SOLEMN PROMISES AND *SOLUM* RIGHTS: THE SAUGEEN OJIBWAY FISHING GROUNDS AND *R.* V. *JONES AND NADJIWON*

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I. INTRODUCTION**

In recent years, the history of aboriginal rights in Canada has been the subject of exhaustive review by lawyers, historians, ethno-historians, anthropologists and others.[1] However, many of the articles which have been published in the area of aboriginal fishing rights discuss such rights as privileges bestowed on aboriginal peoples within public waters over which aboriginal peoples did not themselves have jurisdiction.[2] Indeed, it has been argued by lawyer Roland Wright that the Upper Canada fishing policy as reflected in the first *Fisheries Act*[3] was intended to provide significant security of tenure for traditional aboriginal fisheries within the Great Lakes and was well-grounded in the law of the time.[4]

The question of aboriginal jurisdiction and management of fishery resources post-dating European contact does not seem to have been the subject of much academic review. This may be a result of a general assumption that navigable waters are publicly owned and therefore cannot be owned or used exclusively by any given party. However, as historical geographer Victor Lytwyn has pointed out, "the notion that English common law 'arrived in the new world with English settlers' and gave the newcomers the automatic right to the water and fish in North America is Euro-centric and lacking in historical foundation."[5]

Like many other aboriginal peoples, the Saugeen Ojibway people of southern Ontario experienced difficulties in retaining possession of their traditional fishing grounds despite formal assurances by colonial and later provincial authorities that their rights would be respected. The nature of such government policies and the degree to which they served to usurp Saugeen Ojibway rights in Lake Huron has been extensively reviewed in a recent article.[6]

** The author is indebted to Darlene Johnston, at the time, an Assistant Professor of Law at the University of Ottawa and currently the Land Claims Coordinator for the Chippewas of Nawash Band of Indians. Ms. Johnston acted as the Research Coordinator for *R.* v. *Jones and Nadjiwon* and located, organized, summarized and presented more than 400 historical documents as defence witness in the trial. While this article has served to analyze those materials for present purposes, Ms. Johnston must receive the credit for finding them, identifying their importance to the history of her band, and engaging in the scholarship required to do so.

1 See e.g., W.J. Eccles, "Sovereignty-Association, 1580-1783" (1984) 64 Canadian Historical Review 475; B. Trigger, *Natives and Newcomers: Canada's "Heroic Age" Reconsidered* (Montreal, Kingston: McGill-Queen's University Press, 1986); and P. Schmalz, *The History of the Saugeen Indians* (Ottawa: Ontario Historical Society Research Publication No. 5, 1977).

2 See e.g. R. Wright, "The Public Right of Fishing, Government Fishing Policy and Indian Fishing Rights in Upper Canada" (1994) 86 Ontario History 337.

3 *An Act Respecting Fisheries and Fishing* (1858) 22 Victoria, c. 62. (Can.). See also *Fisheries Act*, R.S.C. 1985, c. F-14 [hereinafter *Fisheries Act*].

4 *Supra* note 2.

5 V.P. Lytwyn, "Waterworld: The Aquatic Territory of the Great Lakes First Nations" in D. Standen & D. McNabs, eds., *Gin Das Winan: Documenting Aboriginal History in Ontario* (Toronto: Champlain Society, 1996) 14 at 15.

6 V.P. Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nation's Fishing Islands Fishery in Lake Huron" in B.W. Hodgins & J.S. Milloy, eds., *Co-Existence?: Studies in Ontario-First Nations Relations* (Peterborough: Trent University, 1992)

This article contests the assertion that Upper Canada fisheries policy served to protect aboriginal fishing rights. In so doing, the assumption that aboriginal fisheries within Upper Canada were public resources in which no proprietary rights could exist is challenged. It will be argued that the effect of government fisheries policies and legislation was to restrict aboriginal activities within, and even exclude aboriginal people from, the fisheries they were understood to have owned and occupied since 'time immemorial'. It will be argued that the foundation upon which such policies rested was not justified in fact or law but was the subject of vigorous disagreement among government officials themselves. In making these arguments, the particular circumstances of the Saugeen Ojibway Nations,[7] whose possession and jurisdiction over traditional waters was explicitly recognized by the Imperial government in the early 19th century will be examined.

II. THE CASE OF *R.* V. *JONES AND NADJIWON*

The decision in *R. v. Jones and Nadjiwon*[8] addressed the issue of Saugeen Ojibway commercial fishing rights within 'public' waters. This judgement is reviewed and analysed in light of the English common law of the time. To explain the findings of fact made in *Jones and Nadjiwon,* this article reviews some of the historical materials placed before the court—documents which detail how the Saugeen Ojibway people exercised jurisdiction over their fisheries and the recognition of this jurisdiction by the Imperial, and later, the colonial authorities. This is evident after a recount of the vigorous debate between the Ministry of the Marine and Fisheries and Department of Indian Affairs; a discourse resulting from attempts by the government to displace the Saugeen Ojibway people from their fisheries in contravention of English laws such as the *Royal Proclamation* of 1763 and in breach of express treaty promises. This study also examines the legal opinions on which government fisheries policies developed at the time and the context in which such steps were taken. Finally, it is argued that these policies were developed not to protect aboriginal security of tenure but to benefit those non-aboriginal fishermen who might suffer from aboriginal competition over an increasingly valued resource.

In 1992, following an exhaustive review of the historical record,[9] the Ontario Court of Justice, Provincial Division held in *Jones and Nadjiwon* that the Saugeen Ojibway Nations held a priority interest in commercial fisheries within their traditional waters both as an incident of aboriginal title and as a treaty right. As noted by the court, however, that which was asserted was not an exclusive right leading to a commercial monopoly, but a recognition that the Saugeen Ojibway people had a constitutional priority to the resource and a right to participate in its management.[10] The learned trial

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[7] The Chippewas of Nawash, also known as the Cape Croker Band, and the Chippewas of Saugeen are collectively known as the Saugeen Ojibway Nations and were originally known as the Saugeen or Sahgeeng people. The Saugeen Ojibway communities are located at Cape Croker and Saugeen.

[8] *R.* v. *Jones* (1993), 14 O.R. (3d) 421 [hereinafter *Jones and Nadjiwon*].

[9] Much of the research referred to in this article was presented before the court in *Jones and Nadjiwon, ibid.*

[10] *Supra* note 8 at 434.

judge noted:

> The undisputed historical evidence led by the defence here has established that for centuries prior to the arrival of European settlers, the Saugeen Ojibway had occupied a vast area of what is now southwestern Ontario, encompassing all of what was known as the Saugeen, now Bruce Peninsula, and including the area south of Georgian Bay and extending west to the eastern shore of Lake Huron. The Ojibway in that area were involved in a very productive fishery from, as is said, time immemorial. Specifically, the evidence established that they made use of numerous fishing stations on both sides of the peninsula including islands immediately offshore from the present Saugeen Ojibway reserves located at Cape Croker on the east side and Saugeen on the west.... Moreover, as the Crown concedes, their fishing operation is accurately described as "commercial" in nature.[11]

There is certainly little question that the Saugeen peoples were considered to 'possess' the fishing rights within their traditional waters in the early part of the 19th century, particularly around the fishing islands in Lake Huron and Georgian Bay. This is evidenced by the fact that it was the Saugeen nations, not the Imperial government, which leased the fisheries and right to occupy fishing stations to third parties and received the rents from such leases. Judge Fairgrieve found that, "[D]uring the 1830s, the Saugeen continued to enter into arrangements directly with third parties for the leasing of their fishing islands by directors of the Huron Fishing Company, which were then affirmed by licences of occupation by the Crown."[12]

In 1834, the Huron Fishery Company was granted the right to occupy the Saugeen fishing islands, which fell within Lake Huron, for a £25 fee for an unlimited term. The lease was entered into between the Huron Fishing Company directly with the Chiefs of the Chippewa Indians of Saugeen[13] and was confirmed by a formal licence of occupation issued by the Imperial government through Sir John Colborne.[14] Occupation of the fishing islands permitted the Huron Fishery Company to conduct operations using the fishing stations as areas for unloading, drying nets and processing. The Saugeen people were aware of the threat to their fisheries by white fishermen, and hoped through the mechanism of these leases to restrict access to the fisheries and exclude interlopers.[15]

In 1836, Sir Francis Bond Head asked the Saugeen people if they would like to settle on the point from "Owen's Sound" to Lake Huron, then known as the Saugeen Peninsula.[16] Stating that the Indians owned all the islands in that vicinity, he promised that all whites who fished in the area would be removed if the Saugeen people would agree to surrender the lands south of Owen Sound.[17] On the basis of that promise, on August 9, 1836, Chief Metigwob and his fellow Chiefs were persuaded to sign Surrender 45½, surrendering 1.5 million acres of land, a cession made without

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[11] *Ibid.* at 435.

[12] *Ibid.* at 437.

[13] Lease to the Huron Fishing Company from Saugeen Chiefs, National Archives of Canada [hereinafter NAC] Record Group [hereinafter RG] 10 vol. 56, Reel C-11,018.

[14] NAC RG 1 A-VII vol. 10, no. 66.

[15] As argued by Dr.V.P Lytwyn during testimony at *Jones and Nadjiwon, supra* note 8.

[16] Now known as the Bruce Peninsula.

[17] Statement of Metigwob on the surrender of the Sahgeeng Territory, Six Nations Land Research Office, cat. no. 836-9-13-1.

compensation.[18] The promise of exclusivity in the fisheries was clearly of importance to the Saugeen people. The retention of their interest in the fisheries after the surrender is evident from the fact that the Chiefs continued to receive payment from the Huron Fishery Company for its lease of the fishing islands.[19]

Sir Francis Bond Head's promise of exclusivity for the Saugeen people within the fisheries was referred to in a Report describing various aspects of Indian Affairs in Upper Canada. The Report noted that with regard to the retained territory north of Owen Sound "His Majesty [had engaged] for ever to protect [the Saugeen] against the encroachments of the whites."[20] As Judge Fairgrieve noted, "[T]he historical evidence supports the conclusion that from the aboriginal perspective, the 1836 treaty had confirmed their exclusive right to their traditional fisheries in the area."[21]

While there is an ongoing debate as to whether the Chiefs understood or agreed to the terms of the 1836 surrender with respect to land, there is little doubt that the Chiefs signed the surrender on the basis of a promise that the Imperial Crown would act to remove white men from their fishing grounds. They were cognizant as well of the need to prevent the lessors from assuming any greater interest than that sanctioned by the Band. In 1839, the tribe at Saugeen filed a petition[22] advising that they required assistance in keeping the white fishermen who had leased the fishing islands 'in due bounds', as they had been fishing far beyond the area leased to them. These whites, according to the petition, "pretend to a claim forever & say they never will go away."[23]

In February, 1839, the Huron Fishing Company wrote to the Lieutenant Governor of Upper Canada advising that their own rights had been interfered with. They requested a new lease granting exclusive rights to them subject to payment of rents either to the Indians or to the Crown. S.P. Jarvis, the Chief Superintendent of Indian Affairs, forwarded the petition to the Lieutenant Governor pointing out that the rent paid to the Saugeen people by the Company was not proportionate to the value of the fishery.[24] J.M. Higginson, the Civil Secretary also noted that the Huron Fishing Company licence had been issued on terms that the Indians themselves were not be excluded from the fisheries.[25] The Huron Fishing Company would not be permitted to obtain an exclusive licence from the Crown and thereby sidestep the aboriginal owners of what remained unceded territories.

The Huron Fishing Company's operations failed in 1840. Without a lessor able to protect the fisheries from encroachment by others on their behalf, the Saugeen people again complained that their fishery had become the subject of interference by Upper Canadians and Americans. By then, the fishing grounds had become "frequently the

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[18] Surrender No. 45 ½ between Crown and Saugeen Indians, NAC RG 10 vol. 1844.

[19] NAC RG 10 vol. 68, Reel C-11,023.

[20] J.B. MacAuley, *Report: Describing various aspects of Indian Affairs in Upper Canada, 1839,* NAC RG 10 vol. 719, Reel 13,411 [hereinafter MacAuley Report].

[21] *Supra* note 8 at 438.

[22] Petition on Behalf of the Tribe at Saugeen, undated—circa 1839, NAC RG 10 vol. 127.

[23] *Ibid.*

[24] M. Hamilton, Huron Fishing Company to Sir George Arthur, Lieut. Governor of Upper Canada (14 February 1839) endorsed by S.P. Jarvis, Chief Superintendent to Indian Affairs, NAC RG 10vol. 130 at 73,585-9.

[25] Letter of J.M. Higginson, Civil Secretary's Office, to S.P. Jarvis, Chief Superintendent to Indian Affairs (2 May 1845) NAC RG 10 vol. 510 at 296-97.

scene of violence with interlopers and trespassers."[26]

In 1843, the Saugeen people requested that they be given a 'piece of paper' that they could show to any whites attempting to settle on their land.[27] This followed requests made to the Queen in 1840 by Peter Jones, an Ojibway missionary at the Credit Mission, for a return of the Saugeen Territory and a title deed evidencing possession of it by the Saugeen people for all posterity.[28]

The Saugeen people continued to express great concern over the exploitation of their fisheries by white men. Efforts were made to find another lessee able to restrict access to third parties. In 1844, Jarvis notified Higginson that the "Indians are unable to prevent people from exploiting the fishery".[29] He advised that a Mr Cayley had applied for a licence to run a fishery at the fishing islands.[30] The Civil Secretary responded that the Governor General had no objection to Mr Cayley and the Indians reaching an agreement, provided the Indians' interests were protected.[31] Jarvis asked Cayley to define his plans for carrying on the fisheries in the event that the Indians consented to 'unite' with him and what share he proposed to offer them. Cayley responded that his plans would not necessitate excluding the Indians from fishing where or when they chose to do so, nor did he desire to do so, as "their labour could be turned to great advantage."[32]

As Judge Fairgrieve noted:

> No licences of occupation were issued to confirm the arrangement in 1845 that the Saugeen Chiefs made with one Cayley, whose name figured prominently in the documents from that time period. Mr. Lytwyn, an historical government geographer called by the defence gave his opinion that the colonial authorities could issue such licences in respect of Crown lands, but could not do so in relation to the Saugeen fisheries because they had not been surrendered.[33]

In 1844, in response to a request from George Copway, a Mississauga Indian and

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[26] MacAuley Report, *supra* note 20 at 140-47.

[27] Letter of Chief Wahbahdick to Colonial Secretary, (10 June 1843) NAC RG 11.3 vol. 538 "W" Bundle, 1843-44, Reel C-2962.

[28] Donald Smith writes that the request for a title deed for the Saugeen tract had originated with Peter Jones of the Credit Mission, who sought to recover the Saugeen territory as a homeland for all Ojibway peoples: "On 14 September 1840 the government gave the Saugeens an annuity equal to that accorded to other tribes but they never regained their lost lands. (They retained only the rocky Bruce Peninsula, separating Georgian Bay from Lake Huron.) The government took no action at all on the question of title deeds." *Sacred Feathers* (Toronto: University of Toronto Press, 1987) at 182. As will be seen, the Imperial Crown in fact issued a title deed in 1847.

[29] Letter of S.P Jarvis, Superintendent of Indian Affairs to J.M. Higginson, Civil Secratary to Governor General Charles Metcalfe (4 April 1844) NAC RG 10 vol. 130 at 77,581-84, Reel C-11,484.

[30] Letter of W. Cayley to S.P. Jarvis, Chief Superintendent to Indian Affairs (18 May 1844) NAC RG 10 vol. 130 at 73,562-5, Reel C-11,484.

[31] Letter of S.P. Jarvis, Chief Superintendent to Indian Affairs, to J.M. Higginson, Civil Secretary's Office (4 April 1844) NAC RG 10 vol. 130 at 73,581-84, Reel C-11,484.

[32] *Ibid.*, marginal note and endorsement.

[33] *Supra* note 8 at 438.

the Methodist minister at Saugeen,[34] to the Governor General as to the legal rights of the Saugeen Indians to the occupancy of the fishery, Jarvis wrote to Higginson advising that while the fisheries had not been ceded, he did not think the government would admit that Saugeen people had any legal right to the fisheries or even a right to lease the fisheries. He stated:

> They [the fishing islands] are part and parcel of the Wilderness of Canada West *which has not yet been conceded* to Her Majesty by the Indians but to assume that on that account they are the private property of a small band of Indians residing twenty miles from them and that the band have an exclusive right to the fish which resort to those Islands at certain Seasons or have the right to grant licences in any shape to others will not, I presume, be admitted by the Government.[35]

Jarvis noted, however, in an apparent reference to the Royal Proclamation of 1763, that the practice of the British government was to first extinguish Indian claims by surrender before other claimants could derive title. He advised that he would ask Mr. Cayley on what terms he held the islands so that a correct opinion could be reached as to the Indian right to the fishery.[36]

In March 1839, two Chiefs from Saugeen made their way to Toronto to present a Petition to the Attorney General and to the Chief Superintendent of Indian Affairs, claiming that they had been defrauded by "wicked white men" who had taken possession of their fishing grounds.[37] By 1845, the fishery had attracted white encroachment on what the Saugeen "consider their exclusive right and on which they rely much for provisions."[38]

It seems Jarvis was mistaken in his views as to the position that would be taken by the Imperial government concerning the Saugeen interest in the fishing islands. Whether the Imperial response was a result of the lobbying by Peter Jones or a response to the requests and petitions of the Saugeen peoples may never be known; however, in 1847, Her Majesty Queen Victoria, issued a Declaration in favour of the Ojibway Indians respecting certain lands on Lake Huron, and within the description of lands possessed by the Saugeen people were included "any Islands in Lake Huron within 7 miles of the main land", with the right to convey.[39] Since the fishing islands were the stations from which fishing was conducted, the acknowledgement of title to the islands

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[34] George Copway worked with the Saugeen band as a Methodist minister between 1843 and 1845. His career ended in 1846 when he was accused by the Saugeen of embezzling their funds. Similar accusations were raised at Rice Lake, his home mission. He was imprisoned for fraud. See D. Smith, *supra,* note 28 at 197.

[35] Letter of S.P. Jarvis, Chief Superintendent to Indian Affairs, to J.M. Higginson, Civil Secretary's Office (25 October 1844) NAC RG 10 vol. 509, Reel C-13,344.

[36] Letter of J.M. Higginson, Civil Secretary's Office to S.P. Jarvis, Chief Superintendent to Indian Affairs (2 May 1845) NAC RG 10 vol. 510 at 296-97.

[37] Letter of P. Jones, Credit Mission to S.P. Jarvis, Chief Superintendent of Indian Affairs (20 March 1839) NAC RG 10 vol. 70, Reel C-11,024.

[38] *Report of the Affairs of the Indians in Canada laid before the Legislative Assembly on 20 March 1845* (Montreal: Rolo Canada) Appendix EEE.

[39] Imperial Proclamation of 1847, (29 June 1847) NAC RG 68 vol. Liber AG Special Grants 1841-1854, C-4158.

was confirmatory of the aboriginal interest in the fisheries.[40] Judge Fairgrieve observed:

> In the Imperial Proclamation dated June 29, 1847, evidently intended as a response to the request for documentary confirmation of their title, the Ojibway were granted a deed of title to a tract of land described to include the entire peninsula "bounded on the north, east, and west by Lake Huron, including any Islands in Lake Huron within seven miles... of the mainland." Mr. Lytwyn testified that the seven mile limit and all the islands within that limit essentially captured the entire fishery at the time, since in 1847 there was no deep-water fishing in Lake Huron or Georgian Bay. He also described the "unique" declaration as "the clearest expression [he had] ever seen to protect the Indians' traditional fishing grounds.[41]

In 1851, the Governor General issued a further proclamation protecting from trespass tracts of land set aside for the Indians under the provisions of the Act, which specifically referred to the Saugeen (now Bruce) Peninsula and the islands within seven miles of the coast as lands reserved for the occupation of the Saugeen and the Owen's Sound Indians.[42]

III. THE LEASE OF THE SAUGEEN FISHERIES

There seemed no longer any legal question as to the Saugeen peoples' right to lease their fisheries. At the request of the Saugeen people, the government advertised for offers to lease the fishing stations on the fishing islands and accepted a number of leasing tenders.[43] A lease to Alex McDonald, was approved, on the condition that the Indians agreed.[44] The Superintendent General of Indian Affairs recommended the arrangement, if the Indians still wished the Islands to be leased, since it incorporated the further payment of rent, as well as arrears.[45] Soon after, however, McDonald died. The Superintendent General of Indian Affairs instructed the Indian Agent to suggest that the Chiefs who were parties to the lease take action to recover possession of the islands formally.[46] He advised that the Governor General wanted to know what the wishes of the Saugeen were with respect to a proposed lease before any further steps were taken.[47] It appears the Saugeen people were agreeable. The fishing islands were again tendered

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[40] The Court in *Jones and Nadjiwon, supra* note 8 held that the *Imperial Proclamation* of 1847 had "extended treaty protection to the Saugeen Ojibway's use of their traditional fishing grounds surrounding the Peninsula."

[41] *Supra* note 8 at 438.

[42] 13 & 14 Victoria Ch. 74. The Owen's Sound Indians, as they were then described, later moved to Cape Croker and became known as the Chippewas of Nawash.

[43] Letter of T.G. Anderson, Superintendent of Indian Affairs to W. Webster, Owen Sound (18 April 1849) NAC RG 10 vol. 130 at 73,575, Reel C-11,484.

[44] Letter of R. Bruce, Superintendent General of Indian Affairs (29 August 1851) NAC RG 10 vol. 514 at 297.

[45] Letter of R. Bruce, Superintendent General of Indian Affairs to Captain Anderson, Indian Agent (20 February 1852) NAC RG 10 vol. 515 at 41, Reel 14,346.

[46] Letter of R. Bruce, Superintendent General of Indian Affairs to Captain Anderson, Indian Agent (28 December 1852) NAC RG 10 vol. 515 at 284, Reel C-13,346.

[47] Letter of R. Bruce, Superintendent General of Indian Affairs to Captain Anderson, Indian Agent (6 June 1853) NAC RG 10 vol. 516 at 3, Reel C-13,346.

for lease, the lease to be "executed by or on behalf of the Indians."[48] Rent from the fishing islands was distributed to the Saugeen and Owen Sound Indians in 1857 for one year in the sum of £75.[49] In the meantime, the Saugeen Indians continued their own fishing activities. In 1856, they sold one thousand barrels of fish,[50] weighing approximately two hundred pounds each.

The Owen Sound, or Nawash, Indians had by this time relocated to Cape Croker as the fisheries adjacent to that reserve were believed to be considerable, although not equal to those on the western side and would "constitute no inconsiderable part of the means of subsistence available for the Band."[51] The same Report, Judge Fairgrieve noted, referred to the three principal islands off the Cape Croker Reserve, White Cloud Island, Griffiths Island and Hay Island, as 'unsurrendered.' He noted:

> Although the Saugeen Ojibway Nation had by this time been divided into separate reserves, there was evidence of continuing recognition of their joint interest in the fisheries around the peninsula. Funds obtained from the rent of the Fishing Islands on the west side continued to be paid jointly to the Saugeen and Cape Croker Indians.[52]

In 1858, Visiting Superintendent Bartlett wrote to the Chiefs and Warriors at Cape Croker to indicate that he wanted to know the names and descriptions of their fishing stations in Georgian Bay and the extent and value of them "supposing they were leased for your benefit". He advised that if the Indians wished to reserve any of the Fisheries for their own use exclusively, they should say where these were situated. This, Bartlett stated, was required to give effect to the intention of the Indian Department to make arrangements for the purpose of better securing the Indian interest in the fisheries. In fact, a new *Fisheries Act* was expected to come into force which proposed to place a fishing lease system in effect to deal with the 'uncertainty of title' in the existing situation and the desirability of settling disputes.[53] The Saugeen people, who had still not surrendered the Fishing Islands, were advised that they were expected to pay rent for use of the specified fishing grounds from their interest money.[54] They were told that if they had overestimated their needs, since the charge for rent would be proportionate to the extent of the grounds, they should notify Indian Affairs at once to avoid overpayment. [55]

Without consulting with the Saugeen people, William Gibbard, the first Fishery Overseer appointed under the new legislation, leased the as yet unceded fishing islands

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[48] Letter of R. Bruce, Superintendent General of Indian Affairs to Captain Anderson, Indian Agent (7 October 1853) NAC RG 10 vol. 516 at 102, Reel C-13,346.

[49] Letter of S.Y. Chesley, Acting Superintendent of Indian Affairs to Captain Anderson, Indian Agent (22 May 1857) NAC RG 10 vol. 518 at 23, Reel C-13,347.

[50] "Report of the Special Commissioners Appointed on 8th September 1856 to Investigate Indian Affairs in Canada." *Sessional Papers* (1858) 21 Victoria, App. 21.

[51] *Ibid.*

[52] *Supra* note 8 at 439.

[53] *Annual Report of the Superintendent of Fisheries for Upper Canada*, by J. McCuaig, Superintendent of Fishing for Upper Canada, Appendix of Journals of Legislative Assembly, Appendix 1, 22 Victoria 1859.

[54] White Cloud, Hay and Barrier Islands remained unsurrendered.

[55] Letter of W.R. Bartlett, Visiting Superintendent of Indian Affairs, to Saugeen Chiefs (23 June 1859) NAC RG 10 vol. 544 at 228, Reel C-13,357.

for fishing purposes to non-whites. Bartlett, in explaining this to the Chiefs and Warriors at Cape Croker, stated that the rent from the islands when placed with annuity monies would be "much better for you than that these islands ... as they formerly have been subject to intrusion by everybody, besides being unproductive and much trouble (*sic*) both yourselves and the Department." As for exclusive grounds, Bartlett advised the Chiefs that "[t]he reserve of all the Cape Croker fisheries for the Indians is very large and is believed to be as much as they can make use of — you will soon get a Government lease of it, so that you will be in a position to warn off intruders, and you will be protected by the Government in your right under it."[56]

The Saugeen people responded by damaging nets set around the fishing islands. In his Report of the Fishery Overseer for the Division of Lake Huron and Superior, Gibbard complained that Indians had annoyed lessees of fisheries on the fishing islands.[57] As well, he alleged they were annoying white fishermen and settlers at Cape Croker.[58] Bartlett wrote to the Chiefs and Warriors at Cape Croker and Colpoy's Bay:

> I am very sorry to hear these complaints against you people the second time. Mr. Gibbard has sent me your lease of the fishery which the Supt. Genl has succeeded in obtaining free for you, upon certain conditions. These conditions are that you will not be called upon to pay any sum of money for your fisheries if you comply with the fishery act and the orders of the Government and council and do not in any way molest lessees or trespass upon leased grounds. If you people continue these practices, I shall be very sorry indeed for you will be called upon to pay out of your annuities $60 a year rent annually.[59]

The response of the Chiefs, Sachems and Principal Men of Cape Croker was directed to Queen Victoria. They prepared a Petition reminding the Queen that they had an old Treaty showing that various kinds of hunting were never surrendered. They complained that the Canadian government had now passed an Act to encourage the forfeiture of hunting and fishing which the "Indians used to, and was to enjoy forever."[60] As for the question of leasing, they wrote:

> For a period of three years our Island Fisheries have been leased and a small remuneration is made half yearly - we think it would be more beneficial for us to repossess those fishing grounds ourselves when - the given time expires in 1863...If we could only have this privilege of all that we should call our own - have the sole management of our lands, our fisheries, our hunting, our timbers and monies, we would be satisfied, and we do not see why we cannot be able to do so, while we have persons of our own blood, who can do all this, in any respect exactly the same as a white man.[61]

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[56] Letter of W.R. Bartlett, Visiting Superintendent of Indian Affairs, to Indian Chiefs and Warriors, Cape Croker (19 August 1859) NAC RG 10 vol. 544 at 284-285, Reel C-13,357.

[57] Letter of W. Gibbard, Fishery Overseer, to W.R. Bartlett, Visiting Superintendent of Indian Affairs (3 October 1859) NAC RG 10 vol.418 at 575-576, Reel C-9625.

[58] Letter of W. Gibbard, Fishery Overseer, to W.R. Bartlett, Visiting Superintendent of Indian Affairs (23 January 1860) NAC RG 10 vol. 418 at 597-600, Reel C-9625.

[59] W.R. Bartlett to Chiefs and Warriors at Cape Croker & Colpoy's Bay Indians (10 March 1860) NAC RG 10 vol. 544 at 490-491, Reel C-13,358.

[60] Chiefs, Sachems and Principal Men of Cape Croker Grand Indian Council to Queen Victoria (17 April 1860) NAC RG 10 vol. 266 at 163,306-8, Reel C-12,652.

[61] *Ibid.*

Two years later, no response had been received. Bartlett wrote to their interpreter, "I have not as yet received an answer. I hope when the question comes up for renewing the leases the Government will not lose sight of the Indians' application."[62] In January of 1864, Bartlett finally received an answer from Headquarters. Amendments to the *Fisheries Act* of 1858, he was told, would prevent *any* exclusive aboriginal title being recognized in the fisheries.[63]

Although Bartlett was told that the new *Fisheries Act* would prevent exclusive title being recognized in fisheries, the amendments to the *Fisheries Act* followed in the wake of a legal opinion from the Solicitor General, Adam Watson, to the effect that no exclusive titles could be granted *unless* such changes were made.[64] Watson's opinion was based on the English common law as it applied to 'sea rights' in tidal waters, where rights vested in the Crown between the low and high water marks with a public right of way and public right of fishing. He stated that the same rules would apply in the Upper Canada "insofar as circumstances permit, where our high and low water marks vary so little that one may say, as a general rule, that all waters are public property."[65]

This opinion completely ignored not only the treaty promises made to the Saugeen people but the English common law as it applied to navigable but non-tidal waters (such as the Great Lakes) in which exclusive fishing rights could exist.

It seems there was another underlying reason for the legislation. The Ministry of Marine and Fisheries hoped that the fisheries legislation would prevent aboriginal fishermen from being able to "supply fish at nominal prices, in barter for goods; and thus competing unfairly with other fishermen and dealers who pay rents and invest capital in faith of the permanent holding under leases or licences."[66]

In December of 1863, the Band had stated that they wanted a fishing ground reserved to their exclusive use.[67] They again wrote to Bartlett saying that if a new *Fishery Act* were to come into force, they wished to ensure they had a sufficient portion of fishing grounds reserved for the use of the band.[68] Bartlett's application on their behalf, dated January 9, 1866 was met this time with the legal opinion of Solicitor General James Cockburn to the effect that no exclusive fishing rights could exist in favour of the Indians. He stated:

> 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, the Crown could not legally have granted an exclusive right of fishing

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[62] Letter of W.R. Bartlett, Visiting Superintendent of Indian Affairs to J. Jones, Interpreter, Cape Croker (24 March 1862) NAC RG 10 vol. 546 at 26, Reel 13,358.

[63] Letter of W.R. Bartlett, Visiting Superintendent of Indian Affairs to Indian Chiefs and Warriors, Cape Croker (19 January 1864) NAC RG 10 vol. 547 at 571-572, Reel C-13,359.

[64] Letter of A. Watson, Solicitor General, to Commissioner of Crown Lands (11 March 1863) NAC RG 10 vol. 323 at 216143-216146, Reel C-9577.

[65] *Ibid.*

[66] Letter of W.F. Whitcher, for Hon. Minister of Marine & Fisheries to E.A. Meredith, Deputy Minister of the Interior (9 May 1876) NAC RG 10 vol. 1972, File 5530, Reel C-11,124.

[67] Letter of W.R. Bartlett, Visiting Superintendent of Indian Affairs to W. Spragge, Deputy Superintendent General of Indian Affairs, referring to petition of 22 December 1863 (7 August 1865) NAC RG 10 vol. 549 at 37, Reel 13,359.

[68] *Ibid.*

> on the lakes and Navigable waters but under the 3rd section of that Act the power is conferred on the Commissioner of Crown Lands of granting licences for fishing in favour 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 favour 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 a reservation no exclusive right could thereby be gained by the Indians.[69]

No explanation is given in the Cockburn opinion as to why Parliament would have to ratify a treaty of the Imperial Crown, or how the Imperial Crown had considered itself to have the legal capacity *before* the *Fisheries Act* to enter into leases recognizing exclusive rights, nor did he refer to any cases or legislative provisions to support his opinion. Nonetheless, from that point forward, Cockburn's opinion was considered to be determinative of the issue by the Ministry of Marine and Fisheries although, as will be seen, the Department of Indian Affairs held completely contrary and opposite views.

In 1875, W.F. Whitcher wrote to the Fisheries Overseer at Collingwood on behalf of the Minister of Marine and Fisheries that fisheries in Canadian public navigable waters belonged *prima facie* to the public, and were administered by the Crown under an Act of Parliament. Indians, he stated, enjoyed no special liberty and had no exclusive control of fishing in connection with Indian properties, but with regard to the obtainment of licences, the government would act towards them with the "same generous and paternal spirit with which the Indian tribes have been treated under British rule."[70]

The promises of both the Royal Proclamation and the Bond Head Treaty had by this time faded from memory. In 1867, Bartlett had written:

> Not only among this tribe of Indians but all the other bands have a vague idea amongst them that a treaty was made by their forefathers with the British Govt, by which the Indians are allowed to hunt and fish whenever and wherever they please. I try to dispel this idea whenever it is alluded to.[71]

By 1876, the Chippewas of Nawash had fallen upon hard times. The Visiting Superintendent of Indian Affairs wrote, "at the present time ... their fishing privileges are so curtailed as to be of little or no use to them."[72]

William Plummer, the Superintendent and Commissioner of Indian Affairs,

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[69] Letter of A. Russell, Assistant Commissioner of Crown Lands to Indian Branch to Indian Branch, enclosing opinion of J. Cockburn, Solicitor General (3 April 1866) NAC RG 10 vol. 549, Reel C-13,359. [Emphasis added].

[70] Letter of W.F. Whitcher, for Hon. Minister of Marine & Fisheries to J. Patton, Fishery Overseer, Collingwood (17 December 1875) NAC RG 10 vol. 1972, File 5530, Reel C-11,124.

[71] Letter of W.R. Bartlett to W. Spragge, Deputy Superintendent General of Indian Affairs (25 March 1867) NAC RG 10 vol. 550, at 207-208, Reel C-13,360.

[72] "Report on the Chippewas of Nawash" by W. Plummer in *Sessional Papers of Parliament* (No.11) (A. 1877) 40 Victoria at 17.

protested the position taken by the Ministry of Marine and Fisheries in lengthy correspondence with the Deputy Minister of the Interior. He pointed out that Fisheries Officers had been instructed to lease what had been Indian fisheries since time immemorial, and that as a result, Indians had been deprived of their principal source of living.[73] He complained that the Cape Croker Indians had still not received a commercial licence allowing them to fish. Whitcher responded that the Cape Croker Indians were really complaining about white men fishing on grounds to which they claimed Indian title, and that until the Fishery Overseer determined the bounds within which Indians would have sole privileges, the Indians would be "free to fish with other fishermen...in common with whites."[74] Plummer retorted there was no excuse for withholding the Cape Croker commercial licence. He threatened to publish accounts of this matter if it was not settled quickly, stating that public sympathy was on the side of the Indians, "[w]hile the class benefitted by their loss was not regarded in the same favourable light."[75]

Plummer wrote that the Cape Croker Indians had undisputed possession of their fishing grounds around the reserve as well as around the unceded fishing islands.[76] The response from Whitcher — sent not to Plummer but to Meredith, the Deputy Minister of the Interior — was that very few Cape Croker Indians fished for a living.[77]

Later that month, Whitcher finally apprised Meredith of the many letters from Indian Affairs written on behalf of the Cape Croker Indians, advising that none had been answered. He stated that the Department would not countenance illegal pretensions advanced on behalf of the Indians and that the 'absolute right' to the fisheries which he acknowledged as one of the inducements to the 1836 Bond Head Treaty would not be recognized by the Department. The Department of Justice would review the facts, but in the meantime, whites and Indians would be free to fish in common in the vacant limits of Lakes Huron and Superior, a course rendered, he wrote was "unavoidable in consequence of the extravagant claims and extraordinary demands advanced on behalf of the Indians, and [their] manifest unwillingness to accept any reasonable extent of fishing privileges..."[78]

A Special Fishery Licence was finally issued to the Band setting out the 'Fishery boundaries' on June 27, 1876 for fisheries. However, white men continued to fish on what had been promised to be exclusive fishing grounds.[79] The explanation for this given by the Fishery Overseer was that licences had been issued to white men creating rights which *predated* the Special Fishery Licence given to the Cape Croker band, and

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[73] Letter of W. Plummer, Superintendent & Commissioner, Indian Affairs, to E.A. Meredith, Deputy Minister of the Interior (1 June 1876) NAC RG 10 vol. 1972, File 5530, Reel C-11,124.

[74] Letter of W.F. Whitcher, for Hon. Min. of Marine & Fisheries to E.A. Meredith, Deputy Minister of Interior (5 June 1876) NAC RG 10 vol. 1972, File 5530, Reel C-11,124.

[75] Letter of W. Plummer Superintendent & Commisioner, Indian Affairs to E.A. Meredith, Deputy Minister of Interior (6 June 1876) NAC RG 10 vol. 1972, File 5530, Reel C-11,124.

[76] *Ibid.*

[77] Letter of W.F. Whitcher, for Hon. Minister of Marine & Fisheries to E.A. Meredith, Deputy Minister of Interior (10 June 1876) NAC RG 10 vol. 1972, File 5530, Reel 11,125.

[78] Letter of W.F. Whitcher, for Hon. Minister of Marine & Fisheries to E.A. Meridith, Deputy Minister of Interior,(24 June 1876) NAC RG 10 vol. 1972 File 5530, Reel C-11,124.

[79] *Ibid.*

therefore white men had the "free scope of fishing to the whole extent of this District."[80] Plummer again protested to the Minister of the Interior: "I cannot see of what use the Fishery Licence covering a certain limit is if white men are permitted and cannot be stopped from fishing over the same territory."[81] The Superintendent General of Indian Affairs stepped into the fray, advising that the Department of Indian Affairs had been caused much embarrassment by the fishery regulations, which:

> seriously interfere with the Indians of Ontario ... in obtaining as they formerly did an important part of their subsistence from waters in which from time immemorial they have been in the habit of fishing unrestricted....[82]

The Minister of the Interior requested a summary of the circumstances leading to the complaint of unfairness. Plummer wrote in December of 1878:

> [T]he fisheries which have been *exclusively Indian* have for the past few years been taken from them and given to white traders who employ white fishermen .... It cannot be for the public interest to lease the best fishing grounds to a few white men and to deprive several hundred Indians who reside in adjacent villages of the privileges which they have enjoyed since time immemorial.... As to Indian treaties, it is well known that in the general surrenders, large tracts of land and adjacent islands were reserved and *there are no treaties in existence covering any surrender of these tracts and islands and the waters by which they are immediately surrounded.* It is also well known that these tracts and islands were released for the express purpose of retaining the privileges of fishing in the adjacent waters, and it is quite natural that they should think they are arbitrarily deprived by Government of rights which they have never surrendered. [83]

But more than ten years later, in reply to a complaint that whites continued to fish within the Cape Croker limits, the Deputy Minister of Marine and Fisheries contended that whites had been fishing within these limits without complaint for the past five to twenty years.[84] Judge Fairgrieve observed[85] that as late as 1894, the Indian agent at Cape Croker had written to the Deputy Superintendent of Indian Affairs in connection with the assurances given the Indians that the surrender of White Cloud Island "would in no way affect their fishing limits."

The Department of Marine and Fisheries' views of public ownership over inland waters were apparently not shared by Prime Minister John A. Macdonald. On three separate occasions between 1881 and 1883, the Province of Ontario attempted to pass legislation "Protecting the Public Interest in Rivers, Streams and Creeks", and on each

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[80] F. Lamorandiere, Secretary Cape Croker Band to Plummer, (21 August 1876) NAC RG 10 vol. 1972, File 5530, Reel C-11,125.

[81] Letter (26 August 1876) NAC RG 10 vol. 1972, File 5530, Reel C-11,125.

[82] Letter of D. Mills, Superintendent General of Indian Affairs to Sir A. Smith, Minister of Marine and Fisheries (18 July 1878) NAC RG 10 vol. 2064, File 10,999 ½.

[83] Letter of W. Plummer, Superintendent and Commissioner, Indian Affairs to D. Mills, Minister of Interior (3 December 1878) NAC RG 10 vol. 2064, File 10,099 ½, Reel C-11,148. [Emphasis added].

[84] Letter of J. Tilton, Deputy Minsiter of Fisheries to L. Vankoughnet, Deputy Superintendent General Indian Affairs (5 December 1889) NAC RG 10 vol. 2439, File 91,338, Reel C-11,221.

[85] *Supra* note 8 at 439.

occasion, the federal government disallowed it, claiming it was a flagrant violation of private rights.[86] By 1890, despite the constant protestations by the Saugeen Indians against "such encroachments on our rights", only two miles of shoreline remained unoccupied by white men.[87]

Although the Solicitor General, James Cockburn, averred that exclusive fishing rights on the part of aboriginal people could exist under the *Act* only if these were express, and only then if ratified by Parliament, he gave no recognition to the Crown prerogative to negotiate treaties with aboriginal peoples. There is no legal requirement that Parliament give its approval to either the signing or the ratification of a treaty.[88]

While Cockburn's opinion contemplated that treaties or instruments could expressly reserve the exclusive right of fishing, he concluded that such rights could not be gained since the Crown could not grant an exclusive privilege in favour of individuals prior to the *Fisheries Act*. However, this ignored the fact that licences of occupation, in the case of the Saugeen people, had already been confirmed by the Imperial Crown. Where these were not confirmed, it was not because of a concern over public rights in the fisheries, or a want of jurisdiction, but because the title to the fishing islands had never been surrendered by the Saugeen Indians.[89]

Adam Watson, in contrast, applied the common law of England as it applies to tidal waters, in which public rights exist. In the case of navigable but non-tidal waters of Ontario, the public's right to navigate was subject to proprietary fishing rights held either by the Crown or by individuals over the *solum*, or underlying bed of the waters.[90] While the applicability of the English common law to the Great Lakes and other large navigable bodies of water in terms of riparian rights was in question through much of the 19th century, the capacity of the Crown to grant (and implicitly, to receive Indian

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[86] In doing so, Macdonald was protecting the private interests of a Conservative lumberman against Premier Oliver Mowat's attempt to make the rivers and streams a common transportation system for the lumber industry.

[87] Motions taken from *Saugeen Council Minutes* (Saugeen Territory, ON: Saugeen Band Council Archives, 1883-1895).

[88] P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 184.

[89] As explained by Judge Fairgrieve in *Jones and Nadjiwon, supra* note 8 at 438: "no licences of occupation were issued to confirm the arrangement in 1845 that the Saugeen chiefs made with one Cayley, whose name figured prominently in the documents from that period. Mr. Lytwyn, an historical geographer called by the defence, gave his opinion that the colonial government could issue such licences in respect of Crown lands, but could not do so in relation to the Saugeen's fisheries because they had not been surrendered. The historical evidence supports the conclusion that, from the aboriginal perspective, the 1836 Treaty had confirmed their exclusive right to their traditional fisheries in the area."

[90] In English common law, ownership of fishing rights accompanies ownership of the bed. Where land borders on tidal waters, the boundary of the water where public rights accrue is fixed as the line set by the average high water mark and below that level and seaward, the land and the bed of the sea is vested in the Crown with fishing rights held in common by the public. But where a stream, river or lake is non-tidal, no such public right exists and there can be exclusive proprietary fishing rights which although severable, go with the property in the *solum* or bed, *Attorney General for B.C.* v. *A.G. Canada*, [1914] A.C. 153 (P.C). The Supreme Court of Canada in *Reference Re Provincial Fisheries* (1895), 26 S.C.R. 444, agreed uniformly that such rights existed and it has been settled law for over a hundred years that the owner of the fishery is presumed to be the owner of the soil, *A.G.* v. *Emerson* [1891], A.C. 649, 61 L.J.Q.B. 79 (P.C.).

surrenders of) the underlying bed to such waters was never in serious doubt.[91]

The position taken by the Minister of Marine and Fisheries to the effect that aboriginal peoples could not hold exclusive rights within the fisheries was hotly contested by the Department of Indian Affairs. The vigorous debate between Indian Affairs and the Ministries of the Interior and Marine and Fisheries reflects the sharp divisions over the legality of such legislation as it related to treaty rights, with Indian Affairs arguing against the interpretation placed on the legislation by the Ministry of Marine and Fisheries.

The underlying basis of the *Fisheries Act*, as stated by the Ministry of the Marine and Fisheries to the chagrin of the Department of Indian Affairs, appears not to have been to provide security of tenure for aboriginal commercial fishermen, but to prevent them from gaining an unfair competitive edge over white fishermen. Judge Fairgrieve commented:

> What the evidence disclosed was a relentless, incremental restriction and regulation of the admitted aboriginal right, despite continuing protests, petitions, objections and resistance by the defendants' band. Much of the conflict appeared to have its source in the apparently inadvertent failure of the first *Fishery Act* to make any special provision for the treatment of native fisheries or existing treaty rights. The evidence documented as well a protracted intra governmental policy clash between Fisheries and Indian Affairs. The former generally prevailed, and the fisheries came under increasingly stricter controls.[92]

Nor did disagreement over proprietary rights in the fisheries end at aboriginal issues. Section 109 of the *Constitution Act, 1867*, transferred title to lands to the Provinces "subject to any Trusts existing in respect thereof and to any Interest other than that of the Province in the same."[93] In later years, a disagreement between the Province of Ontario and the federal government over which level of government held jurisdiction over fishing rights led to the *Fisheries Reference* case.[94] The Privy Council held that while the federal government could regulate the times and manner of fishing in provincially-owned fisheries, it could not grant exclusive leases of these fisheries, since this latter power was proprietary and was held by the province as the owner of the fishery. In other words, while the federal government could not issue leases conferring on the owner exclusive rights within the fishery, this was not because fisheries were the subject of *public* rights held in common, but because such rights were considered to be *proprietary* rights, capable of being held only by the province or by private

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[91] See e.g, *Reference Re Provincial Fisheries, ibid.*, in which the Supreme Court of Canada determined that title to the bed of navigable waters was vested in the provinces by virtue of section 109 of the *British North America Act* as at Confederation, subject to underlying trusts and interests therein, except where such waters were owned by the Dominion or were unsurrendered Indian territory. Indeed, a surrender of land "including all land covered by water between the water's edge and deep or navigable water" was obtained by the Mohwaks of the Bay of Quinte on December 23, 1891: See, Surrender 304, *Canada: Indian Treaties and Surrenders* (Ottawa: Queen's Printer, 1891) vol. 3:43.

[92] *Supra* note 8 at 440.

[93] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[94] *Canada (A.G.)* v. *Ontario (A.G.)* (Fisheries), [1898] A.C. 700, 12 C.R.A.C. 48 (P.C.).

individuals.[95]

IV. CONCLUSION: EXCLUSIVE FISHING RIGHTS

As demonstrated, the promise to remove whites from the fishing grounds induced the Saugeen people to surrender lands in 1836. Their possession of the fishing islands, and therefore the fishing grounds, was confirmed in the *Imperial Proclamation* of 1847. Despite these promises, the *Fisheries Act* was applied to aboriginal peoples "equally" with other members of the public. As has been demonstrated through the historical record, this was far from security of tenure but represented a significant diminution of aboriginal rights.

In determining that a treaty right had been proven, however, Judge Fairgrieve fell short of finding ownership of traditional waters. He held that:

> the evidence supports the conclusion that the *Bond Head Treaty* of 1836, confirmed by the *Imperial Proclamation* of 1847, extended treaty protection of the Saugeen Ojibway's use of their traditional fishing grounds surrounding the peninsula .... *Apart perhaps from the waters immediately adjacent to their settlements and the fishing islands reserved to themselves and used as fishing stations,* the evidence did not establish a clear expectation on their part of exclusivity throughout the area which encompassed their traditional fishing grounds.[96]

Having already found as a fact that the historical evidence supported the conclusion that from the aboriginal perspective, the 1836 treaty had confirmed their exclusive right to their traditional fisheries in the area, the learned trial judge's determination that the evidence did not establish a clear expectation on the part of the Saugeen Ojibway of exclusivity throughout the area encompassing their traditional fishing grounds[97] is puzzling. The comments which immediately follow his statement, however, perhaps reveal the court's reasoning and reflect the ongoing (and it is submitted, erroneous) assumption that there can be no proprietary rights in waters. He ruled:

> There is a distinction to be drawn between the nature of a right to fish in waters which constitute traditional fishing grounds and aboriginal title at common law in relation to land. In my view, it is again not a question of "title" or "ownership", it is a question of the right to fish in those waters and to enjoy the benefit of the resource to be found there.[98]

What this article has attempted to demonstrate is that the exclusive right to fish in waters was understood to flow from ownership of the underlying *solum*, according to the English common law at the time of the *Imperial Proclamation.* The expectation held by the Saugeen Ojibway people of exclusivity in the waters adjacent to their settlements and around their fishing islands must surely have extended to the other unceded waters around the peninsula to which their title was secured in 1847. Such ownership pre-dated the provincial jurisdiction recognized in Section 109 of the *British*

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[95] *Supra* note 88 at 393. [Emphasis added].

[96] *Supra* note 8 at 439-40.

[97] *Ibid.* at 440.

[98] *Ibid.*

North America Act which is itself subject to just such underlying interests.

As such, while the decision in *Jones and Nadjiwon* reflects a thoughtful and considered examination of the historical context governing the treaties of 1836 and 1847, the learned judge's conclusions on the matter of exclusivity are perhaps not as well-founded in law as the balance of his reasons for judgment. The Bond Head treaty clearly promised exclusivity, and the aboriginal perspective, as referred to in Judge Fairgrieve's judgment, was that such rights were to be exclusive. Nonetheless, the ruling represented the first time the Saugeen Ojibway Nation's commercial fishing rights had been recognized as enjoying constitutional protection. It was not until the decision in *Jones and Nadjiwon*, more than a century after Sir Francis Bond Head had promised to protect fishing rights for the Saugeen Ojibway Nations, that the treaty promises were finally recognized.