The Public Right of Fishing, Government Fishing Policy, and Indian Fishing Rights in Upper Canada

ROLAND WRIGHT

On Runnymede meadow in June of 1215 King John met and succumbed to the demands of his barons, thereby simultaneously preserving the tranquillity of his kingdom and laying the cornerstone of the intellectual edifice which would eventually comprise the "rights of Englishmen." But the Great Charter of Liberties – Magna Carta – did more than enshrine the principles of *habeas corpus*, or begin to transform *de facto* English hovel into *de jure* English castle in order to prevent unlawful entry by the king or those acting in his name. In an obscure, lesser-known passage it also prevented the monarch from establishing any new exclusive fisheries in public rivers. This, the forty-seventh provision of Magna Carta, developed into what became known in the common law as the "public right of fishing."[1] It is the necessary starting point of any study of government fishing policy and Indian fishing rights in pre- and post-Confederation Canada.

The English common law relating to fishing and fisheries is fairly straightforward. While there is no property in fish until they are caught, the exclusive right to fish may be the subject of property and as such it generally runs with the title to the land containing the waters in which the activity is conducted. The right may be severed from the land (a property interest known as a *profit a prendre*), although such a severance will not be presumed. In navigable or "public" waters – which in England, importantly, can only be tidal waters – the exclusive right to fish which is normally vested in the owner of the bed is qualified by the paramount right of the public flowing from Magna Carta. Only with the express sanction of Parliament can the public right be displaced and an exclusive fishery be either recognized or created. These principles have been long established. Thus, by the time of the founding of the first permanent English settlement on the eastern seaboard of North America at Jamestown in 1607, the common law of England was such that in non-navigable (non-tidal) waters the right of fishing was vested in the crown or its grantees, while in navigable (tidal) waters it was vested in the public as a whole.

English law arrived in the new world with English settlers. Unfortunately, not all aspects of the common law as it had developed in England were suited to the realities, and in particular, to the geographical realities, of the North American continent. Arguably, one such ill-suited aspect was the artificial equation of navigable with tidal, and non-navigable with non-tidal. Although not far from the true position in the English context, it was hardly reasonable when applied to the vast rivers and lakes of the new world. The consequence was that the courts in both America and Canada tended to ignore the English tidal requirement for navigability, treating waters navigable in fact as if they were navigable in law. In 1851 in *The Propeller Genessee Chief* v. *Fitzhugh*, the United States Supreme Court rejected the common law test of navigability when it extended the jurisdiction of the Admiralty to "wherever ships float and cargoes are received and discharged, whether the tide ebbs and flows or not."[2] Similarly, Mr. Justice Strong in the Supreme Court of Canada commented in 1882:

> I do not hesitate to say that the rule which appears to have been adopted as a principle of the common law as administered in England, that no rivers are to be considered in law as public and navigable above the ebb and flow of the tide, is not applicable to the great rivers of this continent, as has been determined by the Supreme Court of the United States, and ... I think that with us the sole test of the navigable and public character of the streams is their capacity for such uses.[3]

But what then of the incidents normally associated with navigable waters in England? These include the public rights of navigation and fishing, and the exclusion of the *ad medium filum aquae* presumption relating to the construction of riparian land grants.[4] Canadian jurisprudence has treated each differently, sometimes following the English rule, and sometimes not. In so far as the public right of fishing is concerned, Canada today has a public right identical to that in England. However, and this is crucial, the fact that such a right existed solely in navigable, tidal waters in Canada was only determined in 1914,[5] and only then because the Judicial Committee of the Privy Council decided to ignore established Canadian practice and judicial precedent which had long held that the right existed in all waters *de facto* navigable, whether or not they were tidal, of which more below.

The first act of the Legislative Assembly of Upper Canada was to introduce English law into the colony.[4] Unlike many jurisdictions elsewhere, no express provision was made for its alteration to account for local exigencies. Still, general common law principles of interpretation allow for necessary modification, and such was the pattern in Upper Canada, at least in so far as jurisprudence relating to the definition of navigability and the incidents associated therewith are concerned.

It became the "invariable practice ... to treat the right of fishing in navigable waters above the flow of the tide as public." Such was necessary in order to avoid the "injustice and impolicy [*sic*] of a contrary rule and the hardship and inconvenience which would result therefrom to the pioneers of settlement in a new country, who have to some extent to rely on the products of the forests and streams for their food supply."[7] This approach was buttressed by legal opinions given by the law officers of the crown, and by a considerable body of jurisprudence relating to the issue emanating from the pre-Confederation courts.

As early as 1835 the Attorney General's Office of Upper Canada rendered an opinion which was clearly premised on the existence of a common law public right of fishing in the navigable (non-tidal) waters of the province. In that year the Executive Council had passed an order authorizing the lease of an exclusive fishery on the St. Clair River. After reviewing the same, Robert Jameson wrote to the secretary of the lieutenant-governor, informing him that "the Council have acted under an erroneous impression of the Prerogative, which does not I believe extend to the creation of a monopoly in a fishery, which is free to all His Majesty's subjects."[8] This view was affirmed by the Court of Queen's Bench four years later. In *Moffatt et al.* v. *Roddy* the court held that the "Crown cannot grant an exclusive right of fishery in the navigable waters of this province."[9] While never reported, this was an important judgment. The style of cause of the case and the proposition for which it stood found its way into Upper Canada's first law digest (published in 1840) and into each successive digest thereafter.[10] In fact, in the very first digests it was the only case cited under the heading "Fishery." For this reason alone its significance cannot be overestimated.

The approach adopted by the court in *Moffatt* was soon followed in other decisions concerning the public right of fishing and the additional incidents normally attaching to waters navigable at law. In 1852 the court in *Parker* v. *Elliott* treated the waters of Lake Ontario as *de jure* navigable, holding that a grant to the shore of Lake Ontario did not extend into the lake *ad medium filum aquae*.[11] A similar approach was employed with respect to the North Sydenham River in *The Queen* v. *Meyers* the following year.[12] In 1858, in a case involving Burlington Bay, the Court of Appeal held that "the *locus in quo* being navigable waters ... the public have the right to use and fish in it."[13] The later decisions of the *Attorney General* v. *Perry* (1864) and *Whelan* v. *McLachlan* (1866)[14] were also consistent with an approach which ascribed the incidents of English navigability to all waters *de facto* navigable. When reviewing the jurisprudence in 1895 the chief justice of the Supreme Court of Canada remarked that the cases were "conclusive authorities shewing that the right of fishing in such waters [navigable, non-tidal waters] is in the public."[15] While some of the principles enunciated in the cases would be later overturned, it may be fairly stated that in pre-Confederation times the issue

of whether or not a public right of fishing existed in the navigable, non-tidal waters of the province had been considered, and was considered settled, by the courts of Upper Canada. Such a right existed in such waters. It will be seen below that this was a fact of which provincial government officials were cognizant, and one which legislation drafted by those officials was intended to confirm. It was also a fact which would have an impact on the fishing activities of the Indian population of the province.

A common law public right of fishing present in the navigable waters of the province meant that, without the imprimatur of the legislature, Indians could not be excluded from fishing grounds which had seen the long and habitual use by them and their ancestors. Unfortunately, without similar legislative sanction, it also meant that neither they nor the crown could exclude others from those same grounds. Under the workings of the public right, the bald truth was that others would be allowed to fish in waters traditionally used only by Indians. This was to be a source of friction.

Indians had fished in the lakes and rivers of what would become Upper Canada for thousands of years prior to the arrival of Europeans on the shores of North America. While mainly undertaken for subsistence purposes, in some instances such exploitation involved operations of considerable magnitude. In addition, it is clear that fish and fish products figured as a commodity of trade among tribes, although the extent to which this occurred is uncertain.[16] What is certain is that more significant commercial exploitation of the fisheries by the Indians developed with the advent of the fur trade and European settlement. Indians supplied the various wilderness posts with fish, while "elsewhere the traditional native fishery became integrated into the emerging foodstuffs market in such proto-urban centres as Niagara, York and Kingston."[17] By the close of the eighteenth century, therefore, a picture emerges of extensive native utilization of the resource which, although primarily subsistence-oriented, also had commercial elements of some note. The extent to which Indians viewed themselves as having a "proprietary" interest in their traditional fisheries is more properly the subject of another paper. What may be postulated is that they would have seen any interference with such a significant component of their economic life as a cause for concern. Substantial interference, such as that occasioned by the development of a non-native commercial fishery, would have been a cause for alarm.

While there is evidence of non-native commercial exploitation of the fisheries of Upper Canada as early as the 1790s, it seems clear that it only began to reach proportions of consequence in the nineteenth century. Fisheries in the St. Clair River were exploited to serve the Detroit market in 1812, there were salted fish exports to the United States from the Lake Erie fisheries in 1824, and in the 1830s the first municipal bylaws regulating the industry on the Toronto Islands were

passed. That same decade fishermen at Sault Ste. Marie were supplying fish to Detroit, while both the Hudson's Bay Company and the American Fur Company were engaged in commercial operations on Lake Superior.[18] Indeed, in 1837 the former built a 50-ton ship to tap the fisheries of that lake for the American market. In eastern Lake Ontario by mid-century there was an extensive market for fish, with much of the product being shipped south via the major towns on the New York side of the lake. To satisfy the overall demand there developed an in-shore seine fishery which could furnish "stupendous" yields. Supplementing this in those places where the use of the shore was not feasible (seine fishing required the utilization of adjacent land) was an off-shore gill net industry. Well established in Lake Ontario by the 1830s, it eventually spread throughout the Great Lakes.[19]

Clearly, aside from the opportunities it would afford for employment, non-native commercial exploitation of the fisheries of Upper Canada could have only a negative impact on Indian use of the resource. How could traditional Indian fishing grounds be protected in the face of this white encroachment? Some saw salvation through the treaty-making process. Treaties normally involved the cession of the aboriginal interest in land in return for the allocation of reserves and other considerations. In negotiations Indians sometimes demanded and received assurances relating to their avocations of hunting and fishing. However, with one possible exception,[20] wherever such assurances are found in the treaties of Upper Canada they fit within the framework of the contemporary common law as it related to fishing. Furthermore, even if a treaty had purported to grant or recognize an exclusive Indian fishery in navigable waters, in order to displace the public right present therein it would have been considered necessary to have the agreement ratified by the legislature, and that was not the standard practice.[21]

In fact, the Upper Canada treaties often made no mention of fisheries or fishing rights at all.[22] The Manitoulin or Bond Head Treaty of 1836 is a good example. Even though it is clear that Manitoulin Island was chosen as a reserve site in part because it was "surrounded by innumerable fishing Islands," there is no express reference to fisheries or fishing in the treaty itself.[23] And, of course, the mere fact that the location had been chosen with fishing in mind would have been considered insufficient to in any way override the public right. As the secretary of the federal Department of Indian Affairs noted in 1897:

> It will be observed that the wording of this treaty in no way gives the Indians the exclusive rights to the fisheries. It was simply pointed out to them that the fishing islands would be an advantage to them as a place of residence, in order, no doubt, that the fisheries might afford them a means of subsistence; but although this was indicated, it in no sense guaranteed them the exclusive rights to the fisheries as against white men; because the latter, under the then conditions, had the same rights to fish in these waters as the Indians.[24]

Other agreements, like the Robinson Huron and Robinson Superior treaties of 1850, guaranteed the Indians the "full and free privilege ... to fish in the waters ... as they have heretofore been in the habit of doing." This may be reasonably viewed as little more than a declaration of the Indian share of the public right of fishing. No matter how such language is parsed, it is difficult to see how it in any way amounts, as is asserted in a recent paper, to a "right [that] was considered by government to be an exclusive right."[25] So it is also with the McDougall Treaty of 1862 and the Whitefish River Reserve surrender of 1865. The former guaranteed that "the rights and privileges in respect to the taking of fish ... which may be lawfully exercised and enjoyed by the white settlers ... may be exercised and enjoyed by the Indians," the latter that the Indians would retain the right of fishing "in common with the grantees from the Crown."[26] To a reader with a knowledge of the contemporary law, such wording speaks for itself.

Of course, most Indians were not familiar with the intricacies of the common law. Accordingly, some would have believed that treaty promises to the effect that they would be able to fish as they had formerly meant that their traditional fisheries had been secured to them. Others must have believed that no matter what the treaty said, the fisheries were theirs by virtue of long use. In addition, presumably all would have believed that at the least their livelihood and very existence would and should not be threatened by non-native use of traditional Indian fishing grounds. And indeed, such views were sometimes reinforced by Indian Affairs officials, and by local missionaries.[27] Perhaps not surprisingly, therefore, as mid-century approached Indians began to complain that others were using "their" fisheries. In 1845, in one such case, the superintendent general of Indian affairs asked the attorney general of the province if the fisheries around unsurrendered islands in Lake Huron belonged to the crown or to the Indians. W.H. Draper replied: "...the right to fish in public navigable waters in Her Majesty's dominions is a common right – not a regal franchise – and I do not understand any claim the Indians can have to its exclusive enjoyment."[28] Three years later the same opinion was transmitted to the Indian superintendent at Manitowaning in answer to a missive from him indicating that the Indians had been complaining that certain Americans were making "encroachments on their fishing grounds." In 1851 a query from some chiefs on Manitoulin Island asking whether or not they had the exclusive right to fish in the waters beside their reserves was met with the reply that it was "not in the power of the government to give them an exclusive right to the fisheries."[29] A renewed request made two years later to the Executive Council was similarly rebuffed. In both instances, however, the government promised that no one would be allowed to use the shores of their reserves for the purpose of fishing[30] and in this way Indians were able to exercise some measure of control over fishing operations in their locale.[31] Still, such control was but little control. It was

necessarily limited to only those fishing operations which required the use of the adjacent land.

By the mid-1850s the position of the natives was clearly unsatisfactory. For some, white encroachment on their fisheries had become an annoyance; for others, including some of those employed in the non-native commercial fishery, it was worse.[32] With respect to the situation in and about the Great Lakes one government commentator was to note:

> The numerous islands in, and lands bordering on the Great Lakes ... were being used in common by Indians and whites. The latter consisted chiefly of strangers and itinerant traders ... the Indians were made use of to catch fish, and dealers took advantage of their necessities to barter for the catch. Whiskey was, in many places, the chief commodity ... Strangers, in other instances, used to overfish and ruin the fisheries, afterwards deserting at convenience each place after despoiling it; thus abandoning the Indians, dependent thereon, to want and misery.[35]

Without legislative sanction, security of tenure for the natives in their traditional fisheries (as distinct from stations providing access to the same) was impossible to obtain.[34] The public right of fishing, combined with the rapidly expanding non-native population and the increase in the commercial exploitation of the fisheries, seemed destined over time to marginalize, if not entirely eliminate, native utilization of the resource. Fortunately, before this could happen, the government stepped in with legislation establishing a comprehensive scheme for the allocation and management of fisheries. The implementation of the provisions of the 1857 Fishery Act, and its pre- and post-Confederation successors,[35] can only be properly viewed as beneficial to the Indians. Establishing administrative (instead of legislative) control of the resource through a broadly based lease and licence system, for the first time it afforded natives a means to obtain some security for their traditional fishing grounds, while also protecting their right to fish elsewhere. Recent literature fails to appreciate the colonial practice and jurisprudential history which preceded the legislation when it suggests that the act and its successors amounted to an appropriation of traditional Indian fisheries.[36] That had been accomplished long before by the English barons at Runnymede, with the later assistance of new world jurists who had refused to view the common law through an English prism.

Fisheries legislation was not new to Upper Canada in 1857. Beginning in 1807 a series of acts had sought to regulate specific parts of the resource in specific localities of the province, as well as the industry which the resource fostered.[37] Elementary attempts at conservation had been directed at salmon in 1807 and 1810.[38] These were repealed and replaced in 1821 by *An Act to repeal the laws*

now in force relative to the preservation of salmon, and to make further provisions respecting the Fisheries in certain parts of this Province, and also to prevent accidents by fire from certain persons fishing by torch or fire light, which set new close seasons for the species, and outlawed fishing by net or weir and the taking of fry in certain districts. It also contained the first reference to Indians found in provincial fisheries legislation. Section 8 directed that "nothing in this Act contained shall extend or be construed to extend to prevent the Indians as fishing heretofore, when and where they please, except within one hundred yards of a Mill or Mill-Dam, by fire or torch light."[39] Indians were thereby given a dispensation from the full rigour of regulatory control, establishing a precedent which would find a echo after the implementation of the leasing and licensing system, and even today. Two years later the act was amended to prevent non-natives from evading the legislation by employing Indians to fish for them in close season.[40] This, too, was a precedent. It established that the special regulatory privileges made available to Indians were intended to apply to fishing for domestic, non-commercial purposes only.

Further legislation relating to fisheries was promulgated in Upper Canada prior to 1857, although there was no reference to Indians in the same. Still other measures were proposed and debated in the legislature, but never passed. To the extent that the primary purpose of all this activity was the conservation of the resource, it appears to have been generally unsuccessful. By 1857 the salmon fishery, for example, was much diminished, and the fish itself had already disappeared from certain rivers in the province. In *Pioneer Public Service* J.E. Hodgetts argues that, because they were dependent on local justices of the peace for enforcement, the conservation measures which had been "readily devised and written into statutes ... [had] remained virtually dead letters."[41] To the extent that this was true, it was soon to be rectified. Joseph Cauchon, the commissioner of crown lands, dealt with fisheries at some length in his important annual report for 1856.[42] He said that although the fisheries had so far attracted little attention, "they are of more importance than is generally supposed." He went on to note that the fisheries of Upper Canada had become a "considerable staple of commerce" and that the valuable salmon fishery of Lower Canada was in need of protection. As a result, he recommended the initiation of a scheme to protect the fisheries, together with the creation of a network of overseers to implement it.[43] In the next session of the legislature a bill designed to accomplish this purpose was introduced and after some limited debate in both the Assembly and Council,[44] the Fishery Act received royal assent on 10 June 1857.[45]

Repealing most of the earlier legislation, the new act established a comprehensive set of conservation guidelines for the resource (including a species-specific ban on spearing and the use of torch light in Upper Canada, with no

exception made for Indians), mechanisms for the enforcement of the same, and provision for the appointment of officials whose sole duty it would be to superintend the fisheries in Upper and Lower Canada. While it did not establish a procedure for the leasing and licensing of fisheries (that would happen the following year), it did lay the groundwork for the same. And it contained one other very important provision. Section 5 set out the "Rights of Fishermen," the first and foremost of which was:

> V. *All subjects of Her Majesty*, but none other, *may* –
>
> 1. Take bait and *fish in any of the harbours, roadsteads, bays, creeks or rivers of the Province*, except the Rivers lying within the limits of the territory known as King's Post;[46] (emphasis added)

Modelled after a similar clause found in imperial legislation relating to Newfoundland in 1699, and Quebec in 1778,[47] this was a legislative affirmation of the public right of fishing. While the Judicial Committee of the Privy Council would later (in 1921) confine its ambit to the fisheries of tidal waters, or to the fisheries "so accessible from the sea as to make them natural adjuncts to these fisheries,"[48] pre-Confederation officials neither intended nor considered it to be so restricted. Like the common law public right, they believed it to apply to all fisheries in the navigable waters of the province.

The ink on 1857 act was hardly dry when changes to it began to be contemplated. In the speech from the throne on 26 February 1858 legislators were told that "the subject of fisheries in both sections of the province is one which deserves your attention, as I believe that they may be so dealt with, as to hereafter be a source of revenue."[49] While conservation was still to be the primary goal of the act, the creation of revenue now became a consideration, if only to offset a system of bounties introduced at the same time. Revenue generation was to occur through the sale of exclusive leases and licences carved out of the public fishery,[50] which was to be again legislatively affirmed.[51] The new bill generated considerable debate in both Houses. In the Legislative Council on 9 August one member rose to say "that it was highly desirable that Lakes Huron and Superior should be exempted from the operation of the bill, in order that Indians and minors might be permitted to take fish from those lakes at any period in the year and in any manner thought proper by them."[52] Perhaps as a result of this intervention, the two lakes were excluded from the close seasons to be established for certain species, and the prohibition of spearing and the use of torch-light found in the 1857 act was dropped. However, a modified version of the latter would reappear shortly in regulations promulgated under the act, although Indians would then be granted a limited exemption therefrom.

The Fishery Act of 1858 became law on 16 August 1858. Empowering the Governor in Council to "grant special fishing leases and licenses on lands belonging to the Crown, for any term not exceeding nine years," it contained no specific reference to the leasing and licensing of fishing rights themselves. While this would later prove to be a problem, at the time it was not seen as such.[53] An order-in-council passed on 23 January 1859 authorized the commissioner of crown lands:

> to grant Leases during periods not exceeding nine years for the exclusive use of vacant Crown properties bordering on the lakes and Rivers, Islands etc., in Upper Canada, being suitable for occupation as Fishing Stations, together with exclusive privileges of Fishery over certain specific limits as accessory thereunto.
>
> And that likewise for the special use of beach and sole fishery upon described waters lying opposite to private properties, similar leases may be issued whenever so desired by the proprietors and occupants of such lands.[54]

The wording of this order was sufficiently broad to cover the issue of leases and licences to Indians for the fisheries they traditionally utilized, whether adjacent to their reserves or not. Accordingly, shortly after instructions for the implementation of the new scheme were issued on 18 February 1859,[55] the superintendent general of Indian affairs wrote to the Fisheries Branch of Crown Lands suggesting "that the Crown should grant leases, in the name of local Indian Superintendents, of certain fisheries contiguous to Crown and Indian lands, for the sole use of Indian bands to be specified therein."[56] This proposal quickly developed into an arrangement under which Indians, for the first time, acquired recognized legal rights to fisheries to the exclusion of non-Indians, as well as special privileges relating to the acquisition and utilization of those rights.

The administrative agreement between Indian Affairs and Fisheries was in place by the summer of 1859. Indian superintendents "were to make choice [*sic*] of whatever stations they desired to have thus occupied, and leases would issue forthwith so that the holders could exclude rival fishers from among whites and prevent intrusion by strangers."[57] In addition, Fisheries Branch directed that

> no rent will be exacted from Indian lessees of Crown Fishing Stations, in cases where the purport and object of title is to secure to the individuals and families of each Tribe exclusive use of such fisheries for *bona fide* domestic consumption.
>
> The leases will, however, specify rents at discretionary valuation by the Superintendent or Overseer, the remission of which will be conditional on the observance by Members of the respective Tribes, of the other terms of the lease, and of all the requirements of the Fishery Act and Regulations made thereunder.[58]

Only after the Indian selections in any given area were completed were tenders to be accepted for any outstanding fishing stations or fisheries.[59] Under the arrangement Indians were to abstain from fishing in those areas leased to others, although it appears that on an ad hoc basis at least some of the non-native leases were made subject to the condition that natives could fish within the limits thereof for domestic purposes.[60]

The implementation of the arrangement left much to be desired. The priority of selection Indians were supposed to obtain was not universally respected. Some selections made for them were deemed insufficient for their needs. Furthermore, Indians resented those instances where they were unable to fish in limits leased to others. In the result, the advent of the leasing and licensing system, which should have been the occasion of some optimism, ended up creating new grievances and revitalizing old ones. R.T. Pennefather, superintendent general of Indian affairs, reported that the "fishery law has caused considerable dissatisfaction among the native tribes."[61] Indians residing on Lakes Huron and Simcoe went so far as to petition against the legislation. Memorials complaining that others were using their fisheries were laid before the secretary of state for the colonies when he accompanied the Prince of Wales to Canada in 1860.[62] In response, R.T. Pennefather prepared a report in which he commented, *inter alia*:

> 6(2) Another cause of grievance is connected with the fisheries in the Great Lakes, and principal Rivers.
> Up to the year 1857 the fisheries of Canada were not protected in any way. In the Session of that year a Bill passed the Legislative Assembly. Amongst other provisions, restrictions were placed upon the catching of fish, and leases were granted to those willing to pay for the exclusive right of fishing in certain places in the Crown domain. The object of these regulations was at once to preserve the fish themselves, which were being destroyed by netting and spearing out of season, and to make these very productive fisheries a source of revenue.
> 7. The Indians now assert that this act trenches on their just rights, as they never surrendered the fisheries when they ceded their land. I think that to establish this position they should show that until the year 1857 they had enjoyed the monopoly of fishing in these waters. In reality this was not the case; the lakes and rivers were considered open to all. Everyone aided in the destruction of fish, though in a very few instances rent was paid to some of the Indian tribes, not for the fishery itself alone, but for the use of *their land* as a station for drying the nets, curing the fish etc. (emphasis in original).

He then set out the arrangement that had been agreed upon and implemented by Fisheries and Indian Affairs when the new system was established, after which he concluded:

> 9. I think it will be seen that the interests of the Indians ... have not been neglected. Their case in a few words may be stated thus, –
> Instead of taking their chance with everyone else, in all the fisheries of the lakes, they have secured to them by lease the exclusive right of fishing for the support of themselves and their families, at certain places indicated by themselves, free of rent so long as they conform to the provisions of the Fishery Act. In places where the Fishing Stations are made upon their lands, which is only permitted when such lands are uninhabited, a certain percentage of the rent collected for such fishery is appropriated to their benefit, as compensation for the use of that portion of their reserves during the fishing season.[63]

He contrasted this with the situation in Lower Canada where certain tribes clearly had suffered from the new leasing and licensing provisions. Still, he said, even there the main cause of Indian complaint was "the interference of Law at all with their reckless and prodigal destruction of fish."[64] This echoed recent reports by government officials in both Upper and Lower Canada[65] which had detailed extensive spearing on salmon spawing grounds (referred to as "nature's free hospitals of piscary lying-in" by one official[66]), and foreshadowed the legislative and regulatory changes, and stricter enforcement, which would eventually eliminate this practice from the battery of fishing techniques available to Canadians.[67]

Notwithstanding the view of the superintendent general, many natives remained unhappy with the new legislation. In his annual report for 1860 William Gibbard, the fisheries overseer for Lakes Huron and Superior (and unofficial superintendent of fisheries for that part of the province), reported that Indians were harassing non-Indian lessees.[68] The following year natives on Manitoulin Island complained that their local superintendent, George Ironside, had, among other things, let one of their fisheries to a "yankee," and that they had received none of the rent therefor. They said that he would not permit them "to make any remonstrance against the leasing of [their] fisheries."[69] (Ironside denied this, but at the same time pointed to the opinion of the attorney general which had been rendered on 16 April 1845[70].) Later, in the summer of 1861, Indians on the island asked for a copy of the "bylaws concerning of the Indian matters, on account some time white men and French men interferes of our timber & fisheries [*sic*]."[71] Increased Indian dissatisfaction led to increased Indian action. In his annual report of that year William Gibbard remarked:

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

> no restraint of law, and even when caught red-handed it is difficult under present circumstances to know how to punish them; fines they cannot pay, and it would entail great expense and loss of time to take them to any gaol ... One of our most intelligent and enterprising lessees ... has told me that the Indians from some part of the Manitoulin Islands, (under the influence of whiskey and as he asserts, through the connivance or suggestion of a regular whiskey trader, who notoriously gets three-fourths of his fish for whiskey, in the immediate neighbourhood), have burnt down or carried away all his buildings, fish-sheds, wharf and empty barrels – a complete establishment – since he left it in November last.[72]

Again the next year (1862) Gibbard commented that the Indians "still cause serious annoyance to fishery lessees, and commit depredations on their property." Referring tangentially to problems encountered by William McDougall when he negotiated the 1862 Manitoulin Treaty (some of the Indians, supported by the local Jesuit priests, had refused to consent to the treaty, forcing the government to take a surrender of only a portion of the island), he wistfully remarked that " 'Tis found very troublesome to arrange these difficulties in which the Indian tribes, and some halfbreeds, are concerned."[73]

The problems faced by government officials when dealing with Indians and their fisheries were to be brought home to William Gibbard in a very personal way in 1863. Seasonal fishing leases for the Manitoulin Island area were arranged by him in the spring of that year. First enlarging the "extensive" limits previously assigned to the Indians, he then allotted a licence for the south side of Lonely Island to two non-natives.[74] Married to Indian women, Philemon Proulx and Charles de la Ronde had operated a station at the island without interference for many years. While their 1863 licence contained the "customary" proviso that Indians were to be allowed to fish for domestic purposes within the limits of the lease, for some unexplained reason Gibbard subsequently prepared a notice warning that "no Indian or other person will be allowed to fish on that ground or to use the beach included ... in the lease."[75] In a move which seemed calculated to provoke a confrontation, he then determined to deliver the notice himself. On 28 June he met the Indians in the residence of the Jesuit priests at Wikwemikong. The meeting quickly degenerated into a "threatening, menacing, gesticulating, stamping and raving" mêlée, with the Jesuits and Indians objecting to the lease to non-natives, and the priests calling Gibbard (or so he later reported) "a heretic, a vile Englishman, a Protestant hireling, a liar and a servant of a vile lying government." The fisheries overseer left the meeting "thankful that [he] was living under the British flag and that [he] had come out of the meeting safe and sound."[76] He was not to remain safe and sound for long. Two days later, on 30 June, Gibbard was lunching with the Proulxs on Lonely Island when two boatloads

of Indians arrived, determined to drive the lessees off. Pulling knives and guns, the overseer and his men managed to face down the natives and force them to leave. However, they returned the following day, after Gibbard had left, and accomplished what they had initially set out to do. Consequently, after his return to his headquarters at Collingwood, Gibbard swore out informations, swore in eight special constables (he was a justice of the peace) and retained a number of others (twenty-two in all), and then returned to Wikwemikong armed with "police batons, handcuffs and revolvers" in order to arrest the culprits.[77] In this he failed. A further confrontation, provoked when he tried to arrest one of the Jesuit priests, almost overwhelmed him and his whole party. He was forced to retire without any prisoners at all.[78] However, after rejoining the steamer *Ploughboy* for its journey on to Sault Ste Marie, he was able to arrest Osawa-ane-mekee (John Little Yellow Thunder) when the ship stopped at Bruce Mines.[79] According to Gibbard, Osawa-ane-mekee was the "notorious ruffian" who had led the Lonely Island incursion of 30 June.[80]

At Sault Ste Marie the prisoner was remanded and released on bail, and then rejoined the *Ploughboy* for its journey back down the lake. Of course, Gibbard was also still on board, since he had to return to headquarters. On 27 July, prior to leaving the Sault, the overseer quickly penned a letter to William McDougall, the commissioner of crown lands, in which he outlined what had transpired and indicated that he would not return to Wikwemikong "unless backed up by a company of military, in addition to the necessary constables."[81] This would prove unnecessary. When the steamer docked at Collingwood, Gibbard was no longer on board. His body was later found floating in the lake near Little Current. The coroner's verdict was murder, but no one was ever tried or convicted for the same.[82]

On 10 August 1863 McDougall instructed the head of the Fisheries Branch, W.F. Whitcher, to proceed to Manitoulin Island to investigate the incident and "ascertain the actual condition of the various matters within [Gibbard's] cognizance as Overseer." In his resulting report Whitcher put some of the blame for the affair on Gibbard himself, finding his methods unduly confrontational. The arbitrary (and contradictory) refusal to allow the Indians to fish in the waters licensed to Proulx and de la Ronde was a provocation. As well, he attributed some fault to the Jesuit priests who, he said, had "inflamed" the Indians since the signing of the 1862 Treaty. But he also determined that there was a more fundamental problem. The Indians at Wikwemikong had an erroneous perception of their rights: they thought that they owned the fisheries.[84] Having made an intensive study of the common law as it related to fishing, and having keenly followed the various judgments of the Upper Canada courts on the issue,[85] Whitcher was aware of the contemporary legal position. He set it out for McDougall:

> Fisheries cannot belong exclusively to Indians, whether as pertaining to navigable waters about ceded reserves, or belonging to waters impinging upon unconceded islands or tracts of Indian lands. Piscarial rights are public and general. Members of Indian bands and tribes could exercise only individual or tribal rights, in common with all other communities and persons, as integral parts of the public. Exclusive fishing rights and special privileges of occupancy for beaches and locations suitable for carrying on fisheries, are granted by the Crown only under authority of Act of Parliament, in derogation of the common law.[86]

Unfortunately, when he discussed the question with the Indians at Wikwemikong he could not convince them either of the state of the law, or of "the fallacy of their pernicious notions." Nor, apparently, could Commissioner William McDougall when he met the Indian chiefs (including Osawa-ane-mekee) who had voluntarily surrendered to Whitcher and accompanied him back to Quebec.[87] Of course, it would be left to later, more enlightened times, to find the notions not so pernicious.

The problem with the fisheries around Manitoulin Island was but one of a number of difficulties confronting the Fisheries Branch at this time. Far more alarming was the "growing spirit of defiance" among fishermen to the leasing and licensing scheme.[88] In 1861 a magistrate at Kingston had dismissed two charges of trespass on the basis that there was "no law authorizing the leasing of fisheries."[89] This arose because the 1858 act authorized the granting of "fishing leases and licences on lands," rather than the leasing of fisheries, *simpliciter*. That same year another court called into question the legality of leases issued under the hand of the commissioner of crown lands, when the act expressly empowered only the governor-in-council to issue the same. A legal opinion obtained by the Fisheries Branch tended to confirm the approach taken by the courts. On 11 March 1863 the solicitor general, Adam Wilson, told William McDougall that the 1858 Fishery Act did not authorize the crown to grant "exclusive rights of fishery ... to any extent it pleases." The legislation sanctioned only the leasing of crown land, and then only by the governor-in-council, and was not sufficient authority to override the public right of fishing that existed in the navigable waters of Upper Canada.[90]

The consequence of the court decisions was uncertainty. Were the leases valid or not? Not knowing the answer, many lessees refused to pay their rents, while others who would have otherwise fished under the protection of a lease, never bothered to apply for one.[91] Inevitably, this led officials charged with administering the act to call for its amendment. Extensive hearings into the workings of the Fishery Act were held by a select committee of the Assembly. In the spring of 1864 it submitted a report calling for a number of amendments to the legislation designed to ensure that the leases issued under the act would be

valid, and to effect improvements to the conservation focus of the act as a whole. The only reference in the committee report to Indians involved their use of the spear. While some who had testified before the committee had suggested that the practice be outlawed completely, members would only go so far as to recommend that its use by Indians be restricted to the period May through early July each year.[93]

The new bill was introduced in the Legislative Council (Alexander Campbell, the new commissioner of crown lands, sat in the Council) early in 1865.[93] On 9 and 10 March there was an extensive debate on second reading. Much of the discussion focused on the new *fisheries* leasing provision which authorized the commissioner of crown lands to issue the same "where the exclusive right of fishing does not already exist by law in favor of private persons."[94] It was explained that this latter phrase was intended to cover those instances in French Canada where exclusive rights had been conveyed prior to Conquest.[95] Such grants were valid since they had not been subject to the public right of fishing derived from Magna Carta. With the inclusion of this phrase in the general clause conferring leasing authority they would be similarly unaffected by the legislative affirmation of the public right which was present in this act, just as it had been in the earlier acts.[96] The bill also included a provision relating to natives. For the first time the commissioner of crown lands was specifically empowered to lease fisheries for the exclusive use of Indians, although only for those waters where they fished for domestic purposes. (Indian fishing for commercial purposes would continue to be covered under the general leasing clause.) Section 17(8), which was found under the heading "General Prohibitions," read as follows:

> It shall not be lawful to fish for or catch or kill salmon, salmon-trout, sea-trout, or trout of any kind, lunge, winnoniche, bass, bar-fish, pickerel, white-fish, herring, or shad, by means of spear, grapnel hooks, negog or nishagans, nor by aid of torchlight, or any other artificial light; provided, the Commissioner of Crown Lands may appropriate and lease certain waters in which certain Indians shall be allowed to catch fish for their own use as food in and at whatever manner and time are specified in the lease, and may permit spearing in certain localities for bass, pike and pickerel between the fourteenth of December and the first of March.

This appears to have been an attempt to deal with the various facets of Indian food-fishing under a single head. In essence, the one clause encompassed the whole of the government response: provision for the protection of traditional Indian fishing grounds within the framework of the overall leasing and licensing system, some administrative discretion in respect to close season, and a limited relaxation of the ban on spearing once again expressly included in the act.[97]

The new legislation received royal assent on 18 September 1865. While it resolved the problems concerning the overall legality of the leases and licences, it did not have a similar salutary effect on native grievances concerning fisheries. The Indian Affairs Branch now began to assert that Indians had exclusive rights to the fisheries about their reserves and about other properties in which the Indian interest was unsurrendered. The presentation of this claim eventually compelled W.F. Whitcher to write to the commissioner of crown lands. In a letter dated 23 January 1866 Whitcher detailed his view of the law and asked the commissioner, Alexander Campbell, "to determine now the vexed question of fishery rights in connection with Indian properties, according to law, and settle in what manner they are to be dealt with."[98] Campbell directed that the matter be submitted to the Crown Law Office and Whitcher prepared an extensive memorandum setting out the legal authorities, stretching back to the 1839 decision in *Moffatt et al. v. Roddy* and beyond, as enumerated in the various law reports and digests. The sought-after opinion was rendered by the solicitor general, James Cockburn, on 8 March 1866. He was completely supportive of Whitcher's position:

> [Indians] have no other or larger rights over the public Waters of this province than those which belong at Common Law to Her Majesty's subjects in general.
>
> Previous to the recent Statute (29 Vic., c. 11) the Crown could not legally have granted an exclusive right of fishing on the lakes and Navigable Waters but under the 3rd Sec. of that Act the power is conferred on the Commissioner of Crown Lands of granting licences for fishing in favor of private persons, wheresoever such Fisheries are situated, the only exception is "where the exclusive right of fishing does not already exist by law in favor of private persons." This exception was intended as I understand to exclude the application of the Act from certain Fishing rights which had been granted under the French Law in Lower Canada before the conquest; it certainly does not apply to the Indian Tribes who have acquired no such rights by law unless it may be contended that in any of those treaties or instruments for the cession of Indian Territory there are clauses reserving the Exclusive right of fishing and even in that case, if such should be the fact, I should say that without an Act of Parliament ratifying such reservation no exclusive right could thereby be gained by the Indians as the Crown could not by any Treaty or act of its own previous to the recent Statute, grant an exclusive privilege in favor of Individuals over public rights, such as this in respect of which the Crown only holds as trustee for the general Public. The proviso in Sub. sec 8 of Sec 17 is in accordance with this View of the law else why was it necessary to make any Special stipulation for the Indians at all?

This resolved the matter. For the balance of the nineteenth century there would never again be any doubt, at least in senior government circles, that the proprietary interest in fisheries in navigable waters adjoining Indian reserves was in the crown for the benefit of the public, native and non-native alike, and not in the Indians either resident adjacent thereto or elsewhere.

With the issue thus settled, an expanded version of the Indian Affairs/Fisheries arrangement of 1859 – which this time included express recognition of the right of Indians to fish for domestic purposes in waters leased to others – was confirmed. Furthermore, a similar agreement was reached between the Indian Branch of the Department of the Interior and the Department of Marine and Fisheries after Confederation.[100] This was to be expected. Many officials of the Province of Canada stepped into similar federal jobs, among them W.F. Whitcher, who became the first dominion commissioner of fisheries. He was to design a fisheries policy rooted in the common law, just as it had been prior to 1867.[101] From long and careful study, and practical application, Whitcher was familiar with the contemporary legal principles. He also had had the benefit of the advice given in opinions rendered periodically by the law officers of the crown. One such opinion, that of 8 March 1866, had confirmed his earlier views as to the nature and extent of the proprietary interest of Indians in fisheries. Not surprisingly, therefore, that opinion came to reflect not only the provincial policy which preceded it, but also the federal policy. It would be referred to expressly by federal officials as late as 1898, and implicitly well on into the twentieth century.[102] Indeed, it would provide the underpinning to the federal management scheme for fisheries, thereby ensuring that some of the principles developed by the courts of Upper Canada would have a life in public policy long after the Province of Canada passed into history.

This paper has studied a jurisprudence-based public policy and its attendant effect on the proprietary aspirations of Indians with respect to their traditional fishing grounds. In doing so, it has enabled us to view Upper Canada fishing policy and those who charted it in a more favourable light than it and they have been recently portrayed. Rather than a plan crafted to the detriment of Indians, it is clear that Upper Canada fishing policy was one well-grounded in the law of the time, and that a key element of that policy, the comprehensive fisheries management scheme established by legislation in 1857 and after, was designed to benefit Indian and non-Indian users of the resource alike. While the initial implementation of the post-1857 plan suffered from certain Indian-related deficiencies, the fact remains that the plan itself provided, as it was meant to provide, significant security of tenure for traditional Indian fisheries. Notwithstanding its flawed execution, therefore, the new scheme enhanced rather than impaired the position of the Indians of Upper Canada in so far as their fishing interests were concerned. In the result,

recent literature which asserts that in 1857 the government of the Province of Canada "legitimized the takeover of Native fisheries by enacting legislation that effectively ignored the treaty promises and allocated the fishery resource to non-native commercial interests"[103] represents a misreading of both the contemporary common law and the colonial fishing policy, as well as a lack of appreciation of the critical role played by the former in the formulation of the latter.

1 See William Blackstone, *Commentaries on the Laws of England*, 15th edition, with notes and additions by Edward Christian (London: A. Strachan 1809), Vol. II, pp. 39–40 and 417. In a related vein, in clause 33 the king affirmed that he would remove the weirs from the Thames and Medway, and other rivers.

2 Louis Houck, *A Treatise on the Law of Navigable Rivers* (Boston: Little, Brown & Company 1868), p. 30.

3 *The Queen* v. *Robertson* (1882) 6 SCR 52 at pp. 129–30.

4 Discussions of the public right of navigation and the *ad medium filum aquae* rule are found in G.V. LaForest, *Water Law in Canada – The Atlantic Provinces* (Ottawa: Information Canada 1973), pp. 178–91 and 241–47, respectively. Simply put, the rule says that a grant of land bordering a non-navigable waterway will normally include the bed of the adjacent waters to the middle thread of the same.

5 *Attorney General for British Columbia* v. *Attorney General for Canada* [1914] AC 153.

6 *An act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's Reign, intituled, "An Act for making more effectual Provision for the Government of the Province of Quebec, in North America, and to introduce the English Law, as the Rule of Decision in all matters of Controversy, relative to Property and Civil Rights,"* 32 Geo. III, c. 1 (Upper Canada).

7 *In Re Provincial Fisheries* (1895) 26 SCR 444 at p. 528.

8 Robert Jameson to Lieutenant-Colonel Rowan, 11 May 1835 in NA RG1, E3, vol. 16, pp. 124–25.

9 *Moffatt et al.* v. *Roddy*, Michaelmas Term, 2 Vic. (1839), cited in J.H. Cameron, *A Digest of Cases Determined in the Court of Queen's Bench From Michaelmas Term, Tenth George IV to Hilary Term, Third Victoria* (Toronto: Henry Rowsell 1840), p. 38, and Robert A. Harrison and J.C. Robinson, *A Digest of Reports of all Cases Determined in the Queen's Bench and Practice Courts for Upper Canada From 1823 to 1851 Inclusive* (Toronto: Henry Rowsell 1852), p. 215.

10 *Moffatt et al.* v. *Roddy*. The case was also referred to in *Robinson's and Joseph's Digest*, the first edition of which was published before 1866. It is the first judgment cited under the heading "Fishery" in the second edition, published in 1880: see Christopher Robinson and F.J. Joseph, *A Digest of the Reported Cases Determined in the Courts of Common Law and Equity in the Now Province of Ontario, from the Commencement of the Reports of Trinity Term 1823* (Toronto: Rowsell and Hutchison 1880), vol. I, col. 1526. See also J.F. Smith *et al.*, *The*

Digest of Ontario Case Law in the Courts of the Now Province of Ontario from the Commencement of Trinity Term 1823 to the end of the Year 1900 (Toronto: Carswell Company Ltd. 1903), col. 2802.

11 *Parker* v. *Elliott* (1852) 1 UCCP 470 (CA).

12 *The Queen* v. *Meyers* (1853) 3 UCCP 305.

13 *Gage* v. *Bates* (1858) 7 UCCP 116 (CA). See also *Re Miller and Great Western Railway* (1856) 13 UCR 582.

14 *The Attorney General* v. *Perry* (1864) 15 UCCP 329; *Whelan* v. *McLachlan* (1866) 12 Chy. 466, cited in M.F. Cochrane, "Province of Ontario. Classified List of Judicial Decisions Relating to the Use of Water, 1823–1927" in NA, RG89, vol. 536, file 48.

15 *In Re Provincial Fisheries* (1895) 26 SCR 444 at pp. 527–28. The chief justice went on to say that such right was "subject to the right of the provinces to grant, either separately from, or incidental to, the title to the soil, exclusive rights to individual grantees." This Canadian modification of the English public right (that is, no parliamentary sanction was considered to be required for the exercise of the crown prerogative) was brought about because the Magna Carta restriction on such grants applied only to tidal waters.

16 See A.B. McCullough, *Commercial Fishery of the Canadian Great Lakes* (Ottawa: Environment Canada 1989), p. 14; Brian Osborne, "Organizing the Lake Fisheries: Landscapes and Waterscapes," *Historic Kingston* 38 (January 1991); and Tim Holzkamm *et al.*, "Rainy River Sturgeon: An Ojibway Resource in the Fur Trade Economy" in *The Canadian Geographer* 32, no. 3 (1988), pp. 194–205.

17 Osborne, "Organizing the Lake Fisheries," pp. 83–4.

18 McCullough, *Commercial Fishery of the Canadian Great Lakes,* pp. 15–16.

19 Osborne, "Organizing the Lake Fisheries," pp. 86–89.

20 The August 1805 treaty with the Mississaugas of the Credit reserved for the Indians the "sole right of the fisheries" in certain creeks and in the Credit and Etobicoke rivers: *Canada. Indian Treaties and Surrenders* (Toronto: Brown Chamberlin 1891), reprinted version (Toronto: Coles Publishing Company 1971), vol. 1, pp. 35–36. As early as 1797 a "Proclamation to Protect the Fishing Places of the Mississaugas" had been passed: Peter Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press 1991), p. 106. "Possible exception" is used advisedly. It is not clear that the waters in question were actually *de facto* navigable. It is interesting to note that the Credit River portion of the waters was later expressly reserved for the Indians by legislation. This treaty and its later legislative ratification are referred to in Lise Hansen, "Treaty Fishing Rights and the Development of Fisheries Legislation in Ontario: A Primer," a paper prepared in May 1991 and available at the Ontario Native Affairs Secretariat in Toronto. I take this opportunity to acknowledge and thank John Van West for supplying the same to me, and for the kind assistance that both he and Victor Lytwyn provided. While some of my conclusions are at odds with those found in Ms. Hansen's paper, and in the paper of Mr. Lytwyn referred to below, both were very useful for general background, for providing references to specific documentation of interest, and for determining fruitful areas of research.

21 The standard practice was confirmation by the Executive by way of order-in-council.

22 In her paper "Treaty Fishing Rights" Lise Hansen says (p. 3) that the only explicit reference to fisheries prior to 1850 was the one in the 1805 treaty referred to above. I reviewed the treaties and surrenders in 1850 and after, and the only references to fishing were those in the Robinson Huron and Robinson Superior Treaties of 1850, the McDougall Treaty of 1862, and the surrender of the Whitefish Indian Reserve in 1865: see Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co. 1880), reprinted version (Toronto: Coles Publishing Company 1971), pp. 302–4 (Robinson Superior Treaty), pp. 305–9 (Robinson Huron Treaty), and pp. 309–13 (McDougall Treaty); see also *Canada. Indian Treaties and Surrenders*, vol. 1, pp. 255–56 (Whitefish Indian Reserve). Note, however, that in the last volume cited at pp. 193–94 there is an 1854 surrender by the Chippewa Tribe which purports to include ten water lots in the St. Clair River.

23 *Canada. Indian Treaties and Surrenders*, vol. 1.

24 J.D. McLean, Secretary, Department of Indian Affairs. Memorandum dated 26 November 1897 in NA, RG10, vol. 3909, file 107297–3.

25 Hansen, "Treaty Fishing Rights," p. 1.

26 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, pp. 309–13; *Canada. Indian Treaties and Surrenders*, vol. 1, pp. 255–56.

27 In this connection, see W.F. Whitcher, Head, Fisheries Branch to William McDougall, Commissioner of Crown Lands, 24 August 1863 in Legislative Assembly, *Sessional Papers* (hereinafter *SP*), vol. 22, no. 18.

28 W.H. Draper to J.M. Higginson, 16 April 1845 in NA, RG10, vol. 612, p. 215. The copy on file is incorrectly dated 1848.

29 George Ironside to Major T.E. Campbell, 30 August 1848 in NA, RG10, vol. 572, n.p., and Major T.E. Campbell to George Ironside, 25 September 1848 in NA, RG10, vol. 612, p. 214; George Ironside to Lt.-Colonel R. Bruce, 6 September 1851 in NA, RG10, vol. 323, pp. 216152–55, and Colonel R. Bruce to George Ironside, 30 October 1851 in ibid., pp. 216147–50.

30 Province of Canada, Executive Council, order-in-council of 31 January 1853 in NA, RG1, E8, vol. 46.

31 In the next few years leases of reserve land for fishing stations were granted to non-natives by the Executive Council, but only with Indian concurrence: see Victor Lytwyn, "Ojibwa and Ottawa Fisheries around Manitoulin Island: Historical and Geographical Perspectives on Aboriginal and Treaty Fishing Rights" in *Native Studies Review*, vol. 6, no. 1 (1990), pp. 15–16.

32 See Schmalz, *The Ojibwa of Southern Ontario*, pp. 150, 155, 176–78, and 220.

33 W.F. Whitcher, Fisheries Branch to William McDougall, commissioner of crown lands, 24 August 1863 in *SP*, 1863, vol. 22, no. 18.

34 Victor Lytwyn implies at page 19 of his article that the 1855–56 leases referred to in the preceding paragraph were actually leases for fisheries, rather than leases for land-based fishing stations. This cannot be the case.

35 The Fishery Act, SC 1857, c. 21 (Province of Canada); SC 1858, c. 86; CSC 1859, c. 62; SC 1865, c. 11; and SC 1868, c. 60.

36 Lytwyn, "Ojibwa and Ottawa Fisheries," p. 1.

37 The early legislation is set out and discussed in Hewitt Bernard, deputy minister of justice, Memorandum, n.d. [October 1870] in NA, RG13, Acc. 86-87/361, Box no. 3, file 581/1870. See also McCullough, *Commercial Fishery of the Canadian Great Lakes*, pp. 19–21.

38 47 Geo. III, c. 10; 50 Geo. III, c. 3.

39 2 Geo. IV, c. 10.

40 *An Act to repeal part of, and to amend and extend the provisions of an Act in the second year of the reign of His present Majesty, intituled, "An Act to repeal the laws now in force relative to the preservation of salmon, and to make further provisions respecting the Fisheries in certain parts of this Province, and also to prevent accidents by fire from certain persons fishing by torch or fire light,"* 4 Geo. IV, c. 20.

41 J.E. Hodgetts, *Pioneer Public Service* (Toronto: University of Toronto Press 1955), p. 145. In this connection, see also Richard Lambert and Paul Pross, *Renewing Nature's Wealth* (Toronto: Hunter Rose Company 1967), pp. 150–51.

42 The report is discussed in detail in Lambert and Pross, *Renewing Nature's Wealth*, pp. 104–14.

43 Joseph Cauchon, Annual Report of the Commissioner of Crown Lands for 1856, 31 March 1857, in *Journals of the Legislative Assembly of Canada* (JLAC) 1857, vol. 15, appendix no. 25.

44 Province of Canada, Legislative Assembly and Legislative Council, "Parliamentary Debates," 1857. Newspaper scrapbooks in NA Library, Microfilm ML-58, 5, 20, 22 and 23 May 1857.

45 The Fishery Act, SC 1857, c. 21.

46 Ibid., s. 5. The King's Posts was a tract of land on the north shore of the St. Lawrence River then under the control of the Hudson's Bay Company.

47 10 and 11 Wm. III, c. 25 (Imperial); 28 Geo. III, c. 6 (Province of Quebec).

48 *Attorney General for Canada* v. *Attorney General for Quebec* [1921] 1 AC 413 at pp. 429–30.

49 Legislative Assembly and Legislative Council, "Parliamentary Debates," 1858. Newspaper scrapbooks in NA Library, Microfilm ML-58, 26 February 1858.

50 Section 4 was the leasing and licensing provision of the act. Its wording was somewhat imprecise, and would cause the government some problems. This will be referred below.

51 Interestingly, the legislatively affirmed public right (section 6 of the 1858 Act) was qualified by the phrase "for the purposes of trade and commerce." The reason for the change has not been determined. In any event, it became unqualified again in the 1865 Act and remained that way in post-Confederation legislation.

52 Legislative Assembly and Legislative Council, "Parliamentary Debates," 1858. Newspaper scrapbooks in NA Library, Microfilm ML-58, 9 August 1858.

53 See Adam Wilson, Solicitor General, Province of Canada to Commissioner of Crown Lands, 11 March 1863 in NA, RG10, vol. 323, pp. 216144–46, and *Debate on the Fisheries Bill in the Legislative Council* (Quebec: Daily News 1865), Appendix (Memorandum of W.F. Whitcher dated 1865).

54 Province of Canada, Executive Council, Order-in-Council of 29 January 1859 in NA, RG1, E8, vol. 68.

55 P.M. Vankoughnet, Commissioner of Crown Lands to John McCuaig, Superintendent of Fisheries for Upper Canada, 18 February 1859, Annual Report of the Commissioner of Crown Lands for 1859 in *SP*, 1860, vol. 18, no. 12, appendix 30.

56 R.T. Pennefather, Superintendent General of Indian Affairs to [?], 25 February 1859. cited in W.F. Whitcher, Head, Fisheries Branch to William McDqugall, Commissioner of Crown Lands, 24 August, 1863 in *SP*, 1863, vol. 22, no. 18.

57 W.F. Whitcher to William McDougall, 24 August 1863 in *SP*, 1863, vol. 22, no. 18.

58 R.T. Pennefather, to [Duke of Newcastle, Secretary of State for the Colonies], n.d., [*C.* November 1860] in NA, RG10, vol. 1834, pp. 439–66.

59 W.F. Whitcher, Head, Fisheries Branch to William McDougall, 24 August 1863 in *SP*, 1863, vol. 22, no. 18.

60 This right would be formally recognized in 1866 and after Confederation: see W.F. Whitcher to C.T. Dupont, 12 May 1866 in NA, RG10, vol. 323, pp. 216137–38, and W.F. Whitcher, Dominion Commissioner of Fisheries [for the Minister of Marine and Fisheries], Department of Marine and Fisheries Circular to Fishery Overseers, 17 December 1875 in NA, RG10, vol. 1972, file 5530.

61 R.T. Pennefather to Governor General, 4 May 1860, enclosed with Edmund Head, Governor General, Province of Canada to Duke of Newcastle, Secretary of State for the Colonies, 9 May 1860 in *British Parliamentary Papers* (Shannon, Eire: Irish University Press), vol. 23.

62 J.D. McLean, Secretary, Department of Indian Affairs. Memorandum dated 26 November 1897 in NA, RG10, vol. 3909, file 107297-3.

63 R.T. Pennefather to [Duke of Newcastle, Secretary of State for the Colonies], n.d., [*C.* November 1860] in NA, RG10, vol. 1834, pp. 439–66.

64 It appears that the principal salmon streams were quickly leased to non-natives: see William Spragge, Deputy Superintendent General of Indian Affairs, Annual Report of the Commissioner of Crown Lands for 1862 in *SP*, 1863, vol. 21, no. 5, appendix 44.

65 See especially William Gibbard, Overseer of Fisheries for Lake Superior and Huron, 31 December 1859, and W.F. Whitcher to P.M. Vankoughnet, 31 December 1859, both in Annual Report of the Commissioner of Crown Lands for 1859 in *SP*, 1860, vol. 18, no. 12, appendices no. 31 and 34. In this connection, see also P.M. Vankoughnet, 16 March 1861, Annual Report of the Commissiner of Crown Lands for 1860 in *SP*, 1861, vol. 19. no. 15. Note that the superintendent of fisheries for Upper Canada had recommend the elimination of spearing in all cases: John McCuaig, 31 December 1859, Annual Report of the Commissioner of Crown Lands for 1859 in *SP*, 1860, vol. 18, no. 12, appendix 30.

66 W.F. Whitcher to P.M. Vankoughnet, 31 December 1859, Annual Report of the Commissioner of Crown Lands for 1859 in *SP*, 1860, vol. 18. no. 2, appendix no. 34.

67 As noted above, under the 1858 act spearing by Indians was legal. However, fishing for salmon by any means on their spawning grounds by Indians or anyone else was not (Fishery Act of 1858, s. 25). Over time the latter would be more strictly enforced, while the former would be restricted and eventually effectively banned. Of course, as far as the Atlantic salmon was concerned, its

elimination from the Great Lakes and inland rivers was likely the prime reason for the eventual cessation of the practice.

68 For some reason the 1860 annual reports of the various fisheries officials were not printed in the Journals or Sessional Papers. That Gibbard made this comment is deduced from his 1861 annual report in which he says: "The Indians still continue to give great annoyance to our lessees" (Annual Report of the Commissioner of Crown Lands for 1861 in *SP*, 1862, vol. 20, no. 11).

69 Indians of Wikwemikong and others, Petition dated 23 May 1861 in NA, RG10, vol. 573, pp. 287–96.

70 George Ironside, Indian Superintendent, Manitowaning to W.B. Bartlett, Superintendent of Indian Affairs, Toronto, 17 July 1861 in NA, RG10, vol. 573, pp. 297–307.

71 Chief and Indians of the French River Band to George Ironside, 12 July 1861 in NA, RG10, vol. 573, pp. 309–11.

72 Annual Report of the Commissioner of Crown Lands for 1861 in *SP*, 1862, vol. 20, no. 11.

73 Annual Report of the Commissioner of Crown Lands for 1862 in *SP*, 1863, vol. 221, no. 5, appendix 42(b).

74 W.F. Whitcher to William McDougall, 24 August 1863 in *SP*, 1863, vol. 22, no. 18. See also William Gibbard to Commissioner of Crown Lands, 10 July 1861 in ibid.

75 W.F. Whitcher to William McDougall, 24 August 1863, and William Gibbard to Rev. M. Kohler, 27 June 1861, in ibid.

76 William Gibbard to William McDougall, 10 July 1861 in ibid.

77 W.F. Whitcher to William McDougall, 24 August 1863, and William Gibbard to Commissioner of Crown Lands, 10 July 1861, in ibid.

78 Ibid. See also, and especially, the statements of the various constables in the same source. According to one (Joseph Rodgers), the only reason that the Indians did not fall on them was that he had held a gun to the head of the priest.

79 Statement of Chief Constable Adam Dungeon, 29 July 1861 in ibid. In the previous December Osawa-ane-mekee was reputed to have led a group of Indians who had expelled certain other Indians from their homes because they had supported the McDougall Treaty of 1862. See the January 1861 statements of the Indian deponents in the same source.

80 William Gibbard to William McDougall, 10 July 1861 and 27 July 1861, in ibid.

81 Ibid.

82 I have drawn this account almost exclusively from the various statements, letters and depositions found in *SP*, 1863, vol. 22, no. 18. It is also discussed, with helpful references to newspaper accounts, in: Douglas Leighton, "The Manitoulin Incident of 1863: An Indian-White Confrontation in the Province of Canada," *Ontario History* 69, no. 2 (June 1977), pp. 113–24, and in Lambert and Pross, *Renewing Nature's Wealth*, pp. 153–54. The latter work refers to Gibbard as "an early martyr to the cause of conservation." As an aside, note that after Confederation, the Department of Marine and Fisheries always blamed the Indians for the murder, while the Department of Indian Affairs always asserted that such was never proved: see, for example, W.F. Whitcher, Dominion Commissioner of Fisheries, to A.J. Smith, Minister of Marine and Fisheries, 11