

The Ojibway Understanding of
Fishing Rights under Treaty 3:
A Comment on Lise C. Hansen,
“Treaty Fishing Rights and the
Development of Fisheries
Legislation in Ontario: A Primer”

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Analysis and interpretation of the many treaty agreements among First Nations and the Crown is a critical scholarly activity. These treaties are the subject of much attention, both in the courts and in the process of constitutional change that dominates the national Canadian agenda. It is essential that the nature and scope of these agreements be clearly understood and their contents reported as precisely as possible.

A recent instance in the pages of *Native Studies Review* merits comment and correction. In “Treaty Fishing Rights and the Development of Fisheries Legislation in Ontario: A Primer” (vol. 7, no. 1), Lise C. Hansen contends 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. . . . [T]he treaty right to fish was couched in language that suggests it was subject to regulation and disposition.” Hansen so describes one of the “numbered” treaties, Treaty 3, which covers northwestern Ontario from Lac des Mille Lacs near Thunder Bay to the Manitoba border. Hansen contends that the fishing promise made to the Ojibway in 1873 is identical to that recorded in the document published by Canada as Treaty 3. That document surrounds the treaty fishing right with the regulatory control of Canada. According to Hansen’s interpretation:

The Indian people were promised, among other things, “[the] right to pursue their avocations of hunting and fishing . . . *subject*

to such regulations as may from time to time be made by Her Government of Her Dominion of Canada."¹ [Hansen's emphasis]

This presentation confuses the "promise," as understood by the Ojibway at the negotiations, with the "promise" recorded in the document published by Canada as Treaty 3. But that document, while often cited as the sole authority for the treaty, is prepared in a legalistic variant of written nineteenth century English. It is doubtful that it can be translated literally into spoken Ojibway.

Guidelines for judicial interpretation of Indian treaties are not inordinately complex. For example, in *Nowegijick v. The Queen*, the Supreme Court of Canada adhered to a principle that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian."² Vernacular accounts of the agreement, including the discussions leading up to them and subsequent interpretations by participants, are more useful in ascertaining the understandings held by the Ojibway, as spoken to them in their language by government interpreters. In the case of the agreement known as Treaty 3, there are several such documents.³ The issue of discrepancies between the text of the document published by Canada as Treaty 3 and the written record of the oral discussions and agreements, was first explicitly recognized by Canada's officials in 1899. They concluded that the document was not a complete record of the treaty agreement of 1873.⁴

Given this attention to deficiencies in the government text of Treaty 3, Hansen should have clearly differentiated between that text and alternative evidence relating to fishing rights of Treaty 3 Indians. It is surprising that she would contend that the fishing promise made to the Ojibway chiefs in 1873 explicitly included a provision that the right was subject to regulation by Canada. The historical evidence available indicates that the Ojibway understanding of the treaty agreement included no such provision, whatever words the government commissioners may have inserted into the English language document. The negotiation of Treaty 3 was recorded in a number of documents. One may search in vain among these for statements that a treaty fishing right was to be governed by regulations, or for any agreement by Ojibway chiefs that *their* fisheries would be administered by Canada. During treaty negotiations Chief Sakatcheway of Lac Seul and English River stated that in exchange for agricultural assistance, "The waters out of which you sometimes take food for yourselves, we will lend you in return."⁵ In a 1946 letter to a Special Joint Committee of the Senate and House of Commons, the chief and councillors of Lac Seul Band reiterated their understanding of the treaty promise. The agreement as "first explained" to them had guaranteed their right to fish "without

hindrance." They suggested that, had the subject of regulatory control been "fully explained" at that time to their representatives, the treaty either would not have been signed or would have been amended to protect their livelihood:

We are satisfied with our conception of the original agreement and want it to continue; the terms to be carried out as promised and as it was first explained to our representatives who signed the Treaty for the Indians. . . . Our understanding of the original Treaty was that we could hunt and fish without hindrance in the territory ceded by us. The Indians who signed the Treaty could not possibly anticipate any future Government regulations which would change this, as Game and Fish laws were unknown to our forefathers. It seems reasonable to suppose that the white man who arranged the treaty must have known something about Game and Fishery regulations even in those days of long ago. We believe if this had been fully explained to the Indians the Treaty either would not have been signed or would have contained a positive statement giving the Indians full right to hunt and fish without restrictions.⁶

A perception held by an Ojibway signatory of Treaty 3, of the scope of that agreement as it related to fisheries, was noted in a recent article published in *Native Studies Review* by J.J. Van West, "Ojibwa Fisheries, Commercial Fisheries Development and Fisheries Administration." While Hansen cited this article, she did not note the comments made regarding the Ojibway view of the treaty fishing promise. Van West concluded that the Ojibway "did not evidently surrender their collective proprietary rights to the fisheries when they signed Treaty Three."⁷ He referred (p. 54, fn 27) to an 1890 statement by Northwest Angle Chief Conducumewininie, who had signed treaty:

When the Treaty was made with us at the North-West Angle we saw the lips of the Government moving, but now they are closed in silence, and we do not know what is done in the councils of our mother, the Queen. . . . [W]hen we gave up our lands to the Queen we did not surrender our fish to her, as the Great Spirit made them for our special use.⁸

The view expressed by the chief finds some corroboration in a non-Indian recollection of the negotiations. One of the Treaty 3 commissioners, Simon James Dawson, recalled his understanding of rights to traditional fisheries, when writing as a Member of Parliament in 1888. The matter had

arisen then due to fears that commercial fishing companies had commenced operations in the Treaty 3 territory and were thereby depleting an Ojibway resource. In Dawson's recollection, at the treaty negotiations the Ojibway were led to believe that they would "forever have the use of their fisheries"; referring to the fishing right, he wrote to the Deputy Superintendent General of Indian Affairs and explained his understanding:

taken by itself, the wording thereof certainly does not convey an exclusive right, but it does convey to the Indians the right to pursue their avocations of hunting and fishing and of course this right, so conveyed, has in equity to be considered not from the wording alone, but from the evident spirit and meaning of the treaty, as well as from the discussions explanatory of the wording which took place at the time the Treaty was being negotiated. . . . I am in a position to say that, as an inducement to the Indians to sign the Treaty, the commissioners pointed out to them that, along with the land reserves and money payments, they would forever have the use of their fisheries. This point was strongly insisted on and it had great weight with the Indians, who for some years previously had persistently refused to enter into any Treaty.⁹

Dawson also wrote, as noted by Van West, the Ojibway believed that while Euro-Canadians were "perfectly free to use rod and line they regard the sturgeon as their own particular property."¹⁰

Hansen may be correct in stating that the government interpretation of the treaty fishing right was mirrored in fisheries legislation. However, that is an issue separate from assessment of the content of the treaty agreement, particularly the Indian understanding of the treaty. Recent decisions of the Supreme Court of Canada explicitly adopt treaty interpretation principles first stated in the 1899 United States Supreme Court judgment in *Jones v. Meehan*:

In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the

terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.¹¹

Because of the judicial priority accorded to the Indian understanding of treaty terms, it is important that scholars differentiate between government texts and other historical documents that may more accurately reflect the actual terms of any agreement. Differences between Native understandings of treaty agreements and the government text of the numbered treaties have been assessed by a variety of scholars and officials.¹² A recent example of careful analysis is provided by Jean Friesen in her article "Grant Me Wherewith to Make My Living." After extensive review of pre-treaty Indian land use and the record of treaty negotiations, she noted that, in southern Manitoba during and after 1871,

the Indian position on resource use rested on two assumptions: that at the treaty they transferred land but not resources and that the verbal assurances of Treaty 1 confirmed their freedom to hunt and fish as before. . . . [T]hey had transferred land, but not fish and game.¹³

It is by such conscientious historical research that the actual Indian understanding of the various treaty promises will be revealed. To describe treaty promises as if the government version was objective truth is to reflect the biases of an earlier age in Canadian historiography.

Readers of this journal may be interested in further information about the context of assertions that treaty promises are bound by regulations. Hansen cited several recent Supreme Court decisions which are widely seen as strengthening treaty or Aboriginal rights, but she neglected to refer to *R. v. Horseman*, in which a majority of the Supreme Court ruled in 1990 that Alberta law against selling game "is consistent with the very spirit of Treaty 8 which specified that the right to hunt would still be subject to government regulations."¹⁴ Ontario is at present involved in bitter litigation over Aboriginal fishing rights with the Saugeen and Cape Croker First Nations. The Ontario position at trial, as reported in the Owen Sound *Sun Times* of 20 June 1992, is that the fishing right of those First Nations "can be regulated and [that it] is not an unlimited right," a position which, according to Crown attorney Bruce Pugsley, "was reached after considerable consultation with the legal services branch" of the Ministry of Natural Resources. The Ministry imposed a ban on commercial sales of Cape Croker fish, despite a previous commitment from the Minister of

Natural Resources that issues of allocation, jurisdiction and co-management should be negotiated. Readers who are interested in the actions of the government of Ontario in this case and in the concurrent "negotiations" should refer to the several newspaper reports.¹⁵ In Ontario to date, co-management discussions between various First Nations and Ontario have not produced agreements. In the case of Treaty 3 First Nations in northwestern Ontario, fishing agreement negotiations with Ontario have been similarly unproductive, following the "temporary" withdrawal of provincial negotiators in 1986.

Appropriations of the Ojibway share of existing fisheries by both Canada and Ontario have some historic depth in the Treaty 3 region. The destruction of the lake sturgeon fishery during the 1890s by non-Indian commercial companies has been reviewed previously.¹⁶ Later appropriations were more deliberate and reflected calculated policy by Ontario, rather than unrestricted destruction in a regulatory vacuum of competing federal and provincial jurisdictions. During the 1930s, many Ojibway communities were unable to obtain sufficient commercial fishing licences from Ontario, as the grounds were already allocated to Euro-Canadian fishermen. Ojibways were forced to fish without licences to provide for their families. According to a report on a Treaty 3 Indian meeting by the Fort Frances Indian Agent in 1938,

the Chiefs and Headmen . . . had appointed a small delegation to go to Ottawa, to interview the Department in respect to their Treaty, the greatest discussion was in regard to Fishing and Hunting because the Game Wardens are seizing their nets and boats or taking them up in court and being fined for fishing. The Indians cannot make a living unless they are permitted to sell a few fish, as fishing and trapping is the only way they have of making a living. . . . If the Indians are not allowed to catch a few fish to sell, it will be as I was told by a few of my Indians, they said that if they could not sell a few fish to provide for their families, that they would have to go to jail, because they could not see their families starve, and I think they are telling the truth in that respect.¹⁷

The Ontario response was summarized in 1939 when the Kenora Indian Agent commented:

Mr. Taylor, Deputy Minister of Ontario Game and Fisheries when talking to me last summer, said it was nothing to do with him, when asked how the Indians were going to make a living, it was "our Department's baby," not his, and the Indians were not going to live on the Provinces, moose, deer, fish &c, and some other way of their

making a living should be devised by us. The Indians and all of us are very much discouraged, they say the Treaty was signed for "as long as the rivers flow &c," and we are breaking the treaty.¹⁸

Ontario's subsequent management of northwestern Ontario fishery resources has had severe economic impacts on a number of Treaty 3 communities, such as Shoal Lake and Big Grassy. Prior to 1978 these were heavily committed to commercial fishing.¹⁹ Since 1978, the Ontario Ministry of Natural Resources has imposed quotas on high-value fish species such as walleye, and transferred commercial allocations to the non-Native sport fishing sector. Its eventual target for both Native and non-Native commercial fisheries on Lake of the Woods is "an eventual conversion of the majority to more beneficial use by local residents through the tourist industry."²⁰ This "conversion" has led to a decline of reserve jobs for Ojibways and a transfer of the resource to non-Indian tourist operations. The process of "conversion" is proceeding today, despite the several Supreme Court decisions cited by Hansen. Ontario has persisted in restricting the fishing rights of Treaty 3 Ojibway and continues to insist that its regulations have priority over treaty rights as understood by First Nations.

Given the importance of conclusions respecting the spirit and intent of treaty provisions, scholars must carefully assess frequently conflicting documents. The presentation of treaty promises must be balanced and reflect the differing texts and understandings of the agreements. Assertions that treaty promises "mirror" regulatory Crown legislation, without explicit consideration of Ojibway interpretations or the understanding of a treaty commissioner, are expected in adversarial litigation or in the pages of government policy statements. Such statements are, however, antagonistic to the honour of the Crown and its fiduciary responsibilities to First Nations in Ontario. They are also out of place in a professional publication.

Notes

Views expressed in this comment are those of the authors and are *without prejudice* to the positions of Grand Council Treaty 3 and its member First Nations.

- 1 Lise C. Hansen, "Treaty Fishing Rights and the Development of Fisheries Legislation in Ontario: A Primer," *Native Studies Review* 7, no. 1 (1991), pp. 1, 9-10. Her citation of the "promise" is that replicated in the document published by Canada as Treaty 3; see Canada, *Treaty No. 3 Between Her Majesty The Queen and the Saulteaux Tribe of Ojibbeway Indians at the Northwest Angle on the Lake of the Woods With Adhesions* (Ottawa, 1966). Hansen is Director of the Corporate Policy Development Branch of the Ontario Native Affairs Secretariat, which reports to the Hon. C.J. (Bud)

- Wildman as Minister Responsible for Native Affairs. Wildman is also Minister of Natural Resources.
- 2 Supreme Court of Canada, *R. v. Nowegijick*, *Canadian Native Law Reporter*, no. 2 (1983), p. 94.
 - 3 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which They Were Based, and Other Information Relating Thereto* (Toronto, 1971 [1880]), pp. 52-76, record of the "shorthand reporter" as published originally in the newspaper *The Manitoban*; National Archives of Canada (hereafter NAC), Records of the Department of Indian Affairs (hereafter cited as RG 10), vol. 1918, file 2790B, Morris to Minister of Interior, 14 Oct. 1873; NAC, MG 29, C67, Simon J. Dawson, "Notes Taken at Indian Treaty Northwest Angle, Lake of the Woods, from 30th Sept. 1873 to close of Treaty"; NAC, RG 10, vol. 1918, file 2790B, Morris to Minister of Interior, 14 October 1873, appendix A, Notes of Joseph Nolin, "The following are the Terms of the Treaty held at Northwest Angle the Third day of October, Eighteen Hundred and Seventy Three."
 - 4 NAC, RG 10, vol. 2545, file 111834, pt. 1, Reginald Rimmer, "Re the Titles of the Dominion and the Province of Ontario Respectively in Indian Lands, Indian Reserves and in the Royal Metals and Other Minerals Therein and Timber Thereon." After examination of some of the documents relating to the negotiations, Rimmer, Law Clerk of the Department of Indian Affairs, concluded that "there were other conditions relating to the reserves not embodied in the treaty, but which should have been so embodied, inasmuch as they were imposed by the Indians during the negotiations for the treaty, and which are in view of the illiterate condition of the Indians as much conditions of their enjoyment as those actually inserted in the treaty. These conditions include the enjoyment of minerals, precious or base, discovered on the reserve."
 - 5 Morris, *The Treaties*, p. 63.
 - 6 Canada, Special Joint Committee of the Senate and the House of Commons, "Minutes of Proceedings and Evidence No. 26," pp. 1428-31, 23 May 1947, Appendix FP, Submission by Lac Seul Band, 16 Sept. 1946.
 - 7 John J. Van West, "Ojibwa Fisheries, Commercial Fisheries Development and Fisheries Administration, 1873-1915: An Examination of Conflicting Interest and the Collapse of the Sturgeon Fisheries of the Lake of the Woods," *Native Studies Review* 6, no. 1 (1990), p. 34.
 - 8 Canada, Sessional Papers, 1891, no. 18, "Annual Report of the Department of Indian Affairs 1890," pp. 200-01. See also Tim E. Holzkamm, Victor P. Lytwyn and Leo G. Waisberg, "Rainy River Sturgeon: An Ojibway Resource in the Fur Trade Economy," *The Canadian Geographer* 32, no. 3 (1988), pp. 194-205.
 - 9 NAC, RG 10, vol. 3800, file 48542, S.J. Dawson to L. VanKoughnet, 28 May 1888.
 - 10 Van West, "Ojibwa Fisheries," p. 53, fn. 27.
 - 11 Supreme Court of Canada, *R. v. Sioui*, *Canadian Native Law Reporter*, no. 3 (1990), p. 134; United States Supreme Court, *Jones v. Meehan*, 175 U.S. 1 (1899), pp. 10-11.

- 12 Rene Fumoleau, *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Toronto, 1973); Richard Price (ed.), *The Spirit of the Alberta Indian Treaties* (Montreal, 1979). Note that Alexander Morris in 1880 referred to discrepancies between the collateral oral agreements and the government texts of Treaties 1 and 2; see Morris, *The Treaties*, p. 126. For a discussion of the development of the treaty system in North America, see Dorothy V. Jones, *License for Empire: Colonialism by Treaty in Early America* (Chicago, 1982).
- 13 Jean Friesen, "Grant Me Wherewith to Make My Living," in *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, edited by Kerry Abel and Jean Friesen (Winnipeg, 1991), pp. 141-55.
- 14 Supreme Court of Canada, *R. v. Horseman*, *Canadian Native Law Reporter*, no. 3 (1990), p. 107.
- 15 Owen Sound *Sun Times*, "Ojibwa Fishery Centuries-Old, Trial Told," 16 June 1992; "Court Hears Native Concerns over Fishing Ignored," 17 June 1992; "Treaties Ended Fishing Rights, Crown Argues," 18 June 1992; "Fishing Is Identity: Expert," 19 June 1992; "Fish Quota an Infringement," 20 June 1992; "Fish Ban a Hardship, Say Local Chiefs," 30 June 1992. See also the *Toronto Globe and Mail*, "Indians Continue Commercial Fishing: Natives Accuse Government of Negotiating in Bad Faith," 1 July 1992, p. A5.
- 16 Van West, "Ojibwa Fisheries"; Holzkamm, Lytwyn and Waisberg, "Rainy River Sturgeon."
- 17 Canada, Department of Indian and Northern Affairs, Central Registry Files, file 485/3-7, vol. 1, A. Spencer to Secretary, 27 Sept. 1938.
- 18 NAC, RG 10, vol. 8865, file 1/18-11-13, pt. 1, F. Edwards to M. Christianson, 15 Apr. 1939.
- 19 For a pre-quota view of several Treaty 3 commercial fisheries, see Edward S. Rogers, *Ojibwa Fisheries in Northwestern Ontario* (Toronto, 1972), pp. 24-26, 32-33.
- 20 Ontario, Ministry of Natural Resources, *Report on the Commercial Fish Review* (1991), p. 13; for other statements of policy, see Ontario, Ministry of Natural Resources, *Kenora District Fisheries Management Plan* (1988), pp. 5-7, 12-13, 17, 24, 35.