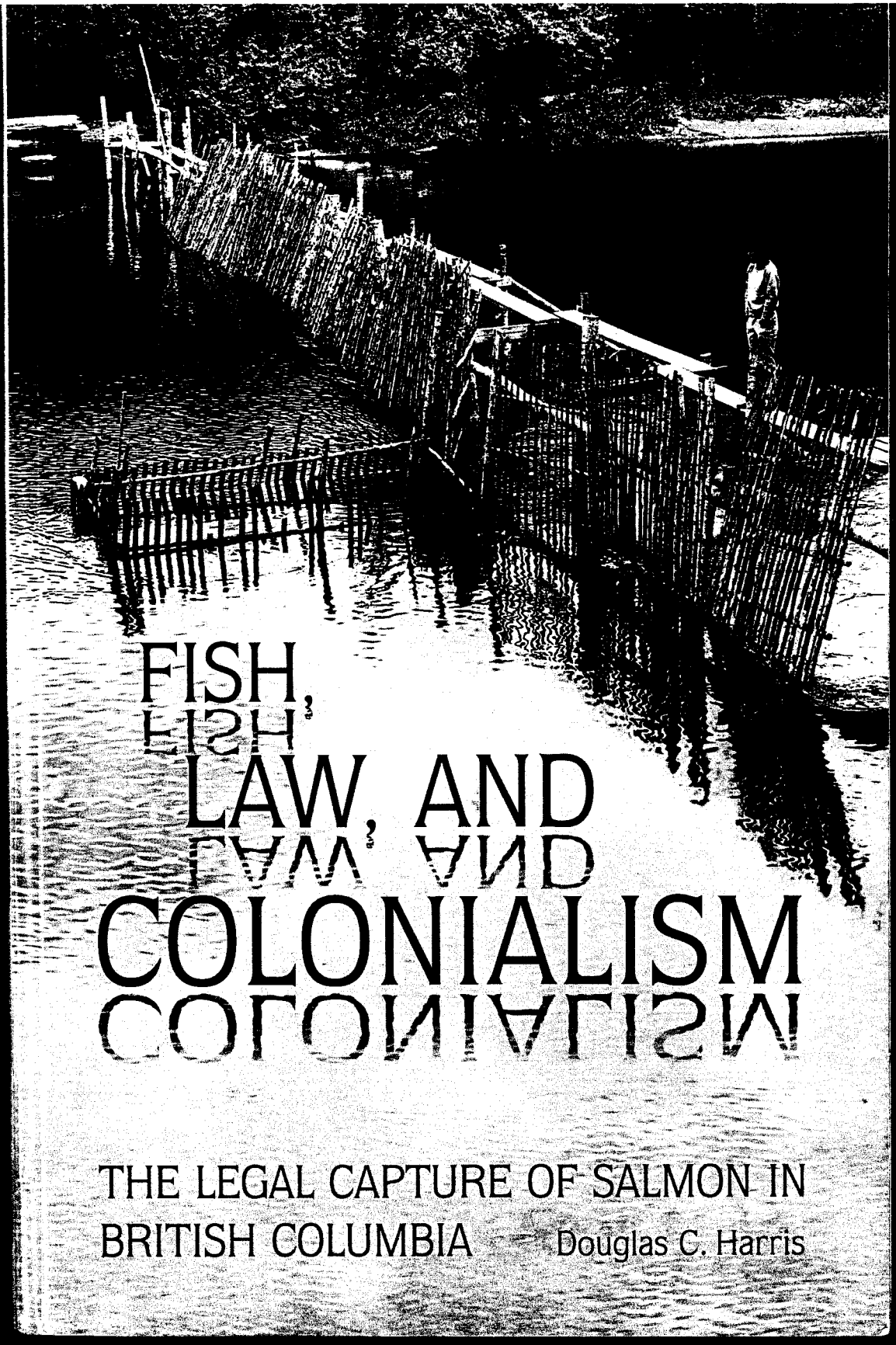

FISH, LAW, AND COLONIALISM

THE LEGAL CAPTURE OF SALMON IN BRITISH COLUMBIA

Douglas C. Harris

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CHAPTER THREE

The Law Runs Through It: Weirs, Logs, Nets, and Fly Fishing on the Cowichan River, 1877–1937

In contrast to the transparent efforts of capital and state to eliminate the Lake Babine weir fisheries and to capture the Skeena sockeye runs, the conflict over fish weirs on the Cowichan River demonstrates the complexity of a continuing colonial encounter and of the role of law in shaping that encounter. Spread over sixty years, while a settler society established its control and the Cowichan people struggled to retain some control, the dispute over weirs reveals state law both as an instrument of colonial power and as an avenue, albeit limited, of resistance. The Canadian state sought control of the river, channelling its use and its resources to lumber mills and fly fishers, and away from the Cowichan people. It did so with law, and in the process denied the legitimacy and efficacy of Cowichan law. The Cowichan, for their part, defended their legal traditions, insisting that human use of the river and the fish in it were allocated under and subject to Cowichan laws. The result of sixty years of struggle, however, was a river subject to the laws of the Canadian state. The Cowichan built their last weir in 1936, a symbolic end of the last vestiges of Cowichan control. They were confined to a meagre subsistence fishery, supervised by the state, on what had been their river.

To focus on the result, however, is to miss the processes of colonialism at work. Weirs had been prohibited on British Columbian rivers under Canadian law since 1877, yet the Cowichan continued to build them for sixty years, often with support from the local settler population and the Department of Indian Affairs, and sometimes with permission from the Department of Fisheries. Constructed at a distance, the formal terms of Canadian law were modified not only by Cowichan resistance and accommodation but also by the presence of a local settler

towards the settlers, who treat them with kindness and consideration.'[52] Clashes erupted over land, and a letter from Archibald Dods, a farmer, to the provincial attorney general expressed another view of the colonial encounter. Complaining of 'Indians trespassing' on his land, Dods wrote that '[t]hey have a hundred times more respect for a gunboat than all the talk in creation.'[53] The Cowichan do not recall a harmonious relationship either,[54] but as settlement grew and settler society consolidated control, its concerns about Cowichan insurrection diminished. By 1894 a railway traversed the valley, the adult settler population in the valley was approaching 500, Duncan was becoming something of a regional centre, and a settler society was comfortably established on British Columbia's south coast.[55] In this context, the Native became viewed as the trusted neighbour and labourer, not the threatening savage. Once secure in their possession of land, the settlers, largely of British extraction, came to see industrial logging operations, railways, and canneries as the primary threats to their way of life, not Cowichan hunting and fishing. In fact, Dominion efforts to limit Cowichan fishing only provoked a Cowichan reaction that concerned the local settler population, which remembered earlier unrest, much more than the activity itself. By the 1890s, a significant segment of settler society supported the Cowichan in their limited use of the weirs as a food source and for local sale. This is an important part of the context in which the Department of Fisheries, based in Ottawa, and its local officials attempted to enforce Canadian fisheries law, and I shall return to it when I evaluate the failed prosecutions of the 1890s.

Protests, Prosecutions, and the Sport Fishery

One element of the English settler society enveloping the Cowichan Valley did not support the Cowichan weirs. Close to Victoria and renowned for its steelhead, the Cowichan River had become the local elite's favourite fly-fishing stream. When the Esquimalt & Nanaimo Railway (E&NR) was completed in 1886, the Cowichan Valley became that much more accessible, and sport fishers and those involved in the tourist industry sought to preserve the Cowichan as a fly-fishing paradise – one to delight the readers of Izaak Walton's *The Complete Angler*, the seventeenth-century book that was immensely popular in North America in the late nineteenth century.[56] Sport fishing, particularly fly fishing, long a favoured and fiercely protected activity of England's landed gentry and, in the nineteenth century, an important element

of an increasing tourist industry, would command the Department of Fisheries' attention. It would accommodate fishing for other purposes – food, fresh market, canning – around the sport fishery on the Cowichan River.

The impact of sport fishing on Native fisheries is underplayed in the existing literature. Historian Michael Thoms, in the only sustained analysis of the sport and Native fisheries in British Columbia, describes how an elite fly-fishing club manoeuvred to evict Native fishers from their age-old fisheries at Pennask Lake near Kamloops in the 1920s and 1930s.[57] It succeeded by purchasing the land around the lake and then using the law of trespass to make the lake its own. Surrounded by Indian reserve in its lower reaches and therefore impossible to girdle with private property, the Cowichan River required direct intervention from public officials to capture its fish for sportsmen.

In 1885, Inspector of Fisheries George Pittendrigh received a complaint about the Cowichan weirs from an avid sportsman who was also the lieutenant-governor, C.F. Cornwall. Pittendrigh went immediately to investigate and found several recently erected weirs in the age-old fishing sites of the Cowichan. Age-old or not, he insisted that to preserve their food supply and to protect the fish the Cowichan must open the weirs weekly for 48 hours beginning at 6 a.m. Saturdays. Pittendrigh acknowledged that the weirs by themselves might not be a problem – long Cowichan use was evidence that weirs and fish could coexist – but with other users taking fish by other means, it was now necessary as a conservation measure to enforce the law. The Cowichan were to *conserve* fish for other users.[58]

In 1887, Indian Agent Lomas filed his report as the first fisheries guardian on the Cowichan River.[59] Better attention was being paid to the fishery closures, he reported, and the compromise that required the Cowichan to open their weirs on weekends, confirmed by the new inspector of fisheries, Oliver Mowat, appeared to be holding. The Cowichan Council, elected representatives from the villages, was less sanguine.[60] It met in June 1888 to consider how to secure the Cowichan supply of fish and to express concern about the growing number of commercial seiners who were catching the schooling fish that appeared in Cowichan Bay in the early fall and were selling them in the Victoria markets. The council passed a resolution to 'protest against the granting of licences to fish with seines or Gill nets in Cowichan Bay as the same is only done during the time that the river is too low to admit of the fish ascending to their spawning grounds, and thus last year the

fish were all taken, before the Indians had a chance of catching their winter food, which has caused much distress among the Cowichan Indians.'[61] Lomas suggested that if Fisheries decided to grant this 'favour,' it should do so on the condition that the Cowichan relinquish their 'right' to use weirs. The right, he claimed, was held by only two or three families in each kin group.[62] Fisheries replied that several seine licences had already been issued for the season and would not be rescinded, but that new territorial limits for seine fishing would minimize the problem by keeping the nets away from the mouth of the river.[63] In September 1889, the minister announced that all salmon fishing within the Cowichan River estuary must occur beyond a line drawn due north from the Cowichan wharf (see figure 3.1).[64] Then, in November 1890, Fisheries banned salmon fishing with seine nets in British Columbia.[65]

The Cowichan fishery on the Fraser was also increasingly threatened. Those who travelled to the Fraser and to the Washington Territory for seasonal employment, mostly young men and women and their children, or who found work in the Island lumber mills were relatively well paid. Those who could not travel were increasingly destitute, according to Lomas, because of the fish and game laws:

> All the younger men can find employment on farms or at the sawmills and canneries, and many families are about leaving for the hop fields of Washington Territory; but the very old people who formerly lived entirely on fish, berries and roots, suffer a good deal of hardship through the settling up of the country. The lands that once yielded berries and roots are now fenced and cultivated, and even on the hills the sheep have destroyed them. Then again, the game laws restrict the time for the killing of deer and grouse, and the fishery regulations interfere with their old methods of taking salmon and trout.[66]

When the Fraser salmon runs were light or the hops failed, however, those who relied on the wage economy also suffered. Imagining that the Cowichan would evolve into stout farming stock, Lomas thought that in the long run this was a good thing. The uncertainty of wage labour would encourage them to cultivate their reserve land and become a land-based farming community.

When Fisheries limited the number of licences on the Fraser in 1889 to 450, 350 of which went to cannery boats, the Cowichan, who had fished with their own boats and nets and sold their catch to the canner-

ies, could no longer purchase licences. Vigorous protest from the independent fishers increased the available licences for non-cannery boats to 150, but the Cowichan would not receive any. Lomas requested licenses for the Cowichan,[67] but John McNab, the new Inspector of Fisheries, replied that the Cowichan earned 'a good livelihood' from selling fish to the local markets in Victoria and Nanaimo, and did not need a Fraser River licence.[68] Lomas wrote again, stating that the Cowichan had been fishing on the Fraser for generations, that they had paid for licences in the past, and that some owned boats and nets worth several hundred dollars. Would Fisheries reconsidered?[69] Ignoring the long-established Cowichan fishery on the Fraser, McNab replied that if the Cowichan received licences, then Natives from around the province would insist on licences for the Fraser as well. The Cowichan were 'favourably situated' on Vancouver Island and had no need of Fraser salmon, which were to be reserved for 'the Fraser River Indians' and so that 'freezing establishments and other fish curing industries may be systematically and successfully conducted.'[70] The provincial government had sold the Cowichan fishing station on the Fraser to a white settler, and some years later Fisheries closed their access to that same fishery (except if they were willing to work as cannery employees) by refusing to sell them licences.

In January 1894, Lomas found commercial gill nets from the Fraser River on the Cowichan River, but could not determine who owned or set them. He asked McNab for instructions, and was informed that it was his duty to seize them. If they were Cowichan nets, McNab replied, 'it was exceeding the permit granted to them as it was not in my opinion, that they should use commercial fishing nets, for catching fish in the Rivers for their own use during the close time.'[71] Despite lingering questions about ownership, several Cowichan men were charged and, if convicted, they faced fines of $20 and costs, or between eight days and one month in jail in default.[72] The prosecution failed, however, because the Crown had no evidence that the Cowichan were catching the fish to sell. Since 1888, the *Regulations* had allowed Native people, at all times, to fish for food, 'but not for sale, barter or traffic.'[73]

Officials in Ottawa were not pleased with McNab's work, and required that he pay the costs of the prosecution. Was he not aware, the deputy minister demanded to know, that the *Regulations* allowed Indians to fish for food, and that it did not matter that they were using commercial nets if they were fishing for food?[74] McNab suspected, however, that the Cowichan were selling fish to white merchants for

the Victoria markets. He was convinced that he had acted correctly, believing if nothing else that it was irresponsible for a fisheries officer to leave unclaimed nets in the water, a deadly practice for fish.[75]

The prosecutions stirred the Cowichan to action. Despite the acquittals, nets had been confiscated and the Cowichan felt increasingly harassed. They met with church and government officials later in 1894 to protest the intervention.[76] Lomas endorsed the protest, and there were no further prosecutions in 1894. McNab decided, however, that he needed a guardian on the Cowichan River who was prepared to enforce his understanding of the law, and he dismissed Lomas from the 'position which requires him to enforce regulations which in his opinion are so objectionable.'[77]

In 1895, McNab refused to issue permits for a Cowichan weir food fishery and he instructed James Maitland-Dougall, the new guardian, 'to see that no dams or other obstructions were erected by the Indians or others.'[78] The Indian Superintendent, A.W. Vowell, objected. The Cowichan food fishery, he argued, was being closed 'to supply inexhaustible sport for the Angler who, at times, takes from 10 to 30lbs of fish a day merely for recreation,' and begrudges the Cowichan their fishery.[79] The Cowichan built a weir nonetheless, and in June Maitland-Dougall charged Jack Quilshamult from Somenos with unlawfully maintaining a fish weir and unduly obstructing the passage of fish in the Cowichan River.[80] Lomas, who was still the Indian agent, appeared with Quilshamult at a preliminary hearing before two justices of the peace, Edward Musgrave and W.H. Elkington. Musgrave, an outspoken member of the Vancouver Island Fish & Game Protection Society, was a vigorous opponent of the weirs.[81]

Lomas argued four points to this presumably unreceptive bench. First, the weirs may temporarily delay fish, but did not prevent migration to the spawning grounds. Second, in 1877 the JIRC had promised that the Cowichan's right to take salmon would always be protected. This had been confirmed by a verbal agreement, witnessed by Lomas, with then Inspector of Fisheries Mowat in 1887, when the Cowichan had agreed to open their weirs on weekends. Third, the Cowichan had never surrendered their right to obtain food with their traditional methods. And finally, even though the Cowichan had once used as many as twenty weirs, the runs had remained healthy, proving that the weirs did not block the migrating fish.[82] Lomas asked for a 17 June trial date so that he could consult with Indian Affairs and the provincial attorney general. According to Lomas, the justices of the peace thought that any

agreement with the JIRC had been extinguished by the subsequent regulations. The only option for the Cowichan, they believed, was to request a food fishing permit from the inspector of fisheries, and they granted Lomas time to secure this permit.

Lomas was concerned that the Cowichan would retaliate against a conviction by refusing anglers and hunters access to their reserve lands. This was a credible threat, for the Cowichan Indian Reserve no. 1 surrounded much of the lower river and many prime hunting and fishing sites (see figure 3.1). He turned to the province, but the attorney general replied that fishing in the Cowichan River was a Dominion responsibility.[83] McNab would not accommodate the weir fishery either. The oral agreement with the JIRC never had any force, he argued, and if it did the Cowichan must still fish 'by lawful methods.' The *Fisheries Act* prohibited weirs, and McNab indicated he had no authority to relax the law; the case would be decided 'according to the laws in force when the offence was committed,' and he had no doubt that the Cowichan would be convicted.[84] Given the loose enforcement of the *Act* and *Regulations* by his predecessors, McNab's insistence on the letter of the law was a new development. Furthermore, he was incorrect. Even where Native food fishing conflicted with the *Act*, the *Regulations* enabled him to grant food-fishing permits.[85] He choose not to.

Unable to secure an agreement with Fisheries, Lomas requested a further adjournment to allow Quilshamult to hire legal counsel, and the trial was rescheduled on the condition that the Cowichan remove their weirs pending its outcome.[86] The Cowichan retained a Victoria barrister, S. Perry Mills, and asked Lomas for a meeting at the Indian Affairs office in Duncan. He declined, apparently not wanting to appear too closely associated with the Cowichan's position, although until that point he had organized their legal defence.

Three days before trial the Cowichan met at the Quamichan schoolhouse and unanimously adopted eight resolutions, which they sent to Indian Superintendent Vowell. In a strongly worded statement that rejected Dominion jurisdiction over their fisheries, the Cowichan asserted a *right* to the fish, to their fishing methods, to hunt game, and to land. Furthermore, their history with the river proved they were capable of managing the fishery, whereas white fishers were damaging the stock and the Dominion should regulate their activities more closely. The resolutions began:

1. We always had the right to take any fish, by any means, at any time, in

Bishop Modeste Demers, for the relatively peaceful relations. Father Peter Rondeault had been in the valley since the late 1850s and had erected a Roman Catholic Indian mission church, St Ann's, before the settlers arrived.

53 *Papers Connected with the Indian Land Question*, 132–3.

54 Marshall, *Those Who Fell from the Sky*, 104–65.

55 This figure is based on the voters' list for the Cowichan-Alberni Electoral District, 30 May 1894, where approximately 225 adult males are listed as residents in the Cowichan Valley. BC Sessional Papers, 1894, pp. 1363–70.

56 Izaak Walton, *The Complete Angler*, ed. Jonquil Bevan (Oxford: Clarendon Press, 1983).

57 J. Michael Thoms, 'A Place Called Pennask,' *BC Studies* [forthcoming].

58 NAC, DIA, RG 10, vol. 3713, file 20,618, Pittendrigh to Powell, 28 April 1885.

59 Canada Sessional Papers, 1888, Fisheries Annual Report 1887. Lomas continued in his roles as Indian agent and fisheries guardian until 1894, when the conflicts between the positions became too great and he was dismissed from Fisheries service.

60 W.H. Lomas recorded the creation of this elected council in 1881, Canada Sessional Papers, 1882, DIA Annual Report 1881, p. 160. The 'elected' members were almost certainly hereditary chiefs.

61 NAC, DIA, RG 10, vol. 3801, file 49,287, 'Resolutions passed by Cowichan Indian Council June 4th 1888.'

62 Ibid., Lomas to Powell, 18 June 1888.

63 Ibid., Deputy Minister of Fisheries to Powell, 5 July 1888.

64 Order-in-Council, 28 September 1889, *Canada Gazette*, vol. 23, p. 546.

65 Order-in-Council, 7 November 1890, *Canada Gazette*, vol. 24, p. 876. In its 1894 amendment of the *Fishery Regulations*, Fisheries prohibited all commercial net fishing for salmon in British Columbia except by drift net; Order-in-Council, 3 March 1894, *Canada Gazette*, vol. 27, p. 1579. See chapter 1.

66 Canada Sessional Papers, 1888, DIA Annual Report 1887, p. 105.

67 NAC, DIA, RG 10, vol. 3828, f. 60,926, Lomas to McNab, 26 January 1892.

68 Ibid., McNab to S.P. Bauset, Acting Deputy Minister of Fisheries, 29 February 1982.

69 Ibid., Lomas to A.W. Vowell, Indian Superintendent, 31 March 1892.

70 Ibid., McNab to Bauset, 21 April 1892.

71 NAC, DMF, RG23, file 583, pt. 1, McNab to Deputy Minister, 17 February 1894.

72 A justice of the peace or fishery officer also had discretionary authority to reduce any penalty if 'the offence was committed in ignorance of the law, or that because of poverty of the defendant the penalties imposed would be oppressive.' Revised Statutes of Canada 1886, c. 95, s. 18(1).
73 Order-in-Council, 26 November 1888, *Canada Gazette*, vol. 22, p. 956.
74 NAC, DMF, RG 23, file 583, pt. 1, Deputy Minister to McNab, 1 March 1894 and 27 March 1894.
75 Ibid., McNab to Deputy Minister, 9 March 1894.
76 Ibid. Bishop Bermens and the Honourable Theo. Davie presided at the meeting; Indian Superintendent Vowell and Indian Agent Lomas endorsed the protest. See letter from Father Geolbs VanGoethem, 23 June 1895.
77 NAC, DMF, RG 23, file 1600, pt. 1, McNab to Deputy Minister, 17 June 1894.
78 Ibid., file 1469, pt. 1, McNab to Deputy Minister, 25 April 1895.
79 Ibid., Vowell to Deputy Supt. Gen. Indian Affairs, 28 May 1895.
80 Ibid., Lomas to Vowell, 10 June 1895. The defendant's name appears in the *Victoria Daily Colonist*, 28 June 1895.
81 Musgrave brought his family from Ireland to Saltspring Island in 1885, and then in 1892 to the Cowichan Valley, where he established a farm. Although of Irish decent, he had spent much of his life ranching in Argentina. See the entry for his son, John Musgrave, in E.O.S. Scholefield, *British Columbia from the Earliest Times to the Present, Vol. IV* (Vancouver: S.J. Clarke Publishing, 1914). In 1889, J.C. Harris, then an 18-year-old recently arrived from England, lived for a few months with the Musgraves on Saltspring Island. 'Mr Musgrave,' he remembered, 'was rather overwhelming ... very much the old aristocrat and very autocratic in appearance and nature.' BCA, MS-1094.
82 NAC, DMF, RG 23, file 1469, pt. 1, Lomas to Vowell, 10 June 1895.
83 Ibid., Deputy Attorney General, Arthur G. Smith, to Vowell, 12 July 1895.
84 Ibid., McNab to Vowell, 12 June 1895.
85 The regulations made under the authority of the *Fisheries Act* had 'the same force and effect' as the *Act*, 'notwithstanding that such regulations extend, vary or alter any of the provisions of this Act respecting the places or modes of fishing or the times specified as prohibited or close seasons.' Statutes of Canada 1886, c. 95, s. 16.
86 NAC, DMF, RG 23, file 1469, pt. 1, Lomas to Vowell, 17 June 1895.
87 Ibid., file 583, pt. 1. The resolutions were recorded 'in substance,' by Father Geolbs VanGoethem and sent to Vowell, 23 June 1895. The claims of ownership were undoubtedly Cowichan in origin, but the appeal to 'natural rights' was probably the priest's addition.