

A Rejoinder to Waisberg and Holzkamm

Lise C. Hansen

The editors of the *Native Studies Review* have asked that I provide a rejoinder to Leo Waisberg and Tim Holzkamm's critical commentary directed at my paper "Treaty Fishing Rights and the Development of Fisheries Legislation in Ontario: A Primer" (vol. 7, no. 1, 1991). I am pleased to respond to the issues that Waisberg and Holzkamm have identified as problematic.

Waisberg and Holzkamm appear to misunderstand the intent of my paper, which is to analyze, within the context of the development of fisheries legislation, the periodic wording changes in the written versions of the treaties that were used to describe the promises made to Aboriginal people in regard to the fisheries. The intent of the paper is not to ignore or deny the Aboriginal perspective, as Waisberg and Holzkamm suggest. Rather, the intent is to examine how the wording that was used in the written version of several treaties changed as fisheries legislation evolved and government assumed more of a regulatory role in this field. This was due, in part, to an increasing awareness of principles of conservation. The wording changes suggest that government's perception of the treaty right to fish was shifting from recognition of a full and free privilege to a right that was subject to the regulatory authority exercised by government. At no point in the paper do I suggest that government's perspective is the only or the correct perspective. I am conscious of the differences in interpretation of treaty rights between Aboriginal people and government. In point of fact, I preface my analysis by stating in the introductory comments that I am examining the "written versions" of the treaties and note that "the Indian peoples' understanding of the terms of a treaty often vary from the written version. . . . [T]he historical record indicates that oral promises were often made by the Crown's representatives. . . . These oral promises were not always recorded in the formal treaty document" (p. 2). These differences in interpretation are long-standing, as Waisberg and Holzkamm point out, and are perhaps the greatest source of misunderstanding between Aboriginal peoples and settler governments today.

Waisberg and Holzkamm also chose to ignore the scope of my paper. By first reviewing the trends in the development of fisheries legislation and then the wording used in the written versions of the treaties during the same time period, followed by a summation of recent key court decisions, I demonstrate that history is coming full circle. The Aboriginal interpretation of treaty promises is being reaffirmed and given greater credence than the government interpretation, which has tended to both prevail in the past and limit the exercise of treaty rights.

I agree with Waisberg and Holzkamm that "[i]t is essential that the nature and scope of these agreements [treaties] be clearly understood and their contents reported as precisely as possible." However, given the focus of my paper, I did not see a need to explore the specific circumstances associated with a particular treaty negotiation. Their allegations, that I do not understand the nature and scope of the treaties and do not report their contents precisely, are unfounded. I am aware of the work of several people who have examined the Aboriginal perspective, including Waisberg and Holzkamm, and cite a number of works, including theirs, in my paper at points where I feel it is important to direct the attention of the reader to examinations of that perspective.

With specific reference to Treaty 3, Waisberg and Holzkamm state that I "should have clearly differentiated between that text [the government text of Treaty 3] and alternative evidence relating to fishing rights of Treaty 3 Indians." Yet, as noted in the introductory comments of my paper, I clearly state that the written version of the treaties often varied from the Indian peoples' understanding of the treaty promises. I do not see a need to repeat this throughout the text whenever I make reference to the written version of a treaty.

I do not contend, as Waisberg and Holzkamm state, "that the fishing promise made to the Ojibway in 1873 is identical to that recorded in the document published by Canada as Treaty 3." What I do contend is that when the development of government's regulatory control of fisheries in general is taken into consideration, it should not be difficult to understand why the written version of Treaty 3 (or any of the other treaties that I refer to in my paper) was worded in a way that suggests that government intended that the treaty right to fish was to be subject to regulation in much the same way that non-Aboriginal peoples' fishing activities were. Treaties 3, 5 and 9 were negotiated during a period when fisheries had come to be considered by government as a public resource and fisheries legislation was considerably more developed than it was when the Robinson treaties, for example, were negotiated. As well, an increasing awareness of

principles of conservation was emerging as a driving force behind the development of more restrictive regulation. Undeniably, implicit in the development of such principles by Euro-Canadian governments is the denial of Aboriginal peoples' knowledge in this field.

The language that was used in all three of the numbered treaties in Ontario was a reflection of the state of fisheries legislation at the time those treaties were negotiated. I fail to understand how Waisberg and Holzkamm could conclude that "[t]his presentation confuses the 'promise', as understood by the Ojibway at the negotiations, with the 'promise' as recorded in the document published by Canada as Treaty 3."

I fail to see why Waisberg and Holzkamm would find it "surprising" that I "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." Since the subject of the paper is an examination of the written versions of the treaties, one only needs to read the written text of Treaty 3, the contents of which were precisely reported, to discern that it very clearly states that the right was to be subject to regulation. They again ignore the intent of the paper and, by twisting the analysis, imply that I conclude that the written version of the treaty was equivalent to the Aboriginal people's understanding of the treaty promise. This is done despite the fact that, at several points in my paper, I refer to the Aboriginal perspective and indicate that as a direct result of government's interpretation of the treaty right to fish, which was often different from Aboriginal peoples' understanding, the right was being increasingly circumscribed.

Toward the end of their comment, Waisberg and Holzkamm state that I "may be correct in stating that the government interpretation of the treaty fishing right was mirrored in fisheries legislation." However, they then state "that is an issue separate from assessment of the content of the treaty agreement, particularly the Indian understanding of the treaty." I disagree that these are separate issues. The examination of government's understanding of a treaty is as necessary and as valid an exercise as the examination of Aboriginal people's understanding of a treaty. Furthermore, both perspectives are required to comprehend the circumstances surrounding the negotiations and, perhaps more importantly, the events that occurred subsequently.

Waisberg and Holzkamm are correct when they state that "it is important that scholars differentiate between government texts and other historical documents that may more accurately reflect the actual terms of any agreement." Again, I must point out that this declaration is contained

in the introductory remarks of my paper. They further state that

It is by such conscientious historical research [in reference to a recent publication by Jean Friesen] 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.

Waisberg and Holzkamm are imposing upon the paper a perspective that is clearly not present nor implied. Their comment suggests that the examination of the issue from a particular perspective is less valid than the perspective they explore the issue from and, therefore, not worthy of serious consideration. As I note above, both perspectives are required to provide a comprehensive understanding of this issue. To disclaim a particular perspective because it is not popular or "sexy" is a disservice to the fundamental principles of academic research.

By the end of their comment, Waisberg and Holzkamm move outside the realm of an honest academic exchange of views. I leave it to the readers to make their own assessments of the value of my research.