THE FISH CANNERIES REFERENCE

Researching decided cases is one of the great pleasures of practising law. I do not mean sitting behind a computer screen punching in key words. I mean pulling down a volume of law reports, blowing off the dust, guarding cuffs and lapels against disintegrating leather bindings, turning up the page with the sought-after case, taking time to see who the judges and counsel were, looking to the marginal notes to see when the case was cited, apld, consd, folld, qtd, aprvd, discd, distgd and ref'd to, then settling in to read every word of the headnote, argument if included, and the judgment; then, resisting the temptation to read the following and preceding cases, looking up the cites for the lower court decisions and finding and savouring them in the same way.

That is what I found myself doing recently with the *Fish Canneries Reference*.[1] This is the well-known case in which the Judicial Committee of the Privy Council, in an opinion given through Lord Tomlin, set out the proper approach to construing ss. 91 and 92 of the *B.N.A. Act, 1867*. The law relating to division of powers was summed up in four concise propositions:[2]

> (1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority even though it trenches upon matters assigned to the provincial legislature by s. 92: see [cases cited]
>
> (2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation unless these matters have attained such dimensions as to affect the body politic of the Dominion: see [cases cited]
>
> (3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91: see [cases cited]
>
> (4) There can be a domain in which provincial and Dominion legislation may overlap in which case neither legislation will be ultra vires if the field is

[1] *AG Canada v. AGBC,* [1930] A.C. 111.
[2] p. 118

> clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see [cases cited]

The Board then turned to the main question at issue in the case, namely whether licensing of fish canneries fell within federal or provincial constitutional competence. Was it a matter relating to sea coast and inland fisheries: s. 91(12)? Or was it property and civil rights within the Province: s. 92(13)? The latter prevailed. The Board held that trade processes by which fish when caught are converted to a marketable commodity are not within the definition of a "fishery".

These propositions of law have been cited in countless cases and are included in every constitutional law text. However, it was the facts which began to intrigue me. They are hardly mentioned in the judgment itself. A hint is given by the closing words: "The respondent fishermen will have their costs of the appeal".[3] The fishermen were what we would today call Intervenors. They were the Association of Fishermen of Japanese Origin. Why, you may ask, were Japanese fishermen interested in a case to do with the licensing of canneries? The answer to this question – which is the real subject of this paper – is that the *Fish Canneries Reference* was the culmination of a long struggle for equality rights in the British Columbia fishing industry.

The third question in the *Reference* directly raised the legitimacy of a licensing policy adopted in the 1920's which blatantly discriminated against fishers of oriental origin. There is very little in the law report to indicate this, but the fact that the Japanese fishermen were awarded their costs foretells a happy ending to a grim story.

Racial discrimination against "orientals" (including East Indians) forms a thoroughly disreputable chapter in the history of British Columbia. It lasted for over half a century. It seems to have begun in the late 1800's. It was a fruitful source of litigation. A number of cases went all the way to the Privy Council. That Board did not exactly distinguish itself as an activist protector of equality rights, but it had little to go on. The *Magna Carta* and the *Bill of Rights 1688* were not much use. Administrative law, including the concept of discrimination in the administrative law sense, was in its infancy. And, of course, there was no *Charter of Rights*. Given the tools it had, the Privy Council did all right.

For example, in *Union Colliery v. Bryden*, [1899] A.C. 580 the Board held that a section in a B.C. statute which prohibited the employment of "Chinamen" in coal mines underground was beyond the powers of the Provincial Legislature. The enactment was held to be not really applicable to coal mines only but devised to prevent the Chinese from earning their living in the Province. Thus it transgressed the federal power in s. 91(25) in respect of naturalisation and aliens.

Cunningham v. Tomey Homma, [1903] A.C. 151 went the other way. This involved a B.C. statute which denied the franchise to Japanese. The Board held this to be within the powers of the Province since it had the exclusive right to prescribe the conditions under which the Provincial legislative suffrage was to be conferred.

A Reference to the B.C. Court of Appeal in 1920[4] concerned the validity of a condition of a timber licence which stipulated:

> NB: -- This licence is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith.

The Court of Appeal struck down the condition on two grounds, first that the condition conflicted with s. 91(25) (naturalisation and aliens) and second that it was repugnant to a Dominion statute, the *Japanese Treaty Act, 1913*, which gave legal effect in Canada to a treaty signed in 1911 between the King and the Emperor of Japan. The treaty provided that the subjects of the high contracting parties were "in all that related to the pursuit of their industries, callings, professions and educational studies" to be placed in all respects on the same footing as the subjects or citizens of the most-favoured nation. If properly applied this would give Japanese subjects in Canada virtual equality rights in the pursuit of occupations such as forestry and fishing.

Notwithstanding the Treaty and the striking down of the discriminatory forest licence condition by the Court of Appeal the provincial government continued its policy. It enacted *the Oriental Orders in Council Validation Act, 1921*. This purported to validate the discriminatory forest licences.

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[3] p. 124

This legislation was challenged by a forest company that wished to employ oriental labour. It took the case all the way to the Privy Council. It was known as *Brooks-Bidlake and Whittall, Ltd. v. AGBC*, [1923] A.C. 450. The issue was whether a timber company doing business in B.C. was entitled to employ Chinese and Japanese labour. The Board held that since the Japanese Treaty had no application to Chinese labour and since the forest and mineral resources were vested in the Province, the licence discriminatory condition was valid, at least, so far as the Chinese labour restriction was concerned.

That may have settled the issue with regard to forest licences, but fishing licences are on a different legal footing. Unlike land-based natural resources, the fishery resource is not vested in the Crown, provincial or federal. By a doctrine of common law traceable back to the *Magna Carta* the tidal fishery is a public or "common property" resource vested in the public. That means <u>every</u> member of the public. So equality rights had at least a fighting chance.

Until the early 1920's federal policy governing access to fishing licences was basically open and non-discriminatory. However, Ottawa was pressured to change this.[5] A committee struck by the federal Minister in 1922 reported as follows:[6]

> Members of the House of Commons from the Pacific province, white fishermen's associations, Indian fishermen and their representatives, organisations such as the G.W.V.A., and the people of British Columbia generally, have consistently and strongly urged that steps be taken toward restoring the fishery to white fishermen and Indians…. As a result of this pressure the Department, in June last, decided to gradually eliminate the oriental fishermen from the fishery by beginning in 1923 with the following reduction in the number of licenses issued in 1922:
>
> Fishing Districts Nos. 1 and 3, a 15 per cent reduction.
> Fishing District No. 2, Rivers and Smiths Inlets a 50 per cent reduction.
> Fishing District No. 2, Skeena and Nass Rivers a 10 per cent reduction.

The Committee supported this policy, saying

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[4] *Re the Japanese Treaty Act*, (1920) 29 B.C.R. 136
[5] Memorandum re Policy of Placing the Fishing Industry in British Columbia in the hands of whites and native Indians, April 14, 1927, NAC, RG 23, vol. 1045, file 721-6-8 [3].
[6] British Columbia Fisheries Commission, 1922, Report and Recommendations, p. 11.

> We therefore, again recommend and most strongly urge that the number of licenses of all kinds, excepting trolling licenses, issued to other than white British subjects and Indians in 1923 be 40 per cent less than the number issued in 1922.

This recommendation was approved and implemented by the Department. Within a short time the policy was extended to encompass the total elimination of orientals. It became known as the "oriental exclusion" policy. By 1926 the Fisheries Branch reported that [7]

> The Department's policy of eliminating the Oriental from the fisheries of the province with a view to placing the entire industry in the hands of white British subjects and Canadian Indians appears to be working out well as is shown by Statement no. 10….
>
> Statement 10: Licenses issued,
> 1925: salmon gill-net…
> Whole province: Whites 1,963; Indians 1,247; Japs 1,015; Total 4,225;
> Increases over 1922: Whites 493; Indians 215;
> Decreases from 1922: Japs 974.

This Report also recorded the number of gill-net licences in district No. 2 *using power boats*. North of Rivers Inlet the Japanese did not hold any such licences. This was because of another discriminatory policy of the federal Minister whereby licences issued to fishers of Japanese origin had a condition inserted that the holder was not permitted to use a gas engine. The Japanese fishermen had to row or sail to the fishing grounds while their white and Indian brethren motored by them, calling out "Come on, Japs! Hurry up!"[8]

I do not propose to get into the moral issue of racial discrimination. However, in reviewing this historical record I found it remarkable how easy it is to rationalize discrimination. Of the preference given to "whites" in the fishing industry in the 1920's it could be argued that since it was "white" technology and capital that created the fish canning industry, all job opportunities should be restricted to whites. Of the preference to "Indians" it could be argued that since they were here first they should be first in line for all the new job opportunities. There is a certain logic to such arguments. They still have some currency today. Neither of these arguments would, of course, assist the Japanese fishers who were denied equality in the 1920's.

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[7] Fifty-ninth Annual Report of the Fisheries Branch, Department of Marine and Fisheries, For the Year 1925-26, pp. 53 and 72.
[8] R. Hayashi, Japanese Canadians in the Early Fishing Industry in B.C., p. 11

The answer to the moral question, in a subjective sense, clearly depends on one's view of the world. If one believes that each human being of whatever race is an equally valid and contributing member of the same human family then all arguments in favour of racial segregation fall away. This is not to be confused with cultural assimilation. Recognizing and protecting the cultural practices of distinct ethnic groups is not racism. Racial segregation in the workplace, however, clearly is. Whether it is morally acceptable may be a personal matter. However, when supported by a society's laws it defines that society. It tells the world whether or not that society accepts or rejects the proposition that all its citizens are born equal.

Today, thankfully, Canadian society has largely embraced equality. That was not always so. The influx of Chinese, Vietnamese and East Indians which has occurred in the last two decades would never have been accepted in the early years of the last century. The prevalent world view in British Columbia at that time was decidedly parochial and racist. Racial segregation and discrimination had somehow become a public virtue.

In 1926, for example, a bill came before the B.C. legislature to limit the employment of Orientals in various occupations. Another bill proposed to exclude Orientals from public schools of the Province! Both bills were defeated but only after advice from the Attorney-General, Alex. Manson, that they were *ultra vires*. For Manson this advice must have stuck in the craw. His personal views are reflected in statements reported in the press at the time, such as the following:

> I believe we should take all property owned by Orientals, pay them a fair compensation and transport them all to other climes. The expense would be enormous. It would run into millions but it should be borne by all of Canada. The people of Canada should consider taking this step before it is too late.[9]

In the following year the B.C. legislature debated a bill calling on Parliament to abrogate the British-Japanese Treaty of 1911 insofar as it restricted the power of British Columbia to enact anti-Oriental legislation. Another bill was proposed to give municipalities power to control the issuance of store licences to Orientals.[10] Again Attorney-General Manson, who was a Presbyterian Scot born in Missouri, left no doubt as to his personal views:

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[9] Prince Rupert Daily News, Feb 25, 1927
[10] Prince Rupert Daily News, Feb. 15, 1928

> Mr. Manson, discussing the resolution, said the greatest danger of all was the probability of the intermixture of the races. He declared it was inevitable from the present trend in British Columbia that the day would come when intermarriage would become more and more frequent with disastrous results. To my mind it is a situation that must be met and met as promptly as possible, declared the Attorney General. "The situation that is developing is not compatible with the development of our own race."[11]

In the midst of this racial maelstrom, fishermen of Japanese origin were, year by year, being ground out of the fishing industry. They applied their skills to boat building, net making and other occupations. However, a sense of injustice hung over them like a dark cloud. This was the contextual setting for the *Fish Canneries Reference*.

The case commenced in 1927 as a prosecution against the Somerville Cannery Company for operating a cannery in Prince Rupert without a federal licence. The cannery was operating as a floating clam cannery, the only one of its kind. All other canneries were on land.

The cannery was aboard the ship "Laurel Whelan", a 240 foot wooden sailing schooner built in Victoria in 1917 as part of the war effort. The "Laurel Whelan" was dismasted in a hurricane in the South Pacific in 1920 and towed back to Vancouver. She was converted to a fully-equipped fish cannery in 1924 by the Somerville Cannery Company. Francis Millerd was the General Manager and part owner. In 1925 he also acquired a land-based cannery at Seal Cove in Prince Rupert. In March 1926 he is reported in the Prince Rupert Daily News as seriously considering withdrawing from the north.

> He charges "discrimination of the rankest kind" against himself in the matter of Japanese salmon fishing licences and states that it has been impossible for him to obtain such licences.[12]

The March 18, 1926 issue of the same newspaper reports Millerd's lawyer making similar representations in Ottawa. But no relief was forthcoming.

To add to Millerd's problems the Department was having second thoughts about the licensing of floating canneries. In her first year of operation, 1924, the "Laurel Whelan" had a successful season. She operated as a salmon cannery in Masset Inlet on the Queen Charlotte Islands. Then

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[11] Prince Rupert Daily News, Mar. 15, 1928

she was brought to Vancouver to unload the final portion of her pack. She was then towed to Quatsino Sound on the west coast of Vancouver Island for the late chum salmon run, following which the equipment was rearranged for salting herring, which she did in Quatsino Sound, Esperanza Inlet and Prince Rupert.

The next year a dispute erupted over the renewal of the licence. It was settled on the basis that the "Laurel Whalen" remain in one location for 1925 and would not be licensed at all after 1929. The owners chose Bernard Cove as their location for 1925.[13] When the run there was finished she was towed over to Prince Rupert where she was operated as an adjunct to a land-based cannery to which she was moored. Later in the season she operated as a herring saltery at Pender Island and Sointula.

After the owners had made their election for 1925, the Department decided that the "Laurel Whelan" should be permanently restricted to the location chosen for 1925. However, the main salmon run in 1926 was on the Queen Charlotte Islands, not in the area of Bernard Cove. After much correspondence, Millerd attempted to circumvent the restriction by building a small land-based plant in Masset Inlet. He acquired a licence for that plant and then moored the "Laurel Whelan" adjacent to it. This, however, did not go over well with the Department. They sent the gunboat H.M.S. "Givenchy" to Masset Inlet with a Fisheries Inspector aboard. On August 11, 1926 the "Laurel Whelan" was seized and proceedings started against the Company for her condemnation by the Court. A compromise was reached (restricting operations permanently to Masset Inlet). But by that time the Company had lost the major part of the run.[14]

The next year the Department found the "Laurel Whelan" canning clams at Prince Rupert without a federal licence. A prosecution was immediately initiated against the Somerville Cannery Company. It came before Magistrate H.O. Alexander on May 2, 1927. He dismissed the charge. The Crown appealed to the Supreme Court of B.C. but the appeal was dismissed.[15]

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[12] March 4, 1926
[13] Bernard Come is on the north side of Princess Royal Island, on Whale Channel.
[14] Damages were claimed in civil proceedings, which were successful in the lower courts but dismissed ultimately by the Supreme Court of Canada in 1932.
[15] On September 23, 1927. See *Rex v. Somerville Cannery Co., Ltd*., [1927] 4 D.L.R. 494

Both courts had applied the constitutional point ultimately upheld by the Privy Council, namely that fish canneries do not require a federal licence.

Meanwhile Francis Millerd continued to challenge the oriental exclusion policy. On April 6, 1927, counsel for the Somerville Cannery, W.E. Williams of Williams, Manson and Gonzales,[16] submitted applications, together with birth certificates and the $1.00 fee, for salmon fishing licences for 22 British subjects born in Canada all of whom had obvious Japanese names. In a further letter on May 3, 1927, Williams pressed for a reply and volunteered some legal advice to the Chief Inspector of Fisheries:

> We would point out that in our opinion any British subject has a right to fish salmon in the territorial waters of British Columbia, and is entitled to a license so to fish. It is our opinion that the licensing powers of the Dominion government in this regard are purely regulative and…that when fishing is to be allowed all British subjects have a right to partake of that privilege without distinction or preference.

This caused the Inspector to wire to the Director of Fisheries in Ottawa as follows:

> YOUR LETTER … TWENTY TWO APPLICATIONS FROM CANADIAN BORN CITIZENS OF ORIENTAL ORIGIN STOP. SOLICITORS OF SOMERVILLE CANNING COMPANY PRESSING FOR DECISION STOP. IS DEPARTMENT PREPARED TO REPLY.

In June, 1927 Williams, still without a reply, suggested that the Department was forcing his clients "to take peremptory proceedings". By September, 1927, no reply having been received, he requested the return of the birth certificates as they were needed for other purposes.

The Association of Fishermen of Japanese Origin also attempted to force the issue. On April 16, 1927 W. N. Tilley, K.C. of Toronto wrote on their behalf to the Minister of Marine and Fisheries requesting that certain questions be referred to the Supreme Court of Canada, including the question whether the Minister when granting fishing licences is "entitled to discriminate between

[16] Williams and A.M. Manson established their law firm in Prince Rupert in 1908. In the early 1930's they were joined by T.W. Brown and the writer's father, J.T. Harvey. The firm name then became Williams, Manson, Brown and Harvey. After serving as the provincial Attorney-General, Manson was appointed to the Supreme Court of B.C. in 1935.

those British subjects who are and those who are not of Japanese race and refuse licenses to the former because of their Japanese origin".[17]

Departmental correspondence following the decision of the Supreme Court of B.C. in the Somerville Cannery case on September 23, 1927 displays a sense of extreme urgency. With no federal jurisdiction over cannery licences the government feared that persons of Japanese origin would be able to enter the cannery business. Since, under the existing law there was no provision for a further appeal the Department, in less than a month, secured an Order-in-Council referring questions as to the vires of cannery licences to the Supreme Court of Canada. The opportunity was then taken to include the question raised by Mr. Tilley relating to the Minister's power to prefer one race over another in the issuance of general fishing licences

Thus, the Order in Council stating the Reference included a third question as follows:

> Under the provisions of the Special Fishery Regulations for the Province of British Columbia… respecting licences to fish… or under said ss. 7A or 18 of the said Act…has…(a) any British subject resident in the Province of British Columbia or (b) any person so resident who is not a British subject, upon application and tender of the prescribed fee, *the right to receive a licence to fish,* or to operate a fish or salmon cannery in that Province, *or has the Minister a discretionary authority to grant or refuse such licence* to any such person whether a British subject or not?

The Association of Fishermen of Japanese Origin then applied to participate in the Reference. They retained Edmund Newcombe, counsel practising in Ottawa. In his affidavit in support of the application, he deposed,

> 4. That in the exercise of his discretion and to bring about Oriental exclusion from the fisheries in British Columbia the Honourable the Minister of Fisheries has adopted a policy of reducing the number of licenses granted to the above mentioned Japanese fishermen year by year so that they will be eliminated in the course of five years from all part in the fishing industry in British Columbia.
>
> 5. That they are in consequence vitally interested in the out come of the Reference.

[17] NAC, RG 23, file 721-6-8 [3]

The fishery regulations in effect at the time were silent about entitlement criteria for a licence. A general discretionary authority was granted to the Minister to issue a licence to British subjects and returned army or navy personnel. Thus, the issue in the third question of the Reference was whether the Minister's licensing discretion was sufficiently broad to enable him to discriminate as between one British subject and another? Remember that the question arose in a context in which fishing rights in tidal waters, since *Magna Carta*, inhere in all members of the public.

W.E. Williams was briefed to argue the case for the Province. On the third question he took the same position as the Japanese fishermen, arguing against the broad discretion contended for by the Dominion. When judgment was given on May 28, 1928, the Supreme Court of Canada split on the third question. The majority judgment was given by Newcombe J., Edmund Newcombe's father. It held that the Minister could not exercise his licensing discretion in a discriminatory manner:

> [N]o legislative power is delegated to the Minister, even if the Governor in Council could delegate any of his statutory powers. No express power is conferred on the Minister, except to issue licenses, and in my view it is improbable that…, unless by plain legislative direction, discretionary licensing authority would have been granted which could be exercised in a manner which might sanction discrimination.[18]

Thus the principle of equality under the law, regardless of race, prevailed. The news was met with jubilation in the Japanese fishing communities up and down the coast. However, the Department chose to ignore the ruling pending a further appeal to the Privy Council. This was not well received in some quarters. The fisheries inspector in Prince Rupert wired the Director of Fisheries in Ottawa as follows on June 25, 1928:

> PATMORE AND FULTON BARRISTERS RUPERT INTEND BRING BRITISH SUBJECTS OF JAPANESE ORIGIN TO RUPERT OFFICE FOR FISHING LICENSES AND IF NECESSARY WILL OBTAIN WRIT OF MANDAMUS TO COMPEL ISSUANCE LICENSES STOP. MINISTER QUOTED IN HANSARD AS STATING THAT UNTIL APPEAL TO PRIVY COUNCIL DECIDED DECISION SUPREME COURT OF CANADA OF NO EFFECT STOP. BARRISTERS STATE THIS NOT IN ACCORDANCE

[18] *In the Matter of a Reference as to the Constitutional Validity of Certain Sections of the Fisheries Act, 1914*, [1928] S.C.R. 457, at p. 477.

> BRITISH LAW AND THAT RULING SUPREME COURT STAND UNTIL REVERSED STOP. WHICH IS CORRECT STOP. WIRE INSTRUCTIONS.

The government's purported justification for ignoring the decision of the Supreme Court of Canada is set out in a memorandum dated June 27, 1928 by the Deputy Minister of Justice:

> …[P]ending the result of our application for special leave and the disposition of the appeal if leave should be obtained, the Attorney General will oppose any proceedings which may be commenced, in the meantime, to obtain a mandamus to compel the issue of fishery licenses. It is, I think, improbable that the Courts in British Columbia would be disposed, pending the disposition of the proposed appeal to His Majesty in Council, to reverse the principle upon which the administration of the Fishery Regulations has hitherto proceeded by granting a writ of mandamus to compel the issue of fishery licences. Apart from that, it is certainly the case that the answers of the Court to the questions referred are advisory only and bind no one. As an expression of opinion upon the interpretation and effect of the regulations, the answer of the majority of the Court to the third question and the reasons given therefor, would, no doubt, receive in any provincial court the respectful consideration which they deserve. But upon this question there was a division of opinion and I think it may be said, without disrespect to the view expressed by the majority of the Court, that the reason given by Duff, J., (concurred in by Mignault and Smith, JJ.), for differing from their opinion upon this question, would, in the present situation, afford ample justification for the refusal by the Court of a writ of mandamus pending a pronouncement on the question by the ultimate tribunal.[19]

Three days later Prime Minister Mackenzie King sent a note to the Minister of Marine and Fisheries noting that the Cabinet had agreed that an appeal would be taken. He invited the Fisheries Minister to keep the Cabinet fully informed "if there is anything further required, by way of legislation or otherwise".[20] The Minister of National Defence, Colonel Ralston, asked to be kept informed by the Fisheries Minister when the decision of the Privy Council was rendered.

Thus, with powerful support, fisheries officials continued to impose the anti-oriental gas-boat and licence reduction policy on the hapless fishermen of Japanese origin during the 1928 fishing season.

As the 1929 fishing season was about to open, an appeal on behalf of the Japanese fishermen was made directly to the Prime Minister, but to no avail. The government temporized. As will

[19] W. Stuart Edwards to W.A. Pound, Director of Fisheries, June 27, 1928, NAC, RG 23, file 721-6-2 [7].
[20] June 30, 1927, Mackenzie King to P.J.A. Cardin, NAC, RG 23, file 721-6-2 [7].

be seen it had a legislative card to play but needed more time. Edmund Newcombe, counsel for the fishermen, wired from Ottawa on May 16, 1929 that

> PRIME MINISTERS ASSISTANCE RE GAS BOAT CAN ONLY BE OBTAINED AFTER FURTHER DELAY AND NOT ADVISABLE TO WAIT STOP. HAVE HOSSIE OBTAIN WHATEVER ORDER IS REQUIRED TO SERVE ATTORNEY GENERAL OF DOMINION AND START PROCEEDINGS AT ONCE STOP.[21]

I could find no record of any such proceedings. Events may have overtaken them. A young fisherman by the name of Jun Kisawa had decided to resort to civil disobedience. He held a bachelor's degree in law from Waseda University, Tokyo. Being single, he was prepared to risk imprisonment. Two members of the Japanese fishing community in Steveston put up the necessary funds to purchase a gas engine for his boat. He went fishing in defiance of the restriction on his licence. He was charged and came before the local magistrates in Prince Rupert on June 18, 1929.

Jun Kisawa addressed the Court as follows:

> Your Honour! The reason why I am here is not to defend myself, because I am aware that I broke the law. I'm here to appeal for justice. We Japanses, like other people, have immigrated to Canada and have become citizens of Canada. Some of us have been born in Canada. Canada is not only your country but also our country. We are all Canadians. But, according to the present fishing law, white and Indian fishermen can use motorboats, which the Japanese cannot. We are not blind to this racial prejudice against us. Your Honour! My faith is in the principle of justice upon which this country is founded. If justice is found anywhere on earth, it is here in Canada. I want only to see justice done.[22]

The magistrates adjourned to consider their verdict. The following day they entered a packed courtroom and gave judgment. The charge was dismissed, no doubt on the basis of the Supreme Court of Canada decision in the *Fish Canneries Reference*. A telegram to the Japanese Fishermen's Association in Steveston reported the result as follows:

> GAS BOAT CASE IS HEARD IN COURT OF JUSTICES OF THE PEACE HERE HIS MORNING AND CASE WAS DISMISSED IN OUR FAVOUR THAT ACCUSED KIZAWA FULLY ENTITLED AS BRITISH SUBJECT SO

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[21] See Rintaro Hayashi collection in UBC archives.
[22] The Forgotten History of the Japanese-Canadians, vol. 1, pp. 10-15

> THAT HE HAS ALL PRIVILEGES OR BRITISH SUBJECT STOP. THE ENDORSATION NOT TO BE USED POWER BOAT IS NOT IN FISHERIES REGULATIONS OR ACT THEREFOR ENDORSATION IS ULTRA VIRES TO FISHERIES ACT STOP.

The whole Japanese gill-net fleet then began preparations to go fishing with gas engines. However, their victory celebration was interrupted by news from Ottawa that the federal government had secured an amendment to the *Fisheries Act*. The words "in his absolute discretion" were inserted after "may" in s. 7 of the *Act*. This is the section which to this day establishes the Minister's licensing authority. It states that "the Minister may, in his absolute discretion…issue or authorize to be issued leases and licences for fisheries or fishing".

A telegram arrived at Port Essington, at the mouth of the Skeena, from the Japanese Fishermen's Association in Steveston. This was on June 19, 1929 – the same day as Jun Kisawa's victory before the magistrates.

> AMENDMENT TO SECTION SEVEN FISHERMEN ACT PASSED PARLIAMENT AND SENATE IN LAST MINUTES RUSH STOP. RECEIVED THE INFORMATION TODAY AND IT IS NOT ADVISABLE TO PROCEED YOUR COURSE NOW STOP. HOPE YOU SERIOUSLY CONSIDERATION IN THIS MATTER STOP.

To the lawyer-fisherman, Kisawa, this raised the question (which lawyers still debate) as to whether the addition of the word "absolute" to the Minister's discretionary authority has any legal effect. In particular, does it allow the Minister to discriminate on ethnic lines? Did it mean that the gas-boat restriction was valid in spite of the *Fish Canneries Reference* and the recent ruling of the Prince Rupert magistrates. Years later the Supreme Court of Canada would answer this question in the judgment of Rand J. in *Roncarrelli v. Duplessis*:[23]

> It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity…. In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power, exercisable for any purpose, however capricious or irrelevant, regardless

[23] (1959), 16 D.L.R. (2d) 689 at p. 705.

> of the nature or purpose of the statute…. Could an applicant be refused a permit because he had been born in another Province, or because of the colour of his hair? The ordinary language of the Legislature cannot be so distorted.

Thus there can be no doubt that Rand J. would consider the word "absolute" to add little or nothing to the breadth of the Minister's discretion and, in particular, that it would not authorize discrimination on racial grounds. However, this was far from clear in 1929.[24] The Skeena Fishermen's Association wired to the Steveston Association as follows:

> WE RELY OUR LAWYER AND HOPE TO FULFILL OUR RECENT WIN TELL WIRE OPINION OF YOU AND LAWYER AND KONGONO JOSAN OYOBI GAS BOAT DE DETEMO JOIKA BOSHYU SARENUKA STOP

On July 2, 1929, Kisawa himself wired Steveston. He referred to conflicting advice he had received. Being the leader of the planned protest, he required a clear answer. He asked,

> WHICH IS FACT? PLEASE VERIFY IT BY WIRE, AS WE MUST BE RESPONSIBLE FOR FISHERMEN, I WISH IF YOU CAN TO HAVE DIRECTEDLY INSTRUCTION FROM THE INSPECTOR.

He seems then to have decided to "damn the torpedoes". His telegram continues:

> IN MY OWN PART, AM GOING TO START NEXT WEEK WITH GASBOAT.

During the following week, in London, England, the Dominion's appeal in the *Fish Canneries Reference* was argued over four days before the Judicial Committee of the Privy Council. Edmund Newcombe appeared again for the fishermen of Japanese origin. He was able to consult Sir John Simon K.C., leading London counsel, at the expense of the Japanese government, which was looking on with interest. On October 15, 1929, the reserved judgment of the Board was given. On the licensing point their Lordships agreed fully with the majority judgment of the Supreme Court and, in addition, awarded costs to the Japanese fishermen. Thus the Board held

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[24] There is no doubt, however, that the intent of the amendment was to give the Minister power to discriminate. A Memorandum from the Deputy Minister of Justice accompanying the Bill and dated June 11, 1929 states: "The interpretation that has been placed on the word 'may' is that the Minister has a discretionary power. Under this interpretation fishery licenses in British Columbia, for instance, were being restricted to white British subjects and native Indians. The question of whether or not the Minister has such discretionary power has been raised, and while a decision in the matter is still before the courts, it was decided in the Standing Committee on Marine and Fisheries that this section should be so amended as to leave absolutely no room for doubt that the Mister has such discretionary authority. Hence the inclusion after the word 'may' of the words 'in his absolute discretion'."

(albeit on the basis of the pre-amendment legislation) that discrimination was not within the ambit of the Minister's discretionary licensing authority.

There is no record of Jun Kisawa ever having been charged for his second gas-boat protest. Was this because the Department did not wish to test the question whether the addition of the word "absolute" would support discriminatory licensing policies? Perhaps, but we will probably never know. The gasboat restriction and the oriental exclusion policy were abandoned for the 1930 season, and by and large, discrimination in the fishing industry came to an end.

Epilogue

In 1992 the Department initiated a "pilot" project whereby a separate *commercial* fishery was set up in the lower Fraser River. Access to it was restricted to members of the Musqueam, Burrard, and Tsawwassen Bands. Not surprisingly, strong objections were voiced by commercial fishers of other racial types who were excluded from it. They staged various protests. At one of these, in Steveston, a young mother of two came upon the crowd and asked what was going on. She was the granddaughter of Rintaro Hayashi, one of the two men who funded Jun Kisawa's purchase of a gas engine for his gill-netter in 1929, the one that landed Jun Kisawa in Court. Leslie Budden, nee Hayashi, was of 100% Japanese blood but had intermarried, to use Attorney-General Manson's term. She and her husband were salmon fishers. Their children were the fourth generation in the Hayashi family to attend the same school in Steveston.

The pilot sales licensing policy was challenged in the recent case of *R. v. Kapp* on the basis of s. 15 of the *Charter*. Ms. Budden gave evidence in the trial. She described how her distaste for this policy caused her to learn more about her family history. She researched her late grandfather's papers in the UBC archives. She found many of the telegrams that are referred to in this paper. When she came to Court she brought a book that her grandfather had written in Japanese and had given to her when she was a young child. A later translated edition contained the following in an editor's note:

> We dedicate this volume to the late Judge Darling, whose "Darling's certificate" (see Ch. 1) puts us in mind of Rintaro Hayashi's prayerful words:

> As the words written on the sandy shore are erased by the tides sweeping in and out, so racial prejudice is about to be banished from our minds once and for all.

Having read these "prayerful words" to the Court from the witness box, and with tears running down her cheeks, Ms Budden said "I feel ashamed in this day and age we are reliving the same thing".

The trial judge in *Kapp* had little hesitation in finding that the pilot sales program contravened the equality guarantee in the *Charter*. Among other things he found that the program had driven a wedge between aboriginal fishers and the rest of the fishing community. He said that it had generated and encouraged further racial discrimination, beyond its own provisions. He said it was most troubling that the program was government sponsored. "When racial discrimination or a semblance of it is identified", he said, "any continuance of it should not be permitted."

The *Kapp* case is now working its way through three levels of appeal courts. It is expected that the Supreme Court of Canada will have the last word. As we have seen, the struggle for equality amongst commercial fishers came before that Court in the *Fish Canneries Reference* at a time of rampant racism and no *Charter of Rights*. The same issue has surfaced again, but now in the context of a tolerant society dedicated to preserving and respecting aboriginal and ethnic diversity within a constitution which, since 1982, guarantees equality rights to all its citizens. To my mind the final result in *Kapp* should not be in doubt. But, as stated earlier, it is surprisingly easy to rationalize racial discrimination.

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October 7, 2004