FISHERIES ACCESS LEGAL PROGRAM
REPORT

BCWF Convention & AGM – April 2014

The Early days

It was during the early '90's when the *Jack, John, John,* case was being heard in the BC Court of Appeal. The case revolved around the question of priority for Aboriginal Fisheries, essentially "Who gets to fish first?" Renowned Constitutional Law expert Keith Lowes was hired as counsel for the commercial sector but there was no representation from the recreational (public) fishery present. When counsel for the aboriginals put forth the comparison of "… fishing for food on the one hand and fishing for fun on the other…" there was nobody around to refute the obvious dismissal of the public interest or bring attention to the importance to all Canadians of their access to fisheries resources. In 1996 in the "trilogy" (*Vanderpeet, NTC Smokehouse, Gladstone*) the value of the recreational fishery was also ignored because it was not represented in the Courts.

This came to the attention of Bill Otway, a very active and knowledgeable BCWF member of the Port Coquitlam club. Bill was a man of action and could rally others with a skill rarely seen in any organization. In 1998 the Sportsfishing Defense Alliance (SDA) was formed and Bill, almost singlehandedly, ran an annual fundraiser dinner to fund advocacy for recreational fishers through legal means. Later the SDA partnered with commercial fishing interests as joint interveners in Court hearings where access to fisheries resources for both sectors were being threatened. Although many BCWF members supported the SDA it remained as an arms length organization. Similarly over the years, the BCWF had been loosely involved with the BC Fisheries Survival Coalition and the United Fishermen Allied Workers Union.

The history of BCWF representation in the Courts consideration of the public interests can be broken into three periods. The first, 1988, when the *Sparrow* case was argued, to 1998 was a fairly stable decade of cooperation among stakeholders. The Freight was paid by two groups, the Fisheries Council of BC representing the processors and the BC Fisheries Survival Coalition representing the commercial fishermen. These groups worked cooperatively but separately. Other than in Sparrow the recreational fishery was not specifically involved.

The years from 1998 to around 2008 were less stable. As various fisheries deteriorated, processing plants closed down, boats and gear were scrapped or sold off for pleasure use and some into US fisheries. The Fishermen's Union weakened, the Fisheries Council of BC broke up.

But a loose coalition remained over that decade with the BC Fisheries Survival Coalition, Underwater harvesters and Sablefish Assn, all trying to keep things going. Fish processors were always there but not organized. This is when Bill Otway got the Sportsfishing Defense Alliance involved. BCWF members benefited from the advocacy of the SDA and from its eventual partnering with the others.

The purpose

The purpose of the BCWF uniting with commercial interests as interveners in Appeals processes is two fold. Firstly, it is critical that when courts determine Aboriginal rights that the interests and needs of the public are presented to them. However, there is no new evidence put forward. Our role is simple and may amount to thirty minutes of legal argument (from hundreds of hours preparation) to articulate our interests in a trial that lasts months. But it is critical that our needs be known to those who shape history.

The second factor from BCWF being partnered with others as interveners is the benefit Courts see in our joint interests with the commercial sector. We are much more powerful together because, where access to fisheries resources are under consideration, combined we represent all stakeholders impacted by legal challenges to fisheries access by aboriginals. We truly represent the public in the "public" fishery.

The Fisheries Access Legal Program

In early 2009 the Fisheries Access Legal Program was formed. The SDA was retired with Bill and the BCWF took charge of being the champion of our rights to access the public fisheries resource. The BCWF partnership in "the Program" with commercial sector interests, funded by the BCWF Legal Defense Fund, continued to be a powerful combination in court hearings. Over all the years of BCWF involvement in over thirty separate legal challenges two Supreme Court decisions stand out to change the future of not just BCWF members but all Canadians.

In *Douglas* (2005) the issue was one of the priority right of an aboriginal right to fish. The *Douglas* case in which we were represented effectively reversed the judgment in *Jack, Jack and John* in which we weren't. The Cheam First Nation argued that they did not have to abide by Fisheries management and if anyone was fishing Fraser River bound fish they could too and if they were shut down so should every other potential harvester on the Coast. The judgment went strongly in favour of the Crown's duty to manage and the balance of aboriginal rights with the public right to fish.

In *lax Kw'allaams* the Supreme Court of Canada ruled similarly as it had fifteen years prior in *VanderPeet,* that is, the Lax Kw'allaams Indian Band et al do not have an aboriginal right to all commercial fisheries. However, the clear positive impact to Canadians is set in paragraph 12 in the Reasons for Judgment where Binnie, J, when speaking for the SCC states

> *".. Aboriginal rights protected as they are under Section 35(1) of the Constitution Act 1982 must be determined after a full hearing that is fair to all the stakeholders."*

This is of huge significance to our future. It effectively adds a fourth test in which the interests of us and others must be taken into account in the determination of aboriginal rights. This was a major win for the BCWF and their partners in the Fisheries Access Legal Program.

The future

Currently the BCWF await the completion of the *Ahousaht* trial which has stalled because of errant parties seeking an appeal to a higher court when there had been no final ruling. Regardless of the delays the outcome of this case will impact the public access to fisheries resources one way or another.

The *William* case is another of major importance to British Columbians. In it a trial judge ruled that the Province of BC did not have the authority to grant timber licenses for the forestry resource. It has been appealed and not yet heard. The outcome of this will be huge for our members because if the Crown's authority to manage under the Forestry Act is not upheld then its authority under the Wildlife Act, Mining Act etc will be undermined too.

The BCWF must take charge of protecting the rights of its members as reconciliation with First Nations unfolds. It is a fact that one avenue we must be prepared to take is our presence in the Courts. Another is to engage where possible with First Nations directly. We share many values and principles. Our aspirations for a future of healthy ecosystems where we practice stewardship of the land so the land can take care of us are sincere and common to all aboriginal people.

Respectfully submitted
Rod Wiebe – Past President, BCWF