

Settling the Fisheries: Pre-Confederation Crown Policy in Upper Canada and the Supreme Court's decisions in *R. v. NIKAL* and *LEWIS*

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Article abstract

Although a casual reading of the Supreme Court of Canada's decisions in *R. v. Nikal* and *R. v. Lewis* might suggest otherwise, this article will argue that Court's decisions in two recent British Columbia aboriginal fishing cases do not apply in Ontario. In doing so, it will be shown that the Supreme Court of Canada relied on evidence of historic Crown policies towards aboriginal fishing rights in Upper Canada in the absence of appropriate context as to when, how and why those policies evolved. As a result, the Court wrongly concluded that fisheries could not be the subject of exclusive aboriginal rights.

Settling the Fisheries : Pre-Confederation Crown Policy in Upper Canada and the Supreme Court's decisions in *R. v. NIKAL* and *LEWIS**

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ABSTRACT

Although a casual reading of the Supreme Court of Canada's decisions in R. v. Nikal and R. v. Lewis might suggest otherwise, this article will argue that Court's decisions in two recent British Columbia aboriginal fishing cases do not apply in Ontario. In doing so, it will be shown that the Supreme Court of Canada relied on evidence of historic Crown policies towards aboriginal fishing rights in Upper Canada in the absence of appropriate context as to when, how and why those policies evolved. As a result, the Court wrongly concluded

RÉSUMÉ

Bien qu'une lecture sommaire des jugements de la Cour suprême du Canada dans R. c. Nikal et R. c. Lewis le suggère, l'auteure soutient que les décisions de la Cour quant aux droits de pêche autochtones dans ces deux jugements de la Colombie-Britannique ne s'appliquent pas en Ontario. Ainsi, il sera démontré que la Cour suprême du Canada a utilisé des preuves découlant des anciennes politiques de la Couronne quant aux droit de pêche autochtone au Haut-Canada en l'absence de contexte approprié quant à l'évolution de ces politiques.

* Editor's note : The original thesis received the Association des professeurs de droit du Québec Award in April 2000. We are glad to publish it in two instalments.

*that fisheries could not be the subject of exclusive aboriginal rights.*¹

La Cour a donc erronément conclu que les droits de pêche ne pouvaient faire l'objet de droits autochtones exclusifs.

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1. This article formed part of a thesis, *The Supreme Court of Canada's 'Historic' Decisions in R. v. Nikal and Lewis: Why Crown Fishing Policy in Upper Canada Makes Bad Law* for which the degree of Masters of Law was awarded by the University of Ottawa in March, 1999. 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. Thanks go to Victor Lytywn and Darlene Johnston for supplying certain historical references and to Jamie Benidickson, Brad Morse and Olive Dickason for their helpful comments and review.

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INTRODUCTION

1. In *R. v. Nikal*,² the Supreme Court of Canada decided that an *Indian Act* Band by-law did not apply to a river running through a reserve in British Columbia because no exclusive right to a fishery had been granted to the Band by the Crown at the time the reservation was established, due to Crown policy. In *R. v. Lewis*,³ rendered concurrently, the Court repeated and adopted the conclusions reached in *Nikal*. As a result, the *Nikal* and *Lewis* rulings could have significant impacts on First Nations throughout Canada with respect to their capacity to use and regulate their fisheries. More particularly, because the Court recited in support of its conclusion historical evidence and cases specific to Ontario, it might appear to the casual reader that these cases would apply to deny exclusive aboriginal fishing rights within Ontario.

This article will analyze the *Nikal* and *Lewis* decisions critically and argue that, in fact, *Nikal* and *Lewis* should not be applied to aboriginal fishing rights within Ontario. It will demonstrate that the Supreme Court of Canada made several significant errors in the manner in which it evaluated and received historical evidence of Crown policy relating to Upper Canada, historical evidence which was specific to a different time and place than the circumstances before the Court.

2. [1996] 3 C.N.L.R. 178 (S.C.C.).

3. [1996] 3 C.N.L.R. 131 (S.C.C.).

I. BACKGROUND

A. THE GENERAL FRAMEWORK OF ABORIGINAL TITLE, TREATY AND OTHER RIGHTS

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

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

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

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

4. In *R. v. Sparrow*,⁵ the Supreme Court of Canada referred with approval to one author's analysis of the effect of the *Constitution Act, 1982*, stating:

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

5. In examining government policies to determine their effect on aboriginal and treaty rights, as the Supreme Court did in the two cases to be discussed, it is important to keep in mind that there is a special relationship between the Crown and aboriginal peoples at stake. This has been described by the Supreme Court of Canada as the "honour of the Crown".⁶ The way in which a legislative objective is to be attained must both

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

5. [1990] 3 C.N.L.R. 160 (S.C.C.), 178.

6. *Id.*, p. 180.

uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples.⁷

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

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

Since the historical context of the information reviewed by the court in *Nikal* and *Lewis* included policies implemented by the Crown in British Columbia and Upper Canada, it is of note that while the fiduciary obligation is held principally by the federal government, it is shared with the provincial governments in areas where they exercise constitutional jurisdiction.¹² As Brian Slattery writes:

The Crown's general fiduciary duty binds both the federal Crown and the various provincial Crowns within the limits of

7. *Id.*, p. 181.

8. [1966] S.C.R. 267, p. 279.

9. *R. v. Taylor and Williams*, [1981] 3 C.N.L.R. 114 (Ont. C.A.), p. 123.

10. *R. v. Sparrow*, *supra*, note 5, p. 183.

11. *Id.*, p. 187.

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

their respective jurisdictions. The federal Crown has primary responsibility toward native peoples under section 91(24) of the Constitution Act, 1867, and thus bears the main burden of the fiduciary trust. But insofar as provincial Crowns have the power to affect native peoples, they also share in the trust.¹³

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

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

In a dispute over timber rights between the provincial and federal governments in ceded territories in 1898, the Privy Council in *St. Catherine's Milling and Lumber Company* held that the provinces were given the entire beneficial interest of the Crown in lands within their boundaries under section 109 of the *British North America Act* of 1867. The Indian title in those lands, the Privy Council held, was simply a burden on the Crown title which became a *plenum dominum* whenever that title was surrendered or otherwise extinguished. The Court stated:

13. B. SLATTERY, "Understanding Aboriginal Rights", (1987) 66 *Can. Bar Rev.* 727-783, p. 755.

14. *Id.*, "First Nations and the Constitution: A Question of Trust", (1992) 71 *Can. Bar Rev.* 261-293, p. 274.

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

16. (1888) 14 A.C. 46 (J.C.P.C.).

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

For a long time following the decision in *St. Catherine's Milling*, pre-existing aboriginal tenure was described as a "personal and usufructuary right dependent upon the goodwill of the Sovereign",¹⁸ a form of possession which could "only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown".¹⁹ In other words, aboriginal rights and title derived from the occupation of lands pre-dating European arrival by millennia were construed as "grants" from the Sovereign. The fallacy of this reasoning should be obvious, particularly the notion that sovereign title on the part of Europeans might apply to territories areas not yet "discovered" but whose inhabitants had occupied and used them in organized societies for many thousands of years. Fortunately, the rather bizarre notion advanced in *St. Catherine's Milling* that aboriginal title was merely a personal or usufructuary right contingent on "discovery" has long since been abandoned and has been rejected by the courts of most former British colonies.²⁰

9. Twenty-five years ago, in *Calder v. A.G. B.C.*, Judson, J. of the Supreme Court of Canada noted that "the fact is that when settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or

17. *Id.*, p. 59.

18. *Id.*, p. 54.

19. *Ibid.*, [emphasis added].

20. M. WALTERS, "Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada", (1998) *Queen's Law Journal* 301 at p. 318.

usufructuary right".²¹ Justice Hall, in a widely-cited dissenting opinion in *Calder*, noted that aboriginal title was much more than a "grant" from a previous Sovereign.

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

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

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

21. [1973] S.C.R. 313, p. 328. As Justice LaForest noted in *Delgamu'ukw v. British Columbia*, [1998] 1 C.N.L.R. 14 (S.C.C.), para. 189: "In my view, the foundation of Aboriginal title was succinctly described by Judson J. in *Calder* [...] where, at p. 328, he stated: 'the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means [...]' More recently, Judson J.'s views were reiterated in *R. v. Van der Peet*, [1996] 2 S.C.R. 507. There Lamer C.J. wrote for the majority, at para. 30, that the doctrine of Aboriginal rights (one aspect of which is 'Aboriginal title') arises from 'one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries'" [emphasis in original].

22. *Calder, id.*, pp. 405-406 [emphasis added].

23. *Id.*, p. 416.

24. *Mabo v. Queensland*, (1992) 107 A.L.R.I. (H. Ct.).

The proposition that when the Crown assumed sovereignty over an Australian colony, it became the universal and absolute owner of all the land therein invites critical examination. If the conclusion [...] be right, the interests of Indigenous inhabitants in colonial lands were extinguished so soon as British subjects settled in a colony, though the indigenous inhabitants had neither ceded their lands to the Crown nor suffered them to be taken as spoils of conquest. According to the cases, the common law itself took from indigenous inhabitants any right to occupy their traditional lands, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes [...] *Judged by any civilized standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.*

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

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

The starting point of the Canadian jurisprudence on Aboriginal title is the Privy Council's decision in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, which described Aboriginal title as a "personal and usufructuary right" [...] The subsequent jurisprudence has attempted to grapple with this definition, and has in the process demonstrated that the Privy Council's choice of terminology is not particularly helpful to explain the various dimensions of Aboriginal title. What the Privy Council sought to capture is that Aboriginal title is a *sui generis* interest in land. Aboriginal

25. *Id.*, pp. 18 and 29 [emphasis added].

title has been described as *sui generis* in order to distinguish it from “normal” proprietary interests, such as fee simple. However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As *with other Aboriginal rights, it must be understood by reference to both common law and Aboriginal perspectives.*²⁶

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

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

B. ISSUES IN NIKAL AND LEWIS

14. Since the factual underpinnings of both *Nikal* and *Lewis* rested on very similar historical and legal issues, the appeals

26. *Delgamu’ukw*, *supra*, note 21, para. 112 [emphasis added].

were argued together. The Supreme Court of Canada's decisions were released concurrently and rely heavily on each other.

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

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

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

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

18. At the trial level of *Nikal*, Judge Smyth acquitted Mr. Nikal, holding that since the Bulkley River "touched" the Mori-

cetown reserve, the Band's by-law applied to the adjacent river and afforded a defence.²⁷ 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 has 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 this 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.²⁸

19. 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.²⁹

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

Having dismissed a *prima facie* infringement of the right, Justice MacFarlane ruled that the by-law could not afford a defence in that it had no application outside the reserve which did not include the river. Moreover, he stated, the appellant could not rely on the principle of *ad medium*

27. *R. v. Nikal*, [1989] 4 C.N.L.R. 143 (B.C. Prov. Ct.).

28. *Id.*, pp. 143-144.

29. *R. v. Nikal*, [1991] 1 C.N.L.R. 162 (B.C.S.C.), p. 173.

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

31. Cited in *Nikal*, *supra*, note 2, p. 183.

filum aquæ 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.³² 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 aquæ* rule did not apply to navigable rivers. By contrast, Justice Hutcheon in dissent, would have held that the *ad medium filum aquæ* 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.³³

21. 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.

22. 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.³⁴ However, he held that an *Indian Act* by-law could not afford a defence, on the basis that the *ad medium filum aquæ* principle did not apply and therefore the waters in question did not form part of the reserve.

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

32. *Ibid.*

33. *Lewis, supra*, note 3, at p. 136. In *Nikal* the Supreme Court found the Bulkley River to be navigable, although portions of it were non-navigable, *Nikal, supra*, note 2, 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 centred on rules applying to non-tidal waters.

34. *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 aquæ* presumption did not apply to navigable waters, the trial judge's factual finding that the waters were non-navigable appears to have been ignored.

35. *Id.*, p. 139.

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 [...]"³⁶ 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".³⁷ 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, including the right to fish on the Squamish River.³⁸

23. 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.³⁹ The major issue, then, was whether the authority of the by-law extended beyond the banks of the Squamish River to include the waters themselves.

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

36. *Id.*, p. 141.

37. *Ibid.*

38. *Id.*, p. 142.

39. *R. v. Lewis*, (1993) 80 B.C.L.R. (2d) 224 (B.C.C.A.).

C. THE SUPREME COURT OF CANADA'S RULINGS

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

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

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

II. THE HISTORICAL CONTEXT OF THE EVIDENCE PRESENTED

27. Since the Court referred to the general policy of the Crown towards aboriginal fisheries in reaching its conclusions, its conclusions should apply equally to First Nations in the rest of Canada. *If* the policy of the Crown was not to recognize exclusive aboriginal fishing rights, as the Court has

40. *Nikal*, *supra*, note 2, p. 179.

41. *Lewis*, *supra*, note 3, p. 133.

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

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

29. The Court's assumptions about public "rights" to fisheries presumed that these rights existed and superceded aboriginal title, or were at least unaffected by it. However, Crown policy in Upper Canada not only recognized that aboriginal title existed and had to be dealt with before aboriginal waters could be accessed by non-aboriginal fishing interests, it confirmed the exclusivity of aboriginal fisheries even within navigable waters.

30. It will be demonstrated that prior to any significant non-aboriginal participation or interest in what had been exclusi-

42. *Nikal*, *supra*, note 2, p. 187 [emphasis in original].

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

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

A. CROWN POLICY CONCERNING ABORIGINAL FISHERIES IN UPPER CANADA

1. The Nature and Scope of Aboriginal Fisheries

32. In *Nikal*, Justice Cory suggested that the historical evidence as to the standard practice of the Crown could be conveniently divided into pre- and post-Confederation periods.⁴³ While it is indeed important to distinguish between two general periods of time, the relevant time periods are not pre- and post-Confederation, as suggested by the Court.⁴⁴ The defining periods of Crown policy were actually pre- and post-

43. *Ibid.*

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

settlement interest in the fisheries, times which varied from province to province and which must be evaluated on a case-by-case basis.

This variation in policy depending on the stages of settlement applied throughout Canada. Following a wave of settlement in Upper and Lower Canada, for example, the *Gradual Civilization Act* of 1856 was enacted to promote assimilationist policies and precluded the recognition of aboriginal group rights.⁴⁵ As Peter Jones, an aboriginal observer at the time noted that in the beginning, Britain had considered the Indians "allies with the British nation and not subjects [...] until the influx of emigration completely outnumbered the aborigines. From that time the Colonial Government assumed a parental authority over them, treating them in every respect as children".⁴⁶

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

33. The aboriginal people who lived in what is now Ontario formed two major linguistic groups, Algonquin and Iroquoian. While the subsistence patterns of these two groups reflected differences in climate and natural areas, fishing was an important resource.⁴⁸ Substantial documentation exists of

45. The 1856 *Gradual Civilization Act* was passed by the Assembly of the Canadas. See D. B. SMITH, *Sacred Feathers: The Reverend Peter Jones (Kahkewaquo-naby) and the Mississauga Indians*, Toronto, University of Toronto Press, 1987, p. 238.

46. P. JONES, *History of the Ojebway Indians with especial reference to their conversion to Christianity*, Freeport, N.Y., Books for Library Press, 1970; first printed London, 1861, A.W. Bennett, 1861, p. 217.

47. See for example, C. CLELAND, "The Inland Shore Fishery of the Northern Great Lakes: Its Development and Importance in Prehistory", 4-7(4) (1982) *American Antiquity* 761-184; C. CLELAND, "Indians in the Changing Environment", in S. FLADER (ed.), *The Great Lakes Forests: An Environmental and Social History*, Minneapolis, University of Minnesota, 1982 and E. ROSTLUND, *Freshwater Fish and Fishing in Native North America*, Berkeley, University of California Press, 1952.

48. L. HANSEN, "Development of Fisheries", *loc. cit.*, note 44, p. 1.

the historic use of certain areas such as the Great Lakes for domestic and commercial consumption.⁴⁹

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

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

The Iroquois in the fishing season sometimes make use of a Net forty or fifty fathoms⁵² long which they put in a Great Canow; after they cast it in an oval Form in places convenient in the Rivers. I have often admired their dexterity in this Affair. They sometimes take 400 white fish besides many Sturgeons which they draw to the Bank of the River with Nets made of Nettles.

49. *Ibid.*

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

51. *Ibid.*

52. 240-300 feet.

To fish in this manner, there must be two men at the end of each net to draw it dexterously to the shore.⁵³

34. In the 17th and 18th centuries, aboriginal peoples throughout Ontario traded and bartered fish to Europeans along with a huge variety of other resources, and in so doing, developed technologies for extracting and marketing natural products.⁵⁴ One such product was *isinglass*, a fish oil taken from the swim bladder of the sturgeon, for which an extensive market in Europe developed because of its use in lamp oil.⁵⁵ The magnitude and extent of aboriginal fisheries is perhaps evidenced by the presents given to aboriginal peoples recorded as having been provided to them by the Crown at Drummond's Island in 1824. These annual gifts included 880 pounds of net thread and 2,000 fish hooks.⁵⁶

35. The involvement of the Saugeen Ojibway peoples of the Saugeen peninsula in fishing activities has been described, for example, as part of their cultural identity as well as an important element in the subsistence economy of the communities.⁵⁷

2. Imperial Recognition of Exclusive Aboriginal Rights

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

53. L. HENNEPIN, *A new Discovery of a Vast Country in America*, Chicago, R.G. THWAITES (ed.), A.C. McClurg and Co., 1903, reproduced by Coles Publishing, Toronto, 1974, pp. 522-523.

54. C. CLELAND, "Historical Development", *loc. cit.*, note 50.

55. *Isinglass* was valued by the Ojibway because of its use as a binding agent in paint; however it was also in demand in Europe as a fining agent in beer and wine and in the manufacture of glue, Tim Holzkamm and Chief Willie Wilson, Rainy River Band, unpublished report "The Sturgeon Fishery of the Rainy River Bands", *Smithsonian Columbus Quincentenary Program, Seeds of the Past*, 23 September 1988.

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

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

In 1761, King George instructed Governor Robert Monckton to ensure that non-aboriginal people would be prevented from receiving Crown grants of lands without aboriginal consent. Monckton, and other colonial Governors, were instructed to "support and protect the said Indians in their just Rights and Possessions and to keep inviolable the treaties and compacts which have been entered into with them, Do hereby Strictly enjoyn and command that neither you nor any Lieut. Gov. President of the Council [...] do upon any pretence whatsoever, upon pain of our highest displeasure and of being forthwith removed from your or his office pass any Grant or Grants to any person whatsoever of any lands within or adjacent to the territories possessed or occupied by the Indians or the property of which has at any time been reserved to or claimed by the Indians".⁵⁸

37. On October 7, 1763, King George issued the *Royal Proclamation*. In it, Britain reserved for aboriginal peoples throughout much of Ontario⁵⁹ possession of their unceded lands and territories as a hunting ground. Terms of the *Proclamation*, which excluded all but licenced traders from travel within the territories, implied exclusive aboriginal possession of the rights protected therein.

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

59. The *Royal Proclamation*, *infra*, note 60, exempted the Hudson's Bay Charter of 1670, and lands north of the "height of land".

And whereas it is just and reasonable and essential to our interest and the security of our Colonies that the several nations or Tribes of Indians with whom we are connected and who live under our protection should not be molested or disturbed in such part of our Dominions and territories *as not having been ceded to us are reserved to them as their hunting grounds [...]* And we do further declare it to be our Royal will and pleasure for the present as aforesaid to reserve under our sovereignty, protection and dominion, for the use of the said Indians all the lands and territories not included with the limits and territory granted to the Hudson's Bay Company and also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest [...]⁶⁰

The *Royal Proclamation* set out a protocol by which unceded territories or "hunting grounds" were to be acquired by the Crown through land cessions. Rights reserved within ceded lands were to be protected, as were reserved lands themselves. 38. Assurances that no territories would be claimed by England until relinquished by the Indians were confirmed by John Graves Simcoe, the first lieutenant governor of Upper Canada, who assured his Indian Allies in 1793 that "no King of Great Britain has ever claimed absolute power or sovereignty over any of your lands or Territories that were not fairly sold or bestowed by your ancestors at Public Treaties".⁶¹ As Lieutenant Governor Simcoe had earlier explained to the Lords of Trade, "[t]he Indians can in no way may be deprived of their rights to their Territory and Hunting Grounds, save and except as formerly stated, and any portion of Lands [...] held as a Reservation must and shall be fully protected, *as well as rights reserved on certain Streams and Lakes for fishing and hunting privileges or purposes*".⁶²

60. *Royal Proclamation* issued by King George, 7 October 1763, A. SHORTT and A. G. DOUGHTY (eds.), "Documents Relative to the Constitutional History of Canada, 1759-1791, Canada", (1907) *Sessional Papers*, N° 18, pp. 121-123 [emphasis added].

61. Cited from the *Simcoe Papers*, Speech of Colonel Simcoe to the Western Indians, Navy Hall, 22 June 1793, in D. B. SMITH, *op. cit.*, note 45, p. 163. John Graves Simcoe was named Lieutenant Governor on 21 September 1791 and left the office in July, 1796.

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

The term "hunting grounds" has been repeatedly held by the courts to have included fishing activities and the use of fishing grounds.⁶³ It seems quite clear that the term was understood at the time to include waters as well. That lands covered by waters was considered the same as lands not so covered was part of the basic English common law summarized by Lord Chief Justice Hale of England as early as 1787.⁶⁴

39. Many of the cessions later obtained from aboriginal peoples within Ontario in accordance with *Royal Proclamation* protocol included surrenders of waters, including navigable ones while others affirmed exclusive fishing rights. Indeed, at the time of the *Proclamation*, as the Surveyor General complained thirty years later, it was not known just how much of the land protected by the *Proclamation's* terms was covered with water, and how much of it was dry land.⁶⁵ As some 19th century colonial officials noted with concern at the time, the *Royal Proclamation* of 1763 recognized that Indian Nations had territorial rights, including "the territorial privileges of

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

64. Lord Chief Justice M. HALE, *De Jur Maris et Brachiorum Ejusdem*, in F. HARGRAVE (ed.), *A Collection of Tracts Relative to the Law of England*, vol. 1, London, T. Wright, 1878 [hereafter cited as "De Jur Maris"].

65. As the Surveyor General complained thirty years later: "The repeated efforts which this Office has in vain made to be informed as to the extent of the purchase from the Indians render it almost impossible to frame with any degree of accuracy a report on the ungranted Lands in this Province. Exclusive of this material uncertainty the estimate must be founded upon old and incorrect maps, as but a very small proportion of the Province is sufficiently known so that a certain calculation may had, of what may prove to be water and what may prove to be land, for although the interior parts of the Country have since the formation of this Government been made much better known than before, yet, even now, no calculation which can be with a certainty be depended upon, can be compiled until the course of the Grand or Ottawa River is known, and the shores of Lakes Huron and Superior, shall be ascertained". Copy of a letter from D. W. Smith, Surveyor General, to Peter Russell, Archives of Ontario, A.E. WILLIAMS/United Indian Bands of Chippewas and Mississaugas Papers, F 4337-2-0-1, microfilm reel # MS 2605, 16 April 1797.

independent sovereigns".⁶⁶ It has been argued that these rights included the control and ownership of the beds of navigable waters within those territories.⁶⁷

It is certain that in some instances before lands were surrendered under the *Proclamation* protocol, the Crown understood even navigable waters to be the subject of ownership by aboriginal peoples since before using such waters, aboriginal permission was sought. For example, in 1784, the Imperial Crown recognized that aboriginal permission would be required before the King's subjects could safely travel navigable waters within Ontario. In Treaty N° 3, dated December 7, 1792, the Chiefs of the Mississauga Nation "gave and granted" to his Majesty the power and right to make roads "through the said Messissague Country", together with the right to navigate the rivers and lakes therein. This ratified a conference in which a similar agreement was entered into on May 22, 1784 which specified that "[...] the King should have a right to make roads thro' the Messissauge country, the navigation of the said rivers should be open and free for his vessels and those of his subjects [...]".⁶⁸

40. The fact that free and open travel was required to be agreed to by the Chiefs of the Mississauga Nation makes it clear that those Chiefs were understood by the English signatories to the Treaty to have control over those same waters.⁶⁹

66. R.T. PENNEFATHER, Superintendent General, Indian Department, "Annual Report, 1856", *Imperial Blue Books*, 1860, N° 595, p. 4, also "Report of the Special Commissioners Appointed on the 8th of September, 1856 To Investigate Indian Affairs in Canada, 1858", in *Journals of the Legislative Assembly of Canada*, vol. XVI, App. 21, p. 92, cited in M. WALTERS, *op. cit.*, note 20, p. 23.

67. See M. WALTERS, *ibid.*

68. *Indian Treaties and Surrenders*, Canada 1891, vol. 1, p. 6.

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

41. In the meantime, prior to surrenders being achieved, lands covered with waters were not understood to be “public” property, whether navigable or non-navigable. This point is important, because in *Nikal* and *Lewis*, the Court proceeded on the assumption that waters were “public” in nature, without considering how title to such waters moved from its original inhabitants to the Crown. However, within Ontario, it was the understanding of both the Crown and First Nations that lands covered with waters required a valid surrender to become capable of Crown alienation or public use for any purposes other than navigation, at least in the early part of the post-contact period.⁷⁰

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

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

chased of the Indians but by the consent of the Governor or Person administering the Government of the Province".⁷¹

Steps were taken soon after to obtain surrenders in certain parts of Ontario to enable aboriginal fisheries to be used for these purposes.

3. Surrenders of Lands covered with Waters

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

44. On May 22, 1798, in Treaty No 5, Chiefs of the Chippewa Tribe surrendered "Penetang-ushene" Harbour, being "all that tract or space containing land and water or parcel of ground covered with water, be the same land or water, or both lying and being near or upon the Lake Huron and called Penetangushene [...] together with the islands in the said Harbour of Penetangushene".⁷² In 1800, in Treaty No 12, Chiefs of the Ottawa, Chippewas, Potawatamie and Wyandot Nations surrendered the land *and water* in a tract known as the Huron Church Reserve.⁷³ On July 10, 1827, Treaty No 29, Chiefs of

71. Letter from John Graves Simcoe to the Committee of the Privy Council for Trade and Plantations, in *The Correspondence of Lieut. Governor John Graves Simcoe*, vol. III, 1794-1795, E.A. CRUIKSHANK (ed.), Toronto, The Ontario Historical Society, 1925, pp. 56, pp. 61-62.

72. *Indian Treaties and Surrenders*, *supra*, note 68, p. 15.

73. *Id.*, pp. 30-31 [emphasis added].

the Chippewa tribe surrendered lands covered with navigable waters. There is no question that that surrender involved waters: the territory is actually described in navigational terms as commencing "at the distance of fifty miles (on a course about north 84 degrees west) from the outlet of Burlington Bay on Lake Ontario, then on a course about north 84 degrees west (so as to strike Lake Huron ten miles and three quarters of a mile north of the mouth of a large river emptying into the said lake called by Capt. Owen of the Royal Navy, Red River Basin), seventy miles more or less to Lake Huron".⁷⁴

45. On February 8, 1834, Henry Brant and other Mohawks surrendered 50,212 acres comprised of parts of two townships "including the waters of the Grand River".⁷⁵ Ojibway Chiefs inhabiting the north shore of Lake Superior in Treaty No 60 were asked to surrender an area on September 7, 1858 which stretched from "Batchewanaung Bay to the Pigeon River inland to the height of land [...] and also the Islands" in Lake Superior. They did so, but specifically reserved their right to fish in the waters.⁷⁶

46. Two years later, on September 9, 1859, Ojibway Chiefs claiming the eastern and northern shores of Lake Huron from Penetanguishene to Sault Ste. Marie and to Batchewanaung Bay reserved to themselves an area at Kitcheposkissegun which included waters described as running westward from Point Grondine "six miles inland by two miles in front [...] so as to include the small Lake Nessinassung".⁷⁷

47. There are many later examples which confirm that aboriginal peoples were understood to have proprietary rights over the underlying bed of waters in that surrenders were asked for by the Crown of those waters. The Garden River Indians, for example, surrendered Maskinonge Bay "inclusive to Partridge Point, also Squirrel Island", on July 29, 1859⁷⁸ and much later, in 1891, the Mohawks of the Bay of Quinte were asked to surrender a portion of their water frontage ("land covered by water") extending to the navigable waters

74. *Id.*, p. 72.

75. Treaty No 38, *id.*, p. 92.

76. *Id.*, p. 147.

77. *Id.*, p. 151.

78. Surrender 91B, *id.*, pp. 229-230.

in the Bay of Quinte.⁷⁹ There is little question that the Mohawks were seen to hold title in the underlying bed of the Bay of Quinte. The surrender was quite specific in this regard :

Also all the water frontage of the said described parcel of land that is to say *all the land covered by water between the waters edge and deep or navigable water* commencing at the centre line between the East and West halves of lot 38 produced to said deep water thence westward to the above mentioned point in lot 30 known as the Upper Ferry and bounded at the said point by a line produced parallel with the westerly limit of said lot 30 to deep water as aforesaid [...]⁸⁰

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

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

49. During the time period during which treaties were entered into, according to English common law, the owner of the bed, or *solum*, was understood to have the exclusive right

79. Oral history indicates that this particular surrender was requested by the Crown to enable inshore navigation, personal communications, Chief R. Donald Maracle, Mohawks of the Bay of Quinte, while documentary evidence indicates that a railway company sought a surrender of the lands and waters to provide it better access to the shore, see NAC, RG 10, vol. 2449, File 94,121 Pt. 1, 1892 for correspondence on this point. If that is so, it is not certain whether this surrender, and other surrenders intended to deal with navigational access rather than access to fisheries, would have had the effect of extinguishing fishing rights. In *R. v. Adams*, [1996] 4 C.N.L.R. 1 (S.C.C.), p. 20, Lamer, J. speaking for a unanimous court, indicated that a surrender of lands cannot be said to evidence a clear and plain intention to extinguish aboriginal fishing rights in the absence of evidence as to what the parties to the surrender intended with regard to those rights. Since the Supreme Court to date, however, has assumed that aboriginal title does not extend to lands covered with waters or the fisheries associated with those lands, the Court has not yet addressed this issue.

80. Surrender No 304, Chiefs and Principal Men of the Mohawks of the Bay of Quinte, 23 December 1891, *Indian Treaties and Surrenders*, Canada, 1891, vol. 3, p. 43 [emphasis added].

to fish in waters over the bed. Because of the *ad medium filum aquæ* presumption, the owner of lands was presumed to own a portion of the bed adjacent to lands bordered by waters. In fact, as discussed by the Lord Chief Justice of England in 1787, any instrument by which land was conveyed which defined the granted lands by a body of water was to be interpreted as including the adjacent waters in accordance with the *ad medium filum aquæ* presumption.⁸¹

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

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

4. Surrenders of Islands

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

There was a great interest in the 19th century on the part of commercial fishing interests in obtaining title to islands within navigable waters as fishing stations from which fishing activities could be conducted. Islands were an ideal location to dry nets and salt fish (in the days before refrigeration) and access to the fisheries around such islands

81. M. HALE, "De Jur Maris", *loc. cit.*, note 64, ch. 1.

was generally obtained through Crown licences of occupation. Licences of occupation protected exclusive fishing rights on the part of those who held them, excluding others from the commercial fishery. These licences of occupation, where granted on islands, could only be obtained once aboriginal peoples had either surrendered the islands or otherwise given their consent.

In many cases, aboriginal peoples themselves, while surrendering other lands, reserved the islands within their traditional territories to permit them to retain access to their traditional fishing grounds. In 1850, for example, the Ojibway Chiefs reserved Batchewananaung Bay for their own use together with a "small island at Sault Ste. Marie used by them as a fishing station".⁸² A later surrender, No 91A on July 29, 1859 again retained these small fishing islands at Sault Ste. Marie specifically.⁸³

52. Confirming, perhaps, the unceded aboriginal title in such lands, inquiries by non-aboriginal peoples concerning the use of unceded islands for fishing purposes were referred to the Indian Department.⁸⁴ As noted by the Chief Superintendent of Indian Affairs in 1844, S.P. Jarvis, "islands within the tract of unceded lands have always been claimed by the Indians".⁸⁵

53. In at least one instance, specific confirmation of the possession and occupation of islands and the lands around them covered with waters was a matter of explicit recognition by the Crown in a treaty later confirmed by Imperial Proclamation. On August 9, 1836 during the negotiations for Treaty 45 ½, Sir Francis Bond Head told the Saugeen Ojibway nations that they "owned all the islands in the vicinity" of the Saugeen

82. *Indian Treaties and Surrenders*, *op. cit.*, note 68, p. 151.

83. *Id.*, p. 227.

84. See references such as "[...] Lake Huron, W. Elliott, for permission to fish on certain Islands in the occupation of the Indians on Lake Huron. Referred to the Indian Dept". State Book, Upper Canada, NAC, RG 1, State Books, vol. Y, microfilm reel C-124, 3 September 1845.

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

peninsula.⁸⁶ In 1847, an Imperial Proclamation issued to the Saugeen by the Governor General took the form of a title deed recognizing a “declaration of possession and occupation of territory by the Saugeen since time immemorial [...] including any islands in Lake Huron within seven miles of the part of the mainland comprised within the hereinbefore described tract of land”.⁸⁷

54. The first recorded surrender of an island took place on June 30, 1798, when the Chiefs of the Chippewa Nation surrendered St. Joseph, or Cariboux Island, in the strait between Lake Huron and Lake Superior.⁸⁸ Oral history suggests that at around the same time, the Mississaugas had specifically reserved certain islands in the Bay of Quinte for their own use when surrendering lands to the Crown to be set aside for the Mohawks of Tyendinaga.⁸⁹

55. Those attempting to breach *Royal Proclamation* protocol by obtaining grants of islands and thereby access to fisheries from aboriginal peoples directly in the absence of a proper surrender were given short shrift. As early as 1765, only two years after the 1763 *Royal Proclamation*, the Senecas, a branch of the Iroquois Confederacy, had offered to give an island to Lieutenant Colonel Vaughn. Vaughn was advised by Sir William Johnson, the Superintendent of Indian Affairs, that the island could not be accepted except as part of a grant, and only then if the Indians “publicly acquiesced”, as required under the terms of the *Royal Proclamation*.⁹⁰

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

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

88. Treaty No 11, *Indian Treaties and Surrenders*, *op. cit.*, note 68, p. 27.

89. Chief John Sunday, Minutes of Council held at the Post of York on 30 January 1828, NAC, RG 10, vol. 791, p. 102, reporting the information received from elders at the time of the Simcoe Deed of 1794, see D.B. SMITH, *op. cit.*, note 45, p. 99.

90. Copy of a letter from Sir William Johnson to Lt. Col. Vaughan, dated at Johnson Hall, AO, RG 10, vol. 1825, p. 355, microfilm reel n° C-1222, 16 August 1765.

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

David McCall. Stating that some time since he entered into a Treaty with an Indian of the name of Guidon Carnow for an exchange of some land which he owns in the Township of Enniskillen for an Island in the River St. Clair called Stag Island comprising about 60 acres of dry land besides marsh claimed by said Guidon Carnow as his own individual property. That he is now informed that an exchange of this nature cannot be effected, but that he must apply to Government for the sale of the said Island: that he is desirous of purchasing the same at a fair valuation and praying that the Commissioner of Crown Lands may treat with him for the sale of the said Island at its fair value. Not recommended as sales by Indians to individuals cannot be recognized and a similar objection prevailed on application made last year for the same island by Robert Begg.⁹¹

Stag Island was finally surrendered by the Chippewas of Sarnia in accordance with *Proclamation* protocol on January 19, 1857.⁹² The Walpole Island First Nation surrendered Peach Island in the upper part of the Detroit River six months later.⁹³

56. The Chippewa of Lakes Couchiching, Simcoe and Huron surrendered four islands in Lake Simcoe and one island in Lake Couchiching together with all the islands "lying and being in the Georgian Bay, Lake Huron", on June 5, 1856, excepting the "Christian Islands" which were reserved to their own use.⁹⁴ Two weeks later, the Mississaugas surrendered the islands situated in the Bay of Quinte, in Lake Ontario, in Wellery's Bay and in the St. Lawrence.⁹⁵ An Executive Committee Report at the time noted that some doubt existed as to whether these islands were actually included in

91. Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. S, microfilm reel #C-106, p. 529, 13 April 1837.

92. *Indian Treaties and Surrenders*, op. cit., note 68, p. 211.

93. Surrenders 85 and 86, *id.*, p. 220.

94. Treaty 76, *Indian Treaties and Surrenders*, op. cit., note 68, p. 205.

95. Surrenders 77 and 78, *id.*, p. 206.

a former surrender, but “that to the islands in the Bay of Quinte and Lake Ontario, [the Indian] title is undisputed”.⁹⁶

57. Although the Supreme Court of Canada in *Nikal and Lewis* seems to have assumed Crown ownership of waters, when one examines the disputes which arose following surrenders of islands in the 1800s, it was far from settled that the Crown held title to the underlying bed of adjacent waters, or *solum*.⁹⁷ If the Crown was presumed to hold title to the waters, including their bed, it should have been free to grant subsurface rights to third parties, or issue licences of occupation to non-aboriginal fishermen to fisheries with or without aboriginal consent. However, a review of two cases contemporary to the time suggest that the subsurface rights and fishing rights to adjacent waters could be granted to third parties only once proper surrenders of aboriginal title had been achieved.

58. The 1898 decision in *Caldwell v. Fraser* provides a specific example of a dispute over sub-surface rights after a surrender had been obtained in 1873. A second decision, *Bartlet v. Delaney*, rendered in 1913, considered the effect of a licence of occupation issued by the Crown in waters which had been the subject of a prior patent, following an express surrender. Earlier, in 1864, in *Attorney General v. Perry*, an Upper Canadian court held that the Crown was presumed to own islands which would otherwise fall within the area of riparian rights, since the Crown was said to own the islands and the soil from which the islands were formed.⁹⁸ As has been shown, however, the Crown’s ownership of islands was not automatic, but was contingent on the Crown first obtaining a surrender of aboriginal title to them.

In 1898, in *Caldwell v. Fraser*,⁹⁹ the Ontario High Court of Justice dealt with subsurface rights to lands under water adjacent to an island which had been surrendered as part of the North West Angle Treaty of 1873, Treaty No 3. The Court

96. “A Committee of the Honourable the Executive Council dated 12 July 1856 approved by His Excellency the Governor General in Council on 14 July 1856”, cited in *Indian Treaties and Surrenders, op.cit.*, note 68, p. 208 [emphasis added].

97. See below.

98. *Attorney General v. Perry*, (1864) Hilary Term 28 Victoria 329, p. 331.

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

drew no distinction between the rights held in lands, and the subsurface rights held in lands covered with water. This was an approach consistent with that taken before the Supreme Court of Canada just three years earlier. In the 1895 *Fisheries Reference* case in which a reference was made to the Supreme Court to consider jurisdictional issues between the Dominion and provincial governments over fisheries, Ontario itself had argued that the reference in section 109 of the *British North America Act* “means as much land covered by water as land not covered by water”.¹⁰⁰

The Court in *Caldwell* first noted that the *British North America Act* of 1867 had not vested in the province the right to sell Indian lands or interfere with them until *after* a formal surrender of the lands to the Crown.¹⁰¹ However, the exclusive federal power over “Indians, and Lands Reserved for Indians” did not mean the federal government had the power to sell Indian lands to the province or others either. A surrender of lands was first required.

As a result of section 109 of the *British North America Act*, the Court found that lands covered with waters were subject to the Indian title and right of Indians to use them.¹⁰² The Court held also that the federal government could not convey or dispose of such lands “until by surrender or otherwise the rights of the Indians had been disposed of”.¹⁰³ The province, it noted, had no right to sell unsurrendered lands without the consent of the Dominion government.¹⁰⁴ In light of the provisions of the *Royal Proclamation*, this consent would necessarily be predicated on the Dominion government first obtaining a surrender.

While the effect of the North West Angle Agreement between the federal and provincial governments in 1873 was to vest certain lands surrendered by treaty in the province¹⁰⁵ the Court noted that “reserved” lands, that is, lands still subject to aboriginal title, had not been surrendered. In reaching

100. *Re. Jurisdiction over Provincial Fisheries*, [1895] 26 SCR 444 (S.C.C.), p. 492.

101. *Caldwell v. Fraser*, *supra*, note 99, p. 5.

102. *Ibid.*

103. *Id.*, p. 6.

104. *Id.*, p. 7.

105. *Id.*, p. 10.

this determination, the Court found Paragraph 4 of the 1873 North West Angle Agreement to be important. Paragraph 4, which will be discussed in more detail later, referred to waters within Indian Reserves as “including the islands” and “not being subject to the public common right of fishery”.¹⁰⁶

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

This, I think, manifestly does not refer to the lands to be set apart [reserves] over which of course, such rights would exist. And in the agreement referred to between the two governments the extinguishment of the right of hunting and fishing is confined to the lands *other than* the ‘reserves to be made’ under the treaty.¹⁰⁷

Since the land cession surrendered only the island at issue and not the lands covered by water around the island,¹⁰⁸ the Court held that these waters were part of the Indian territories and therefore part of the reserve. The province therefore had no right to grant subsurface rights within them. The Court concluded :

I may further say, that if I am correct in this view, the Province had no power to make a grant of any present right to the *unsurrendered lands under the water* and if Fraser or the defendant company is interfering with such lands without right, then, in my opinion, on the facts of this case, the plaintiff is not in a position to raise any such question: The only ones that can complain are the Indians or the Dominion Government as having control of Indian Affairs.¹⁰⁹

59. The Supreme Court in *Nikal and Lewis* did not make note of *Caldwell v. Fraser*. In fairness, it does not seem to have been put before them, and since it is to be located only in public

106. *Id.*, p. 11 [emphasis added].

107. *Id.*, p. 10 [emphasis added].

108. *Id.*, p. 12.

109. *Id.*, pp. 24-25 [emphasis added].

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

60. This argument is confirmed by the 1913 Ontario case of *Bartlet v. Delaney*.¹¹⁰ In *Bartlet*, the issue arose as to whether fisheries adjacent to an island had been properly granted by a Crown licence of occupation to a party other than the owner of the island. The question required a determination of whether a patent of the island following a surrender conveyed the adjacent waters to the land-owner. If it did not, the Crown could issue a valid licence of occupation to the fisheries to a third party. If it did, the owner of the island would hold exclusive rights to the adjacent fisheries. The case is of interest because its underlying facts were based on an interpretation of a surrender, or rather, a series of surrenders, of the island in question. While the *Bartlet v. Delaney* case does not delve deeply into the circumstances of the dispute, the issue of who owned Fighting Island and the waters around it had been the subject of prolonged debate and litigation throughout the 18th and 19th centuries. A review of the facts behind the various surrenders of the island will explain why.

61. Contrary to the provisions of the 1763 *Royal Proclamation*, in 1776, ten Pottawatomi Chiefs signed a deed giving title to Fighting Island to Pierre St. Cosme and his sons.¹¹¹ When St. Cosme died in 1783, he left the island to his wife and children. St. Cosme's wife died in 1793 and his only daughter married one Judge James May, who then purchased the island.

110. *Bartlet v. Delaney*, (1913) O.W.N. 577.

111. NAC, RG 10, vol. 325. Note that in the historical record, "Pottawatomi" is spelled in a variety of ways, including "Potawatomie", "Pottawatomie" and "Pottawatomi". Throughout this article, "Pottawatomi" will be used.

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

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

[The petitioner], having for some time engaged in the taking and curing of whitefish in the River Detroit, is desirous of procuring a situation in the said River for the purpose of a fishing place and ground whereon to cure the fish taken [...] an uninhabited island lying in said River, called Fighting Island [...] has been pointed out as an eligible situation for the purpose. Your petitioner therefore humbly prays Your Excellency would be pleased to grant him a license of occupation for the said Island on such terms as to Your Excellency may deem proper [...]¹¹²

Paxton obtained a licence of occupation from Maitland in 1827, at which time he agreed to pay an annual rent of \$50.00 to the Wyandot First Nation.¹¹³

63. The Walpole Island First Nation, which also claimed the island, objected to the licence of occupation being issued to Paxton, as did local settlers who supported the Walpole Island First Nation’s claim to the island.¹¹⁴ While a Licence of Occupation to Paxton was upheld by an Order-in-Council pending a further investigation, the question of Paxton’s fishing privileges depended on whether a proper cession had been obtained from the aboriginal occupants of the island back in 1776. In other words, it was acknowledged by the

112. Petition from Thomas Paxton to Sir Peregrine Maitland, Lieutenant Governor of Upper Canada, NAC, RG 10, vol. 325, 28 July 1826.

113. See 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, pp. 14-27 [hereafter cited as “Waterworld”] for an examination of this licence and deed.

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

Crown that in the absence of a proper surrender of the island, Paxton's licence, which provided him with an exclusive fishery around the island, would not be valid. As noted in Executive Council Minutes:

The Council upon a consideration of all the documentation before them find no reason for interfering with the Licence of Occupation which the Petitioner at present enjoys, *but it is not known to the Council whether the Island in question has ever been ceded to His Majesty by the Indian proprietors* and whether with respect to such Island a Licence of Occupation should be granted by the Government is respectfully submitted [for] His Excellency's consideration.¹¹⁵

64. Acting Surveyor General William Chewett reported in 1829 to the Executive Council of the Province of Upper Canada that no document could be found to indicate that the Indians had "made over" the Island.¹¹⁶ Paxton, however, continued to make arrangements with the aboriginal peoples claiming ownership of the island directly to purchase or lease the island. In 1834, Paxton explained:

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

115. NAC, RG 10, vol. 325 [emphasis added].

116. V. LYTWYN, "Waterworld", *loc. cit.*, note 113, p. 19.

three years gratuity on inquiry of Major Gravette. When at York he advised me to pay the money to you as the Superintendent acting for the Indians and whenever the question of right could be ascertained.¹¹⁷

65. The Indian Superintendent decided that the island had not been surrendered and therefore still belonged to its "rightful owners", the Chippewas, Ottawas and Pottawatomis.¹¹⁸ On June 13, 1836 the persistent Paxton, again in violation of *Proclamation* protocol, secured an agreement with a number of Chippewa, Ottawa and Pottawatomi Chiefs stating the island was a gift to him. A further agreement dated July 3, 1839 signed by Chippewa, Ottawa and Pottawatomi Chiefs stated that Fighting Island was to be leased to him for a period of 999 years.¹¹⁹

66. When Chief Petawaygishik of the Walpole Island First Nation learned of Paxton's lease, he complained that "[...] Fishing, or Fighting Island, in the same tract, leased to Mr. Paxton, belongs to us, and we receive no benefit from it".¹²⁰ In 1840, Paxton pledged to remit payments under an annual lease to the Superintendent of Indian Affairs or any authorized person: "[...] so long as I shall retain the occupancy of Fighting Island having it in my option to give the said above named amount in fish in the Barrel or money".¹²¹

117. Letter from Thomas Paxton to George Ironside, Indian Superintendent, Amherstburg, NAC, RG 10, vol. 325, 6 September 1834.

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

119. V. LYTWYN, "Waterworld", *loc. cit.*, note 113, p. 20.

120. Letter from Chief Petawaygishik, Walpole Island, to the Chief Superintendent, NAC, RG 10, vol. 209, file 7401-7500, pp. 123, 587-123, 590, Civil Secretary's Office Correspondence, microfilm reel no C-11,522, 28 March 1854.

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

67. By then, Paxton had completely alienated the Wyandots, who were unwilling to cede their interest in Fighting Island if Paxton was to be permitted to purchase it.¹²² They opposed Paxton's claim, asserting they had never received the yearly rent of fifty dollars agreed to in 1827, but instead "have always been paid with fish".¹²³ They added, "it is very grieving to your Indian children to have their Islands enjoyed and occupied by others and all the benefit be kept from them".¹²⁴

68. The Commissioner of Crown Lands reviewed a history of the claim and noted that the Island "comprises about twelve hundred acres of land which during part of the year is mostly under water, and *is only valuable as a fishing ground*".¹²⁵

In 1856, an investigation concluded that no valid cession had been obtained since the earlier cessions of lands¹²⁶ by Ottawas, Chippewas and others had made no mention of Fighting Island and that "if not in the Cession, the Indian Title is not then extinguished".¹²⁷ The Superintendent of the Indian Department concluded that the Island was owned by the Wyandots.

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

122. Report of R.T. Pannefather, Superintendent General of Indian Affairs, to the Executive Council regarding Thomas Paxton's Claim to Fighting Island, NAC, RG 10, vol. 325, 8 August 1857.

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

124. Letter from the Wyandotts of Anderdon, to Sir Edmund Head, Governor General, NAC, RG 10, vol. 325, 1 February 1857.

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

126. The Petition refers to a 1791 cession, rather than the one obtained in 1776.

127. *Ibid.*

Mr. Washington, I am of opinion that Fighting Island is the property *exclusively* of the Wyandotts of Anderdon.¹²⁸

69. In 1863, the Indian Department finally obtained a surrender of the island from the Wyandot Nation, and issued a patent to Paxton on 28 June 1867.¹²⁹ Given the only use that could be made of the island, the patent of Fighting Island was clearly intended to convey an interest in the fisheries around it. The somewhat complicated facts of this dispute, however, make it clear that the basis for title and use to the fisheries around the Island was dependent on the Crown first securing a surrender from the appropriate aboriginal parties in accordance with the *Royal Proclamation*. Until that issue was determined, no valid grant or licence of occupation for use of the fisheries by non-aboriginal people could issue.

70. Decades later, the question of whether the surrender of Fighting Island and the subsequent patent of the island included its adjacent waters became the subject of litigation. In 1909, the Crown granted a licence of occupation under the *Fisheries Act* to one Gauthier to the same fishery allegedly included in the prior grant to Paxton.¹³⁰ The Plaintiffs, successors in title to Paxton, sought a declaration that Gauthier was in derogation of their title to the adjacent fisheries which they asserted were conveyed with title to the island. The issue for the Court to determine was whether or not letters patent from the Crown to Paxton included the waters to which Gauthier held exclusive fishing rights under his licence of occupation.

71. In *Bartlet v. Delaney*,¹³¹ the Court held that the grant of an island indeed included adjacent waters to it, and that the plaintiffs had therefore received a conveyance of the waters adjacent to the island through the Crown patent which followed the surrender of the island.¹³² By the time of the dispute in *Bartlet*

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

129. *Id.*, p. 21.

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

131. (1913) O.W.N. 577, reversed on other grounds (1913) O.W.N. 200 (Ont. C.A.).

132. *Id.*, p. 581.

v. *Delaney*, the fisheries were valued annually at thousands of dollars, an extraordinary sum of money at the time. The Court issued an injunction against Gauthier's further interference with the fisheries and lands of the plaintiff.¹³³

72. There was nothing express in the original patent of lands to Thomas Paxton referring to waters, but it was clear that when he applied for it, it was the fisheries that he wished to exploit from the station on Fighting Island and that he wished to do so exclusively.¹³⁴ That the Court felt free to restrain others from accessing what the Supreme Court of Canada in *Nikal* and *Lewis* characterized as "public" waters, is in itself telling.

73. The case of Fighting Island and the Paxton grant, as well as the ruling in *Caldwell v. Fraser*, demonstrates that Crown licences of occupation permitting non-aboriginal people exclusive fishing rights, and title to water lots in lands adjacent to land grants, could *only* be effected after valid surrenders were obtained from those aboriginal peoples who used and occupied those lands. The Supreme Court's findings in both *Nikal* and *Lewis* that the Crown had not intended to "grant" exclusive fishing rights to aboriginal people by reference to Crown policy in Upper Canada pre-supposed that the Crown had such title in the first place. It should be relatively obvious that there were many circumstances in which no surrenders of the lands or waters in question had ever been achieved.¹³⁵

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

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

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

74. The Supreme Court of Canada should have first turned its mind to whether, or how, the Crown had obtained title to the waters in question, before considering whether the Crown intended to “grant” rights within those waters. No such discussion took place, although the issue was argued before the Court. The aboriginal appellants in *Lewis* attempted to put the argument forward by relying on the American decision of *Alaska Pacific Fisheries v. U.S.*¹³⁶

75. In *Alaska Pacific*, an understanding that a reservation of unceded islands included their adjacent waters had been the subject of judicial comment in the United States in 1918. The Supreme Court of the United States held that the reservation for Indians of a “body of lands known as Annette islands” embraced the intervening and surrounding waters. Van Devanter J.’s reasons for the Supreme Court took into account the aboriginal perspective concerning islands :

The Indians could not sustain themselves from the use of the uplands alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. *The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation.* They had done much for themselves and were striving to do more. Evidently Congress intended to conform its action to their situation and needs. It did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as the Annette Islands and referred to it as a single body of lands. This as we think shows that the geographical name was used, as is sometimes done, *in a sense embracing the intervening and surrounding waters as well as the upland, in other words, as the area comprising the islands.*¹³⁷

76. The Supreme Court of Canada in *Lewis* distinguished *Alaska Pacific Fisheries* based “on its unique circumstances involving islands and intervening waters”.¹³⁸ However, the importance of the *Alaska Pacific Fisheries* case was not perhaps that it applied to islands, but that through the reser-

136. 248 U.S. 78 (1918).

137. Cited in *Lewis, supra*, note 3, p. 141 [emphasis added].

138. *Id.*, p. 148.

vation of islands, reserves were acknowledged to include adjacent waters. They could have done so only if the aboriginal occupants of those islands held aboriginal title to the adjacent waters around them in the first place.

5. The Reservation from Surrenders of Exclusive Aboriginal Fisheries

77. The Court in *Nikal* made its finding that the Crown had not intended to grant exclusive fishing rights to the Band on the basis of its finding that Crown policy “firmly and clearly” militated against the recognition of such interests.¹³⁹ Historic correspondence supporting this conclusion in some instances related specifically to Upper Canada. However, there are a number of treaties within Ontario in which aboriginal people surrendered lands but reserved to themselves exclusive fishing rights, rights which in certain instances were actually protected by Crown legislation. The example of the Mississaugas of New Credit best makes this point.

78. In 1790, the Mississaugas had warned that they would not allow white men to fish in the Credit River: “which they reserve entirely to themselves, any other Creeks they have no objection to peoples fishing on”.¹⁴⁰ On August 1, 1805 the Mississaugas surrendered an area north of Lake Ontario near the Etobicoke River but excepted from the surrender “the fishery in the said River Etobicoke which they the said Chiefs, Warriors and people expressly reserve for the sole use of themselves and the Mississague Nation”.¹⁴¹ According to Council Minutes of the meeting, the aboriginal position was very clear:

Quinipeno [a head man] spoke and returned thanks for the articles they received on their signing the New Deed for the Toronto Purchase. He then spoke with a flat stone in his hand

139. *Nikal*, *supra*, note 2, p. 187.

140. Letter from J. Butler, dated at the Head of Lake Ontario, Archives of Ontario, Simcoe Papers, microfilm reel no MS 1797, 16 October 1790.

141. Treaty N° 13, Mississauga Nation of Credit River and William Claus, Deputy Superintendent General, Indian Affairs, *Indian Treaties and Surrenders*, *op. cit.*, note 68, p. 35.

on which was represented the lines within which they had on a reconsideration agreed to give their Father.

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

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

The Deputy Superintendent General then told them he would make a faithful representation of all that had passed at this meeting to the General; And that a Provisional agreement would be immediately drawn up for them to sign to be laid before His Excellency, on his return, for his approbation. The Provisional agreement was soon after produced, read and signed, and the meeting broke up.¹⁴²

79. The Mississaugas in Treaty No 13a confirmed that they wished to reserve to themselves “the *sole right* of the fisheries in Twelve Mile Creek, the Sixteen Mile Creek, the Etobicoke River, together with the flats or low grounds on said creeks and river which we have heretofore cultivated and where we have our camps. And also the sole right of the fishery in the River Credit with one mile on each side of the river”.¹⁴³

80. A year later, the Credit River Mississaugas executed yet another surrender in which they reserved out “of the present grant unto the said Chechalk, Quenepenon, Wabukanyne, Kebonecence, Osenego, Acheton, Patequan and Wabakegego

142. Minutes of a Council Meeting with the Mississaugues at the River Credit [continuation], recorded by P. Selby, NAC, RG 10, vol. 1, reel C-10, 996, pp. 298-299, 2 August 1805.

143. Treaty 13a, *Indian Treaties and Surrenders*, *op. cit.*, note 68, p. 36.

and the people of the Missisagua Nation of Indians and their posterity forever — the *sole right* of the fisheries in the Twelve Mile Creek, the Sixteen Mile Creek, the River Credit and the River Etobicoke together with the lands on each side of the said creeks and the River Credit as delineated and laid down on the annexed plan, *the said right of fishery and reserves extending from the Lake Ontario up the said creeks and River Credit [...] And the right of fishery in the River Etobicoke from the mouth of the said river to the allowance for road [...]*¹⁴⁴

81. The case of the Mississaugas of the Credit River was not referred to by the Supreme Court in either *Lewis* or *Nikal* when it determined that Crown policy within Upper Canada had consistently rejected any notion of exclusive fishing rights.¹⁴⁵ However, the 1806 Treaty confirms that there could be exclusive aboriginal and treaty rights to fisheries even in navigable waters in Upper Canada. Encroachments by settlers into those rights were actually the subject of preventive legislation.

82. In 1829, the Chief and Council of the Mississauga Band petitioned the Lieutenant Governor, Sir John Colborne, asking that settlers encroaching on their rights be informed of the privileges “in law which the Indians are entitled to”.¹⁴⁶ As Donald B. Smith describes, for more than thirty-five years, white fishermen had raided the aboriginal fishery during the spring and fall salmon runs. The Indians, in petitions drafted by their young leader, Peter Jones, protested the appearance of “the lowest and most immoral class of settlers” who often scattered “the offals of fish” at the river mouth to prevent the salmon’s passage upstream. To protect themselves, the Indians requested that the governor secure the fishery for them.¹⁴⁷ Concerns were expressed by the Indians about the “many unwarrantable disturbances, trespasses and vexations” on the parcel of lands and fisheries reserved exclusively in 1805 for them.¹⁴⁸

144. *Id.*, Treaty 14, September 6, 1806 [emphasis added].

145. *Nikal*, *supra*, note 2, p. 192.

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

147. D.B. SMITH, *op. cit.*, note 45, p. 79.

148. L. HANSEN, “Development of Fisheries”, *loc. cit.*, note 44, p. 3.

83. The government's response was an *Act the Better to protect the Mississauga tribes, living on the Indian Reserve of the River Credit*¹⁴⁹ 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.¹⁵⁰ "By-laws and Regulations" of the Credit River Mississauga enacted in 1830 stated that "all our lands, timber and fishery shall be held as public property and no person shall be allowed to sell, lease or give any part of the lands, timber or fishery unless granted by the council for the general benefit of our fishery".¹⁵¹

84. The example of the Mississaugas of the Credit River alone serves to dispel the argument accepted by the Supreme Court in *Nikal* that there was a "clear and specific Crown policy of refusing to grant, in perpetuity, exclusive rights to [aboriginal] fishing grounds".¹⁵²

6. Aboriginal Leases of Fisheries to Third Parties

85. In *Nikal*, the Supreme Court of Canada recognized that exclusive licences of fisheries following the first fisheries legislation were issued from time to time by the Crown.¹⁵³ This information was put forward to support the conclusion that it was the Crown, and not aboriginal people, who held "title" to the fisheries and lands beneath them.

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

149. (1829) 10 Geo IV, c. 3 (Upp. Can.).

150. *Ibid.*

151. Cited in M. WALTERS, *op. cit.*, note 20, p. 330. In return, the Mississaugas apparently agreed they would only fish five nights a week and would not catch salmon for sale after November 10th. D.B. SMITH, *op. cit.*, note 61, p. 79.

152. *Nikal*, *supra*, note 2, p. 187.

153. *Ibid.*

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

As with the proof of occupation, proof of exclusivity must rely on both the perspective of the common law and the aboriginal perspective, placing equal weight on each [...] Exclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution. As such, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty. For example, it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by “the intention and capacity to retain exclusive control” [...] For example, “[w]here others were allowed access upon request, the very fact that permission was asked for and given would be further evidence of the group’s exclusive control ...” [...] A consideration of the aboriginal perspective may also lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups *by permission* may reinforce, the exclusive occupation of the aboriginal group asserting title.¹⁵⁴

87. It has been shown that there was no distinction drawn by the Crown in the early to mid-1800s between lands and lands covered with waters. This applies equally to the recognition that permission was required before aboriginal fisheries were accessed by non-aboriginal fishermen. It is likely, then, that the Court’s lack of information on this practice in *Nikal* and *Lewis* materially affected the Court’s analysis.

88. Indeed, there are many indications of aboriginal peoples granting permission to others to access their fishing grounds, and in return, expecting to be paid for the use of these waters. As early as 1817, the Chippewa Nation surrendered a tract of

154. *Delgamu’ukw v. British Columbia*, *supra*, note 26, para. 156-157 [emphasis added].

land "within the line along the Kempenfelt Bay and the River Nautonwaysaging until it intersects Lake Huron" in exchange for supplies of seine nets and fish hooks, among other things. Minutes of the Surrender indicate that the Chippewas complained that others within Lake Huron were taking their fish without paying them for the privilege,¹⁵⁵ as was expected.

89. At Fighting Island, as has been discussed, Thomas Paxton had first obtained a licence of occupation from Lieutenant Governor Maitland in 1827 in return for agreeing to pay an annual rent of \$50 and barrels of fish to the Wyandots.¹⁵⁶ As also noted, Paxton had entered into his negotiations with the various tribes asserting aboriginal title to the island directly. Oliver Mowat, a lawyer who would later become the Premier of Ontario, indicated in a legal opinion that this form of lease amounted to a recognition by Paxton of aboriginal title, concluding:

If the fact really is, as I find from the Report of the Superintendent General of Indian Affairs that it is 'said' to be, namely, that Paxton took a Lease for thirty years from the Wyandotts, and paid them rent under it, this would be another ground for holding that he could now make no claim in opposition to that Tribe of Indians. Such a Lease would be a recognition on his part of their Title, a recognition which there is nothing in the circumstances of the case entitling him afterwards to withdraw.¹⁵⁷

90. The clearest long term example of this kind of leasing arrangement involves the Saugeen Ojibway peoples.¹⁵⁸

In the early 1830s, the Saugeen Ojibway peoples of southern Ontario leased the fisheries around the fishing

155. Minutes of Council Meeting between Chippewas Nation and British government, NAC, RG 10, vol. 34, pp. 19, 881-19, 884, 7 June 1817. A treaty promise to supply seine nets and fish hooks suggests that the Chippewas retained their fishing rights in these bodies of water. There is nothing explicit in the surrender to suggest that they had relinquished any rights in the adjacent lands covered with water.

156. See V. LYTWYN, "Waterworld", *loc. cit.*, note 113, for an examination of this licence and deed.

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

158. Licences of occupation permitted the exclusive use of a fishing territory, while leases permitted fishing in common with other users.

islands of the Saugeen Peninsula,¹⁵⁹ together with the right to occupy the fishing stations to third parties and received the rents from such leases.¹⁶⁰ In 1834, the Huron Fishery Company was granted the right by the Chiefs of the Saugeen Nation to occupy the Saugeen fishing islands within Lake Huron for a 25£ fee over an unlimited term. As with Paxton, the lease was confirmed by a formal licence of occupation issued by the Imperial government through Sir John Colborne, the Lieutenant Governor.¹⁶¹

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

William Dunlop, Charles Prior and other Inhabitants of the Town of Goderich forming the 'Huron Fishing Company.' Praying for the *exclusive right of Fishing* on that part of the coast of Lake Huron commencing at the mouth of the River Saugink and terminating at Cabots Head together with all the Islands situated along the said line of Coast for seven years, being from Sept. 1834 to Sept. 1841. Recommended that a License of Occupation during pleasure be granted for the Islands referred to.¹⁶²

An examination of the map which appears on the licence itself makes it clear that it included a large block of adjacent waters.¹⁶³ The Saugeen people were aware by that time of the threat to their fisheries by white fishermen, particularly American interests, and hoped leases would restrict access to

159. "Lease of the Saugeen Fishing Islands with marks of Jacob Metigoob, John Anance, Alexander Matwagash", NAC, RG 10, vol. 56, Reel c-11,018, 2 September 1834.

160. NAC, RG 10, vol. 57, p. 59,033, 17 January 1835.

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

162. Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. Q, microfilm reel no C-105, 21 May 1834, p. 414. Similarly, a licence of occupation issued for Peach Island at the "Entrance of Lake St. Clair [...] reserv[ed] to the three persons of the name LaForest their improvements *and the right of fishery*". "Order in Council approving a License of Occupation be granted to William MacCrae for Peach Island", NAC, RG 1, L2 Upper Canada; Grants, Leases and Licenses of Occupation, circa June 1834.

163. *Ibid.*

the fisheries and keep other white men out.¹⁶⁴ As the lease itself indicated, “we, the undersigned, will use our endeavours to protect the said Islands from Encroachment”.¹⁶⁵

91. In 1832, the Provincial Land Book record indicates that Alexander McGregor claimed he had a licence from the Indians to carry on an extensive fishery on a small island in Lake Huron. He complained that sometime after he had taken occupation, Americans took over possession of it and he requested a lease or licence from Imperial authorities in order to dispossess them of it.¹⁶⁶ Because McGregor was apparently acting with the consent of the Indians, it was recommended that he receive a Licence of Occupation during pleasure.¹⁶⁷

92. In 1836, Sir Francis Bond Head, who had replaced Colborne as Lieutenant Governor, negotiated treaties with the tribes in and around Manitoulin Island.¹⁶⁸ He asked the Saugeen (“Saukings”) people who attended the Manitoulin council, if they would like to settle on the point from Owen’s Sound to Lake Huron, then known as the Saugeen Penin-

164. Dr. Victor Lytwyn, Testimony in *R. v. Jones and Nadjiwon*, *supra*, note 4, 15 June 1992, pp. 68-69. Lytwyn suggests that the licence of occupation to the Huron Fishing Company was issued by the Imperial Government because McGregor was fishing from unceded lands without aboriginal consent, and had only claimed to have a Licence of Occupation; however, McGregor was in fact recommended for a Licence of Occupation. See P. J. BLAIR, *loc. cit.*, note 1, at footnote 358.

165. Lease of Fishing Islands to the Huron Fishing Company, signed by Jacob Metegoob [var. Metigwab, Metigwob, see note 85, *supra*], John Assance and Alexander Matwayash, Copy printed in the *Report of the Huron Fishing Company*, Colonial Office Papers, Public Record Office, London, England, 2 September 1834.

166. Petition from Alexander McGregor, dated at York, to Lieutenant Governor Sir John Colborne, NAC, RG 1, L10, 4 September 1832.

167. “Alexander MacGregor. Stating that he has a License from the Indians to occupy a small Island called “MacGregor’s fishing Island” in Lake Huron and has made arrangements for carrying on an extensive fishery. That some time after he was in occupation of the same, several Americans from the States took possession of it, and praying for a Lease or License of occupation that he may be able to hold the same and dispossess the Americans of it. Recommended for a License of occupation during pleasure. Executive Council Minutes, Upper Canada Land Books, NAC, RG 1, L1, vol. P, microfilm reel no C-105 p. 394, 15 December 1832.

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

sula.¹⁶⁹ He also promised that all white men who fished in the area of the fishing islands would be removed if the Saugeen people would agree to surrender the lands south of Owen Sound.¹⁷⁰

On the basis of that promise, on August 9, 1836 Chief Metigwab and his fellow Chiefs of the Saugeen Nation were persuaded to sign Surrender 45 ½ surrendering 1.5 million acres of land, a cession made without compensation.¹⁷¹ In explaining his actions to the Secretary of State for the Colonies, Bond Head observed that the Indians had long lived "in their Canoes" among the fishing islands, in part because the "surrounding Water abounds with Fish".¹⁷²

The promise of exclusivity in the fisheries was clearly of importance to the Saugeen people.¹⁷³ The retention of their interest in the fisheries after the surrender is evident from the fact that the Chiefs continued to receive payment from the Huron Fishery Company for its lease of the fishing islands until the early 1840s, when the Huron Company failed.¹⁷⁴ In 1839, the Huron Fishing Company requested a new lease protecting exclusive fishing rights, with the rent of 25£ per year to be paid to the Indians or to the Crown.¹⁷⁵ The Huron Fishing Company had taken 6,100 barrels of fish between 1834 and 1839, and the Collector of Customs reminded the Governor General that the Huron Fishing Company had an obligation to pay the Indians rent annually in return for this privilege.¹⁷⁶

169. Now known as the Bruce Peninsula.

170. Statement of Metigwab, *supra*, note 86.

171. *Indian Treaties and Surrenders, op. cit.*, note 68, p. 113.

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

173. See P. J. BLAIR, "Solemn Promises and Solum Rights: The Saugeen Ojibway Fishing Grounds and *R. v. Jones and Nadjiwon*", (1996-7) *Ottawa Law Review* 125-144 for a detailed account of these arrangements.

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

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

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

93. In the same year, the *Annual Report of Indian Affairs in Upper Canada* acknowledged the promises that His Majesty would “engage forever to protect [the fisheries] against the encroachments of the whites”.¹⁷⁷ However, as was noted in the Report, the abundance of fish at the mouth of the Saugeen River, where about 370 Chippewas and “Potawatemies” had settled, “has attracted the attention of white traders, thus annoying the Indians”.¹⁷⁸ By 1840, the Saugeen fishing grounds had become “frequently the scene of violence with interlopers and trespassers”.¹⁷⁹

94. In 1844, in response to a request from George Copway, a Mississauga and the Methodist minister at Saugeen¹⁸⁰ to the Governor General as to the legal rights of the Saugeen Indians to the occupancy of the fishery, S.P. Jarvis, the Chief Superintendent of Indian Affairs wrote to J.M. Higginson, the Civil Secretary to the Governor General.¹⁸¹ He suggested that the federal government deny that the islands and the fish around them belonged to the Saugeen Indians, writing:

[T]he fishing islands [...] are part and parcel of the Wilderness of Canada West which has not yet been conceded to Her Majesty by the Indians but to assume that on that account they are the private property of a small band of Indians residing twenty miles from them and that the band have an exclusive right to the fish which resort to those Islands at certain Seasons or have the right to grant licences in any shape to others will not, I presume, be admitted by the Government.¹⁸²

177. J.B. MACAULEY, *Report describing Various Aspects of Indian Affairs in Upper Canada*, NAC, RG 10, vol. 719, Reel 13,411, pp. 123-124, April 1839.

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

179. *Id.*, pp. 137-140.

180. George Copway, a Mississauga preacher, worked with the Saugeen band as a Methodist minister between 1843 and 1845. His career ended in 1846 when he was accused by the Saugeen of embezzling their funds. Similar accusations were raised at Rice Lake, his home mission. He was imprisoned for fraud, D.B. SMITH, *op. cit.*, note 61, p. 197.

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

182. S.P. Jarvis to J.M. Higginson, NAC, RG 10, vol. 509, 25 October 1844.

Jarvis noted, however, that the practice of the British government was to first extinguish Indian claims by surrender before other claimants could derive title.¹⁸³ Attempts to obtain surrenders of the fishing islands in this area, so that licences of occupation could be granted to white fishermen, soon followed.

95. In March, 1845 two Chiefs from Saugeen made their way to Toronto to present a Petition to the Attorney General and to the Chief Superintendent of Indian Affairs, claiming that they had been defrauded by "wicked white men" who had taken possession of their fishing grounds.¹⁸⁴ It was reported again that year that the fishery had attracted white encroachment on what the Saugeen "consider their exclusive right and on which they rely much for provisions".¹⁸⁵ In response, in 1847, Her Majesty Queen Victoria issued a Declaration in favour of the Ojibway Indians respecting certain lands on Lake Huron. The title deed was specific to the Saugeen Ojibway Indians and within the description of lands possessed by the Saugeen people were included "any Islands in Lake Huron within 7 miles of the main land", together with the right to convey.¹⁸⁶

96. Since the fishing islands were the stations from which fishing was conducted, the acknowledgment of aboriginal legal title to the islands was confirmatory of the aboriginal interest in the fisheries.¹⁸⁷ In fact, following the *Imperial Proclamation* of 1847, the Governor General issued a further proclamation in 1851 protecting from trespass tracts of land set aside for the Indians as reserves. This Act specifically referred to the Saugeen Peninsula and the islands within seven miles of the coast as lands reserved for the occupation

183. *Ibid.*

184. NAC, RG 10, vol. 510, pp. 296-97, J.M. Higginson to S.P. Jarvis, NAC, RG 10, vol. 510, pp. 296-97, 2 May 1845.

185. Report on the Affairs of the Indians in Canada, Laid before the Legislative Assembly on 20 March 1845, Appendix EEE, Montréal, Rolo Campbell, 1847.

186. *Imperial Proclamation* of 1847, NAC, RG 68, vol. Liber. A.G. Special Grants 1841-1854, C-4158, 29 June 1847.

187. The Court in *R. v. Jones and Nadjiwon*, *supra*, note 4, p. 439 held as a matter of law that the *Imperial Proclamation* of 1847 had extended treaty protection to the Saugeen Ojibway's use of their traditional fishing grounds surrounding the Peninsula.

of the Saugeen and the Owen's Sound Indians.¹⁸⁸ Those who entered those lands and waters without aboriginal consent were to be punished accordingly.

97. Shortly after the *Imperial Proclamation* of 1847, at the request of the Saugeen people, the government advertised for offers to lease the fishing stations on the unceded fishing islands and a number of tenders were received.¹⁸⁹ The Superintendent General of Indian Affairs advised that the Governor General wanted to know what the wishes of the Saugeen people were with respect to any proposed lease before any further steps were taken.¹⁹⁰ The fishing islands were again tendered for lease, the lease to be "executed by or on behalf of the Indians".¹⁹¹ Rent from the commercial use of the fishing grounds around the fishing islands was distributed to the Saugeen and Owen Sound Indians in 1857¹⁹² for one year in the sum of 75£.¹⁹³

98. Besides the Saugeen peoples' rental arrangements with white men, there are other, later examples of similar arrangements. The Mohawks of the Bay of Quinte, for example, leased their seining grounds to white men in the 1830s and 1840s in the Bay of Quinte. In 1877, the Department of Indian Affairs took steps to have the province remove these white men as trespassers when these rents were not paid, as agreed, to the aboriginal lessors.¹⁹⁴

188. 13 & 14 Victoria, c. 74. The Owen's Sound Indians, as they were then described, later moved to Nawash and became known as the Chippewas of Nawash.

189. T.G. Anderson, Superintendent of Indian Affairs to Wm. Webster, Owen Sound, NAC, RG 10, vol. 130, p. 73,575, 18 April 1849.

190. R. Bruce to Capt. Anderson, NAC, RG 10, vol. 516, p. 3, 6 June 1853.

191. *Id.*, p. 102, 7 October 1853.

192. 1857 was the same year as the first *Fisheries Act* was enacted, legislation which the Supreme Court relied on in *Nikal* as evidencing a Crown policy *denying* exclusive fishing rights.

193. S.Y. Chesley, Acting Superintendent of Indian Affairs to Capt. Anderson, NAC, RG 10, vol. 518, p. 231, 16 November 1853.

194. 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

99. In 1784, Governor Haldimand had written to John Chew, the Secretary of the Indian Department advising that the Mohawk allies dispossessed from their homelands during the American Revolution, who were to take up residence at the Bay of Quinte, were not to be restricted in their activities at the Bay of Quinte but were to have the free use of the lands set aside for them. He added that "whatever addition shall be deemed necessary for their more comfortable and happy Establishment shall be made".¹⁹⁵

100. On April 1, 1793 a treaty entered into between Governor Simcoe and certain Chiefs of the Six Nations (Treaty 3 1 / 2) reflected an understanding that the tract of land would be "bounded" in front by the Bay of Quinte and set aside for the *sole use* of the Chiefs, Warriors, Women and People of the Six Nations and "their Heirs forever [...] the full and entire possession, Use, benefit and advantage of the said District of Territory of Land to be held and enjoyed by them in the most free and ample manner and according to the several Customs and usages by them".¹⁹⁶ The use of terminology such as "bounded in front" or "bounded by" a body of water generally meant the *ad medium filum aquæ* presumption applied as a matter of common law.¹⁹⁷

101. The Mohawks of the Bay of Quinte cleared the shoreline soon after their arrival for the purposes of seine fishing. By 1830, a fishing station in front of the Bay of Quinte was occupied as a seining ground by the Mohawks of the Bay of Quinte. The first white man who engaged in the commercial

gathered together on that account, preferred the shores of the lake of Kente or Tanouate 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 here are reports of Oneida women (the Oneida being one of the Five Nations of the Iroquois Confederacy) in the early 1600s carrying "salmon-trout" harvested from Lake Ontario back to Mohawk homelands in New York for sale, R.G. THWAITES (ed.), *The Jesuit Relations and Allied Documents*, vol. 42, Cleveland, Burrows Brothers, 1896-91, p. 71.

195. Letter, Governor Haldimand to John Chew, 22 April 1784, cited in C.M. JOHNSON (ed.), *Valley of the Six Nations: A Collection of Documents in the Indian Lands of the Grand River Valley*, Toronto, The Champlain Society, 1964, p. 46.

196. *Indian Treaties and Surrenders*, *op. cit.*, note 68, p. 7.

197. See *Keewatin v. Kenora*, (1907) O.L.R. 185 (Ont. C.A.), pp. 196-198; also *Canadian Exploration v. Rotter*, [1915] S.C.R. 15 (S.C.C.).

fishery was a man named William Davenport who was taken in by the Indians as a partner. In exchange for access to the Mohawk fishery, Davenport furnished the seine.¹⁹⁸

102. On March 5, 1877, Charles Wilkie, the Fisheries Overseer reported to the Minister of Fisheries that the Mohawks of the Bay of Quinte had driven one William Richardson and his son from the fishing station "and threatened to do them bodily harm if they returned" to the fishing grounds opposite the Mohawk Indians' Reserve at Tyendinaga. William Plummer, the Superintendent and Commissioner of Indian Affairs investigated the complaint and reported to the Minister of the Indian Branch that he had made diligent inquiry into the matter and found that the station in question has been occupied by Mohawk peoples for "a very many years" and that white men had only fished there because they had permission from the Mohawks of the Bay of Quinte and paid them rents.¹⁹⁹ He wrote:

My first enquiry was among the Indians and I learned that this station had been occupied as a seining ground by the Mohawks of the Bay of Quinte over forty years ago [...] They intelligently trace the history of the Fishery down to the present time and showed that several white men had from time to time fished with them and that three seasons ago, Wm. Richardson came there; *that for the first two seasons he paid them (the Indians near the station) a certain quantity of fish for the privilege of fishing; that last season he paid them nothing.* The Indians say they can bring many white men to prove the seining ground had been cleared more than 30 years before Richardson had anything to do with it.²⁰⁰

Plummer visited the ground and had an interview with a settler named Drumney residing on the lot in front of and close to the fishing ground. He added that, "Drumney has

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

199. *Ibid.*

200. *Ibid.*, [emphasis added].

resided there 37 years. The station has been fished ever since he came there. When he first came there, the seining ground was clear and free from stones as it is now. The Indians always held the ground but allowed white men to fish with them. White men paid the Indians for the privilege".²⁰¹ The Superintendent of Indian Affairs concluded his report by describing the white men who fished in the waters from the reserve without paying rents to the Indians as "trespassers".²⁰²

103. It is clear then, that for many, many decades after the *Royal Proclamation* of 1763, the Crown recognized that aboriginal people held a sufficient interest in the fishing grounds adjacent to their village sites that the rentals for the use of those fisheries should be paid to the Bands. White men who fished in such areas without aboriginal consent were understood to trespass, and legislative enactments were put in place to prevent such actions.

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

7. The Reservation of Aboriginal Commercial Fishing Stations

104. The Supreme Court's finding that Crown policy did not recognize exclusive aboriginal fishing rights pointed specifically to a Crown policy of not recognizing aboriginal *commercial* fishing rights in support.²⁰³ However, during the treaty processes of the 1840s and 1850s, attempts were made by the Crown to accommodate exclusive aboriginal commercial fishing stations within tracts set aside for reserves within Ontario. Aboriginal fishing stations permitted aboriginal people to conduct trade. Some of these, where reserved specifically from surrenders, have been mentioned already. The

201. *Ibid.*

202. *Ibid.*

203. *Ibid.*

fishing station at Manitou Rapids, by way of further example, was the most important fishing station in Rainy River, and fur traders made numerous references to the important trade there. The customary practice was to send two or three men in a large canoe or boat with trade goods to the fishing stations to conduct business.²⁰⁴

105. The Robinson Huron and Superior treaties of 1850 provided that the Ojibway living on the north shores of Lake Superior and Lake Huron would retain the "full and free privilege [...] to fish in the waters [of the ceded territory] as they have heretofore been in the habit of doing".²⁰⁵

106. Historical evidence suggests strongly that this included commercial as well as domestic fishing and that the Ojibway understood this to be an exclusive right to fish. So did J.W. Keating, who had been present at the treaty negotiations and assisted with the survey of some of the reserves.²⁰⁶ While Ojibway requests for exclusive fishing rights in the waters fronting their reserves were not confirmed by the government, despite Keating's request, the government did indicate it was willing to take steps to prevent other parties "from trespass[ing] on the Deep Water frontage for the purpose of fishing".²⁰⁷ At the time, there was little competition from non-aboriginal commercial fishermen. Aboriginal fishermen exercised an exclusive right to fish commercially in the years immediately following the signing of the Robinson treaties without interference.²⁰⁸

107. Government surveyors adjusted boundaries where necessary to accommodate the Ojibway fishing stations at Parry Sound and Shawanaga River.²⁰⁹ The Batchewana Reserve included a significant fishing station for Ojibway throughout the area, known as Whitefish Island. The importance of the fishing stations is evident in that when the "Chiefs and Warriors of Batchewananny and Gourelais Bay"

204. See T. HOLZKAMM, V. LYTWYN and L. WAISBERG, "Rainy River Sturgeon: An Ojibway Resource in the Fur Trade Economy", in (1988) 32 *The Canadian Geographer* 199 [hereafter cited as "An Ojibway Resource"].

205. L. HANSEN, "Development of Fisheries", *loc. cit.*, note 44, p. 4.

206. *Ibid.*

207. *Id.*, p. 5.

208. *Ibid.*

209. *Id.*, p. 4.

surrendered lands on July 29, 1859 "extending inland ten miles throughout the whole distance including Batchewannanny Bay", they did so on condition that they retained only the "small island at the Sault Ste. Marie used by them as a fishing station".²¹⁰

108. On the other side of the continent, that same year, Governor James Douglas reported that aboriginal fisheries in British Columbia had been protected by treaty "on the Coast and in the Bays"²¹¹ and that fishing stations were to be included in each Reserve.²¹²

109. The Ontario Court of Appeal in *R. v. Bombay* held that the designation of fishing stations as such gave them a form of reserve status.²¹³ The Supreme Court of Canada in *Lewis* mentioned fishing stations²¹⁴ in its decision and acknowledged that these were "reserved" for aboriginal peoples in British Columbia.²¹⁵ However, fishing stations were described by the Supreme Court as lands beside rivers reserved to permit Indian access to the fisheries rather than as "grants" of exclusive fisheries, grants which the Court stated the federal Department of Marine and Fisheries refused to allow.²¹⁶

110. The Supreme Court in *Nikal* dismissed a defence argument that just because fishing stations were reserved did not mean that fishing grounds were excluded, again asserting that the Department of Marine and Fisheries refused to "assign" exclusive fisheries in perpetuity.²¹⁷ The reasoning that such uses had to be "assigned" or "granted" by the government confuses Crown policy with pre-existing aboriginal rights. In determining that the Crown's policy was not to recognize exclusive fishing rights, and somehow separating the reservation of fishing stations from the reservation of the fisheries around them, the Supreme Court of Canada failed to understand what fishing stations were or that when the

210. Cession 91A, *Indian Treaties and Surrenders*, *op. cit.*, note 68, pp. 227-28.

211. *R. v. Bartleman*, [1984] 3 C.N.L.R. 114 (B.C.C.A.), citing Governor Douglas, letter to the Speaker of the House dated February 1859, p. 124.

212. Cited in *Lewis*, *supra*, note 3, p. 143.

213. *R. v. Bombay*, [1993] 1 C.N.L.R. 92 (Ont. C.A.), p. 94.

214. *Lewis*, *supra*, note 3, pp. 142-43.

215. *Ibid.*

216. *Id.* p. 143.

217. *Id.* p. 142.

Crown issued licences of occupation to fishing stations, the Crown conveyed exclusive fishing rights in the waters around them.

111. Crown licences of occupation permitted exclusive fishing in areas around fishing stations by setting out water boundaries within which exclusive commercial fishing rights were to be exercised.²¹⁸ The Crown licence of occupation issued to the Huron Fishing Company, for example, enabled the Company “to possess, occupy and enjoy all those certain tracts of land being Thirteen Islands in Lake Huron, called Gheghets Islands, lying north of the River Sangin, and numbered on a small plan or sketch of Deputy Surveyor John McDonald, from number one to number thirteen inclusive, that is to say, commencing at a point in Lake Huron, west one mile and a quarter; then north five miles and three-eighths of a mile; then east two miles and a half, more or less, to the east shore of Lake Huron; then southerly along the water’s edge of the Lake, following the several Points and Bays to the place of beginning”.²¹⁹ The licence contained a map with a boundary which extended well into the water around the islands.²²⁰

112. While non-aboriginal interest in the waters had increased, the Crown at this time clearly recognized the promises it had made to the Saugeen people, and other First Nations within Ontario. Crown policy in this regard would soon change. The Supreme Court of Canada was not wrong in

218. Section 17 of *An Act for the Regulation of Fishing and Protection of the Fisheries*, 1868, 31 Vict., c. 60 made it an offence to fish within the “limits of [any] stationary or seine fishery described in leases or licences now existing or hereinafter to be granted”. In 1862, a licence of occupation issued, this time to aboriginal people, specifically indicated it would convey the right to fish exclusively “[...] in pursuance of an arrangement made in 1859 with the Supt. General of Indian Dept, [in] the Fishery in front of the Upper and Lower Indian Reserves of Kettle Point and adjoining the Sable River — running into the Lake 5 miles, bounded by the side lines of the Reserves prolonged into the Lake on the same courses — and parallel with the shore at the distance of 5 miles”. Special Fishery License and License of Occupation, to Froome Talfourd, Indian Superintendent, on behalf of the Kettle Point Indian Band, signed by William Gibbard, Collingwood [photocopy], Wawanosh Family Papers, Weldon Library, University of Western Ontario, Box 4381, file no I-1-1, 14 April 1862.

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

220. *Ibid.*

stating that Crown policy ultimately militated against aboriginal exclusive fishing rights in what became to be thought of as public waters. What the Court did not apparently understand, however, was that this was a policy which only developed once non-aboriginal interest in the fisheries increased.

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

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

113. In support of its conclusions that Crown policy mandated that Indians would be treated like other members of the public on fishing matters, the Supreme Court in *Nikal* quoted from a letter dated April 16, 1845 from W.H. Draper, the Attorney General of Canada to J.M. Higginson, the Civil Secretary, to the effect that the "right to fish in *public* navigable waters in Her Majesty's dominions is a common public right — not a regal franchise — and I do not understand any claim the Indians can have to its exclusive enjoyment".²²¹

114. When one examines the archival materials, the case Draper was referring to was that of the Saugeen Ojibway peoples. Two years after he had expressed his opinion, the Imperial Crown apparently disagreed with his views, issuing the 1847 *Imperial Proclamation* and title deed to islands and fishing grounds to the Saugeen Ojibway Nations referred to earlier. It was not until after non-aboriginal interest in Upper

221. *Nikal*, *supra*, note 2, p. 188 [emphasis added].

Canadian fisheries developed, in fact, that the so-called "public" rights of fishing in unceded aboriginal waters were asserted. It is important to understand the context in which this assertion was made, because the aboriginal perspective on these public rights was quite different. The assertion of "public" rights resulted in confrontation and violence between aboriginal and non-aboriginal people as Crown policy in this regard began to change.

115. Although the Supreme Court referred to the Crown's policy favouring public rights over exclusive aboriginal rights as "firm", and found no evidence (despite the appellant's arguments to the contrary) of any interdepartmental disagreement over the policy, a review of the context around the policy illustrates that it was the policy not of the government as a whole but primarily that of the Department of Marine and Fisheries, and one individual, W.F. Whitcher, in particular. Those responsible for Indian Affairs took a very different position resulting in interdepartmental conflict and friction. As well, as will be shown, the intent and the effect of the policy was discriminatory, since its objective was to favour non-aboriginal fishermen over the competition they might otherwise face should aboriginal people be free to fish for commercial purposes.

116. By the middle of the 19th century in southern Ontario, settlers had flooded in to settle and develop agricultural land. Non-aboriginal attention soon turned to the increasingly lucrative fishery. As non-aboriginal people complained of aboriginal competition within those fisheries, Crown policy quickly changed to favour their interests. The first manifestation of that changed policy was new fisheries legislation, legislation which at first seemed neutral on the question of aboriginal fishing rights, but which was ultimately used to institute a pattern of encroachment and interference that almost completely eliminated the exercise of fishing rights by aboriginal people.²²²

117. To understand the extent to which this interference took place, and why, the provisions of the *Fisheries Act* require

222. For a contrary opinion, see R. WRIGHT, "The Public Right of Fishing, Government Fishing Policy and Indian Fishing Rights in Upper Canada", (1994) 86 *Ontario History* 337. Wright has argued that the *Fisheries Act* of 1857 was intended to protect aboriginal fishing.

examination. The Supreme Court looked to the legislation to suggest that because the 1857 *Fisheries Act* did not provide for the permanent alienation of fishing rights, it could not be the source of exclusive aboriginal rights.²²³ It is suggested that this was an error. The *Fisheries Act* was not the source of aboriginal rights. Although it had attempted to regulate them, it could no more create them than extinguish them.²²⁴ The new legislation did, however, recognize that it could not interfere with pre-existing rights in fisheries. That in itself is of interest, since the Supreme Court presumed that only public rights in fisheries existed.

The first *Fisheries Act*, which gave responsibility for fisheries in Upper and Lower Canada to the Department of Crown Lands, did not provide statutory authority for the “permanent” future alienation of fishing rights to private parties. However, the legislation recognized that exclusive rights predating the legislation existed in third parties²²⁵ and that public rights should not interfere with private property.

118. In section 1 of *An Act Respecting Fisheries and Fishing*²²⁶ the Governor in Council was given the authority to grant special fishery leases and licences on lands belonging to the Crown for any term not exceeding nine years.²²⁷ All “subjects of her Majesty” were free to fish for the purposes of trade

223. *Nikal, supra*, note 2, p. 15.

224. The suggestion that the *Fisheries Act* could provide a complete Code inconsistent with the continued existence of an aboriginal right was expressly rejected in *Sparrow, supra*, note 5, p. 174.

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

226. *An Act Respecting Fisheries and Fishing*, (1857) 22 Vict., c. 62.

227. *Id.*, s. 2.

and commerce in any of the harbours, roadsteads, bays, creeks or rivers of the Province²²⁸ subject to the caveat that none of these privileges were to affect private property.²²⁹ In 1865, *An Act to amend Chapter 62 of the Consolidated Statutes of Canada and to provide for the better regulation of fishing and protection of Fisheries*²³⁰ was passed with virtually identical provisions.²³¹

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

119. While there was nothing in the 1857 *Fisheries Act* mentioning aboriginal lands or waters specifically, aboriginal fisheries were originally recognized as falling outside the operation of the Act. In 1858, a year after the legislation was passed, the Visiting Superintendent of Indian Affairs, W.R. Bartlett, asked the Saugeen Ojibway Nations to provide him with a list of fishing stations which they used and to advise him “if the Indians wished to reserve any of the Fisheries for their own use exclusively”.²³² Those fisheries not so reserved would be allocated to non-aboriginal fishermen through the system of leases and licences, with rents from the leases of unsurrendered waters to be paid to the Indians.²³³

120. The Crown at first encouraged the Indians to believe that this new system would work to their advantage and that it would actually protect their rights. In 1859, Bartlett advised the Cape Croker Indians that a government lease under the amended legislation would be a legal means to “warn off intruders [...] you will be protected by the Government in your use of [the fishing ground]”.²³⁴

228. *Id.*, s. 3.

229. *Id.*, s. 4.

230. (1865) 29 Vict., c. 11.

231. *Id.*, s. 3.

232. *Annual Report of the Superintendent of Fisheries for Upper Canada Appendix of Journals of Legislative Assembly*, Appendix 1, 22 Victoria, 1859.

233. W.R. Bartlett to Saugeen Chiefs, NAC, RG 10, vol. 544, p. 228, 23 June 1859.

234. W.R. Bartlett to Indians Chiefs and Warriors, Cape Croker, NAC, RG 10, vol. 544, p. 282, 19 August 1859.

121. Despite these assurances, an agreement was signed between the Indian Department and the Department of Crown Lands "for the Protection of the interest of Native Tribes" in which Indians were exempted from paying fees for such fishery leases under the new legislation. The exemption was to apply only in circumstances, however, "where the purport and object of title [was] to secure to the individuals and families of each tribe exclusive use of such fisheries for *bona fide* domestic consumption".²³⁵ Given the increasing value of commercial fisheries, aboriginal fishermen would soon be expected to pay for licences to fish commercially within their own unceded waters.

122. Because of the Act's encroachment into aboriginal fishing rights, it created immediate conflict. William Gibbard, the first Fishery Overseer appointed under the legislation, leased the unceded fishing islands of the Saugeen people to non-aboriginal fishermen without their consent. Of the 97 leases issued throughout Lake Huron and Lake Superior, Gibbard issued only 12 to Indian Bands,²³⁶ despite an earlier meeting between the Chiefs and Gibbard in 1859 in which they demanded he refrain from leasing any of their fishing islands.²³⁷ Having ignored their wishes, Gibbard advised W.R. Bartlett, the Visiting Superintendent of Indian Affairs that the non-aboriginal lessees were afraid the Indians would molest them.²³⁸ Bartlett wrote to the Indian Chiefs and Warriors at Cape Croker reminding them that the rent from the fishing islands would be credited to their annuity and distributed to members of the band. He warned that the Government would protect the lessees under the law if they were molested or obstructed in any way.²³⁹

Bartlett tried to placate the upset and angry Chiefs and Warriors at Cape Croker by suggesting that the rent from the

235. L. HANSEN, "Development of Fisheries", *loc. cit.*, note 44, p. 6.

236. Report of the Fishery Overseer for the Division of Lakes Huron and Superior for 1859, by W. GIBBARD, *Canada Sessional Papers*, No 12, 23 Victoria, 1860, pp. 84-91, Appendix No 31, 31 December 1859.

237. V. Lytwyn, "Waterworld", *loc. cit.*, note 113, p. 23.

238. William Gibbard to W.R. Bartlett, NAC, RG 10, vol. 418, Reel C-9625, pp. 573-574 11 August 1859.

239. W.R. Bartlett to Chiefs and Warriors, Cape Croker, NAC, RG 10, vol. 544, Reel C-13, 357, pp. 284-85, 19 August 1859.

islands when placed with annuity monies would be “much better for you than that these islands [...] as they formerly have been subject to intrusion by everybody, besides being both unproductive and much trouble to both yourselves and the Department”.²⁴⁰ The Chiefs were not impressed. The Cape Croker Indians²⁴¹ continued to “annoy” lessees of fisheries on Barriere, Rabbit, Hay, Griffith and White Cloud Islands.²⁴² Bartlett threatened the band with the loss of their “free” fishing if they continued to infringe the *Fishery Act* through such disturbances.²⁴³

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

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

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

240. W.R. Bartlett to Indian Chiefs and Warriors at Cape Croker, NAC, RG 10, vol. 544, 19 August 1859.

241. The Chippewas of Nawash, located at Cape Croker, together with the Chippewas of Saugeen, form the Saugeen Ojibway Nation.

242. William Gibbard to W.R. Bartlett, NAC, RG 10, Reel C-9625, vol. 418, p. 572 3 October 1859.

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

they are theirs still, according to all the rules of justice and the letter of the treaty.²⁴⁴

124. In 1860, the Saugeen Ojibway Chiefs issued a petition to the government complaining of encroachments within their traditional waters and indicating that when the leases of the islands and fisheries expired, they wanted the territory back for their own use, "for although we do not prosecute the fishing like the white man, yet we are satisfied that it will be for our own interest and advantage to have them for our own use".²⁴⁵

125. In another petition signed by the Chippewa Indians of Saugeen, Lakes Huron and Simcoe, the Chiefs of those First Nations reminded the government that "when they surrendered their lands to the Government, they did not sign over all the game and fish".²⁴⁶ Despite these objections, Gibbard issued a further six fishing leases to commercial fishing companies within the unceded waters of the Great Lakes. In 1861, these companies harvested about 2,500 barrels of fish from Saugeen waters.²⁴⁷ The Saugeen people and other First Nations responded by damaging nets set around the fishing islands.

126. In his Report of the Fishery Overseer for the Division of Lake Huron and Superior, Gibbard again complained that the Indians had annoyed lessees of fisheries on the fishing islands²⁴⁸ as well as white fishermen and settlers at Cape Croker.²⁴⁹ Bartlett wrote to the Chiefs and Warriors at Cape Croker and Colpoy's Bay stating, "I am very sorry to hear these complaints against you people a second time. Mr. Gibbard has sent me your lease of the fishery which the Supt. Gen'l has succeeded in obtaining free for you, upon certain conditions. These conditions are that you will not be called

244. Letter to the Editor, Thomas Hurlburt, Sarnia, 14 September 1859, in *The Sarnia Observer and Lambton Advertiser*, p. 2, 23 September 1859 [emphasis added].

245. P. SCHMALZ, *The History of the Saugeen Indians*, Ottawa, Ontario Historical Society, Publication No 5, 1977, p. 115.

246. Petition signed by the "Chippewa Indians of the Saugeen and Lakes Huron and Simcoe", Ontario Archives RG 1, vol. A-1-7, p. 4, May 1860.

247. V. Lytwyn, "Waterworld", *loc. cit.*, note 113, p. 24.

248. William Gibbard, Fisheries Overseer to W.R. Bartlett, NAC, RG 10, vol. 418, 3 October 1859.

249. William Gibbard to W.R. Bartlett, NAC, RG 10, vol. 418, pp. 597-600, 23 January 1860.

upon to pay any sum of money for your fisheries if you comply with the fishery act and the orders of the Government and council and do not in any way molest lessees or trespass upon leased grounds. If you people continue these practices, I shall be very sorry indeed for you will be called upon to pay out of your annuities \$60 a year rent annually".²⁵⁰

127. The Chiefs, Sachems and Principal Men of Cape Croker prepared yet another Petition which reminded Queen Victoria that they had an old Treaty showing that hunting of various kinds was never surrendered.²⁵¹ They complained that the Canadian government had now passed an *Act* to encourage the forfeiture of hunting and fishing which the "Indians used to, and was to enjoy forever".²⁵² They again asked that their fisheries revert to their use once the leases of them expired.

For a period of three years our Island Fisheries have been leased and a small remuneration is made half-yearly — we think it would be more beneficial for us to repossess those fishing grounds ourselves when the given time expires in 1863 [...] If we could only have this privilege of all that we should call our own — have the sole management of our lands, our fisheries, our hunting, our timbers and monies, we would be satisfied and we do not see why we cannot be able to do so, while we have persons of our own blood, who can do all this, in any respect exactly the same as a white man.²⁵³

128. Gibbard reported in 1861 that the Americans to whom he had issued leases had destroyed valuable fishing grounds, including those at Saugéen, and that the fishing islands had been overfished by 27 gill net boats and 129 men. The Saugéen inland fishery, he noted, had also been "injured greatly" by Americans losing nets.²⁵⁴ He added, without seemingly making the connection between these reported activities and the aboriginal anger at the leasing system that, "[t]he

250. W.R. Bartlett to Chiefs and Warriors at Cape Croker and Colpoys Bay, NAC, RG 10, vol. 544, pp. 490-91, 10 March 1860.

251. Chiefs, Sachems and Principal Men of Cape Croker Grand Indian Council to Queen Victoria, NAC, RG 10, vol. 266, pp. 163,306-163,308, 17 April 1860.

252. *Ibid.*

253. *Ibid.*

254. *Ibid.*

Indians still continue to give great annoyance to our lessees. They do not fish to any extent on their own grounds (of which the leasing system has given them more than a reasonable share) but seem jealous of everyone and are anxious to drive all others away from their neighborhood".²⁵⁵

Concerned about what he perceived as unfair competition between Indian fishermen and white men, he noted that at Sauble River, "fish put up by Indians always sell at low rates".²⁵⁶ He ignored an offer from the Cape Croker Band to pay whatever white fishermen were paying to lease the islands, and justified the size of the Cape Croker fishing ground he had reserved for them by saying it was more than enough. "I have allotted them three times as much as they will ever require and more than they will ever think of using. In my opinion, all the Indians would be better men and better off if they never saw a fish".²⁵⁷

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

Up to the year 1857 the fisheries of Canada were not protected in any way. In the Session of that year, a bill passed the Legislature whereby amongst other provisions restrictions were placed upon the catching of fish, and leases were granted to those willing to pay for the exclusive right of fishing in certain places in the Crown domain. The object of these regulations was at once to preserve the fish themselves, which were being destroyed by netting and spearing, out of season, and to make these very productive fisheries a source of revenue. The Indians now assert that this Act trenches on their just rights, as they never surrendered the fisheries when they ceded their Land. I think that to establish this position, they should shew, that until the year 1857 they had enjoyed the monopoly of fishing in these waters.

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

256. *Ibid.*

257. Report of William Gibbard, NAC, RG 10, vol. 418, 9 August 1859.

In reality this was not the case; the Lakes and rivers were considered open to all. Everyone aided in the destruction of fish, though in a very few instances, rent was paid to some of the Indian tribes, not for the fishery itself alone, but for use of their Land as a station for drying the nets, curing the fish, etc.²⁵⁸

130. When diplomatic efforts failed to achieve results, the Saugeen Ojibway and other First Nations' peoples turned to increasingly forceful means of removing the interlopers from their waters. In 1857, Indian fishermen from Manitoulin Island lifted a number of nets belonging to non-native fishermen that were in the opinion of the Indian fishermen, set "in trespass within their fishery" and delivered the nets to J.C. Phipps, Indian Superintendent at Manitowaning.²⁵⁹ A similar incident occurred between Indian fishermen from the Christian Island Band and non-native fishermen who had set their nets within the Indian fishing grounds adjacent to Christian Island and the surrounding islands in Georgian Bay.

131. In 1862, Gibbard reported that fishing stations on the fishing islands were being "regularly destroyed by Indians".²⁶⁰ In 1863, he complained that "The Indians [...] still cause serious annoyance to fishery lessees and commit depredations upon their property. 'Tis very troublesome to arrange these difficulties in which the Indian tribes, and some half-breeds, are concerned".²⁶¹ At the Saugeen fishing islands, he stated that "fishing was not 1/10th of what it formerly was: buildings destroyed annually by Indians".²⁶² Gibbard's attitudes towards Indians were perhaps best expressed in a letter he wrote to the *Daily Globe* on March 21, 1863 in which he described the Manitoulin Odawa as "the most miserable-looking, ill-clothed, drunken, lying, stealing vagabonds in the whole band".²⁶³

258. Undated and unsigned, but probably a draft report from Sir Edmund Head, Governor in Chief, to the Duke of Newcastle, Secretary of State for the Colonies, NAC, RG 10, series 2, vol. 2, circa 1861 [emphasis in original].

259. Report of William Gibbard, *supra*, note 257.

260. V. LYTWYN, "Waterworld", *loc. cit.*, note 113, p. 24.

261. Appendix N° 42(b) to William Gibbard's Report on fisheries of Lakes, Huron and Superior, *Sessional Papers* No 5, 26 Vict. 1863, 19 January 1863.

262. *Ibid.*

263. Document referred to in evidence of Dr. Victor Lytwyn, in *R. v. Jones and Nadjiwon*, *supra*, note 4, 16 June 1992 [uncertified copy in author's file].

132. When no response had been received nearly two years after their request that the fisheries around White Cloud, Hay and Barriere Islands be returned to their use once leases expired, Joseph Jones, the Cape Croker Band's interpreter wrote to W.R. Bartlett at the Department of Indian Affairs, saying the Indians had become impatient.²⁶⁴ Bartlett responded, "I have not as yet received an answer (but) I hope when the question comes up for renewing the leases, the Government will not lose sight of the Indian's application".²⁶⁵ Events were soon to make this unlikely.

133. In the summer of 1863, aboriginal unrest resulted in a confrontation in the waters around Manitoulin Island. Responding to a report that the lessees of Lonely Island had been molested by an aboriginal party from Wikwemikong, Fishery Overseer Gibbard convened an armed posse and headed to the east end of Manitoulin Island to confront the alleged law-breakers. A confrontation took place on the shore in front of Wikwemikong, during which an armed standoff between Gibbard's 29 "constables" and a large party of Ottawa warriors, some 300 in number, took place. Gibbard and his posse were forced to depart. Enroute to Sault Ste. Marie, they stopped at Bruce Mines where Gibbard recognized a member of the Wikwemikong Band and arrested him although Oswanamkee had not been involved in the incident at Manitoulin Island. Gibbard took Oswanamkee to Sault Ste. Marie to be tried where he was ordered released by the local magistrate. On his return home by steamer, Gibbard was apparently murdered and thrown overboard. Oswanamkee was suspected, although never convicted of the crime.²⁶⁶

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

264. Joseph Jones to W.R. Bartlett, NAC, RG 10, vol. 519, pp. 827-28, 24 March 1862.

265. W.R. Bartlett to Joseph Jones, Interpreter, Cape Croker, NAC, RG 10, vol. 546, p. 26, 24 March 1862.

266. This incident is described in V. LYTWYN, "Ojibwa and Ottawa Fisheries around Manitoulin Island: Historical and Geographical Perspectives on Aboriginal and Treaty Rights", (1990) 6 *Native Studies Review*, pp. 21-22. See also P.J. BLAIR, "Taken for 'Granted': Aboriginal Title and Public Fishing Rights in Upper Canada", (2000) 92 *Ontario History* 31, p. 41.

or licences to the fishing places on Lake Huron were to be given to the Indians and that forthcoming amendments to the *Fisheries Act* of 1857 would preclude any exclusive titles being “granted” in the fisheries²⁶⁷ to Indians. Bartlett transmitted a letter from the Chiefs requesting that the Whitefish Island be reserved to their own use to the Department of Crown Lands.²⁶⁸ The response was that the Fishing Islands had already been leased to a man named Macaulay in preference to “lawless [aboriginal] fishermen”.²⁶⁹

III. ANALYSIS OF THE DECISIONS IN *NIKAL* AND *LEWIS*

A. RECOGNITION OF RIGHTS

135. Imperial Crown policy in the early 19th century clearly recognized exclusive aboriginal fishing rights at times, as the example of the Credit River Mississaugas alone has demonstrated. In other British colonies as well, governed by the same Imperial policy, there is evidence to support that such rights were indeed recognized.²⁷⁰ The 1840 Treaty of Waitangi between the British Crown and the Maori people of New Zealand, for example, confirmed to the Maori “the full and *exclusive and undisturbed possession* of their Lands and Estates, Forest and *Fisheries* and other properties, so long as it is their wish and desire to retain the same in their possession”.²⁷¹

Several New Zealand decisions in the 19th century had also determined that aboriginal people had exclusive rights to the fisheries within their territories. In the *Kauwaeranga* case of 1870, for example, the Chief Judge held that there was no reason why the Maori could not have ownership of the land covered by the sea at high-water, given the evidence of

267. W.R. Bartlett to Indian Chiefs and Warriors Cape Croker, NAC, RG 10, vol. 547, p. 72, 19 January 1864.

268. W.R. Bartlett to C.F. Walcot, Accountant, Indian Affairs, Québec NAC, RG 10, vol. 548, Reel C-13,359, p. 200 30 August 1864.

269. A. MacNabb to W.R. Bartlett, NAC, RG 10, vol. 421, p. 10, 26 August 1864.

270. Imperial officers, furthermore, served in colonies other than Canada. Sir Francis Bond Head, for example, served in Argentina in the 1820s, see D.B. SMITH, *op. cit.*, note 61, p. 162.

271. Treaty of Waitangi (1840) [emphasis added].

their "consistent and exclusive use of the fisheries" from time immemorial.²⁷² For the court in *Kauwaeranga*, the question was not a legal analysis of whether the Crown had acquired the prerogative right to the foreshore as a result of its assertion of sovereignty but a very different test from that applied by the Supreme Court of Canada. The real question, the Court stated, was a question of fact, namely, "Was the land now claimed at the date of the Treaty of Waitangi, land or a fishery collectively or individually possessed by aboriginal natives? For, if it was, the full, exclusive and undisturbed possession of it thereof is confirmed and guaranteed".²⁷³

136. The factual underpinnings of the rulings in *Nikal* and *Lewis* that fisheries were not part of the lands reserved for Indians are at odds with decisions reached by trial judges which have heard and assessed expert evidence in the full context of a trial. Indeed, the historical facts found to exist by the Supreme Court of Canada in *Nikal* and *Lewis* are inconsistent with the Supreme Court's earlier adoption of facts found at trial in its ruling in *Jack v. The Queen*.²⁷⁴ The trial court in *Jack* made factual findings that fishing grounds had been reserved for Indians in the vicinity of their lands through recommendations from the Minister of the Interior adopted by the Governor in Council on April 24, 1874. One of these recommendations was that "[g]reat care should be taken that the Indians especially those inhabiting the Coast should not be disturbed in the enjoyment of their customary fishing grounds, which should be reserved for them previous to white settlement in the immediate vicinity of such localities."²⁷⁵

137. The Supreme Court of Canada held in *Jack* that trial judge's findings were "a fair interpretation of the historical and expert evidence in the case" and declined to interfere with them.²⁷⁶ As the Supreme Court outlined in *Jack*:

272. *Kauwaeranga* (1870) printed as *Kauwaeranga Judgment*, (1984) 14 V.U.W.L.R. 227.

273. *Id.*, p. 243.

274. *Jack v. The Queen*, [1979] 2 C.N.L.R. 25 (S.C.C.).

275. Memorandum of David Laird, Minister of the Interior and Minister responsible for Indian matters, submitted to the federal Cabinet and adopted by the Governor in Council on April 24, 1874, cited in *Jack*, *ibid.*

276. *Ibid.*

It is extremely difficult to separate out the fishery from either Indians or the lands to be reserved for Indians. In the latter case, lands were to be reserved to Indians for the purpose of permitting them to continue their river fishery at the customary stations. In the former case, the Indians were to be encouraged to exploit the fishery, both for their own benefit and that of incoming white settlers, as a means of avoiding the Indians becoming a charge upon the colonial finances. However one wishes to view the pre-Confederation "policy" it undoubtedly included some elements of an Indian fishing policy.²⁷⁷

The Supreme Court concluded in *Jack* that "pre-Confederation policy gave the Indians a priority in the fishery".²⁷⁸ It should be observed that a priority in a fishery, however it is ranked, is inconsistent with the notion of "public" rights and equal access to fisheries by all, in and of itself.

The decision in *Jack* confirmed that a policy of recognition and non-interference in early Crown policy was predicated on the fact that there was no interest on the part of non-aboriginal people in the sports or commercial fishery at that time.²⁷⁹ As the Court observed, "In 1871, there was no commercial fishery of any importance or scale. Sport fishing had yet to develop into a significant pastime on the part of the white residents".²⁸⁰ This in itself is a compelling reason to reject the Supreme Court of Canada's interpretation of Crown policy in *Nikal* and *Lewis*, and its insistence that the Crown would have "reserved to itself" the fishery from the lands transferred by the province to the federal government for dedication as a reserve.

138. In the circumstances prior to settlement, there was no practical reason for the provincial or federal Crown to have reserved to itself or for public use the fishery in waters in which little or no sports fishing, and no commercial fishing by non-aboriginal people was taking place. There seems to have been nothing extraordinary or startling about Justice Rose's conclusion in *Caldwell v. Fraser*, in 1898 that adjacent waters could be considered to be part of a reserve and part of the

277. *Id.*, p. 37.

278. *Id.*, p. 41.

279. *Id.*, p. 35.

280. *Ibid.*

Indian title until surrendered; just seven years earlier, the Mohawks of the Bay of Quinte had been asked to surrender a portion of the underlying bed of the Bay of Quinte out to navigable or deep waters. If the underlying bed was not understood to be part of either the Mohawk aboriginal title or rights under the Simcoe Deed, such a surrender would clearly not have been necessary.

B. ASSUMING “GRANTS” OF RIGHTS ARE REQUIRED

139. Because lands had been transferred from the province of British Columbia for dedication as reserves, the Court apparently failed to consider how, or even if, the province had acquired title in the first place to unsurrendered lands covered with waters. Nonetheless, the Court somehow concluded that a “grant” of fishing rights to aboriginal people from the Crown was required. In *Lewis*, the Supreme Court of Canada held that the Crown had not intended the aboriginal fishery to be part of the Squamish River reserve. Justice Iacobucci, speaking for the majority, wrote :

Considerable historical evidence indicates that it was never the Crown’s intention at any point in time to include a fishery as part of the reserve. A desire of both the provincial and federal governments to support and protect native fishing does not amount to *granting* exclusive right to fishing grounds. In fact, statements and legislation both pre-Confederation and post-Confederation demonstrate that the Crown’s policy was to treat Indians and non-Indians equally as to the use of the water and not to *grant* exclusive use of any public waters for the purpose of fishing.²⁸¹

140. The Supreme Court’s analysis of the *Nikal* case was written by Justice Cory, who began by stating that “[At] the outset, it must be emphasized that a consideration of the by-law raises the question of whether an exclusive right to fish in the Bulkley River at Moricetown was *granted* to the Band”.²⁸² The Crown policy against “granting” exclusive interests within

281. *Lewis*, *supra*, note 3, p. 141 [emphasis added].

282. *Nikal*, *supra*, note 2, p. 186 [emphasis added].

public waters was found to be fatal to the aboriginal appellants' claim to self-regulation by by-law in both cases.²⁸³

141. The use of the term "granted" raises an initial concern as to whether Justice Cory or Justice Iacobucci were aware of the distinction between ceded and unceded lands or even the nature of pre-existing aboriginal title and rights. The fact that a reserve was set aside did not necessarily mean the Crown "granted" lands to the Moricetown Band. Reserved lands can include lands which have never been the subject of a surrender.²⁸⁴

The assumption on which the Court proceeded seems to have been that there was no aboriginal title in the area in question and that reserve lands became the subject of an exclusive aboriginal interest only when they became "reserved" or "granted to" Indians. On this view, British Columbia's reserves would not have become "lands reserved for Indians" until 1938 when the province conveyed its "reversionary interest" in them to Canada.²⁸⁵ However, aboriginal title was not extinguished by treaty in most of British Columbia; the leading case discussing federal constitutional authority to set aside reserve lands within a province is premised on the prior extinguishment of aboriginal title in those lands.²⁸⁶

142. Although it does not say so, the Supreme Court in *Nikal* and *Lewis* either assumed that aboriginal title could not exist in waters, or assumed that the dedication of lands for use as reserves in both *Nikal* and *Lewis* had somehow severed aboriginal title, such that lands had to be "granted" with an intention to convey exclusive fishing rights before aboriginal rights in waters could exist. However, according to the Privy Council

283. *Ibid.*

284. See *Caldwell v. Fraser*, *supra*, note 99.

285. For a discussion of the flaws in this line of reasoning, see H. FOSTER, "Roadblocks and Legal History: Part II: Aboriginal Title and 91(24)", (1996) 54 *The Advocate* 531.

286. *Ontario Mining v. Seybold*, (1902) 3 CNLC 203 (J.C.P.C.) The doctrine of "discovery" supposedly gave title to the government by whose subjects or by whose authority it was made against all other European governments. However, even the principle of discovery could not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a discovery made "before the memory of man". Discovery did not divest indigenous peoples of their pre-existing rights. The idea that it might have done so has been flatly rejected. See *Worcester v. Georgia*, 31 U.S.(6 Pet.) 515 (1832) (Supr. Ct.).

in the 1898 *Fisheries Reference*, the beds of Indian lands and unsurrendered Indian lands, including those covered with waters, had never vested in the provinces at Confederation but remained vested in the federal government.²⁸⁷ The dedication of lands by the province, then, is completely irrelevant; further, the federal government may not grant that which it does not fully possess.

143. The Court also repeatedly referred to “grants” from the Crown without considering that the only Crown lands that could be granted to anyone were those which had already been surrendered by Indians; in other words, not grants *to* Indians, but grants *from* them.²⁸⁸ In *R. v. Taylor and Williams*, the Ontario Divisional Court noted that pre-existing aboriginal rights continue, unless granted away by a treaty.

Aside from the question as to whether or not aboriginal rights were reserved in the treaty, it is also my opinion that even in a situation *where there is no treaty*, or if a treaty remains silent with respect to aboriginal rights, such as native hunting and fishing, these rights that have existed from the beginning of time continue [...] Unless *those specific rights have been taken away by a treaty, provincial legislation such as the Game and Fish Act in question cannot abrogate from those original privileges, forming part of the “Indian Title”*.²⁸⁹

144. The reservation of lands is a retention of that which has not been surrendered; reserve status protects pre-existing aboriginal rights but does not create them.²⁹⁰ In fact, this point

287. *A.G. for the Dominion of Canada v. A.G. Ontario, Québec and Nova Scotia*, [1898] AC 700 (J.C.P.C.), pp. 703, 712 and 716 [referred to as the *Fisheries Reference*].

288. This has been explained in the United States as the “reserved rights” doctrine in which treaties reserve all rights which have not been explicitly granted away, *United States v. Winans*, 198 U.S. 371, 381 (1905).

289. *R. v. Taylor and Williams*, [1980] 1 C.N.L.R. 83 (Ont. Div. Court), p. 90, aff’d [1981] 3 C.N.L.R. 114 (Ont. C.A.) [emphasis added].

290. As Justice L’Heureux-Dubé noted in her dissent in *R. v. Van der Peet*, *supra*, cited in note 4, p. 224 (S.C.C.): “A piece of land can be conceived of as Aboriginal title land and later become reserve land for the exclusive use of Indians; such land is then, reserve land on Aboriginal title land. Further, Aboriginal title land can become Aboriginal right land because the occupation and use by the particular group of Aboriginal people has narrowed to specific activities. The bottom line is this: on every type of land described above, to a larger or smaller degree, Aboriginal rights can arise and be recognized”.

was argued by the Attorney General of Ontario in its written factum filed (but later withdrawn) as Intervenor in *Nikal* :

Aboriginal rights do not — and cannot, as such — derive by grant from the sovereign; their anchorage necessarily reaches back before Crown sovereignty was established and they continue, at common law, until the sovereign takes specific and competent steps to extinguish them.²⁹¹ [...] The only additional impact express reservation would have had would have been to give such rights sooner the status and protection that section 35(1) of the Constitution Act now accords them.²⁹²

145. The Supreme Court did not explain exactly how it came to be that the public acquired rights in areas in which Indian surrenders and cessions had not been obtained. As the Canadian Bar Association has asked, quite succinctly, “[...] the question remains unanswered: How did the Crown, whether English, French, Imperial, Dominion or Federal, obtain the jurisdiction and therefore the right to *grant* civil jurisdiction to Indians?”²⁹³ Similarly, one must ask “How did the Crown, and thereby the public, obtain the title to the fisheries in unsundered Indian lands and the right to “grant” title to Indians?” The rather obvious conclusion is that they did not, and that aboriginal people continue to hold exclusive fishing rights within areas in which aboriginal title remains unsundered.

146. In *R. v. Van der Peet*, the Supreme Court stated that “the challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined [...] a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives”.²⁹⁴ The legal perspective of First Nations’ peoples within Ontario was that they were entitled to regulate their fisheries. In the early post-contact

291. *Factum of the Intervenor Attorney General of Ontario*, p. 7, para. 64. Ontario withdrew from the appeal before it was heard.

292. *Id.*, para. 65.

293. C. SCOTNICKI, *Aboriginal Civil Jurisdiction in Canada*, Toronto, Canadian Bar Association, p. 23.

294. *R. v. Van der Peet*, *supra*, note 4, p. 202.

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.

C. TAKING JUDICIAL NOTICE OF CONTENTIOUS HISTORICAL "FACTS"

147. It is of genuine concern that the Supreme Court of Canada in *Nikal* accepted newly tendered historical information from the intervenor, the Canadian National Railway Company, over the protests of the aboriginal appellants, information which had not been before the trial judge or the various appeal courts.

This historical information then formed the basis of the decision in *Lewis*, which adopted the conclusions reached in *Nikal*. Justice Cory explained:

At the outset I would confirm that I have read and relied upon some of the historical documents filed by the intervenor Canadian National Railway Company. The appellant objected to any use being made of these documents. I cannot accept that position. First, all parties have had an opportunity to review the documents and make submissions pertaining to them. Further, these are all documents of a historical nature that can be found in the public archives. They are available for use by all members of the public.²⁹⁵

148. In receiving information which was clearly out of context, it is suggested that the Court adopted a procedure which resulted in the Court making fundamental mistakes in the manner in which it accepted and evaluated historical information. Since on their face, the decisions in *Nikal* and *Lewis* could serve to limit and restrict aboriginal fishing rights in Ontario to the rather limited priority recognized in *Sparrow*, the Court's reliance on contentious historical facts relating to

295. *Nikal*, *supra*, note 2, p. 186.

Upper Canada, in a case concerning two British Columbia First Nations, must be firmly rejected. Judicial notice, it is urged, must be judicious notice as well.

149. The Supreme Court of Canada first determined in *R. v. Sioui*²⁹⁶ that it could entertain historical information for the first time on appeal and even conduct its own historical research. In *Sioui*, Justice Lamer had written :

I am of the view that all the documents to which I will refer whether my attention was drawn to them by the intervenor or as a result of my personal research are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge. As Norris, J.A. said in *White and Bob* (at p. 629): "The Court is entitled to take judicial notice of the facts of history".²⁹⁷

150. This was not the first time an appeal court had taken such a position. In *R. v. Bartleman*²⁹⁸ one member of the British Columbia Court of Appeal conducted his own private research, apparently not sharing the contents with other members of the court.²⁹⁹ Mr. Justice Esson, (Carrothers J.A. concurring) expressed some concern about this procedure :

I agree [with the reasons of Justice Lambert] subject only to the reservation that I have not seen or considered the historical material, referred to by Mr. Justice Lambert in the section of his reasons entitled "Judicial Notice of Historical Facts" which was not included in the evidence at trial or the record

296. *R. v. Sioui*, [1990] 3 C.N.L.R. 127 (S.C.C.).

297. *Id.*, p. 144.

298. *R. v. Bartleman*, *supra*, note 211.1.

299. In *Bartleman*, *id.*, p. 116, Mr. Justice Lambert under the heading, "Judicial Notice of Historical Facts" wrote: "I have examined at the provincial archives the foolscap notebook inscribed *Register of Land Purchases* from Indians [...] and I have examined the documentary part of the Nanaimo Treaty. I have also examined the original incoming letters and a transcribed compilation of the outgoing letters, between Fort Victoria and the Hudson's Bay Company Offices in London, for the period 1849 to 1852. Much of this material was put in evidence. But some of it was not. To that extent, and to that extent only, I have gone outside the evidence led at trial. In doing so, I have regarded myself as taking judicial notice of indisputable, relevant, historical facts by reference to a readily obtainable and authoritative source, in accordance with the ordinary principle of judicial notice [...] For the purposes of my independent verifications, I have reached only those conclusions which I regard as beyond rational dispute".

before this court. Without reference to such material, I have reached the same conclusion as Justice Lambert. [...] That being so, I do not need to consider the question whether the doctrine of judicial notice would permit reference to other material.³⁰⁰

151. In *R. v. Augustine and Augustine*³⁰¹ the New Brunswick Court of Appeal was also critical of such an approach. In an appendix for his reasons for judgment acquitting the appellants, the Provincial Court Judge had listed “material considered” by him including an “Historical Ethnography of the Micmac 16th and 17th Centuries”, material not produced at the trial but supplied to the judge at his request by counsel for the appellants who neglected to furnish a copy to Crown counsel.³⁰² The Crown objected that in relying upon material not introduced at trial to determine a question of fact, the trial judge had violated the principle that courts should act only on evidence given in open court.³⁰³ The Court of Appeal agreed.

There is authority for the proposition that a court may take judicial notice of the facts of history whether past or contemporaneous and that the court is entitled to rely on its own historical knowledge and researches: see *Calder et al v. A.G.B.C.* (1973) 34 D.L.R. (3d) 145 (S.C.C.) and *R. v. Polchies et al*, previously cited. But there are limits. The general rule or principle of judicial notice was stated by O’Hearn County Court Judge in *R. v. Bennett* (1971) 4 C.C.C. (2d) 55 at p. 66 as follows:

Courts will take judicial notice of what is considered by reasonable men of that time and place to be indisputable either by resort to common knowledge or to sources of indisputable accuracy easily accessible to men in the situation of members of that court.

Although the contentious article by Mr. Hoffman is not part of the record on this appeal, I would agree with Meldrum, J. that it ought not to have been considered by the Judge of first ins-

300. *Id.*, p. 132.

301. *R. v. Augustine and Augustine*, [1987] 1 C.N.L.R. 20 (N.B.C.A.).

302. *Id.*, p. 30.

303. *Ibid.* [emphasis added].

tance because it was not established to be a source of either indisputable accuracy or authority.³⁰⁴

152. In *R. v. Paul*, the New Brunswick Court of Appeal admonished an appeal judge for conducting his own historical research, holding:

[...] there is no authority for taking judicial notice of disputed facts, whether they be historical or otherwise [...] Mr. Justice Turnbull should not have decided the case on his independent historical research. The short answer is that the appeal provisions noted earlier restricted him to the trial transcript. The longer answer, which follows, is that there is neither authority for making such extensive use of historical material *under the guise of judicial notice* nor for using such material without giving notice to the parties.³⁰⁵

153. It is troubling that the Supreme Court of Canada has decided that where historical records are put forward for the first time on appeal, it possesses the expertise to review such materials and to draw accurate inferences from their contents by way of “judicial notice” simply because the documents are public in nature. The mere fact that historical documents are “public” and generally easy to read, as opposed to medical or scientific documents, does not mean the Court possesses the expertise to evaluate the contents in a proper context. As stated by Justice MacEachern in *Delgamu’ukw v. B.C.*, “[W]hat a document says is for the court, but in this process, the court not only needs but urgently requires the assistance of someone who understands the context in which the document was created”.³⁰⁶

154. It is suggested that since virtually all “facts” of history involving aboriginal people are disputed, given the very differing perspectives on what took place, interpretations of that context, whoever provides them, should be tested through cross-examination. Credibility is as important to determine with regard to the interpretation of historical evidence as it is in other areas where bias may occur.

304. *Ibid.*

305. *R. v. Peter Paul*, [1998] 3 C.N.L.R. 221 (N.B.C.A.), p. 227 [emphasis added].

306. *Delgamu’ukw v. B.C.*, [1990] 1 C.N.L.R. 20 (B.C.S.C.), p. 27.

A trial court is entitled to take judicial notice of certain historical facts contained in authoritative sources such as published maps,³⁰⁷ but the Supreme Court of Canada is not a trial court. It does not hear *viva voce* evidence from experts who can assist in the interpretation of the documents, and it can be ignorant of facts needed to properly understand such information. Of even more importance is the fact that if the Supreme Court of Canada gets its facts wrong by behaving as a court of first instance, there is no remedy to correct the wrong, and no higher court to which to appeal.

155. The reception of materials in *Nikal* at the final level of appeal was unfair to the aboriginal parties who opposed the documents' admission. It is even more troubling when the Court itself takes information out of context. Somewhat ironically, Justice Cory in *Nikal* acknowledged the need to place historical information in context, stating :

In this case much has been said as to the general practice of the Crown in allocating reserves to native peoples. Evidence of a general practice may be particularly helpful in determining the scope or extent of native rights. The relevant evidence is sometimes lost and that which remains must be carefully placed in context so that its true significance is neither distorted nor lost.³⁰⁸

SUMMARY AND CONCLUSION

156. In determining the "facts" of history in *Nikal* and *Lewis*, the Supreme Court of Canada began with a set of assumptions which shaped the decisions it reached. These assump-

307. See *R. v. Bartleman*, *supra*, note 211; *R. v. Zundel*, (1987) 31 C.C.C. (3d) 97 (Ont. C.A.) leave to appeal to S.C.C. refused 61 OR (2d) 588n, and with regard to maps, *R. v. Jameson*, [1896] 2 QB 425. See also *Sioui*, *supra*, note 296, p. 144 with regard to the admissibility of historical documents on the basis of judicial notice.

308. *Nikal*, *supra*, note 2, p. 187. In *R. v. Paul and Polchies*, [1986] 1 C.N.L.R. 105 (N.B. Prov. Ct.), the court specifically noted at pages 116-117 that previous decisions, including a 1981 decision of the New Brunswick Court of Appeal, dealing with a 1725 treaty had become *per incuriam* as a result of new historical information which had been discovered since and which had not been judicially considered.

tions presupposed that what the aboriginal people received was only that “granted” to them.

It is difficult to comprehend how historic Crown policy could be considered to be determinative of whether exclusive aboriginal fishing rights existed in the past. Nonetheless, the Court in *Nikal* and *Lewis* arrived at this very conclusion, relying heavily on historical evidence put forward on appeal relating to Crown policy towards aboriginal and non-aboriginal fishing rights in Upper Canada. The Court received and took judicial notice of contentious historical facts which had not been before the trial or appeal courts earlier and did so over the objections of the aboriginal appellants. The Court’s failure to appreciate the context of the evidence it accepted, indeed its failure to appreciate that such information might *be* contentious, may have made a significant difference to the outcome of the two cases. As has been demonstrated, the historic Crown policy the Supreme Court relied on in *Nikal* and *Lewis* was not consistent, as the Court suggested, but arose at specific times to address non-aboriginal needs.

157. Early Imperial Crown policy recognized aboriginal rights within navigable waters, including exclusive fisheries when there were few settlers and many Indians. A colonial Crown policy denying these rights was not in evidence until surrenders had been obtained allowing settlement and aboriginal fisheries had become the subject of non-aboriginal interest.³⁰⁹ Nonetheless, the Court determined — based on an incomplete understanding of Crown policy and how it had evolved — 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.

158. The challenge now for aboriginal peoples throughout Canada will be to persuade the courts, as these issues arise, that the decisions in *Nikal* and *Lewis* were indeed wrongly decided, and should not be used to limit or restrict existing First Nations’ rights. In many areas of Ontario, surrenders

309. For a full discussion of this point, see P.J. BLAIR, “Taken for ‘Granted’”, *supra*, note 266, p. 41.

have not been obtained from aboriginal peoples of their interests in rivers, streams and lake. In these areas, there may still be exclusive aboriginal fishing rights derived from aboriginal title to lands "covered with water".

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