MEETING THE SPIRIT OF SPARROW: THE REGIONAL FISHERIES COMMITTEE AS A MANAGEMENT MODEL IN CANADA

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ABSTRACT

This comment engages in an analysis of the response by regional branches of the Department of Fisheries and Oceans to the SCC's 1990 decision in R. v. Sparrow. The decision recognized aboriginal fishery rights and mandated increased consideration and consultation for aboriginals when setting quotas for regional fisheries. The comment examines differing strategies implemented in British Columbia and the Yukon, concluding that a new approach is required in British Columbia if the consultation mandated by Sparrow is to be meaningfully implemented.

I. INTRODUCTION

After the Supreme Court of Canada released its decision in R. v. Sparrow,¹ the federal government, through the Department of Fisheries and Oceans (DFO), released a program entitled the Aboriginal Fisheries Strategy (AFS). This strategy, through the provision of funding and resources, was intended to integrate First Nations into fisheries management in Canada. Among the aspects that would be affected by integration were conservation and protection initiatives, as well as development tools and maintenance of fish harvest management systems.

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In the initial press release, the DFO recognized that the government of Canada "must first meet (its) obligations to Aboriginal people." This statement was qualified, however, by the seeming caveat that followed, which noted that "(Canada) must also have a commercial fishery that is profitable and stable." Background documents for the program state that the agreements negotiated between First Nations and DFO are intended "to create cooperation over fisheries management; to respond and meet First Nations desires for greater participation in fish management; to respond per the SCC’s ruling in Sparrow; and to create the infrastructure to carry out the strategy." What the fisheries strategy and the accompanying background documents did not address was exactly how cooperation between government and First Nations would be initiated. This strategy, while laying out an obligation and a plan for addressing that obligation, failed to define what precisely was meant by "participation in fishery management," nor what consultation would mean in terms of actions by DFO. Further, while recognizing the need for both aboriginal involvement and a strong, profitable fishery, the AFS program did not articulate how the inevitable conflicts between the two would be resolved.

The task DFO is mandated to perform is one that requires caution and precision. They must set quotas which will satisfy the demands of the principles of conservation, while allowing for a "profitable and stable" fishery. Sparrow added consultations with First Nations to this balancing act, providing for participation by First Nations representatives who could come to consultations relying upon potentially conflicting scientific data and unique principles of sustainability.

As the AFS was implemented across Canada, the difficulty created by conflicting projections with regard to sustainable harvest quotas rapidly became apparent in the Pacific region. For nearly a decade now, First Nations in BC have annually taken part in the consultation process, only to be overridden as a matter of ministerial discretion where their recommendations differed from DFO sustainable catch targets. As a

4 Fisheries Act, R.S.B.C. 1996, c. F-14, s. 7(1) [Fisheries Act]. Under the Act, the Minister is authorized, in his absolute discretion, to issue licences for commercial fisheries. Such issuance includes terms such as total allowable catches, or quotas.
result, First Nations in some areas are left with the choice of either not fishing, or fishing within a total allowable catch they believe is set too high to be sustainable. Such a situation is surely not what the court in Sparrow envisioned.

While claiming to respond to Sparrow, DFO’s policy ultimately falls short of its mandate. Conservation is, logically, paramount to any fish management strategy, but the conflict between claims of primacy for First Nations rights to fish for ceremonial and food purposes, and the demands of the commercial fishing lobby, is not currently reflected in management strategies in BC today. In addition, there is no evidence that the native recommendations are being adopted as a part of the consultation process that the AFS prescribes.

This article provides a brief and narrow comparative analysis of fisheries in two management areas where the local First Nations have traditionally fished the stocks available, namely the salmon fishery of the upper Yukon River in the Yukon Territory, and the herring fishery of the Nuu Chah Nulth on the west coast of Vancouver Island, BC. Both fisheries fall under the auspices of the Pacific Region Department of Fisheries and Oceans. However, in the case of the Yukon, DFO has created an integrated fisheries management plan that provides a comprehensive strategy to allow sustainable harvests, with deference given to First Nations food fisheries and to the creation of fishery management strategies within the self-governing agreements of the affected First Nations peoples.

In Barkley Sound, where the Nuu Chah Nulth historically fish herring and herring roe on kelp, the lobby of the commercial industry has long outweighed the voice of First Nations’ principles of sustainable fisheries. While integrated fisheries management plans are in place, the continuing practice of DFO is to consult and subsequently override First Nations recommendations where they conflict with DFO-proposed catch quotas. This is arguably detrimental not only to the sustainability of fisheries in Barkley Sound, but also to the relationship between the Nuu Chah Nulth and the federal government for all aboriginal claims negotiations. Therefore, because the mandate to consult has no defined meaning in BC, Sparrow’s requirement of federal deference to s. 35 rights exists, at a basic level, on paper but not in practice.
II. THE SPARROW DECISION

Sparrow was the precedent-setting case that established a constitutional right to fish as a part of s. 35 aboriginal rights. Sparrow, a member of the Musqueam Indian Band, was convicted at a trial level of fishing with a drift net that was longer than the maximum length stipulated in the British Columbia Fishery (General) Regulations. On appeal, the Court held that the Constitution Act, 1982 permitted the regulation of fisheries for conservation and management purposes. This meant that the protection of the aboriginal right to fish in order to secure food did not entail a freedom of First Nations peoples from regulatory measures.

The SCC adopted the Court of Appeal’s holding that regulation for conservation and management purposes was paramount to, and a necessary infringement of, Aboriginal rights to fish for food, social, and ceremonial purposes. However, the Court also added that, after conservation and management goals are attained, First Nations fisheries must as a matter of constitutional principle take priority over commercial and recreational fishing. Under conservation initiatives, therefore, commercial and recreational fisheries must bear the brunt of reduced quotas and closures; only when conservation measures cannot be met without restrictions to First Nations fisheries will such restrictions be ordered.

III. THE GOVERNMENT’S RESPONSE

As a result of the Sparrow decision, DFO was compelled to re-evaluate the hierarchy intrinsic to fisheries management. Theoretically, the consequence of the decision was that commercial fisheries would thereafter defer to aboriginal fisheries for food, ceremonial and social purposes. DFO issued a response to the Sparrow decision, outlining how the

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5 Sparrow, supra note 1.
6 S.O.R./1984-248, s.12 and s. 27(1)(4).
8 Sparrow, supra note 1 at para. 9.
department would address this new mandate. Thus, the Aboriginal Fisheries Strategy was implemented across Canada.

Each fisheries region appears to implement the essential portions of the AFS with slightly different aspects. This seems to be due to variances in how First Nations and their claims are addressed across the country. In the Pacific region, the Aboriginal Fisheries Strategy identifies the following three objectives:

1. To provide Aboriginal people with opportunities to fish for food, social and ceremonial purposes in a manner consistent with the *Sparrow* decision and provide for the co-operative management of these fisheries.

2. To provide a role for the Aboriginal community in the management of Aboriginal fisheries through AFS agreements which includes:
   - Co-operative fisheries management.
   - Economic development opportunities for First Nations.
   - Pilot projects for the sale of fish.

3. The AFS is also meant to avoid or minimize disruption of non-aboriginal fisheries. This is being accommodated by the voluntary licence retirement of commercial licences, transfer of allocation to Aboriginal communities for pilot sales projects, and the issuance of commercial licences to Aboriginal communities.¹⁰

The AFS in British Columbia is also designed to be an interim arrangement between the federal government and the BC First Nations, while negotiations over treaties and self-governing agreements continue between the Crown, the Province and individual First Nations.¹¹

1. Fisheries in the Yukon

In the Yukon, though the territory is still technically covered under the Pacific AFS scheme, arrangements for salmon fisheries, including the Yukon River fishery, are facilitated by the Yukon Salmon Committee (YSC). The Committee was created in 1995, as a part of the arrange-
ments between governments and First Nations under the Yukon Umbrella Final Agreement (UFA). Comprised of representatives of twelve First Nations, as well as commercial and recreational fishers, the YSC advises DFO on all aspects of salmon management in the territory, including research, legislation, policies, programs, and harvest quotas for salmon stocks returning to the Yukon. The YSC is accordingly referred to as "the main instrument of salmon management in the Yukon".

First Nations Fisheries in the Yukon are managed through a communal licensing process under the Aboriginal Communal Fishing Licence Regulations enacted under the Fisheries Act. The YSC implements the consultative process for determining Integrated Fisheries Management Plans (IFMPs) for both Aboriginal Communal Fishing Licences and for commercial, recreational and domestic licences. After consultation and determination by the YSC of annual projected salmon returns, the YSC provides recommendations to DFO. If a salmon run is likely to provide an undersized harvest, affected First Nations are alerted, both to this fact and to the corresponding likelihood of a closure, at the consultative level rather than at the implementation level.

Once recommendations are made to DFO, the government has the final say in setting allowable quotas or implementing closures under the IFMPs. This is subject to the priority granted to First Nations fisheries.

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12 Umbrella Final Agreement, Her Majesty the Queen in Right of Canada, Government of the Yukon, Yukon First Nations (represented by the Council for Yukon First Nations), (29 May 1993) at c. 16 [Umbrella Final]. The Umbrella Final Agreement is a framework document developed between the 14 recognized First Nations in the Yukon, the Government of Canada and the Yukon Territorial Government. The UFA acts as a template for the development and implementation of individual First Nation Land Claims Final Agreements and Self-Governing Agreements. Presently, eight First Nations have signed Final and Self-Governing Agreements, while another five First Nations have signed an Agreement in Principle under the UFA.

13 Representation consists of two representatives from the Champagne and Aishihik (Alsek River) and Vuntut Gwitchin (Porcupine River) First Nations and a further two representatives from the Council of Yukon First Nations (representing ten First Nations in the Yukon River Drainage).

14 Department of Fisheries and Oceans, 2001 Yukon Y.T. Chinook and Chum Integrated Fishery Management Plan at s. 4.5.1.


16 Fisheries Act, supra note 4.

17 Department of Fisheries and Oceans, Interdepartmental Memo, Consultations Within Fisheries and Oceans Canada, Andrea Wilson, A/Regional Negotiator & Executive Secretary, Yukon Salmon Committee (July 2002).
over other fisheries. As DFO maintains communications and works closely with the YSC throughout the consultation process, the resulting recommendations are generally anticipated by DFO and adopted directly into the annual IFMP.\textsuperscript{18} Once target escapements are assured to have been met, the First Nations fishery can take place.

The result of the YSC process has been to provide a very clear communication system between DFO and the First Nations who rely on the fishery for food sources. Criticisms of the process focus around the costs of travel for consultation and the continual struggle of First Nations to find qualified people to spearhead the consultation process, one of many mandatory consultations under the UFA framework for intergovernmental collaborative schemes.\textsuperscript{19}

One of the clear benefits of the YSC consultation process is that "consultation" in this context is clearly defined by the UFA.\textsuperscript{20} The necessity of this is illuminated by the contrasting situation in BC, where the meaning of consultation is vague, and it is unclear what weight the Minister must give to any information gathered through consultations.\textsuperscript{21}

2. Fisheries in BC

In BC, the AFS works as a series of agreements that are generally implemented on an annual basis. The agreements take the form of Watershed Agreements, Contribution Agreements and Fisheries Agree-

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\textsuperscript{18} Ibid.

\textsuperscript{19} Under the UFA and individual First Nations self governing agreements, consultation is required for any activities within a First Nation’s traditional territory. Due to the broad spectrum of activities in traditional territories, coupled with a relatively small population in many communities, First Nations often do not have enough qualified people for the number of consultations that occur.

\textsuperscript{20} \textit{Umbrella Final, supra} note 12 at c. 1. Under the UFA, “Consult” or “Consultation” means to provide: (a) to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its view on the matter; (b) a reasonable period of time in which the party to be consulted may prepare its view on the matter, and an opportunity to present such views to the party obliged to consult; and (c) full and fair consideration by the party obliged to consult of any views presented.

\textsuperscript{21} The criticisms of the BC process include a lack of fair notice for consultations and no indications of full and fair consideration of any views presented: Interview of A. Wilson, A/ Negotiator and Executive Secretary, Yukon Salmon Committee, by author (18 November 2002).
ments. This article focuses only on the contents of Fisheries Agreements, which represent the heart of the AFS.

Fisheries Agreements provide for the allocation of food fisheries and suggest that the Minister, while retaining the discretion to set quotas at levels he or she deems fit, will take under advisement the recommendations made by the First Nation who is party to a Fisheries Agreement with DFO. In reality, it appears that very little weight is given to the recommendations First Nations may provide themselves.

Between 1987 and 1994, DFO maintained a catch ceiling in place for the herring fishery in Barkley Sound. DFO records show that with the ceiling method, the quota for herring was exceeded by approximately 1,800 tons, or 20 percent per year. In 1995, under pressure from the Nuu Chah Nulth and conservation groups, DFO switched to a pool quota for Barkley Sound. This was in place for two years, during which time commercial fishery hauls remained slightly under quota and herring populations appeared to flourish. In 1997, however, DFO reverted to the old system of an imposed ceiling quota for Barkley Sound.

The Nuu Chah Nulth, through their fisheries agreement with DFO, voiced their strong opposition to this. The Nuu Chah Nulth noted that, using purse seining gear, the fishery would reach the quota rapidly. It was likely, the First Nation warned, that each boat would fish heavily and the quota would be exceeded without DFO even realizing it. This, as

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22 A catch ceiling refers to the fisheries management scheme where individual boats fish for whatever quantity of fish they can pull in throughout the course of a time-limited fishery, subject only to the maximum catch totals for the region. At the end of the fishery opening, DFO tallies the weight or number of fish taken in total from a given area. If the number is under the ceiling limit, another opening may occur. If the quantity taken is over the limit, there is no recourse to rectify the overage.

23 Department of Fisheries and Oceans, “Roe Herring and Herring Spawn-on-Kelp Fact Sheet” (26 November 2002), online: Fisheries and Oceans Canada – Pacific Region <http://www-comm.pac.dfo-mpo.gc.ca/publications/factsheets/species/herring_e.htm>.

24 Pooling is a term used to describe a voluntary grouping of licences, a concept that controls the rate of catch by limiting the number of vessels that enter the water. This technique has been demonstrated to effectively reduce catch overages in the seine fishery. Each pool is required to average and monitor their own catches, while any overage goes to the quota of another pool that has not yet fished. (ibid.)

25 Department of Fisheries and Oceans, DFO Science Stock Status Report, B6-04 (2002), “West Coast Vancouver Island Herring” (9 October 2002) [DFO Science Stock Status].

it turned out, was exactly what happened — though the ceiling quota was set at 4,500 tons, the fleet harvested some 7,000 tons, exceeding the quota by 75%. DFO switched back to pool allocations in 1998, but to date the stocks have not recovered to pre-1997 levels.27

DFO states that other factors, such as unfavourable ocean conditions, have also played a role in the slow recovery of the stock.28 The Nuu Chah Nulth contend, however, that even if oceanic conditions play a role, the fact that DFO still allows commercial fishing in the Sound is contrary to conservation principles and to the Sparrow mandate to allow the First Nation priority in the fishery.29

Studies have further shown that the herring spawn on eelgrass has been disrupted in the Sound.30 As the spawn is what the First Nation primarily harvests, this is a significant disruption in their fishery, and consequently of their ability to exercise their s. 35 rights as recognized by Sparrow.31 They have been unable to attain their spawn on kelp harvest quotas for the past three years, while commercial fishing continues.32 What appears to happen is that DFO consults the Nuu Chah Nulth, which voices its opposition to the quotas suggested, after which the DFO-recommended quota is implemented as though that consultation had never occurred. Such consistent results suggest that the DFO grants the consultative process little true respect.

27 DFO Science Stock Status, supra note 25.
28 DFO Science Stock Status, supra note 25.
30 Alberni Environmental Coalition “Herring Threatened in Barkley Sound” (1999), online: Alberni Environmental Coalition http://www.portaec.net/library/ocean/herring_in_barkley_sound_threate.html>. For further statistical data on total spawn in area, also see: Department of Fisheries and Oceans, Herring Spawn Tables, West Coast of Vancouver Island, sub-area 232, West Barkley Sound (20 November 2002), online: DFO Pacific Region Scientific Division <http://www.pac.dfo-mpo.gc.ca/sci/herring/herspawn/table/wcvimapf.htm>.
32 Due to low forecast returns, the commercial fishery was closed in 2001, but reopened again for 2002, with commercial harvest catch at 0.8 tons. (DFO Stock Status Report, supra note 25.)
IV. FISHING PRIORITY AND S. 35 RIGHTS

If a differing level of sustainable harvest is identified between DFO and the affected First Nation, and DFO chooses to adopt its own level of harvest rather than the one the first nation recommends, DFO forces the first nation into a difficult position – a position, noted the Federal Court of Appeal recently in *Kitkatla Band v. Canada (Minister of Fisheries and Oceans)*, which raises serious questions about the protection of s. 35 rights.\(^3\)

In *Kitkatla*, the Federal Court of Canada dismissed an application by the Kitkatla Band for an injunction against the implementation of a commercial test fishery within a specific area of the northern BC coast near Prince Rupert. The applicant band had been unable to harvest their allowable traditional food quota over the previous four years, due to a lack of herring roe spawn in Kitkatla Inlet. DFO planned to implement a commercial test fishery, a plan that went unopposed in many areas but which was of concern to the Kitkatla band, due to the relatively small area in which they hoped to harvest their food quota. The issue was not whether the commercial fishery was sustainable within the area as a whole, but whether Kitkatla Inlet could both accommodate the fishery and provide for the needs of the Kitkatla Band. Adding to the complexity of the matter was the fact that commercial harvesters, in implementing their fishery, would actually kill the herring prior to the spawn occurring.

First Nations fishers, on the other hand, would implement their fishery at the time of spawn, either taking the roe off the kelp beds or inducing the herring to spawn in enclosures, after which the herring would be released.

Given that the commercial fishery would happen first, the Kitkatla Band claimed their s. 35 rights would be violated by allowing the fishery to go ahead. The band argued that a test fishery which killed fish in a small area where they traditionally harvested roe would likely result in the band not achieving its annual allowable harvest.

While consultations did occur throughout this process, and other Nations did endorse the test fishery scheme, the Court held that the result for this particular band, and their particular fishery, was that their

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\(^3\) [2000] F.C.J. No. 383 at 18 [*Kitkatla*].
rights would in all likelihood be violated, and their fish stocks decimated further, by the continuance of a commercial fishery in Kitkatla Inlet. At the very least, the Court held, the IFMP for 2000 raised serious questions about the Fisheries Minister invoking his unilateral authority under s. 7(1) to allow the fishery to proceed in the face of his mandate to accord priority to Aboriginal fisheries.

Ultimately, however, the injunction was refused, and the test fishery proceeded on the grounds that the First Nation did not show that they would suffer irreparable harm if the fishery went ahead. After all, the Court noted, the aboriginal fishery had been below quota for years. If the test fishery caused that result again, such a result could not be characterized as irreparable harm, just business as usual.

While this holding applied the correct law regarding grounds for obtaining an injunction, the reasoning seemed to confine itself to an excessively narrow view of the situation. The Court ignored the fact that the high volume of fish taken by commercial fisheries played a large role in forcing First Nations to demand injunctions in an attempt to preserve their food resources. While not immediately demonstrable, given the First Nation still exists in its traditional territory, it is arguable that the First Nation, in relation to its historic state, has already suffered irreparable harm at the hands of the herring roe industry and DFO's management practices. That the harm is ongoing does not demonstrate that the harm has not occurred. The Court, in its decision, looked only at the context of the one proposed fishery, not where that fishery was situated within the scope of the Kitkatla Band's relations with DFO and commercial roe fishing in general.

A corollary observation to this is that DFO, in the exercise of ministerial discretion in such a case, forces a First Nation into court proceedings in order to protect its ability to fish for food and ceremonial purposes. Such action appears to neutralize any assistance the AFS is purported to provide First Nations in the exercise of their s. 35 rights.

If precedence is to be accorded to First Nations to achieve their food fisheries, fish management must be designed in such a way that guarantees the aboriginal quota is met first, prior to the commencement of any commercial harvests (even test harvests). One partial solution is to

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34 Ibid. at 18-19.
35 Kitkatla, supra note 33 at 20.
36 Kitkatla, supra note 33 at 20.
regard the First Nations fishery as a test fishery itself, under the premise that DFO should not be able to licence a commercial fishery under circumstances where a small fishery guaranteed by the Constitution cannot be sustained. This is complicated by the fact that some First Nations fisheries occur after the commercial fishery, such as terminal salmon fisheries and the harvesting of roe off kelp beds. Again, while prioritized on paper, the First Nation fishery tends to bear the brunt of any unexpected dips in harvest levels in situations where they are the last to fish their quotas.

Continued refusal on the part of DFO to meaningfully consult and prioritize the First Nation fishery will not only lead to distrust and scepticism on the part of First Nations toward the AFS and IFMP process, but quite possibly to further deterioration of all treaty negotiations and consultations with the federal government. The federal government has a fiduciary duty to First Nations peoples, and these negotiations and consultations are important aspects of that duty. Ultimately, First Nations recommendations are subverted by the ministerial discretion that requires consultation, but doesn’t define what the consultation means or how it is to be applied to quotas.

To claim that aboriginal rights are receiving deference, as mandated by the *Sparrow* decision, in an area where commercial fishers have a significant economic stake, is a fallacy that is recognized and condemned by many First Nations across BC. Increasingly, First Nations, with the support of smaller, community-based commercial fishing enterprises, are demanding that DFO consider moving towards a regionally based fisheries management program for the Pacific coast. Such a management scheme would likely mimic the salmon committee implemented in the Yukon, although regional fisheries would cover a smaller geographic scale than the Yukon plan. It could further include provisions for a workable definition of “consultation”, coupled with requirements for the Minister to demonstrate the use of such consultations in determining quotas.

Such a move has met resistance from large commercial operations, such as BC Packers. Owned by the Jim Pattison Group, it is the largest

37 For e.g. comment from “Feeding Frenzy”, *supra* note 26; treaty discussions of the Lheidli T'enneh Band on the Upper Fraser River, Regional Fisheries Management Workshop, 23 October, 2002; *Kitkatla*, *supra* note 33; *Campbell v. British Columbia (A.G.)*, [2000] B.C.J. No. 1524 (QL). (Nisga’a Nation as intervener)
exporter of roe herring in Canada. DFO submits that the development of a regional fisheries management scheme is also hampered by the division among neighbouring First Nations with regard to sustainable quotas and allocations of allowable catches. This criticism of regionally based programs appears to ignore the fact that differing opinions on allowable catches occur under the present program as well. The difference would be that debates over allowable catches would occur at a regional discussion table, as occurs in the Yukon now, as opposed to during individual negotiations between each First Nation and DFO, as is currently the case in BC.

Regardless of the potential pitfalls of creating regional fisheries management strategies across BC, it is evident from the current state of fisheries management that the status quo is falling short of the mandate articulated in Sparrow to accord First Nations priority in fisheries. If the Federal Court of Appeal has already recognized that the unilateral actions of the Minister raised serious constitutional questions in the case of the Kitkatla, it appears likely that it will only be a matter of time before a First Nation chooses to bring about a test case on the constitutional validity of current fisheries management practices in BC.

Rather than wait for court action to effect change, DFO has the opportunity now to utilize some of the regional fisheries management practices as they exist in the Yukon and apply it to fisheries policy in BC. Though there would undoubtedly be areas where the management template of the YSC would fall short of the needs of BC fisheries management, any step in the direction of Yukon-style regional fisheries management strategies would be a positive step, implementing the spirit of the law set out in Sparrow rather than the hollow letter of the law we see in place under Sparrow today.

39 Interview of A. Wilson, A/Negotiator and Executive Secretary, Yukon Salmon Committee by author (18 November 2002).
40 While speculative on the part of this author, it appears that the Kitkatla attempted to use their claim for injunctive relief as a test case. The denial of the injunction was appealed by the Kitkatla, but DFO was successful in having it declared a moot point. This could well be a difficulty with any case brought forward: every year brings a new IFMP; by the time a case could be heard, the fishery would have occurred and the point is then moot. If the only recourse First Nations have to stop a fishery is injunctive relief, the result of the Kitkatla stands against them.