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**The Supreme Court of Canada's "Historic" Decisions  
in *Nikal* and *Lewis*: Why Crown Fishing Policy  
in Upper Canada Makes Bad Law**

by

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The work of the Fisheries Branch is new and somewhat peculiar....The terms, nature and bounds, and the interpretation of special conveyances have to be accurately defined. The Ordnance lands and Indian reserves used for fishing stations, have also to be thus disposed of. ... This part of the duties alone involves long and close study and frequent researches: it requires acquaintance with the French laws and the common law of England, and their applicability in Canada, through decisions of the Courts of Queen's Bench and Appeals, and the Seigniorial courts, whenever, in Lower Canada, the *droit de peche* has come into question, and, in Upper Canada, the 'public piscary' is involved. It demands acquaintance with the operations carried on under the Statutes of the United Kingdom and of other countries. Also, it necessitates constant reference to the various decisions and elaborate arguments had in the Courts of Upper Canada. Besides, a practical knowledge of peculiarities in numerous cases,- which can be obtained only by personal and laborious investigation into authorities, ancient titles and maps, and often actual inspection and measurement of the various premises, in order to ascertain the relative rights of the Crown and of individuals - is indispensable. [Assistance is also required in] settling disputes denoting boundaries, reconciling conflicting interests, conciliating opposition, removing prejudices, &c., &c...<sup>1</sup>

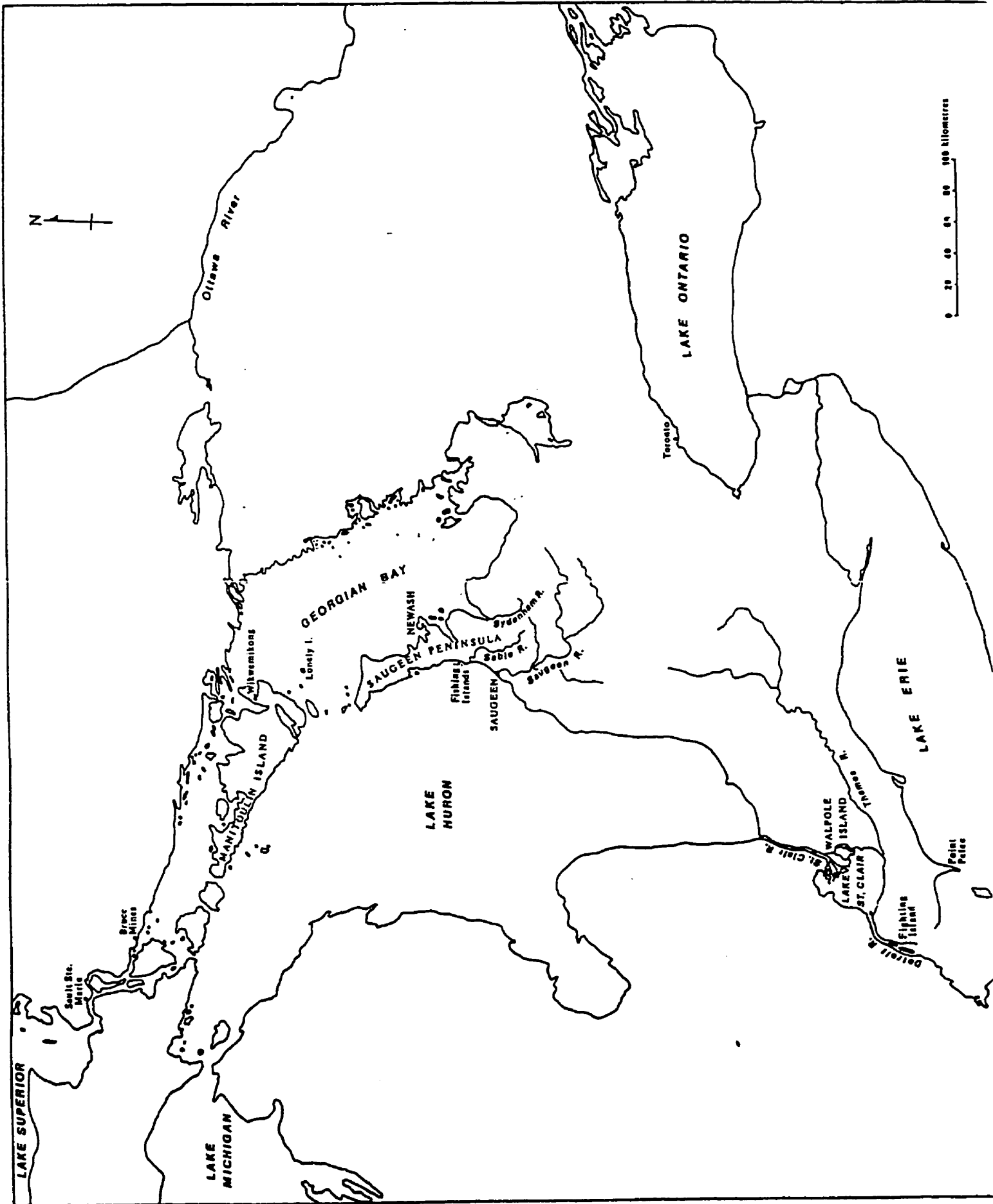
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<sup>1</sup> *Report of the Select Committee on the Working of the Fishery Act, &c., &c., &c. and Response to Question by Mr. Price to Mr. Whitcher [re. job description]*, National Archives of Canada Record Group 10 vol. 323 at 51, 28 April 1863

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Map 1

**Abstract**

Although a casual reading of the Supreme Court of Canada's decisions in *R. v. Nikal* and *R. v. Lewis* might suggest otherwise, this thesis will argue that Court's decisions in two recent British Columbia aboriginal fishing cases do not apply in Ontario.

In doing so, it will be shown that the Supreme Court of Canada relied on evidence of historic Crown policies towards aboriginal fishing rights in Upper Canada in the absence of appropriate context as to how those policies evolved. As a result, the Court wrongly concluded that fisheries could not be the subject of exclusive aboriginal rights. As a result of its reliance on historically discriminatory policies of the Crown, it will be shown that the Court favoured the fishing privileges of non-aboriginal Canadians over the pre-existing rights and title of aboriginal peoples.

In exploring these issues, this thesis will include a review of case-law, legislation and historical materials from the 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> centuries as well as contemporary case-law and legislation.

## Introduction

In *Nikal v. The Queen*,<sup>2</sup> the Supreme Court of Canada rendered a decision that an *Indian Act* Band by-law did not apply to a river running through a reserve in British Columbia because no exclusive right to a fishery had been granted to the Band by the Crown at the time the reservation was established, due to Crown policy. The Supreme Court further held that the *ad medium filum aquae* presumption of ownership did not apply to waters adjacent to the reserve in light of this policy.

In *Lewis v. the Queen*,<sup>3</sup> rendered concurrently, the Court repeated and adopted the conclusions reached in *Nikal*. As a result, the *Nikal* and *Lewis* rulings could have significant impacts on First Nations throughout Canada with respect to their capacity to use and regulate their fisheries. More particularly, because the Court recited in support of its conclusion historical evidence and cases specific to Ontario, it might appear to the casual reader that these cases would apply to deny exclusive aboriginal fishing rights within Ontario.

This thesis will analyze the *Nikal* and *Lewis* decisions critically and argue that, in fact, *Nikal* and *Lewis* should not be applied to aboriginal fishing rights within Ontario. It will demonstrate that the Supreme Court of Canada made several significant errors in the manner in which it evaluated and received historical evidence of Crown policy relating to Upper Canada, historical evidence which was specific to a different time and place than the circumstances before the Court. Since these historical facts provided the context for the Court's interpretation of the *ad medium filum aquae* presumption, it will suggest that the *ad medium filum aquae* presumption was wrongly applied by the court.

Finally, a full understanding of the historical context of the information relied on by the court will demonstrate that not only did the Court ignore the aboriginal perspective on contentious historical "facts," the Supreme Court of Canada accepted racially discriminatory Crown poli-

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<sup>2</sup>*Nikal v. The Queen* [1996] 3 C.N.L.R. 178 (S.C.C.)

cies to define aboriginal rights, thereby favouring the privileges of non-aboriginal Canadians over the pre-existing rights of aboriginal peoples and ignoring the “honour of the Crown.”

## **I. Background**

### **A. The General Framework of Aboriginal Title and Other Rights**

Aboriginal and treaty rights receive protection from sections 35 and 52 of the *Constitution Act, 1982*, which state:

35. The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

52(1). The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

There are two types of section 35 rights, treaty rights and aboriginal rights. These are not mutually exclusive. A treaty can recognize pre-existing rights, as well as create new ones.<sup>4</sup>

In *R. v. Sparrow*,<sup>5</sup> the Supreme Court of Canada referred with approval to one author’s analysis of the effect of the *Constitution Act, 1982*, stating:

... the context of 1982 is surely enough to tell us that this is not a just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to questions sovereign claims made by the Crown.

In examining government policies to determine their effect on aboriginal and treaty rights, as the Supreme Court did in the two cases to be discussed, it is important to keep in mind that

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<sup>3</sup>*Lewis v. The Queen* [1996] 3 C.N.L.R. 131 (S.C.C.)

<sup>4</sup>*R. v. Jones and Nadjiwon*, cited as *R. v. Jones* (1993) 14 O.R. (3d) 421 (Ont. Prov. Div.) at 439, referred to with approval by the dissenting judge, Madam L’Heureux-Dube, in *R. v. Van der Peet* [1996] 4 C.N.L.R. 177 (S.C.C.) at 243.

<sup>5</sup>*R. v. Sparrow* [1990] 3 C.N.L.R. 161 (S.C.C.) at 178

there is a special relationship between the Crown and aboriginal peoples at stake. This has been described by the Supreme Court of Canada as the “honour of the Crown.”<sup>6</sup> The way in which a legislative objective is to be attained must both uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada’s aboriginal peoples.<sup>7</sup>

The principles associated with the honour of the Crown were first articulated in *R. v George*<sup>8</sup> as a warning against “sharp dealing” in that “Parliament [should not be] made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured the Indians and their posterity by treaty.”<sup>9</sup> The honour of the Crown has more than merely moral implications. Because this special relationship applies not just to legislation but to government actions, the Supreme Court of Canada in *Sparrow* has stated that the special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.<sup>10</sup>

On the subject of the meaning of subsection 35(1) of the *Constitution Act, 1982*, *Sparrow* also held that the words “recognition and affirmation” import some restraint on the exercise of sovereign power, and require sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.<sup>11</sup>

Since the historical context of the information reviewed by the court in *Nikal* and *Lewis* included policies implemented by the Crown in British Columbia and Upper Canada, it is of note that while the fiduciary obligation is held principally by the federal government, it is shared with the provincial governments in areas where they exercise constitutional jurisdic-

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<sup>6</sup>*Sparrow*, *supra*, note 5 at 180

<sup>7</sup>*Ibid.* at 181

<sup>8</sup>*R. v. George* [1966] S.C.R. 267 at 279

<sup>9</sup>*R. v. Taylor and Williams*, [1981] 3 C.N.L.R. 114 (Ont. C.A.) at 123

<sup>10</sup>*Sparrow*, *supra*, note 5, at 183

<sup>11</sup>*Ibid.* at 187



tion.<sup>12</sup> As Brian Slattery writes:

The Crown's general fiduciary duty binds both the federal Crown and the various provincial Crowns within the limits of their respective jurisdictions. The federal Crown has primary responsibility toward native peoples under section 91(24) of the Constitution Act, 1867, and thus bears the main burden of the fiduciary trust. But insofar as provincial Crowns have the power to affect native peoples, they also share in the trust.<sup>13</sup>

Prior to Confederation, the Crown was bound in its capacity as head of the various colonies and territories making up British North America. The rearrangement of constitutional powers at Confederation, however, did not reduce the Crown's overall fiduciary obligations to First Nations. It has been argued that these obligations tracked the various powers and rights to their destinations in Ottawa and the provincial capitals.<sup>14</sup> The new approach outlined in *Sparrow* therefore applies to all legislation, whether or not aboriginal peoples or their unique legal rights are mentioned.<sup>15</sup>

A new approach to cases involving aboriginal title has also evolved in recent years, one notably different. As a result, the once leading decision of *St. Catherine's Milling and Lumber Company*,<sup>16</sup> a decision rendered in 1898 in the absence of argument or submissions from the First Nations affected, seems highly Eurocentric from today's perspective.

In a dispute over timber rights between the provincial and federal governments in ceded territories in 1898, the Privy Council in *St. Catherine's Milling and Lumber Company* held that the provinces were given the entire beneficial interest of the Crown in lands within their boundaries under section 109 of the *British North America Act* of 1867. The Indian title in

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<sup>12</sup>This is particularly important in fisheries issues, where the ownership of the resource and underlying bed may be argued to lie with the provinces under the terms of the *Constitution Act, 1867* (originally the *British North America Act*) but where jurisdiction over inland fisheries as well as lands reserved for Indians remains with the federal government.

<sup>13</sup>Brian Slattery, "Understanding Aboriginal Rights," (1987) 66 *Can. Bar Rev.* at 755

<sup>14</sup>Brian Slattery, "First Nations and the Constitution: A Question of Trust," (1992) 71 *Can. Bar Rev.* at 274

<sup>15</sup>*Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 12 August 1991) at 160-161, with thanks to P. Hutchins, D. Soroka and P. Dionne for bringing this reference to the author's attention.

<sup>16</sup>*St. Catherine's Milling and Lumber Co. v. The Queen*, (1888), 14 A.C. 46 (J.C.P.C.)

those lands, the Privy Council held, was simply a burden on the Crown title which became a *plenum dominum* whenever that title was surrendered or otherwise extinguished. The Court stated:

Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, *Attorney General v. Mercer* (8 App. Cas. 767) might have been authority for holding that the Province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the union. But that was not the character of the Indian interest. The Crown has all along had a present proprietary estate in the land upon which the Indian title was a mere burden.<sup>17</sup>

For a long time following the decision in *St. Catherine's Milling*, pre-existing aboriginal tenure was described as a “personal and usufructuary right dependent upon the goodwill of the Sovereign,”<sup>18</sup> a form of possession which could “only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown.”<sup>19</sup> In other words, aboriginal rights and title derived from the occupation of lands pre-dating European arrival by millennia were construed as “grants” the Sovereign. The fallacy of this reasoning should be obvious, particularly the notion that sovereign title on the part of Europeans might apply to territories areas not yet “discovered” but whose inhabitants had occupied and used them in organized societies for many thousands of years.

Fortunately, the rather bizarre notion advanced in *St. Catherine's Milling* that aboriginal title was merely a personal or usufructuary right contingent on “discovery” has long since been abandoned and has been rejected by the courts of most former British colonies.<sup>20</sup>

Twenty-five years ago, in *Calder v. A.G. B.C.*, Judson, J. of the Supreme Court of Canada noted that “the fact is that when settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had for centuries. This is what Indian title means

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<sup>17</sup>*Ibid.* at 59

<sup>18</sup>*Ibid.* at 54

<sup>19</sup>*Ibid.*

<sup>20</sup>Mark Walters, *Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada* [unpublished paper, Oxford, 1997] [copy on author's file] at 17

and it does not help one in the solution of this problem to call it a 'personal or usufructuary right.'<sup>21</sup> Justice Hall, in a widely-cited dissenting opinion in *Calder*, noted that aboriginal title was much more than a "grant" from a previous Sovereign.

In all the cases referred to by the Court of Appeal, the origin of the claim being asserted was a grant to the claimant from the previous Sovereign. In each case, the claimants were asking the Courts to give judicial recognition to that claim. In the present case, the appellants are not claiming that the origin of their title was a grant from any previous Sovereign, nor are they asking this court to enforce a treaty of cession between any previous Sovereign and the British Crown... they are asking this court to recognize that settlement of the north Pacific coast did not extinguish the aboriginal title of the Nishga people - *a title which has its origin in antiquity - not in a grant from the previous Sovereign.* [emphasis added].<sup>22</sup>

As stated by Justice Hall, prior jurisprudence to the contrary required acceptance of the proposition that after conquest or discovery aboriginal people had no rights except those subsequently granted or recognized by the conqueror or discoverer. "That proposition," he stated, "is wholly wrong..."<sup>23</sup>

In *Mabo*,<sup>24</sup> the Australian High Court has similarly criticized the notion that "discovery" could give Crown title over aboriginal lands as being unjust and discriminatory, and essentially uncivilized.

The proposition that when the Crown assumed sovereignty over an Australian colony, it became the universal and absolute owner of all the land therein involves critical examination. If the conclusion ... be right, the interests of Indigenous inhabitants in colonial lands were extinguished so soon as British subjects settled in a colony, though the Indigenous inhabitants had

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<sup>21</sup>*Calder v. A.G.B.C* [1973] S.C.R. 313 at 328. As Justice LaForest noted in *Delgamu'ukw v. British Columbia*, [1998] 1 C.N.L.R. 14 (S.C.C.) at para. 112: "In my view, the foundation of "aboriginal title" was succinctly described by Judson J. in *Calder* ... where, at p. 328, he stated: 'the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means.....'. More recently, Judson J.'s views were reiterated in *R. v. Van der Peet*, [1996] 2 S.C.R. 507. There Lamer C.J. wrote for the majority, at para. 30, that the doctrine of aboriginal rights (one aspect of which is 'aboriginal title') arises from one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.' "

<sup>22</sup>*Calder, ibid.* at 406

<sup>23</sup>*Ibid.* at 416

<sup>24</sup>*Mabo v. Queensland* [1992] 5 C.N.L.R. 1 (H. C.)

According to the cases, the common law itself took from Indigenous inhabitants any right to occupy their traditional lands, exposed to them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the Indigenous inhabitants intruders in their own homes... *Judged by any civilized standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.*

..Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the Indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. [emphasis added]<sup>25</sup>

Although its terminology was rather more polite, in *Delgamu'ukw v. British Columbia*, the Supreme Court of Canada described the Privy Council's characterization of aboriginal title in *St. Catherine's Milling* as not particularly helpful. In *Delgamu'ukw*, the Court highlighted the need to take into account aboriginal legal systems and perspectives as well as the common law, holding:

The starting point of the Canadian jurisprudence on aboriginal title is the Privy Council's decision in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, which described aboriginal title as a "personal and usufructuary right" ...The subsequent jurisprudence has attempted to grapple with this definition, and has in the process demonstrated that the Privy Council's choice of terminology is not particularly helpful to explain the various dimensions of aboriginal title. What the Privy Council sought to capture is that aboriginal title is a *sui generis* interest in land. Aboriginal title has been described as *sui generis* in order to distinguish it from "normal" proprietary interests, such as fee simple. However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. *As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.* [emphasis added]<sup>26</sup>

The Supreme Court of Canada, then, has taken a rather new and more inclusive approach to cases involving pre-existing aboriginal title. While it has yet to describe exactly how it is that European people came to acquire title and sovereignty over areas occupied by indigenous peoples in the absence of conquest, it has at least expressed the need to incorporate aboriginal perspectives and laws in judicial approaches to issues involving aboriginal tenure.

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Delgamu'ukw, supra*, note 21 at para. 112. (Citations will be expressed by paragraph numbers, to conform with the S.C.C.'s new citation format.)

The conceptual approach outlined in *Delgamu'ukw* is certainly encouraging. However, when one examines the Supreme Court's two rulings only a year and a half earlier in *Nikal* and *Lewis*, cases also involving the land rights of two First Nations in British Columbia, it is not at all clear that the Court has applied its own principles to the cases which have reached the same bench. In each case, the Court completely ignored the aboriginal perspective in favour of only the Crown's perspective. In each case, a highly technical set of rules derived from European feudal laws of property were applied while aboriginal legal systems of tenure were wholly ignored. In the result, both First Nations were denied the right to the exclusive use of fishery resources adjacent to their reserve lands, as well as the ability to regulate their own members.

#### **B. Issues in *Nikal* and *Lewis***

Since the factual underpinnings of both *Nikal* and *Lewis* rested on very similar historical and legal issues, the appeals were argued together. The Supreme Court of Canada's decisions were released concurrently and rely heavily on each other.

In each situation, a First Nation within British Columbia with waters adjacent to its reserve had asserted jurisdiction over Band members' fishing activities through the passage of *Indian Act* by-laws. In response, charges were laid against members of each community under the *Fisheries Act* for failing to fish with appropriate licensing authority.

In defence, both communities asserted the legal argument that the *ad medium filum aquae* presumption, which extends the territorial holdings of a land-owner to an imaginary mid-point in waters adjacent to the lands owned, applied to render the waters in question part of the reserves. Since in each case, the fishing activities in question had been sanctioned by *Indian Act* by-laws, if the waters in question indeed formed part of the reserves, the *Indian Act* by-laws would have afforded the defendants a complete defence to the charges.

To explain the issues raised in *Nikal*, first, Benjamin Nikal was charged with fishing without the authority of a licence under s. 4(1) of the *British Columbia Fishery Regulations* of the *Fisheries Act*. Mr. Nikal's Band had refused a communal licence issued by the Department of Fisheries and Oceans, preferring to direct their own members under the authority of an *Indian Act* by-law issued under s. 81 of the *Indian Act*. The by-law, it should be noted, had not been disapproved by the Minister, and therefore, until set aside, had the force of a federal regulation.

The *Nikal* case raised two primary issues as defined by the Court. These were first, whether the Moricetown Band's fishing by-law applied to the Bulkley River at Moricetown, British Columbia and second, whether the requirement of a licence infringed Mr. Nikal's aboriginal rights contrary to section 35 of the *Constitution Act, 1982*. From the appellant's perspective, however, the case had been appealed to the Supreme Court so that the Court could determine whether Mr. Nikal's Band had the authority to regulate its members either through an *Indian Act* by-law or through a section 35 right of self-government.

At the trial level of *Nikal*, Judge Smyth acquitted Mr. Nikal, holding that since the Bulkley River "touched" the Moricetown reserve, the Band's by-law applied to the adjacent river and afforded a defence.<sup>27</sup> The trial judge found that:

The lands comprised in the reserve were conveyed by the provincial government to the Crown in Right of Canada in 1938 in trust for the use and benefit of the Indians. But the evidence is clear that this had been an important fishing place since long before the arrival of the white man. ...I have no doubt that the history of the Indian people at Moricetown is in large measure the history of the fishery. I am equally confident that this reserve owes its existence to the recognition by both the federal and provincial governments of the importance of the place as a source of food for the Indians who lived there in 1938, to their ancestors and to those who have come after them.<sup>28</sup>

On appeal, Justice Millward of the Supreme Court of British Columbia held that Judge Smyth had erred in including land outside the boundaries of the reserve where the by-law could not apply. However, having nonetheless found an "existing" aboriginal right, Justice Millward

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<sup>27</sup>*R. v. Nikal* [1989] 4 C.N.L.R. 143 (B.C. Prov. Ct.)

held that the licensing scheme could not be justified on the basis that an aboriginal priority required that conservation measures be first targeted at other users, such as sports fishermen, and that a licensing scheme that did not provide for a quota was of little use in determining harvest rates and therefore could not provide much information of use in management.<sup>29</sup>

The British Columbia Court of Appeal disagreed.<sup>30</sup> MacFarlane J.A. noted that the appellant was asserting far more than simply the right to fish and that the case involved a different kind of aboriginal right, namely the assertion of an aboriginal right of self-regulation in relation to the salmon fishery.<sup>31</sup>

Having dismissed a *prima facie* infringement of the right, Justice MacFarlane ruled that the by-law could not afford a defence in that it had no application outside the reserve which did not include the river. Moreover, he stated, the appellant could not rely on the principle of *ad medium filum aquae* since in Justice MacFarlane's view, the Crown had never intended to include the bed of the Bulkley River in the reserve allotted to the Moricetown Band.<sup>32</sup> This, he said, was demonstrated by the consistent rejection of the province and Canada of native claims to foreshore rights. Justice Wallace, concurring in the result, agreed for different reasons, holding that the *ad medium filum aquae* rule did not apply to navigable rivers. By contrast, Justice Hutcheon in dissent, would have held that the *ad medium filum aquae* rule created a presumption that the Bulkley River was part of the reserve because it was non-tidal and non-navigable. Therefore, in his view, the appellant could rely on the by-law in defence.<sup>33</sup>

The three appellants in *Lewis* were also charged with a number of violations under the *British Columbia Fishery Regulations*. The issues in the case were virtually the same as those raised

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<sup>28</sup> *Ibid.* at 143

<sup>29</sup> *R. v. Nikal*, [1991] 1 C.N.L.R. 162 (B.C.S.C.) at 173

<sup>30</sup> *R. v. Nikal* (1993) 80 B.C.L.R. (2d) 245 (B.C.C.A.)

<sup>31</sup> Cited in *Nikal*, *supra*, note 2, at 183

<sup>32</sup> *Ibid.*

<sup>33</sup> *Lewis*, *supra*, note 3 at 136. In *Nikal* the Supreme Court found the Bulkley River to be navigable, although portions of it were non-navigable, *Nikal*, *supra*, note 2 at 189. It is not mentioned as to whether the river in question was non-tidal in nature, although it may be presumed from the analysis undertaken by the Court which centred on rules applying to non-tidal waters.

in *Nikal*, differing essentially only as to when the reserve was created.

The trial judge found that the portion of the Squamish River at issue was navigable but non-tidal, facts upheld on appeal to the County Court.<sup>34</sup> However, he held that an *Indian Act* by-law could not afford a defence, on the basis that the *ad medium filum aquae* principle did not apply and therefore the waters in question did not form part of the reserve.

The County Court judge hearing the appeal disagreed. Judge van der Hoop, C.C. J. held that the presumption did apply, and could not be rebutted by subsequent legislation which post-dated the transfer of lands, particularly where the transfer of lands from the province to the federal government in order to set aside reserve lands was neither a “sale” nor a “grant.”<sup>35</sup>

Judge van der Hoop noted that the first step in the creation of the reserve was the allocation of the reserve by a Joint Reserve Commission in 1877. The B.C. Commissioner on the Indian Reserve Question, Archibald McKinley, had been instructed by the Provincial Government on October 23, 1876 to “avoid disturbing them [the Indians] in any of their proper and legitimate avocations whether of the chase or of fishing...”<sup>36</sup> The Court found that the Dominion Commissioner was instructed on August 25, 1876 that the Indians “should be secured in the possession of the villages, fishing stations, fur posts or other settlements or clearing which they occupy in connection with that industry or occupation.”<sup>37</sup> Based on these facts, the County Court concluded:

Given the historical background of the right of the Indians to fish, the desire of both the provincial and federal governments to support and protect that right, and the requirement for a liberal construction of the Indian Act, the term “on the reserve” should be interpreted as, in this case, the right to fish on the Squamish River.<sup>38</sup>

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<sup>34</sup>*R. v. Lewis*, [1989] 4 C.N.L.R. 133 (B.C. Co. Ct.) at 135. In light of the Supreme Court’s findings that the *ad medium filum aquae* presumption did not apply to navigable waters, the trial judge’s factual finding that the waters were non-navigable appears to have been ignored.

<sup>35</sup>*Ibid.* at 139

<sup>36</sup>*Ibid.* at 141

<sup>37</sup>*Ibid.*

<sup>38</sup>*Ibid.* at 142



On appeal by the Crown, the British Columbia Court of Appeal set aside the acquittals and convicted the defendants. Wallace J.A. commenced by indicating that the real interest in the litigation was to determine who had legislative control of the fishery near the Squamish Indian Reserve.<sup>39</sup> The major issue, then, was whether the authority of the by-law extended beyond the banks of the Squamish River to include the waters themselves.

The Court of Appeal concluded the *ad medium filum aquae* presumption was not applicable to navigable waters in British Columbia, and therefore the reserve did not include adjacent waters.

### C. The Supreme Court of Canada's Rulings

The major issue before the Supreme Court of Canada was whether the waters adjacent to the reserves in each case formed part of the reserves, thereby enabling an *Indian Act* by-law defence on the basis of the *ad medium filum aquae* presumption.

In *Nikal*, the Supreme Court of Canada held that Mr. Nikal had an aboriginal right to fish, but a right which was not exclusive, as the Crown had not intended to grant exclusive fishing rights to his Band when it created the reserve. This was detailed as being a matter of Crown policy throughout the 19th century, based on an historical record cited extensively throughout the decision, including correspondence specific to Upper Canada. In particular, the Court found that the fishery was reserved from the Crown's allotment of lands, and therefore the Band's *Indian Act* by-law did not apply.<sup>40</sup>

As a result, the *ad medium filum aquae* presumption was held not to apply to reserve lands adjacent to navigable waters in British Columbia.

The Court in *Lewis* adopted the reasoning and the history relied on by the Court in *Nikal*, adding that the presumption of *ad medium filum aquae* is applicable only to non-navigable

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<sup>39</sup>R. v. *Lewis* (1993) 80 B.C.L.R. (2d) 224 (B.C.C.A.)

waters, and does not apply to navigable waters in British Columbia.<sup>41</sup> In the result, neither Band was able to rely on *Indian Act* by-laws as a defence, although Mr. Nikal was ultimately found to have been exercising an existing aboriginal right which had been infringed by the terms of licence cited by the Court.

## II. The Historical Context of the Evidence Presented

Since the Court referred to the general policy of the Crown towards aboriginal fisheries in reaching its conclusions, its conclusions should apply equally to First Nations in the rest of Canada. *If* the policy of the Crown was not to recognize exclusive aboriginal fishing rights, as the Court has suggested, and *if* Crown policy indeed forms the basis upon which the existence of such rights may be determined, then First Nations throughout Canada will have difficulty advancing exclusive fishing rights or issuing by-laws to regulate Band members in waters adjacent to their reserves. What this thesis will show, however, is that the Court did not inquire as to how title was obtained by the Crown to lands covered by water in the first place. Once that question is considered, it will be obvious that the Court's conclusions were wrong, particularly where these were based on historic Crown policy within Upper Canada.

The Supreme Court of Canada in *Nikal* concluded that the historical evidence, "taken from documents in the public archives, demonstrates that in both [the pre- and post-Confederation] periods, there was a clear and specific Crown policy of refusing to grant in perpetuity exclusive rights to fishing grounds."<sup>42</sup> The Court relied specifically on letters and memoranda from officials in Upper Canada to support this conclusion. However, historical materials which were not placed before the Court disclose many instances in which aboriginal peoples within Ontario were understood by the Crown to hold exclusive fishing rights which had to be surrendered before the Crown could grant rights to fisheries or water lots to others. A Crown policy of confirming many of these arrangements through treaties, licences of occupation and legislation at various times in the 18<sup>th</sup> and 19<sup>th</sup> centuries contradicts the Court's conclusion

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<sup>40</sup>*Nikal, supra*, note 2 at 179

<sup>41</sup>*Lewis, supra*, note 3 at 133

<sup>42</sup>*Nikal, supra*, note 2 at 187

that the Crown had a “clear” policy against recognizing exclusive aboriginal fishing rights.

The Court’s assumptions about public “rights” to fisheries presumed that these rights existed and superceded aboriginal title, or were at least unaffected by it. However, it will be shown that Crown policy in Upper Canada not only recognized that aboriginal title existed and had to be dealt with before aboriginal waters could be accessed by non-aboriginal fishing interests, it confirmed the exclusivity of aboriginal fisheries even within navigable waters. Where settlement was delayed, as in portions of northern Ontario, it will be demonstrated that the Crown continued to view aboriginal fisheries as exclusive in until the latter part of the 19<sup>th</sup> century.

It will be demonstrated that prior to any significant non-aboriginal participation or interest in what had been exclusively aboriginal fisheries, Crown policy was to recognize exclusive aboriginal fishing rights, as well as aboriginal control over and ownership of navigable waters within Ontario. When that policy changed, in the period taken *out* of context by the Court, it did so because of the economic demands of non-aboriginal people and not for any legally supportable reason. Once non-aboriginal people expressed an economic interest in the fisheries, Crown policy changed to favour these non-aboriginal interests. The Supreme Court relied on *these* overtly discriminatory policies as determinative of pre-existing aboriginal territorial rights.

The Court, as will be shown, received and took judicial notice of contentious historical facts which had not been before the trial or appeal courts earlier and did so over the objections of the aboriginal appellants. The Court’s failure to appreciate the context of the evidence it accepted, indeed its failure to appreciate that such information might *be* contentious, may have made a significant difference to the outcome of the two cases.

Because an understanding of the context of the Crown’s policy tends to undermine the overall result in both *Nikal* and *Lewis*, and renders its application in Ontario highly doubtful, this thesis will comprehensively review Crown fishing policy, English common law and statutes of the period with respect to private rights and “public waters” in Upper Canada.

It is not the purpose of this thesis to examine the historical context of aboriginal fishing rights in British Columbia. Each aboriginal community has facts peculiar to it, and a unique relationship with its land. Crown policy, it will be shown, was not consistent as to place or time, in approaching these unique relationships.

A comprehensive understanding of the historical context behind the Crown's changing policy should persuade even the "casual reader" that unceded waters adjacent to reserve lands in Ontario, at least, form part of those reserves as a matter of aboriginal title. According to the Supreme Court of Canada's decision in *Delgamu'ukw, supra*, this enables aboriginal peoples the exclusive use of the resources therein.

#### **A. Crown Policy concerning Aboriginal Fisheries in Upper Canada**

##### **1. The Nature and Scope of Aboriginal Fisheries**

In *Nikal*, Justice Cory suggested that the historical evidence as to the standard practice of the Crown could be conveniently divided into pre- and post-Confederation periods.<sup>43</sup> While it is indeed important to distinguish between two general periods of time, the relevant time periods are not pre- and post-Confederation, as suggested by the Court.<sup>44</sup> The defining periods of Crown policy were actually pre- and post-settlement interest in the fisheries, times which varied from province to province and which must be evaluated on a case-by-case basis.

This variation in policy depending on the stages of settlement applied throughout Canada. Following a wave of settlement in Upper and Lower Canada, for example, the *Gradual Civilization Act* of 1856 was enacted to promote assimilationist policies and precluded the rec-

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<sup>43</sup>*Ibid.*

<sup>44</sup>Hansen argues that a distinction may be drawn between pre-1857 treaties, which reflect an understanding that treaty rights to fish were considered by the government to be exclusive, and those post-1857, when the treaty right to fish was couched in language that suggests it was to be subject to regulation. See Lise Hansen "Treaty Fishing Rights and the Development of Fisheries Legislation in Ontario: A Primer," in (1991) 7 *Native Studies Review* no. 1 at 1 [hereafter cited as "Development of

ognition of aboriginal group rights.<sup>45</sup> As Peter Jones, an aboriginal observer at the time noted that in the beginning, Britain had considered the Indians "allies with the British nation and not subjects ... until the influx of emigration completely outnumbered the aborigines. From that time the Colonial Government assumed a parental authority over them, treating them in every respect as children."<sup>46</sup>

At the time in which Indians were considered allies of the Crown, and "nations" to be negotiated with, there is little question that they were engaged in fishing activities. To fully understand the extent to which aboriginal peoples in Ontario engaged in fishing activities and were self-governing within these activities, the importance of inland shore fisheries to aboriginal peoples needs to be understood prior to, and after, first contact.<sup>47</sup>

The aboriginal people who lived in what is now Ontario formed two major linguistic groups, Algonquian and Iroquoian. While the subsistence patterns of these two groups reflected differences in climate and natural areas, fishing was an important resource.<sup>48</sup> Substantial documentation exists of the historic use of certain areas such as the Great Lakes for domestic and commercial consumption.<sup>49</sup> For the purposes of this paper, the Saugeen Territory, the Rainy River and the Lake of the Woods and the Bay of Quinte will be the focus of attention. [Map 1].

Archaeological information shows evidence of fishing in the Great Lakes as far back as about

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Fisheries"].

<sup>45</sup>The 1856 *Gradual Civilization Act* was passed by the Assembly of the Canadas. See Donald B. Smith, *Sacred Feathers: The Reverend Peter Jones (Kahkewaquonaby) and the Mississauga Indians* (Toronto: University of Toronto Press, 1987) at 238

<sup>46</sup>Peter Jones, *History of the Ojebway Indians with especial reference to their conversion to Christianity* (Freeport, N.Y.: Books for Library Press, 1970 first printed London: A.W. Bennett, 1861) at 217

<sup>47</sup>See for example, Charles Cleland, "The Inland Shore Fishery of the Northern Great Lakes: Its Development and Importance in Prehistory," *American Antiquity* 4-7(4) (1982) 761-184; Charles Cleland, "Indians in the Changing Environment" in Susan Flader ed. *The Great Lakes Forests: An Environmental and Social History* (Minneapolis: University of Minnesota, 1982) and Erhard Rostlund, *Freshwater Fish and Fishing in Native North America* (Berkeley: University of California Press, 1952).

<sup>48</sup>Hansen, "Development of Fisheries," *supra*, note 44 at 1

<sup>49</sup>*Ibid.*

3000 B.C. when spears and harpoons were adapted to capture fish, particularly sturgeon, in shallow water.<sup>50</sup> Hand-held seine nets came into use sometime between 200 B.C. and A.D. 500, and by about A.D. 800, aboriginal peoples discovered that seines could be adapted to fish in deep water in the form of gill nets, used to catch huge quantities of whitefish and lake trout.<sup>51</sup> In the late 1600s, Europeans observed that aboriginal peoples used gill nets, seine nets and spears as harvesting tools. In 1698, Louis Hennepin wrote:

The Savages that dwell in the north fish in a different manner than those of the south: the first catch all sorts of fish with Nets, Hooks and Harping-irons [harpoons or spears] as they do in Europe. I have seen them fish in a very pleasant manner. They take a fork of wood with two Grains or Points and fit a Gin to it, almost the same way that in France they catch partridges. After they put in the water and when the Fish, which are in great plenty by far than with us go to pass through, and find they are entered in the gin, they snap together this sort of Nippers or Pinchers and catch the Fish by the Gills.

The Iroquois in the fishing season sometimes make use of a Net forty or fifty fathoms<sup>52</sup> long which they put in a Great Canow; after they cast it in an oval Form in places convenient in the Rivers. I have often admired their dexterity in this Affair. They sometimes take 400 white fish besides many Sturgeons which they draw to the Bank of the River with Nets made of Nettles. To fish in this manner, there must be two men at the end of each net to draw it dexterously to the shore.<sup>53</sup>

In the 17<sup>th</sup> and 18<sup>th</sup> centuries, aboriginal peoples throughout Ontario traded and bartered fish to Europeans along with a huge variety of other resources, and in so doing, developed technologies for extracting and marketing natural products.<sup>54</sup> One such product was *isinglass*, a fish oil taken from the swim bladder of the sturgeon, for which an extensive market in Europe developed because of its use in lamp oil.<sup>55</sup> The magnitude and extent of aboriginal fisheries is

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<sup>50</sup>Charles Cleland, "The Historical Development of the Great Lakes Aboriginal Fishery," conference paper, C.B.A.-Ontario Law/Canadian Aquatic Resources Section Conference, *Aboriginal Fishing: Traditional Values and Evolving Resource Stewardship*, Wahta Mohawk Territory, Ontario, September 29, 1996 [unpublished][hereafter cited as "Historical Development"]

<sup>51</sup>*Ibid.*

<sup>52</sup>240-300 feet.

<sup>53</sup>Louis Hennepin, *A new Discovery of a Vast Country in America*, Reuben G. Thwaites ed. (Chicago: A.C. McClurg and Co., 1903, reproduced by Coles Publishing: Toronto, 1974) at 522-523

<sup>54</sup>Cleland, "Historical Development" *supra*, note 50

<sup>55</sup>*Isinglass* was valued by the Ojibway because of its use as a binding agent in paint; however it was also in demand in Europe as a fining agent in beer and wine and in the manufacture of glue, Tim Holzkamm and Chief Willie Wilson, Rainy River Band, unpublished report "The Sturgeon Fishery of

perhaps evidenced by the presents given to aboriginal peoples recorded as having been provided to them by the Crown at Drummond's Island in 1824. These annual gifts included 880 pounds of net thread and 2,000 fish hooks.<sup>56</sup>

The involvement of the Saugeen Ojibway peoples of the Saugeen peninsula in fishing activities has been described as part of their cultural identity as well as an important element in the subsistence economy of the communities.<sup>57</sup>

The Saulteaux band of Ojibway's activities at Lake of the Woods in the fishery were every bit as extensive as those of the Saugeen Ojibway peoples. Early historic records suggest that the aboriginal fishermen in the Lake of the Woods were engaged in the large scale capture of fish, first noticed by explorers to the north in the early 1700s. La Verendrye, the French explorer, noted in his journal that he had sent ten men to Lake of the Woods in 1733 and that "[the Indians] caught that autumn 4,000 big whitefish, not to speak of trout, sturgeon and other fish in the course of the winter."<sup>58</sup>

Joseph Lafrance, another early observer, spent thirty days "fishing and hunting as he went with the natives [of Fort Frances] and stayed a month in one of the islands with the Manomin and Sturgeon Indians who live on the north side of this lake and meet in that island to be merry and confirm their friendship and alliance; these last are called so from the great numbers of sturgeon taken in this lake, which is the greatest part of their provisions."<sup>59</sup> In 1790, Alexander MacKenzie wrote in his journal that "the waters of the Rainy River "abound in fish, particularly sturgeon which the natives both spear and take in drag nets...Namikan Lake

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the Rainy River Bands," *Smithsonian Columbus Quincentenary Program, Seeds of the Past*, 23 September 1988 [hereafter referred to as "Sturgeon Fishery"]

<sup>56</sup>Statement of Presents issued at Drummond's Island [1824], reprinted in: *Report on the Affairs of the Indians of Canada* in the Journal of the Legislative Assembly of Canada, 1847, Appendix T.

<sup>57</sup>R.M. Vanderburgh, *Fishing at Cape Croker*, unpublished report, Canada Council Project S74-0105, based on interviews with elders at Cape Croker, 1974-75

<sup>58</sup>Journal entry for 1733, Pierre G.V. La Verendrye in Lawrence Burpee ed. *Journal of La Verendrye*, (Toronto: The Champlain Society, reprinted by New York: Greenwood Press, 1968) at 57

<sup>59</sup>Joseph Lafrance, 1740 narrative in *Report from the Committee appointed to inquire into the state and condition of the countries adjoining the Hudson's Bay and the trade carried on here* (London, 1745) at 34

takes its name from a particular place at the foot of a fall where the natives spear sturgeon.”<sup>60</sup>

Along with the large scale capture of fish, the northern Ojibway also engaged in trade and barter. Alexander Henry, the fur trader, noted in 1755: “We reached the Lake of the Woods or Lac des Isles at the entrance to which was an Indian village, of a hundred souls, where we obtained a further supply of fish. Fish appeared to be the summer food.”<sup>61</sup> Alexander Henry, Jr. writing in 1799 described buying fish in the area.

We have great plenty of sturgeon at present... We camped below Manitou Rapids where we found several Indians fishing. They had a great many sturgeon and various kinds of small fish, a few of which were exchanged for liquor.....[at Lake of the Woods] we found a number of Indians ... We purchased a few fish and dried hurleberries.<sup>62</sup>

The trade in fish was not limited to sturgeon. A trader at Fort Frances wrote in 1804 that in the spring when the hunting season was over, the Ojibway generally assembled in small villages where fish could be found.

They fish with nets, hooks, lines and spears but they have a method of taking sturgeon with a kind of drag-net or seine which I believe is peculiar to themselves. The net used for this purpose is about 20 feet long by 6 feet deep when shut double. It is dragged between two small canoes, having two men in each; while the bowmen paddle gently down the stream, the men in the sterns hold the seines by means of long cords, fixed to each end and which can be shortened or lengthened according to the depth of the water ... This method of fishing is of course practicable only in rivers, narrow channels and small bays where the bottom is clear.<sup>63</sup>

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<sup>60</sup> Alexander Mackenzie, *Voyages from Montreal through the Continent of North America to the Frozen and Pacific Oceans* (M.G. Hurtig Ltd., Edmonton: first published in 1790) at lvi. See also Sir Alexander Mackenzie, *Voyages from Montreal through the Continent of North America to the Frozen and Pacific Oceans* (New York: Citadel Press, 1967, first published in 1801)

<sup>61</sup> Journal entry of Alexander Henry, 30 July 1775 in James Bain ed. *Alexander Henry: Travels and Adventures in Canada and the Indian Territories* (Rutland, Vermont: Charles E. Tuttle Co) at 241.

<sup>62</sup> Journal entry of Alexander Henry, 3 August 1799 in *The Manuscript Journals of Alexander Henry, fur Trader of the Northwest Company and of David Thompson, official geographer and explorer of the same company, and exploration and adventure among the Indians on the Red, Saskatchewan, Missouri and Columbia Rivers* (Ross and Haines Inc: Minneapolis, 1965) at 23

<sup>63</sup> Peter Grant, Journal entry from 1804, “The Sauteux Indians” in L.R. Masson ed., *Les Bourgeois de la Compagnie du Nord-ouest: Recits des voyages, inedits relatifs au Nord-Ouest canadien*, 2 vols. (Quebec: Cote, 1890) at 345-346



A Hudson's Bay trader, John McLouglin purchased 125 sturgeons from the Indians in 1822,<sup>64</sup> and in 1823 wrote in his account books that "the Indians who passes [sic] the summers about the [Rainy River] Rapids kills great numbers with drag-nets and spears, which they cut up in their flakes and dry over a slow fire after which they pound the dried flakes between the stones until it becomes like a kind of sponge; this with the oil they gather affords them a rich and substantial food ... When the Indians make more pounded sturgeon and oil than they want, they trade the surplus with us which we find much better and more substantial for our men when on trips than either rice or corn."<sup>65</sup>

In Rainy River, as many as 1,500 Ojibway were attracted to the river at Manitou and Long Sault Rapids to fish for sturgeon each spring.<sup>66</sup> All the Indians from south of Rainy River came to the Manitou Rapids about twenty miles south of Fort Frances, to capture sturgeon.<sup>67</sup> A seasonal village site of 25 lodges surrounded by "stages" for drying fish was noted in the area in 1843 by a trader who reported that "for six or eight inches of rolled tobacco we got twenty or thirty pounds weight of sturgeon. A little below this village we came to a fleet of ten or twelve canoes fishing together - a pretty sight."<sup>68</sup> The fishery included whitefish. In 1852, Peter Jacobs wrote of Kettle Rapids, where "the Indians catch whitefish in great abundance by scooping them up from the eddies and whirlpools in these rapids. This they do during the whole summer season. [At Manitou Rapids] we found numerous tents of Indians who are now engaged in the sturgeon fishery - about three hundred souls in all."<sup>69</sup>

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<sup>64</sup> Account Book of the Hudson's Bay Company, 2 November 1822 Hudson's Bay Company Archives, Winnipeg, Manitoba, H.B.C.A. B. 105/a/8 fo. 8

<sup>65</sup> Account Book of the Hudson's Bay Company, Hudson's Bay Company Archives, Winnipeg, Manitoba, H.B.C.A. B. 105/e2/fo. 1d

<sup>66</sup> John Van West, "Ojibway Fisheries, Commercial Fisheries Development and Fisheries Administration, 1873-1915: An Examination of Conflicting Interest and the Collapse of the Sturgeon Fisheries of the Lake of the Woods," (1990) 6 *Native Studies Review* no. 1 at 32 [hereafter cited as "Ojibway Fisheries"]

<sup>67</sup> *Account Book of the Hudson's Bay Company*, entry by John Dugald Cameron, 10 May 1825, Hudson's Bay Company Archives, Winnipeg, Manitoba, H.B.C.A. B. 105, fo. 15d and 19 May 1826, H.B.C.A. B. 105/a/aa fo. 32

<sup>68</sup> "Sir Henry Lefroy's Journey to the North West in 1834-4" dated 15 June 1843 in W. S. Wallace ed. *Transactions of the Royal Society of Canada Series III* May 1938 vol. xxxii s. II, at 72

<sup>69</sup> Peter Jacobs, *Journal of the Reverend Peter Jacobs* (New York: published by the author, 1857) at 32

## 2. Imperial Recognition of Exclusive Aboriginal Rights

The importance of the land and resources to aboriginal peoples was acknowledged by the Imperial Crown in a series of instructions and proclamations in the mid-18<sup>th</sup> century. In this regard, no distinction was drawn between lands, and lands covered with water. Crown policy, far from seeking to defeat aboriginal interests in traditional hunting and fishing grounds, operated to protect them.

In 1761, King George instructed Governor Robert Monckton to ensure that non-aboriginal people would be prevented from receiving Crown grants of lands without aboriginal consent. Monckton, and other colonial Governors, were instructed to “support and protect the said Indians in their just Rights and Possessions and to keep inviolable the treaties and compacts which have been entered into with them, Do hereby Strictly enjoyn and command that neither you nor any Lieut. Gov. President of the Council... do upon any pretence whatsoever, upon pain of our highest displeasure and of being forthwith removed from your or his office pass any Grant or Grants to any person whatsoever of any lands within or adjacent to the territories possessed or occupied by the Indians or the property of which has at any time been reserved to or claimed by the Indians.”<sup>70</sup>

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<sup>70</sup>Instructions from King George to Governor Robert Monckton, 9 December 1761, Public Records Office, London, England CO/1130: 31d-80. Monckton was the Governor and commander-in-Chief of the province of New York between 20 March 1761 and 14 June 1765. Governor Jonathan Belcher of Nova Scotia received the same Proclamation. He erroneously determined it applied to his jurisdiction and caused it to be published in His Majesty’s name, asking for an inquiry “into the Nature of the Pretensions of the Indians for any part of the Lands within this Province. A return was accordingly made to me from a Common right to the Sea-coast from Cape Fronsac onwards for Fishing without disturbance or Opposition by any of His Majesty’s Subjects. This claim was therefore inserted in the Proclamation, that all persons might be notified of the Reasonableness of such a permission, while the Indians themselves should continue in Peace with Us and that this Claim should at least be entertained by the Government ‘til His Majesty’s pleasure should be signified. After the Proclamation was issued, no Claims for any other purposes were made.” Darlene Johnston, *The Taking of Indian Lands in Canada: Consent or Coercion* (University of Saskatchewan: Native Law Centre, 1989) at 11. It is noteworthy, then, that an English Governor believed that Indian territories might extend into even tidal waters, and that aboriginal peoples themselves considered that they had exclusive rights within the sea.

On October 7, 1763, King George issued the *Royal Proclamation*. In it, Britain reserved for aboriginal peoples throughout much of Ontario<sup>71</sup> possession of their unceded lands and territories as a hunting ground. Terms of the *Proclamation*, which excluded all but licenced traders from travel within the territories, implied exclusive aboriginal possession of the rights protected therein.

And whereas it is just and reasonable and essential to our interest and the security of our Colonies that the several nations or Tribes of Indians with whom we are connected and who live under our protection should not be molested or disturbed in such part of our Dominions and territories *as not having been ceded to us are reserved to them as their hunting grounds*...And we do further declare it to be our Royal will and pleasure for the present as aforesaid to reserve under our sovereignty, protection and dominion, for the use of the said Indians all the lands and territories not included with the limits and territory granted to the Hudson's Bay Company and also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest...[emphasis added].<sup>72</sup>

The *Royal Proclamation* set out a protocol by which unceded territories or "hunting grounds" were to be acquired by the Crown through land cessions. Rights reserved within ceded lands were to be protected, as were reserved lands themselves.

Assurances that no territories would be claimed by England until relinquished by the Indians were confirmed by John Graves Simcoe, the first lieutenant governor of Upper Canada, who assured his Indian Allies in 1793 that "no King of Great Britain has ever claimed absolute power or sovereignty over any of your lands or Territories that were not fairly sold or bestowed by your ancestors at Public Treaties."<sup>73</sup> As Lieutenant Governor Simcoe had earlier explained to the Lords of Trade, "[t]he Indians can in no way may be deprived of their rights to their Territory and Hunting Grounds, save and except as formerly stated, and any portion of Lands ... held as a Reservation must and shall be fully protected, *as well as rights reserved on*

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<sup>71</sup>The *Royal Proclamation*, *infra*, note 72., exempted the Hudson's Bay Charter of 1670, and lands north of the "height of land."

<sup>72</sup>Royal Proclamation issued by King George, 7 October 1763, Adam Shortt and Arthur G. Doughty, eds. "Documents Relative to the Constitutional History of Canada, 1759-1791, Canada," (1907) *Sessional Papers*, No. 18 at 121-123

<sup>73</sup>Cited from the *Simcoe Papers*, Speech of Colonel Simcoe to the Western Indians, Navy Hall, 22 June 1793 in Smith, *Sacred Feathers*, *supra*, note 45 at 163. John Graves Simcoe was named Lieutenant Governor on 21 September 1791 and left the office in July, 1796.

*certain Streams and Lakes for fishing and hunting privileges or purposes.”*<sup>74</sup>

The term “hunting grounds” has been repeatedly held by the courts to have included fishing and the use of fishing grounds<sup>75</sup> and it seems quite clear that the term was understood at the time to include waters as well. That lands covered by waters was considered the same as lands not so covered was part of the basic English common law summarized by Lord Chief Justice Hale of England as early as 1787.<sup>76</sup>

Many of the cessions later obtained from aboriginal peoples within Ontario in accordance with *Royal Proclamation* protocol included surrenders of waters, including navigable ones while others affirmed exclusive fishing rights. Indeed, at the time of the *Proclamation*, as the Surveyor General complained thirty years later, it was not known just how much of the land protected by the *Proclamation*'s terms was covered with water, and how much of it was dry land.<sup>77</sup> As some 19th century colonial officials noted with concern at the time, the *Royal Proclamation* of 1763 recognized that Indian Nations had territorial rights, including “the

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<sup>74</sup>J.G. Simcoe, Quebec, to the Lords of Trade, London, Archives of Ontario, A.E. Williams/United Indian Bands of Chippewas and Mississaugas Papers, F 4337-2-0-11, Public Records Office extracts (microfilm reel # MS 2605), 28 April 1792 [emphasis added]

<sup>75</sup>See *R v. Denny* [1990] 2 C.N.L.R. 115 (N.S.A.D.), at 124-125; *R. v. White and Bob* (1964) 50 D.L.R. (2d) 613 at 664, affirmed by the Supreme Court of Canada (1965) 52 D.L.R. (2d) 481n; *R. v. Sikyea*, (1964) 46 W.W.R. (N.S.) 65 at 66-67; *R. v. Taylor and Williams* (1981) 55 C.C.C. (2d) 172, 3 C.N.L.R. 114; *R. v. Tennisco* [1983] 1 C.N.L.R. 112 (Ont. Prov. Ct.) reversed on other grounds 64 C.C.C. (2d) 315, *R. v. Nicholas and Bear* [1985] 4 C.N.L.R. 153 (N.B. Prov. Ct) and *Steinhauer v. R* [1985] 3 C.N.L.R. 187 at 189. Cases to the contrary are *R. v. Nicholas et al* [1981] 2 C.N.L.R. 114 (N.B. S.C. App Div.), and *R. v. Jacques* [1978] 20 N.B.R. (2d) 576 (N.B. Prov. Ct.).

<sup>76</sup>Lord Chief Justice Matthew Hale, *De Jur Maris et Brachiorum Ejusdem* in Francis Hargrave ed. *A Collection of Tracts Relative to the Law of England*, vol. 1 (London: T. Wright, 1878) [hereafter cited as “De Jur Maris”]

<sup>77</sup>As the Surveyor General complained thirty years later: “The repeated efforts which this Office has in vain made to be informed as to the extent of the purchase from the Indians render it almost impossible to frame with any degree of accuracy a report on the ungranted Lands in this Province. Exclusive of this material uncertainty the estimate must be founded upon old and incorrect maps, as but a very small proportion of the Province is sufficiently known so that a certain calculation may had, of what may prove to be water and what may prove to be land, for although the interior parts of the Country have since the formation of this Government been made much better known than before, yet, even now, no calculation which can be with a certainty be depended upon, can be compiled until the course of the Grand or Ottawa River is known, and the shores of Lakes Huron and Superior, shall be ascertained.” Copy of a letter from D. W. Smith, Surveyor General, to Peter Russell, Archives of Ontario, A.E. Williams/United Indian Bands of Chippewas and Mississaugas Papers, F 4337-2-0-1 (microfilm

territorial privileges of independent sovereigns.”<sup>78</sup> It has been argued that these rights included the control and ownership of the beds of navigable waters within those territories.<sup>79</sup>

It is certain that in some instances before lands were surrendered under the *Proclamation* protocol, the Crown understood even navigable waters to be the subject of ownership by aboriginal peoples since before using such waters, aboriginal permission was sought. For example, in 1784, the Imperial Crown recognized that aboriginal permission would be required before the King’s subjects could safely travel navigable waters within Ontario. In Treaty # 3, dated December 7, 1792, the Chiefs of the Mississauga Nation “gave and granted” to his Majesty the power and right to make roads “through the said Messissague Country,” together with the right to navigate the rivers and lakes therein. This ratified a conference in which a similar agreement was entered into on May 22, 1784 which specified that “...the King should have a right to make roads thro’ the Messissauge country, the navigation of the said rivers should be open and free for his vessels and those of his subjects...”<sup>80</sup>

The fact that free and open travel was required to be agreed to by the Chiefs of the Mississauga Nation makes it clear that those Chiefs were understood by the English signatories to the Treaty to have control over those same waters.<sup>81</sup>

In the meantime, prior to surrenders being achieved, lands covered with waters were not understood to be “public” property, whether navigable or non-navigable. This point is impor-

reel # MS 2605), 16 April 1797

<sup>78</sup>R.T. Pennefather, Superintendent General, Indian Department, “Annual Report, 1856,” *Imperial Blue Books*, 1860, No. 595 p. 4, also “Report of the Special Commissioners Appointed on the 8th of September, 1856 To Investigate Indian Affairs in Canada, 1858” in *Journals of the Legislative Assembly of Canada*, vol. XVI, App. 21, p. 92 cited in Walters, *supra*, note 20 at 23

<sup>79</sup>See Walters, note 20 at 23

<sup>80</sup>*Indian Treaties and Surrenders*, (Canada: 1891), vol. 1 at 6

<sup>81</sup>While the *Constitution Act, 1791* divided Quebec into Upper and Lower Canada, it did not disrupt existing laws in either province, and certainly had no effect on the provisions of the *Royal Proclamation*. The new Upper Canada legislature immediately introduced legislation adopting the English common law where controversies arose over matters of property and civil rights. However, section 2 of the *Act* stated that nothing within the *Act* would serve to extinguish or affect any existing right or claim to lands within Upper Canada. This would necessarily have included existing aboriginal rights and claims, as evidenced by the policy following 1791 of obtaining land cessions from aboriginal

tant, because in *Nikal* and *Lewis*, the Court proceeded on the assumption that waters were “public” in nature, without considering how title to such waters moved from its original inhabitants to the Crown. However, within Ontario, it was the understanding of both the Crown and First Nations that lands covered with waters required a valid surrender to become capable of Crown alienation or public use for any purposes other than navigation, at least in the early part of the post-contact period.<sup>82</sup>

The importance of securing surrenders from aboriginal peoples in order to provide access to the public to aboriginal fisheries was well understood. As well, achieving “title” over the fisheries was important because of their value to the anticipated wave of settlers as a food supply and the possibility they might have a value in trade. On September 1, 1794, for example, Lieutenant Governor Simcoe advised the Lords of Trade in England that “the Fisheries in the Province of Upper Canada are of no moment, contemplated as an Article of Commerce. The Salmon and other Fish in Lake Ontario and the Sturgeon in Lake Huron etc., are of the greatest assistance to early settlers. It is possible that the latter may in process of time become an Article of Export.” He noted the need to obtain surrenders of aboriginal lands, including those covered with water, adding, “[I]n the first place, the encroachments made upon Indian lands, and the abuses of Indian Traders, are or must be guarded against by Colonial Laws...as no lands can be purchased of the Indians but by the consent of the Governor or Person administering the Government of the Province.”<sup>83</sup>

Steps were taken soon after to obtain surrenders in certain parts of Ontario to enable aborigi-

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peoples before lands could be granted to third parties.

<sup>82</sup>This understanding that navigational control was in the hands of the Indians was not restricted to Ontario alone. Treaty No. 7, signed in 1877 in Southern Alberta described a reserve territory as follows: “...beginning again at the junction of the Little Bow River with the latter river and extending on both sides of the South Saskatchewan in an average width on each side thereof of one mile, along said river against the stream to the junction of the Little Bow River with the latter river, *reserving to Her Majesty as may now or hereafter be required by her for the use of her Indian and other subjects from all the reserves hereinbefore described, the right to navigate the above mentioned rivers to land and receive fuel and cargoes on the shores and banks thereof, to build bridges and establish ferries thereon, to use the fords thereof. ...*” [emphasis added]

<sup>83</sup>Letter from John Graves Simcoe to the Committee of the Privy Council for Trade and Plantations, in: *The Correspondence of Lieut. Governor John Graves Simcoe*, vol. III, 1794-1795, E.A. Cruikshank, ed., (Toronto: The Ontario Historical Society, 1925) at 56, 61-62

nal fisheries to be used for these purposes.

### 3. Surrenders of Lands covered with Waters

In the Supreme Court of Canada's decisions, it was assumed that the Crown had to "grant" exclusive rights to First Nations before those Nations could exercise them. In Upper Canada, however, a large number of surrenders obtained in the late 1700s and early 1800s confirms that First Nations had aboriginal title to lands covered with water (and therefore exclusive rights to the fisheries within those waters), and that surrenders were required for them to "grant" their bays and harbours to the Crown. Where the Crown sought surrenders of lands covered with waters, it is perhaps self-evident that the Crown's policy must have been to recognize that such waters had an aboriginal interest within them which required a surrender. In areas of use and occupation by aboriginal peoples where surrenders of lands covered with waters were not obtained, it will be suggested that aboriginal title was unaffected.

On May 22, 1798, in Treaty No. 5, Chiefs of the Chippewa Tribe surrendered "Penetangushene" Harbour, being "all that tract or space containing land and water or parcel of ground covered with water, be the same land or water, or both lying and being near or upon the Lake Huron and called Penetangushene... together with the islands in the said Harbour of Penetangushene."<sup>84</sup> In 1800, in Treaty No. 12, Chiefs of the Ottawa, Chippewas, Potawatamie and Wyandot Nations surrendered the land *and water* in a tract known as the Huron Church Reserve.<sup>85</sup> On July 10, 1827, Treaty # 29, Chiefs of the Chippewa tribe surrendered lands covered with navigable waters. There is no question that that surrender involved waters: the territory is actually described in navigational terms as commencing "at the distance of fifty miles (on a course about north 84 degrees west) from the outlet of Burlington Bay on Lake Ontario, then on a course about north 84 degrees west (so as to strike Lake Huron ten miles and three quarters of a mile north of the mouth of a large river emptying into the said lake called by Capt. Owen of the Royal Navy, Red River Basin, seventy miles more or less to Lake

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<sup>84</sup>*Indian Treaties and Surrenders, supra*, note 80 at 15

<sup>85</sup>*Ibid.* at 30-31

Huron.”<sup>86</sup>

On February 8, 1834, Henry Brant and other Mohawks surrendered 50,212 acres comprised of parts of two townships “including the waters of the Grand River.”<sup>87</sup> Ojibway Chiefs inhabiting the north shore of Lake Superior in Treaty # 60 were asked to surrender an area on September 7, 1858 which stretched from “Batchewanaung Bay to the Pigeon River inland to the height of land ... and also the Islands” in Lake Superior. They did so, but specifically reserved their right to fish in the waters.<sup>88</sup>

Two years later, on September 9, 1859, Ojibway Chiefs claiming the eastern and northern shores of Lake Huron from Penetanguishene to Saulte Ste. Marie and to Batchewanaung Bay reserved to themselves an area at Kitcheposkissegun which included waters described as running westward from Point Grondine “six miles inland by two miles in front... so as to include the small Lake Nessimung.”<sup>89</sup>

There are many later examples which confirm that aboriginal peoples were understood to have proprietary rights over the underlying bed of waters in that surrenders were asked for by the Crown of those waters. The Garden River Indians, for example, surrendered Maskinonge Bay “inclusive to Partridge Point, also Squirrel Island,” on July 29, 1859<sup>90</sup> and much later, in 1891, the Mohawks of the Bay of Quinte were asked to surrender a portion of their water frontage (“land covered by water”) extending to the navigable waters in the Bay of Quinte.<sup>91</sup>

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<sup>86</sup>*Ibid.* at 72

<sup>87</sup>Treaty No. 38, *ibid.* at 92

<sup>88</sup>*Ibid.* at 147

<sup>89</sup>*Ibid.* at 151

<sup>90</sup>Surrender 91B, *ibid.* at 229-230.

<sup>91</sup>Oral history indicates that this particular surrender was requested by the Crown to enable inshore navigation, personal communications, Chief R. Donald Maracle, Mohawks of the Bay of Quinte. If that is so, it is not certain whether this surrender, and other surrenders intended to deal with navigational access rather than access to fisheries, would have had the effect of extinguishing fishing rights. In *R. v. Adams* [1996] 4 C.N.L.R. 1 (S.C.C.) at 20, Lamer, J. speaking for a unanimous court, indicated that a surrender of lands cannot be said to evidence a clear and plain intention to extinguish aboriginal fishing rights in the absence of evidence as to what the parties to the surrender intended with regard to those rights. Since the Supreme Court to date, however, has assumed that aboriginal title does not extend to lands covered with waters or the fisheries associated with those lands, the Court



There is little question that the Mohawks were seen to hold title in the underlying bed of the Bay of Quinte. The surrender was quite specific in this regard:

Also all the water frontage of the said described parcel of land that is to say *all the land covered by water between the waters edge and deep or navigable water* commencing at the centre line between the East and West halves of lot 38 produced to said deep water thence westward to the above mentioned point in lot 30 known as the Upper Ferry and bounded at the said point by a line produced parallel with the westerly limit of said lot 30 to deep water as afore-said...[emphasis added]<sup>92</sup>

It is a reasonable assumption, then, that lands covered with waters were understood to be the subject of aboriginal title and ownership just as much as lands not covered with waters.

There are also examples of surrenders obtained from aboriginal people just so that licences conveying exclusive fishing rights could be granted to non-aboriginal people. These surrenders which would not have been necessary if the Crown had been understood to hold title to the waters in question or the fish within them. The context of ownership of the underlying bed of such waters is again important to understand.

During the time period during which treaties were entered into, according to English common law, the owner of the bed, or *solum*, was understood to have the exclusive right to fish in waters over the bed. Because of the *ad medium filum aquae* presumption, the owner of lands was presumed to own a portion of the bed adjacent to lands bordered by waters. In fact, as discussed by the Lord Chief Justice of England in 1787, any instrument by which land was conveyed which defined the granted lands by a body of water was to be interpreted as including the adjacent waters in accordance with the *ad medium filum aquae* presumption.<sup>93</sup>

Until the Crown received a surrender of the aboriginal title to the bed of these lands covered with waters, then, it seems inarguable that aboriginal people held exclusive fishing rights within the waters over the *solum* as a matter of common law.

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has not yet addressed this issue.

<sup>92</sup>Surrender No. 304, Chiefs and Principal Men of the Mohawks of the Bay of Quinte, 23 December 1891, *Indian Treaties and Surrenders* (Canada: 1891) vol. 3 at 43

In *Nikal* and *Lewis*, the Supreme Court did not deal with the question of underlying aboriginal title to the beds of waters adjacent to the reserves in question in determining that exclusive fishing rights needed to be “granted” by the Crown. What is important to understand is that at least within Ontario, aboriginal title did exist in both the navigable and non-navigable waters of the province. Where unsundered, this form of title as a matter of common law and Crown policy, at least initially, was understood to protect exclusive aboriginal fishing rights in unsundered territories.

#### 4. Surrenders of Islands

An examination of the retention and surrender of islands within areas of aboriginal title in Ontario suggests that not only did the *ad medium filum aquae* presumption apply within navigable waters, but that the public acquired no rights within the waters adjacent to aboriginal lands until surrenders had been obtained.

There was a great interest in the 19<sup>th</sup> century on the part of commercial fishing interests in obtaining title to islands within navigable waters as fishing stations from which fishing activities could be conducted. Islands were an ideal location to dry nets and salt fish (in the days before refrigeration) and access to the fisheries around such islands was generally obtained through Crown licences of occupation. Licences of occupation protected exclusive fishing rights on the part of those who held them, excluding others from the commercial fishery. These licences of occupation, where granted on islands, could only be obtained once aboriginal peoples had either surrendered the islands or otherwise given their consent.

In many cases, aboriginal peoples themselves, while surrendering other lands, reserved the islands within their traditional territories to permit them to retain access to their traditional fishing grounds. In 1850, for example, the Ojibway Chiefs reserved Batchewananaung Bay for their own use together with a “small island at Sault Ste. Marie used by them as a fishing

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<sup>93</sup>Hale, *De Jure Maris*, *supra*, note 76, ch. 1

station.”<sup>94</sup> A later surrender, No. 91A on July 29, 1859 again retained these small fishing islands at Sault Ste Marie specifically.<sup>95</sup>

Confirming, perhaps, the unceded aboriginal title in such lands, inquiries by non-aboriginal peoples concerning the use of unceded islands for fishing purposes were referred to the Indian Department.<sup>96</sup> As noted by the Chief Superintendent of Indian Affairs in 1844, S.P. Jarvis, “islands within the tract of unceded lands have always been claimed by the Indians.”<sup>97</sup>

In at least one instance, specific confirmation of the possession and occupation of islands and the lands around them covered with waters was a matter of explicit recognition by the Crown in a treaty later confirmed by Imperial Proclamation.

On August 9, 1836 during the negotiations for Treaty 45 ½, Sir Francis Bond Head told the Saugeen Ojibway nations that they “owned all the islands in the vicinity” of the Saugeen peninsula.<sup>98</sup> In 1847, an Imperial Proclamation issued to the Saugeen by the Governor General took the form of a title deed recognizing a “declaration of possession and occupation of territory by the Saugeen since time immemorial ...including any islands in Lake Huron within seven miles of the part of the mainland comprised within the hereinbefore described tract of land.”<sup>99</sup>

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<sup>94</sup>*Indian Treaties and Surrenders, supra*, note 80 at 151

<sup>95</sup>*Ibid.* at 227

<sup>96</sup>See references such as “...Lake Huron, W. Elliott, for permission to fish on certain Islands in the occupation of the Indians on Lake Huron. Referred to the Indian Dept.” State Book, Upper Canada, NAC, RG 1, State Books, vol. Y (microfilm reel C-124) 3 September 1845

<sup>97</sup>S.P. Jarvis to J.M. Higginson, National Archives of Canada [hereafter NAC], Record Group [hereafter RG] 10, vol. 508, p. 194, 10 April 1844.[emphasis added] Again, note that Jarvis does not refer to unceded waters, but “lands,” although he is clearly describing navigable waters.

<sup>98</sup>Statement of Metigwab (var. Metigwob) on the Surrender of the Sahgeeng Territory, Six Nations Land Research Office, Cat. No. 836-9-13-1. The original document, entitled ‘Statement of Metigwab one of the Sahgeeng Chiefs made in a General Council held at the River St. Clair on the 13th Sept. 1836’ was held in the Six Nations and New Credit agency files of the Department of Indian Affairs. no. 123-1836 and was transferred to the custody of Six Nations at Brantford, Ontario. In this statement, Chief Metigwab reported the promises made by Sir Francis Bond Head which resulted in the surrender.

<sup>99</sup>Declaration by Her Majesty in Favour of the Ojibway Indians respecting certain lands on Lake Huron, NAC, RG 68 vol. Liber. A.G., Special Grants, 20 June 1847

The first recorded surrender of an island took place on June 30, 1798, when the Chiefs of the Chippewa Nation surrendered St. Joseph, or Cariboux Island, in the strait between Lake Huron and Lake Superior.<sup>100</sup> Oral history suggests that at around the same time, the Missis-saugas had specifically reserved certain islands in the Bay of Quinte for their own use when surrendering lands to the Crown to be set aside for the Mohawks of Tyendinaga.<sup>101</sup>

Those attempting to breach *Royal Proclamation* protocol by obtaining grants of islands and thereby access to fisheries from aboriginal peoples directly in the absence of a proper surrender were given short shrift. As early as 1765, only two years after the 1763 *Royal Proclamation*, the Senecas, a branch of the Iroquois Confederacy, had offered to give an island to Lieutenant Colonel Vaughn. Vaughn was advised by Sir William Johnson, the Superintendent of Indian Affairs, that the island could not be accepted except as part of a grant, and only then if the Indians "publicly acquiesced," as required under the terms of the *Royal Proclamation*.<sup>102</sup>

An attempt by a David McCall to purchase Stag Island in the River St. Clair in 1837 from an individual Chippewa man was equally unsuccessful.

David McCall. Stating that some time since he entered into a Treaty with an Indian of the name of Guidon Carnow for an exchange of some land which he owns in the Township of Enniskillen for an Island in the River St. Clair called Stag Island comprising about 60 acres of dry land besides marsh claimed by said Guidon Carnow as his own individual property. That he is now informed that an exchange of this nature cannot be effected, but that he must apply to Government for the sale of the said Island: that he is desirous of purchasing the same at a fair valuation and praying that the Commissioner of Crown Lands may treat with him for the sale of the said Island at its fair value. Not recommended as sales by Indians to individuals cannot be recognized and a similar objection prevailed on application made last year for the same island by Robert Begg.<sup>103</sup>

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<sup>100</sup>Treaty No.11, *Indian Treaties and Surrenders, supra*, note 80, at 27

<sup>101</sup>Chief John Sunday, Minutes of Council held at the Post of York on 30 January 1828, NAC, RG 10 vol 791 at 102, reporting the information received from elders at the time of the Simcoe Deed of 1794. see Smith, *Sacred Feathers, supra*, note 45 at 99

<sup>102</sup>Copy of a letter from Sir William Johnson to Lt. Col. Vaughan, dated at Johnson Hall, AO, RG 10, vol. 1825, p. 355, microfilm reel no. C-1222, 16 August 1765.

<sup>103</sup>Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. S (microfilm reel #C-106) p. 529, 13 April 1837

Stag Island was finally surrendered by the Chippewas of Sarnia in accordance with *Proclamation* protocol on January 19, 1857.<sup>104</sup> The Walpole Island First Nation surrendered Peach Island in the upper part of the Detroit River six months later.<sup>105</sup>

The Chippewa of Lakes Couchiching, Simcoe and Huron surrendered four islands in Lake Simcoe and one island in Lake Couchiching together with all the islands “lying and being in the Georgian Bay, Lake Huron,” on June 5, 1856, excepting the “Christian Islands” which were reserved to their own use.<sup>106</sup> Two weeks later, the Mississaugas surrendered the islands situated in the Bay of Quinte, in Lake Ontario, in Wellery’s Bay and in the St. Lawrence.<sup>107</sup> An Executive Committee Report at the time noted that some doubt existed as to whether these islands were actually included in a former surrender, but “that to the islands in the Bay of Quinte and Lake Ontario, [*the Indian*] title is undisputed.”<sup>108</sup>

Although the Supreme Court of Canada in *Nikal* and *Lewis* seem to have assumed Crown ownership of waters, when one examines the disputes which arose following surrenders of islands in the 1800s, it was far from settled that the Crown held title to the underlying bed of adjacent waters, or *solum*.<sup>109</sup> If the Crown was presumed to hold title to the waters, including their bed, it should have been free to grant subsurface rights to third parties, or issue licences of occupation to non-aboriginal fishermen to fisheries with or without Indian consent. However, a review of two cases contemporary to the time suggest that the subsurface rights and fishing rights to adjacent waters could be granted to third parties only once proper surrenders of aboriginal title had been achieved.

The decision in *Caldwell v. Fraser*, *infra*, will provide a specific example of a dispute over sub-surface rights after a surrender had been obtained in 1873. A second decision, *Bartlet v.*

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<sup>104</sup>*Indian Treaties and Surrenders*, *supra*, note 80 at 211

<sup>105</sup>*Surrenders* 85 and 86, *ibid.*, at 220

<sup>106</sup>Treaty 76, *Indian Treaties and Surrenders*, *supra* note 80 at 205

<sup>107</sup>*Surrenders* 77 and 78, *ibid.* at 206

<sup>108</sup>“A Committee of the Honourable the Executive Council dated 12 July 1856 approved by His Excellency the Governor General in Council on 14 July 1856,” cited in *Indian Treaties and Surrenders*, *supra*, note 80 at 208 [emphasis added]

<sup>109</sup>See below

*Delaney*, rendered in 1913, considered the effect of a licence of occupation issued by the Crown in waters which had been the subject of a prior patent, following an express surrender. Earlier, in 1864, in *Attorney General v. Perry*, an Upper Canadian court held that the Crown was presumed to own islands which would otherwise fall within the area of riparian rights, since the Crown was said to own the islands and the soil from which the islands were formed.<sup>110</sup> As has been shown, however, the Crown's ownership of islands was not automatic, but was contingent on the Crown first obtaining a surrender of aboriginal title to them.

In 1898, in *Caldwell v. Fraser*,<sup>111</sup> the Ontario High Court of Justice dealt with subsurface rights to lands under water adjacent to an island which had been surrendered as part of the North West Angle Treaty of 1873, Treaty No. 3. The Court drew no distinction between the rights held in lands, and the subsurface rights held in lands covered with water. This was an approach consistent with that taken before the Supreme Court of Canada just three years earlier. In the 1895 *Fisheries Reference* case, Ontario itself had argued that the reference in section 109 of the *British North America Act* "means as much land covered by water as land not covered by water."<sup>112</sup>

The Court in *Caldwell* first noted that the *British North America Act* of 1867 had not vested in the province the right to sell Indian lands or interfere with them until *after* a formal surrender of the lands to the Crown.<sup>113</sup> However, the exclusive federal power over "Indians, and Lands Reserved for Indians" did not mean the federal government had the power to sell Indian lands to the province or others either. A surrender of lands was first required.

As a result of section 109 of the *British North America Act*, the Court found that lands covered with waters were subject to the Indian title and right of Indians to use them.<sup>114</sup> The Court held also that the federal government could not convey or dispose of such lands "until by sur-

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<sup>110</sup>(1864) Hilary Term 28 Victoria 329 at 331

<sup>111</sup>*Caldwell v. Fraser*. Copy of Judgment of Rose, J. delivered January 31, 1898 at Barrie, Ontario, (Irving Papers, Ontario Archives, Toronto, MV 1469 31/37/17)

<sup>112</sup>*Re. Jurisdiction over Provincial Fisheries*, [1895] 26 SCR 444 (S.C.C.) at 492

<sup>113</sup>*Caldwell v. Fraser*, *supra*, note 111 at 5

<sup>114</sup>*Ibid.*

render or otherwise the rights of the Indians had been disposed of.”<sup>115</sup> The province, it noted, had no right to sell unsurrendered lands without the consent of the Dominion government.<sup>116</sup> In light of the provisions of the *Royal Proclamation*, this consent would necessarily be predicated on the Dominion government first obtaining a surrender.

While the effect of the North West Angle Agreement between the federal and provincial governments in 1873 was to vest certain lands surrendered by treaty in the province<sup>117</sup> the Court noted that “reserved” lands, that is, lands still subject to aboriginal title, had not been surrendered. In reaching this determination, the Court found Paragraph 4 of the 1873 Agreement to be important. Paragraph 4, which will be discussed in more detail later, referred to waters within Indian Reserves as “including the islands” and “not being subject to the public common right of fishery.”<sup>118</sup>

The Court’s finding that the underlying bed of these waters formed part of the reserve, and had not been surrendered was supported, in the Court’s view, by a provision in the 1873 Agreement “preserving” to the Indians the right to pursue their avocations of hunting and fishing throughout the tracts which *were* surrendered.

This, I think, manifestly does not refer to the lands to be set apart [reserves] over which of course, such rights would exist. And in the agreement referred to between the two governments the extinguishment of the right of hunting and fishing is confined to the lands *other than* the ‘reserves to be made’ under the treaty.<sup>119</sup>

Since the land cession surrendered only the island at issue and not the lands covered by water around the island,<sup>120</sup> the Court held that these waters were part of the Indian territories and therefore part of the reserve. The province therefore had no right to grant subsurface rights within them. The Court concluded:

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<sup>115</sup>*Ibid.* at 6

<sup>116</sup>*Ibid.* at 7

<sup>117</sup>*Ibid.* at 10

<sup>118</sup>*Ibid.* at 11. See below, at pp. 117-8

<sup>119</sup>*Ibid.* at 10 [emphasis added]

<sup>120</sup>*Ibid.* at 12

I may further say, that if I am correct in this view, the Province had no power to make a grant of any present right to the *unsundered lands under the water* and if Fraser or the defendant company is interfering with such lands without right, then, in my opinion, on the facts of this case, the plaintiff is not in a position to raise any such question: The only ones that can complain are the Indians or the Dominion Government as having control of Indian Affairs.<sup>121</sup>

The Supreme Court in *Nikal* and *Lewis* did not make note of *Caldwell v. Fraser*. In fairness, it does not seem to have been put before them, and since it is to be located only in public archives in Toronto, one must not be overly critical of its omission. However, the case is important for two reasons. First, it recognized the existence of aboriginal title within unsundered waters. Second, it found these waters formed part of a reserve. This in itself contradicts the conclusion reached by the Supreme Court of Canada in *Nikal* and *Lewis* that exclusive rights within such waters were contingent on Crown recognition, or on Crown "grants." In light of the fact that exclusive use of fisheries accompanied ownership of the *solum*, it supports the argument that until a valid surrender was obtained, no public right to fish within the unsundered waters adjacent to reserves could exist as a matter of law.

This argument is confirmed by the 1913 Ontario case of *Bartlet v. Delaney*.<sup>122</sup> In *Bartlet*, the issue arose as to whether fisheries adjacent to an island had been properly granted by a Crown licence of occupation to a party other than the owner of the island. The question required a determination of whether a patent of the island following a surrender conveyed the adjacent waters to the land-owner. If it did not, the Crown could issue a valid licence of occupation to the fisheries to a third party. If it did, the owner of the island would hold exclusive rights to the adjacent fisheries. The case is of interest because its underlying facts were based on an interpretation of a surrender, or rather, a series of surrenders, of the island in question. While the *Bartlet v. Delaney* case does not delve deeply into the circumstances of the dispute, the issue of who owned Fighting Island and the waters around it had been the subject of prolonged debate and litigation throughout the 18<sup>th</sup> and 19<sup>th</sup> centuries. A review of the facts behind the various surrenders of the island will explain why.

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<sup>121</sup>*Ibid.* at 24-25. [emphasis added]

<sup>122</sup>(1913) O.W.N. 577



Contrary to the provisions of the 1763 *Royal Proclamation*, in 1776, ten Pottawatomi Chiefs signed a deed giving title to Fighting Island to Pierre St. Cosme and his sons.<sup>123</sup> When St. Cosme died in 1783, he left the island to his wife and children. St Cosme's wife died in 1793 and his only daughter married one Judge James May, who then purchased the island.

The 1776 deed was challenged by the Wyandot Nation, (referred to alternatively as "Wynadotts" or Hurons throughout the correspondence), who claimed the island was theirs. It was also challenged by one Thomas Paxton, who wished to establish a fishing station on the island.

Paxton's petition to Sir Peregrine Maitland, Lieutenant Governor of Upper Canada, made it clear his interest was in the fishery around the island. Paxton indicated that:

[The petitioner], having for some time engaged in the taking and curing of whitefish in the River Detroit, is desirous of procuring a situation in the said River for the purpose of a fishing place and ground whereon to cure the fish taken... an uninhabited island lying in said River, called Fighting Island ... has been pointed out as an eligible situation for the purpose. Your petitioner therefore humbly prays Your Excellency would be pleased to grant him a license of occupation for the said Island on such terms as to Your Excellency may deem proper...<sup>124</sup>

Paxton obtained a licence of occupation from Maitland in 1827, at which time he agreed to pay an annual rent of \$ 50.00 to the Wyandot First Nation.<sup>125</sup>

The Walpole Island First Nation, which also claimed the island, objected to the licence of occupation being issued to Paxton, as did local settlers who supported the Walpole Island First

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<sup>123</sup>NAC, RG 10, vol. 325. Note that in the historical record, "Pottawatomi" is spelled in a variety of ways, including "Potawatomie," "Pottawatomie" and "Powtawatomi." Throughout this thesis, "Pottawatomi" will be used.

<sup>124</sup>Petition from Thomas Paxton to Sir Peregrine Maitland, Lieutenant Governor of Upper Canada, NAC, RG 10, vol. 325, 28 July 1826

<sup>125</sup>See Victor Lytwyn, "Waterworld, the Aquatic Territory of the Great Lakes First Nations," in *Gin Das Winan: Documenting Aboriginal History in Ontario* (Toronto: Champlain Society, 1996) 14-27 [hereafter cited as "Waterworld"] for an examination of this licence and deed.

Nation's claim to the island.<sup>126</sup> While a Licence of Occupation to Paxton was upheld by an Order-in-Council pending a further investigation, the question of Paxton's fishing privileges depended on whether a proper cession had been obtained from the aboriginal occupants of the island back in 1776. In other words, it was acknowledged by the Crown that in the absence of a proper surrender of the island, Paxton's licence, which provided him with an exclusive fishery around the island, would not be valid. As noted in Executive Council Minutes:

The Council upon a consideration of all the documentation before them find no reason for interfering with the Licence of Occupation which the Petitioner at present enjoys, *but it is not known to the Council whether the Island in question has ever been ceded to His Majesty by the Indian proprietors* and whether with respect to such Island a Licence of Occupation should be granted by the Government is respectfully submitted [for] His Excellency's consideration.<sup>127</sup>

Acting Surveyor General William Chewett reported in 1829 to the Executive Council of the Province of Upper Canada that no document could be found to indicate that the Indians had "made over" the Island.<sup>128</sup> Paxton, however, continued to make arrangements with the aboriginal peoples claiming ownership of the island directly to purchase or lease the island. In 1834, Paxton explained:

[S]oon after I had obtained this License the Huron tribe of Indians gave me to understand that they were the owners of the said Island and thus I ought to pay them a certain something per annum for the same. I consented to allow them a quantity of twelve pounds and ten shillings currency per year which since I paid them the Hurons two years. About this time the tribes of the Chippeways, Ottaways and Pottawatamies laid claim to the Huron Reserve and to the Island in question. And upon the best information I could collect on the subject I was led to the conclusion that if the Island had not been sold to Government then the latter tribes were the true owners. Acting upon that supposition I paid them, the Chippeways, Ottaways and Pottawatamies, two years gratuity. Subsequently I reflected that the better way would be that to pay the gratuity to any of the tribes until I could ascertain from His Excellency Sir John Colborne which of the tribes of Indians had the better right to the money. I therefore retained three years gratuity on inquiry of Major Gravette. When at York he advised me to pay the money to you as the Superintendent acting for the Indians and whenever the question of right could be ascer-

<sup>126</sup>Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. N (microfilm reel #C-104), 28 February 1829. See also Petition from Inhabitants of Sandwich to Sir John Colborne, Lieutenant Governor of Upper Canada, against the License of Occupation for Fighting Island granted to Thomas Paxton, NAC, RG 10, vol. 325, 29 February 1829

<sup>127</sup>NAC, RG 10, vol. 325 [emphasis added]

<sup>128</sup>Lytwyn, "Waterworld," *supra* note 125 at 19

tained.<sup>129</sup>

The Indian Superintendent decided that the island had not been surrendered and therefore still belonged to its "rightful owners," the Chippewas, Ottawas and Pottawatomis.<sup>130</sup> On June 13, 1836 the persistent Paxton, again in violation of *Proclamation* protocol, secured an agreement with a number of Chippewa, Ottawa and Pottawatomi Chiefs stating the island was a gift to him. A further agreement dated July 3, 1839 signed by Chippewa, Ottawa and Pottawatomi Chiefs stated that Fighting Island was to be leased to him for a period of 999 years.<sup>131</sup>

When Chief Petawaygishik of the Walpole Island First Nation learned of Paxton's lease, he complained that "...Fishing, or Fighting Island, in the same tract, leased to Mr. Paxton, belongs to us, and we receive no benefit from it."<sup>132</sup> In 1840, Paxton pledged to remit payments under an annual lease to the Superintendent of Indian Affairs or any authorized person: "...so long as I shall retain the occupancy of Fighting Island having it in my option to give the said above named amount in fish in the Barrel or money."<sup>133</sup>

By then, Paxton had completely alienated the Wyandots, who were unwilling to cede their interest in Fighting Island if Paxton was to be permitted to purchase it.<sup>134</sup> They opposed Paxton's claim, asserting they had never received the yearly rent of fifty dollars agreed to in

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<sup>129</sup>Letter from Thomas Paxton to George Ironside, Indian Superintendent, Amherstburg, NAC, RG 10, vol. 325, 6 September 1834

<sup>130</sup>"With reference to the Islands, it would appear to be the general opinion of the oldest inhabitants that the Islands in the Detroit River have never been purchased by Government from the Indians. Mr. Robert Reynolds, an old resident of this part of the Province and Detroit, whose letter I have the honour to enclose, differs in the general opinion on the subject, and at this distant period it is difficult to decide on public opinion to whom these Islands belong. Were I permitted, however, to offer my own opinion, from what I have often heard from my late father says, I am inclined to unite with the majority of the old inhabitants, who say that the Islands belong to the Chippewas, Ottawas and Pottawatomies." Letter from George Ironside, Indian Superintendent, Amherstburg, to Colonel James Givins, Chief Superintendent of Indian Affairs, Toronto, NAC, RG 10, vol. 325, circa November 1834

<sup>131</sup>Lytwyn, "Waterworld," *supra*, note 125 at 20

<sup>132</sup>Letter from Chief Petawaygishik, Walpole Island, to the Chief Superintendent, NAC, RG 10, vol. 209, file 7401-7500, pages 123587-123590, Civil Secretary's Office Correspondence, Microfilm reel # C-11,522, 28 March 1854

<sup>133</sup>Copy of Bond made by Thomas Paxton of Amherstburg, for Annual Rental of Lease of Fighting Island, NAC, RG 10, vol. 325, 4 December 1840

<sup>134</sup>Report of R. T. Pennefather, Superintendent General of Indian Affairs, to the Executive Council

1827, but instead “have always been paid with fish.”<sup>135</sup> They added, “it is very grieving to your Indian children to have their Islands enjoyed and occupied by others and all the benefit be kept from them.”<sup>136</sup>

The Commissioner of Crown Lands reviewed a history of the claim and noted that the Island “comprises about twelve hundred acres of land which during part of the year is mostly under water, and *is only valuable as a fishing ground.*”<sup>137</sup>

In 1856, an investigation concluded that no valid cession had been obtained since the earlier cessions of lands<sup>138</sup> by Ottawas, Chippewas and others had made no mention of Fighting Island and that “if not in the Cession, the Indian Title is not then extinguished.”<sup>139</sup> The Superintendent of the Indian Department concluded that the Island was owned by the Wyandots.

During my visit to the Wyandotts in November last, they informed me that about thirty years ago their Chiefs had granted to Mr. Paxton a lease of the Island in question, (but of which they had no copy) for a certain annual sum, but that Mr. Paxton, particularly of late years, had given them only three or four barrels of fish, which he told them they must consider as a present, as he was not bound to pay them anything ... In conclusion I beg to remark that after a perusal of documents in the possession of Chief White, and now in the hands of Mr. Washington, I am of opinion that Fighting Island is the property *exclusively* of the Wyandotts of Anderdon.<sup>140</sup>

In 1863, the Indian Department finally obtained a surrender of the island from the Wyandot Nation, and issued a patent to Paxton on 28 June 1867.<sup>141</sup> Given the only use that could be made of the island, the patent of Fighting Island was clearly intended to convey an interest in the fisheries around it. The somewhat complicated facts of this dispute, however, make it clear

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regarding Thomas Paxton’s Claim to Fighting Island, NAC, RG 10, vol. 325, 8 August 1857

<sup>135</sup> Letter from Solomon White, Wyandotts of Anderdon, to Froome Talfourd, Superintendent of Indian Affairs, Port Sarnia, NAC, RG 10, vol. 325, 2 December 1856

<sup>136</sup> Letter from the Wyandotts of Anderdon, to Sir Edmund Head, Governor General, NAC, RG 10, vol. 325, 1 February 1857

<sup>137</sup> Appended to Petition from Thomas Paxton to Sir Edmund Head, Governor General, NAC, RG 10, vol. 325, May 1856 [emphasis added]

<sup>138</sup> The Petition refers to a 1791 cession, rather than the one obtained in 1776.

<sup>139</sup> *Ibid.*

<sup>140</sup> Letter from Froome Talfourd, Superintendent of the Indian Department, Port Sarnia, to R.T. Pennefather, Superintendent General of the Indian Department, NAC, RG 10, vol. 325, 10 June 1856 [emphasis added]

that the basis for title and use to the fisheries around the Island was dependent on the Crown first securing a surrender from the appropriate aboriginal parties in accordance with the *Royal Proclamation*. Until that issue was determined, no valid grant or licence of occupation for use of the fisheries by non-aboriginal people could issue.

Decades later, the question of whether the surrender of Fighting Island and the subsequent patent of the island included its adjacent waters became the subject of litigation. In 1909, the Crown granted a licence of occupation under the *Fisheries Act* to one Gauthier to the same fishery allegedly included in the prior grant to Paxton.<sup>142</sup> The Plaintiffs, successors in title to Paxton, sought a declaration that Gauthier was in derogation of their title to the adjacent fisheries which they asserted were conveyed with title to the island. The issue for the Court to determine was whether or not letters patent from the Crown to Paxton included the waters to which Gauthier held exclusive fishing rights under his licence of occupation.

In *Bartlet v. Delaney*,<sup>143</sup> the Court held that the grant of an island indeed included adjacent waters to it, and that the plaintiffs had therefore received a conveyance of the waters adjacent to the island through the Crown patent which followed the surrender of the island.<sup>144</sup> By the time of the dispute in *Bartlet v. Delaney*, the fisheries were valued annually at thousands of dollars, an extraordinary sum of money at the time. The Court issued an injunction against Gauthier's further interference with the fisheries and lands of the plaintiff.<sup>145</sup>

There was nothing express in the original patent of lands to Thomas Paxton referring to waters, but it was clear that when he applied for it, it was the fisheries that he wished to exploit

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<sup>141</sup> *Ibid.* at 21

<sup>142</sup> Of course, if a licence of a fishing station did not convey any exclusive interest to fisheries, as the Supreme Court suggested was the case in *Nikal* when fishing stations were reserved for Indians, no issue would have arisen, since the fishery was clearly located in waters *adjacent* to the lands patented.

<sup>143</sup> (1913) O.W.N.577, reversed on other grounds (1913) O.W.N. 200 (Ont. C.A.)

<sup>144</sup> *Ibid.* at 581

<sup>145</sup> *Ibid.* It is of interest, however, that the patent at issue is referred to as incorporating lands *and* waters which had previously been part of an Indian reservation, although the history of the cession involved, and the dispute over it, was not mentioned by the Court.

from the station on Fighting Island and that he wished to do so exclusively.<sup>146</sup> That the Court felt free to restrain others from accessing what the Supreme Court of Canada in *Nikal* and *Lewis* characterized as “public” waters, is in itself telling.

The case of Fighting Island and the Paxton grant, as well as the ruling in *Caldwell v. Fraser*, demonstrates that Crown licences of occupation permitting non-aboriginal people exclusive fishing rights, and title to water lots in lands adjacent to land grants, could *only* be effected after valid surrenders were obtained from those aboriginal peoples who used and occupied those lands. The Supreme Court’s findings in both *Nikal* and *Lewis* that the Crown had not intended to “grant” exclusive fishing rights to aboriginal people by reference to Crown policy in Upper Canada pre-supposed that the Crown had such title in the first place. It should be relatively obvious that there were many circumstances in which no surrenders of the lands or waters in question had ever been achieved.<sup>147</sup>

The Supreme Court of Canada should have first turned its mind to whether, or how, the Crown had obtained title to the waters in question, before considering whether the Crown intended to “grant” rights within those waters. No such discussion took place, although the issue was argued before the Court. The aboriginal appellants in *Lewis* attempted to put the argument forward by relying on the American decision of *Alaska Pacific Fisheries v. U.S.*<sup>148</sup>

In *Alaska Pacific*, an understanding that a reservation of unceded islands included their adjacent waters had been the subject of judicial comment in the United States in 1918. The Su-

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<sup>146</sup>A marginal note to Paxton’s application states, “In Council, 4th June 1835. As there is every reason to believe that *the exclusive right of fishing is intended* the Council recommend that the opinion of the Crown officer together with the tender [be transmitted] back to the department to which they were addressed, for information thereon. [signed] John Strachan.” Letter from Thomas Paxton, Amherstburg, to Peter Robinson, Commissioner of Crown Lands, NAC, RG 1, E3, vol. 16 (microfilm reel C-1190), 18 April 1835 [emphasis added]

<sup>147</sup>The provisions of the *Royal Proclamation* recognized that surrenders were required before lands could be conveyed to third parties, who could then enjoy the presumption of *ad medium filum aquae* in adjacent waters. These parties could clearly not have acquired a greater interest in lands and waters than that which had been surrendered, or the result would be absurd. This supports the author’s position that waters as well as lands were the subject of aboriginal title.

<sup>148</sup>*Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918)

preme Court of the United States held that the reservation for Indians of a “body of lands known as Annette islands” embraced the intervening and surrounding waters. Van Devanter J.’s reasons for the Supreme Court took into account the aboriginal perspective concerning islands:

The Indians could not sustain themselves from the use of the uplands alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. *The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation.* They had done much for themselves and were striving to do more. Evidently Congress intended to conform its action to their situation and needs. It did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as the Annette Islands and referred to it as a single body of lands. This as we think shows that the geographical name was used, as is sometimes done, *in a sense embracing the intervening and surrounding waters as well as the upland, in other words, as the area comprising the islands.* [emphasis added] <sup>149</sup>

The Supreme Court of Canada in *Lewis* distinguished *Alaska Pacific Fisheries* based “on its unique circumstances involving islands and intervening waters.” <sup>150</sup> However, the importance of the *Alaska Pacific Fisheries* case was not perhaps that it applied to islands, but that through the reservation of islands, reserves were acknowledged to include adjacent waters. They could have done so only if the aboriginal occupants of those islands held aboriginal title to the adjacent waters around them in the first place.

##### 5. The Reservation from Surrenders of Exclusive Aboriginal Fisheries

The Court in *Nikal* made its finding that the Crown had not intended to grant exclusive fishing rights to the Band on the basis of its finding that Crown policy “firmly and clearly” militated against the recognition of such interests.<sup>151</sup> Historic correspondence supporting this conclusion in some instances related specifically to Upper Canada.

However, there are a number of treaties within Ontario in which aboriginal people surrendered lands but reserved to themselves exclusive fishing rights, rights which in certain instances

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<sup>149</sup> Cited in *Lewis, supra*, note 3 at 141

<sup>150</sup> *Ibid.* at 148

were actually protected by Crown legislation. The example of the Mississaugas of New Credit best makes this point.

In 1790, the Mississaugas had warned that they would not allow white men to fish in the Credit River: "which they reserve entirely to themselves, any other Creeks they have no objection to peoples fishing on."<sup>152</sup> "On August 1, 1805 the Mississaugas surrendered an area north of Lake Ontario near the Etobicoke River but excepted from the surrender "the fishery in the said River Etobicoke which they the said Chiefs, Warriors and people expressly reserve for the sole use of themselves and the Mississague Nation."<sup>153</sup> According to Council Minutes of the meeting, the aboriginal position was very clear:

Quinipeno [a head man] spoke and returned thanks for the articles they received on their signing the New Deed for the Toronto Purchase. He then spoke with a flat stone in his hand on which was represented the lines within which they had on a reconsideration agreed to give their Father.

Father. We have considered again the subject of the Land we spoke about yesterday; And altho we and our Women think it hard to part with it, yet as our Father wants it, he will of course do better with it than we can do ourselves. We therefore have altogether agreed to give all you ask, to do as our Father pleases with it, except this River which we must persist in keeping in the manner we represented yesterday....

We now rely on you Father to protect us when we want to encamp along the Lake and not suffer us to be driven off as we now are on the Lands we formerly sold our Father, altho we were promised to encamp and fish where we pleased. We also reserve all our fisheries both here [Credit River], at the Sixteen and Twelve Mile Creeks together with our Huts and cornfields and the flats or bottoms along these Creeks.

The Deputy Superintendent General then told them he would make a faithful representation of all that had passed at this meeting to the General; And that a Provisional agreement would be immediately drawn up for them to sign to be laid before His Excellency, on his return, for his approbation. The Provisional agreement was soon after produced, read and signed, and the meeting broke up.<sup>154</sup>

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<sup>151</sup> *Nikal, supra*, note 2 at 187

<sup>152</sup> Letter from J. Butler, dated at the Head of Lake Ontario, Archives of Ontario, Simcoe Papers, microfilm reel #MS 1797, 16 October 1790

<sup>153</sup> Treaty No. 13, Mississauga Nation of Credit River and William Claus, Deputy Superintendent General, Indian Affairs, *Indian Treaties and Surrenders, supra*, note 80 at 35

<sup>154</sup> Minutes of a Council Meeting with the Mississaugues at the River Credit [continuation], recorded by P. Selby, NAC, RG 10, vol. 1: 298-299. (reel C-10,996), 2 August 1805



The Mississaugas in Treaty No. 13a confirmed that they wished to reserve to themselves “the *sole right* of the fisheries in Twelve Mile Creek, the Sixteen Mile Creek, the Etobicoke River, together with the flats or low grounds on said creeks and river which we have heretofore cultivated and where we have our camps. And also the sole right of the fishery in the River Credit with one mile on each side of the river.”<sup>155</sup>

A year later, the Credit River Mississaugas executed yet another surrender in which they reserved out “of the present grant unto the said Chechalk, Quenepenon, Wabukanyne, Kebonecence, Osenego, Acheton, Patequan and Wabakegego and the people of the Missisagua Nation of Indians and their posterity forever - the *sole right* of the fisheries in the Twelve Mile Creek, the Sixteen Mile Creek, the River Credit and the River Etobicoke together with the lands on each side of the said creeks and the River Credit as delineated and laid down on the annexed plan, *the said right of fishery and reserves extending from the Lake Ontario up the said creeks and River Credit... And the right of fishery in the River Etobicoke from the mouth of the said river to the allowance for road...*”<sup>156</sup>

The case of the Mississaugas of the Credit River was not referred to by the Supreme Court in either *Lewis* or *Nikal* when it determined that Crown policy within Upper Canada had consistently rejected any notion of exclusive fishing rights.<sup>157</sup> However, the 1806 Treaty confirms that there could be exclusive aboriginal and treaty rights to fisheries even in navigable waters in Upper Canada. Encroachments by settlers into those rights were actually the subject of preventive legislation.

In 1829, the Chief and Council of the Mississauga Band petitioned the Lieutenant Governor, Sir John Colborne, asking that settlers encroaching on their rights be informed of the privileges “in law which the Indians are entitled to.”<sup>158</sup> As Donald B. Smith describes, for more

<sup>155</sup>Treaty 13a, *Indian Treaties and Surrenders*, *supra*, note 80 at 36

<sup>156</sup>*Ibid.* Treaty 14, September 6, 1806 [emphasis added]

<sup>157</sup>*Nikal*, *supra*, note 2 at 192

<sup>158</sup>Petition of the Mississauga Indians of Rice Lake in the Newcastle District to Sir John Colborne.

than thirty-five years, white fishermen had raided the aboriginal fishery during the spring and fall salmon runs. The Indians, in petitions drafted by their young leader, Peter Jones, protested the appearance of “the lowest and most immoral class of settlers” who often scattered “the offals of fish” at the river mouth to prevent the salmon’s passage upstream. To protect themselves, the Indians requested that the governor secure the fishery for them.<sup>159</sup> Concerns were expressed by the Indians about the “many unwarrantable disturbances, trespasses and vexations” on the parcel of lands and fisheries reserved exclusively in 1805 for them.<sup>160</sup>

The government’s response was an *Act the Better to protect the Mississauga tribes, living on the Indian Reserve of the River Credit*<sup>161</sup> making it a specific offence for anyone to hunt or fish within the Mississauga reserves without the consent of three or more of their principal men or chiefs.<sup>162</sup> “By-laws and Regulations” of the Credit River Mississauga enacted in 1830 stated that “all our lands, timber and fishery shall be held as public property and no person shall be allowed to sell, lease or give any part of the lands, timber or fishery unless granted by the council for the general benefit of our fishery.”<sup>163</sup>

The example of the Mississaugas of the Credit River alone serves to dispel the argument accepted by the Supreme Court in *Nikal* that there was a “clear and specific Crown policy of refusing to grant, in perpetuity, exclusive rights to [aboriginal] fishing grounds.”<sup>164</sup>

## 6. Aboriginal Leases of Fisheries to Third Parties

In *Nikal*, the Supreme Court of Canada recognized that exclusive licences of fisheries fol-

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Lieut. Governor, NAC, RG 10 vol. 5, 2038, 27 January 1829

<sup>159</sup>Smith, *Sacred Feathers*, *supra*, note 45 at 79

<sup>160</sup>Hansen, “Development of Fisheries,” *supra*, note 44 at 3

<sup>161</sup>*An Act the Better to protect the Mississauga tribes, living on the Indian Reserve of the River Credit* (1829) 10 Geo IV c. 3 (Upp. Can.)

<sup>162</sup>*Ibid.*

<sup>163</sup>Cited in Walters, “Aboriginal Rights to Fisheries,” *supra*, note 20 at 29. In return, the Mississaugas apparently agreed they would only fish five nights a week and would not catch salmon for sale after November 10th, Smith, *Sacred Feathers*, *supra*, note 45 at 79

<sup>164</sup>*Nikal*, *supra*, note 2 at 187

lowing the first fisheries legislation were issued from time to time by the Crown.<sup>165</sup> This information was put forward to support the conclusion that it was the Crown, and not aboriginal people, who held “title” to the fisheries and lands beneath them.

What the Court was not aware of were the frequent examples of such leases entered into between aboriginal peoples and non-aboriginal fishermen. These leases were entered into by First Nations directly with third parties through Chiefs representing the communities involved. The issuance of licences of occupation by the Imperial Crown to confirm these arrangements demonstrated a Crown policy of recognition of exclusive aboriginal control of fishing rights in the territories involved well into the 19<sup>th</sup> century, a recognition which predated the *Fisheries Act* by several decades.

This point is important, since the lease of fisheries by aboriginal peoples in what the Supreme Court assumed were always “public” waters again implies aboriginal title. Indeed, the intention to retain exclusive control by granting others permission to use lands was found by the Supreme Court in *Delgamu'ukw* to evidence aboriginal title.

As with the proof of occupation, proof of exclusivity must rely on both the perspective of the common law and the aboriginal perspective, placing equal weight on each.... Exclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution. As such, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty. For example, it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by “the intention and capacity to retain exclusive control” ... For example, “[w]here others were allowed access upon request, the very fact that permission was asked for and given would be further evidence of the group's exclusive control.”... A consideration of the aboriginal perspective may also lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups *by permission* may reinforce, the exclusive occupation of the aboriginal group asserting title.<sup>166</sup>

It has been shown that there was no distinction drawn by the Crown in the early to mid-1800s between lands and lands covered with waters. This applies equally to the recognition that permission was required before aboriginal fisheries were accessed by non-aboriginal fisher-

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<sup>165</sup> *Ibid.*

men. It is likely, then, that the Court's lack of information on this practice in *Nikal* and *Lewis* materially affected the Court's analysis.

Indeed, there are many indications of aboriginal peoples granting permission to others to access their fishing grounds, and in return, expecting to be paid for the use of these waters. As early as 1817, the Chippewa Nation surrendered a tract of land "within the line along the Kempenfelt Bay and the River Nautonwaysaging until it intersects Lake Huron" in exchange for supplies of seine nets and fish hooks, among other things. Minutes of the Surrender indicate that the Chippewas complained that others within Lake Huron were taking their fish without paying them for the privilege,<sup>167</sup> as was expected.

At Fighting Island, as has been discussed, Thomas Paxton had first obtained a licence of occupation from Lieutenant Governor Maitland in 1827 in return for agreeing to pay an annual rent of \$ 50 and barrels of fish to the Wyandots.<sup>168</sup> As has been noted, Paxton had entered into his negotiations with the various tribes asserting aboriginal title to the island directly. Oliver Mowat, a lawyer who would later become the Premier of Ontario, indicated in a legal opinion that that this form of lease amounted to a recognition by Paxton of aboriginal title, concluding:

If the fact really is, as I find from the Report of the Superintendent General of Indian Affairs that it is 'said' to be, namely, that Paxton took a Lease for thirty years from the Wyandotts, and paid them rent under it, this would be another ground for holding that he could now make no claim in opposition to that Tribe of Indians. Such a Lease would be a recognition on his part of their Title, a recognition which there is nothing in the circumstances of the case entitling him afterwards to withdraw.<sup>169</sup>

The clearest long term example of this kind of leasing arrangement involves the Saugeen

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<sup>166</sup>*Delgamu'ukw v. British Columbia*, *supra*, note 26 at para. 156, 157 [emphasis added]

<sup>167</sup>Minutes of Council Meeting between Chippewas Nation and British government, NAC, RG 10 vol. 34 19881-19884, 7 June 1817. A treaty promise to supply seine nets and fish hooks suggests that the Chippewas retained their fishing rights in these bodies of water. There is nothing explicit in the surrender to suggest that they had relinquished any rights in the adjacent lands covered with water.

<sup>168</sup>See Lytwyn, "Waterworld," *supra*, note 125, for an examination of this licence and deed.

<sup>169</sup>[Referring to Paxton] Legal Opinion of Oliver Mowat, Toronto, "In the Matter of the Opposing Claims to Fighting Island," NAC, RG 10, vol. 325, 29 October 1856

Ojibway peoples.<sup>170</sup>

In the early 1830s, the Saugeen Ojibway peoples of southern Ontario leased the fisheries around the fishing islands of the Saugeen Peninsula,<sup>171</sup> together with the right to occupy the fishing stations to third parties and received the rents from such leases.<sup>172</sup> In 1834, the Huron Fishery Company was granted the right by the Chiefs of the Saugeen Nation to occupy the Saugeen fishing islands within Lake Huron for a 25£ fee over an unlimited term. As with Paxton, the lease was confirmed by a formal licence of occupation issued by the Imperial government through Sir John Colborne, the Lieutenant Governor.<sup>173</sup>

As noted, such leases were understood at the time to be confirmatory of the Indian title, and conveyed exclusive rights. This was indicated in Executive Minutes concerning the 1834 Licence of Occupation to the Huron Fishing Company,

William Dunlop, Charles Prior and other Inhabitants of the Town of Goderich forming the 'Huron Fishing Company.' Praying for the *exclusive right of Fishing* on that part of the coast of Lake Huron commencing at the mouth of the River Saugink and terminating at Cabots Head together with all the Islands situated along the said line of Coast for seven years, being from Sept. 1834 to Sept. 1841. Recommended that a License of Occupation during pleasure be granted for the Islands referred to.<sup>174</sup>

An examination of the map which appears on the licence itself makes it clear that it included a large block of adjacent waters.<sup>175</sup> The Saugeen people were aware by that time of the threat to their fisheries by white fishermen, particularly American interests, and hoped leases would

<sup>170</sup>Licences of occupation permitted the exclusive use of a fishing territory, while leases permitted fishing in common with other users.

<sup>171</sup>"Lease of the Saugeen Fishing Islands with marks of Jacob Metigoob, John Ansance, Alexander Matwagash," NAC, RG 10, vol. 56, Reel c-11,018, 2 September 1834

<sup>172</sup>NAC, RG 10, vol. 57, at 59,033 17 January 1835

<sup>173</sup>NAC, RG 10 vol. 56, Reel C-11,018 Lease to the Huron Fishing Company from Saugeen Chiefs issued by Sir John Colborne, 2 September 1834

<sup>174</sup>Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. Q (microfilm reel #C-105), 21 May 1834, at 414. Similarly, a licence of occupation issued for Peach Island at the "Entrance of Lake St. Clair ... reserv[ed] to the three persons of the name LaForest their improvements *and the right of fishery*. "Order in Council approving a License of Occupation be granted to William MacCrae for Peach Island," NAC, RG 1, L2 Upper Canada; Grants, Leases and Licenses of Occupation, *circa* June 1834.

restrict access to the fisheries and keep other white men out.<sup>176</sup> As the lease itself indicated, “we, the undersigned, will use our endeavours to protect the said Islands from Encroachment.”<sup>177</sup>

In 1832, the Provincial Land Book record indicates that Alexander McGregor claimed he had a licence from the Indians to carry on an extensive fishery on a small island in Lake Huron. He complained that sometime after he had taken occupation, Americans took over possession of it and he requested a lease or licence from Imperial authorities in order to dispossess them of it.<sup>178</sup> Because McGregor was apparently acting with the consent of the Indians, it was recommended that he receive a Licence of Occupation during pleasure.<sup>179</sup>

In 1836, Sir Francis Bond Head, who had replaced Colborne as Lieutenant Governor, negotiated treaties with the tribes in and around Manitoulin Island.<sup>180</sup> He asked the Saugeen (“Saukings”) people who attended the Manitoulin council, if they would like to settle on the

<sup>175</sup> *Ibid.*

<sup>176</sup> Dr. Victor Lytwyn, Testimony in *R. v. Jones and Nadjiwon*, *supra*, note 4, 15 June 1992 at 68-69. Lytwyn suggests that the licence of occupation to the Huron Fishing Company was issued by the Imperial Government because McGregor was fishing from unceded lands without aboriginal consent, and had only claimed to have a Licence of Occupation; however, McGregor was in fact recommended for a Licence of Occupation, see note 158, *supra*.

<sup>177</sup> Lease of Fishing Islands to the Huron Fishing Company, signed by Jacob Metegoob [var. Metigwab, Metigwob, see note 200, *infra*], John Assance and Alexander Matwayash, Copy printed in the *Report of the Huron Fishing Company*, Colonial Office Papers, Public Record Office, London, England, 2 September 1834.

<sup>178</sup> Petition from Alexander McGregor, dated at York, to Lieutenant Governor Sir John Colborne, NAC, RG 1, L10, 4 September 1832

<sup>179</sup> Alexander MacGregor. Stating that he has a License from the Indians to occupy a small Island called ‘MacGregor’s fishing Island’ in Lake Huron and has made arrangements for carrying on an extensive fishery. That some time after he was in occupation of the same, several Americans from the States took possession of it, and praying for a Lease or License of occupation that he may be able to hold the same and dispossess the Americans of it. Recommended for a License of occupation during pleasure.” Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. P (microfilm reel #C-105) at 394, 15 December 1832

<sup>180</sup> Bond Head reported, “At the Great Manitoulin Island in Lake Huron, where I found about 1,500 Indians, of various tribes, assembled for their presents, the Chippewas and the Ottawas, at a great council held expressly for the purpose, formally made over to me 23,000 islands. The Saugeen Indians also voluntarily surrendered to me a million and a half acres of the very richest land in Upper Canada.” Memorandum on the Aborigines of North America, Letter from Francis Bond Head, Toronto, to Lord Glenelg, 20 November 1836 in *A Narrative: Francis Bond Head* (London: John Murray, 1839) Appendix A (1a-15a)

point from Owen's Sound to Lake Huron, then known as the Saugeen Peninsula.<sup>181</sup> He also promised that all white men who fished in the area of the fishing islands would be removed if the Saugeen people would agree to surrender the lands south of Owen Sound.<sup>182</sup>

On the basis of that promise, on August 9, 1836 Chief Metigwab and his fellow Chiefs of the Saugeen Nation were persuaded to sign Surrender 45 ½ surrendering 1.5 million acres of land, a cession made without compensation.<sup>183</sup> In explaining his actions to the Secretary of State for the Colonies, Bond Head observed that the Indians had long lived "in their Canoes" among the fishing islands, in part because the "surrounding Water abounds with Fish."<sup>184</sup>

The promise of exclusivity in the fisheries was clearly of importance to the Saugeen people.<sup>185</sup> The retention of their interest in the fisheries after the surrender is evident from the fact that the Chiefs continued to receive payment from the Huron Fishery Company for its lease of the fishing islands until the early 1840s, when the Huron Company failed.<sup>186</sup> In 1839, the Huron Fishing Company requested a new lease protecting exclusive fishing rights, with the rent of 25£ per year to be paid to the Indians or to the Crown.<sup>187</sup> The Huron Fishing Company had taken 6,100 barrels of fish between 1834 and 1839, and the Collector of Customs reminded the Governor General that the Huron Fishing Company had an obligation to pay the Indians rent annually in return for this privilege.<sup>188</sup>

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<sup>181</sup>Now known as the Bruce Peninsula.

<sup>182</sup>Statement of Metigwab, *supra*, note 89

<sup>183</sup>*Indian Treaties and Surrenders*, *supra*, note 80 at 113

<sup>184</sup>Sir F. Bond Head, Lieutenant Governor of Upper Canada to Lord Glenelg, Secretary of State, *Imperial Blue Books*, 1839, No. 93, 1212-23, 20 August 1836.

<sup>185</sup>See Peggy J. Blair, "Solemn Promises and *Solum* Rights: The Saugeen Ojibway Fishing Grounds and *R. v. Jones and Nadjiwon*" (1996-7) *Ottawa Law Review* 125-144 for a detailed account of these arrangements.

<sup>186</sup>Receipt from Alexander and Metigoab, [var. Metigwab] Matwagash of Saugeen to Huron Fishing Company for lease of Huron Fishing Grounds, NAC, RG 10 vol. 68, Reel C-11,023, 17 September, 1836.

<sup>187</sup>Morgan Hamilton, Huron Fishing Company to Lieut. Governor of Upper Canada, NAC, RG 10 vol. 130, pp. 73585-9, Reel C-11,484

<sup>188</sup>John Galt, Collector of Customs, to T.M.C. Murdoch, Chief Secretary to Governor General, NAC, RG 10, vol. 130, pp. 73,599-612, Reel C-11,484 at pp 73,609 and 73,611, 14 March 1842

In the same year, the *Annual Report of Indian Affairs in Upper Canada* acknowledged the promises that His Majesty would “engage forever to protect [the fisheries] against the encroachments of the whites.”<sup>189</sup> However, as was noted in the *Report*, the abundance of fish at the mouth of the Saugeen River, where about 370 Chippewas and “Potawatomes” had settled, “has attracted the attention of white traders, thus annoying the Indians.”<sup>190</sup> By 1840, the Saugeen fishing grounds had become “frequently the scene of violence with interlopers and trespassers.”<sup>191</sup>

In 1844, in response to a request from George Copway, a Mississauga and the Methodist minister at Saugeen<sup>192</sup> to the Governor General as to the legal rights of the Saugeen Indians to the occupancy of the fishery, S.P. Jarvis, the Chief Superintendent of Indian Affairs wrote to J.M. Higginson, the Civil Secretary to the Governor General.<sup>193</sup> He suggested that the federal government deny that the islands and the fish around them belonged to the Saugeen Indians, writing:

[T]he fishing islands ... are part and parcel of the Wilderness of Canada West which has not yet been conceded to Her Majesty by the Indians but to assume that on that account they are the private property of a small band of Indians residing twenty miles from them and that the band have an exclusive right to the fish which resort to those Islands at certain Seasons or have the right to grant licences in any shape to others will not, I presume, be admitted by the Government.<sup>194</sup>

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<sup>189</sup>J.B. MacAuley, *Report describing Various Aspects of Indian Affairs in Upper Canada*, NAC, RG 10 Vol. 719, Reel 13,411, April 1839, at pp 123-124

<sup>190</sup>Extract from the *Annual Report on Indian Affairs*, taken from correspondence of S.P. Jarvis, Chief Superintendent of Indian Affairs, NAC, RG 10 vol. 124, Reel C-11,481 and C-11,482, 20 July 1838

<sup>191</sup>*Ibid.* pp. 137-140.

<sup>192</sup>George Copway, a Mississauga preacher, worked with the Saugeen band as a Methodist minister between 1843 and 1845. His career ended in 1846 when he was accused by the Saugeen of embezzling their funds. Similar accusations were raised at Rice Lake, his home mission. He was imprisoned for fraud, Smith, *Sacred Feathers*, *supra*, note 45 at 197.

<sup>193</sup>Samuel P. Jarvis was stripped of his rank later that year and officially dismissed in 1845 for defrauding Indian trust accounts of some 4,000£. According to Donald B. Smith, Jarvis was reportedly a man who did not much care for Indians. Jarvis had badly beaten an Indian boy in a brawl. He was reported to have fathered an Indian child at Snake Island, and once appointed to the superintendency, failed to account for any revenues received from the sale of reserves. See Smith, *Sacred Feathers*, *supra*, note 70 at 194

<sup>194</sup>S.P. Jarvis to J.M. Higginson, NAC, RG 10, vol. 509, 25 October 1844



Jarvis noted, however, that the practice of the British government was to first extinguish Indian claims by surrender before other claimants could derive title.<sup>195</sup> Attempts to obtain surrenders of fishing islands in this area, so that licences of occupation could be granted to white fishermen, soon followed.

In March, 1845 two Chiefs from Saugeen made their way to Toronto to present a Petition to the Attorney General and to the Chief Superintendent of Indian Affairs, claiming that they had been defrauded by “wicked white men” who had taken possession of their fishing grounds.<sup>196</sup> It was reported again that year that the fishery had attracted white encroachment on what the Saugeen “consider their exclusive right and on which they rely much for provisions.”<sup>197</sup> In response, in 1847, Her Majesty Queen Victoria issued a Declaration in favour of the Ojibway Indians respecting certain lands on Lake Huron. The title deed was specific to the Saugeen Ojibway Indians and within the description of lands possessed by the Saugeen people were included “any Islands in Lake Huron within 7 miles of the main land,” together with the right to convey.<sup>198</sup>

Since the fishing islands were the stations from which fishing was conducted, the acknowledgment of aboriginal legal title to the islands was confirmatory of the aboriginal interest in the fisheries.<sup>199</sup> In fact, following the Imperial Proclamation of 1847, the Governor General issued a further proclamation in 1851 protecting from trespass tracts of land set aside for the Indians as reserves. This *Act* specifically referred to the Saugeen Peninsula and the islands within seven miles of the coast as lands reserved for the occupation of the Saugeen and the Owen’s Sound Indians.<sup>200</sup> Those who entered those lands and waters without aboriginal con-

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<sup>195</sup> *Ibid.*

<sup>196</sup> NAC, RG 10 vol. 510 pp. 296-97, J.M. Higginson to S.P. Jarvis, NAC, RG 10 vol. 510 pp. 296-97.2 May 1845

<sup>197</sup> Report on the Affairs of the Indians in Canada, Laid before the Legislative Assembly on 20 March 1845, Appendix EEE (Montreal: Rolo Campbell, 1847)

<sup>198</sup> Imperial Proclamation of 1847, NAC, RG 68 vol. Liber. A.G. Special Grants 1841-1854 C-4158, 29 June 1847

<sup>199</sup> The court in *R. v. Jones*, *supra*, note 4 at 439 held as a matter of law that the *Imperial Proclamation* of 1847 had extended treaty protection to the Saugeen Ojibway’s use of their traditional fishing grounds surrounding the Peninsula.

<sup>200</sup> 13 & 14 Victoria c. 74. The Owen’s Sound Indians, as they were then described, later moved to

sent were to be punished accordingly.

Shortly after the *Imperial Proclamation* of 1847, at the request by the Saugeen people, the government advertised for offers to lease the fishing stations on the unceded fishing islands and a number of tenders were received.<sup>201</sup> The Superintendent General of Indian Affairs advised that the Governor General wanted to know what the wishes of the Saugeen people were with respect to any proposed lease before any further steps were taken.<sup>202</sup> The fishing islands were again tendered for lease, the lease to be “executed by or on behalf of the Indians.”<sup>203</sup> Rent from the commercial use of the fishing grounds around the fishing islands was distributed to the Saugeen and Owen Sound Indians in 1857<sup>204</sup> for one year in the sum of 75£.<sup>205</sup>

Besides the Saugeen peoples’ rental arrangements with white men, there are other, later examples of similar arrangements. The Mohawks of the Bay of Quinte, for example, leased their seining grounds to white men in the 1830s and 1840s in the Bay of Quinte. In 1877, the Department of Indian Affairs took steps to have the province remove these white men as trespassers when these rents were not paid, as agreed, to the aboriginal lessors.<sup>206</sup>

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Nawash and became known as the Chippewas of Nawash.

<sup>201</sup>T.G. Anderson, Superintendent of Indian Affairs to Wm. Webster, Owen Sound, NAC, RG 10 vol. 130 pp 73,575, 18 April 1849

<sup>202</sup>R. Bruce to Capt. Anderson, NAC, RG 10, vol. 516, p. 3, 6 June 1853

<sup>203</sup>R. Bruce to Capt. Anderson, NAC, RG 10, vol. 516, p. 102, 7 October 1853

<sup>204</sup>1857 was the same year as the first *Fisheries Act* was enacted, legislation which the Supreme Court relied on in *Nikal* as evidencing a Crown policy *denying* exclusive fishing rights.

<sup>205</sup>S.Y. Chesley, Acting Superintendent of Indian Affairs to Capt. Anderson, NAC, RG 10, vol 518, p. 231, 16 November 1853

<sup>206</sup>Because the Simcoe Deed resulted in Mohawks dispossessed of their American homelands relocating to Canada, it is often forgotten that the Mohawk settlement at the Bay of Quinte long pre-dated white settlement in the area. In 1675, a Sulpician missionary wrote of the settlement, “I have no better information about the state of the Kente [Quinte] mission and the disposition of the villages where work can be undertaken among the Iroquois of the north [coast of Lake Ontario] than what you have put in your letter. ...As for the village where it should be more convenient to settle, the same people who know those tribes well and who were gathered together on that account, preferred the shores of the lake of Kente or Tannouate before all other places ...” Nick Adams, “Iroquois Settlement at Fort Frontenac in the 17th and Early 18th Centuries,” (1986) 46 *Ontario Archaeology* at 8. In terms of the location as a site for fishing, there here are reports of Oneida women (the Oneida being one of the Five Nations of the Iroquois Confederacy) in the early 1600s carrying “salmon-trout” harvested from Lake Ontario back to Mohawk homelands in New York for sale, R.G. Thwaites ed. *The Jesuit Relations and Allied Documents* (Cleveland: Burrows Brothers, 1896-91) vol. 42 at 71

In 1784, Governor Haldimand had written to John Chew, the Secretary of the Indian Department advising that the Mohawk allies dispossessed from their homelands during the American Revolution, and who were to take up residence at the Bay of Quinte, were not to be restricted in their activities at the Bay of Quinte but were to have the free use of the lands set aside for them. He added that "whatever addition shall be deemed necessary for their more comfortable and happy Establishment shall be made."<sup>207</sup>

On April 1, 1793 a treaty entered into between Governor Simcoe and certain Chiefs of the Six Nations (Treaty 3 ½ ) reflected an understanding that the tract of land would be "bounded" in front by the Bay of Quinte and set aside for the *sole use* of the Chiefs, Warriors, Women and People of the Six Nations and "their Heirs forever... the full and entire possession, Use, benefit and advantage of the said District of Territory of Land to be held and enjoyed by them in the most free and ample manner and according to the several Customs and usages by them."<sup>208</sup> The use of terminology such as "bounded in front" or "bounded by" a body of water generally meant the *ad medium filum aquae* presumption applied as a matter of common law.<sup>209</sup>

The Mohawks of the Bay of Quinte cleared the shoreline soon after their arrival for the purposes of seine fishing. By 1830, a fishing station in front of the Bay of Quinte was occupied as a seining ground by the Mohawks of the Bay of Quinte. The first white man who engaged in the commercial fishery was a man named William Davenport who was taken in by the Indians as a partner. In exchange for access to the Mohawk fishery, Davenport furnished the seine.<sup>210</sup>

On March 5, 1877, Charles Wilkie, the Fisheries Overseer reported to the Minister of Fisher-

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<sup>207</sup>Letter, Governor Haldimand to John Chew, 22 April 1784, cited in Charles M. Johnson ed., *Valley of the Six Nations: A Collection of Documents in the Indian Lands of the Grand River Valley*, (Toronto: The Champlain Society, 1964) at 46

<sup>208</sup>*Indian Treaties and Surrenders, supra*, note 80 at 7

<sup>209</sup>See *Keewatin v. Kenora* (1907) O.L.R. 185 (Ont. C.A.) at 196-198 and text accompanying note 553, *infra*; also *Canadian Exploration v. Rotter* [1915] S.C.R. 15 (S.C.C.)

<sup>210</sup>Wm. Plummer, Superintendent and Commissioner of Indian Affairs to Minister of the Indian Branch, April 4, 1877 and report dated December 21, 1876, attached to letter written in 1952 from H.R. Conn, Fur Supervisor, Indian Affairs Branch, to various other parties within the Department of Indian Affairs, Ottawa and the Department of Lands and Forests, Toronto contained in NAC, RG 10 file 40-34, "Restricted"

ies that the Mohawks of the Bay of Quinte had driven one William Richardson and his son from the fishing station “and threatened to do them bodily harm if they returned” to the fishing grounds opposite the Mohawk Indians’ Reserve at Tyendinaga. William Plummer, the Superintendent and Commissioner of Indian Affairs investigated the complaint and reported to the Minister of the Indian Branch that he had made diligent inquiry into the matter and found that the station in question has been occupied by Mohawk peoples for “a very many years” and that white men had only fished there because they had permission from the Mohawks of the Bay of Quinte and paid them rents.<sup>211</sup> He wrote:

My first enquiry was among the Indians and I learned that this station had been occupied as a seining ground by the Mohawks of the Bay of Quinte over forty years ago... They intelligently trace the history of the Fishery down to the present time and showed that several white men had from time to time fished with them and that three seasons ago, Wm. Richardson came there; *that for the first two seasons he paid them (the Indians near the station) a certain quantity of fish for the privilege of fishing; that last season he paid them nothing.* The Indians say they can bring many white men to prove the seining ground had been cleared more than 30 years before Richardson had anything to do with it. [emphasis added]<sup>212</sup>

Plummer visited the ground and had an interview with a settler named Drumney residing on the lot in front of and close to the fishing ground. He added that, “Drumney has resided there 37 years. The station has been fished ever since he came there. When he first came there, the seining ground was clear and free from stones as it is now. The Indians always held the ground but allowed white men to fish with them. White men paid the Indians for the privilege.”<sup>213</sup> The Superintendent of Indian Affairs concluded his report by describing the white men who fished in the waters from the reserve without paying rents to the Indians as “trespassers.”<sup>214</sup>

It is clear then, that for many, many decades after the *Royal Proclamation* of 1763, the Crown recognized that aboriginal people held a sufficient interest in the fishing grounds adjacent to their village sites that the rentals for the use of those fisheries should be paid to the Bands.

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<sup>211</sup> *Ibid.*

<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

White men who fished in such areas without aboriginal consent were understood to trespass, and legislative enactments were put in place to prevent such actions.

Far from a “clear” policy *against* recognizing aboriginal exclusivity, this was a policy which recognized aboriginal exclusivity pending the obtaining of surrenders, and used licences of occupation as a means by which others could access what were understood to be exclusively aboriginal waters, with aboriginal consent.

### 7. The Reservation of Aboriginal Commercial Fishing Stations

The Supreme Court’s finding that Crown policy did not recognize exclusive aboriginal fishing rights pointed specifically to a Crown policy of not recognizing aboriginal *commercial* fishing rights in support.<sup>215</sup> However, during the treaty processes of the 1840s and 1850s, attempts were made by the Crown to accommodate exclusive aboriginal commercial fishing stations within tracts set aside for reserves within Ontario. Aboriginal fishing stations permitted aboriginal people to conduct trade. Some of these, where reserved specifically from surrenders, have been mentioned already. The fishing station at Manitou Rapids, for example, was the most important fishing station in Rainy River, and fur traders made numerous references to the important trade there. The customary practice was to send two or three men in a large canoe or boat with trade goods to the fishing stations to conduct business.<sup>216</sup>

The Robinson Huron and Superior treaties of 1850 provided that the Ojibway living on the north shores of Lake Superior and Lake Huron would retain the “full and free privilege .. to fish in the waters [of the ceded territory] as they have heretofore been in the habit of doing.”<sup>217</sup>

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<sup>215</sup> *Ibid.*

<sup>216</sup> See Tim Holzkamm, Victor Lytwyn and Leo Waisberg, “Rainy River Sturgeon: An Ojibway Resource in the Fur Trade Economy,” in (1988) 32 *The Canadian Geographer* 199 [hereafter cited as “An Ojibway Resource”]

<sup>217</sup> Hansen, “Development of Fisheries,” *supra*, note 44, at 4

Historical evidence suggests strongly that this included commercial as well as domestic fishing and that the Ojibway understood this to be an exclusive right to fish. So did J.W. Keating, who had been present at the treaty negotiations and assisted with the survey of some of the reserves.<sup>218</sup> While Ojibway requests for exclusive fishing rights in the waters fronting their reserves were not confirmed by the government, despite Keating's request, the government did indicate it was willing to take steps to prevent other parties "from trespass[ing] on the Deep Water frontage for the purpose of fishing."<sup>219</sup> At the time, there was little competition from non-aboriginal commercial fishermen. Aboriginal fishermen exercised an exclusive right to fish commercially in the years immediately following the signing of the Robinson treaties without interference.<sup>220</sup>

Government surveyors adjusted boundaries where necessary to accommodate the Ojibway fishing stations at Parry Sound and Shawanaga River.<sup>221</sup> The Batchewana Reserve included a significant fishing station for Ojibway throughout the area, known as Whitefish Island. The importance of the fishing stations is evident in that when the "Chiefs and Warriors of Batchewananny and Gurlais Bay" surrendered lands on July 29, 1859 "extending inland ten miles throughout the whole distance including Batchewananny Bay," they did so on condition that they retained only the "small island at the Saulte Ste. Marie used by them as a fishing station."<sup>222</sup>

On the other side of the continent, that same year, Governor James Douglas reported that aboriginal fisheries in British Columbia had been protected by treaty "on the Coast and in the Bays"<sup>223</sup> and that fishing stations were to be included in each Reserve.<sup>224</sup>

The Ontario Court of Appeal in *R. v. Bombay* held that the designation of fishing stations as

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<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.* at 5

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*, at 4

<sup>222</sup> Cession 91A, *Indian Treaties and Surrenders*, *supra*, note 80 at 227-28

<sup>223</sup> *R. v. Bartleman* [1984] 3 C.N.L.R. 114, citing Governor Douglas, letter to the Speaker of the House dated February 1859, at 124

<sup>224</sup> Cited in *Lewis*, (S.C.C.) *supra*, note 3 at 143

such gave them a form of reserve status.<sup>225</sup> The Supreme Court of Canada in *Lewis* mentioned fishing stations<sup>226</sup> in its decision and acknowledged that these were “reserved” for aboriginal peoples in British Columbia.<sup>227</sup> However, fishing stations were described by the Supreme Court as lands beside rivers reserved to permit Indian *access* to the fisheries rather than as “grants” of exclusive fisheries, grants which the Court stated the Department of Marine and Fisheries refused to allow.<sup>228</sup>

The Supreme Court in *Nikal* dismissed a defence argument that just because fishing stations were reserved did not mean that fishing grounds were excluded, again asserting that the Department of Marine and Fisheries refused to “assign” exclusive fisheries in perpetuity.<sup>229</sup> The reasoning that such uses had to be “assigned” or “granted” by the government confuses Crown policy with pre-existing aboriginal rights. In determining that the Crown’s policy was not to recognize exclusive fishing rights, and somehow separating the reservation of fishing stations from the reservation of the fisheries around them, the Supreme Court of Canada failed to understand what fishing stations were or that when the Crown issued licences of occupation to fishing stations, the Crown conveyed exclusive fishing rights in the waters around them.

Crown licences of occupation permitted exclusive fishing in areas around fishing stations by setting out water boundaries within which exclusive commercial fishing rights were to be exercised.<sup>230</sup> The Crown licence of occupation issued to the Huron Fishing Company, for ex-

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<sup>225</sup> *R. v. Bombay* [1993] 1 C.N.L.R. 92 (Ont. C..A.) at 94

<sup>226</sup> *Lewis*, *supra*, note 3 at 142-43

<sup>227</sup> *Ibid.*

<sup>228</sup> *Ibid.* at 143

<sup>229</sup> *Ibid.* at 142

<sup>230</sup> Section 17 of *An Act for the Regulation of Fishing and Protection of the Fisheries* (1868) 31 Vict. c. 60 made it an offence to fish within the “limits of [any] stationary or seine fishery described in leases or licences now existing or hereinafter to be granted.” In 1862, a licence of occupation issued, this time to aboriginal people, specifically indicated it would convey the right to fish exclusively “...in pursuance of an arrangement made in 1859 with the Supt. General of Indian Dept, [in] the Fishery in front of the Upper and Lower Indian Reserves of Kettle Point and adjoining the Sable River - running into the Lake 5 miles, bounded by the side lines of the Reserves prolonged into the Lake on the same courses - and parallel with the shore at the distance of 5 miles.” Special Fishery License and License of Occupation, to Froome Talfourd, Indian Superintendent, on behalf of the Kettle Point Indian Band.

ample, enabled the Company "to possess, occupy and enjoy all those certain tracts of land being Thirteen Islands in Lake Huron, called Gheghets Islands, lying north of the River Sangin, and numbered on a small plan or sketch of Deputy Surveyor John McDonald, from number one to number thirteen inclusive, that is to say, commencing at a point in Lake Huron, west one mile and a quarter; then north five miles and three-eighths of a mile; then east two miles and a half, more or less, to the east shore of Lake Huron; then southerly along the water's edge of the Lake, following the several Points and Bays to the place of beginning."<sup>231</sup> The licence contained a map with a boundary which extended into the water around the islands.<sup>232</sup>

While non-aboriginal interest in the waters had increased, the Crown at this time clearly recognized the promises it had made to the Saugeen people, and other First Nations within Ontario. Crown policy in this regard would soon change. The Supreme Court of Canada was not wrong in stating that Crown policy ultimately militated against aboriginal exclusive fishing rights in what became to be thought of as public waters. What the Court did not apparently understand, however, was that this was a policy which developed as non-aboriginal interest in the fisheries increased.

The Supreme Court of Canada's error was in taking the changed policy as a basis for determining that exclusive aboriginal interests had never existed. The question of how pre-existing aboriginal rights could be altered by Crown policy without the clear and express intention of the Sovereign, or the consent of the parties thereby affected, was not the subject of discussion. Without appreciating that context, the Court cited specific correspondence as evidence of Crown policy. That policy reflected a controversial decision on the part of one Crown Department in particular to favour non-aboriginal economic interests over the pre-existing rights of aboriginal peoples. As the new policy took hold, it was soon forgotten, at least by non-

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signed by William Gibbard, Collingwood [photocopy], Wawanosh Family Papers, Weldon Library, University of Western Ontario, Box 4381, file no. I-1-1, 14 April 1862

<sup>231</sup>License of Occupation from Sir John Colborne to the Huron Fishing Company, signed by William Rowan, Copy printed in the *Report of the Huron Fishing Company*, Colonial Office Papers, Public Record Office, London, England, 3 July 1834

<sup>232</sup>*Ibid.*



aboriginal people, that Crown policy had once been quite the opposite.

## **B. The Public “Right” to Fish in Navigable Waters**

In support of its conclusions that Crown policy mandated that Indians would be treated like other members of the public on fishing matters, the Supreme Court in *Nikal* quoted from a letter dated April 16, 1845 from W.H. Draper, the Attorney General of Canada to J.M. Higginson, the Civil Secretary, to the effect that the “right to fish in *public* navigable waters in Her Majesty’s dominions is a common public right - not a regal franchise - and I do not understand any claim the Indians can have to its exclusive enjoyment.” [emphasis added]<sup>233</sup>

When one examines the archival materials, the case Draper was referring to was that of the Saugeen Ojibway peoples. Two years after he had expressed his opinion, the Imperial Crown apparently disagreed with his views, issuing the 1847 *Imperial Proclamation* and title deed to islands and fishing grounds to the Saugeen Ojibway Nations referred to earlier.<sup>234</sup> It was not until after non-aboriginal interest in Upper Canadian fisheries developed, in fact, that the so-called “public” rights of fishing in unceded aboriginal waters were asserted. It is important to understand the context in which this assertion was made, because the aboriginal perspective on these public rights was quite different. The assertion of “public” rights resulted in confrontation and violence between aboriginal and non-aboriginal people as Crown policy in this regard began to change.

Although the Supreme Court referred to the Crown’s policy favouring public rights over exclusive aboriginal rights as “firm,” and found no evidence (despite the appellant’s arguments to the contrary) of any interdepartmental disagreement over the policy, a review of the context around the policy illustrates that it was the policy not of the government as a whole but primarily that of the Department of Marine and Fisheries, and one individual, W.F. Whitcher, in particular. Those responsible for Indian Affairs took a very different position resulting in interdepartmental conflict and friction. As well, as will be shown, the intent and the effect of the

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<sup>233</sup>*Nikal*, *supra*, note 2 at 188

policy was discriminatory, since its objective was to favour non-aboriginal fishermen over the competition they might otherwise face should aboriginal people be free to fish for commercial purposes.

By the middle of the 19<sup>th</sup> century in southern Ontario, settlers had flooded in to settle and develop agricultural land. Non-aboriginal attention soon turned to the increasingly lucrative fishery. As non-aboriginal people complained of aboriginal competition within those fisheries, Crown policy quickly changed to favour their interests. The first manifestation of that changed policy was new fisheries legislation, legislation which at first seemed neutral on the question of aboriginal fishing rights, but which was ultimately used to institute a pattern of encroachment and interference that almost completely eliminated the exercise of fishing rights by aboriginal people.<sup>235</sup>

To understand the extent to which this interference took place, and why, the provisions of the *Fisheries Act* require examination. The Supreme Court looked to the legislation to suggest that because the 1857 *Fisheries Act* did not provide for the permanent alienation of fishing rights, it could not be the source of exclusive aboriginal rights.<sup>236</sup> It is suggested that this was an error. The *Fisheries Act* was not the source of aboriginal rights. Although it had attempted to regulate them, it could no more create them than extinguish them.<sup>237</sup> The new legislation did, however, recognize that it could not interfere with pre-existing rights in fisheries. That in itself is of interest, since the Supreme Court presumed that only public rights in fisheries existed.

The first *Fisheries Act*, which gave responsibility for fisheries in Upper and Lower Canada to the Department of Crown Lands, did not provide statutory authority for the “permanent” future alienation of fishing rights to private parties. However, the legislation recognized that

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<sup>234</sup>See note 99.

<sup>235</sup>For a contrary opinion, see Roland Wright, “The Public Right of Fishing, Government Fishing Policy and Indian Fishing Rights in Upper Canada,” (1994) 86 *Ontario History* 337. Wright has argued that the *Fisheries Act* of 1857 was intended to protect aboriginal fishing.

<sup>236</sup>*Nikal, supra*, note 2 at 15

<sup>237</sup>The suggestion that the *Fisheries Act* could provide a complete Code inconsistent with the contin-

exclusive rights predating the legislation existed in third parties<sup>238</sup> and that public rights should not interfere with private property.

In section 1 of *An Act Respecting Fisheries and Fishing*<sup>239</sup> the Governor in Council was given the authority to grant special fishery leases and licences on lands belonging to the Crown for any term not exceeding nine years.<sup>240</sup> All “subjects of her Majesty” were free to fish for the purposes of trade and commerce in any of the harbours, roadsteads, bays, creeks or rivers of the Province<sup>241</sup> subject to the caveat that *none* of these privileges were to affect private property.<sup>242</sup> In 1865, *An Act to amend Chapter 62 of the Consolidated Statutes of Canada and to provide for the better regulation of fishing and protection of Fisheries*<sup>243</sup> was passed with virtually identical provisions.<sup>244</sup>

The fact that this legislation excluded private, pre-existing interests from otherwise public regulations again shows that the “public” right in fisheries was subject to private and exclusive interests, a conclusion which contradicts the Supreme Court’s premise in both *Nikal* and *Lewis*.

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ued existence of an aboriginal right was expressly rejected in *Sparrow, supra*, note 5 at 174

<sup>238</sup>There was actually legislation pre-dating the first *Fisheries Act*. In 1807, an *Act for the preservation of salmon in Lake Ontario*, 47 Geo III. Amendments to the *Act* in 1823 prohibited any person “from employing Indians or buying or receiving under any pretence whatever from any Indian or Indians any salmon taken or caught ... during the closed season.” In 1840, legislation which attempted to ensure the quality of the commercial catch was passed to inspect and grade all fish packed in barrels, see Hansen, “Development of Fisheries,” note 44, at 4. In 1845, restrictions on salmon fishing increased. It became illegal to fish for salmon “nearer the mouth of any of the rivers or creeks emptying into Lake Ontario or the Bay of Quinte than 200 yards or within two hundred yards up from the mouth of any such river or creek,” precisely the areas in which the Mohawks of the Bay of Quinte placed their nets and areas which a surveyor later determined were part of the Tyendinaga reserve. See *An Act to repeal and reduce into one Act the several laws now in force for the Preservation of Salmon in that part of this Province formerly Upper Canada, and for other purposes therein mentioned* (1856) 8

Vict. c. 47

<sup>239</sup>(1857) 22 Vict. c. 62

<sup>240</sup>*Ibid.* s. 2

<sup>241</sup>*Ibid.* s. 3

<sup>242</sup>*Ibid.* s. 4

<sup>243</sup>(1865) 29 Vict. c. 11

<sup>244</sup>*Ibid.* s.3

While there was nothing in the 1857 *Fisheries Act* mentioning aboriginal lands or waters specifically, aboriginal fisheries were originally recognized as falling outside the operation of the *Act*. In 1858, a year after the legislation was passed, the Visiting Superintendent of Indian Affairs, W.R. Bartlett, asked the Saugeen Ojibway Nations to provide him with a list of fishing stations which they used and to advise him “if the Indians wished to reserve any of the Fisheries for their own use exclusively.”<sup>245</sup> Those fisheries not so reserved would be allocated to non-aboriginal fishermen through the system of leases and licences, with rents from the leases of unsurrendered waters to be paid to the Indians.<sup>246</sup>

The Crown encouraged the Indians to believe that this new system would work to their advantage and that it would actually protect their rights. In 1859, Bartlett advised the Cape Croker Indians that a government lease under the amended legislation would be a legal means to “warn off intruders .... you will be protected by the Government in your use of [the fishing ground].”<sup>247</sup>

Despite these assurances, an agreement was signed between the Indian Department and the Department of Crown Lands “for the Protection of the interest of Native Tribes” in which Indians were exempted from paying fees for such fishery leases under the new legislation. The exemption was to apply only in circumstances, however, “where the purport and object of title [was] to secure to the individuals and families of each tribe exclusive use of such fisheries for *bona fide* domestic consumption.”<sup>248</sup> Given the increasing value of commercial fisheries, aboriginal fishermen would soon be expected to pay for licences to fish commercially within their own unceded waters.

Because of the *Act*'s encroachment into aboriginal fishing rights, it created immediate conflict. William Gibbard, the first Fishery Overseer appointed under the legislation, leased the

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<sup>245</sup> *Annual Report of the Superintendent of Fisheries for Upper Canada Appendix of Journals of Legislative Assembly*, Appendix 1, 22 Victoria 1859

<sup>246</sup> W.R. Bartlett to Saugeen Chiefs, NAC, RG 10 vol. 544, p. 228, 23 June 1859

<sup>247</sup> W.R. Bartlett to Indians Chiefs and Warriors, Cape Croker, NAC, RG 10 vol. 544, p. 282 19 August 1859

<sup>248</sup> Hansen, “Development of Fisheries,” note 44, at 6

unceded fishing islands of the Saugeen people to non-aboriginal fishermen without their consent. Of the 97 leases issued throughout Lake Huron and Lake Superior, Gibbard issued only 12 to Indian Bands,<sup>249</sup> despite an earlier meeting between the Chiefs and Gibbard in 1859 in which they demanded he refrain from leasing any of their fishing islands.<sup>250</sup> Having ignored their wishes, Gibbard advised W.R. Bartlett, the Visiting Superintendent of Indian Affairs that the non-aboriginal lessees were afraid the Indians would molest them.<sup>251</sup> Bartlett wrote to the Indian Chiefs and Warriors at Cape Croker reminding them that the rent from the fishing islands would be credited to their annuity and distributed to members of the band. He warned that the Government would protect the lessees under the law if they were molested or obstructed in any way.<sup>252</sup>

Bartlett tried to placate the upset and angry Chiefs and Warriors at Cape Croker by suggesting that the rent from the islands when placed with annuity monies would be “much better for you than that these islands ...as they formerly have been subject to intrusion by everybody, besides being both unproductive and much trouble to both yourselves and the Department.”<sup>253</sup> The Chiefs were not impressed. The Cape Croker Indians<sup>254</sup> continued to “annoy” lessees of fisheries on Barriere, Rabbit, Hay, Griffith and White Cloud Islands.<sup>255</sup> Bartlett threatened the band with the loss of their “free” fishing if they continued to infringe the *Fishery Act* through such disturbances.<sup>256</sup>

In the *Sarnia Observer and Lambton Advertiser*, one reader wrote of his understanding that waters were to have been retained as part of the reserves:

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<sup>249</sup>Report of the Fishery Overseer for the Division of Lakes Huron and Superior for 1859, by William Gibbard, *Canada Sessional Papers* (No. 12) 23 Victoria 1860, pp. 84-91, Appendix No. 31, 31 December 1859

<sup>250</sup>Lytwyn, “Waterworld” *supra*, note 125 at 23

<sup>251</sup>William Gibbard to W.R. Bartlett, NAC, RG 10 vol. 418, p. 573-574 Reel C-9625, 11 August 1859.

<sup>252</sup>W.R. Bartlett to Chiefs and Warriors, Cape Croker, NAC, RG 10 vol. 544, p. 284-85, Reel C-13,357, 19 August 1859

<sup>253</sup>W.R. Bartlett to Indian Chiefs and Warriors at Cape Croker, NAC, RG 10 vol. 544, 19 August 1859

<sup>254</sup>The Chippewas of Nawash, located at Cape Croker, together with the Chippewas of Saugeen, form the Saugeen Ojibway Nation

<sup>255</sup>William Gibbard to W.R. Bartlett, NAC, RG 10 vol. 418, p. 572 Reel C-9625, 3 October 1859.

<sup>256</sup>W.R. Bartlett to William Gibbard, Fishery Overseer, NAC, RG 10 vol. 544 p. 490, 10 March 1860, advising of warning given “both personally and in writing” to the Cape Croker Chiefs.

One by one we see encroachments made on the rights of the Indians. The last thing in this line is to lease the fisheries without their consent. So that now, - though under protest, - they hold their fisheries by lease from Government. The fisheries had a strong influence in determining them in the selection of their Reserves, and not until now have their rights in them been called in question.

If there was any law or justice for the Indians the Government have placed themselves in a dilemma from which there is no escape. The treaty is very minute in describing the boundary of the ceded territory; but nothing is said about the waters of the Lake, or the fisheries, which certainly belonged to them. *An unexplained understanding has existed, that the possession of the land secured to the holder the fishing opposite his premises.* The Government, however, have violated this tacit agreement, and now we have nothing but the letter of the treaty to fall back upon. These fish formed a part of the subsistence of the Indians, for ages uncounted, and as they have never been surrendered, or an equivalent received for them, they are theirs still, according to all the rules of justice and the letter of the treaty. [emphasis added]<sup>257</sup>

In 1860, the Saugeen Ojibway Chiefs issued a petition to the government complaining of encroachments within their traditional waters and indicating that when the leases of the islands and fisheries expired, they wanted the territory back for their own use, "for although we do not prosecute the fishing like the white man, yet we are satisfied that it will be for our own interest and advantage to have them for our own use."<sup>258</sup>

In another petition signed by the Chippewa Indians of Saugeen, Lakes Huron and Simcoe, the Chiefs of those First Nations reminded the government that "when they surrendered their lands to the Government, they did not sign over all the game and fish."<sup>259</sup> Despite these objections, Gibbard issued a further six fishing leases to commercial fishing companies within the unceded waters of the Great Lakes. In 1861, these companies harvested about 2,500 barrels of fish from Saugeen waters.<sup>260</sup> The Saugeen people and other First Nations responded by damaging nets set around the fishing islands.

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<sup>257</sup>Letter to the Editor, Thomas Hurlburt, Sarnia, 14 September 1859, in *The Sarnia Observer and Lambton Advertiser*, at 2, dated 23 September 1859

<sup>258</sup>Peter Schmalz, *The History of the Saugeen Indians* (Ottawa: Ontario Historical Society Publication No. 5, 1977) at 115

<sup>259</sup>Petition signed by the "Chippewa Indians of the Saugeen and Lakes Huron and Simcoe" Ontario Archives RG I vol. A-1-7 n.p. 4 May 1860

<sup>260</sup>Lytwyn, "Waterworld" *supra*, note 125 at 24

In his Report of the Fishery Overseer for the Division of Lake Huron and Superior, Gibbard again complained that the Indians had annoyed lessees of fisheries on the fishing islands <sup>261</sup> as well as white fishermen and settlers at Cape Croker.<sup>262</sup> Bartlett wrote to the Chiefs and Warriors at Cape Croker and Colpoy's Bay stating, "I am very sorry to hear these complaints against you people a second time. Mr. Gibbard has sent me your lease of the fishery which the Supt. Gen'l. has succeeded in obtaining free for you, upon certain conditions. These conditions are that you will not be called upon to pay any sum of money for your fisheries if you comply with the fishery act and the orders of the Government and council and do not in any way molest lessees or trespass upon leased grounds. If you people continue these practices, I shall be very sorry indeed for you will be called upon to pay out of your annuities \$ 60 a year rent annually."<sup>263</sup>

The Chiefs, Sachems and Principal Men of Cape Croker prepared yet another Petition which reminded Queen Victoria that they had an old Treaty showing that hunting of various kinds was never surrendered.<sup>264</sup> They complained that the Canadian government had now passed an *Act* to encourage the forfeiture of hunting and fishing which the "Indians used to, and was to enjoy forever."<sup>265</sup> They again asked that their fisheries revert to their use once the leases of them expired.

For a period of three years our Island Fisheries have been leased and a small remuneration is made half-yearly - we think it would be more beneficial for us to repossess those fishing grounds ourselves when the given time expires in 1863...If we could only have this privilege of all that we should call our own - have the sole management of our lands, our fisheries, our hunting, our timbers and monies, we would be satisfied and we do not see why we cannot be able to do so, while we have persons of our own blood, who can do all this, in any respect exactly the same as a white man.<sup>266</sup>

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<sup>261</sup>William Gibbard, Fisheries Overseer to W.R. Bartlett, NAC, RG 10 vol. 418, 3 October 1859

<sup>262</sup>William Gibbard to W.R. Bartlett, NAC, RG 10 vol. 418, p. 597-600, 23 January 1860

<sup>263</sup>W.R. Bartlett to Chiefs and Warriors at Cape Croker and Colpoy's Bay, NAC, RG 10 vol. 544, pp. 490-91, 10 March 1860

<sup>264</sup>Chiefs, Sachems and Principal Men of Cape Croker Grand Indian Council to Queen Victoria, NAC, RG 10, vol. 266, pp. 163,306-8 17 April 1860

<sup>265</sup>*Ibid.*

<sup>266</sup>*Ibid.*

Gibbard reported in 1861 that the Americans to whom he had issued leases had destroyed valuable fishing grounds, including those at Saugeen, and that the fishing islands had been overfished by 27 gill net boats and 129 men. The Saugeen inland fishery, he noted, had also been “injured greatly” by Americans losing nets.<sup>267</sup> He added, without seemingly making the connection between these reported activities and the aboriginal anger at the leasing system that, “[t]he Indians still continue to give great annoyance to our lessees. They do not fish to any extent on their own grounds (of which the leasing system has given them more than a reasonable share) but seem jealous of everyone and are anxious to drive all others away from their neighborhood.”<sup>268</sup>

Concerned about what he perceived as unfair competition between Indian fishermen and white men, he noted that at Sauble River, “fish put up by Indians always sell at low rates.”<sup>269</sup> He ignored an offer from the Cape Croker Band to pay whatever white fishermen were paying to lease the islands, and justified the size of the Cape Croker fishing ground he had reserved for them by saying it was more than enough. “I have allotted them three times as much as they will ever require and more than they will ever think of using. In my opinion, all the Indians would be better men and better off if they never saw a fish.”<sup>270</sup>

The government’s position concerning Indian fisheries had certainly taken a harder turn. The government insisted that the *Fisheries Act* had been enacted to “preserve fish” from the harmful effects of netting and spearing, activities conducted by aboriginal fishermen, and that fisheries had never been the subject of aboriginal proprietary rights. An unknown official wrote:

Up to the year 1857 the fisheries of Canada were not protected in any way. In the Session of that year, a bill passed the Legislature whereby amongst other provisions restrictions were placed upon the catching of fish, and leases were granted to those willing to pay for the exclusive right of fishing in certain places in the Crown domain. The object of these regulations was

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<sup>267</sup> *Ibid.*

<sup>268</sup> Report of William Gibbard on the Fisheries of Lakes Huron and Superior, *Sessional Papers* No. 11, 25 Vict. 1862, dated 31 December 1861

<sup>269</sup> *Ibid.*

<sup>270</sup> Report of William Gibbard, NAC, RG 10 vol. 418, 9 August 1859



at once to preserve the fish themselves, which were being destroyed by netting and spearing, out of season, and to make these very productive fisheries a source of revenue. The Indians now assert that this Act trenches on their just rights, as they never surrendered the fisheries when they ceded their Land. I think that to establish this position, they should shew, that until the year 1857 they had enjoyed the monopoly of fishing in these waters. In reality this was not the case; the Lakes and rivers were considered open to all. Everyone aided in the destruction of fish, though in a very few instances, rent was paid to some of the Indian tribes, not for the fishery itself alone, but for use of their Land as a station for drying the nets, curing the fish, etc. [original emphasis]<sup>271</sup>

When diplomatic efforts failed to achieve results, the Saugeen Ojibway and other First Nations' peoples turned to increasingly forceful means of removing the interlopers from their waters. In 1857, Indian fishermen from Manitoulin Island lifted a number of nets belonging to non-native fishermen that were in the opinion of the Indian fishermen, set "in trespass within their fishery" and delivered the nets to J.C. Phipps, Indian Superintendent at Manitowaning.<sup>272</sup> A similar incident occurred between Indian fishermen from the Christian Island Band and non-native fishermen who had set their nets within the Indian fishing grounds adjacent to Christian Island and the surrounding islands in Georgian Bay.

In 1862, Gibbard reported that fishing stations on the fishing islands were being "regularly destroyed by Indians."<sup>273</sup> In 1863, he complained that "The Indians ... still cause serious annoyance to fishery lessees and commit depredations upon their property. 'Tis very troublesome to arrange these difficulties in which the Indian tribes, and some half-breeds, are concerned."<sup>274</sup> At the Saugeen fishing islands, he stated that "fishing was not 1/10th of what it formerly was: buildings destroyed annually by Indians."<sup>275</sup> Gibbard's attitudes towards Indians were perhaps best expressed in a letter he wrote to the *Daily Globe* on March 21, 1863 in which he described the Manitoulin Odawa as "the most miserable-looking, ill-clothed, drunken, lying, stealing vagabonds in the whole band."<sup>276</sup>

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<sup>271</sup>Undated and unsigned, but probably a draft report from Sir Edmund Head, Governor in Chief, to the Duke of Newcastle, Secretary of State for the Colonies, NAC, RG 10, series 2, vol. 2, circa 1861

<sup>272</sup>William Gibbard to Letter of August 9, 1859, *supra*, note 291

<sup>273</sup>Lytwyn, "Waterworld," *supra*, note 125 at 24

<sup>274</sup>Appendix No. 42(b) to William Gibbard's Report on fisheries of Lakes Huron and Superior, *Sessional Papers* No. 5 26 Vict.1863, 19 January 1863

<sup>275</sup>*Ibid.*

<sup>276</sup>Document referred to in evidence of Dr. Victor Lytwyn, in *R. v. Jones and Nadjiwon*, *supra*, note

When no response had been received nearly two years after their request that the fisheries around White Cloud, Hay and Barriere Islands be returned to their use once leases expired, Joseph Jones, the Cape Croker Band's interpreter wrote to W.R. Bartlett at the Department of Indian Affairs, saying the Indians had become impatient.<sup>277</sup> Bartlett responded, "I have not as yet received an answer (but) I hope when the question comes up for renewing the leases, the Government will not lose sight of the Indian's application."<sup>278</sup> Events were soon to make this unlikely.

In the summer of 1863, aboriginal unrest resulted in a confrontation in the waters around Manitoulin Island. Responding to a report that the lessees of Lonely Island had been molested by an aboriginal party from Wikwemikong, Fishery Overseer Gibbard convened an armed posse and headed to the east end of Manitoulin Island to confront the alleged lawbreakers. A confrontation took place on the shore in front of Wikwemikong, during which an armed standoff between Gibbard's 29 "constables" and a large party of Ottawa warriors, some 300 in number, took place. Gibbard was forced to depart. Gibbard and his posse left enroute to Saulte Ste. Marie and stopped at Bruce Mines where Gibbard recognized a member of the Wikwemikong Band, Oswanamkee, and arrested him although he had not been involved in the incident at Manitoulin Island. Gibbard took Oswanamkee to Saulte Ste. Marie to be tried but he was ordered released by the local magistrate. On his return home by steamer, Gibbard was apparently murdered and thrown overboard. Although suspicion was cast on Oswanamkee, who was also onboard the steamer, insufficient evidence was found to prove him guilty.

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Retaliation was swift. In January of 1864, Bartlett finally received an answer from Headquarters to his requests for a lease to aboriginal peoples, informing him that there *were* no

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4, 16 June 1992 [uncertified copy in author's file]

<sup>277</sup> Joseph Jones to W.R. Bartlett, NAC, RG 10 vol. 519, p. 827-28, 24 March 1862

<sup>278</sup> W.R. Bartlett to Joseph Jones, Interpreter, Cape Croker, NAC, RG 10, vol. 546, p. 26, 24 March 1862

<sup>279</sup> This incident is described in Victor Lytwyn, "Ojibwa and Ottawa Fisheries around Manitoulin Island: Historical and Geographical Perspectives on Aboriginal and Treaty Rights," (1990) 6 *Native*

leases or licences to the fishing places on Lake Huron to be given to the Indians and that forthcoming amendments to the *Fisheries Act* of 1857 would preclude any exclusive titles being “granted” in the fisheries<sup>280</sup> to Indians. Bartlett transmitted a letter from the Chiefs requesting that the Whitefish Island be reserved to their own use to the Department of Crown Lands.<sup>281</sup> The response was that the Fishing Islands had already been leased to a man named Macaulay in preference to “lawless [aboriginal] fishermen..”<sup>282</sup>

The first post-Confederation statute, *An Act for the regulation of Fishing and protection of Fisheries* was passed in 1868, repealing the 1857 statute.<sup>283</sup> At that time, the Department of Marine and Fisheries assumed responsibility for matters previously handled by the Commissioner of Crown Lands. The Crown’s policy towards aboriginal interests was now to deny them altogether. Whether this was the result of the Gibbard incident or not is not known. However, when the Supreme Court referred to Crown policy, they chose documentation from this period to support their conclusion that no aboriginal exclusive fishing rights could exist. In doing so, they turned to a period in history in which the Crown relied on dubious legal opinions and discriminatory policies to exclude aboriginal peoples from fisheries which had become increasingly valuable to others.

## 1. Contemporary Legal Opinions on Aboriginal Fishing Rights

Although the Indian Affairs Department was told that the new *Fisheries Act* would prevent exclusive title being recognized in aboriginal fisheries, amendments to the *Fisheries Act* followed in the wake of a legal opinion to the effect that no exclusive titles could be granted *unless* changes were made to the *Act*.<sup>284</sup>

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*Studies Review* at 21-22

<sup>280</sup>W.R. Bartlett to Indian Chiefs and Warriors Cape Croker, NAC, RG 10 vol. 547, p. 72, 19 January 1864

<sup>281</sup>W.R. Bartlett to C.F. Walcot, Accountant, Indian Affairs, Quebec NAC, RG 10 vol. 548 p. 200 Reel C-13,359 30 August 1864

<sup>282</sup>A. MacNabb to W.R. Bartlett, NAC, RG 10 vol. 421, p. 10, 26 August 1864

<sup>283</sup>(1868) 31 Vict. c. 59, 60. The 1857 Act had also been amended in 1865

<sup>284</sup>Adam Watson to Commissioner of Crown Lands, NAC, RG 10 vol. 323 p. 216143-46, 11 March 1863

Given the uncertainty of title in unsurrendered lands, the Crown Law Department of Upper Canada had been asked by the Commissioner of Crown Lands to delineate “the power of the Crown to grant exclusive rights of Fishing in the Lakes and Navigable Rivers.”<sup>285</sup> In 1863, the Solicitor General, Adam Watson, responded that the public had a right of way over and the right of fishing in all such waters, and that neither the Crown nor any private person could assert any special right or exclusive use of highway or of fishery in such waters.<sup>286</sup> However, the Solicitor General’s opinion was offered without any case-law to support it, and made no mention of the exclusive rights which had already been protected by the Crown through licences of occupation as well as treaties.

The Watson opinion, with respect to the question of aboriginal title, would be cast into serious doubt with the Supreme Court of Canada’s rulings in *R. v. Robertson*, and the *Fisheries Reference* cases, *supra*, later in the 19<sup>th</sup> century. However, because an opinion issued by Watson’s successor which repeated Watson’s earlier errors was clearly of significance to the Supreme Court in *Nikal* and *Lewis*, the opinion requires some examination.

Watson’s opinion was clearly based on the English common law as it applied to “sea rights” in tidal waters. It does not appear that he was familiar with the fact that waters within Ontario were non-tidal. Perhaps this is understandable, given a history on the part of his predecessor, W.H. Draper, of confusing the law of tidal waters to non-tidal ones. Attorney General Draper had advised in 1845 in response to a request for a lease of the fishery in the St. Clair River that “the right to fish in *sea and coasts* is a public right,”<sup>287</sup> thereby misapplying a public right of fishing in tidal waters to a non-tidal body of water.

In 1848, dealing with aboriginal interests specifically, Attorney General Draper had again reported that “...the right to fish in public navigable waters in Her Majesty’s dominions is a common public right - not a regal franchise - and I do not understand any claim the Indians

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<sup>285</sup>Hansen, “Development of Fisheries, “ *supra*., note 44 at 7

<sup>286</sup>*Ibid.*

<sup>287</sup>State Book, Upper Canada, NAC, RG 1, State Books, vol. D, Reel C-124 at p. 68, 23 October 1845

can have to its exclusive enjoyment.”<sup>288</sup> However, as earlier discussed, until aboriginal title had been extinguished, fishing in unceded waters was not a public right. Draper’s opinion was incorrect, but would form the basis from which other incorrect legal opinions followed.

Watson’s opinion also wrongly applied the law of the “sea” to inland, freshwater, non-tidal lakes and rivers in which very different common law rules applied. As earlier noted, ownership of fishing rights accompanied ownership of the *solum*. English common-law presumed, conversely, that the owner of the fishery owned the soil beneath it.<sup>289</sup> Exclusive proprietary fishing rights accompanied the title to the bed, except in tidal waters, where the relationship between the ownership of the fisheries and ownership of the *solum* had given way to public rights. As the Privy Council would later state in 1914, in non-tidal waters, fishing is the subject of property and “must have an owner. No public right to fish exists in such waters.”<sup>290</sup>

In tidal waters, according to English common law, rights vested in the Crown between the low and high water marks with a public right of way and public right of fishing; however, where land bordered on tidal waters, the boundary of the water where public rights accrued was fixed as the line set by the average high water mark and below that level and seaward, the land and the bed of the sea was vested in the Crown with fishing rights held in common by the public. Watson stated, erroneously, that the same rules as applied to tidal waters would apply in Upper Canada “insofar as circumstances permit, where our high and low water marks vary so little that one may say, as a general rule, that all waters are public property.”<sup>291</sup>

In fact, the only contemporaneous case which might have supported Watson’s decision was not released until the *following* year. It decided that English common law should not be applied in Canada, on the basis that:

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<sup>288</sup> Letter from Attorney General W.H. Draper to J.M. Higginson, NAC, RG 10, vol. 612, p. 215, 16 April 1848

<sup>289</sup> *A.G. v. Emerson* [1891] AC 649

<sup>290</sup> *Attorney General for British Columbia v. Attorney General for Canada* [1914] AC 153 (P.C.) at 167

<sup>291</sup> Adam Watson to Commissioner of Crown Lands, NAC, RG 10 vol. 323 p. 216143-46, 11 March 1863

If we hold that the rule of common law as to the flux and reflux of the tide being necessary to constitute a body of water a navigable stream or river in this country, then our great lakes and rivers flowing for hundreds of miles, which in many places along their course are the boundary and common highway between this province and a foreign country, must be considered as subject to the incidents of small inland streams, flowing for comparatively a short distance, in a country like England, and subject to exclusive rights of fishing &c. which may be granted by the crown to the proprietors of adjacent land, or other rights which there vest in the owners of soil adjacent to the shores of these streams..<sup>292</sup>

If all waters were indeed public property, as Watson suggested, then surrenders of bays and harbours and other water bodies would not have been required. Nor would water lots have been capable of alienation to adjacent land-owners following surrenders to third parties.

However, while the applicability of the English common law to the Great Lakes and other large navigable bodies of water in terms of riparian rights was in question through much of the 19<sup>th</sup> century, the capacity of the Crown to grant the underlying bed of such waters to third parties following an Indian surrender was never in serious doubt.<sup>293</sup> Water lots extending out to navigable waters had frequently been made as part of land grants to private individuals.

For example, in 1821, an Order-in-Council granted a water lot “upon a Petition of Robert Innis, for the lot nos. 14 and 15 including the water lot, Amherstburg. Upon representation of the Surveyor General of doubt as to the extent of the Water Lot, recommended that it extend to the channel.”<sup>294</sup> John Ewart applied for an extension, three chains in depth, of a water lot already granted to him in front of the town of York.<sup>295</sup> A water lot was approved in front of the Town of York in 1828<sup>296</sup> and in front of Toronto in 1835.<sup>297</sup> In 1837, inhabitants of the town of St. Vincent applied for a tract of land to be reserved as a fishery and landing place. Executive Council minutes indicate that the land had already been granted, but recommended setting

<sup>292</sup>*Gage v. Bates* (1864) Trinity Term, 21 Vic. 116 (Common Pleas) at 119-120

<sup>293</sup>Peggy J. Blair, “Solemn Promises”, *supra*, note 185 at 141

<sup>294</sup>Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. L (microfilm reel #C-103), 2 May 1821, p. 72

<sup>295</sup>Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. P (microfilm reel #C-105), p. 155, 17 April 1832

<sup>296</sup>Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. N (microfilm reel #C-104), pp. 334, 345, 347-8, 3 July 1828

<sup>297</sup>Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. R (microfilm reel

apart a “sufficient space between its northern boundary and Lake Huron for the inhabitants as a fishery.”<sup>298</sup>

The following year, John Jackson asked for a license of occupation for a portion of the fishing grounds on Turkey Point, Charlotteville on the shore of Lake Erie “for which privilege he is willing to pay three pounds per annum.” His application was deferred for a report “on the value of the fishery thereon.”<sup>299</sup>

Of course, such grants could not be made until the aboriginal owners of the lands and waters had first surrendered them. While most references to such surrenders referred to bays, lands covered with waters, or islands being surrendered, there are specific references to water lot surrenders as well. The Credit River Band, for example, in 1842, expressed a desire “to grant to the Bronte Harbour Company two water lots situate on the west side of Trafalgar Street and north and south of Chisolm Street in the said village of Bronte. The Committee of Council consider that the Indians of the Credit are much interested in the construction of the harbor ... Under the circumstances the Committee recommend a sale to the Harbour Company of the two water lots at the price of two pounds ten shillings.”<sup>300</sup> On May 10, 1854, the Chippewas of Sarnia surrendered lands including “ten water lots fronting the River St. Clair.”<sup>301</sup>

Neither Draper’s nor Watson’s opinions attempted to explain why aboriginal people had been asked to surrender lands underlying “public” waters which according to them, aboriginal peoples did not and could not own. Nor did they explain how it was that private parties could obtain title to such “public waters” through water lot grants once those surrenders were obtained.

Yet the Canadian courts had long recognized the capacity of private individuals to own and

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#C-105), p. 123, 26 August 1835

<sup>298</sup>Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. S (microfilm reel #C-106), p. 581, 11 May 1837

<sup>299</sup>Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. T (microfilm reel #C-106), p. 348, 2 August 1838

<sup>300</sup>Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. A (microfilm reel #C-107), p. 433, 3 December 1842

<sup>301</sup>Surrender 71 ½, *Indian Treaties and Surrenders*, *supra*, note 80 at 194

alienate bodies of water, whether these were navigable or not. In 1851, the Court in *Parker and Wife v. Elliott* noted: “[It] is, I believe, not uncommon in letters patent granting lots of land including lakes to mention the quantity uncovered with water ...this does not prevent the land covered with water from passing by the grant if included within boundary lines.”<sup>302</sup> In 1864, in *A.G. v. Perry*<sup>303</sup> it was held that there was nothing prohibiting the Crown from granting lands covered with water, even where navigable, to third parties on the basis that “[i]n this country the practice has obtained in towns and cities for the Crown to grant land covered with water and generally to the owner of the bank when adjacent to a *navigable* stream and grants so made have never been cancelled for want of power in the Crown to make the grant.”<sup>304</sup>

Without that context, the Supreme Court of Canada’s reliance in *Nikal* on a legal opinion rendered by Attorney General James Cockburn in 1866, which simply repeated the Watson opinion, is particularly troubling.

The Cockburn opinion was solicited in direct response to a request from the Indian Affairs Branch in relation to the Saugeen peoples of Upper Canada. In December of 1863, the Cape Croker Band (part of the Saugeen Ojibway Nation) had again stated that they wished a fishing ground reserved to their exclusive use.<sup>305</sup> They wrote to W.R. Bartlett of the Indian Affairs Department saying that if a new *Fisheries Act* were to come into force, they wished to ensure they had a sufficient portion of fishing grounds reserved for the use of their Band.<sup>306</sup> Bartlett’s application on their behalf, dated January 9, 1866 and the issue of the claims put forward “on behalf of Indians to the fisheries in certain waters at and around parts of the Mainland and Islands in the Lakes of Upper Canada”<sup>307</sup> was this time referred to the “Law Advisors of the Crown” for an opinion.

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<sup>302</sup>(1851) U.C.C.P. 471 at 487

<sup>303</sup>(1864) Hilary Term 28 Victoria 329 (Common Pleas)

<sup>304</sup>*Ibid.* at 331 [emphasis added]

<sup>305</sup> W.R. Bartlett to William Spragge, Deputy Superintendent General of Indian Affairs, NAC, RG 10, vol. 549, p. 37, 7 August 1865 referring to petition dated 22 December 1863.

<sup>306</sup>*Ibid.*

<sup>307</sup>Hansen, “Development of Fisheries,” *supra*, note 44 at 8



The new solicitor general, James Cockburn, simply restated Watson's view that Indian people had no claim to exclusive fishing rights.<sup>308</sup> Bartlett's application for a reserve of fishing grounds for the Cape Croker Band was rebuffed on the basis of the Cockburn opinion.<sup>309</sup>

The Supreme Court in *Nikal* placed a great deal of weight on that legal opinion, although in a rather selective quote, they neglected to include some important sections from it. The Supreme Court quoted Cockburn as having written that:

With reference to the claim of the Indians to exclusive fishing rights, my opinion is that they have no other or larger rights over the public waters of this province than those which belong at common law to Her Majesty's subjects in general..... I should say that without an Act of Parliament ratifying such a reservation no exclusive right could thereby be gained by the Indians as the Crown could not by treaty or act of its own (previous to the recent statute) grant an exclusive privilege in favour of individuals over public rights such as this, in respect of which the Crown only holds as trustee for the general public.<sup>310</sup>

The dotted portion left out of the citation, however, stated that:

Previous to the recent statute, the Crown could not legally have granted an exclusive right of fishing on the lakes and Navigable waters but under the 3rd section of that Act the power is conferred on the Commissioner of Crown Lands of granting licences for fishing in favour of private persons, wheresoever such Fisheries are situated, *the only exception is "where the exclusive right of fishing does not already exist by law in favour of private persons."* This exception was intended as I understand to exclude the application of the Act from certain Fishing rights which had been granted under the French law in Lower Canada before the Conquest; it certainly does not apply to the Indian tribes who have acquired no such rights by law *unless it may be contended that in any of those treaties or instruments for the cession of Indian Territory there are clauses reserving the Exclusive right of fishing...* [emphasis added].<sup>311</sup>

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<sup>308</sup> *Ibid.*

<sup>309</sup> A. Russell, Assistant Commissioner of Crown Lands to Indian Branch attaching copy of opinion of James Cockburn, Solicitor General, NAC, RG 10 vol. 323 p. 216137-216138 Reel C-9577, 8 March 1866

<sup>310</sup> *Nikal*, *supra*, note 2 at 188-89. See also Peggy J. Blair, "Prosecuting the Fishery: The Supreme Court of Canada and the Onus of Proof in Aboriginal Fishing Cases" (1997) *Dalhousie Law Journal* 17 at 62, also Blair, "Solemn Promises," *supra*, note 185, at 136

<sup>311</sup> A. Russell, Assistant Commissioner of Crown Lands to Indian Branch, *supra*, note 309

Cockburn's opinion referring to "cessions," of course, was referring to the procedure established under the *Royal Proclamation* concerning surrenders, a point the Supreme Court neglected to mention. In other words, the Cockburn opinion implicitly acknowledged that exclusive fishing rights could be "reserved" and therefore had been part of the bundle of rights associated with the "Indian Territory." The balance of his opinion, however, was far from accurate. It contained not a single case or authority to support it, and appears to have been written without the benefit of any research in the area. Moreover, Cockburn's statement that an Act of Parliament was required to give effect to exclusive rights is not supported by the law of the time. In ceded territories, the Crown has always had the right to legislate without Parliament.<sup>312</sup> There is no requirement of Parliamentary approval to the signing or ratification of a treaty with aboriginal peoples.<sup>313</sup>

The Cockburn opinion has been challenged by a legal scholar, Mark Walters, who argues convincingly that whatever proprietary interest in lands the Crown obtained as a result of settlement of areas occupied by aboriginal peoples, that interest must necessarily have been diminished to the extent necessary to accommodate the aboriginal interest in land.<sup>314</sup> Put simply, public rights in lands did not exist as a matter of English common law until the aboriginal interest was dealt with. As Walters writes:

[A]lthough individuals lawfully entering this Indian territory might have carried the English municipal law with them to govern their relations with each other, there is no basis upon which to argue that English municipal law applied to the internal affairs of Indian nations or to the determination of their rights to land and resources.<sup>315</sup>

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<sup>312</sup>*Campbell v. Hall* (1774) Lofft 655

<sup>313</sup>See Peter Hogg, *Constitutional Law of Canada* (3d ed.) (Toronto: Carswell, 1992)

<sup>314</sup>Walters, *Aboriginal Rights to Fisheries*, *supra*, note 20 at 18

<sup>315</sup>*Ibid.* at 22. In other British colonies and in the United States in which common law has been applied, indigenous peoples have been recognized to have proprietary rights in waters, and to hold exclusive fishing rights, in certain instances as a result of custom and usage. In Australia, for example, these rights extended even within tidal waters, which could be occupied exclusively by a single family group, Desmond Sweeney, "Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia," (1993) *U.N.S.W. Law Journal*, 101-160, fn 180. In "open waters," any indigenous person could fish in those areas of the ocean over which no other indigenous group exercised exclusive rights, *ibid.*, at 116-117. While the custom of those holding the right was to share it, consent was required. As stated in *Upper Daly Land Claim*, by Kearney, J "it is common throughout aboriginal Australia that those who have the right to forage have the right to be asked first by others who wish to

Walters concludes that the Cockburn opinion was ill-founded in that it disregarded aboriginal title. He notes that the imperial common law “doctrine of continuity” applied in recently settled colonies, and provided that aboriginal title to lands and resources, as well as customary laws and government, continued in force. No “public right” under English municipal law could vest where First Nations held exclusive rights to fisheries and waterways<sup>316</sup> until surrenders were obtained. Cockburn’s opinion simply assumed public rights had vested, even where cessions had not been obtained. This, of course, was entirely incorrect.

While Cockburn’s opinion contemplated that treaties or instruments could expressly reserve the exclusive right of fishing, he concluded that such rights could not be “granted” since the Crown could not “grant” an exclusive privilege in favour of individuals prior to the *Fisheries Act*. In expressing this viewpoint, Cockburn either ignored or misunderstood the nature of pre-existing aboriginal title. His opinion ignored the fact that licences of occupation conveying exclusive fishing rights had been confirmed by the Imperial Crown long before the *Fisheries Act*. Where these were not confirmed, it was not because of a concern over public rights in the fisheries, or any want of jurisdiction, but because the title to the fishing islands had not yet been surrendered.<sup>317</sup>

Cockburn’s opinion is problematic for other reasons. As Walters notes:

It is premised upon the assumption that upon the assertion of British sovereignty exclusive fisheries created under French law for French settlers continued in force but that no such exclusive fisheries could exist and continue in force for aboriginal peoples under aboriginal custom. In other words, the opinion is informed by an unequal application of legal principle. Either the imperial common law principle of continuity applied upon the assertion of British sovereignty or it did not; if it applied to save exclusive fisheries recognized in areas governed by French

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do so,” in Report 31, *The Recognition of Aboriginal Customary Laws* (Australian Law Reform Commission, 1986) vol. 1 at 45

<sup>316</sup>*Ibid.*

<sup>317</sup>This point was the subject of express comment in *R. v. Jones, supra*, note 4 at 438 in which Judge Fairgrieve noted that no licence of occupation was issued to confirm the arrangements between the Saugeen Chiefs and one Cayley, because the colonial government could only issue such licences in respect of Crown lands and could not do so in relation to the Saugeen’s fisheries because they had not been surrendered.

law, then it can be argued that it also saved exclusive fisheries recognized in areas governed by aboriginal custom. Of course, Cockburn stated that the effect of the Fisheries Act was to save exclusive French fisheries in Lower Canada where French civil law, not English common law, continued to govern. If it is accepted that exclusive aboriginal fisheries could have survived the assertion of British sovereignty as an incident of aboriginal title pursuant to the imperial principle of continuity ..... the question becomes whether these exclusive aboriginal fisheries survived the 1792 Act introducing English common law into Upper Canada. *Given his assumptions, Cockburn did not turn his mind to this question.*<sup>318</sup>

There was no mention by the Supreme Court in either *Nikal* or *Lewis* of the flaws in Cockburn's reasoning, such as his failure to recognize the Crown prerogative to negotiate treaties with aboriginal peoples.<sup>319</sup> Cockburn's conclusions that aboriginal fishing rights had to be "granted" by the Crown was adopted without question. The Court's failure to consider aboriginal title, and its acceptance of Cockburn's opinion as evidence that exclusive aboriginal rights could not exist is troubling, particularly in light of the Court's later decision in *Delgamu'ukw*, in which the Court found that aboriginal title conveyed exclusive use of the lands it protected.<sup>320</sup>

There is another good reason, however, to be skeptical of the Cockburn opinion as accurately reflecting either Crown policy or the common-law. The Supreme Court of Canada's 1874 decision in *R. v. Robertson* effectively undermined the conclusions Cockburn had by finding that pre-existing private rights defeated public rights in navigable waters and were not simply confined to Lower Canada, as Cockburn had suggested. Surprisingly, the decision in *Robertson*, a leading decision of the time, was not cited by the Supreme Court in either *Nikal* or *Lewis*.

## 2. The Decision in *R. v. Robertson*

On January 1, 1874 the Minister of Marine and Fisheries, acting under the terms of the federal *Fisheries Act*, executed a lease of a fishery for a nine year period in the Miramichi River, a generally navigable river described in the judgment as non-navigable at certain times of the

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<sup>318</sup>Walters, *Aboriginal Rights to Fisheries*, note 20 at 49-50 [emphasis added]

<sup>319</sup>See Hogg, *supra*, note 313

<sup>320</sup>*Delgamu'ukw*, *supra*, note 26 at para. 112

year. The lease was soon challenged. The Supreme Court of Canada in *The Queen v. Robertson*<sup>321</sup> held that an exclusive right of fishing in the Miramichi River existed in the parties who had received a prior conveyance of parts of the river before Confederation, and that the Minister of Marine and Fisheries therefore had no authority under the *Fisheries Act* to issue a lease of fishing rights in that portion of the river.

In dismissing the notion of public fishing rights in navigable waters, Justice Ritchie held that the public right of highway or passage over navigable waters did not necessarily mean the public held a right to fish in those waters in any event.

I am of the opinion that the Miramichi River from Price Bend to its source is not a public river on which the public have a right to fish and though the public may have an easement or right to float rafts or logs down and a right of passage up and down in canoes &c in times of freshnet in the spring and autumn or whenever the water is sufficiently high to enable the river to be so used, *I am equally of opinion that such a right is not in the slightest degree inconsistent with an exclusive right of fishing ... There is no connection whatever between a right of passage and a right of fishing.* [emphasis added]<sup>322</sup>

The Court noted that ownership of fisheries *per se* imported ownership of the *solum*, or underlying bed.<sup>323</sup> Strong, J. stated that strictly speaking, the rights at issue were not riparian rights, which were only rights of access,<sup>324</sup> but territorial rights arising from the *ad medium filum aquae* presumption which accompanied ownership of adjacent lands.<sup>325</sup> The application of the *ad medium filum aquae* presumption to a navigable body of water again undermines the conclusion reached in *Nikal* and *Lewis*. More importantly, perhaps, Justice Strong found that not even the transfer of lands to the provinces under the *British North America Act* could interfere with such pre-existing rights.

No Act, I will undertake with confidence to assert can be found in the statute books of New Brunswick from the date of the erection of the province to the day of Confederation taking away or interfering with (except as such general regulations might interfere with) the private rights of the individual proprietors of lands through which such rivers run, still less to take

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<sup>321</sup> *The Queen v. Robertson*, (1874) 6 S.C.C. 53 (S.C.C.) [hereafter cited as *Robertson*]

<sup>322</sup> *Ibid.*, at 114

<sup>323</sup> *Ibid.* at 119

<sup>324</sup> *Ibid.* at 132

<sup>325</sup> *Ibid.*

from them the enjoyment of their rights of fishing and to authorize the leasing of the same to others to the exclusion of the owner.<sup>326</sup>

In other words, according to the Court, where a right of exclusive fishing existed before Confederation, the mere passage of legislation could not take it away, although it could be regulated in general terms. In consequence, the Court held that the federal Minister of Marine and Fisheries could not issue a fishing lease to third parties where the underlying beds were owned by either the province or an individual<sup>327</sup> and that any lease attempting to confer proprietary rights to others in such waters was illegal.<sup>328</sup>

Although at this time, the Dominion Government had restricted aboriginal people from fishing even for domestic use except under lease or licence,<sup>329</sup> and had authorized others to fish commercially within unsundered waters, to the exclusion of aboriginal peoples, the Court held that the federal government had no constitutional authority to restrict any proprietary rights.<sup>330</sup> Federal jurisdiction over "Inland and Sea Fisheries," it concluded, was not enacted in reference to property and civil rights.<sup>331</sup>

The Court in *Robertson* determined that navigability alone could not remove exclusive rights in non-tidal waters, for "even in a river so used for public purposes, *the soil is prima facie in*

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<sup>326</sup>*Ibid.*

<sup>327</sup>*Ibid.* at 124

<sup>328</sup>*Ibid.* at 125

<sup>329</sup>The leases and licences referred to in the 1868 fisheries legislation, *An Act for the Regulation of Fishing and Protection of the Fisheries* (1868) 31 Vict. c. 60, were clearly those related to the commercial fishery, and not angling, although a distinction was apparently drawn between angling by non-aboriginal people (which was unrestricted) and fishing for food purposes by Indians which was now restricted to "certain Indians" by leases, section 17. Other provisions of the *Act* appear to have been directed specifically against aboriginal people, in that the use of traditional means of harvesting whitefish and pickerel for commercial purposes was now prohibited, including the capture of "salmon, trout ..of any kind, maskinoge, winnoniche, bass, bar-fish, white-fish, herring or shad by means of spear, grapnel hooks, negog or nishagans, provided, the Minister may appropriate and licence or lease certain waters in which certain Indians shall be allowed to catch fish for their own use ... and may permit spearing in certain localities." [emphasis added] Since spears, for example, were used almost exclusively by aboriginal people to capture fish moving inshore to spawn, the prohibition against their use necessarily affected the means by which aboriginal fishermen had traditionally harvested fish.

<sup>330</sup>*Robertson, supra*, note 321 at 120

<sup>331</sup>*Ibid.*

*the riparian owners and the right of fishing private.*” [emphasis added].<sup>332</sup> This line of reasoning was wholly consistent with the common law of the time to the effect that exclusive fishing rights could co-exist with public rights of navigation.<sup>333</sup>

With respect to the right of public fishing in large navigable non-tidal rivers, Justice Strong indicated the answer depended on whether the beds of such rivers were vested in the Crown in right of the Dominion or in the owners of adjacent lands, “inasmuch as the right of fishing would be in the first case in the public as of common right but in the second vested in the riparian proprietors.”<sup>334</sup> However, other fisheries were “certainly *not*” public fisheries “open of common right to all those who “may chose to avail themselves of them.”<sup>335</sup>

It would seem that on the basis of *Robertson* alone, the opinions of the Crown law advisors, Draper, Watson and Cockburn, had been cast in serious doubt. More importantly, the Supreme Court of Canada in *Robertson*, had concluded that navigable waters were *not* the subject of common public rights, a decision in direct conflict with that reached in both *Nikal* and *Lewis*.

Both *Nikal* and *Lewis* rested their conclusion that the *ad medium filum aquae* presumption did not apply in navigable waters on English common law of the 19<sup>th</sup> century. However, in *Robertson*, the Supreme Court held that the English common law was decisive on the point of private fishing rights insofar as non-tidal waters were concerned, and that private proprietary rights overrode public rights, whether the waters were navigable or not.<sup>336</sup>

Neither *Nikal* nor *Lewis* cited a leading contemporary decision of the Supreme Court of Canada, which if applied, would have countered the conclusion that public rights existed in navi-

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<sup>332</sup>*Ibid.*, citing from *Murphy v. Ryan* at page 118. See Walters, *Aboriginal Rights to Fisheries supra*, note 20 at 10

<sup>333</sup>See Walters, *Aboriginal Rights to Fisheries supra*, note 20 at 10. Also, see *Mayor of Lynn v. Turner* (1774) 1 Cowp. 86; *Anon* (1808) 1 Camp 517n; *Williams v. Wilcox* (1838) 8 Ad & E 314 at 333-34

<sup>334</sup>*Robertson, supra.*, note 321 at 118

<sup>335</sup>*Ibid.* at 132 [emphasis added]

<sup>336</sup>*Ibid.* at 117

gable waters, or that navigability alone was determinative of the *ad medium filum aquae* presumption. That the *Robertson* decision was rendered during the historical period under review makes its omission from consideration by the Supreme Court in *Nikal* and *Lewis* that much more troubling.

### 3. Private Rights in Navigable Waters

The Supreme Court's finding in *Nikal* and *Lewis* that only public fishing rights could be recognized in navigable waters under English common law in the 19<sup>th</sup> century was quite erroneous, and not just because of the *Robertson* decision. A review of 19<sup>th</sup> century English common law once again demonstrates the need for context.

There are many examples of private fishing rights being recognized in navigable waters based on ownership of the *solum*. While at least one early Canadian case in *obiter* argued that the right of navigation included the right of fishing,<sup>337</sup> it acknowledged that the bulk of English authorities were to the contrary.<sup>338</sup> Higher courts uniformly drew a distinction between the public right to navigate, and the private right to fish.

In 1884, for example, the Judicial Committee of the Privy Council had to decide whether a statute permitting the public to float timber on rivers applied to the Mississippi River. In *obiter* remarks, the Court stated that the general English common law rules applied in Ontario, and therefore the owners of land bordering a "running stream, *whether it be navigable or not*," owned the soil under the stream.<sup>339</sup> Lord Blackburn questioned whether it was even possible for there to be a public right of navigation on navigable rivers in Ontario, given that this right would have to be established by user or prescription, concepts which he noted might not be applicable to a recently settled territory.<sup>340</sup>

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<sup>337</sup> *Gage v. Bates* (1858) Common Pleas 21 Victoria 116 at 121

<sup>338</sup> *Ibid.*

<sup>339</sup> *Caldwell v. McLaren* (1884) 9 App Cas 392 at 404-5 [emphasis added]

<sup>340</sup> *Ibid.*



The same question arose in New Zealand in 1900, where English common law also applies. In *Mueller v. The Taupiri Coal-Mines Ltd*, the Court questioned whether any public rights of navigation could vest in navigable waters held by the Maori. Edwards J. stated that “it appears to me to be impossible to infer any dedication by the Crown so long as the soil in the river remained Native Land and in the possession of the Native owners.”<sup>341</sup>

In early American cases, which also relied on English common law, the same distinction was drawn between the right to fish and the right to navigate. In 1822, in *Hooker v. Cummings*,<sup>342</sup> for example, the English common law was applied to fisheries in the Salmon River, a navigable non-tidal river flowing into Lake Ontario. Spence, J. held that because the river was a freshwater river in which the tide did not “ebb and flow”, the owner of the land “has *prima facie*, the right of fishing ... and it was not inconsistent with this right that the river was liable and subject to the public servitude, for the passage of boats.”<sup>343</sup> Similarly, in *Adams v. Pease*, it was held that the owners of land adjacent to the Connecticut River “above the flow and ebb of the tide... have an exclusive right of fishing opposite to their land, to the middle of the river, and the public have an easement in the river, as a highway...”<sup>344</sup> The public right of navigation did not extend so far as to divest the owners of adjacent banks of their exclusive rights of the fisheries therein.<sup>345</sup>

In *Lewis*, the Supreme Court decided that for the purposes of the appeal, it would assume without deciding that the *ad medium filum aquae* presumption applied to reserves.<sup>346</sup> Justice Cory’s statement in *Nikal* that “from the earliest times, the Courts and legislatures of this country have refused to accept the application of a rule developed in England which is singularly unsuited to the vast non-tidal bodies of water in this country,”<sup>347</sup> was clearly an over-

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<sup>341</sup>(1900) 20 N.Z.L.R. 89 (C.A.) at 123

<sup>342</sup>20 Johns 90 (N.Y., 1822)

<sup>343</sup>*Ibid.* at 99

<sup>344</sup>2 Conn Rep 481, at 100

<sup>345</sup>*Ibid.* The exception applied in the United States was with respect to large lakes and waters forming an international boundary, *Champlain & St. Lawrence RR. v. Valentine*, 19 Barb 484 (N.Y.S.C., 1853).

<sup>346</sup>*Lewis, supra*, note 3 at 149

<sup>347</sup>*Nikal, supra*, note 2 at 201

statement.

The *ad medium filum aquae* presumption has been applied in other common law jurisdictions as one which can *only* be rebutted by the Crown by unique facts, such as “if at the time of the grant the river is used as a highway, and the only practicable highway to the land is upon its banks,”<sup>348</sup> or where grants have been made in time of war and the Crown might have required the soil to improve navigation.<sup>349</sup>

The doctrine of a presumed grant *ad medium filum* is based upon a presumption which is rebutted if it be shown that there were facts known to both parties at the time of the grant which showed that it was the intention of the grantor to do something which made it necessary for him to retain the soil in the road or the bed of the stream ... It depends largely upon whether or not it appeared when the grant was made to be to the advantage of the grantor to retain the soil.<sup>350</sup>

In the facts behind the *Lewis* case, for example, shortly after the Cheakamus Indian Reserve # 11 was allotted by a Joint Reserve Commission in November 1876,<sup>351</sup> the federal government asked for explicit recognition by the province of the foreshore rights of the Indians. The province indicated that was not necessary, since the policy of the provincial government was to recognize and fully protect the rights of the Indians in the same way as other upland owners or occupiers of land.<sup>352</sup> Since this was only shortly after the *Robertson* decision had been released upholding pre-existing proprietary rights within navigable waters, one might assume that if the provincial Crown had intended as the alleged “grantor” of rights to retain the soil in the river, the provincial Crown would have said so, however dubious its right to do so may have been. Instead, the province’s response indicated that explicit recognition of foreshore rights was not required because these were already recognized.

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<sup>348</sup>*The King v. Joyce* (1904) 25 N.Z.L.R. 78 (C.A.) at 95 citing *Mueller v. Taupiri Coal Mines Ltd* (1900) 20 N.Z.L.R. 89 (C.A.)

<sup>349</sup>*Ibid.* at 99-100

<sup>350</sup>*Ibid.*

<sup>351</sup>*Lewis, supra*, note 3 at 141. It was one of the areas surveyed in 1881 pursuant to article 13 of the Terms of Union between British Columbia and the Dominion in 1871. In contemplation of the transfer of the Reserve to the federal government, a Memorandum of Understanding was entered into on March 22, 1929 and adopted by both levels of government.

<sup>352</sup>*R. v. Lewis* [1989] 4 C.N.L.R. 133 (B.C. Co. Ct.) at 134 referring to paragraph 5 of the Memorandum.

In 1876, the Crown had no need to “withhold” the fisheries from a land grant in any event, since fish were considered to be an unlimited and inexhaustible resource. There was at the time no commercial fishery to speak of and little in the way of sport fishing. This was a point discussed by the Supreme Court of Canada in *Jack v. The Queen*.<sup>353</sup> The policy in force in the 1870s, at least in British Columbia, was one of not regulating Indian fisheries. This policy was apparently predicated on the assumption the fishery resource was inexhaustible and that “fish being a staple of the Indian diet, it was better to allow them unlimited fishing in order to prevent any hostilities as the land was gradually occupied by non-Indians.”<sup>354</sup>

That public rights had never existed in unsurrendered Indian territories, in any event, was made explicit in the *Fisheries Reference* which followed soon after the 1874 decision in *Robertson*, *supra*.

#### 4. The *Fisheries Reference* cases

In an apparent response to the *Robertson* decision, which recognized that the bed of waters within the provinces where not privately owned belonged to the provinces, the Province of Ontario passed its first fisheries legislation in 1885.<sup>355</sup> This legislation contained terms almost identical to the federal *Fisheries Act*.

The *Ontario Fisheries Act, 1885* applied to all fisheries and rights of fishing in respect of which the Legislature of Ontario had authority to legislate.<sup>356</sup> Like the federal legislation, the

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<sup>353</sup>In *Jack v. The Queen* [1979] 2 C.N.L.R. 25 (S.C.C.), the appellants had been convicted of fishing during a prohibited period. Their defence was based solely on the Terms of Union of 1871, by which British Columbia joined Confederation.

<sup>354</sup>*Ibid.*

<sup>355</sup>*An Act to Regulate the Fisheries of this Province* (1885) 48 Vict. c. 9

<sup>356</sup>*Ibid.*, section 2. In it, Crown lands were defined as including “such ungranted Crown lands or Public lands or Crown domain as are within and belong to the Province of Ontario *whether or not any waters flow over or cover the same.*” The Act clarified: “The word “waters” shall be held to mean and include such of the waters of any lake, river, stream or water-course wholly or partly within the

Ontario *Act* also permitted the granting of a lease or licence except where an exclusive right of fishing already existed by law.<sup>357</sup> In March, 1886 John S. Thompson, the Minister of Justice expressed concern to the Governor General that the Province's legislation encroached on Dominion authority. While noting that the administration of the Act might lead to some conflict with the administration of the federal fisheries, the Minister recommended against disallowance.<sup>358</sup>

The Ontario Game and Fish Commission of 1890-91 mentioned in their study of Ontario fisheries that because of the constitutional issues in the fisheries, they found it difficult to make recommendations as to what to do about them.<sup>359</sup> In 1892, however, the provincial legislature passed *An Act for the Protection of Provincial Fisheries*.<sup>360</sup>

The Acting Minister of Justice, J. Aldric Ouimet, reported that the application of the Act amounted to an infringement of the exclusive power of the federal Parliament to legislate on the subject of the sea coast and inland fisheries. An arrangement was reached with Ontario to refer "the constitutionality of these provisions as well as other contentions respecting the fishery laws."<sup>361</sup> The existence of parallel licensing authorities under the federal *Fisheries Act* and

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said Province as flow over or cover any Crown Lands."

<sup>357</sup>*Ibid.* Section 24 mentioned aboriginal fisheries specifically: "The Commissioner may appropriate and licence or lease certain waters in which certain Indians shall be allowed to catch fish for their own use and at whatever manner and time and subject to whatever terms and conditions are specified in the licence or lease."

<sup>358</sup> Report of the Honourable the Minister of Justice approved by his Excellency the Governor General in Council on March 6, 1886, in W.E. Hodgins, *Correspondence, Reports of the Ministers of Justice and Orders in Council upon the Subject of the Dominion and Provincial Legislation, 1867-1895, compiled under the direction of the Honourable the Minister of Justice* (Ottawa: Government Printing Bureau, 1896) at 198

<sup>359</sup> See Peter C. Thompson, "Institutional Constraints in Fisheries Management," (1974) 31 *J. Fish Res. Board Can.* 1975 at 1977

<sup>360</sup> (1892) 55 Vict. c. 10. Some of the provisions of this Act seemed disproportionately weighted against aboriginal fishermen. Section 7, for example, provided that no person shall take or catch or kill in any provincial water or carry away the greater number than 50 speckled or brook trout on any one day, thereby precluding the use of seines or other nets. Section 9 specified that "no person shall at any time fish for trout, pickerel or maskinonge in any such waters by any other means than angling by hook and line in such waters," thereby effectively removing the ability of aboriginal fishermen to use seine nets, gill nets or spears, technologies unique at that time to aboriginal fishermen. Section 13 imposed a closed season, and imposed penalties for any violation.

<sup>361</sup> Report of the Honourable the Minister of Justice approved by His Excellency the Governor General

the provincial *Fisheries Act* raised a number of questions concerning the respective rights of Canada and Ontario, as well as Nova Scotia and British Columbia, to exercise jurisdiction within provincial boundaries. In February, 1894 this issue was referred to the Supreme Court of Canada for "hearing and consideration."<sup>362</sup>

In its argument, Ontario contended that the beds of all navigable waters within the province became the legislative responsibility of the province, together with the right of fishery, which was therefore "in the public as of common right within the territorial rights of the province."<sup>363</sup> However, when "public waters" were discussed, unsundered Indian territories, including those covered with water, were not considered to be public waters vested in the province under section 109 of the *British North America Act*. Instead, when the question of the constitutionality of the provincial fisheries legislation finally reached the Supreme Court of Canada in 1895, Indian lands and waters were conceded to be within exclusively federal jurisdiction, with the beds vested in the Dominion government.<sup>364</sup> Question 11, to be resolved by the Court, stated:

Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada ch. 95 intituled "An Act respecting Fisheries and Fishing" or any other of the said provisions of the said Act, so far as these respectively relate to fishing in waters, *the beds of which do not belong to the Dominion and are not Indian lands?* [emphasis added]<sup>365</sup>

According to arguments presented, counsel for the federal government claimed exclusive jurisdiction over "waters on lands reserved for Indians... While the Indian title remains, and while the administration and control is vested in the Dominion Government, we say the property in Indian lands is vested in the Dominion Government... That is all I intend to say on the questions as to the right in the beds - that is to say, of the soil under the water - of the different

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in Council on the 2nd June, 1893 in Hodgins, *Correspondence, Reports of the Ministers of Justice*, *supra*, note 358 at 238.

<sup>362</sup>Hansen, "Development of Fisheries," note 44, at 15

<sup>363</sup>*Ibid.*

<sup>364</sup>*In the Matter of Jurisdiction over Provincial Fisheries* (1895) 26 S.C.R. 444 (S.C.C.) [hereafter cited as *Re Provincial Fisheries*]

<sup>365</sup>*Ibid.* at 449

beds of the Dominion.”<sup>366</sup>

The Supreme Court of Canada held that, at the time of Confederation, the beds of all lakes, rivers, public harbours and other waters within the territorial limits of the provinces which had not been granted by the Crown were vested in the provincial Crown under section 109 of the *British North America Act* subject only to the exception respecting existing trusts and interests. These exceptions included the beds of public harbours<sup>367</sup> and unsurrendered Indian lands covered with water which were vested in the Dominion and therefore not considered to be provincial waters in which provincial jurisdiction over proprietary rights would fall:

...within the expression of provincial waters, I include all navigable waters within the boundaries of a province whether tidal or non-tidal *excepting only such waters as belong to the Dominion, that is to say, waters, the beds or soil of which are vested in the Dominion and all streams in unsurrendered Indian lands...* the 24th subsection of section 91 giving the right to legislate as to lands reserved for the Indians *comprehends the right to legislate respecting waters in unsurrendered Indian territory. Over these two latter descriptions of waters Parliament has, I concede, exclusive jurisdiction.* [emphasis added]<sup>368</sup>

The Supreme Court of Canada had been asked in the *Fisheries Reference* if the Dominion Parliament had any jurisdiction in respect of fisheries “except to pass general laws not derogating from the property in the lands constituting the beds of such waters.”<sup>369</sup> The answer was that the Dominion Parliament “has no jurisdiction in respect of fisheries (other than fisheries in what have already been described as Dominion waters and the waters in unsurrendered Indian lands) except to pass general laws as those specified in this question such as are pointed out as *intra vires* of Parliament in the case of *The Queen v. Robertson*.”<sup>370</sup> As a result, section 4 of the *Fisheries Act*, when enforced in areas outside these exemptions, was determined to be *ultra vires*.

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<sup>366</sup>*Ibid.* at 459

<sup>367</sup>*Ibid.* at 514, Chief Justice Strong, King concurring.

<sup>368</sup>*Ibid.* at 533 [emphasis added]

<sup>369</sup>*Ibid.* at 449, question 12

<sup>370</sup>*Ibid.*

In 1898, the *Fisheries Reference* finally made its way to the Privy Council.<sup>371</sup> Once more, it was clear from the questions placed before the Court that there was no issue concerning federal jurisdiction over fisheries within aboriginal waters. The question for the Court was again posed as whether the Dominion Parliament had jurisdiction to pass section 4 of the *Act respecting Fisheries and Fishing* relating to fishing in waters, “the beds of which do not belong to the Dominion and are not Indian lands?”<sup>372</sup>

As for only public rights existing in the post-Confederation period, in the *Fisheries Reference*, the Privy Council again noted that fisheries could be owned exclusively prior to Confederation, stating:

Their Lordships are of the opinion that the 91st section of the British North America Act did not convey to the Dominion any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading. “Sea-coast and Inland Fisheries”, in s. 91. *Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces* respectively remained untouched by that enactment. [emphasis added]<sup>373</sup>

Since the overall decision held that both the federal and provincial governments had exceeded their respective jurisdictions, there remained considerable confusion as to which level of government could act to regulate certain aspects of the fisheries. The immediate result of the decision appears to have been a delegation by the federal government of its authority over to the provincial government.<sup>374</sup> No documentary evidence of the agreement exists.<sup>375</sup> Meetings

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<sup>371</sup> *A.G. for the Dominion of Canada v. A.G. Ontario, Quebec and Nova Scotia* [1898] AC 700 (*Privy Council*), [hereafter cited as the *Fisheries Reference*]

<sup>372</sup> *Ibid.* at 703, question 11

<sup>373</sup> *Ibid.* 712, 716. This did not mean that the provinces had the right to enact regulations relating to the manner of fishing. The court held that the sections of the 1892 Ontario *Act for the Protection of Provincial Fisheries* consisted almost exclusively of provisions relating to the manner of fishing in provincial waters. The court noted that “regulations controlling the manner of fishing are undoubtedly within the competence of Dominion Government.. For these reasons their Lordships feel constrained to hold that the enactment of fisheries regulations and restrictions is within the exclusive competence of the Dominion Legislature and is not within the legislative powers of the Provincial Legislatures.”

<sup>374</sup> As noted by Justice Cory of the Ontario High Court of Justice, as he then was, in *Re. Shoal Lake Band of Indians No. 39 and the Queen in Right of Ontario* [1980] 1 C.N.L.R. 94 (Ont. H.C.J.) at 101, delegation was intended to avoid any difficulties that might arise as a result of the overlapping jurisdiction.

held between the federal minister of Marine and Fisheries and the Premier of Ontario following the 1898 ruling, however, resulted in an arrangement whereby the "Government of Ontario assumed her rights in full and ... administer[ed] the issue of Fishery leases and licences,"<sup>376</sup> excluding, of course, any right to prejudice treaty rights, or to prejudicially affect any Indian rights in unsundered territories.

In fact, the immediate impact of the Privy Council's ruling in the *Fisheries Reference* case in 1898 appears to have been an acknowledgement by the federal Crown that it had no authority to dispose of unsundered Indian waters by granting water lot grants to third parties. In 1900, J.D. McLean, the Secretary of Indian Affairs in Ottawa, wrote to William Simpson, the Indian Lands Agent in Wiarton, that:

In reply to your letter of the 12th Instant, enclosing an application from the Municipal Corporation of the Town of Wiarton to purchase water lots opposite N ½ of Lot 9 and Lot 10, East of Berford Street, Wiarton, I beg to inform you that, under the judgment delivered by the Judicial Committee of the Privy Council in the Provincial Fisheries Case, *it is observed that water lots adjoining Indian Lands or Indian Reserves do not appear to belong to the Crown and are not at the disposal of this Department... In future you will kindly not entertain any applications for water lots in front of Indian Lands in navigable waters.*[emphasis added]<sup>377</sup>

The initial ruling in the *Fisheries Reference* by the Supreme Court in 1895 had at least implicitly supported the arguments advised throughout this period by Indian Affairs that exclusive aboriginal fishing rights could exist within navigable waters. While the province now

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<sup>375</sup> An informal agreement between the Governments of Canada and Ontario in 1899 is referred to in a federal Order-in-Council, PC 714 dated May 8, 1926 [copy on author's file]; however the Department of Fisheries and Oceans, Canada has confirmed that no documentary evidence of the agreement is extant, Letter from M.K. Farquhar, Chief, Conservation and Enhancement Resource Allocation Branch, Pacific, Arctic and Inland Fisheries Operations, Department of Fisheries and Oceans, dated 19 April 1996 [copy on author's file].

<sup>376</sup> Hansen, "Development of Fisheries," *supra*, note 44 at 16

<sup>377</sup> J.D. McLean to William Simpson, 17 March 1900, reference supplied by Dr. Victor Lytwyn, [citation not provided: copy on author's file.] As well, section 41(2) of the 1897 Ontario statute remained in effect. Hansen, *supra*, note 44, argues that this means that Ontario assumed responsibility for the administration of Indian fisheries as well, suggesting the amendment followed the Privy Council decision of 1898 by agreement. However, the amendment to the Ontario fisheries legislation making it without prejudice to aboriginal and treaty rights was enacted in 1897, before the Privy Council had ruled on the *Fisheries Reference* and well before any agreement to delegate federal responsibili-



clearly had a proprietary interest within provincial waters as a matter of "Property and Civil Rights," such that the province could permit the public to fish in provincial waters, the positions taken by counsel before the Court had conceded that unsurrendered waters did not fall within provincial jurisdiction.

Ontario acknowledged this restriction in changes made to its legislation following the first *Fisheries Reference* decision, issued in 1895. In 1897, Ontario passed a new piece of legislation, *An Act Respecting the Fisheries of Ontario*.<sup>378</sup> In recognition of the limits on its authority, the *Act* made it clear that Ontario had no authority to authorize any interference with navigation of navigable waters, a purely federal responsibility.<sup>379</sup> There was an important amendment to Ontario's legislation, in fact, which recognized that its jurisdiction over public waters did not extend into unsurrendered Indian lands and could not interfere with treaty rights or unsurrendered claims. Section 41(2) of the provincial legislation stated:

Provided, nevertheless, that nothing contained herein shall prejudicially affect any rights specially reserved to or conferred upon Indians by any treaty or regulation in that behalf made by the Government of Canada nor shall anything herein apply to or prejudicially affect the rights of Indians, if any, in any portion of the Province *as to which their claims have not been surrendered or extinguished*. [emphasis added]<sup>380</sup>

Since the Privy Council's later ruling was predicated on the same concession, it had no effect on this legislation.

### C. Interdepartmental Disagreements and Post-Confederation Conflict

The Supreme Court in *Nikal* stated that the pre-Confederation policy of treating Indians in the same manner as non-Indians with respect to the allocation of fishing grounds for commer-

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ties to the province had been reached.

<sup>378</sup>(1897) 60 Vict. c. 9

<sup>379</sup>*Ibid.*, section 2

<sup>380</sup>A further change stated that patents of land including navigable waters could be the subject of exclusive fishing rights but only where the grant was express, s. 47.

cial use and the rejection of claims to exclusive use or control of any public waters for the purposes of fishing<sup>381</sup> was maintained in the post-Confederation period.<sup>382</sup> That there were indeed different policies at different times has already been discussed, but a review of the post-Confederation period again points to the need for context, and suggests the Court's conclusions were ill-founded.

The Supreme Court of Canada, in making its finding on the post-Confederation period, referred to a circular from W.F. Whitcher dated December 17, 1875.<sup>383</sup> Interestingly, Whitcher, a bureaucrat whose name appears prominently in the period, referred in the circular to a system of licencing which would "ensure free and *exclusive* use of fishery grounds" for Indians, references not highlighted by the Court in its recitation of the correspondence.

Whitcher, at the time the Dominion Commissioner of Fisheries, was not receptive to the notion of aboriginal exclusive fishing rights. If his correspondence alone is reviewed, it would again seem to the uninformed reader that Crown policy was firmly against the recognition of such rights in favour of public ones. For example, in the circular quoted by the Supreme Court, Whitcher sent a Department Marine and Fisheries Circular to Fishery Overseers which stated that:

Certain circumstances ...render it desirable to direct your attention to the exact legal status of Indians in respect of the Fishery Laws.

Fisheries in all the public navigable waters of Canada belong *prima facie* to the public and are administered by the Crown under Act of Parliament ... Indians enjoy no special liberty as regards either the places, times or methods of fishing. They are entitled only to the same freedom as white men, and are subject to precisely the same laws and regulations... There seems to be an impression in some quarters that exclusive control of fishing in connection with Indian properties belongs to the resident Indians and that they are at liberty to remove the fishing gear of White men who resort to these fisheries under leases or licences granted by the Crown. This impression is alike erroneous, mischievous and unfortunate. No such exceptional power exists.<sup>384</sup>

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<sup>381</sup> *Nikal, supra*, note 2 at 187

<sup>382</sup> *Ibid.* at 189-190

<sup>383</sup> *Ibid.* at 189

<sup>384</sup> *Ibid.* On the same date as he wrote the circular referred to by the Supreme Court, Whitcher also wrote to the Fisheries Overseer at Collingwood on behalf of the Minister of Marine and Fisheries. His letter concluded that "with regard to the obtainment of licences, the government would act towards

Certainly, the Department of Marine and Fisheries, and Whitcher in particular, were not fully receptive to aboriginal peoples' aboriginal and treaty rights to fish.<sup>385</sup> However, the federal Department of Indian Affairs held completely contrary and opposite views, evidence that no firm Crown policy existed at all.

The Supreme Court in *Nikal* found no evidence of an interdepartmental conflict, stating:

It was argued by the appellant that these statements only represent the view of the Department of Marine and Fisheries. It was the appellant's position that the Department of Indian Affairs intended to grant exclusive fisheries to the Indians but that this was overridden by the Department of Marine and Fisheries in what amounted to an interdepartmental dispute as to jurisdiction. *This position, however, is not supported by the evidence.* [emphasis added]<sup>386</sup>

However, the specific reason for the Whitcher circular being issued was because Whitcher wanted to correct an impression left by the Department of Indian Affairs which had advised fishery overseers that Indians *did* in fact have special rights.

A review of the documentation available for this period makes it clear that while the Department of Marine and Fisheries considered Indian people to be subject to the same regulations as non-aboriginal people when fishing for trade in "public" waters, other government officials did not share these views.<sup>387</sup> Contrary to the Supreme Court's finding, there is ample evidence of interdepartmental conflict over the Department of Marine and Fisheries' policies.

Whitcher, for example, himself complained that Indian people had been "misled" by the Indian superintendents with regard to the reservation of fishing rights in "public waters,"

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[the Indians] with the "same generous and paternal spirit with which the Indian tribes have been treated under British rule," W.F. Whitcher to James Patton, Fishery Overseer, Collingwood, NAC, RG 10 vol. 1972 file 5530, Reel C-11,124, 17 December 1875

<sup>385</sup>As Van West writes, the seeds of the rather "remarkable" position taken by Whitcher were sown in pre-Confederation times by the fisheries branch of the Crown Lands Department of Upper Canada when, following the conclusion of the Robinson Treaties in 1850, it was compelled to address aboriginal and treaty fishing rights issues on Lake Huron and Georgian Bay, Van West, "Ojibway Fisheries," *supra*, note 66 at 47.

<sup>386</sup>*Nikal*, *supra*, note 2 at 191

whether ceded or unceded,<sup>388</sup> and that his own fishery overseers were overly sympathetic to the Indians. He complained that incidents at Squaw and Christian Islands (in which nets had been lifted by aboriginal fishermen) were the result of fishery overseers believing Indians were entitled to greater rights than Whitcher thought they should enjoy. Such incidents, Whitcher wrote, were due to the misinformation of local Fishery Overseers

... who have recognized the Indian pretension to control fishing privileges as belonging of right to themselves, and after allowing them to select immense tracts of stations of sixteen miles and more in extent, have marked off these exorbitant limits as Indian fisheries and given the Indians charts of the same, informing them that these bounds are to be defended of intrusion on the part of white men.<sup>389</sup>

As a result of this situation, he directed that the circular referred to by the Supreme Court of Canada should be addressed to Fishery Overseers.<sup>390</sup>

Whitcher sent a second circular out to fishery overseers soon after, assuring them that the Indians would secure by licences "all the freedom of fishing that the most generous interpretation of the treaties could reasonably afford them," that they would be secured "exclusive use" through the licences of whatever limits were described therein, and they would "hold a complete defence against intercession by others."<sup>391</sup> It was not, he added, the intention of the Department of Marine and Fisheries to deprive Indians of their fishing rights, but "to ensure to the Indians free and *exclusive* use of fishery grounds ample for their necessities, and which would not, in any other manner, be appropriated for their use."<sup>392</sup>

In yet another information circular distributed to a number of government officials, including those of Indian Affairs on January 20, 1876, Whitcher advised arrangements had been entered into with the Department of the Interior (which at that time included the Indian Affairs

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<sup>387</sup>Hansen, "Development of Fisheries," *supra*, note 44, at 11

<sup>388</sup>*Ibid.*

<sup>389</sup>W.F. Whitcher, for Honourable Minister of Fisheries to E.A. Meredith, Deputy of the Honourable Minister of the Interior, NAC, RG 10 vol. 1972, File 5530, Reel C-11,124 29 December 1875.

<sup>390</sup>*Ibid.*

<sup>391</sup>W.F. Whitcher to E.A. Meredith, NAC, RG 10 vol. 1972 file 5530 Reel C-11,124, 19 January 1876

<sup>392</sup>Hansen, "Development of Fisheries," *supra*, note 44 at 12

Branch) to the effect that fishery stations licenced to Indians would not be interfered with by whites and *vice versa*, and that the licences issued to Indians would be for their exclusive use. Whitcher emphasized, however, that licenced white fishermen would be permitted to occupy portions of Indian reserves in order to carry out their operations.<sup>393</sup> Bands were told to lift offending nets of any unlicenced fishermen themselves.<sup>394</sup>

Despite these directions, Whitcher warned that the Indians did not have exclusive control of Indian fishing in connection with "Indian properties," and were therefore not entitled to remove the fishing gear of whites who had leases or licences to those "Indian fisheries."<sup>395</sup>

It is interesting that unceded Indian lands and properties and even Indian reserves, had now been opened up, at least in Whitcher's view, to non-aboriginal usage. Whitcher's instructions were immediately opposed by aboriginal peoples themselves. The Manitoulin Indians, for example, sent a Petition which stated:

We have seen with astonishment, the course proposed by Mr. Whitcher to the Government in regard to us, and the assertion that 'Indians enjoy no special liberty in regard either places, times or modes of fishing' (Circular 17 Dec. 1875). Mr. Whitcher seems also to have passed a sponge over the past - still so near to us. We will therefore here recall our rights.

His Excellency the Governor Bond Head being at Manitowaning, accorded the fisheries to the Indians, determining for the limits, Horse Island, Lonely Island, Squaw Island - and, that in their presence, and before other witnesses who can still testify to the authenticity of the concession... Was it not this Deed which Superintendents Ironsides and Plummer had in their hands when they reminded the Indians of those very fishery limits?

..... After the tragic end of Mr. Gibbard, Mr. Whitcher was sent to Wikwemikong in regard to

<sup>393</sup>Circular, W.F. Whitcher for the Minister of Marine and Fisheries, NAC, RG 10 vol. 1972 File 5530, Reel C-11,124, 20 January 1876

<sup>394</sup>G. B. Miller, Fishery Overseer to W. Plummer, Superintendent and Commissioner, Indian Affairs, NAC, RG 10 vol. 1972 File 5530 Reel C-11,124, 18 October 1875. According to Miller, in October, 1875, Whitcher advised that "Instructions have been forwarded to the Chief of the Cape Croker Indians to lift nets of white fishermen on their grounds. Also James Walker has been stopped from fishing until he obtains a licence. This is the first time a proper complaint has been made by the Cape Croker Indians giving the name of the offending party, and it is hoped that this will put a stop to any further complaints."

<sup>395</sup>W. F. Whitcher for the Hon. Minister of Marine & Fisheries to James Patton, Fishery Overseers, Collingwood, NAC, RG 10, vol. 1972 vol. 5530, Reel C-11,124, 17 December 1875

this matter. There, in the presence of the Rev. Miss. J.B. Proulx, still living, who was designated to him as Interpreter and conciliator, he admitted and confirmed to the Indians the concession made to them of those same fisheries and limits. The Indians were also left in possession of those fisheries, and enjoyed them peaceably till last autumn at which period they were still in possession by the authority of their Supt. and the local fishery Inspector.. ... This is why those Indians relying on the concession made to them of those fisheries - a concession which was never revoked, and which could not be, without an offence to justice and humanity - hope for peaceable and continuous possession, which the above facts, and the attempts at encroachment would seem to make necessary. They protest the assertions of Mr. Whitcher, and against all decisions whatsoever tending to deprive the Indians of their rights and their means of subsistence.<sup>396</sup>

The Department of Indian Affairs agreed that Whitcher's view of aboriginal and treaty rights was wrong. In response to a letter from J.C. Phipps, the Indian Superintendent on Manitoulin Island dated February 10, 1876, which attached the petition, the Deputy Superintendent of Indian Affairs, Lawrence Vankoughnet, compiled a report outlining that the Indians were "quite correct" in their statement that that they had been induced to settle at Manitoulin with the promise of fishing rights. He advised the Marine and Fisheries Department that they should be confirmed in these rights, writing.

[The] right to the fishing privileges around the Islands in the vicinity was one of the inducements held out to them to settle upon Manitoulin Island. Viewing in connection with the further fact that the Indians have been in the continuous enjoyment since the date of that Treaty of the Fisheries in dispute - (and this also for many years with the sanction and the authority of the Fishery Officers) - and considering that there are some fifteen hundred Indians who derive an important part of their subsistence from the fisheries in dispute, the undersigned respectfully submits, that it would not be consistent with the principles of either justice or humanity to deprive these Indians of any portion of those fishing privileges; but that they should be confirmed in their occupancy thereof, and allowed peaceably to enjoy the same as heretofore.<sup>397</sup>

Written below the report in different handwriting, is a note responding to Vankoughnet's comments and indicating a surrender might be required. It reads, "Approved. But remark that if the Indians peaceably surrender a portion of their fishing rights, the Department would not object to such a surrender if a proper consideration be offered. Transmit copy of petition with this report to Department of Marine and Fisheries." A further note, again in different handwriting, says, "Write to Min. of M &

<sup>396</sup>Undated petition from The Indians inhabiting the Peninsula of Great Manitoulin to the Hon. The Superintendent General of Indian Affairs, NAC, RG 10, vol. 1972, file 5530, 10 February 1876

<sup>397</sup>Report compiled by L. Vankoughnet, Deputy Superintendent General of Indian Affairs, NAC, RG 10, vol. 1972, file 5530, 6 March 1876

F in conn. with letter.”<sup>398</sup>

The new instructions provided by Whitcher to Fishery Overseers to lease aboriginal fishing grounds were also vigorously protested by others in the Indian Affairs Department. William Plummer, the Visiting Superintendent and Commissioner of Indian Affairs pointed out that Fisheries Officers had been instructed to lease what had been Indian fisheries since time immemorial. As a result, he objected, Indians had been deprived of their principal source of living.<sup>399</sup>

Indians within Ontario were entitled to exclusive fishing grounds, Plummer asserted, and the *Fisheries Act* had discriminated against them. An unnamed bureaucrat in the Ministry of Marine and Fisheries dealing with the Mohawks of the Bay of Quinte complained to the Deputy Minister of the Interior that Plummer had overstated his case but that aboriginal people would not be required to conform with the licensing system for the moment, noting that “[P]ending such investigation, although the *Fisheries Act* does not as Mr. Plummer erroneously thinks it does, make any distinction between Indians and whites, this Dept. has no objection to the Mohawk Indians catching fish for their own subsistence during legal seasons and by lawful means without requiring strict conformity to the licence system. Local fishery overseers on the Bay of Quinte will be instructed accordingly.”<sup>400</sup>

Earlier that year, William Plummer had complained that the Cape Croker Indians had still not received a commercial licence allowing them to fish. Whitcher responded that the Cape Croker Indians were complaining of white men fishing on grounds to which they claimed Indian title, and again, that until the Fishery Overseer determined the bounds within which Indians would have sole privileges, the Indians would be “free to fish with other fishermen ...in common with whites.”<sup>401</sup> Plummer responded there was no excuse for withholding the Cape

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<sup>398</sup> *Ibid.*

<sup>399</sup> W. Plummer to E.A. Meredith, Deputy Minister of the Interior, NAC, RG 10 vol. 1972 File 5530, 6 October 1876

<sup>400</sup> Unknown for the Minister of Marine and Fisheries to E.A. Meredith, Deputy of Hon. Min. of the Interior, NAC, RG 10 restricted, 7 October 1876

<sup>401</sup> W.F. Whitcher to E.A. Meredith, NAC, RG 10 vol. 1972 File 5530, Reel C-11, 125, 10 June 1876

Croker commercial licence<sup>402</sup> and threatened to publish accounts of the matter if it was not settled quickly, noting that public sympathy was on the side of the Indians, "while the class benefited by their loss was not regarded in the same favourable light."<sup>403</sup> He wrote that the Cape Croker Indians held undisputed possession of their fishing grounds around the reserve as well as around their unceded fishing islands.<sup>404</sup>

Whitcher did not respond to Plummer, but wrote a letter to E.A. Meredith, the Deputy Minister of the Interior. He argued that very few Cape Croker Indians fished for a living.<sup>405</sup>

For a time, Whitcher did not inform the Deputy Minister of the Interior of the many letters from Indian Affairs written on behalf of the Cape Croker Band and other Indians. He finally did so in June of 1876, admitting that none had been answered. In his letter, Whitcher urged the Department not to countenance illegal pretensions advanced on behalf of the Indians.<sup>406</sup> However, he acknowledged that the Cape Croker Band had been promised an "absolute right" to the fisheries as one of the inducements to the 1836 Bond Head Treaty. He again advised that until the Department of Justice could review the facts, whites and Indians would be "free to fish in common" in the vacant (that is, unlicensed) limits of Lakes Huron and Superior, a course rendered, he wrote "unavoidable, by the extravagant claims and extraordinary demands advanced on behalf of the Indians and [their] manifest unwillingness to accept any reasonable extent of fishing privileges."<sup>407</sup>

What the Department of Justice had to say about the treaty or Cape Croker's complaints is unknown, as a copy of the opinion has not been located, but a Special Fishery Licence was finally issued to the Band by the Province of Ontario setting out the "Fishery boundaries" on June 27, 1876.<sup>408</sup>

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<sup>402</sup>Wm. Plummer to Meredith, NAC, RG 10 vol. 1972 File 5530, 6 June 1876

<sup>403</sup>*Ibid.*

<sup>404</sup>*Ibid.*

<sup>405</sup>W.F. Whitcher to E.A. Meredith, NAC, RG 10 vol 1972, File 5530, Reel C-11,125, 10 June 1876

<sup>406</sup>*Ibid.*

<sup>407</sup>*Ibid.*

<sup>408</sup>Province of Ontario Special Fishery Licence issued under the 1876 *Fisheries Act* to the Cape Croker Band, NAC, RG 10 vol. 1972 file 5530, Reel C-11,125



Despite the issuance of the licence, Plummer complained that white men continued to fish on what had been promised to be exclusive Indian fishing grounds in Lake Huron and Georgian Bay. The explanation for this given by the Department of Marine and Fisheries was not that the waters were public in nature but that licences had been issued to white men creating rights *before* the Cape Croker licence was issued, and therefore white men had the “free scope of fishing to the whole extent of the District.”<sup>409</sup> Plummer again protested to the Minister of the Interior on behalf of the Department of Indian Affairs arguing, “I cannot see of what use the Fishery Licence covering a certain limit is if white men are permitted and cannot be stopped from fishing over the same territory.”<sup>410</sup> The Superintendent General of Indian Affairs protested that the Indian Affairs Branch had been caused much embarrassment by the fishery regulations.<sup>411</sup>

Plummer again wrote to the Minister of the Interior pointing out that whites were fishing on Indian grounds, and that the matter should be attended to, to prevent whites from further trespassing on rights of the Indians. He observed that the Band had suffered greatly and if “they are not protected, the consequences will be serious.”<sup>412</sup> He warned the Deputy Minister of the Interior that the instructions given to fishery officers to lease Indian fisheries had deprived the Indians of their principal source of living, particularly those at Cape Croker and Christian Island.<sup>413</sup>

The Department of Indian Affairs continued to argue in favour of “Indian claims to exclusive fishing privileges” in Georgian Bay and Lake Huron with the Department of Marine and Fisheries well into the early 1880s. In response, the Department of Marine and Fisheries somewhat

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<sup>409</sup>F. Lamorandiere, Cape Croker Band to Wm. Plummer, NAC, RG 10 vol. 1972 file 5530 Reel C-11,125, 21 August 1876

<sup>410</sup>Wm. Plummer to D. Mills, NAC, RG 10 vol. 1972 file 5530, Reel C-11,125, 26 August 1876

<sup>411</sup>D. Mills, Superintendent General of Indian Affairs to Sir Albert Smith, Minister of Marine and Fisheries, NAC, RG 10 vol. 2064 File 10,999 1/2, 18 July 1878

<sup>412</sup>William Plummer to Minister of the Interior, NAC, RG 10 vol. 1972 vol. 5530, Reel C-11,124, 10 May 1876

<sup>413</sup>William Plummer to Deputy Minister of the Interior, NAC, RG 10 vol. 1972, file 5530, Reel C-11,124, 1 June 1876

paternalistically maintained that it had “liberally provided for the *real* wants of the Indian people” by permitting the various bands living adjacent to Lake Huron and on Manitoulin Island to “fish everywhere free for their own use and consumption” and by issuing licences or otherwise setting apart areas specifically for the “sole use” of the Bands.<sup>414</sup>

In *Nikal*, the Supreme Court of Canada stated that statements made by the Department of Marine and Fisheries in the 1870s reflected a government policy not to recognize exclusivity on the part of Indian fisheries. Nonetheless, the Court dismissed the appellants’ argument that statements of officials of the Department of Marine and Fisheries reflected only the point of view of that department, finding that the evidence did not support an interdepartmental conflict. In this instance, however, the appellants were entirely correct.

### 1. The Discriminatory Effect of Crown Policies

Perhaps the most dangerous part of the Supreme Court of Canada’s approach in *Nikal* and *Lewis* was the Court’s reliance on deliberately discriminatory actions on the part of the Crown as evidencing Crown policy, and then using that policy to evidence whether aboriginal rights existed or not. In Upper Canada, the policies which developed were intended to permit non-aboriginal fishermen to monopolize Indian fishing grounds, and to exclude aboriginal fishermen from competing with non-aboriginal fishermen for economic reasons.

In the spring of 1876, the encroachment of licenced white men in their fishing grounds prevented the Cape Croker Indians from fishing for their own use or for sale, the means by which they had been able to raise money for food while planting gardens and fields.<sup>415</sup>

The Saugeen Chief in 1876 complained that the Saugeen licence issued excluded the White Fish Island fishing station, and objected that the government should not lease fishing islands which had never been surrendered without the permission of the Band, “especially when own

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<sup>414</sup>Hansen, “Development of Fisheries,” note 44 at 13

<sup>415</sup>William Plummer to Minister of Interior, NAC, RG 10 vol. 1972 File 5530, Reel C-11,124 1 June 1876

[sic] people required these fishing grounds,” and when new equipment had “already been purchased” in the expectation that the fishing station would be included in the licence.<sup>416</sup>

Whitcher insisted the Saugeen Indians could not possibly be granted an application for such extensive limits as the Fishing Islands,<sup>417</sup> even though at this time the fishing islands remained unceded. It seems the richer fishing grounds in both instances were excluded from aboriginal licences for a reason. The federal Ministry of Marine and Fisheries hoped the limitations would prevent aboriginal fishermen from being able to compete unfairly with white fishermen.

Whitcher wrote that the Indians could catch fish within the area of their reserves for their “immediate support” only. He explained “immediate use” was a term intended:

... to contradistinguish the catching of fish within limits let to white fishermen from any traffic in the produce of such fishing of a speculative or secondary nature *which might become the means of some rival traders or itinerant fishermen procuring from the Indians a supply of fish at nominal prices in barter for goods, thus competing unfairly with other fishermen and dealers who pay rents and invest capital in faith of the permanent holding under leases or licences.* [emphasis added]<sup>418</sup>

In all other respects, white fishermen, he said, enjoyed exclusive fishing rights.<sup>419</sup> If band members engaged in trading fish wished to continue doing so, they would be required to purchase a license so that “whites would not complain about the competing traffic.”<sup>420</sup>

As noted, a licence had finally been issued to the Cape Croker Band in July of 1876<sup>421</sup> but only after extensive complaints by William Plummer. Despite the fact the licence did not actually exclude white men from fishing in the area, the Department of Marine and Fisheries

<sup>416</sup>Chiefs of Saugeen Band to William Plummer, Superintendent and Commissioner, Indian Affairs NAC, RG 10 vol. 1972, File 5530, Reel C-11,124, 4 May 1876

<sup>417</sup>W.F. Whitcher to E.A. Meredith, NAC, RG 10, vol. 1972 file 5530 Reel C-11,124, 5 June 1876.

<sup>418</sup> W.F. Whitcher to E.A. Meredith, Deputy Minister of the Interior, NAC, RG 10 vol. 1972 File 5530, 9 May 1876

<sup>419</sup>*Ibid.*

<sup>420</sup>W.F. Whitcher to E.A. Meredith, NAC, RG 10 vol. 1972 File 5530, Reel C-11,1124, 10 June 1876.

<sup>421</sup>Province of Ontario Special Fishery Licence issued under the Fisherys [sic] Act 1876 NAC, RG 10

soon moved to reduce the territorial extent of it anyway.

Fishery Overseer G.B. Miller had met with the Band in June, 1876. He had included the waters fronting their reservation in the limits of the licence, reporting it would "seem unjust to deprive them of their principal source of subsistence."<sup>422</sup>

In August, Whitcher decided that the description in the licence and the inclusion of the water frontage must have been erroneous and based on a clerical error. He advised the Deputy Superintendent of Indian Affairs, Lawrence Vankoughnet, that a new licence would be issued reducing the limits to the "reasonable and necessary boundaries ...suggested by Overseer Miller" despite the fact that the licence conformed exactly with what Miller had recommended. Miller had also been instructed to advise the Band that boat licences would now be required for those Indians who wished "to fish as competitors of licensed white fishermen in other waters in the vicinity."<sup>423</sup>

Plummer pointed out that there was no mistake in the licence, which followed to the letter Miller's recommendations.<sup>424</sup> He suggested that the Department of Marine and Fisheries suspend the "letting" of fishing grounds claimed by the Indians until the matter could be brought before the Department of the Interior, and advised his superior that the Saugeen Indians planned a delegation to Ottawa.<sup>425</sup> On this occasion, Vankoughnet was not supportive. He advised Plummer that an Indian deputation would be useless, and to put his concerns in writing.<sup>426</sup> The licence limits remained as they were.

Six months later, the Saugeen Indians again complained that their reduced fishery had been

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vol. 1972, File 5530, 10 July 1876

<sup>422</sup>G.B. Miller, Fishery Overseer, Owen Sound to Minister of Marine and Fisheries, NAC, RG 10 vol. 1972, File 5530, Reel C-11,124, 27 June 1876

<sup>423</sup>W.F. Whitcher to L. Vankoughnet, NAC, RG 10, vol. 1972, File 5530, Reel C-11,124

<sup>424</sup>William Plummer to Minister of Interior, NAC, RG 10 vol. 1972, File 5530, Reel C-11,124, 14 September 1876

<sup>425</sup>William Plummer to Minister of Interior, NAC, RG 10, vol. 1972 File 5530, Reel C-11,124 31 January 1877

<sup>426</sup>Lawrence Vankoughnet to William Plummer, NAC, RG 10 vol. 1972 File 5530, 7 February 1877

taken over by one Jackson, who had trespassed the year before as well, without any action being taken to protect them despite their complaints to the local Magistrate.<sup>427</sup> In 1877, Plummer wrote that “at the present time, their [the Indians] fishing privileges are so curtailed as to be of little or no use to them.”<sup>428</sup> The Minister of the Interior requested a summary of the circumstances leading to the complaint of unfairness, Plummer again emphasized that the fisheries at issue were exclusively aboriginal “... and there are no treaties in existence covering the surrender of these tracts and islands and the waters by which they are immediately surrounded.... it is quite natural that they should think they are arbitrarily deprived by Government of rights which they have never surrendered.”<sup>429</sup>

The Superintendent General of Indian Affairs finally wrote to Sir Albert Smith, the Minister of Marine and Fisheries, requesting modifications in the fishing regulations “insofar as the Indians are affected thereby.”<sup>430</sup> Whitcher wrote back on behalf of the Minister, advising he had been asked by the Minister to “ascertain in what particulars it has been found that the fishery laws unjustly and injuriously affect the Indians.”<sup>431</sup> Whitcher’s letter attempted to blame aboriginal fishermen for a decline in the fisheries, stating:

It is well known that much of the laxity which prevailed in former times, and the prevalence of destructive practices of fishing, particularly by Indians, were due to false sympathy with the pretended sufferings which it was alleged they [the Indians] must sustain if prevented from indulging their habitual preference for spearing fish on their spawning beds. It is scarcely necessary to remark that, owing to the decline of the salmon fisheries, and consequent injury to the trade of the country, the Government has been obliged to supplement the protective enactments adopted by Parliament by an expensive system of fish hatching and restocking through artificial means. *Any proposal, therefore, to restore the illegal abuses which Indians seem to claim some hereditary right to indulge, not merely involves an abandonment of reasonable and necessary*

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<sup>427</sup>William Plummer to Minister of Interior, NAC, RG 10 vol. 1972 File 5530, Reel C-11,124 17 September 1877

<sup>428</sup>Sessional Papers of Parliament (No. 11) 40 Victoria 1877

<sup>429</sup>William Plummer to Minister of Interior, NAC, RG 10 vol. 2064 File 10,999 ½, 3 December 1878 [emphasis added] The Department of Marine and Fisheries’ views of public ownership over inland waters were apparently not shared by Prime Minister John A. Macdonald. On three separate occasions between 1881 and 1883, the Province of Ontario attempted to pass legislation “Protecting the Public Interest in Rivers, Streams and Creeks” and on each occasion, the federal government disallowed it, claiming it was a flagrant violation of private rights. See D.G. Creighton, *Canada’s First Century* (Toronto: Best Printing Co., 1970) at 48

<sup>430</sup>D. Mills to Sir Albert Smith, NAC, RG 10, vol. 2064 File 10,999 1/2, 18 July 1878

<sup>431</sup>W.F. Whitcher to L. Vankoughnet, NAC, RG 10 vol. 2064 File 10,999 ½, 13 September 1878

*restrictions, but would also necessitate Parliamentary sanction, requiring very satisfactory reasons and at least probable facts to justify the same.....*

If the Indian Department will inquire into the past and present condition of the Restigouche Indians, for example, it will be found that although they and some of their interested allies among the whites are quite as clamorous for the restoration of 'spearing privileges' as any other Indian bands, they are actually better off in every moral and material respect than ever before in their lives. There is every reason to believe that such might be the case everywhere else if, instead of craving for a return to the past abuses the Indians could be practically accustomed to adopt the modes of salmon fishing pursued by members of the white communities in which they live.  
[emphasis added] <sup>432</sup>

Charles Skene, the Superintendent of Indian Affairs at Parry Sound, took issue with Mr. Whitcher's comments. He replied that the reduction in fish was owing to over-harvesting by white fishermen, and not to the spearing or netting by Indians. Skene argued that:

As far as the Indians in this Superintendency and along the north shore of Georgian Bay are concerned I question whether it [the restrictions on spearing and netting] can be enforced without breaking with the Treaties. Mr. Whitcher says 'On referring to the treaties mentioned it does not appear that unrestricted fishing or hunting was guaranteed.' Now I differ from him here ....there is a clause in the Robinson Treaty says 'and further to allow the said Chiefs and their Tribes the full and free privilege to hunt over the Territory now ceded by them and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting such portions of the said Territory as may from time to time be sold or leased to individuals or companies of individuals and occupied by them with the consent of the Provincial Government.' I consider this clause very strict and explicit and that unless it can be proved that the Indians did not at that time spear fish the right to do so cannot be taken from them without breaking faith with them. Perhaps Mr. Whitcher may consider it false sympathy on my part pleading for the Indians but as I understand the Robinson Treaty I am only asking for justice to them - and as for the destruction of the game and fish - I have not the least doubt but that has been accomplished ten times more by the whites than by the Indians.<sup>433</sup>

With respect to the reduction in the Cape Croker Band's licence, Whitcher also defended the reduced grounds, alleging that the Cape Croker Band was not using the fishing stations leased

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<sup>432</sup> A footnote to the same document states: "The question would undoubtedly be asked - What claims are possible and sufficient in favoring Indians to injure and destroy a valuable public property that are paramount to the rights and interests of a great majority of the inhabitants to preserve and increase it for the benefit of the trade and industry of the whole country? Besides, it is well known that, in a matter of fact, the Indians are themselves benefitted [sic] through the operation of the present system." W.F. Whitcher to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, NAC, RG 10, vol. 2064, file 10,099 ½, footnote dated 15 September 1878

<sup>433</sup> Charles Skene, Parry Sound Superintendency, to William Buckingham, Deputy Minister of the Interior, NAC, RG 10, vol. 2064, file 10,099 1/2, 22 October 1878

to them, and "if such be the case, it seems undesirable that privileges so useful and extensive should be locked up to the injury of other fishermen and to the detriment of trade."<sup>434</sup>

Plummer wrote back, indicating that he had himself personally seen the Cape Croker Indians fishing in the area twice in 1877 and in the autumn of 1878.<sup>435</sup> He repeated that the problem was that exclusively Indian fisheries had been given to white traders who then sublet them to white fishermen.

It is from this cause that our northern Indians have suffered want and destitution and many of them are still suffering from it. It has been said that the white traders are willing to employ Indians to fish; my answer has been and still is, that Indians and white men never have and never will work together on the same fishery ground. White men monopolise all the best fishing points, and further, it is a well known fact that the traders do not deal fairly with the Indians, and all the arguments that care to be used cannot overcome the prejudice of the Indians in these particulars. It cannot be for the public interest to lease the best fishing grounds to a few white men and to deprive several hundred Indians who reside in adjacent villages of the privileges which they have enjoyed from time immemorial, especially when it is well known that Indians can and do catch quite as many fish when left in undisturbed possession, as the whites do, and further, the surplus fish caught by the Indians are sold, and consumed by the people of the Dominion the same as those caught by white men, and the Indians as a rule are very law abiding and more strictly observant of the fishing regulations than the white fishermen. As to Indian treaties, it is well known that in the general surrenders, large tracts of land and adjacent islands were reserved and there are no treaties in existence covering any surrender of these tracts and islands and the waters by which they are immediately surrounded.<sup>436</sup>

The licence issued to the Cape Croker Band in 1882 reduced what had been an eight mile limit offshore to two arbitrarily.<sup>437</sup> In 1883, William Bull, the Indian Agent, instead of protecting aboriginal rights, advised that the settlers near Hope Bay and the town plot of Adair had been petitioning for a fishery and suggested the limit be further reduced to accommodate the settlers.<sup>438</sup>

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<sup>434</sup>W.F. Whitcher to L. Vankoughnet, NAC, RG 10 vol. 1972 File 5530, Reel C-11,125, 3 March 1879

<sup>435</sup>William Plummer to the Minister of the Interior, NAC, RG 10, vol. 1972 File 5530, Reel C-11,124, 3 April 1879

<sup>436</sup>William Plummer to the Minister of the Interior, David Mills, NAC, RG 10, vol. 563 (microfilm reel # C-13,370), 3 December 1878

<sup>437</sup>Special Fishery Licence, Cape Croker Band from Province of Ontario, NAC, RG 10, vol. 1972, File 5530, Reel C-11,125

<sup>438</sup>William Bull, Indian Agent, Warton to Superintendent General of Indian Affairs, NAC, RG 10, vol. 1972, File 5530, Reel C-11,125, 19 February 1883

In 1889, in reply to a complaint that white men were fishing within the Cape Croker Band's licence limits within Georgian Bay, the Deputy Minister of Fisheries contended that white men complained that it was the Indians who fished on *their* grounds.<sup>439</sup>

In November of 1890, the Chippewas of Saugeen stated that their former Indian Agent "apparently acting under the authority of the Gov't" had mapped out an area of approximately nine miles along the beach between French Bay Road north to Chief's Point within which the Band were to hold exclusive fishing rights. The Band maintained their 1854 treaty had not surrendered any part of the beach, which was to have been reserved for fishing purposes. Despite this, the Department of Marine and Fisheries had issued licences to white men permitting them to fish within this area. The Saugeen Band complained that "[n]otwithstanding our constant protestations against such encroachments upon our rights, we have learned through a letter from the Department of Fisheries to the Indian Department, 17 September 1890, that encroachments have been allowed until only two miles of our beach remain unoccupied by white men."<sup>440</sup>

Despite the various attempts to restrict their activities, reports from the early 1890s indicate that the Saugeen Indians were still considered proficient commercial fishermen, able to compete "with the most expert white men."<sup>441</sup> In 1893, the Minister of Fisheries closed down their fishery as well as "the privilege hitherto granted to Indians on Lake Huron, Georgian Bay and Lake Superior of fishing during the closed season."<sup>442</sup> Fisheries Officers were instructed to seize fish, destroy nets and boats and prosecute aboriginal violators for non-

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<sup>439</sup>J. Tilton, Deputy Minister of Fisheries, Canada to L. Vankoughnet, Deputy Superintendent General of Indian Affairs NAC, RG 10, vol. 2439, File 91,338, Reel C-11,221, 5 December 1889

<sup>440</sup>Band Council Resolution of the Saugeen Band, "Motions take from Saugeen Council Minutes, 1883-1895," 3 November 1890

<sup>441</sup>Report on Saugeen Agency, Jas. Allen, Indian Agent, *Sessional Papers of Parliament*, (No. 14) 55 Vict. 1892, 29 August 1891

<sup>442</sup>Memorandum, L. Vankoughnet, Deputy Superintendent General of Indian Affairs to T.M. Daly, Superintendent General of Indian Affairs, NAC, RG 10, Vol. 2439, File 91,338, Reel C-11,221, 5 January 1893



compliance.<sup>443</sup> Deputy Superintendent of Indian Affairs Vankoughnet protested on behalf of the Department of Indian Affairs that a general prohibition which would cause "great distress" to the Indians.<sup>444</sup>

When the Cape Croker Band received their next licence, it stipulated the use of a gill net alone. The Indian Agent reported the Band "want to fish with a seine net but fear it will jeopardize their licence."<sup>445</sup> The Band's application for a seine net was refused, the Deputy Minister of Marine and Fisheries, Canada stating "this type of fishing is too destructive."<sup>446</sup> The Saugeen Band was also told its "privilege" of seining was to cease with the present year.<sup>447</sup> The Band complained it was "a great loss to be deprived of the privilege of fishing with seines, gill nets not being suitable for this fishery."<sup>448</sup> They requested that they be free to do so, exclusively, free of licence.<sup>449</sup> In this regard, the local M.P. Alex McNeill supported their position, writing to the Minister of Marine and Fisheries, "To my mind it seems clear that to compel the Indians, in view of the Treaty made with them, to pay for [a] licence to fish opposite their Reserve can only be justified on the ground that might makes right."<sup>450</sup> The result of these restrictions was reported to be a fishery greatly reduced in size from that of the previous years.<sup>451</sup> The Saugeen licence was not renewed and they were excluded from the fishery

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<sup>443</sup>William Smith, Deputy Minister of Marine and Fisheries, Canada to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, NAC, RG 10 Vol. 2439, File 91,338, Reel C-11,221, 30 December 1892

<sup>444</sup>Memorandum, L. Vankoughnet, Deputy Superintendent General of Indian Affairs to T.M. Daly, Superintendent General of Indian Affairs, NAC, RG 10, Vol. 2439, File 91,338, Reel C-11,221, 5 January 1893

<sup>445</sup>J. Jermyn, Indian Agent to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, NAC, RG 10, Vol. 2439, File 91,338, Reel C-11,221, 1 August 1893

<sup>446</sup>Wm. Smith, Deputy Minister of Marine and Fisheries, Canada to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, L. Vankoughnet, Deputy Superintendent General of Indian Affairs, NAC, RG 10, Vol. 2439, File 91,338, Reel C-11,221, 22 August 1893.

<sup>447</sup>Report on Saugeen Agency by Jas. Allen, Indian Agent, *Sessional Papers of Parliament*, (No. 14) 57 Vict. 1894, 29 August 1893

<sup>448</sup>Saugeen Band Resolution, "Motions taken from the Saugeen Council Minutes, 1883-1895," 4 March 1895

<sup>449</sup>Letter, J. Hardie, Acting Deputy Minister, Marine & Fisheries to Chas. Briggs, Fishery Overseer, Paisley, NAC, RG 23, vol. 181, File 727 pt. 1, p. 199, Reel T-2948, 3 May 1895

<sup>450</sup>Letter, Alex McNeill, M.P. to Minister of Marine and Fisheries, NAC, RG 23 vol. 181, File 727 pt. 1, p. 199, Reel T-2948, 4 May 1895

<sup>451</sup>Report on Cape Croker Agency, NAC, RG 23, vol. 181, file 727, p. 199, Reel T-2948, 6 September 1893

altogether. In fact, the Saugeen community's collective right to fish commercially was not recognized until the decision in *R. v. Jones and Nadjiwon*, nearly one hundred years later.<sup>452</sup>

In 1894, an attempt was made by white settlers to remove the right to fish in waters around White Cloud Island (which had been surrendered in 1885) from the Cape Croker Licence. These were the most valuable of the Band's fishing grounds.<sup>453</sup> The purchasers of the surrendered island believed it was "an injury to the Municipality [of Keppel Township] and the parties who have purchased Land on the said Island" that the surrender had not conveyed the fisheries, which the Band had specifically reserved.<sup>454</sup>

The Municipality contended that the right of fishery had been sold with the island, while the Department of Marine and Fisheries argued it remained with the Crown. The views of the Department of Indian Affairs were solicited.<sup>455</sup> In the meantime, the Council of the County of Grey requested that the water "surrounding White Cloud Island be withdrawn from the Ne-wash Band's fishing limits,"<sup>456</sup> on the basis that the purchasers had been "disappointed" to learn that the Indians had the control of all the fishing.<sup>457</sup>

The local Indian Agent reported to the Deputy Superintendent of Indian Affairs that the parties who had negotiated the surrender of White Cloud had assured the Indians that the surrender would in no way affect their fishing limits.<sup>458</sup> The Indians were adamant that they would not have made the surrender except for having been told it would not interfere with their fishing grounds.<sup>459</sup> When five or six Cape Croker fishermen applied for commercial fishing licences

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<sup>452</sup>*R. v. Jones and Nadjiwon*, *supra*, note 4. The exclusion was noted by the court, which found, at 451-51 that: "Despite the collective nature of their aboriginal and treaty rights ... the 1989 licence still authorized fishing by only the Chief and eight designated fishermen."

<sup>453</sup>Surrender of White Cloud Island dated 14 January 1885 in *Indian Treaties and Surrenders*, (Canada: 1891) vol. 2 at 151

<sup>454</sup>Petition by Keppel Township Inhabitants, NAC, RG 23, vol. 144, File 359, 20 January 1894

<sup>455</sup>William Smith, Deputy Minister of Marine & Fisheries to H. Reed, Deputy Superintendent General of Indian Affairs, NAC, RG 10, Vol. 2439, File 91,338, Reel C-11,221, 12 February 1894

<sup>456</sup>Memorial, NAC, RG 10, Vol. 2439, File 91,338, Reel C-11,221, 24 March 1894

<sup>457</sup>James Masson, M.P. of House of Commons (forwarding Memorial) to T.M. Daly, Superintendent General of Indian Affairs, NAC, RG 10, Vol. 2439, File 91,338, Reel C-11,221, 28 March 1894

<sup>458</sup>Indian Agent Jermyn to Hayter Reed, NAC, RG 10, vol. 2439, file 91,338, 20 February 1894

<sup>459</sup>Indian Agent Jermyn to Hayter Reed, NAC, RG 10, vol. 2439, file 91,228, 14 March 1894

in 1896 , they were refused, due to dissatisfaction with white fishermen as well as “grave objections” to increasing the number of commercial fishing licences in Georgian Bay.<sup>460</sup>

Hayter Reed, the Deputy Superintendent of Indian Affairs informed the Deputy Minister of Marine and Fisheries that the Department of Indian Affairs did not consider it in the interest of the Band to grant commercial licences to individual band members, as competition with the whites would cause “agitation” and bring pressure from among whites to further restrict the current “privileges” of the Indians.<sup>461</sup>

The situation was little different at the Bay of Quinte. On March 27, 1894, Chief Green of Deseronto complained that Thomas McDonald, a white man, was trespassing on the Reserve by placing fish nets in Mud Creek “ which prevents the fish from running up the Creek and thus deprives the Indians of their much needed supply of fish.”<sup>462</sup> McDonald, he complained, had previously been fined one dollar “but that small fine did not prevent his repeating the trespass every spring.” The Department of Indian Affairs asked that an officer be instructed to take immediate steps to stop the trespass.<sup>463</sup>

There is nothing in the historical record to suggest that any enforcement against non-aboriginal fishermen occurred. However, in August, 1894 the Department of Marine and Fisheries indicated that they had “withdrawn” the privilege of fishing by Indians for domestic purposes during the closed season throughout Ontario, and instructed fishery officers throughout Ontario to seize all fish caught and destroy all nets used in contravention of the regulations.<sup>464</sup>

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<sup>460</sup>William Smith, Deputy Minister of Marine & Fisheries to Hayter Reed, Deputy Superintendent of Indian Affairs, NAC, RG 10 vol. 2439, File 91,338, Reel C-11,221, 2 April 1896

<sup>461</sup>Hayter Reed, Deputy Superintendent of Indian Affairs to William Smith, Deputy Minister of Marine and Fisheries, NAC, RG 10, vol. 2439, Reel C-11,221 22 April 1896

<sup>462</sup>Hayter Reed, Deputy Superintendent of Indian Affairs to William Smith, Deputy Minister of Marine and Fisheries, NAC, RG 10, vol. 2439, File 91,338, Reel C-11,221, 5 August 1894

<sup>463</sup>*Ibid.*

<sup>464</sup>Letter, J. Hardie, Acting Deputy Minister, Marine & Fisheries to H. Reed, Deputy Superintendent General of Indian Affairs, NAC, RG10, Vol. 2439, File 91,338, Reel C-11,221, 8 August 1894

By 1904 a commercial fishing licence in favour of the Mohawks of Tyendinaga "permitting them to fish with gill nets on the north side of the Bay of Quinte from Lot 10 easterly to the town of Deseronto" was discontinued by Band Council Resolution "because in previous years, the Indians were of the opinion that when licences had been granted to them, they were of no use on account of the fact that the shore on the Bay of Quinte and far up Mud Creek was licensed to whites and that they monopolized the business."<sup>465</sup>

In August of 1909, J.D. MacLean, the Secretary of Indian Affairs noted that Chief Maracle of the Mohawks of the Bay of Quinte and Councillors "called at the Department today and state fishermen are camping all along the water front of the reserve stating they have a right to do so."<sup>466</sup> The Indian complaint was confirmed by a law clerk, who could find no record of any road allowance along that portion of the reserve bordering on the Bay of Quinte permitting non-aboriginal fishermen to use the shoreline at all. The grant of the reserve stated, he noted, that it was bounded in the front by the Bay of Quinte "which I understand to mean bounded by the shore of the Bay of Quinte"<sup>467</sup> He wrote that the non-aboriginal fishermen should be regarded as trespassers.<sup>468</sup>

As a result of the Departments' finding, the Indian agent notified fishermen located on the shore of the Bay of Quinte to remove their shanties and fishing plant within ten days. This generated a speedy complaint from the Inspector of Fisheries on behalf of the non-aboriginal fishermen to the Indian Affairs Department, arguing that this was a "hardship on the fishermen because most have had a licence to fish for years in the Bay of Quinte. .. All held a licence from Ontario Government to fish and paid money for this year... These shanties only occupy a rocky point or low flat places which are worthless only for fishing and trespass on no one."<sup>469</sup> The Fisheries Inspector asked that no proceedings be taken until after November

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<sup>465</sup>Reference in Note to file August, 1941 to BCR, Commercial fishing licence No. 1993 in favour of the Mohawks of Tyendinaga by Department of Game and Fisheries Toronto, NAC, RG 10 Restricted file 4 May 1904

<sup>466</sup>J.D. MacLean, Secretary, Memo to Law Clerk, NAC, RG 10 Restricted file 40-34, 12 August 1909

<sup>467</sup>A.S. Williams, Law Clerk to Assistant Deputy Superintendent General, Indian Affairs, NAC, RG 10 Restricted file 40-34, 12 August 1909

<sup>468</sup>*Ibid.*

<sup>469</sup>Inspector of Fisheries, Belleville to J.D. McLean, Sec. Dept of Indian Affairs, Ottawa, NAC, RG

when the licences would expire. However, the non-aboriginal commercial fishermen were issued new licences the following year.<sup>470</sup>

Later in July, 1916 the Deputy Minister of Marine and Fisheries insisted that aboriginal people had no special privileges except on their own reserves and only then where *domestic*, not commercial, fishing was involved. This opinion was apparently based on the old Witcher correspondence, rooted in the erroneous legal opinions of Cockburn and Watson:

On looking over our files I found a letter from the Department of Marine and Fisheries at Ottawa to the Dep'ty Commissioner of Fisheries of Ontario which seems to define the position taken first of all by the Dept. of Marine and Fisheries and subsequently by this Dept. in which your Dept. appears to have acquiesced. The letter in question states: "Indians have no exceptional privileges accorded them for commercial purposes and must comply with the fishery regulations in that respect as all other persons are bound to do." This would seem to respect the special rights of the Indians to take fish by any means and at any time for their own use strictly within their reserves, while placing them on the same footing as all other citizens of the Province while engaging in fishing as a business.<sup>471</sup>

The effect of the increasing restrictions and regulations imposed by the fisheries legislation throughout this time period was described by the Supreme Court of Canada in *Jack v. The Queen*:

The federal Regulations became increasingly strict in regard to the Indian fishery over time, as first the commercial fishery developed and then sport fishing became common. What we can see is an increasing subjection of the Indian fishery to regulatory control. First the regulation of the use of drift nets, then the restriction of fishing to food purposes, then the requirement of permission from the Inspector and ultimately .. the power to regulate even food fishing by means of conditions attached to those permits.<sup>472</sup>

It seems clear, then, from a review of historical information that Crown policy changed to favour non-aboriginal users and to restrict the aboriginal fishery because of the economic benefits to be derived from the fisheries. Changes to the fisheries legislation, as settlement pressures increased, permitted the government to appropriate these fishing grounds without aboriginal consent and lease them to non-aboriginal commercial fishermen, who quickly over-

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10 Restricted file 40-34, 29 September 1909

<sup>470</sup>H.R. Conn, memorandum to file, NAC, RG 10 Restricted file 40-34, *circa*, August 1941

<sup>471</sup>NAC, RG 10 Restricted file 40-34, *circa* July, 1916.

<sup>472</sup>*Jack v. The Queen*, *supra*, note 53 at 39

harvested the resource.<sup>473</sup>

## 2. Exclusive Aboriginal Fishing Rights in the Post-Confederation Period

The Supreme Court of Canada's application of Crown policy in Upper Canada to circumstances in British Columbia has been criticized in this paper for ignoring pre-existing exclusive rights based on aboriginal title, and for taking information out of context. The decisions in *Nikal* and *Lewis* have also been criticized for treating Crown policy as if it remained constant over time. Instead, it has been suggested that Crown policy recognized aboriginal exclusive fishing rights until settlement pressures and non-aboriginal interests in the fisheries increased. If this hypothesis is correct, Crown policies in parts of Ontario where settlement was delayed should be different over the relevant time period from those which had developed in southern Ontario to deny the existence of such rights because of non-aboriginal competition.

This is, in fact, the case. That exclusive fishing rights were recognized by the Crown in the post-Confederation period in parts of Northwestern Ontario is evidenced by events transpiring around the North West Angle Treaty at the end of the 19th century in the area between Ontario and what would become the Province of Manitoba.

In 1871, a year after the transfer of Rupertsland and Hudson's Bay charter lands to the new dominion, Sir Charles Tupper had signed an Order-in-Council directing that a treaty commission be set up to deal with the northern Ojibway and that the Indians be permitted to "retain what they desire in reserves at certain locations where they fish for sturgeon."<sup>474</sup> The Government of Canada established the commission two years later to negotiate what would become Treaty Three. The federal government proposed that Treaty Three reserves be situated in close proximity to the Ojibway sturgeon fishing grounds.<sup>475</sup> The resulting treaty, signed on October 3, 1873, was known as the North West Angle Treaty. It contained the promise that the

<sup>473</sup>Lytwyn, "Waterworld" *supra*, note 125 at 25

<sup>474</sup>Order-in-Council, NAC, RG 2, series 1 at 45, 25 April 1871

<sup>475</sup>Van West, "Ojibwa Fisheries," *supra*, note 66 at 34

Ojibway would “forever have the use of their fisheries” and that they would receive \$ 1,500 per year for “twine for [fishing] nets.”<sup>476</sup> The North West Angle Treaty of 1873 contained the promise that the Ojibway would “forever have the use of their fisheries.” This point was insisted on by the Indians, who for some years had refused to enter into any treaty.<sup>477</sup>

In 1873, the sturgeon fisheries were bountiful.<sup>478</sup> There would be no non-aboriginal commercial fishing on the Lake of the Woods for another eleven years.<sup>479</sup> When commercial fishing activities began, Lawrence Vankoughnet, then the Deputy Superintendent of Indian Affairs, expressed concern that the fishery would be overexploited by Canadian and American interests for the export market, thereby depriving settlers and Indian people of their means of living.<sup>480</sup>

The Ojibway feared the destruction of their fisheries, described by one Indian Inspector as “the eternal nightmare of their apprehensions. They frequently pointed out to me at their councils how the buffalo, the principal source of subsistence of their kindred on the plains was destroyed by the effective weapons of destruction furnished hunters by white men, and implored me to use my influence with the Government to have their fisheries protected from being irretrievably ruined before it was too late.”<sup>481</sup>

In a reversal of what ultimately appeared in the fisheries legislation of 1868, Vankoughnet and Simon Dawson, one of the Treaty Three commissioners and at the time, a local MP, proposed

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<sup>476</sup>*Ibid.* at 46

<sup>477</sup>NAC, RG 10 vol. 3800 file 48542, 28 May 1888

<sup>478</sup>Van West, “Ojibway Fisheries,” *supra*, note 66 at 34

<sup>479</sup>*Ibid.*

<sup>480</sup>*Ibid.* at 36. American fishing vessels enjoyed commercial privileges in the territorial waters of British North America between 1854 and 1866, and again between 1873 and 1885, during which time American fishing vessels could buy bait, ice and supplies, hire ship crews and transship their catches in Canadian ports, see Robert Craig Brown, *Canada's National Policy, 1883-1900: A Study in Canadian-American Relations* (New York: Princeton University Press, 1964) at 5-6. The desire by Americans to access the inshore fisheries of British North America resulted in treaties between Canada and the United States (such as the Treaty of Washington in 1871). The effect these agreements may have had on Crown policy towards aboriginal fishing rights deserves further examination.

<sup>481</sup>Ebenezer McColl, Manitoba Indian Inspector, NAC, RG 10, vol. 3807 file 52443, 22 October 1888.

that the Lake of the Woods fisheries should be exclusively aboriginal, and the settlers should be permitted to catch fish for domestic use only.<sup>482</sup>

Dawson had complained back in 1860 that Indian fisheries had been leased without their consent, noting:

The Indians who are settled in the vicinity of Fort William, Lake Superior, depend for their subsistence chiefly on the fisheries between Black Bay and the U.S. frontier at Pigeon Bay. During the summer months, as a general rule, they catch but little more than suffice for their own use, but in the fall - about the end of September or the beginning of October - the whole settled population move off to the fishing grounds, and they then catch immense quantities of the fish peculiar to Lake Superior, chiefly trout and whitefish, the former almost equal in size and flavour to the finest salmon. They are supplied with nets, barrels and salt by the Hudson's Bay Company, some American traders and, latterly, by traders from Canada.

So far as I know, up to the summer of 1859, there has been no exclusive privilege granted for these fisheries, or if so, it had never been insisted on or maintained to the detriment of the Indians who had been in the habit, from time immemorial, of carrying on their fishing operations wherever they could do so to the greatest advantage, without any question being raised as to their right. Now, however, the case is altered. The fisheries have been leased, and those who hold them will not I am informed allow any of the Indians, except such as they choose, to fish at all and then only under the condition of giving the fish at a fixed price to them, the holders of the leases...If I were to offer a suggestion in the matter, it would be that the Indians should have the right reserved to them of fishing wherever and whenever they pleased and that all licenses or leases to catch fish on Lake Superior should be issued, subject to this right on the part of the Indians.<sup>483</sup>

In 1868, Dawson again noted the importance of fishing to Indians, and had recommended that "certain areas which they have long occupied and which are necessary to them for their fishing and gardening operations such as the Islands in the Lake of the Woods ... should be set aside for their sole and exclusive use."<sup>484</sup> In 1882, the Acting Deputy Minister of Marine and Fisheries argued, however, that a recognition of aboriginal and treaty rights to fish would "provoke collisions between white fishermen and Indians" instead of preventing them.<sup>485</sup>

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<sup>482</sup>Van West, "Ojibway Fisheries," *supra*, note 66 at 47

<sup>483</sup>Memorandum from Simon J. Dawson, Three Rivers, to Pennefather, Archives of Ontario, Dawson Family Papers, MU 831, file 42: n.p., 24 July 1860

<sup>484</sup>Memorandum in reference to the Indians on the line of route between Lake Superior and the Red River, Ontario Archives 1868, Pamphlet 1868 # 14

<sup>485</sup>Van West, "Ojibway Fisheries," *supra*, note 66 at 47



Dawson nonetheless maintained that that the Ojibway had never surrendered their proprietary rights in the fisheries, reminding Vankoughnet in 1888 that “while they [the Indians] look upon strangers as being perfectly free to use rod and line, they regard the sturgeon as their own particular property.”<sup>486</sup> The Ojibway themselves informed the Inspector of Indian Agencies in 1890 that “when we gave up our lands to the Queen, we did not surrender our fish to her.”<sup>487</sup>

Although non-aboriginal people began commercial fishing operations in the Lake of the Woods in mid-1880s, no local fishery overseers were appointed throughout the 1880s<sup>488</sup> leaving the aboriginal fishery unprotected from encroachment. In 1889 the Department of Indian Affairs arranged to have Indian agents appointed fishery overseers *ex officio* to protect the Indian rights in the fisheries.<sup>489</sup> At this time, in such relatively unsettled areas of the Northwest, it was vital that the government provide assurances that aboriginal fishing would be protected.<sup>490</sup>

At Lake of the Woods, three commercial licences to non-aboriginal fishermen were issued by the Department of Marine and Fisheries in 1892.<sup>491</sup> A contingent of eleven Ojibway Chiefs complained to Indian Affairs that there was a wholesale depletion of fish as a result of these

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<sup>486</sup> *Ibid.* at 53 footnote 27

<sup>487</sup> *Ibid.*

<sup>488</sup> *Ibid.* at 47

<sup>489</sup> *Ibid.* at 36

<sup>490</sup> Treaty No. 8 was negotiated on the basis that aboriginal fishing rights would not be curtailed in any way. The Report of the Commissioners for Treaty No. 8, dated September 22, 1889 was addressed to the Hon. Clifford Sifton, the Superintendent General of Indian Affairs and noted that “our chief difficulty [with the Indians] was the apprehension that hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing *if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits*, but over and above that provision we had to solemnly assure them that only such laws as to hunting and fishing as were in the interests of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made and *that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.*” [emphasis added] Treaty No. 8 [Manitoba] *Report of Commissioners for Treaty # 8*, Winnipeg, Manitoba, September 22, 1889 addressed to the Hon. Clifford Sifton, Supt. General of Indian Affairs, Ottawa (Ottawa: Queen’s Printer and Controller of Stationery 1966), Cat. No. Ci 72-0866.

licences, and asked that no further licences be granted.<sup>492</sup> The Department of Marine and Fisheries insisted that the Ojibway would always have fish at their disposal.<sup>493</sup> However, by 1895, the number of licences had increased thirty-fold; 100 more licences were issued.<sup>494</sup> A reported harvest by non-aboriginal fishermen of sturgeon, pickerel, whitefish and jackfish of over three million pounds took place in 1894, compared with only 95,000 pounds in 1888. In March, 1895, Ojibway Chief Powasing wrote in a petition to Indian Affairs that:

... we are in great danger of being seriously injured and in great danger of starvation if something is not done by the Canadian and American governments to stop the destruction of the fish in the Lake of the Woods. There are several large Fishing Companies both American and Canadian carrying on large fishing business here and the sturgeon and other fish are being taken from the lake in such quantities that if something is not done to stop the fishing — the sturgeon particularly — and white[fish] and other fish will be done away with.<sup>495</sup>

Because provincial jurisdiction over the surrendered territory had not yet been declared, prolonged disputes had developed between Ontario and Canada over the location of the boundary between Manitoba and Ontario, as well as over confirmation by Ontario of the Treaty Three Reserves. In 1891, *An Act for the Settlement of Questions between the Government of Canada and Ontario respecting Indian Lands*,<sup>496</sup> was passed jointly by the Dominion and provincial legislatures. In it, the federal government and the provincial government were authorized to enter into an agreement that would have the force of legislation.

In 1894, Canada and Ontario finally signed a statutory agreement that authorized the provinces to concur in the location, size and extent of the Treaty Three reserves.<sup>497</sup> Paragraph 4 of that agreement reads as follows:

That in case of all Indian Reserves so to be confirmed or hereinafter selected the waters within such lands laid out or to be laid out as Indian Reserves within the said Territory, including the land covered with water lying between the projecting headlands of any lake or sheets of water,

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<sup>491</sup> Van West, "Ojibway Fisheries," *supra*, note 66 at 40

<sup>492</sup> *Ibid.*

<sup>493</sup> *Ibid.*

<sup>494</sup> *Ibid.*

<sup>495</sup> *Ibid.* at 41

<sup>496</sup> (1891) 54-55 Vict. c. 5 (Can) and 54 Vict. c. 3 (Ont.).

<sup>497</sup> Van West, "Ojibway Fisheries," *supra*, note 66 at 34

not wholly surrounded by an Indian Reserve or Reserves, shall be deemed to form part of such reserve including Islands wholly within such headlands and *shall not be subject to the common public right of fishery* by others than Indians of the Band to which the reserve belongs. [emphasis added]<sup>498</sup>

For the period between 1894 and 1915, the Treaty Three beneficiaries held an exclusive treaty right to fish. This right was confirmed by a statute intended to exclude the public from certain areas to protect these exclusive fishing rights, until 1915, when Ontario took steps to unilaterally amend its legislation to remove the public exclusion from aboriginal waters.<sup>499</sup>

During the intervening period, however, the province of Ontario, which by then had enacted its own fisheries legislation, issued licences as did the Department of Marine and Fisheries. By the time the *Fisheries Reference* had reached the Privy Council, and the jurisdictional issues had been resolved, the overall fishery was virtually destroyed.<sup>500</sup> By 1900, the sturgeon fisheries of the Lake of the Woods had collapsed due to overfishing by licensed non-aboriginal fishermen.<sup>501</sup> In a final attempt to preserve non-aboriginal commercial fishing interests, aboriginal methods of capturing fish were made illegal. As John Van West notes:

The self-regulating Ojibwa riverine fisheries and the long-established Ojibway fish trading ac-

<sup>498</sup>NAC, RG 10 vol. 3882, file 95,721: n.p.

<sup>499</sup>In 1915, the Province of Ontario attempted to unilaterally abrogate the terms of para. 4 of that Agreement by the passage of *An Act to Confirm the Title of the Government of Canada to Certain Lands and Indian Lands* (1915) 5-6 Geo. V c. 12. Section 2 of the Act stated: "All water powers which in their natural conditions are at the average low stage of water have a greater capacity than 500 horsepower and such area of land, including roads in connection therewith, as may be necessary for the development and utilization thereof, and *the land covered with water lying between the projecting headlands of any lake or sheets of water, not wholly surrounded by an Indian Reserve or Reserves, shall not be deemed to be form part of such reserve* but shall continue to be the property of the Province, notwithstanding anything contained in the fourth paragraph of the agreement hereinbefore mentioned." The issue as to whether the Province could do so remains unresolved. Indeed, in *Gardner v. R. in Right of Ontario and R. in Right of Canada* [1984] 3 C.N.L.R. 72 at 76, the Ontario Supreme Court, Trial Division noted, "It appears that the 1915 provincial statute was a unilateral attempt on the part of Ontario to diminish in scope the promise it had given to the Dominion government in the 1894 agreement. That the Band was the victim of the diminution in scope of that promise is not arguable.. .... [at 85] It would appear from the face of the pleadings that the plaintiffs have been deprived of a valuable right which in part they paid for by surrendering their aboriginal rights to the Crown in right of Canada. It is unseemly that the Province of Ontario which in an agreement with the Dominion of Canada promised to uphold that right is not solicitous of that right."

<sup>500</sup>*Ibid.*

<sup>501</sup>Van West, "Ojibway Fisheries," *supra*, note 66 at 41

tivities were accordingly rendered unlawful with the stroke of a pen in 1903 when the federal government acquiesced to the commercial fishing lobby and passed legislation that prohibited the use of spears and unbaited hooks in Ontario ... as sturgeon capturing devices and restricted access to the resource within the province during the spawning season.<sup>502</sup>

Less than thirty years after the signing of the North West Angle Treaty, the sturgeon fisheries of Lake of the Woods and the Rainy River had essentially been destroyed due to the uncontrolled development of non-aboriginal commercial fisheries.<sup>503</sup>

The Supreme Court of Canada in both *Nikal* and *Lewis* assumed that unsundered waters were publicly owned and had to be "granted" by the Crown before aboriginal exclusivity could be found. The fallacy of this reasoning has already been detailed. The circumstances of the Treaty Three promise of exclusivity entrenched in legislation in 1891 confirm that exclusive aboriginal fishing rights were not a legal fiction, although the Crown did little to protect those rights.

There seems to have been nothing extraordinary or startling about Justice Rose's conclusion in *Caldwell v. Fraser, supra*, in 1898 that adjacent waters could be considered to be part of a reserve and part of the Indian title until surrendered; just seven years earlier, the Mohawks of the Bay of Quinte had been asked to surrender the underlying bed of the Bay of Quinte out to navigable or deep waters.<sup>504</sup> If the underlying bed was not understood to be part of either the Mohawk aboriginal title or rights under the Simcoe Deed, such a surrender would clearly not have been necessary.

Despite the ruling in *Caldwell* and the other cases cited, however, the Department of Marine and Fisheries remained unmoved and unwilling to change its policy of denying aboriginal fishing rights. In December, 1897 the Department of Indian Affairs prepared a lengthy report outlining the aboriginal and treaty rights of Indian people to fish in the various parts of Canada. Its author, Samuel Stewart, noted that these rights appeared to have no weight with the

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<sup>502</sup>*Ibid.* at 42.

<sup>503</sup>*Ibid.* at 31

<sup>504</sup>See note 91, *supra*.

Fisheries Department.<sup>505</sup> The Department of Marine and Fisheries agreed. It responded by saying that little was to be gained by a new inquiry “at this late juncture.”<sup>506</sup>

### III. Analysis of the Decisions in *Nikal* and *Lewis*

Imperial Crown policy in the early 19th century clearly recognized exclusive aboriginal fishing rights at times, as the example of the Credit River Mississaugas alone has demonstrated. In other British colonies as well, governed by the same Imperial policy, there is evidence to support that such rights were indeed recognized.<sup>507</sup> The 1840 Treaty of Waitangi between the British Crown and the Maori people of New Zealand, for example, confirmed to the Maori “the full and *exclusive and undisturbed possession* of their Lands and Estates, Forest and *Fisheries* and other properties, so long as it is their wish and desire to retain the same in their possession.”<sup>508</sup>

Several New Zealand decisions in the 19th century had also determined that aboriginal people had exclusive rights to the fisheries within their territories. In the *Kauwaeranga* case of 1870, for example, the Chief Judge held that there was no reason why the Maori could not have ownership of the land covered by the sea at high-water, given the evidence of their “consistent and exclusive use of the fisheries” from time immemorial.<sup>509</sup> For the court in *Kauwaeranga*, the question was not a legal analysis of whether the Crown had acquired the prerogative right to the foreshore as a result of its assertion of sovereignty but a very different test from that applied by the Supreme Court of Canada. The real question, the Court stated, was a question of fact, namely, “Was the land now claimed at the date of the Treaty of Waitangi, land or a fishery collectively or individually possessed by aboriginal natives? For, if it was, the full, exclusive and undisturbed possession of it thereof is confirmed and guaranteed.”<sup>510</sup>

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<sup>505</sup> Van West, “Ojibway Fisheries,” *supra*, note 66 at 47

<sup>506</sup> *Ibid.*

<sup>507</sup> Imperial officers, furthermore, served in colonies other than Canada. Sir Francis Bond Head, for example, served in Argentina in the 1820s, see Smith, *Sacred Feathers*, *supra*, note 45 at 162

<sup>508</sup> Treaty of Waitangi (1840) [emphasis added]

<sup>509</sup> *Kauwaeranga* (1870) printed as *Kauwaeranga Judgment*, (1984) 14 V.U.W.L.R. 227

<sup>510</sup> *Ibid.* at 243

The factual underpinnings of the rulings in *Nikal* and *Lewis* that fisheries were not part of the lands reserved for Indians and that the Crown's policy was one of treating Indians in common with white men at least in British Columbia and Upper Canada, are also at odds with decisions reached by trial judges which have heard and assessed expert evidence in the full context of a trial. Indeed, the historical facts found to exist by the Supreme Court of Canada in *Nikal* and *Lewis* are inconsistent with the Supreme Court's earlier adoption of facts found at trial in its ruling in *Jack v. The Queen*.<sup>511</sup> The trial court made findings that fishing grounds had been reserved for Indians in the vicinity of their lands through recommendations from the Minister of the Interior adopted by the Governor in Council on April 24, 1874. One of these recommendations was that "[g]reat care should be taken that the Indians especially those inhabiting the Coast should not be disturbed in the enjoyment of their customary fishing grounds, which should be reserved for them previous to white settlement in the immediate vicinity of such localities. [emphasis added]"<sup>512</sup>

The Supreme Court of Canada held in *Jack* that trial judge's findings were "a fair interpretation of the historical and expert evidence in the case" and declined to interfere with them.<sup>513</sup>

As the Supreme Court outlined in *Jack*:

It is extremely difficult to separate out the fishery from either Indians or the lands to be reserved for Indians. In the latter case, lands were to be reserved to Indians for the purpose of permitting them to continue their river fishery at the customary stations. In the former case, the Indians were to be encouraged to exploit the fishery, both for their own benefit and that of incoming white settlers, as a means of avoiding the Indians becoming a charge upon the colonial finances. However one wishes to view the pre-Confederation "policy" it undoubtedly included some elements of an Indian fishing policy.<sup>514</sup>

The Supreme Court noted in *Jack* that "pre-Confederation policy gave the Indians a priority in

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<sup>511</sup> *Jack v. The Queen*, *supra*, note 353

<sup>512</sup> Memorandum of David Laird, Minister of the Interior and Minister responsible for Indian matters, submitted to the federal Cabinet and adopted by the Governor in Council on April 24, 1874, cited in *Jack*, *ibid.*

<sup>513</sup> *Ibid.*

<sup>514</sup> *Ibid.*, at 37

the fishery.”<sup>515</sup> It should be observed that a priority in a fishery, however it is ranked, is inconsistent with the notion of “public” rights and equal access to fisheries by all, in and of itself.

The decision in *Jack* confirmed that a policy of recognition and non-interference in early Crown policy was predicated on the fact that there was no interest on the part of non-aboriginal people in the sports or commercial fishery at that time.<sup>516</sup> As the Court observed, “In 1871, there was no commercial fishery of any importance or scale. Sport fishing had yet to develop into a significant pastime on the part of the white residents.”<sup>517</sup>

This in itself is a compelling reason to reject the Supreme Court of Canada’s interpretation of Crown policy in *Nikal* and *Lewis*, and its insistence that the Crown would have “reserved to itself” the fishery from the lands transferred by the province to the federal government for dedication as a reserve. In circumstances prior to settlement, there was no practical reason for the provincial or federal Crown to have reserved to itself or for public use the fishery in waters in which little or no sports fishing, and no commercial fishing by non-aboriginal people was taking place.

#### **A. Assuming “Grants” of Rights are Required**

Because lands had been transferred from the province of British Columbia for dedication as reserves, the Court apparently failed to consider how, or even if, the province had acquired title in the first place to unsurrendered lands covered with waters. Nonetheless, the Court somehow concluded that a “grant” of fishing rights to aboriginal people from the Crown was required.

In *Lewis*, the Supreme Court of Canada held that the Crown had not intended the aboriginal

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<sup>515</sup>*Ibid.* at 41

<sup>516</sup>*Ibid.* at 35

<sup>517</sup>*Ibid.*

fishery to be part of the Squamish River reserve. Justice Iacobucci, speaking for the majority, wrote:

Considerable historical evidence indicates that it was never the Crown's intention at any point in time to include a fishery as part of the reserve. A desire of both the provincial and federal governments to support and protect native fishing does not amount to *granting* exclusive right to fishing grounds. In fact, statements and legislation both pre-Confederation and post-Confederation demonstrate that the Crown's policy was to treat Indians and non-Indians equally as to the use of the water and not to *grant* exclusive use of any public waters for the purpose of fishing.<sup>518</sup> [emphasis added]

The Supreme Court's analysis of the *Nikal* case was written by Justice Cory, who began by stating that "[At] the outset, it must be emphasized that a consideration of the by-law raises the question of whether an exclusive right to fish in the Bulkley River at Moricetown was *granted* to the Band."<sup>519</sup> The Crown policy against "granting" exclusive interests within public waters was found to be fatal to the aboriginal appellants' claim to self-regulation by by-law in both cases.<sup>520</sup>

The use of the term "granted" raises an initial concern as to whether Justice Cory or Justice Iacobucci were aware of the distinction between ceded and unceded lands or even the nature of pre-existing aboriginal title and rights. The fact that a reserve was set aside did not necessarily mean the Crown "granted" lands to the Moricetown Band. Reserved lands can include lands which have not been the subject of a surrender.<sup>521</sup>

The assumption on which the Court proceeded seems to have been that there was no aboriginal title in the area in question and that reserve lands became the subject of an exclusive aboriginal interest only when they became "reserved" or "granted to" Indians. On this view, British Columbia's reserves would not have become "lands reserved for Indians" until 1938 when the province conveyed its "reversionary interest" in them to Canada.<sup>522</sup> However, aboriginal

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<sup>518</sup> *Lewis, supra*, note 3 at 141

<sup>519</sup> *Nikal, supra*, note 2 at 186 [emphasis added]

<sup>520</sup> *Ibid.*

<sup>521</sup> See *Caldwell v. Fraser, supra*, note 111

<sup>522</sup> For a discussion of the flaws in this line of reasoning, see Hamar Foster, "Roadblocks and Legal



title was not extinguished by treaty in most of British Columbia; the leading case discussing federal constitutional authority to set aside reserve lands within a province is premised on the prior extinguishment of aboriginal title in those lands.<sup>523</sup>

Although it does not say so, the Supreme Court in *Nikal* and *Lewis* either assumed that aboriginal title could not exist in waters, or assumed that the dedication of lands for use as reserves in both *Nikal* and *Lewis* had somehow severed aboriginal title, such that lands had to be “granted” with an intention to convey exclusive fishing rights before aboriginal rights in waters could exist. However, as noted in the 1898 *Fisheries Reference*, the beds of Indian lands and unsurrendered Indian lands, including those covered with waters, had never vested in the provinces but remained vested in the federal government.<sup>524</sup> The dedication of lands by the province is completely irrelevant. Nor, as was noted in the aftermath of *the Fisheries Reference*, could the federal government grant that which it did not fully possess.

The Court also repeatedly referred to “grants” from the Crown without considering that the only Crown lands that could be granted to anyone were those which had already been surrendered by Indians; in other words, not grants *to* Indians, but grants *from* them.<sup>525</sup> In *R. v. Taylor and Williams*, the Ontario Divisional Court noted that pre-existing aboriginal rights continue, unless granted away by a treaty.

Aside from the question as to whether or not aboriginal rights were reserved in the treaty, it is also my opinion that even in a situation *where there is no treaty*, or if a treaty remains silent with respect to aboriginal rights, such as native hunting and fishing, these rights that have ex-

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History: Part II: Aboriginal Title and 91(24)” (1996) 54 *The Advocate* 531

<sup>523</sup>*Ontario Mining v. Seybold* (1902) 3 CNLC 203 (J.C.P.C.) The doctrine of “discovery” supposedly gave title to the government by whose subjects or by whose authority it was made against all other European governments. However, even the principle of discovery could not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a discovery made “before the memory of man.” Discovery did not divest indigenous peoples of their pre-existing rights. The idea that it might have done so has been flatly rejected. See *Worcester v. Georgia* 31 U.S.(6 Pet.) 515 (1832) (Supr. Ct.)

<sup>524</sup>*A.G. for the Dominion of Canada v. A.G. Ontario, Quebec and Nova Scotia* [1898] AC 700 (J.C.P.C.), at 703, 712 and 716

<sup>525</sup>This has been explained in the United States as the “reserved rights” doctrine in which treaties reserve all rights which have not been explicitly granted away, *United States v. Winans*, 198 U.S. 371, 381 (1905).

isted from the beginning of time continue. ....Unless *those specific rights have been taken away by a treaty, provincial legislation such as the Game and Fish Act in question cannot abrogate from those original privileges, forming part of the "Indian Title."* [emphasis added] <sup>526</sup>

The reservation of lands is a retention of that which has not been surrendered; reserve status protects pre-existing aboriginal rights but does not create them. <sup>527</sup> In fact, this point was argued by the Attorney General of Ontario in its written factum filed (but later withdrawn) as Intervenor in *Nikal*:

Aboriginal rights do not – and cannot, as such – derive by grant from the sovereign; their anchorage necessarily reaches back before Crown sovereignty was established and they continue, at common law, until the sovereign takes specific and competent steps to extinguish them. <sup>528</sup> ... The only additional impact express reservation would have had would have been to give such rights sooner the status and protection that section 35(1) of the Constitution Act now accords them. <sup>529</sup>

The Supreme Court did not explain exactly how it came to be that the public acquired rights in areas in which Indian surrenders and cessions had not been obtained. As the Canadian Bar Association has asked, quite succinctly, "... the question remains unanswered: How did the Crown, whether English, French, Imperial, Dominion or Federal, obtain the jurisdiction and therefore the right to *grant* civil jurisdiction to Indians?"<sup>530</sup> Similarly, one must ask "How did the Crown, and thereby the public, obtain the title to the fisheries in unsurrendered Indian lands?" The rather obvious conclusion is that they did not, and that aboriginal people continue to hold exclusive fishing rights within areas in which aboriginal title remains unsurrendered.

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<sup>526</sup>*R. v. Taylor and Williams*, [1980] 1 C.N.L.R. 83 (Ont. Div. Court) at 90, aff'd [1981] 3 C.N.L.R. 114 (Ont. C. A.)

<sup>527</sup> As Justice L'Heureux-Dube noted in her dissent in *R. v. Van der Peet* [1996] 4 C.N.L.R. 177 at 224 (S.C.C.):, "A piece of land can be conceived of as aboriginal title land and later become reserve land for the exclusive use of Indians; such land is then, reserve land on aboriginal title land. Further, aboriginal title land can become aboriginal right land because the occupation and use by the particular group of aboriginal people has narrowed to specific activities. The bottom line is this: on every type of land described above, to a larger or smaller degree, aboriginal rights can arise and be recognized."

<sup>528</sup>*Factum of the Intervenor Attorney General of Ontario* at 7, para. 64. Ontario withdrew from the appeal before it was heard.

<sup>529</sup>*Ibid.* para. 65

<sup>530</sup>Christine Scotnicki, *Aboriginal Civil Jurisdiction in Canada*, (Canadian Bar Association: Toronto, 1993) at 23

## B. The Misapplication of European Property Laws

Having determined that the resolution of the issues in *Nikal* and *Lewis* were based on “grants” of reserved lands, the Supreme Court went on to apply the general property laws which apply to such grants, such as the *ad medium filum aquae* presumption. The contextual errors associated with the Court’s analysis of the *ad medium filum aquae* presumption based on a review of cases from the 19th century have already been discussed.

The Court’s error concerning the existence of public rights as opposed to exclusive fishing rights within navigable waters was repeated in *Nikal* and *Lewis* even in the more recent cases and articles cited by the Court. The Supreme Court of Canada, for example, stated in *Nikal* that “in England, it has been accepted that since the Magna Carta, the Crown has no power apart from statute to grant a several or exclusive fishery to anyone. See Gerard V. La Forest, *Water Law in Canada - The Atlantic Provinces* at p. 196.”<sup>531</sup>

An examination of the reference from *Water Law in Canada*, however, reveals that La Forest’s comments were directed exclusively to tidal waters, and not to rights within non-tidal waters, where La Forest explained that exclusive rights applied automatically.<sup>532</sup> In fact, La Forest wrote that *no* general public right existed in waters which were navigable and non-tidal. Although the province could “permit” the public to fish there, that did not mean a general right existed in the public.<sup>533</sup> Moreover, since according to the *Fisheries Reference* cases, the bed beneath unceded Indian lands and waters remained vested in the federal government, it is unlikely that the lands or the fisheries above them can be considered provincial property over which the province could permit public fishing as a matter of property or civil rights.

There are other anomalies in the Supreme Court of Canada’s legal interpretations. The Supreme Court in *Nikal* began its analysis of the applicability of the *ad medium filum aquae*

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<sup>531</sup>*Nikal, supra.*, note 2 at 188

<sup>532</sup>Gerard V. La Forest, *Water Law in Canada - The Atlantic Provinces*, (Ottawa: Dept. of Regional Economic Expansion, 1973), at 196

presumption, for example, describing it as "... [a presumption] by which ownership of the bed of a non-tidal river or stream belongs in equal halves to the owners of riparian land, *whether the body of water is navigable or not.*"<sup>534</sup> The Court then went on, somewhat inconsistently, to hold that the applicability of the *ad medium filum aquae* presumption was determined by the navigability of the body of water at issue<sup>535</sup> and that since the Squamish River was navigable, the presumption did not apply.

In determining the applicability of the Moricetown Band By-law in *Nikal*, the Supreme Court of Canada considered the application of the *ad medium filum aquae* rule applying a similar line of reasoning. The Court stated, "assuming without deciding that the doctrine of *ad medium filum aquae* should apply in Canada, it does not apply in this case for three reasons. First, it must be remembered that *the doctrine is only applicable in cases where the water forming the boundary is not navigable...*"<sup>536</sup>

As has been shown, the Court's precondition for applying the presumption, namely that waters be non-navigable, was wrong, at least according to the 19<sup>th</sup> century cases referred to. However, in justifying its conclusion, the Supreme Court proceeded to misstate and quote out of context an entire series of cases. For example, the Supreme Court of Canada distinguished the Privy Council 1914 ruling in *B.C. Fisheries Case*,<sup>537</sup> which had been advanced by the appellants, on the basis that it was not concerned with the *ad medium filum aquae* rule, but rather the conveyance of land including lands covered with waters. Justice Iacobucci stated in *Lewis*<sup>538</sup> that:

The Privy Council, in that case, was not considering a grant of designated territory with a river located outside the land granted but *adjacent to it*. The Privy Council merely held that the plain language of the grant of the railway belt transferred whatever lands came within its parameters - whether covered with water or not. I agree with his conclusion, and consider that the *B.C.*

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<sup>533</sup>*Ibid.*

<sup>534</sup>*Nikal, supra*, note 2 at 188 [emphasis added]

<sup>535</sup>*Ibid.* at 150

<sup>536</sup>*Ibid.* at 198 [emphasis added]

<sup>537</sup>*A.G. for British Columbia (B.C. Fisheries Case)* [1915] A.C. 153 [hereafter referred to as *B.C. Fisheries Case*]

<sup>538</sup>*Lewis, supra*, note 3 at 150

*Fisheries Case, supra*, does not settle the question of the applicability of the presumption. [emphasis added]<sup>539</sup>

However, the Privy Council's consideration of waters adjacent to lands granted in the *B.C. Fisheries* case was determined precisely on the basis of the presumption. The Privy Council had stated that "the *solum* of a river bed is a property differing in no essential characteristics from other lands. Ownership of a portion of it usually accompanies riparian property and greatly adds to its value."<sup>540</sup> This was exactly the same point made by Justice Strong in *The Queen v. Robertson, supra*, to the effect that the *ad medium filum aquae* presumption was more than a mere right of access or a riparian right, but afforded a territorial right of ownership over a fishery which could be conveyed to others as one of the profits of land "over which the water flows."<sup>541</sup>

In direct contradiction to the Supreme Court's finding in *Nikal* and *Lewis* that the presumption *only* applied to navigable waters, the Privy Council in the *B.C. Fisheries Case* had added that "the question of whether non-tidal waters are navigable or not has no bearing on the question. The fishing in navigable non-tidal waters is the subject of property, and according to English law must have an owner and *cannot be vested in the public generally*."<sup>542</sup> There is little explanation as to why the *B.C. Fisheries* case was misstated by the Court to support a finding that a presumption of ownership did not apply to navigable waters.

The Supreme Court cited three other cases in *Lewis* to support its conclusion that the *ad medium filum presumption* did not apply to navigable rivers. These were *Re Iverson and Greater Winnipeg Water District*,<sup>543</sup> *Flewelling v. Johnston*<sup>544</sup> and *Friends of the Oldman River Society*.<sup>545</sup> Again, each decision was again taken out of context or applied incorrect principles.<sup>546</sup>

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<sup>539</sup>*Ibid.*

<sup>540</sup>*B.C. Fisheries Case, supra*, note 537 at 167

<sup>541</sup>(1874) 6 S.C.C. 53 (S.C.C) at 132

<sup>542</sup>*Ibid.* at 173 [emphasis added]

<sup>543</sup>*Re Iverson and Greater Winnipeg Water District* (1921) 57 D.L.R. 184

<sup>544</sup>[1921] 2 W.W.R. 374 (Alta. C.A.)

<sup>545</sup>[1992] 1 S.C.R. 3

<sup>546</sup>In the *Oldman River* case, Justice La Forest cited *In Re. Provincial Fisheries* in support of the proposition the distinction between tidal and non-tidal waters was abandoned long ago. However,

In 1921, the same year as the decisions in *Re Iverson and Greater Winnipeg Water District* and *Flewelling v. Johnston* were delivered,<sup>547</sup> the Privy Council had confirmed yet again that the *solum* of waters (and therefore, the fisheries) could be vested in the province or in individuals, even in navigable waters. In the *Attorney General for Canada v. The Attorney General for Quebec re. Quebec Fisheries*, a decision not referred to by the Supreme Court in either *Nikal* or *Lewis*, but also released in 1921, Viscount Haldane of the Judicial Committee of the Privy Council had held that “[T]he *solum* and the consequent proprietary title to the fishery may be vested in the Crown in the right of the province or in a private individual, and insofar as this is so, it cannot be transferred by regulation.”<sup>548</sup>

In yet another example of selective case-law, the Supreme Court in *Nikal* relied on the reasons of Anglin, J. from the 1906 Ontario High Court decision in *Keewatin Power Company v. Kenora* as supporting its conclusion that navigability was determinative of the *non-applicability of the ad medium filum aquae presumption*.<sup>549</sup> That decision had been overturned on appeal to the Ontario Court of Appeal a year later, a fact not mentioned by the Supreme Court.<sup>550</sup>

The appellate decision in *Keewatin Power Co. v. Kenora* actually contradicted the Supreme Court of Canada’s statements on navigability and the application of English common law. The Ontario Court of Appeal, in reversing Justice Anglin’s decision, decided that it was *not nec-*

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when one reviews *In the Matter of Jurisdiction over Provincial Fisheries* (1895) 26 SCR 444 (S.C.C.), known as *Re Provincial Fisheries*, the Supreme Court of Canada was dealing not with the issues related to navigation, but with jurisdiction over fisheries. To that end, the Court very clearly delineated differences between tidal and non-tidal waters, holding that riparian proprietors had an exclusive right of fishing where the beds of non-tidal lakes rivers, streams and waters had been granted to them by the Crown before Confederation. At 527, the Chief Justice had held that if the right of fishing is an incident of the right of property in the bed of the stream, cases from Upper Canada were conclusive authorities. This ruling was not overturned by the Privy Council on the further reference.

<sup>547</sup> *Flewelling v. Johnston* [1921] 2 W.W.R. 374 (Alta. C.A.) cited in *Nikal supra*, note 2 at 199

<sup>548</sup> (1921) 56 D.L.R. 358 at 367-8

<sup>549</sup> *Keewatin v. Kenora* (1906) 13 O.L.R. 237. The reversal on appeal is mentioned in a section quoted from the decision of Beck, J.A. in *Flewelling v. Johnston* at 199 of *Nikal*, but is not noted two pages later, when Anglin, J’s reasons are accepted as correctly stating the law, see *Nikal, supra*, note 2 at 201

essary to determine whether the Winnipeg River was navigable or non-navigable because it was a non-tidal river and therefore riparian rights applied. The Court held that the bed of the river had passed to the appellants as riparian proprietors by virtue of the grant to them under the common law of England, which had been adopted in 1792.<sup>551</sup> According to the Court, any public rights within navigable waters were restricted to navigation only, and nothing more:

At common law the rules applicable to rivers are: in navigable tidal rivers, the right to the bed of the river remains in the Crown; in non-navigable tidal rivers the right is presumed to be in the riparian proprietor and *in navigable rivers above the tide, the right is also presumed to be in such proprietor*. In the case of the Great Lakes and international waters, a contrary presumption might be invoked as there are *dicta* of learned Judges which would give force to such a presumption, but there has been no actual decision on that point. There is no inconvenience or inconsistency in holding that a river is a public highway and at the same time its bed is in the riparian proprietor, subject to the public easement of navigation. *It cannot be assumed that the Crown as represented by the Province intended to reserve the river bed for the protection of the public right of navigation. The province has no jurisdiction or control over navigation and would therefore have no power to make a lease reserving such right.* [emphasis added]<sup>552</sup>

The Ontario Court of Appeal also held the English common law was decisive on this point. In commenting on the Great Lakes, where the issue of riparian rights had not been determined conclusively, the Court of Appeal suggested there was no reason why the presumption of *ad medium filum aquae* should not apply even where non-tidal waters such as the Great Lakes were involved:

Assuming then that the Great Lakes are by reason of not being tidal water or for any other reason, within the *ad medium filum*, what anomaly arises from that, indeed, what difficulty of any sort? If the whole or a great part of this Province had been granted to a great company, like the Hudson's Bay Company, or even to a body such as the Crown Lands Department and had been described as bounded on the south and southwest by the Great Lakes and rivers, would anyone doubt that the grant would carry the title of *ad medium filum*, subject to the highway over them?<sup>553</sup>

The Ontario Court of Appeal in *Keewatin v. Kenora* dismissed the argument that the Crown

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<sup>550</sup> *Keewatin v. Kenora* (1908) 16 O.L.R. 185 (Ont. C.A.)

<sup>551</sup> See *An Act ... to introduce the English Law as the rule of decision in all matters of controversy, relative to property and civil rights* (1792) 32 Geo. III, c. 1 (Upp. Can.). Nothing in the *Act* was to affect any pre-existing lawful rights or claims, s.2.

<sup>552</sup> *Keewatin v. Kenora*, note 549 at 196

<sup>553</sup> *Ibid.* at 196, 198

held title to underlying beds because of a need to preserve a public right of fishing. It held that the “prerogative rights of the Sovereign took their rise in the necessity of providing for the defence of the realm and the protection and safety of the public -- the general commonweal of the public at large -- rather than the necessity of protecting the rights of the public in navigation and fishing.”<sup>554</sup>

For the Supreme Court of Canada in *Nikal* and *Lewis* to suggest, then, that the *ad medium filum aquae* presumption might not apply in Canada, or to assert that it did not apply as a matter of law to navigable waters on the basis of *Keewatin v. Kenora* and the other cases cited was simply incorrect. It was precisely because the presumption applied in navigable, non-tidal waters in Ontario (some fifty years after the Cockburn opinion dismissing the possibility of exclusive rights to fisheries) that the 1911 *Bed of Navigable Waters Act* was enacted in Ontario to expressly remove the presumption from Crown grants of land.<sup>555</sup> As provincial legislation, however, it could have no effect on aboriginal title, whatever its intent.

The Supreme Court’s statement in *Nikal* that the *ad medium filum aquae* rule did not apply because the Crown’s policy was not to reserve exclusive fisheries for the benefit of aboriginal peoples<sup>556</sup> is also contradicted by the evidence of how, and why reserves were created.

In *Saanichton Marina v. Claxton*, the Crown argued that the Indians involved had received no more than a right to fish in common with other members of the public in Saanichton Bay, which are tidal waters. The Court of Appeal rejected this notion, holding that a treaty right to “carry on our fisheries as formerly” included not only the right to catch fish but also the place where the right was to be exercised.<sup>557</sup> In *Pasco v. CNR*<sup>558</sup> the Court observed that the issues

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<sup>554</sup>*Ibid.* at 195

<sup>555</sup>*The Bed of Navigable Waters Act* (1911) 1 Geo. V. c. 6 legislated away the *ad medium filum aquae* presumption of ownership of the bed as passing with a grant, except where the grant expressly mentioned the bed of waters. Where unsundered and therefore unpatented lands were involved, however, the *Bed of Navigable Waters Act*, had no application since these were not “grants” and were not therefore subject to the *Act*, see *Bartlett v. Delaney* (1913) O.W.N. 200

<sup>556</sup>*Nikal*, *supra*, note 2 at 204

<sup>557</sup>*Saanichton Marina v. Claxton* (1989) 57 D.L.R. (4th) 161 (C.A.) at 167. At the appeal level, the aboriginal parties advised they were not seeking a proprietary interest in the seabed.



were complicated ones where riparian rights were at issue:

That [*ad medium filum aquae*] argument raises a constitutional issue: does the province have the legislative competence to deny riparian rights to the federal Crown in connection with an Indian Reserve and if so, does that competence extend beyond the flow of the water alone? Could such a provincial power impinge on federal rights in respect of Indians and fisheries. ...The Band's claim to proprietary rights in the river is strengthened by its fishing rights. *In this province, Indian reserves were reduced in size on the grounds that Indian people did not rely on agriculture and that so long as their fisheries were preserved, their need for land was minimal. ...Fishing rights involve access to the fishery as well as preservation of fish.* [emphasis added]<sup>559</sup>

In New Zealand, the courts have rejected an approach which would see English property law define, and thereby reduce, the incidents of aboriginal custom and usage. As stated in *Te Weehi v. Regional Fisheries Officer*, "doctrines of feudalism in English law should not be allowed to deprive Maoris of rights they had customarily owned."<sup>560</sup> Those circumstances which might permit the *ad medium filum aquae* presumption to apply, or to be rebutted, have been recognized as inappropriate and alien to aboriginal custom and usage.<sup>561</sup>

The New Zealand Court of Appeal in *In re Bed of Wanganui River*<sup>562</sup> expressly rejected the idea that tribal lands could be divided into categories to which concepts of riparian rights would apply. Even the dissenting judge in *In re Bed of Wanganui River* noted that the common law of England "came [to New Zealand] as part of our European law, and not as a body of principles to be applied in ascertaining and interpreting the Maori customs and usages."<sup>563</sup> The majority criticized the Crown for arguing that there could be a distinction between the beds of rivers and other tribal lands:

The territory held by the Wanganui tribe [of New Zealand] must be regarded in its entirety as

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<sup>558</sup>[1986] 1 C.N.L.R. 35 (B.C.S.C.) The British Columbia Supreme Court noted that the application and existence of riparian rights in British Columbia had been upheld by the Supreme Court in 1961 when *Canadian Exploration v. Rotter* [1961] S.C.R. 15 held that a grant of land bounded by a river carries with it title to the centre line of the river.

<sup>559</sup>*Ibid.* at 41

<sup>560</sup>*Te Weehi v. Regional Fisheries Officer* [1986] 1 N.Z.L.R. 680 (H.C.) at 686-87

<sup>561</sup>See comments to this effect in *The King v. Morrison* [1950] N.Z.L.R. 247 at 260

<sup>562</sup>[1955] N.Z.L.R. 419 (C.A.)

<sup>563</sup>*Ibid.* at 450

tribal property. *I can see no justification for the Solicitor General's argument that some distinction is to be drawn between dry land and land covered by water, both were tribal property and both had their uses and served the needs of the tribe. [emphasis added]*<sup>564</sup>

In a later case involving the same parties, *In re Bed of Wanganui River*, the New Zealand Court of Appeal adapted the English common law in a manner which incorporated riparian rights and rights to the *solum* into tribal holdings.

When this court said that the bed of the [Wanganui] River, as well as the whole tribal territory occupied by the Wanganui tribe was held by that tribe according to its customs and usages, it was in no way distinguishing the bed of the river from the riparian lands but *on the contrary was assimilating the bed of the river and the riparian lands into one entire holding, the entirety of which was held by the tribe.*<sup>565</sup>

In another New Zealand case, *Te Runanga o Te Ika Whenua Inc. Society v. Att. Gen.*<sup>566</sup> the Court of Appeal criticized counsel for advancing an *ad medium filum aquae* argument, noting it was crucial not to approach such issues only from the European perspective:

Perhaps the approach which the counsel for the Maori argued for in that line of cases, emphasizing the bed and the adjacent land more than the flow of water is an example of the tendency against which the Privy Council warned in *Amodu Tijani* ... of rendering native title conceptually in terms which are appropriate only to systems which grew up under English law. ... the *ad medium filum aquae* rule applied in the 1962 case is inconsistent with the [Maori] concept and may well be unreliable in determining what the Maori have agreed to part with.<sup>567</sup>

It is suggested that the New Zealand approach, which attempts to effect a reconciliation between common law and customary laws, is in fact, the correct one. It is at least in keeping with the Supreme Court's direction in *Delgamu'ukw* that aboriginal laws be given consideration. In the case of fisheries, though, it may be difficult to find aboriginal laws which address such issues as ownership of the bed, navigability and other concepts which were important to the development of English common-law but which have little application within societies with very different views of land and waters, and a perspective which is based on collective rights rather than proprietary ones.

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<sup>564</sup>*Ibid.* at 461

<sup>565</sup>*In re Bed of Wanganui River* [1962] N.Z.L.R. 600 (C.A.) at 612

<sup>566</sup>[1994] 2 N.Z.L.R. 20 (C.A.)

To that end, it is suggested that issues such as those before the Supreme Court in *Nikal* and *Lewis* should not be determined on the basis of feudal laws, which have little relevance to the cross-cultural nature of these issues, but on the basis of aboriginal title. Common law itself has recognized aboriginal title derived from custom and usage.<sup>568</sup> In English common law, custom and usage has always formed the exception to public rights in what might otherwise be considered public waters.<sup>569</sup> In *Gage v. Bates*<sup>570</sup> the Court observed that common rights in the sea and in navigable rivers were subject to restraint and prohibition based on the local usage of any particular place.<sup>571</sup> In light of that, perhaps a grant by the Crown of exclusive aboriginal rights in adjacent waters congruent with the requirements of common law but based on custom and usage by aboriginal peoples should be presumed.<sup>572</sup> Whatever historical facts

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<sup>567</sup> *Ibid.* at 26

<sup>568</sup> *Mabo v. Queensland, supra*, note 24 at 61. These customary laws and usages were themselves adopted as part of English common law, *Connolly v. Woolrich* (1867) 17 R.J.R.Q. 75 (Que. S.C.) Slattery has suggested that the local customs of the native peoples were to presumptively continue in force and be recognizable in the courts, as a matter of colonial law (which governed property rights, as opposed to imperial law, which governed sovereign rights) except where unconscionable or incompatible with the Crown's assertion of sovereignty, Brian Slattery, *Land Rights of Indigenous Canadian Peoples as Affected by the Crown's Acquisition of Their Treaty*, Oxford University, D.Phil. Thesis 1979, (University of Saskatchewan's Native Law Centre) at 50-59. Although the Crown had the right to legislate within conquered or ceded territories without Parliament, until prerogative legislation was established, British courts presumed that the existing laws, customs, rights, properties and even institutions of the local people continued in force, Walters, *Aboriginal Rights to Fisheries, supra*, note 20 at 14. The adoption of aboriginal customary law by English common law was the subject of comment by Justice Lambert (dissenting on other grounds) in his dissent in *Delgamu'ukw v. Her Majesty*, [1993] 5 W.W.R. 97 (B.C.C.A.) at paras. 653, 655. The majority of the Court of Appeal in *Delgamu'ukw* accepted that Indian customary law insofar as it relates to internal self-regulation of aboriginal communities is a valid exercise of self-governance, provided the internal self-regulation "is in accordance with Aboriginal traditions, [and] if the people affected are in agreement," *ibid.*, para 163. The Supreme Court of Canada in *Delgamu'ukw, supra*, note 16, did not deal with the issue.

<sup>569</sup> *New Windsor Corporation v. Mellor* [1975] 1 Ch 380 at 387, per Lord Denning MR. See also *Kauwaeranga supra*, note 534 at 243 (oyster beds and even the taking of seaweed being two prime examples). In the Northern Territory of Australia, where fisheries regulations do not apply to traditional aboriginal activities, the seas within two kilometres of Aboriginal land may be closed to persons who are not entitled by aboriginal tradition and custom to enter and use those waters, *Fisheries Act*, 1988 (NT) s. 53; *Aboriginal Land Act 1978* (NT) s. 12

<sup>570</sup> *Gage v. Bates* (1864) Trinity Term, 21 Victoria 116 (Common Pleas)

<sup>571</sup> *Ibid.* at 121

<sup>572</sup> This has been the approach taken in New Zealand. As stated in *Kauwaeranga, supra*, note 534 at 244, "... accepting the principle that all properties, rights, privileges or easements of this character are held to be derived from the King, for *prima facie* they are all his, yet immemorial several use having been proved, the Courts will presume the grant. And in our case, the title is older, for the own-

and oral histories apply in British Columbia, it is certain that in Ontario, aboriginal customs and usages included exclusivity in waters adjacent to reserves. As a result, the decisions in *Nikal* and *Lewis* can readily be distinguished.

In *R. v. Van der Peet*, the Supreme Court stated that “the challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined.... a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives.”<sup>573</sup> The legal perspective of First Nations’ peoples within Ontario was that they were entitled to regulate their fisheries. In the early post-contact years, they did so by leasing them and consenting to their use by others. The denial of their perspective and interests in favour of non-aboriginal fishermen resulted in conflict. There is the potential for conflict to develop again, should courts proceed to effectively reallocate rights which have never been surrendered to non-aboriginal fishermen by failing to appreciate the context of the information put before them.

Chief Justice Lamer has himself written of the public interest in reconciliation between aboriginal societies and the Crown, stating “I would note that the legal literature also supports the position that s. 35(1) provides the constitutional framework for *reconciliation of the pre-existence of distinctive aboriginal societies occupying the land with Crown sovereignty.*”<sup>574</sup> However, in both *Nikal* and *Lewis*, only the common law rules of real property, such as *ad medium filum aquae*, were applied. The aboriginal perspective was, in each case, ignored. To do so was to define aboriginal rights solely from a European perspective, an error warned against by the Privy Council in 1921.<sup>575</sup>

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ership was before the King and the King confirmed it and promised to maintain it.” Ultimately, there is no legal reason why a separate aboriginal title derived from custom and usage cannot exist in fisheries even independently of an underlying title to land, if the legal fiction that the Crown owns the underlying bed as a result of discovery and the assertion of sovereignty is maintained.

<sup>573</sup>*R. v. Van der Peet*, *supra*, note 527 at 202

<sup>574</sup>*Ibid.* [emphasis added] Justice Lamer repeated his comments in *Delgamu’ukw*, *supra*, note 16 at para. 186, adding, “Let us face it, we are all here to stay.”

<sup>575</sup>*Amodu Tijani v. Sec., Southern Nigeria* [1921] 2 AC 399. What *Nikal* and *Lewis* perhaps point out is how difficult it is for those schooled in European legal concepts to understand the aboriginal per-

In *Nikal* and *Lewis*, the Supreme Court of Canada assumed that the aboriginal peoples had no rights in lands reserved to them except those granted to them by the Crown. In doing so, the Court breached the admonition set out in *R. v. Taylor and Williams, supra*, that the “courts not create by a remote, isolated current view of past events, new grievances.”<sup>576</sup>

### C. Taking Judicial Notice of Contentious Historical “Facts”

It is of genuine concern that the Supreme Court of Canada in *Nikal* accepted newly tendered historical information from the intervenor, the Canadian National Railway Company, over the protests of the aboriginal appellants, information which had not been before the trial judge or the various appeal courts.

This historical information then formed the basis of the decision in *Lewis*, which adopted the conclusions reached in *Nikal*. Justice Cory explained:

At the outset I would confirm that I have read and relied upon some of the historical documents filed by the intervenor Canadian National Railway Company. The appellant objected to any use being made of these documents. I cannot accept that position. First, all parties have had an opportunity to review the documents and make submissions pertaining to them. Further, these are all documents of a historical nature that can be found in the public archives. They are available for use by all members of the public.<sup>577</sup>

In receiving information which was clearly out of context, it is suggested that the Court adopted a procedure which resulted in the Court making fundamental mistakes in the manner in which it accepted and evaluated historical information. Since on their face, the decisions in *Nikal* and *Lewis* could serve to limit and restrict aboriginal fishing rights in Ontario to the rather limited priority recognized in *Sparrow*, the Court’s reliance on contentious historical facts relating to Upper Canada, in a case concerning two British Columbia First Nations, must be firmly rejected. Judicial notice, it is urged, must be judicious notice as well.

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spective and incorporate it into their approach to these issues.

<sup>576</sup>*R. v. Taylor and Williams* [1981] 3 C.N.L.R. 114 (Ont. C.A.) at 120

<sup>577</sup>*Nikal, supra*, note 2 at 186

The Supreme Court of Canada first determined in *R. v. Sioui*<sup>578</sup> that it could entertain historical information for the first time on appeal and even conduct its own historical research. In *Sioui*, Justice Lamer had written:

I am of the view that all the documents to which I will refer whether my attention was drawn to them by the intervenor or as a result of my personal research are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge. As Norris, J.A. said in *White and Bob* (at p. 629): "The Court is entitled to take judicial notice of the facts of history."<sup>579</sup>

This was not the first time an appeal court had taken such a position. In *R. v. Bartleman*<sup>580</sup> one member of the British Columbia Court of Appeal conducted his own private research, apparently not sharing the contents with other members of the court.<sup>581</sup> Mr. Justice Esson, (Carrothers J.A. concurring) expressed some concern about this procedure:

I agree [with the reasons of Justice Lambert] subject only to the reservation that I have not seen or considered the historical material, referred to by Mr. Justice Lambert in the section of his reasons entitled "Judicial Notice of Historical Facts" which was not included in the evidence at trial or the record before this court. Without reference to such material, I have reached the same conclusion as Justice Lambert. ... That being so, I do not need to consider the question whether the doctrine of judicial notice would permit reference to other material.<sup>582</sup>

In *R. v. Augustine and Augustine*<sup>583</sup> the New Brunswick Court of Appeal were also critical of

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<sup>578</sup>*R. v. Sioui* [1990] 3 C.N.L.R. 127 (S.C.C.)

<sup>579</sup>*Ibid.* at 144

<sup>580</sup>*R. v. Bartleman* [1984] 3 C.N.L.R. 114 (B.C.C.A.)

<sup>581</sup>In *Bartleman*, *ibid.*, at 116 Mr. Justice Lambert under the heading, "Judicial Notice of Historical Facts" wrote: "I have examined at the provincial archives the foolscap notebook inscribed *Register of Land Purchases from Indians* ... and I have examined the documentary part of the Nanaimo Treaty. I have also examined the original incoming letters and a transcribed compilation of the outgoing letters, between Fort Victoria and the Hudson's Bay Company Offices in London, for the period 1849 to 1852. Much of this material was put in evidence. But some of it was not. To that extent, and to that extent only, I have gone outside the evidence led at trial. In doing so, I have regarded myself as taking judicial notice of indisputable, relevant, historical facts by reference to a readily obtainable and authoritative source, in accordance with the ordinary principle of judicial notice. ... For the purposes of my independent verifications, I have reached only those conclusions which I regard as beyond rational dispute. "

<sup>582</sup>*Ibid.* at 132

<sup>583</sup>*R. v. Augustine and Augustine* [1987] 1 C.N.L.R. 20 (N.B.C.A.)

such an approach. In an appendix for his reasons for judgment acquitting the appellants, the Provincial Court Judge had listed “material considered” by him including an “Historical Ethnography of the Micmac 16<sup>th</sup> and 17<sup>th</sup> Centuries, material not produced at the trial but supplied to the judge at his request by counsel for the appellants who neglected to furnish a copy to Crown counsel.<sup>584</sup> The Crown objected that in relying upon material not introduced at trial to determine a question of fact, the trial judge had violated the principle that courts should act only on evidence given in open court.<sup>585</sup> The Court of Appeal agreed.

There is authority for the proposition that a court may take judicial notice of the facts of history whether past or contemporaneous and that the court is entitled to rely on its own historical knowledge and researches: see *Calder et al v. A.G.B.C.* (1973) 34 D.L.R. (3d) 145 (S.C.C.) and *R. v. Polchies et al.*, previously cited. But there are limits. The general rule or principle of judicial notice was stated by O’Hearn County Court Judge in *R. v. Bennett* (1971) 4 C.C.C. (2d) 55 at p. 66 as follows:

Courts will take judicial notice of what is considered by reasonable men of that time and place to be indisputable either by resort to common knowledge or to sources of indisputable accuracy easily accessible to men in the situation of members of that court.

Although the contentious thesis by Mr. Hoffman is not part of the record on this appeal, I would agree with Meldrum, J. that it ought not to have been considered by the Judge of first instance *because it was not established to be a source of either indisputable accuracy or authority.* [emphasis added]

In *R. v. Paul*, the New Brunswick Court of Appeal admonished an appeal judge for conducting his own historical research, holding:

... there is no authority for taking judicial notice of disputed facts, whether they be historical or otherwise.... Mr. Justice Turnbull should not have decided the case on his independent historical research. The short answer is that the appeal provisions noted earlier restricted him to the trial transcript. The longer answer, which follows, is that there is neither authority for making such extensive use of historical material *under the guise of judicial notice* nor for using such material without giving notice to the parties. [emphasis added]<sup>586</sup>

It is troubling that the Supreme Court of Canada has decided that where historical records are put forward for the first time on appeal, it possesses the expertise to review such materials

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<sup>584</sup>*Ibid.* at 30

<sup>585</sup>*Ibid.*

<sup>586</sup>*R. v. Peter Paul* [1998] 3 C.N.L.R. 221 (N.B.C.A.) at 227

and to draw accurate inferences from their contents by way of “judicial notice” simply because the documents are public in nature. The mere fact that historical documents are “public” and generally easy to read, as opposed to medical or scientific documents, does not mean the Court possesses the expertise to evaluate the contents in a proper context. As stated by Justice MacEachern in *Delgamu'ukw v. B.C.*, “[W]hat a document says is for the court, but in this process, the court not only needs but urgently requires the assistance of someone who understands the context in which the document was created.”<sup>587</sup>

It is suggested, however, that since virtually all “facts” of history involving aboriginal people are disputed, given the very differing perspectives on what took place, interpretations of that context, whoever provides them, should be tested through cross-examination. Credibility is as important to determine with regard to the interpretation of historical evidence as it is in other areas where bias may occur.

A trial court is entitled to take judicial notice of certain historical facts contained in authoritative sources such as published maps,<sup>588</sup> but the Supreme Court of Canada is not a trial court. It does not hear *viva voce* evidence from experts who can assist in the interpretation of the documents, and it can be ignorant of facts needed to properly understand such information. Of even more importance is the fact that if the Supreme Court of Canada gets its facts wrong by behaving as a court of first instance, there is no remedy to correct the wrong, and no higher court to which to appeal.

The reception of materials in *Nikal* at the final level of appeal was unfair to the aboriginal parties who opposed the documents’ admission. It is of even more troubling when the Court itself takes information out of context. Somewhat ironically, Justice Cory in *Nikal* acknowledged the need to place historical information in context, stating:

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<sup>587</sup>*Delgamu'ukw v. B.C.* [1990] 1 C.N.L.R. 20 (B.C.S.C.) at 27

<sup>588</sup>See *R. v. Bartleman, supra.*; *R. v. Zundel* (1987) 31 C.C.C. (3d) 97 (Ont. C.A.) leave to appeal to S.C.C. refused 61 OR (2d) 588n, and with regard to maps, *R. v. Jameson* [1896] 2 QB 425. See also *Sioui, supra.*, at 144 with regard to the admissibility of historical documents on the basis of judicial notice.



In this case much has been said as to the general practice of the Crown in allocating reserves to native peoples. Evidence of a general practice may be particularly helpful in determining the scope or extent of native rights. The relevant evidence is sometimes lost and that which remains must be carefully placed in context so that its true significance is neither distorted nor lost.<sup>589</sup>

However, the Court in both *Nikal* and *Lewis* consistently recited documents from different sources at different periods of Canadian history as if they reflected a firm Crown policy, despite a warning in *Jack v. The Queen*<sup>590</sup> that it was an error to look to post-Confederation Indian policy to determine pre-Confederation policy issues.<sup>591</sup>

The Supreme Court of Canada evaluated historical evidence as if it were a trial court but without hearing and evaluating expert evidence which might have provided the context to the policies it accepted as immutable historical fact. Canadian trial courts presented with historical evidence, in context, with the time to hear it and evaluate it and assess the demeanour of the witnesses presenting it, have upheld aboriginal legal claims to exclusive fisheries on several occasions.

In *R. v. Bob*, a County Court held an exclusive right to fish in an area adjacent to a reserve had been proven, and the Supreme Court of British Columbia held in *R. v. Ellsworth, Sampson and Sampson* that a special area at the mouth of the river was reserved to the Indians for their use by the Joint Federal-Provincial Indian Reserve Commission of 1877.<sup>592</sup> In *Pawis*,

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<sup>589</sup>*Nikal*, *supra*, note 2 at 187. In *R. v. Paul and Polchies* [1986] 1 C.N.L.R. 105 (N.B. Prov. Ct.), the court specifically noted at 116-117 that previous decisions, including a 1981 decision of the New Brunswick Court of Appeal, dealing with a 1725 treaty had become *per incuriam* as a result of new historical information which had been discovered since and which had not been judicially considered.

<sup>590</sup>*Jack v. The Queen*, *supra*, note 353

<sup>591</sup>This was because the policy changed as other users entered the fishery, *ibid.* as discussed by the Court in *Jack* at 33: "I think it is apparent from a study of the testimony of the expert witnesses and the documentary evidence that the policy of the Colonial government existed in the context of two critical factors which have undergone major change. First, no significant commercial or sports fishery existed prior to Confederation in 1871. Second, the general perception of the fishery resource was as one of limitless proportions .. What is plain from the pre-Confederation period is that the Indian fishermen were encouraged to engage in their occupation and to do so for both food and barter purposes." [emphasis added]

<sup>592</sup>*R. v. Bob* [1979] 4 C.N.L.R. 71 (B.C. Co. Ct.); *R. v. Ellsworth, Sampson and Sampson* [1992] 4 C.N.L.R. 89 (B.C.S.C.) See also *R. v. Adolph* [1984] 2 C.N.L.R. 96 (B.C.C.A.)

*McGregor et al v. The Queen*, as a result of a factual finding of exclusivity, the Federal Court found it unnecessary to consider whether the *ad medium filum aquae* rule applied,<sup>593</sup> and in *Claxton et al. v. Saanichton Marina*<sup>594</sup> the British Columbia Supreme Court, in a decision upheld by the British Columbia Court of Appeal, held that a reserve included “a very substantial part of the waterfront of [Saanichton] Bay, if not the Bay itself.”<sup>595</sup>

The rights of First Nations within Ontario should not be determined on the basis of decisions which introduced historic evidence at the final stage of appeal, in the absence of contextual information which might have been provided by experts or elders. The Supreme Court of Canada’s decisions in *Nikal* and *Lewis* reflect serious historical, legal and citation errors, and were probably wrongly decided. However, even if the legal principles enunciated in the cases could be said to be correct, the cases were historically wrong in their interpretation of Crown policy in Upper Canada and are therefore readily distinguishable.

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<sup>593</sup>*Pawis, McGregor et al v. The Queen* [1979] 2 C.N.L.R. 52 (F.C.T.D.) at 79: “Because this court has found an exclusive right to fish does exist, it is unnecessary to consider the very novel argument that such a right exists because of the principles of property law and in particular the *ad medium filum aquae* rule regarding the ownership of the beds of freshwater lakes and rivers and supported in *Canadian Explorations Limited vs. Rotter* [1961] SCR at 15.” It should be noted that in *Rotter*, the court held that the marking of a survey plan showing a boundary at the high level mark did not limit the application of riparian rights. In *Pawis*, Peter O’Reilly, the Indian Reserve Commissioner in British Columbia on July 19, 1880 was found to have allotted the Bridge River Indians of September 1, 1881 “the *exclusive right of salmon fishing* on both sides of the Fraser River from a quarter mile south of Bridge River upstream to the Fountain Indians’ fishery, a distance of about three miles.” In *Pawis*, the Court agreed with the defence that a Schedule of Indian Reserves for the year ended March 31, 1913 demonstrated confirmation by both the Federal and Provincial Governments through their respective agents of this exclusivity and held, at 75: “Clearly, this was the result that was intended by our forefathers and it seems the logical and legal result of the documentation.... Accordingly, there will be a finding that an exclusive right to fish does exist as a result of the allotment of Peter O’Reilly on September 1, 1881. “Note that the Supreme Court of Canada in *Nikal* concluded that O’Reilly had no authority to allot exclusive fisheries but could only make recommendations in this regard. With the greatest of respect, the information placed before the Court in *Pawis* demonstrated that O’Reilly’s recommendations were acted upon, and accepted.

<sup>594</sup>[1987] 4 C.N.L.R. 48 (B.C.S.C.)

<sup>595</sup>*Saanichton Marina v. Claxton* [1988] 1 W.W.R. 540 (B.C.S.C.); [1989] 3 C.N.L.R. 46 (B.C.C.A.) There is also an Ontario decision holding that waters adjacent to a reserve form part of the reserve, although little is provided to support the finding, *R. v. Andrew Clifford Miracle*, unreported decision of the Ontario Court of Justice, General Division, issued 14 February 1997, Cosgrove, J.

#### D. Using Crown Policy to Define Underlying Aboriginal Rights

In *Nikal* and *Lewis*, by accepting discriminatory Crown policies to disprove the existence of territorial rights, the Supreme Court essentially held that the Crown could effectively reallocate fisheries from aboriginal to non-aboriginal people as a matter of policy and legislation. Discriminatory policies designed to provide non-aboriginal fishermen access to resources simply because they wanted them have now been determined to form the basis of aboriginal rights themselves. Again, one cannot help but be troubled by this approach.

*Sparrow* had interpreted section 35 as the means by which Crown policy could be scrutinized,<sup>596</sup> but the Supreme Court had also warned at that time that superficially neutral policies frequently posed serious threats to aboriginal rights.

Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but constitute de facto threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected.<sup>597</sup>

*Sparrow* determined that even the detailed regulation of aboriginal rights could not, in itself, define or extinguish underlying rights,<sup>598</sup> a point reaffirmed by the Supreme Court of Canada

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<sup>596</sup>*Sparrow*, *supra*, note 5 at 181

<sup>597</sup>*Ibid.*

<sup>598</sup>*Ibid.* at 174. Soon after *Nikal* and *Lewis*, however, Justice La Forest in a dissenting opinion in *R. v. Gladstone*, [1996] 4 C.N.L.R. 65 (S.C.C.) at 112-115, was prepared to find that extinguishment had occurred by virtue of the Crown having regulated the activity of fishing alone, stating: "I cannot come to any other conclusion than that Order in Council P.C. 2539 evinces a clear and plain intention on the part of the Crown to extinguish aboriginal rights relating to commercial fisheries – should they ever have existed. When the Crown has specifically chosen to address the issue of the translation of aboriginal practices into statutory rights and has expressly decided to limit the scope of these rights, as was done in British Columbia in relation to Indian fishing practices, then it follows, in my view, that *aboriginal rights relating to practices that were specifically excluded were thereby extinguished*." [emphasis added] This is perhaps not a surprising conclusion in light of Justice La Forest's prior written opinion that despite the provisions of the *Royal Proclamation*, "there is complete authority to deal with the [Indian] lands, for the federal Parliament and possibly the federal government, without statutory authorization, could even abolish the Indian title. *A fortiori*, the federal Parliament may negate or modify Indian hunting or fishing rights." La Forest, *Water Law in Canada*, *su-*

in *R. v. Gladstone*.<sup>599</sup> However, the Supreme Court of Canada in *Nikal* and *Lewis* determined that historic Crown policy could do precisely that, pointing, for example, to the Crown's failure to recognize aboriginal commercial fishing rights except on the same basis as those exercised by non-aboriginal people in Upper Canada as negating the existence of an exclusive right. A regulatory policy which, according to *Sparrow* cannot extinguish existing aboriginal rights appears to be able to negate proof of their existence, a peculiar outcome indeed.<sup>600</sup>

The reliance by the Supreme Court on a Crown policy taken out of context in *Nikal* and *Lewis* is of deep concern in that it has apparently resulted in the re-allocation of aboriginal rights to non-aboriginal peoples in the absence of a valid surrender (there being no applicable treaty in either *Nikal* or *Lewis*). In *R. v. Van der Peet*, another recent aboriginal fishing case, Justice McLachlin asked how the Supreme Court can alter and amend constitutionally protected rights in the name of social harmony without aboriginal consent through the re-allocation of aboriginal rights. She observed:

The Chief Justice's proposal comes down to this. ... the Crown may convey a portion of an aboriginal fishing right to others, not by treaty or with the consent of the aboriginal people, but by its own unilateral act. I earlier suggested that this has the potential to violate the Crown's fiduciary duty to safeguard aboriginal rights and property. But my concern is more fundamental. How, without amending the Constitution, can the Crown cut down the aboriginal right?<sup>601</sup>

Justice McLachlin in her dissent in *Van der Peet* described a result which re-allocated such rights without aboriginal consent for purely economic reasons as something "no Court can do."<sup>602</sup> There is little to distinguish her reasoning from applying equally to the decisions in *Nikal* and *Lewis*. To adopt her wording, the conclusion reached by the Court in *Nikal* and

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*pra*, note 338 at 44

<sup>599</sup>In *R. v. Gladstone*, *supra*, note 598, the Supreme Court majority reaffirmed that test, at 79

<sup>600</sup>This is particularly troubling when in *Gladstone*, *ibid.*, at 82, a failure to provide special protection for commercial fishing was seen not as extinguishment, but as evidence that a commercial fishing right in fact existed, the court finding that the government had no intention to extinguish aboriginal rights. "That the government did not in fact have this intention becomes clear when one looks at the general regulatory scheme of which this Regulation is one part.... aboriginal people were not prohibited, and have never been prohibited since the scheme was introduced in 1908, from obtaining licences to fish commercially under the regulatory scheme applicable to commercial fishing."

<sup>601</sup>*Van der Peet*, *supra*, note 527 at 283

<sup>602</sup>*Ibid.*

*Lewis* did not conform to the authorities, was indeterminate, and was, in the final analysis unnecessary.<sup>603</sup> It is an approach which she has described as being itself unconstitutional.<sup>604</sup>

As discussed in *R. v. George, supra*, the “honour of the Crown” is always involved in its dealings with aboriginal people; no appearance of “sharp dealing” should be sanctioned, nor should Parliament be made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured the Indians and their posterity by treaty.<sup>605</sup> If the way in which a legislative objective is to be attained is required to uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and aboriginal peoples,<sup>606</sup> there is little that can be said to support the manner in which aboriginal fishing rights were appropriated in favour of non-aboriginal “public rights” in Upper Canada. Nor is there much to support any argument that Crown policy, as it evolved, was in any way consistent with the “honour of the Crown.”

The challenge now for aboriginal peoples throughout Canada will be to persuade the courts, as these issues arise, that the decisions in *Nikal* and *Lewis* were indeed wrongly decided, and cannot be used to limit or restrict existing First Nations’ rights. In many areas of Ontario, surrenders were not obtained from aboriginal peoples of their interests in rivers, streams and lake. In these areas, it is argued that exclusive aboriginal fishing rights derived from aboriginal title to those lands “covered with water,” continue to this day. As a result of these two cases, the already arduous task of establishing those rights in Canadian courts has been rendered even more difficult.

#### IV. Summary

It is difficult to comprehend how historic Crown policy can become determinative evidence of whether exclusive aboriginal fishing rights existed in the past. Nonetheless, the Court in

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<sup>603</sup>*Ibid.*

<sup>604</sup>*Ibid.* at 283

<sup>605</sup>*R. v. George, supra*, note 8 at 279

<sup>606</sup>*Sparrow, supra*, note 5 at 181,183,187

*Nikal* and *Lewis* arrived at this very conclusion, relying heavily on historical evidence put forward on appeal relating to Crown policy towards aboriginal and non-aboriginal fishing rights in Upper Canada. As has been demonstrated, the historic Crown policy the Supreme Court relied on in *Nikal* and *Lewis* was not consistent, as the Court suggested, but arose at specific times to address non-aboriginal needs.

Early Imperial Crown policy recognized aboriginal rights within navigable waters, including exclusive fisheries when there were few settlers and many Indians. A colonial Crown policy denying these rights was not in evidence until surrenders had been obtained allowing settlement and aboriginal fisheries had become the subject of non-aboriginal interest. While aboriginal co-operation was still required, aboriginal interests were recognized. When they were no longer as important, Crown policy changed. As settlement increased, and once fish were seen to hold an economic value to non-aboriginal fishermen, the Departments of Marine and Fisheries asserted public ownership, not because of any legal issues arising at common law but because the public wanted access to aboriginal fisheries. The Department of Indian Affairs had a very different point of view.

History has proven that so long as land was needed to permit non-aboriginal settlement to occur, and the resource was plentiful, there was little interference with aboriginal rights. What the Supreme Court has essentially determined in both *Nikal* and *Lewis* is that *current* government policy may be challenged on the basis of section 35 as unreasonably infringing pre-existing, unextinguished aboriginal and treaty rights but historic policy which infringed those same rights can be taken to define their existence. This is difficult to accept when it is evident that that this policy deliberately discriminated against aboriginal people in order to favour the economic interests of non-aboriginal people. -

In determining the “facts” of history in *Nikal* and *Lewis*, the Supreme Court of Canada began with a set of assumptions which shaped the decisions reached. These assumptions presupposed that what the aboriginal people received was only that “granted” to them. Overall, the Court determined that since the Crown intended to retain ownership and control of the fisher-

ies, there was a presumption that the Crown had retained ownership of the beds beneath the fisheries. Having examined the evidence, the Court suggested that the *ad medium filum aquae* presumption did not apply in non-tidal navigable waters in any event, although English common law points to a conclusion quite different than that reached by the Court.

In the result, in both *Nikal* and *Lewis*, the Court upheld unilateral actions taken by the Crown which had the effect of conveying exclusive aboriginal rights within the fisheries to third parties. The Supreme Court of Canada assumed a valid historical Crown objective in Crown policy and legislation in circumstances where what evidence there is suggests an objective directed towards preventing aboriginal people from competing with non-aboriginal fishermen in an increasingly valued resource. In *Nikal* and *Lewis*, the Supreme Court of Canada essentially decided that historic Crown policy can define, convey and transfer unsurrendered aboriginal lands and rights to third parties, however discriminatory that policy might have been at the time it was implemented. The result is two decisions which are themselves likely unconstitutional but which, if left unchallenged, may guide Canadian courts to equally ill-founded conclusions.

## V. Conclusion

In *Nikal*, and in *Lewis*, the Supreme Court of Canada made decisions as if it were a trial court, taking historical information, as well as case-law, out of context. In so doing, the Supreme Court essentially re-allocated exclusive aboriginal fishing rights to non-aboriginal people, basing its decision on mostly discriminatory historic Crown policies from Upper Canada designed to achieve the same ends. A careful examination of the context of the policies and cases relied on indicate the decisions do not apply to First Nations in Ontario and that *Nikal* and *Lewis* is not merely distinguishable but wrongly decided. It is hoped that in the future, decisions concerning aboriginal fishing rights will reflect a greater understanding of the context of the evidence presented, and will reflect both aboriginal and non-aboriginal cultural and legal perspectives.

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