The Right to Fish?

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Do fish harvesters have the 'right' to fish for their livelihood? The Supreme Court of Canada, in various judgments over the last twenty years or so, has affirmed that Canadian First Nations have treaty-based 'rights' to hunt, fish and gather wildlife, fish, plants and trees for subsistence, ceremonial, and, in fisheries, 'modest livelihood' commercial purposes. These rights are defined in important ways by an English legal tradition that rests at the heart of the Common Law. To a large extent, the 'common law' expresses judicial and legislative interpretation of how people in society have worked out, through day-to-day living, what matters and how relationships between people should be defined and mediated.

First Nations' entitlements were written into negotiated treaties with reference, at least in part, to Common Law approaches to and understandings of property, access to property, and property rights. For example, within the Common Law it is recognized that an individual or a social group can achieve *legal rights* to physical property such as land and to the use of land through activities such as customary practices and/or a socially recognized history of continuous occupation and use. Generally known examples of these are *easements* and *squatter's rights*. An example of the former is a path across either privately owned or Crown land that has been used by the public, customarily and continuously. With the establishment of an easement, the legal owner of the land is restrained from barring public use of the path. In the latter case, an individual or group can establish legal title to land and its use, particularly in the case of public or Crown lands, through continuous occupation and use.

First Nations' treaty entitlements are rooted in the Common Law recognition that legal rights to land and its use are established through social acknowledgement of an individual's or group's continuous occupation and use (in law these are instances of *usufructs* or 'use rights'). In Common Law this principle and practice applies unless the Crown formally extinguishes such claims by declaring that such rights do not exist. Indigenous peoples' property rights in Canada, as defined and interpreted through English Common Law, have been affirmed, rather than extinguished, throughout the history of First Nations' relations with the British Crown/Canadian Federal Government. This is expressed most directly and emphatically in the numerous treaties negotiated with First Nations by the British Crown

and Canadian Government.

There is no question that the Crown (Canadian Federal Government) retains formal legal ownership and property rights with respect to territorial waters, i.e., rivers, lakes, and internationally recognized coastal zones. This is clear within the Constitution and the Common Law. Yet, indigenous peoples' use rights supercede (take precedence over) the exclusive property rights of Crown (Government) ownership, as judged by the Supreme Court of Canada in circumstances either where such rights are embedded in treaties or where the Crown has not formally extinguished such rights.

Given these attributes of the Common Law and its expression in the definition of aboriginal rights, why haven't similar interpretations been applied to non-aboriginal occupants and users of space and resources falling within the Crown jurisdictions such as coasts and oceans? Put another way, do non-native coastal marine harvesters have a *livelihood right* to fish commercially? The non-aboriginal settlement history of Atlantic Canada is reasonably well understood and documented. More to the point, the settlement and development of coastal communities by fishing families is also well understood and documented. There is little doubt that every contemporary fisheries coastal community is home to persons for whom at least 4 (over 120 years), and commonly 8 (over 240 years) or more generations of family members have fished for their livelihoods. Many have fished for their livelihoods while residing in the same locality, fishing from the same harbors, and, to a large extent, on the same fishing grounds.

Social Research for Sustainable Fisheries (SRSF – www.stfx.ca/research/srsf) has completed some research in partnership with two Northeastern Nova Scotian commercial fishing associations during which family and personal histories in fishing were documented. The Map presented here shows some of the results of this research with respect to fishing families around Chedabucto Bay. The family histories presented demonstrate that a minimum of three to a maximum of five generations of persons, frequently with a number of persons within each generation, are or have been fishing commercially for their livelihoods. Certainly, this carefully documented human record demonstrates historically deep occupation and use of coastal zones and fishing grounds. Shouldn't such a pattern be interpreted as providing marine harvesters rooted in fishing families with a Common Law usufruct or *right to fish*?

Notably, the Federal Government has used historical settlement, use, and economic dependency as key points of legal reference in making the case that Canada, as with other coastal nations, should have management authority over adjacent continental shelves,

including rights of first access to any economically valuable resources. This case has been made successfully and is embedded in the International Convention of the Law of the Sea. This international law provides coastal nations with legal management authority over most of their adjacent continental shelf zones, thereby positioning coastal nation-states to determine and benefit from resource development.

To say the least, it is a tad ironic that historical occupation, use, and economic dependency have been employed successfully to define and entrench aboriginal and nation-state rights, while non-aboriginals with historically deep family and location-specific fishing histories, at best, engage in fishing livelihoods as a 'privilege' provided and managed by the Federal Government. Existing federal legislation such as the Fisheries Act makes it clear that the federal government is the sole proprietor of coastal and ocean space and that access to and use of coastal and ocean space occurs under the authority of and at the will of the Minister of Fisheries (or their designates). As a result, all non-aboriginal marine resource harvesting is framed to proceed only within federal government management authority. This authority is expressed ordinarily through access and participation allocation tools such as licenses and quotas that are distributed to marine harvesters as federally regulated 'privileges'. The federal government, as sole proprietor, retains throughout the legal right to withdraw privileges in times where economic, social and/or resource conditions are such that the 'public good' is better served through reallocations. This sort of action is evident in measures such as fisheries shutdowns, buy-backs, and license cancellations.

Now, arguably non-aboriginal marine harvesters formally acknowledged federal government proprietorship rights by simply agreeing to license and quota allocation management. By buying and renewing licenses and quota marine harvesters have been agreeing, whether understood or not, that they fish at the behest of and with a privilege distributed to them by the federal government, through Fisheries and Oceans Canada. When these management measures where being introduced widely it is likely that the full implications, particularly with respect to their meanings for legal rights, were not clearly understood by all affected. This may provide a basis and a reference point, sometime in the future, to mounting a legal challenge with respect to the attributes of and limitations on federal government proprietary claims and management authority.

There seems little doubt that there is a case to be made respecting whether non-aboriginal marine harvesters' have earned, through their social history in fishing, the *right to fish*. Thoroughly documenting fishing family histories within specific coastal settings is an important aspect of providing evidence for such a case. Research partnerships with university-seated social scientists would be helpful to achieving such an outcome.

Establishing whether or not such a right exists would certainly clarify the place of marine harvesters' experiences, needs, and voices in the shaping of future approaches to marine resource management. Finally, these conditions and their associated issues certainly underline the common sense in non-aboriginal small boat marine harvesters finding ways of allying with First Nations in the development of political and economic goals targeted on acknowledgement of rights to fish and the achievement of sustainable fisheries livelihoods.

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