

## "The Highest Right that a Man Hath": Maritime Property Rights Regimes and BC First Nations

Dianne Newell

*This paper examines conflicting North American notions of property as they pertain to the use and management of resources, particularly fish. It challenges the Western notion, favoured by the courts and economists, that fisheries are inherently "common property" resources that call for government regulation to protect them from excessive exploitation for commercial purposes. This view fails to acknowledge that Aboriginal people on the Pacific slope treated fisheries as communal property managed by the local harvesting group through consensus for ceremonial, exchange and subsistence purposes. The discussion looks at the various ways the perspectives of newcomers gained prominence over those of Aboriginal people, paying particular attention to the "Western myths" that have facilitated this process. This examination reveals that Aboriginal people successfully managed Pacific salmon stocks for thousands of years even though they had the technological capacity to destroy them. Conversely, successive state management systems, often developed on the advice of economists, have had devastating effects on the stocks they were designed to protect. In the future, First Nations' concerns and conservation practices will have to be taken into account for the survival of their cultures and the resource.*

## "Le droit le plus important qu'un homme possède": Régimes des droits patrimoniaux des Maritimes et les Autochtones de la Colombie-Britannique

*Cet article examine des notions nord-américaines contraires sur la propriété comme elles ont rapport à l'utilisation et la gestion des ressources, en particulier la pêche. L'article*

*met en question la notion occidentale, favorisée par les tribunaux et les économistes que les pêches sont fondamentalement une ressource du "bien commun" exigeant le règlement édicté par le gouvernement afin qu'elles soient protégées d'une exploitation excessive par des fins commerciales. Ce point de vue ne reconnaît aucunement les Autochtones habitant la pente du Pacifique qui ont traité la pêche comme propriété commune, gérée par le groupe locale des pêches, à l'intermédiaire d'un consensus pour des échanges cérémoniales et des fins de subsistance. Cette discussion examine comment les perspectives des nouveaux venus ont pris plus d'importance que celles des Autochtones, en prêtant une attention particulière aux "mythes occidentaux" qui ont facilité ce processus. Cet examen révèle des Autochtones gérant avec réussite les stocks de saumon du Pacifique pendant des milliers d'années tout en ayant la capacité technologique pour les détruire. Cependant, les systèmes gestionnaires de l'état qui les ont succédé, souvent développés d'après les conseils des économistes, ont eu des effets dévastateurs sur les stocks qu'ils étaient censé de protéger. À l'avenir, les questions et les pratiques de conservation des Autochtones seront prises en compte pour la survivance de leur culture et de cette ressource.*

PROPERTY: . . . All forms are ultimately French or English representations of the L. word (whence PROPRIETY) with or without conformation to the adj. *propre*, PROPER.

1. The condition of being owned by or belonging to some person or persons . . . hence the fact of owning a thing; the holding of something as one's own, the right (*esp.* the exclusive right) to the possession, use disposal of anything (usually a tangible material thing); ownership; proprietorship: = PROPRIETY . . . 1641 *Termes de la Ley* 226 *Propertie* is the highest right that a man hath or can have to any thing, which in no way dependeth upon another mans curtesie . . .

2. That which one owns; a thing or things belonging to or owned by some person or persons; a possession (usually material), or possessions collectively; (one's) wealth or goods . . . as distinguished from communal property (comparatively few examples before 17th c).

—*New Oxford English Dictionary on Historical Principles*, 1933 (1888).

Without fish we have no culture and with no culture we are not a people. . . . To us, the marine resources of BC are part of our struggle to survive and grow.

—Testimony of the Native Brotherhood of BC to the Commission on Pacific Fisheries Policy (Pearse Commission), 1981.

In the development of relationships between Aboriginal peoples and Europeans, then of transplanted Europeans of the Americas, the right to territory, its uses and derived resources have remained the issue of greatest consequence for Aboriginal peoples. In Western societies, property rights are prized economic rights, the "highest right that a man hath." Colonial society was predominantly property-owning; and the doctrine of the "freedom of the seas" and the open-access common-property definition of marine resources was, in Bonnie McCay's words, "accepted in international law to promote the expansion of European capitalism in the rest of the world."<sup>1</sup> The result for Aboriginal peoples has been a loss of control over most of the territories and resources that are necessary for their economic well-being and survival as distinct societies. The issue of territory is fiercely contested on Canada's Pacific Coast, where, before 1996, treaties with Canada have never been signed. For Canada's First Nations, competing claims to territory and resources here, as elsewhere, arise from very different assumptions about the fundamental notion of ownership and the relationship of groups to government.

Economists have a cultural bias towards "private property," finding "considerable comfort" in this form of property holding, according to economist David Bromley: The "property rights school of economics" tends to assume that any form other than private (individual) property is "insufficient" and prone to overuse and abuse.<sup>2</sup> What the pioneering legal historian J. Willard Hurst said of Americans, that they "preferred 'property in motion or at risk rather than property secure and at rest'," applies equally to all of North American settler society.<sup>3</sup> The higher intensity of use (greater alteration of the physical environment) by Europeans in North America was seen as their moral justification for seizing Native lands, as the other essays in this present volume demonstrate.

Fisheries are a special case when it comes to property regimes. H. Scott Gordon and Anthony Scott in the 1950s, and Garrett Hardin, who defined the metaphor "tragedy of the commons" ("the freedom in a commons brings ruin to all") in 1968, popularized, even "scientized," the notion that fisheries are inherently common property resources and necessitate government-formulated regulations (an old notion that Bonnie McCay



traces to Old World fisheries).<sup>4</sup> However, property regimes are culturally and historically specific. David Bromley, and others before him, reminded us that there is nothing about fisheries or any other resources that inherently make them a common or a private property resource<sup>5</sup>:

The understanding that property regimes—whether private property, state property, or common property—are complex constellations of rights, duties, privileges, and exposures to the rights of others would seem to advance the prospects for a more careful formulation of natural resource policy. It also helps to illustrate the conventional fallacy that considers "common property" as a free-for-all more properly understood as an open access regime.<sup>6</sup>

Pre-contact Aboriginal strategies of organizing salmon fisheries on the Pacific Slope differed from group to group, but, as has been persuasively argued by authorities such as Peter Usher, all systems of resource authority in Aboriginal Canada relied on communal property arrangements, "in which the local harvesting group was responsible for management by consensus . . . [and] management and production were not separate functions."<sup>7</sup>

A major issue in the B.C. Native-White debate over regulation and rights has to do with whether the traditional Aboriginal fishery was simply a subsistence one, or whether it also included commercial trade. The existence of commercial trade in the case of pre-contact Pacific Coast societies ought to have been obvious enough. Western preconceptions of Aboriginal economies, however, have prevented this. The legal argument for denying an Aboriginal right to fish commercially in Canada is that "Aboriginal rights" reflect pre-contact systems and values. Because pre-contact Aboriginal peoples supposedly did not use a market-based system—as narrowly defined by classical economics—to organize their production and exchange in their economies, they could not claim an Aboriginal right in "modern times" to participate in a fishery based on such a system. Nor could they claim that the government laws and regulations controlling commercial fisheries activity infringe on an Aboriginal right. Effectively, Europeans engaged in real "commerce" between nations dictated by the market; West Coast Natives engaged in "ceremonial" or kin-based "exchange." The European concession to Native economic traditions in Canada, as elsewhere, has been to grant subsistence privileges, such as "Indian food fisheries," which are so narrowly defined and retractable, and of such low priority, that they are not likely to threaten the dominant economic order.

The formal state regulation of all aspects of West Coast Native life in

British North America occurred during the 1870s, when the transformation of the British colony of British Columbia into the province of British Columbia (1871) coincided with and reflected the international shift from old European mercantile colonialism to modern (advanced) capitalism. For Aboriginal people, Canadian Confederation simply meant the yoke of a new colonial master, who thought regulation was necessary to maintain order and protect the mutually exclusive property and economic interests of new user groups. An 1888 Canadian government decree on fishing regulations for B.C. in a stroke separated Aboriginal fishing and personal consumption of fish from economic, social or cultural purposes; separated production of resources from management, officially transferring all management of this crucial food and commercial resource from Native people to the state; granted special privileges to Native people for a subsistence fishery but not a commercial one; and banned the use of all but the least efficient, individually owned and operated, traditional fishing gear and methods.<sup>8</sup> Similar regulations would soon be in effect in the other provinces, but only in B.C. was fishing both of major economic significance and a core economic and social activity for Aboriginal societies. This early European-based policy, which completely violated ancient customs, created, among other things, a lasting image of Pacific Coast Native people as simple subsistence-oriented people who were quite unlike the commerce-minded Euro-Canadians. Today, Natives who refuse to comply are cast as abusers of a scheme supposedly established for their benefit. And the existence of the 1888 fisheries ordinance and other similar culture- and rights-eroding regulations and enactments subsequently became part of the standard arguments of the Crown to claim blanket extinguishment of Aboriginal rights in the province. The tactic was to assert that these rights, if they ever did exist, were implicitly extinguished by various early land and resource conservation legislation and regulations, such as the *Fisheries Act*.<sup>9</sup> Even though the B.C. government recently has recognized the existence of Aboriginal rights, it has been slow to act on that acknowledgment, and as of October 1996, modern treaties have yet to be negotiated with B.C. First Nations, although an agreement in principle has been agreed with the Nisg'a (February 1996).

The issue of Native fisheries has been of paramount importance in the modern claims being advanced. A celebrated recent treaty case is *Delgamuukw et al. v. The Queen et al.* (1991), the remarkable three-year trial in the Supreme Court of B.C. involving the Gitksan-Wet'suwet'en comprehensive claim to ownership and jurisdiction over a 57,000-square-kilometre salmon-rich territory in the upper part of the Nass River and middle and upper part of the Skeena systems, and for Aboriginal rights in

the territory. The tribal council litigated because of the government's long-standing refusal to negotiate a modern treaty. In *Delgamuukw*, the fifty-one plaintiffs, all Gitksan and Wet'suwet'en hereditary chiefs, also laid claim to ownership of the beds and banks of the rivers within their territories, which ownership was said to carry over to the fishery.<sup>10</sup> When Chief Justice Allan McEachern of the B.C. Supreme Court dismissed the action against the Crown in right of the province and the plaintiffs' claims, he offered the judicial opinion regarding an Aboriginal right to commercial use of food fish: "the purpose of Aboriginal rights was to sustain existence in an Aboriginal society."

Chief Justice McEachern imagined pre-contact Gitksan-Wet'suwet'en societies as primitive, unorganized and lawless. In doing so he explicitly invoked the seventeenth-century thinking of the English philosopher Thomas Hobbes, writing: "there is no doubt, to quote Hobbs [*sic*], that Aboriginal life in the territory was, at best, 'nasty, brutish and short'." Effectively, he dismissed those societies. As one expert on Aboriginal land claims in B.C. put it:

McEachern made it clear that, as far as he is concerned, Aboriginal people led very primitive lives before Europeans gave them the chance to expand their horizons. . . . Aboriginal people did not lose their right to govern themselves, the chief justice's arguments indicated, for they never really needed traditional political institutions. Their problems were so simple that they could rely on their survival instincts and informal customs.<sup>11</sup>

Perhaps Mr. Justice McEachern could just as easily have invoked the writings of the celebrated Canadian satirist Stephen Leacock as Thomas Hobbes. In his little 1937 account of his travels to western Canada, Leacock mockingly encounters an annoying remnant of Native culture on Vancouver Island:

It is odd, by the way, that on the Island they have a whole lot of names. . . . Indian names, with the "U" pronounced out in full as "You";—such as Ucluit, and Uquittit, and Ucheesit and others I don't remember. British Columbian names are very easy: the natives' minds are very simple; they had to have something they could say and remember.<sup>12</sup>

For contemporary descendants of European maritime empires, myself included, it seems normal to participate in economic development in ways that are compatible with our traditions. We expect to be able to maintain ties with the past, to be proud of our traditions and heritage, and to cherish our



rituals. Our economic rights evolve. In keeping with the traditions of our ancestors, however, we are reluctant to grant Aboriginal peoples the same privileges. Our settler ancestors expected Native people to assimilate or perish. This helps to explain why for so long the treasured traditions of First Nations in Canada were regarded as quaint vestiges of ways of life of peoples who wanted to "cling to the past," or were "caught between the Stone Age and the shock waves of the future." Aboriginal peoples have not been properly credited with the roles they played as builders of the modern economy or contributors to modern culture and thought. Their Aboriginal rights are "frozen in time," or extinguished "with the passage of time." The American environmental historian Richard White critiques traditional histories of Native-White relations with a sea-coast metaphor:

The history of Indian-white relations has not usually produced complex stories. Indians are the rock, European peoples are the sea, and history seems a constant storm. There have been but two outcomes: The sea wears down and dissolves the rock; or the sea erodes the rock but cannot finally absorb its battered remnant, which endures.<sup>13</sup>

Most Westerners continue to imagine Native peoples in these ways, despite all evidence to the contrary.

The image of Aboriginal people as a "battered remnant that endures" is very much reflected in the area of fisheries history. It is usual in histories of commercial fishing to ignore Native fisheries, or at most to relegate them to the introductory remarks about the pre-origins of development support—"in the beginning, there were fish, Natives, and axiomatically, Native fisheries." Natives only appear again, if at all, in the final chapters, in which contemporary controversies over Aboriginal claims and case law concerning traditional Native fishing are identified as one of the problems for modern fisheries management to address. This follows an older, and unfortunately not altogether rejected, approach to the histories of "settler societies," which treated Aboriginal people as part of the natural backdrop against which the important, European drama took place.

Social scientists have until recently been the privileged, self-selected voices for Aboriginal people. This is not meant as a dismissal of their efforts. For several critical decades in the late nineteenth and early twentieth centuries they were among the only real advocates Native people had. The failure of neoclassical economic models to explain the economic behaviour of Native people—behaviour that must take culture, not simply individuals, into account—is partly to blame for the paucity of studies of Aboriginal economies. This, in turn, helps to explain the trend in traditional anthropological studies of Aboriginal societies to avoid extending the

examination of the economic behaviour of their subjects beyond a discussion of reciprocal and ceremonial exchange. It is worth remembering that Aboriginal Pacific Coast fish-based societies have been among the most studied in the world. Indeed, the "Northwest Coast culture area" has, in Rosalind Morris's words, "been utterly central to the anthropological imagination."<sup>14</sup> However, no broad-based study of Northwest Coast Aboriginal fisheries, pre- or post-contact, existed before *Tangled Webs of History* was published in 1993.

A legacy of salvage ethnology, which like Western economic theorizing, can be traced to the European Enlightenment, has been to create cultural divisions based on simplistic traits around tool-making or the subsistence-base of economies, and, beginning early in the twentieth century, to lash the great banks of cultural data thus collected by ethnologists to specific regional environments. Hobbesian cultural evolutionary schemes, developed under the Enlightenment and promulgated later by anthropologists in the late nineteenth and early twentieth centuries, placed "primitive" societies in distant settings of the world on the low end of the cultural evolutionary scale, and postulated that most of these peoples spent their lives on the edge of starvation. Ethnology was essentialist in orientation, comparative by design and directed at developing vast theories about the bounded cultural evolution and development of human societies. Ethnographic analysis was a methodology developed to help "fill in the gaps," the missing links in a long cultural chain crowned by European achievements. The purpose of the culture area approach, an early-twentieth-century outgrowth of ethnography, was to systematize the ethnographic collections of North American Natives, mainly for presentation in museums far removed from the territories of collection—but museums devoted to *natural history*, not to modern history, modern art, industry, or science and technology.

It is an important intellectual enterprise to untangle people and locales historically and study the stories and perceptions generated there. The new studies of Indigenous societies in regions under European domination are written in the "inter-tidal zone." They shift the focus from European, masculine agency to complex local agency. They critically examine the asymmetry, contingency and fluidity of the processes by which specific local cultures both resist and adapt to the homogenizing, standardizing tendencies of capitalist economic and social organization, and of Western science, to, in Arif Dirlik's words, "globalizing the local and localizing the global."<sup>15</sup> They challenge the colonial imperatives of traditional social inquiry and seek a broader range of voices. As such, these studies owe much to the new language, methods, theories and topics being developed within postmodern, postcolonial and feminist critiques in the social sciences.



In British Columbia, two dozen territorial cultural groupings of Aboriginal peoples, each speaking a mutually unintelligible language, had occupied the territories and had been living on the middens of their ancestors in Aboriginal B.C. for thousands of years when discovered by European explorers in the last decades of the 1700s. These were fish-based societies living at a level and population density well above the average of the world's non-agricultural societies—and many of the agricultural ones. European contact with these village-dwellers and this lush region came at the tail end of the European voyages through the Pacific—for Captain James Cook, it would be the last—and of their westward overland sweep across North America, led by Alexander Mackenzie at the end of the eighteenth century.

For thousands of years Northwest Coast societies had oriented their economic, social and symbolic lives around fishing. It is impossible to picture these societies without fishing at the core; the testimony of the Native Brotherhood of B.C. to the Pearse Commission—"without fish we have no culture and with no culture we are not a people"—strikes a familiar note. A beginning point is to appreciate the importance of "water" to Aboriginal fishing economies and to examine how water, in turn, affects the land and property rights issues.

It is common for non-Natives to regard Native people's idea of history as merely myth and legend, and to thereby dismiss it. Largely unquestioned are the Western "myths" about Aboriginal societies. Those pertaining to Pacific Northwest Coast people are:

1. the romantic notion that Natives traditionally were "propertyless," and had an open access system for fish and all other resources; that they did not actually use the land, at least not in a European sense, rather they simply grazed at random in a sea-side garden of Eden. This is the other side of an opposing Hobbesian view upheld by Chief Justice McEachern: that Aboriginal peoples lived at the edge of starvation. In either scenario, there would of course have been no need for Aboriginals to plan allocations of fish and other resources, to "organize" the resource: fishing must have been an undifferentiated, unregulated, free-ranging enterprise.
2. the sentiment that Natives lacked the technical capacity to over-harvest, to over-fish.
3. the romantic idea that Natives had no tradition of accumulating surpluses for trade for economic purposes; that they merely traded what they could spare to other groups that lacked supplies of their own.

4. the conception that the Aboriginal fishery, such as it was, is inherently unworkable in a modern, market-driven, open-ended economy.
5. the belief that the demarcated territory system of Pacific Coast groups must have been a product of European contact and the European-based fur trade.

This lore—much of which has been introduced and perpetuated by Western social scientists, in and out of the courtroom—has helped non-Natives to usurp the traditional fish resource by incorporating them into their *post facto* justifications for doing so. Just as European economic traditions shaped modern legal systems and social science disciplines, which have, in turn, unilaterally defined B.C. Aboriginal economies as "traditional" and intrinsically non-commercial, modern legal systems have also imposed on Native people economic regimes that separate their harvesting of fish and other resources from their use and their management and control of resources and resource environments.

Food resources in the Pacific Slope, as in any food-producing area, are cyclical in abundance and subject to local failure. It is reasonable to suppose that all societies had to organize for the low points in the cycles. Otherwise, they would not have survived. Despite the relative abundance of food sources on the Northwest Coast, societies there had to develop strategies for dealing with gluts, scarcities, minor fluctuations and local failures. This meant developing economic systems in which risks could be spread through diversification and a complex web of social and trade relations. Wayne Suttles' anthropological reading of this behaviour for the Coast Salish of the lower mainland of B.C. is "coping with abundance."<sup>16</sup> Northwest Coast peoples coped with abundance through a sophisticated array of fish-harvesting and fish-processing technologies; through trading networks, which helped fill in the gaps caused by periodic local scarcities of resources or insufficient harvesting sites (or periodically, the inability to harvest specific resources when available); and through feasting systems, to tap all the local environmental niches in order to share local surpluses. They likely could have lived on salmon almost exclusively, but they did not. They exploited every food niche available to them.<sup>17</sup>

The cornerstone of this complex scheme was the house territory tenure and resource use system so carefully recorded by the first European newcomers to the Pacific Northwest Coast. An early and significant finding of the European "discoverers" was their inability to collect fish or wood, or even fresh water, from the beaches without obtaining permission from the local resource-owning group.<sup>18</sup> These coastal cultures also claimed what we

can interpret as "salvage rights" to ships entering their ocean territories without permission.

Most of the salmon fishing took place in rivers and streams, not in tidal waters. Coastal and upriver nations invested human capital in these riverine salmon fisheries. These sites, and lake or near-shore ocean spawning and collecting grounds, fishing territories and individual sites, were not freely accessible: they were considered property of specific families, villages and nations. So, too, were fishing stations, gear and processing facilities, which were claimed by individuals, kin groups or whole villages, depending on what was involved. The so-called "nobles," or "men of property," who fascinated the first of the fur traders to probe the interior region in the early part of the nineteenth century, were not landed squires in the European sense; they were custodians, important local resource administrators. They were organizing and overseeing the local fisheries. This regime fits David Bromley's description of a true, culturally specific common-property regime, and flies in the face of the popular metaphor of the intrinsically wasted commons, the "common property" problems in the fishery. As David Bromley remarks, "the real *tragedy of the commons* is the process whereby indigenous property rights structures have been undermined and delegitimized."<sup>19</sup>

Many of the archival records left by the early European traders were not consulted by anthropologists in their early theorizing about the origins of the property systems of Northwest Coast Aboriginal peoples. They came to light more recently as a consequence of archival research undertaken on behalf of the Gitksan-Wet'suwet'en in support of their action in *Delgamuukw*.<sup>20</sup> Without question, a beneficial—and often intentional—side-effect of contemporary litigation, such as *Delgamuukw*, for many B.C. First Nations has been the collecting and recording of their oral traditions, genealogies and other historical records for educational and cultural purposes in their communities.

It is important to understand that Northwest Coast peoples had potentially destructive gear; they could have overfished but did not. The principal resource, Pacific salmon, are born in fresh water and spend most of their lives in the ocean, returning to spawn at the spot of their birth (they are anadromous), and unlike in the Atlantic, Pacific salmon die after spawning once (they are semelparous). All this meant that many of the Native societies stationed along the principal spawning routes and at the spawning grounds could have monopolized and destroyed this resource, but did not. Archaeological evidence demonstrates the presence of relatively stable fish-based economies for 3,000 to 5,000 years. Over the long haul, everybody along the spawning routes got fish. And, at the time of European contact, the rivers still teemed with fish.



The system worked this way. Each Pacific Coast group traditionally conducted a communal and family-based enterprise of fishing and fish processing in bounded tribal territories. They adapted a multiplicity of hand-crafted technology to local environments, and produced items for the immediate benefit of the local group and for inter-village and international trade. Many groups produced specialized products specifically for trade, and some groups obtained in trade fish and other items that they could have harvested themselves. There is plenty of documentary and oral history evidence about this.<sup>21</sup> Reciprocal use and other ancient rites and customs governed access to fish, and, unlike contemporary Europeans, Pacific Coast societies made no distinction between harvesting times and technologies for subsistence and harvesting times and technologies for exchange or other purposes. In this realm it really does not matter which B.C. coastal group we are talking about. Flexibility was crucial and it was deliberately, not accidentally, achieved.

The new scientific management that Canadian federal regulators introduced for B.C. fisheries at various points in the twentieth century, and especially in 1968 with the Davis Plan, not only destroyed the Native fishing system, but nearly destroyed the resource as well. How federal officials did this is one of the stories of *Tangled Webs*. The question is, where do we go from here? The latest experiments in fisheries management, which emphasize culture, ecology and sustainability, are directing attention to traditional fisheries and local ecologies, hence Native fishing traditions.

Since salmon run in nearly every tribal territory in B.C. and First Nations possess special rights with regards to fisheries, fisheries managers must take Aboriginal practices and concerns into account. In the absence of knowledge of and respect for traditions, however, extraordinary mistakes are possible, as the following brief example reveals.

Presentations given at a recent University of British Columbia Fisheries centre workshop, "Bycatches in Fisheries and Their Impact on the Ecosystem," portray the corner into which conventional fisheries conservation and management officials have painted themselves. Only one paper mentioned Aboriginal fisheries. It concerned the bycatch of steelhead and coho salmon "problem" in the Skeena river sockeye fishery, by representatives of provincial Fisheries Branch. The province is responsible for managing the sport-fished steelhead, not the commercial or the "First Nations" salmon fisheries, which are federal responsibilities.<sup>22</sup> The Skeena River salmon fishery is of interest to fisheries managers because of its considerable economic importance: it is the second largest salmon fishery in B.C., after the Fraser, and the third largest sockeye salmon (the most valuable of the

five commercially exploited pacific salmonids) fishery in the world, behind Bristol Bay, Alaska, and the Fraser River. It also is a thousands-of-years-old major fishery for Aboriginal people, though that was not part of the authors' discussion. The bycatch problem (harvest and destruction of non-target species) in this district is due to migration timings of the different species, and different stocks within each species, occurring at the same time. The authors of this presentation outlined how the enhancement of the Babine system in 1950s, which currently produces approximately 95 percent of the sockeye stocks in the Skeena River system, led to the increased fishing of the Babine sockeye and an increase in incidental kills of the less productive sockeye, coho and steelhead stocks of the Skeena. The bycatch exploitation of the latter, according to provincial steelhead biologists, was 62 percent (the federal fishery managers claim a much lower figure, 36 percent). To combat this speculative "toll," biologists have proposed varying the fishing effort over time and space and changing the type and/or use of harvesting gear. The provincial managers have developed a management model to account for catch and escapement. The model incorporates the "boxcar" theory: "fish on their route to the spawning grounds pass through a series of fisheries before escapement. Harvest is regulated by varying effort over time and location." In the model, the First Nations river fishery shares the "last box car," so to speak, with the sport fishery.

The solutions proposed indicate an ignorance of both the historical and political meaning of current fishing practices in the "First Nations River Fishery" on the Skeena. The authors note that in-river pressure comes from a First Nations fishery "mostly with gill nets but also by more traditional methods like harvesting using a gaff." They propose that First Nations drop these methods in favour of techniques that would guarantee a high rate of escapement of bycatch species—live traps, weirs, and fishwheels:

The First Nations river fishery is being encouraged to use alternative harvest techniques such as live traps, weirs, and fishwheels. These methods allow release of non-target species. Currently, few of these alternate fishing methods are in use and gill nets are still the primary means of harvest.<sup>23</sup>

Lurking behind this seemingly reasonable suggestion is one of the most scandalous events in Native-Euro-Canadian history in British Columbia: the federal government's war-like destruction of the enormously productive Aboriginal weirs on the Babine River nearly 100 years ago. The provision and permission for the use of gillnets in the river was a hard-won concession

from Ottawa, but gillnets and gaffs were hardly the gear of first choice for local First Nations.

B.C. First Nations are determined to play a pivotal role in encouraging the trend towards sustainability in resource management. This year alone, the Massett Band of Haida Gwaii (Queen Charlotte Islands) drew up creative plans for the Old Massett Wilderness/Marine Park and Trail System, both to protect their archaeological, forest and marine resources and to promote "eco-tourism" in their village. The "green movement" tends to champion Native causes, worldwide, in the belief that Natives are the natural guardians of the world's priceless resources, only to discover that Natives, while they may appreciate the moral support, often have their own economic agendas, which may of necessity include the development of these resources for their own economic needs. Unemployment in Old Massett at the height of the commercial fishing season this year ran at the 60-percent level. If this proposed community project goes ahead, Massett Haida will be maintaining their ties to the past and taking part in economic development in ways that are compatible with their traditions. This is, of course, only an interim step towards regaining an element of the control of their resource base that has been lost. Ultimately, the unfinished business of property rights will have to be resolved.

History shows that Aboriginal people in British Columbia will never give up their insistence on regaining effective control of resources in traditional areas of occupation. That there is no uniform response to the strategies and details is a separate matter, with complex local cultural and historical roots. Pacific Coast peoples have maintained distinct societies partly because of their refusal to join other groups when to do so would mean a loss of their "national" or "local" identities. First Nations have been successful at maintaining fluid relations with "outsiders," Native and non-Native alike. How is the particular historic stubbornness of Canada's Pacific Coast First Nations to be explained? No doubt, their culture and love of place was, and still is, much more encompassing and powerful than outsiders could ever have imagined.

## Notes

This is a revised version of "Maritime Property Rights—An Historian's Perspective" presented at the conference "Human Societies and Marine Ecology in the North Atlantic Region, 1500–1995," Memorial University of Newfoundland, St. John's Nfld., 20–22 October 1995.

- 1 See James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York and Oxford: Oxford University Press, 1992), pp. 16, 167–71, for a discussion of sources; see also Dennis J. Coyle, *Property Rights and the Constitution: Shaping Society Through Land Use*



*Regulation* (Albany: State University of New York, 1993). Both of these scholars see the right to acquire and enjoy private property as one of the most distinctive features of American society; as an economic and a fundamental right rooted in English political thinking of the seventeenth century, especially John Locke's theory of property rights; as a natural right that Locke fused with liberty; and in English common law and the American Revolution ("Liberty and Property"), Constitution and Bill of Rights, in the eighteenth century. David W. Bromley, *Environment and Economy: Property Rights and Public Policy* (Oxford and Cambridge, Mass.: Blackwell, 1991), argued against Locke's theory: all property rights flow from the collective as opposed to flowing from some alleged "natural rights." Bonnie McCay, "The Culture of the Commoners: Historical Observations on Old and New World Fisheries," in *The Question of the Commons: The Culture and Ecology of Communal Resources*, edited by Bonnie McCay and James M. Acheson (Tucson: University of Arizona, 1987), pp. 195-96.

- 2 Bromley, *Environment and Economy*, p. 3.
- 3 James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (Madison: University of Wisconsin Press, 1954), p. 24, cited in Ley, *The Guardian of Every Other Right*, p. 6.
- 4 See Fikret Berkes' various critiques of the "Tragedy of the Commons," especially "Common-Property Resource Management and Cree Indian Fisheries in Subarctic Canada," in *The Question of the Commons*, edited by McCay and Acheson, pp. 66-91; McCay, "The Culture of the Commoners," pp. 195-216.
- 5 Bromley, *Environment and Economy*, p. 26; and S.V. Ciriarcy-Wantrup and R.C. Bishop, "'Common Property' as a Concept in Natural Resources Policy," *Natural Resources Journal* 15, no. 4 (1975): 713-27; B.J. McCay, "Systems Ecology, People Ecology and the Anthropology of Fishing Communities," *Human Ecology* 6 (1978): 397-422; all cited in Berkes, "Common-Property Resource Management," p. 67.
- 6 Bromley, *Environment and Economy*, p. 39.
- 7 Peter Usher, "Aboriginal Property Systems in Land and Resources," in *Indigenous Land Rights in Commonwealth Countries: Dispossession, Negotiation and Community Action: Proceedings of a Commonwealth Geographical Bureau Workshop*, Christchurch, February 1992, edited by Garth Cant, John Overton and Eric Pawson (Christchurch: Department of Geography, University of Canterbury, and the Ngai Tahu Maori Trust Board for the Commonwealth Geographical Bureau, 1993), pp. 39-40. See also Usher and N.D. Banks, *Property, the Basis of Inuit Hunting Rights—A New Approach* (Ottawa: Inuit Committee on National Issues, 1986).
- 8 Canada, Order in Council, 26 November 1888.
- 9 The subject Dianne Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993).
- 10 *Delgamuukw et al. v. The Queen in Right of British Columbia and the Attorney General of Canada* (1991), 79 D.L.R. (4th) 185 (BCSC).
- 11 Frank Cassidy, "Aboriginal Land Claims in British Columbia," in *Aboriginal Land Claims in Canada*, edited by Ken Coates (Toronto: Copp Clark Pitman, 1992), pp. 23-24.

- 12 Stephen Leacock, *My Discovery of the West: A Discussion of East and West in Canada* (Toronto: Thomas Allen, 1937), p. 193.
- 13 Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge and New York: Cambridge University Press, 1991), p. ix.
- 14 Rosalind C. Morris, *New Worlds from Fragments: Film, Ethnography, and the Representation of Northwest Coast Cultures* (Boulder: Westview), p. 19.
- 15 Arif Dirlik (ed.), *What Is in a Rim?: Critical Perspectives on the Pacific Region Idea* (Boulder: Westview Press, 1993), introduction.
- 16 Wayne Suttles, *Coast Salish Essays* (Vancouver and Seattle: Talon Books and University of Washington Press, 1987). Two of his previously published essays, "Variation in Habitat and Culture on the Northwest Coast" (1960) and "Coping With Abundance: Subsistence on the Northwest Coast" (1968), are of particular significance for this discussion.
- 17 This discussion of pre-contact fisheries in B.C. relies on Newell, *Tangled Webs of History*, "The Aboriginal Fishery and Its Management."
- 18 James R. Gibson, *Otter Skins, Boston Ships, and China Goods: The Maritime Fur Trade of the Northwest Coast, 1785-1841* (Montreal and Kingston: McGill-Queen's University Press, 1992).
- 19 Bromley, p. 104.
- 20 Arthur J. Ray, "Commentary on the Economic History of the Treaty 8 Area," *Native Studies Review* 10, no. 2 (1995): 169-95.
- 21 Summarized in Newell, *Tangled Webs*, chap. 2.
- 22 Joel Sawada and Art Tautz, "Bycatch of Steelhead and Coho Salmon in the Skeena River Sockeye Fishery," Fisheries Centre Research Reports, University of British Columbia, *Workshop: Bycatches in Fisheries and their Impact on the Ecosystem*, vol. 2, no. 1 (1994), pp. 49-52.
- 23 Sawada and Tautz, "Bycatch of Steelhead and Coho," p. 51.