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No Middle Ground: *Ad Medium Filum Aquae*, Aboriginal Fishing Rights, and the Supreme Court of Canada's Decisions in *Nikal* and *Lewis*

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Résumé de l'article

Le présent article affirme que c'est à tort et par erreur que la Cour suprême du Canada, dans deux décisions traitant de la présomption, *ad medium filum acquae*, a conclu que les droits de pêche exclusifs des autochtones n'avaient pas été « concédés » par la Couronne, et qu'ils étaient par le fait même inexistants dans les eaux adjacentes aux réserves autochtones. L'auteure affirme que dans *Nikal* et *Lewis*, la Cour s'est basée sur des lois européennes très techniques pour en arriver à ces conclusions, sans prendre compte des lois et perspectives autochtones. Il sera démontré que la Cour a ignoré le titre ainsi que les droits pré-existants des autochtones en se basant sur des politiques historiquement discriminatoires.

No Middle Ground: *Ad Medium Filum Aquae*, Aboriginal Fishing Rights, and the Supreme Court of Canada's Decisions in *Nikal* and *Lewis**

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ABSTRACT

This article will argue that in two decisions of the Supreme Court of Canada which considered the ad medium filum aquae *presumptions, the Court wrongly concluded that exclusive aboriginal fishing rights were not "granted" by the Crown and therefore did not exist in waters adjacent to reserves. It will show that in both* Nikal *and* Lewis, *the Court relied on highly technical European laws which are inappropriate where aboriginal laws and perspectives are required to be taken into account. By accepting historically discriminatory policies of the Crown to prove the existence*

RÉSUMÉ

Le présent article affirme que c'est à tort et par erreur que la Cour suprême du Canada, dans deux décisions traitant de la présomption, ad medium filum acquae, *a conclu que les droits de pêche exclusifs des autochtones n'avaient pas été « concédés » par la Couronne, et qu'ils étaient par le fait même inexistants dans les eaux adjacentes aux réserves autochtones. L'auteure affirme que dans* Nikal *et* Lewis, *la Cour s'est basée sur des lois européennes très techniques pour en arriver à ces conclusions, sans prendre compte des lois et perspectives autochtones. Il sera démontré*

* Editor's note: It should be noted that the spelling of aboriginal names and places used in this article is consistent with the spelling in the original historical documents.

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of aboriginal rights, it will be argued that the Court ignored the pre-existing rights and title of aboriginal peoples.

que la Cour a ignoré le titre ainsi que les droits pré-existants des autochtones en se basant sur des politiques historiquement discriminatoires.

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INTRODUCTION

1. *R.* v. *Nikal*,[1] the Supreme Court of Canada held that an *Indian Act* Band by-law did not apply to a river running

1. *R.* v. *Nikal*, [1996] 3 C.N.L.R. 178 (S.C.C.).

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. The Crown's refusal to make such grants was set out as a matter of long-standing policy. In light of this policy, the Supreme Court held that the *ad medium filum aquae* presumption of ownership, a legal principle extending territorial rights to an imaginary mid-point of waters adjacent to granted lands, did not apply to waters adjacent to the First Nation reserve at issue. In *R.* v. *Lewis*,[2] rendered concurrently, the Court repeated and adopted the conclusions reached in *Nikal*.

This article will analyze the *Nikal* and *Lewis* decisions critically and argue that the Supreme Court of Canada made several significant errors in the manner in which it evaluated historical evidence of Crown policy. 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. As well, a full understanding of the historical context of the information relied on by the court will demonstrate that the Supreme Court of Canada accepted racially discriminatory Crown policies to define aboriginal rights, thereby favouring the privileges of non-aboriginal Canadians over the pre-existing rights of aboriginal peoples.

In exploring these issues, this article will review case-law, legislation and historical materials from the 17th, 18th and 19th centuries as well as contemporary cases and materials.

I. BACKGROUND

A. ISSUES IN *NIKAL* AND *LEWIS*

2. In both *Nikal* and *Lewis*, First Nations within British Columbia with waters adjacent to their reserves had asserted they had jurisdiction over their 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

2. *R.* v. *Lewis*, [1963] 3 C.N.L.R. 131 (S.C.C.).

authority. In defence, both communities asserted the legal argument that the *ad medium filum aquae* presumption applied to render the waters in question part of the reserves. In each instance, 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.

3. A major issue in the *Nikal* case was whether the Moricetown Band's fishing by-law applied to the Bulkley River at Moricetown, British Columbia. 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.[3] 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.[4]

4. 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 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.[5]

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3. *R.* v. *Nikal*, [1989] 4 C.N.L.R. 143 (B.C. Prov. Ct.).
4. *Ibid.*
5. *R.* v. *Nikal*, [1991] 1 C.N.L.R. 162 (B.C.S.C.), p. 173.

5. The British Columbia Court of Appeal disagreed.[6] 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.[7] 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.[8]

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

7. 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.[9] However, he held that an *Indian Act* by-law could not afford a defence to the charges, 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.

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6. *R.* v. *Nikal*, (1993) 80 B.C.L.R. (2d) 245 (B.C.C.A.).

7. *Ibid.*

8. *Lewis*, *supra*, note 2, p. 136. In *Nikal* the Supreme Court found the Bulkley River to be navigable, although portions of it were non-navigable, *Nikal*, *supra*, note 1, p. 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 centered on rules applying to non-tidal waters.

9. *R.* v. *Lewis*, [1989] 4 C.N.L.R. 133 (B.C. Co. Ct.), p. 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.

8. 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".[10] 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 [...]"[11] 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".[12] 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.[13]

9. 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.[14] 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.

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10. *Id.*, p. 139.
11. *Id.*, p. 141.
12. *Ibid.*
13. *Id.*, p. 142.
14. *R.* v. *Lewis*, (1993) 80 B.C.L.R. (2d) 224 (B.C.C.A.).

10. 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.

B. THE SUPREME COURT OF CANADA'S RULINGS

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

12. In *Nikal*, although the Supreme Court of Canada ultimately held that Mr. Nikal had an aboriginal right to fish, it also found that 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.[15] As a result, the *ad medium filum aquae* presumption was held not to apply to reserve lands adjacent to navigable waters in British Columbia.

13. 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 waters, and does not apply to navigable waters in British Columbia.[16] In the result, neither Band was able to rely on *Indian Act* by-laws as a defence, although Mr. Nikal was ultimately found not guilty on the basis that he had been exercising an existing aboriginal right which had been infringed by the terms of licence cited by the Court.

15. *Nikal*, *supra*, note 1, p. 179.
16. *Lewis*, *supra*, note 2, p. 133.

II. Pre-Confederation Crown Policy

14. In both *Nikal* and *Lewis*, the Supreme Court referred to post-Confederation historical documents from Upper Canada in reaching the conclusion that Crown policy did not support the "granting" of exclusive rights to aboriginal peoples in reserve waters, even in British Columbia. As described in an earlier article, however, this conclusion wholly ignored the Crown's practices and policies *before* Confederation in Upper Canada. There, Crown policies were predicated on a realization that it was not the Crown which had the authority to "grant" rights to First Nations, but rather First Nations which held aboriginal title to lands and, through surrenders, granted rights of use and occupation to the Crown.[17]

15. Following the *Royal Proclamation of 1763*, the Imperial Crown's policy was to recognize aboriginal title to lands covered with waters in Ontario and to negotiate surrenders of those lands which were needed for Crown purposes such as settlement. No distinction was drawn between lands and lands covered with waters, where *Proclamation* policy was concerned. Until surrenders were achieved, Indian lands were not open to settlers for public or private uses.

In terms of fisheries, then, those wishing to exploit aboriginal waters for commercial purposes were required to enter into arrangements with First Nations to lease the aboriginal fisheries for their own use. These arrangements were acknowledged by the Imperial Crown and formalized by Crown licences of occupation, which enabled those licensees to fish commercially to the exclusion of others. The agreements entered into directly between First Nations and their lessees were viewed at the time as confirmatory of the Indian title to the fishing grounds. Those who did not have aboriginal permission to access the fisheries were considered to be

17. This article is the second part of an LLM thesis, *The Supreme Court of Canada's "Historic" Decisions in R. v. Nikal and Lewis : Why Crown Fishing Policy Makes Bad Law*, for which the degree of Masters of Law was awarded in March, 1999. The first instalment, which details this Crown policy and the arrangements entered into between the Crown and aboriginal peoples was published as P.J. Blair, "Settling the Fisheries : Pre-Confederation Crown Policy in Upper Canada and the Supreme Court of Canada's decisions in *R. v. Nikal and Lewis*" [hereafter cited as "Settling the Fisheries"], (2001) 31 *Revue générale de droit* 87-172.

trespassers, and the Crown promised that it would take steps to prevent encroachments within the fisheries.

16. This Crown recognition and protection of aboriginal exclusivity was confirmed in many instances. In 1796, John Graves Simcoe, the first Lieutenant Governor of Upper Canada directed that in seeking a surrender of lands from the Mississaugas, "lands should be purchased *so as to leave the Mississaugas in full possession of their rivers and fishing grounds*".[18] A series of surrenders of lands between the Etobicoke River and Lake Ontario which followed Simcoe's directions did just that, reserving the "fishery in the said River Etobicoke" for the sole use and exclusive use of the Mississaugas.[19] In 1829, when settlers at the Credit River began to encroach on the Mississaugas' exclusive fishing areas, the Chief and Council of the Mississauga Band petitioned the Lieutenant Governor, Sir John Colborne, asking that the settlers be informed of the privileges "in law which the Indians are entitled to".[20] In response, the government passed an *Act the Better to protect the Mississaga tribes, living on the Indian Reserve of the River Credit* 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.[21]

17. The Saugeen people of the Bruce Peninsula leased their fisheries to white men, but found their traditional fishing areas became the subject of encroachments as the commercial value of their fisheries became widely known. They were promised in 1836 by Sir Francis Bond Head, the Lieutenant Governor of Upper Canada, that in exchange for surrendering 1.5 million acres of land, the Crown would remove all

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18. J.G. Simcoe to Lord Dorchester, York, *The Correspondence of Lieut. Governor John Graves Simcoe*, vol. III, 1794-1795, E.A. CRUIKSHANK, ed., Toronto, The Ontario Historical Society, 1925, vol. 4, p. 239, 9 April 1796, with thanks to Jose Brandao for this reference [emphasis added].

19. Treaty No. 13, Mississauga Nation of Credit River and William Claus, Deputy Superintendent General, Indian Affairs, *Indian Treaties and Surrenders*, Canada, 1891, p. 35.

20. Petition of the Mississauga Indians of Rice Lake in the Newcastle District to Sir John Colborne, Lieut. Governor, NAC, RG 10, vol. 5, 2038, 27 January 1829.

21. *An Act the Better to protect the Mississaga tribes, living on the Indian Reserve of the River Credit*, (1829) 10 Geo IV, c. 3 (Upp. Can.).

white men fishing in the waters around the Saugeen (Bruce) Peninsula without aboriginal consent. In 1847, an Imperial Proclamation confirmed that the Saugeen people held aboriginal title to the lands and waters extending seven miles around the Saugeen Peninsula and including, specifically, the valuable fishing islands.[22]

18. The Mohawks of the Bay of Quinte also leased their seining grounds to white men in the 1830s and 1840s in the Bay of Quinte. Decades later, the Department of Indian Affairs took steps to have white fishermen removed as trespassers when these rents were not paid, as agreed, to the aboriginal lessors.[23] A surrender obtained by the Crown in 1891 included a portion of the reserve extending into the deep and navigable waters of the Bay of Quinte, confirming yet again, that the waters adjacent to a reserve were intended to be part of it at the time lands were set aside.

19. The Supreme Court concluded that Crown policy was to acknowledge no exclusive rights in waters as a matter of policy, based on the notion of "public rights". However, in early patents of land, it was in fact the Crown's policy to include water lots extending out to navigable waters as part of land grants to individuals when requested to do so, thereby recognizing exclusive rights of ownership. For example, in 1821, an Order-in-Council granted a water lot "upon a Peti-

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22. A full account of the Saugeen fisheries, the fishing islands and the treaties which affected them are found in P.J. BLAIR, "Solemn Promises and *Solum* Rights : The Saugeen Ojibway Fishing Grounds and *R.* v. *Jones and Nadjiwon*", (1996-7) 28 *Ottawa Law Review* 125-144 [hereafter cited as "Solemn Promises"].

23. 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 [...]" N. ADAMS, "Iroquois Settlement at Fort Frontenac in the 17th and Early 18th Centuries", (1986) 46 *Ontario Archaeology*, p. 8. In terms of the location as a site for fishing, there 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*, vol. 42, Cleveland, Burrows Brothers, 1896-91, p. 71.

tion 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".[24] 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.[25] A water lot was approved in front of the Town of York in 1828[26] and in front of Toronto in 1835.[27] 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 apart a "sufficient space between its northern boundary and Lake Huron for the inhabitants as a fishery".[28] 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".[29]

20. These grants could not be made until those holding aboriginal title to the lands and waters in question had first surrendered them. While most references to such surrenders referred to bays, lands covered with waters, or islands being surrendered,[30] 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

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

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

26. Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. N (microfilm reel #C-104), pp. 334, 345, 347-348, 3 July 1828.

27. Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. R (microfilm reel #C-105), p. 123, 26 August 1835.

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

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

30. P.J. BLAIR, "Settling the Fisheries", *loc. cit.*, note 17, p. 20.

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".[31] On May 10, 1854, the Chippewas of Sarnia surrendered lands including "ten water lots fronting the River St. Clair".[32]

21. Aboriginal fishing rights in the pre-Confederation period were not founded on Crown "grants", as the Supreme Court concluded, but instead were recognized as an incident of aboriginal title. Whether settlers might acquire riparian rights through the Crown grants they received in surrendered lands was contentious throughout the 19th century, particularly where navigable waters were concerned. 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 this period, 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.[33]

More importantly, the matter of riparian rights and the *ad medium filum aquae* presumptions of ownership of the underlying beds of water were European legal concepts applying to settler rights in lands already surrendered, not to aboriginal title, which applied until surrenders were obtained. The notion of a Crown "grant" to aboriginal peoples, then, presumes that aboriginal people occupied the same legal position as settlers, instead of acknowledging their special and unique interest in their traditional lands and waters.

22. While early Crown policy acknowledged and respected these unique interests, once settlement pressures mounted and particularly in post-Confederation period, Crown policy rapidly changed. The new policy centered on the recognition of only public rights in navigable waters and denied the existence of any special interests on the part of Indians.[34]

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

32. Surrender No. 71 ½, *Indian Treaties and Surrenders*, vol. 1, Canada, 1891, p. 194.

33. P.J. BLAIR, "Solemn Promises", *loc. cit.*, note 22, p. 141.

34. Again, a full description of the change in Crown policy and the settlement pressures which promoted it is outlined in P.J. BLAIR, "Settling the Fisheries", *loc. cit.*, note 17.

III. THE PUBLIC "RIGHT" TO FISH IN NAVIGABLE WATERS

A. CONTEMPORARY LEGAL OPINIONS

23. In *Nikal*, the Supreme Court quoted from an 1866 opinion of the Solicitor General for Upper Canada, James Cockburn, in support of its conclusion that Crown policy was not to "grant" exclusive fishing rights to aboriginal peoples. The Court, however, made no note of the context of that opinion.

24. Because of the uncertainty of title to third parties in unsurrendered Indian lands and waters, 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".[35] 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.[36] 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.

25. 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",[37] thereby

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35. L. HANSEN, "Treaty Fishing Rights and the Development of Fisheries Legislation in Ontario: A Primer", (1991) *Native Studies Review* 1, p. 7 [hereafter referred to as "Development of Fisheries"].

36. *Ibid.*

37. State Book, Upper Canada, NAC, RG 1, State Books, vol. D, Reel C-124, p. 68, 23 October 1845.

misapplying a public right of fishing in tidal waters to a non-tidal body of water.

26. 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 can have to its exclusive enjoyment".[38] However, 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.

27. 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. 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.[39] 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".[40]

28. 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

38. Letter from Attorney General W.H. Draper to J.M. Higginson, NAC, RG 10, vol. 612, p. 215, 16 April 1848.

39. *A.G.* v. *Emerson*, [1891] AC 649.

40. *Attorney General for British Columbia* v. *Attorney General for Canada*, [1914] AC 153 (P.C.), p. 167.

little that one may say, as a general rule, that all waters are public property".[41]

29. 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 :

> 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 treams.[42]

30. If all waters were indeed public property, as Watson suggested, then surrenders of bays and harbours and other water bodies from First Nations in Ontario would not have been required. Nor would water lots have been capable of alienation to adjacent land-owners following surrenders to third parties.[43] 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 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 alienate bodies of water, whether these were navigable or not.

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41. Adam Watson to Commissioner of Crown Lands, NAC, RG 10, vol. 323, p. 216143-46, 11 March 1863.

42. *Gage* v. *Bates*, (1864) Trinity Term, 21 Vic. 116 (Common Pleas), pp. 119-120.

43. See P.J. BLAIR, "Settling the Fisheries", *loc. cit.*, note 17, p. 34.

31. 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".[44] In 1864, in *A.G.* v. *Perry*[45] 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".[46]

32. The Watson opinion, with respect to the question of aboriginal title, would be cast into serious doubt with the Supreme Court of Canadas rulings in *R.* v. *Robertson*, and the *Fisheries Reference* cases later in the 19th century.

33. Without that context, the Supreme Court of Canada's reliance in *Nikal* on a legal opinion rendered by Solicitor 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.

34. As noted, the Saugeen people had long leased their fishing islands and adjacent waters to fishing companies in return for the annual payment of rents, evidencing their title to the waters. This title was explicitly affirmed in the 1847 Imperial Proclamation issued in the name of Queen Victoria. A new system of leases and licences introduced in fisheries legislation in 1857, however, compelled even First Nations to apply for licences if they wished to use their unceded waters.

35. In December of 1863, the Cape Croker Band (part of the Saugeen Ojibway Nation) advised the Indian Affairs Department that they wished a fishing ground reserved to their

44. (1851) U.C.C.P. 471, p. 487.
45. (1864) Hilary Term 28 Victoria 329 (Common Pleas).
46. *Id.*, p. 331 [emphasis added].

exclusive use.[47] They wrote to W.R. Bartlett, the Visiting Superintendent 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.[48] 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"[49] was this time referred to the "Law Advisors of the Crown" for an opinion. Cockburn, an elected member of the Executive Council[50] who occupied the position as acting Solicitor General for a few months while the Solicitor General was out of the country,[51] simply restated Watson's view that Indian people had no claim to exclusive fishing rights :

> 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.[52]

36. 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

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47. W.R. Bartlett to William Spragge, Deputy Superintendent General of Indian Affairs, NAC, RG 10, vo. 549, p. 37, 7 August 1865, referring to a petition dated 22 December 1863.

48. *Ibid.*

49. L. HANSEN, "Development of Fisheries", *loc. cit.*, note 35, p. 8.

50. H.J. MORGAN, *The Canadian Parliamentary Companion*, Montreal, s.n. 1869, p. 81.

51. *Ibid.*

52. *Nikal*, *supra*, note 1, pp. 188-89. See also P.J. BLAIR, "Prosecuting the Fishery : The Supreme Court of Canada and the Onus of Proof in Aboriginal Fishing Cases", (1997) *Dalhousie Law Journal* 17, p. 62, also P.J. BLAIR, "Solemn Promises", *loc. cit.*, note 22, p. 136.

it. The portion they referred to is cited above. However, the part left out of the citation 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* [...][53]

Cockburn's opinion referring to "cessions" was referring to the procedure established under the *Royal Proclamation of 1763* 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".

37. The balance of Cockburn's opinion 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.[54] Even before the provisions of the *Constitution Act, 1982* were enacted, which recognized and affirmed existing treaty rights, there was no requirement of Parliamentary approval for a treaty with aboriginal peoples

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53. A. RUSSELL, Assistant Commissioner of Crown Lands to Indian Branch attaching a copy of opinion of James Cockburn, Sollicitor General, NAC, RG 10, vol. 323, pp. 216131-216 138, Reel C-9577, 8 March 1866, [emphasis added].

54. *Campbell* v. *Hall*, [1974] Lofft 655.

to be considered valid.[55] Nonetheless, W.R. Bartlett's application for a reserve of fishing grounds for the Cape Croker Band was rebuffed on the basis of the Cockburn opinion.[56]

38. 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.[57] 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.[58]

39. 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

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55. See for example, P. HOGG, *Constitutional Law of Canada*, Toronto, Carswell, 1977, p. 184.

56. A. RUSSELL, *supra*, note 53.

57. M. WALTERS, *Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada (pro manuscripto)*, Oxford, 1997, p. 18 [hereafter cited as *Magna Carta*].

58. *Id.*, p. 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, D. 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, *id.*, pp. 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 J. KEARNEY, "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 do so", in Report 31, *The Recognition of Aboriginal Customary Laws*, Australian Law Reform Commission, 1986, vol. 1, p. 45.

government, continued in force. No "public right" under English municipal law could vest where First Nations held exclusive rights to fisheries and waterways until surrenders were obtained.[59] Cockburn's opinion simply assumed public rights had vested, even where cessions had not been obtained. This, of course, was entirely incorrect in light of the provisions of the *Royal Proclamation of 1763*.

40. 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 to fishing islands conveying exclusive fishing rights had been confirmed by the Imperial Crown long before the *Fisheries Act*.[60] 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 and fisheries around them had not yet been surrendered.[61]

41. 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

59. *Ibid.*

60. For a detailed examination of the licences of occupation and the fishing islands, see P.J. BLAIR, "Settling the Fisheries", *loc. cit.*, note 17, p. 36.

61. This point was the subject of express comment in *R.* v. *Jones and Nadjiwon*, (1993) 14 OR (3d) 421, p. 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.

> sovereignty or it did not; if it applied to save exclusive fisheries recognized in areas governed by French 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.*[62]

42. 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.[63] 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 *Delgam'ukw*, in which the Court found that aboriginal title conveyed exclusive use of the lands it protected.[64]

43. 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*.

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62. M. WALTERS, *Magna Carta*, *op. cit.*, note 57, pp. 49-50 [emphasis added].
63. See note 55.
64. *Delgamuukw* v. *British Columbia*, [1998] 1 C.N.L.R. 14, para. 112.

B. THE DECISION IN *R.* V. *ROBERTSON*

44. 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 year. The lease was soon challenged. The Supreme Court of Canada in *The Queen* v. *Robertson*[65] held that an exclusive right of fishing in the Miramichi River existed in favor of 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.

45. 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.*[66]

46. The Court noted that ownership of fisheries *per se* imported ownership of the *solum*, or underlying bed.[67] Strong J. stated that strictly speaking, the right at issue were not riparian rights, which were only rights of access,[68] but territorial rights arising from the *ad medium filum aquae* pre-

65. *The Queen* v. *Robertson*, (1874) 6 S.C.C. 53 (S.C.C.) [hereafter cited as *Robertson*].

66. *Id.*, p. 114 [emphasis added].

67. *Id.*, p. 119.

68. *Id.*, p. 132.

sumption which accompanied ownership of adjacent lands.[69] 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 American 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 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.[70]

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[71] and that any lease attempting to confer proprietary rights to others in such waters was illegal.[72]

47. Although at this time, the Dominion Government had restricted aboriginal people from fishing even for domestic use except under lease or licence,[73] and had authorized

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69. *Ibid.*
70. *Ibid.*
71. *Id.*, p. 124.
72. *Id.*, p. 125.
73. 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,

others to fish commercially within unsurrendered waters, to the exclusion of aboriginal peoples, the Court held that the federal government had no constitutional authority to restrict any proprietary rights.[74] Federal jurisdiction over "Inland and Sea Fisheries", it concluded, was not enacted in reference to property and civil rights.[75]

48. 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 the riparian owners and the right of fishing private*".[76] 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.[77]

49. 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".[78] However, other fisheries were "certainly *not*" public fisheries "open of common right to all those who "may chose to avail themselves of them".[79]

50. 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

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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". 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.

74. *Robertson*, *supra*, note 65, p. 120.

75. *Ibid.*

76. *Ibid.*, citing from *Murphy* v. *Ryan*, page 118 [emphasis added]. See also M. WALTERS, *Magna Carta*, *op. cit.*, note 57, p. 10.

77. M. WALTERS, *Magna Carta*, *op. cit.*, note 57, p. 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, pp. 333-334.

78. *Robertson*, *supra*, note 65, p. 118.

79. *Id.*, p. 132 [emphasis added].

rights, a decision in direct conflict with that reached in both *Nikal* and *Lewis*.

51. 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 19th 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.[80]

52. 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 navigable 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.

C. PRIVATE RIGHTS IN NAVIGABLE WATERS

53. 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 19th century was quite erroneous, and not just because of the *Robertson* decision. A review of 19th century English common law once again demonstrates the need for context.

54. 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,[81] it acknowledged that the bulk of English authorities were to the contrary.[82] Higher courts uniformly drew a distinction between the public right to navigate, and the private right to fish.

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80. *Id.*, p. 117.
81. *Gage* v. *Bates*, (1858) Common Pleas, 21 Victoria 116, p. 121.
82. *Ibid.*

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.[83] 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.[84]

55. 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".[85]

56. 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*,[86] 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".[87] 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

83. *Caldwell* v. *McLaren*, (1994) 9 App Cas 392, p 404-405 [emphasis added].
84. *Ibid.*
85. (1900) 20 N.Z.L.R. 89 (C.A.), p. 123.
86. 20 Johns 90 (N.Y., 1822).
87. *Id.*, p. 99.

highway [...]"[88] 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.[89]

57. 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.[90] 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"[91] was clearly an overstatement.

58. 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",[92] or where grants have been made in time of war and the Crown might have required the soil to improve navigation.[93]

> 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.[94]

59. In the facts behind the *Lewis* case, shortly after the Cheakamus Indian Reserve No. 11 was allotted by a Joint

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88. 2 Conn Rep 481, p. 100.

89. *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). Thanks to Mark Walters for bringing these cases to my attention.

90. *Lewis*, *supra*, note 2, p. 149.

91. *Nikal*, *supra*, note 1, p. 201.

92. *The King* v. *Joyce*, (1904) 25 N.Z.L.R. 78 (C.A.), p. 95 citing *Mueller* v. *Taupiri Coal Mines Ltd*, (1900) 20 N.Z.L.R. 89 (C.A.).

93. *Id.*, p. 99-100.

94. *Ibid.*

Reserve Commission in November 1876,[95] 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.[96] 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.

Moreover, in 1876, the Crown had no need to "withhold" the fisheries from a land "grant" 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*.[97] 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-Indian".[98]

60. That public rights had never existed in unsurrendered Indian territories, in any event, was made explicit in the

95. *Lewis*, *supra*, note 2, p. 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.

96. *R.* v. *Lewis*, [1989] 4 C.N.L.R. 133 (B.C. Co. Ct.), p. 134 referring to paragraph 5 of the Memorandum.

97. 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.

98. *Ibid.*

Fisheries Reference which followed soon after the 1874 decision in *Robertson*.

D. THE *FISHERIES REFERENCE* CASES

61. 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.[99] This legislation contained terms almost identical to the federal *Fisheries Act*.

62. 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.[100] Like the federal legislation, the Ontario Act also permitted the granting of a lease or licence except where an exclusive right of fishing already existed by law.[101] 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.[102]

63. 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

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99. *An Act to Regulate the Fisheries of this Province*, (1885) 48 Vict., c. 9.

100. *Id.*, 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 said Province as flow over or cover any Crown Lands" [emphasis added].

101. *Id.*, 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".

102. 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, p. 198.

them.[103] In 1892, however, the provincial legislature passed *An Act for the Protection of Provincial Fisheries*.[104]

64. 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".[105] The existence of parallel licensing authorities under the federal *Fisheries Act* and 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".[106]

65. 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".[107] However, when "public waters" were discussed, unsurrendered 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

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103. See P.C. THOMPSON, "Institutional Constraints in Fisheries Management", (1974) 31 *J. Fish Res. Board Can.* 1975, p. 1977.

104. (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.

105. 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 Minister of Justice*, Ottawa, Government Printing Bureau, 1896, p. 238.

106. L. HANSEN, "Development of Fisheries", *loc. cit.*, note 35, p. 15.

107. *Ibid.*

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.[108]

66. Question 11, to be resolved by the Court, asked if the Dominion Parliament had jurisdiction to pass section 4 of the Revised Statutes of Canada ch. 95, "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?*"[109]

67. 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 beds of the Dominion".[110]

68. 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[111] 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*

108. *In the Matter of Jurisdiction over Provincial Fisheries*, (1895) 26 S.C.R. 444 (S.C.C.) [hereafter cited as *Re Provincial Fisheries*].

109. *Id.*, p. 449 [emphasis added].

110. *Id.*, p. 459.

111. *Id.*, p. 514 (Chief Justice STRONG, KING concurring).

> *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.*[112]

69. 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".[113] The answer was that the Dominion Parliament "has no jurisdiction in respect of fisheries (other than fisheries in what have already 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*".[114] As a result, section 4 of the *Fisheries Act*, when enforced in areas outside these exemptions, was determined to be *ultra vires*.

70. In 1898, the *Fisheries Reference* finally made its way to the Privy Council.[115] 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?"[116]

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

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112. *Id.*, p. 533 [emphasis added].
113. *Id.*, p. 449, question 12.
114. *Ibid.*
115. *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*].
116. *Id.*, p. 703, question 11.

> 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 Indland 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.[117]

72. 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.[118] No documentary evidence of the agreement exists.[119] Meetings 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"[120] excluding, of course,

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117. *Id.*, pp. 712, 716 [emphasis added]. 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".

118. 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.), p. 101, delegation was intended to avoid any difficulties that might arise as a result of the overlapping jurisdiction.

119. 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].

120. L. HANSEN, "Development of Fisheries", *loc. cit.*, note 35, p. 16.

any right to prejudice treaty rights, or to prejudicially affect any Indian rights in unsurrendered territories.

73. 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 unsurrendered 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.*[121]

74. 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 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.

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121. J.D. McLean to William Simpson, 17 March 1900, reference supplied by Dr. Victor Lytwyn, [citation not provided : copy on author's file.] [emphasis added] As well, section 41(2) of the 1897 Ontario statute remained in effect. L. HANSEN, *ibid.*, 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 responsibilities to the province had been reached.

75. 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.*[122] 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.[123] 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 surrended or extinguished.*[124]

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

IV. INTERDEPARTMENTAL DISAGREEMENTS AND POST-CONFEDERATION CONFLICT

77. 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 commercial use and the rejection of claims to exclusive use or control of any public waters for the purposes of fishing[125] was maintained in the post-Confederation period.[126] That there were indeed different policies at different times and that the pre-Confederation policy was far from

122. (1897) 60 Vict. c. 9.

123. *Id.*, section 2.

124. 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 [emphasis added].

125. *Nikal*, *supra*, note 1, p. 187.

126. *Id.*, pp. 189-190.

treating Indians in the same fashion as settlers has been referred to briefly in this article and discussed at length elsewhere.[127] However, a review of the post-Confederation period again points to the need for context, and suggests the Court's conclusions were ill-founded.

78. 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.[128] Interestingly, Whitcher, a bureaucrat with the Department of Marine and Fisheries 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.

79. 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 impres-

127. See P.J. BLAIR, "Settling the Fisheries", *loc. cit.*, note 17.
128. *Nikal*, *supra*, note 1, p. 189.

> sion is alike erroneous, mischievous and unfortunate. No such exceptional power exists.[129]

80. Certainly, the Department of Marine and Fisheries, and Whitcher in particular, were not fully receptive to aboriginal peoples' aboriginal and treaty rights to fish.[130] However, the federal Department of Indian Affairs held completely contrary and opposite views, evidence that no firm Crown policy existed at all.

81. 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.*[131]

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.

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129. *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 [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.

130. 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, V. 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* 31, p. 47 [hereafter cited as "Ojibway Fisheries"].

131. *Nikal*, *supra*, note 1, p. 191 [emphasis added].

82. 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.[132] Contrary to the Supreme Court's finding, there is ample evidence of interdepartmental conflict over the Department of Marine and Fisheries' policies. Whitcher himself, for example, complained that Indian people had been "misled" by the Indians superintendents with regard to the reservation of fishing rights in "public waters", whether ceded or unceded,[133] 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.[134]

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.[135]

83. 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",

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132. L. HANSEN, "Development of Fisheries", *loc. cit.*, note 35, p. 11.

133. *Ibid.*

134. 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.

135. *Ibid.*

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".[136] 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".[137]

84. In yet another information circular distributed to a number of government officials, including those of Indian Affairs on January 20, 1876, Whitcher advised that arrangements had been entered into with the Department of the Interior (which at that time included the Indian Affairs 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.[138] Bands were told to lift offending nets of any unlicenced fishermen themselves.[139]

85. 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".[140]

86. Unceded Indian lands and properties and even Indian reserves, had now been opened up, at least in Whitcher's view,

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136. W.F. Whitcher to E.A. Meredith, NAC, RG 10, vol. 1972, File 5530, Reel C-11,124, 19 January 1876.

137. L. HANSEN, "Development of Fisheries", *loc. cit.*, note 35, p. 12.

138. 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.

139. 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".

140. W.F. Whitcher for the Hon. Minister of Marine & Fisheries to James Patton, Fishery Overseers, Collingwood, NAC, RG 10, vol. 1972, File 5530, Reel C-11,124, 17 December 1875.

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 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.[141]

141. 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. The "tragic end" of Mr. Gibbard refers to the death of the first Fishery Overseer under the Fisheries Act, allegedly at the hand of an aboriginal man. For a description of these events, see P.J. BLAIR, Settling the Fisheries, *loc. cit.*, note 17, pp. 70-71.

87. 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 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.[142]

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 & F in conn. with letter".[143]

88. The new instructions provided by Whitcher to Fishery Overseers to lease aboriginal fishing grounds were also

142. Report compiled by L, Vankoughnet, Deputy Superintendent General of Indian Affairs, NAC, RG 10, vol. 1972, File 5530, 6 March 1876.

143. *Ibid.*

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.[144]

89. Plummer asserted that Indians within Ontario were entitled to exclusive fishing grounds and that 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".[145]

90. Earlier that year, William Plummer had complained that the Cape Croker Indians, one of the Saugeen Ojibway First Nations, 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".[146] Plummer responded there was no excuse for withholding the Cape Croker commercial licence[147] and threatened to publish

144. W. Plummer to E.A. Meredith, Deputy Minister of the Interior, NAC, RG 10, vol. 1972, File 5530, 6 October 1876.

145. 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.

146. W.F. Whitcher to E.A. Meredith, NAC, RG 10, vol. 1972, File 5530, Reel C-11,125, 10 June 1876.

147. Wm. Plummer to Meredith, NAC, RG 10, vol. 1972, File 5530, 6 June 1876.

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".[148] 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.[149]

91. 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.[150]

92. For a time, Whitcher did not inform the Deputy Minister of the Interior of the many letters from Indians Affairs written on behalf of the Cape Croker Band and other Indians. He finally did so in June of 1876, admiting that none had been answered. In his letter, Whitcher urged the Department not to countenance illegal pretensions advanced on behalf of the Indians.[151] 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 treaty in which the Lieutenant Governor, Sir Francis Bond Head, had secured a surrender in exchange for promising to remove all white men from the aboriginal fisheries of the Saugeen (Bruce) Peninsula.[152] Whitcher 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, unlicenced) 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".[153]

93. What the Department of Justice had to say about the treaty or Cape Croker's complaints is unknown, as a copy of

148. *Ibid.*

149. *Ibid.*

150. W.F. Whitcher to E.A. Meredith, NAC, RG 10, vol. 1972, File 5530, Reel C-11,125, 10 June 1876.

151. *Ibid.*

152. The circumstances of this treaty and the Crown promises made to achieve it, are referred to in P.J. BLAIR, "Settling the Fisheries", *loc. cit.*, note 17, p. 17.

153. W.F. Whitcher to E.A. Meredith, NAC, RG 10, vol. 1972, File 5530, Reel C-11,125, 10 June 1876.

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.[154]

94. 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".[155] 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".[156] The Superintendent General of Indian Affairs protested that the Indian Affairs Branch had been caused much embarrassment by the fishery regulations.[157]

95. 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".[158] 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.[159]

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154. 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.

155. F. Lamorandiere, Cape Croker Band to Wm. Plummer, NAC, RG 10, vol. 1972, File 5530 Reel C-11,125, 21 August 1876.

156. Wm. Plummer to D. Mills, NAC, RG 10, vol. 1972, File 5530, Reel C-11,125, 26 August 1876.

157. D. Mills, Superintendent General of Indian Affairs to Sir Albert Smith, Minister of Marine and Fisheries, NAC, RG 10, vol. 2064, File 10,999 ½, 18 July 1878.

158. William Plummer to Minister of the Interior, NAC, RG 10, vol. 1972, File 5530, Reel C-11,124, 10 May 1876.

159. William Plummer to Deputy Minister of the Interior, NAC, RG 10, vol. 1972, File 5530, Reel C-11,124, 1 June 1876.

96. 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 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.[160]

97. 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.

A. THE DISCRIMINATORY EFFECT OF CROWN POLICIES

98. Perhaps the most troubling 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 as proof of 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.

99. 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

160. L. HANSEN, "Development of Fisheries", *loc. cit.*, note 35, p. 13 [emphasis added].

by which they had been able to raise money for food while planting gardens and fields.[161]

100. 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 [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.[162]

101. Whitcher insisted the Saugeen Indians could not possibly be granted an application for such extensive limits as the Fishing Islands,[163] 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.

102. 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.[164]

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161. William Plummer to Minister of Interior, NAC, RG 10, vol. 1972, File 5530, Reel C-11,124, 1 June 1876.

162. 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.

163. W.F. Whitcher to E.A. Meredith, NAC, RG 10, vol. 1972, File 5530, Reel C-11,124, 5 June 1876.

164. W.F. Whitcher to E.A. Meredith, Deputy Minister of the Interior, NAC, RG 10, vol. 1972, File 5530, 9 May 1876 [emphasis added].

In all other respects, white fishermen, he said, enjoyed exclusive fishing rights.[165] If band members engaged in trading fish wished to continue doing so, they would be required to purchase a licence so that "whites would not complain about the competing traffic".[166]

103. As noted, a licence had finally been issued to the Cape Croker Band in July of 1876[167] 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 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".[168]

104. 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".[169]

105. Plummer pointed out that there was no mistake in the licence, which followed to the letter Miller's recommendations.[170] He suggested that the Department of Marine and

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165. *Ibid.*

166. W.F. Whitcher to E.A. Meredith, NAC, RG 10, vol. 1972, File 5530, Reel C-11,124, 10 June 1876.

167. Province of Ontario Special Fishery Licence issued under the Fisherys [sic] Act 1876 NAC, RG 10, vol. 1972, File 5530, 10 July 1876.

168. 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.

169. W.F. Whitcher to L. Vankoughnet, NAC, RG 10, vol. 1972, File 5530, Reel C-11,124.

170. William Plummer to Minister of Interior, NAC, RG 10, vol. 1972, File 5530, Reel C-11,124, 14 September 1876.

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.[171] On this occasion, Vankoughnet was not supportive. He advised Plummer that an Indian deputation would be useless, and to put his concerns in writing.[172] The licence limits remained as they were.

106. Six months later, the Saugeen Indians again complained that their reduced fishery had been 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.[173] 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".[174] 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".[175]

171. William Plummer to Minister of Interior, NAC, RG 10, vol. 1972, File 5530, Reel C-11,124, 31 January 1877.

172. Lawrence Vankoughnet to William Plummer, NAC, RG 10, vol. 1972, File 5530, 7 February 1877.

173. William Plummer to Minister of Interior, NAC, RG 10, vol. 1972, File 5530, Reel C-11,124, 17 September 1877.

174. Sessional Papers of Parliament (No. 11) 40 Victoria 1877.

175. William Plummer to Minister of Interior, NAC, RG 10, vol. 2064, File 10,999 ½, 3 December 1878. The Department of Marine and Fisheries' views of public ownership over inland waters were apparently not sharerd 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, p. 48.

107. 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".[176] 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".[177] 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 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

176. D. Mills to Sir Albert Smith, NAC, RG 10, vol. 2064, File 10,999 ½, 18 July 1878.

177. W.F. Whitcher to L. Vankoughnet, NAC, RG 10, vol. 2064, File 10,999 ½, 13 September 1878.

> accustomed to adopt the modes of salmon fishing pursued by members of the white communities in which they live.[178]

108. Charles Skene, the Superintendent of Indian Affairs at Parry Sound, took issue with 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 [...] here is a clause in the Robinson Treaty which 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.[179]

178. [Emphasis added]. 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 10,009 ½, footnote dated 15 September 1878.

179. Charles Skene, Parry Sound Superintendency, to William Buckingham, Deputy Minister of the Interior, NAC, RG 10, vol. 2064, File 10,999 ½, 22 October 1878.

109. 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 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".[180]

110. 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.[181] 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

180. W.F. Whitcher to L. Vankoughnet, NAC, RG 10, vol. 1972, File 5530, Reel C-11,125, 3 March 1879.

181. William Plummer to the Minister of the Interior, NAC, RG 10, vol. 1972, File 5530, Reel C-11,124, 3 April 1879.

> surrender of these tracts and islands and the waters by which they are immediately surrounded.[182]

111. The licence issued to the Cape Croker Band in 1882 reduced what had been an eight mile limit offshore to two arbitrarily.[183] 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.[184]

112. 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.[185]

113. 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".[186]

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182. William Plummer to the Minister of the Interior, David Mills, NAC, RG 10, vol. 563 (microfilm reel #C-13,370), 3 December 1878.

183. Special Fishery Licence, Cape Croker Band from Province of Ontario, NAC, RG 10, vol. 1972, File 5530, Reel C-11,125.

184. William Bull, Indian Agent, Wiarton to Superintendent General of Indian Affairs, NAC, RG 10, vol. 1972, File 5530, Reel C-11,125, 19 February 1883.

185. 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.

186. Band Council Resolution of the Saugeen Band, "Motions taken from Saugeen Council Minutes, 1883-1895", 3 November 1890.

114. 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".[187] 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".[188] Fisheries Officers were instructed to seize fish, destroy nets and boats and prosecute aboriginal violators for non-compliance.[189] Deputy Superintendent of Indian Affairs Vankoughnet protested on behalf of the Department of Indian Affairs that a general prohibition would cause "great distress" to the Indians.[190]

115. 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".[191] 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".[192] The Saugeen Band was also told its "privilege" of seining was to cease with the present year.[193] 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

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187. Report on Saugeen Agency, Jas. Allen, Indian Agent, *Sessional Papers of Parliament*, (No. 14) 55 Vict. 1892, 29 August 1891.

188. 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.

189. 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.

190. 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.

191. 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.

192. 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, Reel C-11,221, 22 August 1893.

193. Report on Saugeen Agency by Jas. Allen, Indian Agent, *Sessional Papers of Parliament*, (No. 14) 57 Vict. 1894, 29 August 1893.

fishery".[194] They requested that they be free to do so, exclusively, free of licence.[195] 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".[196] The result of these restrictions was reported to be a fishery greatly reduced in size from that of the previous years".[197] The Saugeen licence was not renewed, and they were excluded from the fishery altogether. In fact, the Saugeen community's collective right to fish commercially was not recognized until the decison in *R.* v. *Jones and Nadjiwon*, nearly one hundred years later.[198]

116. 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.[199] 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.[200]

117. The Municipality of Keppel 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.

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194. Saugeen Band Resolution, "Motions taken from the Saugeen Council Minutes, 1883-1895", 4 March 1895.

195. 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 Mai 1895.

196. 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.

197. Report on Cape Croker Agency, NAC, RG 23, vol. 181, File 727, p. 199, Reel T-2948, 6 September 1893.

198. *R.* v. *Jones and Nadjiwon*, *supra*, note 61. The exclusion was noted by the court, which found, at p. 451 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".

199. Surrender of White Cloud Island dated 14 January 1885 in *Indian Treaties and Surrenders*, Canada, 1891, vol. 2, p. 151.

200. Petition by Keppel Township Inhabitants, NAC, RG 23, vol. 144, File 359, 20 January 1894.

The views of the Department of Indian Affairs were solicited.[201] In the meantime, the Council of the County of Grey requested that the water "surrounding White Cloud Island be withdrawn from the Newash Band's fishing limits",[202] on the basis that the purchasers had been "disappointed" to learn that the Indians had the control of all the fishing.[203]

118. 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.[204] 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.[205] When five or six Cape Croker fishermen applied for commercial fishing licences in 1896, they were refused, due to the dissatisfaction of white fishermen as well as "grave objections" to increasing the number of commercial fishing licences in Georgian Bay.[206]

119. 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.[207]

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201. 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.

202. Memorial, NAC, RG 10, Vol. 2439, File 91,338, Reel C-11,221, 24 March 1894.

203. 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.

204. Indian Agent Jermyn to Hayter Reed, NAC, RG 10, vol. 2439, File 91,338, 20 February 1894.

205. Indian Agent Jermyn to Hayter Reed, NAC, RG 10, vol. 2439, File 91,228, 14 March 1894.

206. 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.

207. 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.

120. 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".[208] 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.[209]

121. 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.[210]

122. 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 licenced to whites and that they monopolized the business".[211]

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208. 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.

209. *Ibid.*

210. Letter, J. Hardie, Acting Deputy Minister, Marine & Fisheries to H. Reed, Deputy Superintendent General of Indian Affairs, NAC, RG 10, Vol. 2439, File 91,338, Reel C-11,221, 8 August 1894.

211. 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.

123. 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".[212] 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"[213] He wrote that the non-aboriginal fishermen should be regarded as trespassers.[214]

124. As a result of the Department's 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".[215] The Fisheries Inspector asked that no proceedings be taken until after November when the licences would expire. However, the non-aboriginal commercial fishermen were issued new licences the following year.[216]

125. 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

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212. J.D. McLean, Secretary, Memo to Law Clerk, NAC, RG 10, restricted file 40-34, 12 August 1909.

213. A.S. Williams, Law Clerk to Assistant Deputy Superintendent General, Indian Affairs, NAC, RG 10, restricted, File 40-34, 12 August 1909.

214. *Ibid.*

215. Inspector of Fisheries, Belleville to J.D. McLean, Sec. Dept of Indian Affairs, Ottawa, NAC, RG 10, restricted file 40-34, 29 September 1909.

216. H.R. Conn, memorandum to file, NAC, RG 10, restricted file 40-34, *circa*, August 1941.

was apparently based on the old Whitcher 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.[217]

126. 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.[218]

127. 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

217. NAC, RG 10, restricted file 40-34, *circa*, July 1916.
218. *Jack* v. *The Queen*, *supra*, note 97, p. 39.

grounds without aboriginal consent and lease them to non-aboriginal commercial fishermen, who quickly over-harvested the resource.[219]

B. EXCLUSIVE ABORIGINAL FISHING RIGHTS IN THE POST-CONFEDERATION PERIOD

128. The Supreme Court of Canada's application of Crown policy in Upper Canada to circumstances in British Columbia has been criticized for ignoring pre-existing exclusive rights based on aboriginal title, and for taking information out of context.[220] 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 was to recognize aboriginal exclusive fishing rights until settlement pressures and non-aboriginal interests in the fisheries increased, then to deny that these existed. If this hypothesis is correct, Crown policies in those parts of Ontario where settlement was delayed should have continued to recognize exclusive aboriginal fishing rights even as Crown policies denied the existence of such rights in areas, such as southern Ontario, where settlement took place much sooner.

That this is so, is in fact the case. Exclusive fishing rights were recognized by the Crown in the post-Confederation period in parts of Northwestern Ontario which were sparsely settled. This is evidenced by events transpiring around the North West Angle Treaty, entered into at the end of the 19th century, in the area between Ontario and what would become the Province of Manitoba.

129. 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

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219. V. LYTWYN, "Waterworld : The Aquatic Territory of the Great Lakes First Nations" in *Gin Das Winan : Documenting Aboriginal History in Ontario*, Toronto, Champlain Society, 1996, p. 25.

220. See P.J. BLAIR, "Settling the Fishery", *loc. cit.*, note 17, pp. 54-63. The Supreme Court of Canada in *R. v. Marshall*, [1993] 3 S.C.R. 456, para. 36, acknowledged this criticism directly, referring to what "these historians see as an occasional tendency on the part of judges to assemble a 'cut and paste' version of history".

they desire in reserves at certain locations where they fish for sturgeon".[221] 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.[222] The resulting treaty, signed on October 3, 1873, was known as the North West Angle Treaty. It contained the promise that the Ojibway would "forever have the use of their fisheries" and that they would receive $1,500 per year for "twine for [fishing] nets".[223]

130. This point was insisted on by the Indians, who for some years had refused to enter into any treaty.[224]

131. In 1873, the sturgeon fisheries were bountiful.[225] There would be no non-aboriginal commercial fishing on the Lake of the Woods for another eleven years.[226] 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.[227]

132. 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

221. Order-in-Council, NAC, RG 2, series 1, p. 45, 25 April 1871.

222. J. VAN WEST, "Ojibway Fisheries", *loc. cit.*, note 130, p. 34.

223. *Id.*, p. 46.

224. NAC, RG 10, vol. 3800, File 48542, 28 May 1888.

225. J. VAN WEST, "Ojibway Fisheries", *loc. cit.*, note 130, p. 34.

226. *Ibid.*

227. *Id.*, p. 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 R.C. BROWN, *Canada's National Policy, 1883-1900 : A Study in Canadian-American Relations*, New York, Princeton University Press, 1964, pp. 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.

effective weapons of destructions 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".[228]

133. In a reversal of what ultimately appeared in the fisheries legislation in 1868, Vankoughnet and Simon Dawson, one of the Treaty Three commissioners and at the time, a local MP, proposed that the Lake of the Woods fisheries should be exclusively aboriginal, and the settlers should be permitted to catch fish for domestic use only.[229]

134. 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 suffices 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 white fish, 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

228. Ebeneezer McColl, Manitoba Indian Inspector, NAC, RG 10, vol. 3807, File 52443, 22 October 1888.

229. J. VAN WEST, "Ojibway Fisheries", *loc. cit.*, note 130, p. 47.

> 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 licences or leases to catch fish on Lake Superior should be issued, subject to this right on the part of the Indians.[230]

135. 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".[231] 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.[232] Dawson nonetheless maintained 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".[233] 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".[234]

136. 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[235] 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.[236] At this time, in such relatively unsettled areas of the Northwest, it was vital that

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230. Memorandum from Simon J. Dawson, Three Rivers, to Pennefather, Archives of Ontario, Dawson Family Papers, MU 831, File 42 : n.p., 24 July 1860.

231. Memorandum in reference to the Indians on the line of route between Lake Superior and the Red River, Ontario Archives 1868, Pamphlet 1868 No. 14.

232. J. VAN WEST, "Ojibway Fisheries", *op. cit.*, note 130, p. 47.

233. *Id.*, p. 53, footnote 27.

234. *Ibid.*

235. *Id.*, p. 47.

236. *Id.*, p. 36.

the government provide assurances that aboriginal fishing would be protected.[237]

137. At Lake of the Woods, three commercial licences to non-aboriginal fishermen were issued by the Department of Marine and Fisheries in 1892.[238] A contingent of eleven Ojibway Chiefs complained to Indian Affairs that there was a wholesale depletion of fish as a result of these licences, and asked that no further licences be granted.[239] The Department of Marine and Fisheries insisted that the Ojibway would always have fish at their disposal.[240] However, by 1895, the number of licences had increased thirty-fold; 100 more licences were issued.[241] 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

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237. 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 furbearing 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 No. 8*, Winnipeg, Manitoba, September 22, 1889 addressed to the Hon. Clifford Sifton, Supt. General of Indian Affairs, Ottawa, Queen's Printer and Controller of Stationery 1966, Cat. No. Ci 72-0866.

238. J. VAN WEST, "Ojibway Fisheries", *loc. cit.*, note 130, p. 40.

239. *Ibid.*

240. *Ibid.*

241. *Ibid.*

> 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.[242]

138. Because provincial jurisdiction over the surrendered territory had not yet been declared, prolonged disputes 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*,[243] 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.

139. 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.[244] 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, 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.[245]

140. 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,

242. *Id.*, p. 41.
243. (1891) 54-55 Vict., c. 5 (Can) and 54 Vict., c. 3 (Ont.).
244. J. VAN WEST, "Ojibway Fisheries", *loc. cit.*, note 130, p. 34.
245. NAC, RG 10, vol. 3882, File 95,721 : n.p. [emphasis added].

until 1915, when Ontario took steps to unilaterally amend its legislation to remove the public exclusion from aboriginal waters.[246]

141. 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* reached the Privy Council, and the jurisdictional issues had been resolved, the overall fishery was virtually destroyed.[247] By 1900, the sturgeon fisheries of the Lake of the Woods had collapsed due to overfishing due to an influx of licensed non-aboriginal fishermen.[248]

142. 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 activities 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

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246. 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., p. 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 [...] [p. 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".

247. *Ibid.*

248. J. VAN WEST, "Ojibway Fisheries", *loc. cit.*, note 130, p. 41.

> unbaited hooks in Ontario [...] as sturgeon capturing devices and restricted access to the resource within the province during the spawning season.[249]

143. 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.[250]

144. The Supreme Court of Canada in both *Nikal* and *Lewis* assumed that unsurrendered waters were publicly owned. It then extrapolated from documents taken out of context in Upper Canada that these "public" waters and the fisheries within them were never granted by the Crown as a matter of policy. The circumstances of the Treaty Three promise of exclusivity entrenched in legislation in 1891 confirm that the Crown's policy was not firm, but changed depending on political pressures and circumstances.

145. Crown policy, however, often differed from legal rulings. In 1898, in *Caldwell* v. *Fraser*, an Ontario Court ruled that the unceded waters adjacent to a reserve in northern Ontario were part of the reserve and subject to Indian title until surrendered.[251] Just seven years earlier, the federal government asked the Mohawks of the Bay of Quinte to surrender a portion of the underlying bed of the Bay of Quinte adjacent to their reserve out to navigable or deep waters.[252] If the underlying bed was not understood to be part of either the Mohawk aboriginal title or rights "granted" to them under the Simcoe Deed, such a surrender would not have been necessary.

Despite the ruling in *Caldwell*, however, and the Crown's continuing practice of securing surrenders not just of lands but of waters adjacent to reserves when required for settlement or development, the Department of Marine and Fisheries remained unmoved and unwilling to change its policy of denying aboriginal fishing rights. In December, 1897, the

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249. *Id.*, p. 42.

250. *Id.*, p. 31.

251. The decision in *Caldwell* v. *Fraser*, is discussed in P.J. BLAIR, "Settling the Fisheries", *loc. cit.*, note 17, paras. 58-59.

252. The circumstances of this surrender and the nature of the Mohawk fisheries in described in P.J. BLAIR, "Settling the Fisheries", *loc. cit.*, note 17, at para. 47.

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 Fisheries Department.[253] 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".[254]

V. ANALYSIS OF THE DECISIONS IN *NIKA* AND *LEWIS*

A. THE MISAPPLICATION OF EUROPEAN PROPERTY LAWS

146. Imperial Crown policy in the early 19th century clearly recognized exclusive aboriginal fishing rights, and understood that it was First Nations, through surrenders, who "granted" rights to the Crown and not the other way around. However, 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.

147. 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 errors 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".[255]

148. 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

253. J. VAN WEST, "Ojibway Fisheries", *loc. cit.*, note 130, p. 47.
254. *Ibid.*
255. *Nikal*, *supra*, note 1, p. 188.

rights applied automatically.[256] 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.[257] Moreover, since according to the *Fisheries Reference* cases, the bed beneath unceded Indian lands and waters remained vested in the federal government as a matter of exclusively federal jurisdiction, 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.

149. 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* 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*".[258] 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[259] and that since the Squamish River was navigable, the presumption did not apply.

150. In determining the applicability of the Moricetown Band By-law in *Nikal*, the Supreme Court of Canada considered 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* [...]"[260]

151. As has been shown, the Court's precondition for applying the presumption, namely that waters be non-navigable, was

256. G.V. LAFOREST, *Water Law in Canada — The Atlantic Provinces*, Ottawa : Dept. of Regional Economic Expansion, 1973, p. 196.

257. *Ibid.*

258. *Nikal*, *supra*, note 1, p. 188 [emphasis added].

259. *Id.*, p. 150.

260. *Id.*, p. 198 [emphasis added].

wrong, at least according to the 19th century cases referred to, such as *Robertson*. 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 1914 Privy Council ruling in *B.C. Fisheries Case*,[261] 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*[262] 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. Fisheries Case*, *supra*, does not settle the question of the applicability of the presumption.[263]

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.

152. The Privy Council had actually 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".[264] This was exactly the same point made by Justice Strong in *The Queen* v. *Robertson*, 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".[265]

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261. *A.G. for British Columbia (B.C. Fisheries Case)*, [1915] A.C. 153 [hereafter referred to as *B.C. Fisheries Case*].
262. *Lewis*, *supra*, note 2, p. 150.
263. *Ibid.* [emphasis added].
264. *B.C. Fisheries Case*, *supra*, note 201, p. 167.
265. (1874) 6 S.C.C. 53 (S.C.C.), p. 132.

153. 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*".[266] 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.

154. 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*,[267] *Flewelling* v. *Johnston*[268] and *Friends of the Oldman River Society.*[269] Again, each decision was taken out of context or applied incorrect principles.[270]

155. In 1921, the same year as the decisions in *Re Iverson and Greater Winnipeg Water District* and *Flewelling* v. *Johnston* were delivered,[271] the Privy Council 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*

266. *Id.*, p. 173 [emphasis added].

267. *Re Iverson and Greater Winnipeg Water District*, (1921) 57 D.L.R. 184.

268. [1921] 2 W.W.R. 374 (Alta C.A.).

269. [1992] 1 S.C.R. 3.

270. In the *Oldman River* case, Justice La Forest cited *In Re. Provincial Fisheries* in support of the proposition that the distinction between tidal and non-tidal waters was abandoned long ago. However, 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.

271. *Flewelling* v. *Johnston*, [1921] 2 W.W.R. 374 (Alta. C.A.) cited in *Nikal*, *supra*, note 2, p. 199.

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 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".[272]

156. 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*.[273] That decision had been overturned on appeal to the Ontario Court of Appeal a year later, a fact not mentioned by the Supreme Court.[274]

157. 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 necessary* 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.[275] 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

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272. (1921) 56 D.L.R. 358, pp. 367-368.

273. *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. *Johnson*, p. 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, p. 201.

274. *Keewatin* v. *Kenora*, (1908) 16 O.L.R. 185 (Ont. C.a.).

275. 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.

> 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.*[276]

158. 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?[277]

159. The Ontario Court of Appeal in *Keewatin* v. *Kenora* dismissed the argument that the Crown 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

276. *Keewatin* v. *Kenora*, note 275, p. 196 [emphasis added].
277. *Id.*, p. 196, p. 198.

rise in the necessity of providing for the defence of the realm and the protection and safety of the public — the general commonwealth of the public at large — rather than the necessity of protecting the rights of the public in navigation and fishing".[278]

160. 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.[279] As provincial legislation, however, it could have no effect on aboriginal title, whatever its intent.

161. 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[280] is also contradicted by the evidence of how, and why reserves were created.

162. 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.[281] In *Pasco* v.

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278. *Id.*, p. 195.

279. *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 unsurrendered 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 *Barlett* v. *Delaney*, (1913) O.W.N. 200.

280. *Nikal*, *supra*, note 1, p. 204.

281. *Saanichton Marina* v. *Claxton*, (1989) 57 D.L.R. (4th) 161 (C.A.), p. 167. At the appeal level, the aboriginal parties advised they were not seeking a proprietary interest in the seabed.

CNR,[282] the Court observed that the issues 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.*[283]

163. 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".[284] 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.[285]

164. The New Zealand Court of Appeal in *In re Bed of Wanganui River*[286] 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

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282. [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.

283. *Id.*, p. 41 [emphasis added].

284. *Te Weehi* v. *Regional Fisheries Officer*, [1986] 1 N.Z.L.R. 680 (H.C.), pp 686-87.

285. See comments to this effect in *The King* v. *Morrison*, [1950] N.Z.L.R. 247, p. 260.

286. [1955] N.Z.L.R. 419 (C.A.).

as a body of principles to be applied in ascertaining and interpreting the Maori customs and usages".[287] 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 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.[288]

165. 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* [...][289]

166. In another New Zealand case, *Te Runanga o Te Ika Whenua Inc. Society* v. *Att. Gen*,[290] 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

287. *Id.*, p. 450.
288. *Id.*, p. 461 [emphasis added].
289. *In re Bed of Wanganui River*, [1962] N.Z.L.R. 600 (C.A.), p. 612 [emphasis added].
290. [1994] 2 N.Z.L.R. 20 (C.A.).

> is inconsistent with the [Maori] concept and may well be unreliable in determining what the Maori have agreed to part with.[291]

167. 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.

168. 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.[292] In English

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291. *Id.*, p. 26.

292. *Mabo* v. *Queensland*, [1992] 5 C.N.L.R. 1 (H. C.), p. 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, B. 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, pp. 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, M. WALTERS, *Magna Carta*, *op. cit.*, note 57, p. 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.), 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", *id.*, para 163. The Supreme Court of Canada in *Delgamu'ukw*, *supra*, note 16, did not deal with the issue.

common law, custom and usage has always formed the exception to public rights in what might otherwise be considered public waters.[293] In *Gage* v. *Bates*,[294] 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.[295] 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.[296] Whatever historical facts 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.

B. IGNORING THE ABORIGINAL PERSPECTIVE

169. 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

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293. *New Windsor Corporation* v. *Mellor*, [1975] 1 Ch 380, p. 387, per Lord DENNING MR. See also *Kauwaeranga* (1870) printed as *Kauwaeranga Judgment*, (1984) 14 V.U.W.L.R. 227, p. 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.

294. *Gage* v. *Bates*, (1864) Trinity Term, 21 Victoria 116 (Common Pleas).

295. *Id.*, p. 121.

296. This has been the approach taken in New Zealand. As stated in *Kauwaeranga*, *supra*, note 293, p. 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 uses having been proved, the Courts will presume the grant. And in our case, the title is older, for the ownership 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.

incorporate both legal perspectives".[297] 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.

170. 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 preexistence of distinctive aboriginal societies occupying the land with Crown sovereignty*".[298] 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, however, an error warned against by the Privy Council in 1921.[299]

171. 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* that the "courts not create by a remote, isolated current view of past events, new grievances".[300]

297. *R.* v. *Van der Peet*, [1996] 4 C.N.L.R. 177 (S.C.C.), p. 202.

298. *Ibid*, [emphasis added]. Justice Lamer repeated his comments in *Delgamuukw*, *supra*, note 64, p. para. 186, adding, "Let us face it, we are all here to stay".

299. *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 perspective and incorporate in into their approach to these issues.

300. *R.* v. *Taylor and Williams*, [1981] 3 C.N.L.R. 114 (Ont. C.A.), p. 120.

C. USING CROWN POLICY TO DEFINE UNDERLYING ABORIGINAL RIGHTS

172. 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 re-allocate 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.

173. *Sparrow* had interpreted section 35 as the means by which Crown policy could be scrutinized,[301] 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 to de facto threats to the existetnce 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.[302]

174. *Sparrow* determined that even the detailed regulation of aboriginal rights could not, in itself, define or extinguish underlying rights,[303] a point reaffirmed by the Supreme

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301. *R.* v. *Sparrow*, [1990] 3 C.N.L.R. 161 (S.C.C.), p. 181.

302. *Ibid.*

303. *Id.*, p. 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.), pp. 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*,

Court of Canada in *R.* v. *Gladstone*.[304] 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 any exclusive aboriginal rights. 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.[305]

175. 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 funda-

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"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". G.V. LA FOREST, *Water Law in Canada — The Atlantic Provinces*, Ottawa, Department of Regional Economic Expansion, 1974, p. 44.

304. In *R.* v. *Gladstone*, *supra*, note 303, the Supreme Court majority reaffirmed that test, p. 79.

305. This is particularly troubling when in *Gladstone*, *id.*, p. 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".

> mental. How, without amending the Constitution, can the Crown cut down the aboriginal right?[306]

176. 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".[307] 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 *Lewis* did not conform to the authorities, was indeterminate, and was, in the final analysis unnecessary.[308] It is an approach which she has described as being itself unconstitutional.[309]

177. As first outlined in *R.* v. *George*, 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.[310] 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,[311] 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".

178. The challenge now for aboriginal peoples throughout Canada will be to persuade the court, 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

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306. *Van der Peet*, *supra*, note 297, p. 283.
307. *Ibid.*
308. *Ibid.*
309. *Id.*, p. 283.
310. *R.* v. *George*, (1996) S.C.R. 267 (S.C.C.), p. 279.
311. *Sparrow*, *supra*, note 30, pp. 181, 183, 187.

rivers, streams and lake. In these areas, exclusive aboriginal fishing rights derived from aboriginal title to those lands "covered with water", may continue to this day. However, as a result of these two cases, the already arduous task of establishing such rights in Canadian courts has been rendered even more difficult.

SUMMARY AND CONCLUSIONS

179. 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. Early Imperial Crown policy recognized aboriginal rights within navigable waters, including exclusive aboriginal fisheries. A colonial Crown policy denying the existence of these rights was not in evidence until aboriginal fisheries had become the subject of non-aboriginal interest.

180. Overall, in *Nikal* and *Lewis* the Court determined that since the Crown intended to retain ownership and control of the fisheries, 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.

181. 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 aboriginals lands and rights to third parties, however discriminatory that policy might have been at the time it was implemented.

182. 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 on those same rights can be used 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.

183. The decisions in *Nikal* and *Lewis*, if left unchallenged, may guide Canadian courts to equally ill-founded conclusions. In essence, by denying that aboriginal people held a special interest in waters adjacent to their reserves, the Court has 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 suggests the rulings were wrongly decided.

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