

**Coming Full Circle?  
An Environmental History of Herring Spawn Harvest  
among the Heiltsuk**

by

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## Abstract

This environmental history consists of two chapters. Chapter 1 contends that the Heiltsuk and other native groups maintained their fisheries by claiming harvest zones and limiting consumption therein. Federal Fisheries disrupted these systems based on common law notions that only the state could claim navigable waters. This approach precipitated stock collapses, forcing Fisheries to adopt strategies resembling aboriginal practices.

Common law's legacy endured, however, as demonstrated in Chapter 2. Despite bringing the band additional licenses, the net impact of the Heiltsuk's suits for expanded participation in the spawn industry remains ambiguous. The courts retained a selective definition of common law that nullified Heiltsuk territorial claims.

The unifying theme in this discussion is common law. The same common law assumptions that the state historically used to appropriate and mismanage Heiltsuk fisheries continue to undermine aboriginal fishing rights. This thesis proposes reassessing this approach in light of Canada's unique geography and history.

**Keywords:** herring spawn fishery; fisheries management; common law; native fishing rights; native dependency.

*To my family*

## Acknowledgments

When I began this study as an honours project three years ago, I felt duty-bound to inform my recently arrived supervisor, Dr. Joseph Taylor, of what an honours essay in SFU's Department of History entailed. He waited patiently for me to finish before replying, "Fine, that's what the Department expects, and this is what *I* expect..." Whether that essay or this thesis ever met his expectations, I leave for him to decide, but both works are the better for his tutelage. He, more than anyone else, assisted in the writing of this thesis.

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Other contributions were less direct but equally important. Dr. Jack Little cemented my interest in history with his engaging seminars and trenchant questions. Dr. Mark Leier taught me to consider why history matters and to write always with that question in mind. Simultaneously, Alec Dawson taught me never to sacrifice nuance to make history relevant.

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## **Abbreviations**

BCCA	British Columbia Court of Appeal
BCPC	British Columbia Provincial Court
BCSC	British Columbia Supreme Court
DIA	Department of Indian Affairs
DFO	Department of Fisheries and Oceans
HBC	Hudson's Bay Company
ILAB	Indian License Advisory Board
MSY	Maximum Sustainable Yield
NBBC	Native Brotherhood of British Columbia
NDP	New Democrat Party
PFA	Pacific Fishermen's Association
SCC	Supreme Court of Canada
UBCIC	Union of British Columbia Indian Chiefs

## Introduction

On 27 April 1988, brothers William and Donald Gladstone shipped 4,200 pounds of herring spawn-on-kelp from Bella Bella on BC's Central Coast to the Vancouver suburb of Richmond. The following day the two Heiltsuk fishers brought a pail of their catch to Seaborne Enterprises Ltd. in Vancouver. They asked the proprietor if he was "interested" in the product. He responded that he would not purchase spawn-on-kelp from native harvesters, so they exited the store. At that point, a platoon of fisheries officers who had been shadowing the Gladstones closed in and arrested them for trying to sell herring spawn without a license. The officers confiscated all 4,200 pounds of spawn-on-kelp and carted the Gladstones off to jail.<sup>1</sup>

For the provincial authorities, this was a straightforward case of poaching, but for the Gladstones and ultimately the Heiltsuk and many other First Nations groups, the stakes were much higher. By illegally transporting two tons of a tightly controlled fisheries product halfway across the province, the Gladstones had wagered their liberty against minor financial gain. That they were willing to engage in such high-stakes resistance bore testament to the poverty and desperation facing native fishers up and down the coast in the 1980s. Unemployment rates on the Heiltsuk reserves approached 50 percent, and many of those lucky enough to find work were still dependent on welfare and unemployment insurance for much of their income. A growing housing shortage

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<sup>1</sup> *R. v. Gladstone* [1996] 2 S.C.R. 723 <[http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol2/html/1996scr2\\_0723.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol2/html/1996scr2_0723.html)> [electronic source, accessed via internet (March 1, 2006)].

only intensified feelings of helplessness and despondency, and the ongoing land claims process between native groups and the government seemed doomed to tangle in a snarl of red tape. These conditions had driven several band members to abandon their reserves in search of work in Vancouver and other metropolises.<sup>2</sup>

This social wreckage was in large measure due to the disruption of a centuries-old environmental relationship.<sup>3</sup> The fecund waters of the Pacific had once provided coastal native groups with sustenance and wealth. Drawing on this environmental cornucopia, they developed rich cultures marked by rank stratification, specialized occupations, and extensive exchange networks. These dynamic cultures thrived, in part, because they included structures that mitigated their impact on local marine environments.<sup>4</sup> The Heiltsuk, for example, claimed ownership of the best harvest sites throughout their territory, and meted out access to these spaces through an elaborate system of rights based on kinship.<sup>5</sup>

By the early-twentieth century, however, the Canadian state had disrupted this environmental relationship. Basing their arguments on a narrow definition of British common law, government officials insisted that no entity save the state could claim

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<sup>2</sup> Michael E. Harkins, *The Heiltsuks: Dialogues of Culture and History on the Northwest Coast* (Lincoln and London: University of Nebraska Press, 1997), 23-24, 26-27; Cecil M. Reid, "Letter to Mr. Wayne Shinnars" (9 May 1985) Gladstone Appeal Books, Exh. 34, Vol. 10, p. 217.

<sup>3</sup> Drawing on Anna Bramwell's definition in *Ecology in the 20<sup>th</sup> Century* this thesis uses "environment" to refer generally to areas consisting of living and non-living entities and "ecology" to refer specifically to energy flows between living organisms within a closed system (New Haven, Yale University Press, 1989), 4.

<sup>4</sup> The systems that Native groups developed to mitigate their impact on the environment, however, differed in important ways from modern conservation; see Shepard Krech III, *The Ecological Indian: Myth and History* (New York: W. W. Norton and Co., 1999).

<sup>5</sup> Randy Bouchard and Dorothy Kennedy, "The Use of Herring Roe on Kelp by the Indian People of the Central British Columbia Coast: Report Prepared for the Department of Fisheries and Oceans" (Vancouver: DFO, 1989), 7.

stewardship over fish stocks because they were public-access resources. The Department of Fisheries and Oceans (DFO) thus opened industrial access to long-restricted fisheries.<sup>6</sup> The state's approach to resource management did not adequately limit harvests and the result was a sadly predictable collapse of local fish stocks. Governmental regulations also tended to favour capital-intensive industrial enterprises at the expense of smallholders such as aboriginal fishers, effectively transferring control of local resources to cannery operators. Stripped of a resource base that had sustained their culture for centuries, groups such as the Heiltsuk grew increasingly impoverished and marginalized.<sup>7</sup>

For the Gladstones and many other Heiltsuk, the emergence of an industrial spawn-on-kelp fishery in the early-1970s offered hope of returning wealth and industry to their impoverished reserves.<sup>8</sup> The Heiltsuk seemed well poised to assume a central role in this lucrative fishery. The DFO had shown an unprecedented resolve to expand aboriginal participation by granting native harvesters the majority of spawn-on-kelp licenses, and the agency had even adopted a regulatory scheme that precluded the sort of industrial overcapitalization that had squeezed native harvesters out of many other

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<sup>6</sup> For an excellent discussion of the common law's role in disrupting aboriginal fisheries, see Douglas C. Harris, *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001), 4, 15, 31. Throughout this study, I refer to the "Department of Fisheries and Oceans" or "Fisheries," meaning in each case the federal agency responsible for managing Canada's marine resources; the department has held several names, however, including "Marine and Fisheries," "Naval Service," and "Fisheries"; see Dianne Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993), 24.

<sup>7</sup> Newell, *Tangled Webs of History*, 53, 110; Joseph E. Taylor, *Making Salmon: An Environmental History of the Northwest Fisheries Crisis* (Seattle: University of Washington Press, 1999), 24; *Précis of the Royal Commission on Indian Affairs for the Province of British Columbia*, (Bella Bella, BC) [unpublished document, held at BC archives, Microfilm B637, file 504C], 57-63.

<sup>8</sup> Dianne Newell delves into Native experiences in the spawn-on-kelp industry in her fascinating essay "'Overlapping Territories and Entwined Cultures': Voyage into the Northern BC Spawn-On-Kelp Fishery," in Dianne Newell and Rosemary E. Ommery, eds. *Fishing Places, Fishing People: Traditions and Issues in Canadian Small-Scale Fisheries* (Toronto: University of Toronto Press, 1999): 121-144. Her work, however, is largely exploratory, and neglects to incorporate the insights of environmental history.

fisheries. Because the Heiltsuk were historically among the largest harvesters and traders of herring spawn on the Central Coast, they felt entitled to a special status in the spawn-on-kelp industry.<sup>9</sup>

By the late-1980s, however, the central role that the Heiltsuk envisioned had yet to materialize. The DFO had been willing to grant native harvesters the majority of licenses in the spawn-on-kelp fishery, but the agency adamantly refused to grant native groups exclusive control over spawn-on-kelp harvest within their historic territories and remained reluctant to expand the fishery before its ecological and commercial ramifications could be fully assessed. Thus despite repeated pleas to have the state affirm their aboriginal fishing rights, Heiltsuk fishers still collectively held but one spawn-on-kelp license with a maximum quota of eight tons. The disillusionment and desperation that resulted was more than ample motivation for the Gladstones to breach a legal system that seemed both unwilling and unable to defend their interests.<sup>10</sup>

These are the broad parameters of the environmental history of herring spawn harvest among the Heiltsuk. The complex web of marginalization and poverty underlying the Gladstones' attempt to poach herring spawn reveals the historical forces, both social and ecological, driving native dependency in the twentieth century.<sup>11</sup>

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<sup>9</sup> Kennedy and Bouchard, "The Use of Herring Roe on Kelp," 9.

<sup>10</sup> C. W. Shinnars, "Letter from C. W. Shinnars, Director-General Pacific Region, DFO, to Cyril Carpenter, Chief Councillor, Heiltsuk Tribal Council" (January 8, 1981) Reid v. Canada, Plaintiff's Docs, Exhibit 13; Douglas C. Harris's "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery," *UBCLR* 34:1 (2000), 223.

<sup>11</sup> Richard White's *The Roots of Dependency: Subsistence, Environment, and Social Change among the Choctaws, Pawnees, and Navajos* provides a very useful framework for discussing how environment, culture, and law have interacted to produce Native dependency in the twentieth century (Lincoln: University of Nebraska Press, 1983); Hugh Shewell, *Enough To Keep Them Alive": Indian Welfare in Canada, 1873-1965* (Toronto: University of Toronto Press, 2004).

Additionally, the Gladstones' appeal case serves as a metric for evaluating the continually changing status of aboriginal fishing rights in Canada during this period. Paying attention to environment, culture, and law in this case leads us toward important lessons about the history of First Nations, the science and politics of fisheries management, and the fate of oceans in the era of industrialization and the modern nation state.

What is most striking about this history is the central role played by federal fisheries agencies in both the wrecking and rebuilding of aboriginal communities. By appropriating and mismanaging historic aboriginal fisheries, the DFO prompted major declines in fish stocks that the Heiltsuk and other groups had relied on for centuries. As Chapter 1 will demonstrate, the Heiltsuk had effectively regulated their resources through elaborate systems of proprietary rights. The DFO failed to recognize the environmental benefits of these systems, deeming them obsolete and invalid. Hewing to the more civilized rules of the common law, the agency unleashed a maddening narrative in which policy makers dismantled a time-tested regulatory scheme, watched their best laid plans implode, and then tried to repair the damage they had wrought by enacting measures that were astonishingly similar in function to the rules that native groups had developed centuries earlier.

The advantage of the Heiltsuk's management scheme lay in its ability to claim spaces of harvest and then place real limits on consumption within these territories. Heiltsuk subgroups claimed the best sites for harvesting herring and herring spawn, and restricted access to these spaces according to rank and lineage. By refusing to grant claims over harvest areas, the Canadian state's common law approach downplayed the

importance of spatial regulation, and major stock declines soon resulted. Thus, when policy makers finally recognized the need for new forms of regulation in the late-1960s, the DFO chose to manage a new, native-oriented spawn-on-kelp fishery through a quota system that paralleled earlier native practices once deemed backwards and illegal.

Common law's legacy endured, however, as demonstrated in Chapter 2. The Heiltsuk's struggle for increased involvement in the spawn-on-kelp industry was repeatedly stymied by policy makers who both recognized that native groups held a special claim to BC fish resources but also continued to hold a definition of aboriginal fishing rights that presupposed the inviolability of state sovereignty. Policymakers were therefore unwilling to grant the Heiltsuk or any other native group sole control over spawn-on-kelp harvest within their historic territories, regardless of the validity of such claims.<sup>12</sup>

Thus ideas about the common law have been a key force shaping the shifting fate of First Nations in general and Heiltsuk rights more specifically. The same legal philosophies that drove the DFO to appropriate and mismanage Heiltsuk fisheries also prevented the Canadian state from fully acknowledging aboriginal rights in the industrial spawn-on-kelp fishery. These broad-scale issues can seem almost ethereal at moments, but in a Richmond parking lot in April 1988, they were central to shaping the fate of two brothers who simply wanted to make a living by selling a product that their father's father's father had traded with no molestation. This thesis is ultimately a call for policymakers to pay greater attention to the historical and geographical dynamics of allocating and managing BC's herring stocks, and this admonition is as relevant to the judiciary as to fisheries officials.

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<sup>12</sup> Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery," 196.

# 1

## **Coming Full Circle? Lessons Learned, Lost, and Relearned in an Evolving Native Fishery**

For centuries Heiltsuk subgroups gathered each spring along stretches of the coast to harvest and process herring spawn. They placed pre-cut kelp as well as branches and entire trees of hemlock in shallow bays and coves for herring to spawn on. Using dugout cedar canoes, harvesters then collected the spawn-laden product. The Heiltsuk consumed some spawn fresh, but they preserved the majority for personal consumption or trade. A number of environmental and cultural factors contributed to this fishery's sustainability but the Heiltsuk also developed regulations to mitigate their impact on local herring stocks. Families and crest groups claimed ownership over the best sites for harvesting herring spawn and limited harvest within these spaces. Other Northwest Coast native groups made similar claims, effectively dividing the coast into a series of autonomous management zones. The perhaps inadvertent result was a complex regulatory scheme that was responsive to regional variations but also placed real limits on harvest coast wide.

The arrival of European traders and settlers brought major changes to the Heiltsuk people and their herring spawn fishery. Operating on a narrow definition of common law, Europeans insisted that Pacific herring stocks could not be claimed. They wanted the Heiltsuk to treat herring products as commodities in a capitalist system of exchange, thus opening access to a fishery that had long been claimed and controlled. The Heiltsuk

struggled to retain control over their territory and resources, but ultimately were unsuccessful. Stripped of a marine-centred resource base that had sustained their culture for centuries, they became an impoverished people, relegated to the margins of a larger colonial project. The arrival of non-native peoples within the Heiltsuk's historic territory disrupted fish stocks as well. The same common law philosophy that colonizers used to justify appropriating Heiltsuk marine resources made effective management of these resources nearly impossible. In the case of herring, complete stock collapse was only narrowly averted in the late-1960s.

Such debacles forced the Department of Fisheries and Oceans (DFO) to develop new forms of harvest and regulation. Thus in the mid-1970s the agency endorsed the creation of an industrial spawn-on-kelp fishery within the Heiltsuk's historic territory. Ironically, this fishery bore a striking resemblance to aboriginal practices the Canadian state had once rejected as primitive and unlawful. The industrial fishery relied on fundamentally different technology from its aboriginal antecedent but the basic premise of encouraging herring to deposit spawn on a retrievable substrate remained the same. The fishery also retained an orientation towards external markets, even if the form and extent of exchange shifted radically. Most notably, the Canadian state managed the industrial fishery through a quota scheme that paralleled systems that the Heiltsuk and other coastal Native groups had developed centuries earlier. In a bold departure from previous federal management strategies, this quota scheme assigned each licensee a specific space of harvest and placed fixed limits on harvest within these areas.

## I

Before discussing the Heiltsuk's aboriginal herring spawn fishery, a brief overview of the band's pre-contact culture is in order. The Heiltsuk occupied an expansive swath of territory on the central Northwest Coast, spanning north to Milbank Sound, south to Calvert Island, and east to the terminus of Dean Channel. This vast and fecund dominion lay almost entirely within the Coast Forest Biotic zone, where mild winters, cool summers, and frequent rainfall prevailed. The Heiltsuk's historic territory encompassed a diverse arboreal landscape, including stands of western red cedar, western hemlock, and Sitka spruce. In addition, an abundance of shrubs provided the Heiltsuk with comestible berries. Blacktail deer, mink, and beaver inhabited the mainland and islands, while mountain goats, marten, and river otter were present on the mainland only. Several bird species, including numerous waterfowl, passed through the Heiltsuk's territory on seasonal migrations. The region also contained a cornucopia of marine resources. Five species of Pacific salmon spawned in the many rivers that coursed through the Heiltsuk's territory and sizeable populations of halibut, herring, rockfish, cod, flounder, and hake congregated offshore.<sup>13</sup>

The Heiltsuk exploited these myriad resources within a seasonal cycle. The Heiltsuk year was divided into a secular season, when subsistence activities were at the fore, and a sacred season, in which ceremonies took precedence. The secular season extended from late-February through October. The Heiltsuk divided into a number of

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<sup>13</sup> Susanne F. Hilton (Stories), "Haihais, Bella Bella, and Oowekeeno," in William C. Sturtevant, general ed. and Wayne Suttles, volume ed., *Handbook of North American Indians: V. 7: Northwest Coast* (Washington: Smithsonian Institution, 1990), 312, 314; Harkins, *The Heiltsuks*, 22.

familial subgroups and scattered to outlying resource camps. Lineage or crest groups claimed ownership over harvest sites, placing finite limits on who could gain access to resources and when. Giving physical testament to their claim, groups often erected permanent house posts at resource camps. The secular season began in late winter with mink trapping, but was not fully underway until early spring, when the Heiltsuk gathered herring spawn and jigged for groundfish. Summer marked the arrival of spawning salmon, which the Heiltsuk captured using weirs, fishtraps, or dipnets. Summer was also the favoured season for hunting marine mammals with harpoons, clubs, or bows and arrows. In fall, the Heiltsuk's focus shifted from the seascape to the landscape. They used dogs to track down animals, which were then snared or speared. An additional subsistence strategy was intertribal trade. The Heiltsuk acquired goods they did not produce, such as eulachon oil, from the Bella Coola, Oowekeeno, and Kitamaat peoples in exchange for products that these groups lacked.<sup>14</sup>

During the sacred season, which stretched from November through January, the Heiltsuk clustered in large, semi-permanent winter villages. The sacred season was a time to build alliances and garner personal rank through elaborate exchanges. The word "potlatch" is a product of Chinook jargon and the Heiltsuk possessed no such umbrella term in their dialect. They instead recognized four distinct forms of ceremonial exchange: First were formal feasts hosted in a chief's home and attended by members of his village. Such feasts demonstrated the chief's respect for his title and his concern for the group's well being. Second were intervillage feasts hosted by rival chiefs. The aim of these gatherings was to increase personal and family prestige by exceeding your counterpart in munificence. Third was the exchange of secular goods, such as animal

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<sup>14</sup> Hilton, "Haihais, Bella Bella, and Oowekeeno," 314-315, 318; Harkins, *The Heiltsuks*, 7.

skins, for sacred goods, including canoes, boxes, and masks. The Heiltsuk believed that the accumulation of secular goods, in that it facilitated the manipulation of sacred ones, offered supernatural powers. The final form of ceremonial exchange that the Heiltsuk recognized involved the distribution or destruction of material goods to restore social harmony following a death or feud.<sup>15</sup>

The above ceremonies served a variety of social functions but all reinforced the Heiltsuk's strict social hierarchy. The primary social unit in Heiltsuk society was the house (*núyemgiwa*). A *núyemgiwa* consisted of a familial group that shared a dwelling or dwellings, oversaw resources and territory, and held claim to one or more titles. These titles, which were generally passed down from mother to first daughter, divided Heiltsuk society into four distinct social ranks – chiefs, nobles, commoners, and slaves. Those holding chiefly names had the authority to allocate resources, though most of their puissance was derived from persuasion, rather than enforcement. Beneath chiefs were nobles. These were past and future chiefs, as well as close relatives of chiefs, distinguished by their ability to host feasts and ceremonies. Next in rank were commoners, whose designation entitled them to token participation in ceremonies. Below commoners were the *xámála*, a group that possessed no ceremonial titles whatsoever. The *xámála*, who consisted of slaves, war captives, and other pariahs, were considered non-persons and banned from participation in ceremonies on pain of death. On a higher and more abstract level than the house, Heiltsuk society was divided into

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<sup>15</sup> Harkins, *The Heiltsuks*, 129.

four clans: Raven, Eagle, Orca, and Wolf. They were loosely ranked in the order they appear above, and all clans, with the exception of Wolf, held chiefly titles.<sup>16</sup>

It would be inane to try to situate pre-contact Heiltsuk culture within a unilinear teleology of human progress that inevitably culminates in capitalist modernity. At the same time, an analysis of Heiltsuk society prior to the arrival of non-native settlers reveals a highly stratified people with a strong sense of property and a keen interest in trade – a people well prepared to accommodate multiple aspects of Euro-American culture and economics. The semantics here matter. Using the term accommodation as opposed to acculturation underscores the ability of native groups to produce a hybrid identity by variably resisting and adopting facets of their non-native counterparts. In recognition of the Heiltsuk's capacity for accommodation, this study will perceive the shifting ways that they conceptualized and engaged in industrial fisheries as representing, not an incomplete transition to capitalist modernity but an ongoing process of creating and recreating a hybrid cultural identity.<sup>17</sup>

The Heiltsuk were one of many native groups on the Northwest Coast that developed elaborate means of harvesting and processing herring spawn.<sup>18</sup> Assessing the

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<sup>16</sup> Hilton, "Haihais, Bella Bella, and Oowekeeno," 317; Harkins, *The Heiltsuks*, 4, 6, 8, 10; Ronald L. Olson, *Notes on the Bella Bella Kwakiutl* (Berkeley and Los Angeles: University of California Press, 1955); 324, 326.

<sup>17</sup> Richard White, *The Middle Ground: Indians, Empire, and Republics in the Great Lakes Region, 1650-1815* (New York: Cambridge University Press, 1999), ix, x; Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2000), 7, 17.

<sup>18</sup> For firsthand accounts of non-Heiltsuk aboriginal herring spawn harvest on the Northwest coast, see G.M. Sproat, *The Nootka: Scenes and Studies of Savage Life* (London: Smith Elder, and Co., 1868), 224; Franz Boaz, *Ethnology of the Kwakiutl: Based on Data Collected by George Hunt: Thirty-Fifth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution: Part 1* (Washington: Government Printing Office, 1921), 184-185, 254-255, 422-425; John R. Jewitt, *A Journal, Kept at Nootka Sound* (New York: Garland Publishing Inc., 1976 [first printed in 1807]), 4-8, 19, 26-27,

nature and extent of each group's harvest is a task of continuing relevance, as the Canadian state relies on this data to define aboriginal rights within the industrial spawn-on-kelp fishery. Archaeological evidence indicates that the Heiltsuk have harvested herring products for approximately 2,500 years, but because herring spawn leaves no archaeological remains, the precise duration of this particular harvest is unknown. Historical records indicate that the Heiltsuk have been harvesting herring spawn since at least the late-eighteenth century, but this timeframe merely reflects the arrival of European chroniclers, who more than likely bore witness to a subsistence strategy that far pre-dated their presence.<sup>19</sup>

Each spring, the Heiltsuk dispersed to a number of outlying resource camps to gather herring spawn. The most popular harvest method involved placing organic substrates in shallow bays and coves for the herring to expel their spawn on. The Heiltsuk employed giant kelp (*Macrocystis integrifolia*) and boa kelp (*Egregia menziesii*) as substrates, but preferred branches and entire trees of hemlock. William Fraser Tolmie, a Hudson's Bay Company (HBC) agent stationed among the Heiltsuk in the early-nineteenth century, described the local herring spawn harvest:

The Sound now abounds with herring, which are depositing their spawn plentifully – they eject it on branches of pine [almost certainly hemlock] placed in

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31, 33, 35, 38, 40-42; Robert Haswell, "Robert Haswell's Log of the First Voyage of the Columbia" in Frederic W. Howay, ed., *Voyages of the "Columbia" to the Northwest Coast 1787-1789 and 1790-1793* (Boston: The Massachusetts Historical Society, 1941), 64; Moses Smith, "Harvesting Herring Eggs: Ehattesaht-Confederacy" (1973) [unpublished document, held at Union of British Columbia Indian Chiefs Library, Vancouver, B.C., Fsm 104].

<sup>19</sup> W. Kaye Lamb, *The Journal and Letters of Sir Alexander Mackenzie* (Cambridge: Cambridge University Press, 1970), 384; Bouchard and Kennedy, "The Use of Herring Roe on Kelp by the Indian People of the Central British Columbia Coast," 5.

convenient stations by the Indians by whom it is used as food & collected in great quantities.<sup>20</sup>

Sometimes, harvesters hung trees and other plant materials from logs or rough wooden frames specially constructed for spawn harvest, a practice that continues in the industrial fishery. An unidentified Heiltsuk informant detailed this technique to anthropologists in the 1960s: “We have to go around the bushes to get the good shape of tree, and then we put in the little log, good-sized log, and hang it up in the log down to the bottom of the water. Then the herrings get in between that and the water and lay some eggs in there.”<sup>21</sup> The Heiltsuk employed such a variety of plant materials both out of convenience and because each substrate imparted a distinct flavour on the product.<sup>22</sup>

Though herring spawn could be eaten fresh, the Heiltsuk preserved the majority of their yield for local consumption or trade with neighbouring groups. Harvesters removed spawn-laden kelp and hemlock from the water when egg coverage was thick and even but not so dense as to hinder processing. The appearance of herring in very shallow water off certain local beaches was one indication that the main spawning was complete and substrates were ready for retrieval, but a trained eye could ascertain from a boat whether the product was ready for harvest. Following retrieval, egg masses were chopped into smaller pieces for ease of transport and relocated to a drying station. The

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<sup>20</sup> Quoted in William Fraser Tolmie, *The Journals of William Fraser Tolmie: Physician and Fur Trader* (Vancouver: Mitchell Press Ltd., 1963), 274; Plaintiff’s Council, “Summary of Evidence, Reid et al v. HMQ: Cecil Reid Evidence in Chief” Federal Court of Canada, 15; Kennedy and Bouchard, “The Use of Herring Roe on Kelp,” 4; Susanne Stories (Hilton) and Jennifer Gould eds., *Bella Bella Stories: B.C. Indian Advisory Committee Project, 1968-69* [unpublished document, archived at B.C. Archives, NW 970.82 H656 5], 105.

<sup>21</sup> Stories and Gould, *Bella Bella Stories*, 105.

<sup>22</sup> Newell, “Overlapping Territories and Entwined Cultures,” 125, 128; Newell, *Tangled Webs of History*, 190; Hilary Stewart, *Indian Fishing: Early Methods of the Northwest Coast* (Seattle and London: University of Washington Press, 1977), 124, 127.

Heiltsuk hung spawn-laden kelp or hemlock on exposed racks or trees, where strong winds and sunlight desiccated the material. It was then sorted according to quality and placed in covered wooden boxes. With the arrival of European explorers and settlers, the Heiltsuk began to use salt as a curing agent. Salt-cured spawn lasted much longer than dried spawn and was relatively impervious to insects.<sup>23</sup>

If properly harvested and preserved, herring spawn was a highly prized trade item. Available evidence suggests that the Heiltsuk were the primary suppliers of herring spawn on the Central Coast, and other native groups have attested to this fact. The Heiltsuk traded substantial amounts of herring spawn to their Bella Coola, Kitamaat, Kwakwaka'wakw, and Tsimshian neighbours, often in exchange for eulachon oil. Accounts from the late-eighteenth and early-nineteenth century corroborate the Heiltsuk's central role in herring spawn production. On 23 July 1793, Alexander Mackenzie described a group of native people, who based on their territory were probably Heiltsuk, as "traders in various articles, such as cedar-bark..., *fish-spawn*, copper, iron, and beads... For these they receive in exchange roasted salmon, hemlock-bark cakes, and other kind made of salmon roes, sorrel, and bitter berries..."<sup>24</sup> Mackenzie specifically identifies "salmon roes", and thus it is reasonable to assume that the unspecified "fish-spawn" refers to herring eggs. On 16 April 1834, HBC agent William Fraser Tolmie made the following entry in his log: "From 15 to 20 large canoes of Wacash's [a powerful Heiltsuk chief] people passed on their way to the Caughquill

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<sup>23</sup> Stories and Gould, *Bella Bella Stories*, 54, 105; Newell, *Tangled Webs of History*, 190.

<sup>24</sup> Lamb, *The Journal and Letters of Sir Alexander Mackenzie*, 384; Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery", 201; Hilton, "Haihais, Bella Bella, and Oowekeeno," 314; Kennedy and Bouchard, "The Use of Herring Roe on Kelp," 9; Stories and Gould, *Bella Bella Stories*, 55; Paula Pryce, "The Manipulation of Culture and History: A Critique of two Expert Witnesses," *Native Studies Review*. 8, 1, (1992), 41; Newell, *Tangled Webs of History*, 190.

country—the canoes were laden with boxes, hampers &c filled with dried herring spawn, which they are to barter for Oolaghans...”<sup>25</sup> Such notations reveal that herring spawn was already a longstanding item of trade and that contemporary aboriginal rights should encompass the harvest of spawn for commercial as well as subsistence purposes.

As with any mode of resource extraction, the Heiltsuk’s aboriginal herring spawn fishery arose through an interaction of environment and culture. The most significant environmental variable shaping this fishery was the life history of Pacific herring (*Clupea harengus pallasii*). Pacific herring’s unique spawning habits provided the Heiltsuk with an abundant, low-fat, high-protein food-source that could be gathered with rudimentary technology. In March and April, coastal waters in the Heiltsuk’s historic territory teemed with spawning herring. Each female herring ejected 20,000 to 40,000 eggs, for a coast-wide distribution in the low trillions. The herring deposited their eggs between one and four layers thick on shallow vegetation in protected bays and coves. Given the massive quantity of spawn, and its easy accessibility, it is little wonder that native groups developed elaborate means of collecting, processing, and consuming this resource.<sup>26</sup>

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<sup>25</sup> Tolmie, *The Journals of William Fraser Tolmie*, 276; Harris, “Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery” 201.

<sup>26</sup> Newell, “Overlapping Territories and Entwined Cultures,” 124; A.S. Hourston and C.W. Haegele, *Herring on Canada’s Pacific Coast* (Ottawa: Campbell Printing, 1980), 1-2; Rodelio Fernandez Subade, “Management of Roe-Herring Fisheries in British Columbia” (unpublished M.A. thesis) (Burnaby: Simon Fraser University, 1993), 5; L.A. Galkina, “Survival of spawn of the Pacific herring (*Clupea harengus pallasii* Val.) related to the abundance of the spawning stock” in A. Saville ed. *Symposium on the Biology of Early Stages and Recruitment Mechanisms of Herring* (Copenhagen: Conseil International pour l’Exploration de la Mer, 1971), 33; F.H.C. Taylor, “Variations in Hatching Success in Pacific Herring (*Clupea Pallasii*) Eggs With Water Depth, Temperature, Salinity, and Egg Mass Thickness” in *Symposium on the Biology of Early Stages and Recruitment Mechanisms of Herring*, 34-41; C.W. Haegele and J.F. Schweigert, “Egg Loss in Herring Spawns in Georgia Strait, British Columbia” in *Proceedings of the International Herring Symposium, Anchorage, USA, October 23-25, 1990* (Anchorage Alaska: University of Alaska Fairbanks, 1991), 309; Stories and Gould, *Bella Bella Stories*, 11.

Subsequent stages in the life history of Pacific herring may reveal why the Heiltsuk's harvest did not bring about a major decline in stock recruitment. Following hatching, herring spend approximately thirteen weeks as larvae. This stage partially coincides with the out-migration of Pacific salmon, which feed on larval herring. Mortality rates for larval herring can thus approach 99 percent, so year-class strength (the abundance of an age-group) at the adult stage is determined based on larval, not egg survival. This may explain why the Heiltsuk's spawn harvest was able to continue for centuries without depleting stocks. The remainder of the first year of life (July through March) is known as the juvenile stage and fish that have completed one year of life are considered immatures. During these two stages, herring shift from shallow bays and coves to offshore feeding grounds. All fish that will mature and spawn during the next spawning season are classified as adults. Between October and December, adult herring gather into large aggregations and begin their annual migration to their inshore spawning grounds, where the life cycle is renewed. While herring return to predictable areas each year to spawn, there is evidence to suggest that larvae mix among different spawning sites and thus each spawning site may not represent a truly distinct stock. This mixing of stocks might also help to explain why native groups were able to harvest herring spawn in concentrated areas without bringing about a long-term decline in arriving spawners.<sup>27</sup>

The Heiltsuk's herring spawn harvest was not solely the product of environmental variables. In this fishery, culture and nature were bound together in a complex circular

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<sup>27</sup> Hourston and Haegele, *Herring on Canada's Pacific Coast*, 2-4; V.I. Karpenko and V.V. Maksimenkhov, "The Impact of Pacific Salmon on Herring Survival in the Western Bering Sea" in *Proceedings of the International Herring Symposium*, 445; F.H.C. Taylor, *Life History and Present Status of British Columbia Herring Stocks* (Ottawa: Fisheries Research Board of Canada, 1964), 3; D.E. Hay and P.B. McCarter, "Retention and Dispersion of Larval Herring in British Columbia and Implications for Stock Structure" in *Proceedings of the International Herring Symposium*, 107.

relationship. The Heiltsuk's semi-nomadic subsistence cycle made a resource that arrived at predictable places and times highly desirable. At the same time, the seasonal nature of herring spawn and other marine resources promoted this subsistence strategy to begin with. Similarly, the Heiltsuk's inter-tribal exchange network placed a premium on a regionally specific, preservable food item like herring spawn, but resource disparities between the Heiltsuk and neighbouring groups encouraged this exchange in the first place. Perhaps most importantly, local environmental conditions had a profound effect on the Heiltsuk's herring spawn harvest, but this fishery was also capable of altering the local marine environment. The Heiltsuk largely mitigated their environmental impact, however, by claiming and managing spaces of harvest within their historic territory.<sup>28</sup>

To pre-emptively derail a misguided train of thought, it must be emphasized that the Heiltsuk and other Northwest Coast Native groups were not too sparse, too simple, or too unsophisticated to wield an impact on their resource base. To provide a straightforward illustration, the Heiltsuk were capable of completely blocking local salmon runs with stone and wooden weirs. Instead they developed systems regulating when, where, and by whom weirs could be deployed, and in the process ensured a continuing supply of salmon year after year. The potential impact of the Heiltsuk's herring spawn harvest is more ambiguous. Unlike salmon, spawning herring never passed through an opening small enough to be completely obstructed by weir or fishtrap. Moreover, the full extent of the Heiltsuk's herring spawn harvest may never come to

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<sup>28</sup> Douglas C. Harris, *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001), 5,21; Newell, *Tangled Webs of History*, 42 Arthur F. McEvoy, *The Fisherman's Problem: Ecology and Law in the California Fisheries, 1850-1980* (Cambridge: Cambridge University Press, 1986), 30; Newell, "Overlapping Territories and Entwined Cultures," 122; Taylor, *Making Salmon*, 24; Stewart, *Indian Fishing*, 18.

light, as herring eggs do not enter the archaeological record and diseases had greatly reduced Heiltsuk numbers by the time Europeans documented this harvest. Nonetheless, the simple fact that these eggs were so accessible and were traded over such great distances seems to suggest that the Heiltsuk could have wielded at least some pressure on herring stocks.<sup>29</sup>

The Heiltsuk curbed their impact on local herring stocks, however, by delineating spaces of harvest and restricting access to these areas. Lineage or crest groups claimed ownership over the most productive spawn gathering sites, meting out access according to elaborate systems of kinship. In some instances, these claims persisted well into the modern era. Writing in the 1960s, anthropologist Philip Drucker observed that Campbell Island “belonged to the Oyaltx [a Heiltsuk subgroup] for herring and herring eggs.”<sup>30</sup> Such assertions of ownership were real but not immutable. When neighbouring groups ran short of dried salmon, for instance, the Heiltsuk would grant them access to a fishing camp called *Mauwash*, Heiltsuk for “You just have to go and ask me.”<sup>31</sup>

Claiming access to a space was accompanied by a set of regulations outlining comportment. The Heiltsuk placed both direct and indirect limits on their herring spawn yield through myths and taboos outlining how, by whom, and for what purposes spawn could be harvested. The band recognized only certain substrates as being suitable for

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<sup>29</sup> Taylor, *Making Salmon*, 13; Harris, *Fish, Law, and Colonialism*, 25; McEvoy, *The Fisherman’s Problem: Ecology and Law in California Fisheries, 1850-1980* (Cambridge: Cambridge University Press, 1986), 21; Kennedy and Bouchard, “The Use of Herring Roe on Kelp,” 5.

<sup>30</sup> Quoted in Kennedy and Bouchard, “The Use of Herring Roe on Kelp,” 7; McEvoy, *The Fisherman’s Problem*, 21; Harris, *Fish, Law, and Colonialism*, 8, 21; Newell, *Tangled Webs of History*, 42.

<sup>31</sup> Quoted in Stories and Gould, *Bella Bella Stories*, 53; Philip Drucker, *Cultures of the North Pacific Coast* (San Francisco: Chandler Publishing Company, 1965), 150; Newell, *Tangled Webs of History*, 190.

gathering herring spawn and lineage and crest groups often controlled these materials. The band also believed that only particular people should participate in the spawn harvest. Menstruating and pregnant women were forbidden from entering harvest sites, as were recent widows or widowers. A doctor serving BC's Northwest Coast in the 1960s observed that "It is well known among the older [Heiltsuk] Indians that if a husband or wife, whose partner has died, visits the fish-eggs' camp before a year has elapsed, the herring will at once quit their usual breeding grounds."<sup>32</sup> Finally, the Heiltsuk often consumed herring spawn in ceremonial feasts, in which elaborate controls governed how food was prepared and eaten. By delineating spaces of harvest and placing direct and indirect limits on harvest within these places, the Heiltsuk ensured that catch did not approach the full yield capacity of local herring stocks. This may reflect a learned respect for short-term environmental fluctuations, but such a claim is difficult to substantiate.<sup>33</sup>

The Heiltsuk's management of local herring spawn harvest would have been far less effective had other Northwest Coast Native groups not also put systems in place to mitigate their impact on herring stocks. Like the Heiltsuk, most native groups on the Northwest Coast managed herring spawn and other marine resources by claiming spaces of harvest and limiting harvest within these spaces. Various historical records attest to this. In 1789, American sailor Robert Haswell observed that the Nuu-chah-nulth people prohibited anyone from fishing for adult herring near Nootka Sound for a period of weeks leading up to the spawn harvest. A century later, lumber camp operator Gilbert Malcolm

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<sup>32</sup> R. Geddes Large, *Drums and Scalpel: From Native Healers to Physicians on the North Pacific Coast* (Vancouver: Mitchell Press Ltd., 1968), 48; Harkins, *The Heiltsuks*, 84.

<sup>33</sup> McEvoy, *The Fisherman's Problem*: 53; Newell, *Tangled Webs of History*, 191.

Sproat noted that every Nuu-chah-nulth had “his own piece of ground” for harvesting herring spawn. Rules governing the consumption of herring spawn could also place indirect limits on harvest. The Kwakwakawakw people, for instance, would only eat dried herring spawn if it were mixed with salmonberry shoots and fish oil. Consumption of spawn was thus partly contingent on the availability of other resources.<sup>34</sup>

As a result of these various tribal and intra-tribal claims, herring spawning sites on the Northwest Coast were divided into a series of real spaces with real limits placed on harvest. This was an effective means of managing the harvest of loosely distinct herring stocks in that it allowed for regional specificity while also placing finite limits on coast-wide consumption. It is doubtful, however, that these groups conceptualized their actions within such an environmental framework and more improbable still that they saw themselves as working collectively to preserve herring stocks. While the Heiltsuk and other Northwest Coast native groups did devise ways to live in accordance with the carrying capacity of their environment, this was not conservation in the modern sense, for their restraint was based on reverence to spirits, not scientifically inferred ecological management. Moreover, in contrast to the static, rationalistic regulations employed by modern states, these groups set up systems of regulation that were dynamic, shifting, and responsive.<sup>35</sup>

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<sup>34</sup> Sproat, *The Nootka*, 224; Haswell, “Robert Haswell’s Log,” 64; Boas, “Ethnology of the Kwakiutl,” 425; Newell, “Overlapping Territories and Entwined Cultures,” 126; Harris, “Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery,” 200, 202; McEvoy, *The Fisherman’s Problem*, 30; Harris, *Fish, Law, and Colonialism*, 21.

<sup>35</sup> Taylor, *Making Salmon*, 30, 36.

## II

In as much as the Heiltsuk's aboriginal harvest of herring spawn revealed an interaction of biological and social factors, the band's industrial spawn-on-kelp fishery also formed a confluence of nature and culture. The latter fishery developed in a very different milieu from its aboriginal antecedent, however, one in which both people and herring had been fundamentally transformed. The Heiltsuk accommodated the non-native colonization of their territory by adopting some traits of the colonizers while resisting others. Herring stocks in the Heiltsuk's historic territory were also affected by the presence of non-native settlers. Once incredibly abundant, BC's herring stocks were brought to the brink of collapse in the late-1960s. Formerly managed by hereditary chiefs and traded throughout the Northwest Coast, BC's herring stocks were now regulated by the DFO and marketed to wealthy Japanese consumers.

The transition in Heiltsuk culture that occurred during the nineteenth and twentieth centuries poses interesting questions for anthropologists and ethno-historians. Despite never having been subdued militarily, the Heiltsuk experienced one of the most rapid cultural changes of any group on the Northwest Coast. Beginning in the 1880s, the Heiltsuk transformed from a notoriously recalcitrant and bellicose people to models of the Victorian virtues of hard work, temperance, and frugality. While many disruptive elements contributed to this transition, including Old World pathogens, Christian proselytizing, and rising trade dependency, the Heiltsuk also willingly participated in this transformation. They did so with an expectation that by adopting aspects of Euro-American society, the band would be recognized as legitimate stewards of their territory and resources. The Canadian state's appropriation of Heiltsuk land and fisheries in the

late-nineteenth and early-twentieth century represented a bitter denial of this expectation.<sup>36</sup>

To a certain degree the Heiltsuk's social transformation took place within a broader world system of colonialism and capitalist expansion. Like countless other indigenous peoples, the Heiltsuk saw their relations of production reorganized under capitalism, and their resources reinvented as commodities for exchange in an intercontinental market. The Heiltsuk also shared the struggle of various American aboriginal groups to retain orally transmitted social structures in the wake of virgin soil epidemics and Christian proselytizing. The result was a radical reconfiguration of how the Heiltsuk understood and interacted with the world. Once occupying the centre of a circumscribed sphere of interaction, they were rapidly relegated to the periphery of an impersonal, state-centred capitalist system based in metropolises far removed from the Northwest Coast.<sup>37</sup>

Such assertions can quickly relegate the Heiltsuk to the status of passive, almost hapless victims, yet in many ways they both resisted and shaped their destiny. The Heiltsuk were a dynamic and adaptive people prior to the arrival of European technology and markets. Pre-contact Heiltsuk society was characterized by elaborate social ranks, specialized occupations, and complex exchange networks. Thus developments that ostensibly heralded the external imposition of class, division of labour, and commerce on the Heiltsuk often actually demonstrated the group's continuing ability to accommodate extrinsic practices within their own cultural web. Indeed, much of the cultural change

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<sup>36</sup> Harkins, *The Heiltsuks*, x.

<sup>37</sup> Harkins, *The Heiltsuks*, 126; White, *The Roots of Dependency*, xix.

that the Heiltsuk experienced following interaction with Europeans occurred at the band's own behest.<sup>38</sup>

The arrival of non-native traders and settlers on the Northwest Coast initiated a series of changes neither solely attributable to the external influences of European technology, commerce, and religion, nor fully explained by the internal engines of social contradiction and cultural dynamism. A mutual desire to exchange goods prompted early interactions between the Heiltsuk and non-natives. The first recorded contact between the Heiltsuk and Europeans occurred in 1793 when George Vancouver and Alexander Mackenzie passed through Heiltsuk territory, the former by sea and the latter by land. Both parties engaged in exchanges that the Heiltsuk tightly controlled. The group was willing to exchange goods with Vancouver, for instance, yet refused to allow him or his crew to land. In this earliest phase of interaction, the Heiltsuk incorporated European goods into pre-existing socio-economic structures. Chiefs and nobility stitched small pieces of copper and iron into clothing and headdresses as emblems of power.<sup>39</sup>

Exchange between the Heiltsuk and Euro-American traders quickly escalated. In the late-eighteenth and early-nineteenth centuries, many British and American maritime traders plied Heiltsuk territory for furs. When the HBC established Fort McLoughlin on Campbell Island in 1833, trade further expanded. The Heiltsuk immediately established themselves as intermediaries between the British-owned fort and American ships, as well as between non-native traders and local native groups such as the Bella Coola. The

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<sup>38</sup> Chakrabarty, *Provincializing Europe*, 7, 17; Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Los Angeles: University of California Press, 1984), xxi, xxxi; Pierre Bourdieu, "Social Space and Symbolic Power", *Sociological Theory*, Vol. 7, No. 1 (Spring, 1989), 17, 21, 22; Richard White, *The Middle Ground*, 50.

<sup>39</sup> Harkins, *The Heiltsuks*, 124, 131; Hilton, "Haihais, Bella Bella, and Oowekeeno," 319.

Heiltsuk aggressively maintained control over their resources, and the group readily employed violence to defend their claims. In 1805, an unexplained trade imbroglio led the Heiltsuk to attack the American vessel *Atahualpa*. Heiltsuk warriors killed the captain and ten members of his crew. In 1833, HBC agents stationed at Fort McLoughlin tried to take a Heiltsuk chief hostage to expedite the return of a runaway servant. The Heiltsuk responded by attacking the fort, resulting in considerable bloodshed for both parties.<sup>40</sup>

In these decades the Heiltsuk were significantly affected by the presence of non-native settlers and traders, but were for the most part able to control the pace and extent of this change. Heiltsuk trade with Europeans was growing less ceremonial in form, and taking on the antagonism typical of capitalist exchange. Growing dependence on rifles and alcohol encouraged the Heiltsuk to see themselves as producers and consumers of *commodities* in the capitalist sense of the word. Indeed, furs, guns, and blankets took on fixed values allowing them to serve a function somewhat akin to money. Heiltsuk economic structures were not simply swept aside, however. While the Heiltsuk were increasingly reliant on Europeans for certain commodities, Fort McLoughlin was dependent on the Heiltsuk for its very existence. The Heiltsuk provided the fort with most of its basic food needs. Consequently, Heiltsuk traders could set firm limits on the degree to which they accommodated European commerce. Throughout this era, resources within the Heiltsuk's territory remained under the control of chiefs and nobles.

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<sup>40</sup> Hilton, "Haihais, Bella Bella, and Oowekeeno," 319, 320; Harkins, *The Heiltsuks*, 133-134, 138.

They oversaw the collective construction of salmon weirs, for instance, even as part of the yield was traded to Fort McLaughlin under quasi-capitalist conditions.<sup>41</sup>

More immediately disruptive than material exchange was the exchange of pathogens that invariably accompanied Heiltsuk interactions with Europeans. Though small pox epidemics probably ravaged the Pacific Northwest as early as the late-eighteenth century, the first recorded epidemics to afflict the Heiltsuk emerged in the mid-nineteenth century. In 1843, HBC Governor George Simpson closed Fort McLoughlin for fear that the Heiltsuk were using the fort's dependence on native food to extract exorbitant trade rates. The Heiltsuk responded by trading with passing ships and embarking on trade excursions to Victoria. In 1862, these excursions to Victoria exposed the Heiltsuk to a smallpox outbreak. The results were immediate and catastrophic. The Heiltsuk experienced an overall mortality rate of 69 percent, with rates even higher in the villages surrounding Fort McLoughlin. The Heiltsuk were also ravaged by recurrent tuberculosis and whooping cough epidemics, as well as outbreaks of measles and influenza in 1882 and 1919 respectively. When multiple diseases struck concomitantly, their impact was all the more calamitous. Wave upon wave of virgin soil epidemics massively disrupted Heiltsuk social structures, which were orally transmitted.<sup>42</sup>

These epidemics undermined the Heiltsuk's ability to control the extraction and exchange of resources within their territory. European traders' growing ability to impose cash exchange was a measure of the Heiltsuk's waning authority. In 1870 the HBC

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<sup>41</sup> Harkins, *The Heiltsuks*, 78, 80-81, 133, 136-138; Hilton, "Haihais, Bella Bella, and Oowekeeno", 320.

<sup>42</sup> Harkins, *The Heiltsuks*, 79-81; Hilton, "Haihais, Bella Bella, and Oowekeeno," 320; Robert T. Boyd, *The Coming of the Spirit of Pestilence: Introduced Infectious Diseases and Population Decline among the Northwest Coast Indians, 1774-1874* (Vancouver: UBC, 2000), 5, 21.

reopened Fort McLaughlin to prevent competitors from developing a foothold on the central coast. By 1877, the fort no longer accepted blankets as currency, insisting that the Heiltsuk provide cash instead. The HBC's demand, in conjunction with a growing dependence on European goods, encouraged numerous Heiltsuk to take wage labour positions in fishing canneries, logging camps, and Victoria manufactories. In this period, most Heiltsuk laboured for the benefit of themselves and their nuclear family, rather than within a complex collective enterprise. Thus tribal elites had far less control over who could access resources and under what conditions.<sup>43</sup>

The arrival of Methodist missionaries in the late-nineteenth century brought additional changes to Heiltsuk society. From the 1880s onwards, growing numbers of Heiltsuk wage labourers interacted with whites and other non-natives on a daily basis. Through these exchanges, the Heiltsuk came into increasing contact with Christianity. In 1880 the Heiltsuk requested and received a Methodist missionary named Charles M. Tate. The Heiltsuk were drawn to Christianity in part because their shamanistic healers had failed to forestall the spread of new epidemic diseases. An additional attraction was a pervading belief that Europeans would be more willing to allow the Heiltsuk to share in the economic wealth of the emerging province of British Columbia – and remain stewards of their land and resources – if they adopted European practices. With these considerations in mind, the Heiltsuk actively participated in the transformation of their society. Though internal tensions existed, most Heiltsuks gave up the Winter Ceremonial

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<sup>43</sup> William Charles, "Letter to F.W. Kennedy at Bella Bella" (Victoria, BC: March 2, 1877) [unpublished document, held at BC archives, Victoria, BC, AD20BB2]; William Charles, "Letter to F. W. Kennedy at Bella Bella" (Victoria, BC: July 20, 1877) [unpublished document, held at BC archives, AD20BB2]; Harkins, *The Heiltsuks*, 140-141; Hilton, "Haihais, Bella Bella, and Oowekeeno", 320.

and took up European lodging and dress. By the 1890s, the Heiltsuk community at Bella Bella was one of the most highly Europeanized on the Northwest Coast. The village's "progressiveness" became a source of admiration for missionaries and Indian Agents alike but of consternation for anthropologists. In 1923, Franz Boas bemoaned that "[t]he whole culture of the Bella Bella has practically disappeared."<sup>44</sup>

The Heiltsuk expected that by converting to Christianity and adopting various Euro-American traits they could participate as equals in the nascent province of British Columbia.<sup>45</sup> Such was not the case. In the late-nineteenth and early-twentieth century, non-natives seized control of the Heiltsuk's historic territory and resources. Far from protecting Heiltsuk autonomy, the church endorsed this colonial project. Methodist missionaries stationed at Bella Bella wanted to subvert the Heiltsuk's seasonal subsistence rounds. The Ministers believed that prolonged escape from the probing eye of the mission encouraged backsliding. Moreover, they viewed the Heiltsuk's subsistence rounds, carried out according to seasonal environmental cycles, as primitive

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<sup>44</sup> Quoted in Olson, *Notes on the Bella Bella Kwakiutl*, 319-320; Harkins, *The Heiltsuks*, 88, 89, 115, 143-145;

<sup>45</sup> Chief Moody Humchit demonstrates this understanding in a letter addressed to the Royal Commission on Indian Affairs on May 25<sup>th</sup> 1915. In this correspondence, Humchit requests that an additional tract of land be added to the Heiltsuk reserves:

When the reserves up here was surveyed our old people asked that this piece of land be included as a reserve but the Surveyor told them if they put a house on it and made garden it would be just the same as a reserve. Since that time we have been using that place as gardens and cleaning it up, built a house and fences, and have been planting out potatoes, berries, etc. About 2 years ago a man named Fred Strom came and took that place... Now will you kindly let us know about this land as we were under the impression that it was our land? (Bella Bella, BC) [unpublished document, held at BC archives, Microfilm B637, file 504C].

Humchit's argumentation is revealing. Making no mention of centuries of prior occupancy, Humchit instead emphasizes the Heiltsuk's most recent transformation of the landscape – the establishment of European-style housing and gardens. It is thus, for Humchit, the Heiltsuk's Europeanization and not their status as the region's indigenous population that is most likely to elude state-acknowledgment of the band's stewardship over their territory and resources.

and disorderly. In order to see these rounds replaced by the rigid factory discipline of capitalism, Methodists encouraged the transfer of Heiltsuk property rights to white-owned enterprises with the financial resources to establish capitalist relations. Thus it was with the church's blessing that the Canadian state forced the Heiltsuk onto reserves without treaty beginning in the 1880s.<sup>46</sup>

The Heiltsuk acquiesced to this relocation, in part, because they believed that they would retain exclusive control over the extraction of marine resources from their reserves. The prominent Heiltsuk chief Moody Humchit expressed this belief in his presentation to the McKenna McBride Commission on 25 August 1913. As the commission struggled to define the boundaries of BC Native reserves and to allocate resources thereon, Humchit noted:

I would like to say in respect to the Reserves which were set aside for the Bella Bella [Heiltsuk] Indians some time back, that I... understood that these Reserves were set aside for the exclusive use of the Indians. I think we ought to enjoy exclusively the hunting, and particularly the fishing privileges, on these Reserves... which we do not enjoy at the present time.<sup>47</sup>

Humchit's expectation that the reserve process would secure an inalienable resource base was widely held. Numerous Heiltsuk speakers demanded that the commission affirm their exclusive claim to marine resources on or near their reserves.<sup>48</sup>

The Canadian state's common law approach to marine resources precluded the exclusive access envisioned by the Heiltsuk.<sup>49</sup> The state clung to a narrow interpretation

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<sup>46</sup> Hilton, "Haihais, Bella Bella, and Oowekeeno", 320; Harkins, *The Heiltsuks*, 146.

<sup>47</sup> *Précis of the Royal Commission on Indian Affairs for the Province of British Columbia*, (Bella Bella, BC: August 25<sup>th</sup>, 1913) [unpublished document, held at BC archives, Microfilm B643 GR123, file AH2], 57.

<sup>48</sup> *Précis of the Royal Commission on Indian Affairs for the Province of British Columbia*, 57-63.

of British common law, which held that federal fisheries could not grant ownership over navigable waters, only short-term usufruct rights through permits and licenses. Acting on this premise in the early-twentieth century, Fisheries granted the Dranery Cannery Company a permit to harvest and process salmon on the Heiltsuk's reserves. The state felt justified in overriding Heiltsuk resource claims because natives were supposedly primitive, backward people, whose inability to maximize resource exploitation doomed them to oblivion. In some ways this became a self-fulfilling prophesy. Because the Heiltsuk were denied permits to fish commercially for salmon, they had to labour for the very cannery that had appropriated their resource. In other industrial fisheries as well, the Heiltsuk and other Northwest Coast Native groups were received as helpers and labourers but not as equal competitors or resource managers. Natives became mired in a system of debt and paternalism. In order to purchase motors and new technology they, like other European and Asian labourers, were forced to borrow money from the canneries at high interest rates. By enforcing the claims of the canneries over those of native groups, Fisheries facilitated this paternal system.<sup>50</sup>

Throughout the first half of the twentieth century, actions taken by the Canadian state further eroded Heiltsuk autonomy. The Department of Indian Affairs (DIA) drew on the Indian Act to govern life on the Heiltsuk's reserves. The DIA labelled the villages of the Heiltsuk and other native peoples "bands", and grouped them under the personal supervision of an Indian agent. All were deprived of a voice in their own internal affairs,

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<sup>49</sup> For an excellent discussion of common law's role in the expropriation of Native fisheries, see Harris, *Fish, Law, and Colonialism*.

<sup>50</sup> Daniel L Boxberger, "Lightning Bolts and Sparrow Wings: A Comparison of Coast Salish Fishing Rights in British Columbia and Washington State", *Native Studies Review* 9, 1 (1993-1994), 1, 5; Newell, *Tangled Webs of History*, 53, 110; Taylor, *Making Salmon*, 136; Harkins, *The Heiltsuks*, 148-9; Jean Barman, *The West Beyond the West: Revised Edition* (Toronto: University of Toronto Press, 1991), 153-157; *Précis of the Royal Commission on Indian Affairs for the Province of British Columbia*, 57-63.

and their interaction with the world beyond the reserve was tightly controlled by the DIA. Throughout this period Indian Agents supervised a broad spectrum of Heiltsuk private and community life. This intrusive surveillance severely undermined the Heiltsuk's ability to exercise even informal control over their historic territory and resources.<sup>51</sup>

Not until the end of the Second World War did the Canadian government reverse its policy towards native people. In place of paternalism, the state pursued an agenda of integrating its native population into the broader body politic. The personal involvement of Indian Agents with native communities gradually declined, and civil servants assumed many of the agents' duties. Because the state now sought to integrate natives into non-native society, government officials sought to expand educational and economic opportunities for native communities. Perhaps as a gesture of good faith, the government granted Natives federal voting rights in 1960. In the subsequent decade, the DIA handed over management of band affairs to native administrators, subject, however, to the continuing jurisdiction of the Indian Act. For native groups on the Northwest Coast this meagre level of self-determination played a role in generating a cultural efflorescence in the 1970s. Control over marine resource bases, however, remained firmly in the grasp of the Canadian state.<sup>52</sup>

As a result of these historical processes, the Heiltsuk nation that requested and received a permit to harvest herring spawn-on-kelp industrially in the 1970s differed fundamentally from the group that Vancouver and Mackenzie had encountered a century earlier. One of the most pronounced transitions concerned how and where the Heiltsuk

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<sup>51</sup> Mary Lee Stearms, "Haida since 1960" in *Handbook of North American Indians: Volume 7: Northwest Coast*, 261.

<sup>52</sup> Barman, *The West Beyond the West*, 261.

people took residence. In place of long-houses sheltering large, extended families, Heiltsuk individuals increasingly shared “white-style” dwellings with their nuclear families. This new mode of residence contributed to an escalating housing shortage on Heiltsuk reserves. Gone too were the days when the band held claim to a large portion of the central coast, facilitating semi-nomadic seasonal subsistence rounds. By the mid-twentieth century, the Heiltsuk held title to just twelve small tracts of land, and the largest segment of the population (1300 people) resided year-round in the community of Bella Bella. A Heiltsuk diaspora had also occurred. Several hundred Heiltsuk had relocated to the city of Vancouver, and others spent at least part of the year pursuing work in cities, returning to Bella Bella only for ceremonies and gathering.<sup>53</sup>

Many of those who sought work in Vancouver did so because there were relatively few employment opportunities near Bella Bella. A transition from collective to wage labour had introduced a phenomenon previously unknown to the Heiltsuk: idleness. By the 1970s, unemployment rates on the Heiltsuk reserves often rose above 50 percent. Bella Bella’s isolation and dearth of local industry along with the Heiltsuk’s declining role in commercial fishing accounted for these conditions. Even those Heiltsuk who still participated in commercial fishing were often underemployed or unemployed for large portions of the year. The Heiltsuk Band Council provided a number of jobs, as did the local school, and several Heiltsuk people ran small local businesses. Nonetheless, government transfer payments in the form of unemployment insurance and welfare remained an indispensable source of income for many Heiltsuks. Bereft of employment opportunities, numerous Heiltsuk supplemented their income with subsistence fishing. In

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<sup>53</sup> Harkins, *The Heiltsuks*, 23-24.

particular, salmon, halibut, cod, and herring spawn remained valuable food sources for impoverished Heiltsuk families.<sup>54</sup>

In spite of these substantial changes, vestiges of the Heiltsuk's earlier social structures remained evident. Increasing authority over local affairs in the 1970s allowed the Heiltsuk to display elements of their culture that the intrusive surveillance of missionaries and Indian agents had driven underground. With the departure of Indian Agents, jurisdiction over reserve-life passed on to the Heiltsuk Band Council, an elected body headed by a Chief Councillor and an Assistant Head Councillor. That hereditary chiefs were most often elected to these positions attested to the continuing relevance of the Heiltsuk's historic social hierarchy. Feasting and potlatching also resumed a central place in community life. Chiefs continued to host these gatherings, often for the purpose of transferring ceremonial names.<sup>55</sup>

Engaged in a continuous quest to procure material needs and reinvigorate elements of their cultural past, the Heiltsuk were obviously adversely affected by the appropriation of their territory and resources. Though the Canadian state's general disregard for the wellbeing of its native population bore much of the blame, federal fisheries' recurrent mismanagement of marine resources within the Heiltsuk's historic territory intensified this suffering. Beginning in the early-twentieth century, state-sanctioned industrial fisheries brought profound changes to waters in the Heiltsuk's historic territory. While the Heiltsuk participated in these fisheries, they did so as labourers and helpers, not as stewards of resources. Control instead resided with the federal fisheries agencies, often with infelicitous results. The same narrow interpretation

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<sup>54</sup> Harkins, *The Heiltsuks*, 26-27.

<sup>55</sup> Harkins, *The Heiltsuks*, 28, 34.

of common law that drove the state to appropriate Heiltsuk marine resources posed serious challenges to resource management. Whereas the Heiltsuk had regulated fish stocks by claiming spaces of harvest and limiting harvest within these spaces, federal fisheries managers refused to acknowledge individual or tribal claims to navigable waters and was reluctant to place fixed ceilings on harvest levels. As made evident by an analysis of BC's industrial herring fisheries, this management approach was doomed to failure if and when market demands exceeded herring biomass.

Prior to the Second World War, limits of market and technology worked to constrain industrial fishers' impact on herring stocks. The first industrial fishery, lasting until the end of the nineteenth century, was carried out with small beach seines taking a relatively insignificant catch of 130 to 650 tons annually. In the early-twentieth century, a drift-net fishery emerged that catered to the Japanese market for dry-salted herring. The annual catch was 30,000 to 85,000 tons. This fishery ended abruptly with the economic sanctions against Japan just before World War Two. During the war, canned Pacific herring was produced for a short time for consumption by allied troops, but the fish's oily flavour proved unpalatable, so they had to be packed in tomato paste.<sup>56</sup>

The herring reduction fishery that reached its apogee in the two decades following 1945 had a far more pronounced environmental impact than its precursors. First attempted in 1925, herring reduction was the only industrial herring harvest that persisted after the war. The industry was almost entirely dependent on the purse seine, and harvest increased exponentially, eventually reaching well over twelve-million tons annually. The

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<sup>56</sup> Hourston and Haegele, *Herring on Canada's Pacific Coast*, 2-46; Newell, *Tangled Webs of History*, 193-194; Taylor, *Life History and Present Status of British Columbia Herring Stocks*, 11; James E. Wilen, *Technical Report No. 21: The Public Regulation of Commercial Fisheries in Canada: Case Study No. 6: The British Columbia Roe Herring Industry* (Vancouver: Economic Council of Canada, 1981), 1.

herring reduction fishery produced fishmeal and fish oil; the former was used in poultry feed, the latter in paints and a plethora of other industrial products. As such, the spaces of consumption expanded tremendously.<sup>57</sup>

A number of biological contingencies conspired to make the herring reduction fishery disastrously efficient. First, herring practice schooling, a defence mechanism used by species that cannot hide from predators. While affective against natural predators, schooling makes a fish population particularly vulnerable to overfishing. This tendency was exacerbated in the case of herring because they were often harvested as they gathered to spawn. As a result, reduced stock density did not bring about a corresponding decrease in yields. Second, herring are extremely sensitive to environmental changes, and even short-term shifts in ocean temperature or food availability have had profound effects on population size. Predation and environmental contingencies thus made herring stocks susceptible to large, unpredictable fluctuations. Herring's ability to reproduce multiple times had offset this environmental sensitivity and under normal ocean conditions, each generation could usually achieve at least one good recruitment year. However, over-fishing of herring stocks in the 1960s reduced average life expectancy in such a manner that there were fewer spawnings per generation, leading to stock depletion.<sup>58</sup>

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<sup>57</sup> Newell, *Tangled Webs of History*, 194; Hourston and Haegele, *Herring on Canada's Pacific Coast*, 6.

<sup>58</sup> Arthur F. McEvoy, *The Fisherman's Problem*, 148; Subade, "Management of Roe-Herring Fisheries in British Columbia," 5; Arthur F. McEvoy, "Toward an Interactive Theory of Nature and Culture: Ecology, Production, and Cognition in the California Fishing Industry," in Donald Worster, ed. *The Ends of the Earth: Perspectives on Modern Environmental History* (Cambridge: Cambridge University Press, 1988), 221; Wilen, *Technical Report*, 27.

Culture also played a substantial role in the failure of BC's herring reduction fishery. Feverishly optimistic and expansionist economic attitudes dominated in North America from 1946 to 1973. For policy makers, North America's extraordinary natural abundance seemed to legitimate this confidence. This environmental cornucopia encouraged a sense that the earth was a passive stage for human advancement. Public officials, including long-serving BC Premier W. A. C. Bennett, shared a conviction that when one resource failed, humans could move on to another, and in any event, science, the modern panacea, could always revitalize nature. In BC, this economic outlook produced a concerted effort to expand the province's fisheries, with little concern about regulation.<sup>59</sup>

A third factor making BC's herring reduction fishery unsustainable was the manner in which it was regulated. The DFO managed the reduction fishery according to maximum sustainable yield (MSY), which remained popular until the early-1970s. As a regulatory scheme, MSY was highly congruent with Fisheries' common law approach to managing marine resources. No group exercised a claim over any stretch of water and only minimal restrictions were placed on harvest rates. The idea was simply to take as much tonnage as possible without impinging the ability of spawners to replenish stocks. This regulatory regime was predicated on a belief that herring were essentially an inert substance that could be acted on but would not act back. Developed to regulate the harvest of hardy fish species, MSY did not take into account the impact of environmental shifts on herring stock health. It also tended to underemphasize the importance of spaces of stocks, harvest, and consumption in assessing and protecting stocks. All these pitfalls

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<sup>59</sup> Newell, *Tangled Webs of History*, 122; McEvoy, *The Fisherman's Problem*, 251, 253. Barman, *The West Beyond the West*, 295.

in reasoning become plainly evident when analyzing a scientific application of MSY: the West Coast Experiment.<sup>60</sup>

The West Coast Experiment was very much a product of the optimistic and expansionist economic culture of post-World War Two British Columbia. As early as the 1930s, researchers observed that increased harvest levels in the herring reduction fishery correlated with decreased stocks. Fisheries responded by placing catch quotas on herring stocks on the east and west coast of Vancouver Island. There was little sense of whether these quotas were effective, and the industry bridled at potentially redundant restrictions. The West Coast Experiment emerged out of these scientific and practical concerns. It tried to determine whether quotas were warranted by removing fetters on the west coast of Vancouver Island for five years (1946-1951). Fisheries maintained quotas on the east coast, then compared the health of stocks in each region. The ultimate finding was that the two regions were equally healthy. The quotas were deemed an unnecessary impediment to MSY and removed. The West Coast Experiment was part of a broad trend towards removing and slackening quotas in the BC herring reduction fishery after the war.<sup>61</sup>

Although the experiment seemed to justify increased harvests, its conclusions were problematic on a number of levels. The experiment posited a cognitive binary of environmental and human causation, concluding that “variations in year-class strength are mainly a result of natural variability of the environment. The variations in size of

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<sup>60</sup> McEvoy, *The Fisherman's Problem*, 254; McEvoy, “Toward an Interactive Theory of Nature and Culture,” 22; Hourston and Haegele, *Herring on Canada's Pacific Coast*, 9; McEvoy, “Toward an Interactive Theory of Nature and Culture,” 219, 224.

<sup>61</sup> Taylor, *Life History and Present Status of British Columbia Herring Stocks*, 17-38; Hourston and Haegele, *Herring on Canada's Pacific Coast*, 6.

spawning stock produced by variations in removals by the fishery are probably not important.”<sup>62</sup> Later researchers would instead conclude that the interaction of natural variability and local fishing pressure led to stock depletion. Second, removing quotas that differentiated the yield capacity of distinct regions demonstrated policy makers’ inability to understand the dynamic interaction of spaces of stocks and spaces of harvest. Given the evidence that herring shift from one stock to another in response to population densities and ocean fecundity, it is easy to see how the West Coast Experiment could reach a conclusion that harvest had no impact on fish in the unrestricted area. Herring on the east coast of Vancouver Island and in adjacent waters were likely shifting to the west coast of Vancouver Island to fill the void produced by increased fishing pressure.<sup>63</sup> Removing the quotas entirely, however, left no shielded spaces to replenish other areas. The fishery remained divided into ten management areas that may or may not have corresponded with the spaces of the loosely distinct stocks, but the removal of enforceable quotas made these spaces more or less meaningless. Rather than recognize the spatial significance of stock concentration and harvest, Fisheries dealt with the reduction fishery through gear regulations and closed seasons, neither of which limited harvest in any given area.<sup>64</sup>

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<sup>62</sup> Taylor, *Life History and Present Status of British Columbia Herring Stocks*, 38.

<sup>63</sup> For an overview of the ongoing debate surrounding the integrity of Pacific herring stocks, see Hay and McCarter, “Retention and Dispersion of Larval Herring in British Columbia and Implications for Stock Structure,” 107; M. Moser, “Biological Tags for Stock Separation in Pacific Herring (*Clupea harengus pallasii*) and the Possible Effect of ‘El Nino’ Currents on Parasitism” in *Proceedings of the International Herring Symposium*, 246; Wilen, *Technical Report*, 5; Hourston and Haegele, *Herring on Canada’s Pacific Coast*, 9.

<sup>64</sup> Hourston and Haegele, *Herring on Canada’s Pacific Coast*, 29; Taylor, *Life History and Present Status of British Columbia Herring Stocks*, 6, 47.

The collapse of BC's herring fisheries in the late-1960s did not come without warning. The West Coast Experiment led to greater dependence on younger fish in the areas where quotas were removed, a population trend that fisheries scientists already understood to signify declining biomass. In 1951, when catch quotas were largely discarded because of the experiment, the reduction fishery became reliant on younger fish coast-wide. Superficially, the fishery still seemed stable when a sizable catch of 241,000 tons was taken in the 1964-1965 season, yet fishers also reported unusual difficulty locating herring. Moreover, herring spawn deposition was clearly decreasing, a trend that persisted over the next two seasons when catch rates declined to 181,000 and 135,000 tons respectively. Nonetheless, the DFO remained reluctant to restrict a fishery that had sustained nearly two decades of largely unrestrained fishing effort. The DFO did not close the reduction fishery until the 1967-1968 season, by which time BC's herring stocks were on the verge of collapse.<sup>65</sup>

The failure of the herring reduction fishery seems to fit snugly into the popular "tragedy of the commons" narrative of environmental declension, but the analogy breaks down. Garrett Hardin devised the "tragedy of the commons" model in the 1960s. His central argument was that when common access to a resource exists, individuals will logically maximize their profit by increasing harvest because they enjoy this profit individually, while the negative repercussions of resource depletion are "social costs" diffusely born by all. This pattern of selfish consumption continues, he argued, until "freedom in a commons brings ruin to all."<sup>66</sup> While regulation of the BC herring

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<sup>65</sup> Hourston and Haegele, *Herring on Canada's Pacific Coast*, 6; Taylor, *Life History and Present Status of British Columbia Herring Stocks*, 23.

reduction fishery did not adequately delineate and regulate spaces of harvest, the result was hardly a commons. Relatively few fishers had access to the herring stocks and even those who did were constrained in important ways. In fact, the tragedy of the commons is a poor trope for explaining the “fishermen’s problem” in any context. Access has never been so equitably distributed as implied by a “commons,” but rather restricted along lines of class, gender, ethnicity, and technology. Moreover, even market fishers have seldom behaved as the self-serving, atomized economic units that Hardin posited.<sup>67</sup>

### III

The implosion of the herring reduction fishery propelled a thorough re-evaluation of management strategies. Change began with a complete moratorium on the BC herring fishery in the late-1960s and early-1970s, which allowed herring stocks to recover. During this hiatus Fisheries also began to consider new forms of harvest, with increased aboriginal participation. Out of these deliberations emerged the industrial roe-herring and herring-spawn-on-kelp fisheries, both of which have been primarily dependant on Japanese markets. The roe fishery involved catching herring near spawning grounds when eggs accounted for 20-35 percent of the fish’s body weight. Roe were extracted and frozen, and the carcasses were processed into fishmeal and fish oil. The industrial herring spawn-on-kelp fishery, in which the Heiltsuk began participating in 1978,

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<sup>66</sup> Garrett Hardin, “The Tragedy of the Commons,” *Science* 162 (Dec 13, 1968), 1245.

<sup>67</sup> McEvoy, “Toward an Interactive Theory of Nature and Culture,” 227; Taylor, *Making Salmon*, 11.

represented a remarkable technological and social breakthrough in Canadian fisheries management.<sup>68</sup>

While this fishery drew on radically different technology from its aboriginal antecedent, the basic premise of encouraging herring to lay eggs on an easily removed substrate remained the same. The Heiltsuk and other industrial fishers harvested spawn-on-kelp in two ways. In the “closed pond method,” fishers deployed spawning ponds – timber frames anchored to float on the surface near shore and enclosed by net – in protected bays or coves where slow currents prevented sand and other debris from spoiling the product. From these frames, fishers suspended one-meter lengths of kelp. Then, as herring clustered into large aggregations, fishers used seine nets to capture spawners and place them in the pond. After spawning on the kelp, the herring were released back to the wild. These procedures had to be carried out with an eye to minimizing environmental impact. Closed pond harvest could result in high mortality rates if the seined herring were transferred too quickly, or if too many herring were crowded into the pond.<sup>69</sup>

In the 1980s, partially in response to pressure from native groups, Fisheries began to permit an open pond harvest that more strongly resembled aboriginal practices. Consisting of the same kelp-laden log structures but without netting, open ponds were deployed in areas where herring were anticipated to spawn. This harvest method was more ecologically sound because no nets were involved and thus no fish were killed.

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<sup>68</sup> Newell, *Tangled Webs of History*, 195; Hourston and Haegele, *Herring on Canada's Pacific Coast*, 7.

<sup>69</sup> Newell, *Tangled Webs of History*, 197; Hourston and Haegele, *Herring on Canada's Pacific Coast*, 7; Thomas Shields and Gary Kingston, *Herring Impoundment and Spawn-on-Kelp Production in British Columbia* (Victoria: Archipelago Marine Research, 1982), 54-55.

Moreover, reduced equipment costs expanded opportunities to enter the fishery. Open pond harvest also proved more efficient. Netted impoundments required the reproductive capacity of 45.5 to 63.5 tons of herring to produce eight tons of product. Open pond operations achieved a similar amount of product from only 35 tons of herring. Open pond operations did, however, tend to produce an inferior product with inconsistent spawn distribution, frequent sand contamination, and occasional damage from dogfish (*Squalus acanthias*).<sup>70</sup>

With either mode of harvest, the work neither began nor ended with the construction and deployment of the pond. Both methods employed extraneous kelp as a substrate. The harvest of kelp was an exacting process carried out in northern BC's salty outer channels. Harvesters carefully cut the kelp to insure that they gathered as much plant mass as possible, while leaving the basal portion to regenerate. They then removed and discarded the uppermost fronds of kelp, because egg masses would not adhere to them. Kelp deteriorated after only six days, however, so harvest had to be carefully coordinated with herring spawning.<sup>71</sup> Both modes of harvest required immediate processing. Permit holders performed much of this processing themselves on a raft adjacent to the impoundment. The spawn-on-kelp was allowed to remain in the water for three to four days, then removed, heavily salted, and placed in containers. Harvesters

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<sup>70</sup> Newell, *Tangled Webs of History*, 197; Hourston and Haegele, *Herring on Canada's Pacific Coast*, 8; T. L. Shields, G. S. Jamieson, and P. E. Sprout, *Spawn-on-kelp Fisheries in the Queen Charlotte Islands and Northern British Columbia Coast – 1982 and 1983* (Nanaimo: DFO, Fisheries Research Branch, Pacific Biological Station, 1985), 2, 16-17; D. B. McEachern, *The B.C. Spawn on Kelp Fishery – 1975-1977* (Vancouver: Economic Fisheries Management, Pacific Region, 1977), 3.

<sup>71</sup> Newell, "Overlapping Territories and Entwined Cultures," 133.

then relocated the product to a packing plant where the spawn was sorted by grade and drained.<sup>72</sup>

The Heiltsuk's industrial herring spawn-on-kelp fishery developed in a very different physical and cultural landscape from its aboriginal antecedent. Nonetheless, as was the case with the aboriginal harvest, it was the interaction of environment and culture that made this industry possible. Most salient among the environmental factors facilitating this industry were the strength and characteristics of local herring and kelp stocks. Were it not for the partial recovery of herring stocks in the early-1970s, the industry could not have emerged. Moreover, the tendency of herring to cluster together before spawning, allowing them to be seined and released into ponds, was crucial to the success of the closed pond method. Herring, however, have evolved physiological and behavioural attributes intended to ensure self- and species-preservation, not profitable commercial exploitation; thus the fish did not always cooperate with harvesters. Herring's proclivity to lay spawn more thickly on pond netting than on kelp, for instance, forced harvesters to develop specialized forms of netting for this fishery.<sup>73</sup>

The abundance of kelp on the northern BC coast has also been a key to the success of the industrial spawn-on-kelp fishery. In the early 1970s, Environment Canada recommended that some form of "commercial exploitation" be devised for BC's seemingly endless stores of kelp and other seaweeds, but the profusion of kelp in northern BC was itself the product of complex developments.<sup>74</sup> Once a scarce resource,

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<sup>72</sup> McEachern, *The B.C. Spawn on Kelp Fishery*, 16.

<sup>73</sup> Hourston and Haegele, *Herring on Canada's Pacific Coast*, 7; Department of Fisheries and Oceans Pacific Region Field Service Branch, *Annual Report, 1979* (Vancouver: DFO, 1979), 26.

its recovery may be linked to the rebound of Pacific otter populations from European and Euro-American pelt hunting in the early nineteenth-century. Otters eat abalone and sea urchins, which feed on kelp. Therefore, where even a small number of otters exist, kelp can grow thickly. Kelp must still be recognized as a finite resource, however. In fact, it may well be at greater risk of depletion than herring, for Canadian Fisheries has recently begun issuing private licenses for the harvest of enormous amounts of kelp in BC waters.<sup>75</sup>

Along with these biological contingencies, various cultural factors shaped the emergence of the Heiltsuk's industrial spawn-on-kelp fishery. Foremost were Japan's burgeoning market for herring spawn-on-kelp and a shifting resource management culture in BC. A vast majority of BC's spawn-on-kelp was sold to Japanese consumers willing to pay top dollar for a status-defining luxury item. Alaskan fishers first introduced spawn-on-kelp to Japan in 1959, but a readymade market preceded its arrival. The people of Japan had enjoyed herring roe for 300 to 400 years before their local herring stocks were decimated in the 1960s and 1970s. North American herring roe and spawn-on-kelp were a practical replacement for local products. Within a few years, spawn-on-kelp had become a sought after delicacy in Japan, often consumed at New Year's Eve celebrations. In spite of ongoing competition from Alaskan producers, the exceptionally discerning nature of Japanese consumers allowed BC's high quality spawn-on-kelp industry to thrive. In the early 1980s a government inquiry into the status of BC fisheries noted,

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<sup>74</sup> Environment Canada, *Annual Report, 1973-74* (Ottawa: 1974), 8; Hourston and Haegele, *Herring on Canada's Pacific Coast*, 8.

<sup>75</sup> McEvoy, *The Fisherman's Problem*, 81; Newell, *Tangled Webs of History*, 198.

Unlike the Alaskan fishery, which markets naturally deposited roe, the Canadian permits authorize harvesters to impound spawning herring in ponds containing fronds of kelp strung on lines. This produces a superior product, and in the *quality-sensitive Japanese market*, it brings much higher prices.<sup>76</sup>

Over time, the two producers carved out separate market niches, with BC catering to gourmet restaurants and Alaska focusing on home consumption.<sup>77</sup>

By selling spawn-on-kelp to Japan, the Heiltsuk joined a growing legion of merchants dealing in that most elusive of commodities – nature; in this case, however, nature merged with culture in a complex mimetic process. The version of nature the Heiltsuk sold was neither universal nor uniquely aboriginal. Rather, they strove to produce a version of nature that Japanese consumers might expect from an authentically aboriginal people. In effect, Heiltsuk spawn-on-kelp became an emblem of Asian consumers' idealization of aboriginal authenticity. The Heiltsuk proved remarkably adept in this endeavour, tantalizing Japanese purchasers with the paradox of appreciating nature through its consumption. On a band-operated website, the Heiltsuk emphasized the authenticity of their natural product and of themselves as an aboriginal people. They displayed spawn-on-kelp atop wooden planks elaborately carved in Northwest Coast Native design. The site emphasized that Heiltsuk have been engaged in the harvest of spawn-on-kelp for “thousands of years” and thus possessed a “traditional knowledge” of how best to harvest and process spawn-on-kelp, unmatched by rival producers. The band sold their product through electronic auction, and potential bidders were encouraged to

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<sup>76</sup> Newell, *Tangled Webs of History*, 196; Peter H. Pearse, *Turning the Tide: A New Policy for Canada's Pacific Fisheries* (Vancouver: Department of Fisheries and Oceans), 1982.

<sup>77</sup> P. Leitz, *A Review of the B.C. Spawn on Kelp Fishery with Some Proposals for Future Management* (Vancouver: DFO, 1979), 4; Peter Leitz and Paul Macgillivray, *B.C. Spawn-on-kelp Fishery: Optimal Production Level and License Allocation Policy* (Vancouver: DFO, September 15, 1983), 8; Joe Amoako-Tuffour, *The Import Demand for Spawn-on-Kelp* (Vancouver: DFO, Pacific Region, 1997), 1, 3; McEachern, *The B.C. Spawn on Kelp Fishery*, 18.

visit Bella Bella to watch Heiltsuk harvesters and processors put this traditional knowledge to work in a breathtaking natural environment.<sup>78</sup>

The emergence of a new resource management culture in the early-1970s also contributed to the success of BC's herring spawn-on-kelp industry. With the near collapse of herring stocks still fresh in their memory, policy makers acknowledged the need for greater limits on harvest. Profits could nonetheless be retained, so policy makers reasoned, through the "Best Use Principle." The new approach suggested three ways to maintain profits while reducing harvest: first, to maximize the benefits of fisheries to the Canadian economy by processing catch into quality, high-value products; second, to increase industry stability by creating a more diverse market for fisheries products; and third, to increase jobs for Canadians by bolstering domestic processing. The herring spawn-on-kelp fishery clearly fit this new mould.<sup>79</sup>

As with its aboriginal antecedent, the sustainability of the Heiltsuk's industrial spawn-on-kelp fishery was not ensured by natural and cultural variables alone. Early industrial success resulted from careful regulation, and this regulation would need to continue to adjust and expand if the industry is to remain successful in the future. The near-collapse of BC herring stocks in the late-1960s forced Fisheries to rethink its management philosophy. In place of simplistic strategies modelled on MSY, Fisheries adopted regulations that heeded the importance of spatiality and recognized that stock health was determined by the interaction of natural and anthropogenic forces. Spawn-on-kelp, being an innovative and relatively small-scale fishery, offered an ideal opportunity

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<sup>78</sup> Heiltsuk Band Council, [www.spawnonkelp.com](http://www.spawnonkelp.com) [electronic source, accessed via internet March 4, 2006].

<sup>79</sup> Pearse, *Turning the Tide*, 37; Hourston and Haegele, *Herring on Canada's Pacific Coast*, 9.

to test this new approach. Fisheries managed the fishery from its inception through a comprehensive quota system that delineated the spaces and impact of harvests. Ironically, this regulatory scheme was similar in many respects to Heiltsuk practices that the Canadian state had earlier rejected as backwards and unlawful.

The DFO regulated the industrial spawn-on-kelp fishery through quotas, which delineated spaces of harvest and set finite limits on harvest within these spaces, all the while recognizing that nature *and* humans influenced stocks. Allowable catch rates have varied from 5.44 to 9.07 tons. In addition to listing the maximum quantity of product, the licenses specified in great detail the spaces and conduct of the harvest. Fishers were informed of precisely when and where they were permitted to net herring, gather kelp, and deploy ponds. A fisheries officer had to certify that each operation's catch was obtained in accordance with these stipulations, and not poached from natural spawning grounds. Each license could be renewed at no charge; they were, however, non-transferable. Because of major population fluctuations in herring, the post-reduction fishery strove to limit harvest of herring to 20 percent of the stock per year. Such practices revealed a newfound recognition that both natural variability and human consumption shaped stock health.<sup>80</sup>

The parallels between this quota system and the proprietary rights native groups used to carve up harvest sites on the Northwest Coast were striking, but there were also important distinctions. For starters, federal fisheries operated with an understanding of

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<sup>80</sup> Pearse, *Turning the Tide*, 15, 38, 136; Newell, *Tangled Webs of History*, 198; Max Stocker, "Recent Management of the British Columbia Herring Fishery," in L. S. Parsons and W. H. Lear eds. *Perspectives on Canadian Marine Fisheries Management* (Ottawa: National Research Council of Canada and DFO, 1993): 267; Francis Dickson, "The British Columbia Fishery" in Brenda Melteff, ed., *Proceeding of The Herring Roe on Kelp Workshop, Cordova Alaska* (Alaska Sea Grant Program, University of Alaska: Fairbanks, Alaska, 1979), 3; ARA Consulting Group, *The 1991 Expansion*, 2-7; Parsons, "Management of Marine Fisheries in Canada," 211.

nature that differed fundamentally from that held by Northwest Coast Native groups. Whereas the Heiltsuk and other coastal native groups explained the natural world through a spiritual and material synthesis, Fisheries used scientific studies and abstract computer models. Fisheries also generated regulation in a fundamentally different manner from coastal native groups. The systems that allowed native fishers to sustainably harvest herring spawn for centuries were highly organic in conception. Preservation was not always an explicit aim of these systems, and native groups were sometimes unaware of their fisheries' full impact on the local marine environment. At the same time, social structures that ensured a continuous supply of marine resources proved more durable than structures that failed to mitigate environmental degradation, and in such a manner the former tended to endure while the latter were abandoned. Fisheries, contrarily, formulated its quota system within a rationalistic bureaucracy. Preservation was an explicit policy objective, and other factors, including market elasticity and fleet capacity were deliberately integrated into its "scientific" calculus.<sup>81</sup>

Herring spawn-on-kelp was not the most substantial or profitable form of post-reduction herring harvest; the herring-roe fishery – itself regulated by delineating spaces and controlling harvest via the Area Licensing Management System – accounted for a greater tonnage of harvest with a higher net worth. Accordingly, Fisheries gave special consideration to the roe-herring fishery when formulating spawn-on-kelp regulation. Spawn-on-kelp licensees were excluded from participation in the roe-herring fishery and spawn-on-kelp harvest was prohibited during the roe-herring season. This has led one historian to suggest that Fisheries resented the spawn-on-kelp industry because it was

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<sup>81</sup> Taylor, *Making Salmon*, 30, 36.

traditional (especially the open-pond method), mobile, and taxing to regulate. It is clear from whence the author draws this argument, for since the late-1960s, Fisheries has generally advanced intensive deep-sea fisheries at the expense of small-scale inshore fisheries. Nonetheless, this line of reasoning raises a number of questions. Most notably, it fails to address why the DFO actually gave spawn-on-kelp top priority when divvying up the total allowable herring catch each season. Fisheries assigned 100 tons of herring to each J license *before* partitioning the remaining tonnage between roe herring seine and gillnet operations.<sup>82</sup>

The Heiltsuk spawn-on-kelp fishery's transition from an aboriginal to an industrial harvest must be situated within a broader context of colonialism and capitalist expansion. Euro-American settlement and commerce on the Northwest Coast brought profound changes to Heiltsuk society and the local environment. The Heiltsuk responded to the colonization of their historic territory with a variety of strategies. Initially, Euro-American dependence on Heiltsuk resources allowed the band to delimit their accommodation of extraneous social structures. As Euro-American diseases, missionization, and commerce undermined the Heiltsuk's ability to exercise territorial sovereignty, however, the band sought new avenues of resistance. By adopting various Euro-American practices, the Heiltsuk strove to retain stewardship over their territory and resources by participating as equals within the nascent province of BC. This hopeful scenario never materialized. The Canadian state's general disregard for BC's native population facilitated the expropriation of Heiltsuk territory inasmuch as common law

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<sup>82</sup> Newell, "Overlapping Territories and Entwined Cultures," 140, 142; Newell, *Tangled Webs of History*, 198; Dianne Newell and Rosemary E. Ommery, "Introduction: Traditions and Issues" in *Fishing Places, Fishing Peoples*, 8; ARA Consulting Group, *The 1991 Expansion*, 2-7.

justified confiscating the band's marine resources. While common law validated plundering Heiltsuk marine resources, it posed serious challenges to administering the spoils. In the case of herring, Fisheries' refusal to grant rights over specific spaces of harvest, or to set fixed limits on catch, resulted in severe stock depletion. Such setbacks forced Fisheries to develop new forms of harvest and regulation. And so it was that in the mid-1970s Fisheries approved the creation of an industrial spawn-on-kelp fishery that in many ways marked a return to Heiltsuk practices the Canadian state once rejected as primitive and unlawful.

## 2

### **Sharing Herring Native Rights, Public Access, and the Limits of Reform in BC's Spawn-on-Kelp Industry**

In addition to providing a valuable heuristic on the advantages of conservation strategies that assign spaces of harvest and control harvest within these areas, an analysis of BC's herring spawn fisheries offers a unique perspective on the changing status of native harvesters in the province's fisheries. Native experiences in the spawn-on-kelp industry demonstrate that the status of native fishers on BC waters has improved greatly in recent decades, but that there are still firm limits on the extent to which the Canadian state is willing to honour aboriginal fishing rights. The spawn-on-kelp industry is the only BC fishery in which Native harvesters hold the majority of licenses and take the lion's share of the catch. This situation has arisen both as a result of several native groups working independently and collaboratively to gain access to this fishery, and because the DFO has been willing to facilitate this agenda. These dynamics have ensured that native input has shaped the industrial spawn-on-kelp fishery from its inception in the early-1970s onwards. Moreover, the DFO has consistently given native applicants preferential status when awarding spawn-on-kelp licenses, to the effect that native participation in this fishery has grown rather than diminished in relation to non-native involvement. At the same time, the DFO's common law approach to marine resources has virtually precluded the creation of an exclusively native fishery, however justifiable exclusive native access might be in this instance.

The Heiltsuk's fruitless struggle to obtain sole control over herring spawn harvest within their historic territory exemplifies this reality. From the spawn-on-kelp industry's emergence in the early-1970s through its efflorescence in the late-1980s, the Heiltsuk persistently sought to expand their role in the fishery through cordial channels. When nearly two decades of petitioning the DFO for additional spawn-on-kelp (J) licenses yielded only apologetic refusal, however, the Heiltsuk challenged their exclusion in court on the basis of aboriginal rights. *Reid et al. v. the Queen* and *Gladstone v. the Queen* tested these claims. While the cases resulted in additional J-licenses, the net impact of these suits remains ambiguous. Neither *Reid* nor *Gladstone* dealt directly with the Heiltsuk's assertion that they possessed a right to govern the fishery within their historic territory. Moreover, both cases revealed the challenges to resource allocation that could result when policy makers sought to reconcile aboriginal resource rights with a narrow interpretation of common law.<sup>83</sup>

In structuring these arguments, it is important to eschew the essentialist representations of indigenoussness that permeate certain scholarly discussions of native participation in fisheries. Too often these discussions attribute to native people an unrealistic level of cooperation and solidarity, and ascribe to native fishers an ahistorical "Indian-ness" that transcends time and space.<sup>84</sup> By overlooking the ability of native

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<sup>83</sup> Douglas C. Harris's excellent essay "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery" strongly informs my analysis of the Heiltsuk's legal suits, particularly my discussion of *Gladstone v. the Queen*.

people to respond to situations based on spatially and temporally specific contexts, and not some universal indigenous consciousness, such discussions strip native people not only of agency, but also of much of what it is to be human. To avoid such conceptual errors in my own work, the above description of DFO-native relations in the spawn-on-kelp fishery requires a caveat that neither BC's native people nor the personnel of the DFO acted monolithically. Moreover, the process by which the Heiltsuk established and expanded their presence in the industrial spawn-on-kelp fishery differed substantially from the experience of other native groups. In recognition of this fact, this chapter is divided into two sections. The first explores the DFO policies and native initiatives that allowed native harvesters to achieve a central position in the spawn-on-kelp fishery; the second focuses specifically on the Heiltsuk's continuing struggle to achieve sole control over spawn-on-kelp harvest in their historic territory.

## I

As with every aspect of this study, the status of natives in BC fisheries reveals a tangled web of nature and culture. It may seem that environmental contingencies have little relevance to how native people have come to dominate the herring spawn-on-kelp industry. However, if this query is slightly altered to a question of how natives have been

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<sup>84</sup> Take for instance the following excerpt from Dianne Newell's *Tangled Webs of History*: "Although coastal Indians had been harvesting herring spawn in open ponds and on branches for thousands of years, most of the early licenses went to individual non-Indian fishers. Indians campaigned successfully for change to this policy," (Toronto: University of Toronto Press, 1991), 200. The reality of the situation was much more complicated. When the DFO first endorsed an industrial spawn-on-kelp fishery, the Union of British Columbia Indian Chiefs immediately demanded that it be closed. They feared that the industrial harvest of spawn-on-kelp would conflict with a pre-existing, exclusively native herring spawn food fishery. Furthermore, when the DFO expanded the fishery in 1991, native fishermen that were already engaged in the fishery aligned with their non-native counterparts in insisting that newly entering native bands face stringent license-retirement restrictions. In effect, these original native entrants impeded, rather than catalyzed the expansion of a native presence within the fishery. Newell's generalization detracts from what is otherwise an excellent discussion of Native participation in the spawn-on-kelp industry.

displaced in so many other fisheries that they once controlled, then nature becomes highly germane. It was contended in Chapter 1 that epidemic diseases severely undermined the Heiltsuk's ability to control their historic fisheries. Other native groups were similarly unable to defend centuries-old resource claims in the wake of successive disease outbreaks in the late-nineteenth and early-twentieth centuries.

Though rendered unenforceable, these resource claims were not forgotten. Thus when the DFO approved the creation of an industrial spawn-on-kelp fishery in the early-1970s, native groups immediately clamoured for a special position in the new fishery. The most obvious explanation as to why they desired a central position in the fishery was the abundance of wealth it generated. Coastal native groups had long recognized personal wealth vis-à-vis other individuals, and village wealth vis-à-vis other groups, and the spawn-on-kelp industry offered a promising and familiar opportunity to bring prosperity to otherwise impoverished native communities. It was a good bet. From 1977 through 1996, the spawn-on-kelp industry grew steadily from 111 metric tons of product valued at \$1.2 million to 256 metric tons of product valued at an impressive \$22.4 million.<sup>85</sup>

In violation of this sense of wealth and ownership, coastal natives had seen their position steadily erode in other wealth-generating fisheries since the early-1900s. Canada used common law notions of public access to justify stripping the Heiltsuk and other coastal native groups of their historic fisheries. Discriminatory licensing practices

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<sup>85</sup> Department of Fisheries and Environment Canada, *Annual Summary of British Columbia Catch Statistics, 1977* (Vancouver, Department of Fisheries and Environment, 1978), 8; Department of Fisheries and Oceans, *Annual Summary of British Columbia Catch Statistics, 1995* (Vancouver, DFO, 1996), 5; Harris, *Fish, Law, and Colonialism*, 21; Newell, *Tangled Webs of History*, 42.

ensured that control passed on to canneries, in many cases forcing native harvesters to labour for the very companies that had run roughshod over un-relinquished resource claims. Then, during the 1920s and 1930s, Japanese competition for labour and the increased use of larger, costlier vessels further reduced the number of native fishers in the industrial fishery. Worse still lay ahead.<sup>86</sup>

The diminution of native participation in BC fisheries became even more pronounced after World War Two because of policies intended to centralize and rationalize the province's fisheries. In 1954, American economist H. Scott Gordon proposed that instead of striving for MSY, Fisheries should endeavour to harvest the amount of fish that was most profitable without risking stock depletion; Gordon dubbed this policy objective "optimum yield." The Sinclair Report, 1960, drew on Gordon's theory to devise a license restriction system aimed at rationalizing BC's fishing fleet. In 1968 the recommendations of the Sinclair Report were incorporated into the Davis Plan, which sought to reduce the size of BC's fleet while rationalizing its structure. Davis believed that limiting the number of vessels fishing would result in greater efficiency. The state could then use higher profits to offset government management costs. In the mid-1970s, however, studies revealed that the cost of fishing had escalated precipitously without the expected benefits for fishers or canneries.<sup>87</sup>

The Davis Plan had a disastrous impact on the rate of native participation in BC's fishing fleet. The plan intended to stabilize profits for full-time harvesters and centralized processors. It was hardly compatible with native fisheries, which tended to be

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<sup>86</sup> Boxberger, "Lightning Bolts and Sparrow Wings," 1, 5; Newell, *Tangled Webs of History*, 53, 110; Harris, *Fish, Law, and Colonialism*, 76; Taylor, *Making Salmon*, 136.

<sup>87</sup> Newell, *Tangled Webs of History*, 126, 127, 135, 150, 153; Pearse, *Turning the Tide*, 78, 79.

part time and peripheral. Moreover, while the Davis Plan limited participation for all user groups, native groups in the North – where centralization had the strongest effect – disproportionately bore this burden. From 1950-1980 the number of native-owned vessels in BC fisheries fell by two thirds. Native employment opportunities in the fisheries plummeted at a similar rate.<sup>88</sup> Stripped of a way of life that had sustained their culture for centuries and with few alternative sources of income, BC's coastal native groups became increasingly dependent on government assistance for their basic living necessities. These trends fuelled the desire of numerous native groups to carve out and maintain a central position in the nascent industrial herring spawn-on-kelp fishery.

A strong cultural connection to the ocean and marine occupations also attracted the Heiltsuk and other native groups to the spawn-on-kelp fishery. Northwest coast native peoples spoke a variety of dialects and possessed distinctive rituals, cosmologies, and subsistence patterns, yet all shared an attachment to and dependence upon the fecund waters of the Pacific Ocean.<sup>89</sup> The Gitskan-Carrier Tribal Council encapsulated this relationship in a letter to the DFO:

The fishery has been of such importance that it is at the very roots of our cultures; our lives have revolved around the yearly arrival of the river's bounty. And so we cannot talk of the fishery without talking of our cultures because in many ways they are one and the same.<sup>90</sup>

The rhetorical power of these arguments was not lost on the native groups employing them. At the same time, no one could deny that coastal native culture had developed in

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<sup>88</sup> Newell, *Tangled Webs of History*, 149, 160; Dianne Newell and Rosemary E. Ommery, "Introduction" in Newell and Ommery, eds. *Fishing Places, Fishing People: Traditions and Issues in Canadian Small-Scale Fisheries* (Toronto: University of Toronto Press, 1999), 8; Boxberger, "Lightning Bolts and Sparrow Wings," 5.

<sup>89</sup> Stewart, *Indian Fishing: Early Methods of the Northwest Coast*, 18.

<sup>90</sup> Pearse, *Turning the Tide*, 174; Stewart, *Indian Fishing*, 18.

correspondence with the ebb and flow of the Pacific Ocean's abundant resources, and natives would not easily abandon this connection.

A broad native desire to participate in the industrial spawn-on-kelp fishery was strengthened by the DFO's coinciding willingness to grant natives access to this fishery. In the late-1960s, policy makers began to explore ways to compensate natives for losses incurred under the Davis Plan and to ensure a continued native presence in the provincial fisheries. In 1968 the DFO created the Indian Fishermen's Assistance Program to provide grants to native harvesters for the purchase of vessels and gear. Native employment opportunities in the fisheries further expanded in the early-1970s when BC's newly elected New Democrat Party (NDP) government funded the creation of two native-operated canneries. The NDP's three years in power from 1972-1975 represented a brief break in the conservative Social Credit Party's otherwise uninterrupted reign over provincial politics from 1952-1991. This hiatus was welcome news for BC's aboriginal population, as the Social Credit Party had historically exceeded even Canada's federal government in indifference to native issues. It was during this relatively pro-native era that BC's spawn-on-kelp industry emerged and Natives therefore enjoyed a uniquely strong position to lobby for involvement in the new fishery.<sup>91</sup>

Subsequent actions taken by the DFO confirmed its resolve to expand native participation in BC fisheries. The Pearse Commission, 1982, made a better deal for natives one of its primary objectives. The Pearse Commission was the first to give serious credence to native testimony. The seventeen native groups participating in the commission called on Pearse to redress the restricted licenses that were pushing native

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<sup>91</sup> Newell, *Tangled Webs of History*, 142, 165; Pearse, *Turning the Tide*, vii; Harkins, *The Heiltsuks*, 28; Barman, *The West Beyond the West*, 307-308, 310-311, 372.

harvesters out of the industry. Pearse agreed that changes were necessary, surmising that “Indian participation has been declining, and because the fisheries afford a unique economic opportunity for them, this trend must be reversed.”<sup>92</sup> Pearse’s attitude towards natives revealed a rising awareness among policy makers of the unenviable plight of natives pushed to the margins of their traditional fisheries. Though a genuine concern for native groups undoubtedly contributed to this shift in policy direction, the 1982 Constitution Act’s sweeping affirmation of all “existing aboriginal and treaty rights” was also a powerful motivation.<sup>93</sup>

For native fishers participating in the Pearse Commission, the divergent epistemological foundations of native ecological knowledge and state-sanctioned scientific conservation produced an interesting quandary. To have their less formalized ecological knowledge integrated into DFO policy, native participants needed to translate their knowledge into forms compatible with a scientific perspective, yet the very act of expressing such knowledge through the vocabulary of Western ecological science appeared to extinguish authentic indigenoussness among some observers. Native participants in the Commission often responded by presenting their knowledge in a hybrid linguistic form that combined the symbolic language and verbal artistry expected of an authentically aboriginal people with the scientific terminology necessary to express complex ecological content.<sup>94</sup> The Heiltsuk Tribal Council, for example, called on

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<sup>92</sup> Pearse, *Turning the Tide*, 150; Newell, *Tangled Webs of History*, 155, 168; “Appendix B: List of Exhibits and Participants in the Commission’s Public Hearings,” Vancouver: DFO, 1982 [unpublished document, archived at DFO Library, Vancouver, SH 328 C371 S.1].

<sup>93</sup> Newell, *Tangled Webs of History*, 169. Boxberger, “Lightning Bolts and Sparrow Wings,” 6

Pearse and the DFO to expand the role of native groups in fisheries management. In so doing, the Heiltsuk presented an argument that combined popular “indigenous” stylistic devices – including reference to an idyllic “old fishery” managed by sagacious “Hereditary Chiefs” – with the vocabulary of Western ecological science – including an astute analysis of local ecological knowledge.<sup>95</sup>

In the period following the Pearse Commission, Fisheries took many additional steps to improve the standing of natives in BC’s fisheries. In 1982 the DFO founded the Indian Fishermen’s Emergency Assistance Program to supply grants and loans to struggling native fishers. Shortly thereafter, Fisheries created a Native Affairs Branch for the Pacific Region to foster cooperation between native organizations and the DFO. Finally, in 1992 the DFO announced a seven-year, \$140 million Aboriginal Fisheries Strategy, intended to increase the participation of native groups in the management of their historic fisheries resources.<sup>96</sup>

As it turned out, one of the most effective means of expanding a native presence on BC waters was giving serious credence to the initiatives that native people themselves proposed. In April 1971 the Skidegate band of the Haida Gwaii (Queen Charlotte) Islands asked the DFO to help develop a new industrial fishery that would produce high-grade spawn-on-kelp for export to Japanese markets. The DFO terminated initial experimentation due to ill-defined “irregularities in operations,” but interest continued to

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<sup>94</sup> Laura R. Graham, “Ch. 6: How Should An Indian Speak?” in Kay B. Warren and Jean E. Jackson ed., *Indigenous Movements, Self-Representation, and the State in Latin America* (USA: University of Texas Press, 2002), 201, 207, 209.

<sup>95</sup> Heiltsuk Tribal Council, “A Brief to the Pearse Royal Commission on Pacific Fisheries Policy, Prepared by the Heiltsuk Tribal Council” (July 1981) [unpublished document, archived at DFO Library, Vancouver, SH 328 C371 S.142].

<sup>96</sup> Newell, *Tangled Webs of History*, 161; Department of Fisheries and Oceans, *Annual Report, 1983-1984* (Ottawa: DFO, 1984), 6; Department of Fisheries and Oceans, *Annual Report, 1992-1993*, 21.

grow. In 1972 DFO scientists returned to Skidegate to resume tests.<sup>97</sup> Through a synthesis of the Skidegate's local knowledge and the DFO's scientific approach, researchers devised two preliminary modes of harvesting spawn-on-kelp. In the "open pond" technique, harvesters collected naturally deposited spawn-on-kelp on the beach in Cumshewa Inlet from three motorized skiffs. In the "closed pond" approach, harvesters suspended a submersed net impoundment from a floating log frame anchored in Skidegate Inlet. They then transferred fresh kelp and live herring spawners to the impoundment to insure the production of a high quality, uniform commodity. Because the latter technique produced a superior product, the DFO decided to favour closed pond harvest when formulating regulations.<sup>98</sup>

The reaction to this experimental fishery illustrates the limits of a racial ideology for understanding aboriginal history. The Skidegate's quest to develop a state-sanctioned commercial spawn-on-kelp fishery met stern resistance from other native groups. When the DFO first issued licenses for the commercial harvest of spawn-on-kelp in 1975, the Union of British Columbia Indian Chiefs (UBCIC) and the Native Brotherhood of BC (NBBC) demanded the fishery's immediate closure. Fearing that a commercial spawn-on-kelp fishery would interfere with a pre-existing native food fishery, these associations called on the DFO to immediately revoke all spawn-on-kelp licenses.<sup>99</sup> These groups

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<sup>97</sup> Quoted in Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery," 207.

<sup>98</sup> F.V. Dickson, et al., *Propagation and Harvesting of Herring Spawn on Kelp: Technical Report, 1972-13*. (Vancouver: Department of the Environment, Fisheries Service, Pacific Region, 1972), 1, 5, 7, 16, 24, 26.

<sup>99</sup> UBCIC, "Union of British Columbia Indian Chiefs Position Paper on Commercial Production of Herring Spawn-on-kelp," Vancouver: 1975 [unpublished document, archived at UBCIC Library, Vancouver, Fsk 104 (Brian Deer)], 1.

also proclaimed their own “unrestricted and unregulated monopoly of the herring roe fishery.”<sup>100</sup>

Though unwilling to grant native harvesters a monopoly over the industrial harvest of spawn-on-kelp, the DFO did take steps to maintain a strong native presence in the fishery. In 1975, the DFO awarded thirteen J-licenses from a pool of twenty-two applicants. How to award these licenses had been a point of considerable debate. Some DFO officials had suggested auctioning licenses off to the highest bidder but the DFO rejected this approach for fear it would provide licenses to those who could afford them rather than those who needed them. Conversely, various native groups insisted that native applicants should receive all of the licenses. The DFO rejected this as well because it conflicted with Fisheries’ priority of maintaining public access.<sup>101</sup> Ultimately, the DFO devised a points system that credited experience in handling live herring, demonstrated interest in harvesting spawn-on-kelp, and remoteness of residence. The DFO considered native applicants separately, eventually awarding them eight of thirteen licenses. The DFO employed similar methods when it granted eight additional licenses in 1976, three more in 1977, and five in 1978, the latter solely to native bands, the Heiltsuk among them. This produced twenty-nine licenses. Non-natives held ten, individual natives held fourteen, and native bands held five.<sup>102</sup>

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<sup>100</sup> UBCIC, “Position Paper,” 2.

<sup>101</sup> UBCIC, “Position Paper,” 4; Harris, “Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery,” 211.

<sup>102</sup> McEachern, *The B.C. Spawn on Kelp Fishery – 1975-1977*, 4-5; ARA Consulting Group Inc., *The 1991 Expansion*, 2-2; P. S. Chamut, “Memorandum from P.S. Chamut Director-General DFO Pacific Region to P. Asselin, Assistant Deputy Minister” (July 5, 1988) Reid v. Canada, Plaintiff’s Docs, Exhibit 121, 2.

In spite of this high rate of aboriginal participation, many Native groups, including the Heiltsuk, remained dissatisfied with the rate at which the DFO was expanding the spawn-on-kelp fishery. Partially in response to sustained pressure from these groups, in the late-1980s the DFO considered another expansion. Officials remained uncertain as to how they should allocate licenses. Suggestions for distribution included a lottery system, a public auction, or simply issuing all new licenses to native bands. In the end, the DFO chose to pursue the third course to provide economic opportunities to otherwise isolated and impoverished coastal native communities.<sup>103</sup>

In 1989 the DFO announced that it would issue ten additional J-licenses to native bands. It also created the Indian License Advisory Board (ILAB) to allocate these licenses. After much deliberation, the ILAB awarded licenses to ten bands in late-1990. The Heiltsuk – already engaged in a heated legal battle for sole control of the spawn-on-kelp fishery within their historic territory – were not selected. Each of the chosen bands was required to surrender one herring roe seine or six herring roe gillnet licenses. In effect, the DFO reallocated a portion of BC's herring stocks from the herring roe fishery to the spawn-on-kelp fishery. Fisheries adopted this approach to ensure that the average catch per license for fishers already active in the spawn-on-kelp fishery and roe fishery were not reduced and to avoid additional harvest pressure on herring stocks.<sup>104</sup>

The 1990 expansion of the spawn-on-kelp fishery stands as a striking corrective to essentialist understandings of native participation in fisheries. The ten bands that received licenses opposed the stipulation that new entrants be required to retire herring

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<sup>103</sup> Chamut, "Memorandum" (1988), 1, 3-4; Chamut, "Memorandum to P. Asselin: Re: Expansion of Spawn-on-kelp Fishery" (July 25, 1989) Reid v. Canada, Exhibit 103, 1.

<sup>104</sup> ARA Consulting Group Inc., *The 1991 Expansion*, 1, 2-3.

roe licenses. These bands emphasized that, for those groups not fortunate enough to already possess an abundance of roe licenses, this stipulation would necessitate the purchase of roe licenses at a very high cost, only to turn around and relinquish them. This hardly seemed congruent with a plan meant to provide economic opportunities to native communities already struggling with indigence. Banks exacerbated the situation by refusing to lend money to bands because they lacked secure assets. Even if the bands had been able to locate a prospective lender, many felt this capital would be better invested in resource enhancement than license retirement. Finally the ten new bands suggested that it was unfair that they be expected to retire roe licenses when no such restrictions had been applied to previous entrants into the fishery.<sup>105</sup>

Rather than supporting these bands, existing native license holders aligned with non-native license holders to demand strict enforcement of the retirement scheme. These bands cited concerns over conservation and market sustainability, and emphasized that newly entering bands would benefit from costly lessons learned by early participants in the fishery. As one unidentified band informed the DFO, “[new license holders] must contribute something to enter the fishery. Original Bands and individuals built up the fishery through experimentation, effort, and innovation. New entrants are benefiting from original license holders.<sup>106</sup> This sense of having pioneered a new industry was parroted by non-native fishers. In the words of one non-native license holder, “The original group developed the fishery at a cost. We should be allowed to cash in on it – do

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<sup>105</sup> ARA Consulting Group Inc., *The 1991 Expansion*, D-1, D-2, D-3.

<sup>106</sup> ARA Consulting Group Inc., *The 1991 Expansion*, D-1.

not give something we developed away for free.”<sup>107</sup> Lost in all this rhetoric was any recognition of the original aboriginal fishery. The mixed response to this license-retirement scheme reveals that while native groups held the majority of licenses in the spawn-on-kelp industry, the groups shared no consensus on the direction the fishery should take or how it should be regulated.

That native participation in BC’s herring spawn-on-kelp fishery remained extremely high owed not only to the DFO awarding native people the majority of licenses but to the type of licenses that the department used to regulate the fishery. The DFO employed four basic forms of licenses to manage BC’s marine resources: 1) unrestricted licenses – a moribund form of management that placed no limitations on entry and in large measure was simply a source of revenue; 2) limited entry licenses – a regulatory strategy that limited the number of persons or vessels engaged in a fishery but, because catch was not limited, did not address competition or overcapacity; 3) quota licenses – a regime that allocated a specific harvest to each license holder, thereby reducing competition and over-capacity; and 4) mariculture leases – an approach that eliminated competition altogether by awarding specific privileges and obligations within a delineated territory.<sup>108</sup>

The DFO had always regulated BC’s spawn-on-kelp industry through a quota system. Every J-license entitled the holder to a fixed quantity of spawn-on-kelp. Since 1975, the quota varied between six and ten tons, with eight tons being the most frequent allocation. In other BC fisheries competition for finite resources resulted in

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<sup>107</sup> ARA Consulting Group Inc., *The 1991 Expansion*, D-3.

<sup>108</sup> Pearse, *Turning the Tide*, 80.

overcapitalization, as each harvester purchased more and more expensive vessels and gear to ensure a sizeable portion of the catch. This cycle of technological brinkmanship often led to enormous entry costs, which restricted Native participation. The spawn-on-kelp fishery' quota system precluded such a scramble and the overcapitalization that would come along with it, keeping the spawn-on-kelp fishery consistently accessible to impoverished native harvesters.<sup>109</sup> The DFO further encouraged native participation by granting native participants reduced license fees, and by stipulating that native bands or individuals could only transfer their J-licenses to other native bands or individuals.<sup>110</sup>

As unique as the high rate of native participation in BC's spawn-on-kelp fishery was, there were some who questioned why native groups were not granted exclusive control over this harvest within their historic territories. After all, native groups had gathered and traded herring spawn for centuries, and native harvesters first proposed the development of an industrial spawn-on-kelp fishery catering to Japanese markets. Conversely, virtually no non-native fishers were involved in the harvest of herring spawn prior to the early-1970s. From the perspective of social policy, many coastal native groups remained isolated and impoverished, with few opportunities for economic development comparable to the commercial harvest of spawn-on-kelp. For all of these reasons, allocating even a minority of J-licenses to non-native harvesters appeared to some as an immoral, state-enforced appropriation of a native fishery.

From the DFO's perspective, however, it was institutionally incapable of even conceiving of awarding all J-licenses to native harvesters. The DFO had always managed BC's marine resources through a strict interpretation of common law. Under such a

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<sup>109</sup> Chamut, "Memorandum" (1988), 2.

<sup>110</sup> ARA Consulting Group Inc., *The 1991 Expansion*, iv; Chamut, "Memorandum" (1988), 3.

regime, public access to marine resources remained sacrosanct, and limiting participation in a fishery by ethnic identity, regardless of the validity of that group's claim, was unthinkable. Some DFO officials also questioned whether awarding licenses on "racial grounds" might be "contrary to the Canadian Bill of Rights."<sup>111</sup> Finally, even had DFO policy makers been willing to break with common law and test constitutional phrasing, they still would have faced the wrath of such powerful lobby groups as the Pacific Fishermen's Association, which adamantly opposed the creation of an exclusive native fishery.<sup>112</sup> As shown below, all three hurdles confronted the Heiltsuk in their struggle to achieve sole control over herring spawn harvest within their historic territory.

## II

Foremost among the native groups that sought exclusive control over their spawn-on-kelp harvest were the Heiltsuk. Because the Heiltsuk were initially distrustful of closed-pond harvest, they entered the spawn-on-kelp industry substantially later than many other aboriginal groups. Nonetheless, the Heiltsuk rapidly reclaimed their historic role as the primary herring spawn producers on BC's Central Coast, and have continued to press for exclusive control over spawn-on-kelp harvest within their territorial waters. The Heiltsuk have employed a variety of strategies to expand their presence in the spawn-on-kelp fishery but none have been more successful, or more exasperating, than the courts. The Heiltsuk sought federal acknowledgement of their aboriginal right to harvest

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<sup>111</sup> Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery," 234; Harris, *Fish, Law, and Colonialism*, 31; UBCIC, "Position Paper," 4.

<sup>112</sup> Pacific Fishermen's Alliance Society (Intervener), "Intervener's Statement of Intervention," *r. v. Reid*. Action No. T-1265-89, Federal Court of Canada—Trial Division, n.d., 3.

herring spawn in the cases of *Reid et al. v. the Queen* and *Gladstone v. the Queen*. These cases vastly expanded Heiltsuk participation in the spawn-on-kelp fishery, but their full impact remains unclear. Both cases failed to address the territorial implications of the Heiltsuk's claim; thus neither lent serious credence to the band's assertion that they possessed a right to govern the fishery within the limits of their historic territory. The cases also revealed the misinterpretations that could arise when parties brought scholarly research forward as legal evidence. Finally, *Gladstone* raised serious questions as to whether aboriginal rights could ever be fully reconciled with Canada's narrow definition of common law.

Before explicating *Reid* and *Gladstone*, a brief analysis of the legal precedents on which these cases hinge is in order. Historically, the legal status of native peoples has tended to reflect the dependence – military, economic, or otherwise – of the colonizers on the colonized. Thus early articulations of native interests in North America, when the dependence of the colonizer was greatest, tended to recognize an inherent aboriginal right to resources. In the late-seventeenth and early-eighteenth centuries, for instance, Euro-Americans signed a series of peace and friendship treaties with native people in what is now eastern Canada. These treaties often stipulated that natives would retain hunting and fishing rights in their historic territories. The Royal Proclamation of 1763 maintained this tack by decreeing that the Crown must extinguish native title to land and resources through treaties before non-native settlement occurred.<sup>113</sup>

Though there was some initial uncertainty as to whether the Royal Proclamation applied west of the Rocky Mountains, Euro-American settlers in what would become BC

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<sup>113</sup> Olive Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Oxford: Oxford University Press, 2002), 154.

originally honoured the decree. From 1850 to 1854, future-BC Governor James Douglas negotiated fourteen treaties with native groups on Vancouver Island. These so called “Douglas Treaties” recognized a native right to fish “as formerly,” and implied that non-native fishing activities could not infringe on these rights. The Douglas Treaties created small reserves, a prevalent trend in regional native policy, because government officials expected that fishing, not agriculture, would continue to provide the bulk of native sustenance.<sup>114</sup>

As Euro-American dependence on local native groups waned, however, their legal status declined precipitously. This was especially so in BC because it was the only western province to retain control over its Crown lands upon entering Confederation. Whereas in the other western provinces the federal government negotiated a series of Numbered Treaties with native groups in the late-nineteenth and early-twentieth centuries, the only post-Confederation treaty signed in BC was Treaty No. 8, addressing an isolated stretch of the province’s north-eastern corner. The federal government was only marginally more concerned with native rights than its provincial counterpart, however. When BC joined the Dominion in 1871, the province ceded legal jurisdiction over its fisheries to the federal government. Initially policy makers exempted from regulation the native “food fishery.” This was a solely subsistence harvest that Euro-Americans, steeped in notions of native primitiveness, erroneously took to be the full extent of “traditional” resource exploitation. In the ensuing decades, Fisheries redefined this food fishery from an inherent aboriginal right to a kindness bestowed by a benevolent

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<sup>114</sup> Dianne Newell, *Tangled Webs of History*, 56; Harris, *Fish, Law, and Colonialism*, 31, 36; Dickason, *Canada’s First Nations*, 218.

government, and in the early twentieth-century Fisheries revoked this “kindness” altogether for many native groups living close to coastal cities.<sup>115</sup>

Although inexorable, the state’s abrogation of aboriginal resource rights was neither immediate nor linear. In 1889 BC’s aboriginal population indirectly received a short-lived legal victory in the form of *St. Catherine’s Milling v. the Queen*. The case grew out of a federal-provincial dispute over natural resources in Ontario, but its most significant ramification was the Privy Council’s ruling that Canada’s native population retained a legal claim to the land they inhabited by virtue of the Royal Proclamation. The court also determined that legislators could only extinguish this claim through treaties negotiated with native groups on an individual basis.<sup>116</sup> Having a right affirmed by a distant court, however, and being able to put that right into practice were two very different things. Canada’s government did its best to ignore the precedent laid down in *St. Catherine’s Milling*, or at the very least to make it impossible for the country’s native groups to benefit from this ruling. When the Allied Indian Tribes of BC advanced native claims to land and resource rights in the province in the mid-1920s, the state responded by passing section 141 of the Indian Act, making it illegal for native groups to raise funds for pursuit of land claims. This legislation remained in effect until 1951.<sup>117</sup>

Native fishing claims in BC stagnated through the mid-twentieth century until a key set of legal decisions in Washington State and BC ushered in a new era of native-DFO relations. This new era began dramatically when native fishers in Washington

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<sup>115</sup> Newell, *Tangled Webs of History*, 113, 120; Harris, *Fish, Law, and Colonialism*, 14, 59, 76; Dickason, *Canada’s First Nations*, 241, 254.

<sup>116</sup> David W. Elliot, *Law and Aboriginal Peoples in Canada, 4<sup>th</sup> Edition* (North York, Ontario: Captus Press Inc., 2000), 6.

<sup>117</sup> Newell, *Tangled Webs of History*, 113, 120; Harris, *Fish, Law, and Colonialism*, 14, 59, 76.

staged a series of illegal “fish-ins.” State attempts to prosecute these harvesters backfired in 1969 when Judge Robert Belloni reaffirmed native treaty rights in the region. In the mid-1970s, Washington State Natives used this precedent to achieve a stunning victory. Judge George Boldt ruled that treaties entitled these groups to fifty-percent of the state’s salmon harvest and stipulated that natives and the state must work co-operatively to manage the resource. Native victories north of the border were more subtle but important nonetheless. In 1973 the Supreme Court of Canada (SCC) denied a land claim by the Nisga’a of BC’s northwest coast. The court ruled against the band, but did concede that aboriginal people may possess title to land based on prior use. Though these were two very differently situated legal cases within two increasingly distinct bodies of law, they both gave BC natives greater clout in their battle for state-affirmed aboriginal fishing rights.<sup>118</sup>

The Constitution Act 1982 marked a much more tangible advance in the legal status of BC’s native population. The federal government created the Constitution Act in an ambitious attempt to address complex socio-economic issues through legal and constitutional guarantees.<sup>119</sup> Two articles carried particular import for Canada’s native population. Section 35(1) decreed that “the existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed,” while Section 25

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<sup>118</sup> Daniel L. Boxberger, “Lightning Boldts and Sparrow Wings,” 7; Elliot, *Law and Aboriginal Peoples in Canada*, 7; Taylor, *Making Salmon*, 243; Alexandra Harmon, *Indians in the Making: Ethnic Relations and Indian Identities around Puget Sound* (Berkeley: University of California Press, 1998), 230-231.

<sup>119</sup> Elliot, *Law and Aboriginal Peoples in Canada*, 7.

guaranteed that competing interests could not invoke the Canadian Charter of Rights and Freedoms as justification for infringing on these rights.<sup>120</sup>

In the early-1980s many court cases tested the implications of section 35(1) for native fishing claims in BC, but none matched the significance of *Sparrow v. the Queen*. Fisheries officers arrested Ronald Sparrow, of the Musqueam band, in 1984 for fishing on the Fraser River with a net longer than permitted under the Fisheries Act. When Sparrow appealed the charge based on aboriginal rights, the Provincial Court denied his claim because the Musqueam Band, like most BC native groups, lacked a treaty. On further appeal, however, the BC Court of Appeal (BCCA) overturned the decision, ruling that section 35(1) guaranteed a native right to a food fishery, even in areas where no formal treaty existed. Moreover, the BCCA ruled that policy-makers should treat this aboriginal right to a food fishery as second in priority only to conservation and the “public interest.”<sup>121</sup>

Dissatisfied with a verdict that fettered their regulatory authority, the DFO appealed *Sparrow v. the Queen* to the Supreme Court of Canada (SCC). The case’s outcome hinged on section 35(1)’s guarantee of “existing aboriginal rights.” The Coast Salish’s right to fish for salmon had been acknowledged through federal provisions for a native food fishery when BC joined Confederation, and no federal act had subsequently extinguished that right. Accordingly, Chief Justice Brian Dickson ruled that the Musqueam possessed an unextinguished aboriginal right to harvest salmon resources for

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<sup>120</sup> Aaron Blake Evans, “Frozen Fish Rights: A socio-legal analysis of *R. v. Gladstone*, *R. v. Van der Peet* & *R. v. N.T.C. Smokehouse* (at the Supreme Court of Canada, 1995-96)” (MA thesis, SFU, 1998), 23. Boxberger, “Lightning Boldts and Sparrow Wings,” 6.

<sup>121</sup> Boxberger, “Lightning Boldts and Sparrow Wings,” 6; Newell, *Tangled Webs of History*, 175; Elliot, *Law and Aboriginal Peoples in Canada*, 69.

subsistence, as well as social and ceremonial purposes. Moreover, Dickson ruled that in future cases, “the phrase ‘existing aboriginal rights’ must be interpreted flexibly so as to permit their evolution over time.”<sup>122</sup> Dickson also stipulated that the Crown could only extinguish such rights through legislation plainly and simply expressing its intent to do so. Thus prior Fisheries legislation that placed limits on native fishing activity had not implicitly extinguished aboriginal rights.<sup>123</sup>

Having determined that the Musqueam possessed an aboriginal right to harvest salmon in their historic territory, Dickson turned his attention to whether the DFO’s attempt to enforce size restrictions on Musqueam fishing nets constituted an infringement of the group’s aboriginal right to fish for subsistence or social purposes. To determine whether impingement had occurred, Dickson developed a three-part formula:

- 1) Is the limitation unreasonable?
- 2) Does the regulation impose undue hardship?
- 3) Does the regulation deny to the rightholder their preferred means of exercising the right?<sup>124</sup>

Based on the third criterion, Dickson ruled that the DFO had indeed infringed on the Musqueam’s aboriginal right to harvest salmon in their historic territory.

All that remained for Dickson was to determine whether this infringement was justified based on DFO objectives. In arriving at his decision, Dickson developed a further two-part test for determining justifiable infringement. Rejecting the BCCA’s vague notion of a general “public interest,” Dickson’s stipulated that a “valid legislative

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<sup>122</sup> Quoted in Thomas Isaac, *Aboriginal Law: Cases, Materials, and Commentary*, 2<sup>nd</sup> ed. (Saskatoon: Purich Publishing, 1999), 409.

<sup>123</sup> Isaac, *Aboriginal Law*, 409; Evans, “Frozen Fish Rights,” 40.

<sup>124</sup> Quoted in Evans, “Frozen Fish Rights,” 38.

objective [such as] conserving and managing a natural resource” had to exist.<sup>125</sup> If this first criterion were met, the Crown must then prove that it was proceeding in a manner consistent with the state’s fiduciary obligation, or “special trust relationship,” towards native peoples. In summary, Dickson ruled that in instances where conservation was a valid DFO objective, Fisheries must restrict non-native fisheries prior to their native counterparts.<sup>126</sup> Accordingly, Dickson ruled that the DFO lacked the authority to regulate the length of Musqueam salmon nets. The DFO may have been acting in the interest of conservation, but the department had done so to conserve stocks for commercial and sports fisheries, which were of a lower priority than the Musqueam’s constitutionally protected harvest.<sup>127</sup>

If the Musqueam’s experience stood as any indication, only force of law could compel the DFO to acknowledge native fishing rights, yet for a number of years the Heiltsuk clung to hope that they could expand their presence in the spawn-on-kelp fishery through cordial channels. In the early-1970s, they demanded the right to sell herring spawn-on-kelp procured in open-ponds to Japanese consumers. The Heiltsuk sponsored studies demonstrating that an open-pond fishery would result in lower mortality rates than conventional closed-pond operations, and outlining the economic benefits an open-pond fishery would provide to the Heiltsuk community.<sup>128</sup> The DFO was unswayed. It refused to issue spawn-on-kelp licenses for any purpose save the “propagation of herring spawn on kelp within an enclosed area, such as a floating impoundment, a trap or some

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<sup>125</sup> Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon, Saskatchewan: Houghton Boston Printers, 2001), 282.

<sup>126</sup> McNeil, *Emerging Justice?*, 282.

<sup>127</sup> Harris, “Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery,” 224-225.

<sup>128</sup> Plaintiff’s council, “Summary of Evidence,” 3-4; Newell, *Tangled Webs of History*, 201.

other type of enclosure.”<sup>129</sup> The DFO tried to draw the Heiltsuk into its plans by offering a closed-pond license in 1975, but the band declined. The Heiltsuk thus became the only native applicant not to receive a license in the fishery’s inaugural season. The Heiltsuk’s refusal was due to a lack of the capital required to launch a closed-pond operation, and to concerns regarding the environmental sustainability of closed-pond harvest. Pressed by economic need, however, the Heiltsuk finally acquiesced to the DFO’s prescribed mode of harvest in 1978. The band accepted a single J-license for closed-pond harvest.<sup>130</sup>

Facing severe unemployment, and increasingly sure that their territory could accommodate expanded fishing pressure, the Heiltsuk Band Council soon became dissatisfied with the prospects of a single J-license. Thus in 1979 the band began to lobby for an expanded harvest within their historic fishing grounds. The Heiltsuk emphasized that the individually held licenses that the DFO had hitherto used to regulate spawn-on-kelp harvest tended to pool wealth among a select few. The Heiltsuk instead wanted band-administered licenses so that returns could be reinvested in the community. To underscore the necessity of such community development, the Heiltsuk painted a vivid picture of the poverty and unemployment endured on the Bella Bella Reserve.<sup>131</sup> Band Council member Edwin Newman linked this plight directly to DFO policy: “Because of the mismanagement and loss of the fisheries, I feel that eighty percent of our people now sit on the beach. They’ve nothing else to do, because the fisheries is all we have. We don’t have logging; we don’t have mining in our area, we have nothing

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<sup>129</sup> Quoted in Harris, “Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery,” 214-215.

<sup>130</sup> Plaintiff’s council, “Summary of Evidence,” 4; Newell, *Tangled Webs of History*, 201.

<sup>131</sup> Plaintiff’s council, “Summary of Evidence,” 5.

else.”<sup>132</sup> The DFO remained unmoved and unwilling to expand the spawn-on-kelp fishery before the department had fully assessed the environmental and economic implications of the existing harvest.<sup>133</sup>

In 1983 the federal government gave the Heiltsuk’s campaign for additional J-licenses fresh life by formally recognizing the band’s comprehensive land claims. Cecil Reid, who replaced Cyril Carpenter as Chief Councillor of the Heiltsuk Band Council in the mid-1980s, suggested that this claim should encompass exclusive access to herring spawn-on-kelp in DFO Management Area 7 and part of Area 8. To bolster his request, Reid emphasized the benefits that the Heiltsuk’s existing J-license had brought to the Heiltsuk community. Funds obtained from the spawn-on-kelp fishery had financed the construction of a Heiltsuk Friendship Centre, as well as a community owned airport on Campbell Island. Reid estimated that an additional license would provide a further \$250,000 for social and economic development in Bella Bella. The DFO refused the request.<sup>134</sup>

When nearly a decade of petitioning yielded only apologetic refusal, Reid turned to less conventional channels. In 1986 he requested that in place of issuing additional J-licenses, the DFO simply increase the spawn-on-kelp quota for the Bella Bella area from eight to eighteen tons. This tactic failed, and so in 1987 Reid appealed directly to Prime

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<sup>132</sup> Edwin Newman, Chief Councillor of the Heiltsuk Tribal Council, “testimony at Vancouver, 30 July 1981,” UBC Special Collections, Commission of Pacific Fisheries Policy (Canada), Proceedings, Vol. 43. Burnaby B.C.: Audiotron Enterprises Ltd., p. 9096.

<sup>133</sup> C. W. Shinnors, “Letter from C. W. Shinnors, Director-General Pacific Region, DFO, to Cyril Carpenter, Chief Councillor, Heiltsuk Tribal Council” (January 8, 1981) Reid v. Canada, Plaintiff’s Docs, Exhibit 13.

<sup>134</sup> Reid, “Letter to Mr. Wayne Shinnors,” 217; Pryce, “The Manipulation of Culture and History,” 36.

Minister Brian Mulroney to grant additional J-licenses to the Heiltsuk Band Council. Reid was once again stymied but if anything Heiltsuk expectations grew rather than diminished. The Heiltsuk continued to try to collaborate with the DFO to develop a cooperative management scheme for the spawn-on-kelp fishery in the Bella Bella area, and in 1988 the band constructed a processing plant that greatly increased their capacity to sort and prepare spawn-on-kelp.<sup>135</sup>

Tension between the Heiltsuk's mounting expectations for an expanded role in the spawn-on-kelp fishery and the diminishing prospects of DFO approval finally prompted the band to adopt more adversarial measures. In 1989, Reid presented the band's claim for additional J-licenses to the Federal Courts on the basis of aboriginal rights.<sup>136</sup> In *Reid et al. v. the Queen*, the Heiltsuk claimed that Section 35(1) guaranteed their people an "exclusive or first-priority right to harvest from the Heiltsuk Roe Harvesting Areas... for their own consumption or commercially, subject only to the conservation of the species."<sup>137</sup> To validate their claim, the Heiltsuk emphasized a long history of resource use:

From time immemorial to the present, Members of the Band and the members of the Heiltsuk People have harvested and cured herring roe deposited on bough or kelp from the Heiltsuk Roe Harvesting Areas, for their own consumption and for trade or sale to others.<sup>138</sup>

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<sup>135</sup> Newell, *Tangled Webs of History*, 201; Cecil M. Reid, "Letter to Prime Minister Brian Mulroney: Re: Herring spawn-on-kelp Licenses" (February 3, 1987) Reid v Canada, Plaintiff's Docs, Exhibit 45; Cecil M. Reid, "Letter to Pat Chamut, Director General, DFO, Pacific Region" (May 12, 1986) Reid v. Canada, Plaintiff's Docs, Exhibit 35; Eric Kremer, "Letter from Eric Kremer, Chief Resource Allocation and Industry Liaison to G.E. Jones, Regional Director, DFO: Re: R.O.K. expansion, concerns, etc." (26, May 1987) Reid v. Canada, Exh. 104.

<sup>136</sup> Newell, *Tangled Webs of History*, 202; Pryce, "The Manipulation of Culture and History," 35-36.

<sup>137</sup> Pryce, "The Manipulation of Culture and History," 36.

<sup>138</sup> Quoted in Pryce, "The Manipulation of Culture and History," 35.

Within months of the suit being filed, the DFO announced that they would issue ten additional J-licenses to native groups through an all-aboriginal License Advisory Board. With no guarantee of receiving one of these licenses, the Heiltsuk pressed on.<sup>139</sup>

The outcome of *Reid et al. v. the Queen* hinged on the extent to which early Heiltsuk trade could be classified as “commercial” exchange. This debate pitted the expert testimony of Dr. Wayne Suttles, acting on behalf of the Heiltsuk, against Dr. Sheila Robinson, representing the Crown. The outcome underscored the divergent epistemological foundations of academia and jurisprudence. Suttles was professor emeritus in the Department of Anthropology at Portland State University. His previous research had positioned him well to assess the extent and nature of Heiltsuk exchange networks, yet the conclusions he drew were less compelling in a legal milieu than those provided by his opposition. Robinson had neither engaged in fieldwork nor published in the fields of anthropology and ethno-history. By carrying out research aimed solely at problematizing Suttles’ contentions, however, she was able to sway the court’s ruling in favour of the Crown.<sup>140</sup>

As expert witness for the Heiltsuk, Suttles established that extensive, large-scale exchange of herring spawn products had long been central to the culture and economy of the Heiltsuk people. While the intended recipients of this product, as well as the goods received in return, shifted over time, Suttles nonetheless demonstrated that a high level of continuity linked the Heiltsuk’s industrial spawn-on-kelp harvest to its aboriginal

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<sup>139</sup> Newell, *Tangled Webs of History*, 202.

<sup>140</sup> For an insightful analysis of this debate, see Pryce, “The Manipulation of Culture and History,” 36-42.

antecedent. Change and adaptation had, Suttles reminded the court, characterized Heiltsuk subsistence strategies far in advance of the arrival of non-native traders and settlers. By drawing on archaeological evidence of extraneous obsidian artefacts in the Bella Bella area, Suttles proved that long-distance exchange had been intrinsic to Heiltsuk culture since prehistory. In addition, Suttles drew on a variety of written sources, including diaries and journals from explorers, traders, and missionaries, to illustrate how the Heiltsuk had harvested and traded herring spawn products without interruption from 1793 through the mid-twentieth century.<sup>141</sup>

Robinson's starkly different interpretation of Heiltsuk history emphasized acculturation. For Robinson, transitions in the Heiltsuk's method of procuring and exchanging herring spawn indicated European disruption. Her argument that "dramatic contrasts can be seen between 'traditional' or historic herring spawn exploitation [and recent practices] in almost every aspect" suggests that she saw pre-contact Heiltsuk culture as largely static.<sup>142</sup> In response to Suttles' evidence of the Heiltsuk's long history of continuous trade in herring spawn products, Robinson countered that such descriptions were "very rare," and did not represent "modern commerce."<sup>143</sup> This assertion in part simply reflected how few early accounts of Heiltsuk society had yet been unearthed. Moreover, her expert opinion that kinship-based exchange was not commercial relied on a presentist definition of market exchange. In the past, aboriginal groups often created kin ties to establish or reinforce economic alliances and trading networks. It is difficult to determine to what extent Robinson was expressing her own view and to what extent she

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<sup>141</sup> Pryce, "The Manipulation of Culture and History," 42-43.

<sup>142</sup> Quoted in Pryce, "The Manipulation of Culture and History," 39, 41.

<sup>143</sup> Quoted in Pryce, "The Manipulation of Culture and History," 41.

was speaking to what she perceived as the established legal test for such cases, but this is not an expert witness's task.<sup>144</sup>

After less than an hour of deliberation, and with no explanation for his verdict, Justice Frank Collier ruled for the Crown. Twenty-seven months later he provided a three page account of his judgment. Robinson's influence was unmistakable. Collier determined that, while there was "some exchange, with friends and relatives, of roe for other things" this activity did not take place in "a market system."<sup>145</sup> How Collier reduced Suttles' evidence of extensive inter- and intra-tribal trade networks to "exchange with friends and relatives" remains baffling. Nonetheless, as a result of Collier's ruling that "the Heiltsuk people have not established that the commercial harvesting of roe on kelp, was ever... an aboriginal right," the Heiltsuk did not receive any of the ten newly issued J-licenses.<sup>146</sup>

Collier's reasoning was as interesting for what he omitted as for what he included. The Heiltsuk's claim contained an important territorial element that Collier chose not to acknowledge. The territorial basis of the Heiltsuk's claim had been prevalent throughout the court proceedings. The appellants had asserted that, prior to the arrival of Europeans, "the Heiltsuk People... occupied their own territory, and harvested and relied on the territory's resources according to their own laws, technology and customs."<sup>147</sup> The

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<sup>144</sup> Pryce, "The Manipulation of Culture and History," 43, 44.

<sup>145</sup> F. Collier, "Reasons for Judgment in the Case of *R. v. Reid*," *R. v. Reid*. Vancouver, BC: Action No. T-1265-89, Federal Court of Canada-Trial Division, February 28, 1993, 2.

<sup>146</sup> Collier, "Reasons for Judgment," 2; Newell, "Overlapping Territories and Entwined Cultures," 141; Newell, *Tangled Webs of History*, 202, 203; Department of Fisheries and Oceans, *Annual Report, 1987-88*, 19.

Pacific Fishermen's Association (PFA) clearly recognized the territorial implications of the Heiltsuk's claim. As interveners in the case of *Reid et al. v. the Queen*, the PFA asserted that,

Under the common law... all members of the public have a right to participate in all tidal fisheries and all public non-tidal fisheries within the Crown domain... [We] deny that the Plaintiffs' ancestors ever claimed, alternatively ever maintained a claim, to the exclusive right to harvest herring roe from the area referred to as the Heiltsuk Roe Harvesting Areas...<sup>148</sup>

The territorial implications of the Heiltsuk's claim were obvious to all. Thus it is striking that Collier did not mention it in his summary. Whether he shared the PFA's assumption that the Canadian state's common law approach to marine resources nullified any territorial component of the Heiltsuk's claim remains uncertain.

Though Collier's ruling surely came as a heavy blow, the Heiltsuk could still hold out hope that a second suit addressing the band's right to harvest spawn-on-kelp would bring more favourable results. *Gladstone v. the Queen* had entered the courts a year in advance of *Reid* as a result of two frustrated Heiltsuk fishermen using extralegal means to exercise their aboriginal right to harvest herring spawn. On April 27 1988, William and Donald Gladstone shipped 4,200 pounds of spawn-on-kelp from Bella Bella to Richmond, a suburb of Vancouver. The following day, they took a pail of their product to Seaborn Enterprises Ltd. in Vancouver and asked the storeowner if he was "interested" in the product. The owner responded that he would not purchase spawn-on-kelp from native harvesters, and the two left the store. At this point, a group of fisheries officers,

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<sup>147</sup> Counsel for the Defendants, "Further Amended Statement of Claim," *r. v. Reid*. Action No. T1265-89, Federal Court of Canada-Trial Division, 1989, 2.

<sup>148</sup> Pacific Fishermen's Alliance Society (Intervener), "Intervener's Statement of Intervention," *r. v. Reid*. Action No. T-1265-89, Federal Court of Canada-Trial Division, n.d., 3.

who had observed the entire operation, arrested the Gladstones for attempting to sell spawn-on-kelp without a J-license, and confiscated all 4,200 pounds of spawn-on-kelp.<sup>149</sup>

The Gladstones contested their arrest on two levels. First, they claimed that their actions had not constituted a clear attempt to sell spawn-on-kelp. Second, they argued that even had they been attempting to sell their catch, they were justified according to aboriginal rights. At Provincial Court Judge Lemiski ruled that evidence of an attempt to sell was irrefutable. However, he agreed that the Heiltsuk possessed a commercial right to spawn-on-kelp that legislation had never plainly and clearly extinguished. Additionally, because the DFO's regulation had the potential to cause the Heiltsuk hardship and denied the Heiltsuk their preferred means of resource exploitation, Lemiski ruled that the department had infringed on this right. Lemiski found, however, that this infringement was warranted on the grounds of conservation. On this point, Lemiski was opposed by Judge Lambert, co-presiding, who suggested that the DFO's licensing scheme was less a tool for conservation than for allocation.<sup>150</sup>

Perhaps buoyed by Lemiski's acknowledgement of an aboriginal right to a commercial harvest of spawn-on-kelp, the Gladstones appealed their case to the BC Supreme Court (BCSC). They were to be sorely disappointed. Judge Anderson dismissed the Gladstones' appeal. Like Lemiski, Anderson found overwhelming evidence of an intention to sell, but Anderson rejected Lemiski's ruling that the Heiltsuk had established an aboriginal right to a commercial spawn-on-kelp fishery. Moreover,

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<sup>149</sup> *R. v. Gladstone* [1996] 2 S.C.R. 723 <[http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol2/html/1996scr2\\_0723.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol2/html/1996scr2_0723.html)> (1996), 7.

<sup>150</sup> Evans, "Frozen Fish Rights," 102; *R. v. Gladstone*, 7-8.

Anderson ruled that even had such rights existed, they had been acknowledged and preserved in the form of a state-sanctioned native food fishery.<sup>151</sup>

Dissatisfied with a ruling that undermined years of hard-fought progress, the Gladstones took their case to the BC Court of Appeal (BCCA). In the BCCA, Judge Hutcheon agreed with Lemiski and Anderson that the Gladstones had obviously attempted to sell spawn-on-kelp. On the question of aboriginal rights, Hutcheon rejected Anderson's ruling that no such rights existed. Instead, Hutcheon returned to Lemiski's ruling in Provincial Court that the Heiltsuk possessed a commercial right to harvest spawn-on-kelp that the DFO had infringed on. Like Lemiski, though, Hutcheon ruled that this infringement was justified on the basis of conservation.<sup>152</sup>

The Gladstones remained unconvinced that the DFO had a valid legislative objective to impinge on Heiltsuk fishing rights, so the two appealed their case to the SCC. Arguments were held November 27 through 29, 1995, and a ruling was delivered on August 21, 1996. Judge Lamer ruled that the Heiltsuk had plainly attempted to sell spawn-on-kelp without a J-license, but the court did not accept the Crown's assertion that the Heiltsuk lacked aboriginal rights to a commercial spawn-on-kelp fishery. On the contrary, Lamer determined that,

The commercial trade in herring spawn-on-kelp was an integral part of the distinctive culture of the Heiltsuk prior to contact and was not incidental to social or ceremonial activities. An aboriginal right to trade herring spawn-on-kelp on a commercial basis was [therefore] established.<sup>153</sup>

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<sup>151</sup> *R. v. Gladstone*, 8; Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery," 223.

<sup>152</sup> *R. v. Gladstone*, 8.

<sup>153</sup> *R. v. Gladstone*, 2.

Lamer also ruled that DFO regulation did not demonstrate the “clear and plain” intention to extinguish aboriginal rights required by *Sparrow*, and thus it had not implicitly terminated the Heiltsuk’s right to a spawn-on-kelp fishery.<sup>154</sup>

On both points Lamer was opposed by the dissenting Judge La Forest. La Forest’s argumentation is interesting in that it reveals how static understandings of “traditional” native societies can serve as justification for denying aboriginal rights in industrial fisheries. La Forest contended that the Gladstones were operating in a “completely different context” from the historic spawn-on-kelp trade and that their activities were therefore not defensible on the grounds of aboriginal rights.<sup>155</sup> While he was correct that the Gladstones were operating in a very different socio-economic context than had Heiltsuk fishers one-hundred and even fifty years ago, La Forest constructed a fundamentally flawed portrait of the nature and scale of early Heiltsuk fishing and trading practices. He offered a definition of culture that froze identity. Any change essentially erased all rights, yet Heiltsuk fishing had never taken place in the stable, “traditional” context that he envisioned.<sup>156</sup>

Fortunately for the Heiltsuk, Lamer and most of the court rejected La Forest’s understanding of history and law. Having established the existence of unextinguished aboriginal rights, Lamer turned to the question of whether the DFO’s J-license scheme infringed on these rights. Adopting the test laid down in *Sparrow*, Lamer ruled that, because Fisheries had denied the Gladstones their preferred means of exercising an

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<sup>154</sup> *R. v. Gladstone*, 3.

<sup>155</sup> *R. v. Gladstone*, 2; Evans, “Frozen Fish Rights,” 19.

<sup>156</sup> *R. v. Gladstone*, 3.

existing aboriginal right, infringement had indeed taken place. As to whether this infringement was justified, Lamer adopted Lambert's dissenting judgment from the BC Provincial Court. The spawn-on-kelp fisheries had a minimal impact on herring stocks, so J-licenses were not a tool of conservation but of allocation. The Crown had presented no evidence that allocation was a valid objective and thus Lamer dropped the charges against the Gladstones and remanded the matter of allocation to the lower courts.<sup>157</sup>

To help guide future cases regarding allocation issues, Lamer made several recommendations on how judges should approach allocation issues. In so doing, he greatly broadened the range of valid legislative objectives for impinging on aboriginal rights.<sup>158</sup> Lamer reasoned that "Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights... [are] a necessary part of that reconciliation."<sup>159</sup> More generally, Lamer contended that "objectives such as the pursuit of economic and regional fairness" might, "in the right circumstances," be a valid justification for adopting an allocation scheme that infringes on aboriginal rights.<sup>160</sup> The notion that such vague objectives as the pursuit of "reconciliation" or "regional fairness" were valid justification for the quashing of constitutionally entrenched rights was strikingly similar to the "public interest" objective Dickson rejected as overly imprecise in *Sparrow*.<sup>161</sup>

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<sup>157</sup> *R. v. Gladstone*, 3; McNeil, *Emerging Justice?*, 285.

<sup>158</sup> Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery," 196.

<sup>159</sup> *R. v. Gladstone*, 4.

<sup>160</sup> *R. v. Gladstone*, 4.

<sup>161</sup> McNeil, *Emerging Justice?*, 285.

Lamer's second recommendation was perplexing. He argued that unlike the Musqueam food salmon fishery considered in *Sparrow*, the Heiltsuk's spawn-on-kelp fishery possessed no internal limits. Therefore, providing the Heiltsuk priority within this fishery could ultimately bar other harvesters from participation. In short, the Heiltsuk could expand their position within the spawn-on-kelp fishery subject only to market and environmental constraints, and any non-native participation in the industry could be seen as an infringement of the Heiltsuk's aboriginal right.<sup>162</sup> To avoid such a development, Lamer recommended that the Crown award the Heiltsuk "priority without exclusivity," a concept that he admitted "must remain somewhat vague."<sup>163</sup>

Lamer's contention that the Heiltsuk's spawn-on-kelp fishery had no internal limit stemmed from his refusal to acknowledge the territorial basis of the Heiltsuk's claim. The Heiltsuk were not in fact claiming an aboriginal right to B.C.'s entire spawn-on-kelp harvest, but to exclusive access to, and control over, the fishery within the confines of their historic territory. Essentially, they were seeking a constitutionally grounded guarantee to maintain activities that they had engaged in for centuries. And unlike salmon fisheries, where a down-river harvester could conceivably monopolize the resource, herring never cluster in such numbers that one user group, operating within a strictly demarcated area, could monopolize the fishery. Lamer, like Collier before him, failed to acknowledge the territorial aspect of the Heiltsuk's claim. Public access and the hegemony of the Canadian state once again trumped Heiltsuk sovereignty.<sup>164</sup>

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<sup>162</sup> *R. v. Gladstone*, 4; Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery," 226-228.

<sup>163</sup> *R. v. Gladstone*, 4.

<sup>164</sup> Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery," 196, 229-230; Evans, "Frozen Fish Rights," 56.

In spite of Lamer's expanded range of valid legislative objectives for infringing on native rights, the DFO's J-license allocation scheme seemingly failed the test of justifiable infringement formulated in *Gladstone*. Because no non-natives were involved in the spawn-on-kelp fishery prior to the 1970s, imperatives of "reconciliation" and "regional fairness" were less applicable than in the case of other fisheries.<sup>165</sup> As well, Lamer's recommendation that the state should grant Heiltsuk spawn-on-kelp harvesters "priority without exclusivity," ambiguous though it may have been, had not been fulfilled by the two J-licenses the band then held.<sup>166</sup> The DFO responded in 1997 by issuing five more J-licenses to the Heiltsuk, and two more in 1998, for a total of nine. These numbers would seem to be in much closer accord with the "priority without exclusivity" allocation that Lamer had proposed.<sup>167</sup>

All told, the experience of the Heiltsuk and other native groups in BC's spawn-on-kelp industry is cause for both hope and concern. In an unprecedented move, the DFO has granted native harvesters the vast majority of licenses in the spawn on kelp industry. Moreover, the *Gladstone* verdict has allowed the Heiltsuk to achieve a status in BC's spawn-on-kelp fishery that far-exceeds any other group's level of participation. At the same time, the Canadian state has refused to grant native harvesters exclusive access to the spawn-on-kelp fishery, regardless of the validity of such a claim. The DFO denied native groups exclusivity in the spawn-on-kelp fishery due to concerns over maintaining

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<sup>165</sup> Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery," 234.

<sup>166</sup> In 1993, the Heiltsuk Tribal Council received one additional J-license in exchange for retiring six herring-roe gill-net licenses; see Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery," 223.

<sup>167</sup> Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-kelp Fishery," 234.

public access. The courts refused to grant the Heiltsuk exclusivity for much the same reason, citing such vague imperatives as “reconciliation” and “regional fairness.” In both instances, policy makers sacrificed aboriginal rights to avoid alienating non-native fishing interests. These actions raise serious questions as to whether the Canadian state, as figurehead of the colonizers, can ever be relied upon to fully defend the rights of the colonized.

## Conclusion

At its core, the environmental history of herring spawn harvest among the Heiltsuk centres on competing visions of space and history. A pitched battle rages along the BC coast with each camp claiming the authority to define the region and its people. On the one side are the Heiltsuk and other coastal native groups that perceive the coast as a series of distinct territories occupied by autonomous cultures with unique and sometimes rival claims to these spaces. For these groups, aboriginal history is an ever-unfolding process characterized by adaptation and accommodation. On the other side is the Canadian state in the form of the DFO and the courts. These institutions tend to view BC waters through a common law prism in which the state's sovereignty is inviolable and competing claims are to be quashed or ignored. For many representatives of the state, aboriginal history is less a process than a point in time before the arrival of non-natives. In this model, pre-Contact native cultures were largely static and any subsequent changes in these cultures have come at the cost of reduced authenticity.

The story of BC's herring fisheries suggests that the former vision of space and history provides a superior framework for managing and allocating marine resources. The Heiltsuk and other coastal native groups sustainably managed their fisheries for centuries by dividing up spaces of harvest and placing real limits on consumption within these spaces. This regulatory scheme was successful because it allowed for regional specificity while also putting a finite cap on coast-wide harvest. When the state replaced these systems with a common law regime that did not heed spatiality and failed to limit harvests, stock declines resulted within decades. Thus when policy makers finally

recognized the need for new forms of regulation in the late-1960s, the DFO chose to manage a new, native-oriented spawn-on-kelp fishery through a quota system that paralleled centuries-old native practices.

Common law's legacy endured, however, as was revealed by the Heiltsuk's fruitless struggle to achieve sole control over spawn-on-kelp harvest within their historic territory. Both the DFO and the courts denied the Heiltsuk's claims on the basis that no entity save the state could claim *in situ* oceanic resources. To strengthen their position, many state officials drew on a static understanding of aboriginal history to argue that native fishing rights did not apply to industrial harvests. By this line of reasoning, native participation in industrial fisheries terminated authentic indigenesness. The trouble was that native groups had never existed in the static, "traditional" context that these officials posited. Thus what ostensibly heralded the external imposition of class, division of labour, and commerce on the Heiltsuk, often simply revealed the band's continuing ability to accommodate extrinsic practices within their own cultural web. Through such accommodation, Heiltsuk culture endured, albeit in shifting forms, in the face of seemingly overwhelming external pressures.

And so we return to the arrests of William and Donald Gladstone some twenty years ago in a Richmond parking lot. For the arresting officers, this was a straightforward struggle for control over a boatload of fish eggs and seaweed, but for the Gladstones, and ultimately numerous other coastal native groups, the stakes were much higher. At issue was the authority to define a people and the land they occupied. The fate of several communities, both human and biotic, hung in the balance

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