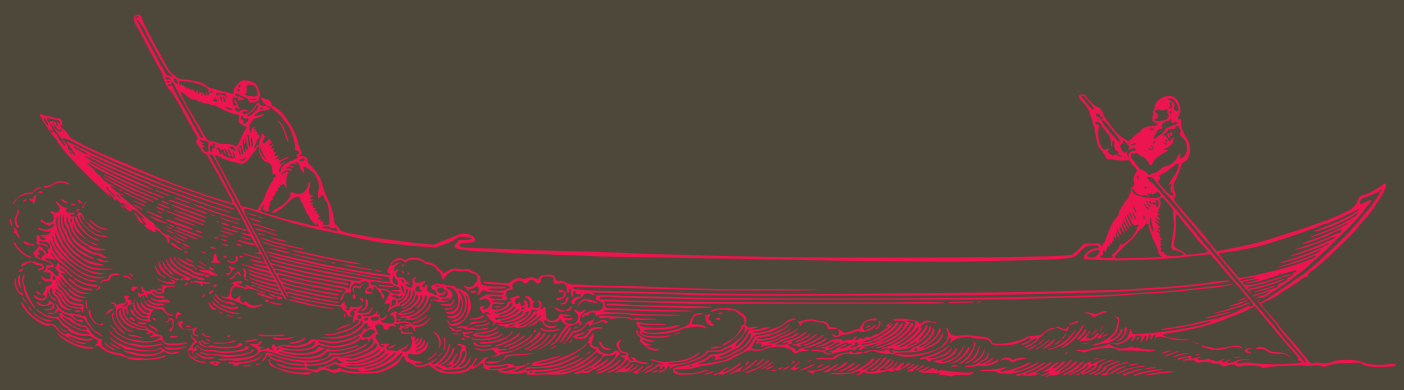


ABORIGINAL FISHING RIGHTS IN CANADA: AN OVERVIEW

SOURCE OF RIGHTS

- Canadian Aboriginal Law
  - Acknowledged Aboriginal Rights: Aboriginal fishing rights are rights that come from historical fishing in an area by a particular Indigenous group and are recognised by courts.

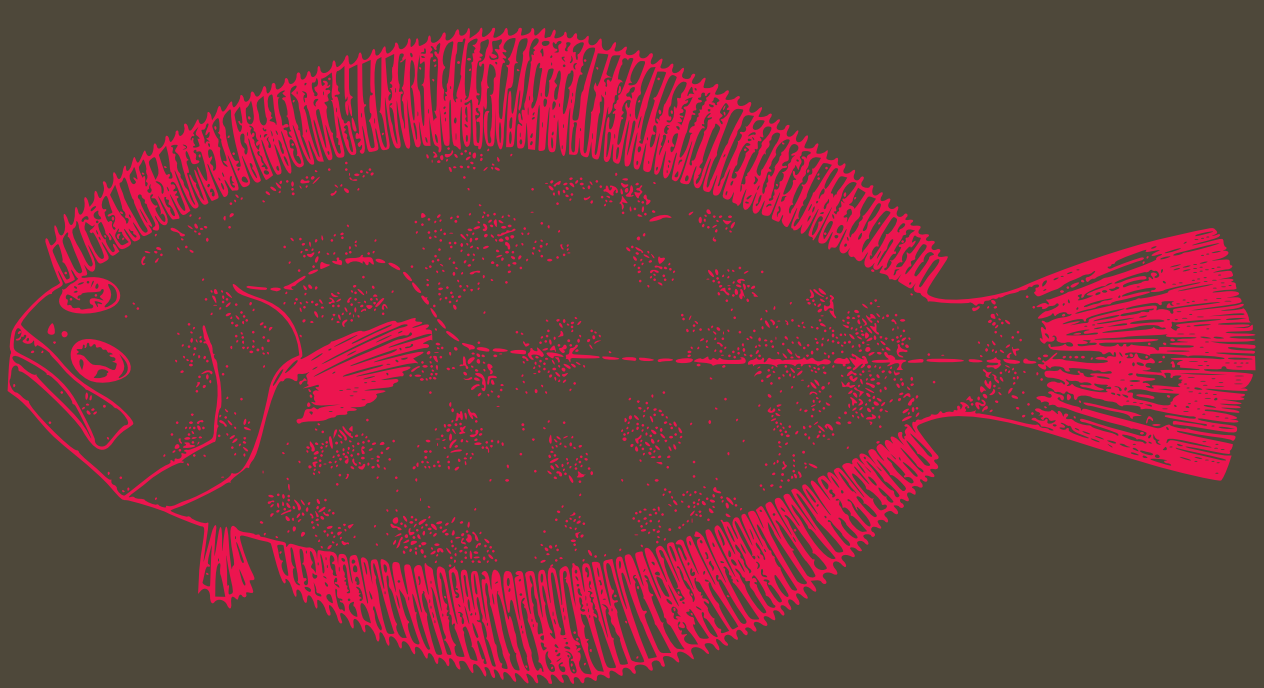
  - Treaty Rights: Treaty fishing rights come from treaties made between Indigenous groups and the Crown. There are two main categories of treaties:
    - Historic treaties: Fishing rights based on these treaties are common on the East Coast.
      - Example: *Marshall* was about eel fishing based on the Treaty of 1760.
    - Modern treaties: Ones from about the last 50 years and generally negotiated by lawyers, these treaties resemble complicated business contracts. They are more common in the fishing context of the West Coast.

- Indigenous Law
  - Traditional laws of Indigenous groups related to fishing.
  - International Agreements and Standards.
    - Example: The United Nations Declaration on the Rights of Indigenous People (UNDRIP), article 36.

EVIDENCE NEEDED

- Aboriginal Rights:
  - Evidence for Aboriginal rights is based on oral histories, archaeology, anthropology, or other relevant sources. Courts are supposed to be accommodating to this kind of evidence.

- Treaty Rights:
  - Historic treaty evidence can be similar to Aboriginal rights evidence in its flexibility. Courts can account for whether the treaties were made fairly and what was promised even if it is not in the treaty.



SUBSTANCE OF RIGHTS

There are three main categories fishing rights acknowledged in Canadian courts:

- Food/Customary
  - The first Aboriginal rights case of *Sparrow* found that there was a special right for Indigenous people to fish and hunt for food or customary purposes in some cases.

- Moderate Livelihood
  - In the treaty fishing rights case of *Marshall*, there was found to be a right to fish for a “moderate livelihood.” This vague phrase has caused a lot of problems in figuring out what exactly a moderate livelihood is.

- Commercial
  - The most significant rights are those to a commercial fishery. Such cases have been rare and are still subject to restrictions, but do exist on the West Coast.
    - An example of such a restriction is the case of *Lax Kw'alaams,* where it was held that the only historic commercial fishery to base an Aboriginal right on was limited to one product: grease of the Eulachon fish.

The different levels of rights can all be infringed on by the government, but the threshold to do so depends on what the rights are. For food/customary rights this bar is high and conservation has been the only valid reason to restrict it. On the other end of the scale, rights to commercial fisheries can be infringed on for a variety of reasons including “regional and economic fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups” in addition to conservation.

OUTCOMES

- Unacknowledged Rights:
  - Indigenous fishing rights exist whether or not they are formally acknowledged by Canadian law. This can mean fishing in accordance with traditional Indigenous laws or the principles of internationally recognized standards like UNDRIP. These kinds of rights are those that may ultimately be acknowledged in court after they have been exercised.

- Acknowledged Rights:
  - Agreements/Licensing:
    - Courts acknowledging rights often leads to agreements with the DFO. The idea is create more certainty around the rights. This can mean the government will buy back licenses from non-Indigenous fishers and/or issue special communal licenses to bands. Agreements and buybacks are often required because of tension in communities as a result of newly acknowledged rights that can even lead to violence, like in Burnt Church after the *Marshall* decision.

  - Co-Management:
    - In addition to DFO licensing, there is the possibility of co-management of fisheries with traditional knowledge and input, as well as DFO procedures. Creating meaningful and respectful partnerships has been difficult, but successful where it has happened.
      - Example: Traditional knowledge of the Nuu-chah-nuith First Nation in BC was used to save the goose neck barnacle fishery there in 2004 through co-management. DFO scientists had previously deemed it unsustainable and closed it.

    - One vision of co-management originated in Mi'kma'ki. Albert Marshall calls his system Etuaptmumk ("Two-Eyed Seeing") and describes it like this:

      "[L]earn to see from your one eye with the best or the strengths in the Indigenous knowledges and ways of knowing ... and learn to see from your other eye with the best or the strengths in the mainstream [Western] knowledges and ways of knowing ... but most importantly, learn to see with both these eyes together,for the benefit of all"

      Etuaptmumk has been recognised as a valuable tool by practitioners and academics in Canada and internationally.