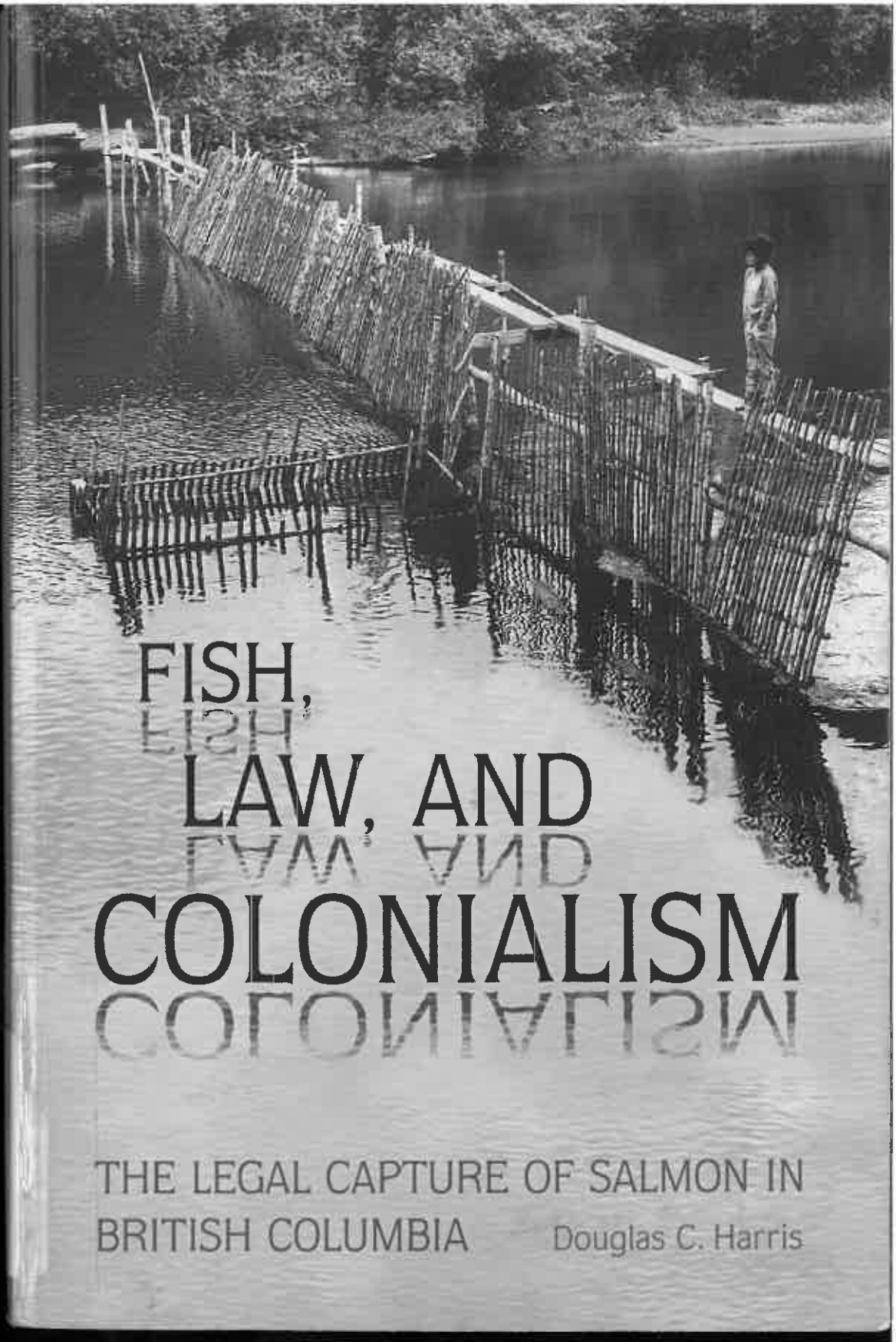

FISH, LAW, AND COLONIALISM

THE LEGAL CAPTURE OF SALMON IN BRITISH COLUMBIA

Douglas C. Harris

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CHAPTER ONE

Legal Capture

There is no law governing fish in British Columbia. Fishing is carried on throughout the year without any restrictions. This state of things is well suited to a new and thinly populated country. The restrictions of a close season would be very injurious to the Province at present, and for many years to come.[1]

These comments in 1872 from H.L. Langevin, the Minister of Public Works for the Dominion of Canada, were part of the first report to the Parliament of Canada on the state of British Columbia's fisheries. Canning operations had just appeared on the Fraser River, and Langevin was an enthusiastic promoter of the industry. Salmon, herring, sturgeon, oolican, and other species were plentiful, the resource was underdeveloped, and if only a few more fishing-minded immigrants would arrive on the coast, he argued, the wealth of the province could begin to be realized.[2] That wealth lay not in the gold that had attracted so much attention, but in the relatively under-appreciated fishery. Langevin believed the fishing industry needed encouragement – but not government regulation – to realize its promise.

When British Columbia joined the Canadian confederation in 1871, it ceded control of the fisheries to the Dominion government; under the *Constitution Act, 1867*, 'Seacoast and Inland Fisheries' were a Dominion responsibility, supervised by the Fisheries Branch of the Department of Marine and Fisheries ('Fisheries').[3] The Canadian parliament had passed a *Fisheries Act* in 1868,[4] but according to the Terms of Union with British Columbia, it was not immediately law in the western province and would not be adopted until 1877. The Dominion had not yet intervened, and that, argued Langevin, was as it should be. The government

must maintain a discreet distance while the fledging industry established itself on the Pacific coast.

Langevin was correct that the Dominion had not yet turned its legislative or regulatory attention to the West Coast fishery. He was mistaken, however, to claim an absence of law. Coastal and freshwater fisheries, the principal source of subsistence and wealth for Native peoples in British Columbia, were neither unregulated nor un-owned. They were, instead, surrounded, even constructed, by a multitude of rules governing their access and use. The opening section of this chapter provides an outline of the patterns of ownership and management that characterized Native fisheries, paying particular attention to the regulation surrounding weirs. Later in the chapter I return to the Native fisheries to gather the evidence of the Native legal forms that survived and responded to the imposition of Canadian fisheries legislation. Legal pluralism characterized the late-nineteenth-century fishery, even as the state sought to assert its dominance.

Anglo-Canadian law was also a presence in the West Coast fisheries even if fisheries legislation was not yet in force. The common law doctrine of the public right to fish opened the fisheries to all British subjects in the colony and constrained the Crown's ability to allocate exclusive fisheries. It constructed fish as an open-access resource. This open access did not, however, reflect some pre-social state of nature, as Garrett Hardin and others have suggested.[5] It was, instead, a legal construct, drawn from centuries-old English law and moulded by the laissez-faire liberalism of the mid-nineteenth century. Unrecognized by Langevin, and ignored in the existing literature on British Columbia's fisheries, the public right to fish formed the foundation for subsequent fisheries legislation. It receives a section in this chapter.

Between these two legal regimes sit the fourteen treaties negotiated between the HBC (on behalf of the Crown) and Native peoples on Vancouver Island in the early 1850s. These treaties, covering a small fraction of Vancouver Island, were exceptions to the general practice in British Columbia, where colonial and later Dominion and provincial governments allowed settlement without first securing the land from Native peoples through treaty. The brief text of these treaties describes the lands surrendered by the Native signatories, and the terms of that surrender. These included a guarantee that Native fisheries would not be disturbed: the signing groups could continue their fisheries 'as formerly.' These treaties, their interpretation and enforcement, are the focus of another section in this chapter.

Other English laws, which were not specific to fishing, defined particular roles for the participants in the emerging industrial fisheries before specific legislation was in force. Under the law of master and servant, Native fishers were transformed into employees subject to imprisonment for breach of employment contract. A remarkable series of cases in the New Westminster Police Court in 1877 illustrate the law's impact. These legal forms – the public right to fish and the law of master and servant – enforced by the Dominion and its courts, shaped the fisheries before laws specifically designed to regulate the fishery were in place. The law defined access to fish (open access for British subjects) and structured particular relationships (master and servant), but these legal forms had so permeated Anglo-Canadian culture that they were invisible to a minister of the Dominion government.

The remainder and bulk of the chapter describes the application and enforcement of Canadian fisheries legislation and regulation, and the changing treatment and characterization of the Native fishery within it. Several important studies have examined aspects of this process. Reuben Ware's *Five Issues, Five Battlegrounds: An Introduction to the History of Indian Fishing in British Columbia, 1850–1930*, charts the creation of an 'Indian food fishery' in Anglo-Canadian law, paying particular attention to the Stó:lō fishery in the lower Fraser River.[6] In this 1983 study, full of quotations and extended appendices from the primary sources, Ware claims, correctly, that the distinction between Indian food fishing and commercial fishing that developed in the 1880s was an artifice imposed on the Native fishery by the Dominion government to limit the Native catch. Ware marks the 1880s as the beginning of Dominion efforts to regulate the Native fishery on the Fraser, and suggests that in the following two decades regulation spread throughout the province, confining the Native fishery.

Geoff Meggs, in *Salmon: The Decline of the British Columbia Fishery*, provides a more general survey of a century of conflict between Natives and non-Natives, workers and managers, fishers and government, over the spoils of a once valuable resource that, he argues, has been greatly reduced by over-harvesting and mismanagement.[7] Meggs also collaborated with Duncan Stacey to produce a wonderful array of photographs and a useful accompanying text, *Cork Line and Canning Lines: The Glory Years of Fishing on the West Coast*, to chronicle the rise of the canning industry with particular attention to the lives of working people, including Native workers who, for the industry's first twenty years, formed the majority of fishers and shore workers.[8]

Dianne Newell's 1993 book, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fishery*, is the only comprehensive study of Native fisheries on the Pacific and of federal fisheries legislation.[9] Newell surveys what she labels 'the politics of resource regulation' from Confederation to the 1990s, and argues that the responsibility to conserve salmon stocks became a burden that consistently fell most heavily on the Native fishery. Conservation claims became the means by which Fisheries justified taking control of the resource on behalf of the industrial canneries. Newell does not dispute the importance of conservation, but suggests that such claims need to be followed by the question; For whom are fish conserved? The answer, she concludes, is that Native people, despite their long history of effective resource management, bore the brunt of conservation for the sport and industrial fisheries. Fish, particularly salmon, were *conserved* by the state for the canneries.[10] Newell is right to focus on federal fisheries legislation, but in covering more than a century she is unable to devote enough attention to the details of enforcement in the late nineteenth century. The law on the books was not the law on the ground, at least not initially, and this is revealed only through closer study. To explore the numerous instances of enforcement and resistance, and the conflicts between the departments of the Dominion, one must delve further into the departmental correspondence. Furthermore, Newell and the other authors underemphasize the non-statutory Anglo-Canadian legal forms that surrounded the fishery, particularly the common law doctrine of the public right to fish that, when invoked in British Columbia by a settler society and its state, created an open-access fishery, erasing any pre-existing claims of Native ownership. These omissions notwithstanding, Newell's is an important contribution both in its scope and in the attention it pays to the effects of technological change; the following study complements rather than rejects her principal conclusions.

On a somewhat different track, *Cheap Wage Labour: Race and Gender in the Fisheries of British Columbia* is Alicja Muszynski's attempt to 'develop a general theoretical framework that can help us understand how salmon canners engaged their shore plant labour forces according to criteria of race and gender.'[11] She focuses on the shore workers – those who worked in the canneries rather than on the fish boats – and on the patriarchal, racial, and colonial assumptions that, in addition to the modes of production, set conditions of work and wage rates of working women and men. Her book, a jumble of history and theory, is an intriguing if not entirely successful attempt to chart the *making* of

shore workers in the industrialization of the British Columbia fishery. The Aboriginal fishery was captured by the state, she argues, in the process turning Natives, particularly Native women, into 'cheap wage labour.' Drawing from the work of numerous Marxist scholars, Muszynski employs the idea of *relative autonomy* to suggest that although manipulated by the canneries, the state was not entirely subservient in its regulation of the fishery.[12] It acted generally in the interests of the canneries, she argues, but not always and not entirely. Nowhere, however, does she provide a sustained analysis of the state's principal device for re-allocating the fishery – the law – and how that institution mediated state power. The role of law in the efforts to both dominate and resist is revealed in local settings, closely studied, something that is developed in this chapter, but perhaps even more so in the chapters on the Babine and Cowichan fisheries.

Other scholars have written about the exclusion of Native peoples from their traditional fisheries in Atlantic Canada,[13] Ontario,[14] and Manitoba.[15] A great deal has been written about the Indian fisheries in Washington State, particularly in the aftermath of Justice Boldt's decisions in the 1970s that the resident tribes were entitled, under treaty, to 50 per cent of the commercial fishery.[16] Further south, Joseph E. Taylor III has produced a remarkably well-documented history of the relationship between fish and humans in the Oregon country, focusing on the demise of the Columbia River fisheries.[17] Arthur McEvoy has considered the American Indian experience on the Pacific coast in several chapters of *The Fisherman's Problem: Ecology and Law in the California Fisheries, 1850–1980*.[18] Despite these useful contributions, both in British Columbia and beyond, the role of law in appropriating local fisheries and resisting is underplayed. By probing these details, I attempt to provide what is not yet in the literature – a thorough study of the colonization, through law, of British Columbia's salmon fisheries.

Native Fisheries

The abundant resources of the temperate Northwest Coast supported one of the world's densest non-agrarian populations. The region, argues Wayne Suttles, 'refutes many seemingly easy generalizations about people without horticulture or herds. Here were people with permanent houses in villages of more than a thousand; social stratification, including a hereditary caste of slaves and ranked nobility; specialization in several kinds of hunting and fishing, crafts, and curing; social

units larger than villages; elaborate ceremonies; and one of the world's great art styles.'[19] Along the West Coast and inland to the Western Cordillera, fish, predominantly salmon, were the principal sources of Native sustenance and wealth. According to anthropologist Philip Drucker, '[e]xploitation of fisheries was the foundation of native economy. This fact was reflected in more than just the daily food-quest routine and diet. It gave the areal culture an orientation toward the sea and river that regulated settlement patterns and was reflected in social organization and religion.'[20] The coastal and interior fisheries were central to Native lives – to some they were the Salmon People[21] – and access to the fisheries was regulated, not by the common law or the *Fisheries Act*, but by the Native peoples themselves.

The social structures and patterns of Native resource ownership varied greatly in what is now British Columbia but some generalization is possible.[22] The principal unit of social organization on the Northwest Coast was the local group, usually a collection of related kin groups that lived together in a village for much of the year, coordinating activities such as the gathering or harvesting of resources and defence of territory. 'The localized groups of kin,' wrote Drucker, 'defined who lived together, worked together, and who jointly considered themselves exclusive owners of the tracts from which food and other prime materials were obtained.'[23] These local groups were socially stratified, usually consisting of 'a wealthy elite (the "chiefs" or "nobles"), their followers (the "commoners"), and their slaves.'[24] Status and privilege were inherited, either from the male or female line, or in some combination thereof. The degree of social distinction varied, being most pronounced on the north coast, and least important among the peoples of the interior.

Given the importance of fish to most local groups, the sites for their capture and harvest were prized, and thus closely surrounded with regulation. In some areas the important fishing sites, like other important food-gathering sites, were owned by high-ranking individuals or families. In other areas, similarly high-ranking members of a local group would own a resource area that included an entire salmon stream.[25] Ownership of these sites or resource areas was inherited, indivisible, and was confirmed or validated by a feast. Title was vested in an individual who had the authority to exclude members of the local group, but ownership more commonly implied the right to manage a fishery by allocating the resource among the local group and those who through kinship connections had claims of access. The owner assumed

the role of steward, ensuring that all members of the group were provided for and that the fishery remained healthy for future generations. Those outside the local or family group were excluded, but those within, although needing to ask permission from the person who owned the resource, had access. Drucker describes the concept of ownership for peoples along the Pacific coast, and provides a specific illustration from the Nuu'Chah'Nulth (Nootka) on the west coast of Vancouver Island:

> *Nootkan custom illustrated the nature of such rights very clearly. Almost every inch of Nootkan territory, the rarely visited mountainous back-country, the rich long-shore fishing and hunting grounds, and the sea as far out as the eye could reach, was 'owned' by someone or other. An owner's right consisted in the right to the first yield of his place each season – the first catch or two of salmon, the first picking of salmon-berries, etc. When the season came the owner called his group to aid him in building the weir or picking the berries, then he used the yield of the first harvest for a feast given to his group, at which he stated his hereditary right (of custodianship) to the place, then bade the people to avail themselves of its products. Any and all of them might do so. (Outsiders were prohibited from exploiting these owned places, except where they could claim kinship to the owner, i.e., for the time identify themselves with his local group.) The essence of individual 'ownership,' was thus simply a recognition of the custodian's right.*[26]

In this way, ownership of the fisheries blurred with management. Gilbert Malcolm Sproat, a young Englishman who operated a lumber mill in Nuu'Chah'Nulth territory in the 1860s, knew of a Nuu'Chah'Nulth of some standing who would not allow others to enter a lake without his permission. Sproat speculated that this gatekeeping was not for personal gain, but rather that the individual was acting on behalf of his people 'to prevent the salmon from being disturbed in their ascent up the river.'[27]

Interior groups owned their fisheries as well. Some fishing sites in Stl'átl'imx territory along the Fraser near Lillooet were individually owned, other sections of the river were associated with residence-groups, and still other sites were public, open to all Stl'átl'imx and some outsiders.[28] The individually owned rocks provided the owner with prime access to the spring (chinook) salmon, the preferred species, but did not create an exclusive property right. The following account reflects a characteristic balance between ownership and stewardship:

> A fishing rock can't be sold from way back. It can be handed down to relations like son, nephew, or anybody else, whoever the old guy that owns the rock, that fixes the platform, whoever he thinks will be capable to keep doing it, keep fixing it. But it doesn't mean for just himself. When he fixes that platform or that rock where he fishes, it's not only him that fishes. Everybody. When he sees anybody come and set, they wait for him, and he just calls them over. He tells them, 'Come on and fish.' They don't hog one rock. If he gets what he needs, the other fellow gets a share, and everybody else gets a share.[29]

The residence-group sites were most often associated with the proximate village whose members had defined access to sites along the adjacent stretch of river. The most productive sites – at Six Mile and the mouth of the Bridge River – were public in the sense that they were open to all Stl'átl'imx and many neighbouring people, particularly those with whom the Stl'átl'imx had reciprocal access to their lake fisheries.[30] However, Aubrey Cannon argues that shared access appears to have been 'a localized phenomena, based on kin and other immediate ties.'[31] Her study of the correlation between conflict and salmon on the interior plateau of British Columbia suggests that relative scarcity and abundance of salmon produced trade and, in some cases, conflict between local groups, and she refutes generalizations that emphasize communitarian principles and open-access resources. Resources or their procurement sites were owned by local groups, and access was traded for or fought over.[32]

The myths and stories of many Native societies suggest the density of regulation that surrounded the Native fisheries. In his introduction to James Teit's annotated collection of the myths of the Nlha7kápmx (Thompson), whose winter villages were located along the middle Fraser and lower Thompson rivers in south-central British Columbia, anthropologist Franz Boas recounted one of the Coyote myths of the Chinook people who lived near the mouth of the Columbia River. Both the Nlha7kápmx and Chinook, like many of the peoples in western North America, shared Coyote as the trickster, transformer, and cultural hero. The following synopsis of the Chinook story begins with a hungry Coyote:

> He [Coyote] made a little man of dirt, who he asked about the method of obtaining salmon. This artificial adviser told him how to make a net, and

> informed him regarding all the numerous regulations referring to the capture of salmon. He obeyed only partially, and consequently was not as successful as he hoped to be. He became angry, and said: 'Future generations of man shall always regard many regulations, and shall make their nets with great labour, because even I had to work, even I had to observe numerous regulations.'[33]

The regulations included rules on the preparation, cooking, and eating of the first salmon caught every year, the making and deployment of nets, the use and movement of canoes while fishing, and the limits on consumption.[34]

Other myths suggest not only knowledge of salmon life cycles, but also management of human behaviour that might affect stocks that supported numerous peoples. A recurring story told by peoples along the Columbia River and its tributaries describes Coyote destroying a downstream weir to allow migrating salmon through to people upstream. The following version, 'Coyote Introduces Salmon,' collected by Teit from the people who lived along the Similkameen in south-central British Columbia, includes many of the common elements.

> Coyote came to Similkameen from the Thompson country. He had already introduced salmon in the Columbia, and many of these fish were at that time running up the Similkameen River. They could not get to its head waters, however, as the two *wi'lawil* sisters had a weir across the river at Zu'tsamEn (Princeton). Coyote stopped when he came to the weir, and said, 'Here I find you!' The sisters answered, 'Yes, we are settled here.' He looked over the weir, and said to them, 'You have plenty of food. I will stay a while.' The elder sister disliked him, while the younger sister liked him. The former said to her sister, 'Have nothing to do with him. He is Coyote, and he will play tricks. Perhaps he intends to destroy the weir that we have erected with so much labour.' Coyote was angry because the elder sister disliked him: so one day when they were away digging bitter-roots on the flats near by, he covered his head with a spoon of sheep-horn, and broke the weir. The elder sister felt that something bad was happening, therefore the sisters hastened home. When they arrived, Coyote had almost broken down the weir. They attacked him with clubs, and beat him over the head to kill him or make him stop; but he continued to demolish the weir, the pieces of which soon floated downstream.[35]

Similar stories were told by people in many parts of the Fraser River

system.[36] To recount them as evidence of comprehensive Native management of river systems as vast as the Columbia and the Fraser is almost certainly to distort their meaning. Myths and stories served many functions in Native societies: to confirm rights of ownership or access to a resource; to impart lessons of human behaviour; and to describe particular relations between humans and the environment of which they were a part. They were also told to entertain, to mock, to esteem, to provoke laughter and tears. Perhaps most importantly, they were spoken (not written) in Native languages and accompanied by expressions, gestures, and varying intonation. Interpretation requires a close contextual analysis. Nonetheless, these stories about animals and humans in the mythical age provide evidence that the fisheries, far from being unregulated, were in fact constructed by the regulations that surrounded them.[37]

Anthropologists T.T. Waterman and A.L. Kroeber describe the plethora of rules and rituals that marked the construction, use, and dismantling of the Kepel Fish Dam, a weir built by the Yoruk people on the Klamath River in northern California. The Yoruk took exactly ten days to build their weir, caught vast quantities of fish for ten more days, and then dismantled the weir. The dismantling of the weir before the end of the salmon run perplexed the observers; it appeared an unnecessary step given that the river's current during the winter rains would have destroyed the structure. Waterman and Kroeber suggest that the weir was dismantled to prevent the intervention of people upstream who depended on the salmon runs as well.[38] Others have suggested that weirs were removed out of an 'ethic of reciprocity' that extended not only to human neighbours, but also to the salmon who had given their lives to humans as a gift.[39] 'We cannot be sure,' wrote anthropologists Michael J. Kew and Julian Griggs of a weir that the Shuswap people removed each evening from a small tributary in the Fraser system, 'that the dam was broken for the sake of "conserving" the fish, but that is beside the point when the removal of the dam is an act called for by the protocol of proper relationships with the fish who are gift-bearing visitors, and the rules of access that underpinned a system of communal property rights.'[40] An ethnographic manuscript by Alexander Caufield Anderson, a trader with the HBC from 1832 to 1858 and later the first Dominion Inspector of Fisheries in British Columbia, supports this view. Anderson described some of the Native fishing technology on the Fraser, including a variety of fish weirs. He noted their efficiency and the 'understanding' that existed between the different peoples on

the river system to ensure adequate food supplies and reproduction. 'The fence, however, is rarely so secure but that the main portion of the shoal contrives to force a passage; and even admitting it were perfectly close, *the natives have a conventional understanding that the fish shall be allowed to pass towards their neighbours further inland, who in turn do not seek to intercept the main body from their spawning grounds.*'[41] This statement reveals the depth of understanding about life cycles, spawning habits, fishing practices, and the human impact on a resource that characterized the Native fishery. Social structures, patterns of ownership, and conventions varied around the region, but the general point – that Natives owned and managed their fisheries closely, reflecting the importance of fish in their material and spiritual lives – holds for the coast and for rivers and lakes in the interior.[42]

Joseph Taylor's extensive survey of the anthropological literature in the Oregon country reveals that Native peoples, specialists who relied on salmon as their principal staple of food and trade, had developed technology for catching and preserving salmon that, if fully deployed, could threaten the continued existence of salmon stocks. The healthy stocks, however, were a testament to Native understandings of salmon and to the effective, if unintentional, moderation of harvest.[43] 'Dependence on salmon,' he suggests, 'created complicated forms of respect. Indians feared the disappearance of salmon, and episodes of scarcity underscored the need to treat fish carefully. These themes pervaded cultural forms of celebration and deference.'[44] Taylor describes the mutually constitutive or circular relationship between cultures and salmon that was remarkably stable and enduring, although not to be confused with static or unchanging. Technological change, for example, by altering the methods of harvest, could create value where it had not existed and diminish what had once been valuable. Kew has suggested that pre-contact Native fishing technology evolved, the new technology allowing earlier access to salmon and creating new resource procurement sites around which new rights of access would develop.[45] Storage techniques were fundamentally important as well, argues Randall Schalk, particularly in the middle latitudes of the Northwest Coast (45–60° north), where anadromous fish migrations were highly seasonal. Before a population could specialize in anadromous fish, they needed the capacity to store their harvest through the winter; until that point was reached the dependence on salmon would be minimal. Once achieved, however, the shift to a specialized economy dependent on salmon 'would be quite abrupt and systemic.'[46]

It seems likely, however, that Native consumption of fish, particularly salmon, was at low ebb in the second half of the nineteenth century. Native peoples along the Pacific had been decimated by their contact with Europeans. Warfare had taken its toll, but the biggest killers were exotic diseases – smallpox, measles, influenza, and others. In some areas disease moved more quickly than Europeans, arriving through adjoining Native populations before the Europeans themselves. Each epidemic brought horrendous suffering, and the cumulative effect was massive depopulation, perhaps by as much as 90 per cent in British Columbia in the contact century, as elsewhere in the Western Hemisphere.[47] When the canning industry appeared on British Columbia's Pacific coast in the 1870s, the Native population was a fragment of its former size and its use of salmon was greatly reduced. Some have projected a 'conservational effect' from the declining Native population that produced an unusual abundance of salmon. Others reject this hypothesis, arguing that competition among an increased number of spawning salmon can actually destroy more spawn than the additional salmon create. Whichever hypothesis one prefers, a much reduced Native harvest coincided with technological advances in transportation and canning that enabled the fishing industry to catch and preserve fish and ship the product to distant markets.[48]

Although reduced, the Native fishery had by no means disappeared. In 1879, Fisheries began to keep track of the 'Home Consumption of Fish by the Indians of British Columbia, exclusive of European supply.' In what was admittedly the most rudimentary of guesses, 'and probably a good deal short of the truth,' A.C. Anderson, in his capacity as the Dominion's Inspector of Fisheries in British Columbia, valued the Native catch of 17,000,000 salmon, 3,000,000 pounds of halibut, as well as sturgeon, trout, herring, oolichan and other fish at $4,885,000.[49] A retired officer of the HBC, he recognized the potential for a lucrative commercial fishery in British Columbia, but was also aware that the fishery supported the Native population. Nevertheless, within a decade this separate category, 'Home Consumption of Fish by the Indians,' which accounted for a Native food fishery distinct from commercial fisheries, would be formalized in law as an Indian food fishery. It would become the remnant within Canadian fisheries legislation of an earlier regime of locally controlled Native fisheries.

How the massive depopulation along the Pacific in the century after European contact affected the Native regulation of the resource is difficult to estimate and perhaps impossible to recover. It is equally difficult

to ascertain how Native legal forms responded to the opportunities presented by the European- and American-based trading companies, particularly the HBC, which in 1821 received from Britain an exclusive licence to trade with Native peoples west of the Western Cordillera. Native peoples, however, did not concede ownership of the fisheries, and traders did not demand it. In the 1840s, salmon purchased from Native traders became the principal HBC export from Fort Langley on the lower Fraser River. Although it traded extensively for fish with Native peoples, the HBC was not interested in regulating the fishery except to defend its trading monopoly against other British subjects and Americans. As with fur-bearing animals, it made little or no effort to catch fish itself, or to regulate or interfere with the Native fishery. Rather than devote scarce resources and limited knowledge to catching fish, the company found it more efficient to purchase fish supplied by Natives. As HBC's chief trader at Fort Langley, Archibald McDonald, reported in 1831, '[W]e made several attempts ourselves last Summer with the Seine & hand scoop net but our success by no means proved that we could do without Indian Trade, nor does even this appear to me a source of great disappointment as in years of scarcity the best regulated fishery of our own would miscarry, while in years of plenty such as the last the expense in trade would hardly exceed the very cost of Lines and Twine.'[50] McDonald had considerably more faith in the Native ability to catch fish and, importantly, to manage the fishery than he did in his own. The HBC offered Native fishers a new market for their fish – one that they took advantage of – but the fishery remained within the Native domain.

Even when the HBC monopoly ended, in 1849 on Vancouver Island and 1858 on the mainland, there was little non-Native activity in the fishery. Most settlers came to farm or to prospect, and the loosened trade rules did not immediately create a rush to exploit the fisheries. Hugh McKay established a fishery at Beecher Bay on Vancouver Island in 1852, barrelling Native-caught fish for export, but few other settlers followed his lead.[51] On the mainland of British Columbia the HBC defended its trading monopoly, which it held until 1858, to prevent competition for the valuable Fraser River sockeye. James Cooper, who in 1873 would become the Dominion's first fisheries appointee in British Columbia, sought to establish a competing saltery on the Fraser in 1852, packing and shipping fish that he purchased from Natives. The HBC refused to sell him barrels, and enforced its exclusive right to trade with Natives to prevent Cooper from opening a competing business. It also employed various strategies to prevent American traders from purchasing Native-caught fish at what it considered inflated prices.[52] This activity, however minimal in the 1850s, did not operate in a legal vacuum. Native fisheries laws remained in place, but the common law also informed earlier settler activity.

The Common Law of Fisheries

Langevin's sweeping statement in 1872 about the absence of law ignored the common law, but the common law had not ignored fisheries. Although legislation became the focus of fisheries law in British Columbia, the common law doctrine of the public right to fish underlay the development of the fishery. It has not received any attention in the existing literature on the British Columbia fisheries, but it is the focus of a lively debate over the rights of Native peoples in Ontario to the Great Lakes fisheries,[53] and it figures prominently in several recent Supreme Court of Canada decisions.[54] To ignore the common law doctrine is to create the impression that Anglo-Canadian law was absent in the Pacific fishery before the introduction of the *Fisheries Act* in 1877. Newell, for example, begins her third chapter of *Tangled Webs* with the following statement: 'In the colonial era, the BC fisheries were not regulated to any extent.'[55] She is right, as was Langevin, to the extent that the colonial government legislated few restrictions on the fisheries, but the statement is misleading in that it suggests an absence of law. Anglo-Canadian law, and the doctrine of the public right to fish in particular, created the conditions under which a non-Native fishery could insert itself into the existing Native fishery. Understanding how the doctrine was interpreted and applied in British Columbia in the mid- to late nineteenth century is crucial, not only to make sense of the fisheries legislation that followed, but also to recognize how the law was used to reallocate the fisheries. Put simply, the public right to fish, as interpreted by Fisheries officials, established a principle of open access to a resource that had been a closely and locally regulated commons. Based on this principle of open access, the Canadian state built a legislative framework, primarily through a system of licences and leases, that confined and excluded the pre-existing Native fishery, at the same time opening it to industrial capital.[56]

English common law, the vast body of uncodified judicial decisions, followed British settlers to their colonies. Except where it was inappropriate given local circumstances, English law, including statutes and

the common law, applied in British settler colonies as it existed on the date of reception, a date determined by the colony. The mainland colony of British Columbia received English law in 1858 when it became a colony, the colony of Vancouver Island when it joined the mainland in 1866.[57] English law would continue to apply in the colony as it was on the date of reception until modified by colonial judges or until the local assembly legislated otherwise. The mid-nineteenth-century English common law of fisheries, therefore, applied to settlers in British Columbia and, many assumed, to Native peoples as well.

The common law did not recognize property in fish until they were caught, but it did establish who had the right to fish.[58] The presumption was that the right to fish in riparian waters belonged to the owner of the underlying soil – the *solum*. This right could be severed from ownership of the soil or divided, but neither was presumed. Moreover, ownership of land included ownership of the *solum*, and therefore the fishery, to mid-stream – *ad medium filum aquae*. In the sea and tidal waters, the right of fishing belonged to the Crown, but the public right to fish was a burden on the Crown's ownership. In the late eighteenth century, the English Lord Chief Justice Mathew Hale described this relationship in the following terms:

> The right of fishing in this sea and the creeks and armes thereof is originally lodged in the crown ... But though the king is the owner ... and as a consequent of his propriety hath the primary right of fishing in the sea and the creekes and armes thereof; yet the common people of England have regularly a liberty of fishing in the sea or creekes or armes thereof, as a publick common of piscary, and may not without injury to their right be restrained of it, unless in such places creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty.[59]

According to Hale, the Crown could grant exclusive fisheries in the sea or tidal waters, or such fisheries could be recognized as customary rights, but the common law presumed a public right to fish for the Crown's subjects. The right was also said to exist in navigable waters, but in England tidal and navigable were virtually synonymous.

Although confirming the public right to fish, Hale did not suggest that the Crown's prerogative to grant exclusive fisheries was limited. By the early nineteenth century, however, it appears that courts would only recognize Crown grants for exclusive fisheries in tidal or navigable waters that predated the thirteenth century reign of Henry II. Joseph Chitty's 1812 treatise on game laws, for example, suggests that the Magna Carta (1215) precluded the medieval king and his heirs from granting exclusive fisheries where the public right existed: 'Hence it seems that a private right of fishery in the sea or a navigable river, cannot be expressly claimed under an existing *grant* from the crown, as a grant to support it must be as old as the reign of Hen. 2d, and therefore beyond time of legal memory.'[60] Authority to encroach on the public right had to come from parliament. Beyond the territorial waters of nation states (which extended three miles from the low-water mark in the mid-nineteenth century), the high seas were an open-access fishery.[61]

In England, tidal and navigable waters were virtually synonymous; the vast inland waterways and Great Lakes in North America were geographical features that the common law had not encountered. Did the public right to fish apply to these navigable, but non-tidal waters? The weight of contemporary Canadian authority suggests that the public right only applies to tidal waters,[62] but before the 1914 decision of the Judicial Committee Privy Council in *Attorney General for British Columbia v. Attorney General for Canada*,[63] Canadian courts tended towards the navigable rule. Mid-nineteenth-century Fisheries officials in the Province of Canada West (Upper Canada) certainly believed that the public right applied to the Great Lakes, and its enforcement produced extended conflict with various Native peoples, including the Saugeen Ojibway and Mississauga, who believed that their long defended rights to exclusive fisheries were in some cases unceded, and in others protected by treaty.

Roland Wright, in something of a revisionist history of fisheries legislation in Upper Canada, argued that the public right of fishing 'is the necessary starting point for any study of government fishing policy and Indian fishing rights in pre- and post-Confederation Canada.'[64] He suggested that the public right to fish prevented the Crown from ceding Native fisheries to non-Natives, but it also prevented the Crown from protecting Native fisheries. Lakeshore or riverside reserve allotments in Upper Canada were insufficient to protect a Native fishery, if the body of water were navigable, he argued, because the Crown's ability to grant exclusive fisheries was limited by the public right to fish. Wright suggested, somewhat controversially, that post-1857 amendments to the Province of Canada's *Fisheries Act* 'can only be viewed as beneficial to the Indians' because they established 'administrative (in-

stead of legislative) control of the resource through a broadly based lease and licence system.'[65] By this he meant that it was only after 1857 that the legislature gave the fledging Fisheries Department the authority to recognize exclusive fisheries, and thereby the means to protect Native fisheries from the public right to fish. To support his argument, Wright cited a variety of mid-nineteenth-century opinion, beginning with an 1845 letter from the attorney general of the Province of Canada and culminating with an 1866 memorandum prepared by W.F. Whitcher, head of the Fisheries Branch in the province, and supported by an opinion from the solicitor general, arguing that whatever rights Natives held to their fisheries, they could not infringe the public right to fish:

> ... at Common Law, piscarial rights are public and general. That fisheries cannot belong exclusively to Indians, whether as pertaining to navigable waters about ceded Reserves, or belonging to water impinging upon conceded islands or tracts of Indian lands. Members of Indian bands can exercise only individual or tribal rights in common with all other Communities or persons as integral parts of the public. Exclusive fishing rights & special privileges of occupation of beaches, barren Islands and shores, and other locations suitable for carrying on fisheries are granted by the Crown only under authority of Act of Parliament in derogation to the Common Law.[66]

Wright concludes that from this point forward there was no doubt among senior government officials that the public right to fish precluded exclusive Native fisheries, except where recognized by Crown grant authorized by legislation.

Wright's argument is vulnerable in several places. Mark Walters, in a meticulous exploration of the public right to fish, argues that its applicability to the Great Lakes was far from certain in the mid-nineteenth century, Whitcher's opinions notwithstanding.[67] Moreover, Peggy Blair and Michael Thoms provide many examples of exclusive Native fisheries that were recognized and in some cases protected by treaty in the late eighteenth and early nineteenth century.[68] More importantly, however, these authors argue that Native fishing rights did not arise, as Wright assumes, from Crown grant. Rather, they arose from long use of the fishery that preceded the assertion of British sovereignty and that was protected in the Great Lakes region, until ceded by treaty, by the

Royal Proclamation of 1763. The rights to exclusive fisheries, recognized as they were in English law, could only be reduced through negotiation and treaty.

Wright is not alone, however, in mistaking the origins of Native fishing rights. In his discussion of the public right to fish, Gerard La Forest contends that with the exception of a few grants by the French crown that preceded English sovereignty, there could be no other limits on the public right to fish, protected as it was in the Magna Carta, because Canada 'was not settled before then.'[69] This was (and is) the central assumption that inhibited the recognition of Native fisheries in Anglo-Canadian law. Canada *was* settled before Europeans arrived, its fisheries managed and used by Native peoples, but these fisheries were not granted by the Crown, and therefore not thought to be protected from public access. At least this is what Fisheries officials believed.[70]

Wright is correct, nonetheless, to emphasize the importance of the public right. It was the legal instrument that was used to appropriate and to justify the appropriation of traditional Native fisheries, not only in the Great Lakes but also in British Columbia. After Confederation, Whitcher became the Commissioner of Fisheries for the Dominion, and his approach in central Canada became Fisheries' policy across the country. In 1875, six months before the Dominion *Fisheries Act* would come into force in British Columbia, Whitcher sent a circular to all the Fisheries overseers (local Fisheries officials) and Indian Affairs forwarded it to its Indian agents. There were no Fisheries overseers in British Columbia yet, and it is not clear whether Israel Wood Powell, British Columbia's first Indian Superintendent, received a copy, but Whitcher's approach to the question of Indian fishing rights across the country was clear:

> 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. They are forbidden to fish at unlawful seasons and by illegal means or without

> leases or licenses. But regarding the obtainment of leases or licenses the Government acts towards them in the same generous and paternal spirit with which the Indian tribes have ever been treated under British rule.[71]

All fishing privileges, in Whitcher's estimation, would flow from the Crown to whites and Indians alike, through the Department of Fisheries acting under the authority of the 1868 *Fisheries Act*.

In 1881, Whitcher addressed the public right to fish in British Columbia. Peter O'Reilly, the Indian Reserve Commissioner who was travelling the province allocating land for reserves, began allocating exclusive Native fisheries in the interior, along the middle Fraser River between Quesnel and Lytton, and then in the waters of the lower Nass River.[72] Indian Affairs forwarded these decisions to Fisheries, and Whitcher demanded to know on what authority O'Reilly was acting when he allocated exclusive fisheries.[73] Sir John A. Macdonald, Prime Minister and Superintendent of Indian Affairs, responded that 'in view of the complications which have been caused by the conflict between Indians and Whitemen's claims to Fisheries in the older Provinces of the Dominion,' he had 'considered it expedient and proper to instruct him, while engaged in assigning these lands, to mark off the fishing grounds which should be kept for the exclusive use of the Indians.'[74] The Minister of Marine and Fisheries, with reference to the earlier opinions produced for the Province of Canada, responded that Indians could only use the fishery on the same terms as whites, and that Indian agents or the Reserve Commissioner had no authority to exclude the public from particular fisheries.[75] Indian Affairs would respond with a request that none of the fisheries set apart by the Reserve Commission for Indians be disposed of without its consent.[76] Whitcher replied that

> as the common law and statutes, now in force in those Provinces [British Columbia, Manitoba, Keewatin and the North West Territories], 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 that the *ex parte* reservations in question obviously exceed the reason and justness of any arrangement found in due regard for the relative rights of public fishermen and the necessitous claims of Indians.[77]

The common law doctrine of the public right to fish, which had effectively turned a closely regulated and managed fishery into an open-access fishery in the Great Lakes and provided the foundation on which a new fisheries management and regulatory scheme could be built, was firmly entrenched in British Columbia. Believing it to have erased any prior claim that Native peoples might have to their fisheries, the state erected its own regulatory structure.

Treaty Rights

The treaties between the HBC, on behalf of the Crown, and fourteen Native groups on Vancouver Island in the early 1850s mark the first formal attempts to define a relationship between the varied legal regimes, Native and non-Native, that now constructed the fisheries: the closely held, locally controlled Native fisheries on the one hand, and the public right to fish on the other. By mid-century, some boundary between the two was required.

In 1849, Vancouver Island became a proprietary colony open for settlement under the direction of the HBC. The prospectus announced that the tidal fishery should be accessible to all British subjects: 'every freeholder will enjoy the right of fishing all sorts of fish on the seas, bays, and inlets of, or surrounding, the said Island.'[78] The public, at least those holding property, would enjoy their right to fish. James Douglas, the HBC's chief trader and future governor of Vancouver Island and British Columbia, remarked on 'valuable fisheries which will become a source of boundless wealth,'[79] but he also recognized the need to protect Native fisheries. 'I would strongly recommend,' he wrote the HBC, 'equally as a measure of justice, and from a 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.'[80] The following year Douglas purchased land from Native peoples on southern Vancouver Island. These fourteen purchases, negotiated between 1850 and 1854 and formally recognized as treaties by the courts in 1964,[81] were the only land cessions that the Crown or its representatives negotiated with Native peoples in British Columbia during the colonial era. Based on New Zealand precedents, the written text of the purchases was minimal and, as anthropologist Wilson Duff argued, '[t]o read a treaty is to understand the white man's conception (or at least his rationalization) of the situation as it was and of the transaction that took place.'[82] The first paragraph of each treaty described in general terms the lands ceded. Later surveys would con-

firm the exact boundaries. The second paragraph (reproduced below) described the terms of the sale, including the transfer of lands to whites and the guarantee that Natives could continue fishing as before:

> 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, with these small exceptions, 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.[83]

The Native fisheries were now, as Douglas thought they should be, 'fully secured to them by law.'

This clause did not *create* a right to the fishery; it simply recognized what already existed: Native-owned fisheries. But why was it included? Newell suggests that the lack of HBC and settler interest in the fishery in the 1850s 'partly accounts for inclusion of guarantees for traditional Indian fishing practices.'[84] This is likely correct, but perhaps more importantly, Governor Douglas had heard the strong and consistent Native representations of ownership of their fisheries, repeated since Europeans arrived on the coast, that would have made any other arrangement impossible without armed intervention. Natives would only agree to treaties, such as they understood them, if their fisheries were guaranteed and protected. Those who wanted access would have to negotiate. Gilbert Malcolm Sproat, in 1876 a member of the Joint Indian Reserve Commission (JIRC) that was established by the provincial and Dominion governments to allocate Indian reserves and to resolve the pressing land question without treaties, observed that 'if the Crown had ever met the Indians of this provinces in council with a view to obtain the surrender of their lands for purposes of settlement, the Indians would, in the first place, have made stipulations about their right to get salmon to supply their particular requirements, and ... land and water for irrigating it would have been, in their mind, secondary considerations.'[85] Later that year, after struggling through the interior in an increasingly difficult attempt to find reasonable land for Indian reserves amid the settler pre-emptions and purchases, Sproat would write again: 'They have had no treaties made with them, and we are trying to compromise all matters without treaty making. Had treaties been made, stipulations as to salmon would have been in the front. It is,

with absence of treaties, all the more necessary to recognize the actual requirements of the people.'[86]

Native fisheries were undeniably important. Sproat understood that the JIRC and the succeeding Indian Reserve Commission (of which he and then O'Reilly were the sole commissioners) were attempts to allocate reserve land without addressing the question of Native title or the need for treaties. He argued, however, that Native rights, such as those to their fisheries, did not disappear simply because there were no treaties. A dispute over the location of a sawmill on part of the Cowichan Reserve (discussed in chapter 3) became a fisheries issue when the owners proposed to float logs down the Cowichan River to the mill, ruining the Cowichan weir fishery. Sproat wrote to Indian Superintendent Powell that the Cowichan, although not signatories of a treaty, had a right to continue fishing as formerly and therefore it would be necessary to receive their consent before floating logs down the river, something that probably could not be acquired without compensation.[87]

Inspector of Fisheries and member of the JIRC, A.C. Anderson agreed. In response to complaints about the Native fishery from cannery owners, and to support his position that the *Fisheries Act* should not apply to Native fisheries, Anderson referred the minister to the fourteen treaties on Vancouver Island that, he pointed out, guaranteed the Native fisheries. This right, he argued, attached not just to the fourteen signing groups, but was recognition that Native people across the province had a right to continue practising their fisheries.

It seems clear, then, that the brief clause, 'to carry on our fisheries as formerly' was intended to protect Native fisheries.[88] But what was the scope of those fisheries? Perceptions probably differed between the two sides, although perhaps not so much as may be assumed. Fish were their principal source of sustenance and wealth for most Native people along the coast, access to those fish was closely and locally controlled, and it was the rights of access and use that Native groups believed they had secured in the treaties. Governor Douglas, on the other hand, probably sought to balance the public right to fish with Native rights of access. The vagueness of the clause 'to carry on our fisheries as formerly' gave him discretion to recognize one or the other, depending on the circumstances. Douglas certainly intended that non-Natives would participate in the fishery; it was one of the principal attractions of the colony to settlers and, Douglas thought, a source of future wealth. He also intended to protect Native fisheries, that they

should be 'fully secured to them by law.' Just as certain areas of land – village sites and enclosed fields – should be reserved exclusively for Natives, so should their fisheries.[89] In a letter to the HBC reporting on the first nine treaties, Douglas paraphrased the language used in the treaties, expanding somewhat on what he had promised with regard to the fishery: '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 the unoccupied lands, and to carry on their fisheries with the same freedom as when they were the sole occupants of the country.'[90] Moreover, Douglas would not have understood the protected fisheries to be limited to food fishing; the Native sale of fish was too common and too important to the fur trade in the Western Cordillera to be so confined. Many HBC posts relied on Native-caught salmon as a source of food and often as a product to export. Protecting the Native fishery, therefore, would include the exclusive right, in certain locations, to catch fish for food and trade. At very least, a non-Native fishery could not interfere with Native fishing.

What, then, is one to make of the colonial legislation that appeared to infringe these treaty rights? In 1859, Vancouver Island's House of Assembly passed a *Preservation of Game Act* that closed the commercial hunting of deer and certain birds in the colony for six months from January 1. The preamble suggests contradictory motives, but it appears that the intent of the act was to protect enumerated species for those who hunted for food, commerce, and sport: 'Whereas, Birds and Beasts of Game constitute an important source of food, and the pursuit thereof affords occupation and the means of subsistence to many persons in this Colony, as well as a healthy and manly recreation; And Whereas Game is unwholesome and unfit for food, and it is expedient to prohibit the destruction and use thereof in the breeding season ...'[91] Governor Douglas does not appear to have given the act his assent and therefore it never became law, but in 1862 he did assent to an amendment of the act that appeared to incorporate the earlier version. The amendment extended the hunting restriction to other birds and also restricted fishing: 'That from and after the passage of this Act, no person shall use or employ any net, seine, drag net, or other engine of a like description for the purpose of taking or capturing Fish in Victoria Arm above Point Ellice, or in any Lake, Pond, or standing water in this Colony, under a penalty not exceeding fifty pounds (£50), to be recovered as aforesaid.'[92] The amendment followed a Colonial Office dispatch that included a memorandum on protecting the salmon fishery and copies of fisheries legislation from the United Provinces of Canada.[93] Douglas acknowledged receipt of the documents, 'which afford so much useful information on the methods of preserving and regulating Fisheries.'[94] This dispatch was probably the immediate catalyst for the amendment to restrict fisheries, but how is one to reconcile the *Preservation of Game Act* with the earlier treaty protection? Natives in the colony were considered British subjects, the law applied to them, and it appeared to restrict Native and non-Native net fisheries indiscriminately. Historian John Lutz argues that the legislation was intended to preserve the fishery for anglers and to conserve game for the white 'sportsman.'[95] Certainly by the late 1880s, provincial enforcement of the game acts near settled areas had drastically reduced Native hunting to the point of hardship.[96] There is no record of enforcement in the 1860s, however, and legislated restrictions were not a priority for the colonial governor or the House of Assembly. Local abundance was presumed, and elected officials seemed more interested in promoting rather than restricting the fishery.[97]

Occasionally colonial officials did interfere with Native fishing, but only in the pursuit of other objectives. Lieutenant Edmund Hope Verney, commander of the HMS *Grappler*, a small gunboat that patrolled the coast between 1862 and 1865, reported an expedition from Bute Inlet to Harper's Ferry, fifty kilometres up the Homathco River, 'to prevent the Chillicoaten Indians from coming here to fish.'[98] This expedition, mounted in the immediate aftermath of the killing of eighteen workmen on the Bute Inlet railway, was a strategic move to limit the movements of the Chilcotin and to force them to surrender the wanted men;[99] it had nothing to do with regulating the fishery. Apart from vigorous boosterism, or the tangential effects of the effort to assert control of the territory, the colonial government did not regulate fishing.

This lack of colonial interest in regulating the fishery reflected developments in Britain. Two commissions on the British fisheries – an 1863 royal commission on the Scottish herring fishery[100] and an 1866 commission on sea fisheries of the United Kingdom[101] – concluded that state regulation of the fishery was unnecessary; it did not preserve fish stocks and succeeded only in favouring one class of fishers over another. Both commissions recommended that the British government deregulate the fishery – a vivid reflection of the dominant liberal paradigm. State interference, it was held, simply reallocated the resource to

those who lobbied most effectively, damaging fishing communities and the national economy. The commissioners believed the ocean fishery to be inexhaustible; if heavy fishing reduced fish stocks in one area, low returns would force fishers from that area, allowing the fish population to recover.[102] The invisible hand of the market and the common law would provide the necessary regulation.

But did the House of Assembly intend to restrict the Native fishery in the 1862 amendment to the *Preservation of Game Act*? It seems likely that the Native fisheries were exempt, and possibly that the act was intended to protect rather than infringe treaty rights.[103] Both before and after signing the treaties, Douglas had explicitly recognized a moral and legal obligation to protect the Native fisheries; he had promised that Natives could continue fishing as they had before European settlement. The House of Assembly may have been less committed to the protection of treaty rights, but Douglas as governor had to give his assent before the act became law, something that he was unlikely to do if it infringed those rights. Fifteen years later, in 1877, Fisheries would informally exempt Native peoples in British Columbia from the *Fisheries Act* and *Regulations* after strong representations from its local officials. This sentiment was not new in 1877. HBC officials and even many settlers not connected with the fur trade recognized the importance of fish to the Native economy. It is unlikely, therefore, that the 1862 fisheries regulations, minimal as they were, were intended to apply to the Native fishery. And even if the legislation did apply generally, its focus on a particular technology – nets – and its geographical restriction suggests that it was directed at the settler population and not at Native fishing. The Songhees, whose territory included Victoria harbour, relied primarily on a reef net fishery (gill nets anchored to land and extending perpendicular from the coast to trap migrating salmon) conducted from a few select points on the southwest coast of Vancouver Island and on the San Juan Islands.[104] The ban on nets in Victoria's inner harbour did not affect their fishery. Moreover, had the colonial legislature wanted to minimize a Native freshwater fishery, it would have prohibited weirs and nets in rivers and streams. Although Natives did fish with nets in 'standing water,' the river-based weirs were of far greater concern to the angling community, as the dispute on the Cowichan River (discussed in chapter 3) amply illustrates. Finally, there is no record of enforcement against Native or non-Native fishers, so that even if the amendment to the *Preservation of Game Act* applied generally and was intended to restrict the Native fishery, its effect was minimal. That would change, but only after the canning industry became a dominant force in the provincial economy. The treaties would become the touchstone for both Native and non-Native who sought to defend the Native fishery.

The *Fisheries Act*, 1877

The industrial commercial fishery on the West Coast depended on canning, a preserving technique first used for fish in Great Britain and Ireland in the early nineteenth century. In the mid-1860s canning technology reached San Francisco Bay on the West Coast. From there it moved north to the Columbia River, and to the mouth of the Fraser River in the late 1860s. It was not until the early 1870s, probably 1871,[105] that the canning industry established a permanent presence, and by 1873, when Fisheries began keeping records of British Columbia's fishing industry, the firm of Findlay, Durham & Brodie canned 115 tons of Fraser sockeye. Several other smaller operations together canned another 80 tons. That year Fisheries hired James Cooper to act as its agent on the Pacific coast. Cooper agreed with Langevin's assessment that to extend the 1868 *Fisheries Act* to British Columbia would not benefit the nascent industrial commercial fishery, and the cannery operators themselves gave no indication that they wanted regulation. Cooper was also concerned that enforcing the *Fisheries Act* that would 'probably lead to complications with the Aborigines,'[106] an early observation about the disjuncture between Native fishing practices and the *Fisheries Act* that would prove entirely accurate.

The reticence of Dominion officials and of the fishing industry in British Columbia towards the *Fisheries Act* was short-lived. As the industrial commercial fishery grew, so did cannery-owner concerns about their competitors' fishing practices and about competing uses of the rivers. Alexander Ewen, initially a partner in the New Westminster canning operation of Loggie & Co., wrote to Cooper in 1875, complaining that gold miners were destroying the spawning beds and Indians were destroying the spawn. He asked that the government intervene to stop the 'wholesale destruction by Indians,' and that it consider establishing fish hatcheries as the Americans had done on the Columbia and Sacramento rivers.[107] Cooper forwarded this and other material to Fisheries as part of his yearly report, in the process making it clear that the industry was ready for government regulation, at least of Indians and gold miners. By the time industry complaints reached Ottawa, the