LANDING NATIVE FISHERIES

Indian Reserves & Fishing Rights in British Columbia, 1849-1925

DOUGLAS C. HARRIS

ı socially embedded phenomenon.
conventional division of law from
, scholarship, educational practice,
ınd society as mutually constitutive
m interdisciplinary engagement of
ıeory, history, political economy,

e end of this book.

LANDING NATIVE FISHERIES

Indian Reserves and Fishing Rights in British Columbia, 1849-1925

DOUGLAS C. HARRIS

UBCPress · Vancouver · Toronto

16 15 14 13 12 11 10 09 08 5 4 3 2 1

Printed in Canada with vegetable-based inks on FSC-certified ancient-forest-free paper (100% post-consumer recycled) that is processed chlorine- and acid-free.

Library and Archives Canada Cataloguing in Publication

Harris, Douglas C. (Douglas Colebrook)
Landing native fisheries : Indian reserves and fishing rights in British Columbia, 1849-1925 / Douglas C. Harris.

(Law and society 1496-4953)
Includes bibliographical references and index.
ISBN 978-0-7748-1419-5 (bound); ISBN 978-0-7748-1420-1 (pbk.)

1. Indians of North America – Fishing – Law and legislation – British Columbia – History. 2. Fishery law and legislation – British Columbia – History. 3. Indians of North America – Legal status, laws, etc. – British Columbia – History. 4. Indians of North America – Land tenure – British Columbia – History. 5. Indians of North America – Canada – Government relations. I. Title. II. Series: Law and society series (Vancouver, B.C.)

KEB529.5.H8H373 2008 346.71104'6956 C2008-900087-0

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada through the Book Publishing Industry Development Program (BPIDP), and of the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Aid to Scholarly Publications Programme, using funds provided by the Social Sciences and Humanities Research Council of Canada, and with the help of the K.D. Srivastava Fund.

UBC Press
The University of British Columbia
2029 West Mall
Vancouver, BC V6T 1Z2
604-822-5959 / Fax: 604-822-6083
www.ubcpress.ca

wcomers were already marking
n."[8] Within the colonial state,
ras savage (not or insufficiently

arkers of possession within En-
ıal ownership, but also evidence
relation to Native peoples, su-
ture that produced them, of an
ese domestic and mundane acts
British dominion separated the
who lived differently in the same
ı colonial powers in the western
ased their claims to sovereignty
assertion of sovereignty and the
displaced prior ways of living on
ce that underscored the dismem-
commons, the creation of private
sion pushing out those who once

els of land to newcomers through
d that could be perfected once the
aid, and evidence of improvements
d Indian reserves. Beginning with
er Island in 1849, these processes,
and land available for the exclusive
ı tandem for seventy-five years, the
ıg a few years behind increased set-
when the Dominion and provincial
ırded as the final reserve geography
ption of the Douglas Treaties on
: northeast, the issue of Native title
Native peoples over the shared use of

rative of the conflict over fish, focus-
ents and the introduction of Anglo-
th the Douglas Treaties and, more
ınd of rights to fish. It then turns to
relation to the fisheries. This discus-
ıe fact that fisheries were not yet a site
comers. The inexhaustible abundance
some imagined the resource could be

a future source of great wealth, there was little non-Native interest. That was not the case in the Great Lakes fisheries, already the site of protracted conflict between Native and non-Native fishers and the colonial government in Upper Canada and then Canada West. It was this history of conflict that British Columbia acquired when it joined the Canadian confederation in 1871 and ceded jurisdiction over fisheries to the Dominion. The chapter concludes with a brief foray into that history.

Treaty and Native Rights to Fish

The agreements known as the Douglas Treaties are fourteen land purchases made by James Douglas in his capacity as the Hudson's Bay Company's chief trader, and then governor of the colony of Vancouver Island, between 1850 and 1854. The land, purchased from Native peoples on Vancouver Island, covered a small fraction of the island, including the area around Victoria, the Saanich Peninsula, the future townsite of Nanaimo midway up the island, and an area near Fort Rupert at its northeastern end (Figure 1.1). The treaties loom over the process of reserve allotments in British Columbia, marking the beginning of an unfinished project to treat with Native peoples and serving as a reminder of the suppressed yet outstanding question of Native title.

Much has been written about why Douglas undertook these purchases on Vancouver Island and why he did not continue them. It seems that recognition of a legal requirement to extinguish Native title was an important part of his motivation for beginning the process, but ebbing enthusiasm for treaties in the Colonial Office in London reduced the incentive to continue the process when other interests intervened. Cole Harris has emphasized Douglas's pragmatism, born of a lifetime in the fur trade, suggesting that he was less concerned about theories of Indian land policy and even of the law of Native title than about finding workable solutions for Native and European coexistence.[11] Legal historians Hamar Foster and Alan Grove suggest that the decision of an Oregon court to deny the existence of Native title, discredited in Oregon and Washington but picked up in Alaska, may also have influenced Douglas and his successor in the formation of colonial land policy, Commissioner of Lands Joseph Trutch, who was openly hostile to the idea of Native title.[12]

The legal standing of Native title may have been fragile enough in the mid-nineteenth century that colonial authorities were prepared to ignore it, but there was less doubt about the existence of specific Native rights, particularly rights to hunt and fish. Moreover, protecting these rights, on which Native economies depended, fit Douglas's pragmatism. Native peoples' hunting could coexist with non-Native ownership, if not use and

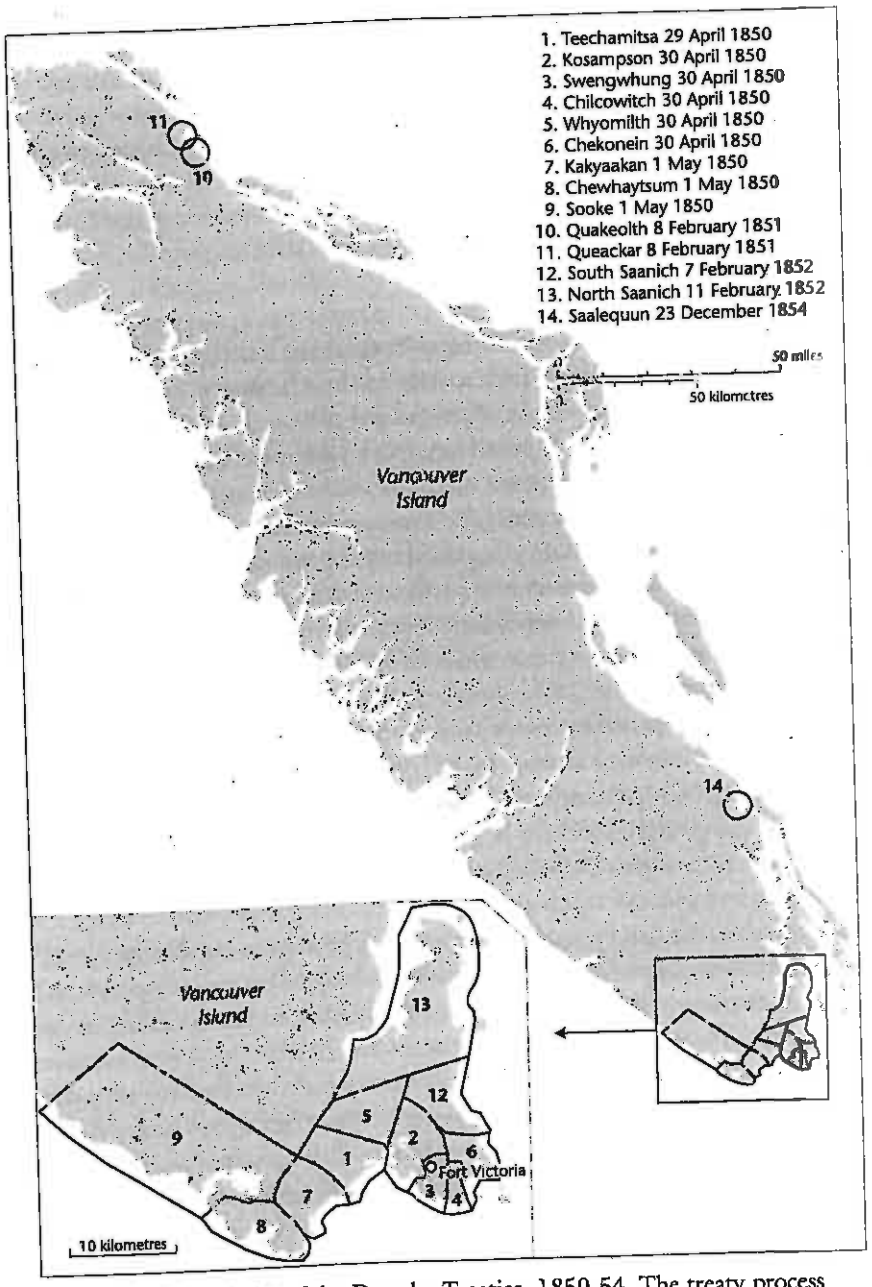

Figure 1.1 Boundaries of the Douglas Treaties, 1850-54. The treaty process did not continue beyond 1854, leaving the issue of Native title unresolved on the rest of Vancouver Island and throughout most of the mainland colony of British Columbia. | *Source:* The treaty boundaries were adapted from the information available in the Government of Canada's Directory of Federal Real Property (http://www.tbssct.gc.ca/dfrp-rbif/treaty-traite.asp?Language=EN).

eaties, 1850-54. The treaty process
issue of Native title unresolved on the
nost of the mainland colony of British
ere adapted from the information available
ederal Real Property (http://www.tbssct.
).

occupation, of the land, and the fishery could be secured without much impact on the land available for incoming settlers. In anticipation of the treaties, Douglas wrote to the HBC that he "would strongly recommend, equally as a matter of justice, and from regard to the future peace of the colony, that the Indians Fishere's [sic], Village Sitis [sic] and Fields, should be reserved for their benifit [sic] and fully secured to them by law."[13] HBC secretary Archibald Barclay, in setting out the Company's obligations and policy towards Native peoples on Vancouver Island, instructed Douglas that the "right of fishing and hunting will be continued to them."[14]

On the basis of these instructions, Douglas entered negotiations with the tribes on southern Vancouver Island. After minimal discussions (of which no minutes were kept), Douglas asked the chiefs to place X's on blank sheets of paper. Following the conclusion of the first nine agreements at Fort Victoria between 29 April and 1 May 1850, Douglas wrote to the HBC to explain his understanding of what had transpired: "I informed the natives that they would not be disturbed in the possession of their Village sites and enclosed fields, which are of small extent, and that they were at liberty to hunt over unoccupied lands, and *to carry on their fisheries with the same freedom as when they were the sole occupants of the country.*"[15] He forwarded the "signatures" of the chiefs and asked that the HBC supply the proper conveyancing instrument to which the signatures could be attached. Several months later, Barclay replied, approving the agreements and sending a template purchase agreement, based on New Zealand precedents, that would become the text of the Douglas Treaties.[16] The first paragraph described the lands that were covered by the treaty; the second described the terms:

> The condition of or understanding of this sale is this, that our [Indian] village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us; and the land shall be properly surveyed, hereafter. It is understood, however, that the land itself becomes the entire property of the white people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and *to carry on our fisheries as formerly.*[17]

Although the structure and content of Barclay's template emulated the New Zealand deeds, the final clause setting out the hunting and fishing rights was new. The guarantee that the Indians were to be "at liberty ... to carry on [their] fisheries as formerly" appears to be an abbreviated version of the agreement as described by Douglas several months earlier: "They were at liberty ... to carry on their fisheries with the same freedom as when they were the sole occupants of the country."

Given these events, the treaties are best understood as oral agreements. The written text, based on imperial precedent, drafted by someone not present at the negotiations, and supplied months afterward, should be considered as evidence of the terms of those agreements, not as the agreements themselves. As evidence, the written text probably provides reasonable indication of what the HBC thought it needed to do and how Douglas understood the treaties. The anthropologist Wilson Duff considered the text to be "the white man's conception (or at least his rationalization) of the situation as it was and of the transaction that took place."[18] It provides little or highly qualified evidence, at best, of how the Native participants understood the agreements.[19]

Even the terms of the written text are not self-evident.[20] It is clear, however, that "fisheries" were an important part of the agreement. A "fishery" or its plural, "fisheries," refers not only to the act of fishing but also to the places where it occurs. In reserving "fisheries," therefore, the Douglas Treaties reserved the right to fish at the places where Native people fished. Several years after concluding the last of the treaties, Douglas informed the Vancouver Island House of Assembly, in similarly broad terms, that Native peoples "were to be protected in their original right of fishing on the coast and in the bays of the Colony."[21] In describing the fishing right as "original," Douglas meant that it preceded the British assertion of sovereignty, not that it was otherwise constrained.

In short, the Douglas Treaties provided broad protection for Native fisheries. In the 1850s, the boundaries of the right did not need to be carefully drawn. An abundance of fish was presumed, and there was little non-Native interest in prosecuting a fishery. However, the fisheries were certainly not an afterthought. The HBC had deployed some of its workers to the fisheries of the Fraser River in the 1840s but had realized that it was more efficient and effective to purchase fish from Native fishers. These fish, which the HBC barrelled and salted on the Fraser beginning in the 1820s, had become one of its principal exports from the Pacific coast of North America.[22] Thus, the treaties were concluded in a context of well-established and ongoing commercial activity in the fishery involving the HBC and Native peoples. Douglas believed that this would continue, and he hoped that it would grow. It is hard to imagine, therefore, that the right to "fisheries as formerly" did not include a commercial aspect, such as the right to sell fish to commercial trading companies. Furthermore, there is no indication that Douglas thought that the treaty protected only a food fishery. In fact, viewing "Indian food fishing" as a separate category was not yet a way of thinking about Native fishing in British Columbia. The concept, established in Canadian fisheries regulations in the late nineteenth century, would become

nderstood as oral agreements.
lent, drafted by someone not
nths afterward, should be con-
agreements, not as the agree-
xt probably provides reasonable
:eded to do and how Douglas
st Wilson Duff considered the
r at least his rationalization) of
ı that took place."[18] It provides
of how the Native participants

ɔt self-evident.[20] It is clear, how-
rt of the agreement. A "fishery"
the act of fishing but also to the
:s," therefore, the Douglas Trea-
:es where Native people fished.
ıe treaties, Douglas informed the
imilarly broad terms, that Native
ginal right of fishing on the coast
ribing the fishing right as "origi-
: British assertion of sovereignty,

l broad protection for Native fish-
right did not need to be carefully
:d, and there was little non-Native
:r, the fisheries were certainly not
some of its workers to the fisheries
realized that it was more efficient
:ive fishers. These fish, which the
· beginning in the 1820s, had be-
ıe Pacific coast of North America.[22]
:ontext of well-established and on-
:y involving the HBC and Native
ıld continue, and he hoped that it
efore, that the right to "fisheries as
aspect, such as the right to sell fish
hermore, there is no indication that
:d only a food fishery. In fact, view-
category was not yet a way of think-
ıumbia. The concept, established in
e nineteenth century, would become

an important part of fisheries management and an effective way to diminish Native peoples' access to the fish, but it was not part of the framework in which the treaties were negotiated.[23]

However, Douglas certainly did not intend to preclude non-Native participation. He believed that the long-term prosperity of the colony depended on attracting immigrants, and the fisheries would be one of the principal draws for those newcomers. The HBC had sought control of the fisheries as part of the Crown grant of Vancouver Island, but the Crown withdrew this provision, which had appeared in an early draft, in the midst of public disapprobation of the HBC in London.[24] As a result, the HBC prospectus for the colonization of Vancouver Island informed prospective settlers that "*every freeholder shall enjoy the right of fishing* all sorts of fish in the seas, bays, and inlets of, or surrounding, the said Island."[25] In tidal waters, then, the prospectus asserted the right of the landowning public to fish as, indeed, the common-law doctrine of the public right to fish established for the public at large.

It was not until the creation and expansion of the industrial commercial fishery in the 1870s that Native rights to fish began to be challenged and that the meaning of the fisheries clause in the Douglas Treaties began to matter – and to be forgotten or ignored. In May 1878, complaints that the Esquimalt people were wasting fish roe were registered in the provincial legislature. Indian Reserve Commissioner Gilbert Malcolm Sproat noted that the allegations, if true, were to be regretted, but that the Esquimalt were a party to one of the Douglas Treaties, which protected their right to fish, and therefore the government could not interfere.[26] A settler's preemption at the mouth of the Goldstream River in Saanich Inlet was another source of concern because, as Sproat pointed out, it would interfere with the treaty fishing rights of several different bands that occupied the location seasonally.[27] Sproat, at least, interpreted the treaty right broadly.

What about Native peoples who were not party to the Douglas Treaties? The language of the fisheries clause – that Native people were "at liberty ... to carry on ... fisheries as formerly" – suggests that the treaties should not be understood as creating or granting a right to fish. Instead, the clause turned an existing practice and right into a treaty right. Native peoples in the rest of the province did not have this treaty right, but they still had rights that pre-existed the treaties. In 1860, Douglas wrote to the Colonial Office to describe a series of meetings with Native peoples in the interior of the mainland colony. Douglas explained that he had told the people gathered at Lillooet that "they might freely exercise and enjoy the rights of fishing the Lakes and Rivers, and of hunting over all unoccupied Crown Lands in the Colony."[28] Although clearly echoing the language in the

treaties, the characterization of the rights to hunt and fish was somewhat narrower. The right to hunt extended only to "unoccupied *Crown* lands" and, without any reference to prior rights or to "fisheries as formerly," the promise that "they might freely exercise and enjoy the rights of fishing" was little more than what Douglas would have told a non-Native audience. The end of the treaties marked the end of Douglas's formal recognition of Native title, and perhaps, by 1860, he was being more circumspect in his recognition of rights to hunt and fish as well.

However, the fishing rights in the Douglas Treaties remained a powerful presence in the discussion of fishing rights beyond the borders of the treaties. Sproat was involved again in 1878 when the location of a sawmill became an issue because the running of logs down the Cowichan River to the mill threatened to destroy the Cowichan's weir fishery. He argued that the Cowichan, although not party to a treaty, had a similar right, by virtue of their long use of the river, to continue fishing as formerly. The government, he thought, should provide compensation and obtain the Cowichan's consent before the mill owner could float logs down the river.[29] The following year, A.C. Anderson, the senior Department of Marine and Fisheries (Fisheries) official in British Columbia and former member of the Joint Indian Reserve Commission, referred the minister of Fisheries to the Douglas Treaties, indicating his understanding that Native peoples across the province, not just the treaty Indians, had a right to continue their fisheries.[30] Four decades later, in 1918, William Sloan, the provincial commissioner of Fisheries, expressed the view that Native peoples had rights to their fisheries, that the fisheries clause in the Douglas Treaties was evidence of this, and that if Native fisheries were to be closed, even for conservation purposes, then the fishers should be compensated. As the devastating impact of the 1914 rock slide at Hells Gate on the Fraser River sockeye became apparent, he wrote:

> The runs of salmon to the spawning-beds of the Fraser have become so alarmingly attenuated that drastic measures will have to be taken to restore the runs. The measures to be taken must not only include the secession of all fishing in tidal limits for a period of years, but must be made to include all fishing above tidal limits by Indians for all time, notwithstanding that ***they have both a natural and a treaty right*** to take such salmon as they desire for food so long as they confine themselves to the gear originally used by them ...
>
> ***The right of the Indians to take salmon is unquestioned,*** but the number of salmon they can now catch is so small as to be of little benefit to them. Owing to the fact that most of the Indians now grow the bulk of the food they use and are no longer dependent on salmon, and that drastic measures must be taken to restore the salmon

> of the Fraser, the Government should step in and acquire by purchase the Indians' right to take fish above the commercial boundaries. It is suggested that the Indians, if deliberately approached, would dispose of their fishing rights to the Government, and that the Government is fully warranted in entering upon negotiations to acquire those rights. The sooner the better.[21]

This understanding was certainly not unanimous. The Department of Fisheries considered Native fishing privileges – it did not consider them as rights – were derived from the Crown at its pleasure. More particularly, they derived, under legislation, from the department itself. This view came to predominate in the 1880s and 1890s, although the Department of Indian Affairs was never entirely comfortable with it, and there were always voices within government, such as Sproat's and, later, Sloan's, which insisted that Native fishing rights needed to be recognized and pointed to the Douglas Treaties as evidence.[32] Native voices were unequivocal, if seldom heard in the halls of the Department of Fisheries in Ottawa. Their fisheries were not a privilege, nor were they derived from Crown grant. They had rights to fish – rights that originated in their laws and legal traditions – that they had never surrendered.[33]

Fisheries and Colonial Land Policy

Cole Harris and Lillian Ford document the creation of 140 reserves on Vancouver Island and in the mainland colony of British Columbia between 1849 and 1871.[34] Of the twenty-eight reserves allotted on Vancouver Island before Confederation, most were Douglas Treaty reserves. Harris describes these allotments as forming the beginnings of a Native land policy that "focused on small reserves tucked within the cadastral survey of colonial settlement ... It was an imposed policy, one that took into some account the location of occupied winter villages, but that shows no evidence of meaningful consultation with Native people. It did provide, however, some minimal space for Native peoples within their traditional territories, a pattern that would endure."[35] The non-treaty reserves on Vancouver Island, most of which were between Duncan and Nanaimo, where growing non-Native settlement was causing considerable unrest among the Cowichan and neighbouring groups, followed a similar pattern.[36]

Although reserves were small, Native people were not confined to them. The hunting and fishing clause in the treaties protected their rights to continue these activities in traditional territories beyond the reserves, and it would have been assumed that these terms applied to the non-treaty groups as well. Probably because of these general guarantees in the treaties and because there was scant non-Native interest in the fisheries, there is

the province refused to recognize
it through treaty. The colonial land
Trutch, of small, scattered reserves
on for Native villages and resource
olicy in the province of British Co-
d somewhat by a Dominion govern-
commodations but that would not
ations with the province or through

y prevailed, it was the Dominion's
at governed the fisheries. Built upon
h common law, a Canadian fisheries
the mid-nineteenth century by a re-
ty rights to fish in the Great Lakes,
regulations tailored for British Co-
sheries officials would inflect the law
its enforcement or, initially, lack of
al legal elements and an institutional
lture of conflict with Native fishers,
olace in British Columbia.
d by officials within the Department
in the Douglas Treaties. In securing
e treaties recognized the fundamen-
ives, economies, and cultures of Na-
er the treaties, the fisheries were, as
lly secured to them by law." Native
s was not the case, or that, if it were,
ure to them their fisheries.

2
Land Follows Fish

The fisheries had not been sites of conflict between Native peoples and newcomers in pre-Confederation British Columbia. Native fishers continued much as they had done, taking advantage of new markets for their fish, but without interference from the colonial state or competition from non-Native settlers. That changed dramatically on the Fraser River in the 1870s with the arrival of canning technology and the rise of the industrial commercial fishery. The first salmon cannery appeared at New Westminster, near the mouth of the Fraser, in 1871. Three canneries were operating there in 1876, two more the next year, and eight by 1878. Several canneries had also opened in the north near the mouth of the Skeena River, and there were salting operations along the coast for salmon and other species.[1] The Hudson's Bay Company had shipped barrels of salted salmon around the Pacific, but canned fish could reach the markets in eastern North America and Europe, and production increased rapidly in the last quarter of the nineteenth century, putting new pressures on the resource.[2] Whether Native peoples participated in the industrial commercial fishery or not, the new concentration of capital changed their fisheries. For some, it provided new opportunities and increased incomes; for others, it reduced access and created considerable hardship.[3] In either event, management of the fishery moved beyond Native control to the Dominion Department of Marine and Fisheries (Fisheries). As a result, the fisheries became, and remain, one of the principal sites of conflict between Native peoples and the government of Canada.

The 1870s brought other important changes as well, particularly a growing non-Native population and its increasing occupation of Native peoples' land. In 1871 there were approximately 36,000 people living in the province, roughly 30 percent (10,500) of whom were immigrants.[4] Most of these new arrivals lived in or around the townsites of Victoria and New Westminster. Ten years later the population had increased to 50,000, nearly

half of them immigrants. Although the non-Native population remained concentrated on southern Vancouver Island and in the Fraser Valley, it had begun to spread inland along the Fraser, Thompson, and Nicola rivers and into the Okanagan.[5] The Crown distributed land to these settlers, either through sale or pre-emption (a process to acquire land before its survey), and although the total acreage of alienated land was small, there was not much arable land in the province.[6] In the absence of treaties or any other arrangement with Native peoples over land, many of these grants produced conflict. Occasionally the conflict erupted into violent confrontation, the most notorious of which was the killing of eighteen non-Native road builders at Bute Inlet in 1862 and the subsequent hanging of five Tsilhqot'in.[7] Events such as this, as well as the "Indian Wars" in the Washington Territory or the earlier shelling of Native villages by Royal Navy gunboats, were the dramatic events that lay in the background of the pervasive violence that marked the enclosure of traditional Native territories. On the ground, fences followed cadastral surveys and maps, and the property lines they created were backed by state law, in turn buttressed by violence. "The establishment of a Western liberal property regime," writes Nick Blomley, "was both the point of these violences and the means by which violent forms of regulation were enacted and reproduced."[8]

Among these lines of private property imposed on the land and the people who lived on it, the Dominion and provincial governments also created boundaries that marked the spaces that were to be reserved for Native peoples. This chapter examines the crucial role of the fisheries in the first attempts to resolve what had become known, following the publication in 1875 of a book of letters and other documents under the same title, as the "Indian Land Question."[9] That question would be answered in British Columbia with small, scattered Indian reserves premised on access to fish.

The Joint Indian Reserve Commission, 1876-78

The governments of Canada and British Columbia had not been able to agree on many issues after Confederation, including the size of Indian reserves and the underlying issue of Native title. As a result, nothing happened on the Indian land question between 1871 and 1875 except the alienation of more land to non-Native settlers. Finally, in 1876, amidst growing unrest among Native peoples over the occupation of their land, the two governments established a commission to investigate the Indian land question. The Joint Indian Reserve Commission (JIRC) was the first attempt by the Dominion and province to seek a satisfactory resolution. Each government would appoint a commissioner, a third would be appointed jointly, and together the commissioners would travel the province

e non-Native population remained
land and in the Fraser Valley, it had
r, Thompson, and Nicola rivers and
buted land to these settlers, either
s to acquire land before its survey),
ıated land was small, there was not
the absence of treaties or any other
and, many of these grants produced
ɔted into violent confrontation, the
ɔf eighteen non-Native road builders
quent hanging of five Tsilhqot'in.[7]
ian Wars" in the Washington Terri-
lages by Royal Navy gunboats, were
ckground of the pervasive violence
l Native territories. On the ground,
maps, and the property lines they
ırn buttressed by violence. "The es-
erty regime," writes Nick Blomley,
es and the means by which violent
reproduced."[8]
y imposed on the land and the people
ɔrovincial governments also created
hat were to be reserved for Native
ucial role of the fisheries in the first
known, following the publication in
ɔcuments under the same title, as the
stion would be answered in British
ı reserves premised on access to fish.

sion, 1876-78

tish Columbia had not been able to
tion, including the size of Indian re-
ative title. As a result, nothing hap-
between 1871 and 1875 except the
ive settlers. Finally, in 1876, amidst
es over the occupation of their land,
ɔmmission to investigate the Indian
rve Commission (JIRC) was the first
nce to seek a satisfactory resolution.
commissioner, a third would be ap-
ımissioners would travel the province

to gather evidence about the Native population, consider existing land use, and make recommendations about what parcels of unalienated Crown land should be set aside as Indian reserves. Land that had been sold or that was subject to a pre-emption claim would not be considered. The question of Native title, which the province refused to acknowledge and the Dominion was prepared to overlook, was set aside.[10]

After considerable delay, the province appointed Archibald McKinley, a retired Hudson's Bay Company trader, as its representative and agreed with the Dominion to appoint Gilbert Malcolm Sproat as the joint commissioner. The Dominion had earlier appointed Alexander Caulfield Anderson, also a former Hudson's Bay Company employee and the first inspector of Fisheries for the province of British Columbia, his dual appointment emphasizing the perception within the Dominion government that the allotment of Indian reserves was closely tied to the fisheries.

The commissioners began their work late in 1876, operating on instructions from the two levels of government about the terms of their commission and the role of the JIRC, including its treatment of Native fisheries. David Laird, the Dominion minister responsible for Indian Affairs, told Anderson that although the long-term goal was to create self-contained agrarian communities, he was not to disturb those Indians engaged in "any profitable branch of industry," including fishing:

> While it appears theoretically desirable as a matter of general policy to diminish the number of small reserves held by any Indian nation, and when circumstances will permit to concentrate them on three or four large reserves, thus making them more accessible to missionaries and school teachers, you should be careful not even for this purpose to do any needless violence to existing tribal arrangements, and especially not to disturb the Indians in the possession of any villages, *fishing stations,* fur-trading posts, settlements or clearings, which they may occupy and to which they may be specially attached, and which may be to their interest to retain. Again it would not be politic to attempt to make any violent or sudden change in the habits of the Indians, or that those who are now engaged in *fishing,* stock-raising, or in any other profitable branch of industry should be diverted from their present occupation or pursuits, and in order to induce them to turn their attention to agriculture.[11]

Two years earlier, Dominion officials had approved a comparable position by order-in-council: "Great 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."[12]

The provincial government adopted a similar approach. In an 1875 report on Indian reserves, the Attorney General, G.A. Walkem, noted that most Native people in the province lived in fishing communities and therefore needed access to their fisheries rather than agricultural land. He wrote that "it is reasonable to suppose that large tracts of agricultural land will not be required for the class of Indians referred to. Those who cannot be employed usefully ... in *fishing* or hunting, might require and fairly expect farming lands. The other portion of the community would be provided for in other ways, by reserving their *fishing stations,* fur-trading posts and settlements, and by laying off a liberal quantity of land for a future town-site."[13] As a result, the province instructed its appointee, McKinley, and the joint appointee, Sproat, not to disturb Indian fisheries: "You will avoid disturbing them in any of their proper and legitimate avocations whether of the chase or of *fishing,* whether pastoral or agricultural."[14]

These instructions to the reserve commissioners contained varying terminology. Sometimes a "fishing ground" was to be protected, other times a "fishing station," and sometimes the activity itself – fishing. The reserve commissioners generally described those allotments made primarily to protect fisheries as "fishing stations," a term that the Supreme Court of Canada has recently interpreted to refer to points of land, but not to the adjacent waters where fish were caught.[15] Although plausible, such a clear distinction between land and fisheries is problematic. Many important indigenous fishing technologies, such as weirs, dip nets, and reef nets, were land-based and, as such, were inseparable from the adjoining land, foreshore, or bed of the body of water. If a fishing station were allotted to secure a weir fishery, as many were, then it is reasonable to suppose the reserve commissioners intended that the reserve include that portion of the river in which the fence-like structure was built, or, at very least, that the reserve include protection for the weir fishery.[16]

The uses of the term "fishing station" vary in the nineteenth century. Sometimes it seems to refer only to the dry land from which fisheries were conducted; at other times it refers to both the land and water, or only to the water on which people fished. As an example of the latter, John McCuaig, the superintendent of Fisheries for Upper Canada, wrote in his annual reports for 1858 and 1859 that he hoped to lease fishing stations in waters adjacent to lands that were held by someone else. This he found difficult: "Another obstacle to the profitable leasing of the Fisheries is found in the refusal of some of the parties owning land on the waters edge to allow a landing place to the fishermen, who might otherwise be willing to lease *stations* in front of such properties."[17] In short, fishing stations might

similar approach. In an 1875 re-
eneral, G.A. Walkem, noted that
n fishing communities and there-
than agricultural land. He wrote
ge tracts of agricultural land will
eferred to. Those who cannot be
g, might require and fairly expect
ommunity would be provided for
tions, fur-trading posts and settle-
of land for a future town-site."[13]
pointee, McKinley, and the joint
fisheries: "You will avoid disturb-
timate avocations whether of the
gricultural."[14]
missioners contained varying ter-
was to be protected, other times
ctivity itself – fishing. The reserve
allotments made primarily to pro-
hat the Supreme Court of Canada
s of land, but not to the adjacent
gh plausible, such a clear distinc-
natic. Many important indigenous
ets, and reef nets, were land-based
adjoining land, foreshore, or bed
on were allotted to secure a weir
le to suppose the reserve commis-
that portion of the river in which
very least, that the reserve include

" vary in the nineteenth century.
dry land from which fisheries were
oth the land and water, or only to
cample of the latter, John McCuaig,
er Canada, wrote in his annual re-
l to lease fishing stations in waters
ieone else. This he found difficult:
ing of the Fisheries is found in the
and on the waters edge to allow a
ight otherwise be willing to lease
In short, fishing stations might include or exist independently of dry land.[18] When, in 1901, British Columbia passed its first *Fisheries Act*, the word "station" was used in a manner that suggested both land and the adjacent fishery: "'Fishery' shall mean and include the particular locality, place or station in or on which a seine, pound or other net is used, placed or located, and the particular stretch of waters in or from which fish may be taken."[19]

A practical reality of the fishery in the nineteenth century, an era of human- and wind-powered fish boats, was that the control of particular points of land effectively secured control of many fisheries. With some exceptions, such as the mouth of the Fraser River, where current, tides, and waves were moderate enough to allow some mobility, access to identified outcroppings or landings was essential to a successful fishery in British Columbia and elsewhere.[20] This was particularly true on many rivers, but also on long stretches of a rough and treacherous west coast. It was only in the twentieth century, with the proliferation of gasoline-powered boats and the increasing enforcement of laws that restricted land-based fishing technologies, that control of particular points of land became less important.[21]

Terminology aside, the provincial government's goal was to reserve as little land as was necessary to quell Native unrest and at the same time ease Native peoples into the wage economy. Officials hoped that the reserves would be temporary, a bridge that would help Native peoples make the transition from traditional to modern economies. They were not to be consolidated on large reserves, but were to have some limited space in their traditional territories from which to access their traditional food sources while gradually integrating, with the help of missionaries, into the wage labour force, particularly that of the emerging industrial commercial fishery. This was the provincial model to which Dominion officials were willing to accede. The Department of Indian Affairs emphasized that the reserve communities were to be self-sustaining, but this reflected as much a desire to keep Native peoples off their welfare rolls as it did a fundamentally different vision. As a result, the land policy was built around access to the fisheries. The governments could allot small parcels of land, leaving most of the province open for non-Native settlement and development, with a reasonable expectation that the fisheries would remain central to Native economies as a means of subsistence but also as a site of their wage labour.

The commissioners quickly discovered, however, that although the canneries offered new employment opportunities, the rapidly expanding industry also threatened many Native fisheries. Cannery fish boats, many of which were worked in the early years by Aboriginal fishers, occupied important fishing grounds, their numbers and nets precluding those who

claimed prior rights of access. The Indian superintendent for British Columbia, I.W. Powell, called for Fisheries to curb the aggressive cannery-based fisheries that were producing conflict with Natives, and for the JIRC to set aside Native fishing sites. Indian Affairs, he argued, "should take steps as soon as possible to reserve certain *fishing grounds* for the Indians who will be sure to create trouble if not thus cared for."[22]

Inclement weather prevented long excursions in the winter of 1876-77, but the commissioners did travel from New Westminster to Musqueam at the mouth of the Fraser, around Burrard Inlet, and then up Howe Sound and Jervis Inlet, across the Strait of Georgia to Vancouver Island, and south along the island's eastern shore. As they went, the commissioners established procedures for allocating reserves and recording their decisions. The "Minutes of Decision" included a description of the reserve boundaries and a sketch, intended to guide the surveyors who would follow. In some cases they gave the reason for granting the reserve. The more general descriptions of the reserves and their uses, often written some months later, became known as "Field Minutes."

The commissioners specifically linked many of the reserves granted on their first circuit to Native fisheries. In the Cowichan Valley, for example, they described four reserves along the upper Cowichan River, at weir-fishing sites, as fishing stations. These explicit connections, however, do not convey a complete accounting of the ties between fisheries and reserves. The large Cowichan Indian Reserve No. 1 at the mouth of the river, which included the principal winter village sites of six communities and their fish weirs on the Cowichan and Koksilah rivers, was also intended to protect those fisheries, although the commissioners did not formally record the importance of these fisheries or the correlation between them and this reserve.

Shortly after the JIRC's visit, the province granted a portion of the large Cowichan reserve to William Sutton, who proposed building a lumber mill and running logs down the Cowichan River to it. Sproat vociferously denounced the province and its disregard of the commission's work. However, if the land grant were to stand without the Cowichan's consent (Sproat thought it should not), then the Cowichan, he argued, must be compensated not only for the land, but also for the loss of their fishery, which would be destroyed by the log runs. According to Sproat, he and the other commissioners on the JIRC had promised the Cowichan that their fishery would not be interfered with or disturbed. The loss, therefore, of such an important weir fishery required Cowichan consent and, if necessary, compensation. The purchaser, who had already paid the Crown, agreed to purchase it again from the Cowichan and with it, perhaps, the right to run logs

4

Exclusive Fisheries and the Public Right to Fish

The public right to fish is a doctrine of the common law. As such, it is a creature of judicial interpretation, operating to limit the capacity of the Crown to grant exclusive fisheries and, in doing so, protecting the right of the public to fish. It is, of course, but one doctrine among the panoply that constitute the common law. This was the body of law – judge-made and statutory – that arrived with English-speaking settlement in North America and throughout the British Empire. In colonies that were settled, wrote William Blackstone in his *Commentaries on the Laws of England* (1765-69), "the law is the birthright of every subject, so wherever they go they carry their laws with them."[1] The introduction of English law with British settlement was followed by its formal reception, the date of which delimited the moment at which further statutory enactments in England would not apply to the colony. Judicial pronouncements from England might still be relevant, and English courts might be the courts of last resort, as they were in Canada until 1949, but the English statutory foundation of a colony was set by the date of reception. Further statutory developments would come from within the colony itself.[2] In British Columbia, the common law was formally received by statute with the founding of the mainland colony of British Columbia in 1858.[3]

Although the English common law accompanied British settlement, the settlers' birthright was not to the common law as it existed in England. Blackstone set out its limits in a subsequent edition of his *Commentaries:* "But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony."[4] In British Columbia, this doctrine was codified in statute: the civil and criminal laws of England applied in the colony "so far as the same are not from local circumstances inapplicable."[5] Determinations of applicability might

the Public

the common law. As such, it is a
ating to limit the capacity of the
n doing so, protecting the right of
e doctrine among the panoply that
ne body of law – judge-made and
aking settlement in North America
colonies that were settled, wrote
es on the Laws of England (1765-
subject, so wherever they go they
luction of English law with British
eception, the date of which delim-
tory enactments in England would
ncements from England might still
be the courts of last resort, as they
ish statutory foundation of a colony
her statutory developments would
British Columbia, the common law
ıe founding of the mainland colony

ıccompanied British settlement, the
ımon law as it existed in England.
quent edition of his *Commentaries:*
ry many and very great restrictions.
much of the English law, as is appli-
condition of an infant colony."[4] In
dified in statute: the civil and crimi-
ɔny "so far as the same are not from
:terminations of applicability might

be statutorily decreed or they might be left to judges, but in either event the transmission of English law involved the parsing of individual doctrine for its suitability to the local. Property scholar Bruce Ziff has described this as the "crucible of *applicability,*" a process in which English law was measured for its colonial fit.[6]

The public right to fish provides a marvellous example of this crucible of applicability. Judges in British North America grappled with a doctrine that had developed in the different geographical circumstances of the British Isles. Did the public right to fish apply in the vast inland lakes and waterways, of which there were no counterparts where the doctrine had emerged? The answer had consequences. It would affect the legality of the exclusive fisheries that Indian Reserve Commissioner Peter O'Reilly marked off in 1881. Beyond the particular application of the public right to fish, its use and, I will argue, misuse in the debate over the legality of the exclusive fisheries set aside by O'Reilly raises interesting questions about the role of state law in the processes of dispossession that mark the colonial encounter.

O'Reilly's allocation of exclusive fishing rights to Native peoples on the Fraser and Nass rivers in 1881 provoked controversy almost immediately. Officials within the Dominion Department of Marine and Fisheries (Fisheries) demanded to know on what authority O'Reilly had presumed to grant exclusive fisheries in addition to the Indian reserves. O'Reilly, they argued, could only recommend parcels of land that should be set aside as reserves, not exclusive fisheries that were contrary to the public's right to fish.

This chapter opens with a description of that right and the challenges in its transmission to North America. It then turns to the reactions against and in support of O'Reilly's allocation of exclusive Native fisheries. Finally, it questions the legal foundation of the opposition to O'Reilly's work and suggests that O'Reilly was working carefully and securely within the bounds of Canadian law when he marked off exclusive Native fisheries in non-tidal waters.

Lingering in the background, and addressed at the end of this chapter, is the larger question of how best to characterize what O'Reilly was doing. Was he recognizing rights to exclusive fisheries that already existed? Or was he, as agent of the Crown, granting rights to exclusive fisheries? Opposition to his work was predicated on the assumption that he was granting and therefore creating rights rather than recognizing existing rights. This view – that rights to land and fish emanated from the Crown – came to prevail in the late nineteenth century. It was part of the consolidation and centralization of power in the colonial state. It was not, however, the only view. Native peoples stated repeatedly that the sources of their fishing rights lay in their legal traditions, not in the Crown. In this view, a provision such

as the fisheries clause in the Douglas Treaties did not create rights but, instead, converted existing rights into treaty rights (see the discussion in Chapter 1). These prior rights of Native peoples to their fisheries, therefore, might be confirmed by the work of the reserve commission, but they were not created by it. This interpretation of Native fishing rights remained in the background in British Columbia along with the issue of Native title, never disappearing but pushed well into the shadows by the prevailing view that rights to land and fish originated from the colonial state. This latter view was less a part of an overt strategy of colonial control than it was simply presumed. Native peoples countered this supposition as best they could, but their pleas for recognition of an alternative source for legal rights received little attention in the late nineteenth and early twentieth centuries.

However one characterizes O'Reilly's work as reserve commissioner, by 1898, when he retired, Native peoples' access to their fisheries had been severed from the reserve grants. Even reserves that were in close proximity to local fisheries, and that had been allotted specifically to secure access to those fisheries, no longer conferred any rights of access to fish, far less exclusive fisheries. The common-law doctrine of the public right to fish, as interpreted by senior Fisheries officials in the late nineteenth century, effectively opened many locally owned and managed fisheries to outsiders, in most cases reallocating the resource from Native to non-Native fishers.

The Public Right to Fish

The English common law did not recognize property in fish until they were caught, but it did recognize a property interest in the right to catch fish. It did so by creating a presumption that the owner of the soil underlying a body of water – the *solum* – had, as an incidence of the ownership of the *solum,* an exclusive right to fish in the water above. This exclusive right to fish could be severed from the ownership of the underlying bed, but severing the fishery from the larger property interest had to be done explicitly in a grant or other instrument used to transfer the interest in property; it would not be presumed.

In determining who owned the *solum,* and therefore the right to fish in waters above it, the common law created another presumption that those who owned the land adjacent to a defined body of water, known as riparian owners, also owned the *solum* to the midpoint of that body, a doctrine known as *ad medium filum aquae.* Riparian owners whose property surrounded a body of water owned the entire bed and the exclusive right of fishing in the entire body of water as a result. In England, this presumption applied to all non-navigable waters, understood in law to mean non-tidal waters.

Treaties did not create rights but,
treaty rights (see the discussion in
/e peoples to their fisheries, there-
if the reserve commission, but they
on of Native fishing rights remained
along with the issue of Native title,
the shadows by the prevailing view
m the colonial state. This latter view
colonial control than it was simply
nis supposition as best they could,
ternative source for legal rights re-
enth and early twentieth centuries.
s work as reserve commissioner, by
' access to their fisheries had been
eserves that were in close proximity
otted specifically to secure access to
ny rights of access to fish, far less
octrine of the public right to fish, as
in the late nineteenth century, ef-
d managed fisheries to outsiders, in
om Native to non-Native fishers.

cognize property in fish until they
operty interest in the right to catch
n that the owner of the soil under-
as an incidence of the ownership of
ne water above. This exclusive right
nership of the underlying bed, but
operty interest had to be done ex-
sed to transfer the interest in prop-

n, and therefore the right to fish in
ed another presumption that those
ed body of water, known as riparian
midpoint of that body, a doctrine
parian owners whose property sur-
ntire bed and the exclusive right of
esult. In England, this presumption
derstood in law to mean non-tidal

In tidal waters, the Crown owned the fisheries. It is not clear whether this right arose as an incidence of the Crown's underlying interest in the tidal foreshore or by some other means, but the Crown held the right of fishing in tidal waters, which English lord chief justice Mathew Hale described in his much-cited passage as "the sea or creekes or armes thereof."[7] In contrast to the situation in non-tidal waters, however, the Crown's ownership of the fisheries in tidal waters was subject to the common-law doctrine of the public right to fish. In effect, the Crown held the right to fish in tidal waters in trust for the public. This prevented it from granting exclusive fisheries in tidal waters to individuals or corporations, something that it and others who held the right of fishing in non-tidal waters were free to do. Parliament could authorize the Crown to grant exclusive fisheries in tidal waters, but such grants were not part of the Crown's prerogative.

The origin of the public right to fish is often said to be the Magna Carta (1215), and that may be so, although the language used is far from explicit. It seems more likely that the thirteenth-century charter of rights, which the barons forced upon King John, became in the eighteenth and nineteenth centuries a proxy for the long-standing custom of public access to the fisheries in tidal waters.[8] The uncertainties of origin notwithstanding, Magna Carta became the touchstone for the public right to fish in the common law, creating a temporal boundary delimiting a time when the Crown had within its prerogative the right to allocate exclusive fisheries in tidal waters (before Magna Carta) from a time when it did not (ever since).

That the public right to fish applied only in tidal waters worked well in England, where there were no large non-tidal waterways or lakes to complicate matters. Some of the large lakes in Scotland and Ireland presented a few difficulties, but the courts maintained a firm line in the cases that arose: only navigable waters, defined in law as tidal waters, were subject to the public right to fish.[9] Circumstances in North America were considerably different. The vast inland lakes and river systems that were navigable but non-tidal required the rethinking of a body of law that had emerged in a context where tidal and navigable were sufficiently synonymous in fact to be considered so in law. Did the *ad medium filum aquae* rule create a presumption that the owner of a small lot beside one of the great lakes also owned the *solum* to the middle of the lake and, therefore, held an exclusive right of fishing in the waters above that land? And if in these circumstances the common law were modified to create a presumption that the Crown retained ownership of the *solum* and thus the fishery, was the Crown's interest subject to the public right to fish? These became important questions in British Columbia when the reserve commissioners allotted land in the 1870s and 1880s to secure Native access to fish.

Exclusive Native Fisheries and the Public Right to Fish

Within days of receiving copies of Peter O'Reilly's minutes of decision creating the reserves along the Nass River and setting aside exclusive fisheries, the Dominion commissioner of Fisheries, W.F. Whitcher, wrote to the Department of Indian Affairs (Indian Affairs) demanding to know "under what authority Mr. O'Reilly has appropriated public fishing privileges in public waters not even connected with Indian land Reserves – for the exclusive right of Indians."[10] Indian Affairs had sent copies of the minutes of decision creating exclusive fisheries along the middle Fraser, but few if any non-Natives were fishing in these waters, the canneries near the mouth of the Fraser had prior access to salmon, and Fisheries had not responded. The exclusive fisheries on the Nass, however, were much closer to, and might damage the viability of, the emerging canning industry on the north coast. This, it appears, provoked the immediate response from Whitcher. He believed that Fisheries had the sole authority, under the *Fisheries Act,* to grant exclusive fisheries in public waters, understood to include tidal and navigable waters.[11]

All of the exclusive fisheries that O'Reilly had designated were in non-tidal waters, but most were in waters that Fisheries considered navigable. To Whitcher's demand for an explanation, John A. Macdonald, prime minister and superintendent general of Indian Affairs, replied that he had "considered it expedient and proper to instruct him [O'Reilly], while engaged in assigning these lands, to mark off the fishing grounds which should be kept for the exclusive use of the Indians and he is following those instructions."[12] In turn, the minister of Fisheries, A.W. McLean, replied that the Crown's prerogative was limited, that it could only grant exclusive fisheries if authority had been delegated from parliament, that parliament had delegated this authority to his department under the *Fisheries Act,* and that Fisheries had no intention of limiting non-Native access by granting exclusive Native fisheries:

> Fishing rights in public waters cannot be made exclusive excepting under the express sanction of Parliament, and ... Indians are entitled to use the public fisheries only on the same conditions as white men, subject to the *Fisheries Act* and Fishery Regulations. The mere assignment of these fishery privileges by Indian Agents, or the abstention of this Department from otherwise disposing of them – which there was no intention to do pending careful consideration of all the circumstances of each case – could not legally exclude the public from fishing therein.[13]

Indian Affairs, on the other hand, sought to protect Native fishing grounds and had instructed the reserve commissioner to include them

ıblic Right to Fish

er O'Reilly's minutes of decision
'er and setting aside exclusive fish-
isheries, W.F. Whitcher, wrote to
ı Affairs) demanding to know "un-
propriated public fishing privileges
ith Indian land Reserves – for the
airs had sent copies of the minutes
long the middle Fraser, but few if
aters, the canneries near the mouth
ı, and Fisheries had not responded.
owever, were much closer to, and
ging canning industry on the north
nmediate response from Whitcher.
: authority, under the *Fisheries Act*,
vaters, understood to include tidal

Reilly had designated were in non-
that Fisheries considered navigable.
on, John A. Macdonald, prime min-
ian Affairs, replied that he had "con-
ruct him [O'Reilly], while engaged
ıe fishing grounds which should be
ıs and he is following those instruc-
ries, A.W. McLean, replied that the
it could only grant exclusive fisheries
parliament, that parliament had del-
nt under the *Fisheries Act*, and that
non-Native access by granting exclu-

made exclusive excepting under the ex-
ns are entitled to use the public fisheries
ı, subject to the *Fisheries Act* and Fishery
se fishery privileges by Indian Agents, or
therwise disposing of them – which there
consideration of all the circumstances of
public from fishing therein.[13]

d, sought to protect Native fishing
erve commissioner to include them

within the reserve allotments. Behind this position lay three considerations. First, Native peoples in British Columbia depended heavily on their fisheries. Reallocating their fisheries would cause great hardship and, from Indian Affairs' perspective, would increase the number of dependents that it would be responsible to support. Second, from its experience in the Great Lakes region, Indian Affairs knew that Native peoples would defend their fisheries tenaciously, and it did not want to provoke unrest in a volatile situation.[14] Finally, the unresolved question of Native title and fishing rights lingered in the background. Officials at Indian Affairs were well aware that they were trying to resolve the land question in British Columbia without treaty at the same time that they were negotiating treaties in what would become the Prairie provinces. The absence of treaties did not mean an absence of rights, including rights to established fisheries. This was not lost on former reserve commissioner Gilbert Malcolm Sproat, who had pointed to the Douglas Treaties as evidence of fishing rights across British Columbia, or on Prime Minister Macdonald, who had written that it was not only "expedient" but also "proper" to set aside exclusive Native fishing grounds. The senior Fisheries official in British Columbia, A.C. Anderson, agreed. He wrote to Whitcher, shortly after O'Reilly's trip to the north coast, to stress the importance of setting aside land and associated fisheries for indigenous people. It was what he had done, as reserve commissioner, and it was what he understood O'Reilly to be doing as well.[15]

Even with this support for the reserve commissioner, Fisheries' refusal to recognize O'Reilly's exclusive fisheries prevailed. O'Reilly did not use the language of exclusive fisheries again, but access to fish remained central to many of his reserve allotments. This continued to concern Fisheries, and in response to O'Reilly's later work on the central coast (see Chapter 5), Commissioner of Fisheries Whitcher wrote that his department "[did] not recognize any unauthorized appropriations of public fishing rights by the Department of Indian Affairs for the exclusive use of Indians."[16] Indian Affairs then asked "that none of the Fisheries recommended to be set apart by the Indian Reserve Comm. for British Columbia ... be otherwise disposed of without the consent of this Dept."[17] In response, Fisheries restated its position:

> I have the honor to refer you again to the Minister's letters, stating that, as the common law and the statutes, now in force in those Provinces, entitle "every subject of Her Majesty" to use these fishing privileges, this Department cannot undertake to debar the public fishermen from exercising their legal rights in the premises, especially in view of the fact the ex parte reservations in question obviously exceed

> the reason and justness of any arrangement founded in due regard for the relative rights of public fishermen and the necessitous claims of Indians.[18]

"Public fishermen" had "legal rights." "Indians," so far as Fisheries was concerned, only had "necessitous claims." This was an important distinction: rights outweighed claims, even "necessitous claims."

In what would be the final exchange in this intra-departmental debate, Indian Affairs indicated that, "in the event of any complications arising out of the diversion to other users of the Fisheries so recommended to be appropriated for the use of the Indians – [it would] hold the Dept. of Marine and Fisheries responsible."[19] There would be no short-term resolution; Indian Affairs and Fisheries simply disagreed over the respective rights of the "public" and Native peoples to the fisheries.

Whitcher's understanding of the law had emerged from his experience as an official in the fledgling Fisheries Branch within the Department of Crown Lands in the Province of Canada before Confederation (see Chapter 1). He was most familiar with the Great Lakes fisheries and with the conflicts there between Native and non-Native fishers. Between the 1830s and 1860s, a series of court decisions, none of which involved Native fisheries, suggested that the public right to fish was not limited, as in Britain, to tidal waters. Instead, it applied to the Great Lakes and other navigable waterways and thus restricted the Crown's prerogative to allocate exclusive fisheries in these waters.[20] The preponderance of legal opinion provided by government officials indicated that the public right to fish limited the granting of exclusive Native fisheries as well.[21]

This position has been taken up more recently by lawyer Roland Wright, who has argued that until the 1857 *Fisheries Act*, which provided that the Fisheries Branch could grant fishing leases of up to nine years, the Crown had no authority to allocate exclusive fisheries.[22] It was only with the consent of the legislature that exclusive fisheries, whether Native or non-Native, might be allocated in navigable waters, understood in North America as navigable in fact and including the Great Lakes and major rivers. Other scholars have vigorously challenged this argument on several grounds. First, this legal opinion did not accord with the reality of numerous instances in which the Crown had recognized exclusive Native fisheries in the eighteenth and nineteenth centuries, often through treaties.[23] Second, it misconstrued the source of the right to exclusive fisheries, placing it in Crown grants and not in the use and occupation of exclusive fisheries before the British assertion of sovereignty.[24] In this, Native claims were no different than those of settlers who had received a royal grant of an exclusive fishery from the French Crown before 1760 and thus before the British assertion of sovereignty.

unded in due regard for the relative
claims of Indians.[18]

'Indians," so far as Fisheries was
" This was an important distinc-
cessitous claims."
n this intra-departmental debate,
t of any complications arising out
ıeries so recommended to be ap-
would] hold the Dept. of Marine
ıld be no short-term resolution;
reed over the respective rights of
isheries.
ıd emerged from his experience as
ı within the Department of Crown
: Confederation (see Chapter 1).
ces fisheries and with the conflicts
ers. Between the 1830s and 1860s,
ch involved Native fisheries, sug-
not limited, as in Britain, to tidal
Lakes and other navigable water-
erogative to allocate exclusive fish-
ıce of legal opinion provided by
ublic right to fish limited the grant-

recently by lawyer Roland Wright,
heries Act, which provided that the
ses of up to nine years, the Crown
sheries.[22] It was only with the con-
ries, whether Native or non-Native,
, understood in North America as
eat Lakes and major rivers. Other
argument on several grounds. First,
he reality of numerous instances in
ive Native fisheries in the eighteenth
ı treaties.[23] Second, it misconstrued
:ries, placing it in Crown grants and
ive fisheries before the British asser-
ims were no different than those of
'an exclusive fishery from the French
e British assertion of sovereignty.

Wright is correct, nonetheless, when he states that by the mid-nineteenth century, Fisheries officials believed that only they had the authority, under statute, to allocate exclusive fisheries. There is no doubt, moreover, that Whitcher believed this interpretation of the common law applied across Canada, including in British Columbia. As commissioner of Fisheries, he sent a circular outlining his views to all Fisheries overseers (local Fisheries officials) in Canada in 1875:

> Fisheries in all the public navigable waters of Canada belong prima facie to the public, and are administered by the Crown under Act of Parliament, which Statute imposes various restrictions on the public exercise of the right of fishing, and subjects the privilege to further regulation and control necessary to protect, to preserve, and to increase the fish which inhabit our waters.
>
> Indians enjoy no special liberty as regards either the places, times or methods of fishing. They are entitled only to the same freedom as White men, and are subject to precisely the same laws and regulations.[25]

Although there were no Fisheries overseers in British Columbia in 1875, and the first inspector of Fisheries for the province, A.C. Anderson, would not be appointed until the following year, it is clear from Whitcher's reaction to O'Reilly's work in 1881 that he believed this policy applied to navigable waters in Canada's westernmost province. In subsequent correspondence, discussed more fully in Chapter 5, Indian Affairs appears to have conceded that the reserve commissioner did not have final authority to allocate exclusive fisheries and that, just as the province and Dominion had to confirm the land grants, so Fisheries and Indian Affairs had to agree about the exclusive fisheries. Nonetheless, Indian Affairs fully expected that the reserve commissioner's recommendations would be implemented.[26] Moreover, Inspector of Fisheries Anderson and Indian Superintendent Powell supported O'Reilly's practice of allocating exclusive fisheries and thought it should continue. In this context, Indian Affairs argued that it would "appear therefore inexpedient, if not positively mischievous, to interfere with the system at present in vogue for allotting Fisheries to the Indian Bands of that Province."[27] However, Fisheries' position prevailed; the public right to fish would preclude confirmation of O'Reilly's exclusive Native fisheries.

The Public Right to Fish in British Columbia

The common-law doctrine of the public right to fish loomed over Peter O'Reilly's work as a reserve commissioner in the 1880s and 1890s. The Department of Fisheries refused to recognize exclusive Native fisheries and

justified its refusal by reference to the public right to fish. As a result, O'Reilly, who had begun his work by allocating exclusive fisheries along important stretches of the Fraser and Nass rivers, stopped making such allocations.[28] For another eighteen years, however, he continued to allot reserves based on access to the fisheries, work that is considered in the following chapter. But although Fisheries' position with respect to exclusive fisheries was clear, it is much less clear that this position reflected the state of law in British Columbia, or even in Canada, in the 1880s. In fact, O'Reilly's allotment of exclusive fisheries in 1881, and his care to restrict them to non-tidal waters, closely matched contemporary developments in Canadian law.

The line of Ontario cases and legal opinions on which Fisheries relied, which suggested that the public right to fish applied to navigable, non-tidal waters, were decided or provided before British Columbia joined the Canadian confederation. In British Columbia, therefore, the court rulings had limited persuasive value and were certainly not binding. Moreover, in a series of British cases from the 1860s, including a House of Lords decision in 1863, the English courts had confirmed that the public right to fish applied only to tidal waters.[29] Unlike the cases from Ontario, the decisions of the English courts were binding in British Columbia. They might be distinguished based on different facts and perhaps even different geographical circumstances, but they could not be overturned. The scope of the public right to fish had not come before the courts in British Columbia, but it had arisen in New Brunswick and was the subject of an Exchequer Court of Canada decision in 1880, the year before O'Reilly began his field work.

In October 1880, Justice Gwynne of the Exchequer Court of Canada released his decision in *Canada v. Robertson,* a dispute over the right of fishing in the Miramichi River of New Brunswick.[30] Both the Dominion and the province claimed the right to allocate exclusive fisheries in the river, the Dominion under section 91(12) of the *British North America Act,* which placed "Seacoast and Inland Fisheries" within its jurisdiction, and the province under its ownership of and responsibility for property recognized in sections 109 and 92(13).[31] The case proceeded to Justice Gwynne as a series of questions about the rights of a riparian owner on a navigable but non-tidal river. Did the law create a presumption that a land grant next to such a body of water included the *solum* to the midpoint of the river – *ad medium filum aquae* – and thus the exclusive right of fishing in those waters?

Gwynne J. established that, whatever the law in Ontario, the right of fishing in New Brunswick rivers "must be considered with reference to the Common Law of *England,*" which restricted the public right to fish to

tidal waters.[32] Although well aware of the Ontario cases, which he had surveyed in deciding an earlier case,[33] Gwynne J. did not consider them in *Robertson*. Instead he reviewed a collection of cases from the United States, some of which grappled with the dissonance of a common-law rule that treated navigable and tidal as synonymous in the North American context. In most of these cases, he concluded, the US courts held that while the public had a right of navigation in all navigable waters, the riparian owner held rights to the *solum* of navigable rivers and thus to exclusive fisheries above.[34]

From this analysis, Gwynne J. held that the public right to fish existed only in navigable rivers as understood in law to mean tidal rivers. Above the ebb and flow of the tide, rivers were "not open to the public for purposes of fishing, but may be owned by private persons, and in common presumption are owned by the proprietors of the adjacent land on either side, who, in right of ownership of the bed of the river, are exclusive owners of the fisheries therein opposite their respective lands on either side to the centre line of the river." Regarding the public right to fish and the relevance of Magna Carta, interpreted in the nineteenth century as the source of the public right to fish, he continued:

> *Magna Charta does not affect the right of the Crown, nor restrain it in the exercise of its prerogative of granting the bed and soil of any river above the ebb and flow of the tide, or of granting exclusive or partial rights of fishing therein* as distinct from any title in the bed or soil, and in fact the Crown grants of land adjacent to rivers above the ebb and flow of the tide, notwithstanding that such rivers are of the first magnitude, are presumed to convey to the Grantee of such lands the bed or soil of the river, and so to convey the exclusive right of fishing therein to the middle thread of the river opposite to the land so granted.[35]

Even if the Crown had not granted the *solum* but had retained it for itself, Gwynne J. ruled that "such a reservation does not give to the public any common right of fishing in the river."[36] It remained open for the Crown, under its prerogative, to allocate exclusive fisheries in non-tidal rivers either as an incidence of a land grant or separately.

I have no evidence that O'Reilly had read or knew of the decision in *Robertson*, although he had been working as a lay judge before his appointment as reserve commissioner, but his allocation of exclusive fisheries in non-tidal rivers fit precisely within its parameters. As a representative of the Crown in right of both the province and Dominion, he could exercise the Crown's prerogative to allocate exclusive fisheries in non-tidal waters.

Officials in the Department of Fisheries, who must have known about *Robertson,* given that it was the minister of Marine and Fisheries who was being sued for licensing an exclusive fishery, showed no inclination to alter their position, even though the decision seemed to undermine their argument that the public right to fish prevented the Crown from allocating exclusive fisheries in non-tidal waters.

On appeal, in 1882, the Supreme Court of Canada upheld most of Justice Gwynne's decision. On the question of the public right to fish, the Supreme Court justices were less expansive. Chief Justice Ritchie wrote briefly that the portion of the Miramichi in question, which was navigable but non-tidal, "is not a public river on which the public have a right to fish," and although the public did have a right of navigation, "such a right is not in the slightest degree inconsistent with an exclusive right of fishing, or with the rights of the owners of property opposite their respective lands."[37] The public right to fish, according to the chief justice, did not apply in non-tidal waters. Justice Strong seemed inclined to disagree, suggesting that on "large navigable freshwater rivers, above the flow of tide,"[38] and on "the great lakes,"[39] the Crown might hold the right to fish in trust for the public. He was, however, reluctant to wade into these waters and concluded that the issue did not need to be resolved to decide the case.[40] Perhaps this hesitation of Justice Strong's was enough for officials at Fisheries. They maintained their opposition to O'Reilly's allocation of exclusive fisheries, even though, after *Robertson,* that position rested on highly unstable legal ground.

In 1896, fourteen years after the Supreme Court's decision in *Robertson,* Chief Justice Strong, as he then was, re-examined the application of the public right to fish in non-tidal waters. The case of *In Re Provincial Fisheries,* a Dominion/provincial reference to the Supreme Court over their relative powers to regulate fisheries, raised the rights of riparian owners and the extent of the public right to fish. On the public right to fish, there was no mistaking Chief Justice Strong's position:

> That the Crown in right of the provinces could grant either the beds of such non-tidal navigable waters or an exclusive right of fishing is, I think, clear. Before Magna Charta the Crown could grant to a private individual the soil in tidal waters with the fishery as an incident to it, or the exclusive right of fishing alone as distinct from the soil. Then, ***as the restraint imposed by Magna Charta does not apply to any but tidal waters,*** there is no reason why the prerogative of the Crown to make such grants in the class of waters now under consideration, large navigable lakes and non-tidal navigable rivers, should not be exercised now as freely as it could have been with reference to tidal waters before Magna Charta.[41]

eries, who must have known about
ter of Marine and Fisheries who was
shery, showed no inclination to alter
on seemed to undermine their argu-
evented the Crown from allocating

Court of Canada upheld most of Jus-
tion of the public right to fish, the
pansive. Chief Justice Ritchie wrote
chi in question, which was navigable
on which the public have a right to
e a right of navigation, "such a right
nt with an exclusive right of fishing,
erty opposite their respective lands."[37]
o the chief justice, did not apply in
ied inclined to disagree, suggesting
ers, above the flow of tide,"[38] and on
hold the right to fish in trust for the
o wade into these waters and con-
o be resolved to decide the case.[40]
ig's was enough for officials at Fish-
on to O'Reilly's allocation of exclu-
rtson, that position rested on highly

preme Court's decision in *Robertson,*
re-examined the application of the
The case of *In Re Provincial Fisher-*
o the Supreme Court over their rela-
d the rights of riparian owners and
On the public right to fish, there was
osition:

> could grant either the beds of such non-
> of fishing is, I think, clear. Before Magna
> e individual the soil in tidal waters with
> ive right of fishing alone as distinct from
> *Magna Charta does not apply to any but*
> prerogative of the Crown to make such
> onsideration, large navigable lakes and
> exercised now as freely as it could have
> Magna Charta.[41]

In sum, the public right to fish did not restrict the Crown's right to grant land, including the *solum* of adjacent non-tidal lakes and rivers, to create exclusive fisheries. If the Crown held riparian land, or had reserved the fishery from a riparian land grant, and had not granted exclusive fisheries, then the public might fish. Indeed, Strong C.J. wrote that it had been the "invariable practice, which has prevailed in Canada from the earliest times since the settlement of the country, to treat the right of fishing in navigable waters above the flow of the tide as public."[42] As a result, the *ad medium filum aquae* presumption did not apply in navigable waters. Crown grants of land adjacent to navigable waters were not presumed to include the fishery to the midpoint. But this did not in any way compromise the Crown's prerogative to allocate exclusive fisheries where it saw fit.[43] This prerogative lay with the Crown in right of the province except in a few circumstances, such as Indian reserves, where it lay with the Crown in right of the Dominion.[44]

The Judicial Committee of the Privy Council heard an appeal of the *Provincial Fisheries Reference* but chose to defer the question of the public right to fish.[45] The Supreme Court's interpretation was neither rejected nor confirmed. Again, perhaps this equivocation was enough for the Department of Fisheries to continue to refuse to recognize exclusive Native fisheries in non-tidal waters. But it is hard to find a legal basis for that position. The preponderance of case law stood opposed. And after the 1913 decision of the Privy Council in *A.G. B.C. v. A.G. Canada,* there could be no doubt. Of the rights to fish within the Dominion-held railway belt (a forty-mile-wide tract of land that bounded the Canadian Pacific Railway through British Columbia), but also as a general statement about fishing rights, Viscount Haldane wrote:

> In the non-tidal waters they [fisheries] belong to the proprietor of the soil, i.e. the Dominion, unless and until they have been granted by it to some individual or corporation. In the tidal waters, whether on the foreshore or in creeks, estuaries, and tidal rivers, the public have the right to fish, and by reason of the provisions of Magna Charta no restriction can be put upon that right of the public by an exercise of the prerogative in the form of a grant or otherwise.[46]

The public right to fish restricted the Crown prerogative, whether the Dominion or the provincial Crown, in tidal waters only. The Crown was free to grant exclusive fisheries in non-tidal waters. To the extent that Canadian courts, including the Privy Council, considered the issue after British Columbia joined Confederation, this had been the consistent finding since Justice Gwynne's decision in *Robertson* in 1880, the year before O'Reilly began allocating exclusive fisheries in non-tidal waters.

Conclusion

If O'Reilly's allotments of exclusive fisheries are characterized as recognizing fishing rights that predate the British assertion of sovereignty, then the restrictions on what the Crown may grant are not an issue. The rights do not arise from Crown grant but precede the Crown and therefore are not subject to a common-law doctrine – the public right to fish – that limits the Crown's ability to alienate exclusive fisheries. Several authors have argued persuasively that this is the better interpretation, and it certainly accords with the recent direction of Aboriginal rights and title litigation. Aboriginal title and rights do not arise from Crown grant; nor do they depend on the application of the Royal Proclamation of 1763 to British Columbia. Instead, they arise from the long use and occupation of land and resources by Aboriginal peoples that predate British assertions of sovereignty.[47]

If, however, O'Reilly's allotments are understood as Crown grants that create exclusive fishing rights, then the common-law doctrine of the public right to fish might operate to limit what grants were possible. With respect to tidal waters, it is clear that the Crown could not alienate exclusive fisheries in tidal waters without authority from parliament. Beginning in 1857, with the first comprehensive fisheries legislation for the provinces of Canada (Quebec and Ontario), elected representatives provided the fledgling Fisheries Branch with the authority to allocate exclusive fisheries for up to nine years. After Confederation, this authority carried over in the *Fisheries Act* to the minister of the Department of Marine and Fisheries. Within these statutory limits, Fisheries could grant exclusive fisheries in tidal waters.

With respect to non-tidal waters, when O'Reilly began his work in 1881, he did so in the aftermath of a decision that clearly restricted the application of the public right to fish to tidal waters. In the ensuing years, this position would be confirmed repeatedly until, in 1913, a decision of the Privy Council left no doubt that the Crown's prerogative to grant exclusive fisheries in non-tidal waters was unaffected by the public right to fish. Opposition to O'Reilly's allocation of exclusive fisheries in non-tidal waters, based as it was on the doctrine of the public right to fish, was unfounded.

Nonetheless, the common-law doctrine of the public right to fish was a crucial part of the legal apparatus that surrounded Native peoples and dispossessed them of their fisheries. In tidal waters, it opened the fishery to everyone. In non-tidal waters, it provided the justification, albeit erroneously, to remove constraints on non-Native fishing. Native fishers could participate on the same terms as everyone else. However, this was the problem. In opening the fishery to everyone, the public right to fish (at least as interpreted by Fisheries) erased the prior rights of Native peoples to their

sheries are characterized as recogniz-
tish assertion of sovereignty, then the
grant are not an issue. The rights do
ede the Crown and therefore are not
he public right to fish – that limits the
isheries. Several authors have argued
terpretation, and it certainly accords
al rights and title litigation. Aborigi-
Crown grant; nor do they depend on
ıation of 1763 to British Columbia.
ınd occupation of land and resources
ritish assertions of sovereignty.[47]
ıre understood as Crown grants that
e common-law doctrine of the public
ıat grants were possible. With respect
vn could not alienate exclusive fisher-
rom parliament. Beginning in 1857,
egislation for the provinces of Canada
entatives provided the fledgling Fish-
ıcate exclusive fisheries for up to nine
ority carried over in the *Fisheries Act*
f Marine and Fisheries. Within these
exclusive fisheries in tidal waters.
ıen O'Reilly began his work in 1881,
on that clearly restricted the applica-
al waters. In the ensuing years, this
dly until, in 1913, a decision of the
Crown's prerogative to grant exclu-
ınaffected by the public right to fish.
exclusive fisheries in non-tidal waters,
public right to fish, was unfounded.
rine of the public right to fish was a
surrounded Native peoples and dis-
idal waters, it opened the fishery to
ided the justification, albeit errone-
Native fishing. Native fishers could
one else. However, this was the prob-
ıe, the public right to fish (at least as
rior rights of Native peoples to their

fisheries. The radical simplification of Native customary tenure in the fisheries was achieved simply by denying its existence. A token Indian food fishery (discussed in Chapter 6) was all that would be allowed to remain. Beyond this erasure of tenure, the opening of the fisheries to the public undermined the Indian land policy that was premised on and justified by the continuing right of Native peoples to their fisheries. The land allotments only made sense in tandem with the fisheries. Finally, constructing the fisheries as common property, to which everyone had the right not to be excluded, worked best for those who had access to the credit and capital that was increasingly necessary to participate as fishers and, even more so, as processors. Native people shared a lack of access to capital with many immigrants, but their status as Indians under the *Indian Act* meant that credit was also difficult to acquire. In a legal regime that did not recognize their prior rights to the fisheries or the correlation between land policy and fisheries, Native peoples were never in a position to participate in the fisheries on equal terms.

Of colonialism more generally, anthropologist John Comaroff suggests that, "far from being a crushingly overdetermined, monolithic historical force, colonialism was often an underdetermined, chaotic business, less a matter of the sure hand of oppression – though colonialisms have often been highly oppressive, nakedly violent, unceasingly exploitative – than of the disarticulated, semicoherent, inefficient strivings for modes of rule that might work in unfamiliar, intermittently hostile places a long way from home."[8] By 1925, many immigrant British Columbians hardly considered themselves "a long way from home." They had come to settle in a new home and make it theirs, and they expected the law of the colonial state to help. It did, but it also provided, and provides, spaces – physical spaces, such as the courtroom, or rhetorical spaces of argument – that were, and are, used as sites of contestation and resistance.

Early in the afternoon of Monday, 6 October 1986, two federal Department of Fisheries and Oceans (Fisheries) officers flew a helicopter patrol up the Squamish River. From the air they spotted nets in the river alongside the Squamish Indian Reserve No. 11 Cheakamus (see Figure 0.1 in the Introduction). Several hours later they returned to the river by truck and seized the nets.[9] The next day, fifty-eight-year-old Jacob Kenneth Lewis, a member of the Squamish Indian band, contacted Fisheries to recover his nets.

Lewis held an Indian food fish licence that read: "Jake Lewis ... being an Indian, is hereby licenced to fish for salmon that may be taken in sufficient quantities to be used for the sole purpose of obtaining food for that Indian and his family in the following described waters or area: Squamish River."[10] Lewis and the other Squamish who held the licences could use one ten-fathom (eighteen-metre or sixty-foot) gill net as a set net – that is, in a fixed location; drift netting was prohibited. Beginning in June, they could fish for twenty-four hours each week, from 12 (noon) on Saturday until 12 (noon) on Sunday. From October through December, the fishing window opened for seventy-two hours a week from Thursday to Sunday. They were also required to mark their fishing gear and carry the licence while fishing, and there were restrictions on the material in the nets.

The Fisheries officer did not return the nets. Instead he charged Lewis with five counts under the *Fisheries Act* on grounds that Lewis had been using two nets where the licence permitted one; that one net was over the ten-fathom limit; that the nets were still in the water on Monday when the fishery was closed; that the nets were unmarked; and that the nets used prohibited material. Two other members of the Lewis family, Allen Frances

and William Douglas, had been charged with similar offences the year before, and a fourth, Allen Jacob, was charged in 1987.

The four accused appeared before Judge Walker in the British Columbia Provincial Court in October 1987. The principal argument in *R. v. Lewis* concerned the boundary of the Cheakamus reserve. If the reserve extended into the river to the spot where the accused had been fishing, it would mean the fishing had occurred on the reserve. And if the fish had been caught on the reserve, then, under the terms of the *Indian Act*, a Squamish Indian Band by-law superseded the federal fisheries regulations. By-Law No 10, "for the preservation, protection and management of fish on the reserve," permitted members of the Squamish band to fish on Squamish reserves without the restrictions set out in the food fishing licence.[11] The location of the reserve boundary turned on the ***ad medium filum aquae*** presumption. Lawyers for the Squamish argued that the band owned the bed of the river, a non-tidal body of water, to its midpoint and therefore held the exclusive right to fish in its waters. However, Judge Walker ruled that, in Canada, the presumption did not apply in navigable waters; the Squamish River was navigable, and therefore the river was not a part of the reserve. The Lewises were bound by the terms of the Indian food fish licences, and Judge Walker levied fines of twenty-five dollars for each offence.

The Squamish appealed to the BC County Court where, in 1989, most of the convictions were overturned. Judge van der Hoop held that the alleged offences had occurred on the reserve. In doing so, he indicated that "the historical background of the right of the Indians to fish," and "the desire of both Provincial and Federal Governments to support and protect that right," were relevant in determining the boundaries of the reserve.[12] However, on the Crown's appeal of this decision, the BC Court of Appeal reinstated the convictions. The Squamish Indian Reserve No. 11 Cheakamus did not extend into the Squamish River, a finding that the Supreme Court of Canada upheld in 1996.[13]

In upholding the convictions, the Supreme Court relied on evidence that none of the lower courts had seen. It allowed an intervenor – Canadian National Railway – to submit new evidence in *Lewis* and in *R. v. Nikal*, a similar case involving Wet'suwet'en Indian reserve boundaries and fisheries on the Bulkley River, a tributary of the Skeena, that the court heard at the same time.[14] The new evidence consisted primarily of nineteenth-century correspondence to and from the Department of Marine and Fisheries regarding the rights of the public and of Native peoples to the fisheries. Largely on the basis of this evidence, which revealed the federal department's

determined opposition to Native fishing rights, the Supreme Court concluded that the Indian reserve commissioners had not intended to allocate exclusive fisheries and, furthermore, that they did not have the authority to do so when they allotted Indian reserves. Justice Iacobucci, who wrote for the court in *Lewis*, concluded in regard to the Cheakamus reserve that "it was never the Crown's intention, at any point in time, to include a fishery as part of the reserve" and, more generally, "that the Crown's policy was to treat Indians and non-Indians equally as to the uses of the water and not to grant exclusive use of any public waters for the purpose of fishing."[15] In his summary he wrote: "It was never the intention of the Crown to provide the Bands with an exclusive fishery in waters adjacent to the reserves."[16] Similarly, Justice Cory, who wrote for the majority in *Nikal*, concluded that "the Crown in all its manifestations was consistently clear in its statements that no exclusive fishery should be granted to Indian bands in British Columbia."[17]

The Indian reserve commissions never formally linked Squamish Indian Reserve No. 11 Cheakamus to the fisheries. This much of the Supreme Court's decision in *Lewis* was correct. Covering more than 4,000 acres, the reserve was almost twice as large as all the other Squamish reserves combined (Figure 0.1). Forty years after the Joint Indian Reserve Commission allotted the Cheakamus reserve in 1876, the Royal Commission on Indian Affairs for the Province of British Columbia described small reserves above, immediately below, and across the Squamish River from the Cheakamus reserve as "fishing stations." The Squamish River was clearly an important fishing river for the Squamish people, but fishing was not the identifying feature of their largest reserve. Instead, the commissioners labelled the one Squamish reserve where it was possible to do something in addition to fishing as "pasturage and timber area."[18]

The Supreme Court's conclusions about the authority of the reserve commissioners and the intent of the Crown are more difficult to sustain. It is clear that the Department of Fisheries understood Native peoples had limited privileges to a food fishery. Beyond this privilege, Native fishers shared with the rest of the public the right not to be excluded from the fisheries, but nothing more. This view was well entrenched in the department when it assumed jurisdiction over the Pacific coast fisheries, and it is this understanding that pervades the decisions of the Supreme Court in *Nikal* and *Lewis*. It was, however, a relatively new understanding, at odds with the Crown's recognition of exclusive Native fisheries in the late eighteenth and early nineteenth centuries in Upper Canada. Indeed, the mid-nineteenth-century legal opinions on which Fisheries officials based their management of the Native fisheries, and on which the Supreme Court's recent judgments

rights, the Supreme Court con-
ners had not intended to allocate
hey did not have the authority to
Justice Iacobucci, who wrote for
o the Cheakamus reserve that "it
oint in time, to include a fishery
, "that the Crown's policy was to
o the uses of the water and not to
r the purpose of fishing."[15] In his
ention of the Crown to provide
aters adjacent to the reserves."[16]
ie majority in *Nikal,* concluded
was consistently clear in its state-
granted to Indian bands in Brit-

formally linked Squamish Indian
ries. This much of the Supreme
ering more than 4,000 acres, the
ie other Squamish reserves com-
oint Indian Reserve Commission
he Royal Commission on Indian
ia described small reserves above,
nish River from the Cheakamus
sh River was clearly an important
t fishing was not the identifying
e commissioners labelled the one
to do something in addition to

out the authority of the reserve
n are more difficult to sustain. It
understood Native peoples had
his privilege, Native fishers shared
o be excluded from the fisheries,
renched in the department when
ast fisheries, and it is this under-
ie Supreme Court in *Nikal* and
nderstanding, at odds with the
sheries in the late eighteenth and
da. Indeed, the mid-nineteenth-
officials based their management
upreme Court's recent judgments

rest, amounted to a fundamental reinterpretation of fisheries law, policy, and treaty rights, the principal object of which was to diminish Native control over and access to the fisheries.[19]

Although Fisheries articulated its vision of limited Native fishing privileges most forcefully, it was never the only view, even in the late nineteenth century. Native peoples were clear that their rights to fish derived from their own legal traditions, not from the Crown, and those rights included, but were not limited to, fishing for food. The fisheries clause in the Douglas Treaties – the right to "fisheries as formerly" – provides some evidence that colonial officials in British Columbia also understood that Native fishing rights emanated from past practice, not the Crown, and that those rights were broadly construed.[20] Furthermore, there is clear and abundant evidence that, whether as a matter of law or policy, the Department of Indian Affairs sought to preserve Native peoples' access to their fisheries. Indeed, throughout the process of reserve allotments, Indian Affairs was a continuing, although faltering and occasionally ambivalent, advocate of Native fishing rights, at times insisting that Fisheries recognize the allocation of exclusive fisheries as part of the established reserve system or assume the costs of not doing so, while at other times deferring to its more powerful sibling department within the Dominion government. The prosecution of Squamish fisher Domanic Charlie, recounted at the outset of this book and in Chapter 6, reveals both the vigorous defence of Native fishing rights by Indian Affairs and the department's conflicted ambivalence towards those rights. It would oppose Fisheries, even in the public forum of the courtroom, but only so far as the county court, in *R. v. Charlie.* Nonetheless, Indian Affairs was a dissenting voice, albeit inconsistently expressed and seldom heard, within the government of Canada to Fisheries' refusal to recognize Native fishing rights. The Supreme Court's conclusions that "the Crown in all its manifestations was consistently clear that no exclusive fishery should be granted," or that "it was never the intention of the Crown to provide Bands with an exclusive fishery in waters adjacent to the reserves," are wrong. In concluding thus, the court has uncritically adopted the position of the Department of Marine and Fisheries and its interpretation of the law in the late nineteenth century as its own.

If, as I think must now be clear, the reserve geography in most of the province is premised on access to fish, then that geography ought to create certain entitlements to the fisheries. This is not an argument based on Aboriginal rights or title, although these underlie the claim, but instead on the government policy and practice of alloting small parcels of land

r 1920, DIA, RG 10, C-II-2, vol. 11302

RG 10, vol. 7784, file 27150-3-13, pt. 1

larch 1923, ibid.

5 July 1923.
ient of Indian Affairs and the Executive
h Columbia, 7-8 August 1923, RG 10,
AC. Attendees: Deputy Superintendent
d Chief Inspector of Indian Affairs for
n Tribes of British Columbia chairman,
Paull (Squamish); Ambrose Reid of the
(Kamloops), Thos. Adolph (Fountain),
sket (Lillooet) representing the Interior
Simon Pierre of the Lower Fraser Tribes;
; Mrs. Cook (Kwawkewlth); and A.E.

248 U.S. 78.
ent of Indian Affairs and the Executive
-70.

r 1924.
:a of Indian Title in British Columbia,
:n Law, vol.6, *British Columbia and the*
oronto: Osgoode Society for Canadian

34 D.L.R. (3d) 145.
C.N.L.R. 160.
uly 1938. See Hamar Foster, "Road-
Cases Make Good Law?" *The Advocate*

listed in a table in UBC's Information
3.

, R.S.C. 1985, app. 2, no. 10, term 13.
Resistance, and Reserves in British Co-

Law and Power on the Frontier (Cam-
36, 240.
serve Farmers and Government Policy
rsity Press, 1990), 149-56.
overning fisheries are reviewed in the

mons in Western Canada," in *As Long*
Canadian Native Studies, ed. Ian A.L.

Getty and Antoine S. Lussier (Vancouver: UBC Press, 1983), 212. A note on terminology: Spry is using "tragedy of the commons" in this passage to refer to a tragedy of a regime of open access. Otherwise, she uses "common property resources" and "commons" interchangeably to refer to resources and land governed by the traditions and customs of local communities. In this book, I have used the term "common property" differently, to refer to a regime in which individuals have a right not to be excluded.

7 See Hamar Foster, "Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927," in *Essays in the History of Canadian Law*, vol.6, *British Columbia and the Yukon*, ed. Hamar Foster and John McLaren (Toronto: Osgoode Society for Canadian Legal History, 1995), 28-86. For a general statement of that law see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

8 John Comaroff, "Colonialism, Culture, and the Law: An Introduction," *Law and Social Inquiry* 26 (2001): 311.

9 *R. v. Lewis* (20 October 1988), Squamish (B.C. Prov. Ct.) (Testimony of Albert James Ionson, 27 October 1987, Trial Transcript at 126).

10 Ibid., Exhibit 6.

11 Ibid., Exhibit 9, Squamish Indian Band, By-law No. 10, *A By-law for the Preservation, Protection and Management of Fish on the Reserve* (12 September 1977).

12 *R. v. Lewis*, [1989] 4 C.N.L.R. 133 (B.C. Co. Ct.), at para. 42.

13 *R. v. Lewis*, [1996] 1 S.C.R. 921, [1996] 3 C.N.L.R. 131, affirming (1993), 80 B.C.L.R. (2d) 224, [1993] 4 C.N.L.R. 98 (B.C.C.A.), reversing [1989] 4 C.N.L.R. 133 (B.C. Co. Ct.).

14 *R. v. Nikal*, [1996] 1 S.C.R. 1013, [1996] 3 C.N.L.R. 178.

15 *Lewis*, para. 33.

16 *Lewis*, para. 48.

17 *Nikal*, para. 83.

18 Royal Commission on Indian Affairs for the Province of British Columbia, *Report of the Royal Commission on Indian Affairs for the Province of British Columbia* (Victoria: Acme Press, 1916), p. 637.

19 See J. Michael Thoms, "Ojibwa Fishing Grounds: A History of Ontario Fisheries Law, Science, and the Sportsmen's Challenge to Aboriginal Treaty Rights, 1650-1900" (PhD diss., Department of History, University of British Columbia, 2004); Peggy J. Blair, 'Settling the Fisheries: Pre-Confederation Crown Policy in Upper Canada and the Supreme Court's Decisions in *R. v. Nikal* and *Lewis*," *Revue générale de droit* 31 (2001): 87-172. For a different view, and the source of much of the Supreme Court of Canada's evidence, see Roland Wright, "The Public Right of Fishing, Government Fishing Policy, and Indian Fishing Rights in Upper Canada," *Ontario History* 86 (1994): 337. See also Chapter 4.

20 This clause, the single most important indicator of pre-Confederation fisheries policy in British Columbia, and the legal touchstone for those who sought protection for Native fishing rights, is not mentioned in either *Nikal* or *Lewis*. It is a serious omission.

21 See Chapter 8.

22 *Alaska Pacific Fisheries v. United States* (1918), 248 U.S. 78, 39 S. Ct. 40 at 41, 4 Alaska Fed. 709.

23 Ibid., at 42.

24 *R. v. Jack*, (1979), [1980] 1 S.C.R. 294, [1979] 2 C.N.L.R. 195, at para. 30.

25 *Lewis*, para. 53.

26 There is a large body of related case law in the United States flowing from *Winters v. United States* (1908), 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340. In this case involving access to water, the US Supreme Court determined that the grant of a reservation included an implied grant of water rights because without water rights the reservation was