

Subsistence or Sale?: An Analysis of Historical Questions Raised in *R v. Gladstone*

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This paper takes an analytical look at the historical basis behind the 1996 decision of the Supreme Court of Canada to recognize that the Heiltsuk had a historic right to harvest and sale of Pacific herring. In examining the history of the Heiltsuk spawn trade the paper traces the evolution of federal fisheries legislation and its ultimate effects on the wider indigenous fishery in British Columbia. The ultimate purpose of this paper is to show how history as a tool can help bring clarity to indigenous rights and pave the way for a healthier relationship between the indigenous peoples of British Columbia and the Canadian government.

In 1988 the brothers William and Donald Gladstone, two members of the Heiltsuk community of Bella Bella British Columbia, were charged in violation of section 20(3) of the *Pacific Herring Fishery Regulations* for the attempt of sale of up to 4,200 pounds of herring spawn without a commercial licence. These charges led the Gladstone brothers to appeal to the Supreme Court of Canada claiming that they had a constitutional right to the sale of herring spawn in accordance to section 35(1) as laid out in the *Constitution Act of 1982*. While the court ruled that the Heiltsuk did in fact have a right to continue a commercial herring spawn on kelp fishery it also recommended an inquiry into whether the licencing system was sufficient in allowing aboriginal fisheries to sustain themselves.¹ In coming to this ruling the presiding Justices raised many questions regarding indigenous fishing rights in relation to commercial trade in Canada. These questions required a great deal of historical analysis and would determine if the Heiltsuk had a substantial herring spawn trade prior to European contact, the importance of the herring trade to Heiltsuk society, whether this right to trade was restricted by legislation and to what effect do conservation regulations have on the Heiltsuk nation's right to control their own sustainable fisheries. In defining the historical importance of the herring to the Heiltsuk way of life the right of the Gladstone Brothers to continue their traditional harvest can be cemented. This essay will explore the answers to these

¹ Canada, Supreme Court of Canada, *R. v. Gladstone*, [1996] 2 SCR 723, 1996 CanLII 160.

questions while also emphasizing the importance of the herring spawn trade to the Heiltsuk and how legislation can not only affect the Heiltsuk fishery economically but also environmentally. Through showing the historic importance of the herring catch as not only a cultural but also as an economic mainstay of the Heiltsuk community I hope to shed further light on the historical basis of the decision made by the Supreme Court of Canada on the Gladstone appeal.

One of the central questions raised by the presiding Justices in the Gladstone Case of 1996 was whether the Heiltsuk people had a substantial herring trade before European contact and how important was this trade to the community as a whole. In attempting to determine the Heiltsuk right to fish herring it is imperative to consider that the Heiltsuk people have been harvesting herring on their traditional fishing grounds² for centuries, long before contact with European society.³ To the Heiltsuk the Pacific herring was a central aspect of their society both culturally and economically. In the early spring when the herring would come into shallow inlets and streams to spawn, communities would come together to harvest this important fish. As a result, many traditional methods developed that involved the use of either a dip net or a tool known as a “fish rake”.⁴ Aside from consuming the actual meat of the herring the native communities on the Pacific northwest including the Heiltsuk would develop a taste for herring spawn and would create a substantial fishery devoted to its collection as a result.⁵ The harvest of herring spawn would prove a convenient practice due to the fact that spawning herring would attach their fertilized eggs to seaweed or other objects found in the shallow inlets that they were spawning in. The Heiltsuk and other indigenous communities would then harvest these eggs off of the kelp and would even develop techniques that involved placing pre-set

² Located along the central coast of British Columbia around the communities of Bella Bella and Ocean Falls.

³ Dianne Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries*. Toronto, ON, CAN: University of Toronto Press, 1993. Accessed February 4, 2016. ProQuest ebrary. 189.

⁴ One of the more popular of these tools was the fish rake which usually consisted of a long bow of wood in which was lined with a series of bone teeth. Fishermen would paddle their canoes into schools of herring and could yield a substantial catch by simply sweeping the water with the rake.

⁵ Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries*, 189.

frames of wood or kelp into these inlets to collect the herring spawn.⁶ To indigenous communities on the Pacific northwest herring spawn was typically consumed on the seaweed it was harvested from and was considered a delicacy central to feasts and celebrations.⁷ To the Heiltsuk people this delicacy would be increasingly important due to the fact that feasts were central to the culture and societal structure of their communities being held on many occasions such as tombstone erections, marriages and the giving of a new name.⁸

While some of the spawn was consumed directly by the community the Heiltsuk would reserve most of the spawn for trade with other nations found on the west coast.⁹ The result would see the development of a complex trade network up and down the coast of British Columbia that would be essential to indigenous communities as it accounted for the fluctuations in the abundance of certain resources.¹⁰ Due to the fact that the strain of kelp that the herring were spawning on greatly influenced the flavour of the eggs, nations like the Heiltsuk would be able to develop a certain demand for their Herring spawn among other nations dependent on the type of kelp they used.¹¹

⁶ Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries*, 189.

⁷ Nancy J. Turner, Fikret Berkes, Janet Stephenson, and Jonathan Dick, "Blundering Intruders: Extraneous Impacts on Two Indigenous Food Systems." *Human Ecology* 41, no. 4 (2013): 566.

⁸ Martha Black, "Looking for Bella Bella: The RW Large Collection and Heiltsuk Art History." *The Canadian Journal of Native Studies* 9, no. 2 (1989): 276.

⁹ Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries*, 190.

¹⁰ Dianne Newell, Ommer and Rosemary, E. *Fishing Places, Fishing People: Traditions and Issues in Canadian Small-Scale Fisheries*. Toronto: University of Toronto Press, 1999. 122.

¹¹ The Heiltsuk particularly were famous for the spawn that they harvested off of Boa kelp and Giant kelp and would be able to open up trade with nations that had a desire for that particular flavour of herring spawn. Perhaps the best example of this differentiation in the spawn trade was the trade between the Heiltsuk of Bella Bella and their Nuxalk counterparts in Bella Coola as the latter often traded specifically for the Heiltsuk Boa Kelp spawn but not for the Giant Kelp spawn; Newell and Ommer, *Fishing Places, Fishing People*:

Many early European explorers in the area such as Captain James Cook took notice of this consumption of herring spawn in indigenous communities throughout the 18th century as Europeans would increasingly come into contact with indigenous societies on the Pacific northwest.¹² Throughout the 18th and 19th centuries these European accounts would continue to be recorded and Europeans working in Heiltsuk lands would often write about the large quantities of preserved spawn that the Heiltsuk would routinely trade.¹³ These annual harvests and trade networks would continue to function alongside European expansion as the Heiltsuk would continue to trade their Boa Kelp spawn to the Nuxalk people for Eulachon grease right up into the 1950's.¹⁴ In the late 18th century as the European presence became more established on the Pacific Northwest they would find themselves becoming increasingly integrated into a well established and complex trade network that spanned the Pacific coast. The Heiltsuk adapted to this new trade partner and regularly traded with the Hudson Bay Company at Fort McLaughlin on Campbell Island.¹⁵ As it was common for the local indigenous communities to supply Hudson Bay Company forts with food it is reasonable to assume that the Hudson Bay Company would have at one point or another bartered with the Heiltsuk for seafood such as preserved Herring spawn at Fort McLaughlin.¹⁶ This indigenous trade in which the Heiltsuk had been central to for so many years would continue until 1974 when government would steer its attention towards the commercial potential of the herring spawn in a global market.

In order to develop an understanding on how such an essential trade to aboriginal societies on the Pacific Northwest could become so dominated and regulated by government institutions it is imperative to examine the development of these institutions and their resulting effect

Traditions and Issues in Canadian Small-Scale Fisheries, 127.

¹² Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries*, 190.

¹³ *Ibid.*, 191.

¹⁴ *Ibid.*

¹⁵ Black, "Looking for Bella Bella: The RW Large Collection and Heiltsuk Art History," 275.

¹⁶ Even after fishing regulations began being established in British Columbia in the late 19th century the Heiltsuk would not only trade with other nations on the coast but also with Japanese Canadian communities in which they would receive soya sauce for their lucrative herring spawn; Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries*, 191.

on the indigenous fishery in British Columbia as a whole. The genesis of a government fishery policy in British Columbia came in 1877 with the implementation of Ottawa's *Fisheries Act of 1868* in the waters of the Pacific Northwest.¹⁷ This was a policy that had cut its teeth in the freshwater fishing disputes that had occurred earlier that century in the Great Lakes between indigenous communities and the settler population of Upper Canada. These policies had originally emerged under the colonial government of Upper Canada in order to protect indigenous fishing grounds in accordance with treaties signed in the area in the early 19th century. However, the growing influx of settlers moving into the Great Lakes region led to a series of amendments to the previously made fisheries legislation that would begin to open up traditional fishing sites to non-native fisheries. These amendments would be reaffirmed by the new federal government in 1868 as a part of their fishery policy for the new nation of Canada. As a consequence when British Columbia inherited the federal *Fisheries Act of 1868* it was inheriting a policy that had been developing for many years towards a consumerist fishery that placed native fishing rights under the control and protection of the government.¹⁸ The new federal policy in British Columbia meant that a strict licencing system was now implemented for an increasing commercial fishery and in 1888 the government passed policies to allow natives to fish without licence as long as it was purely a food based fishery.¹⁹ This created a substantial restriction on communities like the Heiltsuk who had relied on the trade of seafood as the economic staple of their community. However native communities' persistence in exercising their age old trade networks would soon lead to conflicts with the federal fisheries policies such as in 1890 when the Lowe Inlet Canning Company was charged by fisheries officers for buying from unlicensed native fishers.²⁰ The federal government would cement its control over indigenous fisheries in 1894 when regulations were extended to make

¹⁷ Douglas C. Harris, *Landing Native Fisheries: Indian Reserves and Fishing Rights in British Columbia, 1849-1925*, (UBC Press, 2009), 106.

¹⁸ Harris, *Landing Native Fisheries: Indian Reserves and Fishing Rights in British Columbia, 1849-1925*, 107.

¹⁹ *Ibid.*, 109.

²⁰ *Ibid.*, 99.

it mandatory that indigenous fishers carry a permit in order to participate in the food fishery. With the once lucrative indigenous seafood trade network now reduced to a fishery of subsistence many communities including the Heiltsuk were forced to operate outside the law with lowered prices in order to facilitate an economy. Despite these complications the Heiltsuk spawn on kelp trade had continued to thrive without regulation because government interest in the industry was relatively low.²¹ However in 1974 due to increased commercial interest in the herring spawn on kelp fishery the government opened a fishery to the public.²² This fishery was heavily regulated and was not exclusive to indigenous fisheries, all one needed to obtain to harvest herring spawn commercially was a “J” licence and the licencing system that was now driven by market.²³ In this licencing system indigenous fisheries were no longer protected. Access to licenses would go to whoever could afford one. Regardless of that fact indigenous fishers still managed to hold most licences in this fishery. However, in 1978 due to overfishing the government stopped issuing new “J” licences and only 28 of the previously issued licences could be renewed. Even though indigenous fishers had a large portion of the licences in the spawn fishery there was still a great number of indigenous communities in British Columbia that had relied on the herring spawn trade traditionally that were now blocked out of the now closed licencing system.²⁴ Although the Crown claimed in the Gladstone appeal that this was done for conservation purposes and not to extinguish the rights of the indigenous fishing communities these regulations did however inadvertently take away one of the economic mainstays of indigenous communities in British Columbia including the Heiltsuk nation.

With the establishment of a highly regulated Herring Spawn on kelp fishery as mentioned previously it is important to examine not only the effects of these regulations but also of the herring fishery as a whole on the Heiltsuk both environmentally and economically. In the

²¹ In 1955 the government had even reserved the spawn on kelp fishery for indigenous communities on a subsistence basis; Newell and Ommer, *Fishing Places, Fishing People: Traditions and Issues in Canadian Small-Scale Fisheries*, 128.

²² *Ibid.*, 191.

²³ *Ibid.*, 129.

²⁴ Newell and Ommer, *Fishing Places, Fishing People: Traditions and Issues in Canadian Small-Scale Fisheries*, 139.

herring fishery there are two predominant methods to harvest the eggs.²⁵ The herring roe fishery can be extremely detrimental to herring fish stocks due to the fact that the fish are killed during the harvest of the roe. The industrialization of the herring roe fishery in the late 1960s lead to the major decline of the Pacific herring populations in the Pacific northwest.²⁶ This was probably due to the vulnerability of Herring populations to large-scale net fisheries that were required to maintain quota with the catch of impregnated female herring.²⁷ This industrial element of the herring roe fishery in the 1970's spill over into the newly government regulated herring spawn on kelp fishery that in the beginning put a higher value on markets than the conservation.²⁸ The result be the closing of "J" licences by the government in 1978 as mentioned earlier due to decimated Pacific Herring populations. The high regulation of the herring spawn on kelp fishery lead to the exclusion of many of the harvesting techniques that had been implemented by the Heiltsuk prior to European contact.²⁹ Like other indigenous communities on the Pacific Northwest the Heiltsuk had for centuries managed a sustainable fishery before European contact through the practice of selective harvesting and habitat creation.³⁰ The Heiltsuk had maintained their fishery through their laws of Gvi'ilas that assured that their resources were harvested

²⁵ Nancy J. Turner, Fikret Berkes, Janet Stephenson, and Jonathan Dick. "Blundering Intruders: Extraneous Impacts on Two Indigenous Food Systems." *Human Ecology* 41, no. 4 (2013): 566.

²⁶ The first being as spawn and the second being as roe. Spawn is a form of herring egg that has been laid and fertilized before it is harvested; this harvest of herring spawn has no direct consequence for the fish that is laying the eggs. The roe however is the unfertilized egg and it can only be harvested by extracting the eggs directly from the body of an impregnated female; Ibid.

²⁷ Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries*, 192.

²⁸ Newell and Ommer, *Fishing Places, Fishing People: Traditions and Issues in Canadian Small-Scale Fisheries*, 141.

²⁹ Ibid.

³⁰ Turner, Berkes, Stephenson, and Dick. "Blundering Intruders: Extraneous Impacts on Two Indigenous Food Systems," 565.

sustainably.³¹ In doing so traditional techniques proved to have offered a lower mortality rate for herring populations.³² Their techniques contrasted greatly to the new harmful industrial method of the impoundment fishery.³³ Along with this new more aggressive method of harvesting herring spawn the increased access to the once protected indigenous fishery would lead to the over consumption of herring spawn. The dismantlement of the Heiltsuk tribe's ability to control the destiny of its own fishery along with the opening of a coastal commons and the establishment of a government controlled fishery would lead to the decline in fish stock across the Pacific Northwest.³⁴ As a result, the regulations placed on the indigenous fisheries by the government actually suppressed the ability of groups like the Heiltsuk to maintain a sustainable fishery on their traditional lands.

Even though the Gladstone appeal was ruled upon favourably in 1996 for the Heiltsuk commercial right to harvest Herring spawn, the Heiltsuk communities like Bella Bella continue to struggle to maintain a sustainable fishing based economy. As government legislation continues to limit indigenous control over their fisheries and infringe upon the aboriginal right to maintain a fishery for economic fairness.³⁵ After the Gladstone case affirmed the Heiltsuk commercial right to harvest Herring spawn, their community is still plagued by high unemployment rates and futile attempts to remove the restrictive

³¹ Anonymous. "Heiltsuk." First Nations: Land Rights and Environmentalism in British Columbia.

³² These practices were essential to the survival of the Pacific herring due to the fact that the herring spawning behaviour is especially vulnerable to overconsumption. Specifically in the herring spawn on kelp fishery the Heiltsuk used open pond techniques that allowed herring to enter pre-set spawning grounds and leave at their own will; Newell and Ommer, *Fishing Places, Fishing People: Traditions and Issues in Canadian Small-Scale Fisheries*, 140.

³³ For instance, the herring were herded by fishing boats into compounds where they are kept and bred for spawn and then released, this method had a high mortality rate for the herring involved; Newell and Ommer, *Fishing Places, Fishing People: Traditions and Issues in Canadian Small-Scale Fisheries*, 129.

³⁴ Turner, Berkes, Stephenson, and Dick. "Blundering Intruders: Extraneous Impacts on Two Indigenous Food Systems," 565.

³⁵ Parnesh Sharma, *Aboriginal Fishing Rights: Laws, Courts, and Politics*. Halifax, NS: Fernwood, 1998. 93-94.

licences on their fisheries.³⁶ With this lack of control over their fishing grounds the Heiltsuk nation continued in the 21st century to suffer from depleted catch due to overfishing of herring for the roe industry. In 2004 the Heiltsuk and Kitasco nation united to form a 50 boat blockade of their traditional fishing grounds preventing the entry of a herring roe fishing fleet. The community not only has trouble preventing overfishing in their waters but also preventing the pollution of their traditional waters. The main source of the pollution in Heiltsuk fishing grounds are a result of aquaculture facilities like the Panfish-Omega fish farm that was established at Ocean Falls another traditional Heiltsuk community in 2003.³⁷ In 2006 the Heiltsuk nation testified before a British Columbian government panel in Bella Bella regarding the effects that aquaculture had on their communities. The testimony raised many concerns regarding the contamination of water due to the nearby hatchery that was damaging local marine life.³⁸ With the testimony the members of the community provided a detailed list of all the aquatic species that are essential to their way of life, one of the species that was mentioned as being negatively impacted by water contamination was the Pacific Herring.³⁹ The testimonies of the Heiltsuk also confirmed that seafood was still essential to their community as it provided families with food on a weekly basis.⁴⁰ From the information provided by testimonies of members from the Heiltsuk community and the reduction of the Herring fishery by overfishing it is clear that although the regulations placed on indigenous fisheries of the Pacific Northwest were intended to protect fisheries it also inhibited communities like the Heiltsuk from taking action to protect their sustainable fishery from exterior threats to fish populations like they had been doing for centuries before European contact.

³⁶ Heiltsuk Will Assert Aboriginal Right During the Herring Spawn on Kelp Fishery. (2001, Feb 27). *Canada NewsWire*.

³⁷ Anonymous. "Heiltsuk." *First Nations: Land Rights and Environmentalism in British Columbia*.

³⁸ Canada, The Legislative Assembly of British Columbia, *Report on Proceedings: Sustainable Aquaculture*, Robin, Austin., 5 October 2006, 493.

³⁹ *Ibid.*, 492.

⁴⁰ *Ibid.*, 510.

Though the Heiltsuk are still struggling to this day to reduce restrictions on their fishery, the Gladstone case of 1996 was crucial in not only identifying the effects of fishery legislation on indigenous communities but also to defining the right of indigenous communities to harvest traditional resources to maintain a degree of stability in their communities. The Gladstone case raised important historical questions which still to this day define the nature of indigenous fishing rights: Did the Heiltsuk engaged in trade prior to European contact; how important this activity was to the society; whether or not this activity had been extinguished by government legislation and how do conservation regulations effect the Heiltsuk community as a whole? Although seemingly simple these questions can require extensive research by archeologists, historians, ecologists and legal scholars in order to even begin to discover the answer. In finding the answer however history plays an integral role in fitting all these schools of thought together into a cohesive narrative that can help a court to understand not only the temporal priority behind the rights of the Heiltsuk to trade but also the economic and environmental repercussions of regulations placed on Heiltsuk fisheries. Not only does history provide us insight into the rights of the Heiltsuk to exercise a degree of control over their fishery but it also offers solutions for future policies that can come to light through the examination of sustainable and successful Heiltsuk fisheries in the past. This outlook of history will be increasingly important as we move into a future that is plagued by not only overfishing but also contamination of seawater due to industries such as aquaculture. Through the lessons of history, the Gladstone ruling stands as an example of the importance of the recognition of the indigenous rights in the fisheries and the importance of an open government-indigenous dialogue that relies on the willingness to learn and grow together for a collective interest in maintaining a healthy fishery for years to come.

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