

Treaty Fishing Rights and the Development of Fisheries Legislation in Ontario: A Primer

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Introduction

The following discussion is based on the premise that the language of the treaties in Ontario, as it pertains to fishing rights and, in particular, the interpretation by government of the treaty right to fish, was mirrored in the language of emerging fisheries legislation. Prior to 1857, when the first comprehensive fisheries legislation was passed, the exercise of control over the Indian fisheries was *ad hoc*, at best. The treaties negotiated prior to that date that included an explicit reference to a treaty right to fish used language suggesting that the right was considered by government to be an exclusive right. These early treaties pertaining to fishing refer to a sole right, or a full and free privilege, while early legislation contains explicit references to Indian fishing rights. After 1857, conservation principles and the associated regulations to control access to the resource became paramount; the treaty right to fish was couched in language that suggests it was to be subject to regulation and disposition. Current legislation contains no references to Indian fishing rights. This situation will undoubtedly change as a result of the recent Supreme Court of Canada decision known as the Sparrow case.¹

The Indian people who lived in what is now the province of Ontario at the time of European contact and during the early fur trade period represented two major linguistic groups, Iroquoian and Algonkian, and occupied widely varying geographic regions from the agricultural lands in southern Ontario to the subarctic environment adjacent to Hudson and James Bays. While the subsistence patterns of these two groups largely reflected the differences in climate and natural resources in the areas they occupied, fishing provided an important resource for them. For example, the whitefish fishery of the St. Mary's River and the sturgeon fishery on the Rainy River and the Lake of the Woods are now well-documented examples of the historic use of the resource for both domestic and commercial consumption.² Fish provided a predictable, reliable, abundant

and highly nutritious food source on a year-round basis. It was also an item of exchange both before and after contact.

To secure land for settlers, the British colonial government established a process of treaty-making between the British Crown and Indian people as a precondition for Aboriginal land surrenders or sales. This treaty-making process was spelled out in the Royal Proclamation of 1763. The proclamation, which reserved most, if not all, of what is now Ontario as the "Hunting Grounds" of "the several Nations or Tribes of Indians" who occupied the area, established the guidelines that were to be followed in the treaty-making process. It stipulated, so that the occupants of the hunting grounds "should not be molested or disturbed," that the hunting grounds could not be purchased, settled or taken possession of by non-Native people without being "ceded to or purchased by" the Crown.³ It seems logical that, although the royal proclamation does not refer explicitly to fishing or hunting as an activity that was to continue undisturbed within the hunting grounds, the intent of the royal proclamation was that these activities could continue to be carried out by the Indian people as they had been prior to 1763. The royal proclamation did not establish Aboriginal rights; it was declaratory of those rights.⁴

Thirty-six treaties have been negotiated in the province of Ontario since 1763, the most recent being the adhesion to Treaty 9 in 1929. Three pre-confederation and three post-confederation treaties that explicitly included, in their written versions, treaty fishing rights will be the focus of this paper. It should be noted that the Indian peoples' understanding of the terms of a treaty often vary from the written version. Also, fishing rights were not usually explicitly referred to in the early treaties. In some instances, the historical record indicates that oral promises were often made by the Crown's representatives, usually during the council held prior to the signing of a treaty, in response to specific requests from the Indian signatories. These oral promises were not always recorded in the formal treaty document. Treaty 20, negotiated in 1818 with the Chippewa, is one such example.⁵ It should also be noted that recent court decisions suggest that, where a treaty is not explicit concerning the release by the signatories of an Aboriginal right to fish, that Aboriginal right is not diminished.⁶

"A Sole Right" Period

One of the earliest and only explicit reference before 1850 to fishing in a treaty appears in the 1805 treaties with the Mississauga on the north-west shore of Lake Ontario. The main purpose of the treaties was to define the exact area of land, extending west from the Etobicoke River, that the Mississauga had some years earlier agreed to cede to the Crown.

As a condition of the surrender, the Mississauga reserved for themselves "the sole right of the fisheries" in the Twelve Mile Creek, the Sixteen Mile Creek, the Credit River and the Etobicoke River from the mouth to a distance upstream specified in the treaty.⁷ Then, in 1820, the Mississauga surrendered part of their reserves adjacent to the Credit River and the Sixteen Mile and Twelve Mile Creeks. They also surrendered their "sole and exclusive rights of fisheries" in those bodies of water.⁸

As comprehensive fisheries legislation was not passed until 1857, the early legislation was usually explicit to a particular species of fish and/or an area of the country that was "settled" by Europeans. For example, in Lake Ontario, salmon was the preferred commercial species in the early 1800s, and the fisheries legislation that was passed at that time explicitly dealt with it, beginning with an 1807 act for the preservation of salmon.⁹ Subsequent amendments incorporated rudimentary conservation principles, such as regulating the fishing gear, the locations where fishing could occur and closed seasons, although the means of enforcing them were not provided for.¹⁰ For example, the 1823 amendments prohibited "any person or persons" from employing Indians or buying or receiving "under any pretence whatever, from any Indian or Indians, any salmon taken or caught within any of the said Districts [identified in the Act]" during the closed season. Although the act did not indicate that Indian people were prevented from fishing during the closed season, by making it illegal to purchase salmon from Indian fishermen during the closed season, the government was insuring that the incentive to catch quantities of salmon beyond what was required for the use of the Indians themselves (i.e., domestic consumption) would be reduced. Although commercial fishing by Indian people was an established practice, it was one that the government evidently felt it needed to regulate, although indirectly in the first instance.

In 1829, legislation was passed by the government of Upper Canada protecting an exclusive Indian fishery that appears to have been surrendered nine years earlier by the group benefiting from the legislation. This act,¹¹ possibly the only one of its kind, was passed in response to a petition from the Mississauga living at the Credit River to the lieutenant-governor of Upper Canada. The Indians were concerned about the "many unwarrantable disturbances, trespasses, and vexations, practised by diverse idle and dissolute fishermen, and others, upon the ... parcel of land and fishery [on the Credit River]" reserved in 1805 for them. This act made it unlawful for any person or persons to "fish in any way, mode or manner, whatsoever ... upon the said parcel of land and waters thereof," "against the will of the said Mississauga people, or without the consent of three or more of their principal men or chiefs."

The increasing importance of the commercial fishing industry is reflected by the passage in 1840 of the first legislation to establish control over the quality of fish caught for commercial purposes.¹² The lieutenant-governor of Upper Canada or the governor of Canada could thereby appoint "Inspectors of fish" in every district of the province to inspect and grade all fish that was packed in barrels. In 1845, the restrictions on salmon fishing were increased,¹³ and it became unlawful to fish for salmon "nearer the mouth of any of the rivers or creeks, emptying into Lake Ontario or the Bay of Quinte, than two hundred yards, or within two hundred yards up from the mouth of any such river or creek as aforesaid." Unlike the preceding legislation that it replaced, there was no reference to Indian fisheries or Indian fishing rights in the 1845 statute and would not be any in subsequent legislation for the next twenty years.

"A Full and Free Privilege" Period

The Robinson Huron and Robinson Superior Treaties in 1850 with the Ojibway living on the north shores of Lakes Superior and Huron contain an explicit promise to the Ojibway that they would retain "the full and free privilege ... to fish in the waters [of the ceded territory] as they have heretofore been in the habit of doing. ..." The Robinson treaties also contain, for the first time, a condition on the exercise of that treaty right. Specifically, the Indian people could exercise that right "saving and excepting only such portions of the said territory as may from time to time be sold or leased ... and occupied. ..." ¹⁴ The historical evidence strongly suggests that the Ojibway were engaged in commercial as well as subsistence fishing at the time of the treaty negotiations.¹⁵

The importance of fisheries to the Ojibway is reflected in the location of their reserve lands. For example, the Batchewana Reserve included, at the request of the Ojibway who were to occupy it, the "small island at Sault Ste. Marie used by them as a fishing station."¹⁶ The small island is now recognized to be Whitefish Island, a significant fishing station used by the Ojibway throughout the area. Shortly after the Batchewana Band's reserve was surveyed, they surrendered most of it for sale, but would not give up Whitefish Island.¹⁷ Several other areas adjacent to known fishing stations were chosen by the Ojibway to be included within the boundaries of their reserves,¹⁸ or were requested to be reserved for their exclusive use. In fact, efforts were made by the government surveyors to adjust the boundaries where possible to accommodate the Ojibway's fishing stations at, for example, Parry Island and the Shawanaga River.¹⁹

The Ojibway believed that the full and free privilege to fish, promised by treaty, meant they had an exclusive right to fish. The government held

a different interpretation. A year after the Robinson treaties were negotiated, two of the Ojibway signatories, occupying reserves on the north shore of Lake Huron, sent a message to the superintendent of Indian Affairs asking, among other things, whether or not the Ojibwa had the "exclusive right to the fisheries immediate[ly] adjoining and opposite to [their] Reserves."²⁰ Although the reply was negative, it was also noted that "no one will be entitled to make use of their Lake Shore line [frontage of the reserves on Lake Huron] for fishing or other purposes without the Governor-General's sanction."²¹

The Ojibway's requests for exclusive fishing rights in the waters fronting their reserves were not supported by many others. One notable exception was J.W. Keating, who had been present at the treaty negotiations and also assisted with the survey of some of the reserves. In spite of Keating's request,²² the government would not confirm exclusive fishing rights, though it was prepared to confirm the changes made to the boundaries of the reserves to better accommodate fishing stations. In addition, the government was willing to consider "the expediency of giving the Indians such a Title thereto, either by lease, license of occupation or otherwise, as will effectually protect them from future interference" "in the event of any attempt being made by other parties to trespass upon the Deep Water frontage for the purpose of fishing."²³ The legislative basis for the issuance of fishing leases and licenses would not be passed until 1859.

At the time of the Robinson treaties, there was little, if any, competition for the resource from non-Native commercial fishermen, particularly in Lake Superior and the northern portion of Lake Huron. In addition, comprehensive legislation had not yet been passed and what little legislation was in existence was not enforced.²⁴ As a result, Indian fishermen effectively exercised an exclusive right to fish in the years immediately following the signing of the treaties. For varying periods of time, possibly ten to twenty years or more, depending on location, the full and free privilege to fish provided for by the Robinson treaties was not interfered with by government. However, the passage of comprehensive fisheries legislation was to bring about a narrower interpretation of the treaty promise.

Passage of Comprehensive Fisheries Legislation

The legislation of the first half of the nineteenth century included basic principles of conservation, but did not provide an effect means of enforcing those principles. That deficiency was recognized by Joseph Cauchon, Commissioner of Crown Lands in the department's first annual report (1856). The Commissioner noted in that report the growing

importance of the commercial fisheries in Canada and called attention to the decline of the salmon fishery in Lower Canada. Cauchon emphasized the need to protect the salmon fishery from complete destruction, as well as to preserve the other fisheries in Canada, and stated that "it is desirable that ... superintendence should be established and organized in such a manner as to ensure the law being carried into effect in all parts of the province [of Canada]."²⁵

Cauchon was instrumental in the development of the first *Fisheries Act* (1857). The Department of Crown Lands became responsible for fisheries in Upper and Lower Canada. This act, which consolidated preceding legislation into one act,²⁶ contained provisions for the appointment of superintendents of fisheries for Upper and Lower Canada and fishery overseers who reported to the superintendents. The overseers were responsible for the enforcement of the *Fisheries Act* regulations, including closed seasons for certain species of fish, and had full authority as magistrates to enforce the statute by search and seizure. The 1857 *Fisheries Act* did not contain any specific references to Indian people and its provisions were intended to apply to "All subjects of her Majesty."

An amendment to the *Fisheries Act* in 1859 provided, for the first time, for special fishing leases and licences on lands belonging to the Crown, which were granted by the Governor-in-Council. The Governor-in-Council was also authorized to "make all and every such regulation or regulations as may be found necessary or expedient for the better management and regulation of the Fisheries of the Province [of Canada]." The 1859 *Fisheries Act* did not contain any specific references to Indian people. The 1857 statute and the 1859 amendments represented the first comprehensive legislated efforts to manage the fish resources of Canada and to derive a source of government income from them by issuing leases and licenses.

In 1859, shortly after the amendments were passed, an agreement was reached by the Indian Department and the Department of Crown Lands "for the Protection of the interest of native tribes".²⁷ This Agreement suggests that the Indian people were considered subject to the *Fisheries Act* regulations since, pursuant to that agreement, the Indian people in Upper Canada became exempt from paying fees for fishery leases. However, they were exempt from paying fees only "in cases where the purport and object of title is [sic] to secure to the individuals and families of each tribe exclusive use of such fisheries for *bona fide* domestic consumption," provided that they observed the provisions of the *Fisheries Act* with respect to closed seasons. In the opinion of the Superintendent General of Indian Affairs, the agreement thereby allowed Indian people to "enjoy the privilege of free fishing for their own use, so long as they do

not transgress the law."²⁸ This agreement also indicates that, at a very early stage, Indian fishing rights were being interpreted by government as domestic consumption fishing rights only.

It is not clear, however, whether the *Fisheries Act* regulations applied to all Indian fisheries, including those provided for by treaty. If they did apply universally, the spirit and intent of the Robinson treaties, which provided for a full and free privilege to fish, may not have been upheld. Although the issuance of fishery leases was intended to protect the Indian fisheries in the face of increasing pressure on the resource from non-Native fishermen, Indian fishermen were considered to be subject to legislation that was inconsistent with a full and free privilege to fish. Although the Robinson treaties contemplated the treaty right to fish not being freely exercised in areas taken up, there was no reference in the treaties to the right being subject to legislation that, in any event, did not exist in 1850. However, within twenty to thirty years (a single generation) after the Robinson treaties, Indian fishermen exercised a full and free privilege to fish for domestic consumption only, under the authority of a fishery lease.

In 1863, the Commissioner of Crown Lands asked the Crown Law Department of Upper Canada to delineate "the power of the Crown to grant exclusive rights of Fishing in the Lakes and Navigable Rivers."²⁹ The Solicitor General replied that

the rule of law is that the Public have the right of way over and the right of fishing in all such waters, and that neither the Crown nor any private person can assert any special right in or exclusive use of highway or of fishery in such waters.³⁰

He further stated that the *Fisheries Act* did not control "general rights" or grant "power to give exclusive rights." The section in the act that authorized the Governor-in-Council to issue "fishing leases and licenses on lands belonging to the Crown" was interpreted by the solicitor general to mean that "the Government may grant exclusive rights to occupy the *Crown Lands* for fishing purposes—which ... would have been open to the whole public."³¹

Perhaps in an effort to clarify the situation *vis-à-vis* Indian fishing rights, amendments to the *Fisheries Act* in 1865 provided, for the first time, a regulation with respect to Indian fisheries. Section 17(8) stated that the Commissioner of Crown Lands

may appropriate and lease certain waters in which certain Indians shall be allowed to fish for their own use as food in and at

whatever manner and time are specified in the lease, and may permit spearing in certain localities for bass, pike and pickerel between the fourteenth of December and the first of March.³²

This regulation reflected the agreement that had been reached previously between the Indian Department and the Department of Crown Lands with respect to issuing leases for Indian domestic fishing. It also added a new component—an open season—which reflected developing conservation principles.

In 1866, a number of "claims made on behalf of Indians to the fisheries in certain waters at and around parts of the Main land and Islands in the Lakes of Upper Canada" came to the attention of the Department of Crown Lands. The issue was referred to the "Law Advisors of the Crown" for an opinion.³³ The solicitor general for the Crown Lands Department restated the department's view, noted above, that Indian people did not have a claim to exclusive fishing rights and that "they have no other or larger rights over the public waters of this province [of Canada] than those which belong at Common Law to Her Majesty's subjects in general."³⁴ The Commissioner of Crown Lands subsequently directed that "all Fisheries around Islands be disposed of by the Fisheries Branch of the Department [of Crown Lands]." However, he also directed that certain areas be identified that were "desirable to reserve as fishing stations exclusively for certain bands of Indians or for the use of Indians in common," and that other areas be "leased subject to Indians fishing therein for their own use, but not for barter and sale."³⁵ This was to lead to conflicts between Indian and non-Native fishermen.³⁶

With Confederation in 1867, legislative authority for fisheries was vested in the federal government. As stipulated in the *British North America Act (BNA Act)*, the parliament of Canada became responsible for, among other things, "Sea Coast and Inland Fisheries" (section 91[12]) as well as "Indians and Lands reserved for the Indians" (section 91[24]). Section 92, which outlines the "exclusive powers" of the provincial legislatures, did not include any references to the legislatures' power to make any regulations with regard to fishing within the boundaries of the respective provinces. The Government of Ontario was not directly involved in the legislative aspects of resource management until 1885 when it passed the *Ontario Fisheries Act*.

Under Section 91(12) of the *BNA Act*, the government of Canada passed the first post-Confederation *Fisheries Act* on 22 May 1868, thereby repealing the 1865 statute. The Minister of Marine and Fisheries assumed the responsibility for matters previously held by the Commissioner of Crown Lands, such as for issuing fishery leases and licenses "where the

exclusive right of fishing does not already exist by law," and the appointment of fisheries officers, whose powers and duties were provided for in the 1868 *Fisheries Act*. The act authorized the Governor-in-Council "from time to time [to] make, and from time to time [to] vary, amend or alter, all and every such Regulation or Regulations as shall be found necessary or deemed expedient for the better management and regulation of the sea-coast and inland fisheries. ..."37 The act also stated that

It shall not be lawful to fish for, catch or kill salmon, trout (or "lunge") of any kind, maskinonge, bass, barfish, pickerel, whitefish, herring or shad by means of spear, grapnel hooks, negog, or nishagans; provided, the Minister [of Marine and Fisheries] may appropriate and license or lease certain waters in which certain Indians shall be allowed to catch fish for their own use in and at whatever manner and time are specified in the license or lease, and may permit spearing in certain localities.³⁸

Significantly, the first federal *Fisheries Act* maintained the provisions of preceding acts, as well as the 1859 agreement between the Department of Crown Lands and the Indian Department, which provided for the licensing of Indians to fish for their own use. Fishing leases and licenses were issued and/or maintained for domestic and commercial Indian fisheries in Lake Huron, Lake Superior and Lake Simcoe. Indian fishermen were considered to be subject to all regulations in force regardless of their treaty rights.³⁹

"Right to Pursue Subject to Regulation and Disposition" Period

Following the passage of comprehensive legislation, the government clearly intended that Indian fisheries, including those protected by treaty rights, were to be subject to legislation. The language of the treaties after 1857 (i.e., Treaties 3, 5 and 9) leaves little room for doubt that this was the case. However, at the time these treaties were negotiated, the areas that were covered by them generally were not exploited by non-Natives for their fisheries resources and legislation was not enforced, nor was its significance generally understood by the Indian people.

Treaty 3 was "made and concluded" on 3 October 1873 with "the Saulteaux Tribe of the Ojibway Indians." The Indian people were promised, among other things,

[the] right to pursue their avocations of hunting and fishing throughout the tract surrendered ... *subject to such regulations as*

*may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefore by the said Government.*⁴⁰ [emphasis added]

As in the case of the Ojibway on the north shores of Lakes Huron and Superior, the fisheries were an important and valued resource to the Ojibway in the Rainy Lake, Rainy River and Lake of the Woods area.⁴¹ In addition to a treaty right to fish, the Treaty 3 Ojibway were promised reserves that were to be selected in conference with representatives of the government of Canada. As had occurred in earlier treaties, the selection of the location of many of the Treaty 3 reserves included fishing stations within or adjacent to the reserves. For example, an agreement, dated 1 October 1875, between the chiefs of the Rainy River Bands and J.S. Dennis, surveyor general of Canada, stipulated that fishing in the Manitou Rapids and the Long Sault Rapids of the Rainy River was "open to the Indians generally," as was fishing in the Rainy River opposite the Wild Lands Reserve #15M. That agreement also stated that if it were necessary to construct "canal locks or other public works" to bypass the Manitou Rapids or the Long Sault Rapids, and if that construction destroyed the fishery, the government of Canada would deal "fairly" with the Indian people.⁴²

During the 1870s and early 1880s, the number of non-Native commercial fishermen on Lake Huron as well as on the lower Great Lakes continued to increase. That resulted, from time to time, in conflicts between the Indian people and non-Native commercial fishermen when the commercial fishermen set their nets in areas that the Indian people claimed were their traditional fishing grounds.⁴³ The same scenario was repeated on Lake of the Woods a decade later.⁴⁴ The implementation and enforcement of closed seasons for certain species of fish and the regulation prohibiting the spearing of fish during the spawning season were regarded by the Indian people as contravening the fishing rights that were guaranteed by treaty.⁴⁵

The Department of Marine and Fisheries considered Indian people to be subject to the same regulations as Non-native people when fishing commercially or for trade in "public waters," and noted that the restrictions on fishing during the spawning season were for the benefit of all fishermen, Indian and non-Native alike. The department also considered that all waters were accessible to all fishermen, including Indian fishermen, unless they were leased for fishing.⁴⁶ However, a number of events took

place that suggest that the government officials who had the most frequent contact with Indian fishermen, the Indian superintendents, did not fully share the views of the Department of Marine and Fisheries regarding the Indian fisheries.

In 1875, Indian fishermen from Manitoulin Island lifted a number of nets belonging to non-Native fishermen that were, in the opinion of the Indian fishermen, set "in trespass within their fishery" and delivered the nets to J.C. Phipps, Indian Superintendent at Manitowaning. A similar incident occurred between Indian fishermen from the Christian Island Band and non-Native fishermen who had set their nets within the Indian fishing grounds adjacent to Christian Island and the surrounding islands in Georgian Bay.⁴⁷ The Department of the Interior, which was responsible for Indian Affairs at the time, and the local fisheries overseers separately reported the incidents to the Department of Marine and Fisheries. The Commissioner of Fisheries informed the Deputy Minister of the Interior that the Indian people had been "misled" by the Indian superintendents with regard to "reservations of fishing rights in public waters connected with Indian lands, ceded or unceded." The Commissioner noted that the fisheries laws "made no exceptions in favour of Indians"; they were subject to the same restrictions as all fishermen were, and, if they wanted to have exclusive use of any fishing ground for domestic use or for trade, they had to apply for fishing leases or licences.⁴⁸ The Deputy Minister of the Interior accordingly informed the Indian superintendents of the Fisheries Department's above-noted views and asked them to explain to the Indian people their legal status with respect to fishing stations. He also instructed the Indian Superintendents at Sarnia, Sault Ste. Marie and Prince Arthur's Landing (now part of Thunder Bay) to identify any areas where the Indian people in their superintendencies wanted to secure exclusive fishing rights, so the Department of the Interior could apply on their behalf for fishing licences for those areas.⁴⁹

The Commissioner of Fisheries sent a circular, dated 17 December 1875, to the fisheries officers of the Department of Marine and Fisheries, stating that

[l]eases and licenses for fishing limits adjoining or adjacent to Indian reserves, whether ceded or unceded, are granted to them [Indian people] on the most reasonable conditions possible. If they desire to secure the exclusive use of any fishery station where they reside, in order to supply their domestic wants, the title is granted to them free of charge. ... If on the other hand any Indian tribes desire to enter into the fishing business to compete in the markets

with [W]hite fishermen who hold leases or licenses, they are required to pay at least a nominal valuation as rent or license fee. Being themselves minors, all leases or licenses must be secured for them through the Department of Interior, charged with Indian Affairs.⁵⁰

In January 1876, the Commissioner of Fisheries further explained to the Department of the Interior his department's position on Indian fishing rights and fishing as a treaty right. The Commissioner noted with respect to treaty fishing rights that the Indian people and several of the Indian superintendents contended that

this permission ... amounts to a reservation of the exclusive right of fishery in favour of Indians; and such interpretation has been received and acted upon in various localities, occasioning violent disputes and other most unfortunate occurrences. ...⁵¹

However, the Commissioner of Fisheries further noted that, when the issue was referred in 1866 to the Crown Law Department, it was determined by that department that "fishery rights, being at common law public, cannot be made exclusive except under parliamentary sanction."⁵² The Commissioner added that the Department of Marine and Fisheries believed that

the Indians will secure by means of licenses all the freedom of fishing that the most generous interpretation of these treaties could afford them, and all the protection that they can reasonably demand. The licenses will secure them in the exclusive use of whatever limits are described therein, and will be a complete defence against intercession by others.⁵³

Shortly thereafter, the Commissioner of Fisheries noted that it was not the intent of the Department of Marine and Fisheries "to deprive the Indians of the full practical benefit" of treaty fishing rights. Rather,

... it is believed that the cordial cooperation of the Departments [of the Interior and of Marine and Fisheries] in respect of the fishing privileges which exist in the vicinity of Indian Reserves, and the occupation of fishing stations connected therewith, under a uniform system of License, will ensure to the Indians free and exclusive use of fishery grounds ample for their necessities, and which would not in any other legal manner be appropriated to their own use.⁵⁴

The Indian superintendents subsequently identified the areas that the Indian people wanted for their fishing grounds on Lake Superior and Lake Huron. Most of these requests were provided for, although some were not if they were considered to be "excessive." Most of these areas had been used as Indian fisheries for many years for both domestic and commercial purposes.⁵⁵

The Department of Indian Affairs continued its dialogue concerning "Indian claims to exclusive fishing privileges" in Georgian Bay and Lake Huron with the Department of Marine and Fisheries during the early 1880s. Marine and Fisheries maintained that it had "liberally provided for ... the *real* wants" of the Indian people by permitting the various bands living adjacent to Lake Huron or on Manitoulin Island "to fish everywhere free for their own use and consumption," and by issuing licences to bands, or by setting apart specific areas for the "sole use" of bands.⁵⁶

In 1885, the first provincial fisheries legislation in Ontario was passed.⁵⁷ It contained several provisions that were also contained in the federal *Fisheries Act*.⁵⁸ It applied to "all fisheries and rights in respect of which the legislature of Ontario has authority to legislate," including the issuing of fishery leases and fishing licences, the appointment of fisheries overseers, and regulations for the management of Crown land leased for fishing purposes. The Ontario Commissioner of Crown Lands was, like his federal counterpart, authorized to "appropriate and license or lease certain waters in which certain Indians shall be allowed to catch fish for their own use in and at whatever manner and time, and subject to whatever terms and conditions are specified in the license or lease." This overlap in legislation was eventually resolved through the courts.

A royal commission on game and fish, chaired by Dr. G.A. MacCallum, was appointed by an Ontario order-in-council, dated 13 November 1890, to investigate and make recommendations with respect to the wildlife resources of Ontario. The commission submitted its report to the provincial government on 1 February 1892, and recommended a number of specific reforms aimed at the conservation of fish and game resources. The commission also noted that greater effort had to be directed toward the enforcement of existing closed seasons, and recommended that a permanent game and fish commission be appointed as well as a provincial force of game and fish wardens to enforce the game laws.⁵⁹ The 1885 Ontario *Fisheries Act* was replaced by new fisheries laws in 1892 that reflected some of the commission's recommendations to protect and regulate the commercial and game fisheries in Ontario.

Prior to 1892, the fisheries overseers employed by the federal Department of Marine and Fisheries had not strictly enforced the closed

season regulations of the federal *Fisheries Act* against Indian people who were fishing for their own use.⁶⁰ However, in December 1892, the federal Department of Marine and Fisheries felt that the Indian people had "greatly abused" their "privilege" of fishing for their own use during the closed seasons on Lake Superior and Lake Huron by selling fish to dealers. A number of incidents had been reported by federal fisheries overseers on Lake Huron and Lake Superior, and the minister of Marine and Fisheries informed Indian Affairs that it was going to withdraw the Indian peoples' "privilege of fishing" during the closed seasons on Lake Huron, Georgian Bay and Lake Superior.⁶¹

In November 1895, the Deputy Superintendent General of Indian Affairs prepared a "Memorandum for the information of the Minister re fishing privileges claimed by Indians".⁶² His memorandum was sent in January 1896 by the superintendent general of Indian Affairs to the minister of Marine and Fisheries for his consideration with a view to issuing "free fishing licenses for Indians." According to the deputy superintendent general of Indian Affairs, recognition of the Indian "right to fish was absolute and unconditional" in the Robinson treaties.⁶³ In subsequent treaties (i.e., Treaties 3 and 5), the understanding of the Indian people and the government's representatives was that fishing was considered a "free privilege, subject to necessary regulations." He stated that,

[i]n order to get the Indians (and even with regard to the Robinson Treaty Indians it can be done) to recognize the necessity of their own, as well as in the interests of others, if certain restrictions for the preservation of the fisheries and also with a view to fully keeping faith, which is absolutely essential to successful handling of Indians ... this Department [Indian Affairs] is strongly convinced that if it be deemed necessary to make Indians take out licenses to fish for domestic consumption, or for sale or barter, licenses should be issued free of charge, and for the sake of convenience to bands collectively, upon requisition of their respective Agents.⁶⁴

Indian Affairs conceded that "the issue of licenses to fish during the close season should be restricted to fishing for domestic consumption and confined to Indians who can support themselves by no other means."⁶⁵ The Deputy Superintendent of Indian Affairs recommended that fishing licences be granted to bands "free of charge" because, contrary to the belief that free fishing licences would "diminish the Indians' respect for them," such licences would

... bring the Indians into sympathy with the regulations and so not only save the Department of Fisheries expense in watching the Indians but also the half breeds and whites, for the Indians would then recognize it to be in their own interest to prevent infraction of the regulations, and they would virtually form a sort of volunteer preventative force, acting in the interest of the Fisheries Department.⁶⁶

Subsequently, Marine and Fisheries reduced the fee for fishing licences issued to Indian fishermen to \$1.00 from the \$5.00 fee charged for licences issued to non-Native fishermen. Strict observation of the closed season regulations was not, in the Department's view, always adhered to by Indian fishermen and in March 1896 Indian Affairs repeated its proposal, first made in 1883, to Marine and Fisheries that a commission be appointed to determine the rights of Indian people with respect to fishing. However, Marine and Fisheries would not agree to such a commission at that time; the issue of federal versus provincial jurisdiction over fisheries was before the court.⁶⁷

Resolution of Federal-Provincial Dispute Over Control of Fisheries

The coexistence of the federal *Fisheries Act* and the Ontario *Fisheries Act* raised several questions concerning the respective rights of Canada and Ontario, as well as of Nova Scotia and British Columbia, to exercise jurisdiction over fisheries within the boundaries of the provinces. In February 1894, this issue was referred to the Supreme Court of Canada for "hearing and consideration."⁶⁸ Canada contended that under Section 91(12) of the *BNA Act* it had unlimited legislative authority to regulate sea-coast and inland fisheries and the provincial legislatures had no jurisdiction to pass legislation pertaining to inland fisheries in provincial waters.⁶⁹ Ontario contended that the beds of all navigable waters within the province became the legislative responsibility of the province under Section 109 of the *BNA Act* and that

the right of fishery therein is in the public as of common right, and therefore within the provincial rights of legislation in so far as by force of section 109 within the territorial rights of the provinces. The provinces have entire power over the property and the right of taking, provided they take subject to the laws enacted by the Dominion with reference to capture or close season, which does not and cannot affect the right of property in the provincial fisheries.⁷⁰

The Supreme Court ruled that the Government of Canada had the authority to enact legislation for the protection of the inland fisheries and that the Government of Ontario had proprietary interests in the fisheries and the authority to issue licences for fisheries within the province. The decision was appealed to the Judicial Committee of the Privy Council. The decision, provided in 1898, upheld the Supreme Court ruling.⁷¹

Meetings were subsequently held between the federal minister of Marine and Fisheries and the premier of Ontario to discuss the implications of the decision. By agreement, the Government of Ontario "assumed her rights in full, and ... administer[ed] the issue of Fishery leases and licenses" to Indian people in the province.⁷² The provincial and federal acts were amended accordingly. The Ontario *Fisheries Act* applied to "all fishing and rights of fishing and all matters relating thereto, in respect of which the Legislature of Ontario has authority to legislate," including the issuing of fishery leases and fishing licences "for fisheries and fishing wheresoever situated or carried on, in Provincial waters."⁷³ This included the issuing of leases or licenses to Indian people for fishing for their own use,

[p]rovided, nevertheless, that nothing herein contained shall prejudicially affect any rights specially reserved to, or conferred upon Indians by any treaty or regulation in that behalf made by the Government of Canada, nor shall anything herein apply to, or prejudicially affect, the rights of Indians, in any, in any portion of the Province as to which their claims have not been surrendered or extinguished.⁷⁴

This provision no longer appears in the Ontario *Game and Fish Act* or the provincial fishery regulations.

Treaty 9 was negotiated in 1905 and 1906, at a time when federal-provincial jurisdiction over fisheries was well established. Unlike in preceding treaties, Ontario was a signatory to Treaty 9 with Canada and the First Nations. One of the treaty's provisions fully reflected the state of fisheries legislation. It stipulated that the "Ojibeway, Cree and other Indians" who lived in the treaty area between the Albany River and the height of land marking the Lake Superior watershed to the south

shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered ... *subject to such regulations as may from time to time be made by the government of the country* ... and saving and excepting such tracts

as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.⁷⁵ [emphasis added]

Adhesions to Treaty 9 were signed in 1929 and 1930 by the Indian people living north of the Albany River and east of the areas covered by Treaties 3 and 5. These adhesions included the same provisions for hunting, trapping and fishing as were in the original treaty.

Interpretation in the Courts of Treaty Rights to Fish

Indian people have a long history of challenging the government's interpretation of Aboriginal and treaty rights to fish, initially by means of petitions and then through the courts. These past attempts to have their rights recognized were generally not successful.⁷⁶ More recently, however, the decisions of the court have been more favourable. The decisions handed down, for example, in the Sparrow case in British Columbia,⁷⁷ the Denny, Paul and Sylliboy case in Nova Scotia,⁷⁸ and the Agawa case in Ontario,⁷⁹ are precedent-setting decisions that will reshape the regulation of fisheries in the country.

The Agawa case involved charges against a member of a Robinson Huron Treaty band for commercial fishing without a commercial fishing licence, contrary to the *Fisheries Act* and regulations made by the government of Ontario pursuant to it. The Ontario Court of Appeal found that the federal government had the authority to regulate the exercise of the Robinson Huron Treaty right to fish if the purpose of the applicable regulation(s) is for the purpose of valid conservation purposes. The Supreme Court of Canada declined, in the fall of 1990, to hear the appeal of this case.

The Denny, Paul and Sylliboy case involved charges against Micmac Indians in Nova Scotia for fishing without a licence, contrary to the *Fisheries Act* and regulations made by the government of Nova Scotia pursuant to it. The Nova Scotia Court of Appeal found that Indian people who have an Aboriginal right to fish for food also have "the right to an allocation of any surplus of the fisheries resource which may exist after the needs of conservation have been taken into account. This right is subject to reasonable regulation of the resource in a manner that recognizes and is consistent with" rights guaranteed by section 35(1) of the *Constitution Act, 1982*.

In Sparrow, the Supreme Court of Canada ruled that, after conservation needs are met, the Aboriginal right to harvest for food has a priority over other user groups in the allocation of the fishery resource. The case involved a member of the Musqueam Band in British Columbia who was charged under the *Fisheries Act* with fishing with a drift net

which was longer than the net length provided for by the terms of his Band's Indian food fishing licence, issued by the government of British Columbia. The constitutional question of whether the net length restriction contained in the band's food fishing licence is inconsistent with section 35(1) of the *Constitution Act, 1982* was sent back to trial according to the analysis set out in the Supreme Court of Canada ruling.

While the need for conservation of the resource remains paramount, these three cases are defining Aboriginal and treaty fishing rights in ways that clearly suggest that government needs to reassess its allocation and management practices to ensure that the spirit and intent of the treaty promise, as well as the Aboriginal right to fish, both of which are constitutionally protected, are recognized and respected. It is unlikely that Indian people would disagree with conservation needs as a first principle in the management and allocation of the fisheries. Their involvement in what is, to many, an inexact science, would make a welcome and significant contribution, and mark the beginning of a new era in fisheries resource management.

Notes

The views expressed here are those of the author and do not represent those of the Ontario Native Affairs Secretariat or of the Government of Ontario.

- 1 *R. v. Sparrow*, "Supreme Court of Canada (May 31, 1990).
- 2 E.S. Rogers, "Southeastern Ojibwa," *Handbook of North American Indians*, vol. 15 (Washington D.C.: Smithsonian Institution, 1978); T.E. Holzkamm, V.P. Lytwyn and L.G. Waisberg, "Rainy River Sturgeon: An Ojibway Resource in the Fur Trade Economy," *The Canadian Geographer* 32, no. 3, (1990): 194-205; J.J. Van West, "Ojibway Fisheries, Commercial Fisheries Development and Fisheries Administration, 1873-1915: An Examination of Conflicting Interests and the Collapse of the Sturgeon Fisheries of the Lake of the Woods," *Native Studies Review* 6, no. 1 (1990): 31-65; G.A. MacDonald, "The Saulteau-Ojibwa Fishery at Sault Ste. Marie, 1640-1920," M.A. thesis, University of Waterloo 1978.
- 3 A. Shortt and A.G. Doughty, *Documents Relating to the Constitutional History of Canada, 1759-1791* (Ottawa: King's Printer, 1907).
- 4 *R. v. Isaac* (1975) 13 N.S.R. (2d) 460 (N.S.S.C.A.D.).
- 5 *Indian Treaties and Surrenders*, vol. 1, (Toronto: Coles Publishing Company, 1971; orig. Ottawa, Queen's Printer, 1891), pp. 48-49; National Archives of Canada (NAC), Indian Affairs Records (RG10), vol. 35, pp. 20578-79.
- 6 *R. v. Isaac; Denny, Paul and Sylliboy v. The Queen*, Nova Scotia Court of Appeal, March 5, 1990, unreported.
- 7 *Indian Treaties and Surrenders*, pp. 34-35, 35-36, 36-40.

- 8 Ibid., pp. 50-53. The surrender document does not include any reference to the fishery in the Etobicoke River.
- 9 *An Act for the Preservation of Salmon* (47 Geo. III).
- 10 See also A.B. McCullough, *The Commercial Fishery of the Canadian Great Lakes*, Studies in Archaeology, Architecture and History, National Historic Parks and Sites, Canadian Parks Service (Ottawa: Environment Canada, 1989), p. 19.
- 11 *An Act the better to protect the Mississauga tribes living on the Indian reserve of the River Credit, in their exclusive right of fishing and hunting therein* (10 Geo. IV, Cap. III).
- 12 *An Act to regulate the Inspection of Fish, and to prevent non-residents in this Province [of Upper Canada] from fishing within the waters of the same* (3 Vict., Cap. XXIV).
- 13 *An Act to repeal and reduce into one Act the several laws now in force for the Preservation of Salmon in that part of this Province formally Upper Canada* (8 Vict., Cap. XLVII).
- 14 NAC, RG10, vol. 1844, "Treaty 60," "Treaty 61."
- 15 *R. v. Agawa*, (1988), 28 O.A.C 201; also in *Canadian Native Law Reporter* 3 (1988): 73-91; see also Macdonald (1978).
- 16 NAC, RG10, vol. 1844, "Treaty 61."
- 17 *Indian Treaties and Surrenders*, "Cession 91A," pp. 227-28.
- 18 NAC, RG10, vol. 1844, "Treaty 60," "Treaty 61."
- 19 Ontario Archives (OA), RG1, A-1-1, Keating to Bruce, 2 December 1852.
- 20 NAC, RG10, vol. 323, pp. 216151-55.
- 21 Ibid., pp. 216149-50.
- 22 OA, RG1, A-1-6, vol. 66.
- 23 NAC, RG1, E8, vol. 46.
- 24 See V.P. Lytwyn, "Ojibway and Ottawa Fisheries around Manitoulin Island: Historical and Geographical Perspectives on Aboriginal and Treaty Fishing Rights," *Native Studies Review* 6, no. 1 (1990): 1-30.
- 25 Canada, *Annual Report of the Department of Crown Lands*, 1856.
- 26 McCullough, (1989), p. 20.
- 27 NAC, RG10, vol. 3908, file 107297-1.
- 28 OA, RG1, A-1-1, Box 8.
- 29 NAC, RG10, vol. 323, pp. 21644-46.
- 30 Ibid.
- 31 Ibid.

- 32 *An Act to provide for the better regulation of Fishing and protection of Fisheries* (29 Vict., Chap. XI), section 17(8).
- 33 Ibid., p. 216134.
- 34 Ibid.
- 35 Ibid., pp. 215132-33.
- 36 See Lytwyn, (1990).
- 37 *An Act for the regulation of Fishing and protection of Fisheries* (31 Vict., Chap. LX), section 19.
- 38 Ibid., section 13(8).
- 39 NAC, RG10, vol. 6960, file 475/20-2; vol. 6964, file 488/20-2, pt. 1.
- 40 NAC, RG10, vol. 1918, file 2790B, "Treaty #3." Treaty 5, negotiated two years later, has identical fishing provisions.
- 41 See Holzkamm, Lytwyn and Waisberg, (1988); Van West, (1990).
- 42 Ibid., vol. 1918, file 2790D; vol. 214, file 62590-4-2. This agreement can be interpreted as a promise of compensation for loss of the exercise of a treaty right as well as mitigation for damage to the natural environment.
- 43 See Lytwyn (1990) for an example of an incident at Manitoulin Island.
- 44 See Van West (1990).
- 45 NAC, RG10, vol. 2964, file 1099 1/2; vol. 2184, file 36918; vol. 2185, file 37135.
- 46 Ibid., vol. 6964, file 488/20-2, pt. 1.
- 47 Ibid., vol. 1972, file 5522, file 5530.
- 48 Ibid., vol. 1972, file 5530.
- 49 Ibid.
- 50 Ibid.
- 51 Ibid., letter dated 19 January 1876, from Whitcher to Meredith.
- 52 Ibid.
- 53 Ibid.
- 54 Ibid., letter dated 20 January 1876, from Whitcher to Meredith.
- 55 Ibid.; vol. 1972, file 5530; vol. 6964, file 488/20-2, pt. 1.
- 56 Ibid., vol. 6964, file 488/20-2, pt. 1.
- 57 *An Act to Regulate the Fisheries of this Province* (48 Vict., Cap. 9).
- 58 See also McCullough (1989), p. 94.

- 59 Ontario, Game and Fish Commission, *Commissioners' Report*, (Toronto: Warwick and Sons, 1892).
- 60 NAC, RG10, vol. 2439, file 91333.
- 61 Ibid. vol. 2439, file 91338.
- 62 Ibid., vol. 3908, file 107297-1.
- 63 This is the substance of the question considered by the court in *R. v. Agawa*, (1988), O.A.C. 201; also in *Canadian Native Law Reporter* 3 (1988): 73-91.
- 64 NAC, RG10, vol. 3908, file 107297-1.
- 65 Ibid.
- 66 Ibid.
- 67 Ibid.
- 68 "In the Matter of Jurisdiction over Provincial Fisheries," *Supreme Court Report*, vol. 26, p. 446. See also McCullough (1989), pp. 94-95; Van West (1990), pp. 43-54.
- 69 Ibid., pp. 451-52, 469.
- 70 Ibid., p. 487.
- 71 "Attorney General for the Dominion of Canada v. Attorneys General for the Provinces of Ontario, Quebec, and Nova Scotia," *The Law Reports* [Privy Council], 26 May 1898, pp. 700-17. See also McCullough (1989), pp. 94-95; Van West (1990), pp. 43-45.
- 72 "In the Matter of Jurisdiction over Provincial Fisheries," *Supreme Court Reports*, vol. 26, pp. 562, 566, 575. See also Canada, Department of Marine and Fisheries, *Annual Report*, (1899), p. ix. For a discussion of the continuing jurisdictional dispute, see McCullough (1989), pp. 95-6; and Van West (1990), pp. 45-46.
- 73 *An Act respecting the Fisheries of Ontario* (60 Vict., Chap. 9).
- 74 Ibid.
- 75 NAC, RG10, vol. 3033, file 325,225-1, "Treaty 9."
- 76 F. Tough, "Ontario's Appropriation of Indian Hunting: Provincial Conservation Policies vs. Aboriginal and Treaty Rights, ca. 1892-1930," Research report, Ontario Native Affairs Secretariat (1991).
- 77 *R. v. Sparrow*, Supreme Court of Canada, 31 May 1990.
- 78 *Denny, Paul and Sylliboy v. The Queen*, Nova Scotia Court of Appeal, 5 March 1990, unreported.
- 79 *R. v. Agawa*, (1988), O.A.C. 201; also in *Canadian Native Law Reporter* 3 (1988): 73-91.