

by Jev Shelton

THE PACIFIC SALMON TREATY: AN ALASKAN PERSPECTIVE

L'auteur résume la position de l'Alaska en ce qui concerne le Traité sur le saumon du Pacifique et montre en quoi cette analyse diffère de celle qui fonde la position canadienne.

The Pacific Salmon Treaty, signed in 1985, began as a regional arrangement to effect scientifically guided cooperation in the conservation and harvest sharing of Pacific salmon. It has become the focus of bitter political disagreement. To the lay public in the United States and Canada, the Treaty now is characterized by aggressive charges of "overfishing" carried in the Canadian media and by more sensational actions, including the imposition in 1994 of transit fees on US fishing vessels navigating the inside passage through BC and the 1997 blockade of the Alaska ferry "Malaspina" in Prince Rupert, BC. Those emotional, political events have contributed little to a broad understanding of positions regarding the salmon resource and its fisheries that underlie the very real dispute existing in this Treaty.

This commentary outlines basic elements particular to Alaska's position with respect to Treaty issues and contrasts that analysis with elements central to Canada's approach. This restricted focus responds to the fact that virtually every public statement in Canada concerning the Treaty points to the conduct of Alaskan fisheries as the source of never-ending dissatisfaction in Canada with Treaty performance. Not surprisingly, a very different assessment of the Treaty and its functioning prevails in Alaska. That perspective clearly has not attained wide distribution in Canada.

Pacific Salmon Treaty dispute

The primary purposes of the Treaty are to facilitate conservation and optimum production of jointly utilized Pacific salmon resources and to establish fishing regimes that accomplish agreed fair sharing of the harvests of those salmon. These purposes are referenced as the "conservation" and "equity" principles respectively.

The Treaty text describes the scope and principles of the agreement and outlines the structure of its operating Commission. It also incorporates in annex detailed specific fishery agreements that were negotiated in the context of the Treaty document. Salmon fisheries addressed under annex include those on both sides of the Juan de Fuca/Georgia Strait and Dixon Entrance (Canada-Alaska) boundaries that are of most concern from the national perspectives. The specified duration of each fishery regime leads, upon expiration, to renegotiation of terms for that fishery.

With such arrangements in place in 1985, the Treaty Commission operated at least passably through its initial years. However, seeds for serious difficulty existed from the outset. The US and Canada have disagreed for decades over the basis for allocating harvests of salmon that migrate across their common borders. Article III of the Treaty, which first specifies the obligation to conserve the salmon resource and prevent overfishing, framed this sharing issue as each nation deriving benefits equivalent to the production of salmon originating in its waters. That phrasing, however, did not signify underlying agreement.

The equity principle

In the abstract the equity principle seems reasonable enough. Its practical implementation, however, has proved elusive and remains the primary source of Treaty-related conflict. That difficulty stems in part from the complexity of this issue, recognized in the Treaty text by specifying considerations that must be factored into any determination of equitable sharing. These include the desirability of reducing interceptions of salmon destined to spawn in the other nation, the desirability of avoiding disruption of traditional fisheries and the requirement to take into account the substantial annual fluctuations in abundance of the salmon. The relative emphasis placed on these factors by the respective sides differs significantly.

Further difficulty is introduced by the salmon themselves. Salmon species exhibit intricate life cycles, with thousands of individual stocks mixing and depending upon life stages spent in the waters of both countries. Reaching an agreed basis for equitable sharing of harvests in the context of such complexities is not at all straightforward, especially since consensus explicitly was not achieved at the signing of the Treaty.

Canada's "interception-balancing" approach to fishery "equity"

Canada claims systematic and substantial disadvantage in the harvests of Pacific salmon. This assertion follows from its peculiar position regarding the nature of fishery equity. Canada asserts, gratuitously in Alaska's view, that any salmon spawned in Canada belongs fully to Canada, wherever it migrates in its complex life cycle and regardless of the biological imperatives or effects of its behaviour. Thus, if Canadian-spawned salmon are caught in Alaskan (or any US) fisheries, the value is to

be calculated as a debt owed to Canada. Fishery equity in this approach is conceptually simple and calculable: it is equivalence in the values of salmon "intercepted" in the two nations, accounting all of the fisheries coast-wide together. Canada argues that whenever an imbalance in the values of interceptions exists, an obligation is incurred by the advantaged party. That obligation should be satisfied by adjusting fisheries, either to decrease interceptions in the fisheries of the advantaged country or to increase those in the disadvantaged nation. Further, Canada maintains that, despite Treaty wording to the contrary, no considerations other than the balance of interceptions bear on fishery equity and that the Canadian framing of the issue must form the basis for any long-term solution.

Canada's interception-balancing theory has been a constant in its positions regarding Pacific salmon for over 30 years. Alaska and US interests more broadly have consistently rejected that interpretation from the period of treaty negotiations until the present. Yet Canada persists, even demanding in recent years that serious stock conservation issues be put aside until its equity demands are satisfied. American objections to this Canadian view have emphasized several general concerns. The Canadian interpretation does not comport with a reasonable reading of the Treaty and is otherwise not well-founded in customary applications of international law, especially in its abuse of conservation requirements. It is inappropriately narrow in scope, failing to accommodate other obviously relevant factors. There are great practical difficulties in applying a simplistic — really ideological — doctrine to dynamic and very diverse biological and economic systems. The Canadian approach is inequitable; it is designed to maximize Canadian interests at the direct expense of US, especially Alaskan, fishery interests.

American participants in the Treaty have suggested various alternative formulations to facilitate resolution of the harvest sharing dispute. Although expressing grave doubts that quantifying equity across fisheries is possible, the US described an expanded set of factors that would be required for any such determination. The US proposed as well that a theoretical solution to the equity debate is not necessary. Rather, finding ways to cooperate in achieving each nation's goals and objectives for its salmon fisheries would stimulate more productive use of the resources committed to the Treaty process. A more recent formulation was offered that treats equity on a fishery-by-fishery basis. That proposal suggested negotiating the proportion of relevant salmon stocks to be harvested in specific fisheries as a practical means to monitor compliance with all Article III provisions. Canada has refused to consider all suggested alternatives.

Negatives of interception balancing

Canada's interception-balancing approach has significant implications in addition to its failure to incorporate all of the considerations specified in Article III

of the Treaty. Those problems, summarized here, are sufficiently fundamental and pervasive to preclude ultimate Alaskan acceptance of the approach.

Interception balancing ignores and prejudices the biological and economic realities of the salmon resource. Insisting that full ownership of salmon is conferred by the location of spawning simply is capricious. Most salmon spawned in BC spend the majority of their life cycles in US marine waters in and off Alaska where they grow and gain all of their economic value. It takes the ocean, indeed the US ocean, to produce these salmon. Their very survival depends on this residence, and, while in US and Alaskan waters, they consume valuable American marine resources at substantial cost to US interests. Herring, juvenile Alaskan salmon, juvenile pollock, and other species are common prey for salmon stocks spawned in Canada. Those salmon otherwise compete with Alaskan-spawned and other US stocks in the high-quality marine rearing areas in the Gulf of Alaska. Contrary to any claim of ownership on an *a priori* basis, these salmon objectively are a shared resource to which both nations make necessary contributions and in which both nations have legitimate long-term interests. They are jointly produced. Claiming all of the benefits from stocks that happen to be spawned in Canada, as Canada demands, does not square with the respective costs and responsibilities actually involved in their production.

Balancing the value of interceptions is a numerical accounting exercise only. As such it is inherently inconsistent with the biological functioning and rational management of salmon, especially when applied across the vast areas and very different stock conditions encompassed by the Treaty. Application of the Canadian approach to fishery allocations coastwide inevitably will generate fishery limits not keyed to the status of the resource. By creating obligations that are unrelated to salmon abundance on a fishery-by-fishery basis, Canada's system would lead to serious overfishing, particularly in years of poor returns. This is not merely a theoretical concern. Fishing in Canada has exceeded levels justified by salmon abundance in a number of instances and has been authorized, according to Canadian officials, in order to avoid increasing the perceived imbalance of interceptions. Such fishery actions have occurred off Vancouver Island, where chronically depressed stocks of chinook and coho salmon that spawn in southern BC and in Washington State have been damaged further, and in Dixon Entrance in years of very poor returns of pink salmon to southern Alaska. No acceptable approach to fishery equity can sanction such irresponsible prioritization of allocation over resource conservation. A fundamental resource stewardship ethic, recognized in customary international law, and the conservation principle of the Treaty are violated whenever conservation is made subordinate to allocative considerations.

Implementation of Canada's interception-balancing theory would cause the loss of substantial harvestable

surpluses in Alaska. A decline in abundance of salmon returning to Washington (whether from natural occurrences or from overfishing in BC) has occurred and has resulted in decreased total interceptions in BC. That decrease, Canada maintains, requires compensatory reductions in American, especially Alaskan, fisheries. Alaska conducts its salmon fisheries on domestic stocks not of concern to Canada but with which some salmon spawned in Canada are inextricably mixed and therefore taken incidentally. Even in Alaskan fisheries near the international boundary, over 90 percent of salmon harvested derive from stocks spawned in Alaska. Thus, the system demanded by Canada would force Alaska's fisheries to restrict catches of salmon spawned in Canada based on the performance of unrelated Canadian fisheries on unrelated stocks hundreds of miles distant. In so doing it would cause Alaskan fisheries to forego many times more salmon from Alaska's abundant returns. Alaska cannot, *via* such an illogical allocation mechanism, accept losing access to its own stocks of salmon, stocks that never enter Canadian waters. Forcing Alaska to forego surpluses of its own stocks would be inconsistent with the Treaty mandate to optimize salmon production.

Other means to manipulate Alaskan fisheries are inherent in interception balancing. For reasons unrelated to the strength of the resource, such as altering internal allocation patterns among Canadian users, Canada may reduce or terminate traditional fisheries that harvest salmon spawned in US territory. Reallocating harvests to in-river First Nations fisheries is one ongoing example of such change. By thus reducing interceptions, Canada's approach again would force compensatory adjustment of unrelated Alaskan fisheries. To southeast Alaska, a region in which fishing is the largest industry and is the only significant economic activity in many isolated villages, such capricious impacts on the economic base are unacceptable.

Alaskan fisheries, if interception balancing prevails, are vulnerable to internal production decisions taken unilaterally in Canada. Large-scale hatchery or other Canadian enhancement projects introduce massive numbers of salmon into Alaskan waters. After saturating, or "flooding," Alaskan fisheries, Canada proposes to force significant restructuring of those fisheries. In order to avoid increasing interceptions from a significantly more abundant salmon population, Alaska would face reducing and possibly terminating important, traditional fisheries, an outcome contrary to a specific Treaty objective. Creating that obligation effectively would provide Canada the power to treat Alaska as a colony. Southeast Alaska would be required to sacrifice its marine resources for the development of a commodity valuable to Canada and, at the same time, to disrupt its regional economy in order not to interfere with Canada's maximizing its benefits from that artificially enhanced resource. This proposition is unrealistic and wholly inequitable. It would, again, violate the Treaty goal of optimizing salmon production.

Fishery "flooding" currently is a matter of practical concern to Alaska. Production from Canadian enhancement facilities for both sockeye and chinook salmon has altered significantly the species and stock composition in long-standing Alaskan fisheries. Those fisheries now are primary targets in Canada's public relations assault on Alaskan salmon harvests. Specifically, based on increased harvest levels of sockeye salmon, Canada accuses Alaska of overfishing in its Noyes Island purse seine fishery. Canada demands restrictions on that fishery in order to transfer significant numbers of those salmon into Canadian fisheries. Alaska's Noyes Island fishery has existed for over 100 years. It is and has been managed in order to harvest the largest populations of pink salmon in North America, healthy wild stocks that spawn almost entirely in over 5000 streams in southeast Alaska. Enhancement activities on British Columbia's Skeena River now account for roughly three-fourths of sockeye salmon returns to that system. Thus, while incidental Alaskan interceptions of those sockeye salmon have increased in terms of absolute numbers, those harvests represent a stable proportion (averaging only 15 percent) of the Skeena River run. Catch levels at Noyes Island reflect only the artificially enhanced numbers of those salmon mixed with abundant returns to Alaskan rivers. Those catches do not represent an alteration in the fishery or increased Alaskan fishing pressure on sockeye returns to the Skeena River.

As is implicit in the foregoing, the charge of overfishing at Noyes Island is fallacious. Both Canadian harvests and reproductive escapements of the salmon stocks in question have expanded to historic record levels during the period of the Treaty. Canadian fishermen have benefitted in proportion as the returns have increased. The resource is maintaining an extraordinary level of abundance. No overfishing has occurred.

Alaska also adjusted its fishery to the benefit of Canadian fishing interests. The regime agreed in 1985 included provisions to restrict fishing at Noyes Island during July each summer. Recognizing that the respective run timings of Skeena River sockeye and Alaskan pink salmon were not identical, the Alaskan fishery was limited during peak abundance of that sockeye return and restrictions were lifted as peak abundance of Alaskan pink salmon approached. This logical and acceptable compromise respected legitimate fishing interests in both countries and remains a model for resolution of specific fishery disputes. The restrictions accepted by Alaska were not trivial. Fishing time has been reduced roughly 85 percent compared to the pre-Treaty fishery pattern, and an estimated 66 million salmon, the vast majority destined for Alaskan streams, have been foregone by that fleet between 1985 and 1996. No fishery adjustments have been implemented in Canada that would benefit Alaskan interests. Despite its obvious merit, the one-sided character of this arrangement has not been lost on Alaska, particularly considering the shrillness of recent Canadian complaints regarding Alaskan conduct of this fishery.

The future, if any, of the Treaty

The Pacific Salmon Treaty is in serious trouble. Agreement regarding the annual conduct of fisheries has not been achieved since 1993. Canada effectively has withdrawn its participation from the Treaty Commission in favor of initiatives at higher levels of government intended to secure implementation of its interception-balancing doctrine. Those attempts to gain through political manoeuvring what could not be attained in direct negotiation have not succeeded and, in fact, have exacerbated the adversarial atmosphere that surrounds Treaty issues. Further efforts by Canada to impose its allocative system through sheer persistence in a high-level test of political will seem most unlikely to produce acceptance or to facilitate improved relations.

This Treaty, to be successful, needed to generate practical and stable bilateral fishery arrangements precisely because widely differing perspectives existed. Instead it has become the platform for Canadian ideological assaults on Alaskan fisheries. Canada's aggressive stance regarding Alaskan fisheries may play well in Canadian internal politics. However, lack of merit in Canada's allocation theory and lack of balance in its political approach do not play at all with Americans who have legitimate interests in the salmon and in the fisheries. To Alaskans, there is nothing cooperative and nothing equitable in Canada's position.

Without a return by Canada to addressing Treaty issues within the Treaty process and among those who are directly knowledgeable about the salmon, serious consideration must be given to the possibility that this Treaty no longer serves a productive purpose. Alaska has urged Canada to return to full participation in the established Treaty forum. Vastly different perspectives and equally different expectations surround questions of acceptable conduct of a number of discrete fisheries. In Alaska's view, resolution of existing conflicts can be achieved only in the context of concrete fishery negotiations. If this Treaty is to endure as a meaningful instrument, negotiations must be returned to practical discussions that bear on real salmon and real fisheries, that respect the legitimacy of opposing interests and that incorporate all provisions of the Treaty. In such negotiations, each side necessarily brings to the table all of the considerations that it deems important. In the process of give and take, ultimate agreement on proper and responsible conduct of each specific fishery is the best result that can be attained. Where diverse interests are involved, what can be agreed defines what is equitable.

Jev Shelton is a commercial fisherman in southeast Alaska, living in his homeport of Juneau, Alaska. He serves as alternate Commissioner for Alaska in the Pacific Salmon Commission.

by Nelson Wiseman

NATIONAL UNITY: RECOVERING OUR NON-DECLARATORY TRADITION

L'auteur presse les Canadiens en général — et leurs chefs politiques en particulier — de renoncer à exprimer dans une déclaration constitutionnelle en bonne et due forme la nature de leur pays. Si le Canada a fonctionné jusqu'ici, c'est malgré sa Constitution plutôt que grâce à elle. Ce pays s'est montré assez souple et assez pragmatique pour prendre en compte nos réalités complexes et parfois contradictoires.

What part of "No" do our premiers not understand? Their Calgary Declaration is a synoptic rewrite of the Charlottetown Accord. If Canadians within and outside Quebec have shared something in common recently it has been their rejection of proposals for constitutional tinkering. The 1992 referendum demonstrated that Quebecers are now especially expert at such exercises. They have said "No" three times in three referendums since 1980 and, if one accepts that their National Assembly spoke for them when it voted overwhelmingly against the *Constitution Act, 1982*, the total is four in but 15 years. In only three small Atlantic provinces, which make up less than five percent of the national population, did Charlottetown gain majority endorsement. So much for the first ministers as savvy judges of their public's thinking.

If our first ministers believe in the logic, substance and legitimacy of referendums they would have to admit the following: Canadians do not have credence in the rule of law, in the parliamentary and federal systems of government, in the equality of people, provinces and genders, in Quebec's distinctness, in our cultural