

B.C. history, not race, fuels fishing decisions

Treaties based on righting past wrongs done to aboriginal peoples

Hamar Foster, Special to Times Colonist

Published: Tuesday, January 02, 2007

Recently announced final agreements are reviving the "race-based" fishery charge. But what does this mean?

For a law to be "racially based" it must discriminate solely on the basis of race. This was the case, for example, in the United States before de-segregation and in South Africa until more recently.

In B.C. we are also familiar with this sort of law. There was a time when "Indians" could not vote, stand for election, become lawyers or buy land without permission – but "whites" could. And of course the government confiscated the property of Japanese-Canadians – including their fishing boats – during the Second World War because of their race.

But when Japanese-Canadians were compensated for this a few years ago, was this compensation "race-based?" Or was it because it was their property that had been taken?

The claim for aboriginal fishing rights is similar. First Nations are being allocated fishing rights not because of their race but because their fisheries were wrongfully appropriated. Indeed, when this issue was litigated in the U.S. 30 years ago, the courts confirmed that the fishing tribes of Washington and Oregon were entitled by law to up to 50 per cent of the salmon fishery.

I recognize that some people do not accept that legal regimes existed among B.C.'s aboriginal peoples, ones that allocated territories and proprietary rights to resources such as fish. To them, only nation states with legislatures have law. But there were such regimes, and our courts have ruled that they can be a source of aboriginal title and rights.

The reason lies in legal history. A century and a half ago, Governor James Douglas told his superiors in England that Indians had "distinct ideas of property in land" and insisted that their "fisheries ... should be reserved for their benefit and fully secured to them by law."

Accordingly, and because colonists relied on Indians to supply them with fish for food, the treaties Douglas made with the Vancouver Island tribes explicitly state that, in return for accepting settlement, they were guaranteed "their fisheries as formerly."

This promise was made to aboriginal people throughout B.C. in the 1860s and '70s. They understood it to mean that the family fishing spots used by them for centuries were to

remain theirs and that they could sell their catch to the settler population, just as they had to the fur traders.

They were also told that because their fisheries were being guaranteed, they did not need much land. And on this point the government was certainly true to its word: Only one-third of one per cent of B.C. was set aside as Indian reserves.

But the fishing guarantee, the supposed quid pro quo for such small reserves, had a different fate. Non-aboriginal fishing companies that intercepted vast quantities of fish before they could reach the spawning rivers, canning them and shipping them abroad, successfully lobbied in the 1880s to have their operations given priority over Indian fishing.

They even managed to restrict the "Indian food fishery" (created by government to substitute for the earlier guarantee) by arguing that this fishery -- which operated only after the industrial fishery had taken its huge cut -- was the primary threat to conservation.

By the end of the 19th century, a public that had no memory of the promises that had been made came to regard Indians as having no prior rights. Apart from the Indian food fishery, the resource was said to be open to everyone who could get a licence, whether you had been promised that your fisheries would be protected or you had just stepped off the boat from Europe. But we should not be surprised: People who believed that Indians had no rights to their traditional territories can hardly be expected to think that they had prior rights to fish.

Indians protested, of course, but they had no real choice: They had to either abandon the fishery or take part on these new terms. Some, of course, chose to participate and did very well. Most, however, were transformed into wage labourers for the new owners or marginalized altogether.

Because the fishery in B.C. has been premised on a denial of aboriginal rights for over a century, putting things right today is no easy task. Many non-aboriginal interests have intervened, and the passage of time has made deciding who should participate in a treaty fishery much more complicated.

However, calling attempts to come to terms with this history "race-based" does not advance anyone's understanding of the issue.

If a First Nation is recognized as having fishing rights above and beyond the food fishery it will be because it has either established a constitutional right to such a fishery in court (as the Heiltsuk have done with respect to the commercial herring spawn-on-kelp fishery) or because it has negotiated such rights as a side agreement to a treaty.

Either way, historical entitlement is the basis of the agreement, not "race," because simply being "Indian" is not enough. An aboriginal person who is not a member of the

treaty group can no more participate in a treaty fishery without permission than a non-aboriginal person can.

Surely there is something very unfair about taking property away from people because of their race and then arguing that it is racist to give it back. So I say, let's debate these difficult questions vigorously but leave "race" – a vague and confusing term that is not the legal rationale for treaties – out of it.

Hamar Foster is a professor of law at the University of Victoria.

-end-