LANDING NATIVE FISHERIES

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

DOUGLAS C. HARRIS

the sea." O'Reilly responded "that the mountains were as free for him to hunt upon as ever, and that he would enjoy the right to fish in the Ocean *in common* with others."[5] This characterization of a right to fish "in common" emulated the fisheries clause of the 1854-56 treaties in the Washington Territory.[6] Perhaps this was inadvertent – O'Reilly offered no further written explanation for his choice of language, and he does not use the phrase again – but it was another indication of the centrality of the fisheries in his reserve allotments.

Later in August, O'Reilly arrived in Heiltsuk territory on the central coast. His work there provides another good example of what he was doing along the coast. Of the twelve reserves allotted to the Bella Bella (O'Reilly divided the Heiltsuk into Bella Bella and Kokyet), the first secured their

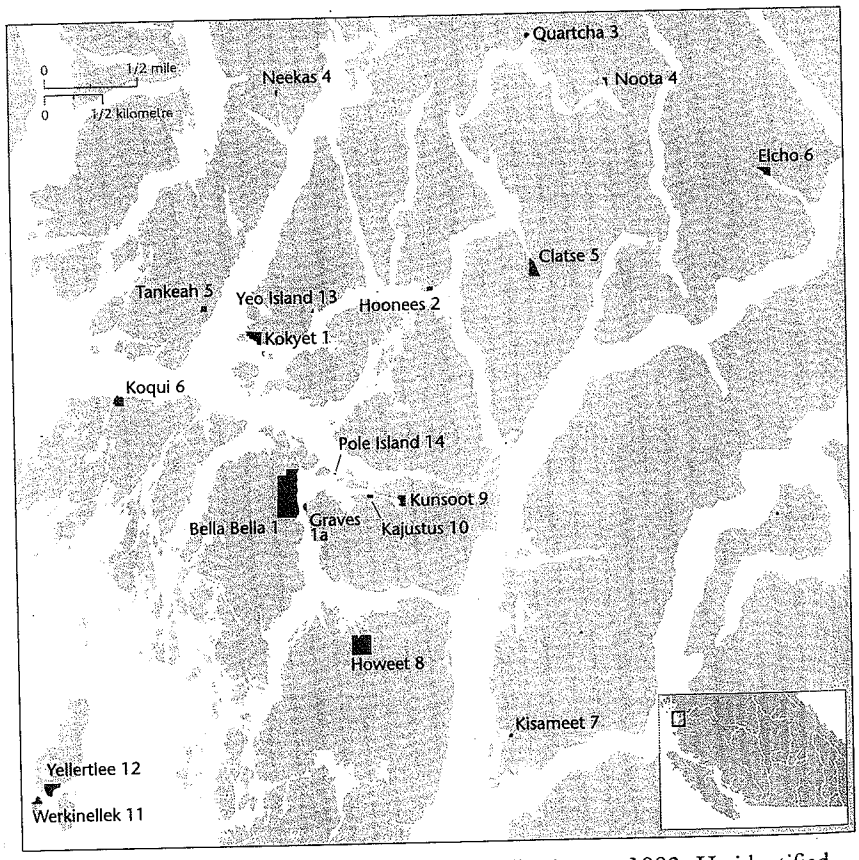

Figure 5.2 Heiltsuk reserves allotted by O'Reilly, August 1882. He identified all but three reserves, which included a grave site and the principal village site, as fishing stations.

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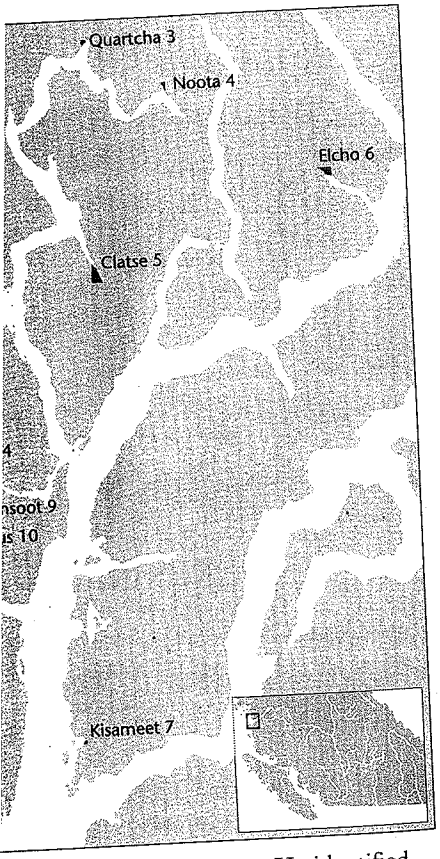

by O'Reilly, August 1882. He identified
grave site and the principal village site,

principal village site and the others were intended to secure access to salmon, halibut, and seal fisheries (Figure 5.2). Using language that he would repeat many times for coastal reserves, O'Reilly described Bella Bella Reserve No. 10, a fifteen-acre parcel, as "only a fishing station, and of no value for any other purpose." Reserve No. 11, containing sixty acres, was the principal summer residence, and O'Reilly wrote of it: "The Western shore is rugged, and weather beaten, and the Reserve of no value except as a fishing station."[7] Of the six reserves he allotted to the Kokyet, four were identified as fishing stations.

O'Reilly no longer mentioned exclusive fisheries in his reserve allotments, but otherwise he continued much as before, setting aside small parcels of land to secure access to fish, the only resource of any consequence that might provide the Nuu-chah-nulth, Kwakwaka'wakw, and Heiltsuk peoples with a reasonable livelihood. Native peoples seem to have been well aware of this pattern, and they sought to secure their fisheries in ways that fit within it. A Haida petition for additional reserves in 1883, for example, requested eight single-acre plots that would secure access to, and enable processing of, dogfish, salmon, and halibut.[8] O'Reilly's reports confirm that this was a sound strategy. In 1886, he informed the Kwakwaka'wakw chiefs of the Lower Knight Inlet tribes "that the object of [his] visit, was to secure to them certain plots of land which would give them the control of their fisheries."[9] In his attempt to convince the Lekwiltok tribes to cooperate in identifying land they wished him to reserve, O'Reilly was a little more tentative; he claimed to have "pointed out to them the advantages they would derive from having lands so set apart, which would virtually give them the control of their fisheries."[10]

O'Reilly's language was not consistent, but it is unlikely that these assurances, however framed, provided much comfort to Native peoples who were witnessing the increasing penetration of immigrant settlers and a state-based legal system into their daily lives. Indian Affairs was also concerned that although O'Reilly appeared to be making general guarantees about Native access to fisheries, they were not specific enough. After reviewing the records from O'Reilly's 1888 tour through Sliammon, Klahoose, and Homalco territory on the coast north of Vancouver, one official noted that although there was much mention of fishing stations and important river fisheries, nowhere did O'Reilly specify the waters that were to be set apart for exclusive Native use. O'Reilly responded that all the fisheries he was being asked about were in tidal waters and he was "not aware that it has ever been the practice to assign exclusive fishing rights in these." Further, he was not aware of any authority for doing so.[11] In this aspect, at least, O'Reilly had been consistent.

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lease.[99] The licences were geographi-
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on the reserve but allowed the fishery to continue in the waters immediately adjacent to it.[103]

The question of ownership of reserve foreshores remained unresolved and a serious concern in many coastal communities. Among the demands of the Allied Indian Tribes of British Columbia in response to the report of the Royal Commission on Indian Affairs was the insistence "that all foreshores whether tidal or inland be included in the reserves with which they are connected, so that the various Tribes shall have full permanent and beneficial title to such foreshores."[104]

Expanding the Seine-Net Fisheries, 1904-24

In 1904, Fisheries amended the *Fisheries Regulations for the Province of British Columbia* to allow, but also to limit and regulate, the seine-net and salmon-trap fisheries.[105] It then began issuing seine licences for many areas along the coast, entitling the holders to exclusive seine-net fisheries for identified stretches of the coast. Although the seine fisheries, which targeted the many lesser runs of salmon, remained a small fraction of the drift-net fishery, they frequently occupied waters adjacent to a reserve, including those set aside by the reserve commission for fishing. The runs on these rivers and creeks might number from a few thousand fish to several tens of thousands, and a seine or two working in the bay could catch most of these fish, dramatically reducing the numbers available to the Native peoples who lived on the reserve. The use of seines in these circumstances prompted repeated complaints.

In 1905, the Heiltsuk protested the grant of seine licences to non-Heiltsuk fisher Robert Draney. The licences affected the fisheries associated with several Heiltsuk reserves that the Heiltsuk understood had been reserved to them when the Indian reserves were allotted. Draney also hauled some of his drag seines ashore on reserve land. If Draney were to be allowed to continue fishing, the Heiltsuk argued, he should pay the Heiltsuk the drag-seine licence fee of twenty-five dollars per year for each stream.[106] It was not just the Heiltsuk who were concerned. Indian Superintendent and Reserve Commissioner Vowell explained that,

> as regards the claim made by the Bella Bella [Heiltsuk] and other Indians to the license fee paid by Mr. Draney, the Indians contend that as Mr. Draney fishes in tidal water at the mouths of the small streams on which their fishing stations are located, he catches the fish that would otherwise ascend into their traps, and which they consequently consider belong to them. This would be the case also with the Tsimpsean, Kitkathla, Kitimat, Kitkata, and Kitlope streams anyone netting within half a mile of the mouth of the said stream would monopolize nearly the whole of

the fish that otherwise might reasonably be supposed to go up those streams to their spawning beds.[107]

Fisheries refused to reassign the licences or to remit the licence fee to the Heiltsuk. Draney, Fisheries officials noted, hired Heiltsuk fishers; the department would therefore not prohibit him from landing his nets on reserve land.[108] In effect, the Heiltsuk could sell their labour but not their fish. However, when the Royal Commission on Indian Affairs visited Bella Bella in 1913, Draney Fisheries Ltd. was hiring Japanese fishers to fish its drag- and purse-seine licences.[109] By 1915, the company held six drag-seine and three purse-seine licences in Heiltsuk territory. Heiltsuk fishers held no seine licences, and their labour in the industrial commercial fishery seemed increasingly threatened as well (Figure 7.4).

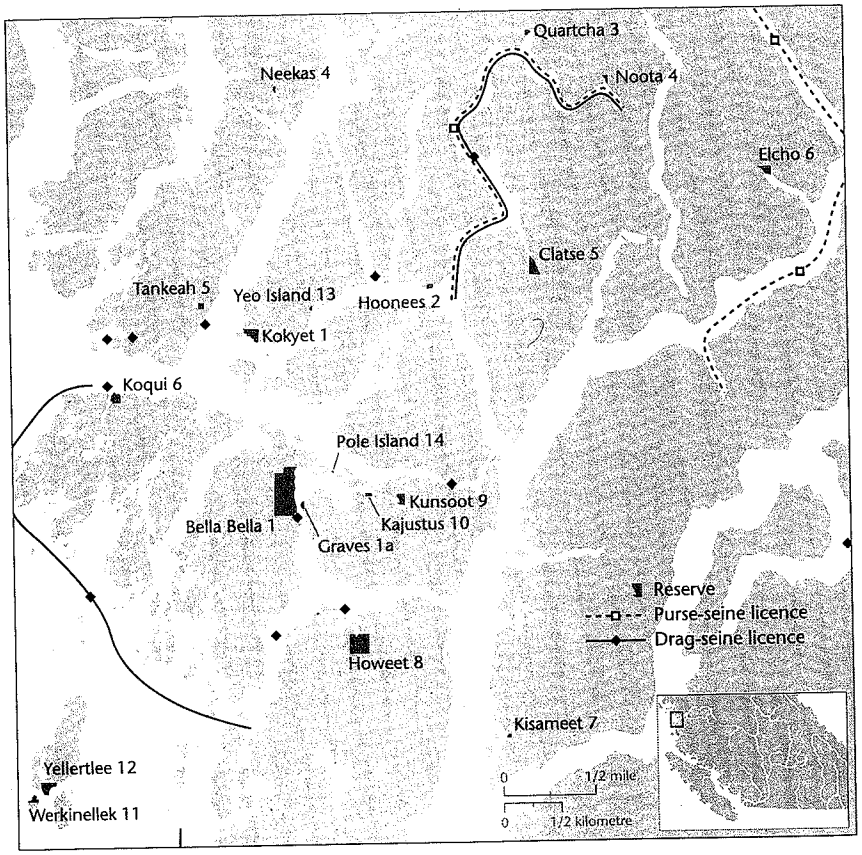

Figure 7.4 Heiltsuk reserves and approximate locations of some Draney Fisheries Ltd. seine-net licences, 1915. | *Source*: Licence locations as described in Cunningham to McIntyre, 20 August 1915, GR 435, box 41, file 367, BCA.

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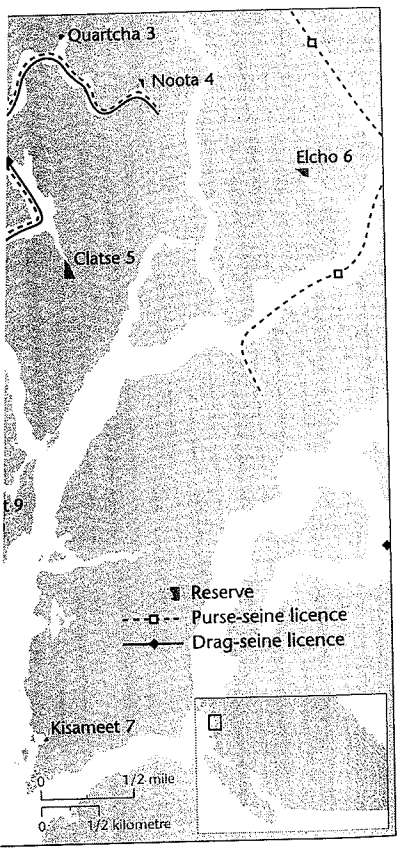

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Where seine licences had not already been issued, Fisheries seemed willing to consider Native applicants, at least for a time. In 1906, two Heiltsuk fishers, Peter Starr and Jacob White, applied for drag-seine licences to operate near the mouths of several rivers on the central coast. Inspector J.T. Williams noted that drag-seine licences had not yet been issued for the areas requested, but neither had such licences been issued to Native fishers before. Did he have authority to do so? Fisheries officials in Ottawa assured him that he did.[110] The Metlakatla received a drag-seine licence in 1906 or shortly thereafter.[111]

However, Fisheries continued to issue seine licences in waters adjacent to coastal reserves and the window of opportunity for Native applicants was short. In 1907, the provincial government amended the *Land Act* to prohibit the sale of Crown land to "aborigines of this continent,"[112] and the Dominion government appears to have followed a similar approach to issuing seine-net and salmon-trap licences: only whites were eligible. In 1911, the Kitkatla again expressed concern about their lack of access to the licences for Lowe Inlet. The creeks in and surrounding Lowe Inlet, and the fisheries in those creeks, were owned, they said, and not for Fisheries to allocate to others:

> We, that is the people of this village, are sending you this letter. You probably know that we fish creeks around here for salmon, and wish to buy licenses for these creeks. We have always fished them, long before any cannery was built here.
>
> The following own creeks of their own:
>
> Moses Gladstone
> Robert Brown
> John Davis
> Oswald Tolsnie
> George Macaulay
> Alfred Robinson
> Frederick Gladstone
> Amos Collison
>
> Each of these wants his own license and will pay for it. Do not give the licenses to Lowe Inlet Cannery or Mr. Curtis; our money is just as good as theirs, therefore we ask you for these licenses.
>
> The license business has just become clear to us. We have always been blinded by the Canneries in connection with licenses. We have worked these creeks for Lowe Inlet ever since there was a cannery there and we worked them before there was a cannery.

rebuke from commission chair Wetmore. Would not the raid be seen as a consequence of the commission's visit, he asked, and how could the commissioners gain the trust of Native peoples when Fisheries destroyed the weirs?[9]

Young produced a report suggesting that Indians could fish for food at any time, including close seasons, if they held a food fishing permit from the inspector of Fisheries. If they fished during a designated opening, they could sell their catch.[10] Hoping it might forestall further enquiries and complaints, the commission issued a statement outlining the law "for the information of Indians."[11] However, Young's interpretation that the regulations allowed the sale of fish caught under a food fishing licence was at odds with Fisheries' intent, and to make this clear the department amended the fishing regulations in 1915 in an effort to eliminate the sale of food fish (see Chapter 6).

As they travelled the province over the next three years, the commissioners heard a similar message: Native peoples wanted secure access to their fisheries, and they wanted the government to limit the incursions of non-Native fishers. In a meeting at Rivers Inlet in August 1913, Oweekeno spokesperson Joseph Chamberlain wondered how the canneries had come to occupy their land. "The reason we want to get this land from Quay to Smith's Inlet," he continued, "is to make our food supplies secure, and so that we will be able to keep the fish for ourselves."[12] Later that month at Bella Bella, Heiltsuk chief Moody Humchit began by focusing on the connections between the reserves and the fisheries:

> I would like to say in respect to the Reserves which were set aside for the Bella Bella Indians some time back, that I was with the surveyors at that time, employed by them, and I understood that these Reserves were set aside for the exclusive use of the Indians. I think we ought to enjoy exclusively the hunting, and particularly the fishing privileges, on these Reserves and in the vicinity of these reserves, which we do not enjoy at the present time.
>
> The Chairman: – Do I understand you to say that as these Reserves were set aside for the Indians, the Indians should have exclusive fishing privileges in all the Inlets on the Sea around here?
>
> A. Yes, everywhere. We are more anxious than ever, at the present time to have these things put right. It has been a very poor year with us.[13]

Humchit indicated that they were not asking to fish without licences, but only that they should be able to take up the licences that had been granted to the cannery operators in the region. He was referring to the seine licences held by Draney Fisheries Ltd.[14]

fishers in the industrial commercial fishery gradually disappeared, many informal barriers, including lack of access to credit and pervasive discrimination, remained. In the food fishery, restrictions and levels of enforcement only increased in the decade following the McKenna-McBride Commission's report.[39]

From Report to Resolution, 1916-24

Even with the most pointed critique of their policies tucked safely away in the confidential report, the Dominion and province did not release the royal commission's final report to the public until 1919. The only activity in the interim had been mounting Native protest over the lack of progress on the many issues surrounding reserves (size and location, non-Native incursions, the province's claim to the reversionary interest, and ownership of the foreshore), the restricted access to food and commercial fisheries, and the continuing failure to address Native title.[40] Recognizing that something needed to happen, in 1919 the provincial legislature passed the *Indian Affairs Settlement Act,* which authorized the government to conduct the negotiations necessary to implement the report.[41] The Dominion moved more slowly, unsure what to do about the provisions in the *Indian Act* that required Native consent before reserves could be reduced or cut off.[42] Officials knew it was highly unlikely Natives would give this consent, but they were also aware that the BC government would insist on the cut-offs and reductions suggested in the report if British Columbia were ever to accept it. To circumvent the need for Native consent, the Dominion government passed the *British Columbia Indian Lands Settlement Act* in 1920. The act overrode the provisions in the *Indian Act* and gave the government authority to do what it had promised it would not: agree to reserve reductions and cut-offs without the consent of Native people.[43] At this point, the Dominion and the province began negotiating the agreements that would lead to the implementation of a slightly modified version of the royal commission's final report.

At the province's suggestion, the two levels of government appointed representatives to a two-person panel that would review the report and make final recommendations. The province nominated Major J.W. Clark; the Dominion, W.E. Ditchburn, chief inspector of Indian Affairs for British Columbia. Although it had discounted the need for Native consent, Indian Affairs employed James A. Teit, ethnographer and advisor to the Nlha7kapmx and former secretary of the Interior Tribes, to provide a perspective on the views of Native peoples.[44] Teit was incapacitated by, and then died from, cancer shortly after his appointment, and Indian Affairs

appointed Peter Kelly (Haida), Andrew Paull (Squamish), and Ambrose Reid (Tsimshian) to replace him. Kelly and Reid were the president and secretary of the Allied Indian Tribes of British Columbia, a coalition of tribal groups that had formed in 1916, replacing the Indian Rights Association, to protest the lack of recognition of Native title in British Columbia. As advisors, however, their input was restricted to the placement of reserves; neither Dominion nor province would talk about Native title.

Ditchburn still hoped to secure some form of Native consent to an amended version of the royal commission's report, and he thought initially that the Allied Tribes might be the vehicle through which to achieve it. However, he eventually concluded, along with Superintendent General for Indian Affairs Duncan Campbell Scott, that although the Allied Tribes had broad support from coastal groups, it was insufficiently representative, particularly among interior tribes. Perhaps more to the point, the senior Dominion officials could not accede to the conditions for settlement proposed by the Allied Tribes, and they knew that provincial officials were even less flexible. As principal spokesperson for the Allied Tribes, Kelly pointed to the Crown's continuing failure to recognize Native title and the increasingly restricted access to the fisheries as the key grievances. Native fishers still had no access to seine licences; cannery seines continued to fish in waters adjacent to reserves and sometimes established beachheads on the reserves themselves; fewer Natives held independent fishing licences; and Fisheries officials seemed to be closing down the Indian food fisheries. The Allied Tribes would not agree to the McKenna-McBride report, however modified, fearing that acceptance would compromise Native title claims and fishing rights. In 1922, Ditchburn reported his understanding of the conditions surrounding the fisheries that would have to be included in any comprehensive settlement that Native leaders might accept:

> From what I have been able to gather the Indians will insist that there be no interference for the future in connection with their being able to obtain their supply of fish for food purposes. The Coast Indians will also ask to be given absolute fishing privileges for commercial purposes in waters fronting on and running through their reserves, but I cannot see how they can hope for success with regard to streams as they would deplete the supply at the spawning grounds, but the setting aside of fishing areas fronting reserves is worth consideration. I feel, however, that they might be assured of being able to earn a livelihood at fishing without having to obtain licenses to use nets. At present Indians can purchase a gill-net license but are discriminated against by the Fisheries Department in the matter of seining licenses, and many of them are in a position to own a sein [sic] ...

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In the setting aside of reserves for the Indians on the Coast the per capita acreage has been very small as it was always considered that they would be enabled to earn their living by fishing and hunting and it would be unfortunate if any impediment were placed in the way of their being able to do so.[45]

Fulfilling their advisory roles, Kelly, Paull, and Reid provided Ditchburn with a long list of suggested new reserves, many of them fishing sites. Ditchburn thought the list highly unsatisfactory, and he reduced it considerably, removing all parcels that had already been alienated or which he thought excessive.[46] The provincial representative, J.W. Clark, had little use for even this reduced list. In his opinion, "the choicest building sites for industrial development at the mouths of the best rivers in the Coastal District are already covered by existing Indian Reserves."[47] He was more interested in reducing existing reserves than in adding to their number. In the end, Ditchburn and Clark submitted separate but substantially similar reports that, with some minor tinkering, largely confirmed the royal commission report. Ditchburn's efforts to increase the size and number of reserves and Clark's efforts to reduce them largely cancelled each other out.[48] This was a result that satisfied the province. In July 1923, it accepted the McKenna-McBride Commission's report as modified by Ditchburn and Clark.[49]

Again, the Dominion hesitated. Officials in Indian Affairs still hoped that Native leaders might be convinced to accept the reports, and they convened meetings with Native leaders in July and August 1923. The fundamental disagreement over Native title remained the insurmountable obstacle. Native leaders insisted that Native title must be part of any discussion; officials within Indian Affairs demurred, uncertain about the legal status of Native title and knowing they would never reach an agreement with the province if they admitted its existence. The other intractable issue was access to the fisheries, and much of an August meeting between senior officials from Indian Affairs, the executive of the Allied Tribes, and other Native leaders revolved around fishing rights. Just as Native leaders refused to separate the question of title from the allotment of reserves, so they refused to separate the question of access to the fisheries. If they were to agree to the report, certain fishing rights had to be guaranteed.[50]

"The fishing question," said Peter Kelly at the outset of a long discussion over two days, "is a burning one, and it does not just affect one particular section of the Province, but it applies to the Province as a whole."[51] He and others recounted many instances where Fisheries officers had destroyed fishing gear (weirs and nets), confiscated fish, and levied fines against

Native fishers. The lack of access to seine and independent licences was a central concern, and so was the failure to recognize exclusive fisheries associated with reserves. Kelly pointed to the Metlakatla community that had moved from British Columbia to Alaska in the 1880s and whose right to an exclusive fishery stemming from their reserve grant had been confirmed in 1918 by the United States Supreme Court in *Alaska Pacific Fisheries v. United States.*[52] Why, he wondered, would the Canadian government not do the same?

At the beginning of the second day, Kelly summarized the position of the Allied Tribes. Under the rubric of fishing for domestic purposes, he argued for a right to fish for food anywhere in British Columbia, including tidal waters, without a permit or limits as to quantity. As for commercial fishing, Kelly claimed first that Natives should have a right to troll for salmon without licence in tidal waters and sell the fish to whomever they wished. Second, Native fishers should have the right, hitherto denied, to acquire a seine licence, and the licence fee should be cut in half. Beyond that, Native fishers should have the same rights as any other citizen to fish in any waters. Third, Natives should have the exclusive right to fish with seine licences on Indian reserve foreshores and at the mouths of rivers that run through reserves. Fourth, certain fishing areas should be set aside for the exclusive use of Native fishers, much as the waters surrounding the Annette Islands had been set aside for the Metlakatla in Alaska. Finally, although Native fishers were now eligible for independent drift-net licences, Kelly sought to ensure that any residual discrimination would not affect their access to these licences.[53] Regarding the connected issue of the foreshore, Kelly insisted that the Crown recognize Native title to the low-water mark in front of reserves. If Natives were to accept the report of the royal commission – in effect concluding a treaty in which they would surrender their Native title – these were the minimum requirements with regards to the fisheries.[54]

Realizing that there was no middle ground between Native leaders and the provincial government on the question of Native title, or between Native leaders and the Department of Fisheries on the question of fish, in 1924 the Dominion moved to accept the royal commission's report as modified by Ditchburn and Clark.[55] Although fisheries issues had been at the fore throughout the two-year process to reconsider reserve allotments, the only tangible results were a handful of new coastal reserves, three of which were recognized as fishing stations (two in Kwakwaka'wakw and one in Tsimshian territory), and, in 1924, the removal of the restrictions on Native access to seine licences.

Conclusion

The process that began in 1876 with the Joint Indian Reserve Commission seemed finally to be coming to a close, and although Native leaders were dismayed, officials within Indian Affairs thought they had secured the best arrangement possible with the provincial government. There were still some unresolved details, such as the province's reversionary interest in the railway belt, and there would be a special joint meeting of the Senate and House of Commons in March and April 1927 to inquire into the claims of the Allied Tribes.[56] This was the last time the Dominion government would suffer Native title arguments in an official forum until the 1970s. Shortly after the hearings, it amended the *Indian Act* to forbid the raising of funds to pursue Native title or land claims without the permission of Indian Affairs.[57] The prohibition was repealed in 1951, but it was only after the Supreme Court of Canada's 1973 decision in *Calder v. British Columbia* that the federal government recognized Native title as a legal interest that had to be reckoned with in British Columbia.[58] The Supreme Court would be the catalyst for changes in the fisheries as well, although that had to wait until 1990 and the court's recognition, in *R. v. Sparrow*, of an Aboriginal right to a food, social, and ceremonial fishery – a right that conferred priority over other users.[59]

In 1930, when the Dominion transferred its title in the railway belt and the Peace River block to the province, returning the land that it had received as the province's contribution to the cost of building the Canadian Pacific Railway, it retained title to the Indian reserves in these lands. It was not until 1938 that the province conceded that the Dominion held title to the remaining reserves in British Columbia.[60] At that point the Dominion held 1,536 reserves, amounting to 835,339 acres of land, in trust for Native peoples. This amounted to slightly more than one-third of one percent of the land area in British Columbia.[61] Approximately half of these reserves, that is, nearly 750, had been allotted specifically to secure access to fisheries.[62]

At least so far as governments were concerned, the "Indian land question" was now a closed file. The reserve geography for the province had been set, and for the most part it reflected the province's view. If Native title existed at all, it was a moral obligation that could be met with reserve allotments. Those reserves, moreover, could be small because the economy of most Native communities revolved around the fisheries, including subsistence fisheries and piecework on fish boats and in the canneries. The fisheries were thus inseparable from the land question, but because fisheries were a Dominion responsibility, the debates over access pitted the

Dominion departments of Indian Affairs and Fisheries against each other instead of Ottawa against Victoria. As the province succeeded in denying Native title and restricting reserve size, so Fisheries was successful in denying the recognition of Native fishing rights and confining the food fisheries. These debates revolved around Native peoples and their rights, but Native peoples had no standing except as witnesses appearing before government-established commissions that had little interest in hearing, and even less authority to act on, Native arguments about title and fishing rights.

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Conclusion

British Columbia's Indian reserve geography presumes that Native peoples have access to their fisheries. This is revealed numerically: the Indian reserve commissions linked nearly half of the more than 1,500 reserves allotted between 1849 and 1925 to the fisheries. It is displayed in maps that show the proximity of the vast majority of reserves on the coast and in the interior to fish-bearing bodies of water. It is expressed in governmental correspondence in which the Dominion and province justified the land policy in British Columbia, characterized by small reserves and per capita acreages, with the argument that Native peoples in British Columbia were fishing peoples and needed only a small land base to protect their traditional economies and to facilitate their participation in the wage economy. It is underscored by the work of the Indian reserve commissioners, who included exclusive fishing rights in reserve allotments to some bands, and who consistently told Native peoples that their fisheries were secure and their access to them undiminished. It is revealed in the voices of Native peoples, who, to the extent that they were participants in the process, insisted that the governments reserve and protect their fisheries. It is also confirmed in the Douglas Treaties, where the provision for small reserves – "village sites and enclosed fields" – was accompanied by expansive protection for Native fisheries – the right to their fisheries "as formerly." In sum, the reserve geography of British Columbia was built around Native peoples' access to their fisheries. Given the small land base, fish were the one resource that might have enabled Native peoples to build viable reserve-based economies.

When British Columbia joined the Canadian confederation, jurisdiction over Indians and fisheries devolved to the Dominion. Ownership of land vested with the province. Recognizing that the Indian land question had not been resolved in the colony, the drafters of the terms of union included