

2008

Landing Native Fisheries: Indian Reserves and Fishing Rights in British Columbia, 1849-1925

Douglas C. Harris

Allard School of Law at the University of British Columbia, harris@allard.ubc.ca

Follow this and additional works at: https://commons.allard.ubc.ca/fac_pubs



Part of the [Indian and Aboriginal Law Commons](#)

Citation Details

Douglas C Harris, "Introduction" in Douglas C Harris, *Landing Native Fisheries: Indian Reserves and Fishing Rights in British Columbia, 1849-1925* (VancouverUBC Press, 2008).

This Working Paper is brought to you for free and open access by the Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

LANDING NATIVE FISHERIES



Law and Society Series

W. Wesley Pue, General Editor

The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and seek to bridge scholarship emerging from interdisciplinary engagement of law with disciplines such as politics, social theory, history, political economy, and gender studies.

A list of the titles in this series appears at the end of this book.

LANDING NATIVE FISHERIES

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

DOUGLAS C. HARRIS



UBC Press • Vancouver • Toronto

© UBC Press 2008

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without prior written permission of the publisher, or, in Canada, in the case of photocopying or other reprographic copying, a licence from Access Copyright (Canadian Copyright Licensing Agency), www.accesscopyright.ca.

16 15 14 13 12 11 10 09 08 5 4 3 2 1

Printed in Canada with vegetable-based inks on FSC-certified ancient-forest-free paper (100% post-consumer recycled) that is processed chlorine- and acid-free.

Library and Archives Canada Cataloguing in Publication

Harris, Douglas C. (Douglas Colebrook)

Landing native fisheries : Indian reserves and fishing rights in British Columbia, 1849-1925 / Douglas C. Harris.

(Law and society 1496-4953)

Includes bibliographical references and index.

ISBN 978-0-7748-1419-5

1. Indians of North America – Fishing – Law and legislation – British Columbia – History. 2. Fishery law and legislation – British Columbia – History. 3. Indians of North America – Legal status, laws, etc. – British Columbia – History. 4. Indians of North America – Land tenure – British Columbia – History. 5. Indians of North America – Canada – Government relations. I. Title. II. Series: Law and society series (Vancouver, B.C.)

KEB529.5.H8H373 2008

346.71104'6956

C2008-900087-0

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada through the Book Publishing Industry Development Program (BPIDP), and of the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Aid to Scholarly Publications Programme, using funds provided by the Social Sciences and Humanities Research Council of Canada, and with the help of the K.D. Srivastava Fund.

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

604-822-5959 / Fax: 604-822-6083

www.ubcpress.ca

Contents

Illustrations /	vii
Acknowledgments /	ix
Introduction /	1
1	Treaties, Reserves, and Fisheries Law / 18
2	Land Follows Fish / 35
3	Exclusive Fisheries / 60
4	Exclusive Fisheries and the Public Right to Fish / 78
5	Indian Reserves and Fisheries / 92
6	Constructing an Indian Food Fishery / 106
7	Licensing the Commercial Salmon Fishery / 127
8	Land and Fisheries Detached / 165
	Conclusion / 187
	Appendix: Indian Reserves Allotted for Fishing Purposes in British Columbia, 1849-1925 / 199
	Notes / 209
	Bibliography / 241
	Index / 250



Illustrations

Figures

- 0.1 Squamish Indian reserves / 3
- 1.1 Boundaries of the Douglas Treaties, 1850-54 / 22
- 1.2 Songhees Indian reserves and fisheries / 29
- 2.1 Indian Reserve Commissioner Gilbert Malcolm Sproat's route through Nlha7kapmx territory, 1878 / 44
- 2.2 Sproat's sketch of proposed reserves at Hells Gate, 1878 / 48
- 2.3 Sproat's sketch of the Palmer pre-emption and a Native fishing site on the Fraser River / 50
- 2.4 Sproat's sketch of Bartlett Newman's pre-emption and the Secwepemc fishery, June 1878 / 52
- 2.5 Bartlett Newman's Crown grant and the adjacent Kamloops Indian Reserve No. 2 on Trapp Lake / 53
- 3.1 St'átl'imc fishing sites along the middle Fraser / 62
- 3.2 Peter O'Reilly's first circuit as Indian reserve commissioner / 64
- 3.3 Exclusive fisheries reserved along the Fraser River / 67
- 3.4 Skeena canneries and location of fishing contracts / 70
- 3.5 Indian reserves and exclusive fisheries on the Nass River, 1881 / 74-75
- 5.1 Nuu-chah-nulth reserves in Barkley Sound and the Alberni Canal / 94
- 5.2 Heiltsuk reserves allotted by O'Reilly, August 1882 / 96
- 5.3 O'Reilly's sketch of the Kitkatla Reserve No. 3 Kumowdah / 99
- 6.1 Squamish reserves on Burrard Inlet and English Bay in 1925 / 118
- 7.1 Department of Marine and Fisheries districts / 130
- 7.2 Diagram of drag-seine fishery / 148
- 7.3 Diagram of the Diamond Salmon Trap at Sooke / 151
- 7.4 Heiltsuk reserves and Draney Fisheries Ltd. seine-net licence areas, 1915 / 154

- 7.5 Indian reserves allotted for fishing purposes and the areas reserved for commercial salmon-trap and seine-net licences for the 1915-16 fishing season in the southern portion of District 3 / 158
- 7.6 Indian reserves allotted for fishing purposes and the areas reserved for commercial seine-net licences for the 1915-16 fishing season in the northern portion of District 3 / 159
- 7.7 Indian reserves allotted for fishing purposes and the areas reserved for commercial salmon-trap and seine-net licences for the 1915-16 fishing season in the northern portion of District 2 / 160
- 8.1 Indian reserves and the areas reserved for commercial seine licences in Barkley Sound and the Alberni Canada, 1915-16 / 175

Photographs

- 2.1 Indian Reserve Commissioner Gilbert Malcolm Sproat in front of his tent at Yale / 43
- 2.2 Native fisher working a back eddy with a dip net from a wooden platform in the Fraser Canyon, ca. 1890 / 45
- 2.3 Indian Reserve Commission camp at Spuzzum, May 1878 / 46
- 3.1 The Fraser River north of Lillooet / 65
- 6.1 Native dip-net fishery on the Fraser River, ca. 1890 / 108
- 6.2 Domanic Charlie and his daughter Bertha / 117
- 6.3 Squamish village at the mouth of the Capilano River, ca. 1912 / 119
- 6.4 Postcard of sport fishers on the Capilano River, ca. 1905 / 122
- 7.1 Drift-net fishing on the Fraser River, 1906 / 132
- 7.2 Salmon canners on the Fraser River, 1889 / 133
- 7.3 Native fisher and boat puller on the Fraser River, 1913 / 136
- 7.4 'Namgis (Alert Bay) drag-seine crew on the Nimpkish River / 162
- 8.1 Members of the Royal Commission on Indian Affairs for the Province of British Columbia (McKenna-McBride Commission) on the steps of the provincial legislature in Victoria, 1913 / 167
- 8.2 The royal commission in session, Victoria, November 1913 / 168
- 8.3 Chief Charlie Suhilton at the meeting with the royal commission, 27 May 1913 / 169

Tables

- 5.1 Reserves and associated fisheries allotted by O'Reilly in Barkley Sound and the Alberni Canal, June 1882 / 95
- 7.1 Nationality of Fraser River fishing licence holders, 1915 / 136

Acknowledgments

In 1996, the Supreme Court of Canada issued judgments in seven Aboriginal fishing rights cases, five of which originated in British Columbia and two that came from Quebec.¹ Following the court's 1990 landmark decision in *R. v. Sparrow*,² a case involving the fishing rights of the Musqueam that established the framework for the interpretation of Aboriginal rights in the Canadian Constitution, these seven cases confirmed the pivotal place of fishing rights in the general development of Aboriginal rights in Canada.

Most of my scholarship, which also began in earnest in 1996, has revolved around the five fishing rights cases from British Columbia. They were too intriguing in their historical interpretation, and too important in their legal developments, for a student interested in law, colonialism, and British Columbia to ignore. These court decisions drew me to the fisheries.

Although not much in evidence until the final few pages of my first book, the rulings of the Supreme Court provided much of the impetus for it. To understand both the emerging case law, so clearly indicative of continuing conflict between the state and First Nations over fisheries, and the role of law in that conflict, I undertook an exploration of the historical and legal context from which the litigation emerged. In *Fish, Law, and Colonialism*, I sought to describe that context in the late nineteenth century and, through several case studies, into the early twentieth.

That project, however, left me more than a few decades short of the cases I had set out to understand. In its writing, I also discovered there were other stories to be told or retold, one of which was an account of the connections between Indian reserves and Native fisheries, the subject of two of the Supreme Court decisions from 1996: *R. v. Nikal* and *R. v. Lewis*. These cases, and the historical record that they opened for me, led me to believe that Canada's regulation of the fisheries in British Columbia could be more fully understood in the context of the process of Indian reserve allotments. Similarly, the emergence of an Indian reserve geography could

be better explained in the light of the fisheries and their regulation. Both these processes – the allotment of reserves and the regulation of the fisheries – occurred together in British Columbia and in tandem with the rise of the industrial/commercial fishery. It is this configuration – the emergence of the industrial/commercial fishery, the allotment of Indian reserves, and the introduction of Canadian fisheries law – that is the focus of this book.

The result is a book that, in terms of the fishing rights cases from 1996, speaks most directly to the issues in *Nikal* and *Lewis*. The documents that the lawyers assembled and the arguments they crafted in putting those cases before the Supreme Court of Canada were immensely helpful to me as I worked to explain the connections between Indian reserves and the fisheries. But although written in the shadow of litigation, decided and continuing, this book is neither a direct product of that litigation nor written specifically in response to it. Rather, the book is intended to address the need for a clearer understanding of the deep historical and legal currents that inform the continuing conflict over the fisheries on Canada's west coast. More generally, the book is also intended as a reflection on the role of law in the late-nineteenth- and early-twentieth-century settler colonialism of British Columbia.

A great many people have helped me over the past years as I worked on this project, and it is my considerable pleasure to thank them. The project began during my time at York University's Osgoode Hall Law School, a faculty blessed with an extraordinary collection of people. Doug Hay, whose work drew me to Osgoode, provided wonderful guidance and inspiration as my supervisor. Brian Slattery, Kent McNeil, and Gordon Christie were part of a larger community that inspired collegiality and critical inquiry. Eric Tucker as associate dean of Graduate Studies, Lea Dooley as graduate program coordinator, and Dean Peter Hogg, through their commitment to graduate studies and the graduate students, brought new life to the graduate program. Shin Imai, Shelley Gavigan, and Bill Wicken all provided critical and constructive feedback. My classmates, particularly Israel Doron and Mundy McLaughlin, were also instrumental in shaping a collegial environment of shared intellectual inquiry.

Midway through the project I accepted an assistant professor's position in the Faculty of Law at the University of British Columbia, and another group of remarkable scholars, some of whom had been my teachers, became my colleagues. Of them, Wes Pue and Ruth Buchanan deserve my particular thanks for many discussions on shared interests in law and geography, and June McCue and Michael Jackson for discussions of Aboriginal law. Michael Thoms, for much of this time a PhD student in history at UBC, engaged me in many discussions over the fisheries and provided

extensive and insightful critical feedback on earlier drafts of this manuscript. Graeme Wynn of UBC's Geography Department gave me an opportunity to present portions of the manuscript in the Nature/History/Society lecture series. Dianne Newell, as a historian and as director of the Peter Wall Institute at UBC, broadened my interdisciplinary horizons through the Early Career Scholars program. Across the Strait of Georgia at the University of Victoria, Hamar Foster and John McLaren have been immensely helpful and interested, providing encouragement and opportunities to present my work. Rosemary Ommer, who directed the Coasts Under Stress project from the University of Victoria, found space for this study within that large, interdisciplinary research project. Chris Franks and the Law and Society Research Cluster at the University of Manitoba gave me an opportunity to discuss my work with them. Dan Marshall pointed me towards some important documents in the BC Archives, and Lissa Wadewitz shared material that she had gathered at the US National Archives. Barbara Lane, whose work on and for Native peoples in British Columbia has been an inspiration to many, shared some of that inspiration with me. The comments of Keith Carlson and two anonymous reviewers, and the copy-editing of Audrey McClellan, improved the manuscript substantially. Finally, Randy Schmidt and Darcy Cullen, editors at UBC Press, helped to steer this project from manuscript to book. This result is in many ways the product of the space that York and UBC, two marvellous public universities, have provided me. For this opportunity I thank the Canadian public and its commitment to post-secondary education.

I owe many thanks to the librarians and archivists who maintain the collections of historical documents and legal materials that I relied upon and who helped me find innumerable sources. I would particularly like to thank Anne Seymour at the Legal Surveys Division of Natural Resources Canada in Vancouver, whose detailed knowledge of the records of the Indian Reserve Commissions was invaluable; Balfour Halévy at the Osgoode Hall Law School Library; Anna Holeton, Mary Mitchell, and Sandra Wilkins at the UBC Faculty of Law Library; Ralph Stanton and George Brandak at UBC Library's Rare Books and Special Collections; the archivists at the British Columbia Archives; Bernice Chong at the Law Society of British Columbia; Elida Peers at the Sooke Region Museum; and Francis Mansbridge at the North Vancouver Archives and Museum. Lawyers Matthew Kirchner, Louise Mandell, Clo Ostrove, John Rich, and Harry Slade generously provided access to trial transcripts and appeal books. Trevor Chandler gave me lodging in Lillooet and pointed me in useful directions as I explored that area. Randy Bouchard and Dorothy Kennedy supplied me with material on the Squamish fishery and the Domanic Charlie case. Susan

Marsden confirmed some of my hunches and corrected others as I sought to understand the Tsimshian fishing leases. UBC students Katie Armitage, Shelley Balshine, Michael Begg, Ian Mosby, and Chris Wendell all provided able help as research assistants. Finally, Eric Leinberger in UBC's Department of Geography has again drawn a marvellous collection of maps that accompany the text.

I have also been privileged to join many conversations with First Nations people from across the province. In particular, Cliff Atleo Jr. spent a day with me, travelling by boat down the Alberni Canal through Nuuchahnulth territory, and Albert (Sonny) McHalsie led me on several occasions through Stó:lō territory in the upper Fraser Valley and lower Fraser Canyon. The Musqueam Nation, on whose traditional territory the University of British Columbia sits, provided me with several opportunities to present my work and to engage in discussion about the fisheries. Leona Sparrow has been particularly supportive. In addition, the First Nations Legal Studies Program at UBC attracts some wonderful students, and it has been my privilege to teach and learn from many of them, particularly Halie Bruce, Bruce Stadfeld, and Ardith Walkem.

I thank the various organizations that generously provided funding for this project, including York University, the Law Foundation of British Columbia, Coasts Under Stress (funded by the SSHRC, NSERC, and associated universities), UBC Faculty of Law, the British Columbia Heritage Trust, and the Osgoode Society for Canadian Legal History.

Finally, my parents have helped me in innumerable ways, but not more than by being marvellous exemplars of how to lead fulfilling and meaningful lives as university academics, parents, and now grandparents.

Candy Thomson has been with me throughout, and it is to her that this book is dedicated.

LANDING NATIVE FISHERIES



Introduction

On 21 October 1925, Domanic Charlie swung his gaff hook into the Capilano River where it runs through Squamish Indian Reserve No. 5 Capilano. The river was low after a dry summer, but with the fall rains the chum salmon, which had been schooling near its mouth, began to move into the river to spawn. With the gaff – a detachable iron hook with a connecting line at the end of a long pole – Charlie impaled a salmon and pulled it from the river. He hooked a second and hauled it ashore as well.

Nearly forty years old, Charlie was a Squamish hereditary chief who held the name of Sec-qawl-tuhn. He had been born on the south shore of English Bay and spent his life working in the local lumber industry, running log booms on the Serpentine River near the Canada-United States border with his half-brother, August Jack Khahtsahlano, and then on the Squamish River. In a pattern common for many Native people in the late nineteenth and early twentieth centuries, Charlie supplemented his wage work in the industrial resource economy by recourse to a traditional economy, including the harvesting of fish. In years when paid employment was scarce, the obverse might be true: sporadic work in the wage economy supplemented a livelihood largely derived from traditional patterns of resource procurement. In the emerging economy built over Charlie's lifetime around seasonal and cyclical resource extraction industries (fisheries, forestry, mining) and agriculture, elements of a more traditional economy provided an important source of food and, in some cases, income for many Native people.¹

The Squamish are a Coast Salish people who claim as their traditional territory the ocean and the land surrounding what is now English Bay, Burrard Inlet, and Howe Sound, as well as the drainage basins of the Squamish and Cheakamus rivers (Figure 0.1). Their village sites looked out over these bodies of water, and, as was the case for other Coast Salish peoples, some of whom shared these spaces, their traditional cultures and

economies were built around marine plants and animals, particularly fish.² The Capilano reserve includes one of those village sites. Allotted in the early 1860s, the reserve surrounds the last stretches of the Capilano River as it flows through a small flood plain and delta before emptying into the Pacific Ocean at the narrows to the inlet that forms the port of Vancouver. Identified in 1916 in the report of the Royal Commission on Indian Affairs for the Province of British Columbia as a “village site and fishing station,” the Capilano reserve had been the first of more than twenty reserves allotted to the Squamish. These reserves provided the Squamish – about 400 community members in 1916 – a small land base in their traditional territory.

The Squamish had fished their traditional territory before newcomers, primarily of European and Asian descent, began to settle on the shores around Burrard Inlet in the mid-nineteenth century. This history of prior use could be understood as one of the sources of Charlie’s right to fish in the Capilano River; he was exercising a Native or Aboriginal right to fish.³ Canada’s Department of Marine and Fisheries (Fisheries) located the legal basis of the Squamish fishery elsewhere. So far as the department was concerned, Charlie was fishing under an Indian food fishing permit that it had issued pursuant to the *Fisheries Act*. This permit allowed its holder to fish for food at times, in places, and with particular technologies that were closed to other fishers. However, the department imposed limits on the food fishery, and at the beginning of 1925 it had closed the Capilano to all fishing except angling in order to protect what it considered an important sport-fishing river. The Capilano was renowned for its steelhead, a sea-going trout and a favourite of sport fishers. Given its proximity to the growing city of Vancouver, the river was heavily fished. Some had advocated turning the river over to an angling club.⁴ That had not happened, but in 1925 Fisheries increased its surveillance of the Native fisheries on the river. In October, the recently appointed Fisheries officer, Austin Spencer, an angler himself, watched Charlie pull the two chum salmon from the water. Later that day he charged Charlie under the *Fisheries Act* with catching fish in the Capilano River “by means other than angling.”

The case of *Rex v. Charlie* appeared on the docket in the local police court the next week. Several weeks later, in a reserved judgment, the magistrate acquitted Charlie. The Department of Fisheries had not made out its case against him, and, more importantly as general precedent, the magistrate ruled that the department had no jurisdiction to regulate Indians fishing on Indian reserves. That responsibility lay with Canada’s Department of Indian Affairs (Indian Affairs). Fisheries hired a senior lawyer, appealed to the county court, and within a month had its conviction. Although Indians held the exclusive right to fish on their reserves, the judge ruled

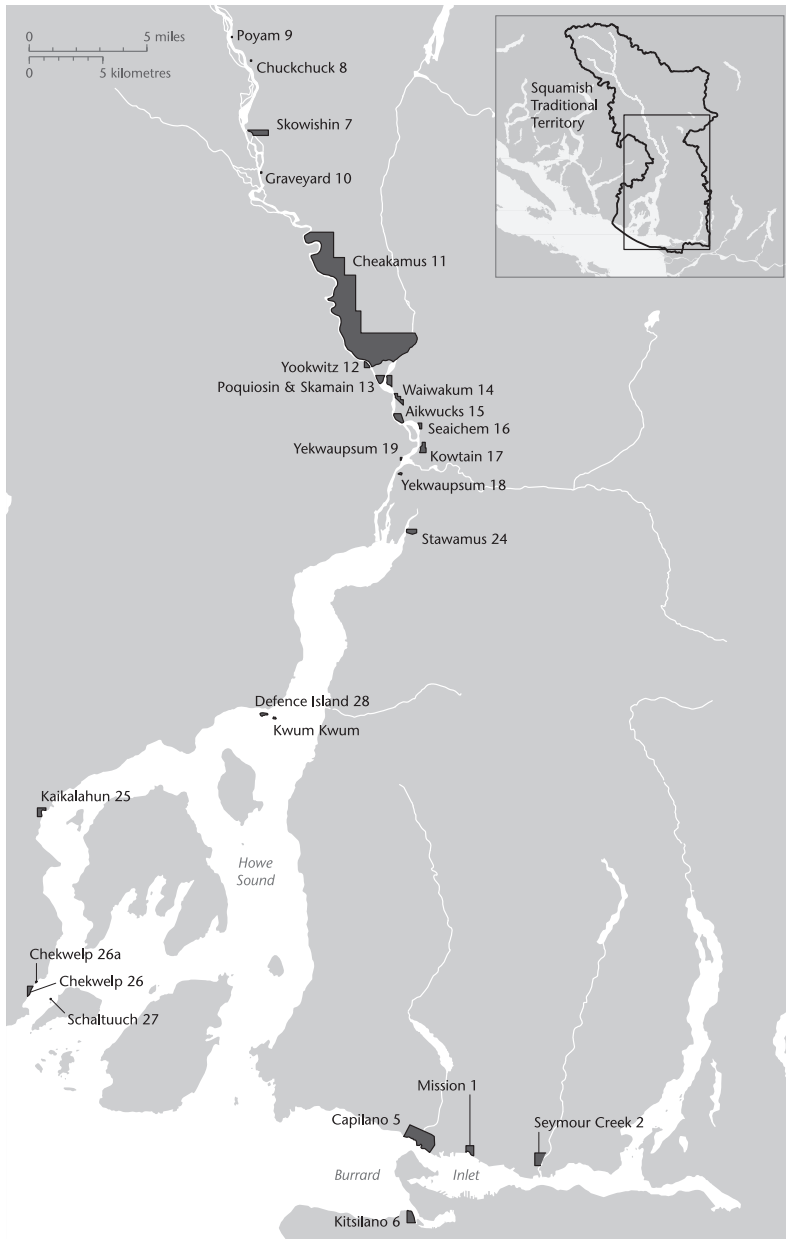


Figure 0.1 Squamish Indian reserves, 1925. The inset map shows the location of the reserves in relation to the area that the Squamish claim as their traditional territory. | *Source:* The boundaries of the traditional territory are based on maps submitted to and approved by the British Columbia Treaty Commission as the basis for treaty negotiation. (These maps are available at http://www.bctreaty.net/nations/soi_maps/Squamish_01_SOL_Map.pdf)

that Fisheries could regulate the Indian food fishery, even to the point of eliminating it to enhance a sport fishery. He fined Charlie one dollar. The Squamish wished to appeal, but Indian Affairs, which had also hired a senior lawyer for the appeal, had sparred long enough with its fellow department in the British Columbia courts. It refused to pursue the case or to release money it held in trust for the Squamish so that they could hire a lawyer to pursue it. The conviction stood. Charlie could not fish on the Capilano reserve, a reserve that had been allotted to the Squamish as a “village site and fishing station,” unless he used a sport fisher’s hook and line.

Charlie, a case that I return to in more detail in Chapter 6, marks the culminating effects of the processes examined in this book. By 1925, the governments of Canada and British Columbia had imposed on the Native peoples of the province an Indian reserve geography that presumed access to the fisheries. Over the same period, Canada had also constructed a legal regime governing the fisheries that, for the most part, opened them to all comers. An increasingly restricted and uncertain Indian food fishery was the only remnant of Native peoples’ prior claim to the fish. These two legal constructs – the Indian reserve and the Indian food fishery – were two of the principal instruments of state power and colonial control in British Columbia. Although nested in two quite different legal regimes – one governing land use and structured around notions of private property, the other governing fisheries and premised primarily on the resource as common property – the reserve and the food fishery served the same purpose. Their intent and effect were to set aside fragments of traditional territories and fisheries for Native peoples, opening the remainder to immigrants. In short, the reserves and food fisheries were the colonial state’s pinched concessions to the prior rights of Native peoples. Constructed together and operating in tandem, these legal categories consigned Native peoples to small parcels of land with inadequate protection for the fisheries that were to be their primary means of support. The story, then, is one of dispossession, a dispossession characterized by the colonial state’s failure to honour its limited attempts to provide space for Native peoples and their livelihoods.

The connections between Indian reserves, Native fisheries, and Anglo-Canadian law in British Columbia need to be understood not only to explain the Indian reserve geography that remains largely intact today, but also to understand the impact on Native peoples of Canada’s regulation of the fisheries. Although they are the subject of legal proceedings that have reached the Supreme Court of Canada, these connections have not been

sufficiently explored or understood by the courts,⁵ by scholars focusing on colonial land policy,⁶ or by those writing on the fisheries.⁷ The fisheries were absolutely central to the allotment of Indian reserves in British Columbia. Chronicling the connections between reserved land and the fisheries, and describing the legal regime that severed them, reallocating the fisheries to others, is the principal contribution of this book. Providing an understanding of the Indian food fishery – to the fisheries what the Indian reserve is to land – is another. These objectives are important not only for what they reveal about Indian land policy and the regulation of the fisheries in British Columbia, but also because the fisheries remain one of the principal sites of conflict between Native peoples and the state. Understanding the history of this conflict is central to its resolution.

The history of colonial land policy in British Columbia is now relatively clear. In *Making Native Space*, historical geographer Cole Harris has described the process of separating Native from non-Native land in the colony and province.⁸ The provincial government's refusal to recognize Native title or to enter into treaties – with the exception of the Douglas Treaties on Vancouver Island in the 1850s – distinguished the construction of an Indian reserve geography in British Columbia from that of its neighbours to the east (the North-West Territories governed by Canada) and to the south (the Washington Territory of the United States).⁹ The province had nothing to do with the negotiation of Treaty 8, one of a series known as the numbered treaties, that included the northeast corner of British Columbia. Over the vast majority of territory, immigrants settled on land for which Native title had not been ceded, a policy whose consequences reverberate today in a modern treaty process, in litigation over Aboriginal title,¹⁰ and in negotiations over the government's responsibility to Native peoples when dealing with unceded or non-treaty land.¹¹

Aside from the refusal to acknowledge title, Native land policies in British Columbia were also distinctive. Instead of detaching Native peoples from their traditional territories and placing them on large centralized reserves (a common pattern in the United States) or providing several substantial reserves within traditional territories (as was the pattern in much of Canada), the Dominion and provincial governments undertook a joint process in British Columbia that resulted in the allotment of many small reserves. They provided Native peoples with points of attachment within their traditional territories, but little more. In the 1920s, when the reserve allotment process came to an end, the acreage set aside as Indian reserve amounted to slightly more than one-third of one percent of the land area in the province.¹² As Harris has argued, echoing the voices of many Native

peoples, the amount of reserved land was too small and its quality too poor to enable them to maintain viable economies in their traditional territories.

To the extent that Dominion and provincial officials sought to justify the unusually small reserve acreage in British Columbia, they did so on the grounds that Native peoples on the Pacific coast were primarily fishing peoples who did not need a large land base. Some agricultural and grazing land would be set aside as reserve, most of it marginal and often without sufficient water rights, but there was little enough viable farmland in the province, and immigrants would occupy most of it. Access to the fisheries was the principal basis on which government officials explained the land policy and on which Indian reserve commissioners allotted Indian reserves. To take one example from many, Indian Reserve Commissioner Peter O'Reilly described the Tlatlasikwala (Nahwitti) Reserve No. 1 Hope Island, at the northern tip of Vancouver Island, as "utterly worthless except as affording sheltered points from which the Indians can, weather permitting, start on their fishing expeditions."¹³ In many parts of the province, the control of land – as a place to set a net or drag it ashore, as a rock from which to work a dip net, as a point of departure or return from fishing expeditions, or as a place to process fish – secured control of a fishery. This would change in the twentieth century as the widespread dissemination of gasoline-powered boats, refrigeration, and other technological changes created a much more mobile fishing fleet, but when Canada and British Columbia constructed an Indian reserve geography, the land/fish nexus mattered. Control of local fisheries provided a means, often the only means, of living on the land.

Government officials were right about the importance of the fisheries to Native peoples along the coast and through much of the interior. The Pacific Ocean provided an enormous abundance and diversity of plant and animal life that sustained large, geographically established, wealthy, and frequently hierarchical societies. Similarly, the river systems of the interior, which bore some of the world's largest salmon runs, were the oceanic tendrils along which Native societies and economies flourished. Lives were lived in seasonal cycles that included movement between a number of resource procurement and ceremonial sites, but most Native peoples in British Columbia were not hunter/gatherers as anthropologists have come to understand the designation. Instead, they were specialists in the harvesting and processing of fish, primarily salmon. Several scholars have written well about Native peoples' use and management of the fisheries along the Pacific coast of North America and the rivers that run to it, and I do not intend to add to that literature here.¹⁴ Nevertheless, these were the condi-

tions that led government officials to emphasize the importance of the fisheries and to discount the need for a large land base when they explained their land policy and justified the particular, and meagre, Indian reserve geography in British Columbia.

The characterization of Native peoples in British Columbia as fishing peoples, while largely accurate, was not neutral. The act of fishing was filled with cultural meaning in British society, a meaning that varied considerably depending on who was fishing and for what reasons. Fishing for pleasure was a guarded prerogative of the landed gentry in Britain, guarded not only to protect stocks but also to prevent the vices of idleness and indolence that the upper classes associated with fishing among the lower. Subsistence fishing was thought an activity of the mean and destitute, while commercial fishing deflected attention that was more appropriately engaged on the land.¹⁵ A variant of this sentiment is captured in the writing of A.C. Anderson, a Hudson's Bay Company trader from 1832 to 1858 and later Canada's first inspector of fisheries in British Columbia and appointee to the Joint Indian Reserve Commission, who described the fishing peoples of the northwest coast of North America as follows: "Procuring an abundant livelihood with little exertion; gross, sensual, and for the most part cowardly – the races who depend entirely, or chiefly, on fishing, are immeasurably inferior to those tribes, who, with nerves and sinews braced by exercise, and minds comparatively ennobled by frequent excitement, live constantly amid war and the chase."¹⁶ A little more than a decade later, Anderson was one of the early defenders of the Native fisheries, but his sense that fishing produced undesirable social consequences reflected broad cultural assumptions. They help to explain various efforts to deflect Native peoples from their fisheries and towards an agrarian economy. But the desire to leave what little agricultural land there was for incoming settlers, and the attachment of Native peoples to their fisheries, produced an Indian reserve geography based around the fisheries.

The maps in the Appendix reveal the locations of nearly 750 reserves across British Columbia that were identified specifically for their importance in the catching or processing of fish.¹⁷ They show a particularly strong connection between reserved land and fisheries along the west coast of Vancouver Island and along the mainland coast to the Alaskan panhandle. In these areas, most of the reserves were intended as fishing stations that would provide access to a variety of fish, including salmon, halibut, herring, dogfish, cod, and oolichan, as well as clam beds and sea mammals, primarily seal. The single most productive fisheries, however, were in the interior at particular locations along the Fraser, Skeena, and Nass rivers. The

anadromous Pacific salmon – primarily sockeye but also chinook, coho, chum, and pink – as well as locally important trout fisheries supported an extensive Native population with food and valuable trade commodities. As a result, many of the reserves in the interior were allotted to secure access to these resources. For both coast and interior, the maps represent a land-based human geography of the fisheries.¹⁸

Many more reserves could easily have been included on the maps. They show only those reserves that were expressly allotted by one of the reserve commissions for fishing purposes or for the processing of fish. Some reserves, including a few crucially important fishing sites, are not included because the reserve commissioners overlooked the importance of the fishery in allotting the reserve or did not record it. In some cases, the reserve was a village site, and this use is noted rather than the fishery. In other cases, the commissioners allotted land for wood or timber but did not mention that the wood might be used in smokehouses or to build fish boats and canoes. Finally, for a great many reserves the commissioners recorded fishing as one among several occupations of the residents but did not connect the reserve itself to a fishery. These reserves are not on the maps, not because the fisheries were unimportant, but because there is no indication in the reserve commissions' records that the reserve itself was allotted to secure access to a fishery. Indirectly, however, by providing a place to live and possibly a means of support during the off-season, these reserves also supported a fishery. In short, most reserves were set aside to secure Native fisheries. Land followed fish.

However, beginning in the 1870s, and coinciding with the rapid emergence of a canning industry, Canada's Department of Fisheries undertook to unravel the connection between land and fish. It sought to ensure that any proprietary interest held by Native peoples in their reserves remained on dry land; the exclusive rights that characterized the occupation of land, Fisheries maintained, did not extend to the fisheries. In fact, the Department of Fisheries based its opposition to the recognition of Native fishing rights on the grounds that while land, including Indian reserve land, might be held as private property, the fisheries were common property. The idea that fisheries were common property, which Dutch legal theorist Hugo Grotius gave voice to in international law and which the English common law gave expression to in the doctrine of the public right to fish, marks a fundamental difference between the law that applied to the land and that operating over water. Understanding these legal regimes and the differential extension of state sovereignty over land and water is crucial to understanding the processes of dispossession in British Columbia.

Sovereignty and Property – Land and Fisheries

Conflict over territory lies at the heart of colonialism.¹⁹ This is most evident in settler colonies, such as British Columbia, where immigrants arrived with aspirations to build new lives and stay. Their settlement depended on the opening of territory that they could physically occupy and legally possess, and it was the function of the colonial state to open it. In some cases, negotiation and agreement with indigenous peoples underwrote the resettlement of territory by an immigrant population; in others it was military power and its violence that made the land available. In most places, these strategies of dispossession coexisted. In a mid-nineteenth-century colonial undertaking, such as British Columbia, military power lay in the past and in the background; its threat rather than its exercise was generally sufficient to prevent uprisings. So too the cultural assumptions of progress, superiority, and civilization buttressed the colonial state. But a growing literature highlights the importance of European law in the extension of imperial power overseas, both as a means of establishing control and as a justification for it.²⁰ State law established order, displacing its opposite, anarchy, and was a pivotal marker of progress, or so many assumed. In fact, the colonial theatre was a site of plural legal orders, indigenous, imposed, and hybrid, that coexisted, although not on equal terms. Where separate and formally recognized systems of customary law emerged, as in much of Africa and Asia, European law remained paramount in instances of conflict. In settler colonies, where the primary object was settlement of an immigrant population, colonial states did not construct separate legal systems. Instead, the salience of indigenous legal traditions withered as the balance of power shifted towards the immigrant society, the colonial state, and its legal structures.

Land

The opening of space to immigrant settlement involved two interrelated and concurrent processes that also defined the emergence of nation-states in Europe: the acquisition of sovereignty over a territory, and the consolidation of control within it. The acquisition of sovereignty involved establishing and defending a territorial claim within which the state held supreme law-making authority. The Peace of Westphalia (1648), which established a temporary reprieve from decades of conflict in Europe, is widely considered the moment when emerging nation-states established the principle that each was sovereign.²¹ The basis of political authority had shifted away from a set of personal relationships between the sovereign and subject, and towards a notion of exclusive jurisdiction within defined territories.²²

The consolidation of control within sovereign territory was part of a process that confirmed state sovereignty and was also an exercise of that sovereignty. Anthropologist James Scott describes the emerging state as the locus of centralized power in post-Enlightenment Europe, a development that, he argues, paralleled the efforts of these new political entities to reduce the complexities that characterized the customary rights and communal uses of feudal land tenure. Understood locally, the rights of land use in feudal society were inseparable from their context and opaque at a distance. A decisive moment in the emergence of the modern state, Scott suggests, was the simplification of land tenure, a process that enabled the central classification of land and, in turn, the extension of state power.²³ The state consolidated its sovereignty through the extension of its law of property.

The marginalization of custom was gradual and never complete. E.P. Thompson's marvellous studies of eighteenth-century rural England reveal a society riven by customary claims on the one hand, and rights based in the common law and statute on the other.²⁴ Custom did not disappear entirely – it remained a source of particular laws and, at another level, of the common law itself – but it had become subject to the jurisdiction of the common law and subordinated to it. As the diversity and salience of customary claims disappeared, the land was filled with a law of property that could be known at a national level. Legal texts such as Littleton's *Tenures* in the fifteenth century, Sir Edward Coke's *Institutes of the Law of England* in the sixteenth, and Sir William Blackstone's *Commentaries on the Laws of England* in the eighteenth made that law known.²⁵

In a regime of private property, the owner's principal claim is to a right to exclude others from occupying, possessing, or otherwise using the thing claimed.²⁶ It is this "idea of ownership," suggests legal theorist Jeremy Waldron, that is the "organizing idea" of private property.²⁷ Blackstone famously described the right to private property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."²⁸ By the nineteenth century, this "ownership model," to borrow Joseph Singer's characterization,²⁹ had become the pervasive understanding of property in Britain and its settler colonies. The onus lay on non-owners to justify interfering with the right to exclusive possession. This had not always been the case, but by the mid-nineteenth century, private property was hegemonic, at least when people thought of land. Common property, characterized not by the right to exclude but by its opposite – the right not to be excluded – was consigned a secondary role in relation to land.³⁰

The assertion of sovereignty and the imposition of a regime of private property occurred in British colonies overseas, albeit more suddenly and completely. In those colonies where colonization – the settlement of immigrant populations – was the principal imperial objective, the appropriation of territory and its reorganization assumed a particular urgency.³¹ Here the doctrine of discovery was important in the European effort to establish spheres of sovereignty; imperial states that “discovered” a territory were entitled to take possession of it to the exclusion of other imperial powers – they were sovereign.³² Sovereignty could also be acquired through treaty or war, and even by the act of settlement itself. In western North America, the Oregon Treaty of 1846 resolved the competing claims of Great Britain and the United States by dividing their interests along the forty-ninth parallel.³³ This treaty, dividing territory between imperial powers, would lead to the construction of a colonial state in British Columbia. It was part of the extension of imperial power, a process that historical geographer Daniel Clayton, in his study of the cartographic and geopolitical processes that placed Vancouver Island in a corner of the British imperial imaginary, has described as the “loss of locality.”³⁴ The spaces of indigenous peoples became territorial possessions within empires. This was the legal scaffolding that would facilitate the emergence of a colonial state and, with it, a settler society.

Initially, the imperial state sought to interpose itself between indigenous peoples and settlers by acquiring land from its indigenous inhabitants – sometimes through purchase and treaty but at other times by war. The effect in law was to sweep away the complexity and, from the state’s perspective, clutter of pre-existing customary rights and to create space devoid of legally recognizable tenure. The colonial state did not need to accommodate, in Scott’s words, the “luxuriant variety of customary land tenure” in its efforts to standardize and centralize.³⁵ Instead, it deployed territorial strategies to empty spaces of indigenous tenure. Its sovereignty established and Native title ceded or ignored (as was the case in British Columbia), the colonial state could then refill the space with its land grants.³⁶

In colonies of the British Crown, the recipients of a Crown grant received what had become the ubiquitous form of property – a fee-simple interest in free and common socage, the largest bundle of property rights known in English law.³⁷ But whatever its particular form, settlers acquired land through Crown grants of standardized bundles of rights. The effect was to bury a prior indigenous legal order, part of a much larger cultural assault that relegated Native peoples to the margins of settler society.³⁸ As anthropologist John Comaroff suggests, “it was by appeal to a specifically legal sensibility that the geography of colonies was mapped, transforming

the land of others – typically seen by Europeans as wilderness before it was invested with their gaze – into territory and real estate; a process that made spaces into places to be possessed, ruled, improved, protected.”³⁹ The idea of ownership – of private property – lay at the core of this sensibility.

The rights to private property, distributed and backed by the colonial state, conferred power on their holders who, by erecting a fence or otherwise enforcing a property line, gave local effect to the generalized act of dispossession inherent in the colonial encounter.⁴⁰ Private property was a form of state-delegated sovereignty over fixed parcels of land.⁴¹ And given the virtues attached to private property in the heyday of mid- and late-nineteenth-century laissez-faire liberalism – for utilitarian philosopher Jeremy Bentham, the division of the English commons into private property was “one of the greatest and best understood improvements” – the extension of private property was itself a justification for imperial control.⁴² The apogee of laissez-faire liberalism and of European colonial expansion coincided.

Indian reserves fit within this framework, although the delegation of sovereignty was incomplete. In British Columbia, as in the rest of Canada, the federal government held title to reserved land in trust for the Indian band to which it had been allotted. Together with the *Indian Act* of 1876, this arrangement was intended to facilitate the management of Native peoples and their integration into immigrant Canadian society.⁴³ Nonetheless, each band held the right of exclusive possession to its reserve land. Within the reserve, the band might distribute rights on the basis of hereditary entitlements, but this was difficult because small reserves excluded most of each band’s traditional territory. Moreover, the state encouraged systems of property within reserves that mimicked the regime of fee simple beyond. Individual band members could apply for certificates of possession that established their right to defined parcels of reserve land.⁴⁴ Beyond the reserves, Native purchase or pre-emption of Crown lands became virtually impossible.⁴⁵ In terms of their capacity to hold property in land, the law confined Indians in British Columbia to their reserves, but the reserves were to belong to them exclusively.

Fisheries

The efforts to establish and consolidate the sovereignty of colonial states did not end at the foreshore. In colonies with a coastline or inland waterways, particularly those with valuable fisheries or strategic navigation routes, the colonial project included efforts to extend control over water and the resources within it.

The extension of state sovereignty over maritime territory proceeded incrementally. The consensus in the international community in the nineteenth and for much of the twentieth century was that state sovereignty over adjacent seas extended three miles from the shoreline. This distance, suggested by the Dutch legal scholar Cornelius van Bynkershoek in the early eighteenth century, was a compromise between those, such as legal theorist Hugo Grotius, who advocated the complete freedom of the seas, and others, such as English scholar John Selden, who argued that states were capable of extending their dominion and establishing property interests in the high seas. Bynkershoek posited that possession might “be regarded as extending just as far as it can be held in subjection to the mainland,” and that this extended “as far as cannon will carry,” a distance understood in the early eighteenth century to be approximately one league or three miles.⁴⁶

This relatively small maritime belt of state sovereignty coincided with prevailing assumptions, held into the twentieth century, about the limitlessness of the ocean and the inexhaustibility of its resources. Beyond the three-mile limit, *mare liberum* (freedom of the seas) prevailed. In the words of Grotius, “the sea can in no way become the private property of any one, because nature not only allows but enjoins its common use.”⁴⁷ The fish within the sea, therefore, were “exempt from such private ownership on account of their susceptibility to universal use; and as they belong to all they cannot be taken away from all by any one person any more than what is mine can be taken away from me by you.”⁴⁸ Beyond the narrow maritime belt of state sovereignty, fisheries were common property – every state had the right not to be excluded.⁴⁹

Within the maritime belt, the legal regime governing fisheries varied with the state, but the characterization of fisheries as common property was not easily dislodged. Under the English common law, the right to fish was understood to belong to the Crown. However, the Crown’s ownership was subject to the public right to fish. In effect, the Crown held the fisheries in trust for the public. It could not, therefore, claim the exclusive right to fish or alienate that right to another party. Parliament could modify this rule, authorizing the Crown to grant exclusive fisheries, but the underlying presumption in the common law was that the Crown’s subjects had a right not to be excluded from the fisheries – they were common property.⁵⁰

In non-tidal rivers and lakes, sites of locally important fisheries, the legal regime followed the forms that applied to land. Under the English common law, rivers and lakes were subject to private ownership. In fact, the law created a presumption that property interests in land included the bed (the

solum) of adjacent bodies of water to their midpoint and, therefore, the exclusive right to fish in those waters. The right to fish could be severed from the adjacent land, but the common law presumed otherwise. In short, the exclusive right to fish followed the right to exclusive possession of land. The courts modified this rule in North America, limiting the extension of private interests to the foreshore if the body of water adjacent to private land were navigable. The bed of navigable bodies of water in Canada belonged to the Crown, but it lay within the Crown's prerogative to alienate this interest, including the right to fish. In non-tidal waters, therefore, the extension of state sovereignty and the property regime that consolidated it emulated the regime on land.⁵¹

In tidal waters, sites of the most productive fisheries, the common-law right not to be excluded was also part of the state's consolidation of control over its sovereign territory. As with the grant of private property, the right not to be excluded emanated from the state and was assumed to supplant whatever preceded it. Even though the legal forms were different (in fact, they were opposites), the effect of their imposition was to erase pre-existing legal regimes, thereby confirming the sovereignty and consolidating the control of the colonial state. Except for the limited Indian food fishing privileges that the Department of Fisheries was prepared to concede, Native peoples had no prior claim to or property interest in the fisheries. The fisheries were common property in the sense that all subjects of the Crown, including Indians, were equally entitled to participate; everyone had the right not to be excluded.

However, just as Fisheries framed its approach to the Native fisheries in legal terms, so did its opponents. Native peoples maintained that they owned the fisheries that were inseparable parts of their communities and, therefore, that they had an Aboriginal right to fish, or that they had rights to fish that flowed from their Aboriginal title. Although this language is in some senses new, appearing since Aboriginal rights were entrenched in the Canadian constitution in 1982 and then interpreted in Canadian courts, the arguments are not. From the beginnings of a European presence in what is now British Columbia, Native peoples clearly articulated their rights to land and to resources, none more strongly than the right to their fisheries. This is reflected in the fisheries clause – the right to “fisheries as formerly” – in the Douglas Treaties, the fourteen agreements negotiated between Native peoples on Vancouver Island and the Hudson's Bay Company as representative of the British Crown. This treaty right became a touchstone for those who sought to find space for Native peoples' fisheries, and I seek to understand it, in conjunction with the emerging colonial land policy, in Chapter 1.

After the Douglas Treaties, the work of the Indian reserve commissioners provides the clearest formal recognition of the importance of the fisheries to Native peoples. In Chapters 2 to 5, I turn to the years between 1876 and 1910 when the Dominion and provincial governments constructed and then implemented a land policy that was explicitly premised on access to the fisheries. Chapter 2 covers the work of the Joint Indian Reserve Commission (1876-78) and that of Gilbert Malcolm Sproat (1878-80) as the sole commissioner of the Indian Reserve Commission. Sproat's work is characterized by careful and thoughtful, if largely futile, attempts to protect the Native fisheries as a means of finding sufficient space for the economies and cultures of Native peoples and immigrants.⁵² In Chapter 3, I consider the first year of Sproat's successor, Peter O'Reilly, the effective and efficient colonial administrator who, more than any other, would implement the province's vision of an appropriate Indian land policy in British Columbia. It is surprising, therefore, that it was the work of this commissioner, inclined to follow instructions and not to advocate, as his predecessor had done, that most provoked the Department of Fisheries. On his first circuit to the middle Fraser and then to the north coast, O'Reilly granted exclusive fisheries along the Fraser and Nass rivers as part of or in addition to the reserves grants, something the department adamantly refused to recognize on the grounds that the grants violated the common-law doctrine of the public right to fish. In Chapter 4, I explore the public right to fish, its interpretation in Canadian courts, and its role in shaping Native peoples' access to the fisheries. I then return, in Chapter 5, to O'Reilly's continuing work as reserve commissioner over nearly two decades, and to the work of his successor, A.W. Vowell, from 1898 to 1910.

In Chapters 6 and 7, I detour from the narrative of reserve creation to describe the statute-based regulation of the fishery and its impact on Native fisheries and fishers. It is in Chapter 6 that I revisit *Charlie* as part of the construction, in law, of an Indian food fishery. In detaching Native peoples from their fisheries, the state also defined the terms under which they could participate as workers in the industrial commercial fishery. As Alicja Muszynski has argued, Native participation was gendered – men fished, women worked in the canneries – but it was also racialized.⁵³ By this she means that the canneries used gender and race as markers to define and limit who might work, in what capacity, and for what remuneration. Native fishers and cannery workers were not the only ones to bear these markers. Japanese fishers and Chinese cannery workers were also the targets of discriminatory attempts to limit or end their participation in the industry. However, in Chapter 7 I focus on the opportunities for Native fishers in the commercial fleet and on the ways in which the

allocation of fishing licences worked to preclude full Native participation in the industry.

I return to the allotment of Indian reserves in Chapter 8 to consider the importance of the fisheries in the work of the Royal Commission on Indian Affairs for the Province of British Columbia – the McKenna-McBride Commission – and in the final agreements between the Dominion and province that wound down the reserve process, fixing the reserve geography of British Columbia that largely remains to this day. Although the commission was to focus on the land question, the commissioners found themselves repeatedly drawn by compelling Native testimony to the fisheries, an issue they could not avoid because the capacity of the reserved land to support viable livelihoods depended, by design, on access to fish.

These chapters are full of place names and discussions of particular locales. This is in part a function of the fisheries. Fishing is not equally good everywhere. Prized locations depend upon innumerable physical and ecological variations (in bodies of water, climate, and species of fish), but are also determined by the prevalent fishing and processing technology and the social/cultural/legal milieu in which they are used. When the reserve commissioners sought input from Native peoples, they heard general statements of ownership, but also specific requests for control of particular sites that were essential parts of local Native economies. More often than not, these were fishing sites. Reflecting this attention to place, the chapters and the appendix are full of maps that, I hope, help the reader make sense of detailed descriptions and identify larger patterns. They also provide a sense of the spatial theatre that law constructs and operates within.

The focus of this book follows from its sources, principally the records of the Indian reserve commissions, the Department of Indian Affairs, and the Department of Marine and Fisheries. These were the authorities most involved in creating Indian reserves and in regulating the fisheries. I spent time with the provincial Department of Fisheries records, but they appear infrequently here. In its early years, most of the provincial department's efforts went into enhancement projects rather than the regulation and management of the fisheries. Other material that I have dipped into includes cannery records and private manuscripts from those involved in the fishing industry. Had the study paid as much attention to management of land as it does to fish, the files of the provincial Department of Lands would have been indispensable. But taking this book on its own terms – as a study of the connections between the colonial land policy and the regulation of the fisheries – what is most glaringly absent are the Native voices. To the extent that they appear, sympathetic accounts are almost always filtered through the ear and pen of a missionary or, more commonly by the

late nineteenth century, an Indian agent or reserve commissioner. More antagonistic representations of Native claims come from the Fisheries officers. It is primarily through the transcripts of the hearings conducted by the Royal Commission on Indian Affairs for the Province of British Columbia, 1913-16, that Native voices appear in the written record in their least mediated form. Here one finds Native voices that eloquently, sadly, and sometimes angrily denounce the laws and policies of the colonial state that refused to recognize the legitimacy of their claims and consigned a great many to lives of poverty. One also catches glimpses of a suppressed legal order struggling to survive the hegemony of the colonial legal order. Beyond the written records, which can only be the most partial representation of Native views, are the oral histories that reside in Native communities. Ethno-historian Keith Carlson has skilfully used those histories and the written record to describe the roots of a continuing conflict between First Nations over the fisheries at Yale.⁵⁴ In this book I deal with the laws and policies of the colonial state, their contradictions and ambiguities, but also their power. To that end, I have attempted to map officially recognized fishing sites, describe the conflicts that ensue, and explore the role of law in the process. I have not attempted the larger and more difficult challenge of mapping the patterns of Native peoples' use and control of the fisheries – in effect, the legal geography of the Native fisheries. Much of that work is being undertaken in First Nations treaty offices around the province and may well result in the most fundamental re-mapping of the territory since the reserves were created in the late nineteenth and early twentieth centuries.⁵⁵

1

Treaties, Reserves, and Fisheries Law

The west coast of North America entered the imperial orbit of Britain in the late eighteenth century when maritime explorers mapped the coast, and merchants followed to trade with Native peoples for sea otter pelts. The coastal trade was vigorous, but seasonal and short lived. In the early nineteenth century, other traders arrived from the east, linking the territory overland to Hudson's Bay, the Red River Settlement, and Montreal, and to markets around the Pacific. Trading posts became the first non-Native settlements in the western cordillera. Personnel rotated through the posts, but the trading companies – until 1821 the North West Company and then the Hudson's Bay Company (HBC) – remained, their corporate presence a constant despite the comings and goings of individual traders and workers. Native peoples responded to these new sources of wealth and power by, in some cases, reorganizing their economies to take advantage of the window into world markets that the trading companies provided or, in other cases, resisting and retreating. In either event, Native peoples continued to live in territories they still largely controlled. Apart from the sites of their forts, gardens, a few farms, and the temporary spaces that their workers occupied as they moved between posts, the trading companies did not seek to control land.¹

It was not until 1849, after the Oregon Treaty of 1846 extended the forty-ninth parallel as the boundary between American and British interests in North America to the Pacific, that the HBC assumed responsibility for Vancouver Island as a proprietary colony of the British Crown with a mandate to encourage settlement.² Settlers, primarily of British descent, and many of them retired HBC employees, trickled into this distant corner of Empire until 1858, when, with the discovery of gold in the Fraser Canyon, thousands of miners flooded north from the gold fields in California to Victoria, stopping briefly for supplies before crossing to the Fraser River on the mainland. To forestall a possible annexation of the territory by the

United States, and to establish British law, if only symbolically, over a well-armed and defiant collection of miners, the Colonial Office created the mainland colony of British Columbia that same year. It also sent a detachment from the Royal Engineers, 220 soldiers strong, that for the next five years provided a land-based military presence to complement the gunboats of the Royal Navy and that began building a colonial infrastructure, including roads, bridges, townsite plans, and land surveys. The island and mainland colonies joined in 1866 and entered the Canadian confederation in 1871.³

The mid-nineteenth-century transition in British interest in the western cordillera – from trading country to settlement frontier – also marked the beginnings of a fundamental transition in relations with Native peoples. Associates in the diversified trading enterprise that had emerged in the first half of the nineteenth century, Native peoples now became obstacles in the way of settlement and progress.⁴ During the initial and brutal encounter of miners and Natives in the Fraser Canyon in 1858, miners shot their way in and used their superior firepower to hold their positions.⁵ Less suddenly, but ultimately with greater implications for the lives of most Native peoples in the two colonies, the fixity of an agrarian economy and accompanying notions of private property clashed with the seasonal patterns of Native land use that revolved around winter villages, fishing and hunting grounds, plant harvesting territories, and spiritual sites. The appearance of a settler fence to satisfy the requirement under a pre-emption claim to “improve” the land, to keep foraging animals out of a vegetable garden, or simply to establish a tangible boundary enclosing private land, was the locally encountered evidence of a new and imposed system of private property. Land inside the fence had become the exclusive possession of its owner.⁶

Supporting the fence and the right to exclusive possession that it announced were cadastral surveys, maps, land registries, courts, police, and the military – the technologies and institutions deployed by the state to extend and confirm its power by defending the inviolability of the rights it had granted. Indeed, one of the principal functions of the colonial state was to protect these new property lines, securing private property and creating transferable value for its owner. Geographer Nick Blomley suggests that the frontier, which marked the spatial limit of the colonial state’s effective control, was distinguishable by the different systems of land tenure that existed on either side: “Inside the frontier lie secure tenure, fee-simple ownership, and state-guaranteed rights to property. Outside lie uncertain and undeveloped entitlements, communal claims, and the absence of state guarantees to property.”⁷ Similarly, historian John Weaver describes “borderlands or frontiers as areas where the colonizer’s regime of property rights

had not been firmly installed, but where newcomers were already marking out places in anticipation of that condition.”⁸ Within the colonial state, life was civilized (propertied); beyond, it was savage (not or insufficiently propertied).

Houses, gardens, and fences were the markers of possession within English culture, establishing not only individual ownership, but also evidence of British sovereignty, civilization, and, in relation to Native peoples, superiority. They were the signs, to the culture that produced them, of an industrious people. The importance of these domestic and mundane acts of building and planting as symbols of British dominion separated the British not only from the Native peoples, who lived differently in the same territories, but also from other European colonial powers in the western hemisphere who, Patricia Seed argues, based their claims to sovereignty on other ceremonies of possession.⁹ This assertion of sovereignty and the regime of property that accompanied it displaced prior ways of living on the land. Blomley emphasizes the violence that underscored the dismembering of a locally owned and regulated commons, the creation of private property and its right of exclusive possession pushing out those who once had access.¹⁰

As the Crown began to alienate parcels of land to newcomers through processes of pre-emption (a claim to land that could be perfected once the land was surveyed, the purchase price paid, and evidence of improvements confirmed) or purchase, it also allotted Indian reserves. Beginning with the creation of the Colony of Vancouver Island in 1849, these processes, which divided land into Indian reserves and land available for the exclusive possession of immigrants, continued in tandem for seventy-five years, the allotment of reserves generally following a few years behind increased settler interest in a region, until 1924, when the Dominion and provincial government agreed on what they regarded as the final reserve geography of British Columbia. With the exception of the Douglas Treaties on Vancouver Island and Treaty 8 in the northeast, the issue of Native title and the need to seek agreement with Native peoples over the shared use of space was ignored.

In this chapter, I begin a parallel narrative of the conflict over fish, focusing on the process of reserve allotments and the introduction of Anglo-Canadian fisheries law. It starts with the Douglas Treaties and, more generally, the nature of Native title and of rights to fish. It then turns to consider the allotment of reserves in relation to the fisheries. This discussion is relatively brief, a function of the fact that fisheries were not yet a site of conflict between Natives and newcomers. The inexhaustible abundance of fish was presumed and, although some imagined the resource could be

a future source of great wealth, there was little non-Native interest. That was not the case in the Great Lakes fisheries, already the site of protracted conflict between Native and non-Native fishers and the colonial government in Upper Canada and then Canada West. It was this history of conflict that British Columbia acquired when it joined the Canadian confederation in 1871 and ceded jurisdiction over fisheries to the Dominion. The chapter concludes with a brief foray into that history.

Treaty and Native Rights to Fish

The agreements known as the Douglas Treaties are fourteen land purchases made by James Douglas in his capacity as the Hudson's Bay Company's chief trader, and then governor of the colony of Vancouver Island, between 1850 and 1854. The land, purchased from Native peoples on Vancouver Island, covered a small fraction of the island, including the area around Victoria, the Saanich Peninsula, the future townsite of Nanaimo midway up the island, and an area near Fort Rupert at its northeastern end (Figure 1.1). The treaties loom over the process of reserve allotments in British Columbia, marking the beginning of an unfinished project to treat with Native peoples and serving as a reminder of the suppressed yet outstanding question of Native title.

Much has been written about why Douglas undertook these purchases on Vancouver Island and why he did not continue them. It seems that recognition of a legal requirement to extinguish Native title was an important part of his motivation for beginning the process, but ebbing enthusiasm for treaties in the Colonial Office in London reduced the incentive to continue the process when other interests intervened. Cole Harris has emphasized Douglas's pragmatism, born of a lifetime in the fur trade, suggesting that he was less concerned about theories of Indian land policy and even of the law of Native title than about finding workable solutions for Native and European coexistence.¹¹ Legal historians Hamar Foster and Alan Grove suggest that the decision of an Oregon court to deny the existence of Native title, discredited in Oregon and Washington but picked up in Alaska, may also have influenced Douglas and his successor in the formation of colonial land policy, Commissioner of Lands Joseph Trutch, who was openly hostile to the idea of Native title.¹²

The legal standing of Native title may have been fragile enough in the mid-nineteenth century that colonial authorities were prepared to ignore it, but there was less doubt about the existence of specific Native rights, particularly rights to hunt and fish. Moreover, protecting these rights, on which Native economies depended, fit Douglas's pragmatism. Native peoples' hunting could coexist with non-Native ownership, if not use and

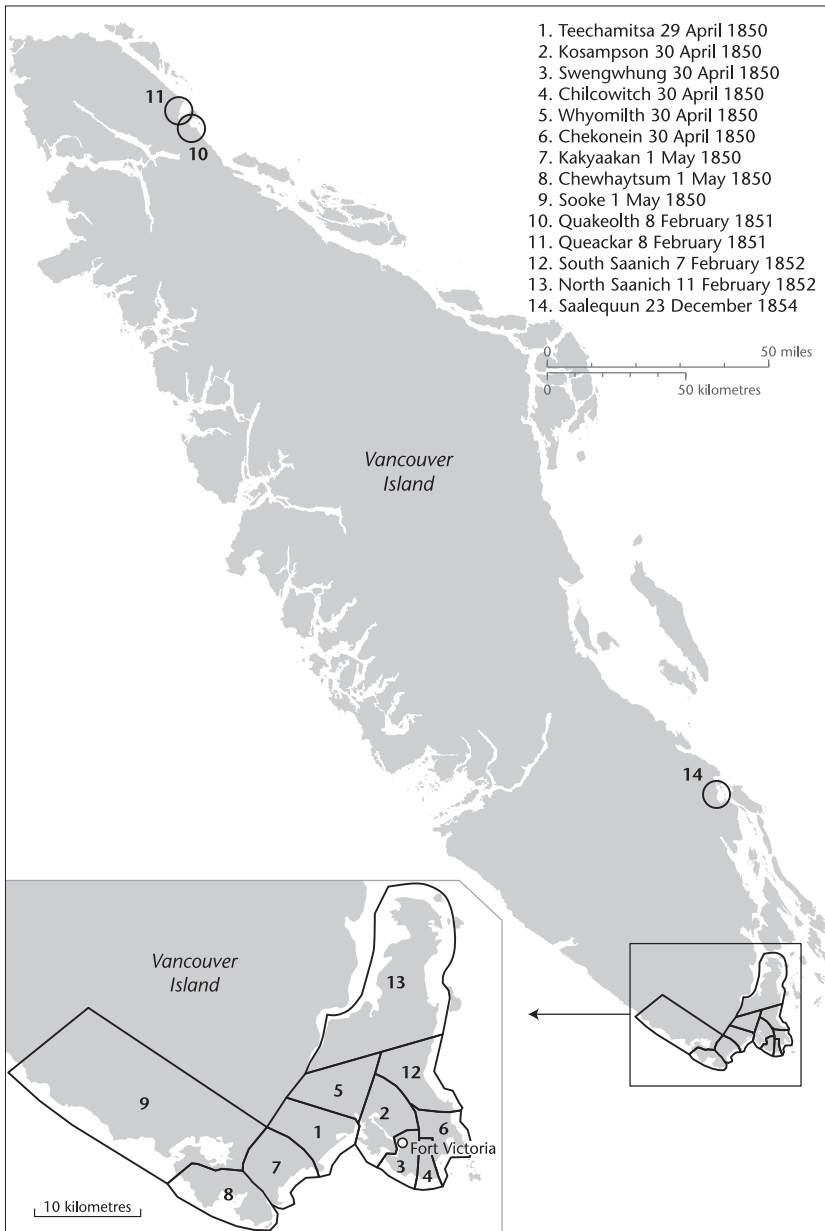


Figure 1.1 Boundaries of the Douglas Treaties, 1850-54. The treaty process did not continue beyond 1854, leaving the issue of Native title unresolved on the rest of Vancouver Island and throughout most of the mainland colony of British Columbia. | *Source:* The treaty boundaries were adapted from the information available in the Government of Canada’s Directory of Federal Real Property (<http://www.tbssct.gc.ca/dfrp-rbif/treaty-traite.asp?Language=EN>).

occupation, of the land, and the fishery could be secured without much impact on the land available for incoming settlers. In anticipation of the treaties, Douglas wrote to the HBC that he “would strongly recommend, equally as a matter of justice, and from regard to the future peace of the colony, that the Indians Fishere’s [sic], Village Sitis [sic] and Fields, should be reserved for their benifit [sic] and fully secured to them by law.”¹³ HBC secretary Archibald Barclay, in setting out the Company’s obligations and policy towards Native peoples on Vancouver Island, instructed Douglas that the “right of fishing and hunting will be continued to them.”¹⁴

On the basis of these instructions, Douglas entered negotiations with the tribes on southern Vancouver Island. After minimal discussions (of which no minutes were kept), Douglas asked the chiefs to place X’s on blank sheets of paper. Following the conclusion of the first nine agreements at Fort Victoria between 29 April and 1 May 1850, Douglas wrote to the HBC to explain his understanding of what had transpired: “I informed the natives that they would not be disturbed in the possession of their Village sites and enclosed fields, which are of small extent, and that they were at liberty to hunt over unoccupied lands, and *to carry on their fisheries with the same freedom as when they were the sole occupants of the country.*”¹⁵ He forwarded the “signatures” of the chiefs and asked that the HBC supply the proper conveyancing instrument to which the signatures could be attached. Several months later, Barclay replied, approving the agreements and sending a template purchase agreement, based on New Zealand precedents, that would become the text of the Douglas Treaties.¹⁶ The first paragraph described the lands that were covered by the treaty; the second described the terms:

The condition of or understanding of this sale is this, that our [Indian] village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us; and the land shall be properly surveyed, hereafter. It is understood, however, that the land itself becomes the entire property of the white people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and *to carry on our fisheries as formerly.*¹⁷

Although the structure and content of Barclay’s template emulated the New Zealand deeds, the final clause setting out the hunting and fishing rights was new. The guarantee that the Indians were to be “at liberty ... to carry on [their] fisheries as formerly” appears to be an abbreviated version of the agreement as described by Douglas several months earlier: “They were at liberty ... to carry on their fisheries with the same freedom as when they were the sole occupants of the country.”

Given these events, the treaties are best understood as oral agreements. The written text, based on imperial precedent, drafted by someone not present at the negotiations, and supplied months afterward, should be considered as evidence of the terms of those agreements, not as the agreements themselves. As evidence, the written text probably provides reasonable indication of what the HBC thought it needed to do and how Douglas understood the treaties. The anthropologist Wilson Duff considered the text to be “the white man’s conception (or at least his rationalization) of the situation as it was and of the transaction that took place.”¹⁸ It provides little or highly qualified evidence, at best, of how the Native participants understood the agreements.¹⁹

Even the terms of the written text are not self-evident.²⁰ It is clear, however, that “fisheries” were an important part of the agreement. A “fishery” or its plural, “fisheries,” refers not only to the act of fishing but also to the places where it occurs. In reserving “fisheries,” therefore, the Douglas Treaties reserved the right to fish at the places where Native people fished. Several years after concluding the last of the treaties, Douglas informed the Vancouver Island House of Assembly, in similarly broad terms, that Native peoples “were to be protected in their original right of fishing on the coast and in the bays of the Colony.”²¹ In describing the fishing right as “original,” Douglas meant that it preceded the British assertion of sovereignty, not that it was otherwise constrained.

In short, the Douglas Treaties provided broad protection for Native fisheries. In the 1850s, the boundaries of the right did not need to be carefully drawn. An abundance of fish was presumed, and there was little non-Native interest in prosecuting a fishery. However, the fisheries were certainly not an afterthought. The HBC had deployed some of its workers to the fisheries of the Fraser River in the 1840s but had realized that it was more efficient and effective to purchase fish from Native fishers. These fish, which the HBC barrelled and salted on the Fraser beginning in the 1820s, had become one of its principal exports from the Pacific coast of North America.²² Thus, the treaties were concluded in a context of well-established and ongoing commercial activity in the fishery involving the HBC and Native peoples. Douglas believed that this would continue, and he hoped that it would grow. It is hard to imagine, therefore, that the right to “fisheries as formerly” did not include a commercial aspect, such as the right to sell fish to commercial trading companies. Furthermore, there is no indication that Douglas thought that the treaty protected only a food fishery. In fact, viewing “Indian food fishing” as a separate category was not yet a way of thinking about Native fishing in British Columbia. The concept, established in Canadian fisheries regulations in the late nineteenth century, would become

an important part of fisheries management and an effective way to diminish Native peoples' access to the fish, but it was not part of the framework in which the treaties were negotiated.²³

However, Douglas certainly did not intend to preclude non-Native participation. He believed that the long-term prosperity of the colony depended on attracting immigrants, and the fisheries would be one of the principal draws for those newcomers. The HBC had sought control of the fisheries as part of the Crown grant of Vancouver Island, but the Crown withdrew this provision, which had appeared in an early draft, in the midst of public disapprobation of the HBC in London.²⁴ As a result, the HBC prospectus for the colonization of Vancouver Island informed prospective settlers that “*every freeholder shall enjoy the right of fishing* all sorts of fish in the seas, bays, and inlets of, or surrounding, the said Island.”²⁵ In tidal waters, then, the prospectus asserted the right of the landowning public to fish as, indeed, the common-law doctrine of the public right to fish established for the public at large.

It was not until the creation and expansion of the industrial commercial fishery in the 1870s that Native rights to fish began to be challenged and that the meaning of the fisheries clause in the Douglas Treaties began to matter – and to be forgotten or ignored. In May 1878, complaints that the Esquimalt people were wasting fish roe were registered in the provincial legislature. Indian Reserve Commissioner Gilbert Malcolm Sproat noted that the allegations, if true, were to be regretted, but that the Esquimalt were a party to one of the Douglas Treaties, which protected their right to fish, and therefore the government could not interfere.²⁶ A settler's pre-emption at the mouth of the Goldstream River in Saanich Inlet was another source of concern because, as Sproat pointed out, it would interfere with the treaty fishing rights of several different bands that occupied the location seasonally.²⁷ Sproat, at least, interpreted the treaty right broadly.

What about Native peoples who were not party to the Douglas Treaties? The language of the fisheries clause – that Native people were “at liberty ... to carry on ... fisheries as formerly” – suggests that the treaties should not be understood as creating or granting a right to fish. Instead, the clause turned an existing practice and right into a treaty right. Native peoples in the rest of the province did not have this treaty right, but they still had rights that pre-existed the treaties. In 1860, Douglas wrote to the Colonial Office to describe a series of meetings with Native peoples in the interior of the mainland colony. Douglas explained that he had told the people gathered at Lillooet that “they might freely exercise and enjoy the rights of fishing the Lakes and Rivers, and of hunting over all unoccupied Crown Lands in the Colony.”²⁸ Although clearly echoing the language in the

treaties, the characterization of the rights to hunt and fish was somewhat narrower. The right to hunt extended only to “unoccupied *Crown* lands” and, without any reference to prior rights or to “fisheries as formerly,” the promise that “they might freely exercise and enjoy the rights of fishing” was little more than what Douglas would have told a non-Native audience. The end of the treaties marked the end of Douglas’s formal recognition of Native title, and perhaps, by 1860, he was being more circumspect in his recognition of rights to hunt and fish as well.

However, the fishing rights in the Douglas Treaties remained a powerful presence in the discussion of fishing rights beyond the borders of the treaties. Sproat was involved again in 1878 when the location of a sawmill became an issue because the running of logs down the Cowichan River to the mill threatened to destroy the Cowichan’s weir fishery. He argued that the Cowichan, although not party to a treaty, had a similar right, by virtue of their long use of the river, to continue fishing as formerly. The government, he thought, should provide compensation and obtain the Cowichan’s consent before the mill owner could float logs down the river.²⁹ The following year, A.C. Anderson, the senior Department of Marine and Fisheries (Fisheries) official in British Columbia and former member of the Joint Indian Reserve Commission, referred the minister of Fisheries to the Douglas Treaties, indicating his understanding that Native peoples across the province, not just the treaty Indians, had a right to continue their fisheries.³⁰ Four decades later, in 1918, William Sloan, the provincial commissioner of Fisheries, expressed the view that Native peoples had rights to their fisheries, that the fisheries clause in the Douglas Treaties was evidence of this, and that if Native fisheries were to be closed, even for conservation purposes, then the fishers should be compensated. As the devastating impact of the 1914 rock slide at Hells Gate on the Fraser River sockeye became apparent, he wrote:

The runs of salmon to the spawning-beds of the Fraser have become so alarmingly attenuated that drastic measures will have to be taken to restore the runs. The measures to be taken must not only include the secession of all fishing in tidal limits for a period of years, but must be made to include all fishing above tidal limits by Indians for all time, notwithstanding that *they have both a natural and a treaty right* to take such salmon as they desire for food so long as they confine themselves to the gear originally used by them ...

The right of the Indians to take salmon is unquestioned, but the number of salmon they can now catch is so small as to be of little benefit to them. Owing to the fact that most of the Indians now grow the bulk of the food they use and are no longer dependent on salmon, and that drastic measures must be taken to restore the salmon

of the Fraser, the Government should step in and acquire by purchase the Indians' right to take fish above the commercial boundaries. It is suggested that the Indians, if deliberately approached, would dispose of their fishing rights to the Government, and that the Government is fully warranted in entering upon negotiations to acquire those rights. The sooner the better.³¹

This understanding was certainly not unanimous. The Department of Fisheries considered Native fishing privileges – it did not consider them as rights – were derived from the Crown at its pleasure. More particularly, they derived, under legislation, from the department itself. This view came to predominate in the 1880s and 1890s, although the Department of Indian Affairs was never entirely comfortable with it, and there were always voices within government, such as Sproat's and, later, Sloan's, which insisted that Native fishing rights needed to be recognized and pointed to the Douglas Treaties as evidence.³² Native voices were unequivocal, if seldom heard in the halls of the Department of Fisheries in Ottawa. Their fisheries were not a privilege, nor were they derived from Crown grant. They had rights to fish – rights that originated in their laws and legal traditions – that they had never surrendered.³³

Fisheries and Colonial Land Policy

Cole Harris and Lillian Ford document the creation of 140 reserves on Vancouver Island and in the mainland colony of British Columbia between 1849 and 1871.³⁴ Of the twenty-eight reserves allotted on Vancouver Island before Confederation, most were Douglas Treaty reserves. Harris describes these allotments as forming the beginnings of a Native land policy that “focused on small reserves tucked within the cadastral survey of colonial settlement ... It was an imposed policy, one that took into some account the location of occupied winter villages, but that shows no evidence of meaningful consultation with Native people. It did provide, however, some minimal space for Native peoples within their traditional territories, a pattern that would endure.”³⁵ The non-treaty reserves on Vancouver Island, most of which were between Duncan and Nanaimo, where growing non-Native settlement was causing considerable unrest among the Cowichan and neighbouring groups, followed a similar pattern.³⁶

Although reserves were small, Native people were not confined to them. The hunting and fishing clause in the treaties protected their rights to continue these activities in traditional territories beyond the reserves, and it would have been assumed that these terms applied to the non-treaty groups as well. Probably because of these general guarantees in the treaties and because there was scant non-Native interest in the fisheries, there is

little suggestion in the official record that the pre-Confederation reserves on Vancouver Island were allotted to secure access to fish, or that officials attempted to justify the small reserves on the grounds that fishing peoples did not need large land bases. That justification would come later. The location of the principal fisheries for some of these groups may also have been a factor reducing the likelihood of explicit connections between reserves and fisheries. The Songhees, whose reserves were in and around Victoria, fished sockeye with reef nets in the San Juan Islands. Their two reserves on Discovery Island and the Chatham Islands, located just off the southern tip of Vancouver Island, may well have been set aside as departure points for those fisheries across Haro Strait, but the fisheries themselves were in United States waters (Figure 1.2).³⁷ Although its effect was not immediately felt, the international boundary, which severed Native territories, would cause great hardship.³⁸ Dave Elliot Sr., a member of the Saanich, who also had fishing grounds across Haro Strait, recounted the impact of the border on his people and their access to the fisheries:

We had all those salmon runs and that beautiful way of fishing [reef nets]. When they divided up the country we lost most of our territory. It is now in the State of Washington. They said we would be able to go back and forth when they laid down the boundary, they said it wouldn't make any difference to the Indians. They said that it wouldn't affect us Indians.

They didn't keep that promise very long; Washington made laws over the Federal laws, British Columbia made laws over those Federal laws too, and pretty soon we weren't able to go there and fish. Some of our people were arrested for going over there. That's what happened to our fishery. That's why we're not fishing right now today. The Indians are fishing in Washington using our way of fishing. We lost our fishery, and our fishing grounds.³⁹

Other groups along the east shore of Vancouver Island, particularly the Cowichan, Chemainus, Penelakut, and Halalt, had important summer fisheries on the mainland near the mouth of the Fraser River. They did not cross an international border to access their fisheries, but government officials did not allot reserves at these summer fishing camps either. This became a problem in the 1870s with the rise of the industrial/commercial fishery and the growing competition for fish.

On the mainland, there were no treaties between 1858 and 1871, but Ford and Harris count 112 reserves allotted primarily in the Fraser Valley and along the Fraser and Thompson river systems. It was here that settler interest in using Native land, largely for agriculture, mining, and road building, had produced the greatest tension and conflict. The records of exactly

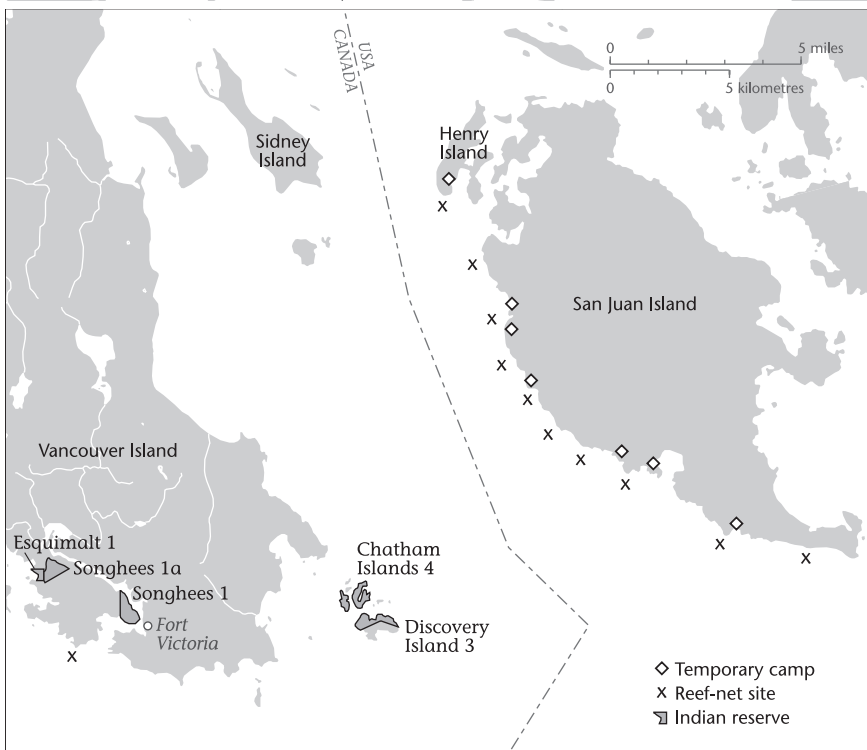


Figure 1.2 Songhees Indian reserves and fisheries. The reserves on Discovery Island and the Chatham Islands may well have been intended as points of departure for the reef-net fisheries on San Juan Island. However, the international boundary, established by the Oregon Treaty in 1846, would eventually prevent Songhees' access to those fisheries. | *Source:* The locations of the camps and reef-net sites are from John Lutz, "Work, Wages and Welfare in Aboriginal-Non-Aboriginal Relations, British Columbia, 1849-1970" (PhD diss., Department of History, University of Ottawa, 1994), 149, 224.

what was allotted in these non-treaty reserves are poor, not only because they do not survive, but also because the government did not record its work carefully. In some cases there were multiple and inaccurate surveys; in other cases there were no surveys at all. The problem of determining reserve allotments is compounded by the significant change in land policy that followed Governor Douglas's retirement in 1864. In comparison to what would follow, the Douglas reserves on the mainland were generous and, when combined with land laws that allowed Natives to acquire other land on the same terms as immigrants, seemed to provide space for Native people to participate as full members in the colonial economy. At least that was Douglas's goal. The new commissioner of Lands and Works, Joseph

Trutch, who replaced Douglas as the principal architect of a Native land policy, set about reducing the size of many of the existing reserves and erecting legal boundaries to limit Native acquisition of other land. His aim, shared by many in the colonial society, was to create as much space as possible for an incoming settler society. It was Douglas's views that were the more unusual.⁴⁰

The reserves allotted under Trutch's tenure were small, to amount to no more than ten acres per family. This was insufficient to support viable agricultural economies, but agriculture was not the focal point of most Native economies in the province. The fisheries were far more important, and many of these small reserves were situated at important fishing sites. This is particularly true of the reserves allotted to the Stó:lō and Nlha7kapmx along the Fraser River. Fish, primarily salmon, were the principal source of sustenance and wealth for these communities, and the placement and distribution of reserves almost exclusively along the river reflects that connection. The fishery at Yale at the start of the Fraser Canyon, for example, was particularly productive, attracting thousands of fishers from downriver in July and August. Upriver there were a great many locally important fishing sites, some of which were included within the reserves. In the flood plain of the Fraser Valley, most of the reserves would have been allotted for some combination of agricultural and fishing purposes. It was at Kamloops and in the Okanagan where the connection between the pre-Confederation reserves and the fisheries was perhaps most tenuous. Fish were still an important part of local economies, but the large reserves, subsequently reduced, were intended to support a farming and ranching economy.

The colonial government after Douglas would likely have reduced Native access to fish, just as it reduced reserves, had fisheries been an important part of the colonial economy. They would become so, but only after British Columbia joined Canada and ceded jurisdiction over fisheries to the Dominion. Until then, the fisheries did not receive much attention. Reflecting both a broadly held perception in Britain that seacoast fisheries were best managed by the market's invisible hand and the relative lack of importance of the fishery to the colonial economy in British Columbia, the local colonial government hardly intervened in the fishery. The House of Assembly on Vancouver Island passed one act in 1862 that contained a clause purporting to regulate fishing in Victoria's inner harbour and the colony's lakes, but no one seems to have paid much attention to it and, as I have argued elsewhere, it does not seem to have been directed at Native fishers.⁴¹ For those who might have been concerned about a lack of protection for Native fisheries, the fisheries clause in the Douglas Treaties and a somewhat weaker, although nonetheless prevalent, sense of Native fishing

rights would probably have seemed enough. The experience of Native peoples around the Great Lakes suggested otherwise.

Fisheries Law and Policy in Pre-Confederation Canada

The colonies of Vancouver Island and British Columbia had relatively little contact with the Province of Canada until the negotiations that would lead British Columbia into the Canadian confederation in 1871. Colonial officials had much more to do with HBC headquarters and the Colonial Office, both of which were based in London, than they did with the eastern colonies. Indeed, it was through the Colonial Office that Douglas received copies of the fisheries legislation from the Province of Canada in the early 1860s.⁴² As a result of these tenuous connections, Indian land policy and fisheries regulation in the east had little impact in British Columbia until after Confederation. However, when British Columbia joined Canada, ceding jurisdiction over “Seacoast and Inland Fisheries” and “Indians and Lands Reserved for Indians” to the Dominion government, it received Dominion fisheries law as well as the existing bureaucracies for managing fish and the lives of Native peoples.⁴³

The province’s refusal to recognize Native title, and its insistence that its land policy continue after British Columbia joined Canada in 1871, provoked considerable debate between the Dominion and the province. The introduction of Dominion fisheries law and a bureaucracy to manage the fishery proved much less contentious. In the mid-1870s, the operators of the industrial commercial fishery at the mouth of the Fraser River began clamouring for state regulation of the salmon fishery, at least to limit competition. As a result, the Dominion introduced the *Fisheries Act* of 1868 to British Columbia in 1877⁴⁴ and the first set of regulations for the province in 1878.⁴⁵ Fisheries did little in the 1870s to enforce these laws, and Native fishers were informally exempted from the regulations, but the beginnings of the legal framework that would govern the fishery were in place. This legal framework, and the bureaucracy that the Dominion established to enforce it, had emerged out of a history of conflict with Native fishers in the Great Lakes. Many of the important figures in the Fisheries Branch of the Department of Marine and Fisheries, including the commissioner of Fisheries, W.F. Whitcher, had cut their teeth on the conflicts that ensued when long-established Native fisheries, most of them protected under treaty, were reallocated to non-Native commercial and sport fishers. It was this legacy of conflict that British Columbia acquired when the Dominion assumed responsibility for the fisheries.

Crown policy on the Great Lakes had not always been thus. In the early nineteenth century, as the non-Native population spread north and west

from Lake Ontario, the British signed a series of land cession treaties with the Ojibwa. Historian Michael Thoms, drawing on oral histories and historical records, argues that these treaties were intended to allow for the political, economic, and ecological coexistence of the Ojibwa and the newcomers. The Ojibwa reserved the wetlands, sites of their most productive fisheries, and ceded the arable uplands to the newcomers to support their agrarian-based economy. Although the written texts of most of these early treaties do not mention fish, the Legislative Assembly of Upper Canada followed every treaty in the early nineteenth century with legislation prohibiting non-Native access to the productive fisheries at the mouths of the rivers flowing into Lake Ontario. These fisheries acts, Thoms suggests, are evidence of the colonial state fulfilling its obligations, under the treaties, to protect the Ojibwa's exclusive fisheries by prohibiting non-Native access at the times and places where the Ojibwa fished. He finds the antecedents of this legislation in English fisheries acts that set aside the inland fishery for the landed gentry. The Upper Canadian legislation of the early nineteenth century, he concludes, was similarly intended to preserve the fisheries for a particular group – the Ojibwa.⁴⁶

As non-Native interest in the fisheries grew, however, so did incursions into Ojibwa fishing grounds. Despite well-documented Native protests, growing more vigorous in the 1830s, that the existing laws were inadequate and insufficiently enforced to protect the Ojibwa fisheries, government officials did little to exclude non-Native fishers. In fact, the colonial government began issuing commercial fishing licences to non-Native fishers in waters that the Ojibwa had thought were reserved, under treaty, exclusively to them. In some cases the government required the licensee to secure permission from and compensate the Ojibwa for the use of their fishing grounds, but these stipulations were seldom enforced. Historian Victor Lytwyn has chronicled the growing conflict over fisheries around Manitoulin Island and the Saugeen Peninsula on Lake Huron in the mid-nineteenth century. This conflict between Ojibwa fishers, non-Native licence holders, and government officials would include the alleged murder of Fisheries Overseer William Gibbard in 1863.⁴⁷ Legal scholar Peggy Blair finds the roots of this conflict in a fundamental transition in government policy in the mid-nineteenth century, perhaps best evidenced by the widely circulated 1845 opinion of Attorney General W.H. Draper: “I have the honor to report my opinion, that the right to fish in public navigable waters in Her Majesty's dominions is a common public right – not a regal franchise – and I do not understand any claim the Indians can have to its exclusive enjoyment.”⁴⁸ In this view, rights to exclusive fisheries derived from the parliament; Native rights to exclusive fisheries that preceded the Crown's

assertion of sovereignty, even if recognized by the Crown in treaties, were unenforceable at law unless approved by parliament.⁴⁹ The accuracy of this opinion has been strongly challenged in recent work,⁵⁰ but even if it were an accurate summation of the law, Thoms argues that parliament gave its imprimatur to the exclusive Ojibwa fisheries in the legislation that followed the treaties.⁵¹

Government officials had either forgotten or dismissed the earlier treaty promises when, in 1857, the Legislative Assembly for the Province of Canada passed its first comprehensive fishing legislation, at the same time rescinding the earlier acts that had been intended, at least initially, to protect Ojibwa fishing.⁵² The new *Fishery Act*, substantially revised (and renamed *Fisheries Act*) in 1858, offered commercial fishers greater security of tenure to fishing grounds through Crown-issued licences and leases.⁵³ It also set aside particular fish for the benefit of sport fishers, who, Thoms suggests, were the most important lobby group behind the new legislation. The new acts did not mention or protect the Ojibwa treaty rights to fish. Indeed, Ojibwa fisheries in Lake Huron were soon overwhelmed by non-Native commercial operators brandishing Crown-granted licences and leases for shore-based seine-net fisheries. At the behest of sport fishers, Fisheries officers targeted Ojibwa fishing in the smaller lakes and rivers as well, imposing close seasons and gear restrictions that accommodated sport fishers' interests and, in effect, setting aside the fisheries for them. In 1865, the government added a section to the *Fisheries Act* that allowed officials to permit Indian food fishing with otherwise prohibited technology at times and in locations that were closed to other fishers.⁵⁴ Exercised at the discretion of the local Fisheries officers, these food fishing privileges allowed restricted opportunities for Native fishers to operate in territories that they had never ceded under treaty, or in which they thought they had treaty rights to exclusive fisheries. In short, it was this institutional history of conflict over fish, and the substantial marginalization of the Native fishery, that British Columbia inherited when the Department of Fisheries assumed control of the Pacific coast fisheries in the mid 1870s.

Conclusion

When, in 1871, British Columbia joined the Canadian confederation, the negotiated terms of union gave the Dominion government jurisdiction over both fisheries and Indians, placing responsibility for them in the departments of Fisheries and Indian Affairs. The terms of union also required the Dominion to pursue as liberal a policy towards Indians as had the former colony.⁵⁵ The Conservative government of John A. Macdonald was soon to realize, however, that the colonial policy in British Columbia had become

neither liberal nor generous, and that the province refused to recognize Native title or the need to extinguish it through treaty. The colonial land policy, as it had evolved under Joseph Trutch, of small, scattered reserves that provided some minimal protection for Native villages and resource procurement sites, became the land policy in the province of British Columbia. This policy would be tempered somewhat by a Dominion government that sought some additional accommodations but that would not press the issue of Native title in negotiations with the province or through the courts. Reserves remained small.

Although the provincial land policy prevailed, it was the Dominion's legislation, regulations, and policies that governed the fisheries. Built upon the common inheritance of the English common law, a Canadian fisheries regime, which had been overtaken in the mid-nineteenth century by a revisionist understanding of Native treaty rights to fish in the Great Lakes, arrived in British Columbia. Specific regulations tailored for British Columbia would soon appear, and local fisheries officials would inflect the law towards local circumstances through its enforcement or, initially, lack of enforcement. Nonetheless, the essential legal elements and an institutional history that had been formed by a culture of conflict with Native fishers, and their dispossession, were now in place in British Columbia.

All but forgotten, or at least ignored by officials within the Department of Fisheries, was the fisheries provision in the Douglas Treaties. In securing the right to "fisheries as formerly," the treaties recognized the fundamental importance of the fisheries to the lives, economies, and cultures of Native peoples on the Pacific coast. Under the treaties, the fisheries were, as Douglas thought they should be, "fully secured to them by law." Native peoples were soon to discover that this was not the case, or that, if it were, legal protection was inadequate to secure to them their fisheries.