terms apply to fishing which takes place on the reserve, in precedence to the terms of the Fisheries Act and Regulations. The defence has been given some credence by some courts but has not yet been fully argued. It is an issue which still remains at the County Court level.
Still to be determined are the interpretation to be given the enabling provision of the Indian Act and the validity of the by-laws, including the extent to which they might preclude application of the federal Fisheries Act on the reserve. A clear ruling by a higher court would assist bands in determining what value these by-laws might be in securing the control they desire over reserve fisheries. Other factors affecting the value of the by-laws to the natives are the amount of control which can practically be exerted over the resource, given most bands' reserve locations upstream from the sites of the commercial and sport-fishing effort but downstream from the spawning grounds, and the level of fisheries management expertise of the various bands.

This paper investigates the potential of band fisheries by-laws to assist natives in their struggle for some control of their fisheries, as well as the implication of these by-laws for other user groups of the fisheries. The historical context of the native Indian fisheries claims is provided, and a description of the current by-laws. Against that background is an analysis of the case law to date. A discussion of the validity of the by-laws reveals their weakness for the intended purpose of excluding the federal fisheries department from any managerial control over reserve fisheries and the necessity for a more viable solution to the problem.
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INTRODUCTION

Native Indians in British Columbia have always asserted a right to fish without hindrance in their usual and accustomed fishing grounds. They, along with non-native commercial and sport fishers, have watched as fishery resources have become more and more depleted and fishery regulations more and more restrictive. Over the last two or three decades, Indians have defended themselves against a growing number of prosecutions under the Fisheries Act by various arguments based on claims of traditional and still-existing fishing rights. As will be explained, these defences have consistently failed. It becomes clear from reading the cases that, while there is often a sympathetic hearing, the courts feel that the legislative and political forum is the appropriate one for any satisfactory resolution.

Politically, the native Indian fisheries claims has become a prominent issue in very recent years. This is attributable to the conjunction of two major factors; the alarming decline of fisheries stocks, particularly salmon, on the West Coast, and an expressed willingness on the part of the federal government to discuss settlement of aboriginal claims generally.

The federal Commission on Pacific Fisheries Policy was established in 1981 to investigate the state of the
fisheries resources on the West Coast and to make recommendations on the management and utilisation of them. The release of the final report of the Commission advised what was already clear to many; that is, that "Canada's Pacific fisheries are at a crisis point." Commissioner Peter Pearse catalogued the ills of the West Coast fisheries, including the conflict generated by Indian claims in the face of ever-increasing government restriction.

The federal government is now expressing a willingness to finally resolve outstanding issues with respect to native claims. These include the very broad questions of land claims; economic and political self-determination; and access to fish and wildlife resources. "The existing and aboriginal and treaty rights of the aboriginal peoples of Canada" were "recognised and confirmed" in section 35 of The Constitution Act, 1982. There was a commitment on the part of the federal government to meet periodically with the country's native leaders in order to negotiate resolution.

In March of 1983 the provincial premiers and the country's native leaders met in Ottawa to commence negotiation with the federal government. There were no substantive results from this first conference but there was, generally, a commitment from most of the provincial premiers to continue the process until agreeable solutions
could be formulated.³

The second such conference, held in Ottawa in March of 1984 ended in bitterness and disappointment for natives. In spite of federal support for the entrenchment in the Constitution of a native right to self-government, the majority of provincial premiers negatived the proposal, refusing to support the concept of self-government until the structure and terms of such government could be defined.⁴ The results of the third conference in the spring of 1985 were similar.

Although Constitutional amendment requires provincial support, the federal government still demonstrates support for greater native autonomy. A Parliamentary Task-force on Indian Self-Government was ordered established in the House of Commons in December of 1982.⁵ An all-party Special Committee tabled the "Second Report to the House" in October of 1983. In it, the Committee recommended recognition of a separate level of government for Indian "First Nations" with a gradual phasing out of Department of Indian Affairs and Northern Development programmes which relate to Indians.⁶ The government's response to the report was that it intended to introduce legislation which would enable Indian groups, in bands or other units, to exercise some control over their economic and political affairs. The legislation would apply only to those First Nations who opted for
The attempts to settle land claims in the North and the return of cut-off lands to bands in British Columbia are examples of the federal government's good faith in these matters.

Fisheries claims are an important aspect of settlement and here, too, the federal government is indicating its readiness to respond to the claims. In 1983, Pierre de Bane, Fisheries Minister at that time, agreed with the proposals of the Pearse Report that Indians take a greater part in the fishing industry. About the same time, Indian Affairs Minister John Munro said that the fisheries aspect of aboriginal claims could now be negotiated. At issue primarily is the salmon-fishing industry as that constitutes the basic food fish for the Indians. It also constitutes the major commercial and sport fishery and is in a serious state of decline. The salmon fishery is a politically sensitive issue in itself and this makes any settlement with the Indians very controversial. Right now, the federal government faces criticism from all user groups for its alleged mismanagement of the resource.

Before examining the current efforts various bands in British Columbia are making to protect their own fisheries, it will be useful to briefly survey the basis of the Indian claim to the fishery and the history of
their failure to convince the courts of the priority of their claim.
The Cultural Significance of Fish to Indians

Salmon has always been of integral importance to Pacific North-West Indians. It has formed the major part of their diet and has also been of great social, economic and religious significance. Life in coastal communities revolved around the annual salmon runs. Bands would move to river fishing camps during the autumn months to harvest the fish which would feed them over the winter and also serve as an item of trade with interior tribes.

The salmon ran in such abundance that it was a relatively easy matter to gather and preserve the winter's food supply within a short time. The benefit of such easy access to this dietary staple shows in the richness of culture which is associated with the Pacific North-West Indian groups. Freed from the necessity of day-to-day food gathering which characterised many early cultures, the coastal Indians had much time to develop and sophisticate their village sites, their art forms and their social systems.10

In their appreciation of, and affinity with,
nature, the natives of the Pacific North-West held the salmon spirit, or being, in great regard. It was the bounty of the salmon beings which sustained the people and they honoured them. The first arrival of the spawning salmon each year was a matter of ceremony to honour and welcome the fish. Philip Drucker, in Cultures of the North Pacific Coast, explains it in the following manner,

Because the salmon were regarded as beings who voluntarily sacrificed themselves for the benefit of man, it was important that they be treated well. Although salmon beings left their material bodies behind, they were immortal, and if offended, might not return the following year. The first catch of the year in important fishing places was given an elaborate welcome, so that the salmon beings would be well disposed toward the humans who fished there.11

b) Colonial Settlement and the Douglas Treaties

The early settlers appreciated the significance of the salmon to the Indians as their main dietary and economic support. As well, the settlers benefited from the native proficiency in fishing as the Indians were able to supply food for the settlers as well. Encouraging the Indians to continue with their usual fishing practices was a mutually beneficial thing. On a commercial level, the early fish canneries were dependent on the Indians as primary suppliers.12

The colonists were originally small in number and
were still vastly outnumbered by native residents by mid-nineteenth century. However, increased settlement was fostered by the British government which, in 1849, leased the whole of Vancouver Island to the Hudson Bay Company on the condition that a British colony be established there.¹³

James Douglas, a Chief Factor with the Hudson Bay Company, had begun construction of Fort Victoria in 1843¹⁴ and, in 1849, moved there to take up the position of Chief Factor of Vancouver Island. While Douglas retained his position as Chief Factor of the Hudson Bay Company,¹⁵ he was also appointed Governor of Vancouver Island. By 1855, the white settlement was still small, numbering under a thousand persons. The Indians on the Island numbered thirty thousand.¹⁶

Douglas was instructed by the Secretary of the Hudson Bay Company, Archibald Barclay, to purchase lands from the Indians for white settlement.¹⁷ Between the years 1850 and 1854 Douglas concluded fourteen treaties with Vancouver Island tribes, mostly in the southern region of the Island.¹⁸

The Indians' strong interest in fishing was clearly a consideration in negotiations with them and Douglas was instructed in this regard. After referring to the principle of compensation to be followed, Barclay writes,
The natives will be confirmed in the possession of their lands as long as they occupy and cultivate it themselves, but will not be allowed to sell or dispose of them to any private person, the right to the entire soil having been granted to the Company by the Crown. The right of fishing and hunting will be continued to them, and when their lands are registered, and when they conform to the same conditions with which other settlers are required to comply, they will enjoy the same rights and privileges.19

After commencing negotiations with the natives,

Douglas responded to Barclay

I informed the natives that they would not be disturbed in the possession of their village sites and enclosed fields, which are of small extent, and that they were at liberty to hunt over the unoccupied land, and to carry on their fisheries with the same freedom as when they were the sole occupants of the country.20

And, indeed, the wording of the treaties themselves confirmed this. The terms of each are similar, the common wording being,

The condition of or understanding of this sale is this, that our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us; and the land shall be properly surveyed hereafter. It is understood, however, that the land itself, with these small exceptions, becomes the property of the white people forever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.21

This allowed Indians to maintain an economic self-sufficiency as well as to continue to supply
food fish for the settlers.—

c) The Reserve Commissions

The policy of setting aside lands for the Indians continued for some years. When British Columbia joined Confederation in 1871, the responsibility for the Indians and lands reserved to them was assumed by the federal government. One finds in the Terms of Union that

The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.

To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.22

The agreement foresaw a transfer of the lands so far reserved to the Indians and those still to be set aside. The anticipated transfer did not take place for another sixty-seven years23 but there
followed a series of Reserve Commissions established to determine the Indians' various locations and the sites they required for their occupations of fishing, hunting and berry-picking. These were to be allocated and noted specifically. To this end successive Reserve Commissioners covered the province, visiting with and negotiating with the numerous bands.

The first of these was a three-person Commission appointed in 1876. In 1877 the size of the Commission was reduced to that of a single Commissioner and it so remained until 1898. The allocation was, for the most part, completed by 1898 but the actual terms of transfer had still to be formulated.

The Royal Commission for Indian Affairs for British Columbia was appointed in 1913 to attempt to finalise the extent of the lands to be transferred and also to deal with other issues which remained outstanding between the two levels of government. The commission, commonly referred to as the McKenna-McBride Commission, for the two government representatives, also travelled throughout the province to discuss local needs. A number of the fishing locations allotted by earlier commissions were confirmed by the McKenna-McBride Commission.24

The original Reserve Commissioners were advised to pay close attention to established fisheries. In the letters of instruction there was a clear direction
not to disturb the Indians in the possession of any villages, fishing stations, fur-trading posts, settlements or clearings, which they may occupy and to which they may be especially attached.... They should rather be encouraged to persevere in the industry or occupation they are engaged in, and with that in view should be secured in the possession of the villages, fishing stations, fur-posts or other settlements which they occupy in connection with that industry or occupation.

d) Court History

Claims of aboriginal fishing rights have been raised in defence to charges under the federal Fisheries Act and its accompanying regulations. The negotiating activities of James Douglas and the Reserve Commissioners have been argued as being supportive of those claims. However, in any guise presented, the argument that Indians should be free to fish as they are accustomed, without fear of prosecution, because of previous governmental promises and policies, has been singularly unsuccessful in the courts. In some instances courts have given some recognition to the existence of aboriginal rights, treaty rights, or exclusive rights to fish in certain traditional areas. However, there has been a resounding statement from the courts that federal legislation may supersede any rights earlier secured by the natives.26

The position of the courts currently is that the primary consideration is the conservation of the resource.
This was made clear by the Supreme Court of Canada in *Jack et. al. v. Regina*\(^27\) which case has been followed a number of times since.\(^28\) In one case at the Provincial Court level in British Columbia, *Regina v. Bradley Bob*,\(^29\) the court found, in the band of which Bob was a member, an "exclusive right" to a fishery at a traditional location as a result of an acknowledgement by one of the Reserve Commissions. It was held, though, that that right was not synonymous with an absolute control over the resource and the fishery must still be subject to the interests of conservation.

The argument has been made that Indians have fishery rights which were recognised by earlier governments and which have never been extinguished.\(^30\) Today, the federal government talks of negotiated settlement. With respect to the courts, though, as Christopher Pibus points out,

> after a decade of court decisions that considered and rejected fishing rights of every description and source and consistently identified conservation values with the federal authority, it seems pointless to assert native rights as a defence to prosecutions under the *Fisheries Act*.\(^31\)
CHAPTER II

BAND COUNCIL FISHERIES BY-LAWS

a) Introduction

It can be seen that since the time of the first treaty arrangements with James Douglas in 1850, Indians have been concerned to maintain and protect their traditional access to the fish which sustain them, both nutritionally and culturally. They have been unsuccessful defending those rights in the courts, and they have not yet secured political recognition of those rights.

The salmon were once an abundant resource, the fish being,

in lush years...so plentiful that men were afraid to enter the river lest their boats be capsized by schools of fish rushing through the waters, but the salmon have since been dangerously overfished and mismanaged. Competing demands for a diminishing resource have caused a great deal of controversy among the various user groups and a heightened awareness of the need for conservation. Given the imperilled state of the fishery, the issue is no longer only guaranteed access, but also participation in the management and control of the resource that there might be a fishery for posterity.

There exists in the Indian Act a provision which allows band councils to pass by-laws for the administration of certain reserve matters, fisheries being
among the enumerated subjects. Specifically,

81. 'The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely;

(o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;...33

The provision is not a new one. It has existed in its present form since 1951.34 However, it is not a device which has been commonly used by band councils in British Columbia. When used in the past, it has been for limited purposes such as, for example, a resolution passed by a band to require non-band members to obtain permits from the band council before fishing on reserve lands.

In more recent years there would appear to have been a recognition that the by-law could very well be a useful instrument to help natives gain some control over their reserve fisheries. By-laws drawn and passed by some bands in the last few years have gone far beyond the stipulation that non-band members obtain permits before engaging in reserve fishing. A small number purport to give the band council and their appointed management personnel what amounts to total control of the fishery on the reserve, including habitat protection and anti-pollution provisions.

The validity and strength of the by-laws are now being tested in the courts in British Columbia in defence to prosecutions under the Fisheries Act and Regulations. The primary contention is that the by-law is a valid
statutory instrument made pursuant to the Indian Act, a federal statute. Being a federal statute, the Indian Act is of equal legislative weight to the Fisheries Act. A by-law under this provision is of specific application; that is, as to subject matter and location and should, therefore, take precedence over the application of the Fisheries Act, which is of more general application, on reserves where a by-law is in force. This, it is argued, would be in accord with the principle of statutory interpretation which would allow two apparently conflicting statutory instruments to co-exist without repealing either one.

There have been five cases decided since 1982 where the existence of a band by-law has been raised as a defence. The by-laws involved in the first three were those of the Squamish and Bridge River bands. The two most recent cases involved two different by-laws of the Cowichan band. These cases will be discussed in some detail but it will be of interest to first examine the nature and content of some of the current by-laws in force among bands in British Columbia.

b) Description of Current By-Laws

In spite of a current interest in the use of by-laws to assist in Indian fishery management, use is not widespread in British Columbia. Since the provision came into effect in 1951, it would appear from a By-law Register maintained by the Department of Indian and Northern
Affairs, that only about fourteen fisheries by-laws are in existence, two of those relating to fisheries conservation officers, rather than to fisheries management per se. While the by-laws are registered pursuant to the Statutory Instruments Act, regulation makes them exempt from publication in the Canada Gazette. Texts of the various by-laws, then, are available only through the graces of the Department of Indian and Northern Affairs or the respective band councils. The rationale for the lack of a publication requirement is that a limited number of persons are likely to be affected by the by-law although, as will be seen, the more recent fisheries by-laws could have a pronounced effect on all parties concerned with a particular fishery.

There are similarities among the by-laws and emerging patterns are apparent. Beginning with the Squamish band by-law, passed and approved in 1977, the current by-laws are much more comprehensive and sophisticated than those of earlier years.

Between 1956 and 1965, six bands in British Columbia (the Okanagan; Cowichan; Kispiox; Stellaquo; Moricetown; and Bella Coola) made use of the by-law provision in the Indian Act. These earlier by-laws have very little substantive provision. The clear intent of the by-laws is to control fishing on the reserve by non-band members. The Cowichan band's 1956 by-law is representative of this group and a
section similar to the following appears in each. That is,

No person, other than a member of the band, shall be permitted to fish on the reserve without first obtaining a written permit to do so from the person authorized by the Council to grant such permission.38

The Bella Coola by-law, 1964, refers to camping permits as well as fishing permits, as does the Moricetown band by-law, 1962. The Stellaquo band by-law, 1960, also requires non-band members to obtain permits for hunting on the reserve.

With respect to fishing, it is noted that the five of these six earliest by-laws which were examined all contained a reference which made applicable on the reserve fishing regulations otherwise applicable in the province. In other words, the only salient feature was the intention to restrict and control access to the reserve fishery by non-band members.

No further fisheries by-laws were passed until the Squamish band introduced theirs in 1977. They were followed by the Tahltan in 1979; the Nimpkish in 1979 (although the by-law was not approved until 1981); the Upper Nicola, Qualicum and Bridge River bands in 1980; Nitinaht and Sheshaht in 1982; and, most recently, the Cowichan band in 1983.

The by-laws of the Nitinaht and the Sheshaht, both of which lie in the Nanaimo agency, are almost identical, but differ from the remaining by-laws, of which the Squamish band's is the prototype. There will be some discussion of the validity of these by-laws and the
purported extent of authority deriving from them, but let us first examine their substance.

The Squamish by-law, termed By-law #10, states in the first section that

"Squamish Indian Band Waters" means all water situated upon or within the boundaries of Reserves set aside for the use and benefit of the Squamish Band of Indians.39

Fishery officers are intended to be appointed by the band council as enforcement and regulatory officers pursuant to the by-law.40

Unlike some of the other bands, which allow limited fishing by non-band members, the Squamish absolutely prohibits fishing by other than Squamish band members.41

The substantive regulatory portions of the by-law refer to the prohibition of the destruction of eggs and very young salmon;42 stream obstruction;43 and the addition of harmful substances and debris to "any water frequented by fish".44

There is a section which purports to give the band manager the authority to make extensive regulations over all aspects of management and conservation including habitat protection; water pollution; fishing vessels and gear; catch and possession; and quotas and closed times.45

On comparison of this by-law with the Fisheries Act, one finds that a great many of the sections were transcribed from the Act, some with minor changes, such as power given to the Minister of Fisheries and Oceans in the
Fisheries Act being ascribed to the band manager or band council. Thus, the definitions of "fish" and "fishery" appear as in the Fisheries Act. Section 4 of the by-law, relating to salmon fry, parr and smolt is as in the Fisheries Act. Section 8 of the by-law appears in a section of the Fisheries Act relating to the construction of fishways. The requirement to remove "stakes, posts, buoys or other materials placed for fishing purposes" also appears in similar form in the Act. Sections 10 through 13 of the by-law all appear in the Act so that very little of the by-law and, in fact, nothing of real substance, is original or particular to that band. This fact will be considered later with respect to the validity of this type of by-law.

Section 14 of the by-law is necessarily the most significant section when looking to the management of the fishery. This is the section which gives the band manager the authority to make regulations further to the by-law. The same provision appears in the Fisheries Act, section 34, with the following exceptions. The regulatory power under the Act resides in the Governor-in-Council. Sub-section (a) of section 34 refers to "seacoasts and inland fisheries" rather than just "fisheries". There are references in section 34 to licencing and to inter-provincial transportation of fish. Otherwise, the regulatory power is identical. That particular section of the by-law invites challenge as to its validity in re-
lation to the authority given a band by way of section 81 of the Indian Act and it, too, will be discussed further.

The "By-law for the Preservation, Protection and Management of Fish on Tahltan Reserves", passed in 1979, is virtually the same as the Squamish by-law. The exception is a reference to a "tribal" council and "tribal" waters which, in context, seems to imply an application to a unit larger than the band.

The Nimpkish by-law, passed by the Nimpkish band council in 1979, but not approved by the Minister until 1981, again is similar to that of the Squamish band. The Nimpkish, however, make provision for on-reserve fishing by non-band members where there is explicit permission by the band council.

There is a further provision that

no person or persons shall be permitted to sell fresh or preserved fish, or waste or otherwise dispose of fish caught in food fishery within Nimpkish Band waters.

In 1980 the Qualicum Indian band passed a by-law which is identical to the Squamish by-law.

The Upper Nicola Indian band by-law, also passed in 1980, while very similar to the Squamish prototype, carries a wider definition of "band waters". It resembles the definition in the other by-laws in that band waters means all water situated upon or within
the boundaries of Reserves set aside for the use and benefit of the Upper Nicola Band of Indians

but then adds

and all areas of land and water which from time immemorial were designated Indian food fishing waters; more specifically those areas in different water sheds, lakes and streams.\textsuperscript{50}

This appears to be an attempt to include off-reserve waters to which the band believes it has aboriginal claim. This raises the question of whether the by-law can have an "extra-territorial", or off-reserve, reach.

The penalty sections in the various by-laws are generally consistent with the maximum one hundred dollar fine and/or thirty days of imprisonment provided for in section 81(r) of the \textit{Indian Act}. The Upper Nicola band has, however, exceeded that by stating a minimum fine of two hundred dollars for a first offence and/or imprisonment of one to two months. The penalty is stated in the by-law as "not less than $200.00; and not more than $100.00", apparently a typographical error. For subsequent offences the penalty is stated as

\textit{a fine of not less than $500.00 and not more than $200.00 [again, an apparent error], or to imprisonment for a term of not less than 3 months, and not more than 6 months, or to both such fine and imprisonment}.\textsuperscript{51}

As the jurisdiction to pass by-laws derives from section 81 of the \textit{Indian Act} this section is clearly in excess of jurisdiction. It is further stated in
the by-law that every fine or forfeiture goes to the band. As with the Tahltan and the Nimpkish, the Upper Nicola allow fishing by permit for non-band members.  

There is the section which gives to the band manager and council the regulatory authority similar to that which the Governor in Council has in the Fisheries Act, but there is also a final clause to the by-law which states that

The Upper Nicola Indian Band Council, pursuant (sic) to the Indian Act may from time to time make regulations not inconsistent (sic) with this By-law as they may deem necessary or advisable for the purpose of carrying into effect the provisions of this By-law according to their true intent and for supplying any deficiency, therein and, without restricting the generality of that power.

The Bridge River Indian Band Fishing By-law No. 1-1980 is similar to, but less comprehensive than the Squamish by-law. It seems to attempt an extra-territorial reach in its definition of band waters, which are said to be

all waters situated upon, within the boundaries of reserves or otherwise falling into the jurisdiction of the Indian Government or as set aside for the exclusive use and benefit of the Bridge River Band of Indians.

The band council also attempts to give itself an ongoing power to regulate in the following terms:

The Band Council may from time to time make regulations not inconsistent with this by-law as they may deem necessary or advisable for the purpose of carrying into effect the provisions of this by-law according to their true intent and
for supplying any deficiency and without restricting the generality of that power. 56

The Cowichan Indian band's new by-law, which replaces the 1956 by-law, is the most recent by-law to be approved by the Minister. It has been in effect only since 1983. It defines "deleterious substance" and "fish habitat" and declares, in a very broadly worded section, that

No person shall carry on any work or undertaking that results in the harmful alteration, destruction or disruption of fish habitat. 57

Largely, the by-law is similar to the others mentioned, although there are some variations.

There is one other "type" of fisheries by-law, exemplified by those of the Nitinaht and Sheshahat bands, both approved in 1982. They are virtually identical and envisage co-operative management with the Department of Fisheries. Enforcement and management authority is given to a band fisheries conservation officer who is to determine an allowable catch; designate openings and closings; and specify gear type. More interesting, the fisheries conservation officer is to collect catch statistics and "shall provide any information requested by any [federal] fisheries officer." 58 There is provision for a joint management committee, consisting of the conservation officer and his assistants and an equal number of Department of Fisheries and Oceans appointees, to "make recommendations to the Band Council concerning
the fishery".\textsuperscript{59} There are none of the provisions seen in the Squamish-type of by-law relating to river obstructions, or pollution control or habitat protection. The clear intention of the Squamish-type of by-law is to take complete control over all aspects of fisheries and habitat management. Here, there is an expressed desire to work with federal fisheries personnel rather than exclude them. The Nitinaht and Sheshaht by-laws, however, are the only two in this vein.

c) The Requirement for Ministerial Approval of the By-laws

While section 81 of the \textit{Indian Act} gives a band council the power to pass fisheries by-laws, section 82 of the Act is significant. That is, the Minister of Indian Affairs and Northern Development must approve any proposed by-law. The Minister has forty days from the time a section 81 by-law is forwarded to him to review it and, unless it is disallowed within that forty day period, the by-law comes into force.\textsuperscript{60}

Thus, the authority of a band to pass such a by-law is circumscribed not only by section 81, but also by the requirement of Ministerial approval.

A review of certain of the by-laws indicates that the forty-day period is too short for the Minister to have an opportunity to properly view all by-laws. In practice, the Minister views the by-law and forwards it to the Legal Services Department for comment. While there is no formal review by Fisheries officials, there are
meetings at a deputy ministerial level to review the by-laws.61  

It is interesting to note from the Department's By-law Index that, in recent years, the number of by-laws which have been rejected is equal to the number of by-laws currently in force. Except for one, all of those by-laws disallowed were disallowed in 1982 and 1983. Of these, one, the by-law of the Gitwangak band is not very different from the Squamish-type of by-laws. It does, however, refer to a "Tribal Council" and eight member bands, rather than to a single band council.

Two identical by-laws, those of the Toquaht and Hesquiat bands, were disallowed in 1982. The substance and tenor of the by-laws are not markedly different from those of the Nitinaht and Sheshaht bands and, indeed, all four of these bands are located in the Nanaimo Agency. The two which were rejected, however, make liberal reference to "aboriginally defined territorial fisheries Reserve grounds and waters." The reference is to traditional fishing grounds which do not lie within reserve boundaries and, as such, are a contentious issue with the federal government. There is nothing in the Indian Act to suggest that a band council can exercise off-reserve administrative control.

The Qualicum band attempted to have a by-law approved which would have repealed their 1980 by-law but the attempt was unsuccessful. The proposed by-law would have applied to "traditional" band waters without
limiting those to waters bounded by the reserve. In terms of enforcement, proposed powers would have been similar to those granted fisheries officers under the Fisheries Act: that is, powers of search over buildings, vehicles and vessels; and the authority to enter private property. There is also a power of arrest and the creation of a charge of wilful obstruction of a band fisheries conservation officer.

Whether the disallowance of the majority of by-laws proposed over the last two years is one way of controlling the Indian efforts to manage their fishery, or whether it is the view of the Department that the by-laws currently being proposed are, on the face of it, beyond the scope of section 81, is not clear. However, with the exception of the Nitinaht and Sheshahlt "co-operative" type of by-law, the only other by-law approved since 1980 has been the Cowichan by-law. And, in that particular case, it should be noted that the by-law passed "by default", or without having been reviewed within the forty-day period. It is difficult to say whether the by-law would have passed had it gone through a customary review procedure.

Can it be, then, that fisheries by-laws could be an efficacious means for Indians to gain the much sought after control over their fisheries? Certainly one must keep in mind the ministerial veto but, where by-laws are in force, what effect will the courts give them? What effect should the courts give them? And,
practically, is there the capacity to ably manage a fishery resource by attempting to control events only within the reserve boundaries?

As mentioned earlier, by-laws have been raised in at least four courts in British Columbia in defence to charges under the Fisheries Act.

The first three decided cases formed a cluster which was drawn upon in arguing the only other two cases so far dealing with this point. The cases are inconsistent one with another and a thorough examination is necessary to attempt to understand not only what happened, but also what might be expected in future cases. The interest to natives is whether the by-law can be an appropriate vehicle for the use to which it is now being put.

A fuller discussion of the fourth and fifth cases will serve to illuminate many aspects of the Indian fishery claims; of the difficulties of resource conservation vis-à-vis those claims; and the practical limitations of management by way of a by-law.
a) Regina v. Leech; Regina v. Baker; Regina v. Basil

The appearance in the courts of the fisheries by-law defence to federal fisheries prosecutions is so recent that it is not surprising that the cases decided so far are not entirely satisfactory in explaining if, when, or how a by-law might take precedence over Fisheries Act or Regulation provisions. Virtually the same argument has been advanced in all cases, but the argument has been variously received and interpreted. The facts and apparent reasoning of the cases will be outlined. It will be important, then, in order to see if future judicial decisions can be expected to give effect to the by-laws, to examine the bases of the decisions.

The first decision was handed down by His Honour Judge Gordon on May 12, 1983, at Lillooet, B.C., in the case of Regina v. Walter Leech.

Mr. Leech, a member of the Bridge River Indian band, was charged with a breach of section 5(2) of the British Columbia Fishery (General) Regulations, which prohibits possession of sockeye, pink, or chum salmon from non-tidal waters. While aware of the provision in the Regulations which would have allowed him a food fish permit, Mr. Leech had not obtained such a permit. The Bridge River band had had a by-law in effect since 1980,
as has been previously described. It was argued on behalf of Mr. Leech that the by-law constituted a more particular conservation scheme within the reserve area than did the Fisheries Regulations so that the by-law should take precedence over the application of the Regulations.

The court found the by-law and the Regulations to be of equal legislative authority and examined them with a view to determining if they could co-exist. It was held that they could, the by-law taking effect where it was more detailed and restrictive than the Regulations. However, it is clear that the by-law cannot displace prohibitory Fisheries Act Regulations which are of general application. Neither can the by-law displace the effect of those provisions in the Fisheries Act Regulations which regulate how a class of people shall be excepted from those general prohibitory provisions. 63

This is consistent with the view that the Fisheries Act is one of general application to all persons. Its purpose obviously, is to manage and preserve fishery stocks within our own sea coast and inland fisheries. The Indian Act applies to Indians and their Bands. It is not of as broad an application as the Fisheries Act. Its provisions, so far as they are not inconsistent with the Fisheries Act, must be read as subject to that statute's provisions. 64

The court found that the Bridge River by-law could not be said to be more specific than the Regulations. Rather, "the By-law shows that of itself it does virtually nothing to regulate fishing within the
designated waters". And, in reference to the section of the by-law which seemingly gives the band council a running control of the fishery, it was said that

In fact, the By-law purports to authorize the Band council..."to make regulations for the proper management and control of the fisheries and respecting the conservation and protection of fish." No such regulations, however, have ever been passed. Further, it would appear that this is an attempt by the Band to confer upon its council an authority to enact legislation other than in accordance with section 81 and 82 of the Indian Act. At best, the By-law is a statement of intention to adopt legislation for the purposes mentioned. In effect, there is no regulation of the fishery which emerges from this particular By-law.

Mr. Leech was convicted.

The second case on this point was that of Regina v. Eugene Baker, decided in County Court in Vancouver by the Honourable Judge Sheppard on June 3, 1983. In this case the accused was a member of the Squamish Indian band and pleaded, in defence to the charges, the Squamish band by-law, already described.

Mr. Baker was charged with two counts, one of fishing by net for pink salmon in the Squamish River, in non-tidal waters, without a licence. This was allegedly in contravention of section 40(1) of the British Columbia Fishery (General) Regulations. The second count was that of catching and having in his possession pink salmon from non-tidal waters of the Squamish River, allegedly contrary to section 5(2) of the British Columbia Fishery (General) Regulations.
Although the Squamish by-law was the thrust of the defence, the defence argument concluded in terms of mistake of fact as against mistake of law. That is, the accused had been fishing at a location which, though apparently off-reserve, he believed to be on-reserve, or at least a traditional fishing area. If, it was argued, that location had been on-reserve, Mr. Baker's activities would have been covered by the permissive section of the Squamish band by-law, which allows members to fish "at any time and by any means except by the use of rockets, explosive materials, projectiles, or shells". The mistake of fact was only as to whether or not he had been on-reserve at the time.

The court held that the "mistake" had been one of mixed fact and law and that that entitled Mr. Baker to be acquitted of the charges. In arriving at that point, of course, it was necessary to find that the by-law would take precedence over the *Fisheries Act* Regulations in the circumstances. Unfortunately, there is little discussion of the *ratio* supporting the application of the by-law in precedence over the Regulations. The court merely refers to one case cited by the defence, *Falardeau et. al. v. Church*, and takes it from that case that, where two statutes are inconsistent, "it must be seen if one cannot be read as a qualification of the other". Then, the entirety of the court's comment with respect to the by-law *vis à vis* the *Fisheries Act*, after finding that the charging sections of the Regulations were clearly...
in conflict with section 6 of the by-law, was as follows:

My interpretation of the two sets of regulations is that the Indian Band by-law is effective within the boundaries of the Reserve and that the application of the Fishery Act (sic) and regulations in a case where a properly drafted and enacted Indian Band by-law is in existence ceases at the boundary of the reserve if the two are in conflict. Thus, I come to the conclusion that if the appellant had been fishing in water within the boundary of the Reserve, he would have been protected from the charges laid by the by-law.71

The third case was a provincial court decision by His Honour Judge Friesen at Matsqui, B.C., October 26, 1983, Regina v. Roger Steven Basil. In acquitting the accused, the court stated it was applying the reasoning in R. v. Baker but that is not evident from a reading of the case.

Mr. Basil faced four counts: unlawfully transporting salmon without a licence, contrary to section 7(1) of the Regulations; unlawfully bringing salmon caught above a commercial boundary to a place below the boundary, contrary to section 26(1) of the Regulations; fishing for and retaining salmon from non-tidal waters, contrary to section 5(2) of the Regulations; and having an amount of salmon roe in his possession in excess of a stated limit, contrary to section 37.1(1) of the Regulations.

Mr. Basil, while not a band member, was fishing on the Bridge River reserve, by permission of the Chief, on a day when fishing was allowed by the band council. Consequently, it was argued that the fishing was lawful.
pursuant to the Bridge River band by-law and therefore
Mr. Basil was not subject to the provisions of the *Fisheries Act* Regulations.

This was the same by-law as was considered in *R. v. Leech* and the court in *Basil* was referred to both the *Leech* and *Baker* decisions. In his reasons, His Honour Judge Friesen cited the relevant portions of the two earlier decisions. He recognised His Honour Judge Gordon's view that the Bridge River by-law was not regulatory of fishing in band waters and that the by-law appeared only to express an intention to regulate in the future. Although in the *Leech* case the court did not find any conflict between the Regulations and the by-law, stating that the by-law was not regulatory, the court in *Basil* referred to the *Leech* case as if contradiction had been found. In referring to the *Baker* case after outlining *Leech*, it is said that "again the court was concerned with a conflict between Regulations under the *Fisheries Act* and a provision of a Band Council By-law".72 This is notable because *Baker*, which *Basil* prefers, makes it clear that there must first be conflicting provisions before one looks to see which governs.

In *Baker*, it was specifically stated that section 6 of the Squamish by-law, permitting band members to fish except by stated prohibited means, clearly conflicted with those provisions of the Regulations which prohibit unlicensed net-fishing in non-tidal waters and possession of pink salmon from non-tidal waters.73
Basil does not succeed in delineating a similar conflict. As stated, Mr. Basil was charged with four offences. Without examining the by-law vis-à-vis each charge, the court says only that the "By-law must, however, be sufficiently specific if it is to override the general prohibition in Regulation 5". That refers to fishing for salmon in non-tidal waters. The other charges relate to possession and transportation of salmon off-reserve. While an argument that if the salmon are lawfully caught on-reserve, they can lawfully be taken off-reserve might be anticipated, the cases which Baker and Basil follow would indicate that each provision must be studied to see if it can stand compatibly with the other legislation.

Reference is made to just one section of the Bridge River by-law, and that is to a general permissive section in the following terms:

Band members and non-band members shall be permitted to engage in fishing upon Bridge River Indian Band waters, as shall be permitted by the Bridge River Indian Band.

There was no mention of any other provision of the by-law. The court stated that it was choosing to follow Baker, "which holds that such a By-law can displace Regulations under the Fisheries Act". Baker, however, held that the by-law applied only where its provisions conflict with those of the Act or Regulations. Basil goes considerably farther than that in its decision that section 4 "is regulatory in character, and as such is
sufficient to render the *Fisheries Act* Regulations
inoperative within the Bridge River Indian Reserve". That is, on the basis of one section of the by-law, the entire operation of the *Fisheries Act* and Regulations was held suspended within reserve boundaries.

b) The Basis in Law for the Decision in Regina v. Baker

The court in *R. v. Baker* did not clearly outline the process of its reasoning but did state that it relied on a particular case cited, that of *Falardeau et. al. v. Church*, a decision of the British Columbia Supreme Court in 1972. The plaintiffs in that case were suing for damages done to crops by the defendant's trespassing cattle. Statutes governing the liability were in conflict. A provincial statute, *The Trespass Act*, stipulated that a landowner would have no right to obtain damages for cattle trespass if the land was not lawfully fenced. However, the township in which the plaintiffs' land was located had passed a by-law under authority of *The Municipal Act* to deal with the impounding of animals running at large.

The by-law made it unlawful for any person to allow cattle to trespass on private or public land within the township. The plaintiffs contended, therefore, that the provision in *The Trespass Act* which abrogated the common law remedy of damage for trespass when a lawful fence was in place, was displaced by the relevant section of the township's by-law. The court agreed with the plaintiffs
and, in doing so, relied on earlier cases cited to it.

_Baldrey v. Fenton_, a 1914 decision of the Supreme Court of Saskatchewan, was relied on as authority for the proposition that a by-law, passed under the authority of a provincial statute, has all the force of a statute. In that regard, in _Falardeau_, the township's by-law was given statutory weight equal to that of _The Trespass Act_.

_Baldrey v. Fenton_ also involved a situation of animal trespass and conflicting statutes. In that case, the plaintiff's horse had strayed onto the defendant's property, fallen into an open well, and died. In suing for the value of the horse, the plaintiff cited a section of _The Open Wells Act_ which prohibited persons from having on their property open wells or excavations which would be of a size which might constitute a hazard to stock straying upon the premises. Contrary to that, and raised in defence to the suit, was a section of a by-law duly passed pursuant to _The Rural Municipalities Act_ which made it unlawful to allow animals, other than dogs, to run at large within the municipality.

The case is not so much supportive of the proposition that the by-law ousts the operation of _The Open Wells Act_ in the particular municipality as the court found that the defendant had breached the provision of _The Open Wells Act_ and the plaintiff had breached the provision of the by-law. The particular case was decided on the basis that the plaintiff knew the well existed and assumed the risk of his horses straying and falling
into the well.

_Bishop v. Liden_, a 1929 decision of the British Columbia Court of Appeal,\(^8^0\) and _Gladysz v. Gross_, from the same court in 1945,\(^8^1\) were two other cases referred to by the court in _Falardeau_, again dealing with animal trespass.

In _Bishop v. Liden_ the section of _The Trespass Act_ which disallowed an action for damages arising from trespass by cattle where the property was not surrounded by a lawful fence was again in issue. In opposition to that section was a section of the _Animals Act_, also a provincial statute, which prohibited allowing swine (included in the definition of 'cattle' in _The Trespass Act_) to run at large. It was held that the two statutes were not repugnant, but could be read in conjunction with each other.

The object of the _Animals Act_ was to regulate the running at large of domestic animals. The Legislature had in view the conditions of the country. Some animals including swine were not to be allowed to run at large at all; other animals were allowed to run at large. Against the latter owners of land were bound to fence and if damage were done because of the unfenced condition of the land injured, the owner of the cattle was not responsible therefor. It was a special Act dealing with a special condition. Properly construed, section 14 of the _Trespass Act_ in no way conflicts with the _Animals Act_. It must, I think, be held to contemplate trespass on unfenced land by cattle which might unlawfully run at large.\(^8^2\)

The court looked at the purpose of the enactments,
as well as the wording on the face of it, in construing the sections. It was a matter of the general yielding to the specific.

Subsequent to that was the decision in Gladysz v. Gross. Again, the same section of the Trespass Act was involved, this time in opposition to sections of the Pound District Act.

The plaintiff's land, although not surrounded by a 'lawful fence' in accordance with the Trespass Act lay within a pound district and it was prohibited by the Pound District Act to allow animals to run at large. Anyone doing so would be liable for any damage caused by such animal. The court followed Bishop v. Liden and held that, on a proper construction of the two statutes there was no conflict between them. Again, the specific was to be preferred over the general.

The court in Falardeau also referred to a case from the Saskatchewan Court of Appeal which was similar to the situation in Falardeau itself.

It is important to note that in each of the cases the Falardeau court was relying on, the result was that, in certain circumstances, the provision in one statute gave way to the provision in another. None of the cases went so far as to say that the general act did not apply in the locality where another act or by-law was in force. That is, the analysis in each instance surrounded two specific provisions. In no case was it suggested that an entire act be displaced.
However, note the finding in Falardeau, after stating a reliance on the cases just described.

So I conclude that the Legislature, in giving municipalities power to pass bylaws, intended that The Trespass Act should not operate within the areas to which municipal bylaws applied. The Municipal Act and the bylaws passed thereunder do not repeal The Trespass Act. They could not in view of the fact that the Legislature in enacting s. 14(1), said that it was to prevail "any law to the contrary notwithstanding". But the enactments can be read together on the footing that The Trespass Act simply does not apply to lands that fall within the scope of the bylaw.83

That is a very broad statement which simply does not flow from the earlier cases and, even in Falardeau, that statement must be read in context for, in the paragraph following, it is stated that

The point is that the provisions of the Trespass Act, restraining the exercise of that common-law right to an action for trespass, do not apply here because the enactment of the bylaw has limited the application of the Trespass Act.84

The only meaningful reading of the case can be that, in those particular circumstances, the relevant section of the by-law suspends the operation of the otherwise relevant section of the Trespass Act.

Compare this with the conclusion in Baker which holds the band by-law effective within reserve boundaries where there is conflict between its provisions and those of the Fisheries Act or Regulations. That conclusion was stated without benefit of the detailed examination
one sees in Falardeau and the cases on which it relied. That is, there is no explicit advertence to the purpose of the by-law as opposed to the purpose of the Fisheries Act, and the substance of the by-law, other than the one broadly worded section which gives virtually unlimited fishing privileges to band members, received no attention.

c) Is the Issue of Indian Band By-laws Versus the Fisheries Act Properly Subject to the Same Kind of Analysis?

It will be argued that while, at a first reading, the case of Falardeau v. Church might be seen to apply to the fisheries by-law issue by a parity of reasoning, the cases are not sufficiently analogous to lead one to the conclusion that a by-law should apply on a reserve to the exclusion of the Fisheries Act.

Note that in Falardeau v. Church, Baldrey v. Fenton, Bishop v. Liden and Gladysz v. Gross the courts were dealing with very specific issues: that is, the respective civil remedies of plaintiff and defendant in situations of animal trespass and conflicting sections of provincial statutes or by-laws made pursuant to provincial statutes.

There was never any question raised as to the validity of any of the acts or by-laws. The situations were discrete in the sense that in each there were only two interested parties and in each the decision, relating to liability and damages, would not have an effect which would reach beyond the two parties to the suit. It is
the writer's view that the fisheries by-laws, by their very nature, require a more comprehensive analysis than they have been afforded.

First, the by-law should be examined in relation to the enabling legislation, section 81 of the Indian Act. Can each by-law in question be said to fall within the ambit of the "preservation, protection and management" of fisheries on the reserve? The by-laws, prior to being registered as statutory instruments are, at least theoretically, reviewed by a Minister of the Crown. This does not assure their validity, and their true construction and applicability are still to be interpreted by the courts. Upon looking at a number of the by-laws it is clear, by the duplication of many sections of the Fisheries Act, that the intention expressed through the by-law is that the Fisheries Act be displaced completely on the reserve. It is questionable whether that kind of overriding authority can be drawn from the plain wording of section 81.

Nor, in properly construing the by-laws, can one ignore the subject of the by-laws and the possible practical results of upholding them. That is, it is not a question of damages between individual parties in a private situation. What the Indians are claiming through their by-laws is a right to control entire fisheries, a public resource. Disregarding for the moment the question of aboriginal claim to fisheries, and keeping in mind that what is at issue is solely statutory authority,
it is difficult to find a rationale which would support the application of the by-law. By the very nature of the resource, that is, the migratory nature of salmon, and the fact that Indian reserves are generally located downstream of spawning grounds, it is obvious that a band has complete control of escapement beyond its own waters to the spawning ground upstream. Although certainly many fish are taken prior to the entry of the runs into reserve waters, the band, at that stage, has absolute and ultimate control over the stocks.

While Falardeau was the only case referred to by the court in Baker other cases were cited and, on looking at those cases, one sees that that principle of construction which applies the specific over the general is not the only factor for consideration when construing conflicting statutes.

It is intended to discuss two of the other cases which were referred to the courts in all three of the fisheries by-law cases and then to suggest that the reasoning in Leech, as far as it goes, is to be preferred to that in Baker and Basil.

The case of Old Kildonan Municipality v. City of Winnipeg, a 1943 decision of the Manitoba King's Bench, was cited in support of the accused's position. A reading of the case, however, makes it clear that one is to consider all the circumstances, and the fact that one statute is general and one is particular is not of itself necessarily determinative.
The issue in that case was whether the Old Kildonan Municipality had the authority to tax a public golf course which, although physically within the boundaries of the municipality, was owned by the City of Winnipeg. The City Charter exempted from tax land owned by the city, lying outside the territorial limits of the city, and used for public park purposes.

The Court first determined that the golf course qualified as a "public park" within the meaning of the City Charter. It then examined successive legislative provisions from 1912 to 1940 which variously affected the land in question, including revision of municipal boundaries. Finally, in 1940, the Winnipeg Charter was revised to specifically include the land within city boundaries and, at the same session of the Legislature, the same property was specifically named as being a part of the municipality of Old Kildonan. That was included in the Municipal Boundaries Act, which was characterised as a general act dealing with many municipalities.

The question was whether the amendment to the Municipal Boundaries Act, which put the golf course in Old Kildonan, had the effect of repealing the tax exemption given to park lands owned by the city or, further, of repealing the statutes which put the land within city boundaries.

It was not determinative that the Municipal Boundaries Act had been the last statute passed, nor was it determinative that one statute was more general
than the other. In holding that the land was not taxable by the municipality of Kildonan, the court considered that the city's Charter allowed it to hold land outside its ordinary limits for park purposes; that the golf course property had been specifically included in certain statutes defining legal boundaries of the city; and, it was not unimportant that, from 1912 to 1943, no municipality had ever attempted to assess the land for taxes.

Another case cited which indicates one must look at the circumstances to see what reasonable interpretation can be taken where conflict exists was that of Waugh and Esquimalt Lumber Company Limited v. Pedneault, a 1948 decision of the British Columbia Court of Appeal. There, the question was whether use of the term "any land" in a section of the Forest Act gave a logging inspector the power to enter upon and expropriate a logging road which was already being used by another logging operator.

It was held that the Legislature could not have intended that a stranger should acquire a right in a logging road actually in use and thereby interfere with another's logging operations.

The Legislature cannot be presumed to act unreasonably or unjustly, for that would be acting against the public....That is why words in an Act of the Legislature are not restricted to what are sometimes called their "ordinary" or "literal" meaning, but are extended flexibly to include the most reasonable meaning which can be extracted from the purpose and object
of what is sought to be accomplished by the statute."  

In the circumstances, it was unjust and quite unreasonable that the section be given a literal reading and the court declined to do so.

It is suggested that a careful reading of the cases presented by the defence and apparently relied on by the Baker court, at least, does not necessarily lead one to the conclusion that band fisheries by-laws should exclude the operation of the Fisheries Act and Regulations on reserve. Note that the cases operate at a very specific level, dealing with civil conflicts between two parties and involving evident, discrete conflict in individual situations. That is, Falardeau and the cases it follows are cases of animal trespass; Old Kildonan is a case of municipal taxation; and Waugh and Esquimalt Lumber Co. involves the statutory right of one logging operator against another. The courts attempted to discern legislative intention in interpreting conflicting provisions, in the trespass cases especially, looking at the situations the legislation was attempting to remedy.

Of the first three fisheries by-law cases, only Leech looks at the purpose of the by-law and relates it to the general regulatory scheme of the Fisheries Act. The comment is not extensive but there is a clear statement that a by-law could not displace the Fisheries Act.

His Honour Judge Gordon suggested that a by-law could have effect on reserves if it were more specific
in its regulation than the Fisheries Act. It is suggested that this is not an unreasonable way of reading the Act and by-law so they might co-exist.

There is a qualitative difference between the type of situation which arose in the "animal trespass" cases and the type of situation which arises in the presence of a band fisheries by-law. It is significant that, by the very nature of its subject-matter, this type of by-law has "extra-territorial" effects. That is, it is aimed primarily at the salmon resource which, of course, is migratory. In almost all cases, the Indian reserves are located down-river of the salmon spawning grounds, and, for that reason, there is a theoretical ultimate control of the resource at the reserve location if the by-law objective of excluding the operation of the Fisheries Act is successful. When one examines the latest by-laws with their permissive fishing clauses, the provisions duplicative of the Fisheries Act and their sections which purport to empower the band council to pass regulations on an ongoing basis, there can be no doubt that the intention is to completely exclude the operation of the Fisheries Act and Regulations on reserves. It is a valid policy consideration that the federal government already has a regulatory system in place.

Even at the first stage of the inquiry, that of finding a prima facie conflict, the reasoning of His
Honour Judge Gordon in *Leech* is to be preferred to that of His Honour Judge Friesen in *Basil*. On the face of the Bridge River by-law, no conflict arises. The court in *Basil* made a finding that the accused caught fish on a day when fish could be taken, by permission of the Bridge River Indian band.\(^8\) There is nothing in the by-law itself which specifies open or closed times so that there must have been a reliance on a rule of the council which was made outside of the authority of the by-law. On a plain reading of the by-law, then, this constitutes an error and, as the court was dealing with the same by-law as was raised in the *Leech* case, one would expect the matter to have been ended on the basis that there were no conflicting provisions before the court.

Even if the *Baker* case is correct in holding that a provision of a by-law could take precedence over a provision of the *Fisheries Act* or the Regulations, one is still faced with the necessity of enquiring, in every instance, whether or not the relevant provisions conflict. The cases simply cannot be read so broadly as to say that, where there is a by-law in force, the *Fisheries Act* will not apply within reserve boundaries.

With respect to conflict, and specificity over generality, it could be argued in many instances that the provision in the *Fisheries Act* is more specific in nature than a corresponding by-law provision. A good example of this is found in *Baker*. The section of the
Squamish band by-law which was said to supersede the Fisheries Act Regulation was a generally permissive section, allowing band members to fish almost without restriction. It could be argued that the regulation prohibiting fishing by net is more specific in that it restricts the method of fishing. The two provisions could be read in conjunction so that net fishing would constitute an exception to the fishing "by any means" of the by-law. The section can be read that way without doing harm to the sense of either.

In terms of the practical question of whether or not band fisheries by-laws take precedence over the Fisheries Act, Baker is certainly not decisive. The validity of the by-laws in general and the extent to which courts will honour them are questions not answered by Baker.
CHAPTER IV

LEGAL VALIDITY OF THE BY-LAWS

Two different by-laws were involved in the three cases so far discussed. In none of these cases was there a challenge to the validity of either of the by-laws. In each of the three cases examined, the fact that the by-law in question had received ministerial approval and had been duly registered pursuant to the Statutory Instruments Act was sufficient for the court to recognise it. A by-law, however, has no legislative sanction. Its only sanction is the ministerial approval it receives. A by-law must be open to challenge on the ground that it exceeds the scope of the enabling legislation.

In the opinion of the writer, many of the existing by-laws, in whole or in part, would not stand against argument in opposition to their validity.

Let us return to the wording of section 81 itself. The council of a band is empowered to make by-laws for, among other things, "the preservation, protection and management of fur-bearing animals, fish and other game on the reserve". Although management denotes control, it also denotes administration and, in this case, administration for the preservation of the resource. A by-law of this type does not bestow an absolute and exclusive right to the resource itself.
Note that fur-bearing animals and other game are included in the same sub-section. Game birds and animals, as a resource, are subject to entirely different considerations than migratory fish. Any regulatory measures taken with regard to game on the reserve would apply to discrete, limited populations. The effect of such measures would be confined within the boundaries of the reserve. It is not analogous to the situation of an anadromous fishery where the entire runs of a particular river are likely to pass through a reserve on the way to spawning grounds. Here, a band could have ultimate control over the entire resource. In other words, the effect reaches beyond reserve boundaries to all potential users of the resource. This is not, then, strictly speaking, management of fish "on the reserve". Theoretically, a band which allows virtually unrestricted fishing on reserve sites could entirely prevent escape- ment in a given year and the result would be elimination of that cycle of runs on that particular river.

Section 81(o) cannot be read so broadly as to embrace the legislative role which is drafted into the later, all-encompassing type of by-law. Rather, it imparts an administrative function.

The goal of the band councils which have passed by-laws in the last few years is clear, however, and that is to attain complete and exclusive fisheries management. Many of the newer provisions, by necessary
implication, reach beyond reserve boundaries. The sections relating to protection of fish habitat, particularly to the deposit of deleterious substances, or of logging or land-clearing debris "into any water frequented by fish, or that flows into such water"\(^{89}\) must be intended to apply to operations either on or off reserve if deposits might eventually reach on-reserve sites. Yet, the jurisdiction of a band is circumscribed by the *Indian Act*. It is restricted to reserve area and there would not appear to be any mechanism which would be successful in bringing an off-reserve party within the purview of the by-law.

The fact that many sections of the newer by-laws are duplicative of *Fisheries Act* sections also demonstrates an exclusionary intent. A similar management scheme is envisaged, but controlled by the band council rather than by the Department of Fisheries and Oceans.

The provision in the newer by-laws which causes the greatest concern in terms of legal validity is that which purports to confer upon the band manager or band council the authority to make regulations on an on-going basis. It first appears in the Squamish band by-law as section 14:

> The Band manager may make regulations for carrying out the purposes and provisions of this by-law and in particular, but without restricting the generality of the foregoing, may make regulations:

- (a) for the proper management and
control of fisheries;

(b) respecting the conservation and protection of fish;

(c) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;

(d) respecting the operation of fishing vessels;

(e) respecting the use of fishing gear and equipment;

(f) respecting the obstruction and pollution of any waters frequented by fish;

(g) respecting the conservation and protection of spawning grounds;

(h) prescribing the powers and duties of persons engaged or employed in the administration or enforcement of this by-law and providing for the carrying out of those duties and powers;

(i) authorizing a person engaged or employed in the administration of this by-law to vary any closed time or fishing quota that has been fixed by the regulations.

As noted earlier, this section is, in all material respects, identical to section 34 of the Fisheries Act which empowers the Governor in Council to pass such regulations.

There is very likely a strong argument to be made that a provision of this type exceeds the authority of the band council. It almost certainly offends the maxim delegatus non potest delegare, "a delegate may not re-delegate". The maxim is a rule of construction and not a rigid principle but it is
generally applicable to any form of sovereign power and operates to prevent one government body endowed with legislative functions by the state from transferring its deliberative functions to another body or official. Phrased conversely, it means that political power can be exercised only by those who are responsible in law for its execution. In terms of municipal law this means that, in the absence of express statutory authority, a municipal council, as the recipient of delegated authority itself, cannot assign to an official or any other agency any legislative or discretionary power vested in it.91

David Mullan, in his discussion of the topic states that, in considering whether a delegation of authority can be inferred from the legislation, the courts will look to factors such as:

- the nature of the authority on whom the power was originally conferred,
- the nature of the person to whom the purported delegation has been made,
- the nature and extent of the power possessed by the original authority and the conditions upon which it can be exercised, the extent of the delegation in relation to the total power and the controls and conditions imposed by the original decision-maker on the exercise of power by the delegate.

In general, the more important the power, the more likely it is that the courts will hold that it cannot be delegated and must be exercised by the person or authority named in the empowering statute.92

In looking again at the empowering legislation for the by-laws one must have regard for both sections 81 and 82 of the Indian Act.
81. The council of a band may make by-laws not inconsistent with this Act of with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes namely:

(o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve.

In conjunction with this is the section 82 requirement that a copy of any by-law made under the authority of section 81 must be forwarded to the Minister, who may disallow the by-law. The statutory authority given the band council is to make by-laws for, among other things, fisheries on the reserve, but any by-law passed by a council is subject to ministerial approval.

By section 14 of the Squamish by-law, the band council has attempted to deposit virtually all rule-making authority with the band manager. The scope of the subjects covered in the section encompasses every aspect which could conceivably relate to the operation of fisheries on the reserve. Naturally, by attempting to build into the by-law an on-going regulatory mechanism, the approval of the Minister is effectively by-passed. Total regulatory authority is imparted to the band manager. With the initial discretion for approving the by-law lying with the Minister, the band council is not in a position to further delegate to the band manager whatever regulatory power it may have.

In some cases, such as with the Cowichan band, the
council gives itself the subsequent regulatory power. This, too, is arguably invalid in its circumvention of Ministerial approval. Beyond that, it is doubtful that council itself has the full range of regulatory (legislative) power to which it ascribes.

Case law dealing with the extent of a band council's authority under section 81 of the Indian Act is minimal. Some insight can be gained, however, by reviewing the few relevant cases.

*Regina v. Gingrich* was a 1958 decision of the appellate division of the Alberta Supreme Court. There was an appeal from a conviction under section 30 of the Indian Act for trespassing on a reserve. The band council had a requirement that anyone going on the reserve must first obtain a permit. A missionary who had been visiting the reserve for many years was twice denied a permit when the band's permit system first came into use. The band council had the power, through then section 80(p), to make by-laws for "the removal and punishment of persons trespassing upon the reserve or frequenting the reserve for prescribed purposes". Of interest in this case is that the court held that the band council could not, in effect, define trespassing by contending that anyone on the reserve without a band-issued permit was trespassing. In the absence of any definition of trespass in the Act the court looked to the common law definition and, as the minister had been
invited to attend on the reserve, on that and many other occasions, he was not trespassing. The band's powers were held to be narrowly circumscribed by the wording of the subsection.

A more recent case is useful for its comments on the nature and function of a band council. *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan and Labour Relations Board of Saskatchewan* was a 1982 decision of the Saskatchewan Court of Appeal. The case involved an application for judicial review of a Saskatchewan Labour Relations Board decision regarding the jurisdiction of the S.L.R.B. over the Whitebear band council. The band council had entered into certain agreements with the Department of Indian and Northern Affairs to manage certain programmes on the reserve, including some construction on the reserve.

On an application by a union to represent carpenters on the reserve project, the band council objected to the jurisdiction of the S.L.R.B., arguing that the labour relations would fall under federal legislative jurisdiction.

In his decision, Mr. Justice Cameron commented on the nature of the band council as a "creature" of the Parliament of Canada. The elected officials - a chief and twelve councillors - are intended by Parliament to provide some measure - even if rather rudimentary - of local government in relation to life on Indian reserves and to act as something of an intermediary between the
band and the Minister of Indian Affairs.

More specifically, section 81 of the Act clothes Indian band councils with such powers and duties in relation to an Indian reserve and its inhabitants as are usually associated with a rural municipality and its council. ... Hence, a band council exercises - by way of delegation from Parliament - these and other municipal and governmental powers in relation to the reserve whose inhabitants have elected it.

In summary, an Indian band council is an elected public authority, dependant on Parliament for its existence, powers and responsibilities, whose essential function it is to exercise municipal and government power - delegated to it by Parliament - in relation to the Indian reserve whose inhabitants have elected it.95

The Quebec Court of Appeal has given further indication of the judicial view of the status and role of a band council in a third case. Re Stacey and Montour and The Queen96 involved an application for an order of prohibition on the ground that the court and/or the judges had no jurisdiction in the matter. The appellants were members of the Caughnawaga Indian Reserve. The alleged act of assault took place on the reserve, both assailants and victims being reserve inhabitants.

The appellants argued, among other things, that, even if the judges derived jurisdiction from the provisions of the Criminal Code, Parliament had made an exception in the Indian Act by creating a special court with exclusive jurisdiction to hear cases dealing with the commission of criminal acts on the reserve by reserve members. They referred to the following sub-sections of section 81:
(c) the observance of law and order;

(d) the prevention of disorderly conduct

(q) with respect to any matter arising out of or ancillary to the exercise of powers under this section.

It was argued that section 81 conferred not only a legislative power on council but also an executive and judicial one, that the band has not only the power to make by-laws but also to legislate "with respect to any matter arising out of or ancillary to the exercise of powers under [section 81]". That is, it has the power (executive) to assure that its regulations are respected and that the offenders be brought before the authority designated by the band to decide whether there was an offence and, if so, to determine the punishment (judicial).

The response of the court was that

The powers conferred by section 81 are first of all, powers to regulate, and to regulate only "administrative statutes". In other words, a band has, in this area, the same sort of legislative powers as those possessed by the council of a municipal corporation. The power to give effect to regulations cannot extend beyond these administrative statutes; they are accessory and nothing more.
The reasoning of the court in Re Stacey and Montour, drawing the analogy between a band council and a municipal council and limiting the function to an administrative one only, suggests that the band by-law which attempts to oust completely the government fisheries departments' presence from the reserve will not be successful. This was, in fact, the result when this argument was put to the court in the most recent instance of a band fisheries by-law being raised in defence to a fisheries charge. The case was Regina v. John Louis Jimmy, an unreported decision of His Honour Judge Heard, handed down in Duncan Provincial Court December 14, 1984. The decision followed two and a half years of combined court proceedings on that and an earlier case, each involving a different by-law of the Cowichan Band. The history of these two cases and of the band's attempts to maintain their fisheries demonstrates the practical aspects of this controversy. Looking at it will help to illuminate the importance of the by-law issue and also show how the courts might eventually treat it. The question is what potential role can such a by-law have in the satisfaction
of the native claim to fisheries. Ancillary to that, of course, is the question of ultimate impact on all fisheries user groups.

The reserve locations of the Cowichan Indian band, near Duncan on Vancouver Island, were recognised by the Indian Reserve Commission in 1877. Several sites along the Cowichan River were specifically included as fishing stations in the allocation. Band members take as given their right to fish for what they need in accordance with their traditional practices. No treaties were ever entered into by the band with either level of government.

Confrontation with the government over the right to pursue their fishing practices began virtually with the imposition of early fishing controls. Both the present chief of the band, Dennis Alphonse, and the local fisheries officer, Trevor Fields, agree that the band has travelled a rough road in the history of its relationship with the Royal Canadian Mounted Police and the federal Department of Fisheries.

Early confrontations with the R.C.M.P. revolved around the use of fish weirs, when it was felt that the weirs were responsible for taking too many fish. The Indians were persuaded to use nets in place of the weirs. In referring to a lack of co-operation between band members and the Department of Fisheries, Chief Alphonse indicated that, in the past few decades the R.C.M.P. have been called in several times because of antagonistic displays towards fisheries officers.
Mr. Fields, the fisheries officer in charge of the district since 1977, while recalling numerous instances of confrontation, says relations have improved considerably since he has arrived in Duncan.99

The band has always maintained it has traditional fishing rights and has attempted to defend those rights in court on several occasions. The case of Jack et. al. v. Regina100 reached the Supreme Court of Canada and was one of the last notable cases involving native fishing rights which have made it eminently clear that federal fishing legislation would supersede native claims.

The case involved eight members of the Cowichan band who were charged with fishing for salmon in a closed period. The defence argued that Article 13 of the Terms of Union, stating that the Dominion Government would, after British Columbia's entry into Confederation, abide by a policy towards the Indians as liberal as that previously employed by the British Columbia Government, applied in this case. It was contended that the prior policy of the British Columbia Government was to encourage the Indians in their fishing pursuits and to allow unregulated fishing. Eight members of the Court found that nothing in Article 13 operated to inhibit federal legislative power in the field of fisheries. Further, even if fishing rights were established, conservation of the fisheries would take precedence. Mr. Justice Dickson also dismissed the appeal but on
narrower grounds. He found that Article 13 did protect the native fishery by giving it some priority but, in the particular instance, a conservation interest had been established and that was paramount. The fisheries by-law as a defence to fisheries charges has been introduced since Jack et. al.

Salmon stocks have declined in the Cowichan River as they have elsewhere in the province. The Cowichan band is able to take all the chum salmon it needs but the chinook and coho salmon, favoured for eating, are not available in sufficient numbers. Band members recognise that stock sizes are critical and that some controls are necessary.

Since the late 1970's a degree of co-operation has developed between the band and the fisheries officers to the point that the band does have some de facto control over fisheries management. It began with some discussion between the parties regarding closed times being imposed by the band rather than by Fisheries. The band was then given the opportunity to determine which of its members would apply for food fishing permits from the Department. Certain members of the band took a college course in fisheries and river management and began to co-patrol the river with fisheries officers.

In 1981 an opinion from the Department of Justice appeared saying that, where a by-law was in place, it was to be respected in preference to the Fisheries Act.
No regulations were enforced on the reserve by federal fisheries officers that year and, according to Fisheries personnel, nets appeared in river almost nightly that year in spite of a federal regulation which bars fishing by net in Cowichan River at any time of the year.102

Since the inception of the second by-law, the federal fisheries officers have allowed the band to manage on-reserve fisheries, going onto the reserve only to make joint patrols or where fish are being sold in contravention of the Fisheries Act. On the whole, the Department of Fisheries has taken a very passive position with respect to the existence of band fisheries by-laws. This is not the case with the provincial Ministry of Environment, which is presently very concerned for the maintenance of steelhead stocks in the province's rivers.

The steelhead is a sea-going trout with a life-cycle similar to that of salmon. The management of the resource is the responsibility of the provincial government. The policy of the Ministry is that the steelhead supports a sport fishery only, not a commercial fishery nor an Indian food fishery.

The decline of steelhead stocks was the reason behind the Ministry's introduction, in 1979, of its "catch and release" provisions. The steelhead run from November to April of each year and, when the runs are at their peak, (December through March, depending
on the locale) fishers are required to take steelhead by angling only, and to immediately return the fish to the river.103

The Cowichan River is of particular interest to the provincial government as it has traditionally shown a strong steelhead population. It is one of the five or six major steelhead rivers on Vancouver Island. Vancouver Island is very important itself for steelhead anglers, providing, as it does, about fifty per cent of the total provincial catch.104 While other steelhead rivers on Vancouver Island have responded to the catch and release measures by showing increased steelhead stocks, the Cowichan River has not. Stock numbers have remained constant since 1979. Robert Hooton, fisheries biologist with the Ministry of the Environment and responsible for steelhead management of Vancouver Island estimates that present steelhead production in the Cowichan River is about sixty per cent of its optimum productivity. In his view, the runs are not recovering largely due to the numbers of steelhead taken by Cowichan band members. In his estimation, the issue has only arisen over the last few years as more steelhead are being taken by gillnet. Due to the high water and muddy river conditions over the winter months, steelhead can be taken only by gillnet or by angling. The most popular locations for band members are at the mouth of the river where the fish are more vulnerable, entering in high concentration
of numbers. In Hooton's experience from past years, most netting activity ended in December, with the end of the salmon runs. Over the past five years, he has seen the netting activity carry on past December. The restriction this places on escapement is preventing the stock from increasing to its full potential.

The Indians, of course, dispute the imposition of steelhead regulations. They maintain that steelhead has always been a mainstay of their diet in winter as it is the only food fish in the river during the winter months. As they do not fish for sport, but only for food, the catch and release provisions make no sense to them and certainly do not help them acquire food.

In July of 1982 a charge of fishing by means of a net was laid against two members of the band, Sandy Richard Joe and Isaac John Bill. The information was sworn by the provincial conservation officer following a river patrol on the reserve in February of that year. No issue was taken as to the facts. The two young men were retrieving a gillnet which had been set the night before. Three steelhead fish were in evidence. This was at a time of the year when the catch and release provisions were in effect for steelhead. There is an absolute prohibition, however, against fishing by net in the Cowichan River at any time of the year, for any type of fish. There is no doubt that conservation of the steelhead resource was at issue in these proceedings.
The first line of defence was that the defendants were protected by the Cowichan band by-law passed in 1956. They relied on the section stating that

No person, other than a member of the band, shall be permitted to fish in the reserve without first obtaining a written permit to do so from the person authorised by the Council to grant such permission.106

It was argued that, by requiring non-members to seek permission to fish on the reserve, it was implicit that members could then fish without restriction on the reserve. This argument was made in spite of the fact that a witness for the defence, the chief of the band, testified that, in 1956, the primary concerns of the band councillors were the control of sports fishers on the reserve and the generation of income for the band through permit fees. Further, it is clear on the face of it that the intent of the section is only to impose a particular restriction. The section can in no way be read to give an absolute right to fish to band members. In support of a limited reading of the section is section 4 of the by-law which refers all matters not specifically dealt with in the by-law to the Special Fishery Regulations for the Province of British Columbia.

If the by-law were to apply in the circumstances, the next inquiry would be whether the by-law would take precedence over the Fisheries Act Regulations. An argument similar to that made in R. v. Baker and R. v. Basil
was presented by the defence. That is, the Falardeau line of cases was presented. As an alternative, mistake of fact was argued in that the young men had an "honest belief" in their "right" to fish for steelhead based on the practice of earlier generations fishing for steelhead.

Extensive argument was presented. In December of 1983, rather than rendering a decision, His Honour Judge Heard quashed the information, in spite of the fact that no objection had ever been taken to it. One year later, after appeal and remittance to the provincial court for re-trial, the court found in favour of the defendants on the basis of 'mistake of fact'. The decision on the issue of mistake of fact was most probably appealable, given the decision of the County Court in Regina v. Cyprian Bob that analogous circumstances constituted a mistake of law rather than one of fact.107 The issue of greater interest, however, was that of the by-law and, as that was dealt with in R. v. Jimmy, no appeal was taken in R. v. Bill and Joe.

R. v. Jimmy became a far more interesting case in terms of the by-law defence. In January of 1983, almost a year after the Bill and Joe netting incident, the band council passed the Cowichan Indian Band Fishing By-law, 1983, No. 2. The by-law was, as mentioned earlier, the only one of its type approved by the Minister since 1980. Correspondence at the time clearly shows the by-law passed "by default" or, without benefit of a ministerial
review.

The band council started working on the by-law as early as 1978. There was a realisation that measures had to be taken to protect the stocks and the council was of the opinion that band controls might be more readily accepted by band members than federally imposed restrictions. By the early 80's, the band was working with Fisheries to regulate days and methods of fishing. They were beginning to have a few members trained in aspects of fisheries management and began to co-operate with Fisheries in patrolling the river. The trainees also participated in fish "counts"; that is, swimming portions of the river, counting fish and then estimating stock numbers. In connection with provisions of the new by-law the intention is to eventually train personnel in areas of erosion and flood control; water quality; pollution; and habitat management, all essential aspects of fisheries management.

The by-law itself is an all-inclusive, "closed circuit" system of making and enforcing regulations. It is more specific than the Squamish prototype and, further to the power to make 'special orders' to carry out the by-law's purposes, the band council, via section 20, gives itself the power to interpret the by-law in cases of uncertainty. The council also attempted to extend its jurisdiction by making the by-law applicable to
Cowichan Indian Band waters, and such areas of reserve land adjacent to Cowichan Indian Band waters as may be necessary for the proper enforcement of this by-law, whether such land be surrendered land or otherwise.108

In designing the by-law, the band was attempting to exclude entirely the presence of fisheries officers on the reserve. This may very well be a critical flaw in this particular by-law and others like it. In fact, the very obvious attempt to displace the Fisheries Act was a determining factor in the failure of the by-law defence in the case of R. v. Jimmy.

Jimmy was charged with a contravention of the British Columbia Sport Fishing Regulations, which are made pursuant to the federal Fisheries Act. The particular charge was retaining a wild steelhead which had been taken by sport fishing, or angling. The incident occurred January 27, 1984 and presented the first opportunity to raise the 1983 by-law in defence.

Evidence was led by the prosecution as to the state of the steelhead resource in the Cowichan River and the necessity of conserving it.

The defence argued was similar to that argued in Bill and Joe. That is, based on the cases of Baker and Basil, and relying on the principle stated in Falardeau, the by-law should be held to apply, rather than the Fisheries Act.

In this case the argument was available that, on the face of it, the by-law could cover the circumstances.
Section 5 generally allows fishing by band members with only minor restrictions.

The main thrust of the Crown's argument, however, was that Baker did not properly apply the reasoning in Falardeau and that, once the line of cases on which Falardeau depends is analysed, the fisheries by-law cases can be distinguished. Stacey and Montour was also argued by the Crown, particularly the concept that section 81 of the Indian Act grants only powers to regulate administrative statutes. It was also urged upon the court that, upon the evidence and on the face of the by-law, the guiding precept in drawing the by-law was to exclude all federal regulation that the band might totally control all matters pertaining to fishing on the reserve.

In rendering his decision, His Honour Judge Heard found first that the wording of the by-law was sufficient to apply to the fishing done by Jimmy. He accepted the Crown's arguments that the case at hand was distinguishable from Falardeau. The exclusionary aspect of the by-law became crucial.

The evidence before this Court indicates that the Cowichan Band By-law No. 2 was enacted to gain complete and total control of all fishing and fisheries within reserve boundaries to the total exclusion of the Fisheries Act and any Regulations made pursuant thereto and enforcement therefore by Fisheries Officers....

When the Cowichan Band By-law No. 2 is considered in its entirety, it gives the Band complete control over all fisheries
to the total exclusion of either the Federal Government or Provincial Government acting under their proper Act and Regulations.

Under the By-law as enacted by the Band, and I am not suggesting that it would, could decimate the fish in the Cowichan River system. Surely when Parliament enacted Section 81(o) of the Fisheries Act, it did not intend that such a by-law could be enacted.109

In light of Re Stacey and Montour, that result was unacceptable.

Further, it was found that the regulations in question were in place to enhance the steelhead stock and were necessary even to maintain numbers.

In the end, His Honour Judge Heard agreed with the conclusions of His Honour Judge Gordon in Leech and found that, "in the instant case" the by-law was not able to displace the Fisheries Act and Regulations.

This case has been appealed by the defendant and it may be that, eventually, a higher court will give a more definitive answer to the status of the fisheries by-laws. At this stage, though, there are clearly more questions than there are answers as to the extent to which Indian bands can rely on these by-laws to grant them any management controls.
CHAPTER VI

CONCLUSION

a) Weaknesses in the By-law Scheme

It is apparent that there are far more weaknesses than strengths in the fisheries by-law approach to native management of reserve fisheries.

At this stage, one would be ill-advised to predict the court outcome of any particular case. Court decisions so far have been ambiguous and inconsistent. The writer has endeavoured to demonstrate that the result of litigation to this point is not a statement that the band council fisheries by-laws take precedence over the application of the Fisheries Act on reserves where by-laws are in force. The elements of each case must be examined systematically. It must first be determined whether the circumstances of the incident fall within the confines of the by-law. Specific conflict between by-law provisions and Fisheries Act or Regulation provisions must exist. The validity of the relevant section or sections of the by-law must, if challenged, be determined.

With this issue at the lower court level that it is, it would be difficult to draft a by-law which one could anticipate would receive court recognition, and which would also achieve the purpose of ensuring reserve fishery control. One of the two predominant issues which
needs to be thoroughly addressed by the courts is whether the *Falardeau* line of reasoning is applicable to the by-law question. In the *Jimmy* case, His Honour Judge Heard felt that *Falardeau* was binding unless it could be distinguished and decided that the Crown had distinguished *Jimmy* from *Falardeau*. The argument is still to be made, however, that *Baker* incorrectly applied *Falardeau* and that the latter case should not be applied on a par with the by-law cases.

The second issue which needs to be thoroughly canvassed by the courts is that of the assertion of total regulatory control. The comments on the nature and function of a band council which are found in the *Whitebear Band Council* and *Re Stacey and Montour* cases to the effect that band powers are circumscribed and of an administrative nature do not speak well for the by-laws which purport to be strongly regulatory. Certainly His Honour Judge Heard in the *Jimmy* case was not prepared to accept the Cowichan by-law and its unveiled attempt to assert total regulatory control over Cowichan fisheries.

Were regulations purportedly made pursuant to a by-law to be cited in defence to a charge, a determination would have to be made on the validity of the delegation of the regulatory authority.

In brief, court sanction for the by-laws has been minimal so far.
These difficulties arise from the fact that the by-laws are a purely statutory tool, dependant for their existence on a section of the *Indian Act* which has been in force since 1951 and largely unused until the past few years. One can probably say with some assurance that the Legislature, in drafting section 81 of the *Indian Act*, did not envisage band councils creating their own schemes to displace the operation of the *Fisheries Act*. The section does not create or recognise "rights". It merely provides an administrative vehicle.

A further element of uncertainty, from the natives' position, is the presence of the ministerial veto. The fact is, the majority of fisheries by-laws since 1980 have been disallowed by the Minister of Indian and Northern Affairs. It may be, then, that the fisheries by-law will not be available to all bands on an equal basis.

There are other factors which may limit the usefulness of the by-law. One is the issue of enforcement. The by-laws create certain offences and most allow for the appointment of enforcement personnel. Presumably, if fines are to be levied or imprisonment imposed, a court hearing will be necessary. Most likely, the band councils would be responsible for providing the funds for prosecution and engaging a prosecutor. This could be costly and complicated and could easily act as a deterrent to enforcement. Lack of enforcement would mean a lack of effectiveness.

One other consideration, which is not necessarily
as obvious as it might seem at first, is whether or not waters allegedly covered by by-laws are technically "on the reserve" for the purposes of section 81. That is, reading the reserve descriptions found in the 1938 Order in Council 1036, which formalised the transfer of reserve lands from the provincial to the federal government, one finds a number which read "on the left bank" of a particular river, or "on the western shore" of a particular body of water. In cases where reserve lands go only to the banks of bodies of waters, it may be that they are not "on the reserve", in spite of the fact the waters are traditionally fished. The major reserve locations of the Cowichan band encompasses both sides of the river so that this question did not arise in the two Cowichan cases. The Squamish reserve descriptions, however, in Order in Council 1036, are mostly on one or the other side of the Squamish River, Burrard Inlet or Howe Sound.

b) Difficulties in Resource Management

Assuming that the by-laws eventually receive court credence, and greater number of bands make use of them, one still has to consider the unavoidable difficulty of trying to manage the fishery, including its habitat, within such a limited jurisdiction.

Salmon and steelhead present complex management problems even to those with far greater financial resources, research capacity and human resources than are
available to any band.

Management difficulties for salmon and steelhead arise from their sensitivity to their environment. Generally, the life-cycle varies from about two to four years, partly in fresh water and partly in the ocean. Because they return to spawn in their own natal waters, proper management of their fresh-water environment is crucial to their survival. Spawning waters are affected by numerous factors, such as pollution from sewage systems or industrial plants; the introduction of chemicals used for, among other things, spraying forests; hydro-electric construction which may block river ascent and descent; and forest cover removal which may lead to the destruction of spawning beds through changes in water level or temperature, silting or flash floods.

River systems differ as these influential factors differ so that each must be treated with remedies specific to it. As the factors have an impact on the entire river system, the river system must be managed as a whole, and not on a piecemeal, or fragmented, basis.

Consider also that the same watersheds popular with salmon support agriculture, industry, lumbering, mining and hydro-electric projects and urban development. Balancing the various interests is a fine art indeed and one which requires extensive monitoring of the system. On this scale, one cannot expect bands to have either the resources or the expertise to deal with large-scale management. And, when seen on the large scale, the
concept of "reserve fishery management" seems much less feasible.

Not only does habitat management loom large, but natives are faced with being the last to take in the sequence of fishers. By the time the fish have reached the reserve locations, commercial and sports fishers have already taken their catch. Problems of overfishing, then, at the earlier stages, mean fewer fish must be taken by the Indians in order to allow sufficient escape-ment. This further complicates fishery management for the bands. As it is, the Indian salmon fishery accounts for less than four per cent of annual salmon landings.\[111\]

If the power alleged in the by-law to regulate on an ongoing basis is not legally supportable the by-law will be too inflexible to respond to fluctuations in stock size or other changing conditions.

In completing this examination of the by-law issue, one can only conclude that the reconciliation of native claims to fishery management lies elsewhere than in the by-law instrument.

c) Recommendations

Given the uncertainty of obtaining ministerial approval for the by-laws; the unpredictability of the courts' response to these by-laws; the probable limitation on the terms of the by-laws; and the practical difficulties and demands of management, it is probable
that little can be accomplished by using the by-law as a management tool. It may succeed in excluding the Fisheries Act on occasion but cannot be said to be a reliable device for the implementation of management goals. The recent appearance of the by-laws seems to be a reaction to the dissatisfaction Indians have felt with the Department of Fisheries, as well as Indian Affairs, in having their fishery claims recognised. Indians would be well-served if the current by-law controversy were to generate an appropriate political response.

The appropriateness of the response is something that was addressed by Peter Pearse, in the report of his Commission. He urges the government to recognise the validity of native fishery claims, at least to some extent.

It is obvious that some recognition must be accorded the fishery claims. It is obvious the nature of the fishery resource requires co-operative management techniques. It is just as obvious that the interests of other resource user groups must be taken into the balance.

If there is ever to be harmony among the Indians, the federal government and other fishers, co-operative management schemes must evolve. It has been pointed out that, at least in the Cowichan band, the council has some de facto control over fisheries as a result of arrangements made between the band and the Department. The co-operative approach to management was also codified in the Nitinaht and Sheshahth by-laws and this would seem to be an auspicious development which might be taken further.
Pearse also makes some proposals of a positive nature. For the economic welfare of the Indians he advocates encouraging them and assisting them to become more involved in the commercial fisheries, as they were in earlier years.112

A specific annual catch allocation for each interested band is recommended in order to alleviate the problem of having Indian catch numbers restricted to protect escape­ment after the Department has analysed the impact of the commercial and sport catch.113

Pearse suggests having the bands become involved in the administration and enforcement of catch allocation provisions; for example, apportioning the catch among band members; issuing individual permits to band members where a general permit has been issued by the Department; and supervising band fishing activities.114

Some bands in British Columbia already operate enhancement projects and further involvement should be fostered by the government. This aspect is recognised by Pearse, who also would have Indian mariculture promoted.

Pearse recommends that all these steps be accomplished by agreement between the Department and the band, more or less by-passing the by-law controversy.

The Minister of Fisheries and Oceans should initiate discussions with the Minister of Indian and Northern Affairs and representatives of Indian organisations to find means of reconciling band fishing by-laws with the paramount responsibility of the Department of Fisheries and Oceans for fish conservation and management.115
Reconciliation is necessary to end the controversy over the competing claims. In order for the Indians to participate actively and meaningfully in fisheries management they will require assistance of a concrete nature, technically, financially and educationally. The native claim has been asserted and it is now up to the federal government to respond to it.
NOTES


2. Ibid., Preface, p. vii.

3. As reported in The Vancouver Sun, March 15, 1983, "Native rights will not die on vine when premiers' conference concludes".


11. Ibid, pp. 94-95.


15. Smith, "Douglas resigned the position as Chief Factor in 1858". Ibid, pp 41-42.


18. Reproduced in Papers Connected with the Indian Land Question 1850-1975, Lands and Works Department, Victoria, 1875.

19. Letter to Douglas from Barclay, December, 1849, quoted in Pethick, supra, note 17, p.78.

20. Letter to Barclay from Douglas, quoted in Pethick, supra, note 17, p. 79.


29. Ibid.

30. Lane and Lane, supra., note 24, p.2.


34. Indian Act, 1951, C. 29, section 80(o). There was an earlier provision allowing band councils to make "by-laws, rules and regulations" regarding certain reserve matters such as trespass; reserve roads, public works; etc., but with no reference to fish or wildlife resources. See Indian Act, R.S. 1927, C. 81, section 185.

35. Information of the by-laws in existence as well as those disallowed has been obtained from a copy of a By-Law Index forwarded by the Department of Indian Affairs and Northern Development.


15(2) The following regulations and classes of regulations, being regulations or classes of regulations that the Governor in Council is satisfied affect or are likely to affect only a limited number of persons and with respect to which the Governor in Council is satisfied that reasonable steps have been or will be taken for the purpose of bringing their purport to the notice of those persons affected or likely to be affected by them, are hereby exempt from publication:

(e) by-laws made by the council of a band under section 81 or 83 of the Indian Act;

37. These dates and similar information in this section have been taken from the Department of Indian and Northern Affairs By-Law Index and copies of the majority of the by-laws.

38. Cowichan Band By-law, 1956, section 1, see Appendix "A".

39. The Squamish Indian Band By-law No. 10, section 1, see Appendix "B".

40. Ibid, sections 3, 7, 15.

41. Ibid, section 5.

42. Ibid, sections 4, 11.

43. Ibid, sections 7, 8, 10.

44. Ibid, sections 12, 13.

45. Ibid, section 14.

46. Fisheries Act, R.S., C. 119, section 12.

47. Ibid, section 20(6).
48. Squamish By-law, section 9; Fisheries Act, section 23.

49. Compare section 10 of the By-law with section 24(1) of the Fisheries Act; section 11 of the By-law with section 30 of the Fisheries Act; section 12 of the By-law with section 33(2) of the Act; and section 13 with section 33(3) of the Act.

50. The Upper Nicola Indian Band, section 1, see Appendix "C".

51. Ibid, section 12.
52. Ibid, section 4.
53. Ibid, section 10.
54. Ibid, see closing.
55. Bridge River Indian Band Fishing By-law No. 1-1980, s. 1(a), Appendix "D".
56. Ibid, section 16.
57. Cowichan Indian Band Fishing By-law, 1983, No. 2, s. 14, Appendix "E".
58. Nitinaht Band By-law, 1982, s 14, Appendix "F".
59. Ibid, section 15.
60. Indian Act, s. 82(2).

61. Conversation with Dennis Novak, Manager of Legal and Statutory Requirements, Department of Indian and Northern Affairs, March 20, 1983.

62. Letter from J.D. Leask, Director General, Reserves & Trusts, Department of Indian and Northern Affairs, to L.J. Pinder, Counsel for the Cowichan Indian Band, March 3, 1983.

64. Ibid, p. 4.
65. Ibid, p.5.
66. Bridge River By-law, Appendix "D", s.9.
68. Squamish Band By-law, Appendix "B", s. 6.
69. (1972) 6 W.W.R. 450.
71. Ibid, p. 4.
75. Bridge River By-law, supra, note 55, s. 4.
77. Ibid, p.7.
78. (1972) 6 WWR 450.
79. (1914) 6 WWR, 14441.
80. [1929] 1 WWR, 402.
81. [1945] 1 WWR, 266.
82. supra, note 80, pp. 402-403.
83. supra, note 78, pp. 457.
84. Ibid, pp. 457
85. 1943 2 WWR, 268.
86. 1949 1 WWR, 14.
87. Ibid, pp. 15.
88. Supra, note 72, p. 3.
90. Ibid., p. 14.
95. Ibid., pp. 559-561
96. (1981) 63 C.C.C. (2d), 61
97. Ibid., p. 68.
98. The account of the Cowichan band's position was given by Chief Dennis Alphonse in an interview granted March 21, 1984.

99. Trevor Fields was interviewed April 19, 1984.

100. [1979] 5 W.W.R. 364

101. An opinion letter had been sent to Fisheries and Environment Canada August 17, 1978 from the Department of Justice. This opinion filtered through to Fisheries officers in Western Canada in 1980-81.

102. British Columbia Fishery (general) Regulations, s. 19(2).

103 British Columbia Sport Fishing Regulations, made under the Fisheries Act, p.c. 1984-2715, section 60.

104. Steelhead information was provided by Robert Hooton, Fisheries biologist with the Ministry of Environment, responsible for steelhead management on Vancouver Island.

105. Supra, note 102.

106. Cowichan Band By-law #1, s.1. See Appendix "A".


108. An opinion letter had been sent to Fisheries and Environment Canada August 17, 1978 from the Department of Justice. This opinion filtered through to Fisheries officers in Western Canada in 1980-81.


111. Pearse Report, supra note 1, p. 175.

112. Ibid., Ch. 12.

113. Ibid., p. 181.

114. Ibid., p. 183-184.

115. Ibid., p. 184.
BIBLIOGRAPHY


BY-LAW #1, EFFECTIVE 20 DECEMBER, 1956
PRESERVATION, PROTECTION AND MANAGEMENT OF FISH

The Council of the Cowichan Band of Indians at a meeting held the Seventeenth day of October, 1956, makes the following by-law pursuant to paragraphs (o) and (r) of Section 80 of the Indian Act.

A by-law to provide for the preservation, protection and management of fish in the Cowichan Indian Reserve in the Province of British Columbia.

FISHING

1. No person, other than a member of the band, shall be permitted to fish in the reserve without first obtaining a written permit to so do from the person authorized by the Council to grant such permission.

2. Permits may be obtained only on production of a valid and subsisting British Columbia Provincial License, if such is required by the person applying, to fish in provincial waters contiguous to the reserve.

3. Such permit shall authorize the permittee to fish by angling only and may be subject to a fee established from time to time by resolution of the Council of the band.

4. The definition of angling, open and close seasons,
coarse fish, game fish, resident, total length, and all other matters not specifically mentioned in this by-law shall be as provided in the Special Fishery Regulations for the Province of British Columbia.

5. The Chief and Councillors of the Band, Indian constables and any other person or persons named by the Council shall be ex-officio officers for the enforcement of this by-law.

6. Any officer for the enforcement of this by-law shall forthwith seize all fish protected by this by-law, which
   a) is found by him in possession of any person, other than a member of the Band, who is not in possession of a permit under Sec. 2 of this by-law;
   b) appears to have been taken by some unlawful means; and shall bring such fish before a police magistrate, stipendiary magistrate or person appointed by the Governor in Council to be a justice of the peace for offences under the Indian Act.

7. Where a person is convicted of an offence under this by-law, the convicting court or judge may order that the fish, in addition to any penalty imposed, are forfeited to Her Majesty for the benefit of the band provided, however, that the fish so forfeited shall be delivered to a charitable institution designated by the Council.
91.

PENALTIES

8. Any person who violates the provisions of this by-law shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding one hundred dollars or imprisonment for a term not exceeding thirty days, or both fine and imprisonment.
THE SQUAMISH INDIAN BAND

By-law No. 10

A BY-LAW FOR THE PRESERVATION, PROTECTION AND
MANAGEMENT OF FISH ON THE RESERVE

The Band Council of the Squamish Indian Bank enacts as follows:

1. In this By-law unless the context otherwise requires:
   a) "Squamish Indian Band water" means all water situated upon or within the boundaries of Reserves set aside for the use and benefit of the Squamish Bank of Indians.
   b) "Fish" includes shellfish, crustaceans and marine animals.
   c) "Fishery" includes the area, locality, place or station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed, or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir, or other fishing appliance, and also the pound, seine, net, weir, or other fishing appliance used in connection therewith.
d) "Fishing" means fishing for or catching fish by any method.

e) "Band Council" means the council of the Squamish Indian Band.

f) "Band manager" means that person so appointed by the Band Council.

3. Band Council may appoint fishery officers whose acts and duties are as defined by this by-law and amendments hereto and whose titles are as specified in their appointments.

4. Salmon fry, parr and smolt shall not at any time be fished for, caught or killed, and no salmon or grilse of less weight than three pounds shall be caught or killed, otherwise than by angling with hook and line.

5. No person other than a member of the Squamish Indian Band shall engage in fishing upon Squamish Indian Band waters.

6. Members of the Squamish Indian Band shall be permitted to engage in fishing upon Squamish Indian Band waters at any time and by any means except by the use of rockets, explosive materials, projectiles, or shells.
7. Any fishery officer appointed hereunder may direct, either in writing or orally on sight, that nets or other fishing apparatus be reduced in size to occupy less than one-third (1/3) of the diameter of any stream or river.

8. Where unused slides, dams, obstructions, or anything detrimental to fish exist, and the owner or occupier thereof does not after notice given by the Band Council to remove the same, or if the owner is not resident in Canada, or his exact place of residence is unknown to the Band Council, the Band Council may, without being liable to damages, or in any way to indemnify the said owner or occupier, cause such slide, dam, obstruction, or thing detrimental to fish life to be removed or destroyed and in cases where notice has been given to the owner or occupier may recover from the said owner or occupier the expense of so removing or destroying the same.

9. Every person using stakes, posts, buoys or other materials placed for fishing purposes in any water shall remove the same within forty-eight (48) hours after ceasing to use them.

10. One-Third (1/3) of the width of any river or stream, and not less than two-thirds (2/3) of the width of the
main channel at low tide, in every tidal stream
shall be always left open, and no kind of net or other
fishing apparatus, logs, or any material of any kind
shall be used or placed therin.

11. The eggs or fry of fish on the spawning grounds,
shall not at any time be destroyed.

12. No person shall cause or knowingly permit to pass
into, or put or knowingly permit to be put, lime,
chemical substances or drugs, poisonous matter, dead
or decaying fish, or remnants thereof, mill rubbish
or sawdust or any other deleterious substance or
thing, whether the same is of a like character to the
substances named in this section or not, in any water
frequented by fish, or that flows into such water,
nor in ice over either such waters.

13. No person engaging in logging, lumbering, land
clearing or other operations, shall put or knowingly
permit to be put, any slash, stumps or other debris
into any water frequented by fish or that flows into
such water, or on the ice over either such water, or
at a place from which it is likely to be carried into
either such water.

14. The Band manager may make regulations for carrying
out the purposes and provisions of this by-law and in
particular, but without restricting the generality of
the foregoing, may make regulations:

a) for the proper management and control of fisheries;

b) respecting the conservation and protection of fish;

c) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;

d) respecting the operation of fishing vessels;

e) respecting the use of fishing gear and equipment;

f) respecting the obstruction and pollution of any waters frequented by fish;

g) respecting the conservation and protection of spawning grounds;

h) prescribing the powers and duties of persons engaged or employed in the administration or enforcement of this by-law and providing for the carrying out of those duties and powers;

i) authorizing a person engaged or employed in the administration or enforcement of this by-law to vary and close time or fishing quota that has been fixed by the regulations.

15. Any fishery officer appointed hereunder may enforce the provisions of this by-law or any regulation made hereunder.
16. Everyone who violates or prepares to violate any provisions of this by-law, or any regulation, is guilty of an offense punishable on summary conviction and is liable to a fine of not more than $100.00.

17. When not otherwise specified every proprietor, owner, agent, tenant, occupier, partner or person actually in charge, either as occupant or servant, shall be deemed to be jointly and severally liable for any of the provisions of this by-law or of any regulation.

18. Penalties incurred under this by-law or amendments herein shall be sued for within two years from the commission of the offence.

19. Except insofar as in this by-law is otherwise specially provided all penalties and forfeitures incurred under this by-law or amendments hereto are recoverable and enforcable by summary proceedings taken under the provisions of the Criminal Code relating to summary convictions.

20. Should any violation of this by-law or of any regulation continue for more than one day then each day during which such violation continues constitutes a separate offence and may be punished as such.

21. This by-law may be cited for all purposes as "Fishing By-law, 1977, No. 10".

Considered and passed by the Squamish Band Council, on the 12th day of September, 1977.
APPENDIX "C"

THE UPPER NICOLA INDIAN BAND

WHEREAS paragraph (c) of Section 81 of the Indian Act grants jurisdiction to the Band Council to regulate law and order. And this would enable Fisheries Officers to maintain law and order at fishing stations.

WHEREAS paragraph (o) of Section 81 of the Indian Act grants jurisdiction to the Band Council to preserve, protect and manage fur bearing animals, fish and other game.

WHEREAS paragraph (r) of Section 81 of the Indian Act grants jurisdiction to the Band Council for the imposition of a penalty for violation of By-Laws.

WHEREAS it becomes necessary for the peace, order and good government of the Indian Band to regulate the preservation, protection and management of Indian Food Fisheries and fishing.

BY-LAW No. 80-1

BY-LAW FOR THE PRESERVATION, PROTECTION AND MANAGEMENT OF FISH ON THE RESERVE

The Band Council of the Upper Nicola Indian Band enacts as follows:

1. In this By-law unless the context otherwise requires:
a) "Upper Nicola Indian Band Waters" means all water situated upon or within the boundaries of Reserves set aside for the use and benefit of the Upper Nicola Band of Indians and all areas of land and water which from time immemorial were designated Indian food fishing waters; more specifically those in different water sheds, lakes and streams.

b) "FISH" includes:

- Sockeye Salmon or Kokanee (Oncorhynchus Nerka)
- Steelhead, Kamloops: Rainbow Trout (Salmo Gairdneri)
- Coho Salmon (Oncorhynchus Kisutch)
- Chinook Salmon (Oncorhynchus Tshawytscha)
- Burbot-ling Cod (Lota Lota)
- Dolly Varden (Salvelinus Malma)
- Northern Squawfish (Ptychocheilus Oregonense)
- Large Scale Sucker (Catostmus Macroheilus)
- Longnose Sucker (Catostmus Catostmus)
- Bridge Lip Sucker (Catostmus Columbianus)
- Carp (Cyprinus Carpio)
- Redside Shiner (Richardsonius Balteatus)
- Peamouth Chub (Mylocheilus Caurinum)
- Leopard Dace (Rhinichthys Falcatus)
- Pacifich Lamprey (Entosphenus Tridentatus)
- And any other species of fish or crustacean which may be identified from time to time.

c) "Fishery" includes the area, locality, place or situation in or on which a pound, net, weir or other fishing appliance is used, set, placed, or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, net, weir, or other fishing appliance used in connection therewith;

d) "Fishing" means fishing for or catching fish by any method;

e) "Band Council" means the Council of the Upper Nicola Indian Band;
f) "Band Manager" means that person so appointed by the Band Council;
g) "Fishery Officer" means persons so appointed by the Band Council, and includes Band Constables.

2. This By-Law applies over all upper Nicola Band waters:
   - Nicola Lake 1 R#1
   - Hamilton Creek 1 R#2
   - Douglas Lake 1 R#3
   - Spahomin Creek 1 R#4
   - Chapperon Lake 1 R. #5
   - Chapperon Creek 1 R. #6
   - Salmon Lake 1 R. #7
   - Spahomin Creek 1 R. #8

3. Band Council may appoint fishery officers whose acts and duties are as defined by this By-Law and amendments hereto and whose titles are as specified in their appointments.

4. No person other than a member of the Upper Nicola Band shall engage in fishing upon Upper Nicola Indian Band waters without Band Council permission.

5. Members of the Upper Nicola Indian Band shall be permitted to engage in fishing upon Upper Nicola Indian Band waters at any time and by any means except by the use of explosive materials, projectiles, or shells.

6. a) Where unused slides, dams, obstructions, or anything detrimental to fish exist, the Band Council may cause such slides, dams, obstructions, or anything detrimental to fish life to be removed or destroyed;

   b) Without limiting the general power given to the Band Council in sub-section A, if the owner is determined, after the Band Council has removed the obstruction, the Band Council may recover from the owner, the expense of removing or destroying the obstruction.
7. No person shall cause or knowingly put, or knowingly permit to be put, lime, chemical substances, or drugs, poisonous matter, dead or decaying fish, or remnants thereof, mill rubbish or sawdust or any other deleterious substance or thing, whether the same is of a like character to the substances named in this section or not, in any water frequented by fish, or that flows into such water, nor on ice either such waters.

8. The eggs or fry of fish on the spawning grounds, shall not at any time be destroyed.

9. No person engaging in logging, lumbering, land clearing or other operations shall put or knowingly permit to be put, any slash stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

10. The Band Manager and Band Council may make regulations for carrying out the purposes and provisions of this By-Law and in particular, but without restricting the generality of the foregoing, may make regulations:
   a) for the proper management and control of fisheries;
   b) respecting the conservation and protection of fish;
   c) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;
   d) respecting the use of fishing gear and equipment;
e) respecting the obstruction and pollution of any waters frequented by fish;

f) respecting the conservation and protection of spawning grounds;

g) prescribing the powers and duties of persons engaged or employed in the administration or enforcement of this By-Law and providing for the carrying out of those duties and powers;

h) authorizing a person engaged or employed in the administration or enforcement of this By-Law to vary any closed time or fishing quota that has been fixed by the regulations.

11. Any fishery officer or Band Constable duly appointed hereunder may enforce the provisions of this By-Law or any regulations made hereunder.

12. Every person who violates any provision of this By-Law is guilty of an offence and is liable upon summary convictions:

   a) for the first offence to a fine of not less than $200.00; and not more than $100.00 (sic) or to imprisonment for a term of not less than 1 month and not more than 2 months; or to both fine and imprisonment; and

   b) for a second and each subsequent offence to a fine of not less than $500.00 and not more than $200.00, (sic) or to imprisonment for a term of not less than 3 months, and not more than 6 months, or to both such fine and imprisonment.
13. When not otherwise specified every proprietor, owner, agent, tenant occupier, partner or person actually in charge, either as occupant or servant, shall be deemed to be jointly and severally liable for any of the provisions of this By-Law or any regulation.

14. Every fine, penalty or forfeiture imposed under this By-Law or regulations belongs to the Upper Nicola Indian Band for the benefit of the Band with respect to the offence committed and the Band council may from time to time direct that the fine, penalty or forfeiture shall be paid to bear in whole or in part the expense of administering the By-Law under which the fine, penalty or forfeiture is imposed, or that the fine, penalty or forfeiture shall be applied in the manner that the Band Council considers will best promote the purposes of the By-Law under which the fine, penalty or forfeiture is imposed, or the administration of that By-Law.

15. Should any violation of any By-Law or any regulation continue for more than one day then each day during which violation continues constitutes a separate offence and may be punished as such.

This By-Law may be cited for all purposes as "Fishing By-Law, 1980 No 80-1".

Considered and passed by the Upper Nicola Band Council, on the 1st day of May, 1980.

The Upper Nicola Indian Band Council, pursuant to the Indian Act may from time to time make regulations not in consistent with this By-Law as they may deem necessary or
advisable for the purpose of carrying into effect the provisions of this By-Law according to their true intent and for supplying any deficiency therein and, without restricting the generality of that power.
BRIDGE RIVER INDIAN BAND
FISHING BY-LAW No. 1-1980

WHEREAS paragraph (c) of Section 81 of the Indian Act impowers the Band Council to regulate law and order, and this would enable Fisheries Officers to maintain law and order at fishing stations.

WHEREAS paragraph (o) of Section 81 of the Indian Act impowers the Band Council to preserve, protect and manage fur bearing animals, fish and other game.

WHEREAS paragraph (r) of Section 81 of the Indian Act impowers the Band Council for imposition of a penalty for violation of By-laws

THEREFORE the Band Council (Indian Government) of the Bridge River Indian Band enacts the following BY-LAW FOR THE PRESERVATION, PROTECTION AND MANAGEMENT OF FISH.

1. In this By-law unless the context otherwise requires:
   a) "Bridge River Indian Band Waters" means all waters situated upon, within the boundaries of reserves or otherwise falling into the jurisdiction of the Indian Government or as set aside for the exclusive use and benefit of the Bridge River Indian Band of Indians.
   b) "Fish" includes: Tyee Spring Salmon, Chinook Salmon, Sockeye Salmon, Coho Salmon, Brubotling Cod, Dolly Varden, Sturgeon, Steelhead and may include marine animals which may be identified from time to time.
c) "Fishing" means catching fish by any method including dip-netting, set dip-netting and gill netting or by any other method of catching fish as authorized by Band Council.

d) "Fishery" includes the area, locality, place or situation in or on which a pound, net, weir or other fishing appliance is used, set, placed or located and the area, tract or stretch of water in or from which fish may be taken by the said pound, net, weir or other fishing appliance used in connection therewith.

e) Band Council means the elected government of the Bridge River Indian Band.

f) "Band Manager" means the person so appointed by the Band Council.

g) "Fishery Officer" means a person(s) so appointed by the Band Council and may include Band Constables.

2. This By-Law applies over all Bridge River Indian Band waters including:
   a) Bridge River Reserve No. 1,
   b) Bridge River Reserve No. 2,
   c) or any other lands falling into the jurisdiction of the Bridge River Indian Band.

3. Band Council may appoint fishery officers whose acts and duties are as defined by the by-law and amendments hereto and whose titles are as specified in their appointments.

4. Band members and non-band members shall be permitted to engage in fishing upon Bridge River Indian Band waters, as
shall be permitted by the Bridge River Indian Band.

5. Where unused jams, slides, obstructions, diversions or anything detrimental to fish exist, and the owner or occupier thereof does not after notice given by the Band Council to remove the same, or if the owner is not resident in Canada, or his exact place of residence is unknown to the Band Council, the Band Council may, without being liable to damages or in any way to indemnify the said owner or occupier, cause such slide, dam, obstruction, diversion or thing detrimental to fish life to be removed or destroyed and in cases where notice has been given to the owner or occupier the expense of so removing or destroying the same.

6. No person shall cause or knowingly permit into, or put or knowingly permit to be put, lime chemical substance or drugs, poisonous matter, mill rubbish, sawdust or any other deleterious substance or thing, whether the same is of a like character to the substances named in this section or not, in any water frequented by fish, or that flows into such waters, nor on ice over either such waters, or at a place from which it is likely to be carried into either such waters.

7. No person engaging in logging, lumbering, land clearing, mining or other operations, shall put or knowingly permit to be put, any slash stumps or other debris into any water frequented by fish or that flows into such waters, or on the ice over either such waters or at a place from which it is likely to be carried into either such water.
8. The eggs or fry of fish on the spawning grounds shall not at any time be destroyed.

9. The Band Council may make regulations for carrying out the purposes and provisions of this by-law and in particular, but without restricting the generality of the foregoing, may make regulations:

   a) for the proper management and control of the fisheries.
   b) respecting the conservation and protection of fish;
   c) respecting the catching, loading, landing handling, transporting, possession and disposal of fish;
   d) respecting the use of fishing gear and equipment;
   e) respecting the obstruction and pollution of any waters frequented by fish;
   f) respecting the conservation, protection and development of spawning grounds;
   g) prescribing the powers and duties of persons engaged or employed in the administration or enforcement of this by-law and providing for the carrying out of those duties and powers.
   h) authorizing a person engaged or employed to administer and enforce any closed time or fishing regulation that has been emplaced by the Band Council.

10. Any fishery officer or band constable duly appointed hereunder may enforce the provisions of this by-law or any regulations made hereunder.

11. Every person who violates any provision of this by-law is guilty of an offence and is punishable upon summary
conviction to a fine appropriate to the damages or infrac-
tions as determined by the court.

12. When not otherwise specified every proprieter, agent, 
tenant, occupier or person actually in charge, either as 
occupant or servant, shall be deemed to be jointly and 
severally liable to any of the provisions of this by-law 
or any regulations hereof.

13. Except insofar as in this by-law is otherwise special-
ly provided all penalties and forfeitures incurred under 
this by-law or amendments hereto are recoverable and en-
forceable by summary proceedings taken under the pro-
visions of the Criminal code relating to summary convic-
tions.

14. Should any violation continue of any by-law or any 
regulation continue for more than one day then each day 
during which violations continue constitutes a separate 
offence and may be punished as such.

15. This By-law may be cited for all purposes as "Fishing 

16. The Band Council may from time to time make regula-
tions not inconsistent with this by-law as they may deem 
necessary or advisable for the purpose of carrying into 
effect the provisions of this by-law according to their 
true intent and for supplying any deficiency and without 
restricting the generality of that power.

17. Fishing By-Law No. 1-1980 having been considered 
and passed is hereby signed by the Indian Government of 
the Bridge River Indian Band this ___ day of _________,
1980.
PREAMBLE

This by-law may be cited at the "Cowichan Indian Band Fishing By-law, 1983, No. 2."

This by-law is made pursuant to section 81 (c), (o), and (r) of the Indian Act.

This by-law replaces the Cowichan Indian Fishing By-law, 1956, #1.

DEFINITIONS

1. In this by-law, unless the context otherwise requires:
   a) "Band Council" means the duly elected Council of the Cowichan Indian Band;
   b) "Band Manager" means that person so appointed by Band Council:
   c) "Band member" means any member of the Cowichan Indian Band;
   d) "Cowichan Indian Band waters" means all waters situated upon or within the boundaries of reserves established for the use and benefit of the Cowichan Indian Band;
   e) "deleterious substance" means:
      i) any substance that, if added to any water would alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or
ii) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man or fish that frequent that water;

f) "Fish" includes shell fish, crustacans and marine animals;

g) "Fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.

h) "Fishery" includes the area, locality, place or station in or on which a pound, seine net, weir or other fishing appliance is used, set, placed or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir, or other fishing appliance used in connection therewith;

i) "Fishing" means fishing for, catching or attempting to catch fish by any method;

j) "Reserve" means the Cowichan Indian Reserves.

k) "River Management Personnel" means a person appointed as such by Band Council pursuant to this by-law, whose duties and powers are as specified by this by-law;
1) "Traditional fishing methods" means fishing by use of dip nets, weirs, gaffs, spears, or hooks and rod;
m) "waters frequented by fish" means Cowichan Indian Band waters;

JURISDICTION

2. This by-law applies to Cowichan Indian Band waters, and such areas of reserve land adjacent to Cowichan Indian Band waters as maybe necessary for the proper enforcement of this by-law, whether such land be surrendered land or otherwise.

RIVER MANAGEMENT PERSONNEL

3. a) Band Council may appoint, by Band Council Resolution, any person to act as a River Management Personnel.
b) Any River Management Personnel appointed pursuant to these by-laws may direct, either in writing or orally on site that nets or other fishing apparatus be reduced in size to occupy less than 1/3 of the diameter of any stream or river.
c) Any River Management Personnel appointed hereunder may enforce the provisions of this by-law or any regulations made hereunder.

FISHING

4. No person, other than a Band member, may engage in fishing in Cowichan Indian Band waters unless that person possesses a permit pursuant to section 18 of this by-law.

5. Unless otherwise ordered by a special order pursuant to section 16 of this by-law, Band members may fish in Cowichan waters as follows:
a) Band Members who are elders, single mothers, handicapped or disabled may fish by use of set nets 3 days per week, such days to be specified by order of the Band Council pursuant to section 17 hereof, provided that there shall be maximum of one such person per family fishing by this method during these times;
b) Band members specified in section 5 (a) hereof may appoint a Band Member to fish for him or her pursuant to that section;
c) Except as provided in Section 5 (a) hereof, Band Members may fish at all times by traditional fishing methods only and, without restricting the generality of the foregoing, Band members may not fish by use of:
   (i) set nets;
   (ii) spear guns:
   (iii) explosives or projectiles.
   unless otherwise ordered pursuant to section 16 hereof.
6. No Band member shall fish for salmon fry, parr or smolt at any time, and no salmon or grilse of less weight than 3 pounds shall be caught or killed, otherwise than by angling with a hook and line.
7. The eggs or fry of fish on the spawning grounds shall not at any time be destroyed.

OBSTRUCTIONS OR DELETERIOUS SUBSTANCES
8. Where unused slides dams, obstructions or anything detrimental to fish exist, and the owner or occupier thereof does not after notice given by the Band Council to remove the same, or if the owner is not resident in Canada, or his exact place of residence is unknown to the Band
Council, the Band Council may cause the slide, dam, obstruction, or thing detrimental to fish life to be removed or destroyed and in cases where notice has been given to the owner or occupier Band Council may recover from the said owner or occupier the expense of so removing or destroying the same.

9. Every person using stakes, posts, buoys or other materials placed for fishing purposes in any water shall remove the same within forty-eight (48) hours after ceasing to use them.

10. One third (1/3) of the width of any river or stream, and not less than two-thirds (2/3) of the width of the main channel at low tide, in every tidal stream shall be always left open, and no kind of net or other fishing apparatus, logs, or any material of any kind shall be used or placed there.

11. No persons shall cause or knowingly permit to pass into, or put or knowingly permit to be put, lime, chemical substances or drugs, poisonous matter, dead or decaying fish, or remnants thereat, mill rubbish or sawdust or any other deleterious substance or thing, whether the same is of a like character to the substance named in this section or not, in any water frequented by fish or on any ice over such waters.

12. No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.
PROHIBITION

13. No person shall destroy fish by any means other than fishing as authorized or specified by this by-law.

14. No person shall carry on any work or undertaking that results in the harmful alteration, destruction or disruption of fish habitat.

15. No one shall fish for, buy, sell or have in his possession any fish, or portion of any fish, at a place where at that time fishing for such fish is contrary to this by-law.

SPECIAL ORDERS

16. Band Council may by Band Council Resolution specify that Band members:

   a) Shall not fish as allowed under these by-laws, at any time or place specified in the special order until further order of Band Council;
   b) May fish otherwise than as allowed under these by-laws by reason of special circumstances, at any time or place specified in the special order.

17. Band Council may make other special orders for carrying out the purposes and provisions of this by-law as follows:

   a) for the proper management and control of fisheries;
   b) respecting the catching, loading, landing, handling, trasporting, possession and disposal of fish;
   c) respecting the operations of fishing vessels;
   d) respecting the use of fishing gear and equipment;
   e) respecting the obstruction and pollution of any
waters frequented by fish;
f) prescribing the powers and duties of persons engaged or employed in the administration or enforcement of this by-law and providing for the carrying out of those duties and powers;

18. Band Council may issue a permit to any person other than a Band member to fish in Cowichan Band waters at the time and place and according to the method specified in the permit.

19. With regard to Sections 16, 17, and 18 of these by-laws, Band Council shall:
   a) give notice to all persons affected by the special orders by posting a copy of such orders at conspicuous places on the Reserve at least 24 hours prior to the special order coming into effect;
   b) all special orders shall be for the purpose of furthering the conservation and protection of fish or spawning grounds.

INTERPRETATION

20. In the event that any ambiguity or uncertainty arises in the interpretation of this by-law, Band Council may, if requested to do so by a Band Member, provide its interpretation of the by-law by Band Council Resolution.

VIOLATION

21. Every person who violates or prepares to violate any provision of this by-law or any order made pursuant to Sections 16 and 17 hereof, is guilty of an offense and is
punishable on summary conviction to a fine of not more than $100.00 or to imprisonment of not more than 30 days.

22. Should any violation of this by-law or the orders made pursuant to Sections 16 and 17 hereof, continue for more than one day, then each day which such violation continues constitutes a separate offense and may be punished as such.

Considered and passed at a duly convened meeting of the Cowichan Indian Band Council the ___ day of ______, 1982.

THE COUNCIL OF THE COWICHAN BAND, NANAIMO AGENCY, PROVINCE OF BRITISH COLUMBIA, DUNCAN, 18th JANUARY, 1983, DO HEREBY RESOLVE:

This By-law is passed pursuant to Section 81 of the Indian Act, at the regular band meeting on March 10, 1982.

POSITION ESTABLISHED

1. The position of Band Fisheries Conservation Officer is hereby established. This shall be a paid position. The salary for this position shall be established by the Band Council, and shall be paid from Band Funds. The position is to be filled by resolution of the Band Council and the person so appointed shall serve until removed from Office by the Band Council. In case of vacancy in this position, the Band Manager shall perform the duties and functions assigned to the Band Fisheries Conservation Officer.

POWERS AND DUTIES OF BAND FISHERIES CONSERVATION OFFICER

2. a) The Band Fisheries Conservation Officer shall determine according to the best information available to him the capacity of the waters on each of the Band's reserve to sustain production of fish.

b) The Band Fisheries Conservation Officer may close any area for fishing for any period of time he considers appropriate in the interests of conservation.

c) The Band Fisheries Conservation Officer shall prohibit any gear type he considers inappropriate for
any location.

d) The Band Fisheries Conservation Officer shall enforce this By-law.

e) The Band Fisheries Conservation Officer shall collect statistics on all fish caught or sold under this By-law.

PERMIT TO FISH

3. The Band Council may issue a permit to a person not a member of the Nitinaht Band entitling that person to fish on reserve.

OPENING AND CLOSURES

4. The Band Council shall designate openings and closures for the on Reserve Fishery.

ASSISTANT BAND FISHERIES CONSERVATION OFFICERS

5. The Band Council may appoint one or more Fisheries Conservation Assistants. These shall be paid positions. The salary for these positions shall be established by the Band Council, and shall be paid from Band Funds. These assistants shall:

a) under the direction of the Fisheries Conservation Officer carry out work to monitor, administer, and enhance the fisheries, and

b) in the absence of the Band Fisheries Conservation Officer have all powers under Section 2.
NOTICE

6. No opening or closure under Section 4 and no closure under Section 2(b) or prohibition under Section 2(e) shall take effect until notice of the closure or prohibition is posted near the place at which the closure or prohibition is to take effect.

GENERAL CLOSURE

7. No persons shall fish on reserve except as permitted by this By-law.

GENERAL PROHIBITION

8. No person shall use any gear to catch fish on reserve except a type approved by the Band Fisheries Conservation Officer or by permission of the Band Council.

NON MEMBERS

9. It is an offence against this By-law for any person who is not a member of the Nitinaht Band to fish on reserve without a permit issued pursuant to Section 3.

OFFENSE

10. It is an offence against this By-law to fish in contravention of a closure or a prohibition under this By-law.

MARKING OF GEAR

11. All Gear for fishing shall be attended at all times while in use, except that gear may be left unattended when in use if clearly labelled with owners' name. Failure to label gear according to this section is an offence.
under this By-law.

PENALTIES

12. Maximum penalty for commission of an offence under this By-law shall be:

   a) A fine of $10.00 or imprisonment for 3 days for the first offence in any calendar year; and
   b) A fine of $100.00 or imprisonment for 30 days or both for the second offence in any calendar year.

ADDITIONAL PENALTIES

13. In addition to, or in alternative to the penalties set in paragraph 12 above, the Band Fisheries Conservation Officer may prohibit any person who has committed any offence under these By-laws from fishing on reserve for any portion of the calendar year following the year in which the offence was committed. Such prohibition becomes effective as soon as it is communicated to the individual who is subject to the prohibition. Any violation of the prohibition is also an offence under this By-law.

COOPERATION WITH FEDERAL FISHERIES

14. The Band Fisheries Conservation Officer shall provide any information requested by any fisheries officer appointed pursuant to the Fisheries Act on demand. A fisheries officer may commence a prosecution for any offence under this By-law, and may enter any Reserve at any time.
JOINT MANAGEMENT

15. The Band Fisheries Conservation Officer, the Fisheries Conservation Assistants, and such other persons as the Band Concil may appoint, together with as many persons as the Minister of Fisheries & Oceans shall appoint (not to exceed the number appointed by the Band Council), constitute a joint management committee, with power to make recommendations to the Band Council concerning the fishery.

SALE OF FISH

16. Any fish caught under this By-law may be sold to any person provided that person selling the fish reports the number of fish sold to Band Fisheries Conservation Officer.

BAND COUNCIL MAY OVERRULE

17. The Band Counsil may overrule any decision of a Band Fisheries Conservation Officer made pursuant to this By-law.